[HIGH COURT OF AUSTRALIA.]

PARTRIDGE . . . . . APPELLANT;
PLAINTIFF,

AND

McINTOSH AND SONS LIMITED . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 8, 9; *Aug.* 21.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Distress—Distress for rent—Who may distrain—Mortgagee under registered statutory second mortgage containing attornment clause—Operation as demise to mortgagor reserving rent service incident to reversion—Operation as estoppel between mortgagor and mortgagee—Right of distress against goods of stranger—Landlord and Tenant Act 1899 (*N.S.W.*) (*No.* 18 *of* 1899), *sec.* 55*.

Real Property (*N.S.W.*)—*Mortgages, charges and encumbrances—Powers and remedies of mortgagee—Distress—Real Property Act* 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *secs.* 57, 60, 63*.

The goods of a stranger not a party nor a privy to the estoppel created by an attornment of tenancy to a person having no reversion are not liable to distress although found upon the premises the subject of the attornment.

*The *Real Property Act* 1900 (N.S.W.) provides, by sec. 57:—"Any mortgage or encumbrance under this Act shall have effect as a security but shall not operate as a transfer of the land thereby charged . . ." By sec. 60: "The mortgagee or encumbrancee upon default in payment of the principal sum or any part thereof, or of any interest . . . or rent-charge secured by any mortgage or encumbrance may—(*a*) enter into possession of the mortgaged or encumbered land by receiving the rents and profits therefor; or (*b*) distrain upon the occupier or tenant of the said land under the power to distrain hereinafter contained for the rent then due; or (*c*) bring an action of ejectment to recover the said land, either before or after entering into the receipt of the rents and profits thereof or making any distress as aforesaid, and either before or after any sale of such land effected under the power of sale given or implied in his memorandum of mortgage or of encumbrance in the same manner in which he might have made such entry or distress or brought such action if the principal sum or annuity were secured to him by a conveyance of the legal estate in the land so mortgaged or encumbered."

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A mortgagee under the *Real Property Act* 1900 (N.S.W.) is entitled to a statutory charge which gives him no estate or interest in the land available as a reversion to which distress might be incident.

By memorandum of second mortgage under the *Real Property Act* 1900 (N.S.W.) to secure repayment of a certain sum, the mortgagor had attorned tenant at a certain rental and was in possession of the mortgaged premises. He made default in payment under the mortgage, and the mortgagee, treating the moneys due as rent, levied a distress and seized and sold the goods and chattels upon the mortgaged premises, including goods the property of the mortgagor's wife, who was not a party to the mortgage. The mortgagee had not served notice demanding to enter into receipt of the rents and profits of the mortgaged premises.

Held, that the attornment clause operated only to create an estoppel *inter partes* and therefore that the mortgagee did not have the right to distrain upon the goods of the mortgagor's wife upon the mortgaged premises.

Decision of the Supreme Court of New South Wales (Full Court): *Partridge* v. *McIntosh*, (1932) 33 S.R. (N.S.W.) 69; 50 W.N. (N.S.W.) 38, reversed on this point.

Held, also, that sec. 60 of the *Real Property Act* 1900 could not be relied upon by the mortgagee to justify the distraint.

Decision of the Supreme Court affirmed on this point.

APPEAL from the Supreme Court of New South Wales.

Vivian Archibald Chandos Partridge was the registered proprietor of an estate in fee simple in land under the *Real Property Act* 1900 (N.S.W.). He gave a mortgage over the land to the trustees of the Manchester Unity Independent Order of Oddfellows Friendly Society and a second mortgage to McIntosh & Sons Ltd. Both mortgages were duly registered under the *Real Property Act*. The second mortgage was to secure a sum of £1,500 and interest thereon. It

By sec. 63: "(1) Whenever a mortgagee or encumbrancee gives notice of his demanding to enter into receipt of the rents and profits of the mortgaged or encumbered land to the tenant or occupier or other person liable to pay or account for the rents and profits thereof, all the powers and remedies of the mortgagor or encumbrancer in regard to receipt and recovery of, and giving discharges for, such rents and profits, shall be suspended and transferred to the said mortgagee or encumbrancee until such notice be withdrawn or the mortgage or encumbrance shall be satisfied, and a discharge thereof duly registered."

* The *Landlord and Tenant Act* 1899 (N.S.W.) provides, by sec. 55:—"For the purposes of this Part of this Act the word 'rent' shall be held to mean any rent reserved upon any demise lease or contract whatsoever." "This Part" is Part V. headed "Distress for rent and replevin."

contained an attornment clause as follows :—" I hereby attorn and become tenant from week to week of the said mortgagee of the premises hereby mortgaged or such part or parts thereof as now is or are or shall from time to time during the continuance of this security be in my occupation at the yearly (*sic*) rent of £15 clear of all deductions but so that such rent shall be accepted in or towards satisfaction of the interest hereby secured and any surplus thereof in or towards the satisfaction of the principal moneys hereby secured : Provided always and it is hereby agreed and declared that it shall be lawful for the mortgagee, after default as aforesaid at any time without giving previous notice of its intention so to do to enter upon and take possession of the said mortgaged property and to determine the tenancy created by the aforesaid attornment and that neither the receipt of the said rent nor the tenancy created by the aforesaid attornment shall render the mortgagee liable to account as mortgagee in possession." Partridge made default under the second mortgage and the mortgagee, McIntosh & Sons Ltd., distrained upon goods upon the premises, amongst which were certain goods, comprising a pianola, a gramophone and silverware, the property of Partridge's wife. The mortgagee had not given any notice demanding to enter into the receipt of the rents and profits of the mortgaged premises to the tenant or occupier or other person liable to pay or account for the rents and profits thereof. Mrs. Partridge brought an action against the mortgagee for seizing her goods under the distress. The jury found that the goods were her property and that the value of such goods was £315. The parties thereupon agreed that the trial Judge, without expressing any opinion on the law relating to the matter, should take a formal verdict for Mrs. Partridge in the sum of £315, but that judgment was not to be entered until the determination by the Full Court of the Supreme Court of the following questions of law :—" (1) Whether the mortgagee had the lawful right by virtue of its mortgage to distrain upon the goods of Mrs. Partridge upon the mortgaged premises ? and (2) Whether such right existed without the service of a notice by the mortgagee demanding to enter into the receipt of the rents and profits of the mortgaged premises of the tenant or occupier or other person liable

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to pay or account for the same ? " The Full Court answered both questions in the affirmative : *Partridge* v. *McIntosh* (1).

From this decision Mrs. Partridge now appealed, *in forma pauperis*, to the High Court.

J. W. Shand (with him *McLelland*), for the appellant. Unless a person has a legal reversion he has no right to levy distress except in the case of estoppel (*Tadman* v. *Henman* (2)). This position is unaffected by the provisions of sec. 55 of the *Landlord and Tenant Act* 1899 (N.S.W.), which are based upon similar provisions contained in 2 Wm. & M., sess. 1, c. 5. The decision in *Smith* v. *Aubrey* (3) was based upon *Syllivan* v. *Stradling* (4), which in turn was based entirely upon the provisions of the statute 11 Geo. II. c. 19, and therefore does not apply in this case. *Jolly* v. *Arbuthnot* (5); *Morton* v. *Woods* (6) and *Ex parte Punnett* ; *In re Kitchin* (7) were so decided on the ground of estoppel. *Kearsley* v. *Philips* (8) only decides that as the mortgagee in that case had the legal estate he could exercise all the remedies incident thereto. The issue in *In re Stockton Iron Furnace Co.* (9) was whether there was a real intention to create the relationship of landlord and tenant or some fraudulent intention which might defeat creditors, and the dictum of *James* L.J. (10) is without support.

