

I have not now to consider the question of the plaintiff's right to have a reasonable rebate. That has been settled, so far as I am concerned, by the judgment of Riddell, J.; but it was not necessary for him to decide, and he did not decide, whether the defendants could distrain without having made it, or at all.

The questions are: (1) whether the right of distress was gone, the rent reserved having, as the plaintiff contends, become uncertain because the rebate had not been ascertained; (2) whether the lessors could distrain without having first made the rebate; or (3) whether the tenant's only remedy, apart from the question of the distress being excessive, is by action for breach of covenant.

It rested with the lessors, in the first instance at all events, to determine what rebate should be allowed. It was not, necessarily, to be the result of agreement between the parties, or of arbitration; but, if the lessors did not or would not make it, or if the amount was not reasonable, the Court would, as has been held, enforce the performance of the lessors' covenant by action, and so ascertain what the rebate should be. . . .

[Reference to *Davis v. Stacey*, 12 A. & E. 306; *Chambers v. Mason*, Cro. Jac. 34; *Dalman v. King*, 4 Bing. N. C. 105; *Graham v. Tate*, 1 M. & S. 609; *Smith v. Fyler*, 2 Hill (N.Y.) 648; *Bickle v. Beatty*, 17 U. C. R. 465; *Hydraulic Brick Co. v. McTaggart*, 76 Mo. App. 347, 354; 33 Cyc. 1570.]

Here the rebate was to be made by the lessors, and from time to time while the prohibitory law was in force. Their covenant did not directly affect the reservation. If the lessors had expressly agreed to allow, say, \$300 per annum during that time, it would not have affected their right to distrain, according to the cases I have referred to, that not being a "defalcation" of the rent; and I cannot see how it makes any difference in this respect that the rebate had not been ascertained by the lease. It would be ascertained on payment of the rent, which was not, though the rebate may have been, uncertain. For the lessors' refusal to make it, the tenant's remedy was, in my opinion, by action for breach of covenant, and therefore, so far as the action is founded on *replevin*, it fails, the rent not having been tendered before the distress.

In respect, however, of the claim for making an excessive distress, I think a cause of action has been well proved. The value of the goods distrained, making every allowance which is usually made in such case, was, as I find, wholly out of proportion to the rent distrained for, part of which, indeed, that is to say, the arrears of rent for the six rooms, was not distrainable for at all on the goods in the hotel. The goods were not in fact removed