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have broken some social rule of the caste, and in such a case it is to the caste the plaintiff must go for redress. There is no question of property involved, nor can I see that the defendants have by their alleged acts slandered the plaintiff so as to give him a right to sue for damages. I, therefore, reject the plaint.

Attorney for the plaintiff:—Mr. *J. C. Cama.*

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ORIGINAL CIVIL.

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

KATHIAWAR TRADING COMPANY, LIMITED, IN LIQUIDATION *(Original Plaintiffs), Appellants v.* VIRCHAND DIPCHAND *(Original Defendant), Respondent.** [15th and 22nd September, 1893.]

Company—Directors of company—Liability of directors for funds of company applied in transactions ultra vires—*Dealing in shares of other companies—Stale demand—Limitation—Limitation Act (XV of* 1877), s. 10.

The plaintiff company was formed in 1864. By its memorandum of association its object was declared to be commission agency and general trading in cotton and also in goods and commodities suited for market in the interior of India. The memorandum contained the following words:—" If found desirable, the company may effect purchases of cotton and produce in Bombay and ship to England and carry on such local trade as may seem profitable." The company went into liquidation in 1867. In April, 1890, the present suit was filed against the defendant, who had been one of the directors of the company, and it was alleged that after the formation of the company the defendant and his co-directors had carried on speculative dealings in shares of other companies and had used the funds of the company for this purpose, which was not warranted by the memorandum of association. The plaintiffs alleged that their dealings, which were duly set forth in their plaint, had resulted in a heavy loss to the company, and they now sought to recover from the defendant the sum of Rs. 3,37,700-13-5. There had been originally five directors of the company, but at the date of suit two of them were dead and two had become insolvent. The plaint was filed in April, 1890.

Held (affirming the decision of Parsons, J.) (1) that the memorandum of association did not justify the directors of the company in dealing in shares of other companies, and that the transactions complained of by the plaintiffs were *ultra vires.*

(2) That the directors were liable to replace the moneys of the company which they had misapplied by applying them to a purpose which was *ultra vires.*

[120] (3) That s. 10 of the Limitation Act (XV of 1877) does not apply to directors of companies, the directors not being persons in whom the property of the company is vested as contemplated by that section.

(4) That in any case the staleness of the demand was a valid defence to the action, the liquidators of the company having had full knowledge of the facts since the company went into liquidation, but no suit was filed until the expiration of twenty-three years.

[R., 18 B. 401 (424).]

SUIT to recover Rs. 3,37,700 from the defendant, who had been a director of the company.

The company was duly registered as a limited company on the 23rd June, 1864, under Act XIX of 1857. Its capital was Rs. 12,50,000 divided into 125 shares of Rs. 10,000 each.

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*Suit No. 187 of 1890.

The company went into liquidation in 1867, and at the date of suit was still in liquidation (see para. 16 of the plaint, *infra*).

The following were the objects of the company as stated in the memorandum of association :—" Commission agency and general trading in cotton and other staple products to be procured, as far as possible, direct from the producers in Kathiawar, Gujarat, Marwar and other parts of the interior of this country; disposing of them either in Bombay or shipping them to England; commission agency and general trading in goods and commodities suited for market in the interior of India, introducing cotton *churkas* in the interior; or erecting factories, establishment and agencies for trading purposes. If found desirable, the company may effect purchases of cotton and produce in Bombay and ship to England and carry on such local trade as may seem profitable."

The plaint after stating the above facts set forth that the directors of the company were Virchand Dipchand (the defendant), Bharmal Parbut, Jugjivandas Hemji, Gopalrao Bulwant and Dowlatchand Hukumchand, who, as such, were entrusted with, and had the management and control of, the funds of the said company.

The plaint then stated that after the formation of the company the said directors speculated with the company's funds in the purchase of shares in other companies and invested and applied large portions of the funds of the company in the purchase of such shares. It set forth, in detail, the various dealings complained [121] of, which resulted in heavy losses to the plaintiff company, and then continued :—

" The plaintiffs say that the said purchases of shares and the application of the funds of the said company in manner aforesaid were wholly unauthorized by the memorandum and articles of association of the said company and were breaches of trust on the part of the said directors. The plaintiffs believe that some of the shares purchased as aforesaid were the shares of one or other of the said directors, and in particular the plaintiffs say that the said shares of the Imperial Banking and Trading Company, Limited, were purchased from the defendant.

" 15. The plaintiffs also say that the said directors in the case of some of the said purchases when they had not moneys of the said company in their hands, sufficient to pay for the same, obtained money for that purpose on the credit of the said company.