[DIXON J. referred to *Australian Mutual Provident Society* v. *Geo. Myers & Co. Ltd. (In Liquidation)* (11).]

Although tenancies can be created by estoppel third parties are not estopped from disputing the landlord's title (*Tadman* v. *Henman* (2) ; *Ex parte Wilson* ; *Re Bavister* (12)).

[DIXON J. referred to *Holdsworth's History of English Law*, vol. III.

[STARKE J. referred to *Guest's The Transfer of Land Act* 1890 (Vict.) and *Wiseman's The Transfer of Land* (Vict.), 2nd ed. (1931).

[EVATT J. referred to *Moore* v. *Lee* (13).]

(1) (1932) 33 S.R. (N.S.W.) 69 ; 50 W.N. (N.S.W.) 38.
(2) (1893) 2 Q.B. 168.
(3) (1849) 7 U.C.R. (Q.B.) 90.
(4) (1764) 2 Wils. 208 ; 95 E.R. 769.
(5) (1859) 4 DeG. & J. 224 ; 45 E.R. 87.
(6) (1868) L.R. 3 Q.B. 658 ; (1869) L.R. 4 Q.B. 293.
(7) (1880) 16 Ch. D. 226.
(8) (1883) 11 Q.B.D. 621.
(9) (1879) 10 Ch. D. 335.
(10) (1879) 10 Ch. D., at p. 357.
(11) (1931) 47 C.L.R. 65.
(12) (1925) 25 S.R. (N.S.W.) 375; 42 W.N. (N.S.W.) 83.
(13) (1871) 2 V.R. (L.) 4.

The principles enunciated by *Parke* B. in *Daintry* v. *Brocklehurst* (1) are not applicable because here the legal estate was not in the respondent, and the appellant was a person who had goods at a place where she was entitled to have them. The only purpose of the statute, 2 Wm. & M., sess. 1, c. 5, was to give a power of sale which had not previously existed; it does not extend the right to distress (*British Mutoscope and Biograph Co.* v. *Homer* (2)). Sec. 2 of that statute was dealt with in *Slapp* v. *Webb* (3), following which the Act 15 Vict. No. 11 (N.S.W.) was enacted, and sec. 24 of that Act subsequently became sec. 55 of the *Landlord and Tenant Act* 1899 (N.S.W.). The power to distrain given to a mortgagee by sec. 60 of the *Real Property Act* 1900 (N.S.W.) is in respect only of rent due to the mortgagor and does not extend to rent due by the mortgagor to the mortgagee. Under the Act the power to distrain is given not against the mortgagor but against the tenants of the mortgagor. There is no right to distrain on the goods of strangers. Secs. 60 and 63 of the *Real Property Act* should be read together (*Bank of N.S.W.* v. *Palmer* (4); see also *Hogg's Registration of Title to Land throughout the Empire* (1920), p. 244, and *Canaway* on the *Real Property Act* 1900 (N.S.W.) (1902), pp. 109, 110). Sec. 61 of the *Real Property Act* 1861 (Q.) differs in several important features from sec. 60 of the *Real Property Act* 1900 (N.S.W.), therefore *Australian Mutual Provident Society* v. *Geo. Myers & Co. Ltd.* (*In Liquidation*) (5) is not applicable. In the circumstances the respondent had no right to distrain either at common law or under the *Real Property Act* 1900. Even if that Act does confer such a right upon the respondent the requirement of sec. 63 as to notice has not been complied with.

Nicholas (with him *Emerton*), for the respondent. Sec. 55 of the *Landlord and Tenant Act* 1899 makes a distinction between the law in force in New South Wales and the law introduced into England by 2 Wm. & M., sess. 1, c. 5. Rent is something which connotes that the landlord has a reversion. By defining "rent" in sec. 55 as meaning "any rent reserved upon any demise lease or contract

(1) (1848) 3 Ex. 207, at pp. 209, 210; 154 E.R. 818, at p. 819.
(2) (1901) 1 Ch. 671.
(3) (1850) 1 S.C.R. (N.S.W.) App. 54.
(4) (1881) 2 N.S.W.L.R. 125.
(5) (1931) 47 C.L.R. 65.

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whatsoever" the legislature enlarged the power conferred by 2 Wm. & M., sess. 1, c. 5, and made it clear that for the purposes of "distress" rent is not confined to something which issues from the land. It was intended that power of distress was to apply apart from legal technicalities however the relationship of landlord and tenant was created.

[EVATT J. referred to *Walsh* v. *Lonsdale* (1).]

By the combined effect of secs. 34, 37, 55 and 56 of the *Landlord and Tenant Act*, and the Act generally the respondent, by virtue of an attornment clause which constitutes a contract, was within its rights in selling the goods in question. The right of a landlord, under a relationship of landlord and tenant, to enter upon the land and take and sell goods in satisfaction of rent in arrear, is a right which does not depend upon privities between landlord and tenant and the person holding the goods (*Stephen's Commentaries on the Laws of England*, 14th ed. (1903), vol. I., pp. 413 *et seqq.*). The holder of the goods, if he is a stranger, has his remedy against the tenant. The relevant passages in the judgments in *In re Stockton Iron Furnace Co.* (2), and in *Kearsley* v. *Philips* (3), are thus explained.

[STARKE J. referred to *Keech* v. *Hall* (4).]

The surprise expressed by *James* L.J. in *Ex parte Punnett*; *In re Kitchin* (5), was only as to the extent of the estoppel which was held to be good in *Morton* v. *Woods* (6).

[McTIERNAN J. referred to *Redman's Law of Landlord and Tenant*, 8th ed. (1924), p. 21, as to attornment.]

The author accepts *Tadman* v. *Henman* (7) but that case was wrongly decided as the Judge directed his attention to facts which were not relevant to the case, and too much reliance was placed upon estoppel. The respondent is not relying upon any such right of possession as was claimed in *Johnson* v. *Baytup* (8). The argument deduced by *Davidson* J. in the judgment of the Full Court was not brought before the Court in *Tadman* v. *Henman*, and

(1) (1882) 21 Ch. D. 9.
(2) (1879) 10 Ch. D. 335, at p. 357, by *James* L.J.
(3) (1883) 11 Q.B.D., at p. 625, per *Brett* M.R., and p. 626, per *Fry* L.J.
(4) (1778) 1 Dougl. 21; 99 E.R. 17; Sm. L.C., 11th ed. (1903), vol. I., p. 511.
(5) (1880) 16 Ch. D., at p. 232.
(6) (1868) L.R. 3 Q.B. 658; (1869) L.R. 4 Q.B. 293.
(7) (1893) 2 Q.B. 168.
(8) (1835) 3 A. & E. 188; 111 E.R. 384.

Jellicoe v. *Wellington Loan Co.* (1). As to whether estoppel binds a stranger, see *Knight* v. *Smythe* (2). See also *Cole* on *Ejectment* (1857), pp. 211, 215-219; *Rennie* v. *Robinson* (3), and *Marriott* v. *Edwards* (4).

[RICH J. referred to *Lewis* v. *Baker* (5).]

