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immediate effect and operation, in those cases where the interest passed is capable of physical possession, by physical possession, and where it is not, by the creation of a title under an instrument duly registered. We are aware that, in removing conditional sales from the category of art. 10, that failing any special provision to govern them, we relegate them to art. 120. We fully realize the anomalies that must thus necessarily arise, by giving the pre-emptor objecting to a conditional sale that has become absolute a limitation of six years; and in those cases where the *wajib-ul-arz* creates a right of pre-mortgage, two causes of action with a similar period in respect of each. But it appears to us that the Legislature overlooked this form of contract, when providing for the exercise of the right of pre-emption, and has consequently left cases of the kind mentioned in the order of reference unprovided for. Our answer must therefore be that the limitation applicable to a suit by a pre-emptor to enforce his right against the vendor and vendee, under a registered deed of conditional sale relating to a fractional share of an undivided mahál, is that contained in art. 120, namely six years.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

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QURBAN ALI (PLAINTIFF) *v.* ASHRAF ALI (DEFENDANT).

Act X of 1877 (*Civil Procedure Code*), *s.* 276—*Award directing execution of conveyance—Decree in accordance with award—Execution of conveyance—"Private alienation"*

By agreement between *L* and *Q*, the parties to a suit, the matters in difference between them were referred to arbitration. An award was made directing that *L* should transfer certain property to *Q* by way of sale. Between the day the award was made and the day a decree was made in accordance with the award such property was attached in execution of a decree against *L*. After the attachment *L*, in compliance with the decree made in accordance with the award, executed a conveyance of such property to *Q*.

Held by the Full Bench (affirming the decision of STRAIGHT, J., and reversing that of SPANKIE, J.,) that such conveyance was not a "private alienation" in the sense of s. 276 of Act X of 1877, and was therefore not void under that section as against a claim enforceable under such attachment.

QURBAN ALI, the plaintiff in this suit, on the 1st March, 1878, instituted a suit against one Lachman Das for certain moneys.

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* Appeal under s. 10 of the Letters Patent, No. 5 of 1881.

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The matters in difference in this suit were referred by the Court trying it to arbitration. On the 4th June, 1878, the arbitrators made an award directing that Lachman Das should pay Qurban Ali Rs. 35,095, and that Rs. 9,200 of that sum should be paid in manner following, *viz.*, that Lachman Das should, within fifteen days after the confirmation of the award, execute in favour of Qurban Ali a deed of sale of an eight and a half biswas share of a village called Mora, in lieu of Rs. 5,000, of a decree for Rs. 1,700 held by him against a Major Denehy, and of a bond for Rs. 1,500, given him by one Parshadi Lal, and that such share should remain hypothecated until the execution of such deed. The Court trying this suit made a decree in accordance with the award on the 20th June, 1878. On the 28th June, 1878, Lachman Das executed the deed of sale, and on the 2nd July the deed was registered. In the meantime, on the 21st May, 1878, one Biba Jan had obtained a decree for money against Lachman Das. On the 3rd June following she applied for the attachment and sale of a moiety of the share above-mentioned, and the same was attached on the 10th June. Qurban Ali objected to the sale, claiming the property by virtue of the deed of sale of the 28th June, but his objections were disallowed, and the property was put up for sale on the 20th July, and was purchased by Ashraf Ali, the defendant in this suit. Thereupon Qurban Ali instituted the present suit against Ashraf Ali to have the auction-sale of the property of the 20th July, 1878, set aside and for possession thereof, claiming by virtue of the deed of sale of the 28th June, 1878. The defendant set up as a defence to the suit, *inter alia*, that the sale to the plaintiff was void, under the provisions of s. 276 of Act X of 1877, as against his claim as auction purchaser, as such sale had been made after the attachment of the property in execution of Biba Jan's decree. Both the lower Courts allowed this defence and dismissed the plaintiff's suit.

On second appeal the plaintiff contended that the sale to him was not void under the provisions of s. 276 of Act X of 1877. The learned Judges (SPANKIE, J., and STRAIGHT, J.,) of the Division Bench which heard the appeal differed in opinion on the question raised by the plaintiff's contention. The following judgments were delivered by them:—

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SPANKIE, J.—The facts of the case are clearly set out in the judgments of the Courts below.

I am not prepared to say that the view taken in those judgments is wrong. The words "private alienation" in s. 276 of Act X of 1877 were probably used in s. 240 of Act VIII of 1859 as opposed to public or auction sale. Mr. Justice Phear, in the judgment cited by the appellant's counsel (1), says: "In the repealed Regulation, from which s. 240 is taken, private alienation is opposed to alienation by auction sale, and I apprehend that at the date of that Regulation the words 'auction sale' referred to a sale effected under some power of selling paramount to the owner's will. In my opinion, private alienation means alienation voluntarily effected by the owner in exercise of his ordinary powers of ownership (2)." I am quite willing to accept this definition. When parties have a difference and carry it into Court, and agree to submit it to arbitration, and as in this case bind themselves to abide by the decision of the arbitrators, they are following a course of their own free will, and one which the Court in no sense compels them to adopt. When the award has been made by the arbitrators, and the usual conditions have been fulfilled, the Court proceeds to give judgment according to the award, and upon the judgment so given a decree follows, which decree is to be enforced in the manner provided by the Code for the execution of decrees. The award, the basis of the decree, is a settlement of a dispute between A and B, with which C, a third party, has no concern whatever: as between A and B, the award once made, a decree must be enforced by the operation of law if need be. But it does not follow that it is to be enforced as such to the prejudice of C, to whom, in my opinion, it is nothing more than a private sale of her property from A to B. In the case cited to us, the judgment of Mr. Justice Phear did not prevail, and I would say that his argument, which had a special application to the case then before him, would not apply to a case such as that now before us. This is not a case in which the policy of the Insolvent Act has to be considered. Nor one in which the Collector of land-revenue causes property to be sold under the law for arrears due to the Govern-

