Judgment of the Lords of the Judicial Committee of the Privy Council on the Petition of Kistonauth Roy to rehear the Appeal of Ranee Surnomoyee v. Shosheemokee Burmonea and others from the High Court of Judicature at Fort William, in Bengal, delivered 6th February, 1869.

Present:

LORD CHELMSFORD.
SIR JAMES WILLIAM COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

This is a Petition for the rehearing of an Appeal from a Decree of the High Court of Judicature at Fort William in Bengal, which was heard *ex parte* on the appearance of the Appellant alone, and in which their Lordships agreed to recommend to Her Majesty that the Appeal should be allowed, and the Decree of the Court below be reversed.

The Petitioner, one of the Respondents in the Appeal, prays for a rehearing on the grounds that he had fully intended to appear in support of the Decree, and had given instructions to his agents in England to enter an appearance for him, and take all necessary steps for maintaining the Decree, but that neither he nor his agents had any notice that the Appeal had been entered, nor were they aware of its having been fixed for hearing until after the hearing had taken place, and the Report to be made to Her Majesty in Council had been agreed to.

In support of the Petition the case of *Rajunder-narain Roe and another* v. *Bijai Govind Sing*, 1 Moore, 117, was relied upon to show that it is competent to their Lordships, even after a Report to the King and the confirmation of the Report, to recommend that there shall be a rehearing.

Such an unusual indulgence, however, ought never to be granted, except under very special circum-

stances, and only where the *ex parte* hearing has not been occasioned by any default in the party applying for a rehearing. The case referred to was one of this exceptional character. The hearing was *ex parte* upon the appearance of the Respondent alone, and the Committee, adopting a form of order which had been used on previous occasions, affirmed the Decree of the Court below, and dismissed the Appeal with costs upon a Petition by the Appellants praying to have the order for dismissing the Appeal and affirmance of the judgment recalled, and for leave to prosecute their original Petition of Appeal. Their Lordships considered that a simple dismissal was to be regarded as the order which must have been in their contemplation, and that no more could have been intended in substance, although the objectionable form importing affirmance was followed. And upon the application for a rehearing, Lord Brougham, in delivering the opinion of the Committee, stated that the case for indulgence was a strong one, provided there was power to grant the application. The parties were infants under the Court of Wards in Calcutta, and appeared by a public functionary through the appointment of that Court as their guardian *ad litem;* this person neglected the case altogether, and not only did not provide funds for carrying it on, but absconded with funds in his hands which had been allowed for the expense of the Suit, and he was not to be found when the agent here desired to communicate with him, nor had he since returned. Their Lordships therefore thought "in the particular circumstances of the case," His Majesty should be advised to amend the order, and to let in the Appellants to be heard, notwithstanding the dismissal, that is to say, "to restore the Appeal," but the conditions were imposed of payment of the Respondent's costs occasioned by the default at the time of the *ex parte* report, and also by the application for a rehearing.

In the present case it cannot be truly alleged that the *ex parte* hearing took place without any default on the part of the Petitioner or his agents.

The Appeal was from a decision of the High Court of Judicature at Fort William in Bengal, in favour of the Defendants, in a Suit in which Mussumat Ranee Surno Moyee was Plaintiff, and Shoshee Mokhee Burmonia, the Petitioner Kisto Nauth Roy and several others, were Defendants.

In the certificate of the Registrar of the Court accompanying the transmission of the Record, the only Defendant named in the title of the Appeal was Shoshee Mokhee Burmonia, without the addition of the words "and others:" but in the Record itself the words "and others" were added to the name of the Defendant. The Petitioner's instructions to his Agents probably named only himself as the Respondent in the Appeal, because a letter dated 23rd Oct., 1867, was written by them to the Registrar of the Privy Council in these words—

"Ranee Shurno Moyee, *Appellant*,

and

Kisto Nauth Roy, *Respondent*,

In appeal from Bengal.

"We are instructed on behalf of the Respondent in the above appeal, and shall be obliged by your giving us notice when the transcript of proceedings arrives in this country, and by your entering an appearance in due time in our names on behalf of the Respondents."

The agents made inquiries at the Council Office on the day this letter was written, and also subsequently in the same month of October, whether the Record in the Appeal had arrived. As there was no Appeal with the title named in the letter, they were of course answered in the negative. The misinformation as to the non-arrival of the proceedings in this country was owing to the inaccurate description of the Appeal given by the Petitioner to his Agents. This inaccuracy is inexcusable, because he knew perfectly well that there were many other Respondents besides himself, and that his name did not stand the first amongst the Defendants in the title of the suit. All the ignorance of the proceedings taken on the part of the Appellant resulted from the Petitioner having thus originally misled his Agents in his instructions to them. The Agents themselves, too, are not wholly free from blame. They should not have been satisfied with having requested the Registrar to give them notice of the arrival of the proceedings, which it was no part of the duty of his office to do, but they should have examined for themselves at the Council Office, and, having the name of the Appellant accurately given, they would have ascertained that there was an Appeal by him, and upon the production of the

proceedings they would have found that to the name of the Respondent there were added the words "and others," which would have led to a further examination, and to the discovery that it was the Appeal in which the Petitioner was interested, and in which they were instructed to appear for him. Under these circumstances, to grant the indulgence of a rehearing to the Petitioner would be to give him the benefit of his own and his Agents' default.

It is necessary to distinguish this case from that of *Macleary* v. *Hill and others*, which was heard by this Committee on the 30th June, 1868, and in which their Lordships intimated their opinion that the Decree appealed from ought to be varied and amended, and directed minutes of the proposed Report to be prepared by the Counsel for the Appellant. This was accordingly done, and on the 2nd July the minutes were approved and adopted by their Lordships, and were afterwards, on the 7th July, submitted to Her Majesty for approval. Immediately after the Order in Council had been made, the Registrar, in drawing the final Order, discovered that the Appellant's Solicitor had omitted to take out and issue the usual process requiring four out of the five Respondents to appear to the Appeal, although he had issued the regular process against the fifth Respondent. The Registrar reported this fact to their Lordships, and on the 10th July their Lordships reported to Her Majesty that the Order of the 7th July ought to be revoked. The Appeal then stood over for further directions, and the Appellant was ordered to serve a personal notice of the Appeal on each of the four Respondents who had not appeared.

The distinction between this case and the present is that in *Macleary* v. *Hill and others* the Appellant had neglected to take an essential step in the Appeal, and was therefore not entitled to set down the case *ex parte* as against the Respondents. In the present case, although no appearance had been entered on behalf of the Respondents or either of them, the Appellant had done all he was required to do by the practice and rules of the Judicial Committee, and the omission and neglect is that of the Petitioner, who now asks for a rehearing of the Appeal.

The Petition must be dismissed with Costs.