papers in the office of the Commissioner of the Soondurbuns, which would naturally be the papers to be looked for in a boundary dispute like this, the party could not find the chitta out before this last stage of review.

It is then urged that a certain petition by Reazooddeen was binding as an admission against the parties representing Reazooddeen ; but no such ground was taken in the petition of special appeal, and we can, therefore, hardly be said to be wrong in law in not deciding on a point which was not put before us at all to decide, and on which we are now called to admit a review.

Lastly, we are referred to two points originally taken in the petition of special appeal, *viz.*, that the evidence of certain witnesses had been wrongly rejected, and the whole evidence had not been duly considered by the Lower Appellate Court. On these points, however, it is unnecessary to say anything more than that they are completely covered and answered by our judgment in special appeal.

The application is, accordingly, rejected with costs.

The 6th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Non-appearance—Sections 58 and 151 Act X. 1859—Review—Jurisdiction.

Case No. 26 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 16th September 1869, *affirming a decision of the Assistant Collector of Buxar, dated the 26th May* 1869.

Radha Pershad Singh (Plaintiff) *Appellant,*

versus

Sansar Roy (Defendant) *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

A defendant who has appeared on one or more occasions and contested the suit up to a certain point, is not a defendant who has not appeared in the sense of Section 58 Act X of 1859, because at some subsequent stage of the proceedings he was not present when the suit was heard.

The proper construction of the word "revision" in Section 151 is not *review*, but such revision as the Board of Revenue and Commissioners as superior officers exercise over the proceedings of the Collectors and Deputy Collectors, or the High Court over the lower Courts under Sections 404 and 405, Criminal Procedure Code.

HELD that independently of Act X, there may be cases in which a Collector has power to admit a party to come in and be heard when a proceeding has taken place in his absence; and that every presumption should be made in such cases in favor of his having jurisdiction, especially where the party would have been without a remedy if the review had not been admitted.

Markby, J.—I DO not think that we need call upon the respondent in this case.

The facts necessary to state are these—

On the 13th November 1867, the Assistant Collector in a suit for enhancement of rent held that the tenure was not liable to enhancement.

The landlord appealed against the decision, and on the 17th February 1868 the decision was reversed by the Judge who remanded the case to the Assistant Collector to enquire into the rates.

On the 18th May 1868, the Assistant Collector gave a decision for the plaintiff that the rates claimed were such as he was entitled to demand. On that occasion the defendant did not appear, but he appealed to the Judge who, on the 31st August 1868, refused to hear the appeal on the ground that the case must be governed by Section 58 Act X of 1859, which provides that "no "appeal shall lie from a judgment passed "*ex-parte* against a defendant who has not ap- "peared, or from a judgment against a plaintiff " by default for non-appearance," but he informed the appellant that his proper course was to apply for review to the Assistant Collector under that Section. On the 19th February 1869, the suit was re-opened by the Assistant Collector, and on the 21st May 1869 he gave a decree to the plaintiff at the rates admitted by the defendant, thinking that the plaintiff failed to prove the rates at which he claimed. He says that the point which the plaintiff wished to prove was that the rent paid for the lands was below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent, and he thinks that the plaintiff's proofs did not establish this. The plaintiff then went up to the Judge in appeal on the 10th December 1869, and the first objection

that he took was that the first Court had acted contrary to the provisions of Section 58 in reviving the suit, and also that the rates claimed by the plaintiff ought on the evidence to have been allowed.

The Lower Appellate Court declined to go into the first objection on the ground that it was not cognizable in appeal; and on the second objection, held that the plaintiff was bound under Section 17 to prove that the increased rate of rent demanded was fair and equitable. On this latter point, he thought that the decision of the first Court was right and affirmed it accordingly.

It is contended before us in the first place, that the Judge ought to have entertained the first objection taken before him in appeal, and it is also contended that the objection was in fact good in law. Now we think that the appellant before us is so far right as that the words of Section 58 do not apply to such a case as this. The very same question came before another Division Bench of this Court upon Section 119 Act VIII of 1859, the first paragraph of which is precisely similar to that of Section 58, and it was then held, as we now propose to hold, that a defendant who has appeared on one or more occasions and contested the suit up to a certain point is not a defendant who has not appeared in the sense of Section 58 merely because on some subsequent stage of the proceedings he was not present when the suit was heard. In this case, the defendant had appeared at the original hearing, had gone up to the Court on appeal, and it was only when the case came back on remand that he failed to appear, but he had appeared in the earlier stages of the litigation. No doubt, therefore, the Judge was wrong when he declined to proceed further in appeal on this point.

It is too late, however, now to rectify this error, and the defendant having lost the appeal to which he was entitled, ought not to be shut out unless upon the clearest grounds.

It is contended that the action of the Assistant Collector in re-opening the suit was altogether without jurisdiction. Now, on the point of jurisdiction,—we should always require to be clearly satisfied before setting aside the the decision of the Lower Courts on that ground that there was a clear want of jurisdiction; and we should require it especially in a case of this kind where the necessity for taking that course arose out of the objection of the very party who now seeks to contest the jurisdiction. Had not the plaintiff objected to the Judge hearing the appeal of the 31st August 1868, the defendant would then have been heard in his appeal, and the whole matter would have been finally decided.

