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Evicting The Overholding Tenant in Theory and Practice

WILLIAM O. FRANCIS *

The purpose of this article is to discuss the various devices whereby an overholding tenant may be removed from demised premises. References to everyday practice are, of necessity, predicted upon a rather restricted survey and what follows must be read with that in mind. Nonetheless, it is hoped that the content of this article will prove helpful to the reader and perhaps provide a better perspective in regard to the dispossession of the overholding tenant.

The term "eviction" in its legal sense means an act of the landlord¹ done in relation to the land demised, during the continuance of the tenancy, sufficient to discharge the tenant from his obligation to pay rent, but it does not necessarily involve a termination of the tenancy². Hence "eviction" is a misnomer when, as is common, it is used to signify the removal of an overholding tenant. In a non-technical sense, however, it accurately describes his dispossession and for this reason is employed in the title of this article.

An overholding tenant is one who continues in occupation without the consent of the landlord, after his right of tenure has been determined through the effluxion of time, the giving of notice to quit, or by a demand for possession. Whether a tenant can be said to be overholding depends upon the type of tenancy under which he holds and upon the requirements for notice^{2a}.

Three legal remedies are open to the landlord who wishes to rid his property of an overholding tenant. First, he may resort to physical force, a course to be discouraged for obvious reasons. Next, he may avail himself of the summary procedure set out in the Landlord and Tenant Act³. Finally, he may commence an action for the recovery of land, with or without a claim for mesne profits and other relief⁴. Let us consider each of these alternatives separately.

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¹ Williams, *Landlord and Tenant*, 3rd ed., p. 183.

² *Ibid.*, at p. 454.

^{2a} *Ibid.*, ch. 24, p. 112 ff; article 124, p. 537; article 125, p. 537; Landlord and Tenant Act, R.S.O. 1950, c. 207, s. 48(1);

Sidebotham v. Holland (1895), 1 Q.B. 378; Williams, *ante* footnote 1; Article 122 p. 533 ff; Article 123, p. 573; Article 25, p. 121.

³ R.S.O. 1950, c. 199, Part III; for a comprehensive review of the cases dealing with Part II see Williams, *ante*, p. 596.

⁴ Ontario Rules of Practice, Rule 33(1) (f).

(I) *Use of Physical Force*

The least desirable method of removing the overholding tenant is to eject him by physical force. "Forcible entry . . . , upon a person wrongfully in possession by a person entitled to possession is, although a criminal offence,⁵ no civil injury for which the wrongdoer so ejected has any remedy. He can neither sue in ejectment for the recovery of land, nor in trespass for damages."⁶ Further, *Hemmings v. Stoke Poges Golf Club*⁷ has established that where in the course of a forcible entry an assault is committed upon the occupier, or damage is done to chattels upon the premises,⁸ no action will lie against the landlord. The landlord attempting to effect an entry, however, may use only that degree of force which is necessary or justifiable (i.e., reasonable) at common law.⁹

It is almost impossible to anticipate what degree of force used in an entry will be considered "reasonable" by the courts. Further, it is not difficult to envisage situations involving the use of force which would give rise to actions for false imprisonment, assault and the like. At all events, the landlord resorting to this method would expose himself to criminal prosecution under section 73(1) of the Criminal Code. Thus the forcible removal of the tenant is not recommended.

(II) *Summary Procedure under the Act*

The Landlord and Tenant Act provides an expeditious means whereby the landlord may recover possession from an overholding tenant, but it does not help him to recover mesne profits or arrears of rent (a point considered below.)¹⁰ It is important to note that this summary procedure is available only to a landlord or someone in the character of a landlord¹¹, as defined by the Act, against an occupant

⁵ See Canadian Criminal Code, 1953-54, 2-3 Elizabeth II, ss. 73, 74:

S. 73(1) "A person commits forcible entry when he enters real property that is in actual and peaceable possession of another, in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, whether or not he is entitled to enter."

