1894.

NATHMULL NARSINGDA'S v. MALHARRA'O HOLKAR.

I shall, therefore, make the order that the defendants do produce upon affidavit the documents in their possession relating to the suit in the usual form. As to how it is to be obeyed, or what will be the consequence if it is not obeyed, I need not now determine. I understand that there will be no difficulty in complying with it in the present case. The guardian will, I understand, make the affidavit. To the order the proviso asked for by counsel for the defendants will be added that inspection need not be given until the plaintiff has made his affidavit of documents.

I do not by this order decide that the next friend or guardian of an infant can be directly ordered to make an affidavit of documents. Different difficulties stand in the way of the making of such an order, such as are pointed out in *Wághji Thackersey* v. *Khatáo Rowji*[1], *Ingram* v. *Little*[2] and *Dyke* v. *Stephens*[3], which the alteration of the Supreme Court Rules in England does not get rid of, and which apparently the Legislature only can remove; but I give no opinion upon this point. Costs to be costs in the cause.

Attorneys for plaintiff:—Messrs. *Dikshit and Hirálál.*
Attorneys for defendants:—Messrs. *Tyabji, Dayabhai & Co.*

(1) I. L. R., 10 Bom., 167. (2) 11 Q. B. D., 251.
(3) 30 Ch. D., 189.

ORIGINAL CIVIL.

Before Mr. Justice Candy.

1894.
December 11

DORA'BJI JEHA'NGIR RANDIVA, PLAINTIFF, *v.* MUNCHERJI BOMANJI PANTHA'KI, DEFENDANT.*

Limitation—Limitation Act (XV of 1877), Sch. II, Art. 60—Deposit—Loan.

The plaintiff claimed to recover from the defendant, who was his grandfather, the sum of Rs. 4,917, which was the amount standing to his credit in an account in the defendant's books. In November, 1869, the plaintiff being then one year old, his mother (the defendant's daughter) paid over to the defendant the sum of Rs. 650,

* Suit No. 368 of 1894.

and at her request the money was credited in the books of the defendant's firm in the name of her son the plaintiff. A further sum was similarly paid over by her in December, 1871, and at her request was credited to the same account. The plaintiff alleged, and the Court found, that these sums were presents which had been made to him on his birthday and other auspicious occasions. The said sums had been carried over from year to year in the firm's books, the interest being added each year, but no payment had ever been made to the plaintiff, or on his behalf, out of the sum so standing to his credit. Compound interest had been allowed in the account, and on the 9th November, 1893, the amount standing to the credit of the plaintiff was Rs. 4,917.

The plaintiff contended that the money had been paid to, and accepted by, the defendant as a deposit to be held in trust for him. The defendant alleged that the money in question had been lent to him by the plaintiff's mother, and contended that the plaintiff's claim was barred by limitation.

Held, that the plaintiff's claim was not barred. The defendant stood in a fiduciary position to the plaintiff, and, therefore, there was a "deposit" within the meaning of article 60 of the Limitation Act (XV of 1877), and limitation did not commence to run until demand.

THE plaintiff was the grandson of the defendant and was at the date of suit twenty-six years of age. He alleged that at the time of his birth, and subsequently on ceremonial occasions, presents of money had been made to him, which were received by his mother (the defendant's daughter) and were deposited by her on his behalf with the defendant, who accepted the same as a deposit and in trust for the plaintiff, opening an account in the plaintiff's name in the books of his firm, of which he was the sole proprietor. The said moneys were credited to the said account, and interest was credited to the said account every year, and the balance carried forward.

The plaint stated that the defendant had a similar account with him as trustee for the plaintiff's sister. She died in 1877 an infant, unmarried and intestate, and on her death the plaintiff's mother presented the said moneys to the credit of the plaintiff's account, and got the amount transferred to the plaintiff's account, and ever since such transfer the said moneys had been held by the defendant as depositary and trustee for the plaintiff.

