

If the decision of the learned Judge was right, then the legislation, although always labelled "overholding tenants" legislation, really had no more to do with the relation of landlord and tenant than with any other kind of possession; and any one could take advantage of its provisions instead of bringing an action for the recovery of land.

"The person entitled to the possession of the premises," in proceedings under the enactment respecting "overholding tenants," must be some one of the character of a "landlord," and the "occupant" must be some one of the character of a "tenant:" the word "person" cannot mean—for instance—a person claiming possession under a paper-title against a person claiming title by length of possession; nor can the word "occupant" include the latter person. Even the form in which the statute requires the proceedings to be taken is: "In the matter of _____, landlord, against _____, tenant." No such relationship existed between the parties to these proceedings—that was admitted. The regular, proper, and common course of proceeding in a case of mortgagee and mortgagor is to sue for foreclosure or redemption; and immediate possession may be sought and can be had in a proper case: Rules 460, 33, 56, 57, 62. The higher Court has full power to deal with such cases in all their aspects, which obviously cannot be the case in such proceedings as those in question.

The "overholding tenants" enactment was not intended to be a means of unfairly depriving any person of trial by jury, or of any of the ordinary methods of trial, and the ordinary rights of appeal after such a trial. The governing word, even in regard to cases within the legislation, is "may," not "shall," and "may" shall be construed as permissive: Interpretation Act, R.S.O. 1914 ch. 1, sec. 29 (s); and so the powers conferred upon County Court Judges by this legislation should be exercised in proper cases, but should not be exercised in a case which for any good reason ought not to be so tried, but should be tried in the ordinary way. In this case, other mortgagees and persons were concerned in any disposition of the mortgaged premises. Apart from that, this case was clearly not one within the "overholding tenants" legislation.

The appeal should be allowed and the order below be discharged.

MIDDLETON, J., reached the same result, for reasons stated in writing.

LENNOX and ROSE, JJ., agreed in the result.

Appeal allowed.