⁶ Salmond, *The Law of Torts*, 11th ed., p. 217; see also Halsbury's *Laws of England*, 3rd ed., vol. 23, p. 705; Prosser, *The Law of Torts*, 2nd ed., p. 102; *Pollen v. Brewer* (1959), 7 C.B. (N.S.) 371; *Burling v. Reed* (1850), 11 Q.B. 904; *Beddall v. Maitland* (1881), 17 Ch. D. 174.

⁷ [1920] 1 K.B. 720.

⁸ *Ibid.*, at p. 733.

⁹ Salmond, *The Law of Torts*, 11th ed., p. 376; Halsbury's *Laws of England*, ante footnote ⁶ at p. 706; *Clifton Securities Ltd. v. Huntley*, [1948] 2 All E.R. 283.

¹⁰ *Allan v. Rogers* (1855), 13 U.C.Q.B. 166; Bell, *Landlord and Tenant* (1904), at p. 360.

¹¹ *Landlord and Tenant Act*, R.S.O. 1950, c. 207, s. 1(b):

"Landlord includes, lessor, owner, the person giving or permitting occupation of the premises in question and his heirs, assigns and legal representatives and in Part III includes the person entitled to the possession of the premises";

"Landlord" does not include a person claiming under a paper title against a person claiming title by length of possession: *Re Mitchell and Fraser* (1917), 40 O.L.R. 389, at p. 391, per Meredith C.J.C.P.

of the land in the character of a tenant.¹² A mortgagee relying on the attornment clause in a mortgage cannot employ Part III of the Act to turn out his mortgagor.¹³ "It is enough to say that the right of a mortgagor to remain in possession of the mortgaged premises is not in my view 'a right of occupancy' within this statute."¹⁴ "The statute is appropriate when applied to a simple case of landlord and tenant, but inappropriate when it is sought to apply it to the case of mortgagor and mortgagee in that it deprives the mortgagor of the paternal care exercised by the Court of Equity over one of its favourite children . . ."¹⁵ Nor can the Act be used to dispossess a mere trespasser¹⁶ or an occupant claiming title through adverse possession.¹⁷ Further "In order that a case may be brought within the act there must be a demise or an agreement¹⁸ under which the tenant is permitted to occupy the land and this permission must be one which will either determine by a notice pursuant to a term of the agreement or by some other act whereby a tenancy or right of occupancy may be determined."¹⁹ Clearly, therefore, the Act could be used to remove a licensee whose licence has been revoked or in some way terminated.^{19a}

Turning now to the particular provisions of the Act: section 75(1) provides that where a tenant's right of occupation has been determined, and he wrongfully refuses or neglects to give up possession, the landlord may apply upon affidavit²⁰ to a Judge of the County Court of the County in which the land is situate. By subsection two, the Judge is to appoint a time²¹ and place at which he will

¹² *Landlord and Tenant Act*, ante s. 1(d): "Tenant includes lessee, occupant, sub-tenant, under tenant, and his and their heirs assigns and legal representatives"; *Re Mitchell and Fraser* (1917), 40 O.L.R. 389, at p. 391, per Meredith C.J.C.P.; *Courville v. Petty*, [1948] 2 D.L.R. 430 (O.C.A.); *In Re Snure and Davis* (1902), 4 O.L.R. 82.

¹³ *Re Premier Trust Co. and Hawwell*, [1937] O.R. 497; *Re Mitchell and Fraser*, ante.

¹⁴ *Altbaum v. Northover*, [1949] O.W.N. 415, (C.A.); *Re Mitchell and Fraser*, ante footnote 12 at p. 393, per Middleton J.

¹⁵ *Re Premier Trust Co. and Hawwell*, [1937] O.R. 497, at p. 398, per Middleton J.A.

¹⁶ *Manitoba Farm Loans Association v. Zalundek*, [1933] 3 D.L.R. 128; *Courville v. Petty*, [1948] 2 D.L.R. 430.

¹⁷ *Re Mitchell and Fraser*, ante footnote 12.

¹⁸ See *Landlord and Tenant Act*, ante s. 75.

