and at the same time, but on successive days, namely, the 29th and 31st of January last.

It has recently been laid down by this Court, by the Chief Justice, in *Mahomed Akil* v. *Asadunissa Bibee* (1), that "every judicial act which is done by several Judges ought to be completed in the presence of the whole of them."

Now the decisions on which that opinion is founded, are principally English decisions on the subject of awards, and applying that principle to the present case, there are good grounds for saying, that at the time when the judgment was passed by the Judge of Bhagulpore there was not in existence any legal award made by the arbitrators, upon which the Judge of Bhagulpore was competent under section 325 of Act VIII. of 1859 to pass judgment. On this ground at least, without expressing any opinion as to other matters, it seems to me that there is ground for admitting a regular appeal against that judgment.

JACKSON, J.—I also think that a regular appeal ought to be allowed to be filed, both on the point as to whether the award was a legal award or not, and also as to the point whether the judgment of the judge passed within three days of the receipt of the award of the arbitrators, and before the lapse of ten days as directed by law, is good legal judgment, and should be allowed to stand or not.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

MADHAB CHANDRA ROY (DEFENDANT) v. GANGADHAR SAMANT (PLAINTIFF.)*

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May 6.

Parol Evidence—Admissibility—Document.

Parol evidence is not admissible to alter or vary a written document, even if the inadequacy of the consideration and the conduct of the parties show that the transaction was different from what appears in the instrument or writing.

Kasinath Chatterjee v. *Chundy Churn Banerjee* (2) distinguished.

* Special Appeal, No. 3191 of 1868, from a decree of the Additional Subordinate Judge of East Burdwan, dated the 4th of September 1868, affirming a decree of the Moonsiff of that district, dated the 17th of February 1868.

(1) 9 W. R. 29.

(2) Case No. 876 of 1865; February 5th 1866.

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MADHAB CHANDRA ROY v. GANGADHAR SAMANT.

THIS was a suit for redemption of mortgage and to recover possession of certain mal and lakhiraj land upon payment of the amount borrowed, the plaintiff alleging that he did, on the 18th Assar 1270 (1863), on receipt of rupees 116, sell by *kut* to Ramdhan Roy, with a verbal agreement for redemption.

The defendant, who was the heir of Ramdhan Roy, set up in his written statement that the deed under which the property in question was conveyed, was a deed of absolute sale and not a mortgage, and therefore the plaintiff was not entitled to sue for redemption.

The defendant filed a kobala bearing date the 18th Assar 1270 (1863), which in its terms was a deed of absolute sale of the property in dispute, executed by the plaintiff in favor of the defendant's father.

The Moonsiff found from the evidence of witnesses that the value of the property in dispute was rupees 400, and that the same was mortgaged for rupees 116; that there was a verbal stipulation to the effect that when the plaintiff would pay the amount covered by the deed, the property in question would be reconveyed to him; and held that *Kasinath Chatterjee* v. *Chundy Churn Banerjee* (1) was no bar to the plaintiff's case, as the purport of that decision was not "that even if it be proved by the evidence of influential and respectable witnesses who had subscribed to the kobala that the property was mortgaged, still it should be held that the said property was sold simply because a deed of absolute sale had been executed;" but that the real value of the property and the amount for which it was conveyed should be taken into consideration, and thereby the intention of the parties should be ascertained. He accordingly passed a decree in favor of the plaintiff.

On appeal the Additional Subordinate Judge for the reasons contained in the judgment of the lower Court, and as there had been no mutation of names in the zemindar's sherista of the mal land (which would have taken place if it were an absolute sale), confirmed the decree.

(1) Case No. 870 of 1865; February 5th, 1866.

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The defendant appealed to the High Court.

Baboo *Grija Sanker Mazumdar*, for the appellant, contended that parol evidence was not admissible to alter or vary a written document, and cited *Kasinath Chatterjee* v. *Chundy Churn Banerjee* (1).

Baboo *Rajendra Missry* (Baboo *Nalit Chandra* Sen with him) for the respondent.

JACKSON, J.—I think the special appeal in this case must prevail. The plaint sets forth that the plaintiff on a certain date conveyed to the defendant's father, by an instrument which he calls a deed of a conditional sale, but which on the face of it appears to be a deed of absolute sale, certain parcels of land: and that a separate verbal agreement simultaneously took place between the parties, by which it was stipulated that if and when the plaintiff should repay the purchaser the principal amount of purchase-money, the purchaser would be bound to return the bond and the document to the vendor. He states that subsequently the vendor died, and the plaintiff afterwards went to the defendant who was his son, and tendered the purchase-money, but that the defendant refused to restore the land or document, on the ground that the document contained no such stipulation and insisting on his rights as an out-and-out purchaser. The plaintiff therefore sued to recover possession of the land.

The Moonsiff and the Subordinate Judge on appeal concurred in finding that there had been, as alleged by the plaintiff, a contemporaneous verbal agreement between the parties, which converted the instrument from being a bill of sale, as it purported to be, into a mortgage. The Full Bench decision, *Kasinath Chatterjee* v. *Chundy Churn Banerjee* (1) was referred to, and discussed in the judgment of the Court below; and upon the view taken of that decision by the lower Court, it was held that evidence offered by the plaintiff, showing the character of the transaction between the parties, was admissible; and the plaintiff accordingly recovered a decree for the land.

