objected to the will being made. But the adoption having been made in accordance with the will, and the plaintiff having, as appears from his subsequent conduct, assented to the will, and taken the benefits which it secured to him, it is impossible to hold that he is now at liberty to repudiate it. I think there must be a decree for the defendant: and that the plaintiff must bear the costs of both these appeals, and all costs in the Court below.

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Vinayak Narayan Jog v. Govindram Chintaman Jog.

MELVILL, J. concurred.

Marriott for the respondent:—By the terms of the will two houses are secured to the plaintiff, and these have not been made over to him. So much of the District Judge's decree as awards those two houses should be confirmed.

COUCH, C. J.:—The answer to that is, that you cannot claim a decree on a ground which is quite inconsistent with your plaint: you cannot sue as heir-at-law to set aside the will, and, failing that ask, for a decree as devise under the will. If the defendant does not carry out the terms of the will the plaintiff has his remedy.

Decree reversed with costs.

Referred Case.

Nov. 20.

Manchharam Kalliandas ... ...*Plaintiff*,

Baksho Saheb mir Mainudin Khan ... ...*Defendant*.

Action on judgment of Mofussil Court—Cause of Action—Small Cause Court.

A suit cannot be maintained in a Small Cause Court in the Mofussil to enforce the decree of a Civil Court.

Case referred under Act X. of 1867 by Sayad Hussan El Medini, judge of the Small Cause Court at Surat, for the decision of the High Court.

"This plaint has been presented on behalf of the plaintiff to recover the amount of 200 Rupees due on a decree of the Court of the Principal Sadr Amin of Surat, No. 1,588 of

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1861. No process of execution was taken to enforce the decree within the time prescribed by Sec. 20 of Act XIV. of 1859, and, consequently, its enforcement now is barred.

"Assuming the decree as creating a debt or obligation of record, the *vakils* urge that Cl. 11 of Sec. 1 of Act XIV. of 1859, contemplates that a suit on such a decree may be entertained.

"No doubt a suit on a judgment is contemplated in the clause referred to above; but it must either be between parties or in Courts governed by English law, and the judgment must be of a Court of Record.

"Mr. Justice Phear of Calcutta has made the following observations respecting the words 'cases governed by English law':—'I am of opinion that the words of the clause which refer to English law do not mean merely the law formerly administered by the late Supreme Court, or now by the High Court sitting as a Court of Ordinary Original Civil Jurisdiction, but are intended to point out a class of cases in which, as between the parties, exclusively English law must be administered.'

"Neither the Court of Small Causes of Surat nor the parties in this case are governed by English law, nor are the Mofussil Civil Courts considered as Courts of Record. The question then remains to be decided whether a suit between parties, and in a Court not governed by English law, and founded upon a decree of a Court which is not a Court of Record, can be maintained.

"According to the decision of the Calcutta High Court (present Shambhunath Pandit and E. P. Levinge. JJ.) in *Ranee Emamun* v. *Hurdyal Sing* (*a*), and according to the decision of Mr. Justice Phear in the case of *Jussorat Khán* v. *Kanye Lall Dey*, quoted by Mr. Thomson in his work on Limitation, p. 243, Appendix A., it would seem that a suit to recover money due on a decree of a Mofussil Court can be entertained by a Mofussil Court; while Chief Justice Peacock and Mr. Justice Hobhouse have decided in *Sangde*

(*a*) Special vol. Calc. W. Rep. Civ. P. 30.

v. *Jomir Shaikh* (*b*). that a suit cannot be maintained to recover money due on any decree of a Mofussil Court. The Honourable the Chief Justice is also reported to have said 'there would be no end to a case if a fresh suit may be maintained upon a decree' (*c*).

"My opinion on the point raised above is, that as there is no statutory provision in Indian law by which a suit upon a decree has been expressly permitted to be brought, and as Sec. 20 of Act XIV. of 1859 enacts that the judgment of a Civil Court not established by Royal Charter shall not be enforced unless some proceedings shall have been taken to enforce such judgment within three years next preceding the application for execution, and as the results which may be attained by the institution of a suit on a decree can as effectually be attained by the procedure prescribed in Sec. 216 of the Code of Civil Procedure, a fresh suit on a decree should not be entertained.

