ORIGINAL CIVIL.

Before Mr. Justice Scott.

THE NEW FLEMING SPINNING AND WEAVING COMPANY, LIMITED, PLAINTIFFS, *v.* KESSOWJI NA'IK AND OTHERS, DEFENDANTS.* 1885. *January* 16.

Company—Negligence of directors—Liability of directors for negligence in management—Employment of agent by directors—Acquiescence of shareholders—Liability of estate of deceased director—Banker, who is a—Limitation Act (XV of 1877), Sec. 10—*Practice—Additional written statement filed after time allowed.*

The plaintiffs' company went into liquidation early in the year 1879, in consequence of losses sustained by the failure of Nursey Kessowji & Co., which firm had been the bankers of the said company. The said firm had stopped payment on the 26th December, 1878, having then in its hands the sum of Rs. 8,80,250-14-1 belonging to the company. In this suit the official liquidators of the company sought to recover that sum from the defendants, who had been directors of the company, and a further sum of Rs. 2,48,670-14-0 as damages sustained by the company through the fraud and gross negligence of the defendants in permitting Nursey Kessowji, the agent of the company, to deal with certain shares for his own purposes. The first four defendants were the directors of the company the fifth defendant was the assignee of the estate of Nursey Kessowji, whose firm of Nursey Kessowji & Co. had become insolvent. The plaintiffs' company was registered on the 31st July, 1878, and by the memorandum and articles of association the said Nursey Kessowji was appointed secretary, treasurer, and agent of the company for a period of twenty-five years, upon the terms and conditions contained in an agreement annexed to the articles of association, whereby it was *(inter alia)* provided that Nursey Kessowji should deposit with such banker or bankers as the directors for the time being should appoint, all the moneys due from him to the said company, and exceeding in amount at any one time the sum of Rs. 5,000. On the 6th August, 1878, the directors of the company appointed the firm of Nursey Kessowji & Co. to be the bankers of the company.

It was further alleged by the plaintiffs that, immediately after the registration of the company, the directors and Nursey Kessowji began to borrow money upon the credit of the company far in excess of the legitimate wants of the company, and to pay over the money, so borrowed, to the firm of Nursey Kessowji & Co., to be used by that firm in speculative business; that the said loans were obtained by the directors, not *bonâ fide* for the purposes of the company, but for the purposes of supplying funds to the firm of Nursey Kessowji & Co., to enable it to carry on its business. At the end of the year 1878 the sum paid over by the directors to the firm of Nursey Kessowji had, by reason of such borrowing, amounted to the sum of Rs. 8,80,250. The plaintiffs alleged, that the said loans were wholly unnecessary; and they charged the directors with gross negligence in raising the said loans or permitting them to be raised; and in permitting the moneys so borrowed to remain in the hands of the firm of Nursey Kessowji & Co. to be applied by that firm to its own purposes.

* Suit No. 314 of 1879.

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As to the Rs. 2,48,670-14-0, the plaintiffs alleged that certain unallotted shares of the total value of Rs. 3,93,750 had been left in the hands of the directors to be disposed of, the proceeds of which were to be applied in making certain payments due by the company; that, instead of applying these shares to such purposes, the directors had filled up the said shares in the name of Nursey Kessowji, and authorized him to mortgage the same, in order to raise funds; that the said Nursey Kessowji had accordingly dealt with the said shares, and had applied the proceeds thereof to his own purposes. The plaintiffs charged the directors with fraud and gross negligence as to these shares; and claimed to recover Rs. 2,48,670-14-0, in respect thereof, from the defendants.

The defendants alleged that they had acted *bonâ fide* in all matters connected with the company; that they had always believed the firm of Nursey Kessowji & Co. to be in a solvent condition; and had no reason to mistrust its management of the affairs of the company. One of the defendants, (No. 3), died after the institution of the suit, and his sons were made parties. His representatives and Kessowji Náik (defendant No. 1) also claimed to set off against the plaintiffs' claim certain payments made by them as guarantors for the company.

Held, (1) that one of the directors knew as a fact that the agent was not in a solvent condition; and that the other directors, in the circumstances of the case, ought to have ascertained his financial condition.

(2) Directors are responsible for the management of their company where, by the articles of association, the business is to be conducted by the board with the assistance of an agent. They cannot divest themselves of their responsibility by delegating the whole management to the agent, and abstaining from all inquiry. If he proves unfaithful under such circumstances, the liability is theirs, just as much as if they themselves had been unfaithful.

(3) That the directors had not used fair and reasonable diligence in the management of the company's affairs, and were liable to refund the money entrusted by them to the agent, Nursey Kessowji, without proper knowledge as to whether it was needed, and without any subsequent investigation of a serious character with respect to its disposal. Such conduct amounted to gross negligence. All the directors were equally responsible, as all attended the directors' meetings, and all gave the same blind sanction to every act and proposal of the agent.

Held, also, that the estate of the deceased director was liable on the ground that the misfeasance of a director is a breach of trust, and not a mere personal default.

Held, further, that the claim, not being a claim for any specific property still in the hands of the representatives, was not covered by section 10 and art. 98 of the 2nd Schedule of the Limitation Act (XV of 1877), and was barred by the lapse of three years. But that as the limitation counted from the date of the institution of the suit, and not from the date of the amendment of the plaint, the whole claim survived in this case.

A separate debt cannot be set off against a joint and several debt, and directors cannot set off money due from the company to them against sums which they may be ordered to refund to the liquidators.

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THIS was a suit instituted by the official liquidators of the New Fleming Spinning and Weaving Company against the defendants to recover the two sums of Rs. 8,80,250-14-1 and Rs. 2,48,670-14-0. The first four defendants, (Kessowji Náik, Gellábhoy Puddumsey, Sákerchand Nagerdás, and Cursetji Nasserwanji Cámá), were the directors of the said company. The fifth defendant was the official assignee of the estate and effects of the partners in the firm of Nursey Kessowji & Co., one of the partners in which firm (Nursey Kessowji) was also a director of the said company.

In 1879 the Old Fleming Spinning and Weaving Company was wound up, and the plaintiffs' company was constituted. It was registered on the 31st July, 1878, under the Indian Companies' Act, 1866, and by the articles of association the above mentioned first four defendants and Nursey Kessowji were appointed directors. Nursey Kessowji was the son of the first defendant Kessowji Náik.

By the memorandum of association and articles of association Nursey Kessowji was appointed to be the secretary, treasurer, and agent of the company for a period of twenty-five years upon certain terms and conditions contained in an agreement annexed to the articles of association.

The following is the clause in the memorandum of association:—

"Clause IV.—Nursey Kessowji shall be secretary, treasurer and agent of the company at the remuneration, upon the terms and subject to the conditions and provisions contained in the agreement set forth in the schedule annexed to the accompanying articles of association."

The following are the material clauses in the articles of association:—

"116. Nursey Kessowji shall be the secretary, treasurer, and agent of the company for a period of twenty-five years, at the remuneration, and upon the terms, and subject to the conditions specified in the agreement set forth in the schedule marked A, annexed hereto. After the expiration of the said twenty-five years the secretary, treasurer, and agent shall be such fit person as the board may appoint, and the remuneration of such secretary,

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treasurer, and agent, and the period for which, and the terms and conditions upon which, he shall hold his appointment, shall be fixed by the board, subject to the approval of the shareholders in general meeting.

"117. The secretary, treasurer, and agent, Nursey Kessowji, shall have, during the said period of twenty-five years, full power and authority to enter into such contracts and agreements as he may think proper for the purposes of the company, and to appoint and employ in or for the purposes of the transaction and management of the affairs and business of the company, or otherwise for the purposes thereof, and from time to time to remove or suspend such managers, bankers, solicitors, engineers, clerks, brokers, and other officers as he shall think proper, with such powers and duties, and upon such terms as to duration of office, remuneration, or otherwise, as he shall think fit, and generally to appoint and employ any persons in the service or for the purposes of the company as he shall think fit, upon such terms and conditions as he shall think proper."

By the agreement, referred to, it was provided that the said Nursey Kessowji should deposit with such bank or bankers, as the directors for the time being of the company should appoint, all the moneys due from him to the said company and exceeding in amount at any one time the sum of Rs. 5,000. The following is the material clause of the agreement:—

"XVI.—The said Nursey Kessowji shall deposit with such bank or bankers, as the directors for the time being of the said Company shall appoint, all moneys due from the said Nursey Kessowji to the said company and exceeding in amount at any one time the sum of Rs. 5,000. Such deposits to be dealt with in such manner as the directors for the time being of the said company shall from time to time appoint. The said Nursey Kessowji shall not be responsible for any bank or bankers with whom any such deposit as aforesaid shall have been made, nor for any loss or damage whatsoever which may be incurred, in or about the making of any such deposit as aforesaid, if made with the consent of the directors for the time being of the said company."

The plaint stated that at the time the said company was registered it had as its bankers certain local banks of credit and position in Bombay.

On or about the 2nd of August, 1878, a general meeting of the shareholders of the old company was held, wherein, among other matters transacted, a balance-sheet of the accounts, showing its aggregate liabilities and assets to be made over to the new company, was adopted. The details of this balance-sheet as well as of the other documents, so far as they are material for the purposes of this case, are fully set forth in the judgment, *infra*.

On the 6th of August, 1878, the directors of the new company at their board meeting passed a resolution appointing the firm of Nursey Kessowji & Co. the bankers and *mukádams* of the company.

The plaint made the following allegations in respect of this appointment:—

"6. The said firm of Nursey Kessowji & Co. was not a firm of bankers, but was a firm of merchants in fact and to the knowledge of the defendants, the directors, carrying a large speculative business in opium, cotton, and other commodities. The said Nursey Kessowji had a fourteen-annas share in the said firm, while the other partners—namely, Rághowji Kirpál, Vellji Dhunji, Mansey Daisar, Gungájul Passu, Passu Devráj—had amongst them only a two-annas share therein. They brought no capital into the said firm, and were merely working partners in it. The plaintiffs charge that the appointment of the said firm of Nursey Kessowji & Co. was, in substance and effect, the appointment of Nursey Kessowji to be the banker of the plaintiffs' company, and was an appointment *ultra vires* on the part of the defendants, the directors, contrary to the provisions of the articles of association of the said company.

