CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Telang.

1892. *September* 20

QUEEN-EMPRESS *v.* KÁNJI BHIMJI.*

Bombay Gambling Acts (IV of 1887 and I of 1890), Sec. 3—"Common gaming house"—"Instrument of gaming"—"Used"—Meaning of these words in section 3 of the Act.

The accused rented a place near a public road at Bombay at Rs. 250 a month. There they erected a shed containing eleven *pedhis* or stalls. In the centre of the shed they put up, in a prominent position, a clock for keeping accurate time. The stalls were let out to certain persons, each at the rate of Rs. 100 a month.

The roofs of several adjoining houses surrounded this place. From one of these roofs rain fell into the place.

Numbers of people resorted to this place for the purpose of rain-betting.

The rain-betters staked certain sums of money on the chance whether the rain would fall or would not fall within a certain time. After making the bets, the parties betting would go to one of the stall-keepers, and get him to register the particulars of the bet in a book kept for the purpose, and each deposited with the stall-keeper the amount staked.

The bets as to rain falling were determined by persons at the place seeing the rain falling in a stream from such of the roofs of the adjoining houses as had been chosen by the betters on making the bets, and seeing also the time, by the clock, if there was any doubt as to the time.

After the bet was determined, the winner received from the stall-keeper the amount of the stake.

Under these circumstances, the accused were charged before the Chief Presidency Magistrate with committing the offence of keeping a "common gaming house" under section 4, clauses (*a*), (*b*) and (*c*), of the Bombay Gambling Act IV of 1887 as amended by Act I of 1890.

On a reference by the Magistrate under section 432 of the Code of Criminal Procedure (Act X of 1882),

Held that to bring the place in question within the definition of a "common gaming house" in section 3 of the Bombay Gambling Act (IV of 1887) as amended by Bombay Act I of 1890, the instrument of gaming or wagering must be in the place itself, either kept there, or brought there and used there, for profit and gain. It is not sufficient that wagers are made in the place upon or by means of some article or other which is outside the place. The roofs of the houses surrounding the place in question could not, therefore, be regarded "as instruments of gaming either kept or used therein" within the meaning of section 3 of the Act.

Held, also, that the word "used" in section 3 of the Act as amended by Act I of 1890 must be taken in its ordinary sense, as meaning *actually* used. Any article which is *in fact* used as a means of wagering comes within the definition of "an instrument of gaming," even though it may not have been specially devised or intended for that purpose.

* Criminal Reference, No. 80 of 1892.

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Held, per Telang, J., that neither the stalls, nor the books in which the bets were registered, nor the money staked and deposited with the stall-keeper, were instruments of gaming or wagering.

THIS was a reference, under section 432 of the Code of Criminal Procedure (Act X of 1892), by C. P. Cooper, Chief Presidency Magistrate.

The reference was in the following terms :—

"2. The accused were charged before me on the 3rd of August, 1892, with committing an offence on and prior to the 13th day of July, 1892, at Bombay under paragraphs *a*, *b* and *c* of section 4 of Bombay Act IV of 1887 and Bombay Act I of 1890.

"3. They denied having committed the offence.

"4. The facts proved are that the accused, who are the nominees of certain persons, in the month of June last rented a place at the Cathedral Road, Bhuleshwar, from one Purshotamdás Hurkissondás for two months at Rs. 250 a month, and the next two months they should continue to occupy at Rs. 400 a month.

"5. The accused took possession of the place, and afterwards caused to be erected on part of it a shed in which were eleven '*padhis*' or stalls, and also placed in a prominent position in about the centre of the shed an ordinary American clock which kept accurate time. The clock was kept in charge of *rámushis* appointed by the accused to prevent persons tampering with it.

"6. The stalls were let out to certain persons by the accused, at the rent of Rs. 100 each stall per month. The accused had the care and the management of the place, which was used by numbers of persons for the purpose of rain-betting, the place being kept open for any one who liked to go there.

"7. Surrounding the place are several roofs of adjoining houses, the rain from one of which fell into the place.

"8. That persons making bets on the rainfall ventured certain sums of money against each other upon the chance whether rain would fall, or would not fall, within a certain time. The time was not for a less period than three hours, and might be for a longer period during the time from 6 A. M. to 6 P. M. of each day.

