

agreement or by arbitration, but the defendants refused to take less than the whole, apparently desiring that the plaintiff should surrender the lease. The defendants continued to demand and the plaintiff to refuse payment, and in the beginning of November, 1908, the rent as reserved by the lease was distrained for. The plaintiff paid the amount under protest, on the 11th November, having in the meantime (6th November), brought the action above mentioned for a declaration as to the rebate which should properly be allowed under the proviso. The judgment of RIDDELL, J., declared the plaintiff entitled to a rebate, and referred it to a Master to ascertain the amount. The formal judgment declared "that the plaintiff is entitled to a reasonable rebate in the rent payable under the lease, and that such reasonable rebate shall be calculated from the 1st May, 1908, during such portion of the plaintiff's tenancy as the prohibition may be in force."

Notwithstanding the pendency of the action, the defendant on the 18th March, 1909, again distrained on the plaintiff, and on this occasion also for the whole of the rent as reserved by the lease, payable in November and December, 1908, and January and February, 1909, and for the rent said to be due in respect of the six additional rooms rented—in all \$482.64.

The plaintiff thereupon, on the 22nd March, 1909, brought this action, paying into Court (presumably under Rule 1069) the amount of the rent in question. He sued also for an excessive distress, the goods distrained being, it was said, more than were necessary to satisfy all rent that could, in any circumstances, be due and in arrear.

It was stated at the trial that the Master's report in the first action had been made on the 8th October, 1909, finding that the sum of \$300 was a reasonable rebate; it was also said that an appeal from the report was pending.

J. M. Ferguson and J. T. Mulcahy, for the plaintiff.

A. E. H. Creswicke, K.C., for the defendant Quinn.

F. G. Evans, for the defendant Reeve.

OSLER, J.A.:—The principal contention was that, while the amount of the rebate was unascertained, the right of distress was suspended or non-existent, the amount payable for rent being, in the circumstances, no longer a fixed and ascertained sum.

As regards the rent in respect of the six rooms, it was contended that there was no right to distrain for it on the plaintiff's goods in the hotel, the only place where the distress was in fact made.