"7. The plaintiffs charge that the said appointment of Nursey Kessowji & Co. to be the bankers of the plaintiffs' company was not an appointment of that firm *bonâ fide* made by the defendants, the directors, in the interest and for the purpose of the plaintiffs' company, but was an appointment by them for the purpose of placing money in the hands of Nursey Kessowji, or

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for his said firm, to enable it to carry on its aforesaid speculative business.

"8. The defendant Kessowji Náik is the father of the said Nursey Kessowji, and has always been closely connected with him in business. The other defendants, the directors, were and are relatives or debtors and dependants of the defendant Kessowji Náik and of the said Nursey Kessowji, and acted in obedience to their orders and directions."

The plaint further alleged that, immediately after the registration of the company, the directors and Nursey Kessowji began to borrow money upon the credit of the company far in excess of the legitimate wants of the company, and to pay over the money so borrowed to the firm of Nursey Kessowji & Co., to be used by that firm in the aforesaid speculative business. The said firm had in their hands the sum of Rs. 1,23,887-4-4 belonging to the Old Fleming Spinning and Weaving Company at the date of the transfer of its liabilities and assets to the plaintiffs' company. At the end of 1878 this sum had increased to Rs. 8,80,250-14-1. The plaint continued :—

"The plaintiffs charge that the moneys so borrowed and paid to Nursey Kessowji & Co. by the defendants, the directors, and the said Nursey, were borrowed and paid by the defendants, the directors, not *bonâ fide* for the purposes of the said company, but for the purpose of supplying funds to Nursey Kessowji & Co. to enable it to carry on the aforesaid business. The moneys of the said company in the hands of Nursey Kessowji & Co. on the 1st day of August, 1878, amounted to the sum of Rs. 1,23,887-4-4 only, but that sum had, by reason of the aforesaid illegal borrowings at the end of the year (1878), increased to the sum of Rs. 8,80,250 in the manner shown in the summary of account hereto annexed, and marked C. The plaintiffs also charge that the defendants, the directors, or some of them, and especially the defendant Kessowji Náik, through the intervention of the said Nursey Kessowji & Co., received on various pretences large sums out of the moneys so improperly raised upon the credit of the said company as aforesaid."

The plaintiffs also alleged that the moneys were borrowed

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by the directors and Nursey Kessowji upon the credit of the company, although, (as the directors knew or ought to have known), the company had at the time funds of its own in the hands of Nursey Kessowji & Co. amply sufficient for the purposes of the company; and they charged the directors with gross negligence in raising such loans, or in permitting the same to be raised under the circumstances, and in permitting the moneys so borrowed to remain in the hands of the said firm of Nursey Kessowji & Co., to be applied by the said firm to its own purposes; and they submitted that the said directors were liable for the loss of the said moneys resulting from the failure of Nursey Kessowji & Co.

With regard to the second of the two sums claimed in the plaint, *viz.*, Rs. 2,48,670-14-0, the plaintiffs alleged as follows:—

"At and after the time when the said company was registered as aforesaid, the defendants, the directors, had in their hands seven hundred and eighty-seven unallotted shares in the said company of the nominal value of five hundred rupees each, and one unallotted share of the nominal value of rupees two hundred and fifty. The said unallotted shares had been left by the shareholders in the hands of the defendants, the directors, for the purpose of their disposing of the same, and with the proceeds thereof paying off a sum of Rs. 3,00,000, or thereabouts, due by the said company for spindles and machinery and additions to their mill. The nominal value of the said unallotted shares was Rs. 3,93,750. The defendants, the directors, instead of disposing of the said unallotted shares and applying the proceeds of the same to the payment of the said sum of Rs. 3,00,000, or thereabouts, and the other purposes of the said company, filled up the said unallotted shares in the name of the said Nursey Kessowji, senior partner of the said firm of Nursey Kessowji & Co., and authorized him to mortgage the same in order to raise funds. The said Nursey Kessowji sold, mortgaged, or otherwise dealt with the said unallotted shares, and did not apply the proceeds thereof in paying the said sum of Rs. 3,00,000, or for other purposes of the said company, but through the fraud or gross negligence of the defendants, the directors, was allowed and permitted to apply the said proceeds to his own private purposes. The said company has, by reason

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of the fraud or gross negligence of the defendants, the directors, sustained a loss of Rs. 2,48,670-14-0, which the plaintiffs claim to recover from the defendants, the directors, in this suit.

On the 26th December, 1878, the firm of Nursey Kessowji & Co. stopped payment, and on 9th January, 1879, filed their petition in insolvency. At the time of such failure the said company had in its hands the aforesaid amount of Rs. 8,80,250-14-1 belonging to the plaintiffs' company. The plaint alleged that this sum had been wholly lost to the company, and charged that the defendants, the directors, were liable to make good the same.

In consequence of the loss of this money, petitions were presented to the High Court, praying that the plaintiffs' company might be wound up. On the 17th January, 1879, an order was made that the company should be wound up by the Court, and on the 1st February, 1879, liquidators were appointed.

The plaintiffs prayed that the defendants, the directors, should be ordered to pay to the plaintiffs the said two sums of Rs. 8,80,250-14-1 and Rs. 2,48,670-14-0 with interest.

Two of the directors, *viz.*, Sákerchand Nagerdás (defendant No. 3) and C. N. Cámá (defendant No. 4), died after the institution of the suit. The sons of the former were made parties. No proceedings were taken against the representatives of C. N. Cámá.

In their written statements the defendants denied their liability, and stated that they had acted *bonâ fide* in their management of the affairs of the company, and had not been aware of the real nature of the transactions of the firm of Nursey Kessowji & Co. They alleged that they had always believed that firm to be in a solvent condition, and had no reason to mistrust its management of the affairs of the company.

The defendant, Kessowji Náik, and the defendants, the sons of Sákerchand Nagerdás, claimed a set-off against the company in respect of certain payments made by them as guarantors of the company.

The defendants contended that the appointment of Nursey Kessowji & Co. as bankers of the plaintiffs' company was not *ultra vires* on the part of the directors; that it was made by

them *bonâ fide* and in the interest of the company; that the fact that the said firm were the bankers of the company was well known to the shareholders of the company, and was acquiesced in by them; that the moneys borrowed by them were borrowed *bonâ fide* for the purposes of the company, and not for the purpose of supplying the firm of Nursey Kessowji & Co. with funds to be applied in speculative business; that they had not themselves received any portion of the said moneys; and that they were not guilty of fraud or negligence in carrying on the management of the affairs of the company; and they contended that they were not liable to make good the losses incurred by the company.

Latham (Advocate General) and *Inverarity* appeared for the plaintiffs.

Lang and *Telang* for the first defendant.

Macpherson and *B. Tyabji* for the second defendant.

P. M. Mehtá and *F. Vicáji* for the third defendant.

Lang, for the first defendant, (Kessowji Náik), proposed to read and to raise issues upon an additional written statement put in by the first defendant in December, 1884.

Inverarity objected.—This further written statement ought not to be read. I ask that it be ordered to be removed from the file. This suit was filed in April, 1879, and Kessowji Náik's written statement was filed in that year. On the 26th April, 1883, by an order of that date he got leave to file a further written statement which was to be filed on or before the 2nd July, 1883. That order was not obeyed, and this additional written statement was not filed by him until December, 1884. It has been put in without leave, and should be removed from the file. It is not properly a part of the record. If we failed in the suit we would have to pay the costs.

Lang, contra.—There is no precedent for taking written statements off the file.

SCOTT, J.—I think at this stage of the proceedings this supplementary written statement ought not to be taken off the file. If improperly filed in December, the plaintiffs should have at once

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made an application to the Court to have it removed. That, however, was not done; and I think the plaintiffs must be taken to have acquiesced in its forming part of the record.

Inverarity for the plaintiffs.—The pecuniary position of the company and of the firm of Nursey Kessowji appears from their respective books, and cannot be disputed. We contend that the appointment, by the directors, of Nursey Kessowji & Co. to be the bankers of the company was *ultra vires*, or, at all events, not *bonâ fide* in the interests of the company. The directors knew, or ought to have known, that that firm was then hopelessly insolvent, and had in its hands a large sum of money belonging to the company at the time the company was registered. This money ought to have been called in by the directors; but, instead of doing so, they borrowed fresh loans. The intention of clauses 116 and 117 of the articles of association and of the agreement was that some local bank should be appointed in which Nursey Kessowji was not a partner—*Purmánundáss Jivandáss* v. *H. R. Cormack*[1].

The firm of Nursey Kessowji & Co. were not bankers. They were a trading firm doing a speculative business in cotton, opium, and shares. A banker is a dealer in money: see *Encyclopædia Brittanica*. Not being bankers, the appointment was *ultra vires*. The appointment was never acquiesced in by the shareholders. It was never ratified.

As to the negligence of the directors, all the directors were pecuniarily interested in the firm of Nursey Kessowji & Co., and they used the company for the purposes of the firm. Nursey Kessowji was the son of Kessowji Náik. All the directors knew that the firm had neither money nor credit of its own. They kept the firm going by means of the company. The loans raised were really for the firm, and were at once handed over to it. Apart from the question of fraud, or want of *bona fides*, the defendants are liable—*Overend Gurney* v. *Gibb*[2].

Lang for the first defendant (Kessowji Náik).—The defendants are not liable to make good the loss incurred by the com-

(1) I. L. R., 6 Bom., 326, *per* Bayley, J., at p. 343. (2) 5 Eng. & Ir. Ap., 480.

pany. They are not ordinary trustees. They are only "commercial trustees,"—that is, persons managing for themselves and others, and are bound only to exercise reasonable diligence in management—*In re Forest of Dean Coal Mining Company*(1). They are paid agents, and unless they exceed their authority they are not liable—*Smith* v. *Anderson*(2). It is said the defendants were bound to know the contents of the company's books. It has been held that directors are not even bound to know what is in the register of shares—*Hall Mark's Case* (3). The loans were raised on the representation of Nursey Kessowji, who was an *ex-officio* director; and, unless the other directors were guilty of gross negligence, they are not liable—*Perry's Case*(4). Nursey Kessowji & Co. had been bankers of the old company, whose shareholders were the same as those of the new company, and the shareholders had from the balance-sheets distinct notice of the moneys left in the hands of the firm.

