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IN THE MAT-
TER OF THE
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had once allowed the criminal law to be set in motion, he should have required the complainant to carry his prosecution through to the end, and should either have convicted or acquitted the accused persons. A very grave charge had been made against them, which required the most serious investigation, and though the Bank authorities acted with perfect candour and straightforwardness in stating the circumstances that led them to desire to withdraw from the prosecution, he could not properly entertain their application. Nothing could be more mischievous than to allow the process of the Criminal Courts to be used for the purpose of enforcing civil claims, and Magistrates cannot too jealously guard the important and extensive powers they possess from being abused for such a purpose.

The proposed Criminal Procedure Code has not yet become law, and it may be matter for very serious doubt whether it is expedient or desirable to sanction the compounding of such an offence as cheating by personation. I regret that so long a time has elapsed since the Magistrate passed his order allowing the withdrawal, but even thus late in the day I cannot avoid quashing it. The prosecution must be revived and full inquiry made into all the circumstances, and when this has been done the Magistrate will pass such order as appears to him to be proper.

Application allowed.

APPELLATE CIVIL.

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November 16.

Before Mr. Justice Spensie and Mr. Justice Straight.

SADIK ALI KHAN (PLAINTIFF) v. IMDAD ALI KHAN AND OTHERS
(DEFENDANTS)*.

*Filing agreement to refer to arbitration in Court—Reference to arbitration—"Decree"
—Appeal—Act X of 1877 (Civil Procedure Code), ss. 2, 520, 522, 523, 524.*

The sharers of a joint undivided estate agreed in writing that such estate should be partitioned and the accounts thereof settled by arbitration, and named one of such sharers as arbitrator, and agreed that he should settle all the accounts, how the surplus at each sharer's credit, and prepare lots, after partition of the

* First Appeal, No. 123 of 1879, from a decree of Maulvi Abdul Qayum Khan, subordinate Judge of Bareilly, dated the 5th June, 1879.

lands and houses comprehended in such estate, and have them drawn within one year from the completion of the partition. Subsequently one of such sharers applied, under s. 523 of Act X of 1877, to have such agreement filed in court. The other sharers not objecting to this course, such agreement was filed accordingly, and the case was referred to such arbitrator. The arbitrator made an award whereby he partitioned such estate into lots, assigning some only of such lots by name, and wherein he stated that he had not been able to settle the accounts owing to the default of the parties, and that, considering that the partition should take effect without any delay, he did not ask for further time. He further stated that "all the parties state that they will adjust the accounts after renewing the agreement," and he requested that the unassigned lots might be drawn in court. The Court made an order confirming the award, and, it being objected that the settlement of the accounts should not be postponed, but that they should be settled as agreed, directed that the arbitrator should settle the accounts, and gave him a year's time for that purpose, and, some of the parties not being willing to draw the unassigned lots, directed the distribution of such lots "in reference to the age and number" of the sharers.

Held that such order was a "decree" within the meaning of ss. 2 and 522 of Act X of 1877: that the arbitrator should himself have drawn such lots, or he should have made the parties draw them; but, inasmuch as it would not have strained the agreement to have had such lots drawn in court, and no objection had been taken to the arbitrator not having himself drawn them, it was not incumbent on the Court to have remitted the award in order that the arbitrator might have drawn them: that the Court, however, should not have distributed such lots in the manner it had done, but should have drawn a lot for each person, and in acting as it had done it had acted contrary to the award, and for that reason its decree could not be maintained: and that, in confirming the award before the accounts had been settled and an award made in respect thereof, the Court had acted erroneously, inasmuch as the award had left undetermined a very important matter, *viz.*, the settlement of the accounts, and the Court should, under s. 520 of Act X of 1877, have remitted the award for the reconsideration of the arbitrator, and, as it had the power to remit it upon such terms as it thought fit, the Court could have allowed one year, if necessary, for the settlement of the accounts; and on this account, and also because the Court had made an order postponing the settlement of the accounts, and thereby made an order contrary to and in excess of the award, its decree must be reversed.

