been reaped thereby." Applying these principles to the present case, in which the estate of the wrong-doer did not benefit, but actually suffered, in consequence of his wrong-doing, we hold that the suit abated on the death of Ramdas, and that no right to sue the representative of Ramdas survived. We, therefore, reverse the decrees of the Courts below, and order that the suit do abate. Under the circumstances we direct that each party bear his own costs throughout.

Decree reversed.

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13 B. 681.

[681] APPELLATE CRIMINAL.

Before Mr. Justice Scott and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* NAROTTAMDAS MOTIRAM AND ANOTHER.*
[4th April, 1889.]

Bombay Act IV of 1887, *ss.* 3 *and* 4 – *Gaming—Common gaming-house—Rain betting—What constitutes gaming.*

The accused kept a shed where large numbers of people assembled for the purpose of betting on the quantity of rain which might fall in a given time. The instruments used for measuring the quantity of rainfall were two—a rain-gauge, and a gutter attached to the roof of the shed. The accused, who registered the quantity of rainfall, were entitled to a commission on each bet. They were charged, under s. 4. cls. (*b*) and (*c*), of Bombay Act IV of 1887, with keeping the shed for the purpose of a "common gaming-house."

Held, that Bombay Act IV of 1887 did not apply to betting. The shed in question was undoubtedly a common betting place, and the instruments used were instruments of betting, but there is no law in India which makes betting illegal. There is a distinction between betting and gaming. There must be a game before there is gaming; and to constitute a game, there must be a contest, and an active participation of certain persons is also necessary. In the present case there was no contest, no players, and no active part taken by the betters, who merely watched the falling of rain. Rain-betting is, therefore, not a *game* and the place where it was carried on not a "common gaming-house."

[R., 16 B. 283 (289, 291); 28 B 129 (144); 39 C. 968=16 C. L. J. 250=16 C. W. N. 858=13 Cr. L.J. 603=16 Ind. Cas. 171; **Doubted**, 31 C. 542 (548)=8 C.W.N. 458; **D.**, 31 C. 542 (547)=8 C.W.N. 458; 4 Bom. L.R. 297 (298).]

THIS was an appeal, by the Government of Bombay, against an order of acquittal passed by A. W. Crawley-Boevey, Acting Chief Presidency Magistrate, in the case, of *Queen-Empress* v. *Narottamdas Motiram and Hemraj Khimji.*

The accused were charged, under cls. (*b*) and (*c*) of s. 4 of Bombay Act IV of 1887, with keeping a certain shed for the purpose of a "common gaming-house"(1).

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* Criminal Appeal, No. 15 of 1889.

(1) Section 4 of Bombay Act IV of 1887 provides as follows:—

"Whoever:

"(*a*) being the owner or occupier or having the use of any house, room, or place, opens, keeps or uses the same for the purpose of a common-gaming-house,

"(*b*) being the owner or occupier of any such house, room, or place, knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid,

"(*c*) has the care or management of, or in any manner assists in conducting, the business of any such house, room, or place, opened occupied, kept or used for the purpose aforesaid."

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[682] The facts of the case, as found by the Magistrate, were as follows :—

"It is admitted that Narottamdas, No. 1, has rented a large shed near Mumbadevi for the purpose of what is called rain-gambling, and has paid to the owner a sum of Rs. 6,600 in advance on account of one year's rent.

"The shed is divided into thirty-one stalls, which are sublet to different persons at rents ranging from Rs. 161 to 130 *per mensem*. The stalls are used for registering bets, or wagers, for or against, a fall of rain within a particular period of time. The stall-keepers register the bets, and very often bet themselves.

"Two principal appliances are used for the purposes of the betting which is carried on in the shed. One of these appliances is what is called in the information a rain-gauge. It is admittedly used for betting purposes only, and is in no sense a scientific instrument. The other appliance is a mere wooden gutter, or trough, inclined at a certain angle and attached to the roof of the house. Bets are laid whether, within a certain time, water will flow from the so-called rain-gauge, which is popularly called the 'Calcutta Mori,' or whether the flow of rain water will or will not strike a certain wooden cone in falling from the gutter, which is known as the 'Lakri Mori,' to distinguish it from the other contrivance. The odds depend on the state of the weather, and there is a current bazar rate which is publicly offered. The betting house is frequented by large numbers of persons. The police inspector states that he has often seen as many as 500 to 700 persons there at a time, all occupied or interested in the betting.