We say the firm were bankers as well as merchants. In India the difference is not so distinct as in England. They acted as bankers for many persons who deposited money with them. They held in this way about four lákhs of rupees. Their appointment was not *ultra vires*.

The loans were required by the company, and were properly raised. The directors are not liable, because Nursey Kessowji misappropriated the money.

As to the claim of the plaintiffs in respect of the unallotted shares, that claim, which is a distinct cause of action, was first made when the plaint was amended in April, 1883, and it was then barred by limitation. The effect of amending a plaint, if introducing a fresh cause of action, is the same as that of adding new parties—*Rám Coomár Sháha* v. *Dwárkánáth Hazra*(5).

[SCOTT, J., referred to *Rámlál* v. *Harrison*(6); *Ganpát Pándurang* v. *Adarji Dádábhái*(7).]

B. Tyabji for the sons of Sákerchand Nagerdás, (defendant

(1) 10 Ch. Div., 450.
(2) 15 Ch. Div. 247, See p. 275.
(3) 9 Ch. Div., 329.
(4) 34 Law Times, 716.
(5) 5 Calc. W. R. Civ. Rul., 207.
(6) I. L. R., 2 All., 832.
(7) I. L. R., 3 Bom., 312.

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No. 3), deceased.—Sákerchand Nagerdás was not related to Nursey Kessowji. He had no motive in assisting him or his firm. He acted throughout with good faith.

Latham (Advocate General) in reply.—*In re Forest of Dean Coal Mining Company's Case*(1) has gone further than any other case in limiting the liability of directors, but even it is an authority for the doctrine that the directors are trustees for moneys come to their hands. Here all the money that has been lost came under the control of the directors. In *Smith* v. *Anderson*(2) the question was whether a certain business was carried on by trustees or by directors. *Perry's Case*(3) is not in point. *Hall Mark's Case*(4) was decided on the point of estoppel with regard to the list of contributories, and does not touch the point here.

The position of directors in relation to shareholders appears from *Joint Stock Discount Company* v. *Brown*(5) and *Land Credit Company of Ireland* v. *Fermoy*(6). The former was a case of an act *ultra vires*. The latter decided that directors are trustees, and that an improper application of funds is a breach of trust. *Marzetti's Case*(7) lays down that mere carelessness or negligence without dishonesty renders directors liable. In that case the negligence was merely omitting to make inquiries such as a man of ordinary sense would make. Imprudence or want of judgment is not negligence. *Bona fides* includes due care: see Indian Evidence Act. In *Flitcroft's Case*(8) directors were held liable for declaring dividends out of capital. That case also shows that here the directors have no right to a set-off. It was there said that, even if all the shareholders had sanctioned the acts of the directors, the company might still have sued the directors for breach of trust. The corporation is placed higher than the shareholders, and the liquidators higher than the corporation. It is clear, on the authorities, that paying money without due inquiry is a breach of trust, and that directors are trustees as to moneys come to their hands.

The next question is as to what knowledge a director is sup-

(1) 10 Ch. Div., 450.
(2) 15 Ch. Div., 247.
(3) 34 Law Times, 716.
(4) 9 Ch. Div., 329.
(5) L. R., 8 Eq., 381.
(6) L. R., 8 Eq., 7.
(7) 28 W. R., 541.
(8) 21 Ch. Div., 519.

posed to have. He is bound to know that which it is his duty to know—*Ex parte Brown* (1), where directors, who had not examined their books, were held to have known their contents; *Turquand* v. *Marshall* (2); *In re Esparto Trading Company's Case* (3).

In considering whether the representatives of the deceased director Sákerchand Nagerdás, (defendant No. 3), are liable, there is a distinction to be taken between moneys which have come into the hands of the deceased director and moneys which have not. In the former case the claim survives against the representatives according to English common law; in the latter it does not —*Overend* v. *Gurney's Case* (4). Here it is clear the claim survives: see also *Peek* v. *Gurney* (5), where it was held that, if there be a breach of trust, the action survives, and every misfeasance is a breach of trust. In equity, representatives are liable for breach of trust, whether they derive benefit or not—*Montfort* v. *Cadogan* (6), and Williams on Executors (2nd ed.), 1746; *Walsham* v. *Staunton* (7).

Next, as to limitation. By the amendment in our plaint we make a claim, which was not in the plaint originally. *Staples* v. *Holdsworth* (8) decides that some causes of action not in the original claim may be introduced by amendment, without being affected by limitation. Here the new cause of action is so connected with the old one that it cannot be held to be distinct—*Mohummud Zahoor Ali Khán* v. *Mussamat Thakoránee* (9); *Joseph* v. *Solano* (10). The claim would not be barred by English law. But we submit also, that section 10 of the Limitation Act XV of 1877 applies. The 787½ shares were placed in the hands of the directors with a power to allot. They could not delegate this power to an agent. In *The York and North Midland Railway Company* v. *Hudson* (11) and *Thakersey Devráj* v. *Hurbum Nursey* (12) it was ruled that shares, unlike money, could be year-marked. Under article 98 of Sche-

(1) 19 Bea., 97.
(2) L. R., 6 Eq., 112.
(3) 12 Ch. Div., 191.
(4) 4 Ch. Ap., 701. See p. 713 *et seq.*
(5) L. R., 6 Eng. & Ir. Ap., 378.
(6) 17 Ves., 487.
(7) 1 D. J. & S., 678.
(8) 6 Scott., 605.
(9) 11 Moore's Ind. Ap. 468, and see I. L. R., 2 Calc., p. 14.
(10) 9 Beng. L. R., 453.
(11) 16 Bea. 485 at p. 491.
(12) I. L. R., 8 Bom., 432.

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dule III of Limitation Act, time does no begin to run until the death of the trustee.

5th March. SCOTT, J.—This case is of great importance, not only to the parties on account of the magnitude of the sums claimed (eleven lákhs), but also to the whole community on account of the question to be decided—to wit, the extent of the liability of directors of limited companies for the result of negligent performance of their duties. The plaintiffs are the liquidators of the New Fleming Spinning and Weaving Company, which commenced its existence on the 31st of July, 1878, and stopped payment on the 26th of December in the same year. The defendants are Kessowji Náik and Gellábhoy Puddumsey, directors of the company; Mr. Turner, the official assignee of Nursey Kessowji, an insolvent director; and the sons of Sákerchand Nagerdás, a deceased director. Mr. K. N. Cámá was also made a defendant director; but on his death, in the course of the case, the Court, at the request of the plaintiffs, under section 302 of the Civil Procedure Code caused an entry of the death to be made on the record, and the suit proceeded against the other defendants.

The failure of the plaintiffs' company as well as that of three other well-known mill companies was due to the losses caused by their bankers, Nursey Kessowji & Co.; and the plaintiffs seek to make the defendants liable for those losses. The losses may be divided under three heads :—

(*a*). The sum of Rs. 1,23,887-4-4, moneys in the hands of the bankers when the company started.

(*b*). The difference between the above sum and the sum of Rs. 8,80,250-14-1, to which amount the money due from the bankers at the time of the failure was raised by reason of borrowings which the plaintiffs allege to have been illegal.

(*c*). The sum of Rs. 2,48,070-14-0 raised by the bankers by the mortgage of 787 unallotted shares, which sum was applied by the bankers to their own uses. This claim, however, was reduced by the plaintiffs, in the course of the case, to Rs. 2,14,000, which is the sum finally claimed under this head.

The plaintiffs seek to make the defendants liable for the above losses, on the following grounds :—

(1). That the appointment of Nursey Kessowji & Co. as bankers of the plaintiffs' company was *ultra vires* on the part of the directors, and contrary to the provisions of the memorandum and articles of association of the company.

(2). That the appointment was made by them, not in the interests of the company, but for the purpose of placing money in the hands of the firm of Nursey Kessowji & Co., to enable it to carry on a speculative business.

(3). That they raised money beyond the need of the concern, and deposited it all in the hands of Nursey Kessowji & Co., well knowing, or having good cause to know, the firm to be in insolvent circumstances.

(4). That, although by the articles of association they were bound to manage the affairs of the company, they never saw to the proper application of the money by Nursey Kessowji & Co., who were thus enabled to appropriate the sums to their own purposes.

(5). That they acted improperly in handing to the firm the 787 unallotted shares, and in neglecting to see to the proper application of the money raised upon them.

Thus the charge against the defendants is a two-fold one, including misconduct as well as negligence : misconduct in acting *ultra vires* and with bad faith: negligence in not exercising ordinary prudence in the discharge of the duties they had undertaken as directors.

The defendants replied to these charges by separate written statements, which, for the most part, raised common grounds of defence. They said that the firm of Nursey Kessowji & Co. had been the bankers of the Old Fleming Company, out of which the plaintiffs' company was formed, for several years, and that the firm enjoyed, at the time of their re-appointment by the defendant directors, a high reputation and first-class credit as bankers as well as merchants in Bombay. The defendants repudiated all knowledge of the firm's speculative business and

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of the firm's real financial position. The defendants maintained their legal right to make appointments according to the statutes of the company, and further said that the appointment was well known and acquiesced in by the shareholders of the company. They also repudiated any negligence as regards the unallotted shares, and maintained their right to deal with them as they did. Kessowji Náik in particular denied that he had been closely connected with Nursey Kessowji in his business, and that the other directors were either his or Nursey Kessowji's relatives or debtors. He also showed, as a proof of his *bona fides*, that he had guaranteed the payment by Nursey Kessowji & Co. to the Bank of Bombay, and that he had paid on that account more than four lákhs of rupees. He pleads a set-off in respect of these payments, and Sákerchand does the same as regards similar payments. The representatives of Sákerchand and Gellábhoy Puddumsey deny that they in any way acted under the influence of Kessowji Náik. Thus the defendants repudiate the charges both of misconduct and negligence.