ONE Saadat Ali Khan died on the 4th September, 1865, leaving as his heirs six sons and two widows. On the 13th June, 1877, these persons agreed in writing that Imdad Ali Khan, one of such sons, should, as arbitrator, adjust the accounts of the undivided portion of Saadat Ali Khan's estate, and partition such portion which consisted of lands paying revenue to Government, hobitr and gardens. Under the terms of this agreement the arbitrator was to adjust such accounts, and prepare lots and cause them to

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drawn within one year after he had made the partition. On the 11th July, 1878, Sadik Ali Khan, one of the heirs, applied, under s. 523 of Act X of 1877, to have this agreement filed in court. The other heirs did not object to this course, and the agreement was filed accordingly, and an order was made referring the case to the arbitrator. The arbitrator made an award dated the 30th April, 1879, the period for the completion of the award specified in the order of reference having been enlarged from time to time at the request of the arbitrator. The arbitrator stated in the award that he had not been able to adjust the accounts of the property owing to the failure of the parties to submit their accounts, and that, considering that the property should be partitioned, he had thought it advisable not to ask for further time. He further stated that "all the parties state that they will adjust the accounts after renewing the agreement." He partitioned the property into eight lots, assigning, as regards the lands paying revenue to Government, lots to Asghar Ali, one of the sons, and to the two widows, severally, by name, on the ground that Asghar Ali had transferred his share in some of the villages to his wife, and his share and that of one of the widows in other villages had been sold, and the lot of the junior widow was not equal to the lot of the senior one. The arbitrator also requested that the unassigned lots might be drawn in court. Some of the parties objecting that the adjustment of the accounts of the property should not be made the matter of a fresh agreement, as suggested by the arbitrator, but that the accounts should be adjusted at once, in accordance with the existing agreement, the Court decided that the arbitrator should adjust the accounts, but that, having regard to the fact that the accounts relating to some eighty villages for fourteen years had to be prepared, he should be allowed one year for the adjustment. As some of the parties were not willing to draw the lots, the Court held that it was left to it to assign the lots, and it accordingly made the following order regarding the lots:—"It is, therefore, ordered that the arbitrator's award, dated 30th April, 1879, be confirmed: that it be acted upon: that, as regards the lots framed by the arbitrator with specification of names, they be taken by the particular persons specified: that the remaining lots be assigned with reference to size and number: and that equal costs, without interest, be paid

by all the co-sharers: the specification of the lots, the names of the sharers, and the detail of the property be carefully set forth in the decree: the Court further directs that, as regards the second point mentioned in the agreement for reference to arbitration, the arbitrator be allowed one year's time to settle the accounts completely and to file his decision in respect thereof in court: if any party has at that time any objection, the Court will decide such objection in due course."

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The plaintiff appealed to the High Court, contending that the decree of the Subordinate Judge was not in accordance with the award, as the arbitrator had directed that the lots should be drawn, and that the order allowing one year's time for the adjustment of the accounts was illegal.

Pandit *Nand Lal*, for the appellant.

Pandit *Bishambhar Nath* and *Mir Zahir Husain*, for the respondents.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.,) was delivered by

SPANKIE, J.—An application under s. 523 of Act X of 1877 was made that an agreement to refer the matters in dispute between the parties to arbitration might be filed in court. This was done and by consent of all parties the dispute was referred to an arbitrator, who himself was one of the sons of the deceased gentleman whose estate formed the subject of reference. The arbitrator was to partition the estate under conditions set forth in the agreement, and to take an account of mesne profits. He was to settle all accounts, show the surplus at each sharer's credit, and to prepare lots after division of the houses and lands and to have them drawn within one year from the completion of the partition. The parties also bound themselves to assist in the preparation of the accounts from 1273 fasli up to the time of partition. The estate was a large one and considerable delay occurred in submitting the award. The award when submitted did not settle the accounts, but the arbitrator sent in the partition papers and the lots. The arbitrator recored in the award that "all parties stated that they would adjust

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accounts after renewing the deed of agreement." These words mean that a new agreement was to be made in regard to the adjustment of the accounts. The award further states that the papers of partition in detail are forwarded with an application that the Court would draw the lots. Objections were taken that adjustment of the accounts should not have been postponed, but they should have been settled in accordance with the terms of the agreement. The Subordinate Judge appears to have considered this objection reasonable and that he ought to decide that the arbitrator should "settle the account also." He allowed the arbitrator one year for the purpose of completing the account. But the lower Court states that it would be prejudicial to all the sharers if the confirmation of the division of property should be delayed until the accounts had been settled. He, therefore, considers that each sharer should be put in possession of his separate share. The arbitrator had prepared some of the lots, specifying the name of the parties to whom the several lots belonged. But there were other lots without specification. But when the parties were asked to draw these lots, some of them were unwilling to do so. The lower Court, therefore, undertook to distribute the lots amongst the several sharers. The Subordinate Judge records that he "assigned them with reference to age and number." He then confirms the award as regards the partition and directs that it be acted upon, and allows the arbitrator one year's time to settle the accounts and to file his award in court, when this part of the case would be disposed of. It is objected that the decree is not in accordance with the award. The lots should not have been distributed between the sharers according to number and age, but the sharers should have drawn lots. It is also urged that the Court acted illegally in giving one year's time to the arbitrator to settle the accounts. A preliminary objection was taken by respondent that there was no appeal, as there was no decree within the definition of that word in the Civil Procedure Code. We, however, do not see the force of this objection. When an application has been admitted, it is numbered and registered as suit between the parties interested. The appellant was the plaintiff, the other sharers were the defendants. By s. 524 of the Code the foregoing provisions of chapter XXXVII, so far as they are consistent with any agreement filed under s. 523, are made