(1) Case No. 870 of 1865; February 5th, 1866.

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The special appellant simply contends that this decision is at variance with the Full Bench Ruling; and we called upon the respondent to support the judgment of the lower Court. He contends that although the majority of the Full Bench held that evidence of a parol contract to vary a written document was inadmissible, yet in such a case as the present the acts of the parties, and parol evidence to explain those acts, were admissible; and it was shown that, in the case in which the Full Bench decision was given, the proceedings were remanded to the Principal Sudder Ameen, in order that he might consider certain acts of the parties in that case, and determine whether the transaction was an absolute sale or a mortgage.

I confess that I have some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument, and the admissibility of evidence showing the acts of the parties, which after all are only indications of such unexpressed unwritten agreement between the parties. Nevertheless, if the case set up by the plaintiff in the suit before us had been one of that kind, namely that the transaction although apparently an out-and-out sale, was not in reality so; and that the conduct of the parties in relation to the land would show what the real character of that transaction was, we might have been obliged to hold that evidence of that description was in fact admissible, and that the decision of the lower Appellate Court founded upon that evidence was in conformity with law. But it seems to me that the plaintiff in this case has sought to do precisely that which the decision of the Full Bench declares he cannot do. His allegation has been distinctly that which the Full Bench held cannot be successfully made, namely, that the parties entered into a written contract, which was varied by a verbal stipulation, and the whole case made by the plaintiff in the Court below was of that description. No doubt evidence was given of the acts of the parties, such as seems to come within the observations of the Chief Justice in the ruling which I have referred to; but then that was given entirely and absolutely in support of the principal allegation in the plaint, namely, that there was a verbal agreement by which a written document was varied.

I think, therefore, that we act strictly in accordance with the decision of the Full Bench in that case, when we declare that the plaintiff's suit was one that ought not to succeed, and in reversing the judgment of the lower Court with costs. I think therefore that this is the decision which we are bound to give.

MARKBY, J.—I also think that this special appeal must be decreed. In the Full Bench case it was decided by a majority of three Judges against two, that where there was a distinct and unambiguous agreement in writing, evidence of a contemporaneous parol agreement contradicting the written agreement could not be given, and if I may be permitted to say so, in that decision I entirely concur. In this case it is perfectly clear, that the lower Courts have, in contradiction of a perfectly clear document, received evidence of a contemporaneous parol agreement, and have found that such a parol agreement existed, and therefore that decision as now given clearly cannot stand.

Then the respondent says that we ought to send the case back to try the same question, as the Principal Sudder Ameen was ordered to try upon the order of remand in the Full Bench case. Now, of course, the whole of the circumstances of that case are not now before us; and therefore it is impossible for us to say exactly what the question there was to be considered. But it seems to me to be very difficult to understand the distinction there drawn between evidence of a parol agreement contradicting the terms of a written contract being inadmissible, and evidence of the acts of the parties contradicting the terms of such a contract being admissible. In all these cases one starts with the proposition that there was a written instrument which unequivocally and unmistakeably declares the intention of the parties, and I should have thought that it was quite as objectionable, if not more so to contradict the plain terms of this contract by what are called "acts" by the Full Bench, which can only lead to an inference than to contradict them by an express and unequivocal and unmistakeable parol agreement between the parties. I should have thought that the principle was this, that when we have once got a clear expression in writing of that which professes to be the intention of the parties, that must

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conclusively be taken to be the relation which was intended to be created between them, and that to get at their intention no other evidence whether of contemporaneous acts or agreements ought to be admitted. But it may be that we, sitting here as a Division Bench, should not have been at liberty to question the Full Bench Ruling, if the point had directly arisen before us. In the present case however it is clear that the point does not arise. This was not the case which the plaintiff in the Courts below intended to prove. He distinctly avers that there was a parol agreement, and he only resorts to the acts of the parties, to the sufficiency of the considerations, and to the non-registration of the document, for the purpose of supporting that allegation. Therefore, having made that allegation, and having abided by that allegation up to this time, I think he ought not to be allowed now to change it.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

BHIRO CHANDRA MOZOOMDAR AND OTHERS (DECREE-HOLDERS) *v.* BAMUNDAS MOOKERJEE AND OTHERS (JUDGMENT-DEBTORS.)*

Mesne Profits—Cultivating Ryot.

When a cultivating ryot is ejected by his zemindar, the mere rent of the land realized by the zemindar from another tenant is not necessarily the measure of the damage sustained by the ryot, and recoverable by him as mesne profits.

Baboos *Mahini Mohan Roy* and *Gopal Lal Mitter* for appellants.

Baboo *Srinath Das* for respondents.

The facts are sufficiently clear from the judgment of

NORMAN, J.—The plaintiff, in this suit obtained a decree for possession with wasilat, or mesne profits. In execution, the lower Court awarded, by way of mesne profits, a sum equivalent to the fair and reasonable rent of the entire land, not only of that which was actually occupied by ryots, but also of that which was not

* Miscellaneous Special Appeal, No. 539 of 1868, from a decree of the Officiating Judge of Dinagepore, dated the 17th August 1868, amending a decree of the Subordinate Judge of that district, dated the 5th May 1868.