Before I consider what is the law with regard to the liability of directors, and how that law is applicable to the case as proved by the evidence, I will, for the sake of clearness, give a short history of the plaintiffs' company, the New Fleming Spinning and Weaving Company.

It arose out of the Old Fleming Spinning and Weaving Company, which in 1874 had sprung out of the Royal Spinning and Weaving Company. The Old Fleming Company had a capital of eighteen and a half lákhs. In 1877 it largely increased its number of spindles by an addition of 13,300 new ones, and incurred other expenses, which altogether involved an expenditure of over three lákhs. To meet this new charge the directors of the old company—who, with the exception of Sákerchand, were the same as the directors of the new company, (the defendants to this suit),—decided to transfer the mill and all its interests and liabilities to a new company, with an increase of capital up to twenty-two and a half lákhs. They called a meeting of shareholders of the old company, and made a report, in which they stated the object of transfer to be "an increase of the available capital of

the company". This increase was to be attained by the issue of 787 shares of Rs. 500 each. The rest of the shares of the new company were distributed amongst the holders of the old as the price of the transfer. The resolutions regarding the transfer were unanimously carried, and on the 31st of July, 1878, the new company was registered. Although it was in name a new company, the new concern was in reality only the old company reconstituted. The memorandum of association and the articles of association remained the same. With the memorandum there was also incorporated the agreement, which had been in force with the old company, setting out the terms on which Nursey Kessowji held the post of secretary, treasurer and agent, and he was continued in that office on the same terms. His firm of Nursey Kessowji & Co. had been bankers of the old company and of its predecessor the Royal. They held in their hands at the time of the transfer the sum of Rs. 1,23,000, which passed under the arrangement to the new company. They continued at the transfer without any interruption to act as the bankers of the company, paying and receiving money, and on the 6th August they were formally appointed as bankers by the board. By the balance-sheet of the old company (exhibit A 22) there appears to have been due at the time of the transfer—

	Rs.
For old loans falling due at different dates	9,81,624
Debts due to cotton merchants	9,903
Debts due for unclaimed dividends	21,930
Debts due on security of yarn and cloth	2,36,974
Suspense account	43,819
Adjusting account	41,654

On the assets side of the account we find—

Cost of buildings and machinery	22,17,867
Stock of cotton stores and goods	5,29,528
Cash in banks and good debts (50,000 in Bank of Bombay)...	62,174
Consignments to Calcutta...	19,477
Consignments to China	1,94,754
In hands of Nursey Kessowji & Co. as bankers	1,23,887
Profit and loss	76,941

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From this statement of the affairs of the company at the time of the transfer it is evident that money would have to be raised to meet, not only the old loans amounting to nearly ten lákhs as they fell due month by month, but also the other debts, the most important of which were the debts due on the security of yarn and cloth, which were over two and a quarter lákhs in amount. In addition to these existing liabilities there would be, of course, the necessary monthly disbursements for the purchase of cotton and yarn and for the general working of the mill. The sum necessary on this head was, in round figures, Rs. 1,50,000 *per* month.

The primary source, from which these liabilities could be met, was the cotton cloths and yarn in stock, of which I have already stated the value, and those which were in course of production, which varied from one and a half to two lákhs of rupees worth every month. Unfortunately the country had recently suffered from famine, the usual Mofussil market was almost closed, and the sales that were actually made during the whole existence of this company resulted in no appreciable profit. The next course to adopt was to obtain advances on this stock, for the moment unsaleable. Money had already been raised on it, but the balance-sheet shows the advances to be two lákhs short of the full value. Then there were the consignments to Calcutta and China, on which security money might also be raised. Finally, there was the course of raising new loans to meet the old ones. As a matter of fact, Nursey Kessowji & Co. adopted all the three latter courses. But the directors say that they were only informed of the new loans, and knew nothing of the rest. The course of business pursued by the agent, in his capacity as the working partner of the concern, and by the directors in their capacity as supervisors of the business in the interests of the shareholders, was as follows. The directors held a meeting of the board about once a month. Nursey Kessowji attended the meetings as agent and *ex-officio* director. At these meetings, I find by the minute book (exhibit N), the agent produced "a tabular statement showing the purchase and consumption of cotton, coals, stores, &c., and the production of yarn and cloth,

with the rates of the sales thereof *per* pound, and the general expenditure for the month." The agent also "informed the board that the following loans had been taken," and that "the following loans had been paid."

Now it is a fact of cardinal importance in the present inquiry that whilst this was all the information given to the directors concerning the business of the company, they never sought to obtain any other for themselves. The two directors, who gave evidence, admitted that they made no other inquiry. Kessowji Náik says "that a memorandum of the loans to become due and for money required for the working of the mill was placed before them." He goes on to say: "We believed it to be correct. We did not investigate it. No director did. Nursey also reported what loans had been taken and what paid. I never compared what he reported as paid with what he had previously stated as payable." Then, again, he says: "Against the yarn shipped to China and Calcutta, *hundis* may have been drawn. That was the practice. I did not inquire how much was received on that account." Further on he admits that, by the agreement with the cloth agent, the agent was bound to advance a sum approximate to the value when he removed the cloth from the mill, and he admits that the agent may have held a large stock of cloth on which advances had been made. He then says: "I never looked at the books of the company in all my experience. I never asked a question of the servants of the company. I never inquired what money was in the hands of Nursey Kessowji & Co." Gellábhoy Puddumsey, the other director who gave evidence, made in substance the same admissions. He says as to the information with which the directors were satisfied: "All we know was the loans to be paid off, and the money due to cotton merchants. And tabular statements were also laid before us. Nursey used to tell us what loans he had paid; but I never checked the accuracy of this with his previous statement of what loans had to be paid. We used to ask Nursey if the loans had been paid off, and he said, yes. We had confidence in him, and did not examine the books."

On October 6th, 1878, an event occurred which must have materially affected the fortunes of the company. The house of

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Nicol & Co., for whom they acted as *mukádams*, was brought down by the failure of the Glasgow Bank. A very important source of income to the firm, amounting on an average to over Rs. 30,000 a year, was thus suddenly cut off. In the course of the same month another important event occurred. At a meeting of the board on the 13th of October the question of the 787 unallotted shares was brought forward. It was then for the first time brought to the collective notice of the directors that they had failed to place those shares upon the market, and thus the principal object of the reconstitution of the company, "to enable the business of the company to be carried on with an increased capital," had failed. Whatever the defendants now say it is certain that the concern had reached a crisis in its fortunes. Trade was bad, and their cloth and yarn had no sale in Bombay. The fall of a colossal house had cut off a large and steady source of income to the company, whilst it had shaken the credit of almost every firm in Bombay. The anticipated increase in capital by the sale of the 787 shares, for which the new company had been formed, had not been obtained. These facts confirm the evidence of Mr. Premchund Roychund, who was their broker, and Mr. Fraser, who was their banker—both men most competent to speak on such a subject, and who both said that the credit of the company was failing from the time of its foundation, and gradually worsened down to its failure. It is impossible, also, not to suppose that the defendant directors, all of them men of business and all of them not only directors, but otherwise interested in cotton goods and mill property, were ignorant of the real state of things.

Now to resume my narrative. It was resolved, not at this meeting, but subsequently on the 31st of October, to raise money on these shares by way of mortgage, and they were placed in the name of Nursey Kessowji, in order that he might effectuate that object. As a matter of fact, Nursey in the course of the following month did raise large sums on the shares, which he used for his own purposes. But the directors say they never became aware of the pledges or of the misappropriation until after the failure of the firm, and they admit that they made no inquiries. In December the Bank of Bombay asked for a statement of

the company's affairs, and on the 12th of December the directors, including Nursey, presented a statement with the following note annexed and signed by them all :—"We have examined this account, and we find that it contains a true and exact statement of the position of the company." The two defendant directors who gave evidence now tell us that they made no investigation at all, but took the statement blindfold from Nursey. It represents as part of the capital of the company the sum of Rs. 8,40,000, whilst as a matter of fact that sum, which had been raised by the company to meet its obligations, had been applied by Nursey Kessowji & Co. to their own purposes. Kessowji Náik tells us that, in the days following the 12th of December, he learnt from the mill manager, Bápuji, that the statement was incorrect; and that he informed the bank of its incorrectness. Consequently on the 23rd the bank demanded another statement, and one was given them on the 25th, which represented the Rs. 8,40,000 no longer as part of the available capital of the company, but as a mere debt due from Nursey Kessowji & Co. The stoppage of the New Fleming Company's mill and the failure of its managers, Nursey Kessowji & Co., followed immediately. And subsequent investigation proved that Nursey Kessowji & Co. had increased their debt to the mill from Rs. 1,23,000, the sum due on the 31st of July at the time of the transfer, to Rs. 8,80,000, and had also misappropriated at least Rs. 2,14,000 which they had raised on the 787 unallotted shares.

I have now described, in order of date, the transactions out of which this suit has arisen. I will next lay down the law which is applicable to the case.

The first legal point to be settled as regards the directors is, whether they are trustees or mere agents. All the authorities beginning with Lord Hardwicke a hundred years ago, (2 Atkins, 400), who says that the directors in accepting their trust are within the case of common trustees, down to Bacon, V. C., a few months ago (*London Financial Association* v. *Kelk*[1]), who says "they are not improperly called trustees," agree in assigning them the former position. The question was fully discussed in *Flitcroft's Case*[2]. Bacon, V. C., there says: "They have interests of their

(1) 26 Ch. Div. at p. 143. (2) 21 Ch. Div., 519.