applicable to all proceedings under the order of reference, and "to the award of arbitration, and the enforcement of the decree founded thereupon." Thus the provisions of s. 522 of the chapter would be applicable, for they are in no way inconsistent with the agreement, but are altogether consistent with it. Under s. 522 the Court, when all objections to its doing so have been removed, shall proceed "to give judgment according to the award," and upon the judgment so given "a decree shall follow, and shall be enforced in the manner provided in this Code for the execution of decrees." Here the decree was the formal expression of the adjudication upon the rights of the parties, and the adjudication decided the suit. Therefore the definition of "decree" in s. 2 of the Code includes the order made in this case. Moreover, under the terms of s. 522, though ordinarily a decree confirming an award is final, still an appeal is allowed when the decree is in excess of or not in accordance with the award. These remarks dispose of the preliminary objection.

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On the appeal we think that the lower Court, if the Subordinate Judge believed that he was at liberty to act, and the parties were unwilling to draw lots for themselves, should have drawn a lot for each person, and should not have assigned the several parcels with reference to the number and age of the several parties. But we observe that the arbitrator himself ought to have drawn the lots where he had not already specified their owner by name, or he should have made the parties draw them. He was authorized by the agreement "to prepare the lots and have them drawn within one year after dividing the houses and villages." It may, however, be said that it would not be straining the agreement, if the arbitrator preferred to have the lots drawn in the court, and it does not appear that any objection was taken to his not having himself drawn them. We do not, therefore, consider that it was necessary to remit the award to the arbitrator to draw the lots. But we think that the lower Court acted contrary to the award in distributing the lots in the way adopted by it, and on this account the decree cannot be maintained. We also observe that the lower Court acted erroneously in confirming the award before the account had been prepared and an award given in respect of them. The Court had left undetermined a very important matter referred to

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tion, namely, the settlement of the accounts, and under s. 520 the Court should have remitted the award for the reconsideration of the arbitrator, and, as he had the power to remit it upon such terms as he thought fit, the Subordinate Judge could have allowed one year, if necessary, for the settlement of the accounts. The Subordinate Judge should not have determined the suit upon an incomplete award, and we are compelled to reverse his decree on this account, and also because he has made an order postponing the adjustment of the accounts and thereby made an order contrary to and in excess of the award. For the award, if a good one, does not undertake to settle the accounts, but states generally and vaguely that a new agreement would be made hereafter respecting them. As it becomes necessary to reverse the decree, it would be proper that the case should go back to the lower Court, and the Subordinate Judge will have the opportunity of remitting the award for the adjustment of the accounts, and he can also instruct the arbitrator to carry out the terms of the agreement and to have the lots drawn, either by the parties or for them. When the arbitrator has carried out his instructions, he will again submit his award, and upon it the Subordinate Judge can proceed according to law. We decree the appeal and reverse the decree of the lower Court with costs, remanding the case in order that it may be dealt with in accordance with the instructions contained above.

Cause remanded.

1880
November 25.

Before Mr. Justice Pearson and Mr. Justice Spinkie.

RAI CHAND (PLAINTIFF) v. MATHURA PRASAD AND OTHERS (DEFENDANTS).*

Adjournment—Non-appearance of plaintiff—Act X of 1877 (Civil Procedure Code), ss. 102, 103, 540—Appeal.

Nothing remained to be done in a suit except to hear arguments, for which he had been appointed. Neither the plaintiff nor his pleader appeared at the fixed time. The Court consequently dismissed the suit. *Held* that its decree appealable under s. 540 of Act X of 1877, and the lower appellate Court should

* Second Appeal, No. 641 of 1880, from a decree of C. J. Daniell, Esq., Judge of the District Court at Mirzapur, dated the 25th March, 1880, affirming a decree of Muhammad Ali Khan, Subordinate Judge of Mirzapur, dated the 21st September, 1879.