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Present: Garvin J.

WEERASINGHE *v.* WIJEYESINGHE.

172—P. C. Panadure, 9,596.

Autrefois acquit—*Fiscal's officer—Unlawful removal—Execution of writ of possession—Penal Code, s. 162, Criminal Procedure Code, ss. 181, 182, 191, 380.*

Where a Fiscal's officer in execution of a writ issued in pursuance of a decree for the possession of immovable property, removed a person who set up a claim of title to the property—

Held, that he was not guilty of disobeying an express direction of the law within the meaning of section 162 of the Penal Code.

Where the Fiscal's officer in question was charged with criminal tresspass and mischief and acquitted, and was subsequently charged on the same facts under section 162 of the Penal Code,—

Held, that under the circumstances the plea of *autrefois acquit* cannot be sustained.

H. V. Perera (with *Ranawake*), for 1st accused, appellant.

Weerasooria, for 2nd accused, appellant.

T. P. Gunetilleke, for 3rd and 5th accused, appellants.

L. A. Rajapakse, for 4th accused, appellant.

J. S. Jayewardene (with *Abeyewardene*), for respondent.

July 14, 1927. GARVIN J.—

This is one of a series of criminal cases which arose out of an attempt to deliver possession of immovable property in pursuance of a writ of execution issued to the Fiscal in case No. 9,627 of the District Court of Kalutara.

The 1st appellant is the Fiscal's officer to whom the execution of the writ was issued. The 3rd accused is the writ holder. He sued the complainant's husband and others in the case referred to and obtained a decree. The 1st accused, with the 3rd accused and others, proceeded to the land for the purpose of executing this writ. They were obstructed by the present complainant. A prosecution was entered against her by the 1st accused under section 183 of the Penal Code. She was convicted by the Police Magistrate, but on appeal the conviction was reversed on the ground that in attempting to remove her from the land the Fiscal's officer was doing an act which he was not authorized to do in his capacity of Fiscal's officer, and that consequently any resistance offered to him was not resistance in respect of which a prosecution under section 183 would lie. A second attempt was then made to execute the writ.

The complainant was once again on the premises, and the evidence tends to show that the Fiscal's officer took her by the hand and drew her away from the house and removed her from the land. Thereupon the 3rd accused and the others charged in this case entered the house, removed the furniture and other property of the complainant from the building, and demolished it. The complainant then preferred charges against the five accused in the Police Court of Panadure. That case bears No. 8,175. Charges of criminal trespass and mischief were framed against the accused. To these charges they pleaded not guilty, and the Police Magistrate ultimately made order "acquitting and discharging them". Thereafter the complainant prosecuted them in this case, charging the 1st accused with an offence punishable under section 162 of the Penal Code, in that he did on the August 18, 1926, "pull down the house and remove Dona Rosaline Weerasinghe (complainant) from her house, such conduct being contrary to the provisions of section 723 of the Civil Procedure Code and known by him to be prejudicial to the said Dona Rosaline Weerasinghe". The other accused were charged with having aided and abetted the the 1st accused in the commission of this offence. The accused were convicted, and the present appeal is taken from that conviction. For the purposes of the appeal it must, I think, be taken to be established that the Fiscal's officer did on the day in question take the complainant by the hand and remove her from these premises. Whether he did give any direction that the building was to be demolished, or whether this was the independent act of the decree holder assisted by some or all of the remaining accused, may be open to question. It is, however, not necessary for the purpose of the disposal of this appeal that I should express any opinion upon that question of fact. The two points urged upon me by Counsel for the appellants are these: (*a*) That the Police Magistrate should have upheld the plea of *autrefois acquit;* (*b*) that the facts as found by the learned Police Magistrate did not disclose the offence of disobedience of an express direction of law made punishable under section 162 of the Penal Code. The Police Magistrate disallowed the plea of *auterfois acquit* upon the ground that in his view the order made by his predecessor in case No. 8,175 was in effect an order of discharge under section 191 and was not therefore a bar to a fresh prosecution. The proceedings of that case show that a complaint was made, that process issued, that charges were framed, and that the accused were called upon to plead to those charges. Thereafter the complainant was examined at length and cross-examined and gave evidence of the very facts to which she has spoken in this prosecution. The Police Magistrate then made the following order: "I acquit and discharge the accused at this stage". He then proceeded to set out at some length his reasons for the

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conclusion, that upon the facts disclosed in the evidence the accused were not guilty of either of the offences (criminal trespass and mischief) with which they had been charged.

The word "acquittal" is sometimes used through inadvertence when it is evident from the proceedings that it was only intended to discharge the accused; even as the word "discharged" is sometimes inadvertently used when "acquitted" is what was intended. This is not such a case. When the Magistrate said "I acquit and discharge the accused" it cannot be doubted that he said what he intended.

