HOBBS, OSBORNE & HOBBS (DEFENDANTS) ..... } APPELLANTS ;

AND

THE ONTARIO LOAN AND DEBENTURE COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

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*Mar. 17.

*Dec. 10.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Landlord and tenant—Creation of tenancy by mortgage—Demise to Mortgagor—Construction of—Rent reserved—Intention to create tenancy.

A mortgage of real estate provided that the money secured thereby, $20,000, should be payable with interest at 7 per cent. per annum as follows: $500 on December 1st, 1883 ; $500 on the first days of June and December in each of the four following years ; and $15,500 on June 1st, 1888 ; and it contained the following provision : "And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken, and be in all respects in satisfaction of the moneys so then payable according to the said proviso." The mortgage did not contain the statutory distress clause, or clause providing for possession by the mortgagor until default and it was not executed by the mortgagees. The mortgagor was in possession of part of the premises and his tenants of the remainder and such possession continued after the mortgage was executed. The goods of the mortgagor having been seized under execution the mortgagee claimed payment of a year's rent under the Statute of Anne.

Held, per Strong, Gwynne and Patterson JJ. (Ritchie C.J. and Taschereau J. dissenting,) the mortgage deed failed to create between

*PRESENT :—Sir W. J. Ritchie C. J. and Strong, Fournier, Taschereau, Gwynne, and Patterson JJ.

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the mortgagor and mortgagees the relation of landlord and tenant, so as to give the mortgagees the right to distrain for arrears of rent, under the provisions of 8 Anne c. 14, as against an execution creditor of the mortgagor; because, even if the deed could operate as a lease although not signed by the mortgagees, the rent reserved was so unreasonable and excessive as to show conclusively that the parties could not have intended to create a tenancy and that the arrangement was unreal and fictitious.

The right to impugn the validity of a lease between a mortgagor and mortgagees on the ground that it is merely fictitious and colorable is not to be confined to any particular class such as assignees in bankruptcy, but may be exercised wherever the interests of third parties may be involved.

Per Strong J. The excution of the deed by the mortgagor estopped him from disputing the tenancy, and the mortgagees were also estopped by their acceptance of the mortgagor as their tenant, evidenced by their accepting the deed, advancing their money upon the faith of it and permitting the mortgagor to remain in possession.

The mortgage deed, although executed by the mortgagor only, operated in any event to create a tenancy at will, at the same rental as that expressly reserved by the demise clause. Sec. 3 of 8 & 9 Vic. c. 106, (R.S.O. c. 100, sec. 8,) has not the effect of repealing the words of the statute of frauds which make the lease required by that statute to be in writing signed by the lessor so far effectual as to create a tenancy at will.

Per Gwynne and Patterson JJ. The mortgage deed not having been signed by the mortgagees failed to create even a tenancy at will.

Per Gwynne J. The form adopted for the demise clause is such that by the mortgagees executing the deed it would operate as a lease, and by their not executing it the clause would be simply inoperative.

Per Ritchie C.J. and Taschereau J. The execution of the mortgage by the mortgagor and continuing in possession under it amonnted to an attornment and the relation of landlord and tenant was created. The deed was intended to operate as an immediate lease with intent to give the mortgagees an additional remedy by distress and was a *bonâ fide* contract for securing the payment of principal and interest, and in the absence of any bankruptcy or insolvency laws there was nothing to prevent the parties from making such a contract.

APPEAL from a decision of the Court of Appeal for

Ontario (1) reversing the judgment of the Queen's Bench Division (2) in favor of the defendants.

The facts of the case are sufficiently set out in the head-note and in the following judgments of the court. At the trial judgment was given for the plaintiffs, the learned judge holding that while the rent would be unreasonably excessive if the tenancy was treated as for the whole term of five years, yet that the term was divisible and there was a good lease for four and a-half years at $1,000 a year. The Divisional Court reversed this decision and held that no real tenancy was created. The Court of Appeal, in turn, reversed the decision of the Divisional Court and held in favor of the tenancy. The defendants appealed to this court.

Gibbons for the appellants cited *Trust and Loan Co.* v. *Lawrason* (3); *Ex parte Voisey* (4); *Ex parte Jackson* (5).

Moss Q.C. for respondents referred to *Ex parte Punnett* (6); *Alton* v. *Harrison* (7).

SIR W. J. RITCHIE, C.J.—I think there is nothing in this case to lead one to doubt the *bona fides* of this transaction, or to lead to the conclusion that as a matter of fact the partners did not intend to create the relationship of landlord and tenant; the mortgagor was, at the time of the execution of this mortgage, in perfectly solvent circumstances, and the mortgagee advanced his money by way of loan on the security of this mortgage and the provisions contained therein. The mortgagor was the owner of this land in fee and he conveyed it by way of mortgage to the mortgagee. I cannot understand why the redemise clause cannot be treated as a lease, or as creating a tenancy. The

(1) 16 Ont. App. R. 255.
(2) 15 O. R. 440.
(3) 6 Can. S.C.R. 286.
(4) 31 Ch. D. 442.
(5) 14 Ch. D. 125.
(6) 16 Ch. D. 226.
(7) 4 Ch. App. 622.

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mortgagee was at law the owner of the land in fee, what then prevented him from making a lease for the term mentioned in the mortgage?

I think the payments made must be taken to have been made as rent payable in accordance with the terms of the mortgage. Why should this clause be eliminated from the mortgage, what right have we to say that the mortgagee would have advanced his money without the security of this clause, and does not this very litigation show that such a relationship was for the better securing the payment of the mortgage money?

What right have we to say, contrary to the express language of the redemise clause, that that was a provision merely that the mortgagor shall remain in possession until default? Why, if that was the intention, was it not so treated and plainly expressed? Why should we be called on to say that the parties intended that the contract should be different from that expressed in the deed by which his right to remain in possession rests on the express demise creating the relation of landlord and tenant?

I think that after the execution of the mortgage and continuing in possession under the mortgage amounted to an attornment and the relation of landlord and tenant was created.

I think the deed was intended to operate as an immediate lease with intent to give the mortgagee an additional remedy by distress.

There was no bankruptcy law in existence when this deed was excuted. In the absence of any bankrupt or insolvent laws, what was to prevent the parties making this contract? What right have we to say it does not express the true bargain and that a tenancy was not created which the parties expressly say shall be created?

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The mortgagor agrees that a tenancy shall exist on the terms mentioned in the mortgage and this deed is delivered to the mortgagees who accept and assent to it, and the mortgagor pays rent under it. What more perfect attornment could there be? What stronger language could be used to show that a tenancy was created and the mortgagor assumed the position of tenant at the rent specified.

I think there is no ground for saying that this was a mere device for evading the bankruptcy or insolvent laws, in fact it could not be, for there were no bankrupt or insolvent laws to evade nor to defraud or interfere with any others, and therefore the rent reserved, even if out of proportion to the annual value, is no objection to the demise.

I think the contract in this case was a *bonâ fide* contract a reality and no sham by which the relation of landlord and tenant was established for securing the payment of principal and interest on the mortgage security. I will only cite one authority which I consider conclusive; other cases bearing on this question have been so fully discussed in the court below that I do not deem it necessary to refer to them, all of which, in my opinion, fully justify the decision at which the Court of Appeal have arrived. It is the case of *Ex parte Voisey* (1).

Jessel, M.R. says:

But some other points have been taken. It was said that there was no tenancy at all, because you cannot make a tenancy except by agreement, and that, as the mortgage deed was not executed by the mortgagees, there is no agreement. The fallacy of that argument appears to me to be in confounding agreement with evidence of agreement. Certainly there must be an agreement, or else you cannot have a tenancy, but an attornment may be evidence that the landlord has entered into an agreement for a tenancy. In this case we have an attornment to the legal owner by deed executed by the

(1) 21 Ch. D. 456.

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tenant in possession and delivered to the legal owner—very good evidence of a tenancy—evidence, therefore, of an agreement for a tenancy, and as was said in *Ex parte Punnett* (1) that is an estoppel in pais which would prevent the tenant from denying the tenancy. Therefore, there is in this case a well created tenancy.

Page 457. Brett J. says:

Now the stipulation which is called an attornment, if it be a *bonâ fide* and honest transaction, is a contract in writing between the two parties to it. It is signed by only one of them, if you please, but it is delivered by that person to the other, and kept by him, and the intention of it is that it shall form a contract and, if that be so, it is a contract. If it is a contract, it is a contract in writing, and if it be a *bonâ fide* contract, and is in writing, the effect of it depends entirely upon the construction of the writing.

And at page 459 :

That raises the question whether the contract was a *bonâ fide* one. Now, in what sense can it be said that it is not *bonâ fide ?* Whatever may be its terms, and however excessive the rent, it is not a fraud as between the parties, because nothing was concealed by the one from the other, and both agreed to the terms. Therefore it could not be a fraud as between the parties. It was not intended to defraud any known individual. It cannot, therefore, in the ordinary sense of the term, be a fraud at all. The only way in which it can cease to be a *bonâ fide* contract is if it was not intended to be acted upon between the parties at all, and was only a device to evade the bankruptcy laws. That would not be what is ordinarily called a fraud, but it would be what is called a fraud upon the bankruptcy laws, that is, an attempt to evade the bankruptcy laws in case of a bankruptcy. Now that attempted evasion, that want of *bonâ fides* with regard to the bankruptcy law, must exist, if at all, at the moment when the contract is made. Therefore what we have to consider is this (and this is the real meaning of *Ex parte Williams* (1) at the time when the contract was made it was made for the purpose of its being acted upon between the parties, whether there should be a bankruptcy or not, or, although in terms it appears to be made between the parties with the intention that it should be acted upon whether there is a bankruptcy or not, were their minds really then fixed upon this, that it was to be acted upon only if there should be a bankruptcy ? In other words, they must have had bankruptcy in their contemplation at the time of making the contract, they must have contemplated evading or attempting to evade the fair distribution of the mortgagor's property in case

(1.) 16 Ch. D. 226. (2) 7 Ch. D. 138.

of his bankruptcy. That seems to me to be the true proposition and the true principle of the law which is laid down in *Ex parte Williams* (1).

And at page 461 he says :

I take it that the question is whether there was a real honest stipulation between the parties, intended to be acted upon whether there should be a bankruptcy or not, or whether it was a stipulation which they intended to be acted upon only for the purpose of defeating the bankruptcy law.

Cotton J. at page 464 says :

Of course the question is, was the transaction a sham or a reality ? and I think we ought in the present case to take it to be a reality and not a sham. And, if we come to this conclusion, there being nothing to prevent a mortgagee and a mortgagor from agreeing together that the relation of landlord and tenant shall exist between them, we cannot deprive the mortgagee of the consequences resulting from the legal relation which has been honestly and really constituted by the contract between the parties.

Jessel, M. R. at page 465, says :

I wish to add that I entirely agree in the observations of Lord Justice Brett, as to the principles of law which are te extracted from *Ex parte Williams* (1) and the two subsequent cases.

I think, therefore, that the appeal should be dismissed.

STRONG J.—This was an interpleader issue. The appellants who were the defendants in the issue were execution creditors of David Darvill and under their executions certain goods and chattels, the property of the execution debtor, were seized by the sheriff of Middlesex. These goods were, at the time of the seizure, upon certain lands and premises of the execution debtor which had previously been mortgaged by him to the respondents. The respondents insisted that under the terms of this mortgage the relation of landlord and tenant had been created between themselves and the mortgagor, and that a rent equal to the instalments of principal and interest of the mortgage

(1) 7 Ch. D. 138.

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debt, which the mortgagor had covenanted to pay, had been duly created, and they claimed that the sheriff should not remove the goods seized by him from the mortgaged premises until certain arrears of the rent mentioned should be paid to them, pursuant to statute 8 Anne ch. 14.

The mortgage was to secure the repayment of a loan of $20,000 and interest, and was, by indenture dated the 31st May, 1883, the parties to the deed being David Darvill the mortgagor, and the present respondents the mortgagees. It contained the following proviso for defeasance, viz.:

Provided, this mortgage to be void on payment of twenty thousand dollars of gold coin of legal tender in Canada, or at the option of the mortgagees or their assigns, the then equivalent thereof of lawful money of Canada, with interest of seven per cent. per annum as follows:—Five hundred dollars of the said principal sum to be paid on the first of December next (1883); five hundred dollars on the first day of each of the months of June and December in each of the four following years: 1884, 1885, 1886 and 1887, and fifteen thousand five hundred dollars, being the balance of the said principal sum, on the first day of June, in the year eighteen hundred and eighty-eight. And the interest at the rate aforesaid, likewise of gold coin or its equivalent as aforesaid, on the unpaid principal from the first day of the month of June, 1883, to be paid semi-annually on the first day of each of the months of June and December, in each year, until the said principal sum and interest shall be fully paid and satisfied. The first of said semi-annually payments of interest to become payable on the first day of December, in the year eighteen hundred and eighty-three.

There was also a power to take possession and sell in case of default in payment conferred by the following words:

Provided, that the said mortgagees, on default of payment for one month may, on one month's notice, enter on and lease or sell the said lands. Provided also that any such sale may be for cash or on terms of credit, and that in case of default of payment as in foregoing proviso mentioned, for three months, the foregoing powers of entry, leasing and sale, or any of them may be exercised without any notice having been given as therein provided.

And there was also in the deed the following clause

purporting to be a demise of the mortgaged property by the mortgagees to the mortgagor:

And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount, the amount payable on such days respectively, according to the said proviso without any deduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso. Provided always, and it is agreed that in case any of the covenants or agreements herein of the mortgagor, his heirs, executors, administrators or assigns, be untrue, or be unobserved or broken at any time, the mortgagees, their successors or assigns, may without any previous demand or notice enter on the said lands or any part thereof, in the name of the whole, and take and retain possession thereof, and determine the said lease. And no reconveyance, release or discharge from these presents, of any part or parts of the said lands by the mortgagees or their assigns shall cause an apportionment of the said rent, but the whole thereof shall be payable out of the remainder of the said lands.