¹⁹ *Re Mitchell and Fraser*, ante footnote 12 at p. 392, per Middleton J.; it is important to note that the provisions of Part III of the Act also may be used to dispossess a tenant for a breach of covenant giving rise to forfeiture.

^{19a} *Reliance Petroleum Limited v. Rosenbloom*, [1953] O.W.N. 115 (Co. Ct.) *contra*; It is respectfully submitted that the County Court Judge erred in refusing to hear an application under Part III of the Act because the matter concerned a license (a right of user) and not a tenancy. It is clear by section 1(b)(d) that the Act (and therefore Part III proceedings), is intended to encompass something more than the conventional landlord and tenant relationship. A landlord is one "permitting occupation" and a tenant is *inter alia* an "occupant". The court failed to determine whether the parties were landlord and tenant within the meaning of the Act as it should have done; and see generally *Cobb v. Lane*, [1952] 1 All E.R. 1199—Exclusive possession is consistent with a mere license.

²⁰ Section 75 indicates that the landlord is required to make out a *prima facie* case before he obtains an appointment: *Re Rousseau and Leclair* (1920), 18 O.W.N. 340, per Ferguson J.A.

²¹ The clerk of the Court may sign the appointment; *United Cigar Stores v. Freeman*, [1948] O.W.N. 738 (C.A.).

inquire and determine whether the holder is a tenant, whether his rights as a tenant have ceased, and whether he is wrongfully withholding possession from the landlord.²² No colour of right set up by the tenant justifies the judge in declining to exercise this statutory duty.²³ This is so even though the judge considers it a case which might better be disposed of in a substantive action and not summarily.²⁴

Section 75(3) stipulates that notice²⁵ in writing of the time and place appointed, together with the principal facts alleged by the complainant²⁶, shall be served upon the tenant²⁷ or left at his place of abode at least three days²⁸ before the day so appointed, and that to such notice there shall be annexed a copy of the judge's appointment, the affidavit on which the appointment was obtained, and the documents to be used upon the application. The law relating to irregularities²⁹ in the notice is found in part in section 77. Section 77(1) permits the judge, in default of the tenant's appearance at the time and place appointed, to order the issuance of a writ of possession if he determines the continuing tenure to be wrongful. Sub-section two provides that if the tenant appears the Judge shall hear the matter in a summary manner and if it appears that the tenant wrongfully holds he may order the issue of the writ.³⁰ It has been held that "the procedure that is provided by Section 75 is procedure for the purpose of informing the tenant of proceedings that are being taken against him, and that without that procedure, proceedings may not be taken in his absence, but where, on being informed of the proceedings, he appears, then, notwithstanding that he may object to the regularity of the procedure by which he was informed, his appearance nevertheless gives the judge jurisdiction to act under section 77(2) and to proceed with the enquiry."³¹ An astute tenant wrongfully

²² *Humans v. Doyon*, [1945] 2 D.L.R. 312 at p. 134, *per* Roach J.A.

²³ *Re Dickson & Co. and Graham* (1912), 27 O.L.R. 239, [1912] 8 D.L.R. 928, at p. 930, *per* Riddell J.

²⁴ *Ibid.*, at p. 931.

²⁵ On the question of onus of proof of service, see *Re Rousseau and Leclair* (1920), 18 O.W.N. 340.

²⁶ The landlord has the onus of proving that the person complained against was his tenant for a term or period that has been determined, and the landlord must prove his own right to possession and the continued wrongful possession of the tenant: *International Association of Hairdressers Ltd. v. Glasgow*, [1957] 9 D.L.R. 2d 615.

²⁷ For proper style of cause see *Landlord and Tenant Act*, *ante* s. 76.

²⁸ The three days notice required by s. 75(3) may include Sundays and holidays: *Re Gow and Dower*, [1935] O.R. 397.

²⁹ See also *Landlord and Tenant Act*, *ante* s. 78: "The Judge shall have the same power to amend or excuse irregularities in the proceedings as he would have in an action."

³⁰ Where the applicant accepts rent (which could by implication create a new tenancy) subsequent to the order to issue a writ of possession, that acceptance does not disturb the order: *Shell Oil Co. of Canada Ltd. v. Park*, [1950] O.W.N. 433.

