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considers that it has not then sufficient materials before it, the Court may permit the defendants to plead.

LINDLEY, L.J. I quite agree with what my Brother Lopes has last said.

Solicitors for plaintiff: *Torr & Co., for Travell & Woodward, Nottingham.*

Solicitor for defendants: *W. Whitfield.*

W. L. C.

Nov. 17.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE JUSTICES OF THE CENTRAL CRIMINAL COURT.

Practice—Appeal—Jurisdiction—“Criminal cause or matter”—Property obtained by False Pretences—Pledge of, to Innocent Party—Sale of, by him—Power to order Restitution of Proceeds of Sale in Hands of Agent of Convicted Prisoner—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47—24 & 25 Vict. c. 96, s. 100.

By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any property by false pretences is convicted thereof, in such case the property shall be restored to the owner or his representative, and in every such case the court before whom any such person shall be tried shall have power to order the restitution thereof in a summary manner.

The Queen's Bench Division having discharged a rule for a certiorari to remove an order for restitution made under the above section:—

Held, that the order of the Queen's Bench Division was a judgment “in a criminal cause or matter” within s. 47 of the Judicature Act, 1873, and that there was no appeal to the Court of Appeal.

Held, further, that an order may be made under the above section for the restitution of the proceeds of the property, as well as of the property itself, and that it may be made upon an agent who holds such proceeds for the convict, without notice of the fraud.

APPEAL from a judgment of the Queen's Bench Division (1); the facts sufficiently appear from the judgments and from the report of the case in the court below.

Abrahams, for the respondent. There is a preliminary objection to the hearing of this appeal. The order for the restitution of the goods was made in a “criminal cause or matter,” within

(1) Reported 17 Q. B. D. 598.

the meaning of s. 47 of the Judicature Act, 1873, and no appeal will lie from the decision of the Divisional Court. (1)

E. Wilberforce, for the appellants. The right of appeal given by s. 19 of the Judicature Act, 1873, is very wide, and is only subject to the limitation imposed by s. 47 of that Act; this is not a judgment in a criminal cause or matter within the latter section. The first test is, to consider whether the proceeding on which, or on any step in which, the judgment was given, might result in fine or imprisonment; for in all cases where it has been decided that no appeal lay, either the appellant or respondent might have been liable to fine or imprisonment as a consequence of the proceeding on which the appeal was brought: *Reg. v. Fletcher* (2); *Loughborough Highway Board v. Curzon* (3); *Mellor v. Denham*. (4) It is true that the statutory remedy by restitution conferred by 21 Hen. 8, c. 11, and by 24 & 25 Vict. c. 96, s. 100, is exerciseable only by the Court before which the felon is tried: *Reg. v. Lord Mayor of London* (5); but restitution is a civil matter arising out of the criminal trial, and a writ of restitution could be pleaded to: *Burges v. Coney* (6); *Bishop of Worcester's Case*. (7) If no order is made under the statute for the restitution of stolen property, the owner may sue in trover: *Scattergood v. Sylvester* (8); though in a case decided before 7 & 8 Geo. 4, c. 29, s. 57, it was held that he could not have sued where the only conversion was before the thief's conviction, and before the property had reverted in the original owner: *Horwood v. Smith*. (9)

[LOPES, L.J., referred to *Reg. v. Foote* (10), where it was held

(1) By s. 19 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the Court of Appeal has jurisdiction to "hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice."

By s. 47, "... no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the con-

sideration of the judges under " 11 & 12 Vict. c. 78.

(2) 2 Q. B. D. 43.

(3) 17 Q. B. D. 344.

(4) 5 Q. B. D. 467.

(5) Law Rep. 4 Q. B. 371.

(6) Tremaine's Pleas of the Crown, p. 315; (and see Kelyng's Crown Cases pp. 35, 48.)

(7) Moore, 360.

(8) 15 Q. B. 506.

(9) 2 T. R. 750.

(10) 10 Q. B. D. 378.

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by the Court of Appeal that a refusal by the Divisional Court to grant bail was a judgment in a criminal cause or matter.]

In that case the jury had been discharged without giving a verdict, and the criminal proceedings were not at an end. In *Reg. v. Steel* (1) it was held that the taxation of costs on a criminal information was not a matter of appeal; but that was on the ground that the costs were a necessary consequence of the judgment, and that therefore the order for costs was part of the procedure in a criminal matter. This was also the *ratio decidendi* in *Reg v. Latimer*. (2)

Another test is whether the object of a given proceeding is punishment or only redress; in the former case the proceeding itself is one in a criminal matter, in the latter it is a civil one: *Attorney-General v. Radloff* (3), per Platt, B.; *Attorney-General v. Bradlaugh* (4), per Brett, M.R. (5); and the object of the proceeding in the present case is the recovery of the stolen goods or their proceeds. The prosecutor had the choice of three remedies; the Act of 21 Hen. 8, gave him a right of action, and also gave the justices before whom the prisoner was tried power to order a writ of restitution, both of which are civil remedies; and 7 & 8 Geo. 4, c. 29, superadded an order for restitution in a summary manner, thus adding a third civil remedy to the two already existing.