"Large sums of money change hands, and the stall-keepers make a profit by exacting a commission. The betting is chiefly for cash, but accounts are opened with known customers.

"The premises are open to all and sundry, and it is not disputed that the place is a public betting-house."

On these facts the Magistrate held that the place where rain-betting was carried on was not "a common gaming-house" within the meaning of s. 3 of Bombay Act IV of 1887. He, therefore, passed an order discharging both the accused.

[683] Against this order the Government of Bombay appealed to the High Court.

Latham (Advocate-General), for the Crown.—The case turns on the construction of s. 3 of Bombay Act IV of 1887. Is the place where the rain betting was carried on a "common gaming-house"? I submit that the words of s. 3 are wide enough to include such a place. There is no doubt that the Legislature intended to prevent and punish such forms of gambling. They come within the mischief intended to be prevented. He referred to *Tollett* v. *Thomas* (1); *Thorpe* v. *Coleman* (2); *Jenks* v. *Turpin* (3); *Allport* v. *Nutt* (4).

Lang, for the accused.—There is a distinction between *betting* as such and *gaming* as such. The distinction is clearly pointed out in the various Acts in force in England. It is not proper to apply to India provisions of the English law which were intended to refer simply to gaming. The cases cited do not, therefore, apply. There is no law in India which makes

(1) L.R. 6 Q. B. 514
(2) 1 C. B. 990.
(3) L.R. 13 Q. B. D. 524.
(4) 1 C.B. 974.

betting unlawful. And it would be an unwarrantable straining of the language of s. 3 of Bombay Act IV of 1887 to hold that betting is included in gaming. There must be a game before you have gaming. According to Webster's definition of gaming, there must be a contest between two or more persons actively engaged in gaming. There was no such contest in the present case. Here a number of persons assembled in a room for the purpose of laying bets, and deciding their bets by means of the rain-gauge. Their game did not depend in the slightest degree on the action of the machine. There was, therefore, no gaming at all. There was merely a betting upon a certain contingency. The Indian Legislature has not thought it necessary to deal with betting. However improper the practice may be, this Court has no jurisdiction to interfere with it.

JUDGMENT.

SCOTT, J.—This is an appeal by the Government of Bombay against an order of acquittal, on the 4th October last, by the late Chief Presidency Magistrate, who delivered an able and elaborate judgment. The facts are admitted. The accused were charged, [684] under the Bombay Prevention of Gambling Act IV of 1887, with keeping a certain shed for the purpose of a "common gaming-house" within the meaning of the Act. The statutory definition of a common gaming-house is "a house, room, or place in which cards, dice, tables, or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using, or keeping such place." The instruments here kept or used are two—one, a rain-gauge; the other, a gutter. They are constructed and used exclusively as a means of ascertaining the rainfall in the monsoon. On that rainfall, thus ascertained, great numbers of people are in the habit of making bets, which are registered by the accused, who, after deducting a commission on each bet, pay over the money to the winner. The place is, beyond doubt, a common betting place, and the instruments are instruments of betting. But betting is not illegal in India, and to come within the present law the place must be a common gaming place. In what, then, does gaming consist, as distinguished from betting? Gaming or gambling, (which is only a frequentative of gaming), is defined by Wharton in his Law Lexicon as "the art or practice of playing and following up any game, particularly those of chance." A game is defined by Johnson as "sport of any kind—a single match at play—a solemn contest;" and by the Imperial Dictionary "to game" is defined—"to use cards, dice, billiards, or other instruments, according to certain rules, with a view to win money or other thing waged upon the issue of the contest." Thus both lexicographers make a contest an essential element, and an active participation of certain persons is also necessary. In the present case neither element is to the found. The operation of nature, the falling of rain, is brought within easy observation by the gauge or the gutter, in order to wager on its uncertainty. But there is no contest, no players, and no participation by the betters, save as on-lookers. The keeper of the place only registers the rainfall, the betters only watch. Nobody takes an active part in the operation, and no active part could be taken in it. The case of *Tollett* v. *Thomas*(1) was cited as a precedent in favour of the Government. That turned on the Stat. 31 and 32 Vic., cap. 52, which enacts that every person [685] playing or betting in a public place, at any game or pretended game of chance, at or with any table or instrument of gaming, or other article

(1) L.R. 6 Q.B. 514 (518).

