

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sahibzada Zeinulabdin Khan v. Sahibzada Ahmd Raza Khan and others, from the High Court of Judicature at Allahabad, North-West Provinces, delivered Friday, 22nd November 1878.*

Present:

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE question in this case is whether the first part of section 119 of Act 8 of 1859 applies to a case which has been decided under the provisions of section 147 of the same Act. That part of section 119 is in the following words: "No Appeal shall lie from a judgment passed *ex parte* against a Defendant who has not appeared." Section 119 must be read together with sections 109, 110, and 111. Section 109 says: "On the day fixed in the summons for the Defendant to appear and answer, the parties shall be in attendance at the Court House in person or by a pleader, and the suit shall then be heard, unless the hearing be adjourned to a future day which shall be fixed by the Court." Section 110 says: "If on the day fixed for the Defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned, neither party shall appear either in person or by a pleader when duly called upon by the Court, the suit may be dismissed." There the words are "If on the day fixed for the Defendant to appear and answer, or any other day subsequent thereto

“ to which the hearing of the suit may be  
“ adjourned.” Then comes section 111, which  
says: “ If the Plaintiff shall appear in person ;”—  
it does not say “ on the day fixed, or on any  
“ subsequent day,” but simply “ If the Plaintiff  
“ shall appear in person or by a pleader, and the  
“ Defendant shall not appear in person or by a  
“ pleader, and it shall be proved to the satis-  
“ faction of the Court that the summons was  
“ duly served, the Court shall proceed to hear  
“ the suit *ex parte*.” Sections 109 and 111, taken  
by themselves, clearly relate to the appearance  
of parties and to their non-appearance at the  
first hearing of the suit. The 146th and 147th  
sections are enactments relating to adjournments.  
Section 147 enacts that “ If on any day to which  
“ the hearing of the suit may be adjourned, the  
“ parties, or either of them, shall not appear in  
“ person or by pleader, the Court may proceed to  
“ dispose of the suit in the manner specified in  
“ section 110, section 111, or section 114, as the  
“ case may be, or may make such other order as  
“ may appear to be just and proper in the  
“ circumstances of the case.” There is no enact-  
ment in that section that, in case the Court  
disposes of the suit in the manner specified in  
section 111 (the section which applies to the  
present case), the first part of section 119 shall  
apply to such a judgment. Under Act VIII. of  
1859, the general rule is that an Appeal lies to  
the High Court from a decision of a Civil or  
Subordinate Judge, and a Defendant ought not  
to be deprived of the right of Appeal, except by  
express words or necessary implication. Looking  
at all the sections together, their Lordships are  
of opinion that the words “ who has not ap-  
peared,” as used in section 111, mean “ who has  
not appeared at all,” and do not apply to the  
case of a Defendant who has once appeared but  
who fails to appear on a day to which the  
cause has been adjourned.

There are several cases to that effect decided by the High Court in Calcutta. Marshall's Reports, page 32; 3rd Bengal Law Reports, Appendix 121; and 6th Weekly Reporter, page 86.

Two cases were referred to by the learned Judges who decided this case,—a case in 6th Bengal Law Reports, 618, and one from the North-Western Provinces Reports of 1869, page 59. Their Lordships have referred to those decisions. It appears to them that the case cited from the 6th Bengal Law Reports, 618, so far from being an authority in support of the decision of the High Court, is rather an authority against it. The case which is cited from the North-Western Provinces Reports of 1869, page 59, is certainly in conflict with the several decisions in the High Court at Calcutta to which reference has been made, and which in the opinion of their Lordships were correctly decided.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the High Court was erroneous, and that the case be remanded to the High Court to hear and determine the Appeal. The Respondent must pay the costs of this Appeal.

