and also bequeathed to another person personal estate to which her power did not extend, it was held that the husband was not put to his election—*Rich* v. *Cockell* (1) ; but the remarks of Giffard, V. C., in *Blaiklock* v. *Grindle* (2) show that the law can scarcely be regarded as settled. It was also held that the heir would not be put to his election where an infant gave a legacy to his heir-at-law and devised real estate to another person—*Hearle* v. *Greenbank* (3) ; although from the remarks of Lord Eldon in *Sheddon* v. *Goodrick* (4), it may be doubted whether he would have so decided the question had it been *res integra*. However, in the present case the testatrix's inability to devise the immoveable property in question did not arise from a personal incapacity to devise immoveable [441] property, but was of the same nature as that which precludes every one from disposing by will of what does not belong to him. The law limits the widow's interest in what she inherits from her husband to the beneficial use of it during her life and disposal of it for certain special purposes, and it is on that account she cannot devise it.

We think, therefore, that the Court below was right in holding that the plaintiff should be put to his election, and as he has elected to take the legacy, we must reverse the decree of the Court below so far as it directs possession to be given to the plaintiff of half the immoveable property. Appellant to have his costs of this appeal.

Decree reversed.

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Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* NARSANG PATHABHAI AND OTHERS.*

[8th and 13th January, 1890.]

Right of private defence—Commencement and extent of the right—Indian Penal Code (Act XLV of 1860), ss. 99, cl. 3, and 105, cl. 1.

The third clause of s. 99 of the Indian Penal Code must be read with the first clause of s. 105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences. Before such apprehension commences, the owner of the property is not called upon to apply for protection to the public authorities. The apprehension which justifies a recourse to the authorities ought to be based on some information of a definite kind as to the time and place of the danger actually threatened.

The accused No. 1 received information, one evening, that the complainants intended to go on his land on the following day and uproot the *juvari* seed sown in it. At about 3 o'clock next morning he was informed that the complainants had entered on his land and were ploughing up the seed. Thereupon he at once proceeded to the spot, followed by the other accused, and remonstrated with the complainants. The complainants, without paying any attention to his remonstrances, commenced an attack on the accused. In the fight which ensued, both sides received serious injuries, and the leader of the complainants' party was killed. The accused were thereupon charged and convicted, under ss. 304, 114, 325, and 323 of the Indian Penal Code, of culpable homicide not amounting to murder, of voluntarily causing grievous hurt, and of causing hurt.

Held, reversing the convictions, that the complainants being the aggressors, the accused had, under the circumstances, the right of private defence, both of

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* Criminal Appeal No. 235 of 1889.

(1) 9 Ves. 370. (2) L.R. 7 Eq. 215. (3) 3 Atkyn's 715. (4) 8 Ves. 481.

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[442] person and of property, and that in the exercise of this right they did not inflict more harm than was necessary.

Held, also, that the accused were not bound to act on the information received on the previous evening and seek the protection of the public authorities, as they had no reason to apprehend a night attack on their property.

[R., 24 C. 686 (690); 35 C. 368=7 C.L.J. 359=12 C.W.N. 384 (389)=7 Cr.L.J. 256=3 M.L.T. 385; U.B.R. 1905, 2nd Qr., Penal Code, p. 21; D., 21 A. 122 (125); 24 A. 143 (145).]

APPEAL from the convictions and sentences recorded by Vyankatrao R. Inamdar, Acting Joint Sessions Judge of Ahmedabad, in *Queen-Empress* v. *Narsang Pathabhai*.

The facts of this case were these. One Narsang Pathabhai, accused No. 1, was the owner of a certain field which was in the possession of his tenant, accused No. 4. On the evening of the 4th July, 1889, Narsang received information that one Vakhatsing, a neighbouring *girassia*, intended to make a raid on his land on the following day and uproot the *juvari* seed which had been sown in it. Next morning, at about 3 o'clock, Narsang was awakened, and informed that Vakhatsing and his party had taken possession of the field and were ploughing up the *juvari* seed. Thereupon Narsang, accompanied by accused Nos. 2, 3, 4, and 8, proceeded to the spot and began to remonstrate with Vakhatsing. He, however, paid no attention to their remonstrances, and told his men to strike the accused. A fight ensued, in which both parties received serious injuries, and Vakhatsing fell with his skull fractured.

