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.

The next objection is, that upon the facts on which the plaintiff sued he was bound to prove his possession, and inasmuch as that possession was not proved, his suit should have been dismissed. No doubt, the plaintiff does seem to have thought it necessary for him to prove his possession, but it is quite clear that he erred on that point, and that on his grounds of action it was not only not necessary but that the very ground which he took was a ground to the effect that he was not in possession. Possession of landed property, such as this, means nothing more than enjoyment of the usufruct of that property by the receipt of rents from ryots and so forth; and the plaintiff's cause of action was that he had been prevented from enjoying such usufruct by the defendant, special appellant before us, setting up a *miras* pottah, suing by virtue of that pottah, and being successful in that suit, that is to say, successful in ousting the plaintiff of the usufruct of the land by taking that usufruct to himself.

The third objection is to the principle on which the Lower Appellate Court has decided the issue which was before it. That principle is to be found in the following words of the Lower Appellate Court's judgment. The Judge says: "I am of opinion that a "permanent encumbrance of the nature in- "volved in this suit cannot be created by the "mortgagor, so as to stand good as against "the mortgagee, when his right has been per- "fected by foreclosure-proceedings. Al- "though such a *miras* lease might stand good "so long as the right to redeem the mortgage "remains with the mortgagor, yet no sooner "is that right lost and the property passes "absolutely to the mortgagee, the lease will "be held as determined, and the mortgagee "will be entitled to get the property free from "the encumbrance. Such a lease partakes "of the nature of the right of the grantor, "which is but a conditional one, and it must "cease when the condition lapses. The mort- "gagee to whom the sale was made is surely "entitled to recover the property in the "state in which it was at the time of that "sale, and not at the time when his right "to enter into possession accrues after the "foreclosure-proceedings." The meaning of that decision, shortly stated, is that the mortgagee, if the mortgage is not redeemed, and if, under the terms of that mortgage, he takes possession of the property mortgaged, is entitled to have that property in the same condition as that in which it stood when it was mortgaged to him.

We think this is an equitable interpretation to put upon the contract between the parties in the case. It is pressed on us, however, or rather the argument arose out of a doubt expressed by the Court itself, that if, while the mortgagor is still in possession and before foreclosure, he can alienate the property, and that alienation will under certain circumstances be good, so it follows that he can create encumbrances on the property. This argument, however, seems to us not to be logical. No doubt, a mortgagor in possession can for certain purposes alienate the property, but that is not, as pointed out by Baboo Onookool Chunder Mookerjee, a real alienation of the property. It is nothing more than *selling the right to redeem*. If the alienee pays off the mortgage, then the mortgagee has got all that he bargained for, and the alienee's purchase must stand good. If, on the other hand, the alienee does not pay off the mortgage, the mortgagee will get possession of the property, and the question will still remain as to the state in which he should receive it. That question is not to be determined by the fact that the mortgagor can alienate pending the foreclosure.

It is further contended by the pleader for the special appellant that the burden of proof was on the plaintiff to show that the *miras* pottah in question was an encumbrance which was injurious to his interests. It seems to us almost absurd to contend, with our knowledge of the transaction comprehended in a *miras* pottah, that the creation of such a *miras* pottah does not deteriorate the property in which it is created; but even if it were not so, we should still say that the contract between the parties was at the time of the mortgage either that the mortgagor should pay off the mortgage within a certain time and thus redeem the property, or else that he should give up the property in the same state in which it stood at the time of the mortgage. And it seems to follow, therefore, that if subsequent to the mortgage the mortgagor has created any encumbrance which was not in existence at the time of the mortgage, it is upon him to show that such encumbrance has not injured the outturn of the property. This has, as above remarked, not been shown in this case. This seems to us to be the equity of the case, and we are not shown anything to the contrary.

The special appeal is dismissed with costs.