

1866.
January 27.
Appeal No. 32.

Howard for the respondent stated that there was another defect in the conduct of the appeal. There was no certificate from the Prothonotary that security had been given for costs.

ARNOULD, J.—There has been negligence in the conduct of this case. The Rules of the Court have not been complied with; and the appeal must, therefore, be dismissed.

WESTROPP, J.—I am of the same opinion. The Court must assert its Rules. No sufficient excuse has been put forward for the failure of the appellant to comply with them.

Appeal dismissed with costs.

Original Suit No. 388 of 1865 ; Appeal No. 40.

MUHAMMAD BHA'I DHARAMSI' and
another *Plaintiffs and Appellants.*
BHA'NJI' TOPAN *Defendant and Respondent.*

Security for costs—Time within which to appeal.

Appeal dismissed, as the appellants had not given security for costs; and as the appeal had not been filed within the time required by the Rules of the Court.

It is sufficient for the respondent to object at the hearing of the appeal for non-compliance with the Rules of the Court; and he need not apply specially to have the appeal rejected, when the memorandum of appeal is preferred.

February 1.

THIS was an appeal from the decision of Mr. Justice ANSTAY, who dismissed with costs a suit brought by the appellants for the recovery of Rs. 4,648-4-8, as damages for breach of a contract by which the defendant had agreed to purchase from the plaintiffs 1,000 bales of Ambara jute.

Marriott (with him *McCulloch*), for the respondent, objected to the appeal being heard, as the appellants had not given security for costs, as required by the Rule of the Court, and by Sec. 342 of the Civ. Proc. Code. Another rule (published on the 16th of June 1865) had also been disregarded.

which required the memorandum of appeal to be filed "within ten days after the judgment, order, or decree shall have been pronounced, exclusive of the time requisite for obtaining a copy of such judgment, decree, or order."

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Bayley (with him *Reid*), for the appellants, contended that the rule referred to a certified copy of the decree, which could not be obtained from the Prothonotary's office until after the decree was sealed. The decree was sealed on the 30th of November 1865, but the appellants did not obtain a certified copy until the 12th of December, from which date they were entitled to ten days within which to file the memorandum of appeal. The respondent was, moreover, too late with this objection, which he should have brought forward when the memorandum of appeal was preferred.

Marriott, in reply, referred to the correspondence between the attorneys, to show that the respondent had given notice of his intention to rely upon the objection now raised.

Couch, C.J., said that the appeal should be dismissed, as the Rules of the Court had not been complied with. It was not necessary for the respondent to have made any special application to the Court in regard to these objections; and it would not be right to establish a practice of that kind, which would increase the expense to suitors.

Westroff, J., concurred.

Appeal dismissed with costs.

NOTE.—The Rules now in force, as published on the 20th of November 1866, are as follow:—

1. An appeal from, or application to review, any decree, order, or judgment of any Division Court or Judge of the High Court in the exercise of its original [civil] jurisdiction shall be preferred within *twenty* days after the judgment shall have been pronounced or the order made; unless such Division Court or Judge shall, within such period, enlarge the time for making such appeal or application for a review.

2. It shall *not* be necessary for the Memorandum of Appeal to be accompanied by a copy of the decree or order appealed against, but the Memorandum of Appeal shall state the substance of the judgment appealed against, and be in the following form, or to the following effect:—(*Form.*)

3. If the substance of the judgment shall not be correctly stated, the Court of Appeal may set aside the Memorandum of Appeal, or may order it to be amended.

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4. Memoranda of Appeal, accompanied by the Prothonotary's certificate that security has been given, are, provided they are within the prescribed time, twenty days, to be filed in the Prothonotary's office, and *not* presented in Court.

5. In all cases in which a Memorandum of Appeal is filed, the Attorney of the party appealing shall apply forthwith to the Clerk of the Judge by whom the case was tried for a copy of the Judge's Notes of the trial, which copy must be certified by such Judge's Clerk, and must be filed with the Prothonotary at least two days before the day fixed for the hearing of the appeal; a copy of the Judge's Notes must also be forwarded by the Attorney for the Appellant, at the same time, to the Clerk of each of the Judges sitting in Appeal.

6. No Memorandum of Appeal will be received, except by special order of Court, unless attended by a certificate from the Prothonotary that security has been given for costs.—*Ed.*



Original Suit No. 365 of 1865; Appeal No. 38.

W. B. THOMPSON &..... *Plaintiff and Appellant.*

JEHA'NGI'R HORMASJI' ... *Defendant and Respondent.*

*Production of document when plaint is presented—Filing of copy—
Restoration of suit— Civ. Proc. Code, Secs. 39 and 351.*

In a suit brought upon a promissory note, where the note was produced when the plaint was presented, and marked by the officer of the Court; but the Judge, at the hearing, refused to receive it, when tendered in evidence, because he found that there was no *copy* of the note among the papers, and the plaintiff's counsel was unable to explain the omission; and, there being no application made to withdraw, the suit was dismissed:—

Held that the Judge ought to have received the note in evidence, as it was "produced in Court by the plaintiff, when the plaint was presented;" that the plaintiff's counsel was not bound, under the circumstances, to apply to withdraw the suit; and that the Judge was not justified in dismissing the suit—which was, accordingly, remanded, under Sec. 351 of the Code, with a direction that it should be restored to its original place on the Register, and be tried by one of the Judges of the Court.

1866.
June 21.
Appeal No. 38.

A PPEAL from the decision of Mr. Justice ANSTEY.

The Original Suit was brought on a promissory note for Rs. 5,000 and interest, made by the defendant and payable to the plaintiff or order on demand. The plaintiff was the Agent in Bombay of the Delhi Bank Corporation.

The suit was called on for hearing on the 4th of November 1865, when it was dismissed with costs, on the ground that no copy of the note had been filed with the plaint.

Pigot (with him *Cooper*), for the appellant (after reading the Judge's notes, and referring to Sec. 39 of the Code of