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"9. After the bets were made the parties betting would go to one of the stall-keepers, and get him to register the particulars of the bet in a book kept and used by him for that purpose alone, and in most cases each of the parties would deposit with the stall-holder the money ventured (the stakes).

"10. The bets were determined as to rain falling by persons at the place seeing the rain falling in a stream from such of the roofs of the surrounding houses as had been chosen by the individual betters on making the bets, and the time by the clock if it was necessary, but in case of no doubt without reference to the clock.

"11. After the bet was determined, the winner received from the stall-keeper, whether the loser was present and consented or not, the amounts staked, less two pice a rupee deducted by the stall-keeper as his commission from the amount won.

"12. No business, except rain-betting, was carried on in the shed.

"13. The clock in the shed could be looked at and used by the persons frequenting the place for other purposes besides those of determining the time in respect of the betting, and the evidence proved it was so used.

"14. A plan of the premises and the clock is forwarded herewith.

"15. Mr. Little on behalf of the prosecution contended that the place was used for the purpose of a common gaming house within the meaning of section 3 of the Act, and the clock, the roofs of the adjoining houses, the stakes or deposits of money, and the books are each of them an article used in the place as a subject or means of gaming, including wagering, and referred to the case of *Queen-Empress* v. *Govind*[1], and particularly to the judgment of the Honourable Justices Birdwood and Parsons.

"16. Mr. Inverarity on behalf of the accused contended it was necessary, before convicting under section 4, to prove that the place was used as a common gaming house under section 3; that all instruments or articles used for gaming or wagering

(1) I. L. R., 16 Bom., 283.

kept or used for the profit or gain of persons using or keeping the place must be those specially devised or intended for that purpose; that under the Act the Court had the power to order the destruction of instruments of gaming; that the point really for decision is referred to by the Honourable Mr. Justice Jardine in the case of *Queen-Empress* v. *Govind*, what are 'instruments of gaming,' then to consider if any of these articles, which are kept or used on the premises, come under the definition, and what is really meant by 'means of wagering.' He contended that the roofs were not instruments of gaming; that it was clear these roofs are only the ordinary roofs of surrounding buildings, though the roof of the adjoining chawl, which belongs to other persons, projects a few inches over the place.

"17. He maintained it could not be contended that these roofs are used in the place, and that in any event they are not instruments of gaming or wagering.

"18. As to the stakes, that is covered by the decision in *Queen-Empress* v. *Govind*.

"19. The books of account are covered by the case of *Tollett* v. *Thompson*[1].

"20. As to the clock, there was no attempt to make out there was anything peculiar about it, that it was used only in connection with the betting on certain occasions, and at other times by the persons frequenting the place for other purposes.

"21. There was no evidence to show that any one is bound by the entries made in the books, and he contended that in any event none of these things are instruments of wagering within the Act.

"22. As to the word 'used' it does not mean actual usage therefrom. Under the section it is meant to be understood that anything that assists in the smallest degree in making or ending a bet is an instrument of gaming; but instruments that are actually used for wagering, which is something actually made for that purpose, or something devised for it.

(1) L. R., 6 Q. B., 514.

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"23. In England, they have a special legislation for betting houses, which we have not here, and he referred to the English Acts relating to betting houses.

"24. The questions for the opinion of the High Court are—

"(1) Whether the accused, who had the care and management of the place, kept or used the same for the purpose of a common gaming house within the meaning of section 3 of Bombay Act IV of 1887 as amended; and

"(2) Whether any of the articles, *viz.*, the clock, the money staked, the '*pedhis*' or stalls, the books or the roof of the adjoining houses, were instruments used as subjects or means of gaming, including wagering, within the meaning of section 3 of the said Act."

Lang, (Acting Advocate General), for the Crown:—The accused have rented the place simply for the purpose of carrying on rain-betting. They have put up a clock there, not with the object of seeing the time of the day, but of deciding the bets by it. Bets are laid and deposited with the stake-holder. There are books kept in which the bets are registered. I contend that the clock is used as a means of gaming. So, too, the roofs of adjoining houses were used as means of gaming.

[PARSONS, J.:—Then you might as well contend that the rain was used in the building.]