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own, but they are trustees of the money which may be collected by subscriptions and of all the property that may be acquired." Jessel, M. R., says in the same case on appeal, "they are *quasi* trustees for the company." Cotton, L. J., says: "The directors are in the position of trustees." In another case Jessel, M. R., calls them "commercial trustees"—*Smith* v. *Anderson*[1]. Lord Romilly says (L. R. Eq., p. 11): "Directors are responsible as trustees for the employment of funds. In section 88 of the Indian Trusts Act No. II of 1882 directors are placed in a list of persons bound in a fiduciary character to protect the interests of others. And the Specific Relief Act I of 1877 in its interpretation clause, (section 3), says: "Trustee includes every person holding expressly, by implication, or constructively, a fiduciary character." My conclusion is that, (*a*) although the directors are not trustees in every sense of the term, they stand in a fiduciary relation towards their shareholders with respect to the funds and the business placed in their charge. (*b*) It follows that they are liable to be sued for a breach of trust, in case they have not dealt with the property and watched over the business as carefully as a man of ordinary prudence would deal with such property and watch over such business if they were his own.

The question of liability, therefore, in this case may be put in this way. Did the defendant directors as commercial men, managing a trading company, in conjunction with the agent, for the benefit of themselves and all the other shareholders in it, use fair and reasonable diligence in the management of the company's affairs? In deciding such a question the Court has to hold the balance fairly, in order to avoid alternative dangers. On the one hand the interests of shareholders and of creditors must be safeguarded against negligence and misconduct. On the other hand, the duties of directors must not be made so onerous as to cause every honest and prudent man shrink from accepting such a post. If directors were to be made pecuniarily liable for every slip and error, all prudent men would refuse to act, and companies would be at the mercy of fools or rogues. In laying down any general rule for India as to the duties which ought properly

(1) 15 Ch. Div. at p. 264.

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to be imposed on the directors of joint-stock companies, which are an institution of purely English origin, we should, I think, be guided by a consideration of English commercial rules and by the current of English decisions so far as they can be suitably applied to a people whose trade is of comparatively recent growth. But the importance of association in commercial matters is now fully realized by the natives of India, and the advantages of a limited liability are not less recognized. I find from the "*Times of India Calendar*" that in the island of Bombay there are eleven joint-stock banks, forty mill companies, and over fifty other large trading concerns of all kinds conducted on the limited liability principle, with directors, instead of partners, to supervise the management. In the interests of the public, therefore, whether shareholders or creditors, it is necessary to lay down rules to ensure as equitable a management of a company's concerns, from those who are entrusted with its direction, as can now be obtained from the members of an ordinary partnership.

It was argued that the pecuniary liability of directors ought not to extend to mere consequences of negligence where they have not themselves benefited improperly. I cannot accept this contention so broadly stated. A man, of course, is not forced to place himself in a fiduciary position. But if he does undertake the affairs of others, he must exercise ordinary prudence and vigilance. No doubt the directors were not, in the present case, bound to transact personally the daily affairs of the company. By the statutes of the concern there was a special agent on whom devolved that duty; but his existence did not relieve them from all responsibility. They were not mere ministerial officers placed there to confirm the agent's acts. It is an established rule, that trustees cannot delegate their office, and, if they do thus divest themselves of their trust, they are held liable for any breach of trust committed by the person to whom the office has been entrusted. "Trustees", says Lord Langdale, (*Turner* v. *Corney*[1]), "who take on themselves the management of property for the benefit of others, have no right to shift their duties on other persons, and, if they employ an

(1) 5 Beav., 517.

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agent, they remain subject to responsibility towards their '*cestui que trust*' for whom they have undertaken the duty." There are, of course, exceptions to this general rule, as, for instance, when the employment of an intermediary party, such as a shareholder, is absolutely necessary, (*Ex parte Belchin*[1]; *Speight* v. *Gaunt*[2]). But that exception does not apply in the present case, where the directors had a distinct duty imposed upon them to watch over the business of the company in conjunction with the agent. The articles of association say "the business of the company shall be managed by the board (of directors) with the assistance of the agent."

Marzetti's Case[3] is on all fours with the present case. There, a director of a company was present, and voted at a meeting of directors, where a payment was sanctioned for preliminary expenses. He made no inquiry as to what the payment was for. It was, in fact, for expenses incurred by fraudulently raising the price of company's shares in the market. The director was held liable to repay the amount so paid, as, although a director's liability is not governed by the strict rules applied in the case of trustees, he must show reasonable diligence. The Lords Justices in this case confirmed Sir George Jessel, and held that a director, even though he be acquitted of any thing like dishonesty, still he must be held liable, if he fails to show reasonable diligence in calling for accounts and explanation. *Brown's Case*[4] was cited with approval where similar doctrine was laid down by James, L. J.

If, instead of performing their duty and showing reasonable diligence, the defendants delegated all the control to the agent, and so enabled him to misapply the company's money, they must, on the authority of the rule laid down by Lord Langdale, be held liable for that misapplication. I have now dealt with the law on this point.

The next question of law is, whether any, and, if any, what, errors of directors can be excused by the acquiescence of the shareholders. I do not think this point so important as the last in the special circumstances of the present case. But the ques-

(1) Amb., 212.
(2) 9 App. Cas., 1.
(3) 28 W. R., 541.
(4) L. R., 8 Eq., 381.

tion is discussed at great length in *Ashbury Carriage Company* v. *Riche*[1]. A distinction was drawn between acts *ultra vires*, not only of the directors of the company, but of the company itself, and acts which are *extra vires* the directors, but *intra vires* the company. The first cannot be ratified, because they are beyond the powers given by law, either as being against public policy, or prohibited by statute, or because their admission would be unjust to the outside public, or because they are inconsistent with, or foreign to, the objects expressed in the memorandum of association. The second class applies to cases where the directors have gone beyond the powers entrusted to them; but still the acts are not beyond the objects of the memorandum of association, and may be validated by the sanction of the company. This second class is capable of ratification, and I think the nomination of Nursey Kessowji & Co. as bankers would come under that head. But there must be distinct proof of ratification in accordance with the formalities laid down by the statutes of the company, and a mere presumption of the assent of each shareholder will not be sufficient. Now in the present case the defendants have not even established a presumption. The shareholders of the new company never once met during its existence. It cannot be truly said that the new company was virtually the old company under a new name. Not only were the existing shares changed into shares of a small amount, but 787 new shares were created. The acquiescence of the old company cannot, therefore, be taken to extend to its successor. No doubt at the commencement the shareholders were the same. But the list was subject to daily change by the sale of shares. There is, therefore, no proof of acquiescence, and this defence may be at once rejected.

I next come to the question of law as to the survivorship to his sons of the liabilities of Sákerchand Nagerdás, a director who is now deceased.

The rule of common law on this point was laid down by Lord Mansfield (Cowp., 376): "Where property is acquired which benefits the testator, then an action for the property shall survive

(1) 7 H. L., 653.

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against the executor." But the Courts of Equity have extended this liability to the representatives of a person who stood in a fiduciary position, even where the estate has not been benefited by the breach of trust—*Walsham* v. *Staunton*(1). It was urged on behalf of Sákerchand Nagerdás that his liability, if any, did not survive his death as a charge on his assets, because it was, at the most, a mere personal default productive of no benefit to his estate. Two well-known cases were cited in support of this contention—*Overend, Gurney & Co.* v. *Gurney*(2), and *Peek* v. *Gurney*(3). But neither of those cases are on all fours with the present case. In the first case Lord Hatherley, C., in his judgment, says that he would have decided differently if the charge had been one of a breach of trust in the disposal of money actually entrusted to the care of the defendants. In the second case Lord Chelmsford, in his judgment, expressly stated that the case before him was not one of breach of trust, but of inducing people to subscribe by deceit and misrepresentation. The present case is one distinctly of breach of trust; and the English law is clear on that point. It is laid down by Sir W. Grant in *Montford* v. *Cadogan*(4), where he says: "A question was raised by Cadogan's executors, whether, as this was a mere personal default productive of no benefit to his estate, his assets are liable to make compensation;" but in *Scurfield* v. *Homes*(5) the trustee's estate had derived no benefit from the breach of trust, and in *Adam* v. *Shaw*(6) Lord Redesdale says: "It has been the constant habit of Courts of Equity to charge persons in the character of trustees with the consequence of a breach of trust, and to charge their representatives also, whether they derive benefit from the breach of trust or not." I have already said that misfeasance of a director constitutes a breach of trust. It is more than mere negligence, which consists in the omission to do something which a reasonable man would do, or the doing something which a reasonable man would not do. Negligence depends upon the public duty which is incumbent upon every one to exercise due care in his daily life; but a breach of trust depends upon the

(1) 1 D. J. & S., 678.
(2) L. R., 4 Ch. Ap., 701.
(3) 6 H. L., 393.
(4) 17 Ves., 489.
(5) 3 Bro. C. C., 90.
(6) 1 Sch. & Lef., 243.

neglect of some special duty undertaken in regard to some specified person or body of persons. In the former case the liability dies with the person; in the latter it follows his estate after his death.

Then comes the further question, whether, although the liability survives, the term of liability is not governed by rules laid down for the limitation of suits. The English rule as regards the liability of trustees is now laid down by the Judicature Act, 1873, section 25, sub-section 2: "No claims of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitation." But the law of limitation in India is placed on a special statutory footing, and suits are governed solely by Act XV of 1877. Unless the present suit falls within the exemption of section 10, it is liable to become barred by some one or other of the articles of the second schedule of the Act. To claim the benefit of section 10, which deals with suits against a trustee or his representatives, the trustee must be "a person in whom property has become vested in trust for a specific purpose," and the suit must be for the purpose "of following the trust property in his hands." In the present case no specific property, save the unallotted shares, came into the hands of the directors. No doubt they were entrusted with the general supervision of the affairs of the company, but the actual moneys never came into their hands at all. By the articles of association all moneys over Rs. 5,000 were to be paid to the company's bankers, and money below that amount was to be in the hands of the agent. The case, beyond the unallotted shares, is one of gross negligence in the performance of fiduciary duties, not one of misapplication of particular sums. It does not, therefore, come under section 10.

As regards the unallotted shares, if the directors committed a breach of their trust by entrusting them to the agent,—that is to say, if he had been an unlawful recipient of them,—I think the case might perhaps come under section 10. But a careful consideration of the statutes of the company has led me to the opinion already arrived at in a former suit by Bayley, J.—to wit, that the directors had the power to entrust the shares to the agent:

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Purmánundáss Jivandáss v. *H. R. Cormack*[1]. The liability arises solely from the directors' want of vigilance in not seeing to the agent's fulfilment of his duty in regard to the shares. That, again, is a charge of negligence, and not one of the misapplication of special funds. These shares cannot, therefore, any more than the other sums lost to the company, be held to be trust property which can be followed as being in the hands of the trustees in the sense of section 10 of the Limitation Act.