(1) *Anand Chandra Pal* v. *Panchilal Sarma*, 5 B. L. R., 691.

(2) at pp. 705-706.

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ment, or where some other authority by virtue of power given to it can order a sale. The award of arbitrators, though enforceable by law as between A and B, is the settlement of a dispute between themselves, and as they consent to abide by the settlement, the execution of a deed of sale in accordance with its terms is, I think, a private alienation within the meaning of s. 216 of the Code.

It is certain that it is not a public sale in the sense of an auction-sale. It is not an involuntary sale since it arises out of the voluntary exercise of the will of the parties, who consented to abide the award of a referee. The Court's action is merely mechanical until the award is made, and its decree when given is nothing more than a ordinary decree of Court. Had there been no submission of the case to arbitration, no one can say that the Court would have ordered the sale. Indeed it could not have done so, but must have decided the case on the merits. When the property was attached by execution of decree (the 10th June, 1878), I cannot hold that it had become vested in plaintiff by the award of arbitrators dated the 4th June, 1878. The award had not been confirmed, and was not, when it was prepared, binding upon the parties to it. It was not binding upon them until the procedure of s. 522 of the Code had been completed by a decree in accordance with the award. Moreover, the award does not pass the property by sale. It directs that, within fifteen days from the confirmation of the award, the one party shall execute a deed of sale of the property in favour of the other, and that until this has been done the property shall remain hypothecated. When the attachment was made on the 10th June, the sale-deed had not been executed, and the award itself had not been confirmed. The sale-deed was not executed until 28th June, 1878, when the property was already under attachment, which attachment continued until the auction-sale of the 20th July, 1878. Under s. 276 any private sale is void as against the execution creditor, and therefore the auction-sale of the 20th July, 1878, appears to have given a good title to the purchaser, and the plaintiff cannot succeed in setting aside that sale, on the ground either that the property was sold to him on the 28th June, 1878, or that the sale was not a private alienation, but one that was involuntary under the operation of law. I would dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—On the 21st May, 1878, one Biba Jan obtained a money-decree against Lachman Das, defendant-respondent No. 2. On the 3rd June following she applied for execution, and on the 10th of the same month the property to which the present suit has reference was attached. On the 20th July it was brought to auction-sale, at which defendant-respondent No. 1 became the purchaser. This sale was subsequently confirmed.

The respondent No. 2 formerly carried on business in a large way as a banker at Bareilly, and prior to the commencement of 1878 the plaintiff-appellant had been a depositor with him to a large amount. In February of that year, in consequence of certain rumours coming to his ears, the appellant called upon respondent No. 2 to pay over the moneys in his hand. This respondent No. 2 confessed his inability to do, and ultimately on the 24th February he executed a conveyance to the appellant of certain properties belonging to him, among them the mauza involved in this suit. In this conveyance the properties were represented to be free from charge or incumbrance, but very shortly after the execution of the instrument the appellant had reason to doubt the accuracy of this statement, and he at once, upon the 1st March, instituted a suit against respondent No. 2, first, to have the conveyance set aside, and, secondly, to recover Rs. 32,571-2-0, the amount then due and owing to him. On the 14th May, by order of the Subordinate Judge, upon an agreement between the parties, the suit was referred to arbitration under s. 508 of the Civil Procedure Code, and on the 4th June the award was made. Objections were filed by respondent No. 2, but they do not seem to have been pressed, and on the 20th June a decree was passed upon the basis of the award under s. 522 of the Code in the following terms:—"It is ordered that, in accordance with the arbitration award, a decree for Rs. 35,095-2-0 be passed in favour of the plaintiff against the defendant: that the defendant do execute, within fifteen days, a sale-deed in lieu of Rs. 9,200 in respect of 872 biswas of mauza Mora, of a decree of the 27th February, 1875, for Rs. 1,700 against Major Denehy, and of the bond executed by Parshadi Lal, dated 24th February, 1878: that until completion thereof the property be considered to stand hypothecated: that should Major Denehy plead pay-