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used as an instrument or means of such wagering on gaming, may be punished. The terms here are much wider than those used in the Bombay Act, and wagering on games of chance as well as gaming are expressly dealt with. A machine used at a race-course by which persons induced to use it won or lost their money according as the ticket they drew had on it the number appropriated to the winning horse or not, was held to be an instrument of wagering or gaming at a game of chance, within the meaning of the Act. It was so held, because, in the first place, "it was an instrument of wagering" and in the second place, because the betting was on the event of a horse-race, which is a game—see *Thorpe* v. *Coleman*(1)—to which an additional element of chance was introduced by the instrument, so as either to convert the horse-race into a game of chance, or to make out of the operation of the machine and the racing combined a separate game of chance. This case does not appear to me to be on all fours with the present one. In rain-betting there is no game at all; there is only an instrument of betting; and the case in the Queen's Bench turned on there being a game as well as an instrument of betting. It was argued that the fact of the instrument having been specially designed for the purpose of the betting introduced an element of gaming. To admit the argument would be to widen unjustifiably the meaning of the word "gaming" as already defined. There must be a game, and there was none. Roulette was cited as a parallel, but the keeper of the roulette table and the player both take part, and, moreover, roulette has been judicially described as a game, and is included in the list of unlawful game in Gaming Acts: see *Jenks* v. *Turpin* (2). The case of a sweepstake was also cited—*Allport* v. *Nutt*(3), but that decision turned on the fact that it was within the prohibition of the Lottery Acts. In *Jenks* v. *Turpin* (2) the question, what is a "common gaming-house?" is much discussed, and is defined to be, under the old Statute of Henry VIII (33 Hen. 8, c. 9) and 8 and 9 Vic., cap. 109, "any house or place kept or used for [686] playing therein at any unlawful game." Hawkins, J., gave a list of what are unlawful games, which is cited by the Magistrate. In the Indian definition the term "unlawful game" does not occur. But some "instrument of gaming" must be used to bring the case within the Indian law; and, in order to constitute gaming, there must be a game. So that, in both countries, there must be a game to make a common gaming house; and, for reasons already given, I do not think these instruments of rain-betting, and the way they are used, constitute a game. I think, on another ground, the Magistrate's orders should be maintained. [The Act is of a penal character, and must be construed strictly.] No cases can be held to fall within it that do not fall within the reasonable meaning of its terms, even though they may fall within the mischief intended to be prevented. It would be an undue straining of the word "gaming" to hold that it covers these rain-betting operations. The appeal must be dismissed.

JARDINE, J.—I also am of opinion that the acquittal was right. The facts are not in dispute. It is admitted that people frequent the house of the accused to bet on the quantity of rain which may fall in a given time, and that there is an appliance used to measure the quantity, of the nature of a rain-gauge. This appliance is the accepted measure of the quantity; it registers quantity, just as the watch in the hand of the judge at a horse-race registers time, or as a thermometer is used to register heat,

(1) 1 C. B. 990.
(2) L. R. 13 Q.B.D. 505, (524).
(3) 1 C. B. 974.