The right to distrain follows from the relation of landlord and tenant (*Woodfall* on *Landlord and Tenant*, 22nd ed. (1928), p. 557) and is a right to distrain on all goods found upon the premises. The effect of *Daintry* v. *Brocklehurst* (6); *Tadman* v. *Henman* (7); *Cuthbertson* v. *Irving* (8); *Jolly* v. *Arbuthnot* (9); *Morton* v. *Woods* (10), and *Ex parte Wilson*; *Re Bavister* (11) is to show that there is an estate created in the tenant which may arise either by agreement or by estoppel and the Court gives effect to the estate which is created. See also *Smith's Leading Cases*, 13th ed. (1929), vol. II., pp. 767, 769. If the relationship of landlord and tenant is created then the right of distress follows as a matter of course (*West* v. *Fritche* (12)). Such a right would flow from a tenancy at will (*In re Threlfall*; *Ex parte Queen's Benefit Building Society* (13)). See also *Linsey* v. *Edwards* (14). The power of distress given by the *Real Property Act* is not a power given as between landlord and tenant; the rights of persons under that Act do not interfere with their rights under the general law (*Barry* v. *Heider* (15)). Although the *Real Property Act* does to a very limited extent alter the law which previously existed with regard to the relationship of mortgagor and mortgagee, there is nothing in the Act which prevents any two persons from assuming another relationship (*Ex parte Wilson*; *Re Bavister* (11)).

[EVATT J. referred to *Davis* v. *McConochie* (16).]

(1) (1886) 4 N.Z.L.R. (S.C.) 330.
(2) (1815) 4 M. & S. 347; 105 E.R. 862.
(3) (1823) 1 Bing. 147; 130 E.R. 60.
(4) (1834) 6 C. & P. 208; 172 E.R. 1211.
(5) (1905) 1 Ch. 46.
(6) (1848) 3 Ex. 207; 154 E.R. 818.
(7) (1893) 2 Q.B. 168.
(8) (1859) 4 H. & N. 742; 157 E.R. 1034.
(9) (1859) 4 DeG. & J. 224; 45 E.R. 87.
(10) (1868) L.R. 3 Q.B. 658; (1869) L.R. 4 Q.B. 293.
(11) (1925) 25 S.R. (N.S.W.) 375; 42 W.N. (N.S.W.) 83.
(12) (1848) 3 Ex. 216; 154 E.R. 822.
(13) (1880) 16 Ch. D. 274.
(14) (1836) 5 A. & E. 95; 111 E.R. 1102.
(15) (1914) 19 C.L.R. 197.
(16) (1915) 15 S.R. (N.S.W.) 510; 32 W.N. (N.S.W.) 172.

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The appellant appears *in forma pauperis* and should not be awarded any costs: Rules of the High Court, Part I., Order III., r. 9.

Shand, in reply. The possession which arises by way of estoppel was originally carelessly termed an "estate." It should not be regarded as a real estate at law (*Woodfall* on *Landlord and Tenant*, 22nd ed. (1928), p. 528; *Cuthbertson* v. *Irving* (1)). The right of distress depends upon possession of a legal estate out of which rent issues; such an estate does not extend beyond a leasehold interest in the land (*Whitehall Court Ltd.* v. *Ettlinger* (2)). A mere possessory right does not give a right of distress: see *Redman's Law of Landlord and Tenant*, 8th ed. (1924), pp. 466 *et seqq.* *Parry* v. *House* (3) and *Poole* v. *Longuevill* (4), referred to in *Smith* v. *Aubrey* (5) depended upon statutory provisions which do not apply here.

Cur. adv. vult.

Aug. 21.

The following written judgments were delivered:—

RICH J. In my opinion the appeal should be allowed. I have read the judgment of my brother *Dixon* and agree with it.

STARKE J. Partridge was possessed of, and registered as the proprietor of, certain land under the *Real Property Act* 1900 of New South Wales. He gave a first mortgage over the land to the trustees of the Manchester Unity Independent Order of Oddfellows Friendly Society, which was registered under the Act, and a second mortgage to the respondent McIntosh & Sons Ltd., which was also registered under the Act. This mortgage was to secure a sum of £1,500, payable on 22nd August 1929, with interest thereon at 12 per cent. per annum payable quarterly, but reducible to 10 per cent. on punctual payment. It also contained the following attornment clause: "And I hereby attorn and become tenant from week to week of the said mortgagee of the premises hereby mortgaged or such part or parts thereof as now is or are or shall from time to

(1) (1859) 4 H. & N., at p. 755; 157 E.R., at p. 1040.
(2) (1920) 1 K.B. 680.
(3) (1817) Holt 489; 171 E.R. 315.
(4) (1670) 2 Wms. Saund. 282; 85 E.R. 1063, at p. 1069, note (*k*).
(5) (1849) 7 U.C.R. (Q.B.) 90.

time during the continuance of this security be in my occupation at the weekly rent of £15 clear of all deductions but so that such rent shall be accepted in or towards satisfaction of the interest hereby secured and any surplus thereof in or towards satisfaction of the principal moneys hereby secured. Provided always and it is hereby agreed and declared that it shall be lawful for the mortgagee after default as aforesaid at any time without giving previous notice of its intention so to do, to enter upon and take possession of the said mortgaged property and to determine the tenancy created by the aforesaid attornment and that neither the receipt of the said rent nor the tenancy created by the aforesaid attornment shall render the mortgagee liable to account as mortgagee in possession."

The *Real Property Act* 1900, by sec. 57, prescribes that such mortgages shall have effect as a security, but shall not operate as a transfer of the land thereby charged. Partridge made default under the second mortgage, and the respondent distrained upon goods upon the premises, amongst which were certain goods belonging to the appellant, Partridge's wife. She brought an action against the respondent for seizing her goods under the distress. The trial Judge stated certain questions of law for determination by the Supreme Court of New South Wales, which answered them in favour of the respondent. Hence the present appeal.

The attornment clause created the relationship of landlord and tenant between Partridge and the respondent. But it operated by way of estoppel only, for the respondent had neither an estate in nor possession of the land. There was no express demise from the respondent to Partridge, but a demise need not be express : a mere acknowledgment, such as an attornment clause, by a person in possession of land, of tenancy in another, sufficiently establishes a legal reversion in the landlord, to which the rent reserved is incident. Thus *Blackburn* J., in *Morton* v. *Woods* (1) says :—"Then comes the second objection, that a considerable portion of the premises was already mortgaged, and the mortgagor had only the equity of redemption, and it was contended, and rightly, that there must be a reversion in order to give a right of distress ; but then there may be a reversion by estoppel ; that is when one party is let into

(1) (1868) L.R. 3 Q.B., at pp. 669-670.

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possession by the other under an agreement that the one shall be tenant and the other landlord, both parties are estopped as between themselves from denying the other's title. But in answer to that, it is said that in the present case it is disclosed on the face of the instrument evidencing the agreement of the parties, that the mortgagor had not the legal estate; but I do not see, on principle, why that should make any difference. The principle is, that if it is agreed that one shall be tenant to the other, both are estopped from disputing the other's title as landlord, and even though it be expressly stated that the landlord has no legal estate, still if they agree that the relation of landlord and tenant shall be created, and this agreement is carried out by the one being let into possession, as between them the relation of landlord and tenant is created, and they are just as much estopped as if there had been no such statement. There was no letting into possession here, but there was what amounted to the same thing, a continued occupation, instead of a change of possession and then a letting into possession again." "The foundation of the doctrine being" as *Cababé* says in *Principles of Estoppel* (1888), p. 22, "that the parties must be deemed to have dealt with one another, on the basis of their rights being regulated by a conventional state of facts, it makes no difference, supposing the actual state of facts to differ from the conventional, that an admission of the former should have been made, or even that they should appear in a deed of demise; the true inference being that the parties desired their legal position to be regulated by the conventional state of facts, notwithstanding that the actual facts were different."

