1863. January 26. S. A. No. 53 of 1862.

so far as it relates to the documents not appearing to have been admitted or proved. It further appears that the documents were duly filed. We accordingly must dismiss the appeal, not however without remarking that the Civil Judge seems to have acted most irregularly in receiving and referring to a communication from the district engineer, in answer to a question which appears to have been sent him on the subject of the defendant's character. We cannot suppose that this communication was allowed improperly to influence the Civil Judge's mind, and therefore do no more than refer to it.

FRERE, J. concurred.

Appeal dismissed.

APPELLATE JURISDICTION (*a*)

Original Suit No. 11 *of* 1862.

RÁMJI MADAUJI *against* RANGÁYYA CHETTI.

A document given to a witness as a script, to refresh his memory is not "received in evidence" within the meaning of section 39 of Act VIII of 1859, and need not therefore have been produced when the plaint was filed.

In an action by the vendee against the vendor for breach of a contract to deliver goods "in two or three days,":—*Held* that the measure of damages was the difference between the contract-price and the price which similar goods bore on the lapse of a reasonable time for delivery, not less than three days from the date of the contract.

1863. Jan. 22, 27, & 28 O. S. 11 of 1862.

THE plaintiff claimed rupees 35,090, the difference between the market-price, at rupees 220 per khandi (500 lb) and the contract-price of 300 bales of western cotton, weighing 180 khandis, sold to him by the defendant on the 2nd of July 1862 at 115-8-0 rupees per khandi, and of 100 bales of the same cotton, weighing 60 khandis, sold on the 13th of July 1862, at rupees 132 per khandi.

It appeared from the evidence that there were three contracts between the parties. The first, entered into on the 25th of June 1862, was for 200 bales; the second, on the

(*a*) Present Scotland, C. J. and Bittleston, J.

1863.
Jan. 22, 27 & 28.
O. S. No. 11 of 1862.

2nd of July was for 100 bales ; and the third, on the 11th July, was for 100 bales. None of the contracts were in writing ; but it was proved that the agreement in each was that delivery should be made " in two or three days " from the date thereof.

Under the first contract 197 bales of white cotton were with the assent of the buyer, delivered between the 15th and the 20th of August 1862 ; and it appeared that by mutual assent the matter was kept open till the end of August. Then the defendant tendered a further quantity of cotton. The plaintiff went to his screw-godown, where certain bales were shewn him. These were found to contain inferior white western cotton : the others were red. The plaintiff accordingly refused to receive them, whereupon the defendant said to him, " If you don't choose to have that you may go elsewhere."

The Advocate General, *Norton* and *Mayne* for the plaintiff.

Branson and *Arthur Branson* for the defendant.

A book of the plaintiff's, containing a memorandum of one of the contracts, had not been produced in Court when the plaint was presented. And in the course of the case, *Norton*, while examining the plaintiff, was about to put the book into his hand that he might use it as a script to refresh his memory with respect to the contract, when

Branson objected that this was merely a mode of giving evidence of the contents of a document which ought to have been, but was not, produced when the plaint was presented. Section 39 of Act VIII of 1859, enacts that such a document shall not be received in evidence on behalf of the plaintiff at the hearing of the suit without the sanction of the Court; and in the present case such sanction had not been obtained and ought not to be given. He also referred to section 128 of the same Act, which provides that " on documentary evidence of any kind [not produced at the first hearing], which the parties, or any of them, may desire to produce shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shown to its satisfaction for the non-production thereof at the first hearing."

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SCOTLAND, C. J :—The sections relate to documents relied upon as themselves evidence in support of the case of the respective parties. For the purpose of refreshing the memory of a witness a document may be used which is not evidence in itself ; and on the present occasion it is sought to use the memorandum only as a means of refreshing the memory of the witness and not as evidence in itself. We cannot therefore, I think, say that it is " received in evidence " within the meaning of the sections.

BITTLESTON, J. concurred, and the objection was overruled.

The case then proceeded, and resulted in a judgment for the plaintiff. The following is such portion of the Chief Justice's judgment as related to the rule for measuring the damages awarded.

SCOTLAND, C. J.:—This is an action by the vendee against the vendor for not delivering cotton, and the only point of law which calls for our decision is what is the rule as to damages for breach of a contract to deliver goods " in two or three days" from the date of the contract ? Where a time for delivery is fixed the rule in such cases is that their measure is the difference between the price agreed on and that which goods of a like description and quality bore at the time when the goods contracted for ought to have been delivered. When no time is fixed for delivery, then we must consider the price at which similar goods could have been obtained on the lapse of a reasonable time for delivery (*a*). In the present case we think the question simply is whether a reasonable time had elapsed ? For the expression " two or three days, " under the circumstances in evidence here, means, I think, a reasonable time not less than three days. It clearly does not mean a specific time terminating at the end of three days ; and we cannot hold that the mere fact of non-delivery within two or three days is such a breach as to require the measure of damages to be ascertained by reference to the price of cotton on the day after the three days had expired. The parties I think, intended that a reasonable time for delivery should be allowed.

Damages mere assessed at Rs. 32,690. with costs, nine days being allowed as a reasonable time for delivery.

(*a*) See *Mansuk Das* v. *Rangayya Chetti supra*, p. 162.