THE TRUST AND LOAN COMPANY OF CANADA..... } APPELLANTS;

AND

MILLER LAWRASON, *et al.*, EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE WILSON DARNLEY..... } RESPONDENTS.

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*Dec. 7, 8.
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*May. 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Rev. Stats. Ont., ch. 104—Wrongful Distress for Mortgage money—Attornment clause.

A mortgage made in pursuance of the Act respecting Short Forms of Mortgages, R. S. O., ch. 104, in addition to all the clauses mentioned in the statute, contained the following provision and variation: "And the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the company, subject to the said proviso." Among the statutory clauses in the mortgage were those

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

(1) *Young* v. *Smith*. 4 Can. S. C. R. 494.

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providing that the mortgagees on default of payment for two months, might on one month's notice, enter on and lease or sell the lands; that they might distrain for arrears of interest, and that until default of payment, the mortgagors should have quiet possession.

Held, per *Strong*, *Fournier* and *Henry*, JJ., (affirming the judgment of the Court of Appeal for *Ontario*,)—That upon the proper construction of the deed there was no reservation of rent entitling the mortgagees to claim a landlord's right, as against an execution creditor, of a year's arrears of interest on their mortgage before removal of goods on mortgaged premises by the sheriff.

Sir *W. J. Ritchie*, C. J., and *Taschereau* and *Gwynne*, JJ., *contra*.

The Court being equally divided the appeal was dismissed without costs.

APPEAL from the Court of Appeal for *Ontario* (1).

The following special case without pleadings was submitted by consent of the parties:

"This is an interpleader issue directed by two several orders bearing dates respectively on the 22nd day of January, A.D. 1880, and the 18th day of February, A.D. 1880, and made by *Robert G. Dalton*, Esq., clerk of the Crown and Pleas, Queen's Bench, for the purpose of determining the right of the plaintiffs as against the defendants to the sum of $1,596.79 which has been paid into court in the cause of *Lawrason* v. *Christie*, and by the consent of the parties and by the order of the said *Robert G. Dalton*, bearing date on the 11th day of May, A.D. 1880, the following case has been stated for the opinion of the court.

"1. Under and by virtue of an indenture of mortgage, bearing date the 23rd day of March, A.D. 1877, and made between The Hon *David Christie* of the first part, the plaintiffs of the second part, and *Margaret R. Christie*, wife of the said Hon. *David Christie*, for the purpose of barring her dower only, of the third part, of which mortgage a true copy is hereto annexed, the plaintiffs became and have ever since the date of the

(1) 6 Ont. App. R. 286.

said mortgage remained, mortgagees of the lands and premises in said mortgage described, for securing payment to them of the moneys which the said mortgage purports to secure at the times, and in the manner in the said mortgage provided for payment and the said mortgage was not executed by the said mortgagees.

"2. The said The Hon. *David Christie* remained in actual possession of the said lands under and pursuant to the provisions of the said mortgage from the date thereof until after the directing of the interpleader issue herein.

"3. Under and by virtue of a writ of *fieri facias* against, goods tested the 7th day of February, A.D. 1879, and issued out of the Court of Queen's Bench for *Ontario*, directed to the sheriff of the county of *Brant* for the having of execution of a judgment of that court recovered by the defendant *Miller Lawrason* in an action at his suit against the said The Hon. *David Christie*, and under another writ of *fieri facias* against goods, tested the 18th day of February, A.D 1879, and issued out of the county court of the county of *Brant*, directed to the said sheriff for the having of execution of a judgment of that court recovered by the defendants, *William Burrill*, *John Heaton* and *Henry Wilson Darnley* as executors of the last will and testament of *George Wilson Darnley*, deceased, in an action at their suit against the said The Hon. *David Christie*, and under two other several writs of *fieri facias* against goods tested respectively on the 18th day of February, A.D. 1879, and the 24th day of April, A.D. 1879, and issued each out of the county court of the county of *Brant*, and directed to the said sheriff for the having of execution of two several judgments of that court recovered by the defendant *Cockshutt* in two several actions at his suit against the said The Hon. *David Christie*, the said sheriff did in the month of December, A.D. 1879, seize and

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take in execution all the goods and chattels of the said The Hon. *David Christie*, then lying and being upon the said lands, and he has since under and by virtue of the said writs sold and removed the said goods and chattels from the said lands.

"4. The plaintiffs, before the date either of such sale or of such removal, but some days subsequently to such seizure as aforesaid, and while the sheriff was in possession under such seizure, gave notice to the said sheriff that they claimed to be landlords of the said lands, and that the said the Hon. *David Christie* was their tenant, and that there was then due to them from and payable by the said the Hon *David Christie* for rent of the said lands for several years preceding the date of the giving of the said notice, a sum greatly exceeding $2,720, and that they required the said sheriff, before removing any of the said goods and chattels, to pay to them the sum of $2,720, as and for one year's rent of the said lands for the year next preceding the giving of the said notice.

"5. The said sheriff, after the giving of the said notice, applied to this court for relief under the Interpleader Act, when an order was made by the said *Robert G. Dalton*, bearing date 22nd day of January, A. D. 1880, and ordering the said sheriff to pay into court in the said cause of *Lawrason* v. *Christie*, and out of the proceeds of the sale of the said goods and chattels, a sufficient sum to cover the amount of the said execution of the defendant *Lawrason*, together with interest and costs up to the time of such payment, and the taxed costs of the application for the said order, to abide the result of an issue between the plaintiffs and the defendant *Lawrason*, and that he should pay over to the plaintiffs the balance of the proceeds of the sale of the said goods after deducting thereout his own fees, poundages and incidental expenses, together with the moneys so directed to be paid into court as aforesaid; provided that such

balance should in all not exceed the said sum of $2,720.

"6. Afterwards, upon the application of the defendants *Cockshutt, Burrill, Heaton* and *Darnley*, an order was made by the said *Robert G. Dalton*, bearing date the 18th day of February, A. D. 1880, whereby it was ordered that the lastly mentioned order be amended, and that the sheriff should pay into court a further sum sufficient to cover the amount of the said several executions of the defendants *Cockshutt, Burrill, Heaton* and *Darnley*, together with interest thereon and costs up to the time of such payment, and that the said defendants should be added as parties defendants to said issue.