According to the argument addressed to us, the tenancy carries with it, therefore, the power of distress, with all the usual rights and incidents, whether of the common law or by statutes, of a rent service. So it does, as between the parties. Estoppel, however, is only a personal matter, between the particular parties. "Outside this transaction, and in respect of matters unconnected with it, there is no ground whatever for exacting the admission, from either party; and, of course, so far as third parties not privy with nor claiming under either of them are concerned, *their* rights cannot be thereby affected in any way, either beneficially or prejudicially; the

rights and liabilities of such parties depending upon the actual facts, which must be proved in the ordinary way. . . . But although the estoppel is only a personal matter between the particular parties, yet to really give the parties the benefit of it, and subject them to the burden of it, it is essential that not they only, but those of whom it can be predicated, that they are their 'representatives in interest' should likewise have the benefit of and be subject to the burden of the admission. Upon any one, therefore, upon whom all the rights and obligations of any legal entity devolve, such as an executor, administrator, or trustee in bankruptcy, there will devolve, as one of such rights and obligations, the right to exact, or the obligation to be subjected to the admission; and so, too, upon any one, upon whom the rights and obligations arising out of the particular transaction that give rise to the estoppel devolve, as, for example, a purchaser or assignee, that will also devolve *this* right and this obligation" (*Cababé, Principles of Estoppel*, (1888), pp. 111-113; *Ewart* on *Estoppel* (1900), pp. 187 *et seqq.*; *Richards* v. *Jenkins* (1)). And it has been held in the case of a tenancy created by estoppel that an owner of goods on the demised premises by permission of the tenant is not estopped from disputing the landlord's title in an action against the landlord for an illegal distress. Estoppel as between the landlord and the tenant does not extend to him (*Pinhorn* v. *Souster* (2); *Tadman* v. *Henman* (3); *Jellicoe* v. *Wellington Loan Co.* (4)). It is contended that there are high authorities to the contrary, e.g., *West* v. *Fritche* (5); *Jolly* v. *Arbuthnot* (6); *Morton* v. *Woods* (7); *Yeoman* v. *Ellison* (8); *In re Stockton Iron Furnace Co.* (9); *Ex parte Punnett*; *In re Kitchin* (10); *In re Threlfall*; *Ex parte Queen's Benefit Building Society* (11); *Ex parte Voisey*; *In re Knight* (12). But these cases create, I think, no difficulty; they are all cases in which the goods distrained were goods of a party bound by the estoppel—either the goods of the tenant himself or those of a party claiming under him. The decision in *Kearsley*

(1) (1887) 18 Q.B.D. 451.
(2) (1852) 8 Ex. 138, at p. 145; 155 E.R. 1292, at p. 1295, per *Parke* B. *in arguendo*.
(3) (1893) 2 Q.B. 168.
(4) (1886) 4 N.Z.L.R. (S.C.) 330.
(5) (1848) 3 Ex. 216; 154 E.R. 822.
(6) (1859) 4 DeG. & J. 224; 45 E.R. 87.
(7) (1868) L.R. 3 Q.B. 658; affirmed (1869) L.R. 4 Q.B. 293.
(8) (1867) L.R. 2 C.P. 681.
(9) (1879) 10 Ch. D. 335.
(10) (1880) 16 Ch. D. 226.
(11) (1880) 16 Ch. D. 274.
(12) (1882) 21 Ch. D. 442.

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v. *Philips* (1), however, and an observation of *James* L.J. in the *Stockton Iron Furnace Co.'s Case* (2) do create some difficulty.

In *Kearsley* v. *Philips*, one Kearsley by an indenture of mortgage demised certain premises for the residue then unexpired (except the last day) of a term of 993 years. By the mortgage Kearsley attorned and became tenant to the defendants at a yearly rent, and it was further provided that it should be lawful for the mortgagees to determine the tenancy by giving to the mortgagor or his assigns seven days' notice in that behalf. Kearsley being mortgagor demised the premises to one King, who granted his goods by bill of sale to the plaintiff. The defendants distrained the goods so granted to the plaintiff, which were on the mortgaged premises. The distraint was held lawful. But in this case an actual legal tenancy was created. The defendants had a right or interest, if not an estate, in the premises; they were entitled to the unexpired residue (except the last day) of a term of 993 years. It was a right of property, assignable and demisable (*Leake* on *Property in Land*, 2nd ed. (1909), p. 150). "The mortgagee," as *Denman* C.J. said in *Doe d. Parsley* v. *Day* (3) "before entry into the leasehold part of the premises, had an interesse termini which was sufficient (*Sheppard's Touchstone*, p. 269; *Coke Litt.* 46 (*b*)) to enable him to demise to John Doe." So, as *Fry* L.J. observed in *Kearsley's Case* (4), "the real point" was "whether by the so-called attornment clause the defendants re-demised the premises to James Kearsley" and he was "of opinion that they did." See also *Doe d. Parsley* v. *Day* (5); *Wilkinson* v. *Hall* (6), and note the citation by *Fry* L.J. during argument in *Kearsley* v. *Philips* (7) of *Litt. Tenures*, ss. 554, 555, and *Coke Litt.* 311 (*a*). "The question", as *Richmond* J. said in *Jellicoe* v. *Wellington Loan Co.* (8), "whether a mere reversion by estoppel would warrant the distraint of the goods of a stranger did not arise on the facts of the case of *Kearsley* v. *Philips*." But the observation of *Fry* L.J. in *Kearsley's Case* (4), that the plaintiff's counsel had failed to satisfy him that in the case of a mere attornment the right

(1) (1883) 11 Q.B.D. 621.
(2) (1879) 10 Ch. D. 335.
(3) (1842) 2 Q.B. 147, at p. 156; 114 E.R. 58, at p. 62.
(4) (1883) 11 Q.B.D., at p. 626.
(5) (1842) 2 Q.B. 147; 114 E.R. 58.
(6) (1837) 3 Bing. N.C. 508; 132 E.R. 506.
(7) (1883) 11 Q.B.D., at p. 624.
(8) (1886) 4 N.Z.L.R., at p. 334.

to distrain a stranger's goods does not exist, was pressed upon us, as also was the fact that *Brett* M.R. and *Lindley* L.J. in the same case (1), appear to have thought, as did *James* L.J. in the *Stockton Iron Furnace Co.'s Case* (2), that a tenancy created by an attornment clause in a mortgage had "all the incidents of a tenancy both as regards the parties themselves and a third person whose goods happen to be on the property." But in *Punnett's Case* (3), decided subsequently to the *Stockton Case* (4), *Jessel* M.R. was "not aware of the decision" in *Morton* v. *Woods* (5), and *James* L.J. was "startled by it."

The present case therefore falls for decision upon principle rather than upon the authority of any decided case. And in my opinion the true principle is that the rights of third parties not privy with nor claiming under parties bound by an estoppel cannot be affected thereby, and that their rights depend upon the actual facts and not upon any conventional state of facts. Accordingly it follows that the decision below cannot be supported.

Some reliance was placed upon sec. 60 of the *Real Property Act* 1900, but I agree with the learned Judges of the Supreme Court that this section affords no justification for the distress upon the appellant's goods. It was conceded that the *Bills of Sale Act* 1898 of New South Wales does not affect the case.

The result is that the appeal should be allowed, and the first question of law stated for the opinion of the Supreme Court answered in the negative.

