We have been much pressed with several precedents of this Court, in which strong opinions have been expressed with regard to the courses to be taken by Courts of Justice in receiving applications for review.

It is contended in this case that there is nothing on the record to show that the Subordinate Judge, in admitting the review, had satisfied himself that the evidence tendered by the petition for review was evidence not previously attainable by him, and not in his possession, and that consequently the review was one which ought not to have been admitted.

No doubt in several decisions, namely, is one reported in Marshall, page 553, and another in II. Weekly Reporter, page 174, and X. Weekly Reporter, page 432, and in XVI. Weekly Reporter, page 7, observations have been made on the subject which tend to support the contentions of the appellant.

But we are not now called upon to state what are the proper preliminaries to be observed in admitting a review, nor on what principles a review should be admitted. If we were, we might have stated our views. But we are asked to set aside a judgment of the Lower Appellate Court on the ground that certain preliminaries had not been complied with when he granted the review.

In the several cases referred to, the Judges deal with them on their respective merits, and we are not bound to follow their ruling only that there might be uniformity in our decisions on such a point; nor are we bound to reverse the decision of the Lower Court, simply upon the ground that certain forms had not been followed.

On the other hand, we ought, I think, to presume in favor of the Lower Courts that all things have been done as the law requires. I do not therefore find in the circumstances of this case anything that induces me to think that the proceedings of the Court below are in any way contrary to law; and as there is no other valid objection taken to the decision of the Lower Appellate Court, we ought to dismiss the appeal with costs."

Markby, J.—I am of the same opinion. I entirely agree with my brother Jackson, that we have no question now before us as to what are the proper steps to be taken before the admission of a review. We have to decide now whether we ought not to presume that the steps and procedure prescribed by law were followed in the Lower Court; and as a general rule I think that we ought to presume that the proceedings of the Courts below have been conducted according to law, and ought not to presume that the requirements of the law have not been complied with. More especially, we ought not to presume so in this case when the appellant does not show us anything from which we can suppose that he took any objection in the Court below to the document on which the review was granted.

The appeal must be dismissed with costs.

The 25th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of Suit—Co-sharer—Discharge of Receiver—Act VIII. of 1859, s. 73—Discretion (Non-exercise of, by Lower Court—Interference of Superior Court—Party summoned as Witness under s. 170—Lawful Excuse—Witness's Expenses (tender of.)

Regular Appeals from a decision passed by the Subordinate Judge of Beerbhoom, dated the 28th August 1871.

Case No. 274 of 1871.

Ishen Chunder Sen (one of the Defendants), *Appellant,*

versus

Onath Nath Deb (one of the Plaintiffs), *Respondent.*

Baboos Gopal Lall Mitter and *Nil Madhub Sen* for Appellant.

Baboos Mohinee Mohun Roy and *Rajendro Nath Bose* for Respondent.

Case No. 276 of 1871.

Mr. Herbert Cowell (Plaintiff), *Appellant,*

versus

Ishen Chunder Sen (Defendant) and another (Plaintiff), *Respondents.*

Baboos Chunder Madhub Ghose and *Bhyrub Chunder Banerjee* for Appellant.

Baboos Gopal Lall Mitter and *Nil Madhub Bose* for Respondents.

A co-sharer who takes over into his own hands, from the Receiver, the management of his share of the estate, is entitled to sue, or to be made a party, under section 73, Act VIII. of 1859, to a suit already brought for rents which had accrued before the date of the Receiver's discharge.

Where the law allows a discretion to any Court, it presumes that such discretion will be soundly and properly exercised; and where it is shown that the discretion was not so exercised, the omission will be a ground for interference by the Superior Court.

Accordingly, the Subordinate Judge's order under section 170 was set aside on the ground that he had not exercised his discretion at all, inasmuch as he had ignored the fact that plaintiff had given very substantial reasons for his inability to attend and give evidence when summoned to do so; and as the Subordinate Judge had held substantially that there was sufficient evidence to prove plaintiff's claim, plaintiff was entitled to a decree, his failure to give evidence notwithstanding.