"7. The said sheriff has, in pursuance of the said orders, paid into court as thereby directed the sum of $1,596.79, and has paid to the plaintiffs the sum of $1,180.91, besides which sum the plaintiffs have not since the making of the said mortgage been paid anything on account of the moneys thereby secured, either for principal or interest, or by way of rent. The question for the opinion of the court is, whether the plaintiffs by virtue of the said mortgage or anything therein contained and of the facts hereinbefore set forth, are entitled as against the defendants to any portion of the money so paid into court as aforesaid in the cause of *Lawrason* v. *Christie.*

"If the court shall be of opinion in the affirmative, their judgment shall be entered up for the plaintiffs for the amount of the said money so paid into court as aforesaid, together with the interest which shall then have accumulated thereon, and their costs of the said interpleader proceedings and of and incidental to their issue, to be paid by the defendants. If the court shall be of opinion in the negative, then judgment for the said moneys and accumulated interest, together with costs of defence to be paid by the plaintiffs, shall be entered up for the defendants."

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The Court of Queen's Bench held that a tenancy at will was created by the mortgage at a fixed rent, equivalent to interest, for which the mortgagees had all the remedies of a landlord. The Court of Appeal reversed the judgment of Queen's Bench and held there was no rent fixed for which there was power to distrain.

Mr. *Marsh* for appellant:

The main question that arises in the present case is one of construction of the mortgage. Is there a tenancy at a fixed rent? The statutory distress clause contained in the mortgage in question, coupled with the possession had by the mortgagees pursuant to the provisions of the mortgage, created the relationship of landlord and tenant between the mortgagor and the respondents: *Royal Canadian Bank* v. *Kelly* (1).

By the wording of the distress clause in question, rent and interest are equivalent and interchangeable terms. The effect of this is to reduce the arrears of interest to the extent of whatever amount of interest may be collected by way of rent. This avoids the difficulty raised in some of the cases decided under other distress clauses, where it was objected that there was no provision for the application of the rent in payment of the interest. This equivalence of the rent to the interest also establishes the fact that the rent is fixed and certain, for there is no question but that the interest reserved by the mortgage is fixed and certain, and so must that be which is its equivalent. The distress clause provides that as soon as the interest falls into arrear it may be recovered "by way of rent reserved." Upon reference to *Webster's* Dictionary, under the word "way," it will be found that the phrase "by way of" is equal to the phrases "as being," 'in the character of," which latter is the meaning given to it by Mr. Justice *Gwynne* in *Royal*

(1) 19 U. C. C. P. 196 and 430, as explained in 14 C. L. J. 8.

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Canadian Bank v. *Kelly* (1), where he considers that the rent is fixed by the use of this phrase. Upon substituting either of these two phrases, "as being," "in the character of," for its equivalent as used in the statutory distress clause, it will appear that the distress clause indicates not only the mode in which the overdue interest may be recovered ; but also, the character in which it is to be recovered, viz., as a rent (2).

That part of the clause which provides that the time for payment of the principal money may be extended upon payment of arrears at any time before judgment shows that the clause in question was intended merely as a license to the mortgagees to commence action upon default, but that the mortgagees' right to treat the mortgagor as a trespasser is not complete until judgment is obtained, and in this case no action or suit was commenced after default and before the directing of the interpleader issue herein,

Clause 2 of the special case states that the mortgagor "remained in actual possession of the said lands under and pursuant to the provisions of the said mortgage from the date thereof until after the directing of the interpleader issue herein," *i. e.*, as tenant at will.

A tenancy at will at a fixed rent having been created upon the execution of the mortgage, and the will never having been determined as is shown by clause 2 of the special case the same tenancy at the same rental still subsisted after the default (3).

The attornment clause in the mortgage expressly creates a tenancy at will, subject to the proviso for payment of interest, and the statutory distress clause provides that the mortgagees may distrain for interest "by

(1) 19 U. C. C. P. 211.

(2) See Osler, J., 6 Ont. App. Rep. 304, and Gwynne, J., in *Royal Canadian Bank* v. *Kelly*, 19 U. C. C. P. 211.

(3) See 1st point of argument mentioned by Mr. Leith, 14 C. L. J. N. S. 11.

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way of rent reserved," which should be constructed as and for rent reserved These three clauses, when read together, create a tenancy at will at a fixed rent.

An attornment clause in a mortgage creates the relation of landlord and tenant, with all its incident remedies

Jolly v. *Arbuthnot* (1); *Morton* v. *Woods* (2); *Re Stockton Iron Works Furnace Co.* (3); *Exparte Bank of Whitehaven. Re Bowes* (4); see note to *Keech* v. *Hall* (5).

Another point taken is that we do not come within the provisions of 8 *Anne*, ch. 14, sec. 1, and as we claim under that statute we must show that we come within the meaning of that statute. There is an express case which proves conclusively that the statute of *Anne* extends to the case of a tenancy under an attornment clause in a mortgage. *Yates* v. *Ratledge* (6). The same principle was acted in the case of *Monroe* v. *Build* (7).

Another objection taken was that appellants claim was prejudiced by the Chattel Mortgage Act. In order that an instrument may be avoided by the Chattel Mortgage Act, it must be strictly within the terms of that act. The instrument in question here is not a "mortgage or conveyance intended to operate as a mortgage of goods and chattels." In *England* it has been held that such an attornment does not infringe upon the Bill of Sales Act. See *re Stockton Iron Works Furance Co.*(8); *re Bowes* (9); see also *Patterson* v. *Kingsley* (10); and *McMaster* v. *Garland* (11). The proper construction of this instrument may be best arrived at by applying the ordinary rules which judges have framed for the interpretation of written contracts. See *Morton* v. *Woods* (12).