The mortgage deed was duly executed by the mortgagor but not by the mortgagees. The sheriff having seized the goods of the mortgagor found upon the mortgaged premises under the execution of the appellants, the respondents on the 8th June, 1887, served him with a notice that there was due to them for rent reserved in respect of the tenancy alleged to have been created by the mortgage, the aggregate amount of $3,180, being composed of the three payments which had fallen due in June and December, 1886, and in June, 1887, and they required the sheriff not to remove the goods until they were paid. The appellants disputed this claim. Thereupon the sheriff obtained the interpleader order, whereby it was directed that an issue should be tried to ascertain the rights of the respective parties. An issue was accordingly framed

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in which the present respondents were plaintiffs and the appellants defendants; whereby the question to be determined was stated to be whether the respondents were entitled as landlords of David Darvill or otherwise under the mortgage from said David Darvill to the plaintiffs dated the thirty-first day of May, A. D. 1883, to be paid out of the moneys realized on the sale of the goods and chattels of said David Darvill, seized on the first day of June, A.D. 1887, in execution by the sheriff of the county of Middlesex, the sum of $1,077.50 and $1,060.00 due to the plaintiffs for arrears of rent or otherwise under said mortgage, and payable on the first day of June, 1886, and the first day of December, 1886, respectively, in respect of the lands upon which the said goods and chattels were at the time of the seizure and sale thereof, or some part thereof, as against the execution creditors.

This issue came on to be tried at the Middlesex assizes before Mr. Justice Rose and a jury, when the learned judge having discharged the jury reserved the case for further consideration and subsequently found the issue in favour of the present respondents and entered judgment for them accordingly. Upon motion to the Divisional Court of Queen's Bench this judgment was set aside and judgment was ordered to be entered in favour of the appellants. The respondents then appealed to the Court of Appeal by which court the order of the Divisional Court was reversed and the judgment of Mr. Justice Rose restored. The judgments in the Divisional Court and in the Court of Appeal were respectively concurred in by all the learned judges who took part in those decisions.

It is well settled by authority that it is competent for the parties to a mortgage of real property to agree that in addition to their principal relation as mortgagor and mortgagee they shall also as regards the mortgaged

lands stand towards each other in the relation of landlord and tenant, the mortgagor thus remaining in possession as the tenant of the mortgagee. It is, however, essential to the validity of such an arrangement that it should be so carried out as to comply with the requirements of the law prescribed for the creation of leases, and further that it should appear that it was really the intention of the parties to create a tenancy at the rental (if any) which may be reserved and not merely under colour and pretence of a lease to give the mortgagee additional security not incidental to his character of mortgagee. If these conditions are complied with the relation of lessor and lessee is considered to be established not merely as between the parties themselves but in respect of third persons also. In such a case it has been held that the mortgagee may distrain for rent in arrear upon the goods of a stranger found upon the mortgaged or demised lands, and it also follows that in a case like the present, he is entitled to insist as against the sheriff and the execution creditors of the mortgagor upon the rights conferred on landlords by the statute 8 Anne ch. 14 and claimed by the respondents in the present instance. It is somewhat remarkable that the right of the mortgagee to distrain the goods of a stranger does not appear to have been finally determined by judicial authority in England until a date so recent as 1883, when in the case of *Kearsley* v. *Philips* (1), it was so decided by the Court of Appeal. Previously, however, to the date of this decision in *Kearsley* v. *Philips* the courts of Ontario had in many cases recognized this right of distress and it may now be regarded as well established, subject however, to the conditions already mentioned.

The questions we have to deal with in the present case are two, namely, 1st, was the mortgage deed, having

(1) 11 Q.B.D. 621.

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regard to the fact that it was executed by the mortgagor only and not by the mortgagees, sufficient to create any tenancy at all between the parties at the rent assumed to be reserved by its terms, three gales of which are claimed by the mortgagees by the notice served on the sheriff; and 2ndly if the instrument was itself sufficient does it appear to have been the real intention of the parties, in good faith, to constitute between themselves the relation of landlord and tenant and that at a real rental or was the arrangement not real but merely a fiction or sham entered into for no other purpose than to obtain for the mortgagees an additional security similar to that which a landlord would have by means of the common law right of distress upon such goods as might be found upon the premises. Upon the first question I am of opinion that the mortgage executed as it was was sufficient to create a tenancy. In support of their position under this head the respondents have relied principally upon two cases, *Morton* v. *Woods* (1) and the same case in the Exchequer Chamber (2) and *West* v. *Fritche* (3). It appears to me, however, that neither of these cases exactly covers the question arising here, though the judgments delivered in *Morton* v. *Woods* do I think contain the enunciation of principles which greatly assist in deciding the point now under consideration. In *Morton* v. *Woods* the clause of the mortgage which was relied on as creating the tenancy was in its terms different from that in the instrument before us; it was in form an attornment clause, by which the mortgagor declared that he attorned to and became tenant to the mortgagees; in the present case the clause (before stated) is in terms a demise by the mortgagee to the mortgagor. It seems, however, that this is an immaterial difference; in this case as in the case of the

(1) L.R. 3 Q.B. 658. (2) L.R. 4 Q.B. 293.
(3) 3 Ex. 216.

attornment clause there is an admission under seal by the mortgagor of the terms of the demise and by force of the words "yielding and paying therefor" a covenant to pay the rent. This coupled with the facts that the mortgagees advanced their money on the faith of all the provisions contained in the deed and that the mortgagor was allowed to remain in possession after the execution of the mortgage and as it must be assumed under the provision in question would it seems to me amount to an estoppel binding the mortgagor as well as the mortgagee, and which would therefore be sufficient to constitute a tenancy unaffected by the provisions contained in the statute of frauds and in the eighth section of the revised statutes of Ontario, 1887 ch. 100 (a re-enactment of the Imperial Act 8 & 9 Vic. ch. 106 sec. 3). These enactments require that when a lease for more than three years depends on the conventional acts of the parties it must be evidenced by a deed; but this in no way interferes with the doctrine of estoppel which proceeds upon the principle not that there is sufficient legal evidence of a demise but that the parties are by their acts debarred from disputing that fact. Therefore I should, if there were no other grounds for so determining, be prepared to hold that the mortgagor's execution of the deed estopped him from disputing the tenancy and that the mortgagee was also estopped by his acceptance of the mortgagor as his tenant evidenced by his accepting the deed, advancing his money upon the faith of it and permitting the mortgagor to remain in possession. This conclusion would, I think, be fully supported by the case of *West* v. *Fritche* (1).

In *Morton* v. *Woods* it was not necessary to have recourse to the doctrine of estoppel for the purpose of establishing that there was a demise, though it was resorted to in order to get over another difficulty there

(1) 3 Ex. 216.

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arising, that from the circumstance of there having been a prior outstanding mortgage there was no legal reversion in the mortgagor.

The objection founded upon the requirements of the statute making a deed essential to the creation of a tenancy for more than three years was got over in a different way. It was there held that inasmuch as it appeared that upon the true construction of the attornment clause the parties did not intend to create a tenancy for a term but a mere tenancy at will, the statutes did not apply; and that all that was requisite for the creation of such tenancy at will was some evidence even by parol to that effect. Further, that there had been an actual present demise by the mortgagee to hold at the will of the latter and that this was to be implied from the execution by the mortgagor of the mortgage deed containing the attornment clause, and from the assent to its terms by the mortgagee to be inferred from his acts in advancing the money on the faith of the deed allowing the mortgagor to continue in possession and otherwise acting on the mortgage. The statutes therefore had no application whatever, and by the agreement of the parties without in any way resorting to the doctrine of estoppel a good parol demise or lease at will was made out. The difficulty occasioned in the present case by the non-execution of the mortgage by the mortgagee might be got over in precisely the same way if it were possible to say that upon the true construction of the mortgage deed the parties intended to create only a tenancy at will. This, however, I am unable to do, for, differing with great respect from Mr. Justice Burton, I have failed to discover from the terms of the deed that any other tenancy was designed to be created than one which was to continue until the expiration of the time

limited for the last payment under the mortgage on the 1st of June, 1888.

There is, however, another alternative by which as it seems to me this technical objection might be surmounted. In the judgment of the Exchequer Chamber, in *Morton* v. *Woods*, (1) delivered by Chief Baron Kelly, the following passage occurs :—

> But even if there were any doubt upon the construction of this instrument as to the intention to create a tenancy at will only, and if as was contended on behalf of the plaintiffs, it be taken to have been the intention to create a term of ten years the operation of the statute puts an end to the question. For if it had been clearly intended to grant a lease of ten years, the lease being by parol only by reason of the non-execution of the deed by the mortgagees, by the express words of the statute of frauds the lease is not absolutely void but has the effect of a lease at will. From the execution of the deed therefore, or on the attornment by the mortgagor he became tenant at will to the defendants and there being a rent of the specified amount of $800, appearing on the face of the deed a distress by them for that specific rent would be lawful.

Although this was a dictum merely and was not required for the purposes of the decision in *Morton* v. *Woods*, it indicates a safe ground upon which to rest the determination of the point now under consideration in the present case. Assuming that I am wrong as to the estoppel, and aside from that principle altogether, there was here an assent by both parties to the demise clause purporting to create a present lease for a term of five years—that is to say, an assent by the mortgagor in signing and sealing the deed and in remaining in possession under it, and an assent by the mortgagees by their adoption of its terms, by acting upon it in the way they did advancing their money, and allowing Darvill, the mortgagor, to continue in possession. There was, therefore, in fact, an actual present lease which would have been a good parol lease at common law for the whole term, though it was not actually valid as such for the reason that it did not comply with statutory requirements.

(1) L. R. 4 Q. B. 293.

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By the express provision of the Statute of Frauds, however, as the Chief Baron pointed out in *Morton* v. *Woods*, a parol lease for a term exceeding three years is void as to the term, but is, nevertheless, to operate so far as to create a tenancy at will; and there is nothing in the subsequent statute enacting that when the statute of frauds required a writing signed by the lessor a deed should be requisite, and that the lease should be void if not made by deed, which repeals the words of the statute of frauds making the lease in such a case so far effectual as to create a tenancy at will. The later statute is to be read and construed merely as substituting a deed for the signed writing required by the earlier enactment, and the avoidance of the lease has reference only to its nullity as a lease of a term; the tenancy at will arising in such a case is not created by, nor is it dependent on the lease, but is a creation of the statute, a statutory consequence of the attempt to create a lease by parol for more than three years, and of the nullity of such a proceeding declared by the statute. There is, therefore, no more inconsistency between this implied or resulting tenancy at will raised by the statute and the provision that the lease shall be a nullity if not by deed, than there was between the original enactment that the lease should be wholly void unless in writing and signed by the lessor, and the proviso which followed saying that in such a case there should be a tenancy at will. This proviso is still preserved, although the lease for term must now be made by deed. In other words, it is apparent that the tenancy at will in such a case did not arise from the agreement of the parties, but was the effect of the statute which has never been repealed.

Then to apply this principle to the present case it must be held that the parties having attempted to

create a term of five years by a parol lease, which, as I have said, must be the result of the mortgagor having signed and sealed the deed, and of the mortgagees having assented to its terms by acting upon it in the way before mentioned, the consequence follows that this parol demise being void under the statute as a lease for five years operates as a tenancy at will under the provision of the statute of frauds. And if there was a tenancy at will it must have been a tenancy at the same rental as that expressly reserved by the demise clause in respect of the void lease. For these reasons the objection to the judgment of the Court of Appeal based on the non-execution of the mortgage deed by the mortgagees wholly fails.

The language of the Master of the Rolls (Jessel) in the case of *Ex parte Voisey* (1), is applicable to both points on which, as it appears to me, the objection founded on the non-execution of the deed by the mortgagee fails, on estoppel and agreement. As I have already shown, agreeing in this respect with Mr. Justice Osler, there can be no material difference between the demise clause in the deed before us and what is called the attornment clause generally found in the mortgages which have come in question in the English cases, and the execution by the mortgagor alone of the demise clause in the present mortgage, its acceptance by the mortgagee was just as effectual as an acknowledgment of tenancy, as would have been the execution by the mortgagor alone of an attornment clause. This being so the following language of the Master of the Rolls in *re Voisey* seems conclusive. Sir George Jessel there says :—

> But some other points have been taken ; it was said that there was no tenancy at all, because you cannot make a tenancy except by agreement, and as the mortgage deed was not executed by the mort-

(1) 21 Ch. D. 442.

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gagees there is no agreement. The fallacy of that argument appears to me to be in confounding agreement with evidence of agreement. Certainly there must be an evidence or else you cannot have a tenancy, but an attornment may be evidence that the landlord has entered into an agreement for a tenancy. In this case we have an attornment to the legal owner by deed executed by the tenant in possession and delivered to the legal owner, very good evidence of a tenancy, evidence therefore of an agreement for a tenancy, and as was said in *ex parte Punnett* (1) that is an estoppel *in pais* which would prevent the tenant from denying the tenancy. Therefore there is in this case a well created tenancy.

Further, I think it would not be difficult to demonstrate that for equitable reasons based on the doctrine of part performance this first objection is not sustainable. I think it unnecessary, however, to enter upon a consideration of them, as I consider what has already been said sufficient for the purpose.