DIXON J. The registered proprietor of an estate in fee simple in land under the *Real Property Act* 1900 (N.S.W.) gave a mortgage containing an attornment clause which stated that he thereby attorned and became tenant from week to week of the mortgagee of the mortgaged premises at a specified weekly rent, but so that the rent should be accepted in or towards satisfaction of interest and thereafter of principal secured by the mortgage. The weekly rent fixed by the attornment clause was much greater than was required to keep down the interest payable under the mortgage. Its payment

(1) (1883) 11 Q.B.D., at pp. 625, 626.
(2) (1879) 10 Ch. D., at p. 357.
(3) (1880) 16 Ch. D., at pp. 231, 232.
(4) (1879) 10 Ch. D. 335.
(5) (1868) L.R. 3 Q.B. 658; (1869) L.R. 4 Q.B. 293.

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having fallen into arrear, the mortgagee levied a distress upon the mortgaged premises which were occupied by the mortgagor. Under the distress some chattels were seized and sold which proved to be the property of the mortgagor's wife. The question for our determination is whether the mortgagee can justify the trespass to and conversion of her goods for which, otherwise, on these facts he would be responsible.

No justification can be found in sec. 60 of the *Real Property Act* 1900, and the question depends upon the effect of the attornment clause.

The statutory mortgage does not upon registration effect a transfer to the mortgagee of an estate in the land, or confer upon him an immediate right to possession or to perception of the profits of the land. He has, of course, an interest in the land at law, but it is in the nature of a charge. Accordingly, the attornment clause cannot, as it might under a first mortgage under the general law, operate by way of demise to the mortgagor reserving a rent service incident to a reversion vested in the mortgagee. Subject to exceptions not material to the present case, the remedy of distress as of common right "that is, by the common law, without any particular reservation or provision of the party" belongs only to a rent service; and a rent service must be incident to a reversion. *Coke Litt.* 142 (*a*). "If the donor or lessor reserve not the reversion, he cannot distrain of common right; but he may reserve to himself a power of distraining, or the reservation of the rent may be good to bind the lessee by way of contract, for the performance whereof the lessor shall have an action of debt" (2 *Bac. Abr. Tit. Distress* (*A*), p. 691). A distress under a power of distraining arising simply from "a particular reservation or provision of the parties" cannot be levied upon the goods of strangers. But from such an acknowledgment as that contained in the attornment clause an estoppel arises which precludes the mortgagor from relying on the absence of a reversion and imposes upon him the liabilities of a tenant. If the clause operates by way of estoppel and not otherwise, parties and privies only would be bound by the assumption that the relation of landlord and tenant subsists between the mortgagee and mortgagor and would be exposed to the distress consequent upon such a

relationship. The mortgagor's wife took under her husband neither possession of the land nor any interest therein. In reference to the situation of her goods upon the mortgaged premises, she must be considered but a mere licensee of her husband. She is, therefore, not bound by an estoppel. The question in the case is whether the clause has a further operation than to create an estoppel *inter partes*, an operation sufficient to satisfy or to overcome the rule that the remedy of distress of common right is incident to, and, therefore, requires a reversion. *Davidson* J., who delivered the judgment of the Full Court, took the view that as a result of the attornment the mortgagee stood in the relationship to the mortgagor of landlord and so, stating it briefly, was possessed of the land by his tenant: his title to the reversion could not, therefore, be disputed by strangers. In considering whether upon this, or any other ground, the mortgagee obtained the same remedy by way of distress as a reversioner, it is necessary to remember that the mortgagee not merely has no estate in the land, but, upon the terms of the statute, he was never entitled to possession of the land. In *Morton* v. *Woods* (1) where a second mortgage, that is a mortgage of an equity of redemption, contained an attornment clause, the Court treated the matter as if the mortgagee having obtained possession of the premises then let the mortgagor into possession as his tenant with the result that a reversion by estoppel arose. "The mortgagor did not go out and receive possession from the mortgagees, but that formal ceremony was not necessary, because he attorned to the 'mortgagees,' and he must therefore be in the same position as if he had gone out and come in again" (per *Lush* J. (2)). A reversion by estoppel is the result of one party's letting the other into possession as his tenant and of the other's taking possession in that character (3); and see *Cuthbertson* v. *Irving* (4). Under the general law a mortgagor in possession who gives a second mortgage assigns to the second mortgagee his equitable estate and, as between themselves, confers upon the second mortgagee, subject to the covenants contained in

(1) (1868) L.R. 3 Q.B. 658; (1869) L.R. 4 Q.B. 293.
(2) (1868) L.R. 3 Q.B., at pp. 671, 672.
(3) (1868) L.R. 3 Q.B., at p. 668, per *Cockburn* C.J.; pp. 669-670, per *Blackburn* J.; p. 670, per *Mellor* J. and p. 671, per *Lush* J.
(4) (1859) 4 H. & N., at p. 758; 157 E.R. 1034, at p. 1041.

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the mortgage, a right to possession. No difficulty arises, therefore, in conceiving the second mortgagee as first assuming possession and then letting the mortgagor back into possession as his tenant. But a statutory mortgagee under the *Real Property Act* has no immediate right to possession of the mortgaged premises as against the mortgagor. He cannot be considered as having let the mortgagor into possession under him. The estoppel between the parties is, therefore, entirely conventional. It is not the consequence of the acceptance by one party of possession from another, actual or notional. It depends altogether upon the acknowledgment expressed in the attornment clause. In *Pinhorn* v. *Souster* (1) a mortgagee of a term of years levied a distress upon the mortgaged premises, the mortgagor being in possession, and seized thereon goods of a stranger. The distress was levied under the supposed authority of a clause contained in the mortgage by which it was agreed that the mortgagor should hold the premises as tenant at will of the mortgagee at a specified yearly rent, for which rent it should be lawful for him to distrain on the premises as landlords may for rent reserved on leases for years. In an action by the stranger against the mortgagee for trespass *de bonis*, the mortgagee justified under this instrument but his plea failed to allege or disclose any title in the mortgagor to the term of years which he had purported to assure by way of mortgage. The plea was held bad. *Parke* B. said (2) :—" In the present case, there is only a title by estoppel between the parties to the deed, and it is not alleged that the plaintiff claims either through the defendant or " the mortgagor. Subsequently the case went down for trial under the general issue and proof was then given that the mortgagor was in fact entitled to the term of years which he had mortgaged to the defendant. The term had been granted to him by way of sub-demise and the proof, which was held sufficient, consisted of evidence that when the head lease was granted the head lessors were in possession of the premises and claimed an estate in possession therein. When it thus appeared that, under the mortgage, the mortgagee in truth obtained an estate or interest in the premises the conclusion suggested by the defective plea was

(1) (1852) 22 L.J. Ex. 18 ; 8 Ex. 138 ; 155 E.R. 1292.

