defence should address the jury first, and that he, as counsel for the prosecution, should have the right of reply. He relied on s. 292 of the Criminal Procedure Code (Act X of 1882).

Russell, contra, cited *The Queen* v. *Grees Chunder Banerjee* (1); *Empress of India* v. *Kaliprosonno Doss* (2).

ORDER.

[438] The Court ruled that the prosecution had no right of reply.

Attorneys for the prosecution: Messrs. *Nanu and Hormasji.*

Attorneys for the defence: Messrs. *Balkrishna and Dikshit.*

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14 B. 438.

APPELLATE CIVIL.

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

MANGALDAS AND ANOTHER (*Original Defendants*), *Appellants v.* RANCHHODDAS BHAVANIDAS (*Original Plaintiff*), *Respondent.** [21st December, 1889.]

Election—Will—Hindu law.

The doctrine of election applies to wills made in India.

D., a Hindu widow, died, making a will in respect of property which she had inherited from her husband. She bequeathed Rs. 2,000 as a legacy to the plaintiff, and the immoveable property to K., the defendants' father. The plaintiff and K. were the heirs of her husband. The plaintiff sued for the legacy under the will, and for half the immoveable property as heir.

Held, that the plaintiff should be put to his election whether to take the legacy under the will, or half the property as heir of the testator's husband.

[R., 12 Ind. Cas. 591.]

THIS was a second appeal from a decision of J. J. Heaton, Acting Assistant Judge of Thana.

One Divalibai died possessed of moveable and immoveable property which she had inherited from her husband Tulsidas, who died childless.

By her will, Divali left a legacy of Rs. 2,000 to the plaintiff, and the rest of the property to the defendants' father, who was also appointed the executor of her will. The plaintiff and the defendants' father were the sons of the sisters of her husband Tulsidas.

The plaintiff sued to recover the legacy and also half of the property left to the defendants' father. He claimed the legacy under the will and the half share of the property as heir of Tulsidas.

The defendants, their father having died, contended through their mother and guardian, among other things, that the plaintiff should be put to his election.

Both the lower Courts awarded the plaintiff's claim.

[439] The defendants preferred a second appeal to the High Court, which sent back the case for the determination of the following issues:—

1. Ought the plaintiff to be put to his election?

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* Second Appeal No. 789 of 1887.

(1) 10 C. 1024. (2) 14 C. 245.

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2. If so, whether, if plaintiff elects to take the immoveable property, he is bound to relinquish the legacy?

The lower Court returned a finding on the first issue in the affirmative, leaving the second issue undetermined, as the plaintiff had elected to take the legacy in case he was put to election.

The case now came on for hearing and disposal.

Jardine (*Gokuldas Kahandas* with him), for the respondent (plaintiff).—The lower Court was wrong in deciding that the plaintiff should be put to his election. The doctrine of election does not apply to the present case, for here the widow was incapable of devising the immoveable property, and her case resembles that of a married woman or an infant in England —*Rich* v. *Cockell* (1); *Blaiklock* v. *Grindle* (2).

Rav Saheb *Vasudev Jagannath*, for the appellants (defendants).—The cases cited for the respondent do not apply here. A Hindu widow is not incapable of alienating immoveable property; she can alienate it under certain circumstances. She can alienate her *stridhan*. Or, with the consent of persons who have an interest in the property in her possession, she can alienate such property. A Hindu widow cannot be compared to a married woman in England or an infant under the English law. Her inability arises from the limited interest she has in the immoveable property during her lifetime. The respondent's claim is inconsistent, *viz.*, he claims the legacy under the will and the immoveable property against it as heir. He must, under the circumstances, be put to his election, and the lower Court was right.

JUDGMENT.

SARGENT, C.J.—The plaintiff in this case sues, as one of the heirs of one Tulsidas entitled to succeed to the immoveable property on the death of hir widow Divalibai, and also as a legatee under Divalibai's will, to recover from the defendants half the immoveable property and also a legacy of Rs. 2,000. The entire [440] immoveable property was devised by Divalibai's will to defendants' father Kandas. The Court below decreed possession to the plaintiff of half the immoveable property, and also payment of the legacy, but, on second appeal to this Court, the case was sent back for the Court to determine on the following issues:—

1. Ought the plaintiff to be put to his election?

2. If so, whether, if plaintiff elects to take immoveable property, he is bound to relinquish the legacy?

The Court below has answered the first question in the affirmative.

The doctrine of election depends upon an implied condition that the devisee will comply with all the provisions of the will by renouncing the right to his own property—see *Sir John Talbot* v. *The Duke of Shrewsbury* (3) and the remarks of Sir W. Grant in *Welby* v. *Welby* (4), and it is, therefore, equally applicable to wills made in this country. But it was contended that, as the widow had no power to devise the immoveable property inherited from her husband, the case resembled that of married woman in England or of an infant under the old English law, whose will was valid as to personal estate and invalid as to realty. If a married woman made a valid appointment by will, under a power, to her husband

(1) 9 Ves. 370.
(2) L.R. 7 Eq. 215.
(3) 2 Wh. & Tud. L. Ca. in Eq., p. 378.
(4) 2 V. & B. 187.

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. *Creenbank* (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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14 B. 441.

APPELLATE CRIMINAL.

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.