ages to be assessed by a jury either before itself or in a court of law, and to give all necessary directions for such purpose; and the amount of damages when assessed shall be proveable as if a debt due at the time of the bankruptcy, etc." I have no doubt that what it was intended to refer to were cases of express contracts, which raise a demand in the nature of a debt technically so called, and which, not having been assessed at the date of the bankruptcy, was not proveable. Express contracts are, I think, what the section points at, and its primary reference is, I think, to contracts of a mercantile character. Is the present, then, a claim of that description? It clearly is not. It arises out of a distress levied on the goods of the plaintiff by the landlord of the defendant, for rent which the defendant owed and ought to have paid. Now, there was no contract on the part of the defendant to keep down the rent; and the liability which he incurred is one which arises out of the relation in which the parties stood to each other, from which relation the law supposes an implied contract. It is a liability on account of which the defendant might be sued either in the shape of an action of assumpsit or one of tort the non-payment of rent being treated either as a breach of contract or a breach of duty, the duty, no doubt, springing out of the relation between the parties, and; therefore, out of what the law says is an implied contract. But though we call it a contract for the sake of convenience, it is not, I think, such a one as is contemplated, by the 153rd section of the Bankruptcy Act. I think, therefore, that the present case does not come within the 153rd section, which contemplates only express contracts, and on that ground, I think the judgment of the county court judge was right.

HAYES, J.—I quite agree with the judgment of my learned brother. The 153rd section of the Bankruptcy Act, 1861, was passed with reference to mercantile contracts made by the bankrupt, an illustration of which is given in the case of *Green* v *Bicknell*. 8 Ad. & El. 701, cited by Mr. Chitty in his book on Contracts, where an agreement was made for the sale of oil, which should arrive by a certain ship, and when the oil was tendered to the party who contracted to purchase it, he refused to take it; on his afterwards becoming bankrupt, the measure of the claim against him was the difference between the contract and market prices at the time when he should have fulfilled his contract. But though the market price was known to the parties in that case, it was nevertheless held that the claim was founded in damages, and could not be proved under the bankruptcy. That was a grievance which is now remedied. The present action is quite of a different description.

The contract is one which arises from the relation of landlord and tenant subsisting between the parties, and the cause of action against the defendant is well stated in the particulars of the county court plaint, which says that the action was brought "to recover compensation for the injury and loss sustained by the plaintiff in consequence of the defendant wrongfully allowing certain rent payable by him . . . to be in arrear and unpaid, whereby the plaintiff's goods were distrained." The law allows the person who is compelled to pay under such circumstances, in order to redeem his goods, to say to the other party, "I have paid your debt and you must recoup me." Generally the money must be paid at the request of the other party in order to be so recoverable, and there was no request here. That furnishes an indication of the nature of the present action, which is not one of contract, but is not unlike the case of an action against a common carrier for not carrying safely, which has been held not to be an action of contract within the meaning of the County Courts Act, but one of tort. I am of opinion then, that the present action is to be regarded as one of tort, although, if it had been framed in contract, it would, perhaps be difficult to say that it could not be regarded in that light also.

Judgment for the respondent.

JONES v. RHIND.

RHIND v. JONES.

Mortgage—Priority—Statute of Limitations.

S., in 1841, executed a legal mortgage of leasehold property to J. to secure £300 and interest. In 1865 he purported to execute another legal mortgage of the same property to R. to secure £121 16s. and interest. R. had no notice of the first mortgage, and the lease of the property was given up to him.

Held that R.'s mortgage was entitled to priority, inasmuch as no explanation was given of the fact of S. being in possession of the lease.

S. paid no interest on his mortgage from the date of its execution, but kept down the interest on a sum of £300 which J. was liable to pay under a bond he had entered into for the benefit of S. The Court presumed the payment of interest on the bond was made under an arrangement for that purpose, and that J.'s debt was not barred by the Statute of Limitations.

[17 W. R. 1091.]

On the 4th of December, 1841, Thomas Smith, who was then in possession of and entitled to a blacksmith's shop in the parish of St. Luke, Chelsea, under a lease for a term of thirty-four years from Lady-day, 1841, demised the same to Benjamin Jones by way of mortgage for securing a sum of £300 and interest, which Jones was liable to pay under a bond he had entered into the benefit of Smith.

A memorial of this mortgage was registered in the Middlesex registry shortly after its execution.

It did not appear whether the lease of the property was given up to Jones on the execution of the mortgage, or whether he ever had it in his possession.

No interest was paid by Smith in respect of the mortgage-debt, but he kept down the interest on the bond to the 16th September, 1867, when he executed a creditor's deed under the Bankruptcy Act, 1861. He also, from time to time paid sums amounting in the whole to £130 in reduction of the principal sum secured by the bond

In the year 1865, Smith, being still in possession of the property, executed another mortgage of it (also by demise) to William Rhind, Herbert Sutton Smith, and Joseph Long Porter, as trustees of the West London Permanent Mutual Benefit Building Society, for securing to them the payment of a sum of £121 16s. On the execution of this mortgage the lease of the property, which was then in possession of Smith, was handed over to the trustees. It was admitted that at the time of this mortgage they were entirely ignorant of the prior mortgage; in fact, the plaintiffs in the first suit, themselves the ex-