It is urged that the Lower Appellate Court has expressed no opinion on the depositions of the witnesses produced by the appellant. But there is no force in this objection. There is nothing to show that the Lower Appellate Court did not go through all the evidence on the record, or at least through that portion of it on which the appellant intended to rely.

The next objection is that the Lower Appellate Court was wrong in acting under the provisions of Section 230 of the Code of Civil Procedure, inasmuch as the plaintiff was not in actual possession of the property in dispute. But the Courts have found that the person in actual occupation, namely, Boodhie Singh, was a tenant of the plaintiff, and that the plaintiff had been in the receipt and enjoyment of rent through him. Possession by receipt and enjoyment of rent is as good in law as actual occupation, and we do not see any reason why we should hold that the provisions of Section 230 apply to those cases only in which the party seeking for relief under that Section was in personal occupation.

We see no reason to interfere with the judgment of the Lower Appellate Court, and we, therefore, dismiss this appeal with costs.

The 20th January 1871.

Present:

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

Rent-suit—Excess area—Notice—Section 13, Act X., 1859.

Case No. 1591 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 7th May 1870, reversing a decision of the Deputy Collector of Monghyr, dated the 30th November 1869.

Thekmee Beldar (Defendant), *Appellant,*

versus

Ram Kishen Lall (Plaintiff), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Mr. R. E. Twidale for Respondent.

A suit for arrears of rent of a quantity of land alleged to have been held by defendant over and above the quantity covered by his pottah was held to be in substance a suit for rent at an enhanced rate requiring the issue of a notice under Section 13, Act X. of 1859.

The objection that no notice had been served, though not taken in the Court below, was allowed in special appeal, inasmuch as the suit had infringed provisions of law which were not mere matters of form, but substantial protection to the ryot for whose benefit Act X. was enacted.

Bayley, J.—I am of opinion that the plaintiff's suit in this case must be dismissed, although not for the same reasons upon which the first Court has proceeded.

The plaintiff sued for the rent of 20 beegahs and odd cottahs of land for the years 1274, 1275, and 1276 on the allegation that the defendant obtained from him a pottah for 142 beegahs and 13 cottahs, but that over and above that quantity he actually held and occupied the sum of 20 beegahs in excess, and therefore was liable to pay the increased rent claimed.

The defendant averred that there was no excess of land whatever, and added, apparently by way of challenge, and not as an admission or waiver, that, if it were proved that he was in occupation of the excess lands stated by plaintiff, he was ready to pay the same rent for them as he did for the other lands.

Now, in the first place, in a suit like this, which was, in substance, a suit for rent at enhanced rate on the ground of excess area, the service of a notice before suit was necessary by Section 13, Act X. of 1859. The terms of Section 13 are: "No ryot or under-tenant, &c., shall be liable to pay any "higher rent than the rent payable for the "previous year, unless a written notice *shall* "have been served," &c., &c.

Now, in this case it is admitted that no notice was served on the defendant. It follows, therefore, that under the law the defendant is not liable to pay the enhanced rate that the plaintiff has claimed. It was

the duty of the plaintiff, if he wished to enhance the rent on the ground of excess area, to bring his suit in strict conformity to the requirements contained in the provisions of Section 13 for such enhancement.

It is urged, however, that this objection was not taken in any Court below, but at the same time it is admitted, for it cannot be questioned, that this Court has discretion in each particular case to allow any new objection that it thinks fit either at the motion of the party or otherwise, and I think that the present is a case in which that discretion ought to be exercised; for if we are to hold, notwithstanding the absence of notice in this case, that the ryot is liable to pay an enhanced rent, it would be holding in direct opposition to the prohibition contained in Section 13, Act X. of 1859. I think, therefore, that in this particular case, where the suit is so improperly brought against the provisions of law (and those provisions are not mere matters of form, but substantial protection for the ryot for whose benefit the Act was enacted), we should allow the objection to be taken, although it was not taken in the Courts below.

Further, the plaintiff's suit was for rent of land alleged to have been held and occupied by the defendant in excess of the 142 beegahs mentioned in the pottah; and for this purpose the evidence of the Patwaree, Mondul, or any of his land agents, would have been the best evidence, and he should have also proved his case by the *dagwaree* chittahs which are in the hands of every man who is, as plaintiff is shown on the record to be, the owner or farmer of an entire pergunnah; but nothing of this kind has been done. An Ameen was ordered to investigate as to what was the area of the excess lands held by the defendant. The Ameen found 32 beegahs—or 12 beegahs lands in the defendant's occupation beyond the 20 beegahs excess for which plaintiff claimed an enhancement of rent. It appears, too, that as to these extra lands two persons, Patur Beldar and Dugree Beldar, advanced claims to the effect that the lands were theirs, and not the defendant's, but this point does not seem to have been investigated either by the first Court or by the Lower Appellate Court. The first Court proceeded upon the ground that, as the plaintiff could not point out what extra lands were held by the defendant, he could not succeed in this case. On appeal, the Lower Appellate Court says: "As the entire pergunnah "was leased to the plaintiff, unless it can be "shown that the terms of the lease specially "barred the plaintiff from receiving rent for "any land over and above the lands for "which pottahs were granted to the ryots "by the settlement-officer, the plaintiff, as "lessee of the entire pergunnah, is legally "and equitably entitled to the rent of any "extra lands cultivated within the precincts "of the estate covered by his lease;" thus wrongly putting the burthen of proof, which ought to have been placed on the plaintiff, upon the defendant.

The legal course which the plaintiff ought to have pursued was that of serving a legal notice on the tenant under Section 13, Act X. of 1859, before the institution of the suit, and then furnishing proof of the facts stated in the notice as the ground for seeking enhanced rent, *viz.*, an excess of area. But nothing of this kind has been done. There is no chittah or any other similar evidence adduced to identify the lands claimed as excess lands, and in fact everything is wanting which ought to have been legally proved in the case. Had the plaintiff given some proof of the justice of his claim, probably this Court would have thought it proper to offer him an opportunity of making up the deficiency in his evidence; but such as it is, his case is in the first illegally brought, and in the next wanting in legal proof. The practice of sending Ameens to take evidence in cases like this, where the evidence ought more properly to have been taken before the Court itself, is, in my opinion, not only erroneous in law, but very likely to tend to mischief and injustice.

Thus, the plaintiff having come into Court without doing a single thing which, under the law, he was required to do, his suit must be dismissed without prejudice to any further action that he may be advised to bring.

As the objection as to notice was not taken in any Court below, I think each party should bear his own costs throughout.

Miller, J.—I concur in dismissing the plaintiff's suit. The suit was ostensibly brought as an ordinary suit for arrears of rent, but in substance it was a suit for arrears of rent at enhanced rates. It was, therefore, incumbent on the plaintiff to serve a notice upon the defendant, under the provisions of Section 13, Act X. of 1859, before he commenced any proceedings on such a cause of action.

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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