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I can see no reason for straining the language of the section to the extent for which the respondent contends.

I have for the sake of argument assumed in the respondent's favour that a Hindu father can appoint a guardian of his minor son by will, but I do not so decide, as in the view I take of the section it is not necessary that I should.

The result is that the decree of the learned Judge must be reversed and the case heard on its merits.

The respondents must pay the appellants' costs of the appeal.

Decree reversed.

Attorneys for the appellant: *Messrs. Dharamsey & Co.*

Attorneys for the respondent: *Messrs. Mulla and Mulla and Messrs. Pestonji, Rustim and Kola.*

E. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

NARRONDAS RAMJI AND ANOTHER, PLAINTIFFS, v. NARRONDAS
RAMJI AND OTHERS, DEFENDANTS.*

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February 12.

Express Trust—Limitation Act (XV of 1877), section 10—Effect of Limitation in cases where the person liable for payment of a legacy and the person entitled to receive the legacy are the same.

L. K. was a partner in the firm of R. L. As such partner he was entitled to his proportion of certain shares of the Hongkong Mill and of the commission earned by his firm as agents of such mill. On his retirement from the firm in 1900 entries were made in the firm's books from which it appeared that 35 of such shares were appropriated to the said L. K. and that he from the date of the entries ceased to have any interest in the firm of R. L.

Held, that under provisos 2 and 4 of section 92 of the Evidence Act evidence was admissible to show that in fact the arrangement was that L. K. should continue to be entitled to his share in the commission.

The suit was brought by the executors of L. K.'s will against the executors of R. L.'s will. The first plaintiff was an executor of both wills.

* Original suit No. 120 of 1906.

Held: (i) That R. L. was an express trustee in respect of L. K.'s share of the commission, and that section 10 of the Limitation Act was no bar to the plaintiffs' suit.

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Soar v. Ashwell⁽¹⁾ followed and applied.

(ii) That the executors of R. L.'s will could not rely on the Statute of Limitation when the non-payment of L. K.'s share of the commission within three years of the receipt thereof was occasioned by their own default.

(iii) That when the person liable for the payment of a legacy, and the person entitled to receive it are the same, no question of limitation can arise.

Binns v. Nichols⁽²⁾ followed.

THIS suit was filed by the plaintiffs as executors of the will of one Ladha Kara against the defendants as the executors of the will of one Ramji Lakmidas to recover from the defendants as such executors the share of Ladha Kara in the agency commission earned by Ramji Lakmidas as a partner in the firm of Govindji Thakersey Moolji and Company who were the agents of the Hongkong Spinning and Manufacturing Company. The share of the said Ramji Lakmidas in the said commission was 3 annas. The share of Ladha Kara as a sub-partner of Ramji Lakmidas was $\frac{3}{16}$ of the said 3 annas share. They prayed for a decree for the amount actually received by the said Ramji Lakmidas and after his death by his said executors, and further for a declaration that they as executors of the said Ladha Kara were entitled to the $\frac{3}{16}$ th share of the 3 annas share of the commission earned by the agents of the abovenamed Company, and that they were entitled to recover the same from the defendants as executors of the said Ramji Lakmidas as and when the said 3 annas share of the said commission should be received by them. Narrondas Ramji, the plaintiff and 1st defendant in the suit, was an executor of the will of Ladha Kara and also of the will of Ramji Lakmidas.

The following is a translation of the entries marked as B. and C. and referred to in the judgment. They were entered in the fair cash book of the firm of Ramji Lakmidas under date of 24th October 1900:—

(1) [1893] 2 Q. B. 390.

(2) (1866) L. R. 2 Eq. 256.

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B.

Dr. Rs. a. p.