³¹ *Burns v. Hodgson*, [1945] O.R. 876 at p. 881, *per* McRuer J. A.; *Rex v. Isebell*, 63 O.L.R. 384; See also *Kettle v. Jacks*, [1947] O.W.N. 141 (C.A.), and *Humans v. Doyon*, [1945] 2 D.L.R. 312: In both cases there is a suggestion that if the irregularity were cited before the County Court Judge at the time of the hearing, rather than on the appeal, then the County Court Judge could declare the proceedings irregular.

overholding would not be ill-advised, where he observes a failure to comply with sub-section three, to neglect to appear at the time and place appointed and thereby render all proceedings taken under section 77 (1) of Part III of the Act a nullity. The burden of proving that notice has been properly effected rests with the applicant.³²

It is to be noted that the provisions of section 77 authorizing the issuance of a writ of possession are permissive rather than mandatory and therefore confer a discretion upon the judge. In Manitoba³³ it has been held that the judge ought not to order the issue of the writ where it can be seen that issues beyond the usual County Court jurisdiction are involved.³⁴ In Ontario, however, there is substantial authority which denies the County Court Judge any discretion in such situations. He is compelled to decide the issues before him; and it is for the Court of Appeal only to decide if these issues are too complicated to be determined under a summary procedure.³⁵ Should the Court of Appeal so decide, the order for the writ of possession would be set aside and the applicant left to proceed by an action for possession.³⁶

There may be instances where identical issues are raised before a County Court in an application under Part III of the Act and before a higher Court in an action for the recovery of land. This poses the problem of whether proceedings in the County Court ought not to be stayed. In *Feltenstein v. Gould*³⁷ it was held that "... an order for prohibition should not issue unless the tribunal against which it is sought has usurped a jurisdiction with which it is not legally vested, . . ."³⁸ or is not keeping within the jurisdiction under which it purports to act. And the mere fact that the same issues are pending in another Court is no ground for prohibiting the County Court Judge from determining the application before him.³⁹

An appeal from the order of a County Court Judge in overholding tenant proceedings, however, would work a stay of execution and prevent the sheriff from acting upon the writ of possession.⁴⁰

Section 79 permits an appeal to the Court of Appeal. If the Court of Appeal is of the opinion that the case is not one to be tried by summary procedure,⁴¹ it may discharge the order of the County

³² *Re Rousseau and Leclair* (1920), 18 O.W.N. 340.

³³ *The Manitoba Landlord and Tenant Act, R.S.M.* 1954, c. 136, s. 70 ff, is essentially identical with Part III of the Ontario Act.

³⁴ *Manitoba Farm Loans Association v. Zalundek*, [1933] 3 D.L.R., 128 at p. 134, per Robson J.A.

³⁵ *Re Dickson & Co. and Graham* (1912), 8 D.L.R. 928, at p. 931, per Riddell J.: "It is not for the County Court Judge to decide whether the right of the tenant should be determined under the Act in question since the jurisdiction is vested in the Court of Appeal by s. 79(2)"; *Humans v. Doyon*, ante footnote ³¹ cites the above case with approval.

³⁶ *Manitoba Farm Loans Association v. Zalundek*, ante footnote ³⁴, and Section 79(2) of the Ontario Act.

³⁷ [1947] O.W.N. 314.

³⁸ *Ibid.*, at p. 1, per Wells J.

³⁹ *Ibid.*, at p. 3.

⁴⁰ *Re Borinsky and Borins v. Beer*, [1948] O.W.N. 696.

⁴¹ Cases on point are *Re Premier Trust Co. and Hazwell*, [1937] O.R. 497; *Manitoba Farm Loans Association v. Zalundek*, [1933] 3 D.L.R. 128; *In Re Magann and Bonner* (1897), 28 O.R. 37.

Court and direct that the tenant be put back into possession (as required),⁴² the applicant being permitted to proceed by action for the recovery of land.