" 16. In consequence of the funds of the company having been applied as aforesaid, the said company was unable to meet its liabilities, and it was duly resolved to wind the same up voluntarily, and by an order on the 21st January, 1867, it was ordered that the same winding up should be continued under the supervision of this Court. Pestonji Merwanji Narielwalla, the official liquidator of the said company, having been appointed to that office, by an order dated the 6th day of July, 1886, is now winding up the affairs of the company.

" 18. The plaintiffs submit that under the circumstances aforesaid the defendant is liable to repay to the plaintiffs the said sums aforesaid, amounting in all to Rs. 3,37,700-13-5 and interest thereon at the rate of 9 per cent. per annum from the said 21st January, 1867."

The plaintiff company accordingly claimed to recover the said sum from the defendant. The suit was filed on the 2nd April, 1890.

Of the five directors above mentioned, two (*viz.*, Bharmul Parbut and Dowlatchand Hukumchand) were dead at the date of the suit, and two (*viz.*, Jugjivan Hemji and Gopalrao Bulwant) had become insolvent.

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In his written statement the defendant admitted that the company traded in shares, and alleged that trading in shares was at the time one of the principal trades in Bombay, and seemed to be and was considered to be a profitable trade. He stated that some of the plaintiffs' transactions had resulted in loss and some in profit, and he submitted that the plaintiffs were not entitled to select exclusively those transactions in which there was a loss. He admitted all the transactions set forth in the plaint, which he said appeared in the company's books and were known to the liquidator in the year 1867 when the company went into liquidation. [122] He denied all liability to the plaintiff company, and submitted that the said transactions in shares were not *ultra vires* of the company or of the directors. The concluding clauses of his written statement were as follows:—

"7. Neither the defendant or his co-directors ever concealed or attempted to conceal from any one that the plaintiff company had carried on the said share transactions as part of their business, nor had they any reason to do so, as they believed that such transactions were *intra vires* of the plaintiff company.

"8. This defendant says that this suit, brought twenty-three years after the plaintiff company went into liquidation, is barred by the Limitation Acts in force from time to time during that period."

At the hearing the following issues (*inter alia*) were raised:—

(1) Whether the claim in this suit is barred by the law of limitation?

(2) Whether, apart from the law of limitation, this claim is unsustainable as being a stale demand?

(3) Whether the purchases of shares and the application of the funds of the company stated in the plaint, were unauthorized by the memorandum and articles of the company as alleged?

Lang (Acting Advocate-General) and *Scott*, for plaintiffs.

Macpherson and *Inverarity*, for defendant.

The judgment of the Court (Parsons, J.) was as follows:—

30*th January*, 1893. PARSONS, J.—(After stating the facts and referring to the pleadings his Lordship said):

I will deal with the third issue first. It is contended for the defendant that the words in the third clause of the memorandum of association —"carry on such local trade as may seem profitable"—would include the purchase of the shares in question. I am not, however, able to assent to this contention. Speculative dealing in shares is not trade in the usual sense of the term, and the memorandum itself clearly shows that the trade of the company was to be in cotton and produce only, certainly not in shares. I find the third issue in the affirmative.

The first issue raises the question of limitation, and its decision depends upon whether s. 10 of the Limitation Act (XV of 1877) applies to the case or not. It can do so only if the defendant as a director of this company was a person in whom property had [123] become vested in trust for some specific purpose. The point is not without authority. [In *In re Oxford Benefit Building and Investment Society*(1) Kay, J., says: "It is settled by authorities which I cannot dispute, that(1) directors are *quasi*-trustees of the capital of the company, (2) directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up * * * * and (5) such an act is a

(1) 35 Ch. D. 502 (509).

breach of trust and the remedy is not barred by the statute of limitation."] In *In re Sharpe*; *In re Bennett*; *Masonic and General Life Assurance Company* v. *Sharp* (1), Lindley, L.J., says: "A director of a company is certainly not a mere agent. It is his duty, amongst other things, to protect the company and to enforce its rights even against himself, and the conflict between his interest and his duty when he has misapplied the company's money prevents the statute of limitations from applying to an action brought against him by the company in order to recover such money;" and I take it from Buckley in his work on Companies, pp. 495 to 497 (6th Ed.), that directors are undoubtedly trustees of the powers entrusted to them as between themselves and the shareholders, for the assets of the company are entrusted to them to be applied for certain defined objects, and they are responsible as for a breach of trust if they apply them to other objects. There can, therefore, I think, be no doubt that s. 10 does apply to the present suit; for, as ruled by their Lordships of the Privy Council in *Balwant Rao Bishwant* v. *Purun Mal* (2), the expression "for the purpose of following in his or their hands such property" means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trust in question it may be recovered without any bar of time from the hands of the persons indicated in the section. I find the first issue in the negative.

