

Eng. Rep.]

CRAVEN V. SMITH.

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not be entitled to his costs in this action, and why the master should not be at liberty to tax the same."

Against this rule *Francis* now showed cause.—In the first place, there are no sufficient affidavits before the court to inform it of the nature of this action. There is nothing to show that it is not an action which might have been tried in a county court. It has been before an officer of this court, and all that was laid before him ought to have been brought here on affidavit. In the second place, if the case of *Gray v. West*, 17 W. R. 479, L. R. 4 Q. B. 175, is pressed on me, I contend that that case has not decided that in all actions of slander a plaintiff is entitled to costs. The effect of it only comes to this, that the power of certifying for costs is confined to cases where the county court has concurrent jurisdiction. In *Gray v. West* the plaintiff had recovered much beyond what would have entitled her to costs in a superior court, under the general law applicable to actions of slander, but here all that is before the court is a bare statement that the jury awarded £5, and that the judge said "I would certify if I had the power." Section 34 of 23 & 24 Vic. c. 126, has been repealed, but section 5 of the present County Court Act carries out the intention more fully. The section applies to actions of slander, and the Legislature has there fixed £10 as a standard under which damages are not to carry costs, with a view of discountenancing trivial and frivolous actions.

*Anderson* in support of the rule, was not called upon by the court.

KELLY C. B.—This rule must be made absolute. The first question which we have to determine is, whether we are at liberty to look at the record in order to judge of the nature of this action. The reasons suggested against our doing this are, firstly, that no affidavits on this point are before the Court; secondly, that the nature of the action is not alluded to in the rule. Now, I think that the Court is at all times at liberty to look at its own record. Our practice in making rules absolute for new trials, without requiring the record to be brought before us by affidavit, is analogous with and supports this view.

The second question is, whether we are called upon to look at what occurred before our brother Blackburn at Chambers, when he refused to make an order in this matter, and it is said that in consequence of his refusal the matter now comes before us as an appeal from his judgment. I am of opinion that we cannot without affidavits look to that which took place before the learned judge, and we must, therefore, in the present case, disregard entirely all that passed before him, and act in this matter as if no previous application had been made.

The third question we have to solve is, whether we are to allow the plaintiff in this action his costs. Now this was an action of slander as we learn from the record, and a very grave charge of felony was deliberately made by the defendant against the plaintiff. The jury by finding a substantial verdict of £5 marked the strong view they took of the case, and we have also the opinion of the Under-Sheriff, that the plaintiff was well entitled to costs, but he did not believe he had the power of granting them. Now I am of opinion that the Under-Sheriff clearly had the power

of certifying for the plaintiff's costs in this action although he supposed that he had not. The words "any action" used in the beginning of 30 & 31 Vic. c. 142, s. 5, certainly include an action of slander, an action which cannot be brought except in one of the superior courts, and for the trial of which a plaintiff must necessarily come here if he wishes to vindicate any aspersion on his character. I am, therefore, of opinion that this was a very proper case for a certificate of costs being granted by the judge who tried the case, but I go further and say that when any action such as the present is tried, an action which, if tried at all, must be tried in one of the superior courts, there is an imperative duty on the judge to certify unless some good cause to the contrary be shewn. There is always a chance that the action may be of a nature that ought not to be tried at all, and in such case there would properly be a field for the exercise of the discretion of the judge.

BRAMWELL, B.—I am of the same opinion. This was an action for slander, and we have the slander stated. It is very forcible, and imputes a felony to the plaintiff. Section 5 includes an action of slander, and consequently where damages under £10 are awarded, the plaintiff gets no costs unless the judge who tries the case certifies for them, or they are allowed by the Court or a judge at Chambers. If this had been a primary application to us I should not have hesitated at all; and when I consider how bad the slander was, and that the jury awarded substantial damages I must come to the conclusion that the action was a right and proper one to bring; and from this it follows, as a logical consequence, that it is right and proper that the plaintiff should have his costs. Mr. Francis has ingeniously argued that by section 5 the Legislature meant to set a standard of £10, under which damages were not to carry costs, with a view of discountenancing trumpety actions, but I cannot agree with him. The meaning of the section is, that where the plaintiff gets less than £10 he must satisfy the judge that he has good reason for coming into a superior court where the County Court has jurisdiction; but where there is no concurrent jurisdiction—where an action, if brought at all, must be brought in a superior court, there is, I think, at once a *prima facie* case in favor of the certificate being granted, and the onus lies on the opposite party to disprove it. It is said that in reviewing this matter after it has been before my brother Blackburn, we are exercising an appellate jurisdiction, and that we ought, therefore, to have before us all the evidence that was then produced at Chambers before we can overrule his decision. Now I think we have quite as much as he had on which to come to a decision, and we have moreover, the reason of his decision, and that was, "that he never did grant such certificates." As to *Gray v. West*, that case is not only an authority for the present case, but it is even more than is wanted by the present plaintiff, for the judgment in that case seems to go so far as to say that a judge ought to certify in *all* cases of slander; I do not go so far as that, but I think that in this case as real damages have been awarded, as the action could not have been brought except in a superior court, and as it was one which it was quite pro-