(III) *An Action for Recovery of Land*

The third method of dispossessing an overholding tenant is an action for the recovery of land with which a claim for mesne profits, arrears of rent, double value or other relief may be combined.⁴³ This is "... in fact purely a common law action for ejectment and mesne profits. Although before the time of Henry VII an action in which damages for disseisin, of which the measure was the mesne profits, were awarded, when ejectment in a fictitious form with a nominal plaintiff came into use for the recovery of the term, or possession of the land, that only was recoverable in it, with nominal damages, but not with mesne profits (*Goodtitle v. Tombs* (1770), 3 Wilson K.B. 118, 120) which then became the subject of a supplemental but distinct action in trespass, in which it was necessary to shew a prior recovery of the possession in ejectment. (*Alsin v. Parlsin*, [1758] 2 Barr 665)."⁴⁴ Thus an action for the recovery of land under the Rules of Practice is in substance the old common law action of ejectment, the principles of which are unimpaired by the Judicature Act despite the fact that the procedural rules have been altered.⁴⁵ Mesne profits may now be recovered without the plaintiff having first to obtain possession.⁴⁶

As noted above, mesne profits constitute damages for trespass, and their measure is usually the rent for the period of overholding.⁴⁷ Where, however, the real value of the land for the period in question is higher than the rent, mesne profits must be assessed at the higher rate.⁴⁸ The tenant, moreover, is liable for the loss of profits on the whole of the premises, though part only are retained.⁴⁹ The damages awarded in fact go beyond mesne profits and extend to the actual

⁴² See also *Judicature Act* R.S.O. 1950, c. 190, s. 27(1): "The Court upon appeal may give any judgment which ought to have been pronounced and may make such further order as may be deemed just." See also *Shell Oil Co. of Canada Ltd. v. Park*, ante footnote 30.

⁴³ See Rule 33(1)(f) Ontario Rules of Practice; Canadian Encyclopaedic Digest, 2nd ed., vol. 6, Ejectment, p. 386 ff.

⁴⁴ *Montreuil v. Ontario Asphalt Co.* (1922), 63 S.C.R. 401, at p. 438, per Anglin J., for the history of the action of ejectment see also *Minaker v. Minaker*, [1949] S.C.R. 397, at p. 400, per Rand J., at p. 404 per Kellock J.; Newell, *A Treatise on the Action of Ejectment*, (1892); Vol. 6, C.E.D.; Adams, *On Ejection*, 4th ed., (1846).

⁴⁵ *Barnier v. Barnier* (1892), 23 O.R. 280, per Ferguson J.

⁴⁶ Halsbury's *Laws of England*, ante p. 561; C.E.D. vol. 6, p. 392; *Montreuil v. Ontario Asphalt Co.* ante.

⁴⁷ *Clifton Securities v. Huntley*, [1948] 2 All E.R. 283 at p. 284, per Denning J.; *Henderson v. Squire* (1869), L.R. 4 Q.B. 170; For a complete review of the cases see Halsbury's *Laws of England*, vol. 23, ante; Mesne profits are to be assessed from the date of the writ and not from the date of the breach of covenant: *Elliott v. Boynton*, [1923] 1 Ch. 422; (1923), L.Q.R. 282.

⁴⁸ *Clifton Securities v. Huntley*, ante.

⁴⁹ *Henderson v. Squire* (1869), L.R. 4 Q.B. 170, at p. 173.

loss sustained by the landlord.⁵⁰ Included is the expense of ousting third parties, for example sub-tenants.⁵¹

As already remarked, the procedural rules governing the action of ejectment have been changed by the Judicature Act and the Rules of Practice. Rule 33(1)(f) of the Rules of Practice provides that in actions for the recovery of land⁵² (with or without a claim for rent or mesne profits) the writ of summons may be specially endorsed. This endorsement "should be sufficient to shew a cause of action"⁵³ and substantially in accordance with Form 5 appended to the Rules.⁵⁴ Rule 41 provides that in default of appearance or in the event that an appearance is entered but the defence is confined to part of the land only, the plaintiff, notwithstanding that the writ may be endorsed with any other claim, may sign judgment against the defendant for possession of the land or for the part thereof to which the defence does not apply, without prejudice to his right to proceed against any other defendant or for any other relief.⁵⁵ This Rule must be read in conjunction with Rule 42 which states that where the defendant fails to appear, and the writ is endorsed with a claim for mesne profits, arrears of rent, or double value in respect of the premises claimed, or damages for breach of contract, or wrong or injury to the premises claimed, the plaintiff may sign judgment⁵⁶ against the defendant for possession and may proceed as to other claims.