Debited to the account of Bhai Latha Kara. On account (as follows :—)

I had a share in the shops (firms) carried on in the name of Bhai Ramji Lakmidas at Bombay and Karáchi and in the shops (firms) of Bhai Dwarkadas Narrondas and Keshavji Ramji appertaining thereto. In connection therewith as to the outstanding claims of the above shops (firms) and the sums standing credited and debited in the profit and loss account and the "Liti" (Line) account and the bad debt account and as to all the "Kapad" (piece-goods) loose or unpacked in bales and cases whatever there is as a balance in those shops (S. E.) and godowns and in the godowns of the office people and in warehouses and as to all the shares which there are and as to all the effects and chattles appertaining to the said "Vahivat" (business) and as to the house I in number at Karáchi (bearing) number which has been purchased from Multani Chelaram Valumal and which is situated in the Bombay Bazár and which adjoins (the house of) Khoja Gulam Husein Magba and as to whatever share and right I had in all the "Vahivats" (businesses) mentioned above, I have discontinued the same from the 30th of Aso Vad of Sa (Samvat) 1956 (23rd October 1900). And having made over all the said "Vahivats" (businesses) and the monetary dealings and transactions, &c., appertaining thereto which have been written above to Bhai Ramji Lakmidas and having settled through Shah Chunilal Chhotalal that Rs. 1,500, namely fifteen hundred, shall be paid (by me) in respect of the amount of loss appertaining to my share, I of (my) free will and pleasure have come to this amicable settlement and I have discontinued my share in and right to all the above (mentioned) "Vahivats" (businesses). The (amount) in respect thereof has been debited to my account. Henceforward I have (shall have) no manner of right to or interest in the "Vahivats" (businesses) carried on in the name of Bhai Ramji Lakmidas and in the "Vahivat" (business) of Dwarkadas Narrondas and the "Vahivat" (business) of Keshavji Ramji appertaining thereto. If Bhai Ramji Lakmidas should find it necessary to have a document made and delivered (to him) in connection with this I am duly to make (and deliver) the same

... .. 1,500 0 0

(Signed) LADHA KARA.

C.

Dr.

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Debited to the account of Bhai Ladhā Kara Rs. 35,000, namely thirty-five thousand, on account as follows:—

Thirty-five shares of the Hongkong Mill in respect of your share, at the rate of Rs. 1,000 namely (Rupees) one thousand (per share), amounted to Rs. 35,000 the same having been debited to my account are credited to the account of the Hongkong Mill shares. The particulars thereof are as follows:—

Shares 5, namely five, (bearing) numbers 558/62, which stand in the name of Bhai Ladhā Kara.

Shares 30, namely thirty, (bearing) numbers 523/52, which stand in the name of Bhai Ramji Lakhmidas.

In all shares 35 Rs. 35,000 for the same are debited to my account (My) own handwriting 35,000 0 0
The signature * (of) Ladhā Kara ;
(My) own handwriting.

Lowndes (Scott and Inverarity with him) for the plaintiffs.

Robertson (with Setalvad) for the defendants.

RUSSELL, J.:—In this case the two plaintiffs, Narandas Ramji and Cursondas Ramdas Bhanji, the executors of the last will of Ladhoo Kara, sue the defendants (1) the said Narandas Ramji, (2) Damodar Ramji, (3) Nagindas Doolabdas, and (4) Rattonji Cursetji Wadia, the executors of the last will of Ramji Lakhmidas.

It appears that Ladhoo Kara and his uncle Ramji Lakhmidas carried on business in Bombay and elsewhere in partnership in the name of Ramji Lakhmidas from 1884 to 1900, Ladhoo Kara's share being $\frac{3}{8}$ ths and Ramji Lakhmidas' share $\frac{1}{8}$ ths.

In 1891 the said firm of Ramji Lakhmidas became entitled to $\frac{1}{4}$ share in a Mill called the Hongkong Mills, other sharers being Gordhandas Cursondas and Govindjee Thakersey and Co.

In 1894 Ramji Lakhmidas, Gordhandas Cursondas, and Govindjee Thakersey and Co. converted the said Mill partnership into a Joint Stock Company with 750 shares capital of Rs. 1,000

* The signature, &c., is partly written across the face of an anna receipt stamp affixed to the original.

