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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.** [30th September, 1892.]

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), s. 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 [198] taking over the business from him together with the capital and assets engaged therein. The nominal capital of the company was Rs. 25,00,000 divided into one thousand shares of Rs. 2,500 each. On the 22nd July, 1864, an agreement carrying out the above object was executed between W. Wallace and the defendant company. This agreement set forth the assets and property to be transferred, and classified them as (*a*) "fixed assets," which consisted of immoveable property, buildings, &c., valued at Rs. 2,76,000, or thereabouts; and (*b*) assets other than fixed assets, which consisted of what were called "forest operations," and of valuable contracts, rights and concessions from the King of Burmah, &c. The agreement further specified the consideration to be paid to W. Wallace for each of these classes of assets. For the "fixed assets" he was (under the 12th clause of the agreement) to receive one hundred fully paid up shares of the company. That clause contained certain provisions as to the payment of the ordinary dividend upon those shares, and concluded with a provision that the directors of the company should not be bound to consent to or to recognize as valid any assignment made by W. Wallace, his executors or administrators of the shares, or any of them, within five years from the date of the registration of the company.

For the remaining assets it was provided by the 13th clause of the agreement that W. Wallace, his executors, or administrators, should be entitled, *so long as he or they should hold the hundred shares, to an extra or preferential dividend* payable out of such surplus net profits as might remain in any year after paying a dividend of twelve per cent, on all the shares of the company including the said hundred shares and after setting apart an amount (left to the discretion of the directors) for the reserve fund. The said extra or preferential dividend was to be one-third of such surplus net profits. The said 13th clause also provided that if W. Wallace died within the above stated period of five years, his executors or administrators should not be entitled to the said extra or preferential dividend after the expiration of the said period, notwithstanding that they might continue to hold the said shares.

Subsequently to the execution of this agreement the business and assets were transferred to the company by W. Wallace, and one hundred fully paid up shares were duly allotted to him under cl. 12, and his name was entered on the register of shareholders. In 1888, W. Wallace, then domiciled in England, died. By his will he appointed his three brothers—R. Wallace, L.A. Wallace, and A. F. Wallace—his executors, and he directed that his executors should hold the said shares and all his interest therein and attached to the holding thereof upon trust for such of his said brothers as might survive him, if more than one, as joint tenants. R. Wallace died in the testator's lifetime, and only A.F. Wallace proved the will. On the 27th September, 1888, letters of administration with the will annexed were granted by the High Court of Bombay to the plaintiff in this suit (F. Yorke Smith) as attorney for the said executor A.F. Wallace. On the 29th September, 1889, the said letters of administration were produced to and registered with the defendant company. The hundred shares continued to stand in the testator's name in the register of shareholders. In a parallel column in the register, under the heading "Remarks" the following entry was made:—"Administration in India to the estate of W. Wallace has been granted to [199] Mr. Frederick Yorke Smith as attorney for W. A. F. Wallace." Save for this entry the register remained unaltered after the testator's death.

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The plaintiff now sued to have it declared that cl. 13 of the agreement was still in operation, and that as such administrator as aforesaid he was entitled to the extra or preferential dividend payable on the said hundred shares if and when there should be sufficient net profits to allow payments thereof under the said clause. The company disputed the plaintiff's claim. They contended that A. F. Wallace, the proving executor of the testator's will, had ceased to hold the shares as executor, and was holding them as trustee under the specific bequest in the will, and that he was only entitled to the preferential dividends, if at the time when such dividends were declared he was holding the shares in the capacity of executor and as an undistributed part of the testator's estate. They insisted that the plaintiff should prove that he so held the shares before he could be entitled to the declaration sought for. The executor was examined in England on commission. He deposed that the estate had been got in, and the debts paid; that the estate had not been divided, because it would not be in accordance with the private wishes of the testator, which they (*i.e.*, he and his brother L.A. Wallace) were aware of; that, apart from these private wishes, there was no reason why the estate should not be divided between his brother and himself.

Held, by Farran, J., and by the Court of appeal, that the plaintiff was entitled to the declaration sought for. The executor or his attorney (the plaintiff) was still the registered holder of the shares, and under cl. 13 of the agreement it was intended that W. Wallace, his executors or administrators should be entitled to the extra dividend so long as he or they should be the registered holder or holders of the shares, without reference to the beneficial interest therein. There was nothing to be found in the agreement, express or implied, showing the intention of the parties to regard anything but the legal holding, and to go beyond that holding would virtually be to add a new term to the agreement.

In appeal, the defendants contended that the Court would not make a declaratory decree with regard to a right which (as in the present case) was future and contingent, there being no fund actually in existence when the suit was brought, from which a preferential dividend could be claimed, and no certainty that there ever would be such a fund.

Held, by the Court of appeal, that the present case was one in which in the interests of both parties the Court, in the exercise of a sound discretion, should make a declaration as to the right in question. The right was existent, and although the exercise of it was undoubtedly contingent on there being a balance of profits as contemplated by cl. 13 of the agreement, the very nature of the agreement assumed that there might and probably would be such a balance, and a large sum had been already applied towards the dividend in question. Further, it was intended that the directors should exercise their discretion as to the amount to be carried to the reserve fund upon which the balance of profit available for the preferential dividend depended. It was, therefore, from the very nature of the case, important that the directors should know for certain whether the right to a preferential dividend was still in existence as contended by the plaintiff, [200] or had come to an end. The circumstance, moreover, that the objection had been taken for the first time on appeal would by itself be fatal to it.

[Affirmed., 19 B. 1 (P.C.)=21 I.A. 139=6 Sar. P.C.J. 498.]

THE plaintiff (respondent) was the administrator with copy of the will annexed, in India, of the estate of one William Wallace, who died on 28th January 1888.

For some years previous to the year 1863 the said William Wallace had carried on an extensive timber trade, in its various branches, at Rangoon and other places in Burmah: the firm of Wallace and Co. of Bombay, acting as his agents in Bombay in that business.

In the year 1863 the defendant company was formed and registered under Act XIX of 1857 for the purpose of taking over the said trade and business and the capital and assets of the said William Wallace engaged therein.

By the clauses and articles of association of the company, Wallace and Co. of Bombay, were to be the secretaries and treasurers. The nominal capital of the company was Rs. 25,00,000, divided into one thousand shares of Rs. 2,500 each.

