

Selection.]

DIAMOND V. GRAY.

[Com. Law Cham.]

footmarks, and certainly none so worthless. "I found footmarks,—I compared them with the prisoner's boot;—They corresponded exactly." If the tracks *do* exactly fit the boots, they are the strongest evidence that the boots, with probably the prisoner in them, assisted at whatever was done when the tracks were made. Unless the tracks fit *exactly*, they are no evidence at all. Now the value of the above statement, as usually received in evidence from the mouth of a rural policeman, or other witness, will be more correctly appreciated if you consider the process which would be requisite in order to determine that the tracks do fit exactly. A mere eye comparison of the shape of the sole with the edge of the track is clearly not enough, because scores of men may wear their boots into very much the same shapes, especially if made by the same maker. Nor is it enough to count the hob nails, because a country cobbler will very likely have a set pattern and a set number of nails for all boots of a certain size. The orthodox plan, when the print is yet plastic, in wet clay or garden mould for instance, is, we believe, to press the boot down into the print, and then stand aside and see if the fit looks all right. It is true that the sole is the crucial test, and that while in the print no one can see the sole; but the plan has this advantage, that the firm pressure in the soft soil produces in the old print a new one, which, *ex necessitate*, must correspond exactly with the boot. In many cases a very accurate admeasurement with compasses would be necessary to test the correspondencies of the two, and in many other cases, from the imperfection of the print the test is impracticable.

The prisoner's advocate ought always to examine the witness minutely as to the process by which he satisfied himself that the boot corresponded with the track. A few months ago a case occurred in which a prisoner, being charged before a clerical magistrate, on the evidence of a constable who deposed in the usual form that the prisoner's boot fitted the footmark to a nicety, the worthy clergyman took the boot in his own hands and personally compared it with the marks. The first thing he did was to look at the nailmarks, when to his surprise he found that neither in number nor pattern did they correspond with the nails in the boot. The prisoner, of course, was acquitted; but, unless the magistrate had made this discovery, he would, in all probability have been committed on this blundering evidence.—*Solicitors' Journal*.

A wife cannot execute a deed; which is, perhaps, the reason why Shakspeare, who was a first-rate lawyer, made Macbeth do the deed, which lady Macbeth would have done so much better, had not a deed done by a woman been void to all intents and purposes.—*Comic Blackstone*.

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law,
Reporter to the Court.)

DIAMOND V. GRAY.

Change of venue—Preponderance of convenience and expense.

A defendant when applying to change the venue on the ground of preponderance of convenience and expense, should suggest in his affidavit the number of witnesses the plaintiff is likely to call, and where they reside. Cases on applications of this kind considered.

[Chambers, March 6, 8, 1867.]

The defendant obtained a summons to change the venue from the County of Lennox and Addington to Prince Edward, on an affidavit which stated, amongst other things, that the action was brought for the conversion of plaintiff's goods; that the declaration had been served but no plea pleaded; that the cause of action, if any, arose in the County of Prince Edward and not elsewhere: that deponent had "reason to believe and does verily believe that at least ten witnesses will be called to support the defence in this action;" that it would probably be very difficult to reach the County Town of Lennox and Addington, and that the trial would be attended with very much greater expenses if tried there than if tried at the County Town of Prince Edward.

Oster shewed cause, referring to Ch. Arch. 12 ed., pp. 1352, 1353.

GWYNNE, J.—*Dr. Rothschild v. Schilston*, 8 Ex. 503, decides, in accordance with a report made by a committee of Judges to whom the subject was referred, that the application to change the venue may be made either before or after issue joined, as may be most convenient, but if the application be made before issue joined it is requisite that the party applying should state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause is shewn. He may, however, if he choose, rest his application that the cause of action accrued in the county to which he wishes to remove the case, but if he does he may be answered by any affidavit negating this fact, or shewing that the cause may be more conveniently tried in the county where the venue is laid. If the application is made after issue joined, the party applying must in his affidavits, in support of the application, shew that the issues may be more conveniently tried in the county to which it is proposed to change the venue. *Smith v. O'Brien*, 26 L. J. Exch. 30, is to the same effect. There it is said the general rule is to try the cause where the witnesses reside; but to this rule, however numerous the witnesses may be, and however great the expense in procuring their attendance, there is an exception, as if it can be made to appear that a fair trial cannot be had in the county to which it is sought to be changed: *Penhallow v. Mersey Harbour and Dock Co.*, 26 L. J. Ex. 21.

When the ground of the application is the expense attending the trial in the county where the venue is laid, the preponderance of convenience must be very great. In *Thornhill v. Oastler*, 7 Scott, 272, the rule was refused, although