or a barometer the pressure of the atmosphere. Its use resembles, further, the use of these instruments, in that it does not introduce any element of chance into the betting. Thus, in my opinion, it differs very much from the "Pari Mutuel" machine, which in *Tollett* v. *Thomas* (1) was held to be an instrument of wagering, and to constitute the transaction, among the parties betting, a game of chance within the meaning of the Act 31 and 32. Vic., cap. 52, s. 3. The Advocate-General has argued that the appliance for measuring the rainfall constitutes the betting a game, and that the gauge is itself an instrument of gaming within the meaning of Bombay Act IV of 1887, s. 3,—an enactment which strikes at gaming, but not, in the preamble or [687] elsewhere, at wagering or betting. He relies on *Tollett* v. *Thomas* (1). He concedes that, if two people meet together where there is a thermometer, used for ordinary convenience or scientific purpose, and bet about the number of degrees of heat which it will register in a given time, the thermometer is not an instrument of gaming, the bet is not a game, and the persons betting are not guilty under the enactment. But, as I understand the argument, the contention is that, if the thermometer is contrived and used only to facilitate the betting, then the bet, the chance, and the instrument constitute a game. I do not think this criterion can be accepted in construing a Statute which, as it interferes, must be construed strictly—*Bows* v. *Fenwick* (2)—more especially as it shifts the *onus* of proof in certain circumstances from the prosecution to the accused. There would also be found great difficulty in practice, in drawing the distinction; as evidence would have to be taken about the reason for having the particular gauge, watch, thermometer, or barometer made, and the various uses to which it might be applied. Moreover, the uncertainty would promote evasion. So in circumstances like those of *Hampden* v. *Walsh* (3), where there was a wager whether the world is round, and the wager was settled by certain tests agreed upon before and applied by the referees and umpire on a spot chosen, the question whether the bet was a game, whether the enactment had been broken, might depend, on the question whether the scientific instruments used to ascertain curvature had been intended, or made for the purpose, or were ordinary instruments of survey. I do not think the case of *Tollett* v. *Thomas* (1) goes as far as is contended. The English Statute strikes at wagering and betting: so the "Pari Mutuel" machine was obviously within the mischief contemplated. It was held to be an instrument of betting. There is no law in India which makes wagering and betting unlawful. This Act against gaming does not mention those practices. Again, there are two other differences between the case of *Tollett* v. *Thomas* (1) and the case tried by the Chief Presidency Magistrate. In the former it [688] was argued and shown that the amount of winnings did not depend solely on the result of the horse-race. Lord Cockburn, C. J., says (p. 521)—"Whether a horse-race be in itself a game of chance or not, we can entertain no doubt that, if some additional element of chance be introduced, the wagering on a horse-race may be converted into a game of chance." The "Pari Mutuel" arrangements introduced a variety of chances "independent of the issue of the race, as well as of the will and judgment of the winner, depending, as it does, on the will or caprice of the other persons betting." . . . "There being, then, this element of chance in the transaction among the parties betting, we think it may properly be termed, as amongst them, a game of chance."

(1) L. R. 6 Q. B. 514. (2) L. R. 9 C. P. 339. (3) L.R. 1 Q.B. Div. 189.

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In the case before us this element did not exist: the rain gauge only registered an operation of nature, and did in nowise, like the "Pari Mutuel" machine, increase the number of chances among the betters themselves. Thus the reason on which *Tollett* v. *Thomas* (1) was decided does not apply to the present case of a rain-gauge, which did not of itself create a new and peculiar form of diversion among the betters which in England might be treated as a game under the Statute. The other distinction is that there is no horse-race or other sport or contest in this case as there was in *Tollett* v. *Thomas* (1). It must be repeated also that the learned Judges held that case to come within the mischief at which the English Statute struck, namely, wagering and betting. But in India, as pointed out by the Chief Presidency Magistrate, the Legislature has refrained carefully from interfering with wagers or bets; and while enacting laws similar to those of England relating to common gaming houses, has abstained from any enactment of the laws about betting houses. There is no law here, like the Stat. 16 and 17 Vic.,cap, 119, which was passed for the suppression of betting houses, and makes them to be deemed gaming houses. The subject has been before the Legislature several times, and the omission to interfere finally with betting has doubtless been intentional. In 1848 it was decided by the Judicial Committee of her Majesty's Privy Council that the Stat. 8 and 9 Vic., cap, 109, (to amend the law concerning games and wagers), did not extend to India (*Ramloll* **[689]** *Thackoorseydass* v. *Soojumnull Dhondmull* (2), and that, in the absence of Statute, an action might be maintained on a wager. In the same year Act XXI of 1848 was passed, as suggested by the Judicial Committee, declaring null and void all agreements by way of gaming and wagering. In Act VIII of 1867 an exception is made in favcur of certain horse-racing transactions: and the rule and the exception are substantially reproduded in s. 30 of the Indian Contract Act IX of 1872. The Indian laws go no further than make wagering contracts void; they are not unlawful. The distinction is discussed fully in an unreported case, *Parakh Govardhanbhai Haribhai* v. *Ransordas Dulabhdas* (3). by Westropp, C. J. That judgment incorporates another by Sir M. Sausse, in which also that learned Chief Justice discusses the English and Indian Statute law, and affirms the unanimous judgment of the Supreme Court in *Ramlal* v. *Dulabdas* (4), that wagers were not illegal by Hindu law. "The state of Hindu law," says Sir M. Sause, "on this subject appears to have been very analogous to that of the British law before the Stat. 8 and 9 Vic. Cap. 106, until which period wagers, generally, were lawful contracts, although particular descriptions of them, such as gaming with dice, cards, &c., were rendered illegal by Statute." It is also not to be forgotten that the Indian Legislature, in amending the Indian Penal Code, re-enacted in s. 294A, which treated lotteries as transactions which may be authorized by Government itself. The Indian Legislature have never expressed itself against wagering and betting in the severe terms used in the preamble to the English Statutes. If this Court were to hold that a bet is converted into a game, and a betting-house into a gaming-house and the betters there into offenders against the criminal law, because a rain-gauge or hour glass, or other measure is contrived and used to settle the bet, I think the Court would assume to itself the work of legislation which Parliament has confided to another authority. Except by a metaphorical

