[IN THE ASSIZE COURT OF NICOSIA.]

REGINA

v.

GEORGHI ANDONI YALLOURI.

COURTS—JURISDICTION—PLEA OF AUTREFOIS CONVICT—CYPRUS COURTS OF JUSTICE ORDER, 1882, SECTIONS 52 AND 153—EXTRADITION ORDER IN COUNCIL, 1881, SECTION 40.

To an information charging him with having committed homicide with premeditation, the accused pleaded that he had been previously convicted of the same offence. It was proved that the accused had been previously tried and convicted of the offence charged in the information, but that the Court before which he was tried had no jurisdiction.

HELD: That the previous proceedings were a nullity and formed no bar to a subsequent trial for the same offence.

To sustain the plea of autrefois convict or autrefois acquit, it is necessary that the judgment of conviction or acquittal relied upon, *should have been given by a Court having jurisdiction* to try the person charged in respect of the offence with which he is charged.

THE prisoner was placed on his trial, on an information filed by the Queen's Advocate, charging him with the premeditated homicide of Abdullah Osman, the Mudir of Paphos, on the 5th October, 1892.

He pleaded that he had been previously tried and convicted of the same offence before the Assize Court of Paphos, on the 13th February, 1894.

The facts were that the prisoner was a convict who escaped from prison in December, 1891, whilst undergoing a sentence of three years' imprisonment.

He left Cyprus at a time unknown, and in April, 1893, an extradition warrant was granted for his arrest by the Supreme Court on a charge of wounding a zaptieh with intent to kill him.

On that charge he was extradited by the Ottoman Government and was brought back to Cyprus on the 1st February, 1894. He was then charged with the premeditated homicide of Osman Abdullah, the Mudir of Paphos, and placed on his trial before the Assize Court of Paphos, convicted and sentenced to death.

Doubts having arisen as to the jurisdiction of the Assize Court of Paphos, an extradition warrant was subsequently granted by the Supreme Court for the arrest of the prisoner on the charge of the premeditated homicide of the Mudir of Paphos, and, in the month of August last, he was taken to Beyrout and handed over to the Ottoman authorities, by whom his extradition on this charge was granted, and he was brought back to Cyprus.

ASSIZE COURT, NICOSIA.

REGINA v. GEORGHI ANDONI YALLOURI.

Templer, Q.A., for the prosecution. I contend that the proceedings before the Assize Court of Paphos were null and void, inasmuch as that Court had no jurisdiction to try the prisoner. Under Section 40 of the Extradition Order in Council, 1881, the prisoner was not triable in Cyprus in February last for any offence committed within British jurisdiction before his extradition, other than a scheduled offence proveable by the facts on which his extradition is grounded. At the time he was extradited to Cyprus nothing was known of his connection with the homicide of the Mudir of Paphos, his extradition had been granted on a charge of the attempted murder of a zaptieh, and on this charge alone was it competent for any Court in Cyprus to try him. According to the decisions of Courts in England, a man may plead autrefois convict if he be placed on his trial for an offence for which he has been previously convicted and sentenced by a proper and lawful judgment. In the present case there was no proper and lawful judgment, as the Court had no jurisdiction to give it.

In "Russell on Crimes," Vol. I., p. 47, it is laid down "wherever the indictment whereon a man is acquitted is "so far erroneous (either for want of substance in setting "out the crime or the authority in the Court before which "it was taken . . . . that no good judgment could "have been given upon it against the prisoner), the acquittal "is no bar to a subsequent indictment, because in judgment "of law the prisoner was never in danger upon it," etc.

There is no Court of Error here and no procedure by which the judgment of the Assize Court of Paphos can be set aside, but the proceedings must be treated as a nullity and form no bar to the present trial.

Diran Augustin, for the prisoner. The judgment of the Assize Court of Paphos is a bar to the present proceedings. The procedure of the Courts in Cyprus is regulated by the Cyprus Courts of Justice Order, 1882, which prescribes how and in what cases the judgments of Courts can be set aside. There is admittedly nothing in that Order in Council which would enable the judgment of the Assize Court of Paphos to be set aside, and if it cannot be set aside it must stand, and is a bar to any subsequent proceedings for the same offence. Whether the Court had jurisdiction or not, the judgment still stands, and anyone turning to the judgment book will find there the record that the prisoner was then tried and convicted for the offence alleged against him in the present information. Whether that judgment was, for any reason whatever, not carried into execution by the executive authorities has nothing to do with the Court. Section 52 of the Order in Council says, that no person shall be tried twice for the same offence. What meaning will

these words have, if, whilst a judgment of the Assize Court still exists, the prisoner can again be placed on his trial for the same offence ?