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The second issue raises the question of staleness of demand. The principle and application of the doctrine of laches is set out most clearly in the judgment of Sir Barnes Peacock in the case of *Lindsay Petroleum Co.* v. *Hurd* (3). In his judgment [124] (p. 239) he says: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." The same doctrine is discussed in the cases of *Erlanger* v. *New Sombrero Phosphate Co.* (4) and *In re Mammoth Copperopolis of Utah* (5).

A consideration of those cases and of the remarks also in the case *In re Sharpe* (1) leads me to the conclusion that if there ever was a case to which the principle ought to be applied, the present is such a one; for here the dealings were perfectly open and above board, they were fully set out in the books of the company and must have been known to the shareholders and to all the liquidators since the winding up, and yet the suit is not

(1) L.R. (1892) 1 Ch. 154 (167). (2) 10 I. A. 90. (3) L.R. 5 P.C. 221.
(4) 3 Ap. Ca. 1279. (5) 50 L. J. (Ch.) 11.

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brought until after the expiration of twenty-four years. There is no allegation of fraud, and the directors of this company were only doing what in those times was universal, and are not shown to have been actuated by any other motive than desire for the welfare and benefit of the company. It seems to me that the length of the delay in the present case and the nature of the acts done during the interval and the changed circumstances of the defendant would make it very inequitable and unjust now to award the [125] claim. I find the second issue in the affirmative, and dismiss the suit, but without costs.

The plaintiffs appealed, on the ground that the Judge was wrong in holding—

(1) that the alleged staleness of the claim disentitled them to a decree;

(2) that the doctrine of laches had any application to the case;

(3) that the delay and the nature of the acts done during the interval and the changed circumstances of the defendant would render a decree for the plaintiffs unjust and unequitable.

The defendant also filed cross objections to the decree. He contended that the Judge erred (1) in not holding that the suit was barred by limitation; (2) in holding that the words "local trade" in the memorandum and articles of association of the company did not include dealing in shares.

Lang (Acting Advocate General) and *Scott*, for the appellants (plaintiffs):—The defendant was one of the directors of the company. As such he was a trustee. He and his co-directors invested the money of the company in the purchase of shares. The Court below has found the first and third issues in our favour, but has dismissed the suit, as it found the second issue for the defendant. Under the memorandum of association the directors were not justified in dealing in shares—*In re Asiatic Banking Corporation* (1); Chadwyck Healey on Companies, p. 21; *Ashbury Railway Carriage, &c., Co.* v. *Riche* (2). As to whether the suit was barred by limitation, the following authorities were cited:—Section 10 of the Limitation Act (XV of 1877); *Metropolitan Bank* v. *Heiron* (3); *Balwant Rao* v. *Purun Mal* (4); *In re Oxford Benefit Building and Investment Society* (5); *Flitcroft's case* (6); *Ramskill* v. *Edwards* (7); Buckley on Companies (6th Ed.), pp. 495 to 497; *In re Hallett's Estate* (8).

Where the Act of Limitation applies, the equitable doctrine with regard to staleness of claim does not apply. They referred [126] to Buckley on Companies (6th Ed.), p. 411; *Stringer's Case* (9); *Erlanger* v. *New Sombrero Phosphate Co.* (10); *Rama Rau* v. *Raja Rau* (11); *Peddamuthulaty* v. *N. Timma Reddy* (12); *Tarack Chunder Bhuttacharjee* v *Huro Sunkur Sandyal* (13); *In re Sharpe, &c.* (14); *The New Fleming Spinning and Weaving Co.* v. *Kessowji Naik* (15); *Juggernath Sahoo* v. *Syud Shah Mahomed* (16); *In re Hallett's Estate* (17); *Cunningham* v. *Foot* (18); *Lindsay Petroleum Co.* v. *Hurd* (19); *In re Mammoth Copperopolis of Utah* (20); *In re Alexandra Palace Co.* (21).