(1) L.R. 6 Q. B. 514.
(2) 4 M I. A., 339.
(3) Printed Judgments for 1875, p. 77, 81, 82.
(4) Perry's Oriental Cases, 198.

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use of the word, contrary to the ordinary as well as the statutory use, a bet cannot, for the purposes of criminal law, be treated as a game. [690] The common and legal use of the latter word coincide substantially; it required express enactment to make betting houses be deemed gaming-houses. What the law treats as a game can be gathered from the Statutes reviewed in *Jenks* v. *Turpin* (1), *e. g.*, 16 Car. 2, c. 7, s. 2, where cards, dice, tables, tennis, bowls, skittles, shovel-board, cock-fighting, horse-races, dog-matches, foot-races are mentioned before the more general words "other past-times, game or games whatsoever." According to Bacon's Abridgement, gaming—a foot-race and a horse-race are games within the Statute; so it seems is cricket. In the present case, where money is staked on an operation of nature, and the instrument is a mere measure of the operation, I am of opnion that the amusement provided by the keeper of the house, who makes an income by allowing the betters to come there and use the rain-gauge as a means of deciding the event of the bet, is not a game, and that the house is not a comman gaming-house within the meaning of Bombay Act IV of 1887. I am also of opinion that the Act is not directed against betting and wagering practices, except as connected with games.

Order of acquittal upheld.

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13 B. 690.

APPELLATE CIVIL.

Before Mr. Justice Nanabhai Haridas and Mr. Justice Parsons.

GANGABAI (*Original Plaintiff*), *Appellant v.* ANANT AND OTHERS (*Original Defendants*), *Respondents.** [7th September, 1888.]

Hindu law—Adoption—Adoption of a daughter—Validity of such adoption.

The adoption of a daughter by a Brahmin is invalid under the Hindu law.

THIS was a second appeal from the decision of A. Steward, Acting Assistant Judge of Poona, in appeal No. 56 of 1885 of the District File.

[691] The plaintiff sued, as the adopted daughter and heiress of one Rowji Shastri of Poona, to recover possession of his property. The defendants were the sons of Rowji's step-brother. They disputed the plaintiff's title, on the ground that her adoption was invalid under Hindu law and usage.

The Subordinate Judge held, on the authority of the Dattaka Mimansa and Sanskara Kaustubha, that, according to the Hindu law, a daughter could be adopted. He also found that the custom of adopting daughters was prevalent in the district where the parties resided. He, therefore, passed a decree in plaintiff's favour.

On appeal the Assistant Judge reversed this decree. He held that the adoption of a daughter was invalid under the Hindu law, and that there was no local usage sanctioning such an adoption.

Against this decision the plaintiff preferred a second appeal to the High Court.

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* Second Appeal No. 654 of 1886.

(1) L.R. 13 Q.B.D. 505.