There is error upon the record; the defect appears on the face of the order appealed from; the order of the Divisional Court is drawn up on the rule nisi, which makes the order of the judge at the Central Criminal Court an exhibit; his order may therefore be looked at by this Court; all the orders together make up the record. In the cases referred to in the judgment of the Divisional Court the proceeds of the robberies were still in the possession of the thief at the time of his conviction; if they have passed out of his possession, they cannot be the subject of such an order: *Lindsay v. Cundy* (6) (reversed on another point); *Moyce v. Newington*. (7) It is contended for the respondent that the fact

(1) 2 Q. B. D. 37.

(2) 15 Q. B. 1077.

(3) 10 Ex. 84.

(4) 14 Q. B. D. 667.

(5) Page 690.

(6) 1 Q. B. D. 348; 2 Q. B. D. 96.

(7) 4 Q. B. D. 32.

that in *Lindsay v. Cundy* (1) there had been a sale of the goods to the defendant by the offender himself distinguishes it from the present case, where the sale was only made by the appellants as his brokers ; but the appellants had a lien on the proceeds, and a mere pledge is as effectual as a sale in giving to the pledgee rights which cannot be interfered with : *Attenborough v. London and St. Katharine's Docks Co.* (2)

[LORD ESHER, M.R. That was a case of interpleader ; and in administering the equity of interpleader proceedings, the Court will say to whom the property in justice belongs.]

The power of ordering summary restitution given by s. 100 of the Larceny Act only arises in cases where the property is to be restored under the first part of the section ; it is clear from *Lindsay v. Cundy* (1) and *Moyce v. Newington* (3) (4) that in such a case as this trover will not lie, and the property cannot be restored ; the judge therefore exceeded his jurisdiction in making the order. Such an order may be quashed for excess of jurisdiction : *Reg. v. Corporation of London.* (5) Where a fact gives jurisdiction, and the Court, as in the present case, finds the fact, its excess of jurisdiction may be reviewed on certiorari.

[He also cited *Chichester v. Hill.* (6)]

Abrahams, for the respondent. The question whether the order is rightly made in point of law is not open upon an application for a certiorari : *Reg. v. King.* (7) There is no error apparent on the face of the order of the Divisional Court. It is not necessary to bring the case within s. 47 of the Judicature Act that the order should be a judgment of a criminal nature ; it is sufficient if it is made in a criminal cause or matter. This order was made, as appears from the recital, on the trial of the prisoner, and the power to make it is given to, and is only exercisable by, the Criminal Court having jurisdiction to try him by virtue of its commission : *Reg. v. Lord Mayor of London.* (8) The cases relied on by the appellants are all cases of a bonâ fide

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(1) 1 Q. B. D. 348 ; 2 Q. B. D. 96. in *Vilmont v. Bentley*, post, p. 322.
(2) 3 C. P. D. 450. (5) E. B. & E. 509.
(3) 4 Q. B. D. 32. (6) 52 L. J. (Q.B.) 160.
(4) *Moyce v. Newington* has since (7) 14 Cox, 434.
been overruled by the Court of Appeal (8) Law Rep. 4 Q. B. 371.

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purchaser of goods holding the proceeds for himself; the present is the case of agents holding them for the prisoner.

[He was stopped by the Court.]

Wilberforce, in reply.

LORD ESHER, M.R. In this case the criminal was tried at the Central Criminal Court on a charge of obtaining flax by false pretences, and was convicted; and after the conviction the judge who tried him was asked to make, and made, an order on the appellants to restore to the prosecutor the money the proceeds of a sale by them of the flax. They had sold it as brokers for, and instructed by, the convicted criminal. With regard to that order, a motion was made in the Queen's Bench Division to bring it up by certiorari for the purpose of quashing it; but on the hearing the Court discharged the rule, and refused to make the order asked for, hence the present appeal.

It was urged in the first place against this appeal that this was an order made in a criminal matter, while the appellants contended that it was not so made, but that the order for restitution was made in a civil matter after the decision had been given in the criminal proceeding; and we have to decide what is the view that should be taken of the statute which gives the power of making the order. This power is given to the judge or Court which tries the criminal, and it seems that the order can, and what is more, ought to be, made practically at the time of the trial; I do not say that it must be made at the minute, but it must be made as one of the conclusions of the trial. On the true construction of the Act of Parliament, then, I am of opinion that the judgment of the Queen's Bench Division was an order made in a criminal matter; and if that is so, it is clear that no appeal lies here unless, it may be, the defect appears on the face of the order. I have great doubt in the present case whether the alleged defect does appear on the face of the order with which we have to deal; but it is unnecessary to decide the point. If it does appear, what is it that appears on the face of the order? That an order was made by a judge of the Central Criminal Court for the restitution of goods which it is not denied had been obtained by false pretences, and that it was made, not on a

