

OSLER, J.A.

MARCH 15TH, 1910.

*HESSEY v. QUINN.

Landlord and Tenant—Provision in Lease for Rebate—Distress for Rent Reserved without Making Rebate—Tenant's Remedy—Replevin—Action on Covenant—Pleading—Excessive Distress—Damages—Counterclaim for Rent—Reference—Costs.

Action for wrongful and excessive distress, for replevin, etc. Counterclaim for rent.

The plaintiff was tenant of the defendants of the hotel and premises in the town of Orillia known as "The Orillia House" for a term of ten years from the 1st May, 1899, renewable for a further term of ten years, at the yearly rental of \$1,200, payable in equal sums of \$100 on the first day of each month, commencing on the 1st June, 1899. The lease contained the usual covenant by the lessee to pay the rent, and a proviso for re-entry by the lessors on non-payment, and at the end a proviso as follows: "Provided that, in the event of any law being enacted in the future which shall prohibit the sale of intoxicating liquors upon the demised premises, the said lessors shall make a reasonable rebate in said rent during the period of such prohibition."

On the 8th February, 1908, a "local option" by-law was passed by the town of Orillia to prevent the sale of intoxicating liquors. The by-law was quashed on the ground of some irregularity, but, the Provincial Secretary having refused his consent, under 8 Edw. VII. ch. 54, sec. 11, to the issue of licenses to sell liquor in the town, the by-law having been in fact carried by the requisite majority of the persons entitled to vote thereon, the sale of intoxicating liquors became and was, in fact, by law prohibited therein, as held by RIDDELL, J., in a former action between the parties: *Hessey v. Quinn*, 18 O. L. R. 487.

Shortly after the execution of the lease, the plaintiff rented from the defendants, for use in connection with the hotel, three bed-rooms over an adjoining store, for \$48 per year, payable at the rate of \$4 per month at the same time as the rent of the hotel, and later on also rented, for a similar purpose, three sample-rooms over another adjoining store, at \$80 per annum, payable monthly at \$6.66 per month in the same way; and the necessary communications were made between these sets of rooms and the hotel.

In May, 1908, the plaintiff objected to paying the rent for the hotel until the amount of the rebate had been ascertained by

*This case will be reported in the Ontario Law Reports.