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each, and the said Ramji Lukhmidas took 187 shares in the said Company, of which 177 were in his own name, five in the name of Ladhoo Kara and five in the name of his son, the first plaintiff. The said 187 shares belonged beneficially to the said firm of Ramji Lukhmidas. The firm of Govindjee Thakersey and Co. were appointed Agents of the Mill which was called Hongkong Spinning and Manufacturing Co., Ltd. The partners in the said agency firm were the said Govindjee Thakersey and Co., Ramji Lukhmidas and Gordhandas Cursondas who entered into an agreement, dated the 19th of June 1895, a copy whereof is annexed to the plaint and marked A. The share of the said Ramji Lukhmidas in the Agent's commission was three anna share and the plaint states that he held the same as trustee for the said firm of Ramji Lukhmidas. The three-anna share of the commission was thereafter credited in the profit and loss account in the said firm of Ramji Lukhmidas down to the 3rd of October 1900, when the said Ramji Lukhmidas and the said Ladhoo Kara dissolved partnership. The material clauses of the said agreement of the 19th June 1905 are the following :—

1. That the said Govindji Thakersey and Company Ramji Lakhmidas and Gordhandas Cursondas shall and do hereby become partners and as such shall carry on business of the Secretaries, Treasurers and Agents of the Hongkong Spinning and Manufacturing Company, Limited.

2. That the name of the said co-partnership shall be Govindji Thakersey Moolji and Company.

3. The conduct and management of the co-partnership business shall be absolutely under the direction and control (subject to the provisions of these presents) of the said Govindji Thakersey and Company exclusively and the said Ramji Lakhmidas and Gordhandas Cursondas shall not be at liberty to sign or use the name of the partnership or act in the name or on behalf of the partnership for any purpose but the said Ramji Lakhmidas and Gordhandas Cursondas may at all times see, inspect and examine all the account books, papers, plans, works and transactions of the partnership, provided also that it shall be competent for all the partners for the time being with one accord to make such changes in the management of the business as they think fit.

4. The shares of the partners in the profits or losses of the partnership shall be as follows :—Namely the share of the said Govindji Thakersey and Company will be annas eight in the rupee, the share of the said Ramji Lakhmidas annas four in the rupee and the share of the said Gordhandas Cursondas annas four in the rupee.

5. The commission to be paid by the said Company to the co-partnership for carrying on the business of the Secretaries, Treasurers and Agents shall be divided between the parties hereto in manner following that is to say one equal fourth share to be paid to the said Govindji Thakersey and Company and the remaining three-fourths to be distributed between the partners according to their respective shares.

8. The parties hereto shall get the whole number of shares of the proposed Company subscribed in proportion to the respective shares in the partnership namely the said Govindji Thakersey and Company shall get shares subscribed to the extent of one-half the total number of shares, the said Ramji Lukhmidas to the extent of one-fourth, and the said Gordhandas Cursondas to the extent of one-fourth.

On the dissolution of the firm of Ramji Lukhmidas above-mentioned, two documents, which are Exhibits B and C in the case, were executed.

Three-sixteenths of 187 shares are $35\frac{1}{16}$ shares, and it is material to notice that under clause 8 of the above agreement of the 19th June 1895, Ramji Lukhmidas underwrote $\frac{1}{4}$ of 750 shares in the Mill, namely 187 shares, the result being that Ladhoo Kara underwrote 35 shares, being $\frac{3}{16}$ ths of Ramji Lukhmidas' 187. At the time of the dissolution of Ramji Lukhmidas it was arranged that the $\frac{3}{16}$ ths of the said Ladhoo Kara in the three-anna share of the commission earned in the Hongkong Mill should be continued, and that the said Ramji Lukhmidas should receive the said three-anna share of the commission as aforesaid, and on receipt thereof hold $\frac{3}{16}$ ths for Ladhoo Kara. It was also arranged that Ladhoo Kara should be debited with the full face value of the said 35 shares in the said Hongkong S. and M. Co. although the estimated marked value was about Rs. 300 per share, and that the said Ladhoo Kara should hold the said shares subject to the conditions specified in the said agreement of the 19th of June 1895.