(1) 4 DeG. & J. 224.
(2) L. R. 3 Q. B. 658; affirmed on appeal L. R. 4 Q. B. 293.
(3) 10 Chy. D. 335.
(4) 42 L. T. N.S. 409.
(5) Smith's L. C. (8th ed.) 583.
(6) 5 H. & N. 249.
(7) 36 U. C. Q. B. 469.
(8) 10 Ch. D. 335.
(9) 25 Grant 425.
(10) 14 Ch. D. 725.
(11) 31 U. C. C. P. 320.
(12) L. R. 4 Q. B. 305.

The attornment clause here, if not construed together with the distress clause, so as to create a tenancy at a rent certain, will either be of no effect or will be a *clausula damnosa* so far as the mortgagees are concerned, rendering them liable, in the character of mortgagees in possession, to account to subsequent incumbrancers for rents and profits which by the terms of the contract they have debarred both themselves and the subsequent incumbrancers from collecting. The instrument being intended solely as a security for money, it could never have been intended by the parties to it, that it should have any such prejudicial effect upon the mortgagees, and the above authorities show that it should not be treated as inoperative. It would therefore appear that the attornment clause and the distress clause must be so read and construed together as to create a tenancy at a fixed rent.

Phillips on Insurance (1); See *Am. Express Co.* v. *Pinckney* (2); *Harper* v. *Albany Mutual, &c., Co.* (3); *Gumm* v. *Tyrie* (4).

The mortgage in the present case conforms to the Statutory Short Form of Mortgages throughout, with the addition, however, of some further clauses, one of which is the attornment clause. If this latter clause should be thought to conflict with any of the clauses contained in the statutory short form, then upon the authority of the above citations, it should be treated as the governing clause. Moreover, it is stated in the special case, that the mortgagor "remained in actual possession of the said lands and premises under and pursuant to the provisions of the said mortgage from the date thereof until after the directing of the Interpleader issue herein," and it also appears therefrom

(1) Sec. 125.
(2) 29 Ill. 392.
(3) 17 N. Y. 198.
(4) 33 L. J. N. S. Q. B. 111.; per Blackburn, J.

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that default was made in payment of the mortgage moneys within a few months after the date of the mortgage, while an examination of the mortgage itself will show that the attornment clause contains the only provision under and pursuant to which the mortgagee could remain in possession after default.

A point is made in the judgment of *Patterson*, J., also in the judgment of *Burton*, J., of the fact that in the long form of the statutory distress clause, from which the lastly quoted words are taken, the said words are followed by the clause "as in the case of a demise," and it is argued from this that it is indicated by the lastly mentioned clause that the statutory short form of mortgage does not create the relationship of landlord and tenant between the mortgagor and mortgagee. Whether this be a proper deduction or not it has no bearing on the present case, for here there is a demise, or what is equivalent to it, an attornment by the tenant. All that is here required is to show that there is a fixed rent.

It was also objected in the court below that the various statutory clauses relating to possession contained in the mortgage in question are inconsistent one with another, and inconsistent with the attornment clause. I submit, in case of any such inconsistency, the attornment clause should prevail. It is not necessary for the appellants to show the the exact nature of the tenancy under which the mortgagor held; it is sufficient if they show that there was a tenancy of any kind and that it was at a fixed rent. That there was a tenancy of some kind is sufficiently shown by the special case when it is admitted that the mortgagor "remained in actual possession of the said lands under and pursuant to the provisions of the said mortgage from the date thereof until after the directing of the interpleader issue herein."

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Mr. *Kerr*, Q.C., and Mr. *Wilkes* for respondents:

The appellants in the case make their claim under the provisions of the statute of 8 *Anne*, ch. 14, sec. 1, and in order to succeed they must show: 1st. That the relation of landlord and tenant was created; 2nd. That there was a fixed rent; and 3rd, that the rent was fair and reasonable.

The mortgage is made in pursuance of the Act respecting short forms of mortgages (1), and the clause upon which appellants rely is what they allege to be the attornment clause. That clause does not refer to any rent, and if the intention of the parties had been that the interest should be the rent, it would be likely that the words "at the rent fixed by this provision" would have been added. That clause gives only the right to take possession of the land, and the distress clause in the mortgage in question is a mere license to the mortgagees to distrain the goods of the mortgagor for arrears of interest. The ground which the Court of Appeal took was, that if effect was given to this clause as creating the relation of landlord and tenant at a fixed rent, then it would be holding that the intention of the parties was to confer and secure a remedy against the goods of a stranger that might happen to be on the premises. If such had been the intention of the parties, would the mortgagees have allowed three years of interest to accrue; for the mortgage was given in 1877, and it was not until after the seizure by a judgment creditor, that the present appellants moved in the matter.

The mortgage in this case was given and accepted as a security for moneys lent on the security of the lands mortgaged, and the courts have always required any extraordinary right that may be reserved to the mort-

(1) R. S. O. ch. 104.

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gagee to be such as is a fair and reasonable one, having regard to the nature of the security.

It has been considered right that a mortgagee should have the same security for his debt when the mortgagor is in possession as he would have if the mortgagor's tenant or a stranger was in possession, the mortgagee being entitled, on default of payment of interest, to demand and recover from the tenant or stranger the rent which would otherwise be paid to the mortgagor, who was entitled to the possession of the premises until default should be made in payment of the mortgage. The clause of attornment of the mortgagor to the mortgagees was then devised, and has been very extensively used, and this was done because it was conceded that the proviso allowing the mortgagees to distrain for arrears of interest amounted to nothing more than a license to seize, and it has been well decided, it is submitted, that the term in the intended form of the covenant that the mortgagees may distrain, and by distress warrant recover, by way of rent reserved, as in case of a demise of lands, the interest due, together with the costs attending such distress as in like case of distress for rent, means no more than that the like proceedings may be taken to recover the interest as may be taken when a distress is made for rent. This proviso, as appears from the language used in the short form, is only intended to give the right to distrain for arrears of interest and not rent; and it is submitted that if any other construction is put upon this proviso, it will become repugnant to the other terms of the ordinary mortgage (apart from the attornment clause), all of which show that the essential matters provided for are payment of the principal money secured thereby, with interest thereon.