So I do. The rain from one of the adjoining roofs fell into the place. The word "used" in section 3 of Bombay Act IV of 1887 means actually used, and it must be given full effect to. No inference can be drawn from section 8 of the Act, which empowers a Magistrate to destroy the articles used as instruments of gaming after a conviction. The section is permissive. The ruling in *Queen-Empress* v. *Govind*[1] does not conflict with this view.

Inverarity for the accused:—If the Legislature had intended to stop betting, it would have passed an Act for that purpose. Stat. 16 and 17 Vict., c. 119, expressly brings a betting house within the statutory definition of a gaming house. See also 36 and 37 Vict., c. 38. Refers to Encyclopædia Britannica,

(1) I. L. R., 16 Bom., 283.

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title "Game." The mere keeping of a common betting house is not criminal in India as it is in England. There is nothing illegal in persons meeting together in a particular place for rain-betting. The expression "instrument of gaming" no doubt includes means of gaming. The two words are convertible terms, as shown in Webster's Dictionary. But that definition does not apply to the clock used in the present case. The bets are not made with reference to the clock; they are made with reference to the time. They are not determined by the clock. The clock is, therefore, not an instrument or a means of wagering. The wager is independent of the clock. An instrument of gaming is an instrument specially devised for the purpose of gaming—*Imperatrix* v. *Vithal*(1); *Queen-Empress* v. *Narotamdás*(2); *Queen-Empress* v. *Govind*(3); *Reg.* v. *Rama*(4); *Imperatrix* v. *Mahomed*(5).

These cases show that an instrument of gaming is an instrument specially devised or intended for the purpose of gaming. The words "other instrument of gaming" in section 3 of Bombay Act IV of 1887 mean other instrument *ejusdem generis*. The clock is not, therefore, an instrument of wagering. The wager is independent of the clock. It is a convenient thing in a place of public resort. As to the roof of the adjoining house, the definition of the word "*instrument*" in the Act shows that it is some tangible, moveable article; it does not include immoveable property. The roof is not a tangible moveable article, and, therefore, is not an instrument of wagering. The word "used" in the definition of *instruments of gaming* as given in Bombay Act I of 1890 is not a word of wide import. It means not actually used, but ordinarily used. The stakes or coins are not instruments of gaming.

Lang, in reply:—The cases cited were decided before the amending Act I of 1890 was passed. The definition of "instruments of gaming" given in this Act is very wide, and includes any and every article which is used as a means of gaming.

[PARSONS, J.:—What do you mean by "used"?]

(1) I. L. R., 6 Bom., 19.
(2) I. L. R., 13 Bom., 681.
(3) I. L. R., 16 Bom., 283.
(4) Bom. H. C. Cr. Rul. dated 19th June, 1873.
(5) Bom. H. C. Cr. Rul., No. 72 of 1886.

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I mean actually used as an instrument or means of gaming. The clock is used for the purpose of wagering. The bets were to be decided by the clock in case of doubt. The object of putting up the clock on the premises was for the purpose of deciding the bets. It is immaterial if the clock is used by people for other purposes. As to stakes, it is idle to say that stakes are not the subject of wager. The roof is also used for purposes of gaming.

[TELANG, J. :—Is the roof an "article"?]

Lang :—The word "article" means "thing." The roof is used for the purpose of deciding bets. People stand on the premises and make use of the adjoining roof for determining the bets. If a house be kept for betting on a subject however distant, it falls within the definition of a common gaming house.

Cur. adv. vult.

PARSONS, J. :—Since the hearing of the arguments in this case my learned colleague and myself have consulted together and have arrived at a unanimous conclusion on the points of law involved and upon the terms of the order to be passed on the reference. We have decided to deliver separate judgments, considering the importance of the subject and for its better elucidation.

The Chief Presidency Magistrate has referred to this Court the following questions :—Firstly, whether the accused, who had the care and management of the place, kept or used the same for the purpose of a common gaming house within the meaning of section 3 of Bombay Act IV of 1887 as amended ; and, secondly, whether any of the articles, *viz.*, the clock, the money staked, the *pedhis* or stalls, the books, or the roofs of the adjoining houses, were instruments used as subjects and means of gaming, including wagering, within the meaning of section 3 of the said Act. His reference shows that the place in question is used as a common betting house for the profit of the occupant. Since gaming, by the provisions of Bombay Act I of 1890, includes wagering, the place will be a common gaming house if cards, dice, tables or other instruments of gaming or wagering are kept or used therein (see section 3 of the Bombay Prevention of Gambling Act IV of 1887).

