follows: "Whosoever unlawfully and maliciously sets fire to any matter or thing, being in or against any building, *under such circumstances that if the building were thereby set fire to, the offence would amount to a felony*, is guilty of felony, and shall, etc."

The prisoner's act was no doubt "unlawful," but that it was done maliciously could only be inferred from the act itself. The evidence shows it was the crazy and unthinking act of a man under the influence of liquor. Under these circumstances I do not think I can convict the prisoner. If the damages had exceeded $20 the prisoner could have been found guilty of a misdemeanor, under section 59, and, at any rate, the magistrate could have fined him under section 60. Instead of this he has committed him for a felony, and the prisoner has thus escaped from any punishment for a wanton and reckless act, which might unhappily have been followed by loss of much property, and perhaps of life itself.

Even if the malicious design to destroy by fire a chattel within the building had been proved, it does not follow that the firing of the building itself, as the probable or immediate effect of the act, would amount to a felony. The design or intent to fire the building itself, is, I take it, the *gravamen* of the charge. I am sustained in this view by the case of *Regina* v. *Childs*, (L.R. 1 Cr. Ca. Reserved 307), which was a case reserved upon an indictment under a similar clause in the English Criminal Statutes. In that case, although the jury found that the chattel had been unlawfully and maliciously set on fire, the Court was of opinion that no felony had been committed. Blackburn, J., in giving his opinion says, "Mr. Greaves, in his edition of our Consolidated Acts, (p. 165), says that if you set fire to one thing, under such circumstances that you are likely thereby to set fire to another thing, then, if the setting fire to the one thing is malicious, the setting fire to the other is so too. If that is good law, then the setting fire to the house here, if it had caught fire, would be felony. But it is not law, and the framers of the Act have failed to express the meaning they intended to express."

I find the prisoner not guilty of the felony as charged.

RECENT ENGLISH PRACTICE CASES.

WOOD v. WHEATER.

Imp. R. 17, r. 2, 42, r. 3—Ont. R. 116, 341—Foreclosure—Action for recovery of land.

[L. R. 22 Ch. D.

CHITTY, J.—A foreclosure action, although held in *Heath* v. *Pugh*, L. R. 6 Q. B. D. 345; 7 App. Cas. 235, to be an action for the recovery of land, is not an action for the recovery of the possession of land within the meaning of O. 42, r. 3, (Ont. R. 341). The effect of an order for foreclosure absolute is merely to bar the equity of redemption . . . Possibly, in future, it might be advantageous in every foreclosure action to add a claim for possesion.

[NOTE.—*As to an action for foreclosure being an action for the recovery of land, see Barwick v. Barwick, 21 Gr. 39.*]

COMPTON v. PRESTON.

Imp. O. 17, r. 2, 19, r. 3, 22, r. 9—Ont. R. 116, 127, 168—Pleading—Recovery of land—Counter-claim.

The provision of Imp. O. 17, r. 2, (Ont. R. 116), that no cause of action, except those specified in that rule, shall, unless by leave of the Court, be joined with an action for the recovery of land, applies to a counter-claim as well as to an original action.

[L. R. 21 Ch. D. 138.

The defendant, by counter-claim, sought to set up two causes of action; the first, a right to recover land; the other, a right to damages for deceit. No leave had been obtained to join the two causes of action.

FRY, J., held the joinder of the two causes of action in the counter-claim was, in its nature, embarrassing, and made an order excluding the defendant from the benefit of the counter-claim.

As to Imp. O. 17, r. 2, (Ont. R. 116), he says: "It is to be observed the terms of the rule are perfectly general, and it is difficult to see why a counter-claim for the recovery of land is not an action for the recovery of land. At any rate, that which is embarrassing, if joined in a statement of claim with an action to recover land, is likely to be embarrassing if joined in a counter-claim for the recovery of land. And, further, it would be absurd to hold that that which cannot be joined with a claim to recover land can be