led the other members of the family into a reasonable and well-grounded supposition that there has been a separation on his part, and an acceptance of a defined portion of the property instead of his family share.

In this case the plaintiff sued defendant for having wrongfully built up a wall and obstructed the lights of his (the plaintiff's) house, and thrown the waters of the rains against his wall, and thereby damaged it. And the plaintiff also sued for a partition of certain homestead land.

The Lower Appellate Court dismissed the plaintiff's suit on the ground that he had not denied that the land on which the defendant built his wall belonged to the defendant; and further that the plaintiff might himself have prevented the nuisance of the water; and that he had by laches and acquiescence lost his right to a partition.

It is objected, on special appeal to this Court, that the Judge has erred in saying that the plaintiff did not in his plaint deny the defendant's right to build his wall on the ground where he placed it; and, after hearing the whole plaint read, we think the objection valid. We also remark that, even if the land on which defendant built his wall belonged to him, the question would still remain whether he had a right to build in such a manner as to obstruct the access of light and air to the plaintiff's house, and cause injury to his buildings by the rain-water.

The appellants also object that, inasmuch as the Judge held that there had not, in fact, been a partition, he was wrong in law in saying that the plaintiff had no right to ask for a partition. And we also think this objection is correct. Unless the Judge finds that the acts of the plaintiff, or those from whom he claims, have been such as to lead the other members of the family into a reasonable and well-grounded supposition that there has been a separation on the part of the plaintiff, and an acceptance of a defined portion of the property instead of his family share, and such as to induce them to make arrangements on the faith of it, he ought not to hold the plaintiff barred from the right which every member of a Hindoo family, who is *sui juris*, possesses of requiring a partition of the family property.

We accordingly remand the case for re-trial upon the whole cause with reference to the above remarks.

The 27th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Sales of attached property—Section 246 of Act VIII. of 1859, prospective.

Case No. 3164 of 1864.

Special Appeal from a decision passed by the Judge of Patna, dated the 5th August 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 10th May 1864.

Lokun Singh and others (Plaintiffs), *Appellants,*

versus

Deo Narain Singh and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Sreenath Doss* for Appellants.

Mr. C. Gregory for Respondents.

Section 246 of Act VIII. of 1859 (relative to investigations of claims and objections to sales of attached property) is prospective, and does not apply to past proceedings in execution.

In December 1852 the property of one Shere Mungel having been attached in execution of a decree of Court, certain persons intervened, and laid claim to a portion of it on the strength of some deeds of conveyance or assignment which they set up, and their claim was allowed by the Court.

In February 1857, the present plaintiff, at the sale of this very property in execution of the above-mentioned decree, purchased the rights and interests of Shere Mungel therein, subject to the claim of the said intervenors, of which he had notice.

He afterwards brought a suit in the Civil Court against the said intervenors to set aside the deeds upon which they based their claim as fraudulent and void, and to recover the interests so held by them. This suit went by appeal to the Judge, who, on the 25th February 1862, gave a decree against him. It seems that the deeds in question were conveyances made by the elder sons of Shere Mungel after their father's death, but during the minority of some of their brothers, who had not all attained their majority in February 1862; and the Judge appears to have held that the suit was premature, inasmuch as the validity or invalidity of the deeds would depend upon whether the minors' consent should be given to them when they came of age.

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