

DISTRESS CLAUSES IN MORTGAGES.

terms of clause 15, of schedule 2, 27 & 28 Vic. ch. 31, with an averment that there were due \$1,412.50 for interest, and that default had been made, and thereupon defendant Kelly distrained."

The avowry as above given does not set it forth fully as pleaded. Other important facts can be collected from the judgment, viz. : that in the covenant for payment, no day was named for payment of interest, except the one day named for payment of principal; that the distress was after default in the covenant, and was only for interest accrued due up to the day for payment of the principal. It is said to have been admitted on argument that the mortgage was drawn under the Act as to short forms of mortgages.

Clause 15, referred to in the avowry, is, "provided that the mortgagee may distrain for arrears of interest," which, under the corresponding lengthy form, amounts to this, viz. : that the mortgagee may distrain on the lands, and by distress warrant recover by way of rent reserved, as in case of a demise of the land, interest in arrear with cost of distress, as in like cases of distress for rent.

The avowry was demurred to on the ground, among others, that the distress clause did not authorize the taking goods of a stranger on the premises, but was a mere license to take the mortgagor's own goods.

Judgment was given for the demurrer; the learned judge who gave judgment, saying :—

"Upon the whole I have come to the conclusion that a clause in a mortgage that the mortgagor shall continue in possession, coupled with his occupation in pursuance of such clause, and coupled also with a covenant for distress, in the terms contained in this instrument, does create the relation of landlord and tenant at a fixed rent; that by the indenture of mortgage in this case, the tenancy created was until the day of re-payment of the princi-

pal for a determinate term, and thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the premises. I am, however, of opinion that the demurrers to these avowries must prevail; for in neither of these avowries is it alleged that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy in pursuance of such permission at the time of the distress, or at any time, which are matters as it appears to me necessary to be averred."

It will be observed that so much of the above language as relates to the creation of any tenancy between the parties is extra-judicial, for the judgment proceeded on the sole ground that the avowry showed no right in the mortgagor to continue in possession, nor that in fact he did so continue. The whole matter seems to have been gone into from the mortgage having been admitted in argument "to contain a clause providing for the mortgagor continuing in possession." So much of the judgment as referred to the creation of a *tenancy at will at an annual rent* after the day named for payment, was, as will be seen hereafter, over-ruled by the decision in Appeal.

The case came up again on an amended avowry in 19 C. P. 430.

The avowry, as reported, showed a mortgage to the defendant under the short form Act, with proviso for redemption of the land on payment of principal and interest on or before 1st February, 1867, with the distress clause, No. 15, as above, and the clause, No. 17, allowing mortgagor possession until default. It alleged that the mortgagor under that clause 17, entered and occupied at and after the taking the goods, and paid no interest; that defendant permitted the mortgagor so to occupy as his tenant; and that at the time of taking, and while mortgagor occupied, a large sum for