Now, we have not before us the reasons which induced the Assistant Collector to admit this case to a re-hearing, but it is argued that under no circumstances can a Collector review his decision. It is said that that is so, firstly, because in Section 151 Act X of 1859 it is laid down, in the concluding words, that "no judgment of a "Collector or Deputy Collector in any suit, "and no order of a Collector or Deputy "Collector passed in any suit and relating "to the trial thereof, or after decree and "relating to the execution thereof, shall be "open to revision or appeal, otherwise than "as expressly provided in this Act." We think that the proper construction of the word "revision" is not *review*, but such revision as the Board of Revenue and Commissioners as superior officers exercise over the proceedings of the Collectors and Deputy Collectors, or this Court over the proceedings of the Lower Courts in Criminal trials under Sections 404 and 405 of the Criminal Procedure Code.

It is also said that the power of a Collector to admit a review is further limited by Section 154, but that Section only applies to cases in which the judgment of the Collector is final, and, as has been already shewn, the judgment was not so in this case. We think, however, that independently of any provisions contained in Act X, there may be cases in which a Court has power to admit a party to come in and be heard when a proceeding has taken place in his absence. We admit that these cases must be exceedingly rare, but we do not think that we ought to hold as a matter of law that he acted entirely without jurisdiction. We think that every presumption which we ought to make ought to be in the other way, especially in a case where, if the review had not been admitted, the party would have been entirely without a remedy.

The only other question is whether the appeal is rightly disposed of by the Judge on the merits. What we understand the Judge to mean when he says that "the "party seeking to enhance must adduce

"most ample and convictive proof that the "increased rate of rent demanded is *fair* "*and equitable*," is that he means to say that they are fair and equitable when tried by the test of the rules for enhancement laid down in Section 17, because he had immediately prior to using those words, referred to Section 17, and he immediately afterwards goes on to affirm the judgment of the first Court which had proceeded, in his judgment, entirely upon that Section. We do not think, when the Judge used those words and referred to the Section, he intended to set up any standard of fairness and equity except that laid down under Section 17. We think, therefore, that this ground also fails, and the result is that this special appeal is dismissed with costs.

The 6th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Usufructuary mortgage—Possession.

Case No. 70 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 30th September 1869, *modifying a decision of the Sudder Moonsiff of Chuprah, dated the 31st December* 1868.

Shaikh Fyezoollah and another (Defendants) *Appellants,*

versus

Syud Kazim Hossein and another (Plaintiffs) *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Baboo Kalee Kishen Sein for Respondents.

A party who by paying off a mortgage debt becomes an usufructuary mortgagee in place of the original zur-i-peshgeedar does not need to sue for the amount due, but is entitled to remain in possession until the whole debt has been discharged by the usufruct.

Markby, J.—This is rather a complicated case, but we do not think it necessary to state the facts at very great length.

The suit was for possession of 11½ pie of Mouzah Kureem Chuck and 3½ cottahs in Mouzah Danawana. We may get rid of the 3½ cottahs at once, for it is admitted that no question arises in this appeal as regards those lands.

The 11½ pie may then be divided into two parts, *viz.*, 8 pie which is said to have come into the family of Bibun and 3½ pie which is said to be a share in the two annas which belong to Hessamoodeen. As to the 8 pie which came to the family of Bibun, it is found now beyond question by the lower Courts that the share of Hossein Ali and the share of Enayet Ali have been conveyed by a valid instrument to the defendant, and to that extent she has been successful. The only question before us rises as to the share of Kefait Ali which descended to Nuzur Ali. That share, whatever it was, went to Kaneez Fatima, the plaintiff's vendor, and the Lower Appellate Court has given him a decree for it. The objection raised in special appeal is, that the Lower Appellate Court has not disposed of the finding of the first Court, that whatever may have been the title of Kaneez Fatima, she never obtained possession, and therefore the claim of the plaintiff who derives through her is barred by limitation.

The first Court did in fact find generally that Kaneez Fatima never obtained possession of any share at all in this property. The Lower Appellate Court, when it reversed that finding, no doubt, had just been speaking, not of the share which came from Kefait Ali to Kaneez Fatima, but of the share which came from Mussamut Bibun to Kaneez Fatima; but seeing that that Court has reversed the judgment of the first Court on this point, we think that the proper inference is that it intended to find that which is far the more probable thing in point of fact,—that Kaneez Fatima did get into possession, not only of what came from Mussamut Bibun, but of all that which her father Nuzur Ali was entitled to—that is to say, what he obtained from both Kefait Ali and Mussamut Bibun. This disposes of the first point.

Then the other point taken is as to the 3½ pie share which came to Kaneez Fatima through Hessamoodeen. As to this the first attempt of the defendant was to set up a title to it under a will of Hessam's daughter Ameerun. That attempt however altogether failed, and that failing, he fell back upon a zur-i-peshgee lease originally executed by Hessamoodeen to which he said he had a title by paying off the debt and being from 25 years ago ever since in possession. Both the Courts below have found that in fact