It remains to consider the objection to the clause of tenancy, contained in this mortgage, which is based on the more substantial ground that it was not intended by the parties in reality to constitute by it the relation of lessor and lessee, but merely to give by means of it to the mortgagees a right corresponding to that which in case of a *bonâ fide* lease the lessor has to exercise the common law power of distress, and thus to extend the mortgagees' security to the chattel property which might be found on the mortgaged premises; in other words, it is insisted that upon the evidence as to the annual value of the property it must be taken as established that the tenancy which the parties assumed to create was not a *bonâ fide* lease but was, to use the expression applied in some of the English cases, a sham, a mere colourable contrivance, to obtain the benefit of the power of distress, which in the case of a real lease the law gives to the landlord as an incident of his reversion and by this means

(1) 16 Ch. D. 226.

to acquire a priority over the creditors of the mortgagor having executions against his chattels, and also to seize and sell the goods of third persons which might be found upon the premises. I confess it is not easy to see for what object these clauses of tenancy, inserted in mortgages, were designed, except for the purpose of conferring on the mortgagor the power of making all distrainable chattel property found on the premises available towards the satisfaction of the principal and interest of the mortgage debt, and as the right of distress must necessarily in every case where it comes in conflict with the rights of assignees in bankruptcy of execution creditors or of a third person owning goods found upon the land, have the effect of prejudicing their rights in a most unjust manner I should have thought that in all cases in which a conflict occurs the right of honest creditors and innocent third parties ought to prevail over an arrangement which could only be attributed to the object mentioned or at least that this should be so in all cases where the security of the land being ample, the mortgagor, if this device of creating a tenancy had not been open to him, would never have thought of taking possession. The authorities, however, have, beyond doubt or question, established the validity of such agreements in all cases where it appears that the intention of the parties was to create a real tenacy at a real rent. The advantage accruing to the mortgagee from such a tenancy must, for some reason, be considered of considerable value, for by it there is conferred upon him a very onerous obligation, viz., the liability to account to subsequent mortgagees not only for rents actually received, but for such as might without wilful default have been received, and th mortgagee is thus compelled for his own protection to be active in enforcing his right as a lessor though his security otherwise may be ample; he is thus as it were

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converted into a bailiff for subsequent incumbrancers, a position which I should have thought not desirable for a mortgagee with a sufficient security, however it might be with one whose security was not ample. However, the practice of conveyancers, both in England and in this country, to insert such clauses seems to have become universal, and the decisions of the courts have now too firmly settled the validity of such provisions in mortgages to admit a doubt of their legal validity in proper cases. It is, however, laid down in several cases lately decided by the English Court of Appeal, that, however binding these claims may be between the actual parties, it is open to third persons affected by their enforcement to impeach them in cases in which it may appear from the evidence that they were not intended to create a real tenancy, but were designed merely as a cloak for an additional security to the mortgagee. The principal authorities in which this has been held or in which the doctrine has been recognized are the following, viz.: *Ex parte Williams* (1); *ex parte Stockton Iron Co.* (2); *ex parte Jackson* (3); *ex parte Punnett* (4); *ex parte Threlfall* (5); and *ex parte Voisey* (6). Perhaps I ought to have omitted from this list the first case mentioned, that of *ex parte Williams*, as the *ratio decidendi* in that case was that well known principle applied under bankruptcy and insolvency statutes, that any provision by a debtor that in the event of his becoming bankrupt or insolvent there shall be a different distribution of his effects from that which the law provides is void [see *Watson* v. *Mason* (7)]; the deed in that case did provide for an advantage to arise to the mortgagee from the tenancy clause in

(1) 7 Ch. D. 138.
(2) 10 Ch. D. 336.
(3) 14 Ch. D. 726.
(4) 16 Ch. D. 226.
(5) 16 Ch. D. 274.
(6) 21 Ch. D. 442.
(7) 22 Gr. 574.

the case of bankruptcy. It is obvious that this doctrine has no application to the present case. Here we have nothing to do with bankruptcy, or insolvency statutes, and I only point this out to avoid confusion. The dicta in this case of *Ex parte Williams* are broad enough to cover the law as laid down in the subsequent decisions. The other cases, however, do establish the law as I have stated it, and are distinct authorities for the proposition that if it appears that the tenancy for which the mortgage deed provides is not intended by the parties to be a real lease, at a real *bonâ fide* rent, but is a mere sham and pretence intended merely to give the mortgagee the extraordinary remedies of a landlord, such a clause is void at least as against the assignees in bankruptcy of the mortgagor; and it has also been held that in case it should appear from evidence that the rent was greatly in excess of the annual value of the mortgaged premises, and such a rent as no *bonâ fide* tenant would think of paying, the fact that such an excessive and unreasonable rent had been reserved was conclusive to show that the parties could not have intended to create a tenancy, and that the arrangement must therefore be considered unreal and fictitious.

In *Ex parte Jackson* (*ubi supra*) Baggallay L.J. says:

> Now as was pointed out by the Master of the Rolls, *in re Stockton Iron Furnace Company*, there was nothing unreasonable in the original introduction into mortgage deeds of attornment clauses in cases in which the mortgagor was in possession of the mortgaged premises. If the mortgaged premises had been occupied by a stranger the mortgagee could at any time have demanded from him payment of his rent in arrear and he could have applied any rent paid to him under such a demand in discharge in whole or part of the interest in arrear on his mortgage and if the rent received by him was more than sufficient to discharge the interest it could be applied in discharge or satisfaction *pro tanto* of the mortgage debt. Now so far as any inference can be drawn from the practice of inserting attornment clauses it appears to me that the benefit to be derived by the attornment clause was in-

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tended to be an equivalent for that which the mortgagee would have derived from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be the right to the payment of a fair and reasonable rent such as an ordinary tenant would be willing to give for the property under ordinary circumstances. That as it seems to me, is the rent for which a properly prepared attornment clause should make provision; not necessarily the exact amount which a tenant would pay for the property, but such an amount as a willing tenant would probably pay as a *bonâ fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent it appears to me though that you may call it rent, it is no longer a real rent but a fictitious payment under the name of rent.

In this same case of *Ex parte Jackson*, we find the following passage in the judgment of Cotton L. J.

Undoubtedly a mortgagor and a mortgagee have a right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee and thus by contract constituting the relation of landlord and tenant between them. Under such circumstances when it is a real and not a fictitious and sham arrangement the ordinary consequences of a tenancy follow and there can be a distress for the rent agreed upon which will be valid and effectual in the case of bankruptcy. As has been pointed out by Lord Justice Baggalley, this is quite reasonable for the mortgagee has a right to take possession and to turn out the mortgagor whether he be in possession by himself or his tenant. If the mortgagor is in possession by a tenant then the rent which that tenant pays comes into the hands of the mortgagee. If the property is in the possession of the mortgagor himself the mortgagee may turn him out and let the property either to a stranger or to the mortgagor; and, therefore, there is nothing unreasonable or that can be called a fraud in the law of bankruptcy in allowing the parties to make a contract in the mortgage deed which they might validly and effectually make afterwards. If the mortgagee lets to a third party no question can arise as to the amount of the rent; and if the attornment clause is one which really constitutes the relation of landlord and tenant between the mortgagor and mortgagee the court will not be nice in considering whether the rent is too great for the mortgaged property. But it is a very different question which we have now to consider, viz., whether there is a real or only a fictitious or ostensible contract to constitute the relation of landlord and tenant. On that question the amount of the rent created may be most material; it may be so excessive as to afford even of itself, a probability that that which is in form a contract constituting the relation of landlord and tenant and

reserving a return for the use of the property was not so in substance and fact but was a mere colour in order to cover something else. Nor is it material how the rent, if rent is to be applied. No doubt, the rent may be sufficient to cover the interest, but if it is more than sufficient to cover the interest and is received by the mortgagee he must apply it in reduction of the capital, subject to the question whether the interest was in arrear at the time he took possession for as against a mortgagor in possession when the interest is not in arrear an account would be taken with annual rents. Therefore, the stipulation that a rent fairly reserved, a real rent, is to be applied in paying the principal and interest of the mortgage debt, cannot avoid a contract which in other respects is a real contract and not a mere device to cover something else.

Further on the learned Judge says :—

Under these circumstances the conclusion to which I have come is this, that there was no real rent, though a sum was stipulated for under the name of rent. But it was not a rent in respect of which the legal incident of distress arises, and, therefore, on the ground that there was no legal right to distrain the bank under their distress, have not got any title to these goods which, unless there has been an effectual distress, remained the property of the bankrupt. And I go further than that. No doubt, any distress which is exercised does give to a mortgagee, if he is a landlord, something which he would not have got if he had not exercised it. But, yet, it must be a distress for a real rent, to which the law has annexed as an incident the power of distress.

Lord Justice Cotton also says :—

Here there was no real rent and no real relationship of landlord and tenant, and, therefore, there was no power of distress.

In the same case Lord Justice Thesiger holds the following language :—

Therefore although it is clear that persons may bargain with each other as to the amount of rent and the courts will not rightly interfere with bargains so made it is obvious looking at the nature of these uses and the object with which they can be legitimately inserted in mortgage deeds that the amount of the rent may, under certain circumstances, become a matter very important to consider in order to determine whether they are real attornment clauses, whether the rent fixed is a real rent and whether a real tenancy has been created. * * * Granted that these attornment clauses are valid and operative under ordinary circumstances, yet if from the terms of the particular deed or from the amount of the rent fixed by the attornment clause it can

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be concluded by the court that the rent is not a real rent buta mere sham, and that the attornment clause is a mere device to give the mortgagee a hold in the event of bankruptcy over the goods and chattels of the mortgagor which could otherwise have been distributed among his general creditors then the attornment clause is invalid and inoperative because it is a fraud upon the bankruptcy law. * * *

The learned judge also says :

The question is whether for any purpose there was a real rent or real tenancy.

And he adds :

But here the right of distress can only be supported upon the ordinary principles of law which attach that right to a legitimate tenancy with a legitimate rent. If once you arrive at the conclusion that there is no tenancy and no rent, but that the attornment clause creates only a sham tenancy and a sham rent for purposes such as I have described, then it follows that no distress, can by the ordinary principles of law be attached to such a tenancy in respect of such a rent and for that reason it seems to me, that no legitimate distinction can be drawn between a distress levied before and a distress levied after bankruptcy.

In the last reported case, that of *ex parte Voisey* (*ubi supra*) the judges are equally distinct in their enunciation of the same principles of law. Thus Brett L.J. says:

That raises the question whether the contract was a *bonâ fide* one. Now in what sense can it be said that it was not *bonâ fide* ? Whatever may be its terms, and however excessive the rent, it is not a fraud as between the parties because nothing was concealed by the one from the other, and both agreed to the terms. Therefore it could not be a fraud as between the parties. It was not intended to defraud any known individual.

And the Lord Justice then proceeds to point out that it was a fraud on the bankruptcy law. In the same case L. J. Cotton affirms distinctly and emphatically the law as he had laid it down in the previous case and thus expresses himself :

It is undoubted that a mortgagor may enter into a contract with his mortgagee, that the mortgagor shall be a tenant to the mortgagee and it is equally undoubted that the law gives certain rights and priorities to a landlord but the question is whether the contract between the parties was one under which (whatever were the words they used) they really intended to create the relation of

landlord and tenant, or whether, under the mask of certain words, they intended, without any real tenancy, to endeavour to give to the mortgagee all those rights which he could have only if he was landlord and the mortgagor was his tenant. This may be put in other words. It may be said that the question is, whether there was between the parties any real relation of landlord and tenant or whether whatever were the words used it was all a sham. In considering that question we must look at both the amount of the rent or what is called the rent and the other circumstances, and if we find that the so-called rent is so excessive that it never could have been meant to be paid by the occupier to the owner of the land for its use and occupation, that is very strong evidence indeed that there was no real intention to create a tenancy.

And subsequently the learned judge adds, referring to *Ex parte* Jackson :—

In that case there could be no doubt that there was a mere nominal creation of the relation of landlord and tenant, or that in reality the intention was to try and get the benefit which a landlord only can have over any other creditor by using the words landlord and tenant without any intention of creating any such relation.

It is to be observed of all these cases that they are instances in which the validity of the leasing clause was impugned by assignees in bankruptcy, and therefore the language is in some respects confined to the rights of such persons. I am of opinion, however, and the passages I have extracted from the judgments delivered in the Court of Appeal entirely bear me out, that it was not intended to restrict the principles laid down to cases in which the question was raised after a bankruptcy, but that these principles must be generally applied wherever the interests of third persons require their application. Some of the learned judges in the judgments I have quoted from, lay it down generally that when it appears on the face of the deed, or otherwise, that an actual demise at a *bonâ fide* rent was not really intended by the parties, but that the pretended demise was a mere contrivance to enlarge the mortgagee's remedies, the common law incident of a right of distress would not attach at all. The mort-

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gagor himself would be considered as having incapacitated himself from asserting the invalidity of what he had deliberately affirmed to be the true relation between himself and the mortgagee in an instrument under seal, but as regards third parties interested in so doing I know of no reason why it should be confined to any particular class such as assignees in bankruptcy. The avoidance of the fictitious lease at the fictitious rent is not dependent on any principle peculiar to the bankrupt laws, but proceeds on this—that when there is no real tenancy, and therefore no real rent, an extraordinary and very stringent remedy which the common law has made an incident of the reversion for the purpose of recovering a rent service cannot exist. And if it does not "lie in the mouth" of the mortgagor to assert this, it ought nevertheless to be open to all third parties really interested to do so. Therefore I regard the cases in which it has been considered open to assignees in bankruptcy in the interest of the general creditors to set up the colorable character of an attornment clause, as only instances of the application of a general rule which upon every ground of reason and law must also apply to other third parties whose rights ought only to be intercepted by a *bonâ fide* landlord and especially to execution creditors of the mortgagor as well as to persons whose goods are sought to be taken by one who has no real but only a pretended and colourable right to the privilege which he assumes to exercise.