The plaint also stated that the defendant from time to time furnished the plaintiff's father with statements of accounts of the moneys belonging to the plaintiff; that the account of the plaintiff

1894.

DORA'BJI JEHA'NGIR RANDIVA v. MUNCHERJI BOMANJI PANTHA'KI.

in the defendant's books was carried forward and appeared in the books for 1893; that nothing had ever been drawn from the account, and that the whole amount received by the defendant and interest was due to the plaintiff, who believed that the sum due was about Rs. 4,900.

The plaint prayed for full discovery of the amount standing to the plaintiff's credit, and for payment thereof with interest.

The defendant denied the alleged deposits, but alleged that on 18th November, 1869, the plaintiff's mother, Virbáiji, had lent to his (defendant's) firm a sum of Rs. 650, and directed that it should be credited in the name of the plaintiff, which was duly done in the defendant's books. A further loan of Rs. 942 was made by her to the defendant's firm on 6th December, 1871, which was at her request credited to the same account. He further stated that the said account in the plaintiff's name had been carried over from year to year in the firm's books, the interest being added each year, but that no payment, either of principal or interest, had been made to the plaintiff or on his behalf out of the moneys standing to the plaintiff's credit. He contended that the plaintiff's claim was barred by limitation, and that in any case he was entitled to set off the sum of Rs. 1,080, being the cost incurred by him in maintaining the plaintiff for three years prior to the suit.

Virbáiji, the plaintiff's mother, died in 1889.

Starling and *Badrudin Tyabji* for the plaintiff.

Lang (Advocate General) and *Macpherson* for defendant.

The following authorities were cited:—*Rám Sukh Bhunjo* v. *Brohmoyi Dási*(1); *In the matter of T. Agábeg*(2); *Ishur Chunder* v. *Jibun Kumári*(3); *Ichhá* v. *Nátha*(4); *Tidd, In re*; *Tidd* v. *Overell*(5); Limitation Act (XV of 1877), Sch. II, arts. 57, 62.

CANDY, J.:—Defendant is a Europe shopkeeper. Plaintiff is the son of the defendant's daughter, Virbáiji, who died in 1889. It is not denied that plaintiff was born on 16th November, 1868.

(1) 6 Calc. L. R., 470.
(2) 12 Calc. L. R., 165.
(3) I. L. R., 16 Calc., 25.
(4) I. L. R., 13 Bom., 338.
(5) L. R. (1893), 3 Ch., 154.

It is admitted that on 18th November, 1869, when plaintiff was just a year old, Rs. 650 were credited in defendant's book in the name of the plaintiff, to bear interest at 5 per cent. On 6th December, 1871, a further sum of Rs. 942 was credited to the same account, which has evidently been carried forward from year to year, bearing 5 per cent. compound interest. On 9th November, 1893, the balance stood at Rs. 4,917.

As stated by the learned Advocate General, for the defendant, the question simply is, did this money reach defendant's hands under circumstances which show "a deposit" within the meaning of that term in article 60, Schedule II, Act XV of 1877? If it did, then the claim is not barred, for the only demand on the part of the plaintiff which is proved is within three years of the filing of the suit.

Defendant stated in his deposition that the plaintiff made an oral demand in 1889, but this is not proved. He contradicted himself more than once on the point. He said that neither Virbáiji nor plaintiff had ever demanded the money. I am not satisfied that plaintiff did make such a demand in 1889. At that time apparently the members of the family were living in harmony, and were all content to leave the money standing in their names in the books of the firm invested in the business.

The question then is, what were the circumstances under which the money shown in the books in the name of the plaintiff came into defendant's hands? It is common ground that it was Virbáiji, the plaintiff's mother, who paid the cash or caused it to be paid; and that it was at her request that the money was credited in the name of her son. But while plaintiff says that he always understood that the money belonged to him, being presents on his birthday and other auspicious occasions, defendant says that he always understood the money to be Virbáiji's own, and advanced as an ordinary loan to her father. I have no hesitation in holding that plaintiff's story appears to be the true one. He himself can have no personal knowledge of the circumstances under which the money was paid, but he called his grandmother, defendant's wife, who deposed to the first payment of Rs. 650 being a birthday present given by plaintiff's father, and

1894.