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On the 22nd July 1864, an agreement carrying out the above object was executed between the defendant company and the said William Wallace. The agreement stated the formation of the company and its objects, and set forth the various property and assets of which the said William Wallace was possessed, or to which he was entitled in connection with his trade in Burmah. Part of the assets were referred to in the agreement as "fixed assests," and consisted of immoveable property, buildings, &c., which were valued at Rs. 2,76,000, or thereabouts. The remainder consisted of what were termed "forest operations" in Burmah and of certain valuable contracts and certain valuable rights or permits from the Government of India and from the King of Burmah, &c.

The agreement specified the consideration to be paid to W. Wallace for both the above classes of assets which were to be taken over from him by the company. For the "fixed assets" he was to receive (as provided by the 12th clause of the agreement) **[201]** one hundred fully paid up shares in the company. The said clause contained certain provisions with respect to the *ordinary* dividend to which he was to be entitled in respect of these shares, and concluded with a provision that the directors of the company should not be bound to consent to or to recognize as valid, any assignment made by William Wallace, his executors or administrators of the shares, or any of them, within five years from the date of the registration of the company. The said twelfth clause was as follows :—

"12. In consideration of the transfer, by the said William Wallace to the company, of the said *fixed assets*, the said William Wallace, his executors or administrators shall be entitled to have allotted to him or them one hundred shares in the said company, of rupees two thousand and five hundred each, the whole amount of which shall be deemed to have been paid up; but the said William Wallace, his executors, administrators or assigns shall not be entitled, in respect of such one hundred shares or any of them, to participation of any dividend which may be declared in respect of profits up to the thirty-first day of May one thousand eight hundred and sixty-four, nor shall he or they at any time be entitled to any dividend in respect of the same one hundred shares respectively, save in respect of so much of them respectively as in respect of any other one hundred shares of the same amount in the said company respectively shall for the time being have been actually called up and become due to the said company respectively, but from and after the thirty-first day of May, 1864, the company shall pay to the said William Wallace, his executors, administrators or assigns interest at the rate of seven and a half per cent. per annum on the difference for the time being between the amount of the one hundred shares so allotted and the amount actually for the time being called up and become due in respect of any other one hundred shares of like amount in the said company, provided that, in the event of the said company increasing their capital before calling up the full amount of the original shares, then and in such case the interest to be paid to the said William Wallace on the uncalled amount of such shares shall, if the rate of dividend paid in any year on any class of shares shall exceed seven and a half per cent., be equal to the rate of such dividend in addition to the said one hundred shares so to be allotted to the said William Wallace, the said company shall be liable to pay to him, his executors or administrators the amount of the sums expended by him or on his account since the beginning of the month

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of February, 1864, in, upon the erection of Engineers' and other dwelling-houses and offices or otherwise in or upon the improvement of the said fixed assets or any part thereof, and the amount so become payable as last aforesaid shall be deemed to have accrued due on the thirty-first day of May, 1864, provided always that the said company or directors shall not be bound to give their consent to, or in any way to recognize as valid any assignment which the said William Wallace, his executors or administrators may have made or purported to make of the said one hundred shares, or any of them, during a period of five years from the date of registration of the company."

[202] The thirteenth clause of the agreement stated the consideration payable in respect of the assets other than the "fixed assets," and certain specified timber and live-stock. For these assets it provided that William Wallace, his executors or administrators, should be entitled, as long as he or they should hold the hundred shares, to an extra or preferential dividend payable out of such surplus net profits as might remain in any year after paying a dividend of twelve per cent. on all shares of the company including the said hundred shares and after setting apart an amount (which was left to the discretion of the directors) for the reserve fund. (The said extra or preferential dividend was to be one-third of such surplus net profits, and, in addition, William Wallace, his executors, administrators and assigns were to share *pari passu* with the other share-holders in the remaining two-thirds of such surplus net profits, &c. The clause concluded by providing that, if William Wallace died within the above stated period of five years, his executors or administrators should not be entitled to the said extra or preferential dividend after the expiration of the said period, notwithstanding they might continue to hold the said shares. The said thirteenth clause was as follows:—

"13. In consideration of the transfer by the said William Wallace to the company of the premises hereby agreed to be transferred (other than the said fixed assets and other than the premises mentioned in the clauses six, seven, and nine), the said William Wallace, *his executors or administrators shall be entitled, so long as he or they shall hold the said one hundred shares, to an extra or preferential dividend* equal to one-third of such surplus net profits of the company as may remain in any year after paying a dividend at the rate of twelve per cent. per annum on the paid up amount of all shares in the company (including the said one hundred shares) and after setting apart from time to time out of such surplus profits as a reserve fund or to the credit of any reserve fund already created such sum as the directors of the company for the time being may in their discretion think fit, provided always that nothing herein contained shall operate to take away the right of the said William Wallace, his executors, administrators and assigns to share *pari passu* with other share-holders of the company in the remaining two-thirds of the said surplus net profits, and provided also that nothing herein contained shall operate to prevent the directors for the time being of the company from exercising any such discretion as but for these presents they might have exercised in respect of setting apart profits as a reserve fund, or in respect of applying any reserve fund or any part of any reserve fund or any part of any reserve fund formed in any preceding year or years to the payment of any dividend or dividends for any succeeding year or years, but nevertheless any sum taken from the reserve fund for dividend shall be deemed to be [203] and form part of the income or profits of the company for all years in which it is taken, provided further and it is hereby agreed between the

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said parties that, in the event of death of the said William Wallace before the expiration of the said period of five years, his executors or administrators, notwithstanding they may continue to hold the said one hundred shares, shall not be entitled to the said extra or preferential dividend thereon after the expiration of the said period of five years."

In due course, after the execution of the said agreement, William Wallace transferred to the company the said "fixed assets" and other properties and rights agreed by him to be so transferred, and he performed all that was required to be done by him under the agreement, and one hundred fully paid up shares in the company, of Rs. 2,500 each, were allotted to him pursuant to cl. 12 above set fourth, and his name was duly entered in the register of shareholders of the corporation as the owner thereof.

Subsequently, *viz.*, in May, 1866, the company, by a special resolution, adopted as one of the articles of association a clause whereby the various arrangements and agreements contained in the above agreement were approved and sanctioned by the company, and it was provided that the directors should at all times have full power to do all such acts and things and to enter into such engagements on the part of the company as might be necessary for the better and more effectually carrying out of the said arrangements and agreements.

On the 28th January, 1888, William Wallace, then domiciled in England, died, having made his will, dated 25th May, 1880. By this will he appointed his three brothers—Richard Wallace, Lewis A, Wallace and Alexander F. Wallace—his executors, and directed that his executors or administrators should hold the shares and all his interest therein and attached to the holding thereof in trust for such of themselves as should survive him, if more than one, as joint tenants.

