We think, therefore, that the Courts below were right in throwing the burden of proof on the plaintiff. Neither, in regard to the other ground of objection taken, do we think that the Lower Appellate Court erred in law in the reasons which it gave for rejecting the oral testimony of the plaintiff. The Court said that it was of a conflicting nature, that it was hearsay and open to doubt as that of persons who were either interested to speak for the plaintiff or not likely to have knowledge of the facts to which they were supposed to be speaking.

We dismiss this special appeal with costs.

The 5th June 1869.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

New trial—Section 21, Act XI., 1865—Period for notice — Questions by Small Cause Court Judges.

Reference to the High Court by the Judge of the Small Cause Court at Hooghly, dated the 30th March 1869.

Petumber Shadhookhan and another (Defendants), *Petitioners*,

versus

Doya Moyee Dossee (Plaintiff), *Opposite Party*.

Notice of intention to apply for a new trial under Section 21, Act XI. of 1865, is an essential step towards such application, and without such preliminary step an application cannot be entertained.

In calculating the period within which notice is to be given, the date of the decision should be excluded.

Judges of Small Cause Courts should propound for the opinion of the High Court such questions only as arise in a suit, not speculative questions.

Case.—THIS is an application for review of judgment passed on the 14th of January last, in the original suit No. 7 of 1869, in which the petitioners were defendants, and the opposite party, the plaintiff. The case was instituted in this Court for the recovery of Rupees 30 on a simple contract-debt, and was tried on its merits and decided in favor of the plaintiff, who having applied for immediate execution of the decree against the person of the defendant No. 1, Petumber Shadhookhan, caused the amount of the decree with costs in full to be realized under a warrant of arrest issued by the Court. The money was duly paid and the judgment-debtor released from jail on the 15th idem.

On release of the judgment-debtor from jail, the petitioners had applied for a copy of decree on the 20th January last, which was granted to them on the same day.

On the day following, *viz.*, the 21st January last, the petitioners had submitted the application in question for a review of judgment under Section 21 of Act XI. of 1865.

The plaintiff was required to show cause why the application of the petitioners for a new trial should not be granted. Among other grounds on which my former judgment may not be reviewed, the plaintiff's pleader contends that as the application of the petitioner for a new trial was not preferred within seven days from the date of the decision (it having been filed only on the 21st January, being the eighth day from the 14th idem, the date of the decision), it cannot be maintained by the Court, nor its merits tried. He further argues that Section 21 of Act XI. of 1865 provides that, in cases decided on the merits, "it shall be "competent to the Court to grant a new "trial, if notice of the intention to apply "for the same at the next sitting of the "Court be given to the Court within the "period of seven days from the date of "the decision, and if the same be applied "for at the next sitting of the Court;" but no such notice having been submitted to the Court within the limited time, the application for a new trial cannot be granted, which was but a secondary step in the matter, and which was presented to the Court on the 21st January last, when the period allowed for preferring an application for a new trial had expired on the previous day under the law above quoted.

Under the circumstances stated above, two questions arise for determination, *viz.*—

1st.—Whether a notice of the intention to apply for a new trial is an essential step to be adopted by the petitioners before making a formal application at the next sitting of the Court, or without this preliminary step being taken an application for review of judgment is to be considered quite sufficient in the case, if it be presented to the Court within the period mentioned in Section 21 of Act XI. of 1865?

2ndly.—Whether the period of limitation within which such notice or application is to be presented should be computed inclusive or exclusive of the date of the decision; and whether a petitioner is in time if he comes to Court on the seventh day from, and exclusive of the date of, the decision?

In regard to the first of these questions, I am of opinion that a notice of the intention to apply for a review of judgment is not an essential step when the application itself is presented within the limited period. Under Act XLII. of 1860 (for the establishment of Courts of Small Causes, &c.), which is repealed by Act XI. of 1865, the period of limitation within which an application for review of judgment could be preferred was thirty days from the date of the decision; but under the present law the period is limited to seven days only, within which it is not possible in every case to prefer an application containing all the particulars required by law. "The discovery of new "matter or evidence which was not within "the knowledge of the petitioners or which "could not be adduced by him at the time "when such decree was passed," &c., must require time; and the notice in question, which contains merely an intention of the party to apply for a review of judgment at the next sitting of the Court, was contemplated, it appears, to precede an application with a view to take the case out of the Law of Limitation; but in a case where an application could at once be preferred within the period prescribed by law, the notice does not seem necessary to be given.

Respecting the second question at issue, I do not think that it was the intention of the Legislature to include the date of the decision in computing the period within which the notice should be given. That date should in all cases, in my opinion, be excluded from the period of limitation. "The days shall be reckoned from and ex-"clusive of the day on which judgment was "pronounced," are the words which occur in appeal-cases under Section 333 of Act VIII., 1859. Under Section 377 of the same Code, under the head of review of judgment, the application shall be made "within ninety days from the date of the "decree, unless the party preferring the "same shall be able to show just and reason-"able cause to the satisfaction of the Court "for not having preferred such application "within the limited period." But Section 21 of Act XI. of 1865 contains no words to a like effect. The period is fixed by the Act, and I am, in consequence, doubtful on the subject and refer the matter for the decision of the Hon'ble Judges of the High Court.