Where there was no proof that a defaulting witness's expenses were not tendered to him by the party at whose instance he was summoned, the Court on appeal declined to order that witness's evidence to be taken or to take it themselves.

Glover, J.—ONE judgment will govern both these appeals.

The suit was for rent due on a share of a *putnee* tenure called Shakbahar, belonging to the estate of the late Promonath Deb of which the plaintiff, Mr. Cowell, was the Receiver.

The suit was instituted on the 18th March 1871, and whilst it was pending, Onath Nath Deb, one of the sons of Promonath, applied to be made co-plaintiff on the ground that he had discharged Mr. Cowell from the Receivership of his share of the estate. The application was allowed by the Court, and on the 7th July 1871, Onath Nath Deb was made a party to the suit under section 73 of the Procedure Code.

The defendant Ishen Chunder Deb admits tenancy and does not dispute the rate of rent. His defence substantially is that he has, in various ways, which will be noticed hereafter, paid all that is due from him in the shape of rent with the exception of Rs. 453-2-9.

The Subordinate Judge decreed in favor of the plaintiff, Mr. Cowell, for one half of the sum admitted by the defendant to be due and in favor of the co-plaintiff Onath Nath Deb for Rs. 1,724-11-4, the balance of rent on his share of the estate still proved to be due.

Against this decision, the plaintiff Mr. Cowell and the defendant Ishen Chunder Deb appeal.

It will be convenient to take the plaintiff's appeal first.

Mr. Cowell contends (1) that the provisions of section 170, Act VIII. of 1859 ought not to have been enforced against him inasmuch as he had a lawful excuse for non-attendance at the Small Cause Court on the day fixed for taking his evidence.

(2) That as the Subordinate Judge accepted the evidence as proving the claim of Onath Nath Deb, he should not have refused Mr. Cowell the benefit of that evidence, even though he did not himself attend and give evidence.

And (3) that as the rents sued for accrued before the date of the Receiver's discharge in respect of Onath Nath's share, Onath Nath ought not to have been made a party to the suit under section 73.

The last objection has not been pressed by the appellant's pleader. It would be clearly untenable, for as Onath Nath is admittedly the owner of a fourth share of the rents, and had admittedly discharged Mr. Cowell from the Receivership of that share within a few days after the institution of this suit, he, Onath Nath, was a party interested both in the subject-matter and in the result of the litigation, and the lower Court cannot be said to have been wrong in making Onath Nath a co-plaintiff. From the day on which Onath Nath took the management of his share of the estate into his own hands, he was entitled to sue for its rents no matter for what year (within the period of limitation) they had accrued.

With reference to the 1st objection, it appears that the defendant desired that both Mr. Cowell, the plaintiff, and his general Mookhtear Knogendro Nath Mullick, should be summoned, and two commissions were sent to the Small Cause Court in Calcutta for the purpose of examining these witnesses. Mr. Cowell represented to the Court that the day on which he was directed to attend was Saturday, a day on which he was necessarily on duty at the Bengal Legislature Council of which Council he was Officiating Secretary. There seems to be some doubt as to whether both summonses were served. The Subordinate Judge says that the second only was served, but the bailiff, we observe, in his evidence speaks of two, and the Subordinate Judge afterwards passed an order to the effect that, as the summons had been served twice without effect, it was a proper case for the application of section 170. But whether served once or twice is immaterial. The Subordinate Judge has held that Mr. Cowell's omission to attend the Small Cause Court and give evidence is sufficient to prevent his obtaining any remedy in this suit except so far as the defendant chooses to admit liability.

Now, section 170 restricts the penal consequences of refusing or neglecting to give evidence to parties "without lawful excuse." The appellant contends that he had such excuse, being unable to attend on the day named in consequence of official duties which

kept him elsewhere. The respondent Ishen Chunder argues that the sole judge of this was the Court before which the case was pending, and that there can be no interference with its discretionary power in this respect.