It only remains to enquire whether this mortgage deed does upon its face show that the parties did not really intend to constitute the relation of landlord and tenant. The passages which I have extracted from the judgments delivered in the English Court of Appeal show that upon this enquiry the gross excess of the rent over the actual rental value of the property is

conclusive. That being so there is no alternative but to pronounce against the validity of the alleged tenancy in the present instance at least so far as it would affect the appellants and make them liable to the claim asserted by the mortgagees. The evidence is conclusive to show that $750 per annum is the highest annual value which can be placed on the mortgaged property. The rent reserved is in the aggregate $20,000 for the five years of the pretended tenancy. This would make a rental of $4,000.00 a year more than four times the actual value. This is sufficient to establish that the parties never intended to create a tenancy at such a rental otherwise than for the indirect purposes to which I have before referred, and it must therefore be adjudged that the respondents have failed to make out their right to the arrears they claim. Mr. Justice Rose thought the difficulty could be got over by excluding the rent for the last year and treating the rental reserved for the first four years as a *bonâ fide* rent, but I do not feel at liberty so to model the contract of the parties; we must take it in its integrity and so taken it shows that for a term of five years a gross rental of $20,000 was reserved and this is so greatly in excess of the real value that we must assume that it never was the intention of the parties to make a true lease at such a rent; and the circumstance that the payments to be made for the first four years were moderate and fair in amount cannot do away with the inevitable inference to be drawn from the payment of $15,500 stipulated to be made for the last year of the term.

The appeal must be allowed with costs to the appellants in all the courts and judgment must be entered in the interpleader issue accordingly.

FOURNIER J. concurred with STRONG J.

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TASCHEREAU J. was of opinion that the appeal should be dismissed for the reasons given by the Chief Justice.

GWYNNE J.—Upon the 31st of May, 1883, one David Darvill executed an indenture of mortgage in pursuance of the Ontario Act respecting short forms of mortgages of certain lands therein mentioned, in favor of the Ontario Loan and Debenture Company, for the purpose of securing re-payments to them of the sum of twenty thousand dollars then lent by them to Darvill, together with interest thereon ; the clause or proviso for redemption contained in the mortgage was that the mortgage should be void on payment of twenty thousand dollars of gold coin of legal tender in Canada, or at the option of the mortgagees or their assigns the then equivalent thereof of lawful money of Canada with interest at seven per centum per annum, as follows :—

> Five hundred dollars of said principal sum to be paid on the first day of December next (1883), five hundred dollars on the first day of each of the months of June and December in each of the four following years, 1884, 1885, 1886 and 1887, and fifteen thousand five hundred dollars, being the balance of the said principal sum, on the first day of June, in the year eighteen hundred and eighty-eight ; and the interest at the rate aforesaid, likewise of gold coin, on the unpaid principal from the first day of the month of June next (1883), to be paid semi-annually on the first day of each of the months of June and December until the said principal sum and interest shall be fully paid and satisfied ; the first of the said semi-annual payments of interest to become payable on the first day of December, in the year eighteen hundred and eighty-three, and taxes and performance of statute labor ; the mortgagor, his heirs or assigns, having the privilege of paying one hundred dollars, or any multiple thereof not exceeding one thousand dollars on account of the said principal moneys in advance on the days of any of the above mentioned half-yearly payments.

There was a proviso that on default of payment for one month the mortgagees might on one month's notice enter upon and lease or sell the said lands, and

further, that in default of payment of any instalment of principal or interest thereby secured the whole of the principal thereby secured should become payable.

The fifteenth clause of the form of mortgage given in the schedule to the act, that is to say, the clause providing that the mortgagee might destrain for arrears of interest, which, as extended in the statutory form, is expressed to be for the purpose of enabling the mortgagee in case the mortgagor should make default in payment of any part of the interest secured by the mortgage at any of the days and times limited for the payment thereof to destrain therefor on the mortgaged premises, and by distress to recover by way of rent reserved, as in the case of a demise, such arrears of interest, was altogether omitted from the mortgage, and a clause not in the statutory form given in the schedule to the act was inserted, in the terms following :—

And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the said mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively, according to the said proviso, without any deduction, and it is agreed that such payments, when so made, shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso. Provided always, and it is agreed that in case any of the covenants or agreements herein of the mortgagor, his heirs, executors, administrators or assigns, be untrue, or be unobserved or broken at any time, the mortgagees, their successors or assigns, may, without any previous demand or notice, enter on the said lands or any part thereof in the name of the whole and take and retain possession thereof and determine the said lease, and no reconveyance, release or discharge from these presents, or of any part or parts of the said lands by the mortgagees or their assigns shall cause an apportionment of the said rent, but the whole thereof shall be payable out of the remainder of the said lands.

Upon the first day of June, 1887, the sheriff of the

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county in which the lands were situate seized certain chattel property of the mortgagor upon the mortgaged premises to the amount of about three thousand dollars to satisfy an execution placed in his hands to be executed, which had issued upon a judgment recovered by the above appellants against the mortgagor. Upon the 8th day of the said month of June, a notice, upon behalf of the mortgagees, was served upon the sheriff in the words following:—

To the sheriff of the County of Middlesex, &c., &c. Take notice that the sum of three thousand one hundred and eighty dollars is now due and owing to the Ontario Loan and Debenture Company from David Darvill, of the City of London, manufacturer, for the following payments of rent of the premises in his occupation at said City of London and township of Westminster: $1,077.50 due on the 1st day of June, 1886, $1,060.00 due on the 1st day of December, 1886, and $1,042.50 due on the 1st day of June, 1887, under and by virtue of an indenture dated 31st May, 1883, made by said David Darvill to said company, upon which premises you claim to have seized and taken in execution certain goods and chattels. And you are hereby required not to remove any of said the goods and chattels from off the said premises until the said arrears of rent are paid pursuant to the statute in such case made and provided. Dated this 8th day of June, 1887.

An interpleader issue was sent down to be tried in pursuance of an order in that behalf, dated the 5th day of September, 1887, wherein the said Ontario Loan and Debenture Company were plaintiffs and the said appellants and others execution creditors of the said David Darvill were defendants, and wherein

the said plaintiffs affirmed and the said defendants denied that the said plaintiffs are entitled as landlords of David Darvill, or otherwise under the mortgage from the said David Darvill to the plaintiffs, dated the 31st day of May, A.D. 1883, to be paid out of the moneys realized on the sale of the goods and chattels of the said David Darvill seized on the 1st day of June, 1887, in execution by the sheriff of the County of Middlesex, the sum of $1,077.50 and $1,060.00 due to the plaintiffs for arrears of rent or otherwise under said mortgage, and payable on the 1st June, 1886, and the 1st December, 1886, respectively in respect of the lands upon which the said goods and chattels were, at

the time of the seizure and sale thereof, or some part thereof, as against the execution creditors.

Mr. Justice Rose before whom the interpleader issue was tried without a jury, found, as matters of fact, that at the date of the mortgage a large portion of the mortgaged property was under lease to persons who were tenants of the mortgagor, and as I undertand his judgment that the annual rents of the property so under lease was at the time of the execution of the mortgage about $2,250, and the annual value of the part in the actual occupation of the mortgagor, $1,216; or a total annual value of nearly $3,500. The learned judge was of opinion that in estimating the *bona fides* of the creation of the relation of landlord and tenant he might separate the annual payments to be made in the first four years from the residue, thus, the amounts to be paid under the proviso contained in the mortgage appears to have been for the first year, terminating on the 1st June, 1884, $2,382,50; for the second year, terminating 1st June, 1885, $2,312.50; for the third year, terminating 1st June, 1886, $2,242.50; for the fourth year, terminating 1st June, 1887, $2,172.50. These amounts the learned judge was of opinion would not be an excessive rent if he was at liberty to compare such annual payments alone with the annual value of the whole of the mortgaged property, including that already under lease to the mortgagor's tenants, but if such four annual payments, as above, should be regarded as issuing only out of the land in the actual occupation of the mortgagor, then he was of opinion that even these amounts would be so excessive, having regard to the actual annual value of the land in such actual occupation of the mortgagor, as to prevent the transaction being held to be one in which a *bonâ fide* lease at a rent reserved was in reality intended, and that, therefore, the relation of landlord and tenant

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had not been created, and he came to the conclusion that he might determine the *bona fides* of the transaction by such comparison of the first four annual payments with the annual value of the whole property instead of with the value only of that part which was in the actual occupation of the mortgagor, but he was further of opinion that if he was bound to take into consideration the $15,500 of principal, together with the interest on the unpaid principal made payable at the expiration of the term, amounting together to the sum of $16,042.60, he must hold that to be so excessive as to exclude all idea that a real rent was intended to be reserved; he came, however, to the conclusion, upon the authority of *Kitching* v. *Hicks* (1), that he could exclude from consideration such last mentioned reservation and that, therefore, he could hold the lease to be good as to the rent reserved payable up to 1888, and so he held the plaintiff to be entitled to recover on the issue upon the authority of *Morton* v. *Woods* (2), *Ex parte Jackson* (3), and *In re Stockton Iron Furnace Company* (4), which cases, he considered, governed the present. The Queen's Bench Division upon appeal reversed this judgment, and held the clause as to the lease of the premises by the mortgagees to the mortgagor to be void, as it was for a term exceeding three years and was not by deed, the mortgagees never having executed the deed—and that the relation of landlord and tenant was never in reality intended to be created—that there was no tenancy at a rent reserved on a lease for years at will or otherwise, so as to entitle the mortgagees to claim as landlords under statute 8 Anne ch. 14 the amounts claimed by them as due for rent for any lands leased by them to the mortgagor.

The Court of Appeal for Ontario, upon appeal to

(1) 6 O. R. 739.
(2) L.R. 3 Q.B. 658; 4 Q.B. 293.
(3) 14 Ch. D. 725.
(4) 10 Ch. D. 335.

them from the Queen's Bench Division, were of opinion that the case was governed by *West* v. *Fritche* (1), *Morton* v. *Woods* (2), *In re Threlfall* (3), *Ex parte Voisey* (4), *Walsh* v. *Lonsdale* (5), *Allhusen* v. *Brooking* (6), and other cases, and they reversed the judgment of the Queen's Bench Division and restored the judgment of Rose J.

In this conflict of opinion, I find myself compelled to concur substantially with the judgment of the Queen's Bench Division, that this is not a case of a rent reserved on a lease for a term of years, at will or otherwise, within the provisions of the statute 8 Anne c. 14, and for the following reasons: In *West* v. *Fritche* (1), the mortgage deed, although executed by the mortgagor only, contained the ordinary attornment clause, whereby,

> for the better and more effectual recovery of the interest of the said sum of £800 by and out of the rents, issues and profits of the said messuage, hereditaments and effects, the mortgagor did attorn and become tenant to the said G. Fritche, his executors, &c., of the same premises, at the yearly rent of £40, to be paid half-yearly on the 9th day of June and the 9th day of December in every year, during so long time as the said sum of £800 or any part thereof shall remain secured upon said premises.

Now, it is to be observed that in this case no question under the statute of frauds, or 8 & 9 Vic. ch. 106, arose. The mortgagor did not attorn as tenant for any term of years at all—the tenancy might not have lasted for three years, and the statute of frauds, as decided in *Ex parte Voisey* (4), applies only where the tenancy, if good, must, of the necessity of the contract, last more than three years, or that the case was one simply of a tenancy

(1) 3 Ex. 216.
(2) L. R. 3 Q. B. 658; L. R. 4 Q.B. 293.
(3) 16 Ch. D. 274.
(4) 21 Ch. D. 442.
(5) 21 Ch. D. 9-14.
(6) 26 Ch. D. 559.

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for a term not required to be in writing by the statute of frauds; and the decision merely was that in such a case continuance in occupation by the mortgagor under the covenant involved in his express attornment to the mortgagees as their tenant, did create the relation of landlord and tenant, and did entitle the mortgagees to destrain. Parke B. giving the judgment of the court said:

> We all think that the subsequent occupation coupled with the covenant constituted the relation of landlord and tenant.

Morton v. *Woods* (1), raised a question merely of intention on the construction of the deed. There a mortgagor in possession executed a second mortgage of the mortgaged premises to the defendants to secure repayment with interest of certain advances. The mortgage was by indenture between the mortgagor and the defendants, but was not executed by the latter. The mortgagor conveyed to the defendants all the premises comprised in the first mortgage, which was recited, upon trust that the defendants should either immediately, or at any time, sell the premises, and should apply the purchase money to arise from such sale in the manner therein mentioned:—

> And as further security for the principal and interest moneys for the time being due from the mortgagor under and by virtue of the indenture, he did thereby attorn and become tenant to the defendants, their heirs and assigns, as and from the date thereof of such of the said hereditaments and premises thereby granted or otherwise conveyed as was or were in his occupation for and during the term of ten years, if that security should so long continue, at and under the yearly rent of £800 to be paid yearly on every first day of October, in every year, the first yearly rent to be paid and payable on the first day of October then next, provided that notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators or assigns, before or after the execution of the trusts of sale therein contained, to enter into and upon the said mortgaged premises or any part thereof and to eject

(1) L. R. 3 Q. B. 659.

the said grantor and any tenant claiming under him therefrom, and to determine the said term of ten years, notwithstanding any lease or leases that might have been granted by the grantor.

