

DEEN v. NICOL

Supreme Court (Webber, C.J.): December 31st, 1935

- [1] Civil Procedure — writ of summons — specially indorsed writ — may only be used by mortgagee to recover possession of land from mortgagor where attornment clause creating relationship of landlord and tenant: A mortgagee, or his successor in title, cannot proceed by specially indorsed writ in an action to recover the mortgaged land from a mortgagee in possession unless the mortgage contains an attornment clause. Although such a clause is void in certain respects, it is valid to the extent that it creates the relationship of landlord and tenant between the mortgagee and mortgagor, or their successors in title, so as to enable the mortgagee to initiate proceedings to recover the land by specially indorsed writ under the terms of O.III, r.6(f) of the Supreme Court Rules (*cap.* 205) (page 409, lines 17—30). 5 10
- [2] Landlord and Tenant — creation of tenancy — mortgagor as tenant — attornment clause in mortgage deed essential to create tenancy between mortgagor and mortgagee: See [1] above. 15
- [3] Mortgage — mortgagee's rights — possession — mortgagee may only recover possession of land from mortgagor by specially indorsed writ where attornment clause creating relationship of landlord and tenant: See [1] above. 20

The plaintiff brought an action against the defendant for the recovery of land.

The defendant mortgaged certain premises to another person who, under the covenant for sale, sold them to the plaintiff. The conveyance was in fee simple free from incumbrances. The defendant remained in possession of the premises and refused to leave, whereupon the plaintiff instituted the present proceedings by the issue of a writ of summons specially indorsed under the Supreme Court Rules (*cap.* 205), O.III, r.6 in which, by virtue of O.XIV, r.1 of the same Rules, he applied for liberty to enter final judgment for recovery of the land. 25 30

The defendant contended that, as there was no attornment clause in the mortgage deed between himself and the plaintiff, no relationship of landlord and tenant existed between them, and therefore the plaintiff could not proceed against her on a special indorsement of the writ. The plaintiff did not deny that there was no attornment clause, but contended that since the Conveyancing Act, 1881 an attornment clause must be implied, and that the defendant, being in default of payment, was merely a tenant at sufferance. 35 40

The court gave judgment for the defendant.

Cases referred to:

- (1) *Casey v. Hellyer* (1886), 17 Q.B.D. 97; 54 L.T. 103.
- 5 (2) *Daubuz v. Lavington* (1884), 13 Q.B.D. 347; 51 L.T. 206.
- (3) *Kemp v. Lester*, [1896] 2 Q.B. 162; (1896), 74 L.T. 268.

Legislation construed:

Supreme Court Rules (Laws of Sierra Leone, 1925, *cap* 205), O.III, r.6:

10 The relevant terms of this rule are set out at page 408, line 31—page 409, line 2.

WEBBER, C.J.:

15 This is a summons under the Supreme Court Rules (*cap*. 205), O.XIV, r.1 in which the plaintiff asks that he be at liberty to sign final judgment in this action against the defendant for possession of the land referred to in the indorsement on the writ.

20 By his affidavit counsel for the plaintiff stated that by an indenture of mortgage dated April 11th, 1935, certain premises at No. 65 Sackville Street were mortgaged by the defendant to one George and that, in the exercise of the covenant for sale, the premises were sold and the plaintiff became the purchaser to whom a conveyance in fee simple free from incumbrances was granted.

25 The ground of the action was that the defendant continued in possession and has refused to give up possession. In the affidavit reference is made to a letter written by the defendant's solicitor asking for time up to December 31st, 1935 for the defendant to quit the premises.

30 The plaintiff is now proceeding by special indorsement under the Supreme Court Rules (*cap*. 205), O.III, r.6 which reads as follows:

35 "In all actions where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising. . . (f) in actions for the recovery of land, with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant, the writ of summons may at the option of the plaintiff, be specially indorsed with a statement
40 of his claim or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of

such of the Forms in Appendix C, Section IV., as shall be applicable to the case.”

The defendant’s counsel contends that there is no attornment clause in the mortgage deed and consequently no relationship exists, as between landlord and tenant. To this contention the plaintiff refers me to para. 7 of the affidavit which, he says, estops the defendant denying such relationship. I was referred to the cases of *Casey v. Hellyer* (1); *Daubuz v. Lavington* (2); *Kemp v. Lester* (3); and it was contended that without an attornment clause the plaintiff cannot proceed on a special indorsement of the writ. Plaintiff’s counsel, who did not deny that there was no attornment clause, contended that since the Conveyancing Act, 1881 an attornment clause must be implied and that the defendant was merely a tenant at sufferance.

I have given careful consideration to these arguments and I have come to the conclusion on the authorities quoted that the defendant’s contention is correct. An attornment clause is inserted in mortgages by an occupying owner in order to give the mortgagee the remedies incident to his position as landlord. Formerly the mortgagor attorned tenant at rent equal to the value of interest which gave the mortgagee a power to distrain for the interest. This is now void *but*, and a very great and important *but*, it is not void for other purposes.

An attornment clause in a mortgage is essential to create a relationship of landlord and tenant and it is this which enables a mortgagee to avail himself of the appropriate summary procedure for recovery of possession. Under the circumstances I can find nothing here to justify using the summary procedure permissible under O.III, r.6 and I must therefore dismiss the motion with costs to be taxed and direct pleadings. As to the point of estoppel taken by the plaintiff in reference to para. 7 of his affidavit, I do not think that this can be regarded as an admission of the relationship of landlord and tenant.

Order accordingly