The following was his will :—

"Whereas I am entitled to one hundred fully paid up shares in the Bombay Burma Trading Corporation, Limited, which shares are standing in my name and so long as I or my executors or administrators shall hold the said shares, we are entitled to an extra or preferential dividend equal to one-third of the surplus net profits of the company as in the articles of association of the company and in the agreement therein referred to is more fully set forth, Now I hereby direct **[204]** that my executors or administrators shall hold those shares and all my interest therein and attached to the holding thereof upon trust for and so that the same shall be at the absolute disposal of such of my brothers Lewis Alexander Wallace, Richard Wallace, and Alexander Falconer Wallace as shall survive me, if more than one, as joint tenants, and as to all the residue of my real and personal estate whatever and wheresoever to which I or any person or persons in trust for me may be entitled at the time of my decease I do hereby give devise, and bequeath the same unto such one or more of my brothers Richard Wallace, Lewis Alexander Wallace, and Alexander Falconer Wallace as shall be living at the time of my decease, and if more than one in equal shares as tenants in common and not as joint tenants for his and their own absolute use and benefit, and as to all estates, if any, vested in me upon trust or by way of mortgage I give the same to the said Lewis Alexander Wallace, Richard Wallace and Alexander Falconer Wallace, executors of this my will, and I revoke all former or other testamentary writings by me at any time made."

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One of the brothers (Richard) died in the lifetime of the testator, and only one (*viz.*, Alexander F. Wallace) of the two surviving brothers proved the will. He proved the will in England on the 5th June 1888.

Letters of administration with the will annexed were granted by the High Court of Bombay to the plaintiff F. Yorke Smith, as attorney of the said Alexander F. Wallace, the executor, on the 27th September 1888.

The letters of administration were on the 29th September 1888 produced to and registered with the company, and the hundred shares in the company which had been originally allotted, as above mentioned, to William Wallace, continued to stand in his name in the register of shareholders. In a parallel column in the register, under the heading "Remarks," the following entry was made :—"Administration in India to the estate of William Wallace has been granted to Mr. Frederick Yorke Smith as attorney for Mr. A. F. Wallace." Save for this entry the register remained unaltered after Mr. Wallace's death.

The following clauses in the articles of association of the defendant company provided for the devolution of shares on the death of a shareholder:—

"XXIX.—The executors or administrators of a deceased shareholder shall be the only persons recognized by the company as having any title to his share. But no person shall be recognized as executor, administrator, or representative [205] of a deceased shareholder, but upon production of probate or letters of administration granted to such executor, administrator or representative by the High Court of Judicature at Bombay.

"XXX.—Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the directors.

"XXXI.—Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any shareholder may, with the consent of the directors, instead of being registered himself, elect to have some person to be named by him and approved by the directors registered as a transferee of such share."

The plaint in this suit was filed on the 26th April, 1890. The plaintiff claimed to be entitled, as administrator of William Wallace, to the extra or preferential dividend in respect of the hundred shares provided by cl. 13 of the agreement.

The plaint, after stating the facts above set forth, continued :—

"17. The plaintiff submits that under the circumstances hereinbefore appearing he is as such administrator aforesaid entitled to the extra or preferential dividend payable in respect of the said hundred shares under cl. 13 of the said agreement if and when there shall be sufficient net profits to allow the payment thereof under that clause. The company, however, does not admit that he is so entitled, and suggests that that clause has now ceased to have any operation."

The prayer of the plaint was—

"that it may be declared that the said cl. 13 is still in operation, and that the extra or preferential dividend payable on the said 100 shares provided for by cl. 13 is still payable and is payable to the plaintiff as such administrator as aforesaid, if and when there shall be sufficient net profits to allow the payment thereof under that clause."

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The defendant company disputed the claim of the plaintiff. They filed a written statement as follows:—

"The defendants believe that, in the events which have happened, Alexander Falconer Wallace in the plaint named as proving executor of the will of William Wallace, deceased, now holds the shares in the plaint referred to in the character of trustee of the same as specifically bequeathed by the said will, and not in the character of executor.

[206] "2. The defendants submit that the plaintiff is entitled to the preferential dividends in the plaint referred to, upon the assumption only that the said shares shall, when such dividends may be declared, be held by the executor of the said testator in the capacity of executor and as an undistributed part of the testator's estate, and not otherwise.

"3. The defendants claim that the plaintiff must prove that the said shares are so held as in the last paragraph stated before he can be entitled to the declaration sought in this suit."

The executor (A. F. Wallace) was examined on commission in London as a witness for the defendants on the 23rd November 1891. He deposed (*inter alia*) as follows:—

"All the estate in England of the testator has been got in for some time and is now represented by money lodged with my firm as bankers. All the debts of the estate were paid as they came in; the only outstanding one that I am aware of is that for legal expenses connected with the present proceedings. I personally and my brother Lewis Alexander are, under the terms of the will, absolutely entitled, but we are in possession of private instructions or rather private knowledge as to the wishes of the testator. The estate has not been divided, because it would not be according to the private wishes of the testator which we are aware of, and which concern the interest of minors. These private wishes had nothing to do with the dividends on the 100 shares, or with the right to those dividends. Apart from these private wishes there is no reason why the estate should not be divided between myself and my brother. I cannot name a time at present at which the account will be closed, and the estate distributed, in accordance with the testator's wishes. By virtue of these wishes I and my brother consider ourselves trustees for certain persons, with discretion as to the selection of the objection. These persons are now in existence. We have not exercised our discretion in any binding way among them."

At the hearing, counsel for the defendants raised the following issues:—

1. Whether Alexander F. Wallace now holds the shares referred to as trustee for the specific legatee or as executor of the testator?

2. Whether cl. 13 of the agreement referred to in the pleadings is still in operation?

3. What is the proper construction of the said clause?

4. Whether the plaintiff is entitled to the relief claimed, or to any and what part thereof?

Counsel for the plaintiff raised—

5. Whether the defendants are entitled to raise the question raised in the first issue?

[207] *Kirkpatrick* (*Scott* with him), for plaintiff.—The administration is still open, and the executor is entitled to the extra dividend payable under cl. 13 of the agreement. So long as there is an executor, and until the shares are actually transferred, the executor, as representing the estate, can take the dividend. There is no limit of time as to the obligations imposed on the executor by the agreement (see cls. 4 and 10

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of the agreement (1) and see also art. 145 of the Articles of Association (2)), and, if the executor is still liable to the burdens, he is still entitled to the benefit. The concluding words of cl. 13 set forth the only case in which the executor is not to get the dividend. The benefit of the agreement was clearly not limited to the life of Wallace, for it was to go to his executors. The holder meant in the agreement is not necessarily a beneficial holder, for under it executors may hold, and executors do not hold beneficially.