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It appears, then, that by the deed in that case the grantees were empowered to execute the trusts of sale either immediately or at any time at their will and pleasure, and they were empowered before or after the execution of the trusts of the deed to evict the grantor and all persons claiming under him. This was a power also to be exercised at the sole will and pleasure of the grantees. It was held, therefore, that upon the true construction of the deed these provisions, notwithstanding the attornment clause being for a term of ten years, showed plainly the intention of the parties to be that the grantor, by his attornment, should become tenant at will of the grantees paying rent for ten years, if permitted by the grantees to remain so long in possession. That was not the case of a lease which, if good, was intended to last f ten years, and therefore neither the statute of frauds, nor 8 & 9 Vic. ch. 106, requiring leases for more than three years to be by deed, applied. Cockburn C J. giving judgment, says: (1).

With reference to the intention to create a term, and the failure by reason of the non-execution of the deed, any tenancy for a term not beyond three years may be created without any deed or writing, and in my opinion it is plain that all the tenancy the parties intended to create was a tenancy at will, no more and no less. The primary object of the parties was to secure to the mortgagees the amplest remedies to enforce the repayment of the mortgage money and interest, and though the term of ten years is mentioned it was intended, on the one hand that the lessors should be fully empowered to turn the mortgagor out at any moment, and so to realize their security by sale, while on the other hand the mortgagor should be empowered to get rid of his tenancy by paying off the mortgage money. That, I conceive, amounts to all intents and purposes to no more nor less than an intention to create a tenancy at will, which might be created without any deed.

Then Blackburn J. said: (2).

(1) At p. 667.

(2) At p. 669.

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When we look at the instrument to ascertain the intention of the parties, is it the true construction that they intended to create a term of ten years? I cannot think they intended that: the intention was that the mortgagor should become tenant at will to the mortgagees, with the understanding that he should be permitted to remain for ten years, should the will not be determined before.

And it is upon this construction that the case of *West* v. *Fritche* was applied. Miller J. says:

> I cannot help thinking that upon the true construction of this deed it was the object of the parties that John Brown should become tenant at a fixed rent to the defendants so as to give them the power of distress, and that it could not have been the intention to create a term of ten years when he was liable to be evicted at any moment, but they intended to create a tenancy at will only.

And Lush J., says: (1)

> The first question is, what term did the parties intend the mortgagor should take from the mortgagees so long as the mortgage money remained unpaid? If a term of ten years, then the intended demise failed; if a term less than three years then the mere assent of the parties amounted to a demise. It is plain that there was no intention that the mortgagor should remain in possession any given length of time, but that he should remain on the premises at the will of the mortgagees, he binding himself to pay £800 for a term not exceeding ten years, if left in possession so long. That being the intention the intended demise did not require a deed for its validity, and the objection that the mortgagees did not execute the deed falls to the ground.

This construction put upon the deed by the Court of Queen's Bench was affirmed in the Exchequer Chamber (2) and the result is that but for these provisions in the deed which showed that the true intention of the parties was to create a tenancy for an indeterminate period, which might have been less than three years and not a term for ten years certain, the attornment clause would have failed to create the relation of landlord and tenant between the mortgagor and mortgagees In *re Stockton Iron Furnace Company* (3) the

(1) At p. 671.

(2) L. R. 4 Q.B. 293.

(3) 10 Ch. D. 365.

question was, whether the sum of £5,000 reserved as an annual rent by an attornment clause in a mortgage was so unreasonable as to demonstrate that the attornment clause was inserted as a sham and not with the intention of creating a tenancy in reality. No question arose as to whether the tenancy was void as being for more than three years. In point of fact it was not for a term exceeding three years and so did not require a deed for its validity. The attornment clause was in the following terms :—

And this indenture further witnesseth that in pursuance of the said recited agreement, and for the consideration aforesaid, the said company do hereby attorn and become tenants from year to year to the the said parties hereto of the second part, their heirs and assigns, for and in respect of the said mortgaged premises at the yearly rent of £5,000, clear of all deductions, to be paid by equal half-yearly payments on the 23rd day of August and the 23rd day of February in every year, the first half yearly payment to be made on the 23rd day of August next. Provided always, and it is hereby declared, that it shall be lawful for the said parties hereto of the second part, their heirs and assigns, at any time after the said 23rd day of August next, without giving previous notice of their intention so to do to enter upon and take possession of the hereditaments and premises whereof the said company have attorned and became tenants as aforesaid, and to determine the tenancy created by the aforesaid attornment and put out and expel the said company from the said hereditaments and premises without any ejectment or other legal process as effectually as a sheriff might do in case the landlords had obtained judgment in ejectment for the recovery of such possession and a writ of *habere facias possessionem* had issued on such judgment.

The tenancy created by this atttornment was one from year to year, determinable, however, at the will of the mortgagees at any time after the expiration of the first six months. In *Ex parte Jackson* (1), in the Court of Appeal, no question arose either as to the validity or invalidity of the tenancy purported to be created by the attornment clause in a mortgage, by reason

(1) 14 Ch. D. 725.

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of its having been for a period in excess of three years and not created by deed. The question was whether the amount reserved as rent was not so excessive as to demonstrate that no tenancy was, in reality, intended to be created. In it, however, the cases of *Morton* v. *Woods* and *In re Stockton Furnace Company* underwent much consideration, and the principle involved in them was explained. The attornment clause in the mortgage was as follows:

> The mortgagor doth hereby attorn and become tenant to the said company and their assigns of the hereditaments hereinbefore expressed to be hereby granted and assigned, or such part thereof as is in the possession of the mortgagor, as tenant, from year to year, from the date hereof at the annual rent of £800,&c.

Lord Justice Baggallay giving judgment in that case says: (1).

> Now, so far as any inference can be drawn from the practice of inserting attornment clauses, it appears to me that the benefit to be derived from the attornment clause was intended to be an equivalent for that which the mortgagee would derive from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be a right to the payment of a fair and reasonable rent such as an ordinary tenant would be willing to give for the property under ordinary circumstances. That, as it seems to me, is the rent for which a properly prepared attornment clause should make provision, not necessarily the exact amount which a tenant would pay for the property, but such an amount as a willing tenant would probably pay as a *bonâ fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent, it appears to me that although you may call it rent, it is no longer a real rent, but a fictitious payment under the name of rent.

And referring to *Morton* v. *Woods*, he says: (2).

> Now, the case of *Morton* v. *Woods* has been referred to on behalf of the respondents, and the view presented by their counsel, as I understand it, is this: that it is quite immaterial what the amount of rent is which you place upon the premises by an attornment clause, you are at liberty to make it as much as you choose—to cover the whole principal and interest if you think fit, and the court will not interfere

(1) At pp. 733-4. (2) P. 738.

with it—but *Morton* v. *Woods* does not decide that. It decides, as a general rule, an attornment clause is not in itself unlawful, provided it is real. The rent need not be limited to the amount of interest from time to time becoming due upon the mortgage debt. It is not introduced for that purpose alone, although it is one way of securing the interest. The measure of the real rent is the leasable value of the property, not the amount of the mortgage debt. In *Morton* v. *Woods* there was no suggestion that the rent fixed by the attornment clause was other than the real and proper rent, and as I read the case all that the court decided was the general principle that effect will be given to attornment clauses when they are real and carry out the true intention of the parties to them, so far as that intention is limited to creating the relation of landlord and tenant in the proper sense.

In the same case Lord Justice Cotton, p. 739, says :

Undoubtedly a mortgagor and a mortgagee have a right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagees, and thus by contract constituting the relation of landlord and tenant between the two. Under such circumstances where it is a real and not a fictitious or sham arrangement the ordinary consequences of a tenancy follow, and there can be no distress for the rent agreed upon, which will be valid and effectual in the case of bankruptcy. As has been pointed out by Lord Justice Baggalley this is quite reasonable for the mortgagor whether he is in possession by himself or by his tenant. If the mortgagor is in possession by a tenant then the rent which that tenant pays comes into the hands of the mortgagee. If the property is in the possession of the mortgagor himself the mortgagee may turn him out and let the property either to a stranger or to the mortgagor, and, therefore, there is nothing unreasonable or that can be called a fraud in the Law of Bankruptcy, in allowing the parties to make a contract in the mortgage deed which they might validly and effectually make afterwards.

And again, p. 741, he says :—

Under these circumstances the conclusion to which I come is this, at that there was no real rent although a sum was stipulated for under the name of rent But it was not a rent in respect of which the legal incident of distress arises.

And again :—

No doubt any distress which is exercised does give to a mortgagee, if he is a landlord, something that he could not have got if he had not exercised it. But, yet, it must be a distress for a real rent to which the law has annexed as an incident the power of distress. When there

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is no real rent but something called rent. which in fact is not rent, then, in my opinion, the clause which attempts to give the power of distress incident to rent, in respect of that which is not rent, and thus to give to a mortgagee a right which he would only have as landlord and not as mortgagee, to give it to him as mortgagee and not as landlord is an attempt to alter and disturb the legal distribution of the mortgagor's property in bankruptcy.

And he came to the conclusion, concurring with the rest of the court, that in the case under consideration it was a mere sham calling the sum reserved by the attornment clause rent ; and Lord Justice Thesiger, in the same case, referring to these attornment clauses on mortgages, says on p. 743 :

I can even imagine a case in which the rent reserved may be sufficient to pay both principal and interest. But while that is so it must be admitted that the object of attornment clauses is, while giving any additional security to the mortgagee to place him as regards the mortgagor who is left in possession of the property and in the matter of rent in the same position in which he would have been if the mortgaged premises had been under lease to a third party. Therefore, although it is clear that persons may bargain with each other as to the amount of rent, and the courts will not lightly interfere with bargains so made, it is obvious, looking at the nature of these clauses, and the object with which they can be legitimately inserted in mortgage deeds, that the amount of the rent may, under certain circumstances, become a matter very important to consider, in order to determine whether they are real attornment clauses, whether the rent fixed is a real rent and whether a real tenancy has been created that, I understand to be the rule laid down by the authorities which have been cited. Granted that these attornment clauses are valid and operative under ordinary circumstances, yet, if from the terms of the particular deed, or from the amount of the rent fixed by the attornment clause, it can be concluded by the court that the rent is not a real rent, but a mere sham, that the tenancy is not a real tenancy, but a mere sham, and that the attornment clause is a mere device to give the mortgagee a hold in the event of bankruptcy over the goods and chattels of the mortgagor which would otherwise have been distributed among his general credi tors, then the attornment clause is invalid and inoporative.

In re Threlfall (1), in the Court of Appeal, the attornment clause created a tenancy from year to year deter-

(1) 16 Ch. D. 274.

minable at the will of the mortgagee at any time after the expiration of three months from the date of the mortgage. The contention there was that upon the authority of *Morton* v. *Woods*, the tenancy created by the attornment clause was at will for the purpose of contending that the tenancy was determined by a liquidation petition of the mortgagor, and that, therefore, the distress which was subsequent to the filing of the liquidation petition, and to its coming to the knowledge of the mortgagee was invalid. Lord Justice James delivering judgment there, says :

We are asked in this case not to construe a deed, but to contradict it for the purpose of entirely destroying the intention of the parties to it. The mortgagor was left in possession of the property, and was thereby enabled to give a power of distress to the mortgagee. The attornment clause was in the common form, and was intended to create the relation of landlord and tenant between the parties. The mortgagor, by the express terms of the deed, was to be tenant from year to year at the yearly rent specified. This tenancy was determinable at the will of the mortgagee, but this power the mortgagee would equally have had if the premises were in the possession of a third party, and it is the usual power given to a mortgagee to enable him to take possession. We are asked to say that in spite of the express terms of the deed this was not a yearly tenancy, but a tenancy at will, on account of some expressions of some of the judges in *Morton* v. *Woods*. But in that case there was no actual demise, but for the purpose of giving effect to the manifest intention of the parties it was held that a tenancy at will had been created.

And Lord Justice Lush, who was himself one of the judges who had decided *Morton* v. *Woods*, says, p. 282 :

Although in *Morton* v. *Woods* the expression "tenancy at will" was used by some of the judges while professing to describe the relation between the parties, yet it must not be taken as intended to be an exact legal definition, particularly when we consider the facts and arguments before them. In all cases the words of a judgment must be considered with reference to the arguments adduced. I am rather glad to see that I did not myself describe the tenancy as a tenancy at will. But the argument in that case was that the attornment was for ten years, and if so void because not made by deed, and, therefore, the judges said that it was a tenancy at will, meaning a tenancy for an in-

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definite term not to exceed ten years, determinable at the will of the landlord.

This case is valuable as an affirmation by the Court of Appeal of what had been in effect held in the Court of Queen's Bench, that if that court had not found expressions in the mortgage which showed that the creation of a tenancy for ten years had not been and could not have been intended, and if they had been obliged to construe the deed as intended to create a tenancy for ten years, they must have held that the attornment had failed to create the relation of landlord and tenant between the mortgagee and mortgagor. In *ex parte Punnett* (1) counsel referring to a tenancy under an attornment clause in a mortgage argued that such a tenancy operated by estoppel, " no doubt," they said, " it is a fiction," and referring to *Morton* v. *Woods* they said :

Morton v. *Woods* is a decision that the court will give effect to a fiction against the rights of creditors ;

To which observation Lord Justice Lush replied :

By giving effect to the fiction the manifest intention of the parties was carried out.

Again showing that the judgment in *Morton* v. *Woods* vested on the fact that the clause in the mortgage relied upon by the court in that case showed that the manifest intention of the parties was not to create a term of ten years, but a term determinable at the will of the mortgagee landlord, and so not necessary to be created by deed. In *ex parte Voisey* (2), the attornment clause in the mortgage which was executed by the mortgagor only was in the following terms :—

And for better securing the payments, which by the rules of the society (building society) ought to be made by the mortgagor, it was agreed that if the mortgagees should, at any time, become entitled to enter into possession or receipt of the rents, and if the mortgagor

(1) 16 Ch. D. 232. (2) 21 Ch. Div. 442.

should then or afterwards be in the occupation of the whole or part of the property, he should, during such occupation, be tenant thereof from month to month to the mortgagees at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mortgagor from time to time for subscriptions, interest, fines, and other moneys under the rules, and that the tenancy should commence on the day up to which he should have paid all and every part of such subscriptions, fines and other moneys, and the rent for the period intervening between the commencement of the tenancy and the day on which the trustees should be entitled to enter into possession or receipt of rents should be payable and paid on the day, and the monthly rent due upon and subsequently to that day should become due monthly in advance, and be payable at the monthly meetings, the first payment of rent becoming due on that day on which the mortgagees should first becoming entitled to enter into possession.