Some confusion has arisen as to how one "may proceed" in regard to "other claims". In *Newcombe v. Scott et al.*⁵⁷ Mr. Justice Lebel held that the proper procedure, where the writ was endorsed⁵⁸ with a claim for mesne profits, was for the plaintiff to file and serve a statement of claim and in default of defence to note pleadings closed and move for judgment. French, however, suggests that the correct method is to sign interlocutory judgment with an assessment of damages under Rule 38(2) and obtain final judgment under Rule 38(2) and (3).⁵⁹ This procedure seems to have been endorsed by Mr. Justice

⁵⁰ *Watson v. Lane* (1856), 11 Exch. 769, at p. 774; *Goodtitle v. Tombs* (1770), 3 Wils. 118 at p. 121.

⁵¹ *Henderson v. Squire, ante*; *Henderson v. Van Cooten* (1922), W.N. 340.

⁵² The expression "recovery of land" includes any action for possession: *Brown and Brown v. McCrone*, [1957] O.W.N. 561; *Gledhill v. Hunter* (1880), 14 Ch. D. 492, at p. 499. An action for the recovery of land under this rule is not the same kind of action as one under the old rule 460 for the foreclosure of a mortgage and the immediate delivery of possession as incident thereto: *Independent Order of Foresters v. Pegg* (1900), 19 P.R. 80.

⁵³ *Morrow v. Morgan* (1919), 17 O.W.N. 280, at p. 290, *per* Kelly J.

⁵⁴ *Ibid.*, and Rule 809.

⁵⁵ Rule 41(2): "Where judgment by default is signed but is not signed against all defendants, a writ of possession shall not be issued unless directed by a Judge."

⁵⁶ Rule 43 provides that in default of appearance the plaintiff shall not be entitled to costs unless he files an affidavit showing that at the time of the issue of the writ the defendant was in actual adverse possession or obtains an order allowing him to sign judgment for his costs as well as for possession of land.

⁵⁷ [1949] O.W.N. 312, at p. 314.

⁵⁸ The writ was specially indorsed for the recovery of land and mesne profits. It was held, *inter alia*, that a claim for mesne profits was not properly the subject of a specially indorsed writ.

⁵⁹ French S. C., *Practice and Procedure in Ontario*, vol. 1, p. 107.

Lebel in the earlier case of *Mark v. Haines*⁶⁰ where he approved the following statement of Chief Justice Robertson: "A plaintiff is only entitled to note pleadings closed under Rule 121 where there is default in delivering a statement of defence in a case where judgment cannot be signed"⁶¹ A claim for mesne profits, which, after all, are merely damages for a continuing trespass, is surely a claim for pecuniary damages within the meaning of Rule 38(2),⁶² and therefore subject to interlocutory judgment. The operation of Rule 121 would seem to be confined to cases where special relief is sought, such as an injunction.

Regarding the types of claims mentioned in Rule 42, the writer sees no reason why a claim for arrears of rent should not properly be the subject of a specially endorsed writ under Rule 33(1) (a). So too, a claim for double rent arising out of section 58 of The Landlord and Tenant Act is recoverable in the same manner as single rent and therefore can be brought within Rule 33(1) (a) or (d). But a claim against an overholding tenant for double the yearly value of the land is unliquidated and therefore not the subject of a special endorsement.⁶³ Damages for breach of contract may or may not be unliquidated depending on the particular fact situation, and a claim for wrong or injury to the premises most assuredly is unliquidated.

