1873.

HANMANTRA'V KHANDERA'V *v.* BHAVA'NRA'V BA'JIRA'V.

PER CURIAM :—By the terms of the decree, the plaintiff is authorized, in the event of non-payment by Hanmantráv, to take out execution against the estate of the deceased Khanderáv. Under this decree, he has attached, in the hands of the Collector, allowances accruing due, subsequently to Khanderáv's death, to Hanmantráv, the present holder of the *watan*. These allowances can, in no case, be held to be the property of the deceased Khanderáv who had only a life interest in the *watan**. It may be that the decree does not give to the plaintiff all to which he is entitled, or all which it was intended to give; but the Court cannot, in execution, look beyond the terms of the decree, and these terms do not authorize the attachment of the *watan*.

The orders of both Courts below are reversed, and the attachment ordered to be raised. Costs on Bhavánráv.

Order accordingly.

* See, Reg. XVI. of 1827, Sec. 20, cls. 1 and 2; *Kunialal* v. *Wiswasrav*, Morris Part III. p. 4; *Krishnarav* v. *Rangrav* 4 Bom. H. C. Rep. 12, 13, A. C. J.; West and Bühler Bk. II., Cap. III., Sec. 4, Question 3, (p. 52).—Ed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 379 *of* 1872.

June 18.

NASIR BIN ABDUL HABIB FAZAL.*Plaintiff and Appellant.*

DA'YA'BHA'I ITCHA'CHAND...*Defendant and Respondent.*

Banker and Customer—Principal and Agent—Limitation—Act XIV. of 1859, Sec. 1, cl. 9.

A deposited certain moneys with B, a banker, and drew against them, but not to the full extent; the residue was employed on A's account by B, according to an agreement between them.

Held that, besides the ordinary relation of banker and customer, there subsisted also between them that of principal and agent; that, therefore, the right of action arose at the time of demand. *Held* also that a three years' limitation applied under Act XIV, of 1859, Sec, 1, cl. 9.

1873.

NASIR BIN ABDUL HABIB FAZAL v. DA'YA'BHA'I ITCHA'CHAND.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Surat, confirming, in appeal, the decree of the First-Class Subordinate Judge of that place.

The plaintiff in 1869 sued the defendant to recover Rs. 3,246-15-6, being the balance of various sums deposited, from time to time, with the latter in 1864-65, whereof a part had been since withdrawn. The written statement disclosed the fact that, in pursuance of an agreement entered into between the parties, the residue not drawn against had been employed by the defendant on account of the plaintiff in the purchase and sale of *hundis*, and that the profits arising therefrom had been credited to the account of the latter.

It was contended in the Court of first instance, on behalf of the plaintiff, that each item was a deposit within the meaning of Sec. 1, cl. 15, of Act XIV. of 1859, and, consequently, recoverable within thirty years. On the other hand, it was objected, on behalf of the defendant, that the relation between the parties was that of debtor and creditor merely; that, therefore, the cause of action arose at the time of deposit; and that, as more than three years had elapsed since then, the suit was barred under Act XIV. of 1859, Sec. 1, cl. 9. The defendant's objection was allowed by both the Lower Courts, and the claim was, therefore, rejected. The District Judge, however, remarked, on regular appeal, that, notwithstanding the decision of the Calcutta High Court in *Tarini Prasad Ghose* v. *Rám Krishna Banerjee* (*a*), he felt bound to apply the common law doctrine that the cause of action in respect of money lent accrues at the date of the loan, because that ruling had not been adopted by the High Court at Bombay in *Mulchand* v. *Girdhar* (*b*).

The special appeal was heard by MELVILL and WEST, JJ.

Leith (with him *Dhirajlál Mathurádás*, Government Pleader) for the special appellant:—The only point is with regard to limitation. In *Foley* v. *Hill* (*c*) Lord Brougham de-

(*a*) 6 Beng. L. R. 160. (*b*) 8 Bom. H. C. Rep. A.C. J. 6.
(*c*) 2 H. L. Ca. 28.

1873.

NASIR BIN ABDUL HABIB FAZAL v. DA'YA'BHA'I ITCHA'CHAND.

scribes the position of a banker to be that of a debtor, but adds that he may, in certain cases, make himself an agent or trustee. Here the defendant, in his written statement, admits that he employed the moneys remaining in his hands on account of the plaintiff by dealing in *hundis*, in pursuance of an agreement entered into between them, and that he credited the plaintiff with the profits arising therefrom. He is, therefore, clearly an agent. See also, with regard to the fiduciary character of the banker, the decision in *Lord Hollis's case* (*d*), and the doubts expressed by Pollock, C. B., in *Pott* v. *Clegg* (*e*).

If this be a case of money lent, the period of limitation would run from the date of the demand, which was made less than three years ago. In *Parbati Charan Mookerjee* v. *Ramnarayan Matilal* (*f*), Macpherson, J., dissented from the English rulings, and followed them only because he considered himself bound to do so. In *Tarini Prasad Ghose* v. *Rám Krishna Banerjee (supra)* the Court refused to extend to the Courts of the Mofussil the English doctrine that the cause of action arises at the date of the loan. Furthermore, in *Brammayi Dasi* v. *Abhai Charan Choudhry* (*g*), Norman, Acting C.J., held that a demand was necessary by Hindu law.

Macpherson (with him *Shántárám Náráyan*) for the special respondent:—The Lower Courts have found upon the evidence that the relation between the parties to the suit was that of banker and customer. This is not a case of agency at all, and no agency was set up till now. It is clearly a case to which, under Sec. 1, cl. 9, of Act XIV. of 1859, a limitation of three years applies from the cause of action which arose, not from the date of demand, but from the date of the loan. The judgments of the Lower Courts must, therefore, be upheld.