There is no demise of the premises by the mortgagees contained in this proviso, nor is there any agreement

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that on default a tenancy shall be created, and that the interest shall then become rent, nor is it alleged that there is any interest in arrear.

The case of *Clowes* v. *Hughes* (1), shows that there was no subsisting tenancy here. See also *Walker* v. *Giles* (2).

Moreover, there is an inconsistency and repugnancy in the clauses of the said mortgage; for how can the tenancy at will be reconciled with the provision that in default of payment for two calendar months the mortgagees may, on one calendar month's notice, enter on and lease or sell the said land?

Under the attornment clause, the mortgagee is entitled, if at all, to the rental of the lands mentioned in the mortgage from its date, while under the other clause just referred to, the mortgagor, being entitled to quiet possession until default, the mortgagee cannot enter on and lease the said lands, in order that he may receive the rents and profits of the said lands, until there is default of payment for two months, and then only on giving one month's notice. The mortgagee, therefore, could not enter at will, as he would have the right to do if a tenancy at will was created.

If the mortgagor abandoned possession of the lands and default was made, the mortgagee could not obtain possession thereof and make a lease until after two months' default and one month's notice had been given. But if the attornment clause in the mortgage in question is held to be a valid one, the mortgagee would be entitled at any time to give notice of the termination of the tenancy at will and take possession. The attornment clause cannot be construed to confer two such distinct rights inconsistent with each other.

My learned friends have relied on the case of the *Royal Canadian Bank* v. *Kelly* (3), but the judgment

(1) L. R. 5 Ex. 163. (2) 6 C. B. 700.
(3) 19 U. C. C. P. 430.

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of the Court of Error and Appeal, in that case, reversed the decision of the Court of Common Pleas that the statutory distress clause in a mortgage, under the Short Forms Act, creates the relationship of landlord and tenant between the mortgagor and the mortgagee.

Then it is contended that the proviso as to distraining for interest applies and aids the attornment clause as before mentioned. This distressing clause cannot be held to be "the said proviso" mentioned in the attornment clause. This attornment clause, however, contains no allusion to rent, and by itself it could give no power to distrain. It is an excrescence upon, not an integral portion of the mortgage, and there is no portion of the distress clause, either in its short or extended form, that gives the right to distrain for any rent.

Another reason why appellants cannot succeed is, that by the terms of the mortgage, upon default of payment of interest the principal became due, and default was made on the twenty-third day of March, 1877, as the interest was payable in advance and the mortgage money became wholly due and payable prior to the said seizure, and the mortgagor still remaining in possession could not be a tenant, but was a trespasser, and the interest was assessable as damages only.

Finally, we submit that it is against public policy that any such power as is claimed in this case should be given to mortgagees. Such a power is in direct contravention of the Chattel Mortgage Act, and if allowed would seriously impair the usefulness of that Act.

Mr. *Marsh*, in reply, relied on *Morton* v. *Woods* (1); *Re Threlfell* (2); *Pinhorn* v. *Souster* (3); *Brown* v. *Metropolitan Counties, &c., Society* (4); *Turner* v. *Barnes* (5).

(1) L. R. 3 Q. B. 658, and 4 Q. B. 293.
(2) 16 Chy. D. 274.
(3) 8 Ex. 763.
(4) 1 El. & El. 832.
(5) 2 B. & S. 435.

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RITCHIE, C. J.:—

Whatever may be the effect of the distress clause standing alone, upon which there appears to have been a difference of judicial opinion, I think there can be no doubt as to the construction and effect of the attornment clause and the distress clause in the same instrument. In construing these two clauses, we must take into consideration the whole scope and object of the instrument, and not regard the position of the clauses; because, as *James*, L.J., says in *ex parte National Guardian Assurance Co.* in *re Francis* (1):

There is no magic in the position of the clauses in the deed, every clause is part and parcel of the bargain between the parties.

It is said in *Mill* v. *Hill* (2):

The general rule of construction is that the courts, in construing the deeds of parties, look much more to the intent to be collected from the whole deed than from the language of any particular portion of it. The intent must be collected from the deed itself, and not from evidence *aliunde;* and the courts consider themselves authorized and bound, where they can collect the intent from the language of the deed, if all the parts of the deed will admit of it, to construe that deed rather according to the general intent than according to any particular phraseology contained in it.

And with reference to attornment clauses, *Jessel*, M. R. says *In re Stockton Iron Furnace Co.* (3):

According to the course of practice of conveyancers, when the mortgagor is occupying, so that there is no rent receivable to meet the interest on the mortgage debt, it is usual that he should agree to become tenant. There is nothing novel or remarkable in the mortgage. It is in the ordinary form.

Bacon, C. J., in *ex parte Jackson*, in *re Bowes* (4), says:

The case of *In re Stockton Iron Furnace Co.* (5) is valuable for the observations which it contains, which traverse the whole ground of these attornment provisions, and no disapprobation is expressed by the judges, either in that case, or even in *ex parte Williams* (6), of

(1) 10 Ch. D. 413.
(2) 3 H. L. Cas. 847.
(3) 10 Ch. D. 353.
(4) 14 Ch. D. 730.
(5) 10 Ch. Div. 335.
(6) 7 Ch. Div. 138.

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the use of an extensive attornment clause. Attornment clauses are in themselves valid. They can only be impeached, that is to say, the contract between the parties can only be set aside, if you can infer from the facts that there is an attempt to defraud the other creditors of the mortgagor in the event of bankruptcy happening. There is not a particle of evidence in this case which leads me to think that such an intention was present here.

Cotton, L. J. (1):

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 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 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 *Baggallay*, this is quite reasonable, for the mortgagee has a right to take possession, and to turn out 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 on 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 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.

Thesiger, L. J. (2):

There can be no doubt that such clauses contained in the mortgage deeds are valid and operative in themselves, and that they may, and ordinarily do, create the relationship of tenant and landlord between the mortgagor and mortgagee, and with it the ordinary right of distress which the law attaches to that relationship. And, more than that, it appears to me abundantly clear, both upon principle and authority, that attornment clauses will be valid and operative, although the rent reserved by them may be considerably in excess of what may be required to keep down the interest on the mortgage debt. I can even imagine a case in which the rent reserved

(1) P. 739. (2) P. 743.

