As to costs the decree will be varied. The executors' costs taxed as between attorney and client to be paid out of estate as well as the costs of defendants Nos. 4 to 12. Plaintiffs and defendant No. 3 to bear their own costs respectively. Plaintiffs to be at liberty to add their costs to their mortgage security. In other respects the decree of the lower Court is affirmed with costs other than the costs of defendants Nos. 4 to 12, whose costs may be added to their costs in the Court below.

Appeal dismissed.

Plaintiffs' Attorneys :—Messrs. *Little and Co.*

Defendants' Attorneys :—Messrs. *Bicknell, Mervánji and Motilál,* and Mr. *M. H. Khán.*

ORIGINAL CIVIL.

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice B. Tyabji.

MUNCHERJI BOMANJI PANTHAKI (ORIGINAL DEFENDANT), APPELLANT, *v.* DORA'BJI JEHA'NGIR RANDIVA (ORIGINAL PLAINTIFF), RESPONDENT.*

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August 16.

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, 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 were carried over from year to year in the defendant'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 defendant had held the money not as a loan but as a deposit: that article 60 of the Schedule II of the Limitation Act (XV of 1877) applied, and that the plaintiff's claim was not barred.

* Suit No. 368 of 1894.

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MUNCHERJI BOMANJI PANTHAKI v. DORÁBJI JEHÁNGIR RANDIVA.

APPEAL from Candy, J.[1].

The plaintiff was the grandson of the defendant. He alleged that at his birth, and subsequently on ceremonial occasions, presents of money had been made to him which were recovered by his mother Virbáiji (the defendant's daughter) and were deposited by her on his behalf with the defendant as a deposit and in trust for the plaintiff, opening an account in the plaintiff's name in the books of his firm. The said moneys were credited to the said account, and were credited every year and its balance carried forward. The plaintiff now sued to recover the amount standing to the credit of this account.

The defendant contended that the moneys in question were given to him by the plaintiff's mother Virbáiji as a loan and not as a deposit, and he pleaded limitation.

The other facts of the case will be found stated *supra*, p. 352.

Candy, J., held that the moneys received by the defendant were received and held by him as a deposit; that article 60 of Schedule II of the Limitation Act (XV of 1877) applied; and that the suit was not barred, as time ran only from the date of demand.

He accordingly passed a decree for the plaintiff.

The defendant appealed.

Macpherson (Acting Advocate General) and *Lowndes* for the appellant; they relied on the authorities cited in the Court below.

Inverarity and *Scott*, for the respondent, were not called on.

FARRAN, C. J.:—This case raises the question as to the distinction between a loan and a deposit which has frequently come before this Court, and which is generally difficult to decide. Ordinarily money paid into a banking account is regarded as a loan upon the authority of *Foley* v. *Hill*[2]. That is a well-known rule. But there are circumstances here which distinguish the payments which were made to the defendant from payments made of money into a bank. It is pretty clear that the sum of Rs. 650, which was the foundation of the account between the defendant and Virbáiji, was really paid to him by her as belonging to her son. The child

(1) See *supra* p. 352. (2) 2 H. L. Ca., 28.

was only a year old, and it is difficult to believe that the defendant did not know that this money paid over to him in the child's name was the child's property and paid over to him (the defendant) as a deposit. When a mother pays her son's money into his grandfather's firm, as was done in this case, the intention must be that it is to be kept as a deposit for her son and to be ultimately given to him when he demands it, unless indeed in the meantime it has already been applied in some way or other for his use and profit.

Then we find that the amount thus paid in was regularly carried forward in the firm's books from year to year with compound interest. That I think is also a significant fact. The son when he attained full age made no demand for payment, nor did his grandfather offer to repay it, but the account still continued to run, and the interest was added from year to year. No statement of account was rendered either to Virbaiji or to her son. All these circumstances, I think, show that this money was not treated as a loan by Virbáiji to the defendant, but as a deposit for and on account of her son. Both the sums of money stand in the same position, and the same rule applies to both. We must hold that both were deposits made with the defendant; and that the case consequently comes within article 60 of the Limitation Act. The appeal must be dismissed.

TYABJI, J.:—I am of the same opinion. There are several circumstances which show that this was not the case of an ordinary loan, but was a transaction of a fiduciary character.

The first point is that the money belonged to the son and was paid to the defendant by Virbáiji in the son's name. That shows, I think, it was for his benefit. If it was intended as a loan, she would have paid it to the defendant in her own name.

Next, it is significant that the interest runs at five per cent. and not at nine per cent. which is the usual mercantile rate. The probability is that, if this transaction was intended as a loan, the usual rate would have been charged.

Then, lastly, we have the fact that the defendant was not a banker at all. He was a shopkeeper and was not in the habit of borrowing. It is well known that in this country it is a common

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MUNCHERJI BOMANJI PANTHAKI v. DORA'BJI JEHA'NGIR RANDIVA.

thing for the younger members of a family to deposit money belonging to them with the older members. That, I think, was really what took place in the present case. The money remained with the defendant as a deposit, and no part of it has since been withdrawn from him. On all these grounds, I am of opinion that we should hold this money to be a 'deposit.' If the circumstances here do not make it a deposit within the meaning of the word as used in the Limitation Act, it is difficult to understand what a deposit can be.

Appeal dismissed.

Attorneys for the appellant:—Messrs. *Bicknell, Mervánji and Motilál.*

Attorney for the respondent:—Mr. *M. M. Saklátwálla.*

INSOLVENT JURISDICTION.

Before Mr. Justice Parsons and Mr. Justice Starling.

1895.
August 30.

IN THE MATTER OF HORMARJI ARDESHIR HORMARJI, AN INSOLVENT.

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic., C. 21), Sec. 86—Entering up judgment against insolvent—Final discharge—Discretion.

In August, 1892, the insolvent was found guilty of various offences under sections 50 and 51 of the Indian Insolvent Act (11 and 12 Vic., c. 21) and was sentenced to imprisonment for three months, his discharge being also postponed for a further period of twelve months. In December, 1894, on his application for final discharge under section 60 of the Act, the Official Assignee applied that before the order of discharge was made, judgment should be entered up against him under section 86 for the amount of his debts. The Commissioner of the Insolvent Court in the exercise of the discretion given to him by the Act ordered judgment to be entered up accordingly. On appeal by the insolvent,

Held, reversing the order, that under the circumstances of the case the discretion of the Commissioner had been improperly exercised, and that the order to enter up judgment against the insolvent should be discharged.

APPEAL from an order made by Farran, J.[1]

The insolvent had filed his petition on the 1st May, 1891. In August, 1892, at the hearing of his application for discharge under section 47 of the Insolvent Act (Stat. 11 and 12 Vic., c. 21)

(1) See *supra*, p. 297.