We must, therefore, leave section 10 of the Act, and consider article 98 of the second schedule. That article says, that the general estate of the trustee is liable for three years from his death to make good any loss occasioned by a breach of trust. It was argued that this section would cover any loss occasioned by a trustee. I cannot yield to that argument. It raises a contradiction between this section and the section in the body of the Act, which must be considered the best interpreter of the intention of the Legislature. I think the two sections must be read together. When so read it is evident that the word "loss" in section 98 must be read as referring to loss of the "specific property" mentioned in section 10; and the meaning of section 98 is that, in case the specific property is irrecoverable, then the value can be recovered out of the "general estate" for the period of three years after the death of the trustee. This view of the Indian law of limitation, *viz.*, that it only makes special provision for trusts of specific property, is supported by a reference to the previous Act, (1859), where all the trustee provisions are placed in one section, instead of being separated, as they are in the present Act, into section 10 of the Act and section 98 of the schedule; and it is, consequently, more obvious that the latter is intended to be subordinated to the former. "No suit against a trustee in his life-time, and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time; but no suit to make good the loss, occasioned by a breach of trust, out of the general estate of a deceased trustee shall be maintained in any of the said Courts,

(1) I. L. R., 6 Bom., 326.

unless the same is instituted within the proper period of limitation, according to the last preceding section (*i.e.* three years), to be computed from the decease of such trustee: provided, that nothing herein contained shall prevent a co-trustee from enforcing against the estate of a deceased trustee any claim for contribution, if he shall institute a suit for that purpose within six years after such right of contribution has arisen."

The claim, therefore, against the directors not being a claim for any specific property still in the hands of them or their representatives, is not covered by section 10 and section 98 of the Limitation Act. And, I think, it is liable to be barred by the ordinary period of limitation of three years.

This introduces a further question, which applies not only to Sákerchand's sons, but equally to all the defendants. The main claim against the defendants is certainly not barred. But the demand for the unallotted shares was only made by an amendment to the plaint on the 25th of April, 1883, whilst the original claim was made on the 29th of April, 1879. The former date would admit the plea of limitation if the unallotted shares had been made the subject of a separate suit. The question to be considered, therefore, is, from what time the limitation should count? The general rule is to be found in section 4 of the Limitation Act, XV of 1877, which fixes, as the time from which the limitation should count, the date of the institution of the suit. The section also lays down the rule, that a suit is instituted when the plaint is presented to the proper officer. The only express restriction placed upon this general rule is under section 22, which says that when a new party is added, or substituted, the time of limitation, so far as he is concerned, should date from the time of his introduction. The question here is, whether the date of the claim for the unallotted shares relates back to the institution of the suit or not? No doubt some of the amendments, which are introduced under the present wide powers of amendment, may be tantamount to fresh causes of action. In the case of such proposed amendments, when the new cause of action is barred by lapse of time, it must be remembered that the Court in its discretion can refuse to allow an amendment; and I think that bar would be a fair ground of

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agreement against the admission of the amendment. *Staples* v. *Holdsworth*[1] shows that under the old rules in England if this objection is raised at the time the amendment is asked for, and the amendment is shown to constitute a new cause of action, which as an independent suit would be barred, the amendment would be refused. But if the amendment is once admitted, I think it follows, from a fair interpretation of the Indian Act, that limitation must only count from the institution of the suit. Moreover, in the present case the negligence, in respect of the unallotted shares, is too much *in pari materia* with the rest of the claim to be considered a distinct cause of action, such as was the subject of the amendment in the case cited by Mr. Lang, where a claim in an amendment for certain shares was held to be barred in a suit for the administration of a trust. It may be there is an omission in the Act; but that is a matter for the Legislature, and not for this Court. My present interpretation of the law is supported by a direct decision of a Division Court at Allahabad (*Rám Lál* v. *Harrison*[2]), and by the following *dictum* of the present Chief Justice:—"When a party is added to the record, no doubt the suit, so far as he is concerned, is deemed to have been instituted at the time when he is so added. But though, if this plaint were amended, there might nominally be a new suit, yet virtually it would be the same. It would still be, in fact, the suit of the plaintiff. I should be of opinion that no new plaintiff had been introduced within the meaning of the Limitation Act"—*Ganpat Pándurang* v. *Adarji Dádábhái*[3]. I think this interpretation receives indirect sanction from the Privy Council in *Mohummed Zahoor Alikhán* v. *Mussamut Thakooranee*[4], where they allowed the plaintiff to amend his suit so as to renew his claim as against one of his defendants alone, the amendment being expressly allowed on the ground that a new suit would be barred. My decision on this point also follows the rule laid down by the late Chief Justice, that "an Act of Limitation, being restrictive of the ordinary right to take legal proceedings, must, where its language is ambiguous, be construed strictly—*i. e.*, in favour of the right to proceed"—*Umiáshankar Lakhmirám* v. *Chhotálál*

(1) 6 Scott, 606.
(2) I. L. R., 2 All., 832.
(3) I. L. R., 3 Bom., at pp. 320, 321.
(4) 11 Moo. I. A., 468.

Vajerám[1]. I am of opinion, therefore, that the whole claim survives as against the sons of Sákerchand, and is not barred as against any of the defendants.

Two of the defendants—Kessowji Náik and the representatives of Sákerchand—also raised the defence of set-off.

The two defendants had both become guarantors of the debts of the four mills, either by backing bills or by signing general guarantees. In consequence of these engagements Kessowji Náik's property had been seized by the Bank of Bombay to the amount of five and a half lákhs of rupees, and he has also been condemned to pay other sums to other persons. Sákerchand has paid to the same bank over two lákhs of rupees in the same way. Thus they both are in the position of sureties who have paid money for their principals, and they have, subject to the statute of limitation, a right of action against the principals accordingly. Each, if they are not barred by time, will be able to claim, as creditors of the company, the amount they have been obliged to pay as its sureties. But, as regards Sákerchand, he paid over his money in 1880, and the set-off was not claimed by him until 1885. If it has always been a liquidated claim, in the sense required for a set-off, it would be barred. But as regards both claims it is doubtful whether they are liquidated claims. The guarantees were given partly by bills backed by them for the mill, partly by securities for moneys advanced to Nursey Kessowji & Co. to all four mills. There has, as yet, been no allocation, in Kessowji Náik's case, of the aggregate sums to the various mills. In Sákerchand's case, Rs. 78,000 (odd) have been taken from the plaintiffs' mill, but no evidence was given of the date it was so appropriated. All the evidence as to time is that the whole sum paid by Sákerchand was surrendered in 1880. I think, therefore, that in neither case are the amounts sought to be set off sufficiently "ascertained sums of money legally recoverable by the defendants from the plaintiffs" to come within the definition of a set-off in section 111 of our Code. But there is another and equally grave objection. The present suit is on the joint and several liability of the defendants as directors. But the money

(1) I. L. R., 1 Bom, 19.

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which will be found due from the company to Kessowji Náik on these sums now claimed to be set off will be due to him alone, and that due to Sákerchand will be due to him alone. Now it is a well-settled rule of law, that a separate debt cannot be set off against a joint and several claim. "The general rule in equity as well as in law is, that joint and separate debts cannot be set off against each other", (Story's Eq. Jurisp., Sec. 1437 *a*). This rule is adopted by the Indian law in section 111, sub-section (*g*) of the Code of Civil Procedure, and is illustrated by the following hypothetical case:—"A sues B and C for 1,000 rupees. C cannot set off a debt due to him by A alone." The question has been more than once decided in company cases, and the two following rules have been laid down :—(*a*) A shareholder cannot set off debt due to him from the company against calls in a voluntary or compulsory winding up: see *In re Whitehouse & Co.*[1]; *Grisell's Case*[2]; and (*b*) that the directors cannot set off any money due from the company to them against the amounts which they were ordered to replace—*Flitcroft's Case*[3].

I have now disposed of the legal questions, and will deal with the evidence on the main question, the liability of the directors. That liability depends on a chain of facts which must be carefully examined.

In the first place it is stated that the firm of Nursey Kessowji & Co. were insolvent at the time of their appointment as bankers of the new company, and it is further alleged that they had been in this state of insolvency for some years previously. In proof of this the evidence was given of an accountant, Frámji, who had examined their books with great care, and had prepared a synopsis of their contents with balance-sheets for each year. This evidence was admissible under section 65, sub-section (*g*), of the Evidence Act, which admits evidence of the general result of numerous accounts or documents by any person who has examined them and who is skilled in the examination of such documents. This witness was cross-examined, but no material inaccuracy in his statements was proved. Another specially qualified witness was called on the other side, but he established no good con-

(1) 9 Ch. Div., 595. (2) L. R., 1 Ch. Div., 528.

(3) L. R., 21 Ch. Div., 519.

tradictory case, and certainly had not gone into the matter with the same exhaustive care. I think I am bound to give credence to Frámji's evidence upon the contents of the books of Nursey Kessowji & Co., and I also feel bound to rely upon the second accountant, Pestonji, called by the plaintiffs, who had examined the plaintiffs' company's books with equally elaborate care. Now let us see the result of this testimony. In the first place, balance-sheets, (exhibit G), of the firm of Nursey Kessowji & Co. were produced for the years 1927-1934, (inclusive), which put beyond all doubt their long-continued insolvent condition. Their indebtedness beyond their assets varied in the different years from two and a half to nine lákhs, but in all the seven years they had never once a credit balance. Their final indebtedness was over fifty lákhs, and up to this date they have only paid one dividend of one per cent. I hold the fact, therefore, to be proved that the firm of Nursey Kessowji & Co. had long been in an insolvent condition at the time they were named bankers of the company.