(2) (1852) 8 Ex., at p. 145 ; 155 E.R. at p. 1295.

negatived. It was decided on the contrary that, under the operation of the clause in the mortgage, the mortgagor became actually a tenant at will of the mortgagee at a yearly rent. The remedy of distress being incident to the tenancy, the seizure of the plaintiff's goods was lawful (*Pinhorn* v. *Souster* (1)). The diverse decisions given in this one case, the first on the hypothesis demanded by the plea and the second upon the facts proved, well illustrate the principle governing distress under a mere estoppel and distress incident to a reversion. When the facts pleaded were consistent with the existence in the distrainor of no reversion, not even a reversion arising from a bare possessory title to the premises at the inception of the tenancy, the distress was justified only by the estoppel created by the provision in the mortgage and the estoppel bound no one but parties and privies. But when it appeared that a term had vested in the mortgagee so that he might be possessed in reversion subject to the mortgagor's tenancy at will at a rent, there was no longer any difficulty in the existence of the remedy of distress as of common right. In the same way when the vicar of a parish granted a lease of land which, although under his *de facto* control, was vested in his bishop who had neither authorized nor ratified the lease, *Charles* J. held that the lease had no operation except by estoppel and goods upon the premises belonging to a stranger to the estoppel could not be distrained upon (*Tadman* v. *Henman* (2)). However clear the difference may be in principle between an estoppel binding the parties to the rights and obligations of landlord and tenant and an actual tenancy with a reversion expectant thereon, the application of the distinction has not escaped a confusion arising from some uncertainty as to what may amount to a sufficient reversion. When a lessee has been let into possession of the demised premises by a lessor in actual possession who, nevertheless, has no legal estate or interest in the land, it is less clear than once might have been supposed that the lessor has no reversion. Before the term is granted his possession is good against strangers to the title and at the expiration or determination of the term he will be entitled to resume it. In *Tadman* v. *Henman* (3) according to some

(1) (1853) 22 L.J. Ex. 266; 8 Ex. 763; 155 E.R. 1560.

(2) (1893) 2 Q.B. 168, at p. 171.

(3) (1893) 2 Q.B. 168.

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reports of the argument (e.g. (1)) it was claimed on this ground that a tenancy existed otherwise than by mere estoppel, because the vicar when he granted the lease had a " possessory title." The reports of *Kearsley* v. *Philips* (2), do not agree as to what *Fry* L.J. said, but, if his opinion was that such a " tenancy by estoppel " as arose in *Morton* v. *Woods* (3) conferred a right of distress extending to the goods of strangers, its justification must be based upon the ground that a " reversion by estoppel " existed good against strangers, that is to say that the mortgagee who was considered to have let the mortgagor into possession had a possessory title in reversion. The dictum of *James* L.J. in *In re Stockton Iron Furnace Co.* (4) that " such a tenancy has all the incidents of a tenancy both as regards the parties themselves and a third person whose goods happen to be on the property " is difficult to reconcile with the nature of the security in question in that case. But, unless he found some reversion in the mortgagee, the statement cannot, I think, be supported. In any case, his observations during the argument of *Ex parte Punnett*; *In re Kitchin* (5) deprive the dictum of much of its authority. But whether or no it is possible to find a sufficient reversion when the attorning tenant is actually or notionally let into possession by a person taking the attornment who has no legal estate or interest except of a possessory character, I am unable to agree with the view adopted by the Full Court that, because receipt of rents and profits or the attornment of the occupier may afford evidence of a reversionary interest good against strangers to the title, a reversion should be taken to exist sufficient to support a distress upon the premises extending to goods of third parties. The fact being that no particular estate or interest was granted by a person having any right of which he could remain seized or possessed in reversion, no evidence, not amounting to an estoppel binding the party, can establish the contrary of this fact against him.

It is needless to consider whether something short of an actual legal estate or interest may now afford a reversion to which a rent service may be incident, because in a mortgage under the *Real*

(1) (1893) 9 T.L.R. 509.
(2) (1883) 11 Q.B.D. 621; 52 L.J. Q.B. 581; 49 L.T. 435; 31 W.R. 909.
(3) (1868) L.R. 3 Q.B. 658; (1869) L.R. 4 Q.B. 293.
(4) (1879) 10 Ch. D. at p. 357.
(5) (1880) 16 Ch. D., at pp. 230, 232.

Property Act not even a right to immediate possession can be ascribed to the mortgagee. I am of opinion that under the attornment clause the goods of parties not privy to the estoppel are not distrainable upon the mortgaged premises. This view was adopted in New Zealand by *Richmond* J. in *Jellicoe* v. *Wellington Loan Co.* (1), and also in two Provinces of Canada (*Hyde* v. *Chapin Co.* (2); and *First National Bank* v. *Cudmore* (3)).

I do not see how the definition of rent in sec. 55 of the *Landlord and Tenant Act* 1899 (founded on 2 Wm. & M., sess. 1, c. 5, sec. 2) can operate to authorize the seizure of a stranger's goods under a distress levied in reliance upon the estoppel.

I think the appeal should be allowed : the order of the Full Court should be discharged, and in lieu thereof it should be ordered that the first question in the special case should be answered No, and that the plaintiff should have the costs of the special case. The cause should be remitted to the Supreme Court to be dealt with as may be just.

EVATT J. This appeal raises the question whether the defendant, who was the mortgagee under a memorandum of mortgage duly registered under the *Real Property Act* 1900, was entitled by virtue of an attornment clause therein contained to distrain upon the goods of the plaintiff, the wife of the mortgagor, which were upon the premises when the distress was made. The memorandum of mortgage was subject to a prior mortgage for £5,000 and interest in favour of the Manchester Unity Independent Order of Oddfellows Friendly Society. That prior mortgage has not been put in evidence, so that no question arises in this case as to the possible effect upon the attornment clause in the registered second mortgage of a similar clause in the first mortgage.

By clause 12 of the defendant's mortgage, the husband of the plaintiff attorned tenant from week to week of the mortgaged premises at a yearly rental of £15 (*sic*) " but so that such rent shall be accepted in or towards satisfaction of the interest hereby secured."

The judgment of the Supreme Court of New South Wales determined the question in dispute in favour of the defendant. Mr.

(1) (1886) 4 N.Z.L.R. (S.C.) 330. (2) (1916) 26 D.L.R. 381.
(3) (1917) 34 D.L.R. 201.

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J. W. Shand in his able argument for the appellant relied strongly upon the cases of *Tadman* v. *Henman* (1) and *Jellicoe* v. *Wellington Loan Co.* (2), which both emphasize the limited character of the tenancy created by mere estoppel. Upon these authorities, *Davidson* J. observed (*Partridge* v. *McIntosh* (3)) :—

> " The attention of the Court in these cases does not appear to have been drawn however to the authorities which establish clearly that the creation of the relationship of landlord and tenant by the act of a person in occupation of land at the time produces more extensive results than a mere estoppel between the parties themselves. Being an act of possession as it is termed it is evidence of title against the world."

For this criticism the learned Judge relied upon the observations of Baron *Parke* in *Daintry* v. *Brocklehurst* (4), where it was said :—

> " The plaintiffs, by having received the rent, gain a good title to the reversion against everybody but the true owner of it, even supposing they had no title at all to the reversion ; and nobody can dispute their title to the reversion, except the owner of the legal estate."

It was considered by *Davidson* J. that decisions though pronounced in ejectment actions, were also applicable here.

Cases like the present are, in my view, quite distinct from those in ejectment, where questions as to the method of proof of title, and what is sufficient *prima facie* evidence thereof, may be all important. Here, by the commanding force of statute law, the land being under the *Real Property Act* 1900, the mortgage had effect as security only, and no estate passed to the mortgagee (*Real Property Act*, sec. 57). As we know the precise state of the legal title, there is no occasion for the introduction of the doctrine of presumptive proof of title.

The outstanding feature of the case is, therefore, that the defendant had no legal reversion whatever in the land when he distrained upon it for " rent." It is driven to rely upon the theory that, between it and the mortgagor, there existed " a relationship of landlord and tenant " and the right to distrain is always " incident to such relationship."