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may be sufficient to pay both principal and interest. But, while that is so, it must also be admitted that the object of attornment clauses is, while giving an 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.

Now what was the intent of the parties in reference to this deed? Clearly their sole object was to secure to the mortgagor the repayment of the mortgage money and interest. The clauses in the deed, more especially those we are now considering, were unquestionably inserted with a view to that end in the interest of, and for the benefit and protection of the mortgagee. If it was intended that the right to distrain was merely a collateral license, assuming the distress clause gave no more than a license, to which the right to distrain the goods of a stranger on the premises would not be incident, nor would the right to claim a year's rent, under the statute of *Anne*, when the goods are seized by the sheriff, what possible object could there have been in the interest of either party in inserting the attornment clause. If the attornment does not establish the relation of landlord and tenant, it is meaningless. If it establishes the relation of landlord and tenant, but without the reservation of a fixed rent, and is to be read as separate and distinct from the distress clause, then instead of operating in the interest of the mortgagee, and in furtherance of his security, it would impose on him a most onerous burthen, and cast on him a duty of a character having the exact contrary effect, viz.: by making him a landlord it would constitute him a mortgagee in possession with all the corresponding liabilities attaching to that position, and more particularly in regard to any subsequent incumbrances, without conferring on him any other or greater rights or privileges than he would have without the

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insertion of such a clause, a state of things not benefiting but detracting from the security, a state of things not indicated by the deed, and which, I think, neither party could have contemplated or intended, and which will be avoided by giving legitimate effect to all the clauses of the instrument.

By reading these two clauses together as creating a tenancy at a fixed rent, distrainable as between landlord and tenant, the clauses are consistent the one with the other, and in accordance with the scope and object of the mortgage security. To read them separately and as having no connection with or bearing on each other is to render them wholly irreconcilable. To say that the mortgagor when he agreed to the insertion in the mortgage of a clause in these words: "And the said "mortgagor doth release to the company all his claims "upon the said lands and doth attorn to and become "tenant at will to the company subject to the said pro- "viso," viz, the proviso for repayment of principal and interest, and, at the same time, inserted the statutory clause that the company might distrain for interest, which, extended by the terms of the statute, reads thus:

And it is further covenanted, declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators shall make default in payment of any part of the said interest at any of the days and times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises or any part thereof, and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands, tenements, hereditaments and premises so much of such interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like cases of distress for rent;

To say that he did not intend to make himself a tenant under the first clause, and did not intend under

the second clause, read in connection with the first, to fix the amount of rent and times of payment as between landlord and tenant, and make the rent so fixed, rent distrainable by way of rent under the tenancy so created as a right of distress incident to a tenancy, is to say, it appears to me, that the instrument is incapable of a reasonable and consistent construction. I think the only possible object the parties could have had in inserting the attornment clause was to make the interest, when in arrears, rent, and give the landlord the same right, as if in so many words, the attornment clause had specified that the mortgagor became tenant at a fixed rent, viz: the amount of the interest in arrears reserved by the mortgage. Any allusion to rent in the attornment clause was rendered unnecessary, because the rent is fixed by the distress clause, which authorizes the interest to be distrained by way of rent reserved. Those clauses, as I said before, being read together, establish the relation of landlord and tenant, and in my opinion fix the amount of interest as rent for the purposes of the tenancy; or in other words, that the reason why the attornment clause was inserted was to prevent any doubt arising as to the right to distrain being treated under the distress clause as a mere leave and license, and not as a rent charge.

In delivering judgment on the appeal in *Morton* v. *Woods*, (1) Lord Chief Baron *Kelly*, after noticing the appellant's contention that there were certain defects in the form of the mortgage instrument there under consideration which rendered it invalid as a lease, says:

> It might be so in the ordinary case of a lease; but in order to ascertain whether such a rule of construction has any application to the present instrument, we must take into consideration the whole scope and object of it. And when we find the main, and indeed only object of the deed is a mortgage, and that the creation of a tenancy and the relation of landlord and tenant with a reservation

(1) L. R. 4 Q. B. 305.

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of rent are intended as a mere security for the repayment of the mortgage money and interest, the authority cited is no longer applicable; and we must look at the whole instrument taken together in order to ascertain the intention of the parties.

and I agree that if the mortgage in question herein be construed according to the rule enunciated in *Morton* v. *Woods*, there can be no reasonable doubt that the relationship of landlord and tenant at a fixed rent was thereby created.

Therefore, in my opinion, the occupation by the mortgagor, connected with the attornment clause and the provision that the mortgagee should have the power of distress for the interest in arrears by way of rent reserved, constituted the relation of landlord and tenant between the mortgagor and mortgagee, whereby the mortgagor became tenant at will to the mortgagee, at a fixed rent, viz: the amount of the interest payable at fixed times, and that under such demise, on default in payment of the interest, it became payable *qua* rent and liable to be distrained for as rent, the right to distrain not being a mere collateral license but a right of distress incident to a tenancy.

As the addition of the attornment clauses distinguishes this case from the *Royal Canadian Bank* v. *Kelly* (1), and makes whatever may be doubtful in that case clear in this, I refrain from discussing or expressing any opinion on the point there decided that without the attornment clause, the statutory distress clause has the same effect, as I think the two have in this case.

STRONG, J.:—

I am of opinion that we ought to dismiss this appeal. I entirely agree with the majority of the Court of Appeal that, upon the proper construction of the mortgage

(1) 19 U. C. C. P. 43.

deed, there is no reservation of rent. Nothing is said about rent in what is called the "attornment" clause, and, assuming, as I do for the present purpose, that either by the effect of this attornment clause, or by the operation of the covenant, that the mortgagor should retain possession until default, or by the combined effect of these two provisions, a tenancy of some kind was created there is no pretence for saying that there was, either by expression or implication, any reservation of rent as incident to that tenancy, unless it was contained in the distress clause. What we have to do, then, is to construe the extended statutory equivalent of the short form of proviso actually used by the parties in the mortgage deed itself. And here, I would observe, that the present case affords a very good example of the imprudence of using these short forms, which, in *England*, as I find it stated in writers of authority, are never adopted. The short form in the mortgage is:

Provided that the company may distrain for arrears of interest.