We are of opinion that, where the law allows a discretion to any Court, it presumes that such discretion will be soundly and properly exercised; and that where it is shown that the discretion was not so exercised, the omission would be a ground for interference by the Superior Court. In Data Hurukman Singh *vs.* Oodoy Chand Pyne, VI. Weekly Reporter, 247, a Principal Sudder Ameen's order under section 170 was set aside on the ground that he had not exercised his discretion properly.

Now, in this case the Subordinate Judge does not appear to have exercised any "discretion" at all. His order (vernacular) passed on the back of the plaintiff's petition is to the effect that "whereas the plaintiff (Cowell) has not appeared after being twice summoned, the case will be brought under the provisions of section 170". He ignores the fact that Mr. Cowell had given very substantial reasons for not being able to attend the Small Cause Court on Saturdays, and had begged that some other day might be fixed. It is a matter of which this Court is bound to take judicial cognizance, that the Bengal Legislative Council's days of assembling are Saturdays, as notified in the *Government Gazette*, and that Mr. Cowell is the Gazetted Officiating Secretary to that Council. We have been informed that the Small Cause Court examines witnesses on commission on Saturdays only, but this would not affect the lawfulness of the plaintiff's excuse. We think that the Subordinate Judge was not justified under the circumstances in visiting the plaintiff with the extreme penal consequences of an omission which he could not prevent.

But in any case the plaintiff would not be precluded by an order under section 170 from appealing against the Lower Court's decision on the merits, where there had been such decision, nor from getting a decree, if there were sufficient evidence on the record to warrant such decree, the plaintiff's failure to give evidence notwithstanding. In Bishu Nath Mojoomdar *vs* Kheitur Chunder Sein, Marshall's Reports, 467, it has been so held by this Court.

Now, in this case the Subordinate Judge has held substantially that there is sufficient evidence to prove the plaintiff's claim, but that he is not to take advantage of it because of his omission to attend and give evidence. The co-plaintiff Onath Nath Deb has got a decree for his share of the rents on that evidence, and if that evidence is sufficient (which is the point for consideration in Ishen Chunder's appeal), Mr. Cowell, the Receiver, would be entitled to a decree for the other half share irrespective of his former laches.

The question remains whether that evidence is sufficient.

The defendant, appellant, Ishen Chunder contends that it is not sufficient; that he did all he could by summoning Mr. Cowell and his Mookhtear Khogendro to prove that he had paid various large sums to the proprietors of the estate, and had afterwards given their receipts to the plaintiff's Mookhtear Khogendro for the purpose of having the payments credited in his accounts, and that until the plaintiff and his servant come forward and deny on oath the allegations that he, defendant, has vouched for by his own oath, the plaintiff's evidence is altogether insufficient to justify a decree being passed in his favor. The defendant further contends that it is in the highest degree improbable, and is opposed to all zemindaree custom, that rents should be paid for one year whilst a balance is still due on a preceding year, and that it cannot be believed that payments for the year 1276 would have been accepted (as the plaintiff says they were) whilst there was still a balance due for 1275.

The sums for which the defendant claims credit, were, he says, paid by him either to the various proprietors direct or paid to others on their behalf and for their advantage. The receipts, he says, he made over to the Receiver's Mookhtear Khogendro Nath who promised to give him credit for them in account. The Subordinate Judge disbelieves this statement on the ground that Ishen Chunder has not called the Mookhtears of these proprietors to prove the fact of payment, nor any one of his own servants in whose presence he says that the payments were made.