Power was also given to the mortgagees to determine the tenancy by fourteen day's notice.

Now, it is obvious that under this attornment clause, the contemplated tenancy might never commence, and if it ever should commence it might not continue (even though not determined by the mortgagees under the power in that behalf vested in them), so long as three years—the term when it should, if it ever should commence was to be a monthly tenancy. It was not a case, therefore, coming either within the Imperial Statute 8 and 9 Vic. ch. 106 sec. 3, from which the Ontario Statute ch. 100, sec. 8 of the Revised Statutes of Ontario is taken, or within the statute of frauds as necessary to be in writing. Jessel, Master of the Rolls there says, p. 456:

> Another objection was taken that there was some provision in th statute of frauds which affects the case. I am not aware of any. It does not appear to me that this was within the statute of frauds at all, indeed it was not even a lease for years, because we do not know how long it may last, it may not last for three years or for one year, and it does not appear to be obnoxious to the statute of frauds.

Again:

> You must construe a deed according to the words used in it, you can only gather the intention of the parties from the words they use,

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and here they have not made it a tenancy at will. It may be put an end to by the mortgagees, no doubt, if they think fit, but it is not a tenancy at will—it is a tenancy from month to month—a monthly tenancy.

Lord Justice Brett says:

This is not a tenancy within the statute of frauds at all. The first section of the statute of frauds applies only where the tenancy, if good, must of necessity last for more than three years. But if at the time of the arrangement, the tenancy may last for less than three years, although it may last for more, it is not within the section of the statute at all, and it is obvious that the tenancy in this case, although it may last for more than three years may last for less, it is in terms a tenancy from month to month.

And Lord Justice Cotton says:

Here the tenancy was to arise only in certain events which might happen (if at all) a very short time before the period of fourteen years (the period within which the principal with interest thereon was to be paid), when of necessity the mortgage must come to an end, I mean of necessity according to the contract between the parties.

The case, however, is chiefly valuable as further elucidating the principle of *Ex parte Williams* (1) and *Ex parte Jackson* (2), and as explaining the principle upon which the court proceeds when the question is whether a tenancy purported to be created by an attornment clause in a mortgage is intended to be a real tenancy at a rent reserved, or is, on the contrary, a mere sham for the purpose of giving the mortgagee in certain events, rights under the name of "rent" which he could only exercise as a landlord, which, in reality, it was never intended he should be. Now, upon the above authorities it cannot, I think, be doubted, that in *Morton* v. *Woods* it would have been held that no tenancy whatever had been created between the parties, if it had not been for the passages above extracted and relied upon as showing the manifest intention of the parties to have been to create a tenancy at will, or at least for a period not requiring a

(1) 7 Ch. D. 138. (2) 14 Ch. D. 725.

deed. Notwithstanding that a term of ten years was mentioned in the manner in which it was, and that if the court had felt bound to construe the instruments as manifesting an express intention to create a tenancy for the term of ten years they would have held the instrument to be void as to the term under 8th and 9th Vic. ch. 106 sec. 8, and so that no tenancy had been created. By the statute of frauds it was expressly enacted that an instrument failing to take effect as a lease under that statute should operate as creating a tenancy at will, but there is no such provision in 8th and 9th Vic. ch. 106, or in the Ontario statute ch. 100 R. S. O. So that if an instrument fails of taking effect according to its expressed intent for non-conformity with the latter statutes, it cannot, contrary to such expressed intent, be construed as creating a tenancy of a wholly different character.

Applying then the language of the Master of the Rolls in *ex parte Voisey* to the present case :—

> We must construe the deed before us according to the words used, we can only gather the intention of the parties from the words they use.

We must not construe it so as to contradict its express terms. Now the deed in which the clause under consideration appears is a mortgage in a printed form prepared by the Ontario Loan and Debenture Company for their own use in the case of all loans made by them. The language used in the clause is not that of the mortgagor as it is in case of an ordinary attornment clause whereby a mortgagor under his hand and seal attorns and becomes tenant to the mortgagees. The form adopted for the clause is such that by the mortgagees executing the deed it would operate as a lease and by their not executing it the clause would be simply inoperative, so that the mortgage without a letter added to the clause would in its printed form

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apply equally to a case in which there was an express agreement between the mortgagor and the mortgagees that the former should accept a lease from the latter for a term of years certain during which the principal should be expressed to be outstanding on the security of the mortgage paying as rent the instalments of principal and interest at the days and times on which they are made payable by the proviso; and to a case wherein there was no agreement or intention whatever that the relation of landlord and tenant should be created; all that was necessary to give effect to the intention of the parties in the former case was that the mortgagees should execute the mortgage deed, and in the latter that they should not. The clause states in express terms that

> The mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, he the mortgagor paying therefor in every year during the said term on each and every of the days in the above proviso for redemption, appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso without any deduction.

This is the only language in the deed which intimates that either of the parties thereto had any intention that the relation of landlords and tenant, as well as that of mortgagees and mortgagor, should exist between the parties, and the language purports to be that of the mortgagees alone, and to manifest their express intention to be to create a term for the five years certain mentioned in the proviso for redemption in the mortgage. There is not a single expression in the deed which intimates any intention whatever that any term for any less period should be created, or which qualifies in the slightest degree the duration of the term, which is expressly alleged to be granted by the mortgagees. There is no provision for determining

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the term, either at the will of the mortgagees or of the mortgagor, or in any way whatever, save only the mode which is incident to, and usually inserted in, every demise, namely, forfeiture for non-payment of rent or non-fulfilment of covenants. The term so purported to be granted, if well granted, that is to say, if the mortgage had been executed under the seal of the company, must have continued for the full term of the five years, unless forfeited for non-payment of rent. This is what the clause expresses, although, of course, a question as to its validity upon the ground of the objection taken in *ex parte Williams* would be still open. A question not unnaturally, perhaps, arises here. What object could the company have had in omitting from the printed form of mortgage, the 15th clause contemplated by the act respecting short forms of mortgages to be used in mortgages made in pursuance of the act, while declaring the mortgage to be executed in pursuance of the act, and inserting in its stead the clause under consideration? The answer seems to me to be clear, and to show that what the company intended was the creation of a demise for a term of years to be granted by them under their corporation seal whenever the relation of landlord and tenant should be agreed upon, namely, that it was because of the division in this court in the case of *The Trust and Loan Company* v. *Lawrason* (1). In that case three of the judges of this court were of opinion that the 15th clause in the form of mortgage set out in the schedule to the act respecting short forms of mortgages did create the relation of landlord and tenant between the mortgagees and the mortgagor, while three on the contrary, affirming the judgment of the Court of Appeal for Ontario, were of opinion, that it did not—that there was no rent reserved—and that, therefore, the mortgagees had no claim

(1) 10 Can. S. C. R. 679.

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under the statute of Ann, upon a seizure made of the mortgagor's chattels upon the mortgaged premises under execution at the suit of his creditors; and the judgment of the Court of Appeal for Ontario to that effect stood. It was doubtless in consequence of the result of this case that *The Ontario Loan and Debenture Company* resolved to discard the 15th clause in the short form of mortgage adopted by the act, and to adopt in its stead the clause now under consideration in all their mortgages in such a form that when the mortgage should be executed by the company it should take effect, and when the mortgage should not be executed by the company the clause should be merely inoperative; and expressed in the ordinary terms of a lease evecuted by a landlord to a tenant for a fixed term at a rent reserved, so that when the relation of landlord and tenant was in reality agreed upon, and the mortgage should therefore be executed by the company, there should be no possibility of doubt as to their having granted a lease to the mortgagor for a fixed term at a rent reserved. That the relation of landlord and tenant was not agreed upon, or intended to be created, or deemed necessary in the present case, may well be inferred not only from the fact that the mortgagees did not execute the mortgage, but also from the fact that a large part of the mortgaged premises was, at the time of the execution of the mortgage, in possession of tenants of the mortgagor at an annual rent exceeding the several instalments except the last of the principal and interest made payable under the terms of the proviso for redemption in the mortgage, the benefit of which rents the mortgagees in case of default by the mortgagor could obtain without the creation of the relation of landlords and tenant between the mortgagees and mortgagor by entering into possession under the terms

of the mortgage and giving notice to the tenants; and from this further fact that the mortgagees never assumed to exercise a landlord's right of distress for the instalment which fell due on the 1st of June, 1886, and remained in arrears for more than twelve months, nor for the instalment which fell due on the 1st December, 1886, and remained in arrear for more than six months, nor although the mortgagor's chattels on the mortgaged premises were seized in the month of March, 188', under executions issued at the suit of some of his creditors do they appear to have asserted any claim as landlords until their present claim was made upon the 8th June, 1887, after the seizure made on or about the first of that month under the execution issued at the suit of the appellants. There is no foundation, in my opinion, for the contention that the mortgage operates as creating a tenancy at will between the mortgagees and the mortgagor indeed to hold the mortgagor in the present case to have been in possession of the mortgaged premises as tenant at will of the mortgagees, and so subject to eviction before default, would be to hold contrary to the plain intent of the parties as expressed in the instrument, would be to contradict the instrument and not to construe it. Applying, then, the judgment in *Morton* v. *Woods* to the very different state of facts existing here; in order that the relation of landlord and tenant should have been created at law between the mortgagees and the mortgagor by the mortgage in the frame in which it is, it should have been executed by the mortgagees. It is contended, however, that although the mortgage by reason of its not having been executed by the mortgagees may fail to take effect as creating a legal demise by the mortgagees to the mortgagor for the term of years expressed, it can nevertheless be construed to be a

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valid executory agreement for a lease for the term of the five years, capable of being enforced at the suit of the mortgagees by a bill in equity for specific performance, and that, therefore, since the Judicature Act the mortgagees are entitled to the same benefit as if the mortgage had been executed by them with their corporate seal.

Walsh v. *Lonsdale* (1) and *Allhusen* v. *Brooking* (2), were cited in support of this contention, and other cases. In *Walsh* v. *Lonsdale*, a person had been let into premises as tenant under an executory agreement in writing, within the provisions of the statute of frauds, signed by both the landlord and tenant for a lease for the term of seven years. By the executory agreement it was provided that the rent to be reserved in the lease was to be made payable yearly in advance, and the question was whether the rent could be distrained for in advance before the lease was actually executed? The contention of the tenant was that until the lease should be executed granting the term for the seven years he was in possession only as tenant from year to year, and that the executory agreement, under which he was let into possession, although enforceable in equity, did not operate as a present demise, and that distress was a legal remedy, are daily applicable to a legale state. The court, however, held that a tenant holding under an agreement, for a lease of which specific performance would be decreed stands in the same position as to liability as if the lease had been executed, and that since the Judicature Act, every branch of the court must now give him the same rights.

Jessel, Master of the Rolls, giving judgment says:

There is an agreement for a lease under which possession has been given. Now, since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly. One

(1) 21 Ch. D. 9. (2) 26 Ch. D. 559.

estate at com: ion law, by reason of the payment of rent, from year to year, and an (state in equity under the agreement. There is only one court and the equity rules prevail in it. The tenant holds under an agreement fo: a lease. He holds, therefore, under the same terms in equity as if a ease had been granted, it being a case in which both parties admit .hat relief is capable of being given by specific perform- ance, . That b ing so he cannot complain of the exercise by the land- lord of the sa ie rights as the landlord would have had if the lease had been granted.

In that (ase there was no question as to the fact of the person in possession of the premises being in such possession as tenant, under an agreement in writing, executed v ithin the provisions of the statute of frauds, the right to have which specifically performed by a lease exec ited in the terms of the executory agreement was admitted by both parties, and all these points wer e relied upon by the Master of the Rolls as the basis c his judgment. It is sufficient to say that the differe ice between that case and the present is so obvious as not to admit of its application as governing a case like the present.

In *Allhusen* v. *Brooking* the point decided simply was that, upon the true construction of the instrument in that case under consideration, the word "vested," as used therein, was not limited to an actual legal vesting under a lease in possession, but included an equitable vesting of the right in question under an agreement for a lease. *Walsh* v. *Lonsdale* was referred to, it is true, but as deciding merely that a person in possession as tenant, under an executory agreement for a lease, of which specific performance would be granted, holds, under the same terms, in equity as if a lease in accordance with the terms of the executory agreement had been granted.

Then there is the case of *Stratton* v. *Pettit*, decided in 1855. There, by articles of agreement between

(1) 16 C. B. 420.

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A. and B., it was witnessed that A. agreed to let and B. agreed to take certain premises in possession for the term of five years on certain specified terms, and A. agreed to sell and B. agreed to purchase the demised premises at the end of the term. In an action by A. against B., for non-fulfilment by him of a part of the agreement to be performed on his part, the defence was that the agreement purported to be a lease of land for a term of five years and that it was void as not being under seal. Jarvis C. J., delivering the judgment of the court, says (1) :

> The question in this case is whether the instrument set forth in the declaration is a lease or an agreement. If it is a lease it is void by the statute 8 and 9 Vic. ch. 106 sec. 3, and the defendant is entitled to judgment; if it is an agreement it is not within the statute and the plaintiff will succeed. It was admitted during the argument that the instrument would have been a lease if it had been made before the statute, but it was contended that it ought, since the passing of the act, to be held to be an agreement only, because if it is a lease it is void and it could not have been the intention of the parties to make a void instrument. The rule to be collected from all the cases is that the intention of the parties as declared by the words of the instrument must govern the construction. The question then is, what was the intention of the parties when the instrument was made ? Doubtless they intended to make an instrument which should have some operation ; but did they intend to make a lease or an agreement ? If the former, they have not done what they intended, because the lease is void by the statute. The intention of the parties must be collected from the instrument itself.