stranger but, on the agents of the convicted criminal; that is, that it was an order for the restoration of the proceeds in the hands of the agents, which was the same as though they had been in the hands of the offender himself. I think that the Court has power to order not only the restitution of the things themselves, but also the proceeds of their sale in the hands of the convicted criminal, and the cases cited prove it; and if the proceeds are in the hands of an agent holding them for the convicted criminal, I think an order can be made against him. Further than that I do not go, and I say nothing as to the power to make such an order where the proceeds are in the hands of anyone but an agent of the convict. In the present case I think that the judge had power to make the order, on the ground that the appellants were holding money as agents for the offender at the time of his conviction. It is true that they had a lien for part of the money, but that was only such a lien as would enable them in accounting to him to retain a part of the money for themselves; they were in any event bound to account to him, and they were his agents to hold for him the gross, and not merely the nett, proceeds of the sale. I am of opinion, therefore, that the judge had jurisdiction to make the order for restitution, and that even if the alleged defect is apparent on the face of the order (as to which I give no opinion) it does not shew that he had no jurisdiction.

LINDLEY, L.J. This is an appeal from a decision of the Queen's Bench Division discharging a rule nisi for a certiorari which had been obtained on March 19, the object of which was to remove into the Queen's Bench Division an order of Mr. Commissioner Kerr for the restoration of certain money, being the proceeds of the sale of the property which had been fraudulently obtained by a convicted prisoner, and the ground on which the rule was granted was, that the order was made without jurisdiction. The rule having been discharged there is an appeal to this Court. We have to consider the order appealed from and to decide whether it was made in a criminal cause or matter. This order of Mr. Commissioner Kerr was made under s. 100 of the Larceny Act, and the jurisdiction to make such orders is by that

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section conferred on the judge in the exercise of the criminal jurisdiction given to him, and the order itself is drawn up in the form of criminal orders. Though it affects property, it seems clear to me that the order is one which was made in a criminal cause or matter, and that the judges in the Divisional Court were right in so holding. Then, is this order a judgment within s. 47 of the Judicature Act, 1873? That section has received judicial interpretation before now in many cases, and it is clear from the decision in *Reg. v. Witchurch* (1), that a rule absolute for a writ of certiorari is a judgment within the meaning of that section, and I am quite unable to see how it can be successfully contended that an order discharging a rule nisi is not also a judgment.

Stopping there, it is clear that there is no appeal to this Court unless it is apparent on the face of the order that it is erroneous. The order of the judge at the trial has been the subject of much argument, and I assume that his order is so incorporated in the order of the Divisional Court as to set out all the facts of the case, and that those facts would shew that the order of the judge was wrongly made. But where does that lead us? We have to consider whether the judge had jurisdiction to make the order, not whether he was right or wrong in making it. It seems impossible for us to say that he had no jurisdiction to make the order which he did; looking at the jurisdiction conferred by s. 100 of the Larceny Act, and bearing in mind the fact that the persons holding the money were the agents of the prisoner. I do not give any opinion whether the order was on the facts rightly or wrongly made.

LOPES, L.J. This is an order made under s. 100 of the Larceny Act, which authorizes the Court or judge to make an order for the restitution of stolen property, and the first question that we have to decide is, whether the order was made in a criminal cause or matter within the meaning of s. 47 of the Judicature Act of 1873; if it is so, there is no appeal from the judgment of the Divisional Court. The order was made by a judge who exercises criminal jurisdiction, and he could not have made it, except

(1) 7 Q. B. D. 534.

in the exercise of that jurisdiction. It is argued that he made it in a civil cause or matter; but it was made by the judge who tried the convict, and if we look at the caption of the order, it seems impossible to conclude but that it was made in a criminal matter within the meaning of the section.

But it is said that, even if it was made in a criminal matter, there is error apparent on the record, and there is still an appeal. Whether the record comes within the meaning of s. 47 of the Act of 1873 I do not say, and I express no opinion as to whether the alleged error is apparent on its face, which can only appear by incorporating in it the order made by the learned judge at the trial. There seems to be no error at all when the facts of the case are understood; the order was made on persons who held money as agents for the convict, and the case of *Lindsay v. Cundy* (1), and the other cases cited by the appellants' counsel do not apply. There is no doubt whatever that the criminal court has power to order restitution of the proceeds in the hands of the convict of the sale of stolen property; and his agents stand in the same position as the convict himself.

Appeal dismissed.

Solicitor for appellants: *Oldman.*

Solicitors for respondents: *Michael Abrahams, Son, & Co.*

(1) 1 Q. B. D. 348.

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ERRATA.

<i>Page</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
322	15 from top	"thief"	"fraudulent buyer."
545	4 & 5 from top	"November 16, 1887 "	" November 16."
594	note (4)	" 4 Ch. D. 242 "	" Law Rep. 4 Ch. 242."