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The expression instruments of gaming or wagering is by Bombay Act I of 1890 made to include any article used as a subject or means of gaming or wagering. The point, therefore, narrows itself to this "—Is any article used as a subject or means of wagering kept or used in the place in question"? The Advocate General on behalf of the Crown contended that the word "used" where it first occurs in the above sentence, which is taken from the definition given in Bombay Act I of 1890, means actually used. Mr. Inverarity for the accused argued that the word must be confined to things that are specially devised and intended to be used for the purpose of wagering, and he cited cases and the opinion of Jardine, J., in *Queen-Empress* v. *Govind*(1) in support of his contention. After a full consideration of his argument, and of the authorities he cited, I can come to no other conclusion than that the word "used" must be understood in its ordinary meaning, and that it refers to an actual user; in other words, I am of opinion that any article that is made use of as a subject or means of wagering, no matter of what nature that article may be, comes within the definition of instruments of gaming or wagering. I see nothing in section 8 that is opposed to this view, for the power to order the destruction of articles found in a common gaming house is permissive only, and a Magistrate would only order the destruction of what properly ought to be and could be destroyed. There is no indication in the Act of 1890 of any intention to restrict the meaning of the word "used", and it is almost impossible, considering the decisions, to suppose that the Legislature, had it intended the articles to be limited, would not have plainly so provided when it passed the Act. Whether or not an article is used as a subject or means of gaming or wagering, is a question of fact which has to be determined upon the evidence in each case. It is not a point that I would be willing to consider in a reference of this kind, since in case of a conviction there would be an appeal open to the accused in which the propriety of the finding could be called in question.

The above would, I consider, have been a sufficient reply to the reference were it not for the mention of the roofs of the adjoin-

(1) I. L. R., 16 Bom., 283.

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ing houses in it and for the arguments of the Advocate General thereon. This requires us to determine the legal meaning of the words "kept or used in the place in question" which occur at the end of the point before raised, and which are taken from section 3 of the principal Act. The roofs of the adjoining houses clearly are not kept in the place in question. But the Advocate-General contends that they are used therein, since they are made use of for the purpose of wagering therein. If this argument is sound, then it would have been far simpler to have proceeded against the accused for the use of the rain itself, since that admittedly was used as the subject of wagering within the place. The whole of the bets were laid on or against the fall of the rain. I am unable, however, in any way to accept the argument. I think that, to bring the place within the section, the instrument of wagering must be in the place itself, either kept there or brought there, and used there for profit or gain, and that it is not sufficient that wagers are made in the place upon or by means of some article or other which is outside the place. To hold otherwise would be, I think, to do violence to the language of the section, while it would be inconsistent with the provisions of sections 5 to 8. The roofs of the adjoining houses must, therefore, be excluded from the list of articles that are in law capable of being used in this place as a subject or means of wagering.

The only other article that is relied on in argument as coming within the definition is the clock. That under the Act would be an instrument of wagering if it was used as a subject or means of wagering; if, for instance, wagers were made depending upon, or to be decided by, the time kept by it, it would, I think, be used as a means of wagering. This, however, as I have before said, is a question of fact upon which I am unwilling even to express an opinion, as the point may come before us in another form. Even if I were willing, I could not do so in the present reference, since we have not got the evidence, and the Magistrate has not himself found upon the point. All he says is that the clock kept accurate time and was watched by *rámushis*, and that bets were decided by persons seeing the time by the clock if necessary, but in cases of no doubt without reference to the clock. I cannot infer from

this that bets were made and decided by the time kept by this clock, which is apparently what would have to be proved in order to make it an instrument of wagering.

The order of the Court is that the reference be returned to the Chief Presidency Magistrate with the following answers, viz., (1) In the affirmative only if any article is kept or used in the place as a subject or means of wagering. (2) With the exception of the roofs of the adjoining houses, which are not within the place, any one of the articles mentioned might be an instrument of wagering if it is within the place and actually kept or made use of in the place as a subject or means of wagering, but not otherwise.