The estate is the real holder of the shares through its representative the executor. See Buckley on Companies, (6th Ed.), notes [208] to s. 76, p. 204, and notes to art. 12, Table A, p. 461. Once a holder of shares is duly registered he continues to be the holder until he executes a transfer of the shares. No transfer of these shares has been executed, and the register is unaltered. As to the position of executors, see *Buchan's case* (3). The defendants contend that under the agreement the executor must hold as executor, but that here he now holds as trustee. But the register does not and cannot show that he holds as trustee (ss. 53 and 126 of the Indian Companies Act, VI of 1882), and it is from the register alone that the holder is ascertained. The company cannot raise any question as to the capacity in which the person on the register holds. They cannot call on the executor to show that he is not a trustee. He may be a trustee, but that does not concern the company. It is bound by its register—Buckley on Companies (6th Ed.), p. 88 ; *Pulbrook* v. *Richmond Consolidated Mining Co.* (4) ; *Ex Parte Bugg* (5) ; *In re Perkins* (6) ; *Turquand* v. *Kirby* (7) ; *Pender* v. *Lushington* (8). The company could still regard the estate as holder of the shares, and enforce claims against it. If so, the estate has a right to the dividend—*Keene's Executors' case* (9) ; *Ex parte Bulmer* (10) ; *Ex parte Gouthwaite* (11). An executor may be also a trustee—Williams on Executors (8th Ed.), p. 1804. As to the assent of executor, see Indian Succession Act (X of 1865), ss. 293, 295 ; Williams on Executors (8th Ed), pp. 1386—1388.

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(1) (Clause 4).—Provided always that the said William Wallace, his heirs, executors and administrators shall and will at all times at the expense of the said company execute, do and take or cause to be executed, done and taken all such conveyances, assignments, acts and proceedings as may be in his or their power, in order that the rights of him the said William Wallace under the said permits and grants and under the said contracts may be secured to and exercised and enjoyed by the said company, their successors and assigns.

(Clause 10).....the said William Wallace, his executors and administrators will do all things in his or their power to induce such persons to remain in the service of the said company and others to secure to the company and their successors the advantages and benefits of such good will.

(2) Article 145 of the Articles of Association.—The Directors shall have power, if they shall see fit so to do, to enter into any new agreement or agreements with or to be binding upon any assignee or assignees, transferee or transferees, of the said one hundred shares of the said William Wallace, or any of them, which may be assigned or transferred by the said Willam Wallace, before or after the expiration of the said five years with the consent of the Directors such as shall impose upon such assignee or assignees, transferee or transferees, the same liabilities and obligations towards the said Company as were undertaken by the said William Wallace, by said Indenture of the 22nd day of July, 1864, in all that relates to the said shares, and every such agreement as last aforesaid shall be binding on the parties, any clause or regulation herein contained to the contrary notwithstanding, as if the provisions thereof were by these regulations specially excepted or affirmed and approved.

(3) 4 Ap. Ca. 595 (596). (4) 9 Ch. D. 610. (5) 2 Dr. and Sm. 452.
(6) 24 Q. B. D. 613. (7) L. R. 4 Eq. 123. (8) 6 Ch. D. 70.
(9) 3 D. M. and G. 272. (10) 33 L.J. (Ch.) 609. (11) 3 Mac. and G. 187.

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Latham, Advocate-General (*Jardine* with him), for defendants.—It is clear that the estate has been administered, and the duty of the executor is ended. He has ceased to hold as executor, and now holds as trustee and acts as such—Lewin on Trusts (9th Ed.), p. 204; Williams on Executors (8th Ed.), p. 1380. The shares ought to be transferred to those who are entitled to them under the will. Not to do so, but to allow the register to remain as it is for the purpose of claiming the dividend as executor, is really a fraud on cl. 13 of the agreement. It could not have been intended that the extra dividend should be payable for ever to Wallace's estate. The agreement evidently intended that five [209] years' enjoyment of the extra dividend should satisfy Wallace's claim. For five years it secured that his interest and service should be given on behalf of the company. In cl. 13 the word "hold," in the sentence "so long as they should hold the hundred shares," means holding as executors, not as trustees. The executor has clearly assented to the legacy of these shares, and it is no longer held as part of the general estate. *Ex parte Bulmer* has been relied on, but the authority of that case is now shaken See *Bainbridge* v. *Smith* (1). A company may be affected by a trust. It cannot disregard equitable titles: see Buckley on Companies, (6th Ed.), p. 86 *et seq.*; *Binney* v. *Ince Hall Coal Co.*(2).

11*th March*, 1892. FARRAN, J.—The plaint in this suit prays that it may be declared that cl. 13 of a certain agreement of 22nd July, 1864, made between William Wallace of the one part and A. F. Wallace and four other directors of the defendants' corporation on its behalf of the other part, is still in operation; and that the preferential dividends on the 100 shares referred to in the clause is still payable; and that it is payable to the plaintiff as administrator with the will annexed of the said William Wallace, now deceased.

The plaint does not ask for consequential relief. No objection has been taken by the defendants on that ground under s. 42 of the Specific Relief Act, and as no fiscal regulation is contravened by the omission, I see no reason why the Court should raise the objection of its own motion.

From the recitals in the agreement, it appears that the defendants' corporation, originally called the Burmah Trading Company, Limited, was established in 1863 with the object of carrying on trade, and especially the timber trade, with Burmah and its neighbouring States, and, for that purpose, of acquiring and working forests in Burmah. Its secretaries, treasurers and managers were to be the firm of Messrs. Wallace and Co., of Bombay. That firm were the agents of William Wallace of Burmah. William Wallace, before the formation of the company, had been, and was at the date of the agreement, carrying on the [210] timber trade in Burmah; and the object of the agreement was that the company should take over the business and assets of William Wallace in Burmah as a going concern on terms equitable towards both parties.