"It certainly seems somewhat anomalous that while we could not object to the institution of a suit in this country on a judgment of a foreign court, we should decline to concede this privilege to our own decrees; but the rules of law regarding the operation of decrees are founded on expediency, and if by an analogous mode of dealing we were to hold that a suit should not be entertained also on the decree of a foreign country, we might in some cases do injustice, whereas no injustice can be caused by our declining to entertain a fresh suit on our own decree, as security is provided against that by the provisions of Sec. 216 of the Code of Civil Procedure.

"As Sec. 32 of the Code of Civil Procedure directs that 'if upon the face of the plaint it appears to the Court that the subject-matter of the plaint does not constitute a cause of action, the Court shall reject the plaint,' and as the decree sued upon does not constitute a cause of action, I have rejected the plaint contingent upon the opinion of the Honourable the High Court. Since writing the above I have had an opportunity of reading the decision of the Honourable

(*b*) 9 Calc. W. Rep. Civ. R. 399. (*c*) Ibid, p. 401.

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the Chief Justice of Madras, and Mr. Justice Jones in *K. Sunjivia* v. *Nungiev*, reported in the *Madras Jurist* for October 1869, page 364. Their Lordships also have decided that a suit on a judgment-debt is not maintainable."

The case was considered by Couch C. J., and Lloyed, J.

Couch, C. J.:—The question referred to us in this case is whether a suit can be maintained in the Small Cause Court of Surat, upon a decree of the Court of the Principal Sadr Amin of Surat. *Prima facie* an action lies on the judgmen- of every Court of competent jurisdiction, the general print ciple being that the judgment of a Court of competent jurisdiction creates a duty to pay on which debt will lie: *Berkeley* v. *Elderkin* (d). I doubt whether the duty thus created is within the terms of Sec. 6 of Act XI. of 1865, namely, "claims for a money due on bond or other contract, or for rent or for personal property, or for the value of such property, or for damages;" but I think the question may be decided on a higher ground. The decree sued upon is the decree of a Court regulated by the Code of Civil Procedure, which contains the amplest provisions for the execution of the decree, not only within the jurisdiction of the Court by which it was passed, but within any part of the British territories in India. As regards the mode of executing this decree, the obtaining a judgment in the Small Cause Court would be of no benefit whatever to the plaintiff; in fact he would be in a worse position, as he could not have execution of the judgment of the Small Cause Court upon the immoveable property of the defendant until the Court was satisfied that there was not sufficient moveable property. As a remedy, the action in the Small Cause Court would be futile when the execution of the decree is not barred by the law of limitation, and it is the policy of the law not to allow such actions to be brought. The Legislature has been careful in the Limitation Act to provide that the judgments and decrees of Civil Courts shall be enforced within certain periods, and if an action might be brought upon a judgment or decree which is within those provisions, the law of limitation might

(d) L. E. & B. 805.

be evaded. Where an action on a judgment or decree will not give to the plaintiff a higher or better remedy than he already has; there is no advantage in allowing it to be brought; and it would be contrary to the spirit of the Code of Civil Procedure to do so. Where it will give a higher or better remedy the case is different, and there are cases in which an action may be the only mode of enforcing judgment or decree. For these reasons I am of opinion the decision of the Judge of the Small Cause Court of Surat is right.

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Manchharam Kalliandas v. Bakshe Saheb mir Maiundin Khan.

LLOYD, J., concurred.

Dec. 1.

Special Appeal No. 206 *of* 1869.

Dajiba Anandrav... ... ... *Appellant.*

The B. B. and C. I. Railway Company... ... *Respondent.*

Trespass to immoveable property—Damages—Quarrying.

Where the defendants without leave quarried on the land of the plaintiff and removed a large quantity of stone therefrom, it was held that the plaintiff was entitled to recover by way of damages the value of the stone after it was quarried, and that the defendants were not entitled to a deduction therefrom of the cost they had incurred in quarrying the stone.

This was a Special Appeal from the decision of A. Bosanquet, Judge of the District of Thana, in Appeal Suit No. 432 of 1868, amending the decree of Madhavrav Sheshgir, Munsif of Dahanu, in Original Suit No. 689 of 1867.

The Special Appeal was heard before GIBBS and LLOYD J. J., on the 11th of August 1869.

Vishvanath Narayan Mandlik for special appellant.

Latham for the special respondent.

Cur. adv. vult.

1st December 1869—GIBBS, J., in delivering the judgment of the Court said :—

This is a suit to recover from the defendant, the Bombay, Baroda, and Central India Railway Company, a sum of Rs. 2,487-11-8 damages, on account of trespass committed by the latter on certain lands belonging to the plaintiff, and