A good deal was made by the defendant's (appellant's) pleader of the neglect of the Mookhtear Khogendro to attend and give evidence; and if we could be satisfied that the defendant really did all in his power to procure the attendance of this most important witness, we should undoubtedly refuse to decide this appeal without having his evidence recorded. But the contrary appears to be the case. Khogendro was no doubt summoned and the *subpœna* was duly served upon him, but there is no proof that the usual travelling

expenses were furnished to him. The bailiff witness, who deposes to the service, admits that Khogendro expressed his willingness to attend if his expenses were tendered, but he knows nothing further, and there is nothing on the record to show that they were tendered; whilst, on the other hand, there is proof that Mr. Cowell's expenses were tendered and received. Now, if the defendant's plea of payment to the zemindars, and his subsequent handing over of the receipts to Khogendro, were true, we should have expected that he would have spared no pains to secure such a very important witness as Khogendro himself. Mr. Cowell could have had no special knowledge of anything connected with the suit, and his evidence could have proved little or nothing; but Khogendro's was the backbone of the defendant's case, and yet we find him altogether neglecting his interests and omitting to deposit the money which would have secured the presence of his principal witness. We do not therefore, at this late stage of the case, consider ourselves justified either in ordering Khogendro's evidence to be taken, or in taking it ourselves. The less so as there were other ways of proving the payments by the evidence of the parties to whom and in whose presence they were made. We may remark in this place that Ishen Chunder's own deposition as to the time and manner of his alleged making over of the receipts to Khogendro is extremely vague and unsatisfactory. He makes three distinct and opposite statements as to the year, and two as to the month. He admits, moreover, that he never mentioned the fact to the Receiver, Mr. Cowell, nor entered any memo. of the transaction in what he calls his *pucca* account-books; and, as we have before stated, although he mentions the names of at least four persons who were present, he has not thought proper to call any one of them as a witness.

It remains then that the defendant, on whom was the *onus* of proving payment of what was admitted to be the correct rate of rent due on the estate, has altogether failed to prove such part of it as relates to the balances of the years 1275 and 1276. And we see no force in the defendant's objection as to the year in which some of the money was paid. That money was paid as rent *in* 1276, whilst there was still a balance of 1275 unpaid is likely enough, but there is nothing on the record to show that that money was paid as rent *for* 1276, or that rent for that year was paid whilst there was still a balance due for 1275.

As the *onus* of proving payment in full was on the defendant, and as he failed to support that *onus*, both the plaintiff and the co-plaintiff Onath Nath Deb are entitled to their full shares of the balance of the admitted rent. The decree of the Court below is modified accordingly, and Mr. Cowell, the Receiver, and Onath Nath Deb will each recover Rs. 1,724-11-4 with interest. The appeal of Ishen Chunder (No. 274 of 1871) is dismissed, and Ishen Chunder will pay the whole costs of this litigation.

The 26th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII. of 1859, s. 2—Res adjudicata—Right of Occupancy (under Act X. of 1859, s. 6)—Holding as Koorfadar or Trespasser—Erection of Building—Acquiescence.

Case No. 859 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 24th April 1871, affirming a decision of the Moonsiff of Ghattal, dated the 23rd January 1871.

Ishen Chunder Ghose and others (Plaintiffs), *Appellants,*

versus

Hurish Chunder Banerjee (Defendant), *Respondent.*

Baboo Taruck Nath Dutt for Appellants.

Baboo Bama Churn Dutt for Respondent.

Plaintiff having in a former suit obtained a declaration that certain lands was his mál land, and not defendant's lakheraj, served defendant with a notice to quit, and on his non-compliance with that demand, brought the present suit for ejectment and *khas* possession. HELD that section 2, Act VIII. of 1859 did not apply to such a case, the causes of action in the two suits not being the same.

HELD, also, that defendant's holding either as a *koorfadar* (sub-lessee) or as a trespasser gave him no right of occupancy under section 6, Act X. of 1859; and that his erection of a mud house on the land and dwelling there for more than 12 years afforded no presumption of acquiescence on the part of plaintiff.

Kemp, J.—THE plaintiff is the special appellant in this case. He sued to recove