Thereupon the accused Nos. 1, 2, 3, 4 and 8 and four others were charged with culpable homicide not amounting to murder, voluntarily causing grievous hurt, and hurt under ss. 304, 325, and 323, respectively, of the Indian Penal Code.

The accused pleaded not guilty. Accused Nos. 1, 2, 3, 4, and 8 contended that they acted in the exercise of their right of private defence, and were protected by ss. 96—106 of the Indian Penal Code.

The other accused set up the plea of *alibi*.

The Joint Sessions Judge convicted accused Nos. 1, 2, 3, 4 and 8 of culpable homicide not amounting to murder, of voluntarily causing grievous hurt, and of voluntarily causing hurt, under ss. 304 and 114, 325 and 323, respectively, of the Indian Penal Code, and sentenced them each to rigorous imprisonment [443] for three years under s. 304, for one year under s. 325, and a fine of Rs. 100 under s. 323.

The other accused were acquitted.

Against these convictions the accused appealed to the High Court.

Branson (with him *Chimanlal Harilal*), for the accused.

Goverdhan M. Tripati, for complainants.

Shantaram Narayan, Government Pleader, for the Crown.

Branson.—The accused were in possession of their land. They expected an attack on their property; they went to defend it; and they were attacked. The injuries they received were serious, almost amounting to grievous hurt. Under these circumstances they had unquestionably the right of private defence of person as well as of property—*Queen* v. *Mitto Singh* (1); *Birjoo Singh* v. *Khub Lall* (2); *Shunker Singh, In re* (3);

(1) 3 W. R. Cr. R. 41. (2) 19. W. R. Cr. R. 66. (3) 23 C. W. R. Cr. 25.

Empress on the Prosecution of Denonath Ghuttack v. *Rajcoomar Singh* (1); *Ganouri Lal Das* v. *The Queen-Empress* (2).

Shantaram Narayan.—The accused are not protected by the right of private defence, either of person or of property. In the first place, the evidence as to the ownership of the land is contradictory. It is doubtful to whom the land belonged. The witnesses for the Crown state that the complainants were in possession. The Sessions Judge's finding, that the accused had possession, can hardly be supported. He finds that the accused went to the spot with a determined mind to resist the complainants. They had ample time to resort to the police. They had received information, on the previous evening, of the complainants' intention, to go on the land. They ought to have informed the police of the intended attack, and sought their protection. The right of private defence of property did not, therefore, accrue to them. See s. 99, cl. 4 of the Indian Penal Code. Nor had they the right of private defence of person. None of the accused received grievous hurt; the fear of grievous hurt must be strictly made out; the accused have not discharged [444] this burden. There is nothing to justify the murderous attack on Vakhatsing. Even if they had the right of private defence, they have done more harm than was actually called for—*Empress of India* v. *Abdul Hakim* (3).

Branson in reply.—The information received by the accused on the previous evening was of the vaguest description. They were not bound to act on such information.

JUDGMENT.

BIRDWOOD, J.—The Joint Sessions Judge has carefully weighed the evidence in this case, and there is no sufficient ground for setting aside his finding that the field where the quarrel took place between the complainants and the accused, in the course of which the deceased Vakhatsing received fatal injuries and grievous hurt was caused to the complainant Devising and simple hurt to the complainant Narsang and others, is the property of those of the accused persons who are *girassias*. This field, or, at all events, a part of it, had been sown with *juvari* seed by accused No. 4, who is the tenant of the *girassia* accused. The accused No. 1 seems to have been informed by the accused No. 8, the havaldar of the *girassias*, on the evening before the quarrel took place, that the complainants were coming the next day to plough up the *juvari* seed. During the night, however (*i.e.*, at about 3 or 4 A. M.) the accused No. 1, according to his own statement, which there seems to be no reason for disbelieving, was awakened by the havaldar, and told that the ploughs were already in the field. Accused No. 1 then went to the field, and says that he told the persons he found there, among whom were the deceased Vakhatsing and the complainant Devising, not to uproot the *juvari*. Accused No. 1 was either accompanied or followed by others of the accused persons. The case for the accused is that they remonstrated with the complainants, but without effect, and that Vakhatsing told his son to strike the accused "with sticks"; that, thereupon, the accused were struck, and a fight took place. I do not think it necessary to discuss in detail the evidence which has been adduced in this case. It is discussed in the judgment which Mr. Justice

