Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Attorney-General for Trinidad and Tobago v. *Eriché and others, from the Supreme Court of Trinidad and Tobago; delivered 3rd August* 1893.

Present:

LORD HOBHOUSE.
LORD ASHBOURNE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

In this case Her Majesty's Attorney-General for Trinidad and Tobago is taking proceedings by Information of Intrusion and by writ of summons against the Defendants, for the purpose of asserting the title of the Crown to an estate called Mon Repos of which the Defendants are in possession, and from which they are or were getting asphalt. The Defendants moved to stay proceedings, on the ground that the question of title between them and the Crown had already been decided in a previous litigation, and that the present proceedings were frivolous and vexatious. This motion was refused by Mr. Justice Rayner, but on appeal to the Supreme Court it was allowed, and an order was made on the 11th January 1892 to the effect that the present action should be dismissed as frivolous and vexatious, the question at issue therein being already *res judicata*. And by the same order an injunction,

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which had been granted by Mr. Justice Rayner against the Defendants, was dissolved with costs.

The Supreme Court have thus refused to hear the case on its merits, and as the Attorney-General has appealed to Her Majesty in Council against that decision, this Committee has to examine the previous litigation, in order to see whether it was such as to preclude the Crown from asserting its claim afterwards.

By Ordinance 4 of 1889 it was enacted that the digging of asphalt on Crown lands without a license should be an offence against the Ordinance, for which the person digging might be arrested, and be punished on summary conviction before a Justice of the Peace. And the person accused of digging was put to prove either that he was not in fact engaged in digging asphalt from Crown lands, or that he had a license to do so; otherwise he was to be held guilty.

As it was found that under this Ordinance the jurisdiction of the Magistrate was ousted directly a question of title was raised, another Ordinance (No. 11 of 1891) was passed to avoid that obstacle. Section 1 enacts as follows:—

"1. Notwithstanding any Ordinance or law to the contrary, it shall be lawful for any Stipendiary or other Justice to hear and determine any case wherein any person may be charged with an offence under any or either of the said Ordinances respectively, and notwithstanding that any question shall or may arise or be set up in any such case as to the title to any lands alleged to be Crown lands or any interest therein or accruing therefrom."

Sections 2, 3, and 4 declare that any party dissatisfied with the decision of the Stipendiary or other Justice, may appeal to the Supreme Court, which may reverse or confirm in whole or in part the order or decision appealed against, or may

give such new or different order or decision as in its discretion it may think fit, and may receive new evidence.

Section 5 enacts that a person against whom an order is made or who is convicted by any Stipendiary Justice of the Peace, shall not, and that persons claiming under him shall not, after the order or conviction, and before the Supreme Court in case of appeal has given judgment for the Appellant, dig asphalt from the lands in question. This would seem to be for the purpose of protecting the property pending appeals; but whatever its exact intention may be, it cannot cover the scope of a civil suit, for it does not apply to cases of acquittal, when no order is made against any one.

On the 22nd May 1891 certain persons, who for this purpose may be taken as identical in title and interest with the present Defendants, were charged before Mr. Rayner, Stipendiary Magistrate of La Brea, with digging asphalt on Crown lands. These lands were the estate of Mon Repos. A question of title was set up, and Mr. Rayner heard some evidence on it. On the 2nd June he convicted the Defendants. They appealed to the Supreme Court who on the 16th June adjudged that the conviction should be quashed. Nothing beyond this bare statement, except Mr. Rayner's notes, appears on the record of the criminal proceedings. The present proceedings were commenced immediately afterwards, viz. on the 20th June 1891.

Nobody contends that as an ordinary rule a criminal proceeding can be conclusive on a question of property between the Crown and the accused, and when the result is an acquittal, it can hardly be conclusive of anything beyond that particular prosecution. What has been contended at the bar is that the Magistrate in this case was bound to try the question of title

that the accused could not escape conviction except by showing that Mon Repos was not Crown land; and that such was in point of fact the ground on which the Supreme Court quashed the conviction.

That Mr. Rayner could not have properly convicted the accused unless he had been satisfied that they failed to show that Mon Repos was not Crown land, is pretty plain. But that in acquitting the accused the Supreme Court thought they were passing a decision on the question of title, is by no means clear to their Lordships. Indeed they gather from the statements made in this case by the learned Chief Justice, who also presided in the criminal appeal, that the investigation into the title was of a slight and informal character, though it may have been sufficient for the decision of the criminal charge; that the Chief Justice himself expected that the Crown would come again to raise the question in a more formal and comprehensive manner; but that when the Crown did so come, he thought that it ought not to dispute what he considered were the findings of a Court which the Crown itself had created and had put in action (Rec. pp. 66, 67.)

But whatever may have been the exact intention of the Supreme Court in quashing the conviction, it is clear to their Lordships that the Ordinances in question have not the effect of erecting the Stipendiary Magistrate into a tribunal for the decision of questions of title. The later Ordinance provides that setting up a question of title shall not, as so often happens, limit the jurisdiction of the Magistrate. He is to go on to hear and determine the case, notwithstanding the question of title. That question, may, or may not, enter into his determination; he may undoubtedly examine it so far as necessary for his judgment; but the

case he is to hear and determine is the criminal charge, not the title to the property. Their Lordships hold that the Magistrate is not a Court of competent jurisdiction to decide the question of title; and that the Supreme Court, sitting in appeal from him, has still only the criminal charge before it to hear and determine, and has no greater jurisdiction than the Magistrate himself.

It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of *res judicata*, the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the point. In the *Duchess of Kingston's* case (Smith's Leading Cases, vol. 2, p. 642), which is constantly referred to for the law on this subject, it is laid down that in order to establish the plea of *res judicata* the Court whose judgment is invoked must have had jurisdiction and have given judgment directly upon the matter in question; but that if the matter came collaterally into question in the first Court, or were only incidentally cognizable by it, or merely to be inferred by argument from the judgment, the judgment is not conclusive. In the present case the question of title is only incidentally cognizable by the Magistrate, and by the Court sitting in appeal from him. It is true that the Ordinance of 1891 gives the magistrate greater latitude in dealing with criminal charges involving questions of title than is usually accorded to Criminal Courts of summary jurisdiction. It is true also that the provisions of Sections 3 and 4 give to the Supreme Court powers of passing orders and of receiving new evidence which are not usual in such cases, and that the provisions of Section 5 are of a peculiar kind. But all these provisions are subordinate to the issue which by Section 1 is to be heard and determined, viz., the criminal charge; and they

are far from erecting a Criminal Court of summary jurisdiction into a Civil Court for litigations concerning property.

Their Lordships are of opinion that the Full Court should have dismissed with costs the Defendants' appeal from the orders of Mr. Justice Rayner, and that a decree should now be made discharging the order appealed from, restoring the orders of Mr. Justice Rayner, and directing the Defendants to pay to the Appellant his costs of the appeal to the Supreme Court. They must also pay his costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.