

be exercised against an assignee who is in possession of immoveable property of an estate in his quality as such.

JOHNSON, J. The defendant is assignee of the insolvent estate of William Henderson, who purchased from the plaintiff, in October, 1872, five lots of land for the sum of \$2,855, paying down \$713, and undertaking to pay the balance in four annual instalments with interest, and hypothecating the land for security. The balance now due is \$1,955. In July, 1875, Henderson made an assignment to Mr. James Tyre, and the defendant was subsequently elected by the creditors. In November following Henderson got a deed of composition and discharge from his creditors, and, in addition to the sum that they agreed to take, he assumed all hypothecary claims on his real estate; and the assignee was to reconvey everything except the immoveable property, which was to remain vested in him as collateral security for the performance of all the other conditions of the deed. He has remained in possession ever since, and the object of the present action is to get a *délaissement*, or make him pay to the plaintiff the balance of the price of the land. There is a demurrer to this declaration; and it was ordered to stand until the merits. The grounds of it are, first, that the action as taken is prohibited by the 125th section of the Insolvent Act; and secondly, that, under the allegations of the plaintiff, even if the right of bringing an ordinary action existed, it is made apparent that the defendant's possession, in his quality of assignee, has a character given to it by the deed of composition which would prevent the exercise of the hypothecary action, and deprives him of the means of making a *deguerpiement* as an ordinary proprietor, as he holds as he does only in virtue of his office, which subjects him to the operation of the Insolvent Act. It appears to me quite undeniable that the defendant holds only as assignee, and has certain duties imposed upon him in respect of this property as such, and only as such. He is sued as assignee, and to a certain extent is still accountable to the creditors. The 125th section subjects him to the summary jurisdiction of the Court, as one of its officers; and it enacts also in express terms that "all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property

"upon any effects or property in the hands, possession or custody of an assignee may be obtained by an order on summary petition; and not by any suit or other proceeding what-ever." The remedy therefore here is not an hypothecary action in the ordinary form as taken in the present case; but it is to ask for an order that the assignee be authorized to sell the property; and under the demurrer the action is dismissed with costs. It was urged that an order had been made in the Insolvent Court at variance with this view of the law; but I have looked at that order which was made by myself, and I only find it ruled there that property seized upon Henderson was seized *super non domino*, which does not in the least conflict with the denial of an ordinary right of action against an assignee who is subject by law to the summary jurisdiction of the Court.

Benjamin for plaintiff.

A. & W. Robertson for defendant.

DIGEST OF ENGLISH DECISIONS.

[Continued from p. 240.]

2. A mining company sank a pit, and intercepted underground water, which had previously flowed in an unascertained course, and threw it upon the land of a neighbour. The water had previously, when left to flow underground of itself, come out upon the neighbor's land. Held, that the mining company was liable for the damage.—*West Cumberland Iron and Steel Company v. Kenyon*, 6 Ch. D. 773.

Misprint.—See *Innkeeper*.

Navigable River.—The right of navigation in a river above tidewater, acquired by the public by user, is, as regards the owner of land through which the river flows, simply a right of way; and the owner of the land may erect a bridge over the river, provided it does not substantially interfere with the right of way for navigation. The property in the river-bed is in the owner of the land.—*Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

Negligence.—See *Mine*, 1; *Telegraph*.

Partnership.—In September, 1871, C. gave bonds, in accordance with the rules of *Lloyd's*, to enable his son W. to become a member thereof, as he the same month did, carrying on the business in his own name exclusively. In January, 1872, an agreement was made pur-