(1) 3 C. 573. (2) 16 C. 206. (3) 3 A. 253.

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Jardine has prepared, and I concur in the conclusion he has arrived at. There is no [445] ground for disturbing the decision of the Joint Sessions Judge, that the deceased Vakhatsing and his party were aggressors in the quarrel with the accused. They seem to have been the first on the ground. They went there at a very early hour—at an earlier hour than would, I suppose, be usual if their object was only to plough land of which they were already in peaceable possession. The probabilities of the case are in favour of the view taken of the facts by the Joint Sessions Judge. It is in his application of the law as to the accused's right of private defence that he has erred. After remarking that the contents of Ex. "S, T" disprove the title and possession of the complainants and support those of the accused *girassias*, and that, if so, there is no doubt that the land in question was cultivated by accused No. 4 during the current year, and that the presence of Vakhatsing and his party on it "on the morning in question was due to their desire to interfere with that possession," he adds: "If accused Nos. 1, 3, 4, 8" (*i.e.*, the present appellants) "had gone there that morning for doing their own work without any previous intimation of the intended obstruction by their adversaries, their conduct in resisting their unexpected obstruction to their possession would have been justifiable, and the injuries which they caused to their opponents during the course of their resistance would not have rendered them liable to criminal punishment. Accused Nos. 1—8, however, admit * * and their witnesses * * depose that they had previous intimation of their adversary's intentions, and if so, they were bound to have obtained the assistance of the police or the *mukhi* before proceeding to their land with a view to resist the obstructions of Vakhatsing and his party. If they failed to obtain such assistance, they took the risk of the consequences, and are criminally responsible for the injuries inflicted by their men, though in consequence of the aggression on the part of Vakhatsing and his people." The question, then, is whether there was time for the accused to have recourse to the protection of the public authorities. If there was, then, under the third clause of s. 99 of the Indian Penal Code, there was no right of private defence. Now this clause must be read with the first clause of s. 105. The right of private defence of property [446] commences when a reasonable apprehension of danger to the property commences. Before such apprehension commences, the owner of the property is not called upon to apply for protection to the public authorities. The apprehension which justifies a recourse to the authorities ought generally to be based on some information of a definite kind, as to the time and place of the danger actually threatened. Now, in the present case, the accused No. 1, no doubt, received information on a certain evening that the complainants were coming to his field to plough up the seed sown in it. The information was to the effect that they were coming next day. Nothing, apparently, was said as to their coming during the night. It cannot be said that the accused had any definite intimation of the raid actually made on their property before sunrise. The accused No. 1 was not bound to go at once that evening to the patel. That he was in no apprehension of a night-raid on his land is shown, apparently, by the circumstance that he went to sleep, instead of going to his field or to the patel. When he was awakened at 3 or 4 A.M., and received definite information of the actual presence of the complainants on his land, he was entitled to go at once to protect his property. It is not shown, or suggested, that he passed the patel's house on his way to the field, and

could thus have obtained the protection of the village police. If there had been much delay in reaching the field, the very mischief threatened to his property would have been completed. The seed which had been sown would have been ploughed up. I am of opinion, therefore, that the accused had a right of private defence of their property in this case.