The Magistrate should complete the trial of the case in accordance with the above answers. The costs of this reference are to be paid by the accused if they are ultimately convicted, but by the Crown if the result of the prosecution is an acquittal.

TELANG, J.:—This case comes before the Court on a reference made by the Chief Presidency Magistrate under section 432 of the Code of Criminal Procedure. The questions referred are as follows :—

(1) Whether the accused, who had the care and management of the place, kept or used the same for the purpose of a common gaming house within the meaning of section 3 of Bombay Act IV of 1887 as amended ? and

(2) whether any of the articles, *viz.*, the clock, the money staked, the "*pedhis*" or stalls, the books or the roofs of the adjoining houses, were instruments used as subjects and means of gaming, including wagering, within the meaning of section 3 of the said Act ?

The answer to the second of these questions decides the answer to be given to the first, and the argument before us has been consequently directed to the elucidation of the point, whether any of the specific articles mentioned in the second question, and chiefly the clock, the money staked, and the roofs, are or are not instruments or subjects or means of wagering within the meaning of section 3 of Bombay Act IV of 1887, interpreted by the light of Bombay Act I of 1890. I will first deal with the "articles"

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which did not form the subject of argument, *viz.*, the "*pedhis*" or stalls, and the books. I am of opinion that, having regard to the statements in the case referred, neither of them can be held to fall within the purview of the Gambling Acts. The stall is the seat or office, so to say, of the man who keeps a register of the bets made, and the books are those in which the bets are registered. In my opinion, they are both too remotely connected with the wagering to be accurately described as either instruments or means or subjects of wagering. They appear to me, according to the statements in the case, to be merely helps to the preservation of evidence relating to the completed wagering transaction. As regards the money staked, I think it would be a straining of language to describe that as falling within the words instrument, or means, or even subject of the wager. It is rather the fruit or result of the wager, and falls outside the scope of the section. This view may be supported to some extent by the language of sections 5, 6 and 8, and is in accordance with the opinion expressed by Jardine, J., in *Imperatrix* v. *Govind*[1].

The roofs of the neighbouring houses must next be considered. I do not think it to be necessary on the present occasion to decide whether, looking at the manner in which they are utilized for the purposes of these wagers as stated in the case, they are instruments or means or subjects of the wagers; or, again, whether they can be properly included under the term "articles" used in Bombay Act I of 1890. It seems to me enough to say that they are not "kept or used *in*" the place in question. They plainly are not kept there. And, having regard to the provisions of such sections as 6, 7, and 8, I am, to some extent, confirmed in the view I expressed during the argument, that the Legislature cannot have intended that tangible things should be treated as used in a place where they are not physically.

Lastly comes the clock. And, as regards the clock, I confess I have felt considerable doubt. The doubt is, partly at least, due to the circumstance that the facts stated in the case do not furnish sufficiently full and precise information. Thus it is not quite clear from the case whether, in point of fact, the clock has

(1) I. L. R., 16 Bom., 283.

ever been consulted at any stage of any of the wagering transactions entered into on the premises in question. All that the Magistrate states is that "the bets were determined as to rain falling by persons at the place seeing the rain falling in a stream from such of the roofs of the surrounding houses as had been chosen by the individual betters on making the bets, and the time by the clock if it was necessary, but, in cases of no doubt, without reference to the clock." This is not quite precise. Again, this statement does not make it clear whether the "determination" as to the time was made by the parties to the bet referring to the clock or by "the persons at the place" doing so, or whether it was the stakeholder, who, in order to deal with the alleged winner's application for the stakes, satisfied himself by such a reference. It may be, I say no more at present, that different results may follow in the different cases.

It is true that, if Mr. Inverarity's argument is correct to its full extent, these points will be all immaterial. He contends that the interpretation of the phrase "instruments of gaming" in *Watson* v. *Martin*[1] and other authorities adopted by this Court in more than one ruling is still good in spite of Bombay Act I of 1890. This certainly appears to have been the opinion of Jardine, J. But, I own, I find it difficult to concur in that opinion. *Primâ facie*, I should say that the very fact that the Legislature, having all these authorities before it, lays down a fresh interpretation of the phrase "instruments of gaming" affords by itself an indication that some enlargement of the scope of the words was intended. And, secondly, I think that the word "means" is a word with a wider signification than was given to the word "instrument" by the judicial decisions which have been alluded to. Taking the phrase "means of wagering" in its ordinary idiomatic sense, I should say that it might fairly be regarded as somewhat wider than the phrase "instruments of wagering." And when the former phrase is added by express separate legislation to the definition of the latter, it seems to me difficult to avoid the inference that some widening of the scope of the old law must have been intended. The considerations

(1) 34 L. J., M. C., 50.