The inclusion of attornment clauses in mortgages executed and registered in accordance with the New South Wales *Real Property Act* was not customary, even by the year 1880. Although occasional

(1) (1893) 2 Q.B. 168.
(2) (1886) 4 N.Z.L.R. (S.C.) 330.
(3) (1932) 33 S.R. (N.S.W.), at p. 76 ; 50 W.N. (N.S.W.), at p. 39.
(4) (1848) 3 Ex. 207, at p. 210 ; 154 E.R. 818, at p. 819.

instances of their inclusion may be found soon after the inception of the Act, it was only by the year 1890 that there had developed a general disposition to include them. To-day the practice is almost universal. In England the practice is well over a century old. It is obvious that the practice in New South Wales was due to a somewhat blind, though understandable copying of the English conveyancing practice.

For the distinction between the legal position in the two countries was fundamental. In England, the legal estate was vested in the mortgagee, and, apart from the difficulties created later by the *Bills of Sale Acts*, there was no reason why further security should not be obtained by the mortgagee's creating a legal tenancy and retaining a reversion to support a distress. But the position in New South Wales under the *Real Property Act* is essentially different, because the legal estate fails to reach the mortgagee.

The present respondent's argument that at common law the remedy of distress is incident to " the relationship of landlord and tenant " is stated far too broadly. It suggests that a mere factitious arrangement between A and B to regard themselves as though they were landlord and tenant, makes them landlord and tenant in law and fact, and enables the supposed landlord to levy distress upon the goods of C. This theory is quite erroneous. It results from an attempt to circumvent a common law rule as to rent service, which can only be applied, not rationalized. In the process of rationalization there is, as the present case shows, the danger of abstracting a vital element from the attempted generalization. Here, that element is the possession by the party distraining of the legal reversion. Instead of saying that the right of distress is " incident to " the " relationship " of landlord and tenant, it might, with more accuracy, be said, conversely, that where there exists a right of distress (omitting the anomalous cases of rent-charge, and, by statutory provision, of rent-seck), there must be a relationship of landlord and tenant.

The true analogy to the present case is to be found in certain English cases where the right of distress for rent-service was sought to be exercised upon land wherein the person distraining had not, at such time, any legal estate.

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A convenient starting point is the decision in *Cooper's Case* (1), which was based upon a ruling of *Fynchden* C.J. in 45 Edward III. In *Cooper's Case* the action was for replevin. The defendant avowed under a distress for rent due by the plaintiff to him upon an assignment by the defendant of a lease for a term of years vested in the defendant. There was no clause of distress contained in the assignment. The defendant had retained no reversion, but it also was said to be "the intent of the parties" that, for the residue of the term, the plaintiff was to pay rent to the defendant. The Court decided in favour of the plaintiff regarding the non-existence of a reversion as being fatal to the right of distress. They said:—"If the avowant will recover what is owing to him from the plaintiff, he must bring his action upon the contract" (1).

In *Pluck* v. *Digges* (2), an Irish case, which went to the House of Lords, it was determined that a defendant in replevin could not avow generally under the Irish statute of 25 Geo. II. c. 13, which corresponded to the English Act 11 Geo. II. c. 19. In the House of Lords, Lord *Tenterden* said (3):—

> "The rent in this case cannot be considered as rent service, or as rent reserved by a landlord and payable by his tenant. There cannot be such rent where there is no reversion."

Lord *Tenterden's* observations were directed to the point that the habendum in the sub-lease was for the same lives as in the original lease, so that it operated as an assignment, and there was no reversion to support the attempted reservation of rent.

When the case was before the Court in Ireland, *Bushe* C.J. (4) dealt exhaustively with the proposition stated in *Cooper's Case* (5) that "there is no such thing as a rent-seck, rent-service, or rent-charge issuing out of a term for years." He said that:—

> "The proposition attributed to the Court is not at all borne out by the passages referred to in *Brooke's Abridgment*, and the Year Book there cited. What is said by *Finchden* in E. 45 Edw. III., 8, pl. 10. (by mistake called 43 Edw. III., 4, in *Wilson*), is only this, 'If I have only a term for years, and let to you all my estate of the term rendering me a certain rent, I believe that I cannot distrain if the rent should be in arrear;' and for that alone the Year Book is cited by *Brooke*; and the proposition is not made to depend on

(1) (1768) 2 Wils. 375; 95 E.R. 870.
(2) (1831) 5 Bligh N.S. 31; 5 E.R. 219.
(3) (1831) 5 Bligh N.S., at p. 42; 5 E.R., at p. 223.
(4) (1831) 5 Bligh N.S., at pp. 62, 63; 5 E.R., at pp. 234, 235.
(5) (1768) 2 Wils. 375; 95 E.R. 870.

the interest being for years, but upon the fact that all the interest was granted, and no reversion was left: and that the law was, in ancient times, held to be the reverse of what is stated in *Cooper's Case* (1) in *Wilson* appears from the Year Book, 2 Edw. IV., 11, pl. 2. In that case a termor for eighty years subdemised for fifteen years, reserving rent, and distrained for that rent. *Littleton*, who was counsel in the cause, said, 'It seems that he cannot distrain on account of this reversion, for he has no reversion except the reversion of a chattel:' But *Moile* J. answered him, 'It is well enough; but if he had granted *all* his term rendering rent it would be otherwise.' "

Bushe C.J.'s summary of the position at common law was :—

"That *distress* is not *incident* to a grant of land with the reservation of an annual or periodical sum, where there is no reversion; that where there is a reversion of *any kind*, the rent reserved is *rent*, properly so called, or *rent-service*, having distress incident to it; where there is no reversion, but a clause of distress is inserted in the deed, it is a *rent-charge*, granted, as it were, by the grantee of the land to the grantor; and where there is no clause of distress reserved by the indenture, it is a *rent-seck*, which at common law did not allow the grantee to distrain, but left him to his action on the contract, by force of which alone it was due; and such continued to be the law until the 11 Ann. Ir. c. 2, s. 7 (4 G. 2, Eng. c. 28, s. 15, enacted some years before the case in *Wilson* was decided), which empowered all persons to distrain for rent-seck, according to the English Act, 'as in the case of rent reserved upon lease:'—the words of the Irish Act are, '*as in cases of rent-charges*' " (2).

The case of *Preece* v. *Corrie* (3) was decided in 1828, but not referred to in *Pluck* v. *Digges* (4). In the former case the avowant had a term expiring on November 11th, 1826, but let the premises orally from September 11th till November 11th in that year. This was found to be a demise as distinct from an assignment, but it was held that there could be no valid distress, because the whole of the interest had been parted with. The defendant had avowed generally that rent was in arrears from the plaintiff, as a tenant of Thomas White under a demise for a certain term, and that he distrained, as White's bailiff, to satisfy the arrears. But, in reply, the plaintiff alleged that, at the time of the distress, White had not "any reversionary estate, term, or interest in the premises expectant, or to take effect upon or after the expiration of the term granted to the Plaintiff by the supposed demise." After issue joined, the jury found expressly that there was a demise from White to the plaintiff, but a verdict for the plaintiff was had because of the jury's second

(1) (1768) 2 Wils. 375; 95 E.R. 870.
(2) (1831) 5 Bligh N.S., at p. 63; 5 E.R., at p. 235.
(3) (1828) 5 Bing. 24; 130 E.R. 968.
(4) (1831) 5 Bligh N.S. 31; 5 E.R. 219.

