mortgagor could have distrained, then he could have well avowed.

The following points arose on argument:

1st. Taking it to be clear, as indeed it was, that if the mortgagee had executed the mortgage, there would have been a good valid re-demise to the mortgagor till 1st January, 1867; what was the effect of his non-execution? It was deemed of importance by the appellants to make out that there was a tenancy created to 1st January, 1867, and not a tenancy at will at the outstart; for if it were a tenancy at will, then probably it would be held to continue such down to the time of distress; whereas, if held to be a tenancy for a term till 1st January, it left it open to the appellants to contend (as the Court afterwards held) that after 1st January, the mortgagor was an overholding tenant, and so not liable to any rent.

I read the judgment of the Court, given by Draper, C. J., and it distinctly recognised a tenancy created by the mortgage up to 1st January (indeed the judgments in the Court below recognised this); but I do not remember whether this was on the ground that the acceptance of the mortgage by the mortgagee might be regarded as evidence of valid demise by parol, or whether on the ground that, as contended in argument, the term was well executed in the mortgage under the Statute of Uses. If the latter, the mortgage would have operated as a conveyance to the mortgagee to the use of the mortgagor, till default, with a shifting use to the mortgagee after default.

2nd. Whether admitting a tenancy till 1st January, 1867, such tenancy was as a matter of *construction* of the mortgage *at a rent;* and whether the distress clause was not a mere collateral agreement licensing only seizure of goods of the licensor. 3rd. Admitting that, as a matter of construction, there was an intention to create a tenancy at a rent, whether the *reservation* of the rent was not bad, the covenant to pay interest being to pay, not to the heirs, but the executors, who were strangers to the reversion? The appellants on this insisted that such a covenant did not run with the land, but was a collateral covenant to pay a sum in gross; and that as the right under the distress clause did not arise except on non-performance of the covenant, the reservation was bad as being uncertain, conditional, and dependent on non-performance of a collateral matter to be performed in favour of strangers to the reversion.

As to the two last points I am unable to remember the judgment. The first of them is of great importance. The Court may or may not have decided these points; it was not necessary for them to do so, as they held, as I remember, that no rent became due after 1st January, and therefore the distress was invalid as being more than six months after that date, even supposing a rent were well reserved up to that date.

As a matter of opinion I should say as to those two questions, with great deference, that on the *construction* of the instrument there was no demise *at a rent, i.e.*, no rent reserved as rent service.

4th. Was there any tenancy at will after the 1st January, there being no evidence of assent or dissent by the mortgagee to continuance of possession? As to this I have a distinct recollection that it was held (Gwynne, J. diss.) that the mortgagor was a mere overholding tenant, and not tenant at will, and so not liable to any rent. Consequently, for the reason above stated, the distress was not warranted.