

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* FLETCHER.1876  
Nov. 24.

*Judicature Acts*, 1873 & 1875, 36 & 37 *Vict. c.* 66, ss. 19, 47; 38 & 39 *Vict. c.* 77, s. 19, *Order LXII.*

A rule for a certiorari having been obtained in the Queen's Bench Division to bring up a summary conviction by justices, for the purpose of quashing it on the ground of want of jurisdiction, the Court discharged the rule. On appeal:—

*Held*, that the case was within the last clause of s. 47 of the *Judicature Act*, 1873, as a judgment of the High Court in a criminal matter, and that there was therefore no appeal.

APPEAL from the decision of the Queen's Bench Division discharging a rule for a certiorari, to bring up a conviction,—by Henry Fletcher, Esq., and others, justices of Cumberland, of Robert Birnie, under 1 & 2 Wm. 4, c. 32, s. 30, for trespass by day in pursuit of game, whereby Birnie was adjudged to pay 1s. penalty and costs, or be imprisoned for seven days,—for the purpose of quashing the conviction for want of jurisdiction, Birnie having, as it was alleged, set up a *bonâ fide* claim of right.

*Forard*, for the prosecutor, objected that the Court of Appeal had no jurisdiction, this being a criminal case, citing *Reg. v. Steel*. (1)

*Bompas*, for the defendant Birnie, contended that this was not a criminal proceeding in the High Court. It was a mere collateral proceeding in the nature of civil process, being part of the peculiar jurisdiction of the Queen's Bench Division in exercising control over justices. True, it was on the Crown side of the Queen's Bench Division, but there was nothing in the statutes to except cases on the Crown side (if not criminal cases) from the general enactment of s. 19 of the Act of 1873, which gave an appeal, save as thereafter mentioned, from any judgment or order of the High Court. *Mandamus* and other writs were clearly in the nature of civil process; and this Court had lately heard an appeal in a *quo warranto*: *Reg v. Collins*. (2) It was true that *Order LXII.* said that nothing in the rules should affect the practice or procedure in criminal proceedings; but the rules could not

(1) *Ante*, p. 37, where the sections of the Acts are set out.

(2) *Ante*, p. 30.

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control or take away the right of appeal given by the statute:  
*Reg. v. Sillem.* (1)

MELLISH, L.J. The question is, whether this Court has jurisdiction in an appeal from a decision of the Queen's Bench Division discharging a rule for a writ of certiorari to bring up, for the purpose of quashing it, a summary conviction by justices of the peace for trespass in pursuit of game. The question, therefore, turns upon whether this decision of the Queen's Bench Division was "a judgment in a criminal cause or matter" within the last clause of s. 47 of the Judicature Act, 1873. In *Reg. v. Steel* (2) we held that clause was not confined, as was contended, to the High Court when sitting as the Court to hear points reserved in criminal cases, but extended to all criminal cases in the High Court, and therefore to criminal cases in the Queen's Bench Division. The question here is somewhat wider, whether the exemption from appeal extends to a proceeding in the Queen's Bench Division, which might be said to be not strictly a criminal proceeding in that court, but was a proceeding taken in that court for the purpose of quashing a conviction before justices, which was clearly a criminal proceeding. Was that proceeding in the Queen's Bench Division "a proceeding in a criminal matter?" Now, the intention of the legislature appears to me clearly to have been to leave the procedure in criminal cases substantially unaltered. Matters in the peculiar jurisdiction of the Court of Queen's Bench were transferred to the Queen's Bench Division, and in the same way the Court for Crown Cases Reserved was reconstituted of judges of the High Court, but beyond this it was not intended that there should be any practical alteration in the procedure in criminal cases; and I have no doubt that the clause that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter," was intended to refer to all criminal matters whatever coming before the High Court. I can see no reason why it should not be construed according to its plain meaning, so as to extend to criminal matters on the Crown side of the Queen's Bench. I do not mean to say that the exception extends to all matters on the Crown side of the Queen's Bench Division. There

(1) 10 H. L. C. 704; 33 L. J. (Ex.) 209.

(2) Ante, p. 37.