There is no indication n these words of any intent to reserve a rent. If, therefore, we read the proviso, of which this short form is the symbol, as containing a reservation of rent, we are giving an effect to it which makes the use of this statutory form a snare. If the statute had enacted in so many words that interest should mean rent, of course there would be an end of the matter; but, whilst it stops short of that, and so long as there is any ambiguity in the words of the enlarged covenant (though I am far from admitting that there is any ambiguity in the extended form here), I think we ought so to construe the extended form as to ascribe to it a meaning of which the short form may be said to be a fair general expression, and this we certainly should not be doing if we were, by the aid of the statute, to translate the word "interest" as meaning or including rent. I do not,

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however, consider this as a conclusive reason, though, in my estimation, it certainly greatly strengthens the construction placed upon the extended form by the majority of the court below. Again, the very existence of an express clause of distress which would be totally unnecessary to entitle the mortgagee to distrain for rent, though not conclusive, is also a circumstance weighing against the construction contended for by the appellants. But I rest my judgment upon what appears to me, speaking with all respect for those who entertain different opinions, to be the plain meaning and intendment of the words of the proviso, taken in its extended form as given in the schedule to the statute, and which is as follows:—

If the said mortgagor, his heirs, executors or administrators, shall make default in payment of any of the said interest, at any of the days and times heretofore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and by distress warrant to recover by way of rent reserved (as in case of a demise) of the said lands, tenements, hereditaments, and premises, so much of such interest as shall from time to time be, or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like case of distress for rent.

Reading this form, it is apparent at once that all depends upon what is to be considered as meant by the words "to recover by way of rent reserved as in case of a demise of the said lands * * * * so much of said interest," &c.

Now, in the first place, it is to be observed that what is to be recovered by the distress, is not rent but interest *eo nomine*; what warrant is there then for saying that this arrear of interest is to be considered as rent reserved? The only answer which can be suggested is, that the words "by way of rent reserved" show that the interest is, so soon as it gets into arrear, to be considered as a reserved rent; but this is to beg the whole

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question for the words by way of rent reserved are not used in connection with the interest, but with the mode of recovering it; it is not said that interest in arrear is to be considered as rent reserved, but that when interest in arrear is to be recovered, it is to be so recovered in the same way that rent reserved on a demise is to be recovered, namely, by distress. And the latter words of the clause, providing that the costs of the distress shall be recovered "as in like case of distress for rent," reflect light on the preceding expressions, and show, as clearly as language can express it, that the distress is not to be for rent, but for interest to be recovered in the same way as rent.

The case of *Doe Wilkinson* v. *Goodier* (1) is an authority amply sufficient to warrant this construction. In that case, the power of distress authorized the mortgagee to distrain for interest in arrear for twenty-one days "in like manner as for rent reserved on a lease;" and the court held that this did not amount to a reservation of rent, but was a mere personal clause of distress. I am unable to see any difference sufficient to make a reasonable distinction between the concluding words of the clause in question here, and which, as I have said, are a key to the construction of the expressions used in the earlier part of the proviso, "as in like case of distress for rent;" and the words in *Doe Wilkinson* v. *Goodier*, "in like manner as for rent reserved on a lease." I am, therefore, of opinion, that for the reasons given by the majority of the Court of Appeal—reasons to which I profess to add nothing, but merely to reiterate them in my own language—this appeal should be dismissed.

I have arrived at this conclusion, as already indicated, merely by a process of verbal construction, and without being influenced by any considerations of the impolicy

(1) 10 Q. B. 957. See also *Doe dem Garrod* v. *Olley*, 12 Ad. & El. 481.

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or hardship of giving effect to the provision in question as amounting to a reservation of rent.

As I was a party to the decision in the case of the *Royal Canadian Bank* v. *Kelly*, in the Court of Appeal, I think it proper to say that I have given no weight to that decision as an authority in the present question; for this the want of any authentic report of the case would alone be a sufficient reason, but besides this, my recollection of that case is such that I could not properly act upon it. In *Kelly* v. *Royal Canadian Bank* there was not, as there is here, an express provision in the mortgage deed that the mortgagor should become tenant at will to the mortgagee—in other words, there was no attornment clause—the only clause contained in the deed from which a tenancy could be implied was the provision that the mortgagor should have quiet possession until default, and I am able to say that the grounds of my own judgment, which concurred with those stated by the Chief Justice, was that there was no tenancy to which a rent (as a rent service) could be incident, since the covenant that the mortgagor should have possession until default in payment —in a case where the principal and interest were payable not at one fixed date but by instalments—wanted that certainty which is requisite for the creation of a term. The judgment of the court in that case was the judgment of a large majority, but a majority which did not agree in the reasons assigned for their judgments, for whilst the judgments of some of the learned judges proceeded upon the grounds I have just mentioned those of others proceeded upon the ground upon which the Court of Appeal have rested their decision in this case, the proper construction of the clause of distress in the extended form given in the statute. This want of unanimity was probably the reason why the judgment was witheld from the reporter. I only mention it now

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as explaining why I attributed no weight to it in arriving at a decision of the present appeal.

