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

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quarrying and carrying away stones therefrom, and otherwise rendering it unfit for purposes of cultivation.

The Munsif of Dahanu, Azam Madhavrav Sheshgir, gave judgment for the plaintiff; and directed that he should recover from the defendant Rs. 1,666-10-8, on account of the value of stone, Rs. 576 the amount of mesne profits up to date of judgment, and Rs. 181 for restoring the land to its former state; in all Rs. 2,423-10-8, together with interest at 2 per cent. on the amount, excluding costs of restoration at 2 per cent. per mensem from the date of plaint, and costs, together with interest at the same rate on the whole sum, including costs, from the date of decree up to final liquidation.

Dissatisfied with this decision, the Agent of the Railway Company appealed to the District Judge, who laid down four issues for trial. His first issue was whether the claim was barred by the Law of Limitations. His finding was in the negative, and for the plaintiff. His second issue was what was the value to the plaintiff of the stone taken by the defendant from his land; and his finding was that it was of no value whatever to the plaintiff. The third issue was whether the defendant had rendered the plaintiff's land unfit for cultivation; and, if so, what would it cost to restore it to its former state. The finding upon this was in the affirmative and the sum of Rs. 181 was fixed as the cost of restoration. The forth and last issue was, whether if the plaintiff was entitled to recover mesne profits, what amount should be awarded to him, and the finding upon this was that Rs. 576 should be awarded. The District Judge accordingly amended the Munsif's decree by admitting the plaintiff's claim to the extent of Rs. 757 only.

Against this decision a special appeal was preferred to the High Court. It was argued before my brother Lloyd and myself on the 11th of August last, and adjourned on that day to enable us to consult Sir Charles Sargent with reference to the case of *Parshavam* v. *B. B.* and *C. I. Railway Company*, tried before him on the original side of this Court. We have consulted Sir Charles Sargent, and we find that his decision

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will not assist us in deciding this case. In that case, sitting as a Court of Original Jurisdiction, he found, as a matter of fact that the stone was of no value. We are here sitting in special appeal, Judges of law only, and as such bound to accept the findings of fact recorded by the Judge below. He has found that "at Mahim, four miles from the plaintiff's land, stones fetch one rupee for two cart-loads, and also that the cart-hire would be annas four or five for each cart;" but he added: "Besides that, there is the cost of quarrying the stone, and filling the carts. I cannot see that the plaintiff could sell stone from his field at any profits."

Against this finding it was urged by the special appellant that the Judge below was in error in taking into consideration the cost of quarrying the stone; and the case of *Martin* v. *Portor* (*a*), was quoted as an authority on the point. The circumstances of that case were as follows:—The plaintiff and defendant were adjoining proprietors in a coal district. The defendant had worked his coal mine under the plaintiff's land to an extent exceeding a rood, unintentionally, as it to be inferred, the contrary not being alleged and had brought up a considerable quantity of coal. Trespass being brought, the defendant supposed the rule of damages to be the value of the coal in the bed, or its market value, less the price of getting it out, and paid into the Court the sum of £133. But Parke, B., who tried the case, said that the plaintiff would have been entitled in an action of *trover* to the value of the coal as a chattel, either at the pit's mouth or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing the defendant anything for having worked and brought it there; and not having made such a demand; and this action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away; that is, as soon as it existed as a chattel, which value would be the sale price at the pit's mouth, after deducting the expenses of carrying the coals from the place in the mine where they were got to the pit's mouth, *but not the cost of quarrying*

(*a*). 3 M. & W. 351.

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the stone. The principle was affirmed in appeal. Lord Abinger said : "It may seem a hardship that the plaintiff should make this extra profits of the coal ; but still the rule of law must prevail." Parke, B., added : " I am not sorry this rule is adopted ; it will tend to prevent trespass of this kind which are generally wilful."

Applying the principle laid down in *Martin and Porter*, we find that the Judge below was in error in taking into consideration the cost of quarrying the stone; and we must therefore reverse his decision, and remand the cause for him to determine the value of stone, excluding the cost of quarrying it.

Decree reversed and case remanded.

Dec. 1.

Special Appeal No. 330 of 1869.

Sakho Narayan Khandalkar... .....*Appellant.*

Narayan Bhikaji Khandalkar.....*Respondent.*

Jurisdiction—Act XIV of 1869—Appellate powers—Assistant Judge—Correction of an error of law in a decree—Coparceners—Limitation—Reg. V. of 1827.

A decision passed on appeal from a decision of a Munsif by an Assistant Judge, subsequent to the date on which Act XIV of 1869 came in to operation (14th March 1869), and prior to the date on which the Assistant Judges in the Bombay Presidency were invested with appellate powers under the Act (4th April 1869), is not illegal, as the Act did not alter the procedure as regards appeals against decisions passed by Courts constituted under the old Regulations, under which the Assistant Judges had power to hear appeals.

Also, when the parties neglect to get an error of law in a decree of the High Court corrected by a review, the High Court will decline to correct it when the case comes up before them again in a subsequent Special appeal.

Also, when Hindu coparceners have, for a period of more than thirty years, held shares different from those which as such coparceners they would be entitled to by law, and no separation is proved between the parties, the coparcener holding less than his proper share can sue to recover his full quantum, and his claim is not cancel either by Reg. V. of 1827 Act XIV. of 1859.

This was a Special Appeal against the decision of J. R. Naylor, Assistant Judge at Ratnagiri in Appeal Suit No. 135 of 1865, amending the decree of the Munsif for Vingula