As the question of uniformity of payment of the rent for 20 years before suit has not been gone into by the Judge in the Court below, we think that the case must be remanded for that purpose. If the defendant can prove that for the last 20 years he has paid at a uniform rate of rent, and the landlord cannot disprove it, he, the tenant, will be entitled to the benefit of the presumption arising under Section 4 of Act X. of 1859, for there is nothing in the wording of the pottah showing a variation in the year 1249. Costs to follow the result.

The 4th June 1869.

Present:

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

Section 230, Act VIII., 1859—Onus probandi—Possession.

Case No. 220 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 11th November 1868, affirming a decision of the Moonsiff of that District, dated the 27th March 1868.

Woodoy Tara Chowdhrain (Plaintiff), *Appellant,*

versus

Khajah Abdool Gunee (Defendant), *Respondent.*

Baboo Tarinee Kant Bhuttacharjee for Appellant.

Mr. C. Gregory for Respondent.

In a suit under Section 230, Code of Civil Procedure, to recover possession, as part of plaintiff's share of a pergunnah, of certain fisheries of which she had been dispossessed by defendant, though they were part of a *julkur* mehal which had been left by a partition in the joint possession of all the shareholders, defendant averring that the fisheries in dispute had been created since the partition:

HELD, that it lay with the plaintiff to start her case by showing that the fisheries were a part of the *julkur* mehal held ijmalee by the parties, and that it was specially necessary for her to prove *bonâ-fide* possession.

Hobhouse, J.—THIS was a suit under the provisions of Section 230 of the Code of Civil Procedure to recover possession of certain *julkurs*, of which the plaintiff alleged she had been in possession as part of her share of Pergunnah Attia and had been dispossessed by the defendant. The plaintiff's contention was that she was one of the 8 annas shareholders of one part of the mehal, and that the defendant was one of the 8 annas shareholders of the other part of the mehal; that this mehal had been partitioned in 1838; that by that partition the *julkur* mehal was left in the joint possession and enjoyment of the shareholders of the 16 annas, and been held by them ever since; and that particular fisheries of which plaintiff sues to recover possession were part of that meha

The defendant does not seem to have denied the partition in question, nor that the *julkur* mehal at the time of that partition was left and had been ever since held ijmalee; but he averred that the particular *julkurs* for which the plaintiff sued were *not* a part of the *julkur* mehal created by the partition of 1838 and held ijmalee, but had been created since the partition had been created, he said, by the diluvion of one of his villages in the mehal, and had been ever since held by him as proprietor.

Both the Courts below have found that the plaintiff has failed to establish her case, and have dismissed her suit.

In special appeal, it is urged that the Courts below have proceeded on a wrong theory and thrown the burden of proof upon the wrong person, and two cases are quoted, (1) page 41, Volume VI., Weekly Reporter; (2) page 267, Gap Volume of the Weekly Reporter of 1864.

In both these cases, it seems to us, there was no contention but that the *julkurs* in question were a part of the original *julkur* mehal, or had sprung out of it or were additions to it.

Here, however, the first question that arises and was in issue between the parties was whether the two particular *julkurs* in dispute were a part of the *julkur* mehal held ijmalee by the plaintiff and the defendant as such part of such mehal. In such a case, the burden of proof was clearly upon the plaintiff to start her case, by showing that the particular *julkurs* in question were a part of the *julkur* mehal held in ijmalee by the parties; and, as pointed out by Mr. Gregory, it was especially necessary in this case that the plaintiff should prove the possession which she set up, because a suit under the provisions of Section 230 can only proceed on the ground that the plaintiff was *bonâ fide* in possession of the property which she sues to recover; while here we have a distinct finding of the Lower Appellate Court to the effect that "there is an "entire want of evidence as to the plaintiff's "possession."

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?