DORA'BJI JEHA'NGIR RANDIVA v. MUNCHERJI BOMANJI PANTHA'KI.

by her advice handed to defendant. The learned Advocate General, for defendant, dwelt on the fact that plaintiff's father, though present, was not called as a witness; but the argument cuts both ways. The plaintiff says that he is on bad terms with his father, and so he refrained from calling him. Why did the defendant not call him if he (plaintiff's father) could have sworn that he had no knowledge of the money, or that he was aware that the money belonged to Virbáiji? It is clear that, in Pársi families, presents are sometimes given to infant children on birthdays and such like occasions, and nothing would be more natural than that the infant's mother should invest such money in her father's business for the infant's benefit. Whether she added to the fund, which commenced with the item of Rs. 650, by paying other sums given similarly as presents to the infant, or by payments from her own pocket or otherwise, it is clear that the moneys mounting up each year by compound interest, were treated as one fund for the benefit of the infant. Since Virbáiji's death in 1889, her husband apparently never put forward any suggestion that the money was Virbáiji's to which he has a claim. It was argued that Ruttonbái (the witness called by plaintiff) is on such bad terms with her husband, the defendant, that no reliance can be placed on her statements. But the same argument would hold good against the evidence of defendant and his son and partisan, Dinshaw. The family quarrel is evidently so fierce that the evidence of one member against another should be carefully scrutinised.

We must look at the surrounding circumstances and judge of the general probability. Directly this is done, it is seen that defendant's story cannot be true. It is that being in want of money, he asked his daughter for a loan which was given by her just as any ordinary banker would have done. As to further payments, he asked for loans and she made them. He admitted that he had similar accounts in the names of various members of his family, and he alleges that these are all ordinary loans. In fact, he stated that he never borrowed from outsiders. But his son Dinshaw contradicted him, and said that they did borrow from outsiders and repaid after intervals, when convenient. If the sums credited to the various members of the family are ordi-

nary loans, how is it that repayments have not been continually made? The only repayment mentioned in this case was in regard to a sum paid by Virbáiji and credited in the name of her infant daughter, Pootlibái, who died while still an infant, and so the money was subsequently repaid to Virbáiji. This is just what might have happened had the money been invested by the mother in her father's business for the benefit of the infant. At present we are only concerned with the moneys paid to the credit of the plaintiff; and looking at all the circumstances, I cannot regard them as ordinary loans made by Virbáiji to her father, but must regard them as moneys invested by her for her son's benefit in her father's business. They did not bear the ordinary mercantile interest of 9 per cent., which would probably have been the case had they been ordinary loans, but they carried 5 per cent. interest, which was calculated at compound rate, the intention apparently being that a fund should be accumulated for the benefit of the infant, invested in the business of which defendant is the sole owner, and which should so remain in the business till plaintiff, after he came of age, should demand the same.

These being the facts which I find, it only remains to consider whether such a transaction is a deposit within the terms of article 60 of Schedule II of the Limitation Act, 1877? The authority quoted of our own High Court (*Iccha* v. *Nátha*[1]) is not of much assistance in the present case. The judgment shows (page 342) that, in the case of a loan payable on demand, the Act of 1871 made the time run from the date of the demand, but by the present Act of 1877 it is made by article 59 to run from the date of the loan, and a new article 60 has been introduced, applicable to suits to recover money deposited under an agreement that it shall be payable on demand, in which case the time runs from demand being made. But, whatever may be the cases to which this article is intended to apply, it is at any rate not applicable where the transaction is regarded by the law as a loan, and which is the case in the ordinary banking dealings between a native sávkár and his customers. It may be remarked that this judgment was delivered in October, 1888, though not

(1) I. L. R., 13 Bom., 338.

1894.