The property of William Wallace in Burmah consisted partly of immoveable property, buildings, mills, works and machinery easily capable of valuation, which in the agreement were termed "fixed assets," and partly of assets upon which it was difficult to place a money valuation, such as concessions and expected concessions from the King of Burmah and the Government of India, running contracts with natives of Burmah for cutting timber, the possession of a trained and organised staff, and generally the good-will of a very peculiar business depending

(1) 41 Ch. D. 462.

(2) 35 L. J. (Ch.) 363.

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largely for its successful working on the loyal co-operation of William Wallace with those who carried it on.

The earlier clauses of the agreement provide for William Wallace making over both classes of property to the company. Clauses 12 and 13 contain the consideration which Mr. Wallace was to receive from the company. Clause 12 provides that, in consideration of the transfer by William Wallace of his "fixed assets," he, his executors, and administrators shall be entitled to have allotted to him or them 100 shares of the company, of Rs. 2,500 each, the whole amount of which shall be deemed to have been paid up. Then follow certain provisions regulating the payment of the ordinary dividend on the 100 shares, and the clause concludes as follows:—"Provided always that the company shall not be bound to give their consent to or in any way recognize as valid any assignment which the said William Wallace, his executors, or administrators may have made or purported to make of the said 100 shares or any of them during a period of five years from the date of the registration of the company." That proviso seems to me to be of importance when considering the interpretation to be put on the succeeding clause. It shows that for some reason the parties to the agreement considered it to be of importance to the company that not only William Wallace in his lifetime, but that his executors or administrators after his death, should not assign his shares; but [211] that his executors or administrators should hold his shares for some time. This must have been irrespective of the beneficial disposition which William Wallace should make of his shares. Then comes cl. 13—"In consideration of the transfer by the said William Wallace to the company of the premises hereby agreed to be transferred" (other than the said fixed assets and other than the premises mentioned in cls. 6, 7, and 9, *viz.*, certain timber and stores in hand) the said William Wallace, his executors or administrators shall be entitled, so long as he or they shall hold the said 100 shares, to an extra or preferential dividend, equal to one third of such surplus net profits of the company as may remain in any year after paying a dividend at the rate of 12 per cent. per annum of the paid-up amount of all shares in the company (including the said 100 shares) and after setting apart from time to time, out of such surplus profits, as a reserve fund, or to the credit of any reserve fund already created, such as the directors of the company for the time being may in their discretion think fit Provided always that nothing herein contained shall operate to take away the right of the said William Wallace, his executors, administrators and assigns to share *pari passu* with other shareholders of the company in the remaining two-thirds of the remaining surplus assets." Then follows another explanatory proviso, and the clause concludes:—"Provided, further, and it is hereby agreed between the said parties, that, in the event of the death of the said William Wallace before the expiration of the said period of five years, his executors or administrators, notwithstanding that they may continue to hold the said 100 shares, shall not be entitled to the said extra or preferential dividend than after the expiration of the said period of five years." Pausing here for a moment, I may remark that the holding of the shares by the executors or administrators of William Wallace after his death is put practically on the same footing whether he dies within the five years' period or beyond it. In the former case, they are forbidden to assign the 100 shares until the five years' period expires, and they receive the preferential dividend. In the latter case, the right of the executors or

administrators to receive the preferential dividend is limited only by their [212] ceasing to hold the 100 shares. They are allowed to assign after the five years' period expires; but, if they did so, they were to lose their right to the preferential dividend.

William Wallace died on the 8th January 1888, and consequently after the period of five years limited by the agreement had expired. He left his will, dated the 25th May 1880, unrevoked, and thereby appointed R. Wallace, L. A. Wallace, and A. F. Wallace his executors. Of these R. Wallace predeceased the testator. A. F. Wallace alone proved the will in England. The plaintiff, F. Yorke Smith, as his attorney, has taken out letters of administration to the estate of William Wallace here, with copy of the will annexed.

The testator, William Wallace, by his will, after referring to the conditions under which the 100 shares in the defendants' corporation were held, and to the preferential dividend attaching thereto, directed his executors or administrators to hold the same, and all his interest therein, upon trust, so that the same should be at the absolute disposal of such of his brothers as should survive him. The residue of the testator's property under the terms of the will is given also to the same beneficiaries. Acting under instructions from the plaintiff as representing the estate in India, the defendants' corporation has left the 100 shares upon the register in the name of William Wallace, appending a note thereto, that administration in India to the estate of William Wallace has been granted to the plaintiff as attorney for Mr. A. F. Wallace.

Whether this be the correct mode of keeping the register or not, I think that, for the purposes of this case, it must be deemed that the executor of William Wallace is now the registered holder of the 100 shares. The parties to the agreement contemplate that there could be a holding of shares by an executor. Clause 12 of the agreement, as well as cl. 13, refers to such a holding and the agreement recites one of the articles of Association of the company, which provided that no shareholder should hold more than 25 shares at one time on his own account, nor should any shareholder hold more than that number at any one time in any one representative capacity—a proviso which, [213] however, was not to apply to William Wallace if he became a shareholder. The general estate of William Wallace has all been got in, and is now represented by a sum of money standing to the credit of his executors in England in the books of Wallace Brothers in London as bankers of the executor. There are no assets of William Wallace in India, except the 100 shares in question, with the preferential dividend (if any) payable in respect of them, and as to these shares the plaintiff says that L. A. Wallace and A. F. Wallace are entitled to call upon the administrator of the estate to transfer the same to them. In this sense, he says that the beneficial interest in the 100 shares is vested in them. The estate, therefore, of William Wallace is ready to be handed over to the beneficiaries under this will. This has not been done, because the testator entertained wishes, known to his executor, as to its ultimate disposition, which cannot at present be carried into effect. It is not clear, from the evidence of the executor, Mr. A. F. Wallace, whether those wishes extended to the 100 shares or not. I rather think that Mr. A. F. Wallace intended to draw no distinction between the 100 shares and the rest of the estate.