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finding that White parted with the whole of the term. A motion to set aside the verdict was dismissed, *Best* C.J. saying (1) "there is no pretence for the motion." The Court regarded the findings as not inconsistent with each other. *Gaselee* J. said (2): "In *Smith* v. *Mapleback* (3), the Court held that the lessor could not distrain upon a demise like the present, though it was held to be sufficiently a demise to entitle him to sue in *assumpsit* for the sum reserved."

Choke J. in a case of *entre sur disseisin* in Year Book 10 Edw. IV. (No. 6 Easter Term), said :—

> "On a release which gives an estate in land a man is able to reserve a rent; as in a case a man lease land for the term of another's life, and then release to that other and to his heirs in fee simple or in tail etc. he may well reserve a rent on such a release because by that release he had given that other the fee, which he had not before; but if a man disseises me, and I release to him, he rendering a certain rent, and in default of payment a re-entry etc., this is void, because by my release he had only the right that I had, because he had the fee simple before."

These observations would suggest that the attempt of the registered proprietor of a mortgage under the *Real Property Act* to reserve for himself a rent-service by an attornment clause purporting to treat the tenant in fee simple (the mortgagor) as his own tenant, should possibly be regarded as a nullity. Further it is an attempt which might have to be regarded as being inconsistent with sec. 57 of the statute, against which there can be no estoppel.

However that may be, I am quite satisfied that the attempt of the present parties to create a rent-service in favour of the respondent cannot, in the absence of a legal reversion, have any effect beyond the immediate parties to the attornment clause, and persons claiming under them. Therefore, even assuming that the mortgagor could not have set up the absence of any legal tenancy had his goods been seized, the plaintiff, a third party, is not, in respect of her goods, bound by the hypothetical tenancy.

In my opinion, the following passage from Mr. *H. Dallas Wiseman's* careful work *The Transfer of Land* (Vict.), 2nd ed. (1931), at p. 471, forcibly states the case against the present respondent :—

> "Under the Act the legal estate remains in the mortgagor and the mortgagee has only a statutory charge upon the land with (*inter alia*) the 'rights and

(1) (1828) 5 Bing., at p. 26; 130 E.R., at p. 969.

(2) (1828) 5 Bing., at p. 27; 130 E.R., at p. 969.

(3) (1786) 1 T.R. 441; 99 E.R. 1186.

remedies at law and in equity' conferred by sec. 156, and the concept of an attornment by a mortgagor under the Act is equivalent to a lease by a chargee to the legal owner of the fee simple, which, amongst other difficulties, involves a contradiction of the ordinary rules of merger of estates. Therefore, if attornments by mortgagors under the Act are to be recognized at all, as no doubt they are, their effect, it is submitted, cannot be extended beyond leases by estoppel between the parties thereto. Consequently, it is submitted that the only property which can be taken by distress under such attornments is the property of the mortgagor or of persons claiming possession under him."

Obviously, sec. 60 of the *Real Property Act* did not authorize the distraint, so that, but for one further point, the appeal should succeed. That point is this. Does not the very fact that the present mortgagor has the fee simple of the land, enable him to grant to the mortgagee a rent issuing therefrom, which, as rent-seck, cannot be distrained for at common law, but which may, since the passing of 4 Geo. II. c. 28 in England (by 9 Geo. IV. c. 83 in possible force within New South Wales) be distrained for as in the case of rent reserved upon a lease ?

On the whole, I think that the course taken by the parties to the present litigation should preclude us from considering the question whether the attornment clause may not be regarded as a grant of a rent-seck by the tenant in fee simple to a stranger. Such a suggestion has not been made on behalf of the respondent throughout the proceedings. The appellant has not produced in evidence the first mortgage, probably owing to a determination to rely upon the only point debated here and before the Supreme Court, whether a valid rent-service was created to support the distress. The point as to rent-seck would require close investigation of (1) the form of the attornment clause, (2) the possibility of the existence of a valid rent-seck in land under the *Real Property Act* where provision is made for the registration of encumbrances as well as mortgages, (3) the validity of the devastating criticism in *Pluck* v. *Digges* (1) upon the failure of the Court in *Cooper's Case* (2) to treat the ineffective attempt to reserve a rent-service as a good grant of a rent-seck sufficient to support a distress (cf. *Bullen* on *Distress*, 2nd ed. (1899), pp. 297-300 ; *Lewis* v. *Baker* (3)) and (4) the application to New South Wales of the statute 4 Geo. II. c. 28.

In my opinion the appeal should be allowed.

(1) (1831) 5 Bligh N.S. 31 ; 5 E.R. 219.
(2) (1768) 2 Wils. 375 ; 95 E.R. 870.
(3) (1905) 1 Ch. 46.

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PARTRIDGE v. McINTOSH & SONS LTD.

McTiernan J.

McTIERNAN J. I agree that the appeal should be allowed. The decisions have been fully referred to in previous judgments and I do not deem it necessary to refer to them again in detail.

Where the mortgagor continues in possession of the mortgaged lands the legal estate in which is conveyed by the mortgage to the mortgagee, and the mortgage contains an attornment and tenancy clause, the relationship of landlord and tenant is created in addition to that of mortgagee and mortgagor. In such a case "actual possession is seldom taken by a mortgagee, and followed by a subsequent demise to the mortgagor" (*In re Willis*; *Ex parte Kennedy* (1)). The circuity which would be involved in performing these acts would in that case appear to be unnecessary for the creation of the tenancy. The mortgagor's right to possession flows from the attornment and tenancy clause whereby the mortgagor and mortgagee respectively also become tenant and landlord. The former is the tenant of a particular estate, the latter as landlord is the owner of the reversion. The money which is payable by the mortgagor as rent is incident to the mortgagee's reversion and the mortgagee may therefore distrain the goods of a stranger which were on the mortgaged premises (*Kearsley* v. *Philips* (2); *In re Willis*; *Ex parte Kennedy* (3)). But in view of the special character of a mortgage of land under the *Real Property Act* 1900 the same result does not flow from an attornment and tenancy clause in a mortgage of land under that Act. In this case the mortgagor is, notwithstanding the mortgage, entitled to the possession of the mortgaged land. The position is not altered in this respect by the fact that the mortgage now in question is a second mortgage. Although the memorandum of mortgage does contain an attornment and tenancy clause, the possession of the mortgagor is not derived from any demise to him by the mortgagee. It is not true in any sense that the mortgagor was let into possession by the mortgagee. His possession cannot be explained on any such hypothesis. Hence the estate of the mortgagor resulting from the attornment and tenancy agreement in the memorandum of mortgage in the present case was a tenancy by estoppel only, and the mortgagee was not otherwise entitled to any

(1) (1888) 21 Q.B.D. 384, at p. 397, per *Lopes* L.J.
(2) (1883) 11 Q.B.D. 621.
(3) (1888) 21 Q.B.D., at p. 395.

reversion in the mortgaged lands. The appellant is neither a party nor a privy but a stranger in law to such estate or estoppel. I do not see therefore how the legality of the respondent's action in distraining the appellant's goods on the mortgaged premises can be sustained. I agree that sec. 60 of the *Real Property Act* 1900 cannot be relied upon by the respondent to justify the distraint.

Appeal allowed. Order of the Full Court discharged, and, in lieu thereof, order that the first question in the special case be answered No, and that the plaintiff have the costs of the special case. Cause remitted to the Supreme Court to be dealt with as may be just. No order as to the costs of this appeal.

Solicitors for the appellant, *C. Don Service & Co.*

Solicitors for the respondent, *J. A. Clapin & Fleming.*

J. B.