DORA'BJI JEHA'NGIR RANDIVA v. MUNCHERJI BOMANJI PANTHA'KI.

reported till the middle of 1889. In July, 1888, (reported in January, 1889) Wilson and O'Kinealy, JJ., held in *Ishur Chunder* v. *Jibun Kumári*[1] that money paid to a man's credit with his banker is a deposit within the meaning of article 60. But it should be remarked that, in the last quoted case, no reference was made to any authorities, while in the judgment of the Bombay High Court[2] mention is made of the authorities which show that both in England and in India all money paid to a man's credit with his banker is nothing but an ordinary loan, and not a deposit. So far, therefore, the Calcutta case can be disregarded, but I agree with the remark in the judgment that the question is not whether a particular case is covered by the words of article 59 or any other article, but whether article 60 applies to it; for if it does, the more specific provision must prevail. In the present case the learned Advocate General sought to apply not only article 59, but also articles 57 or 62. The words of these articles may in a general sense cover the facts of the present case, but those facts may also show that there was a "deposit" as that term is used in article 60, and if so, the more specific provision must prevail.

There is another remark in the Calcutta judgment with which I wish to express my concurrence. In my judgment in Suit No. 179 of 1894, which was a suit by a son (and his wife) of the present defendant against the present defendant[3] to recover certain sums credited in the books of defendant in the name of the plaintiff, under circumstances somewhat similar to the present case, I held that it was not a case of an ordinary loan or a transaction between banker and customer, but, adopting the language of White, J., in *Rám Sukh Bhunjo* v. *Bhrohmoyi Dási*[4], that the money was lodged under an express trust or under circumstances from which a trust could be implied. On consideration, I am of opinion that this language must be qualified and explained. I agree with the judgment in *Ishur Chunder* v. *Jibun Kumári*[1] (at p. 31) that it is impossible to apply article 60 to those trusts which are covered by section 10 of the Limitation Act, but it is to be remarked that there is no mention of

(1) I. L. R., 16 Calc., 25.
(2) I. L. R., 13 Bom., 338.
(3) An appeal is now pending in this suit.
(4) 6 Calc. L. R., 470.

"express" trusts in section 10, which speaks of property vested in trust for any "specific" purpose. The marginal heading of the section speaks of "express" trusts, but it does not follow that the word "specific" in the Indian Act of Limitation corresponds exactly to the word "express" in the English Act (see remarks of Markby, J., in *Kherodemony Dossee* v. *Doorgamoney Dossee*[1]). However that may be, it is clear that article 60 cannot apply to suits to recover property vested in trust for any specific purpose, for to them section 10 would apply. But there are many cases of implied trusts or trusts which the law would infer merely from the existence of particular facts or fiduciary relations. These would not come under section 10 (see the case just quoted, pages 465, 469 and 470, and see also in the same volume the remarks of White, J, and Garth, C.J., in *Greender Chunder Ghose* v. *Mackintosh*, pp. 918, 919, 923.) These, in my opinion, would come under article 60. There must be some definite distinction between money lent under an agreement that it shall be payable on demand, and money deposited under an agreement that it shall be payable on demand. That distinction between a loan and a deposit I take to be that, in the latter case, there must be something partaking of the nature of a trust, or at any rate fiduciary relations. Story on Bailments (7th ed., Boston), section 84, describes an irregular deposit as when a person having a sum of money which he does not think safe in his hands, confides it to another, who is to return him, not the same money, but a like sum when he shall demand it. Here the mother wanting to create a fund which would be of use to her son when he grew up, instead of letting the money lie idle, placed it with her father in order that he might use the same for the purpose of his business, and credit it in his accounts in his grandson's name with compound interest every year. There was no trust for any specific purpose. Defendant could have buried the money in the ground if he liked. But it was evidently intended that he would be at liberty to use the money in his business, and in any case the balance to the grandson's credit was to accumulate at compound interest. There was, in short, a trust which made the transaction something more than a loan. It was a deposit. In *In re Tidd*;

(1) I. L. R., 4 Calc., 455 at p. 470.