The Queen's Advocate replied.

Judgment: The judgment of the Court on the plea of autrefois convict was delivered by the Chief Justice to the following effect :—

The prisoner is brought before us on an information charging him with the premeditated homicide of Abdullah Osman, on the 5th October, 1892. He pleads that he has been already convicted of this offence before the Assize Court of Paphos, on the 13th February last, and it is contended for him that under Section 52 of the Cyprus Courts of Justice Order, 1882, he cannot be tried again for this offence. A copy of the judgment of the Assize Court of Paphos was not produced before us, but the prisoner's advocate undertook to procure one; and the Queen's Advocate admitted that the prisoner had been tried and convicted before the Court of the offence charged against him in the present information, and the notes of the Chief Justice to which we referred, form, for the purposes of to-day, a sufficient record of the fact that the prisoner was charged with, and convicted of, the premeditated homicide of Abdullah Osman, on the 5th October, 1892. It is alleged on the part of the prosecution that the proceedings before the Assize Court of Paphos form no bar to this trial, inasmuch as that Court had no jurisdiction to try the prisoner, and that his trial and conviction were null and void; and, on the other hand, that as there is a judgment of that Court subsisting on record and no machinery provided by which it can be set aside, it forms a bar to the present trial.

With regard to the facts, it is proved that the prisoner's extradition was granted by the Ottoman authorities in January last on a charge of wounding with intent to kill a zaptieh named Nikeforos, at Kritou Terra: that at that time there was no charge against the prisoner of killing the Mudir of Paphos; but, that when he was brought back to Cyprus, under the warrant charging him with wounding the zaptieh, the charge of killing the Mudir of Paphos was instituted, the prisoner was committed for trial, tried and convicted. Now, Section 40 of the Cyprus Extradition Order in Council, 1881, says, "In case of the extradition of any person to Cyprus . . . . by the Ottoman Government . . . . . he shall not be triable in Cyprus for any offence committed within British jurisdiction" (and, therefore, in Cyprus) "other than a scheduled offence proveable by the facts on which the extradition is grounded, unless and until he has been restored to the country by

ASSIZE COURT, NICOSIA.

REGINA v. GEORGHI ANDONI YALLOURI.

whose Government he was given up, or has had in the judgment of the High Commissioner reasonable opportunity of returning thereto."

Now the prisoner having been extradited in January last, on a charge of attempted homicide of a zaptieh, it is clear that he was not triable and could not lawfully be tried on a charge of the homicide of the Mudir of Paphos in October, 1892, until he had been restored to Ottoman territory, or had a reasonable opportunity of returning thither, and we are, therefore, of opinion that the Assize Court of Paphos had in February last no jurisdiction to try him on this charge of homicide. But it is contended that as he was so tried and convicted he cannot again be placed on his trial.

Section 153 of the Cyprus Courts of Justice Order, 1882, enabling an accused person to plead that he has been previously acquitted or convicted, as the case may be, of the same offence, was no doubt framed with regard to the English practice and principles regulating the matter; as, so far as we are aware, nothing is to be found in the Ottoman Law in force in Cyprus touching the question. The decisions of the English Courts, though not binding upon us here, are of great value as decisions upon the same state of facts. It is clear from these decisions that to sustain the plea of autrefois convict or autrefois acquit, the judgment of the Court relied upon must be a proper and lawful judgment, and that the judgment of a Court which had no jurisdiction, will not be a bar to subsequent proceedings. In the present case it is clear that the judgment of the Assize Court of Paphos was the judgment of a Court having no jurisdiction to try the prisoner, and that he was never in the eye of the law in peril. This being so, we are of opinion that the proceedings in the Assize Court of Paphos were a nullity, and the fact that no machinery is provided by the Cyprus Courts of Justice Order, 1882, by which the judgment can be expunged from the record at Paphos, is immaterial. The plea of autrefois convict appears to us to be regulated by the same principles as regulate that of autrefois acquit. There is, so far as we are aware, no machinery in England by which the record of a judgment of acquittal can be expunged, yet that fact will not enable an accused person to sustain a plea of autrefois acquit, if the judgment has been given by a Court which had no jurisdiction.