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which would be applicable in interpreting a statute, in which both the words "instrument" and "means" occurred together, would not necessarily apply where "instruments" being the sole word used in the first statute an amending statute was subsequently passed to add the word "means". It seems to me, therefore, that we cannot now hold ourselves bound by the older authorities referred to in the case of *Queen-Empress* v. *Govind* [1]. And, looking at the question apart from those authorities, I think we must come to the conclusion that a thing may be an "instrument or means" of gaming or wagering, although not "devised or intended for that purpose," or "primarily used for that purpose," or "destined for that purpose," or "proved to have no other use", in the sense in which these various phrases have been employed in the authorities touching this point. It seems to me that, looking, as we are bound to do, at the course of legislation on this subject, we ought to hold that any article which is in fact used as a means of wagering must be held to be within the definition, even though it may also serve some other purpose or purposes. This construction, it will be noticed, is not open to the observations made by Mellor, J., in *Tollet* v. *Thomas* [2], that if half-pence are instruments of gaming, then we all carry these dangerous instruments. All do not use half-pence, in fact, as means of gaming or wagering, and in so far as they do, I do not know why under our Acts they should not be held to carry dangerous instruments. Nor do I think that section 8 is in any way opposed to that view. I doubt whether, according to the decision in *Julius* v. *Bishop of Oxford* [3], the section ought to be construed as obligatory, as argued by Mr. Inverarity. But, even if it were so construed, I am not at all sure that the inconvenient and alarming consequences indicated by Mr. Inverarity would necessarily and unavoidably follow.

I ought, perhaps, to notice one other point. Mr. Inverarity cited Webster's Dictionary to show that the words "instrument" and "means" are convertible terms. Conceding that, I venture to think that the conclusion above expressed is nevertheless not vitiated, because I think it clearly fallacious to argue that as

(1) I. L. R., 16 Bom., 283. (2) L. R., 6 Q. B., 314.
(3) 5 Ap. Ca., 214.

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means is convertible with instrument, and instrument is by judicial decision interpreted in a limited sense in certain Acts, therefore means also must necessarily bear the same limited construction in other Acts, even although these other Acts are *in pari materia*. I have already shown grounds for adopting a different mode of interpretation. And here I will only add, that it appears to me that instrument and means are convertible and co-extensive, according to Webster, only when the sense of the two words is taken generally, and not limited, as it is in *Watson* v. *Martin* (1) and other cases of that class.

The result is that, in my opinion, the clock here in question, although, of course, it may be, and, as stated in the case, is utilized, as it certainly is capable of being utilized, for other purposes, may nevertheless, in point of law, be also used as an instrument or means of wagering within the meaning of the Prevention of Gambling Acts. Whether it is in point of fact so used, is a matter on which we cannot properly give an opinion under section 432 of the Criminal Procedure Code.

I, therefore, agree with Mr. Justice Parsons in thinking that the Chief Presidency Magistrate must be left to come to his own finding, on the evidence before him, as to the questions of fact, and then decide whether the conditions laid down in section 3 of the Act are satisfied, having regard to the interpretation of the conditions which we have now stated.

(1) 34 L. J. M. C., 50.

ORIGINAL CIVIL.

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

THE BOMBAY BURMAH TRADING CORPORATION, LIMITED, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* F. YORKE SMITH, (ORIGINAL PLAINTIFF), RESPONDENT.*

1892. *September* 30.

Company—Shareholder—Executor, or administrator of a shareholder, rights of—"Holding a share," meaning of—Agreement—Construction—Declaratory decree—Specific Relief Act (I of 1877), Sec. 42—Objection taken for first time in appeal—Practice—Procedure.

Prior to the year 1863 W. Wallace carried on an extensive timber trade in Burmah. In that year the defendant company was formed for the purpose of

* Suit No. 249 of 1890.