1863. January 23. O. S. No. 1 of 1862.

NOTE.—As to the doctrine that where a party to a contract utterly repudiates it, or puts it out of his power to perform it, the injured party may at his option sue at once or wait till the time for performance has elapsed, see, besides *Hochster* v. *DeLatour* above cited (where Lord Campbell, C. J. overruled Parke B.'s doctrine in *Philpotts* v. *Evans*, that the injured party must wait till the time fixed for performance), *Raid* v. *Hoskins* 25 L. J. Q. B. 55, S. C. in error 26 L. J. Q. B. 5; *Avery* v. *Bowden*, 5 El. & B. 714, S. C. 25 L. J. Q. B. 49 : in error 6 El. & B. 953, S. C. 26 L. J. Q. B. 3 : *Barwick* v. *Buba* 26 L. J. C. P. 280 : *Pole* v. *Cetcovich*, 80 L. J. C. P. 102 : *Danube and Black Sea Railway* v. *Xenos*, 31 L. J. C. P. 84 ; and Mayne on Damages, pp. 79, 80.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 53 *of* 1862.

GURUMURTTI NÁYUDU.....*Appellant.*

PÁPPÁ NÁYUDU.....*Respondent.*

When a Court has granted a review, the High Court on appeal will not interfere, though the grounds for granting the review may have improper or insufficient.

On an enquiry whether a signature is genuine, the signature cannot be compared with a document not before the Court, or with one of which the authenticity is disputed.

1863. January 23. S. A. No. 53 of 1861.

THIS was a special appeal against the decree of J. Ratliff, the Civil Judge of Bellary, in Appeal Suit No. 245 of 1861, in which he reviewed and reversed a decision of his predecessor P. Irvine, reversing the District Munsiff's judgment in favour of the plaintiff in Original Suit No. 574 of 1861.

The plaintiff sued on a bond alleged to have been executed by the first defendant. This defendant, Páppá Náyudu, pleaded that the bond was a forgery. The District Munsif decreed for the plaintiff : the defendant appealed, and Mr. Irvine reversed the decree.

Mr. Ratliff, Mr. Irvine's successor, granted a review of judgment, caused the defendant to make a signature before the Court, and then compared the signature to the bond with this and with four others of the same party, procured from the superintendent of police and the office of the district engineer. From this evidence Mr. Ratliff came to the conclusion that the bond was not a forgery, and decided against the defendant.

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

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Mr. Ratliff's judgment contained the following passages :

"3. That the original of exhibit No. 1, filed by defendant is as presently pleaded, a *forgery*, appears clear from the documents filed by plaintiff in support of the allegation, whilst it would further appear from a communication made to this Court by the district engineer, under date 3rd July 1862, and in reply to a question on the subject, that defendant was dismissed by his situation in the department of public works for similar nefarious proceedings, to wit for tampering with certain vouchers in the office, and in one of his documents forged Mr. Ross's signature.

"4. The Government vakil has on oath given evidence on review-hearing tending very strongly to support the bona fide character of the bond sued on.

"5. Convinced in his own mind that the signature at foot of said bond was made by defendant himself, and it being evident, moreover, that said defendant has attempted to support his repudiation of the document by having recourse to forgery, as well as inferable that he is anything but unaccustomed to resort to said nefarious tactics, the civil judge unhesitatingly rejects his appeal, and confirms the original decree passed against him, assessing him, with all subsequent costs."

Mayne for the appellant, the plaintiff: First, Mr. Ratliff had no jurisdiction to review Mr. Irvine's decision on a mere question of facts. Counsel referred to ss. 376, 378 of Act VIII of 1859.

Secondly, none of the documents with which the Civil Judge compared the signature to the bond were filed ; and as it does not appear that they were either proved or admitted, he could not compare the bond-signature with them.

Branson, for the respondent : Whether the Court acted rightly or wrongly in granting the review is not matter of appeal. It lay in discretion of the Court, and its order was final. Sec. 378 of Act VIII of 1859, applies.

SCOTLAND, C. J. :—The first ground of objection on the part of the appellant is that the Civil Judge had no authority to review the decision of his predecessor on a mere

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question of facts; and we are called on to decide whether or not this Court can upon appeal entertain the question of whether the Court below properly exercised its jurisdiction to review. Now sec. 376 of the Civil Procedure Code (Act VIII of 1859) enacts that any person considering himself aggrieved by a decree of any of the Courts therein mentioned, and who from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree. Therefore in order to entitle him to apply for a review, the party must shew the Court either that some matter or evidence has been discovered since the passing of the former decree, or that there is some matter or evidence which he could not then produce, or that there is some other good and sufficient reason. Section 377 then provides within what time and on what paper the application should be made; and then section 378 mentions the circumstances under which the Court is to make an order, whether for rejecting the application or granting the review. This is the important section here. It runs as follows:—"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject, the application but if it shall be of opinion that the review desired it necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review; *and its order in either case*, whether for rejecting the application, or granting review, *shall be final*," and concludes with a proviso as to giving notice to the opposite party. Passing over sec. 379 as having no application to the present case, we come to sec. 380, which enacts that "when an application for a review of judgment is granted, a note shall be made in the register of suits or appeals (as the case may be), and the Court shall give such order in regard to the re-hearing of the suit as it may deem proper in the circumstances of the case."

When once, then, the Court has thought it right to grant the review, the case is placed precisely in the situation of a suit to be reheard on the grounds put forward at

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the grounds for applying for a review, and the court's order granting the review becomes final under the provision in section 378, and it cannot afterwards be objected upon appeal that the reasons for granting the review, or in other words the rehearing, were improper or insufficient. According to the old Regulation XV of 1816 the Court below could not grant a review. Parties requiring a review had to go to the Sadr, and questions like the present could not have arisen. We must take for granted that the legislature had this regulation before their mind when they enacted section 378, and that in transferring the power to grant a review to the court making the decree, it was intended that the exercise of discretion as to the order granting a review should be final, and not subject to appeal.

As to the second ground of objection, there is no doubt that in evey case of proof of handwriting by comparison you must first shew the genuineness of the writing with which the comparison is made. Formerly you could not as a rule prove a party's handwriting to a document by comparing it with others in his handwriting unless these were evidence in the cause and admitted or proved to be in his handwriting. Then Act V of 1855 (*a*) was passed, and section 48 of that Act provides that "on an enquiry whether a signature, writing or seal is genuine, *any undisputed signature, writing or seal* of the party, whose signature, writing or seal is under dispute, may be compared with the disputed one, though such signature, writing or seal be on an instrument which is not evidence in the cause." Now in the present case, if it had appeared that the Civil Judge had compared the signature to the bond with a document not before the Court, or with one whose authenticity was disputed, this would have been an illegal act. But sec. 48 provides that comparison may be made with undisputed signatures on instruments which are not evidence in the cause, and this is all that appears to have been done here. There is nothing to lead to the inference that these instruments were disputed, and we must therfore take it that they were undisputed; if so, Mr. Mayne's objection falls to the ground

(*a*) Compare the Common Law Procedure Act 1854, 17 & 18 Vict. c. 125 ss. 27, 103.

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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.

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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.