The estate is all, however, still held by the executor, including the 100 shares. So far as the 100 shares are concerned, the estate has not

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been got in. If the defendants' corporation refused to deal with the shares according to the wishes of those entitled to them, the attorney for the executor, the administrator in India, would have to sue in respect of them, and conversely, if the defendants' corporation wished to obtain an order from the Court in respect of the shares, they would have to take proceedings against the attorney of the executor. The executor or his attorney is, in fact, still the registered holder of the shares. This is, in my opinion, what is meant by the executor "*holding*" the shares in cl. 13 of the agreement. Holding a share is the equivalent of being a shareholder and shareholder throughout the agreement, and the memorandum and articles of association of the company which must be read with, and in explanation of the agreement, has a fixed and definite meaning, *viz.*, that of registered holder. For example cl. 4 of the articles of association provides that "every person whose name shall be entered in the [214] register of shareholders as the owner of any share shall as regards the company be deemed to be the owner of such share." Again, cl. 7 states: "Every shareholder shall on payment * * * be entitled to a certificate under seal of the company specifying the share or shares held by him and the amount paid up thereon." I therefore read cl. 13 as if the words "shall be the registered holder or holders of" were substituted for their equivalent "shall hold." The clauses will then read: "In consideration of the transfer by the said William Wallace to the company * * * the said William Wallace, his executors, or administrators shall be entitled, so long as he or they shall be the registered holder or holders of the said 100 shares, to an extra or preferential dividend thereon." That appears to me to be the plain grammatical meaning of the sentence, and that is what we must first look to in construing an agreement. In attaching this meaning to the words, there is nothing, I think, repugnant to the rest of the agreement. I have already pointed out that, in the case of the five years' period coming into operation, it is contemplated that the executors shall hold the shares for the portion of that time unexpired at the death of the testator, without reference to the beneficial ownership of the shares.

If I am correct in so reading the clause, the fact that the registered holder of the shares is a trustee for some other person does not affect the company—*In re Perkins* (1). There is no qualification to the words "shall hold the shares" such as "in his or their own right." The question as to the meaning of this qualification, which was discussed in *Pulbrook* v. *Richmond Consolidated Mining Co.* (2) and in *Brainbridge* v. *Smith* (3), does not therefore arise. The absence, however, of words of qualification shows that the intention of the parties to the agreement was to disregard everything but the registered holding.

It is contended by the Advocate-General that under the circumstances which I have detailed, the executor of William Wallace must be taken to have assented to the specific bequest of the 100 shares, and he now holds them, not as executor, but as a [215] trustee for the beneficiaries. That may possibly be so as between the executor and the specific legatees. I express no opinion upon the point. It is not so, I think, as between the executor and the defendants' corporation. The latter have still the right to treat the executor, or the estate he represents, as the holder of the shares. That would be the case if the shares were

(1) 24 Q. B. D. 613. (2) 9 Ch. D. 610. (3) 41 Ch. D. 462.

liable to have calls made upon them—*Keene's Executor's case* (1); *Ex parte Bulmer* (2); *Ex parte Gouthwaite* (3). Here the shares are fully paid up, but the executor is under other obligations to the company, such as those imposed by cls. 4 and 10 of the agreement(4)—theoretical perhaps now, but such as must be taken into account in considering the legal position of the parties. Clause 145 of the articles (4) of the defendants' corporation would seem to indicate that the corporation consider them more than merely theoretical.

The Advocate-General further contends that it is a necessary implication arising from the wording of the agreement, that the preferential dividend was not intended to be perpetual, and, further, that the executor now continuing to hold the shares is a fraud, in its legal sense, upon the agreement. As to the latter point, if the agreement put no limit upon the period for which the executor should hold the shares after the death of William Wallace, I cannot see that he is not entitled to hold them so long as his beneficiaries and the law allow him to do so. To hold that the executor is bound to cease to hold the shares at any particular time, or at any particular stage of his executorship, would be, in effect, to introduce a new term into the agreement, or to construe it according to its supposed, and not according to its expressed, meaning. As to the preferential dividends not being intended to be perpetual, they are, in terms, limited to the period during which William Wallace, his executors, or his administrators, hold the shares. By appointments perpetually of administrators "*de bonis non*" to the estate of William Wallace, representation to him could be kept up theoretically indefinitely. It is not, I think, necessary in the thirteenth clause of the agreement to construe executors or administrators as [216] including administrators "*de bonis non.*" In other clauses it may have to be so construed, but in this clause the expression is used to limit the period of the payment of the preferential dividend; and it seems to me that the expressed intention of the parties to the agreement will be carried out if the words are construed in their strict literal meaning. What, however, I decide is, that the preferential dividend is payable so long as the executor of William Wallace is the registered holder of the 100 shares.

I find on the issues—

(1) In so far as the defendants' corporation is concerned, that A. F. Wallace now holds the shares as executor of the testator.

(2) In the affirmative, and for the plaintiff.

(3) That the agreement is to be construed as set out in my written judgment.

(4) In the affirmative, and for the plaintiff.

(5) No finding.

Decree for the plaintiff. Declaration in terms of paragraph (*a*) of the plaint down to the word "aforesaid." Plaintiff to have his costs.

The following was the material portion of the decree:—

This Court doth pass judgment for the plaintiff, and doth declare that cl. 13 of the agreement dated the 22nd day of July 1864, hereinbefore mentioned, is still in operation, and that the extra or preferential dividend payable on the 100 shares provided for by the said cl. 13 is still payable to the plaintiff as administrator of William Wallace as in the plaint mentioned, and this Court doth construe cl. 13 of the said agreement in accordance

(1) 3 D. M. and G. 272.
(2) 33 L.J. (Ch.) 609.
(3) 3 Mac. and G. 187.
(4) See *supra*, 17 B. 207, note.

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with the written judgment of this Court, copy of the extract from which judgment, so far as it relates to the construction of the said clause, is hereunto annexed and marked A (1); and on the issue whether the defendants are entitled to raise the questions raised in the following issue, *viz.*, whether Allexander Falconer Wallace now holds the shares referred to, as trustee for the specific legatee, or as executor of the testator, this Court doth record no finding, &c., &c.

[217] The defendants appealed. In their memorandum of appeal they (*inter alia*) raised the point that the suit was not maintainable.

The plaintiff also filed objections to the decree. He objected, 1st, that it was unnecessary to decide whether an administrator *de bonis non* was or was not included in the words "executors or administrators" in the 13th clause of the agreement; 2nd, that, if it was proper to decide that point, the decision should have been that the said words did include an administrator *de bonis non*.

Inverarity (*Jardine* and *Anderson* with him), for the appellants.—This suit is not maintainable. The plaintiff asks merely for a declaration of a right to a dividend which does not at present exist, and which may never exist—Specific Relief Act (I of 1877), s. 42. The Court is asked to express an opinion as to the construction of the agreement in a hypothetical case, for no dividend has been as yet declared, and the directors have a discretion whether to declare one or not. There is no allegation in the plaint that there are or will be profits. The words in the prayer are "if and when"—Daniell's Chancery Practice (6th Ed.), p. 791; *Kevan* v. *Crawford* (2); *Bright* v. *Tyndall* (3); *Strimathoo Moothoo* v. *Dorasinga Tever* (4). We may take the point now though it was not taken in the Court below—*Raja Har Narain Singh* v. *Chaudrain Bhagwant* (5). The Courts are bound to take notice of the provisions of the Act.

