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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.

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APPEAL 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

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Civil Procedure):—The decision was given in spite of the production of the original note in court at the hearing. The terms of the Act had been complied with, as the original document was produced in court. The intention of the Legislature in providing for the filing of a copy seemed to be to give the Judge an opportunity of looking over the case before the hearing, as he was supposed to do, and nothing more.

Cooper said that he was in court at the time of the trial; that the attention of the learned Judge was called to the original document, and though the plaintiff's counsel offered to amend the plaint, the Judge refused to allow it to be done.

The respondent did not appear.

COUCH, C.J.—In this case, which was a suit brought upon a promissory note, it is stated in the notes of the learned Judge (after mention of an application on the part of the counsel for the plaintiff to amend the plaint)—"I examine the record, and find that no copy has been filed of the note on which the action is to be brought. Mr. O'Leary cannot explain the omission. I refuse leave to amend under these circumstances, and inform him that I shall decline to receive the note in evidence. Mr. O'Leary hereupon tenders the note, and says he has no other application to make."

The note which was so tendered by the learned counsel appears to bear upon it the mark of the officer of the court—the Deputy Registrar—who was present with the Judge at the time when he was receiving the plaint, the mark showing that the note had been produced to the learned Judge at the time when the plaint was presented. Whether the copy had been left with the officer of the Court at the time when the mark on the note was made, and had in some way been detached from the papers, or whether it was an oversight of the officer of the Court at the time in not getting the copy before he returned the note, does not appear; but the fact is beyond question that the note bore a mark of having been produced at the time the plaint was presented, and that the note was tendered to the learned Judge, who, however, refused to receive it.

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Now, Sec. 39 of the Code of Civil Procedure, under which, if at all, this proceeding on the part of the learned Judge can be justified, enacts that "when the plaintiff sues upon any written document, or relies upon any such document, as evidence in support of his claim, he shall produce the same in court (which corresponds in this court to the Judge sitting in chambers) when the plaint is presented, and shall, at the same time, deliver a copy of the document to be filed with the plaint;" and "The Court (or, in this court, the Judge by his officer) shall forthwith mark the document for the purpose of identification, and, after examining and comparing the copy with the original, shall return the document to the plaintiff." And then the latter part of the section says: "Any document not produced in court by the plaintiff, when the plaint is presented, shall not be received in evidence on his behalf at the hearing of the suit, without the sanction of the Court." It does not say that any document, of which a copy does not appear on the record of the court, shall not be received in evidence without the sanction of the Court: it speaks only of a document which is not produced at the time when the plaint is filed. And it does not appear to me that there is any provision in the Code which would justify the Judge in refusing to receive the note in evidence, because he "examined the record and found that no copy of the note was filed with the papers," and because the plaintiff's counsel was unable to explain the omission. The document appears to have been produced when the plaint was filed; and, therefore, it did not come within the terms of the Code, which apply to a document that was not produced when the plaint was presented.

The Judge was not justified in declining to receive it in evidence upon the ground which he assigned for so doing. And that appears to be the only ground on which he ultimately came to the conclusion in favour of the defendants, because he says—"I refuse to receive the note," and then, "there being no further evidence offered, and no application to withdraw the suit, I dismiss the suit." The plaintiff was not bound to apply to withdraw the suit. He was entitled

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to put the note in evidence; and the Judge ought to have received it. The decree of the court below must, therefore, be reversed; and we must remand the case, under Sec. 351, with a direction that the suit be restored to its original number in the Register, and be tried by one of the Judges of this court.

WESTROPP, J.—I completely concur in the remarks of the Chief Justice.

Pigot applied for the costs of the appeal.

WESTROPP, J.—You cannot show any dissent on the part of the respondent to a reversal of the decree.

Pigot.—Will the costs, then, be costs in the suit? It seems hard that they should be borne by the appellant.

COUCH, C. J.—It would be equally hard in the case of the defendant. The defendant has stayed away, and seems to have been quite content that judgment should be given against him. I do not see that he can be made to pay costs. There ought to be no costs. Very possibly if the defendant had been here, he would not have taken any objection to the reversal of the decree.

Decree reversed and suit remanded.

Attorneys for appellant: *Keir, Ramsden, and Prescot.*

Original Suit No. 545 *of* 1865; *Appeal No.* 35.

PARBHUDA'S PRANJI'VANDA'S... *Appellant and Defendant.*
RA'MLA'L BHA'GIRATH ... *Plaintiff and Respondent.*

Sale of shares for future delivery—Readiness and willingness—Specific performance—Share "receipts."

Held that a contract to deliver shares in a public company is sufficiently performed when the vendor places the vendee in such a position as enables him to become the legal owner of them.

A share in a company signifies a definite portion of its capital; and does not necessarily mean the right of a person whose name is then actually on a register of shareholders.

1866. Jan. 26, 30. O. S. No. 545 of 1865.

APPEAL from the decision of Sir M. R. SAUSSE, C.J.

The Original Suit was brought upon an agreement by which the defendant (the appellant) agreed to purchase from