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(1) L. R. 4 Ch. 252. (2) L. R 7 H. L. 653. (3) 5 Ex. D. 319.
(4) 10 I. A. 90. (5) 35 Ch. D. 502 (509). (6) 21 Ch. D. 519.
(7) 31 Ch. D. 100. (8) 13 Ch. D. 696. (9) L. R. 4 Ch. 475.
(10) 3 Ap. Ca. 1218 (1278). (11) 2 M H C.R. 114. (12) 2 M.H.C.R. 270.
(13) 22 W.R. C. R. 267. (14) L.R. (1892), 1 Ch. 154. (15) 9 B. 373.
(16) 2 I.A. 48. (17) 13 Ch. D. 709. (18) 3 Ap.Ca. 974.
(19) L.R. 5 P.C. 221. (20) 50 L.J. (Ch.) 11. (21) 21 Ch.D. 149.

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Inverarity (with *Macpherson*) for the respondent (defendant).—We contend that the Limitation Act (XV of 1877) applies to this case, and that the suit was barred at the end of six years by art. 120 of the schedule of that Act. In cases to which s. 10 of that Act applies it is true that no lapse of time is a bar to an action. But that section does not apply here. It applies only when the suit is a suit against "persons in whom property has been vested in trust for some specific purpose." But a director of a company is not such a person. He is not a trustee, and he is not a person in whom property is vested for a purpose. He is, no doubt, in a fiduciary position and may be guilty of a breach of duty or a breach of trust, but that does not necessarily make him a trustee. Persons in a fiduciary position are loosely and for convenience called trustees, but they are not necessarily trustees. Section 10 does not apply to all persons in a fiduciary position. It does not apply to all cases of breach of duty or breach of trust. It is expressly limited to breaches of trust by persons who are strictly and properly trustees. Compare Stat. 3 and 4 Will. IV, s. 25, from which s. 10 is taken. For a definition of breach of trust, see Wharton's Law Lexicon, p. 102. No person is properly called a trustee except a person in whom property is vested. Directors of a company have merely an authority or power to manage the property of the company, but no estate is vested in them. As to the meaning of "vest," see [127] Lord Westbury's judgment in *Dickenson* v. *Teasdale* (1); *Kherodemoney* v. *Doorgamoney* (2); *Coverdale* v. *Charlton* (3); *Greender* v. *Mackintosh* (4). Compare the Indian Insolvent Act (Stats. 11 and 12 Vic., c. 21), s. 7; Act V of 1881, s. 4; Bombay Municipal Act III of 1888, s. 298; *Rolls* v. *The Vestry of St. George, the Martyr of Southwark* (5); *Queensbury Industrial Society* v. *Pickles* (6); Lindley on Companies (5th Ed.), pp. 364—374. Directors are not trustees: see per Bowen, L. J., in *Imperial Hydropolis Hotel Company* v. *Hamson* (7); *In re Faure Electric Accumulator Co.* (8); *Sheffield, &c., Building Co.* v. *Aizlewood* (9); *Knowles* v. *Scott* (10); *Smith* v. *Anderson* (11); *The London Trust Co.* v. *Mackenzie* (12).

Under the Indian Trusts Act a director is not a trustee: see s. 3. That Act regards a trustee as owner of the property: see s. 88. Counsel also cited *Balvantrav* v. *Purshotam* (13); *Umiashankar* v. *Chhotalal* (14); *Luchmee Buksh Roy* v. *Runjeet Ram Panday* (15); *Greender* v. *Mackintosh* (4); *Kherodemoney* v. *Doorgamoney* (2); *Arunachala* v. *Ramasamya* (16); *Thackersay Dewraj* v. *Hurbhum Nursey* (17); *Zemindar of Palcondah* v. *Secretary of State for India* (18); *Balwant Rao Bishwant* v. *Purun Mal* (19); Lindley on Company Law (5th Ed.), p. 526; *Trevor* v. *Whitworth* (20). We contend that the suit is barred by limitation.

Lang, in reply, as to the meaning of the word "vest" referred to *Sethu* v. *Krishna* (21); *Sethu* v. *Subramanya* (22); *Metropolitan*

(1) 1 DeG.J. and S. 52 (59).
(2) 4 C. 455.
(3) 4 Q.B.D. per Butt, J. 120.
(4) 4 C. 897.
(5) 14 Ch. D. 785.
(6) L.R. 1 Ex. 1.
(7) 23 Ch. D. 12.
(8) 40 Ch. D. 141 (150).
(9) 44 Ch. D. 452.
(10) L.R. (1891), 1 Ch. 722.
(11) 15 Ch. D. 275.
(12) 62 L. J. Ch. 870.
(13) 9 B. H. C. R. 99 (111).
(14) 1 B. 19.
(15) 13 B. L. R. (P.C.), 177.
(16) 6 M. 402.
(17) 8 B. 432.
(18) 12 I. A. 120.
(19) 10 I. A. 90.
(20) 12 Ap. Ca. 409.
(21) 14 M. 61.
(22) 11 M. 274 (279).