The rule is well explained, he says, in *Morgan* v. *Bissell* (2), as follows :—

> When there is an instrument by which it appears that one party is to give possession and the other to take it, that is a lease unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made

Then he proceeds :—

> It is admitted that before the statute this instrument would have

(1) P. 494. (2) 3 Taunt. 65.

been held to be a lease, and if the true rule would be that the intention of the parties as declared by the words of the instrument must govern the construction, it is clear that the parties intended this instrument to operate as a lease. It is void as a lease and therefore the defend ant is intitled to our judgment.

Then there is the case of *Pain* v. *Coombe* in 1857 (1). That was a case of a Bill in Equity filed by a tenant in possession of premises for specific performance of an agreement for a lease made under the following circumstances : The plaintiff and defendant in the presence of a third person (a land agent and surveyor) orally agreed upon all the terms of the proposed lease, and the defendant then directed the plaintiff and such third person to instruct a Mr. Hodding, a solicitor, to reduce the terms so agreed upon to writing. Mr. Hodding did so, and afterwards converted a rough draft first made by him into a fair draft agreement which he sent to the defendant, who afterwards let the plaintiff into possession, and afterwards directed Mr. Hodding to prepare a lease in conformity with such draft agreement. Mr. Hodding prepared the lease accordingly, but the defendant refused to execute it and gave the plaintiff notice to quit, who thereupon filed his bill for specific performance. The case was one founded not upon an agreement signed within the statute of frauds, but upon the equitable doctrine of performance ; taking the case out of the operation of the statute of frauds. I make an extract from the judgment of the Lord Chancellor on the case in appeal from the report in 3 Jur. N.S. 847, as being more full than that in 1 DeG. and Jones. At p. 848 he says, and in this his judgment, the Lords Justices concurred :

I confess that looking to this case merely upon the evidence before me I have not the smallest hesitation in coming as a juror to the conclusion that Mr. Coombs put Mr. Pain into possession on the 3rd of

(1) 3 Jur. N.S. 847 ; 1 DeG. & J. 84.

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January, having in his hand the document B, and that he meant to say, therefore, "take possession upon the terms of the articles of that agreement." If I am asked why I came to that conclusion, it appears to me to follow irresistibly from a fair attention to what the witnesses say. I am not going through the evidence of Mr. Ewer, the surveyor, but speaking of the meeting which took place on the 24th October, between himself, the plaintiff and the defendant, he says, expressly: "the terms of letting were definitely settled and agreed upon between the plaintiff and the defendant at the interview, and it was also agreed upon (this appears to be important) between the plaintiff and defendant, that the plaintiff and himself should instruct Mr. Hodding to commit the terms to writing and prepare a formal agreement for a lease according to them, accordingly on the following day, he, (Mr. Ewer) with the plaintiff, went to Mr. Hodding, and by their instructions Mr. Hodding took down the memorandum marked A. Then what says Mr. Hodding: Mr. Hodding says he was to prepare a formal agreement for both parties. Mr. Hodding appears to be solicitor ordinarily for the plaintiff, but for this purpose Mr. Combs desired him to act for him also. He says, having received these statements which induced him to draw out these heads called exhibit A a day or two afterwards he caused a draft agreement for a lease of the said farm to be prepared, being the draft agreement mentioned in the 7th paragraph of the bill, exhibit B, which he sent to the defendant. Now, I infer from Mr. Ewer's evidence that it certainly was not the intention of Mr. Coombs to act in so hasty and unguarded a manner as to put Pain in possession until he had before him in writing the terms upon which the possession was to be taken, and those instructions having been conveyed to Mr. Hodding, he prepared first of all in a rough way the exhibit A, then in a more formal way exhibit B, and sends that agreement to the defendant. It is said there is no proof when he got it—that appears to be so, but when he says he prepared it two or three days afterwards and sent it to him, the natural and almost irresistible inference is, that he means he sent it to him then and there immediately, or within a day or two afterwards, and when we find Mr. Coombs a couple of months afterwards put Mr. Pain into possession, and some months afterwards desires a lease to be prepared according to that agreement, the inference, to my mind, is irresistible, that he had the agreement before him.

And again:

This (the agreement, exhibit B) is put into his (Mr. Coomb's) hands, and with that he puts Mr. Pain into possession. That appears to be the solution of this case, and, therefore, upon the terms of that paper Mr. Coombs is bound to grant a lease.

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Mr. Fry, in his work on specific performance, sec. 577, refers to this case simply as an illustration of the equitable doctrine that

> the acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore, constantly been received as evidence of an antecedent contract.

Between that case and the present there is such an obvious difference as to divest *Pain* v. *Coombs* and the above doctrine which it illustrates from all application in the present case.

In *Parker* v. *Taswell* (1), an agreement for a lease which contained all the conditions of the proposed letting was signed by an agent of the person named as lessor and by the proposed tenant, under this agreement the tenant had been let into possession of the premises, and the proposed landlord proceeded with the performance of certain acts which, by the agreement, were to be performed on his part, but differences having arisen between him and the tenant, he brought an action of ejectment against the tenant, who filed his bill for specific performance.

The contention of the defendant was that the agreement was expressed in terms that before the statute 8 and 9 Vic. ch. 106 sec. 3, would have been sufficient to operate as a present demise, and that it must therefore, be regarded as a lease and void by the statute as not being under seal. In fact the contention was that it was not a lease because it was not under seal, but, that, as it was expressed in terms sufficient before the statute to operate as a present demise, it should be held to be a lease upon the authority of *Stretton* v. *Pettit* for the purpose of making it void under the statute. Stuart V. C. would not listen to this contention, but granted a decree for specific per-

(1) 4 Jur. N.S. 100 ; 2 DeG. & J. 559.

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formance holding the agreement to be as it was in its terms a good agreement in equity for a lease.

Upon appeal, Lord Chancellor Lord Chelmsford giving judgment (2), says :—

On the part of the defendant it is insisted that this document was intended for a lease, and that, therefore, if it is void for that purpose it cannot be used as an agreement. The case of *Stretton* v. *Pettit* is cited in support of that argument. That case, however, is merely an authority to show that the intention of the parties to be collected from the language of the instrument was that it should take effect as a lease, and that it was void as such by the third section of the 8th and 9th Vic. c. 106, not being by deed. But the instrument now in question could not amount to a lease, because it was not signed by an agent lawfully authorised by writing, nor was it signed in the name of the principal so as to render it a lease binding upon the lessor.

Then he adds :—

Assuming, however, that it had been signed in the name of the lessor, and would, therefore, have amounted to a lease as containing words of present demise. Yet there is nothing in the Act to prevent its being used as an agreement though void as lease because not under seal. The legislature appears to have been very cautious and guarded in language, for it uses the expression "shall be void at law"—that is as a lease. If the Legislature had intended to deprive such a document of all efficiency it would have said that the instrument should be "void to all intents and purposes." There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect.

The learned chancellor thus appears to refer to the principle involved in *Stretton* v- *Pettit* to show that it was not a decision in support of the contention of the defendant on whose behalf it was cited. The above remarks of the learned chancellor amount simply to this, that assuming the instrument to have been signed by the lessor as required by the statute of frauds expressed in such terms as to have constituted a

(3) 2 DeG. & J. 570.

good lease within the Statute of Frauds, prior to the passing of 8th and 9th Vic. ch. 106 sec. 3, it would be plain that the intention of the parties was that there should be a lease, and to give effect to that intention as by reason of 8th and 9th Vic., the instrument could not operate as a lease, equity would treat the instrument to be an agreement for a lease of which character it was not deprived by 8th and 9th Vic. ch. 106, and, therefore, upon such an instrument so signed, the court could, in aid of the intention of the parties, decree a lease to be executed in accordance with the terms of the instrument. That, however, is far from being an authority that (although neither is this the case before us), a verbal agreement for a lease and possession given thereunder, and so not capable of being enforced under the provisions of the statute of frauds, but enforceable in the discretion of the court according to the circumstances appearing in each particular case, in despite of the statute, is, since the Judicature Act, any more than it was before an actual lease, within the provisions of the statute 8th Anne ch. 14, so as to enable the alleged lessor to invoke the provisions of the statute after the goods of the party in possession have been seized at suit of his judgment creditors. When such a case arises it will be time enough to determine whether *Walsh* v. *Lonsdale* applies to it. In the present case the possession of the party sought to be declared to have been a tenant of the Ontario Loan and Debenture Company, at a rent reserved, is attributable to his title as mortgagor and owner of the equity of redemption in fee of the mortgaged premises, upon which the mortgagees by the 7th and 14th clauses of the mortgage, as they are extended in the act respecting short forms of mortgages, were duly empowered to enter in the event of default being committed by the mortgagor in payment of any of the instalments of principal and

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interest at the times in that behalf mentioned in the proviso for redemption.

There is not a tittle of evidence that in point of fact it had ever been agreed upon by the mortgagor that the relation of landlord and tenant in addition to that of mortgagees and mortgagor should exist between the parties. If it had been so agreed upon, and if at a rent, equal to the instalments payable under the proviso for redemption as expressed in the printed form of mortgage in use by the company, they could, and no doubt would, have executed the mortgage which, as I have already shown, contained a printed clause so framed as to be able to take effect as a lease, if that had been agreed upon by the mortgagees executing the mortgage, and so as to remain inoperative by the mortgagees not executing it when the creation of the relation of landlord and tenant had not been agreed upon. In the present case they have not executed the mortgage, nor have they offered any explanation why they did not do so when, if the relation had been agreed upon, they would, by executing it, have so easily given effect to such agreement.

But if the mortgage had been executed by the mortgagees the case must, in my opinion be governed by *ex parte Williams*, *ex parte Jackson*, and the principle expounded in *ex parte Voisey*. The learned judge who tried the case was of opinion that he must have so held, if he was obliged to take into consideration the amount made payable as the rent for the last half year of the term, amounting to upwards of $16,000, and in that opinion I entirely concur for in such case the sum made payable during the term of five years and expressed to be for rent would be just $26,212.50. It needs no argument that such an amount would be so monstrously excessive that it never could have been intended to become payable as rent for the use and

occupation of the land during the term even if the mortgagor had been in the actual occupation of the whole of the lands in the mortgage. That was an amount which no ordinary tenant—

Would be willing to pay for the use and occupation under ordinary circumstances.

It would not be a real rent, but a payment of the instalments secured by the mortgage under the fictitious name of rent.

The mere nominal creation of the relation of landlord and tenant for the purpose of the mortgagees trying to get the benefit which a real landlord alone could have over any other creditor of the mortgagor without any intention of creating the relation of landlord and tenant in reality.

Now that the whole amount of the $16,042.50, purported to be made payable as rent for the last half year of the term, must be taken into consideration for the purpose of determining a question as to the actual intention which the parties had in introducing into the mortgage deed, a clause purporting to create the tenancy as well as the whole of the period named for the duration of the term expressed to be created must be taken into consideration, cannot in my opinion, admit of any doubt whatever; the questions being whether the term itself and the tenancy expressed to be created during its continuance was not a mere sham, and whether the amount expressed to be reserved as rent during the term was not so excessive as to demonstrate the tenancy to be a sham, and that no real tenancy was intended it is impossible to read the clause purporting to grant one single term of a fixed duration as creating several terms for distinct shorter periods than the one named, for the purpose of showing that the moneys payable during such shorter periods which are, in fact, but parts of the one term granted, would be fair and reasonable sums to be reserved as rent. That would be to make a wholly new contract for the parties

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which they themselves had never contemplated making, not to construe their intention as appearing on the contract which they did make. No doubt, there might be a *bonâ fide* rent of varying amount reserved, payable in each year during the term, but to arrive at the intention of the parties in naming in the mortgage deed the period for the duration of the term and the amount payable as rent in each year during the term, it is impossible to exclude from consideration any portion of the period named for the duration of the term or any portion of the sums expressed to be payable as rent during its continuance. The case of *Kitching* v. *Hicks* (1) upon which the learned judge proceeded has no application to the present case. There it was held that an instrument by way of chattel mortgage of certain goods and stock in trade and of certain book debts of a debtor contained two distinct contracts, and that the deed passed the book debts as to which it was held that registration was not necessary, although as to the goods and stock in trade the mortgage failed to take effect for want of registration. That is a different thing from cutting up a single term expressed by the contract of the parties to be created, but not so created as to be effectual and valid in law, into several minor terms at distinct rents, and which, by such process of dissection, should be made valid in the interest of one of the parties without any consent of the other. For all of the above reasons I am of opinion that the appeal should be allowed with costs and that judgment should be ordered to be entered in the court below for the defendents in the interpleader issue.

PATTERSON J.—The reality of the tenancy between the mortgagor and the defendant company depends in the first place on the sufficiency of the lease as a matter

(1) 6 O. R. 739.

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of conveyancing, and in the next place on the *bonâ fides* of the transaction.

The latter point has usually been tested in England in the light of the bankruptcy law. Here we have no bankruptcy law at present, but it does not therefore follow that the intention with which the lease is made is to be disregarded. Creditors may be taken advantage of in other ways than those expressly forbidden by the bankruptcy laws, and the right to challenge one of these leases is not confined to creditors. Some of the ordinary incidents of the relation of landlord and tenant are fitted to produce injustice, and the person affected by them must have the right to question the reality of the relationship. A notable example is the right to distrain the goods of a stranger, which still exists in Ontario though modified by statute, R.S.O. 1887, ch. 102, s. 16, 17.

