It is said that this objection was not taken in the Court below, but the objection is one which goes to show, under the express words of the Section above referred to, that the defendant is not liable to pay any enhanced rent to the plaintiff, because he was not served with the notice required by that Section. It is quite clear that the defendant has been throughout contesting his liability to pay any enhanced rent, and under such circumstances it cannot be for a moment contended that there was any waiver on the part of the defendant. Whether I should have allowed this objection to be taken in special appeal, if the circumstances of this case were different from what they are, it is not necessary for me to say; but looking to the way in which this suit was brought and managed on the part of the plaintiff in the Courts below, I am clearly of opinion that he is not entitled to harass the defendant by continuing this litigation any further. Instead of coming forward with clear and distinct evidence in support of his allegations, he has left everything to be proved for him by the Ameen; and although there is nothing in law which prevents a party from asking for a local investigation, I cannot help remarking that the plaintiff's request for such investigation in this case was nothing but an expedient to do away with those provisions of the Code of Civil Procedure which enjoin that, except under special circumstances, witnesses should be examined in open Court in the presence of the parties, and not by commission. It is true that the Ameen was competent to take the depositions of witnesses, but I see no reason whatever why those witnesses should not have been produced and examined in open Court. No inspection of the land was necessary in this case, and the first thing that the plaintiff ought to have proved was, not merely that the lands in dispute were situated within the geographical limits of the pergunnah leased to him, but that those lands were included in the settlement made with him, and that the defendants were, in point of fact, in occupation thereof as his tenants. Nothing of this kind has been attempted to be done, and I would, therefore, without going any further into the merits, dismiss this suit on the simple ground that no enhancement of rent can be decreed against the defendants in the absence of the notice prescribed by Section 13, Act X. of 1859.

I agree also in the order as to costs.

The 24th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Certificate of administration—Heirs—Maintenance.

Case No. 21 of 1870.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and Dwarkanath Mitter, on the 13th July 1870, in Miscellaneous Appeal No. 88 of 1869.

Dinobundhoo Chowdhry (Objector), *Petitioner,*

versus

Rajmohinee Chowdhrain (Petitioner), *Opposite Party.*

Mr. J. W. B. Money for Petitioner.

Mr. J. Graham and *Baboos Mohendro Lall Shome* and *Grija Sunkur Mojoomdar* for Opposite Party.

Where the will set up by objectors to an application by the natural heir for a certificate of administration is not sufficiently proved, a Court is justified in looking on the natural heir as the party entitled to the certificate.

The question of the adequacy of the maintenance granted to widows and daughters must depend in each case on its own peculiar circumstances.

Bayley, J.—After fully hearing the learned Counsel for the applicant, I am still of opinion that, for the purposes of a certificate, the will propounded by Dino Bundhoo is not sufficiently proved to justify me in holding that he is entitled under it to that certificate in preference to the widow, the next heir of the deceased.

The two main points argued are—*firstly,* that the inadequacy of the grant made to the widow and the daughter in the will must not weigh against the direct evidence in support

of the will; and, *secondly*, that the maintenance allowed is in accordance with the custom of the family, as is proved by certain records in the case of a brother and an uncle in the same family.

When we first heard the case, we considered the evidence very carefully, and weighed, on the one hand, the direct evidence as to the execution of the will, and on the other, the probabilities and surrounding circumstances of the case, and thought it immaterial and improbable that the widow and the daughter should be left without those ordinary provisions generally made to such nearest of kin.

After a full rehearing of the whole case today, I still adhere to the opinion that I formerly entertained. I think that the special title, that is, the will set forth by Dino Bundhoo, is not sufficiently proved, and that thus, for the purposes of the certificate, we are justified to look to the natural heir as the party entitled to it.

As to the other wills that have been filed to show that Rupees 25 was the ordinary maintenance allowed for next heirs, widows and daughters, in other cases in the family of the testator, we have to observe, in the first place, that those wills are not proved; and, secondly, we must not come to any conclusion in this case simply on the acts of the other members of the family in other cases, and each case must depend on its own peculiar circumstances. It may be that some special reasons exist in relation to one member of the family which do not hold good in the case of another. But be that as it may, the result of a careful consideration of the whole evidence and circumstances of this case is that the will propounded by Dino Bundhoo is not sufficiently proved to divest the natural heir of her right to the certificate. The petitioner is, no doubt, entitled to bring a regular suit if he is so advised. This order will not prejudice his so doing, if advised.

The application is rejected with costs.

Mitter, J.—I concur in rejecting this application. The new documents ought not to be admitted. The petitioner had ample opportunity to produce them at the first trial, particularly after the order of remand.

Upon the other arguments, I have already expressed my opinion in the judgment formerly delivered by me, and I adhere to that opinion now.

The 24th January 1871.

Present:

The Hon'ble G. Loch and Onookool Chunder Mookerjee, *Judges.*

Execution—Refund—Interest.

Case No. 389 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 30th August 1870, modifying a decision of the Subordinate Judge of that District, dated the 14th May 1870.

Wooma Soonduree Burmonia (Judgment-debtor), *Appellant,*

versus

Gooroo Pershad Roy and others (Decree-holders), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Anund Chunder Ghossal and *Mohendro Lall Seal* for Respondents.

While a special appeal was pending, the decree-holder took out execution, and realized a sum in satisfaction of his whole decree. The decree having been modified, and the amount decreed reduced, the judgment-debtor applied for a refund of the excess payment, and this was awarded to him with interest.
HELD that interest was rightly awarded.

Loch, J.—IT appears that in this case a decree was passed by the Judge of Moorshedabad in alteration of a decree of the Subordinate Judge. By that decree, the Judge awarded to the plaintiff wassilat for five years on account of one mouzah Dhurumpore, and for two years on account of the other two mehals Tehatee and Baboopore, with interest thereon. A special appeal was preferred to this Court when the decree of the Judge was modified on the 14th May 1869, and the plaintiff was declared entitled to mesne-profits only for two years on account of mouzah Dhurumpore as well as of the two other villages. It appears also that, while the special appeal was pending, the plaintiff took out execution in August 1868, and realized from the defendant the sum of Rupees 1,967-10-9 in satisfaction of the whole of his decree. On that decree being modified by an order of the High Court, the defendant applied for a refund of the excess payment, and the Judge has awarded him the sum of Rupees 1,607-14-4