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Bank v. *Heiron* (1); Stroud's Judicial Dictionary (1890); The English Judicature Act, 1873, s. 25.

JUDGMENT.

[128] SARGENT, C. J.—The suit, which has given rise to this appeal, was brought by the liquidator of the Kathiawar Trading Company against the defendant, who was one of the directors during the short existence of the company before going into liquidation, to recover the balance of money expended by the directors in the purchase of shares of various companies, and which have not been accounted for, on the ground that such share transactions were *ultra vires*, the company and, therefore, the directors. The transactions as alleged in the plaint are not disputed by the defendant, who is the only surviving director with the exception of Jugjivan Hemji and Gopalrao Bulwant, who have become insolvents.

The first question, therefore, for consideration is whether the trading in shares by the directors was within the words of the memorandum of association, which determines the purposes for which the company was incorporated. (His Lordship read the clause in the memorandum above set forth and continued :—)

It has been contended for the defendant that it came within the general words "and carry on such local trade as may seem profitable." It would, we think, be difficult to say that the term "trading" necessarily excludes trafficking in shares; but such general words must, according to well-established principles of construction, be read in conjunction with what has gone before in the memorandum. The case of *Ashbury Railway Carriage, &c., Company* v. *Riche* (2) is a good illustration of the application of that principle of construction. Now the primary object for which this company was established was to do commission agency, a general trading in cotton and other staple products, to be procured, as far as possible, from the producers in Kathiawar, Gujarat, Marwar and parts of the interior of the country, with the view of disposing of the same either in Bombay or shipping them to England; and, secondly, general trading in goods and commodities suited for the market in the interior of India. So far the object of the company (as stated by the memorandum of association) is to trade with the interior of India; but, if found desirable, the company might purchase cotton and produce in [129] Bombay and ship to England and "carry on such local trade as might seem profitable." In other words, the memorandum contemplates the possibility of its being found desirable to purchase cotton and produce in Bombay for the purpose of shipping to England and carrying on such local trade as may seem profitable." By "such local trade" must be meant trade in Bombay of the same nature as before mentioned, *viz.*, goods and commodities;" the choice being left as to the particular goods and commodities they should trade in. "Goods and commodities" cannot, we think, according to the ordinary use of those terms, be held to include, "shares in companies," and we agree, therefore, with the Judge of Division Court that the transactions were *ultra vires*.

Assuming, then, that the moneys of the company were misapplied by the directors in the sense of being applied to a purpose, which was *ultra vires*, there can be now no doubt, upon the English authorities that the directors are liable to replace the moneys. I need only refer to the judgment of Sir G. Jessel in *In re National Fund Association* (3) where the payment of dividends out of capital was held to be *ultra vires*, and of Lord Justice Lindley

(1) 5 Ex. D. 325. (2) L. R. 7 H. L. 664. (3) 10 Ch. Div. 128.

in *In re Sharpe*(1) when he says "as soon as the conclusion is arrived at that the Company's money has been applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted."

The more difficult question in the case remains for consideration, namely whether the right to recover the moneys by the liquidator is barred by the Act of Limitation or by the staleness of the demand on the principles laid down by the Privy Council in *Lindsay Petroleum Co.* v. *Hurd*(2) and Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.*(3). Apart from the operation of s. 10 of the Act of Limitation on which the plaintiffs rely, such a claim would be barred, we apprehend, in six years under art. 120 of the Act, which period has long expired, and it has been contended for the defendant that the language of the above section is not applicable to the present case. Now that directors are *quasi*-trustees in respect of the capital [130] of the company, and it is said that, in the event of their applying the funds of the company in a manner which is *ultra vires* the memorandum of association, the relief which the Court will give against them is not barred by the Statute of Limitations is treated as settled law by Kay, J., in *In re Oxford Benefit Building and Investment Society*(4), and was so regarded by the Court of Appeal in *In re Sharpe* (1).

