

The minors have since come of age, and repudiated the deeds.

On this repudiation, the plaintiff says that he is entitled to have the deeds declared void as against him, and to recover the property which has thus fallen back into ShereMungel's estate, which he bought in 1857. He therefore brings this suit. Both the lower Courts dismiss it on the ground that, as it has not been brought within one year of the establishment of the intervenor's claim in 1852, it is barred by the provisions of section 246 of Act VIII. of 1859.

The plaintiff appeals to us specially on the ground that Act VIII. does not operate to take away any right of suit which the plaintiff possessed before the time when it became law.

We think this objection is valid. The words of section 246 are eminently prospective, and there is nothing whatever to lead to the inference, even that the Legislature desired the section to apply to past proceedings in execution.

The case must therefore be remanded for re-trial with reference to the above remarks.

The 27th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell,
Judges.

Portuguese Roman Catholics—Nuncupative Wills—Succession of intestates.

Case No. 3715 of 1864.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 19th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st May 1864.

Antony Rebeiro and another (Defendants),
Appellants,

versus

Mrs. Sarah Rebeiro and another (Plaintiffs),
Respondents.

Baboos Kalee Mohun Doss and Chunder Madhub Ghose for Appellants.

Baboo Kissen Succa Mookerjee for Respondents.

Quære.—Whether a Roman Catholic, of Portuguese extraction, can, under the law current amongst members of that Church in Chittagong, take under a nuncupative will; and, if not, to what

is a wife entitled under the law regulating succession of intestates amongst members of that Church.

THE plaintiff in this case states that she and her husband were the descendants of Portuguese, and members of the Roman Catholic Church; that under the law of that Church she is, on her husband's death, entitled to half-share of his property; that, in the present instance, he, by a verbal will shortly before his death, cut down her right to a one-quarter share; that this devise by her husband was ratified by a deed executed by the defendant subsequently to her husband's death; and that, as he will not give her possession, she sues for the same.

The defendant pleads that he is not a Portuguese Roman Catholic, but a Feringhee Christian, and that, under the law applicable to the plaintiff and him, she is only entitled to maintenance. He pleads further that the deed executed by him was so executed by him when he was of tender years, and ignorant of the contents of the deed.

The Lower Appellate Court found that the parties were the descendants of Portuguese Roman Catholics, and that the deed executed by defendant was in the nature of a will, and therefore inoperative till his death; and that, under the law, as cited by Elberling, section 233, which governs Roman Catholics of Portuguese extraction, when a deceased leaves issue and a wife, the wife takes half, and the issue the other half.

The defendant now appeals specially, urging: *1st*, that, as the Judge found that the deed executed by him was inoperative, he should have dismissed the plaintiff's claim; *2ndly*, that the Portuguese law cannot regulate this case between inhabitants of this country; and, *3rdly*, that there is no legal evidence on the record to show that the ancestor of the parties came from Portugal, and therefore the authority cited by Elberling will not apply.

The deed executed by defendant in clearly not a will. The finding of the Judge, therefore, to the effect that that document is inoperative till his death, cannot stand, and must be set aside.

The lower Courts have found on good evidence that the parties before the Court are Roman Catholics of Portuguese extraction. With that finding we do not interfere, but we think that the other issues in the case have not been tried fully and sufficiently. Those issues are: *1st*, was the deed executed by defendant executed by him with full knowledge of its contents, and when he was of legal age? If this issue be

answered in the affirmative, the plaintiff's claim must be at once decreed; if it be answered in the negative, the remaining issues must then be tried. The 2nd issue will be, is the nuncupative will set up by plaintiff proved or not? If it be, the 3rd issue is, can the plaintiff, under the law current amongst members of the Roman Catholic Church in Chittagong, take under a nuncupative will or not? If she cannot take under such an instrument, the 4th issue will then be, to what is plaintiff entitled under the law regulating successions of intestates amongst members of the Roman Catholic Church? It will be observed that it is upon the law of that Church, and not upon Portuguese law, that the parties base their separate claims. Hence the necessity of the issues now laid down. In deciding the law point, the Judge will call before him parties who are cognizant of the law of the Roman Catholic Church, examine them as experts, and will obtain from them the authorities upon which their answers may be based, and pass whatever orders seem just and proper.

The 29th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Judges.

**Registration (of contingent contract to sell)—
Bona fide purchase without notice—Specific
performance of contract—Damages.**

Case No. 2816 of 1864.

*Special Appeal from a decision passed by
the Principal Sudder Ameen of Dacca,
dated the 25th June 1864, reversing a
decision passed by the Moonsiff of that
District, dated the 10th July 1863.*

Ramtonoo Surmah Sircar (Defendant),
Appellant,

versus

Gour Chunder Surmah Sircar (Plaintiff),
Respondent.

*Baboo Womesh Chunder Banerjee for
Appellant.*

*Baboos Nil Madhub Bose and Nuleet
Chunder Sein for Respondent.*

The want of registration, not of a deed of sale or gift of land, but of a contract by A to sell land to B at some future time on receipt of balance of sum agreed on not then paid, is no bar *per se* to B's preferential claim over C, a subsequent purchaser, whose sale has been registered under Act XIX. of 1843.

If C purchased in good faith and without notice, and is in possession, his possession cannot be disturbed in consequence of A's non-fulfilment of his contract with B, but B's remedy is not by a suit for specific performance of contract, but by an action for damages.

THIS was a suit for specific performance of a contract under the following circumstances:—

Plaintiff, who is the special respondent before us, advanced 124 rupees to the defendant Ramtonoo, on a byenamah, dated Srabun 25th, 1269, B. S., in which it was stipulated that, on payment of a further sum of Rupees 800, the plaintiff should receive defendant's share of the talook. Instead, however, of carrying out his bargain, defendant (special appellant) sold the land to a third party.

The defence is a simple denial of the whole transaction.

The Principal Sudder Ameen, on appeal from the Moonsiff, considered that the contract was proved; and that the plaintiff was entitled, on paying the 800 rupees, to specific performance, and to possession of the defendant's share in the talook. He reversed the first Court's order accordingly.

It is contended in special appeal that, as the deed of sale to the third party was registered, whilst that of the special respondent was not registered, the former is, under Act XIX. of 1843, entitled to precedence over the latter; and that this is not a case for specific performance even if proved, but for damages.

With regard to the first objection, we observe that Act XIX. of 1843 refers to deeds of sale or gift of land; but the deed propounded by special respondent is not a deed of that nature; it is simply a contract to sell land at some future time on receipt of a certain sum not then paid. The want of registration, therefore, of the first deed is no bar, *per se*, to the special respondent's preferential claim.

But, on the second point, we think there must be a remand for enquiry into the *bona fides* of the second conveyance. It is not denied that the third party is in possession; and, from the special respondent's contract not being registered, there is no reason to suppose that he purchased the estate after due notice of the claim upon it.

If the party in possession can prove that he bought the share in good faith for a valuable consideration, without notice, we think that his possession cannot be disturbed, in consequence of the special appellant's non-fulfilment of his contract with the special