If their story is true—and there seems to be no sufficient ground for disregarding it—then they remonstrated with the complainants at first, but no attention was paid to their remonstrances. They certainly received serious injuries, almost amounting to grievous hurt, in the fight which followed. I am not prepared to say on the evidence, such as it is, that in striking their assailants, as they must be taken to have done in defence of their bodies as well as of their property, they inflicted more harm than, in the circumstances, it was necessary to inflict for [447] the purpose of defence. The convictions and the sentences must be reversed, and the appellants acquitted and set at liberty.

JARDINE, J.—There are several reasons, besides the extreme contradictions in the testimony given on each side, for a very careful examination of the facts. Only one of the assessors remained to the end of the trial, and his opinion, that the prisoners are guilty of culpable homicide not amounting to murder, is based on reasons stated in the most general terms, *viz.*, that he considered the witnesses for the prosecution trustworthy and those for the defence untrustworthy. But the learned Joint Sessions Judge is of opinion that the complainants and their witnesses have given most untrustworthy, and apparently false, evidence on the cordinal questions of fact; and he is also of opinion that much of the evidence for the defence is true, namely, that to the effect that the prisoners Nos. 5, 6, 7 and 9 were not present at the fight, and that the land was not in the ownership or possession of the complainants, or their tenant, but was in the possession of the prisoner No. 4 as tenant of the Vanala *girassias* accused.

As to the finding about possession, we have been asked by the Government Pleader, in support of the convictions, to hold that the Joint Sessions Judge is wrong. But I am satisfied with the grounds and evidence on which that finding is based.

No objection has been taken to the finding that the four prisoners acquitted were not at the place at all. The complainants and their witnesses make a vast body of testimony affirming that prisoners 6 and 7, Ratansing and Jesabhai, were present, and that it was Ratansing who struck the fatal blow on Vakhatsing's head, and that Vakhatsing named Ratansing in his dying statement as one of his assailants. I think the Joint Sessions Judge's reasons are sufficient to show that these assertions are false and made maliciously. I further concur with his view, that the *alibi* asserted by Ratansing and Jesabhai is substantiated, in detail, by trustworthy witnesses and the toll receipts and counterfoils. I agree with him, also, in the finding that the witnesses, who say they saw these two men making complaint to the patel at Fedra, and who say they saw them at Dhandhuka the same day a few hours later, are not to be believed. The Joint Sessions [448] Judge also points out another good reason for distrusting the witnesses for the prosecution. They pretend that they are ignorant of the cause of the contusions suffered by the prisoners, and suggest that they are self-inflicted. I do not doubt that these injuries were caused at the fight by complainants and their supporters.

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The four prisoners, who were convicted, admit that they were present at the fight; and prisoner 4, Mula, the tenant of the land, asserts that he gave a blow with the blunt end of a *karpadala* to Vakhatsing, which did not, however, fell him to the ground. The Joint Sessions Judge does not determine whether such a blow was given, or whether prisoner No. 4 gave it in the manner confessed, and whether it caused the death. But he is of opinion that all the four are guilty, under ss. 304 and 114 of the Penal Code, of culpable homicide and other hurts, because they were all present and engaged in the scuffle, and exceeded their right of private defence, seeing that they omitted to call in the aid of the village police patel, and had gone there with the determined object of resisting Vakhatsing and his men by force. The Joint Sessions Judge applied cl. 3 of s. 99; and it has been argued here, also, that cl. 4 applies against the appellants.