(*d*) 2 Ventr. 345. (*e*) 16 M. & W.
(*f*) 5 Beng. L. R. 396. (*g*) 7 *Ibid* 489.

1873

NASIR BIN ABDUL HABIB FAZAL v. DA'YA'BHA'I ITCHA'CHAND.

WEST, J.:—The suit in this case was brought for the recovery of a balance alleged to be due by the defendant to the plaintiff, on account of moneys deposited and partly drawn against, leaving a residue still owing to the plaintiff. The plaintiff claimed as a depositor in trust. The defendant replied that he must be treated as a mere borrower, and that, viewed in this light, his liability was barred by limitation, the last sum placed with him having, according to the plaintiff's own statement, been paid in more than three years before the institution of the suit. The Courts below held this plea a bar to the prosecution of the suit, and decreed against the claim.

An examination of the statements made by the parties shows that the plaintiff, in the first instance, intended to rely on his character as a depositor to bring himself within the clause of the Limitation Act, which allows 30 years for the institution of a suit against a depositary, counted from the time of the deposit. To this character, we do not think he is entitled. The relation of a depositor (in the popular use of that word) to a banker is conclusively settled by the case of *Foley* v. *Hill (supra)* to be that of a lender to a borrower. There is, in ordinary cases, no trust to prevent the banker's dealing with the money for the purposes of his own business. The depositor cannot even sue for an account. He knows, as well as the banker, what has been paid in and drawn out, and there is no fiduciary relation imposing a special duty on the latter.

If strictness of pleading, therefore, were not properly to be subordinated, in this country, to the ascertainment of the truth, and the furtherance of substantial justice, a question would arise of whether the plaintiff was not, upon the case, made by himself, deprived of the remedy accorded only to those lenders of money who take proceedings within three years of the loan or its acknowledgment. The District Judge, in upholding the decision arrived at by the Subordinate Judge, has considered himself bound by the English cases, and by that of *Mulchand* v. *Girdhar* (*h*), in this Court,

(*h*) 8 Bom. H. C. Rep. A. C. J. 6.

1873.

NASIR BIN ABDUL HABIB FAZAL v. DA'YA'BHA'I ITCHA'CHAND.

to reckon the time for limitation from the date of each deposit; and, in determining whether this view were correct, we should have to estimate the force of the reasons assigned for and against the English rule, that a cause of action arises immediately out of a debt without a demand made for its payment, in the discussions of the question contained in the cases cited before us from the Bengal Law Reports. In the view we take of the present case, such an investigation becomes unnecessary; and we will only suggest that the explanation of the apparent injustice of allowing an action for a debt that had never been claimed, is to be found in the peculiar history of the action of assumpsit, which, being one of a class first devised for wrongs, was gradually allowed to supersede the old common law action of debt in cases of contract.

Fortunately, we are not obliged to sacrifice the end to the means. "The substance and merits of the case," as observed by L. J. Knight Bruce in the case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonveree* (*i*), "are to be kept constantly in view. The substance, and not the mere literal wording of the issues, is to be regarded." And when we read the defendant's statements along with those of the plaintiff in this case, we cannot doubt that, besides the ordinary relation of banker and customer, there subsisted between them that also of principal and agent. The defendant was to employ the money, deposited with him, on the plaintiff's account, and, of course, therefore, at his risk by dealing in *hundis*. For any moneys thus realized, the defendant would plainly be liable to the plaintiff. What amounts had been gained or lost on the transactions entered into, could be known for certain only to the defendant. Under such circumstances, the plaintiff would have a right to claim an account, and this right would not be affected by the fact that some of the items in such account would probably, or even certainly by themselves, be of the class of those arising in the usual way between a banker and his

(*i*) 6 Moo. Ind. App. 410

customer. The case of *Topham* v. *Braddick* (*j*), which has frequently been relied on in more recent cases, establishes clearly that where such a relation and such a right subsist, "a demand must be either proved or presumed in order to give the plaintiff a cause of action." The demand, in this case, was made, as the District Judge says, and the consequent right of action arose within three years before the institution of the suit. The claim was not barred, and the decrees of the Courts below, on that point, being reversed, the cause must be remanded for retrial on its merits.

Costs to follow the final decision.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 95 *of* 1873.

RA'MCHANDRA BHIKA'JI.....*Appellant.*

THE COLLECTOR OF RATNAGIRI .....*Respondent.*

July 21.

Jurisdiction of Small Cause Court —Special Appeal—Sec. 27 *of Act XXIII. of* 1861—*Act XIV. of* 1869, *Sec.* 32.

A suit to recover less than Rs. 500, levied as assessment by Government officials, is cognizable by a Court of Small Causes ; and, therefore, under Sec. 27 of Act XXIII. of 1861, no special appeal lies.

District Judges should, ordinarily, try such suits when brought in the District Court, and should not delegate the trial to their Assistants.

THIS was a special appeal from the decision of H. Birdwood, Acting Judge of Ratnagiri, in appeal, affirming the decree of H. J. Parsons, Assistant Judge in the same place.

This action being against the Collector of Ratnagiri, in his official capacity, was instituted in the Court of the District Judge, under Sec. 32 of Act XIV. of 1869. The District Judge, however, referred it to the Assistant Judge for trial. Both the Courts having thrown out the plaintiff's claim, a special appeal was preferred to the High Court against the decree of the District Court in appeal.

(*j*) 1 Taunt. 572