1894.

DORA'BJI JEHA'NGIR RANDIVA v. MUNCHERJI BOMANJI PANTHA'KI.

Tidd v. *Overell*[1], the plaintiff Charles Tidd handed certain money to his brother, George Tidd, saying "you may as well take care of it, till I want it," or words to that effect. The Judge inferred from the evidence that it was in the minds of the parties present that the money might be useful to George in his business, and held that the transaction was not only a loan, but that George stood in a fiduciary position to Charles Tidd, and, therefore, the case fell within the principle enunciated by Pothier, that "where a man deposits money in the hands of another to be kept for his use, the possession of the custodee ought to be deemed to be the possession of the owner, until an application and refusal, or other denial of the right; for until then, there is nothing adverse, and I conceive that upon principle, no action should be allowed in these cases without a previous demand; consequently, that no limitation should be computed further back than such demand[2]."

In the well-known case of *Foley* v. *Hill*[3], a banking firm who on opening an account with a customer had agreed to allow him interest at three per cent. on the balance, which should from time to time be standing to his credit, set up the statute of limitation as a defence to a bill filed against them by the customer for an account; but their Lordships ruled that money in the hands of a banker is merely lent. Accordingly in *Tidd's* case *(supra)*, North, J., drew a distinction between money deposited in a bank to provide for a current account, and money paid in on a deposit account, quoting the remark of the Master of the Rolls in *Atkinson* v. *Bradford Third Equitable Benefit Building Society*[4], that the one transaction is very different from the other, and he came to the conclusion that the person to whom the money was paid stood in a fiduciary position to the person paying the money, and thus time did not begin to run under the statute of limitation (21 Jac. 1, c. 16) till demand. So here I must hold that defendant stood in a fiduciary position to the plaintiff, and, therefore, there was a deposit, and limitation did not commence to run till demand. It is to be regretted that there is no trace to be found, in any public document, of the reason which induced the Indian Legis-

(1) L. R. (1893), 3 Ch., 154.
(2) Pothier on Contracts, by Evans, Vol. II., p. 126.
(3) 1 Ph., 399; 2 H. L. C., 28.
(4) 25 Q. B. D., 377.

lature to insert article 60 in the second schedule of the Limitation Act of 1877. When the Bill was first published (*Gazette of India*, 28th February, 1877), article 57 (now article 59) stood as it ran in Act IX of 1871, "for money lent under an agreement that it shall be payable on demand three years from when the demand is made." No change was made in the wording of the article (No. 59) in the Bill published with the report of the Select Committee (*Gazette of India*, 31st March, 1877). Nor is there any mention of the point of the report. On the 28th June, 1877, a further report of the Select Committee was presented (Abstract of the Proceedings of the Legislative Council, 1877, Vol. 16, p. 462). But I can find no trace of any such report having been published. When the Honourable Mr. Stokes moved that the reports of the Select Committee should be taken into consideration (*Idem*, p. 464), the only reference which the honourable member made to the subject was that the time from which limitation was to run in the case of money lent under an agreement that it should be payable on demand, was changed from the date of the demand to the date of the transaction. This was in accordance with the ruling in *Norton* v. *Ellam*[1], and made the law in England and in India in accord; but at the same time article 60 was inserted, and no reason was given for the insertion, nor was any indication offered as to the difference between a loan and a deposit. In the absence, then, of any such indication, I hold that a deposit is a loan and something more, *i. e.*, the depositee stands in a fiduciary position to the depositor. I, therefore, hold that the plaintiff is entitled to the relief claimed with all costs, *i. e.*, Rs. 4,917 with costs and six per cent. interest on judgment.

Decree for plaintiff.

Attorney for plaintiff:—Mr. *M. N. Sakhlatwalla.*

Attorneys for defendant:—Messrs. *Bicknell, Merwánji and Motilál.*

(1) 2 M. & W., 461.