are cases on the Crown side which are really civil cases. This was a conviction for an offence under the criminal law, and although not commenced in the Queen's Bench Division, the proceeding in that Court, in order to obtain a certiorari, was in a matter which was clearly a criminal matter before the justices. If there is an appeal at all, it must lie for both sides. Suppose the rule had been made absolute for a certiorari, and a rule had also been made absolute to quash the conviction, surely the latter would have been a judgment in a criminal proceeding, and I can see no difference between an appeal from a rule to quash and an appeal from discharging a rule for a certiorari. If, then, there were an appeal in the one case, there must also be an appeal in the other, so that it would follow that on every conviction with a small penalty or a few days' imprisonment, there might be an appeal to this Court and so to the House of Lords. I cannot think that the legislature contemplated such a change as this; on the contrary, I think that it was intended that there should be no appeal in any criminal case except the old appeal by writ of error for error on the record. I therefore think that the present case comes within the meaning of the exception in s. 47. It is clearly a criminal matter, it is a proceeding in the Queen's Bench Division, although not commenced there, and therefore it is a proceeding in a criminal matter in the High Court. Sect. 19 of the Act of 1875 throws light upon the construction of the previous Act, and shews that the legislature intended to give no fresh appeal in criminal cases; at least s. 19 assumes this to have been the intention, for it says that the practice in criminal cases in the Court of Appeal shall be the same as before the Act: that was by writ of error, but how could this practice be applicable to the new appeals, if there were any created by the new Act? The practice in the Court of Appeal could not remain the same if the jurisdiction were entirely altered and enlarged. The contention, therefore, of the appellant cannot be maintained, and the exception in s. 47 must extend to all criminal matters in the High Court, which includes the present case.

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BRETT, J.A. I am of the same opinion. The only way in which s. 19 of the Act of 1875, as the Lord Justice has said, can be

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used is as shewing what was to be the interpretation of s. 47 of the Act of 1873. And this was the way s. 19 was used by the Court in *Reg. v. Steel*. (1) If you apply s. 19, it says that the practice in criminal cases in the Court of Appeal is to be the same as before the Act, unless it is altered by the rules, that is to say, cases on appeal which were only for error on the record are still to be by writ of error; and the rules were not intended to alter this; but Order LXII. was inserted by the framers of the rules for greater caution, lest some of the rules should be supposed to have changed the practice in criminal cases; and accordingly Order LXII. says that none of the rules shall apply to the Crown side of the Queen's Bench or to criminal proceedings. Sect. 19, however, does no more than say the practice shall remain the same; but it is significant as shewing in criminal cases the legislature thought no fresh appeal had been given by the former Act; but it does not solve the question, and can only be used to assist in interpreting the meaning of s. 47, as we held in *Reg. v. Steel*. (1) It was clear that under s. 19 of the Act of 1873 an appeal was given from every judgment or order of the High Court, except so far as it was taken away by something subsequent in the statute, and the question in that case was, how far s. 47 had done this. It was argued that the latter part of s. 47, which clearly only referred to the Court for Crown Cases Reserved in the earlier part, was confined to criminal cases in that court, but the Court held that its scope was much larger, and that it applied to a judgment in any criminal matter whatever in the High Court. In the present case, it is said that judgment must be confined to a judgment in a criminal cause or matter in the High Court itself, and does not extend to a proceeding in a case which has not its inception in the High Court. I cannot agree to that. I should read the clause as meaning "no appeal shall lie from any decision of the High Court by way of judgment in any criminal cause or matter." Is not this "a decision by way of judgment"? There has been a conviction in a criminal matter by justices, and a motion in the Queen's Bench Division for a certiorari for the purpose of determining whether that conviction is good or ought to be quashed; and the Queen's Bench has determined, by discharging the rule

(1) Ante, p. 37.

for a certiorari, that the conviction ought to stand; in other words, the Court has affirmed the conviction. If that is not a proceeding in a criminal matter, I am at a loss to see what is. It is in effect a judgment or decision on the question whether a man shall be fined or imprisoned or not. On the whole, therefore, I think that the intention of the legislature was that there should be no appeal at all in criminal matters beyond what there was before. This case, therefore, follows the judgment in *Reg. v. Steel*. (1)

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AMPHLETT, J.A. I am of the same opinion. It is argued that this is really a civil proceeding for protecting the civil rights of a person who has a bonâ fide claim to the right of shooting. But that is not so; in substance as well as form it is a criminal proceeding. If the man makes out primâ facie that he is setting up a bonâ fide claim of right, the justices ought to hold their hands; and if they proceed to hear and convict notwithstanding, the Queen's Bench Division will grant a certiorari, even if certiorari is taken away in the particular case, because it is for the purpose of preventing the justices from proceeding without jurisdiction; and when it comes before the Court the purpose is not to determine the civil right, but to determine whether or not the magistrates had jurisdiction, or whether, as it were, the plea to the jurisdiction was a valid plea. It is, therefore, a proceeding in a criminal matter to determine whether the conviction can be sustained; and consequently there is no appeal. It would be most inconvenient if this were not so, and a petty case arising from the killing of a rabbit might be made the subject of appeal to the House of Lords, not to try the civil right, but to determine whether there had been a bonâ fide claim of right before the magistrates.

PER CURIAM :

*Appeal dismissed with costs.*

Solicitors for appellant: *Bischoff, Bompas, & Bischoff, for E. & E. L. Waugh, Cockermouth.*

Solicitors for prosecutor: *Helder, Roberts, & Gillett, for J. Webster, Whitehaven.*

(1) Ante, p. 37.