Although I rest my judgment in the present case entirely on the same grounds as those relied on by Mr. Justice *Burton* and Mr. Justice *Patterson*, in the Court of Appeal, I think it right to point out some further grounds for the conclusion that, notwithstanding the existence of the attornment clause in this mortgage deed, no tenancy to which a rent service could have been incident, was created. This attornment clause appears to be so utterly inconsistent with the proviso, that the mortgagor should have quiet possession until default, that the one or the other of these clauses must be void for repugnancy. The mortgage deed, operating as a conveyance to the mortgagee of the whole fee, these provisions are in the nature of redemises to the mortgagor, and, therefore, must be construed beneficially to the mortgagor, and strictly against the mortgagee, who is in the position of a grantor as regards them. Then it being impossible to reconcile a tenancy at will, that is, a tenancy determinable at the will of the mortgagee, under which the latter can, at any time, take possession, with a provision, though in form but a mere personal covenant, that the mortgagor shall remain in quiet possession until default in payment; one or the other of these two clauses must necessarily give way, and upon the principle of construction just stated, it is clear that this must be the attornment clause being less beneficial to the mortgagor. It is no answer to this argument to say that the tenancy at will can subsist with the collateral personal covenant of the mortgagee not to take possession until default, for such a covenant would be enforced specifically by a court of equity, which would restrain the mortgagee from taking possession in violation of its terms, and thus there would arise a direct

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repugnancy between such a provision and a tenancy at will. Then, in determining whether a tenancy is created or not, and what is the nature of the tenancy we must have regard at law as well as in equity to the terms of the whole deed, for to this extent at least the case of *Walker* v. *Giles* (1), though impugned in other respects, is still law, and is so recognized in the later cases of *Pinhorn* v. *Souster* (2), and *Brown* v. *The Metropolitan Counties, &c., Society* (3). That this is the effect of the authorities is also recognized in *Davidson's* Conveyancing (4), and in the 3rd edition of *Fisher* on Mortgages (5) the true principle to be extracted from the authorities is thus stated:—

> Although a tenancy may be created by insufficient words in the deed it will not be allowed where the effect would be inconsistent with the general object of the deed.

Then, the tenancy at will created by express words in the attornment clause being thus rejected we have only to deal with the provision that the mortgagor shall hold until default in payment of principal or interest at the times stipulated in the deed; if any tenancy is created it must be by that clause. Now, when I say that this clause is in the nature of a re-demise, I do not mean to say that it creates a strict legal tenancy, that it confers upon the mortgagor a chattel interest amounting to a legal term, for it has been determined—and upon long established principles of the law relating to leases and terms for years, it could not be otherwise held—that the uncertainty in the duration of the term is fatal to such a construction, though, as I have before said, the covenant is one which a court of equity would undoubtedly enforce by restraining the mortgagee from ejecting the mortgagor before default.

(1) 6 C. B. 662
(2) 8 Exch. 763.
(3) 1 El. & El. 832.
(4) 2 Vol., p. 645. (3rd Ed.)
(5) P. 446.

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In the view which I thus take of the proper construction of the mortgage deed, after eliminating, for the reasons already stated, the clause purporting to create the tenancy at will, there is neither a tenancy created by the remaining provisions of the deed nor anything amounting to a reservation of rent.

The uncertain duration of the holding until default in any one of the half-yearly payments of interest during a period of five years, and then until default in the payment of the principal at the end of that time, makes the implication of a tenancy, in view of the requisites for the creation of a legal term, in my opinion, impossible.

Tere are, it is true, some decisions which may seem contradictory on this point, and *Wilkinson* v. *Hall* (1) is supposed to have determined otherwise. I think, however, that case is sufficiently distinguished from the present in the full and able discussion of the authorities contained in the note to *Keech* v. *Hall* in *Smith's* Leading Cases (2). This distinction is that in *Wilkinson* v. *Hall* the mortgagor was to remain in possession until default made in the payment of the mortgage money at one certain time fixed by the deed —not as here, until default should be made in any one of a number of half-yearly payments spread over a series of years. In a case—such as that of *Wilkinson* v. *Hall*—all the money, principal and interest together, being payable at a day certain, the duration of the term was fixed and ascertained as soon as the deed was executed to be until the one certain day named for payment. In a deed framed like the present, it is, however, impossible to say what the duration of a right of possession will be, which is dependent altogether on *ex post facto* events—in the present case ten different contingencies.

(1) 3 Bing. N. C. 508.

(2) 1 Smith's Lead. C. (Ed. 8), p. 577.

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Therefore, for the reason that it wants that prefixed certainty which is essential to the creation of a term, I should be inclined to hold—if the point had to be decided—that the quiet possession clause in the present case does not create a legal tenancy. The editors of *Smith*'s Leading cases state the following as a general conclusion from the authorities (1):

> It may, perhaps, be concluded in this review of the authorities that in order to make a re-demise there must be an affirmative covenant that the mortgagor shall hold for a determinate time and that where either of these elements is wanting there is no re-demise.

The mortgage deed in the present case does contain the affirmative covenant that the mortgagor shall hold, but not that he shall hold for a determinate time

It is no answer to this to say "*id certum est quod certum reddi potest*," for no principle of the law of property is better established than that which makes it indispensable to the creation of a term that its duration should be prefixed and certain from the beginning, and not fluctuating or uncertain according as certain contingencies may or may not happen.

We find it laid down that a lease for so many years as *A* shall live is void for uncertainty, though nothing can be more certain than that there is a limit to human life, but a lease for twenty-one years if *A* shall so long live is good, being a lease for a term certain, determinable on a contingent event which may happen before the expiration of the term limited (2).

So in the case of a mortgage where the principal is payable in one sum, at one fixed date, and the interest is made payable in a number of half yearly payments, as in the present case, if the covenant should be that the mortgagor should have quiet possession until the time fixed for payment of the principal, with a proviso that such right of possession should be determinable upon default

(1) Smith's L. C. 8th Ed., p. 583. (2) See Co. Litt., 45 v.

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in payment of the interest at any of the stipulated times, that, no doubt, would create a perfectly good legal interest in the nature of a term of years. This distinction may be thought very thin and meaningless, but it is well-settled law, and that is sufficient for the present purpose. I have made these observations, not as intending to rest my judgment upon them, but because it occurred to me that it might be useful to draw attention to the difficulty I should have felt, in holding that the quiet possession clause created a tenancy, as a suggestion that this clause, in mortgage deeds, should be so framed as to avoid the objection, as may easily be done.

