Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moonshee Ameer Ali v. Inderjeet Koer and others, from the High Court of Judicature at Fort William in Bengal; delivered July 15th, 1871.

Present:

SIR JAMES W. COLVILE.
JUDGE OF THE HIGH COURT OF ADMIRALTY.
SIR JOSEPH NAPIER.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.

SIR LAWRENCE PEEL.

THEIR Lordships are of opinion that the preliminary objection taken to the hearing of this Appeal ought to prevail. The certificate of the High Court of Fort William in Bengal is to the effect that in consideration of the Court deciding the Appeal before them upon one point only, that is the validity of the mooktearnamah, the Counsel for the Appellant, in the presence and with the consent of the son and agent of the Appellant, stated to the Court that he would not appeal from the decision as to the validity of the mooktearnamah. Their Lordships upon consideration find that there was really very good and sufficient consideration for such an agreement on the part of Counsel, as part of the conduct of the case, because the result was this, and a very important result to the parties, that by obtaining the decision upon the validity of the mooktearnamah alone the case became a case not decided against Bisshen Singh, the party in whose right the Appellant was suing. If the case had been heard by the High Court, and

upon appeal the merits had been gone into, and the whole matter determined upon as in a suit by Bisshen Singh and others, Bisshen Singh and the persons claiming under him would not have been precluded from appealing to this Court, but might on the other hand have had two successive decisions against them upon questions of fact going to the merits of the case. But confining it to the decision upon the mooktearnamah, it was really substituting a nonsuit for an adverse verdict, leaving it open to Bisshen Singh and the Appellant himself, if he can get a new and genuine document in his favour, to bring a fresh suit. That being so, it was clearly a valid agreement on the part of Counsel not to appeal, and there is no doubt that it was done with the actual consent of the son and representative of the Appellant. The Appeal is brought in violation of good faith, and their Lordships feel that they ought not to entertain an Appeal so brought where the real merits of the case have been withdrawn from the Court below.

But their Lordships have had some difficulty in determining what should be done with regard to costs. Now their Lordships feel that where a certificate of this kind comes over with the Record, and must, therefore, be known to both parties, it was the duty of each party to have made an application to the Registrar, who would at once have brought the matter to the attention of their Lordships, and taken their Lordships' directions as to what ought to be done with a Record so situated before any expense had been incurred in preparing cases, or in delivering briefs for the hearing. It was wrong of both parties to proceed with an expensive litigation in the face of this certificate without its being brought, either through the Registrar or by an application at their Lordships' bar, to their attention. Disposing of it upon this preliminary but still very serious objection, their Lordships feel that they ought not to give all the costs as if the case had been fully heard upon the Appeal, but still they think the Appellant ought not to escape a very considerable portion of the costs which have been incurred. They think, therefore, that this is a case in which they may use the power with which they are invested, to give a sum of money *nomine expensarum*, and, therefore,

they will humbly recommend Her Majesty to dismiss the Appeal, allowing to each of the three Respondents the sum of fifty guineas for the costs of the dismissal of the Appeal.