It is, however, to be remarked that directors of a company are precluded, in England, from pleading the bar of the statute by virtue, either of a general rule of the Court of Equity applicable to all trustees or *quasi*-trustees, or else by the Judicature Act of 1873, which is applicable to all persons "holding" property upon trust, but that the question, whether they are precluded in this country, depends exclusively upon whether they can, in the language of s. 10 of the Statute of Limitations, be regarded as "persons in whom the property of the company is vested in trust for a specific purpose." It is certainly not vested in them, as is the case with trustees of a settlement or will. Lord Justice James remarks on this distinction in *Smith* v. *Anderson.* (5) He says: "The same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional and casual circumstance."

Mr. Justice Kay in *In re Faure Electric Accumulator Co.* (6) alluding to the same distinction says: "One obvious distinction, (*i. e.*, between directors and trustees of a settlement or will), is that the property of the company is not legally vested in them, but at the same time they have large powers of management and control vested in them over the property of the company." It is doubtless by reason of such management and control that they are held liable for the misappropriation of the trust funds, as explained by Sir G. Jessel in *In re Forest of Dean Coal Mining Company*(7) but it is certainly contrary to the ordinary accepted meaning of the term "vesting" to say that property is vested in persons by reason merely of their having control over it. "Vesting" as explained by Brett and Cotton, JJ., in *Coverdale* v. [131] *Charlton*(8) when applied to the subject-matter of property according to its ordinary legal acceptation gives the property in it and not merely the control over it. Again, in *Dickenson* v. *Teasdale*(9) Lord Westbury construing "vesting" in 3 and 4 Will. IV s. 25, which is substantially the same as s. 10 of the Limitation Act of 1877, c. 27, held that "vesting" implied property in the subject-matter that a person who

(1) L. R. (1892) 1 Ch. 165. (2) L. R. 5 P. C. 221. (3) 3 Ap. Ca. 1218.
(4) 35 Ch. D. 509. (5) 15 Ch. D. 275. (6) 40 Ch. D. 150.
(7) 10 Ch. D. 451. (8) 42 Q.B.D. 120. (9) 1 Deg. J. & S. 52.

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had merely power to charge the land did not, therefore, come under the section. On the whole, although directors of a company are *quasi*-trustees, we think it would be unduly straining the language of s. 10 to say that they are persons in whom the property of the company is vested as contemplated by that section. It may perhaps be subject of regret that such should be the conclusion on the language of the section. If so, it will be for the Legislature to amend the section.

This is sufficient for the decision, but we think it right to express an opinion that, in any view of s. 10, the staleness of the present demand is a valid defence to the action. In *In re Mammoth Copperopolis of Utah*(1), Hall, V. C., held that the claim against the directors could not be enforced on the ground of great default on the part of the liquidators and the difficulty in which the directors would be consequently placed by such default. It is true that in *In re Sharpe* two of the Lords Justices, Lindley and Fry, L. JJ., reserved their opinions whether the doctrine of staleness of the demand is applicable to a demand against directors to restore the funds applied *ultra vires*, but as the liquidation is for the purpose of settling all claims arising out of the working of the company and all interests, whether of the creditors or the shareholders, are fully represented for that purpose by the liquidators, it is difficult to understand why the doctrine when the liquidators are in fault should not equally apply to such a demand. In the present case the liquidators, as admitted by the present liquidator, had full knowledge that the capital of the company had been applied in trafficking in shares. That is shown by the directors' report and the schedule of debts [132] produced by the liquidators at the commencement of the liquidation. Nevertheless the liquidators never made any claim or took any steps to make the directors liable until the present suit was brought. During the long period of twenty-three years which has elapsed since the company went into liquidation the co-directors of the defendant have either died or become insolvent, and the defendant's right to contribution from them in the event of his being held liable is thus rendered practically valueless—a circumstance much relied on by Lord Campbell, in *Bright* v. *Legerton* (2), as showing the unreasonableness of a stale demand in that case and which the cases show is the foundation of the doctrine. In *Erlanger* v. *New Sombrero Phosphate Co.*, Lord Blackburn says: "It must always be a question of more or less dependence on the degree of diligence which might reasonably be required and the degree of the change which has occurred whether the balance of justice or injustice is in favour of granting the remedy, or withholding it." In the present case, after such a period of time and such changes, we cannot doubt the balance is in the favour of the latter, and that the Division Court was right in so holding.

For these reasons we must confirm the decree, except as to costs. The plaintiff to have his costs here and in the Division Court.

Decree confirmed.

Attorneys for the plaintiffs :—Messrs. *Crawford, Burder and Co.*
Attorneys for the defendant :—Messrs. *Bhaishankar and Kanga.*

(1) 50 L. J. Ch. 11. (2) 2 DeG. F. and J. 606.