Further, the declaration made by the decree is not the one prayed for. The decree assumes there are dividends. The plaint is framed on the assumption that there were none.

As to the construction of cl. 13 of the agreement, we say that as soon as it appears that the executor has ceased to hold as executor, and holds it as trustee, he has ceased to "hold" within the meaning of this clause. The executor could not probably be placed in the register as executor—*Buchan's case* (6). The Judge below regards the executor as the registered holder, **[218]** but he is not. The registered holder is William Wallace. But he is dead, and cannot be the holder—*Bainbridge* v. *Smith* (7). The estate is not the holder, for there is no estate now. It is administered. Wallace's will gives the executors the shares in trust for themselves. As soon as they began to hold "on trust" they ceased to hold as executors. At latest, they do so when all the estate is administered, that is, in this case when all the debts are paid, as there are no legacies. The estate therefore should have been transferred to the *cestuis que trustent*. It is possible to cease to be an executor and to hold as trustee—Lewin on Trusts (9th Ed.), p. 215; *Phillipo* v. *Munnings* (8); *Dix* v. *Burford* (9); *In re Smith* (10); *Northey* v. *Northey* (11).

(1) The extract referred to comprises from the words "The Advocate General" on p. 215 to the end of the judgment.
(2) 6 Ch. D. 42. (3) 4 Ch. D. 189. (4) 2 I. A. 169.
(5) 18 I. A. 55. (6) 4 Ap. Ca. 549. (7) 41 Ch. Div. 462.
(8) 2 My. and Cr. 315. (9) 19 Bea. 409. (10) 42 Ch. D. 302.
(11) 2 Atkins, 76.

If, then, as a fact, the executor now holds as a trustee, can he claim to hold as executor within the meaning of cl. 13? He claims to be the registered holder. We contend, first, he is not the registered holder; secondly, we say that "holder" in cl. 13 does not mean registered holder. In the agreement the word has not the same meaning as it has in the Companies Act.

The construction which the plaintiff seeks to give cl. 13 involves this, that if William Wallace died within five years, his executors could only claim the extra dividend up to the expiration of the five years; but if, on the other hand, William Wallace survived the period of five years, and died at a later time, then, although he had received this dividend up to his death (receiving of course the more the longer he lived), yet he was further to be entitled to it in perpetuity. The mere fact of his surviving beyond the period of five years not merely gave to himself during his life a larger consideration for the property which he had transferred, but bound the company to go on paying the consideration for ever to his executors or administrators. It is impossible that the agreement could have intended this.

As to the effect of s. 53 of the Indian Companies Act (VI of 1882). Suppose William Wallace had sold the shares in his lifetime on the terms that his name should remain on the register for [219] the benefit of the vendee. If, as is contended, William Wallace in that case still "held" the shares, the vendee could nevertheless have sued the company, and the company would have to recognize him as *cestui que trust*—*Binney* v. *Ince Hall Coal Co.* (1). If the vendee ordered the company not to pay William Wallace, it could not do so. Under these circumstances could Wallace be said to be the holder of the shares?

Lang, Acting Advocate-General (*Scott* with him), for the respondent:—As to this suit not being maintainable because when filed no dividend had been declared, the appellants have no right to take this objection in appeal. If they had taken it below, the plaint could have been amended, as at the time of hearing a dividend had been declared. They cited *Curtis* v. *Sheffield* (2) and the cases relied on in the Court below.

JUDGMENT.

SARGENT, C. J.—This suit arises out of an agreement entered into by the directors of the Burmah Trading Company with Mr. Wallace for the purchase of the timber business which he had been carrying on in Burmah together with the capital, good-will, and assets appertaining to the same. By the 12th clause of that agreement it was agreed that 100 fully paid up shares in the company should be allotted to Mr. Wallace, in consideration of his transfer of the "fixed assets" of the business, and by the 13th article it was further agreed that, in consideration of the transfer of the other assets, "the said W. Wallace, his executors and administrators should be entitled, so long as he or they shall hold one 100 shares, to an extra or preferential dividend equal to one-third of the surplus net profits of the company as may remain in any year after paying a dividend at the rate of 12 per cent. per annum on the paid-up amount of all shares in the company, including the said 100 shares, and after setting apart from time to time out of such surplus profits, as a reserve fund or to the credit of any reserve fund already created, such sum as the

(1) 35 L.J. (Ch.) 363, (368). (2) 21 Ch. D. 1.

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directors of the company for the time being should in their discretion think fit, &c."

Mr. Wallace died on the 28th January, 1888, having made a will, by which he appointed his three brothers, Messrs. R. Wallace, [220] L. A. Wallace, and A. F. Wallace, his executors, of whom Mr. R. Wallace predeceased the testator, and Mr. A. F. Wallace alone proved the will, which, after referring to the 100 shares and the preferential dividend attaching thereto, directed his executors or administrators to hold the same upon trust so as to be at the absolute disposal of such of his said brothers as should survive him. The plaintiff, as attorney to Mr. A. F. Wallace, has taken out letters of administration to the will in India, and a note that administration has been granted to him has been appended to the register, leaving the 100 shares upon the register still in the name of the testator.

The plaintiff prays "that it may be declared that the said cl. 13 is still in operation, and that the extra or preferential dividend payable on the said 100 shares, provided for by cl. 13, is still payable, and is payable to the plaintiff as such administrator as aforesaid, if and when there shall be sufficient net profits to allow the payment thereof under that clause." The defendants' written statement contends that, "in the events which have happened, A. F. Wallace, as the proving executor of the will of William Wallace, now holds the said shares in the character of a trustee of the same specifically bequeathed by the said will, and not in the character of executor; and that the plaintiff is entitled to the preferential dividends upon the assumption only that the said shares shall, when such dividends may be declared, be held by the executor of the said testator in the capacity of executor, and as an undistributed part of the testator's estate and not otherwise."

