

Eng. Rep.]

HUDSTON V. THE MIDLAND RAILWAY CO.

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per to bring, we ought certainly to make this rule absolute.

PIGOTT, B.—I am of the same opinion. An action of slander is clearly within the meaning of section 5. Now comes the question, have we materials before us on which to form an opinion as to the nature of this action. I think we have, and they are furnished to us by the record. Both parties are at liberty to examine the record, so there can therefore be no surprise on either side. I cannot imagine that any injustice or inconvenience can arise from our making this use of it. And now having materials so furnished to us, we come to the affidavits. Without blindly following the Under-Sheriff, but looking at the slander as it is stated I concur in his opinion, and think that he was right when he said "that he would certify if he could." When my brother Blackburn refused to grant an order in this matter, all that I think he meant to say was, that before he granted such an order he would require strong proof of the reasonableness of bringing an action of this nature

CLEASBY, B.—It must not be supposed that we are now deciding that the Court takes judicial notice of the record as of an Act of Parliament.

I find that in a rule in arrest of judgment, a rule grounded entirely on the record before the Court, the practice in the Queen's Bench and in this Court differs from that pursued in the Common Pleas. The rule as there drawn up is, on "reading the record of *nisi prius* between the parties;" here and in the Queen's Bench these words are not used as if the record were constantly before the Court. I will say nothing on the other points, as I agree with the judgments of the Court.

Rule made absolute.

HUDSTON V. THE MIDLAND RAILWAY COMPANY

Railway company—Personal luggage—Carrier.

A took a first-class return ticket by railway from N. to L. and back, subject to the following condition: "Luggage: first-class passengers are allowed 112 lbs. . . of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge." A. on his return journey brought with him on the railway a spring horse," which he had bought for the use of his children. The toy weighed 78 lbs., and was an improvement on the old "rocking-horse," being about forty-four inches in length and standing on a flat surface. The company refused to carry this toy unless a sum of 2s. 6d. was paid. A., under protest, paid the amount, and then brought an action in the county court. The learned judge decided in favour of the company, on the ground that the article in question was not personal luggage.

On appeal to this Court,

Held, that the judgment of the county court judge was right [Q. B., 17 W. R. 705.]

Appeal from the County Court at Derby.

The appellant sought to recover damages from the respondents in consequence of their refusing to carry a "spring horse" as and for his personal luggage.

On the hearing of the case before the county judge at Derby it was proved that the appellant (who was a stock-broker) on the 10th March, 1868, took a first-class return ticket from B. Euston, near Nottingham, to King's-cross, and that he took no luggage with him, but while in London he bought, for the use of his children, a child's toy called a "spring horse," weighing 78 lbs. It was an improvement on the old rocking-horse,

being about forty-four inches in length, and standing on a flat surface. On the return journey, however, the respondents refused to allow the appellant to take this toy with him as his personal luggage, and demanded a charge of 2s. 6d. for its carriage. The appellant objected, but subsequently paid the charge under protest. On the railway ticket so issued and delivered to the appellant there was the following printed condition—"This ticket is issued subject to the regulations and conditions stated in the company's time-tables and bills."

The following were the regulations referred to in the foregoing condition so far as concerned the matter in question:

"Luggage: First-class passengers are allowed 112 lbs., second-class 100 lbs., and government passengers 56 lbs. of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge. All excess of luggage above the weight allowed will be charged for according to distance."

Before the learned judge at the County Court the appellant contended that according to the terms of the respondent's contract with him, as set forth on the railway ticket referred to, and in the time-tables and bills published by the respondents, he was entitled as a first-class passenger to take the "spring horse" in question with him, and have the same carried as his personal luggage free of charge, it being under the allowed weight and not within the restriction in the respondent's bills, "of merchandise or other articles carried for hire and profit." The respondents have a fixed tariff for excepted articles, but that tariff does not appear in their acts or public time-tables. The respondents contended that the spring horse did not come within the meaning of the words "personal luggage," inasmuch as it was not for his personal use and convenience as a traveller, but was an article for the carriage of which they were entitled to charge according to their usual custom and that of other specified railway companies.

On the 11th May the learned judge gave judgment for the respondents on the ground that the horse in question was not such an article as a passenger would usually carry with him, but gave the appellant leave to appeal.

The question for the opinion of the Court is whether under the above circumstances the appellant was entitled to take with him the spring horse in question free of charge, or whether the respondents were entitled to charge for the carriage of the same.

Muchnamara, for the appellant.—The question is whether this toy is personal luggage. The Court will construe this regulation against the company and in favour of travellers. It must be taken that the company are cognizant of the habits and wants of travellers. The decided cases on that point show that it is impossible to draw a definite line, but the words personal luggage must be construed with reference to those things that are usually carried by travellers in each particular case; thus, sailors going to a seaport it is submitted may take their bedding, or the cricketer his cricket things, the fisherman his fishing tackle, or the sportsman his gun. The company here have used words of exclusion; they have therefore placed a meaning upon the