what end then should the truth be enquired into, which if also established for defendant, would lead to the same judgment; whereas if the plaintiff succeeds on demurrer the judgment is *respondeat ouster*. With such results to be attained before the merits are approached, I would not, though I could, authorize the two modes of trial. The order will be to discharge the summons with costs.

Summons discharged with costs.

ENGLISH REPORTS.

EXCHEQUER CHAMBERS.

Morton and Others v. Woods and Others.

Mortgage—Landlord and tenant—Attornment by mortgagor—Estoppel—Distress—Statute of Frauds, 29 Car. 2, c. 3—Bills of Sale Act, 17 & 18 Vic. c. 36.

A mortgagor in possession executed a second mortgage to the defendants, in which the prior mortgage in fee was recited.

By the second mortgage he attorned, and became tenant to the mortgagees, their heirs and assigns, of the premises thereby conveyed, for the term of ten years, if the security should so long continue.

The mortgage contained a proviso that the mortgagees, their heirs, executors, administrators or assigns, *might* re-enter at any time without demand, and determine the term of ten years, it was executed by the mortgagor, but not by the mortgagees.

The mortgagor continued in possession, and the defendants subsequently distrained for a year's rent.

Held, that by the Statute of Frauds, 29 Car. 2, c. 3, the instrument, not having been executed by the defendants, created an estate at will only; and further, that the intention of the parties, as gathered from the deed, was to create that estate, and not a lease for ten years, and that it was therefore immaterial that the deed had not been executed by the defendants.

Held also, that although it was apparent upon the face of the instrument that the mortgagor had no legal reversion which he could assign to the defendants, he having agreed to become tenant to them, was estopped from denying that they had the reversion, and that the distress was therefore valid.

Semble, that a mortgage which includes personal property is not within the Bills of Sale Act, 17 & 18 Vic. c. 36.

[Ex. Ch., 17 W. R. 414.]

Appeal from a judgment of the Court of Queen's Bench for the defendants upon a special case.

Reported 16 W. R. 979, L. R. 3 Q. B. 658.

The question, which depended upon the construction of a mortgage-deed, was whether a distress made by the defendants, the mortgagees, upon certain chattels alleged by the plaintiffs to be their property as creditors' assignees of the mortgagor, was a valid distress.

The material portions of the deed will be found in 16 W. R. 979.

Feb. 2, 3.—*Joshua Williams, Q.C.* (*Manisty, Q.C.*, and *Hugh Shield* with him), for the plaintiffs, contended,—1. That the parties did not, on the true construction of the deed, intend to create an estate at will, but a term of ten years; that the deed not being executed the term was not created, and there was no rent incident to the term, and no right of distress. 2. That the defendants were estopped from denying the recital in the deed, from which it was apparent that the mortgagor possessed only an equity of redemption, and not a legal reversion, which he could convey to the defendants, and that the mortgagor was not estopped from denying that the defendants had a legal reversion, and that there was a tenancy—that being apparent upon the face of the deed. 3. That the transaction was an evasion of the Bills of Sale Act, 17 & 18 Vic. c. 36. In addition to the authorities cited in the Court below, he referred to Bacon's Ab. Leases, Co. Litt. 576; *Disdale* v. *Isles*, 2 Lev. 88; *Newport's Case*, Skin. 431; *Penhorn* v. *Souster*, 1 W. R. 436, 8 Ex. 138, 763; and *Saunders* v. *Merryweather*, 13 W. R. 814, 3 H. & C. 902.

Kemplay, for the defendants, was not called upon.

Kelly, C. B.—The question upon this special case is, whether the distress made by the defendants can be legally supported. It has been contended by the plaintiffs that it cannot, upon the ground that the defendants had no legal estate in the premises, as the mortgagor had only an equity of redemption when he mortgaged to them, and no legal reversion which he could convey to them; and that consequently there was no rent incident to that reversion for which a distress could be made. It has been contended further, that when the terms of the deed are examined, it will appear that the relation of landlord and tenant was not created between the parties. The contention is put upon two grounds: first, that if any tenancy was contemplated by the deed, it was a tenancy for ten years, and that the deed not having been executed by the defendants, was inoperative, and created no such tenancy; and secondly, that the power of re-entry does not convert the intended lease for ten years into a mere tenancy at will, and that there was therefore no tenancy at all, and no right to rent. This argument is highly technical, but notwithstanding it must, if it is the law, be supported. The objection that the defendants had no legal estate, is correct in point of fact: that may be said of all cases where a tenancy is created by estoppel; but it becomes of primary importance in the present case, because it is argued that this tenancy, if a tenancy at all, is so only by estoppel, and that there can be no estoppel when the truth appears upon the face of the instrument itself upon which the question arises. Now it doubtless does appear upon the face of this instrument that the defendants are not legally seised of the premises, but that the legal estate was, at the time of the conveyance to them, outstanding in the first mortgagee. In support of the proposition numerous cases have been cited, but looking at the facts of those cases, and the *rationes decidendi*, it appears that they are not in point. They are either actions of covenant, or, in one case, an action of ejectment on a clause of re-entry, where it is clear that the plaintiff must fail unless he has the legal interest, and accordingly the action was held not to be maintainable. But if the authorities referred to go the length of deciding that when the truth appears there is no estoppel, they must be taken to be overruled by *Jolly* v. *Arbuthnot*, 7 W. R. 532, 28 L. J. Ch. 547, decided on appeal by Chelmsford, L. C., and binding upon us as a court of co-ordinate jurisdiction. There it was manifest upon the deeds that the receiver had no legal estate and no interest in the premises. The decision of the Master of the Rolls (7 W.R. 127, 28 L. J. Ch. 274 (was in accordance with the proposition contended for by the plaintiffs,