1869 :

Dajiba Anandrav v. The B. B. and C. I. Railway Company.

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

1869

Sakho Narayan Khandalkar v. Narayan Bhikaji Khandalkar.

The special appeal was heard before GIBBS and MELVILL, JJ.

Shantaram Narayan appeared for the appellant.

Bhairavanath Mangesh appeared for the respondent.

The facts, in so far as they are material, appear from the following judgment delivered by

GIBBS, *J.* :—This case has been before the High Court on several occasions. On the last remand the Assistant Judge arrived at the same conclusion as the Joint Judge had arrived at before, adding merely a provision "that the plaintiff shall recover from the defendants a half share of the proceeds of the Rewandi estate, until such time as the partition is effected, and he is put in separate possession of his half share.

At the last hearing of the special appeal on the 19th October, Mr. Shantaram Narayan argued that Mr. Naylor, the Assistant Judge, had no jurisdiction to try the appeal, as at the date of trial he was not vested with appellate pwers under Sec. 17 of Act XIV. of 1869. Mr. Shantaram's objection was not allowed, as we were of opinion, following the principle laid down in the Full Court Decision in the case of *Ratanchand* v. *Hanmantrav*, (*a*) that the decision passed on appeal from a decision of a Munsif by an Assistant Judge subsequent to the 14th of March 1869 (the date on which Act XIV. of 1869 came into operation), and before the 4th of April 1869 (when the Assistant Judges had appellate powers conferred upon them under the Bombay Civil Courts' Act) was not illegal, as the said Act did not alter the procedure as regards appeals against decisions passed by Courts constituted under the old Regulations, and under those Regulations the Assistant Judges had powers to hear appeals.

At the last hearing it was also noticed that when this case was before the High Court last, in the shape of Special Appeals Nos. 52 and 66 of 1867, the Divisional Bench were in error in holding that Reg. V. of 1827 was a law of prescription and not of limitation, and that therefore the

(*a*) Ante p. 160.

1869

Sakho Narayan Khandalkar v. Narayan Bhikaji Khandalkar.

plaintiff could not, under Clause 2, Section 7, derive any benefit from the reference to arbitration, and *Jewajee v. Trimbuckjee and Jagoji* (*b*) was quoted as an authority. On this we may observe that this case was not cited when the last remand order of the High Court was made, and that the proper course to get any error corrected was by a review. And although we wish we could allow a review in this case, for the reference to arbitration would save the limitation, we think that it is too late now, and that it would not be advisable to allow a proceeding which might establish a precedent leading to open up any case at any future time.

The only point we have now to decide therefore is, whether when coparceners have held for more than thirty years shares different from those to which as such coparceners they would be entitled on a formal partition, each of them acquires a prescriptive title to the portion so held by him, or whether if he holds less than his proper share, he can claim to recover his full quantum. It was conceded in the argument that if this suit had been brought under the new law of limitation it would not have been barred, for under that law possession of a share by a coparceners is in the nature of a payment; but the suit having been instituted under the old law, the question of limitation must be decided thereby. The case cited by Mr. Shantaram (*Mahipatrav* v. *Moro*, S. A. No. 102 of 1865, decided by TUCKER and WARDEN, JJ., on the 18th of August 1886,) does not apply. In Special Appeal No 2,871, the late Sadr Adalat had, on the 15th of January 1853, held that if a claimant is proved to be one of the *bhauband* of the defendants, no lapse of time since the active enjoyment of the privileges would bar his claim to such a share as he would be entitled to. Latterly, however, this principle had been departed from, for, in *Gudhur Rushetuna* v. *Govind* (*c*) Keays, Hart, and Hebbert, Puisne Judges, held, that "in a suit for a division of family property, if the party in possession can show thirty years of such possession uninterrupted and as proprietor, and further that during this time the party claiming has never derived any profits from, or

(*b*) 3 Moo. Ind. App. 138.

(*c*) 7 Harrington 371.

recovered any part of the proceeds of the property in dispute, then such possession is good proof of a separation of interests and will bar the action." This principle was followed by the High Court in *Rane* v. *Rane* (*d*,) Between these cases and the case before us, there is however this distinction: In the former the party claiming was out of possession altogether; and therefore, according to the ruling of this Court in *Guravi* v. *Guravi* (*c*) it would not be necessary that actual separation should be proved. It would be enough to show that the defendants had been in uninterrupted possession for more than thirty years. But in the class of cases similar to the one before us, where both parties are in possession of portions, we should require a definite finding as to whether there had or had not been partition between the parties. In this particular case we have a clear finding that no partition was made, and that each party is in possession of a portion of the entire estate, either by mutual agreement or accidental circumstances. In this view of the matter we consider the suit not barred, and we confirm the Lower Court's decree.

1869

Sakho Narayan Khandalkar v. Narayan Bhikaji Khandalkar.

Dec. 7.

Referred Case.

Lachhman Joharmal... ... ...*Plaintiff.*
Bapu Khandu, and Tukaram Khandoji ... ...*Defendants.*

Nandram Sardarmal ... ... *Plaintiff.*
Bhavani Haibati, and Bhau Tuka ... ...*Defendants.*

Surety—Liability of surety to be such.

Held, that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety, and that when a decree is obtained against a surety it may be enforced in the same manner as a decree for any other debt.

This was a reference under Act X, of 1867 from J. L Warden, Judge of the Court of Small Causes at Ahmednagar for the opinion of the High Court.

(d) 3 Bom. H. C. Rep. A. C. J. 173. (c) Ibid, 170.