This is the first link in the chain. The next is to be found in the statement of the same accountant Frámji, that this state of insolvency could have been easily ascertained, and in a very short time, by any one who took the trouble to examine the profit and loss account of the firm. This statement was contested by the defendant's witness, the chief *mehtá*, but it was not disproved to my satisfaction. He said that the books of the firm had not been made up; that it would take some time to prepare a balance-sheet for any single year; and that it could not be made up at all until all the account sales had been returned. That is all perfectly true; but, although an accurate balance-sheet would have been a long and difficult business, I cannot think it was very difficult to learn approximately the solvent or insolvent condition of a firm whose books were admittedly well kept and in perfect order. The *mehtá* was not asked the special question, "how long would it take to ascertain whether the firm was in a sound financial condition?" The plaintiffs' accountant should answer this question, and I believe his answer was the true one. This established the second link in the chain, which is that the directors might have ascertained the real state of things if they had made reasonable inquiry.

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The next matter to examine is, whether the defendants, directors, or any of them, did actually know the real state of Nursey Kessowji & Co.'s affairs. It is necessary here to separate Mr. Kessowji Náik from his colleagues, and to ascertain his real connection with his son since his own retirement from the firm in 1865. He had been so often engaged in litigation about these mills, and he has been so frequently interrogated upon this particular matter, that the plaintiffs only cross-examined him very generally on this occasion as to his relations with his son, and relied upon his evidence on two former occasions as admissions made under oath and tested by cross-examination. The result of all these examinations, in my opinion, decides beyond the shadow of a doubt that Mr. Kessowji Náik was fully acquainted with the details of his son's business. That business was transferred from the father to the son in 1865. There were some other partners, but the son was the only responsible person; the evidence of one of them shows that he and the rest were really servants paid by a share in the profits without any real authority or responsibility. The whole capital of the firm came from Kessowji Náik. On his retirement he gave Nursey more than five lákhs, whilst he left all the rest of his property—ten lákhs in cash and twenty lákhs in immoveables—standing to his credit in the firm. The firm did a colossal business in cotton and opium, and latterly in shares. They had two offices: one in the Fort and the other at Mándvi Bandar. Kessowji Náik sat in the office at the Fort for a couple of hours every afternoon, and admitted that he gave advice concerning the transactions of the firm. He also admitted that the firm did a large business in opium, that he advised them in that business, and that he also assisted them in *suttá* share transactions. The *munim* of one opium house said that he always looked upon Kessowji Náik as the real head of the firm, and gave that as the reason why he trusted the firm up to the moment of their failure. He "occasionally saw Nursey," he said, "but always Kessowji" in their transactions, which amounted one year to fifty and sixty lákhs of rupees. All the partners used to dine with Kessowji on Malabár Hill every Sunday. He drew what he liked from the firm, and his carriage expenses were defrayed by it. The China

firm corresponded with Kessowji about the business, and in the seven years previous to the failure out of forty-four lákhs (of dollars) worth of bills, thirty-nine lákhs were drawn in favour of Kessowji Náik and endorsed by him. In the same period other bills were drawn and negotiated to the extent of sixty lákhs of rupees, of which thirty-two lákhs were drawn by Kessowji Náik and endorsed by him. He also corresponded on business matters with the Calcutta branch, and admitted that he had sent them numerous telegrams. In 1871 he gave a guarantee to the Bank of Bombay of three lákhs on behalf of the firm, and the document recites, that Kessowji Náik had often asked the bank to advance to, and incur liabilities for, the firm. He signed similar guarantees in subsequent years, and for the last three years gave a general guarantee to the bank for the fulfilment by the firm of all contracts and engagements.

These facts are sufficient in themselves to establish such intimate relations between Kessowji Náik and the firm as to lead to the irresistible inference of his knowledge of the real state of their affairs. It is impossible to suppose that so astute a man of business would have left the whole of an enormous fortune in the hands of the firm without availing himself of every opportunity he had of ascertaining its true financial position. His own admissions in the Insolvency Court before Kemball, J., in April, 1879, carry the case against him still farther. He says as regards the Alexandra and Royal Mills (the Royal afterwards became the Fleming Mill): "Nursey Kessowji was secretary of both those mills. It was in this year (1928) that these mills came into our hands. I mean my mills. The accounts were kept by Nursey Kessowji for me. At first he credited it to me, and then I got it credited to Nursey Kessowji himself afterwards. The commission did not belong to Nursey Kessowji himself; it was by my favour that I gave over the commission. I was the master, and did all the business and used his name. * * * Really I was the secretary, and the commission belonged to me. Nursey Kessowji's name was only used." In another part of the same examination, he said, as regards his large opium dealings in partnership with Dhurrumsey Punjábhoy, which were

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entered as the transactions of Nursey Kessowji & Co. in the firm's books, Nursey Kessowji & Co. had "no interest in the partnership; it was mine and Dhurrumsey Punjábhoy's. They got no commission or reward for keeping the accounts of the partnership in the books. They used to do my business, and I used to do their business." He denies that he had any interest in the profit or loss of his son's firm, yet he admits that when Dossá Kirpál in 1933 charged him as a partner he settled the case by a payment of Rs. 15,000. At the time of Nicol's failure (October 6th, 1878) seven and a quarter lákhs were due from him to the firm; but at the Diváli (31st October, 1878, the native settling day for the year) by means of transfer entries that heavy debit was transformed into a credit, so that Rs. 26,000 were due to him when the firm suspended payment. He said he made these transfers because he was sick, and could not attend to business, but he could not point out any such transfers or adjustments in previous years. The present Chief Justice has in a previous case refused to admit some of these transfers as genuine. Mr. Lang argued that Kessowji Náik's *bonâ-fide* belief in the solvency of Nursey Kessowji & Co. must be inferred from the steady pecuniary support he gave them up to the last, and from his offer to surrender all his property to the creditors if they would relinquish all their claims. This conduct, however, is open to another obvious interpretation, namely, that the son and the firm were merely dummies, and that the fall of the house meant the fall of Kessowji Náik himself. It is not necessary for me, however, in the present case to say whether Kessowji Náik was or was not the real head of his son's firm. It is sufficient for my purpose that there is overwhelming evidence to show that he was well acquainted with the real state of affairs. I hold, therefore, as regards Kessowji Náik, that he knew the firm, named as bankers to the new company, to be in an insolvent condition at the time of their appointment. The nomination, therefore, as far as he was concerned, was an improper one; the trust reposed in them was quite unjustifiable, and he must be held liable for its consequences.

I now pass to the question of the liability of the other directors, which stands on a different footing. Both Gellábhoy Pud-

dumsey and Sákerchand Nagerdás had, however, been in intimate relations with Nursey Kessowji & Co. for many years. Gellábhoy was a member of the firm of Kusháll Hurridás & Co., which had large dealings in cotton with the four mills. Sákerchand was a partner in the firm of Vádilál Sákerchand, who were the agents for the sale of cotton cloths to the mills. Thus they were both interested in the prosperity of Nursey Kessowji & Co. as the controlling power of the mills, and although not to the same extent as Kessowji, they did to some degree, by their appointment of Nursey Kessowji & Co. as the bankers, place themselves in a position where their interest and their duty might be in conflict, and they would be tempted to overlook misconduct. There is also no doubt that the firm of Vádilál Sákerchand were allowed to break the conditions of their agreement, which obliged them to pay the approximate value of the cloth before they removed it from the mill. There is also no doubt that they were a party to transfer entries by means of which Nursey Kessowji was enabled to conceal from the old company the real amount of his firm's indebtedness to them—as, for instance, in their balance-sheet for 1877.

Still the evidence does not prove on their part the same knowledge as Kessowji Náik had of the firm's affairs, nor has the allegation in the plaint been proved that they were so much under the influence of Kessowji Náik as to have done all that they did, not as free agents, but as his creatures. I must, therefore, consider the question of their liability separately from that of Kessowji Náik. Their defence may be described as follows.

Nursey Kessowji & Co. had been the bankers and agents of the mill to the knowledge and tacit acquiescence of the shareholders since the present company's predecessor had come into existence. At the date of the transfer of the business to the present company the commercial reputation of Nursey Kessowji & Co. was so high that it never occurred to the defendants to withdraw the confidence that had been reposed in them. They left the whole management in their hands, because that had been the course of business for many years. Nothing came to their knowledge which made it their duty to change the system in favour of an efficient supervision. That is their case.

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I have already shown that the directors might have ascertained by reasonable inquiry the financial condition of Nursey Kessowji & Co. I will now consider what they did do.

It must be remembered, in the first place, that they all attended every meeting of the board. Whatever was done by the board was done by each and all. There is no question here of any individual director who from inclination or from circumstances took no active part and attended no meetings.

Now, almost their first official act, as a board of directors, was the appointment of Nursey Kessowji & Co. as the bankers of their company. Was that a right and proper proceeding, even if they believed the firm to be solvent? Although the new company by its memorandum of association continued and confirmed Nursey Kessowji as agent, it did not continue him or his firm as its banker. We must, therefore, look to the statutes of the company,—that is to say, the memorandum, articles and agreement combined,—and consider how the banker of the company was to be chosen. This is to be found in article 16 of the agreement, read with article 17 of the articles of association. It is difficult to reconcile the two provisions; but it must be borne in mind that as the agreement is incorporated with, and made a part of, the memorandum of association it is of greater importance than the articles of association. Article 16 of the agreement says that Nursey Kessowji, the agent, "shall deposit with such bank or banker as the directors, for the time being, of the said company may appoint," all moneys due from the agent to the company over the sum of Rs. 5,000; and it goes on to say that such deposits are to be dealt with "as the directors shall appoint". Section 117 of the articles gives the agent power, "for the purposes of the transaction and management of the affairs and business of the company," to appoint "such managers, bankers", &c., as he shall think proper. The directors evidently did not think this applied to the appointment of the permanent bankers of the company, as they made that appointment themselves, and did not leave it to the agent. I think they were right, under article 17 of the agreement, in assuming this right to appoint.