The circumstances of this case strongly resemble those of a somewhat similar case which arose in Cyprus. In the year 1879, Sava Christodoulo, commonly known as Mavro Sava, was charged with the premeditated homicide of a zaptieh at Larnaca. He was brought before the Daavi Court, and, being claimed as a Greek subject by the Greek Consul, was committed for trial before the High Court of

Justice, without any further examination as to the question of his nationality. On his trial before the High Court of Justice, he was convicted and sentenced to death. Doubts subsequently arose as to the jurisdiction of the Court to try him, on the ground that he was not a Greek but an Ottoman subject, and also on the ground that even if he were a Greek subject, under the terms of the Capitulations with Turkey he would still be triable before the Ottoman tribunals. The facts were referred to England for the consideration of the Law Officers of the Crown, who advised that Sava was an Ottoman subject, that the trial before the High Court of Justice was a nullity, and that he should be brought before the Ottoman tribunals. Sava was accordingly brought before the Temyiz Court, and was again tried and sentenced.

The principles involved in that case appear to us to be identical with those involved in the present. In that case, as in this, the prisoner was tried and convicted before a Court having no jurisdiction to try him, the proceedings were held to be a nullity, and he was again placed on his trial before a tribunal having jurisdiction to try him. In that case too, we may observe, no proceedings were or could be taken to set aside the record of his conviction before the High Court of Justice, and that record, no doubt, exists at the present day.

The decision at which the Court has arrived is also supported by the judgment of the Supreme Court in the case of *Regina v. Mehmet Ahmet and others* (C.L.R., Vol. II., p. 16). In that case a charge was made against certain persons of an offence not triable summarily, under Section 2 of the Firearms Law, 1889. Without ascertaining whether the accused consented to the case being tried summarily, the Magisterial Court affected so to try the case and dismissed the charge, the dismissal of a charge by a Magisterial Court operating as an acquittal. Subsequently an application was made to the Magisterial Court to issue fresh summonses in respect of the same offence, and refused on the ground that the charge had already been dismissed. An application was then made to the Supreme Court, under Section 63 of the Cyprus Courts of Justice Order, 1882, for an order directing the Magisterial Court to issue the summonses. On the hearing of the application before the Supreme Court, it was urged that the proceedings before the Magisterial Court were a bar to any further proceedings in respect of the offence. The Supreme Court held that, inasmuch as the Magisterial Court had no jurisdiction to deal with the case in the way it purported to do, the dismissal of the charge was a nullity, and formed no bar to the institution of fresh proceedings. If the Court in that case drew up an order of dismissal, as it might be required to do,

ASSIZE COURT, NICOSIA.

REGINA v. GEORGHI ANDONI YALLOURI.

there is no procedure by which that order can be erased from the Court records; nevertheless the proceedings were held to be a nullity and no bar to the institution of a subsequent charge in respect of the same offence.

In our opinion Section 52 of the Cyprus Courts of Justice Order, 1882, which enacts that no person shall be tried twice for the same offence, means that where a person has been tried by a Court having jurisdiction to try him and has been acquitted or convicted by a proper and lawful judgment, the acquittal or conviction is a bar to any further trial for the same offence.

We decide, therefore, that the plea of autrefois convict has not been sustained.

The accused then pleaded not guilty to the information, and was tried, convicted, and sentenced to death.

SMITH, C.J. & FISHER, ACTING J. 1894.

[SMITH, C.J. AND FISHER, ACTING J.]

ARGHIRO HADJI LOIZO AND OTHERS *Plaintiffs,*

v.

NAILE HANOUM *Defendant.*

UPROOTING GROWING CROPS—DAMAGES—CLAIM FOR, WHERE CROP SOWN BY TRESPASSER—MEASURE OF DAMAGES—LAND LAW, ARTICLES 21 AND 22—MEJELLE, ARTICLES 907 AND 986.

An owner of land on which trespassers have sown a crop must not uproot or destroy such crop, but should take legal steps to procure the uprooting of the crop by the proper officer.

The measure of damages which the trespasser is entitled to, where the owner has uprooted crops so sown by the trespasser, is the lowest value the crop would have had when standing in the field ripe for cutting, and not the value the grain might have when harvested and brought to market.

APPEAL of plaintiffs from a judgment of the District Court of Nicosia.

The facts and arguments sufficiently appear from the judgment of the Supreme Court.

Pascal Constantinides (*Diran Augustin* with him), for the appellants.

Macaskie, for the respondent.

Sept. 13. *Judgment:* The plaintiffs in this action sought to restrain the defendant's interference with a piece of land of which they claim to be the registered owners, and to set aside any registration that may exist for this land in the defendant's name. They also claim damages for the act of the defendant, or her agents, in uprooting a crop of wheat sown by them upon the disputed land.