is not to be inferred that he sold more than was necessary to raise the arrears actually due,—that the count here did not allege a taking of more than sufficient to cover the real arrears, but an untrue claim of larger arrears than due; nor did it go on to allege a sale of more than would cover the real arrears, &c., but a compulsory payment of larger supposed arrears to regain possession of the goods distrained, which the Court did not consider an equivalent averment,—that as some rent was due the taking was lawful, and the distress not being excessive, the detainer lawful, for the defendant was entitled to a tender of what was actually due, and of the amount of this he was not bound to inform his tenant, and the case was within Gulliver v. Cosens, 1 C. B. 788, where it was held that a party paying, though under protest, an extortionate sum to regain possession of a distress taken *damage feasant*, without a previous tender of amends, could not recover it back. And see Lucas v. Tarleton, 3 Hurl. & N. 116, and Thompson v. Wood, 4 Q. B. 493, from which it appears, that as under the common count framed upon this Statute nothing is said of a sale, (a sale being at the time of the passage of the Act unlawful, and no damages recoverable therefor in an action on the case,) a proper averment must be introduced with respect to it, if the plaintiff wants damages for the sale as well as the seizure of too many goods. [1]

But our law does cast on the landlord the duty of informing his tenant on whom he is about to distrain of the amount of rent in arrear.[2] By the Code, Art. 53, sec. 8,[3] every landlord or his agent shall, previous to taking a distress, make affidavit to the amount of rent in arrear, &c., and the account

[1] In Thwaites v. Wilding, 11 Q. B. D. 421, 12 Q. B. D. 4, it is said that distraining for a larger amount of rent than is due does not *per se* give a cause of action,—that there must be special damage.

In Fell v. Whittaker, L. R. 7 Q. B. 120, the case of Glynn v. Thomas, 11 Exch. 870, *supra*, was distinguished if not disapproved. In this case rent was in arrear to the amount of £9. Defendant distrained for £18 and costs and seized £100 worth of goods. The rent actually due with expenses was tendered to the bailiff and refused and he remained in possession until an undertaking was given on behalf of the plaintiff for the payment of the whole demand, upon which the distress was withdrawn. It was held that an action for illegal distress would lie.

[2] The decisions in Maryland as to a distress for more rent than is due have followed the English cases which are prior to Fell v. Whittaker, note 1 *supra*:—

A distress is not vitiated by more rent being distrained for than is due. The avowant may recover in replevin what is actually due though he alleges a larger sum to be in arrear than is so in fact. Jean v. Spurrier, 35 Md. 110.

No action lies for distraining for more rent than is due, and if legal it makes no difference that the distress is malicious. But if the untrue claim is followed by a sale of more goods taken than is sufficient to raise the amount of rent really in arrear with legal charges, then a good cause of action arises. Hamilton v. Windolf, 36 Md. 301. But see Bonaparte v. Thayer, 95 Md. 548.

[3] Code 1911, Art. 53, sec. 8 (as now amended).