tities, though the bridge might have obstructed that, they should have found for defendants. *Croft* v. *Town Council of Peterborough*, 5 C. P. 141; *Sutton* v. *Clarke*, 6 Taunt. 29; *Municipality of Thurlow* v. *Bogart*, 15 C. P. 9; *Corporation of Wellington* v. *Wilson*, 16 C. P. 124; *Fitzsimons* v. *Inglis*, 5 Taunt. 534; *The King* v. *Tindall*, 6 A. & E 143; *The Queen* v. *Russell*, 3 E. & B. 942; *The Queen* v. *Betts*, 16 Q B. 1022; *Blyth* v. *The Birmingham Water Works Co.*, 2 Jur. N. S. 333; S. C. 11 Ex. 781.

RICHARDS, C. J., delivered the judgment of the court.

It will be very difficult to come to the conclusion that this action can be maintained against the defendants in the present form of the declaration, and on the evidence given. There is no doubt that the defendants had the right and were bound to maintain a bridge on the street in question, and that their only liability to the plaintiff must arise from doing that which they are at liberty and bound to do in an unskilful manner. The plaintiff does not sue the defendants for any breach of duty, but simply charges them, not with doing some act that occasions him injury, but on the first of March and divers days and times afterwards, with penning back the water of the stream and obstructing the same, whereby it overflowed the plaintiff's land. The defendants did not do this on the first of March, and divers, &c., but, on the contrary, more than twenty years ago built a bridge, and in 1850 built the present one; and that is all they did towards penning back the water.

We do not understand from the evidence that there was any ground of complaint when the bridge was built, or any perceptible penning back of the water, or any injury done to any one until within a few years past. It seems to us the allegations in the plaintiff's declaration are no more sustained by the evidence than they would be if trespass were brought against a person for throwing a log on the highway whereby plaintiff was injured, when the evidence shewed the log had been cast on the highway a month before the plaintiff was injured; and the very illustration given in *Chitty* on Pleading, shewing the distinction between trespass and case, 7th ed. Vol. I. p 142, applies to the case before us. He says: "If a person place a spout on his own building, in consequence of which water afterwards runs therefrom into my land, the damage is consequential, because the flowing of the water, which was the immediate injury, was not the wrong-doer's immediate act, but only the consequence thereof." Here it is even doubtful if the penning back of the water is in consequence of defendants' act at all.

The case of *Fitzsimons* v. *Inglis* (5 Taunt. 534), is an express authority in favor of the defendants' contention. There the plaintiff declared that the defendant wrongfully placed and continued a heap of earth whereby refuse matter was prevented from flowing away from his house down a ditch at the back thereof. The evidence was that the heap was not originally placed so as to obstruct the water, but that in process of time earth from the heap was trodden and fell into the ditch. *Held*, that it was a fatal variance.

In *Griffiths* v. *Marson* (6 Price 1), where the third count of the declaration was for wrongfully diverting and turning divers large quantities of the water of the stream out of the usual course, the plaintiff proved that the defendant's son had let down the rear of the dam, whereby the plaintiff's meadow was flooded and damaged by checking the course of the stream. The plaintiff was nonsuited. The court held that in actions of this nature it was necessary that the count relied on should be so framed as to meet the particulars of the fact more distinctly, and with greater certainty.

In *Chitty* on Pleading, vol. ii., 7th ed., p. 601, in a note, it is said, "It seems that a declaration for obstructing a water-course without shewing how, is bad on demurrer, but not after verdict: Ld. *Ray* 452. *Sed quære.* The injurious act should be described according to the fact, and a count for diverting and turning, &c., is not supported by proof of penning back and checking a stream." Reference is made to 6 Price 1, and 5 Taunt. 534.

In *Woolrych* on Waters, at p. 317, the learned author states, "The particular mode of obstruction cannot be too carefully described." He then refers to the cases in 5 Taunt. and 6 Price, and also states that *Shears* v. *Wood*, cor. Wood Baron, at Guildford, 7 Moore, 345, though later in point of time, seems hardly reconcilable with the prior cases.

The case in Moore is abstracted in Mr. *Woolrych's* work The action was for diverting water from the plaintiff's mills. The obstruction charged in the declaration was putting a dam across the stream, and cutting above and higher in the stream, so that large quantities of the plaintiff's water were thereby diverted, and the *accustomed* flow of the water was stopped. There was a general count for turning the water out of its usual course. The evidence was, that the defendant put down the dam in question about a mile above the plaintiff's mills, and this had prevented the water from being regularly supplied, but that the water was not thereby diverted, because it returned to its regular course long before it reached the plaintiff's mills, and there was no waste of water. It was proved that the plaintiff had sustained injury by reason of the interruption of his regular supply. It was objected that the mischief had been misdescribed in the declaration, for the complaint should have been that the water had been irregularly or insufficiently supplied, or that it did not reach the plaintiff's mills at the proper and the usual time. The jury having found for the plaintiff, it was moved to enter a nonsuit, but Mr. Justice Burroughs said, that it was in fact stated in the declaration that the water did not run to the plaintiff's mill as they were accustomed to have it, and that this was a mere technical objection, which ought not to be allowed after verdict. The rest of the court concurred, and the nonsuit was refused.

Notwithstanding the decision arrived at in the case just referred to, we do not see our way clear in holding that the plaintiff can recover under the declaration and evidence in this case.

There is no doubt that the mere erection of the bridge has not penned and does not pen the water back on the plaintiff's land, and the weight of evidence, as we understand it, certainly is that the obstruction which makes the water flow back is caused by the large quantity of ice sent down the stream from above, which lodging below, and, as the plaintiff contends, at the defendants'