Another question incidentally arises which should also be determined in this case, *viz.*, whether a petitioner, under Section 21 of Act XI. of 1865, applying for a new trial after the expiration of the period of limitation, the last day of which falls during an authorized vacation or Sunday, is in time if he comes to Court on the first day the Court re-opens.

A similar question has already been disposed of by the Full Bench ruling, dated 14th June 1865, in the case of Rajkristo Roy *versus* Denobundhoo Surmah, which was referred by me for the decision of the High Court, but that was a regular suit, barred by limitation under Act XIV. of 1859, where the time for its institution expired on a holiday; and I am doubtful whether the same decision can be applied to an application for review of judgment, which is neither similar nor analogous to it. Suppose, for instance, a decree is passed by the Court at the latest hour of the day followed by authorized close holidays, extending over a period exceeding the time allowed for giving a notice or preferring an application for review of judgment, it becomes quite impossible for the party to seek redress under the Section of the law above alluded to, and it must be productive of great hardship and injustice to the applicant if no allowance be made to him in this respect.

I am, therefore, of opinion that when a Sunday or an authorized vacation during which the last day allowed for a review of judgment falls, the petitioner is entitled to the benefit of the time during which the Court is closed.

Under the circumstances stated above, I would grant the application of the petitioner for a review of judgment contingent on the decision of the High Court.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that the notice of an intention to apply at the next sitting of the Court for a new trial was an essential step to be adopted, and that without such preliminary step an application to the Court cannot be entertained. In calculating the period of days

within which notice is to be given, the date of the decision should be excluded. Neither the 21st nor the 22nd of January last fell on a Sunday or on a holiday, or during an authorized vacation. The Judge of the Small Cause Court is under a mistake in saying that the question as to a case on which the last day falls on a Sunday or during an authorized vacation, incidentally arises in this case. Judges of Small Cause Courts should confine the questions which they propound for the opinion of the High Court to such as arise in a suit, and should not propound speculative questions.

The 5th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Issues—Possession—Right to usufruct—Mortgage—Encumbrances.

Case No. 346 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 25th November 1868, reversing a decision of the Moonsiff of Lechragunge, dated the 17th February 1868.

Gobind Chunder Banerjee (Defendant), *Appellant,*

versus

Mr. J. P. Wise (Plaintiff), *Respondent.*

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

Mr. C. Gregory and *Baboos Onookool Chunder Mookerjee* and *Bungshee Dhur Sein* for Respondent.

The mortgage of certain property having been purchased by *S*, he sold it to *G*, who foreclosed, got a decree for possession, and sold to *W*. *W's* intervention having failed in a suit for arrears of rent by a party setting up a title intermediate between him and the ryot, on the ground of a *miras* pottah obtained from the mortgagor subsequently to the mortgage, he (*W*) sued to have his right declared to the rents payable by that ryot. His suit was dismissed on certain issues in the Court of first instance, but decreed in appeal on the single issue as to the pottah having been granted subsequent to the conditional sale.

HELD, that this issue arose legitimately, and was one within the Lower Appellate Court's discretion to allow, and within his jurisdiction to determine.

HELD, that it was not only not necessary for plaintiff to prove possession, but the very ground he took was want of possession, his cause of action having been that he had been prevented from enjoying the usufruct.

HELD, that plaintiff was entitled to get the property free from the lease, for a mortgagee taking possession under the terms of the mortgage is entitled to have the property in the same condition as it was in when it was mortgaged.

HELD, that it was for defendant to show that the encumbrance did not injure the outturn of the property.

Hobhouse, J.—THE facts of this case are somewhat peculiar. The suit on the part of the plaintiff was to have his right declared to a 4-annas share of rents payable by a certain ryot on the estate which was the subject of dispute. That estate was originally the property of Koodrutoollah and another. They mortgaged the property to the Dacca Bank. That Bank, on the 24th Assar 1266, sold the mortgage to one Mahomed Sonee who, on the same date, sold to Khajah Abdool Gunny, and the Khajah, in Jyet 1272, having in the meantime foreclosed the mortgage and got a decree for possession, sold to the plaintiff. At some time or other, not stated to us, the defendant, special appellant before us, sued the ryot-defendant for arrears of rent, and although the plaintiff intervened in that suit, a decree was given to the special appellant. The special appellant set up a title intermediate between the plaintiff and the ryot defendant, on the ground of a miras pottah given to him by the mortgagor on the 24th Pous 1266, that is, subsequent to the mortgage. Certain issues were laid down by the Court of first instance, and on those issues the plaintiff's suit was dismissed. The plaintiff appealed to the Lower Appellate Court, and by the permission of that Court was allowed to rest his case on a single point, *viz.*, that as the defendant's miras pottah was granted subsequent to the date of the conditional sale, so it could not stand good against the purchasers under that sale after foreclosure of the mortgage. The plaintiff dropped all other issues and rested his case on this alone, and on this issue the Lower Appellate Court has given him a decree.

The *first* point taken in special appeal is that the issue on which the Lower Appellate Court has decided in the plaintiff's favor was an issue which changed the whole case; further, that the Court has given the plaintiff a decree upon a ground which originally he never set up.

We think that this objection is not good in law. There is no doubt that upon the facts on which either side relied, the issue on which the Lower Appellate Court allowed the plaintiff to rest his case was an issue which legitimately arose; and this being so, the Lower Appellate Court had no doubt a discretion to allow the issue, which was one of law only, to be heard, and had jurisdiction to determine it.