As to the point that the quiet possession clause could, in no case, operate, because the mortgage was not executed by the mortgagees, I am clearly of opinion that, even as a strict legal objection, it is of no force, since the principle is, that a mortgagee or grantee is bound, even at law, to sustain the burden of covenants and provisions contained in a deed under which he claims to take a benefit, even though he has not executed the instrument (1), and, at all events, a court of equity would, on the ground of equitable fraud, restrain a party to a deed in such a position from repudiating any obligation or onerous provisions which the instrument imposed upon him.

It was suggested, that, although no tenancy was created to which a rent, as a rent service, could be incident, the distress clause might be construed as creating a rent charge. This point is sufficiently answered by the view which—following the Court of Appeal—I have taken of the proper construction and meaning of the clause in question a further and conclusive reason being that the mortgagor had no legal estate out of which such a rent charge could issue.

(1) See Co. Litt 230b.

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My conclusion is, that the appeal should be dismissed, with costs.

FOURNIER, J., concurred with STRONG, J.

HENRY, J.:

I agree with my brother *Strong*, and entirely adopt the views of Mr. Justice *Patterson* and Mr. Justice *Burton*. I have come to the conclusion that the attornment was not to attorn further than to give a license to distrain which would enable the mortgagees to collect arrears of interest and did not create the relation of landlord and tenant so as to enable them to distrain strangers' property found on the premises.

TASCHEREAU, J.—Was of opinion that the appeal should be allowed.

GWYNNE, J.:—

At the time of the passing of the 27th and 28th *Vic.*, ch. 31, it was the universal practice, I may say, in the Province of *Upper Canada* for mortgagees to insist, as a condition of all loans on mortgage, upon a clause being inserted in the mortgage whereby in express terms the mortgagor become tenant to the mortgagee at a rent which was the interest agreed upon for the principal sum secured by the mortgage, and the object of the act was simply, in my opinion, as its title indicates, to establish a short form, which could conveniently and at a trifling expense be registered in full. That the relation of landlord and tenant can subsist between a mortgagee and his mortgagor simultaneously with, and by virtue of the same instrument as creates the relationship of mortgagee and mortgagor, is not disputed. If then, the language of the short form given by the statute is sufficient to create the relationship of landlord and tenant at a rent, I cannot see upon what principle

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we should construe that language as conferring a mere license to distrain the goods of the mortgagor himself alone, and so deprive the mortgagee of the security which (upon the faith of the language of the statute being sufficient for the purpose), may have been an essential condition without which he would not have consented to lend his money; and I cannot see how a mortgagee's insisting upon his having the security, which a mortgagor becoming tenant of the mortgagee for the mortgaged premises gives to the latter, can be regarded as in fraud of the Chattel Mortgage Act. Now, the language of the statute when expanded as it is in column two of the Act is:

> And it is further covenanted, declared, and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors, or administrators shall make default in payment of any part of the said interest at any of the days and times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns to distrain therefor upon the said lands, tenements, hereditaments and premises or any part thereof, and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands, tenements, hereditaments and premises so much of such interest as shall from time to time be and remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like cases of distress for rent.

Now this language is, to my mind, essentially different from the language used in *Chapman* v. *Beecham* (1); *Doe Wilkinson* v. *Goodier* (2); and *Pollitt* v. *Forrest* (3). The covenant is not that the mortgagee may distrain for the interest "in like "manner as landlords are authorized to do in res- "pect of distress for arrears of rent upon leases for "years;" nor "in like manner as for rent reserved by "lease;" nor does the covenant impose a penalty for which the mortgagee may distrain "as for rent in

(1) 3 Q. B. 723.
(2) 10 Q. B. 957.
(3) 11 Q. B. 962.

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arrear " as in *Pollitt* v. *Forrest*, but it is that the mortgagee may distrain upon the lands and for the interest, and recover it by way of rent reserved as in the case of a demise, thus, as it appears to me, plainly declaring that the interest shall be deemed to be rent reserved and recoverable as such. But it is said that the introduction into the clause of the words " as in the case of a demise of the said lands, &c.," is quite inconsistent with the relationship of landlord and tenant being created; but on the contrary, the language appears to me to be sufficiently appropriate to the object in view, which was not to create an indenture of demise merely, which the legislature knew to be an instrument which in its terms is different from an indenture of mortgage, but in an indenture of mortgage to attach the relationship of landlord and tenant to that of mortgagee and mortgagor, with all the incidents of the former relationship as in the case of a demise—just as if the parties should have said that although this is an indenture of mortgage, and the parties to it are called mortgagee and mortgagor, the relationship of landlord and tenant shall also exist between the parties, and the interest payable by the mortgagor shall be paid to and recoverable by the mortgagee by way of rent reserved upon the indenture of mortgage, just as in the case of a pure indenture of demise. The language of the statute appears, to my mind, to be abundantly sufficient to superadd the relationship of landlord and tenant to that of mortgagee and mortgagor, upon the authority of *West* v. *Fritche* (1); *Doe Dixie* v. *Davies* (2); *Pinhorn* v. *Souster* (3); *Doe Bastow* v. *Cox* (4); *Brown* v. *Metropolitan Counties, &c., Society* (5); *Morton* v. *Woods* (6); and being sufficient for that purpose I do not think that we should be

(1) 3 Ex. 216.
(2) 7 Ex. 89.
(3) 8 Ex. 763.
(4) 11 Q. B. 122.
(5) 1 El. & El. 832.
(6) L. R. 3 Q. B. 658.

justified in diminishing its force. However to a clause which, to my mind, is in itself sufficient, the parties to the mortgage before us, to make assurance doubly sure, have introduced a further clause whereby the mortgagor in express terms attorns to, and becomes tenant at will to the mortgagee, subject to the proviso for redemption contained in the mortgage. I am unable to see how we can declare that the relationship of landlord and tenant, with all its incidents, does not exist without declaring that the plainly expressed intention of the parties shall not prevail. The appeal therefore must, in my opinion, be allowed and the judgment of the Court of Queen's Bench be restored.

Appeal dismissed without costs.

Solicitors for appellants: *Macdonald, Macdonald and Marsh.*

Solicitors for respondents: *Hardy, Wilkes, Jones and D. Brooke.*