Mr. Robertson for the defendants argued that oral evidence as to the above arrangement could not be given having regard to the terms of the document, Exhibit B, above-mentioned because, as he said, such an arrangement was contrary to the terms of that document.

In my opinion, however, that is not so, and the arrangement in question comes under provisos 2 and 4 of section 92 of the

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Evidence Act. And it must be observed that there was full consideration for the arrangement inasmuch as, as I have pointed out above, Ladhoo Kara was to underwrite 35 shares at their full face or par value.

It appears that Ladhoo Kara drafted his will in his own handwriting, in which he referred to the 35 shares in the said Mill, retained by him, and his $\frac{3}{16}$ of the said commission, and gave the said draft to the first plaintiff for making a fair draft which the first plaintiff did with certain alterations and additions as directed by the said Ladhoo Kara. In the said fair draft reference was made to the said $\frac{3}{16}$ of Ladhoo Kara in the commission as an item of his property and to the arrangement made as regards such commission and to the conditions on which the said 35 shares were to be held by him. Ladhoo Kara was at the time living in the same house as the said Ramji Lukhmidas and the said fair draft of the will was shown to the latter, of which he approved, and the same was subsequently engrossed and duly executed by Ladhoo Kara.

Ladhoo Kara died shortly after the arrangement was made and before any commission was received by Ramji Lukhmidas since the date of the arrangement.

The plaintiffs proved Ladhoo Kara's will on the 1st of April 1902 and a copy thereof is annexed to the plaint as B thereto. Exhibit C to the plaint are the particulars of the plaintiffs' claim which gives the details of the amounts received in respect of the three-anna commission by Ramji Lukhmidas from the Mill, and after his death by his executors, the defendants, and $\frac{3}{16}$ thereof comes to Rupees 4,808-7-0 to which Ladhoo Kara's estate is entitled.

Ramji Lukhmidas died on the 21st June 1904, having left a will, whereof the defendants are the executors as aforesaid and they proved the said will on the 17th of May 1905.

Narandas Ramji, the plaintiff and the first defendant, who, as above stated, is the son of the said Ramji Lukhmidas and who was personally aware of the arrangement as to Ladhoo Kara's share in the said commission, requested the said Ramji Lukhmidas to pay to the plaintiffs as executors, as aforesaid, the share of

Ladhoo Kara in the said commission, and the said Ramji Lukhmidas agreed to do so as soon as the accounts were made up and closed. Ramji Lukhmidas, however, died before the accounts for the year were made up and so no payments were made to the plaintiffs.

The plaintiffs submit that under the arrangement aforesaid the said Ramji Lukhmidas was a trustee of the said Ladhoo Kara in the $\frac{3}{16}$ of the said commission.

The first plaintiff is executor both of Ladhoo Kara's will and of Ramji Lukhmidas' will and was willing, as executor of Ramji Lukhmidas, to pay the $\frac{3}{16}$ share of Ladhoo Kara in the said commission to the plaintiffs, but his co-executors, the other defendants, made some difficulty about doing so, and this suit became necessary.

The defendants, other than the first defendant, by their written statement take up no contentious attitude with reference to the plaintiffs' claim but submit to the Court the question whether the plaintiffs are entitled to recover the share in any commission received by Ramji Lukhmidas three years before the institution of the suit and inasmuch as one of the beneficiaries under the will of Ramji Lukhmidas is a minor. These defendants under the circumstances submit that the plaintiffs should be put to the strict proof of their claim.

The following were the issues raised :—

(1) Whether it was arranged at the time of dissolution of partnership between Ramji Lukhmidas and Ladhoo Kara that the latter was entitled to receive three-sixteenth of the three-anna share in the agency commission in H. and S. S. and M. Company received by the firm as alleged in paragraph 5 of plaint.