The next question is, were they right in the particular appointment made? No doubt, it was in the contemplation of the ori-

ginal framers of these statutes that the banking business of the company should be confided to *bonâ-fide* bankers. "The moneys were to be deposited with such bank or banks" is the phrase used in one place, and in the other place the agent is to appoint "such bank or bankers as he thinks proper." Now it is pretty clear that Nursey Kessowji & Co. were not bankers in the strict sense of the term. The Imperial Dictionary defines a banker to be "one who traffics in money, receives and remits money, negotiates bills of exchange;" and a bank is defined as "an establishment which trades in money, an establishment for the deposit, custody, and issue of money, as also for granting loans, discounting bills, and facilitating the transmission of remittances from one place to another." What constitutes a banker has also been the subject of judicial decision. For instance, "a stock-broker and notary public who largely engaged in trade, who received money from some of his customers, and paid it out again upon their drafts, and occasionally discounted bills, but neither held himself out to the public as a banker, nor appeared to be considered by the public as such, and the entries in his books of banking transactions were mixed up with those appertaining to his other callings, was held not to be a banker in the strictly legal sense of the term—*Stafford* v. *Henry*[1]." Now Nursey Kessowji & Co. did not buy and sell bills as native shroffs do. They only dealt in the bills of their own branch firms. They did not receive money on deposit to any great extent. They did not advance money on security. They did not, in short, traffic in money as their principal business. They were a large mercantile house which had been carrying on, for years before the time of appointment, a very speculative business in cotton and opium where great risk was involved, and whose speculations the two previous years had extended to large *suttá* operations in the share market. Although they did do a very small amount of banking business I do not think they could be properly chosen as bankers in the sense required by the statutes of the company; and the appointment was the more improper, as the head of the firm was the son of the principal director of the company. This point was incidentally dealt with

(1) 12 Ir. Eq. Rep., 400.

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by Mr. Justice Bayley in a very carefully considered judgment reported in *Purmánundáss Jivandáss* v. *H. R. Cormack*(1), where he says: "This appointment, in August 1878, of Nursey Kessowji & Co. as bankers of the company, Nursey Kessowji & Co., being a trading firm, carrying on very large and hazardous speculations, as was shown by their schedule filed in the Insolvency Court on the 8th of February, 1879, and not a firm of bankers in the ordinary sense of the word—seems to have been a very questionable act on the part of the directors, and looks much like a violation of clause 16 of the agreement incorporated in the memorandum * * * * * *. Clause 117 of the articles of association, giving power to Nursey Kessowji to appoint bankers to the company, would not, I think, authorize the appointment of his own firm to act as bankers." Even if their error, though improper and probably *ultra vires*, was not sufficient alone to throw upon the directors any pecuniary liability, it certainly cast upon them a special duty to be vigilant in their supervision.

Let us now consider if in all subsequent dealings as directors they exercised proper prudence and vigilance.

We must first consider the powers and functions of the directors as set forth in the statutes of the company. The articles say: "The business of the company shall be managed by the board with the assistance of the agent." It is then laid down that they are to meet for the despatch of business, and they are enabled to delegate any of their powers to committees formed out of their own body. They have also express power to raise money on the property of the company, to buy the raw commodities required, to sell the manufactured goods produced, to invest the funds of the company as they think desirable, and generally to do every thing that is conducive to the attainment of the objects of the company, (see articles 101, 103 and 104, and also memorandum of association). All this work was, of course, to be done with the assistance of the agent, who, in his turn, with the aid of his manager, was to conduct the daily business of the company. Such being the division of labour it is quite clear that the directors could not delegate the whole control to

(1) I. L. R., 6 Bom., 343.

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the agent. By the articles of association there was to be no general meeting of shareholders till the 31st of October, 1879. Thus for fifteen months these directors were to act for the general body before they rendered an account of their stewardship. They certainly were not appointed to be mere dummies during those fifteen months; nominally to watch over the interests of the shareholders, but in reality to supply without inquiry the wants of the agent, and sanction blindly all his acts. If they drifted into such a position through their confidence in him, I hold that they failed to perform their duty, and ran the risk of being held liable to any losses caused by the misconduct of the agent, which would not have accrued had they exercised the duties clearly imposed upon them by the articles I have cited. As a matter of fact they practically left every thing in the hands of the agent. Their cardinal duty, in the circumstances of the company, was to see to the application of the money they voted. Yet they never found out for themselves how much money was required; they never considered what was the best form of raising it; and when it was raised they never ascertained whether it had been applied to the purposes to which it was appropriated by the board. If the sums had been small, it might have been argued that it would only hamper the agent to interfere with his discretion. But every one of these loans, which the directors voted so blindly, was in itself, if lost or misapplied, sufficient to wreck a company, whose capital, though large, was all locked up, whose liabilities were heavy and pressing, whose increasing stock of goods was practically unsaleable, and whose credit was steadily falling. As a matter of fact, large sums were being misappropriated, whose misappropriation would have been impossible if the directors had properly performed the duties they had undertaken. Considering the critical state of the affairs of the company I think that they ought to have treated the information that was given them as quite insufficient; and they ought to have insisted upon a monthly statement of the exact financial position, giving the amount in hand, the total amount actually due, the amount falling due in the ensuing month, and the amount paid away during the past month. No such statement was made, and no efficient check placed on the financial management.

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The evidence of the accountant Pestonji shows what would have been revealed if the directors had made these investigations. Exhibit H shows that the real transactions on behalf of the plaintiffs' company, carried on by Nursey Kessowji & Co., did not at all correspond with the statements made by them every month. Exhibit J shows the sums left unpaid by Nursey Kessowji & Co. at the end of each month, whilst exhibits Q and R show how much they retained for their own uses of the amounts placed at their disposal for the mill. Large sums were raised on the security of cloth by bills on consignments, and by bills on goods in China, of which the directors knew nothing. The lákh and a quarter which was in the hands of Nursey Kessowji & Co. at the commencement was not only improperly retained, but it was increased to Rs. 8,80,000 by further fraudulent misappropriation. All this embezzlement was successfully practised, because, as Gellábhoy Puddumsey said, "the directors saw only what was laid before them"; and he added, "the same practice exists in all companies in Bombay." If he spoke the truth, if all directors are mere shams, and irremoveable agents have the whole management of every mill company, it certainly is a very surprising system, and one which in the present case has led to terrible disasters. I think the chain of facts I have set forth leads to the irresistible conclusion that the directors have behaved with most culpable negligence in the performance of their trust. I am of opinion that, having regard to the general rule as to the liability of directors, and to the duties of these directors as set forth in the statutes of their company, the defendant directors are liable to the repayment of the money thus lost to the company.

There is equally strong reason for this liability as regards the 787 unallotted shares. The duty to sell these shares, or to raise money upon them, is vested absolutely in the directors collectively by article 6 of the articles. If they chose to delegate that duty to any one of their number, the rest were bound to see to its due performance. This obligation seems to have been present in the minds of the board when they added to the resolution of the 31st of October the instruction to Nursey Kessowji to report to the board as soon as he had succeeded in placing any of the shares

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It is clearly proved that Nursey Kessowji did speedily mortgage a large portion of the shares without informing his brother directors, and the firm is now an admitted debtor of the company in the sum of Rs. 2,14,000 on that account. Although the transactions occurred in the month of November, it does not appear that Nursey made any report at all about them. When we consider that the raising of this particular money was the sole object of the creation of the new company, this neglect of the directors is totally inexcusable. In this case, as in the general control, they delegated their collective duty to Nursey, and never saw to his performance of it. They did not thus divest themselves of their trust and responsibility. If the agent proved unfaithful, the liability was theirs, just as much as if they themselves had been unfaithful. The two directors, who gave evidence, did say that they asked Nursey once or twice about these shares in conversation. If they did so, which I doubt, it is quite insufficient under the circumstances. I think this money also was lost through their gross negligence.

Now, to sum up the effect of my decision. The amount of loss caused by the gross negligence of the directors must, of course, be the measure of their liability. I do not include the amount of Rs. 1,23,807, that was already in the hands of Nursey Kessowji & Co. when the company was founded. It would have been more prudent if the directors had watched over that sum with greater care. But it stands on a different footing to the sums the directors themselves entrusted to the agent without any proper knowledge whether it was needed, and without any subsequent investigation of a serious character into its disposal. I think the latter conduct amounts to gross negligence; and I hold the defendant directors, with the sons of Sákerchand Nagerdás, to be liable for the amount so lost, which, with the sum lost on the shares, comes to Rs. 9,70,443-9-9, with interest at six per cent. from the date of the failure of Nursey Kessowji & Co. There are gradations in the respective amount of culpability of the defendant directors; but I think all are equally responsible, as all attended the directors' meetings, and all gave the same blind sanction to every act and proposal of the agents.

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I also hold that the estate of Sákerchand Nagerdás is liable, and that the set-off put forward is not admissible under section 111, sub-section *g*.

As regards costs, the Official Assignee, for Nursey Kessowji, set up no defence.

As to the other defendants, they have already sacrificed very large sums to meet their guarantees; and as they have not been proved to have themselves benefited by their negligence, I think it will be sufficient if they pay their own costs. There will be no order, therefore, as to costs.

A decree, therefore, will issue, declaring that the loss of the sum of Rs. 9,70,443 was due to the gross negligence of the defendants Kessowji Náik and Gellábhoy Puddumsey, and the late defendant Sákerchand Nagerdás, and the defendant Nursey Kessowji, now an insolvent, and that they became jointly and severally liable to make good the said loss by refunding to the plaintiffs' company the total amount of the aforesaid sums, with interest thereon, respectively, at the rate of six per cent. *per annum* from the date of the failure of Nursey Kessowji & Co., less such dividends as the plaintiffs' company may have received from the estate of the said Nursey Kessowji & Co.; and as to the estate of the deceased Sákerchand Nagerdás, the liability will only be in a fair course of administration; and as to the estate of the said Nursey Kessowji, only by way of proof under his bankruptcy order for payments of the said sums respectively.

Judgment for the plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Ardesir and Hormasji.*

Attorneys for the defendants.—Messrs. *Little, Smith, Frere, and Nicholson*; and Messrs. *Jefferson, Bháishanker and Dinshá*; and Mr. *J. C. Cámá.*