UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* Chris. Robinson Esq., Q.C., *Reporter to the Court.*)

Edgar v. Newell.

Slander—Evidence of character—Justification—New trial.

In an action for slander imputing theft, defendant having pleaded and endeavoured to support pleas of justification, *Held* that evidence of the plaintiff's general bad character for honesty was properly rejected

Semble, per *Hagarty J.* that it would have been inadmissible even with the justification; but that, if not guilty only be pleaded, defendant may shew, solely in mitigation of damages and to rebut the presumption of malice, that before uttering the words it was a common rumour in the neighbourhood that defendant had been guilty of the specific offence charged.

The evidence in support of one of the pleas of justification was very strong, sufficient to have warranted a conviction, if the plaintiff had been on his trial. The charge however was made three years after the alleged offence, for which there had been no prosecution, and defendant had no special interest in the matter. The jury having found for the plaintiff, and $150 damages, the court refused to interfere.

[Q. B., H. T., 1865.]

Slander, the words charged being "Edgar is a thief, and I can prove it." *Pleas*, 1. Not guilty. 2 and 3, Justification. The second plea alleged that the plaintiff before the said time when, &c., to wit on, &c., feloniously did steal, take, and carry away certain goods and chattels, to wit, one over-coat, two horse-blankets, and one bag containing empty bags, of one William Snider. The third plea charged the plaintiff with stealing a barrel of salt of one J. P. O'Higgins.

The case was tried at Stratford, before *Draper* C. J. The words were proved, and defendant gave very strong evidence to shew that the theft charged in the second plea had been committed by the plaintiff about three years previously. He attempted to make out the charge alleged in the third plea as well, but the proof offered was insufficient, and was not pressed before the jury. He also tendered evidence that the plaintiff's character for honesty and his general reputation in that respect was bad, which the learned Chief Justice rejected, on the ground that there was a plea of justification on the record

The jury found for the plaintiff, $150 damages.

Christopher Robinson, Q.C., obtained a rule *nisi* for a new trial, on the ground that the justification pleaded in the second plea was clearly proved; or on the ground that the learned Chief Justice improperly rejected evidence tendered by the defendant of the plaintiff's general reputation for dishonesty, and bad character as regards that particular trait or quality.

Robert Smith shewed cause. He contended that the plaintiff having been in effect placed upon his trial on a charge of felony, it would be contrary to the established practice in such cases to interfere with the finding of the jury in his favour, even though it might seem to be against the weight of evidence—*Symons* v. *Blake*, 2 C. M. & R. 416: that the defendant having failed to prove his second plea of justification, the verdict on that issue was clearly right, and a new trial, which would disturb it, should not be granted—*Baxter* v. *Nurse*, 6 M. & G. 935: that the jury might have been properly influenced in their view of the whole case by the fact of such plea having been pleaded without sufficient ground; and that the evidence as to character was properly rejected—*Jones* v. *Stevens*, 11 Price 235; *Thompson* v. *Nye*, 16 Q. B. 175.

Robinson, Q.C., in support of the rule, cited, as to the motion for new trial on the evidence, *Mellin* v. *Taylor*, 3 Bing. N. C. 109; *Regina* v. *Johnson*, 1 L. T. N. S. 513, Q. B.; *Peters* v. *Wallace*, 5 U. C. C. P. 238; *Swan* v. *Cleland*, 13 U. C. Q. B. 335: As to the admissibility of the evidence of character, *Richards* v. *Richards*, 2 Moo. & Rob. 557; *Knobell* v. *Fuller*, Peake Add. Cas. 139; *Earl of Leicester* v. *Walter*, 2. Camp. 251; *Inman* v. *Foster*, 8 Wend. 602; *Bell* v. *Parke*, 11 Ir. C. L. Rep. 424; ——— v. *Moor*, 1 M. & S. 284; *Bennett* v. *Hyde*, 6 Conn. 24; *Bracegirdle* v. *Bailey*, 1. F. & F. 535; *Myers* v. *Currie*, 22 U. C. Q. B. 470; *Jones* v. *Stevens*, 11 Price, 235; *Foot* v. *Tracy*, 1 Johns. 46; *Wyatt* v. *Gore*, Holt N. P. C. 299; *Newsam* v. *Carr*, 2 Stark. N. P. C. 70; *Douglass* v. *Tousey*, 2 Wend. 352; *Wolcott* v. *Hall*, 6 Mass. 514; *Ross* v. *Lapham*, 14 Mass. 275; *Sawyer* v. *Eifert*, 2 Nott. & McCord 511; *Root* v. *King*, 7 Cowen 613; Taylor on Evidence, 4th Ed., 355-6; Rose. N. P. 576; Add. on Torts 730. As to the effect of a justification being pleaded, Starkie Ev., 3rd Ed., vol ii, 806 note *k*, 641-2; *Cornwall* v. *Richardson*, R. & M. 305; *Snowden* v. *Smith*, 1 M. & S. 286, note *a*; *Root* v. *King*, 7 Cowen, 613.

Hagarty, J., delivered the judgment of the court.

As to the merits. This is one of the many cases in which the court is asked to set aside a verdict of which it cannot approve on a calm consideration of the evidence. The testimony certainly was very strong. It would have sufficed most likely to convict the plaintiff, had he ever been put upon his trial for the offence; and had any right, estate or franchise, or large sum of money been at stake, we think it would be only right to submit the case to another jury. But we hardly see our way to interfere in a case like the present. The charge was made long after the alleged offence had been committed. No person had thought proper to prosecute the plaintiff for it, and the defendant, having no especial interest in the matter, charges the plaintiff generally with being a thief. He does this at his peril, and when sued for damages tries to prove the charge, and fails to convince the jury.

It does not follow, because a man has once committed an offence, that a jury will always regard with favour a person who persists in casting it up against him at any period, however remote. A person may make the charge relying on his being able to prove it to the satisfaction of a jury. We think he must always run this risk. But we do not think a court is bound to set aside, as a matter of right, a verdict rendered against the weight of evidence, but may leave the defendant to the consequence of his own rashness. It is not usual to put a plaintiff, deliberately charged with fraud or felony in a civil action, twice, as it were, upon his trial; at all events, an action for slander is not one in which the ordinary wholesome rule should be set aside.

We think we cannot properly interfere on the merits.