In finding the facts to which the provisions of law about private defence are to be applied, I lean to the statements of the prisoners, because they are to be believed, as already shown, on the questions about the presence of Ratansing and Jesabhai, the tenancy and possession of accused 4, the injuries suffered by the appellants, and because the complainants are not to be believed. As complainants were not in possession, the first part of their story is untrue; they, and not the prisoners, were the aggressors, and this is found by the Court below. They must have given the contusions to the prisoners. It is probable that as they went on the land with aggressive intent at 3 A. M., they did so with show of force, and it is also probable that prisoner I went with a friend or two to remonstrate. I do not find that the prisoners had sufficient notice of the intended time of the mischief and criminal trespass, so as to make it necessary to [449] apply to the police patel for protection the night before. It is not shown that they had time at 3 A.M., when they got the news of the actual mischief beginning. Those interested in the crop had a right to go at once and protect it, and to remonstrate against the complainants who were going to plough the land. The facts seem to me not readily distinguishable from those in *Birjoo Singh* v. *Khub Lall* (1); *Shunker Singh, In re* (2); *Queen* v. *Sachee alias Sachee Bole* (3). They are different to those of the case of *Ganouri Lal Das* v. *The Queen-Empress* (4). The evidence is doubtless tinged with animus; but I do not think it proved that the prisoners, on entering the ground, made any show of arms or of force to overcome all resistance. Their story, that the complainants replied to their lawful remonstrance by unlawfully assaulting them with sticks, is under all the circumstances more probable than that the aggressors, after taking possession of the land at 3 A.M., submitted without resistance to a very severe thrashing and infliction of grievous hurt, and did not even give the prisoners the contusions which the Hospital Assistant found on their heads and sides.

I am of opinion, also, that it is not shown that the right of private defence was exceeded. I think the prisoners might well apprehend the infliction of grievous hurt; and, in fact, they did get a good many blows. The complainants have falsely imputed the fracture of skull to Ratansing, and I do not think there is any trustworthy evidence as to how that hurt was caused. I am inclined to impute all the blows given by the

(1) 19 W.R. Cr. R. 66.
(2) 23 W. R. Cr. R. 25.
(3) 7 W.R. Cr. R. 76 (112).
(4) 16 C. 206.

prisoners to the complainants to the usual necessity of hitting out hard when there are a number of assailants. The details of blows as to number, succession and person giving, are described by the complainants and their witnesses; but it would be unsafe to believe such persons.

I would, therefore, reverse the convictions and sentences.

Convictions and sentences reversed.

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[450] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

GANOJI UTEKAR AND OTHERS (*Plaintiffs*) *v.* DHONDU AND OTHERS (*Defendants*).* [16th January, 1890.]

Execution of decree—Decree for partition—Jurisdiction—Collector, power of, to refuse execution—Practice—Ultra vires.

The plaintiffs obtained a decree against the defendants for partition and possession of their share in the lands in the village of Kasai. That decree was sent for execution to the Collector. In the meantime a revision survey had been introduced into the village, under which the designation of some of the lands directed to be partitioned was changed from *khoti* to *dhara* lands. The Collector proposed to partition them, as described by the survey; but the plaintiffs having declined the proposal, he refused to partition the lands, and returned unexecuted the decree to the Court. On reference to the High Court.

Held, that the Collector had acted *ultra vires*. The plaintiffs were entitled to have the lands partitioned, quite independent of the result of the new survey as regards the character of the lands. The proposal of the Collector was virtually to contravene the command of the Court, which, as a purely ministerial officer, it was not in his power to do either directly or indirectly.

[F., 28 B. 238=5 Bom. L.R. 950; R., 15 M.C.C.R. 139; D., 15 B. 527; 5 Bom. L.R. 648.]

THIS was a reference by Rav Saheb N. G. Phatak, Subordinate Judge of Chiplun, in the Ratnagiri District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs obtained a decree for partition and possession of their share in the village of Kasai, which was sent in execution to the Collector for partition. A revision survey having been introduced into the village, the Collector returned the decree unexecuted, on the ground that the plaintiffs were unwilling to have their share partitioned according to the descriptions of the village lands under the revision survey.

The Subordinate Judge thereupon referred the following question for the High Court's decision:—

Whether the plaintiffs have a right to ask for partition according to the descriptions of lands contained in the decree, or whether they should be asked to prove in a Civil Court that the old descriptions contained in the decree were the correct ones before obtaining partition?

[451] The Subordinate Judge's opinion on the first part of the question was in the affirmative, and on the second in the negative.

Vasudev Gopal Bhandarkar, for the plaintiffs.—The Collector was bound to partition the lands as described in the decree, he being a

* Civil Reference No. 24 of 1889.