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ment, the defendant will remain liable to that extent." On the 28th June, 1878, the sale-deed directed by this decree to be made was executed, and duly registered on the 2nd July. Under it the appellant obtained possession of mauza Mora, but was subsequently ousted therefrom by respondent No. 1, and on the 15th July, 1879, the present suit was instituted. It will therefore be seen that the contest lies between the appellant, purchaser under a sale-deed of the 28th June, 1878, made by his judgment-debtor, in execution of the decree of 20th June, 1878, which was based upon the award of the 4th of June, and respondent No. 1, auction-purchaser at a sale in execution of the 20th July, 1878, of a money decree, under which attachment had been made upon the 10th of June. Both the lower Courts dismissed the suit, and the substantial ground in appeal before us is, that the lower appellate Court has misapplied and misinterpreted the provisions of s. 276 of the Civil Procedure Code. It is further contended, that the terms of the award created and gave the appellant a lien upon the property from the moment it was made, on the 4th June, and that the subsequent attachment on the 10th June was ineffectual. In the view I take of this case, it does not appear to me necessary to consider the second point. Whatever may have been the effect of the provisions of Act VIII of 1859, I do not think that under the present Code an attachment after judgment has the effect of creating a lien for the holder of the decree for money on the strength of which the property has been attached. Nor does it give him any priority in the distribution of assets subsequently realized by sale in execution of decree against other judgment-creditors. All holders of decrees for money are now apparently upon the same footing, and are entitled to a rateable division of the sale-proceeds, no matter when their attachments were made, if they have applied for execution of their decrees. As far as I can see, the present effect of attachment is to make any "private alienation" subsequent thereto *de facto* void; and if the property attached happens to be sold in execution of some other decree, it enables the attaching creditor, under s. 295 of the Code, to participate in the assets derived from such sale. The real question in the present case therefore appears to be, whether the sale-deed of the 28th June, 1878, by respondent No. 2 to the appellant can be

regarded as a private alienation. I do not think that it can. The agreement to refer a suit to arbitration does not close the litigation: on the contrary, the parties continue before the arbitrators in the adverse positions of plaintiff and defendant, the one seeking to fix liability on the other, and the other to avoid that liability. Even if the award is subsequently made upon the consent of the parties, it does not occur to me that it stands in any respects in a different position to a confession of judgment in the suit itself, and the decree that is passed in either case would seemingly stand upon the same footing. When once the award has been made, the arbitrators have no power to alter it, and it can only be set aside or amended by the Court itself that passed the original order of reference, upon certain defined grounds specified in the Code. After the limited time for filing objections, it is imperative upon the Court to give its judgment in accordance with the award, and upon such judgment a decree follows which can be enforced in manner provided for the execution of ordinary decrees. This procedure was followed in the present case, and the decree of the 20th June, 1878, being in accordance with the judgment and the award, became final. It is not suggested that in framing the decree as it did the Court exceeded its powers, but even if it did, it is difficult to see how the decree, having become final by positive declaration of law, and no steps having been taken to set it aside, can be questioned or disturbed. It is true that, if the suit had proceeded in ordinary course instead of being referred to arbitration, all that the Court could have done would have been to pass a simple money-decree in favour of the plaintiff. But it does not appear to me that this is a conclusive argument to show that a decree given in accordance with the special provisions of s. 522 of the Code is to be regarded as a private arrangement, and as ineffectual against third parties. I think the words "private alienation" mean a voluntary sale, gift, or mortgage in contravention of the attachment order, and not as in the present case the enforced execution of a conveyance or assignment in obedience to the decree of a Court qualified to pass it. Had the judgment-debtor refused to execute the sale-deed of the 28th June, 1878, he might have been compelled to do so, or the Court itself might have done it for him. Such being the view I entertain, which I regret is at variance

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with that held by my brother Spankie, I am of opinion that the respondent No. 1 purchased nothing at the sale of the 20th July, 1878, and that he has wrongly obtained possession of property the ownership of which had passed before that date to the appellant.

I would therefore allow this appeal with costs, and reversing the decision of both the lower Courts, decree the appellant's claim.

The plaintiff appealed to the Full Court, under s. 10 of the Letters Patent, from the judgment of Spankie, J.

Mr. *Ross*, for the appellant.

Maulvi *Obeidul Rahman*, for the respondents.

The following judgment was delivered by the Full Bench :—

TYRRELL, J. (STUART, C. J., STRAIGHT, J., OLDFIELD, J., and BRODHURST, J., concurring)—Having heard argument on both sides, we have no doubt that this appeal must be allowed. The sale of the 28th June, 1878, made under the operation of an arbitration decretal order and conveying to the appellant property which had been previously attached in execution of the decree of another case, was not a private alienation in the sense of s. 276 of the Civil Procedure Code. That sale was therefore unaffected by the special disabilities created by that section. No authority was cited, and we are not aware that any exists in support of the contrary view adopted in the judgment (*per* Spankie, J.) which is the subject of this appeal: but the interpretation that we approve is in harmony with the principle applied by a Bench of this Court in the analogous case of *Sarkies* v. *Bundho Baee* (1).

We reverse the judgment of Spankie, J., and affirming that of Straight, J., we set aside the decrees of the Courts below, and decree this appeal with all the costs of the litigation.

Appeal allowed.

(1) N.-W. P. H. C. Rep., 1869, p. 81 (21st June 1869.)