It is by no means certain that the words "at this stage" necessarily imply that the acquittals were entered before the case for the prosecution was fully placed before the Magistrate in consequence of his refusal to hear further evidence. Even so, I am not prepared to assent to the contention that an order of acquittal made in such circumstances may be ignored and a fresh prosecution entered upon the same facts in any case in which the Magistrate can be shown to have refused or omitted to take the evidence of one or more witnesses on the list of witnesses for the prosecution.

If the complainant was dissatisfied with this judgment of acquittal, he should have taken steps to procure its reversal by the Supreme Court. So long as it remained unreversed it must, I think, be accorded the force of an acquittal.

This, however, is not conclusive of the question whether or no the plea of *autrefois acquit* should be admitted. The plea can only succeed when the accused is charged with the same offence or upon the same facts for an offence for which a different charge from the one made against him might have been made under section 181 or for which he might have been convicted. The offence in respect of which the accused are now being charged is clearly not the same offence with which they were charged in the earlier proceeding. It appears to have been assumed in the Court below that the offences with which the accused are now charged are offences for which they might have been charged under section 181 or convicted under section 182, and hardly any argument was addressed to this aspect of the question in appeal. The cases contemplated by sections 181 and 182 are those in which a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute. The charges upon which the accused were brought to trial in the earlier proceedings were those of criminal trespass and mischief by destroying the building which stood on the land. They were not brought to trial upon any charge alleged to have been constituted by the illegal removal of the complainant from the land, nor did any question arise as to whether the facts by which such removal was to be established constituted one or the other of several offences. If the allegations made against the

accused be true, this is an instance of more than one offence committed in the course of one and the same transaction within the meaning of section 180 (i) of the Criminal Procedure Code. It is a case in which a separate and distinct charge of an offence constituted by the illegal removal of the complainant might have been preferred under section 180 (i.). Section 330 (ii.) of the Code expressly contemplates a subsequent trial for a distinct offence in such a case. The plea of *autrefois acquit* cannot be admitted.

There remains the question whether an offence under section 162 is disclosed by the evidence. The offence made punishable by that section consists in wilful disobedience by a public officer of an express direction of law with intent to cause or knowing that by such disobedience he will cause injury to any person. It is open to question whether any other intention can fairly be imputed to this Fiscal's officer than a desire to give effective possession in accordance with the writ entrusted to him for execution. But the principal ground on which the conviction was impeached is that it has not been shown that in removing the complainant from the land the accused committed a breach of any express direction of law as to the way in which he was to conduct himself.

It is urged *per contra* that such an express direction of law exists in section 324 of the Civil Procedure Code. This provision requires a Fiscal or his officer upon receiving a writ issued in pursuance of a decree for possession of immovable property " as soon as reasonably may be to repair to the ground and deliver over possession to the judgment creditor or some person appointed by him to receive delivery on his behalf ". It empowers him, if need be, to remove any person bound by the decree who refuses to vacate the property, and it instructs him how to proceed to give delivery of " so much of the property, if any, as is in the occupancy of a tenant or other person entitled to occupy the same as against the judgment debtor and not bound by the decree to relinquish such occupancy ".

It is claimed that this provision is in substance a direction of law which forbids the Fiscal or his officer to remove any person who may choose to claim a right to the land, even when it is evident that such claim is utterly baseless and is made collusively and solely for the purpose of keeping a judgment creditor out of the fruits of the decree in his favour.

The section contains no such prohibition. It expressly authorizes the removal of an obstructive judgment debtor. It deals specially with the case of the occupancy by a tenant or " other person entitled to occupy the same as against the judgment debtor " as opposed to a person who claims a right to the land, in regard to whom it gives no direction.

In the absence of any provision of law which can fairly be treated as an express direction forbidding the removal of any person under

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any circumstances whatever so long as he sets up a claim of right to the premises, a Fiscal's officer when he removes such a person is in no better position than any other person, but his position is no worse. He cannot claim the protection which the law gives to public servants when acting within the limits of the authority conferred upon them. But there is no provision of law which exposes a public servant to prosecution for every act which is not specially authorized. When he acts outside the limits of his authority, so long as those acts are not a breach of any express direction of law as to how he should conduct himself, he may like any other member of the public become amenable under the criminal law or incur a civil liability. But those are matters outside the scope of the present inquiry, which is to determine whether this public servant has wilfully disobeyed an express direction of law as to the way in which he is to conduct himself. I have given my reasons for holding that he has infringed no such direction.

The appeals are allowed and all the accused acquitted.

Appeal allowed.