A preliminary objection has been taken that the Court will not make a declaratory decree with respect to a right which is future and contingent, as was said to be the case here, there being no fund actually in existence when the suit was brought from which a preferential dividend could be claimed, and no certainty that there ever would be such a fund. It was pointed out that the Court of Chancery in England does not, as a general rule, make a declaration with respect to future or contingent rights. Here, however, the right itself is existent, and although the exercise of it is undoubtedly contingent on there being a balance of profit, [221] as contemplated by cl. 13 of the agreement, the very nature of the agreement assumes that there may and probably will be such balance, and indeed the past history of the company shows that more than four lakhs have already been applied towards the preferential dividend in question. Further, it is plain that it was intended that the directors should exercise their discretion as to the amount to be carried to the reserve fund, upon which the balance of profit available for the preferential dividend depends, with some regard to the fact that it was agreed to be paid as the consideration for the transfer of the assets other than the "fixed assets." It is, therefore, from the very nature of the case important that the directors should know for certain whether the right to a preferential dividend is still in existence, as contended by the plaintiff, or has come to an end. We think, therefore, that it is clearly a case in which, in the interests of both parties, the Court, in the exercise of a sound discretion, should make a declaration as to the right in question. It is also to be remarked that this objection has been taken for the first time on appeal—a circumstance which by itself is, in our opinion, fatal to it.

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The real question between the parties in this case turns upon the meaning to be given to the expression "hold" in the 13th clause of the agreement, which provides for a preferential dividend being paid to Mr. Wallace, his executors and administrators "so long as he or they should hold the 100 shares," which, by the previous clause it had been agreed, should be allotted to him as the consideration for the transfer of the "fixed assets." By holding shares in its ordinary acceptation is meant being a "shareholder," *i.e.*, a person whose name is on the list of shareholders, or at any rate entitled to have his name placed on it, and the language of the latter part of cl. 13 shows that Mr. Wallace's holding was regarded as being in that character without any qualification being annexed to it.

As to what is meant by the executors and administrators of Mr. Wallace "holding" the shares, the agreement must be read in connection with the sections of the articles of association of the defendants' company which relate to the transmission of [222] shares. Those sections are ss. 29, 30 and 31, and provide that the executors and administrators of a deceased shareholder shall be the only persons that the company can recognize as having a title to the shares, and that they can be registered as shareholders, or elect to have some person to be named by them registered as a transferee of such shares. These articles show that the executors and administrators, although not entered on the register, are the only persons whose title can be recognized by the company. And as long as that is so between themselves and the company, they would be the "holders" of the shares in their representative character, in the sense that no one else could dispose of them, and there is nothing in this agreement to show that the executor and administrator were required to make themselves personally liable by having their own names placed on the register. The shares were fully paid up, and they would remain, in any case, until transferred by the executors and administrators of Mr. Wallace, subject to a lien in respect of all Mr. Wallace's obligations. By "holding" therefore, in the absence of anything in the agreement to show a contrary intention, must, in our opinion, in the case of the executors and administrators, be understood to be their continuing to be the only persons who could be recognized by the company as having a title to the shares; and the executor, Mr. A. F. Wallace, is still in that position with respect to the shares.

It is, however, objected by the defendants in their written statement that it never could have been intended that the executors and administrators should continue to be entitled to the preferential dividend after the debts on the estate of Mr. Wallace had been paid, as was admitted to be the case here; and that Mr. A. F. Wallace, the executor, who had taken out probate, would, it was contended, be regarded in a Court of Equity as a trustee for the person entitled to the shares under the will, *viz.*, for himself and his brother, Lewis Wallace. Whether Mr. A. F. Wallace would, under the circumstances disclosed by his deposition, be so regarded by a Court of Equity, is not necessary to determine, as we agree with Mr. Justice Farran that there is nothing to be found in the agreement express or implied, which shows an intention of the parties [223] to the agreement to regard anything but the legal "holding" under the articles of association by Mr. Wallace, his executors and administrators, and that to go beyond that holding would be virtually to add a new term to the agreement. There are no express words qualifying the "holding," and the language throughout the agreement, especially that of

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the proviso at the close of cl. 13, points to Mr. Wallace and his representatives, as the legal holders of the shares, being the only persons in the contemplation of the parties. Lastly, the very form of the consideration provided by cl. 13 for the transfer of the other assets, shows that the object the company had in view was to afford an inducement to Mr. Wallace and his executors to continue on the register as the holders of the shares.

These inferences as to the intention of the parties are entitled to special consideration from the circumstance that the agreement is not an inartificial document such as is often found in transactions of this nature, but a highly artificial instrument—the work obviously of a skilled draftsman. We are of opinion, therefore, that Mr. A. F. Wallace, by his attorney, the plaintiff, is still holding the shares within the contemplation of cl. 13 of the agreement, and the plaintiff is, therefore, entitled to a declaration in the terms of the prayer of his plaint. We do not, however, think it advisable for the Court to express an opinion as to the construction of the expression "executor and administrator," a question which may never arise in the future, and is not raised by the pleadings.

We must, therefore, vary the decree by omitting the part of it which follows after the words "is still payable to the plaintiff as administrator of W. Wallace as in the plaint mentioned," but in other respects the decree is confirmed. Respondents to have their costs of this appeal.

Attorneys for the appellant: Messrs. *Craigie, Lynch and Owen.*

Attorneys for the respondent: Messrs. *Little, Smith, Frere and Nicholson.*

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[224] APPELLATE CIVIL.

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

DAJI NILKANTH NAGARKAR AND OTHERS (*Original Plaintiffs*), *Appellants v.* GANPATRAO NILKANTH NAGARKAR (*Original Defendant*), *Respondent.** [30th September, 1891.]

Jurisdiction—Court of Agent for Sirdars in the Deccan—Suit in that Court—Pensions Act (XXIII of 1871), s. 4, applies to such suit—Collector's certificate—Reg. XXIX of 1827, ss. 4 and 6—Ordinary Rules—Reg. II of 1827.

A suit brought against a *sirdar* in the Court of the Agent for Sirdars in the Deccan, of the class specified in s. 4 of the Pensions Act (XXIII of 1871), requires a Collector's certificate, as provided by s. 6 of that Act.

THIS was an appeal from the decision of G. C. Whitworth, Agent for Sirdars in the Deccan at Poona.

Suit for an account and recovery of income.

The plaintiffs alleged that they and the defendant Ganpatrao Nilkanth Nagarkar, deceased (pending appeal to the High Court), who was a third class *sirdar*, were co-sharers in certain *jaghir, inam, saranjam* and other properties situate in the Ahmednagar District; that partition had taken place between the co-sharers, and that they had been separately receiving the income of their respective shares; that for the sake of convenience the lands had not been actually partitioned, and that the

* Appeal No. 123 of 1889.