(2) Whether Ramji Lukhmidas was shown the draft of Ladhoo Kara and whether he approved of the same as alleged in paragraph 6 of plaint.

(3) Whether the allegations in paragraph 10 of plaint are true.

(4) Whether the claim for commission in 1900-1901 and 1902 are not barred by limitation.

(5) General Issue.

In support of the arrangement whereby Ladhoo Kara was to receive $\frac{3}{16}$ of Ramji Lukhmidas' share of the commission in the Mill, evidence was given by the plaintiff and one Choonilal

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Chhotalal, and although no doubt, as pointed out by Mr. Robertson for the defendants, the plaintiffs' evidence acquired strength as he proceeded, still I see no reason for disbelieving it, supported as it is by Choonilal Chhotalal.

The plaintiffs demanded the amount by their attorney's letter of July 1905 (Exhibit E) to which no reply was sent.

It is contended for the defendants that in any event the plaintiffs cannot recover the commission for any period prior to three years before the filing of the plaint. This will depend upon the question whether Ramji Lukhmidas can be said to have been an express trustee for Ladhoo Kara in respect of Ladhoo Kara's share of the commission.

In the first place according to the plaintiff the moneys subscribed for the 187 shares of the Mill was the money of the firm of Ramji Lukhmidas. I see no reason to doubt this. In the next place according to Choonilal "He (Choonilal) wanted Ramji Lukhmidas to take up the shares at Rs. 600 or Rs. 700 each together with the commission." Ramji Lukhmidas declined to do so. Ladhoo Kara was to keep the shares at par and was to get the 3 annas in the commission from the shop—as it was to be credited in the profit and loss account and he was to get it from that account. There is no doubt the share of Ladhoo Kara in the commission was not credited to him in the firm's books but was included in the profit and loss account, but it was credited to him as I am told in his own account.

It seems to me that Ramji Lukhmidas under the circumstances of the case may be said to have occupied a fiduciary position towards Ladhoo Kara with regard to the latter's share of the commission. As far as we know Ladhoo Kara's right to the 35 shares in the Company carried with it his right to $\frac{3}{16}$ of the commission. It does not appear whether the 35 shares were actually transferred to him or whether they remained with Ramji Lukhmidas. As to the shares themselves it must, I think, be held that Ramji Lukhmidas, if they remained in his hands, was an express trustee for Ladhoo Kara. Looking at the evidence of Choonilal above set out, in my opinion, it must be held that Ramji Lukhmidas was an express trustee also in respect

of Ladhoo Kara's share of the commission. The trust was express—and was created in expressed terms.

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The case of *Soar v. Ashwell* ⁽¹⁾ contains a reference to all the cases on this point. Bowen, L. J., says:—"The principle which clothes those who receive property in their fiduciary position with the liabilities of express or direct trustees was clearly laid down in *Burdick v. Garrick* ⁽²⁾. 'I do not say,' says Hatherley L. C., 'that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply; but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the statute has no application.' 'I do not hesitate to say,' says Giffard L. J., 'that, where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time.' It is with reference to this language that Kay, J., said in *Banner v. Berridge* ⁽³⁾ 'That obviously enlarges the definition which Kindersley, V. C., gave, and points out that a man may be bound by an express trust where moneys, which in no sense belong to him, and in which he has no kind of interest, or goods, plate, or jewels, are placed in his hands by the real owner as deposittee of them, and that without any writing or even expression in words that it was to be a trust. That would come, according to Lord Hatherley's dictum here, within the definition of express trust.' This view was followed by Wickens, V.C., in *Gray v. Bateman* ⁽⁴⁾, and by Chitty, J., in *Lake v. Bell* ⁽⁵⁾, and has never since been impeached."

If this view is correct section 10 of the Limitation Act applies and limitation is no bar to any part of the plaintiffs' claim.