It would be wise to serve a statement of claim along with the writ of summons where there is a claim for mesne profits or other relief so as not to run afoul of Rule 39 which provides that no interlocutory judgment shall be signed for default of appearance unless the precise cause of action is clearly stated in the endorsement on the writ.

If the action for recovery of the land is contested, a statement of claim must be served and filed. The requisites of this statement will be found in the cases referred to in the note below.⁶⁴ The action must be brought in the Supreme Court unless the plaintiff can bring himself within the jurisdiction of the County Court.⁶⁵ Where the matter comes within the latter jurisdiction then the writ may be issued in any county.⁶⁶ Whatever the tribunal, the action must be tried in the county in which the land is situate⁶⁷ and in a Supreme Court action, at the County town.

Normally the defendant is the tenant who holds the land under an oral or written contract. Nevertheless, all persons found in possession of the land may be made defendants if the plaintiff so

⁶⁰ [1945] O.W.N. 715.

⁶¹ *McIntosh v. McIntosh*, [1942] O.R. 574, at p. 577.

⁶² *McCurdy v. Aikens*, [1945] O.W.N. 79, where pecuniary damages were held to mean damages generally.

⁶³ *Magann v. Ferguson*, *ante*, at p. 237, *per* Meredith J.: "Yearly value is unliquidated and to be determined by the proper tribunal; and the statute applies a further liability equal to that." Section 57 of the *Landlord and Tenant Act*, *ante*, applies only to a tenant for a term of life, lives or years and confers the right to double the yearly value.

⁶⁴ See Bell, *Landlord and Tenant*, *ante*, p. 651 ff; Rule 141; *Philips v. Philips* (1878), 4 Q.B.D. 127; *Davis v. James* (1884), 26 Ch.D. 778; *Jones v. Carling* (1884), 13 Q.B.D. 262; *O'Connor v. O'Hara* (1870), 8 Ir. L.R. 249; *Lyell v. Kennedy* (1889), 20 Ch.D. 491; *Palmer v. Palmer* (1892), I.Q.B. 319.

⁶⁵ County Court Act, R.S.O. 1950, c. 75, s. 20(e).

⁶⁶ *Kendell v. Ernst* (1894), 16 P.R. 167.

⁶⁷ County Courts Act, *ante*, s. 28(2); Rule 245(c).

desires.⁶⁸ Sub-tenants, however, need not be made parties,⁶⁹ and where the plaintiff relies on an equitable right, it may be that the owner of the legal estate should be made a party.⁷⁰ One of two joint tenants can not maintain an action for possession against a lessee without joining the other joint tenant.⁷¹ If a sub-tenant wishes to defend a landlord's action to recover possession, he may, under Rule 53, defend without leave by filing an appearance together with an affidavit that he is in possession. If, either by action or by summary proceedings under Part III, a sub-tenant is sued for possession and fails to advise his landlord of the proceedings, he shall be liable for all damages sustained by the landlord by reason of his failure to so advise.⁷² Once obtained,⁷³ judgment may be enforced by a writ of possession.⁷⁴ Of itself, however, judgment does not have the effect of interrupting the defendant's possession.⁷⁵

If the plaintiff has obtained judgment both for the recovery of land and some other pecuniary relief, he may at his option require the issue of one writ or separate writs for the recovery of possession and money.⁷⁶ However, an appeal would constitute a stay of execution.⁷⁷

(IV) Conclusion

The initial action against an entrenched tenant is usually a letter from the landlord's solicitor demanding immediate possession. Where the overholding tenant is within the provisions of section 57 of the Act,⁷⁸ the letter should include a warning that double the yearly value of the land will be claimed for the period of wrongful tenure. These letters, of course, do not always shake the determination of the recalcitrant occupant; sometimes they even incite him to further obstinacy. Also, the client often is unwilling to permit delay in resorting to direct legal remedies, in which case the landlord must employ one of the three methods already discussed.

For all too obvious reasons, few, if any solicitors ever advise their clients to resort to physical force. As noted, this could result in criminal charges for forcible entry and civil suits for assault, false imprisonment, and the like. However, it remains true that there may be instances where physical force is justified from the practical viewpoint.