Kcarsley v. *Philips* (1) is an instance of the exercise of that right under the attornment clause in a mortgage, and in the case *Re Willis* (2) one of the lords justices refers to that power as a reason why an attornment is more beneficial to a mortgagee than a mere power to enter and distrain.

It cannot be denied that a mortgagor competent to contract will be bound by whatever bargain he voluntarily makes with his mortgagee, and, in attorning tenant to him, may, if he please, agree to pay him rent at a higher rate than a stranger would be likely to give for the premises, but when the question is whether there is an honest intention to create the relationship of landlord and tenant, or whether a tenancy is ostensibly created in order to cover some other purpose, we can properly, and without interfering with the freedom of contract, consider the terms of the lease as a part of the evidence bearing on the fact of intention.

(1) 11 Q.B.D. 621. (2) 21 Q.B.D. 384, 395.

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On the question of conveyancing the deed differs from, I think, all of those on which the English cases which have been cited were decided, by not giving the mortgagees a right to immediate possession. There is not the old redemise clause which provided in direct terms for the mortgagor retaining possession until default, but there are equivalent stipulations. There is a proviso that the mortgagees, on default of payment for one month, may, on one month's notice, enter on and lease or sell the lands. That is the statutory short form, and a modification is added dispensing with notice if the default lasts three months. This is quite inconsistent with a right in the mortgagees to enter before default. A mortgage similar in this respect was before the Court of Queen's Bench in Ontario, in *Superior Loan and Saving Society* v. *Lucas* (1) in 1879. That was an action of ejectment in which the society, failing to establish a default on the part of the mortgagor, sought to recover possession of the land because of the absence of the formal re-demise. The court held that notwithstanding the omission of the re-demise clause, it sufficiently appeared from the provisions of the mortgage itself and the rules and regulations of the plaintiff company, that it was the intention of the parties that the defendant should retain possession until default. I think that decision was correct. It would be so *a fortiori* under the rules of equity which prevail since the passing of the Judicature Act.

There is in the clause which is relied on as a lease, and which has inaccurately been spoken of as an attornment clause, another proviso:

> Provided always, and it is agreed, that in case any of the covenants or agreements herein of the mortgagor, his heirs, executors, administrators or assigns, be untrue, or be unobserved or broken at any time, the mortgagees, their successors or assigns, may, without any previous

(1) 44 U. C. Q. B. 106.

demand or notice, enter on the saids lands or any part thereof in the name of the whole, and take and retain possession thereof and determine the said lease.

The term is described in the clause as from the date of the deed until the date therein provided for the last payment of any of the moneys thereby secured, or in other words, for five years.

It cannot see any grounds for holding it to be at will.

It is not unusual in England, though very unusual in this country, to give a mortgagee the right to immediate possession. The right was not given I believe in some of the cases which have been discussed on the argument, *e. g.*, *Ex parte Williams* and *Ex parte Voisey* (1), but it was given by the deed in question in *Morton* v. *Woods* (2), and the effect may be concisely expressed by borrowing the words of Cockburn C.J. :

> The primary object of the parties was to secure to the mortgagees the amplest remedies to enforce the repayment of the mortgage money and interest, and though the term of ten years is mentioned, it was intended, on the one hand, that the mortgagees should be fully empowered to turn the mortgagor out at any moment, and so to realise their security by sale, while, on the other hand, the mortgagor should be empowered to get rid of his tenancy by paying off the mortgage money.

Here, as I have shown, the mortgagors were not empowered to turn out the mortgagor at any time, and the utmost privilege accorded to the mortgagor, in the way of paying off, was the right to pay $100, or any multiple of $100 not exceeding $1,000, in advance, on the day of the date of any half-yearly payment.

The lease, then, being for upwards of three years, is required to be in writing by the statute of frauds, and is void at law for not being by deed under the Ontario statute (3).

It has been suggested that the position and rights of

(1) 7 Ch. D. 139, 21 Ch. D. 442. (2) L.R. 3 Q.B. 685, 687.
(3) R.S.O. 1887, ch. 100, s. 8.

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the parties to this deed may be explained, and the right of the mortgagee to distrain maintained, on the ground that the deed contains an agreement for a lease, and that on doctrines of equity, the mortgagor must be regarded as holding under the same terms as if a lease had been granted ; and some cases have been referred to in which that doctrine has been recently applied to agreements for leases. *Swain* v. *Ayers* (1), per Lord Esher; *in re Maughan* (2), per Field J.; *Walsh* v. *Lonsdale* (3), per Jessel M.R., and other cases.

It may be that this deed contains an agreement for a lease. I am not sure that it does ; but assuming that it does, I am not prepared to hold without more direct authority than is furnished by the cases cited, that the enactment of the Judicature Act (4), that in matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail, has so completely done away with distinction between a lease and an agreement for a lease, as to render lands which are the subject of an agreement only " lands or tenements which are or shall be leased for life or lives, term of years, at will, or otherwise," which are the words of the statute. Nor do I see my way to hold that there has been any attornment by the mortgagor. The clause in the deed is not in form an attornment. In every one of the late precedents which have been brought to our attention the mortgagor " doth attorn tenant," except only *ex parte Voisey* (5), and in that case he covenants to become tenant upon a certain event. In every case he is the person who speaks. Here it is the mortgagee who purports to lease. It has been said that there is an attornment to be

(1) 21 Q. B. D 289, 293.
(2) 14 Q. B. D. 956.
(3) 21 Ch. Div. 141.
(4) Ont. J. A. 1881, 1, 17 subs. 10.
(5) 21 Ch. D. 442.

found in the words : " He, the mortgagor, paying, &c.," in this passage from the lease :

And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any moneys hereby secured, undisturbed by the mortgagees or their assigns, he, mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction.

I understand the argument to be that this is a covenant by the mortgagor to pay the rent, just as, in an ordinary lease, a covenant by the lessee is involved in the *reddendum*, " yielding and paying, &c.," and that the agreement to pay rent is an attornment. A case is cited, *Cannock* v. *Jones* (1), where the doctrine that no technical words are necessary to constitute a covenant was illustrated in an action by a tenant against his lessor, the words held to be a covenant being " the farm-house and buildings being previously put in repair and kept in repair by the said Elizabeth Jones."

I am afraid the reasoning is more subtle than sound. " He, the mortgagor, paying therefor in every year during the said term, &c.," is the *reddendum* " yielding and paying, etc." Debt for rent, or covenant, lay from early times on this word " yielding." See note 2 under *Thursby* v. *Plant* (2). But you cannot detach the words " yielding, &c.," from the *habendum* and *tenendum*. It is only in connection with the grant by the lessor that it has the force of a covenant. The rule is shortly laid down in *Bush* v. *Coles* (3):

That upon a reservation an action of covenant will lie, as where rent is reserved covenant will lie upon the words of reservation without any expressed words of covenant.

That is a different thing from implying a covenant

(1) 3 Exch, 333.
(2) Wm. Saund, p. 280.
(3) Carth. 232.

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where, as in this case, there is no reservation and no demise.

The divisional court decided this case on the one ground, that what was done was not sufficient to create the relationship of landlord and tenant. My opinion is that that decision is correct. I do not feel pressed by any of the English decisions, because I think they turn on facts that differ radically from those presented in this case. I have given the general views in which my opinion inclines to the conclusion reached by the divisional court rather than that of the Court of Appeal. I believe I am in substantial accord with my brother Gwynne, whose exhaustive and elaborate judgment I have seen; and I should have to give effect to my opinion by holding that the appeal should be allowed. Still I should not do so without some feeling of want of certainty on more than one point. But, if the conveyancing difficulty were surmounted, I should hold without hesitation that there was no reality in the alleged tenancy.

The question is one of fact.

The learned judge who tried the action did not, and properly felt that he could not, sustain the lease as a whole; but he satisfied himself that he was at liberty to separate the last instalment of rent from the others, and then finding that each instalment of those due before the sheriff seized was reasonable in relation to the value of the land, he held that the landlord was entitled to recover in respect of the two of the reasonable instalments which were all that were claimed for. This mode of disposing of the matter must have been taken in misapprehension of what was the question to be tried, a misapprehension that may easily have been induced by the form of the issue, which if an interpleader at the instance of the sheriff, as I suppose it to be, is a mistaken proceeding.

The right of a landlord under the statute of Anne is to have the goods remain on the premises until the execution creditor pays the rent which is due, not exceeding a year's rent. He is not entitled to have the rent paid out of the money realized by the sheriff from the sale under the execution, although in practice there may usually be a tacit understanding that it will be paid by the sheriff out of that money. Under the statute there is no question between the sheriff and the landlord in respect to that money, and the issue on the record ought to be found against the plaintiffs without any regard to the question of tenancy which is the whole subject of the contest.

It is not possible, and if it were possible it would not be advisable to attempt, to formulate all the considerations by which the reality and honesty of one of these leases may be tested. It is a question of fact in each case, and you cannot satisfactorily try facts by formulas. The enquiry in the present case turns, as must be the case in the bulk of these mortgage cases, to a great extent on the amount of rent reserved. We may in conducting that inquiry usefully keep in view some general observations made by Lord Justice Baggallay in *Ex parte Jackson* (1) which commend themselves to me as accurate in principle. "So far," the Lord Justice remarked, "as any inference can be drawn from the practice of inserting attornment clauses, it appears to me that the benefit to be derived by the attornment clause was intended to be an equivalent for that which the mortgagee would derive from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be a right to the payment of a fair and reasonable rent, such as an ordinary tenant would be willing to give for the property under ordinary circumstances?

(1) 14 Ch. D. 725, 733.

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That, as it seems to me, is the rent for which a properly prepared attornment clause should make provision; not necessarily the exact amount which a tenant would pay for the property, but such an amount as a willing tenant would probably pay as a *bonâ fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent, it appears to me that, though you may call it a rent, it is no longer a real rent, but a fictitious payment under the name of rent."

I adopt that criterion, and it may be applied without in the least trenching on the right of the parties to make what contracts they please. The question is have they made a real contract by which the one intends to become tenant to the other, or is the object to give the mortgagee in addition to the security upon the land (which, as a rule, is all the security stipulated for in the application and agreement for these loans, read apart from the printed form of mortgage), the power to distrain, not for a reasonable rent, for that would be consistent with good faith, but for an amount which may give the mortgagee an undue advantage, in respect of the personal property on the land, over execution creditors of the mortgagor, and even enable him to obtain payment out of the goods of a stranger.

In this case the principal money secured by the mortgage is $20,000 and it bears seven per cent. interest. The payments are half-yearly for five years from the first day of December, 1883, to the first day of June, 1888. Each six months down to the first of December, 1887, five hundred dollars of principal and interest on the unpaid principal are payable, making the half-yearly payments something over $2,000, the amounts diminishing each half year by the amount of half a year's interest on five hundred dollars

These are payments within the fair annual value of the property, and if the whole had been of the same amount

no inference unfavourable to the reality of the transaction could have been drawn from the amount of rent reserved, but the remaining payment of $15,500 of principal with half a year's interest on that sum, making upwards of $16,000, is considerably over four times the most extravagant estimate. It is impossible to hold that a lease on those terms was arranged with the honest purpose of creating a real tenancy. It is simply incredible. To divide the payments, as was done in the court of first instance, and say that some may stand while it is out of the question to sustain others, is to lose sight of the object of the inquiry. We are not concerned with the reasonableness of this instalment or that as a demand by the mortgagee against the mortgagor, or in relation to the lettable value of the property. The question is the design with which the alleged lease was made, and we look at its terms as part of the evidence upon that question of fact. The right of parties to a mortgage to constitute between themselves the relation of landlord and tenant, with a view to the greater security of the mortgagee or the more convenient realization of the mortgage moneys, is now undoubted, and every reasonable presumption should be made in favour of the *bona fides* of what they profess to do. But while we may go, as seems to have been done in at least one of the reported English cases, as far as credulity can reach, we must not put these transactions on a plane entirely above the practical business of real life. If we find that the lease which is set up by a mortgagee as taken from him by his mortgagor is one which, after every allowance and consideration in its favor, obviously would never have been entered into by any person as a business transaction of letting and hiring, there need be no hesitation in concluding that the object was not the creation of a real tenancy. I repeat that that is the

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question. A mortgagor is at perfect liberty to agree that the mortgagee may distrain for all the mortgage moneys, principal as well as interest, without any regard to the value of the land, and whether the goods are on the mortgaged premises or elsewhere. I believe that in Ontario this power is not fettered even by such safeguards for creditors as are provided in England by the Bills of Sale Act, 1878. See *In re Willis* (1). It may also be said that, as far as liberty of contract is concerned, any one may contract to pay double its value for the house or farm he rents. But to have a legal right to do so is one thing, and intentionally to do so is a very different thing, and the difference is by no means unimportant to bear in mind when the motive of the ostensible transaction has to be inquired into.

There was some discussion in one of the courts below—I am not sure that it was renewed before us—upon the effect of the existence of leases of portions of the property at the time the mortgage was made. Nothing can turn on that subject if my views on the principal questions are correct. I have therefore thought it unnecessary to consider the subject. I think, however, that the doctrine of estoppel as applied in *Ex parte Punnett* (2) would preclude any question between the mortgagor and mortgagee.

In my opinion the appeal should be allowed with costs and the judgment of the divisional court restored.

Appeal allowed with costs.

Solicitor for appellants: *George C. Gibbons.*

Solicitor for respondents: *Albert A. Jeffrey.*

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(1) 21 Q.B.D. 384.

(2) 16 Ch. D. 226.