In addition to this, there is the fact that Ramji Lukhmidas approved of the contents of Ladhoo Kara's will in which Ladhoo Kara treated himself as the absolute owner of the commission and dealt with it as such.

(1) [1893] 2 Q. B. 390 at p. 397.

(3) (1881) 18 Ch. D. 254.

(2) (1870) L. R. 5 Ch. 233.

(4) (1872) 21 W. R. 137.

(5) (1886) 34 Ch. D. 462.

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Assuming, however, that no express trust was created, I am of opinion that upon other grounds it can be correctly said that the statute of limitations has no application, although the point is a novel one as Mr. Lowndes said.

Ladhoo Kara died in 1900. The plaintiffs were his executors and by section 4 of the Probate and Administration Act all his estate vested in the plaintiffs as such. This Court has held section 4 applicable before probate. See *Shaik Moosa v. Shaik Essa*⁽¹⁾ approved in *Mathuradas Lowji v. Goculdas Madhewji*⁽²⁾. And in *Bai Harkor v. Maneklal Rasikdas*⁽³⁾ it seems to have been assumed that the effect of section 4 would have been to vest the property in the executor of a will made before the passing of the Act, and not governed by the Hindu Law, although probate had not been granted. In *Komolochun Dutt v. Nilruttun Mundle*⁽⁴⁾ Markby, J., says: "The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the will." The commission due to Ramji Lukhmidas which included Ladhoo Kara's share was not received till 26th August 1901, and it vested in the plaintiffs as his executors from that date. By section 100 of the Probate and Administration Act it was the duty of the plaintiffs to collect the estate of Ladhoo Kara with all reasonable speed, although probate was not granted to them till 1st April 1902.

Ramji Lukhmidas died on 21st June 1904, within three months of the commission having been received, and by section 103 of the Probate and Administration Act it was the duty of his executors to pay his debts which included that due to Ladhoo Kara in respect of his share in the commission, although probate of his will was not taken out till 17th May 1905. In my opinion the executors of Ramji Lukhmidas cannot rely on the statute of limitation when the non-payment of Ladhoo Kara's share of the commission within three years from the receipt thereof was occasioned by their own default. Again, I am of opinion that

(1) (1884) 8 Bom. 241.

(2) (1886) 10 Bom. 468.

(3) (1887) 12 Bom. 621.

(4) (1878) 4 Cal. 360 at p. 362.

the principle stated in *Binns v. Nichols*⁽¹⁾ applies, *viz.*, "where the person liable for the payment of a legacy, and the person entitled to receive it, are the same, no question of limitation under the statute can arise." The first plaintiff, as one of Ladhoo Kara's executors, was entitled to receive Ladhoo Kara's share from the 21st August 1901, the date when it was received from the mill. And from 21st June 1904, the date of Ladhoo Kara's death, was one of the persons liable to pay, *i. e.*, as one of Ramji Lukhmidas' executors. This debt due by Ramji Lukhmidas' estate to the estate of Ladhoo Kara was (to use V. C. Page Wood's expression) "at home," *i. e.* (in the present case), would have been paid even had Ramji Lukhmidas' other executors not raised objections. Hence no question of limitation can arise.

I find, therefore, the issues as follows:—

- (1) Affirmative.
- (2) Affirmative.
- (3) Affirmative.
- (4) Negative.
- (5) General.

I, therefore, pass a decree in favour of the plaintiffs in the terms of paragraph 13 of the plaint save that 4½ per cent. interest will be charged instead of 6 per cent.

I direct the costs of both parties as between attorney and client to come out of the amount of the commission herein claimed, or hereinafter to be claimed, as the point was not a clear one.

Attorneys for plaintiffs: *Messrs. Bhaishankar, Kanga & Girdharlat.*

Attorneys for defendants: *Messrs. Wadia, Ghandhy & Co.*

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(1) (1866) L. R. 2 Eq. 256.