⁶⁸ *Bannerman v. Dewson* (1866), 17 U.C.C.P. 257.

⁶⁹ *Synod of Toronto v. Fiskien* (1898), 29 O.R. 738.

⁷⁰ *Cope v. Crichton* (1899), 30 O.R. 603, at p. 609.

⁷¹ *Tepper v. Abramsky*, [1937] O.W.N. 142.

⁷² *Landlord and Tenant Act*, ante, s. 28; and see also s. 34: "A tenant may set off against the rent due, a debt due to him by the landlord."

⁷³ For form of judgment see Canadian Court Forms (1954)

(a) in default of appearance Form 171 at p. 579;

(b) in default of defence in an action for the recovery of land with damages to be assessed Form 173 at p. 580.

⁷⁴ Rule 540 (Form 114): see also Rule 541; sub-tenants may be put out of possession under such a writ although not parties to the action; *Synod of Toronto v. Fiskien* (1898), 29 O.R. 738.

⁷⁵ *Hamilton v. R.* (1917), 54 S.C.R. 331.

⁷⁶ Rule 542.

⁷⁷ Rule 500.

⁷⁸ *Landlord and Tenant Act*, ante: such a demand is required if double value is sought under s. 57. See also s. 58 for double rent provisions.

Although most solicitors employ the summary procedure of Part III of the Act, there are several disadvantages to such a course which may not be immediately apparent. Part III is intended simply to facilitate the recovery of possession of the premises; it provides no other relief.⁷⁹ The plaintiff, therefore, is unable to recover mesne profits, arrears of rent, damages for use and occupation,⁸⁰ double rent or value, etc. on summary application. To do so, he is compelled to commence a separate action in the appropriate court. If the tenant fails to appear, the landlord still must appear and establish his right to the land to the satisfaction of the County Court Judge before an order for a writ of possession will issue. Further, the burden lies upon the landlord to confirm that the requirements of Section 75 as to notice to the tenant have been met. Failure to comply with the section, as has already been observed, will render the proceedings a nullity. There is clearly a great value in using the summary procedure where the application is likely to be opposed and the possibility of a good defence exists. The costs of a full scale action would patently be far more substantial. But even here the Court of Appeal may decide that the matter concerns issues beyond normal county court jurisdiction and set aside an order for a writ of possession.

If the landlord's bid to recover possession was made the subject of a specially endorsed writ, there could be combined claims for other forms of relief, such as arrears of rent, etc. which may themselves be properly the subject of a special endorsement. In the event that the defendant does not appear, the plaintiff would have judgment for the land without further ado on the basis of Rule 41 and within ten days from service of the writ of summons (Rule 45).⁸¹ Rule 38 would enable him to secure interlocutory judgment and an assessment of damages for his other pecuniary claims. Should the action be defended and the prospect of substantial costs arise, then the plaintiff would be at liberty to abandon his action and make an application under Part III. The mere fact that the same issues are being considered in another Court does not destroy the jurisdiction of the County Court Judge. At all events, it would be possible to examine the defendant on his affidavit of merits and conceivably obtain judgment by virtue of Rule 57.

Generally speaking, overholding tenants constitute the financially irresponsible element in the community with no modicum of legal right to continued possession. The prospects of a defended action are for that reason clearly remote.

In conclusion, it is suggested that the action for recovery of land would seem to warrant more attention than it is receiving in this particular aspect of the landlord and tenant relationship. However, summary proceedings and physical force respectively have their peculiar merits which the facts of the particular situation would call into play.

⁷⁹ *Ashwin v. Lash*, [1948] O.W.N. 288 (C.A.) *per* Robertson C.J.O., at p. 280; *Allan v. Rogers* (1855), 13 U.C.Q.B. 166, at p. 167, *per* Draper J.

⁸⁰ For the requisites of this action see Williams, *Landlord and Tenant*, *ante*, p. 218 ff, and especially p. 222.

⁸¹ Possibly sooner by Rule 62; for costs see Rule 43.