Present : Bertram C.J. and De Sampayo J.

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NANAYAKKARA *et al. v.* ANDRIS *et al.*

104—D. C. Matara, 8,794.

Informal lease of a land to plaintiffs for gemming—Sublease by oral agreement by plaintiffs to defendants for half share of the value of gems found—Action for half share of gems or value—Ordinance No. 7 of 1840, s. 2—Use of Statute of Frauds as an instrument of fraud—Claim for compensation for use and occupation—May person who has no legal title claim compensation for use and occupation ?—May the oral agreement to give half share be considered in assessing compensation ?—Doctrine of part performance considered.

The first six plaintiffs took an informal lease of a land from the other plaintiffs for gemming, and in the same month by a verbal agreement sublet the land to defendants for half share of the gems, or their value.

The plaintiffs (1 to 6) brought this action for their share of the value of the gems mined. The defendants contended, *inter alia*, (1) that the agreement was of no force or avail in law under section 2 of Ordinance No. 7 of 1840 ; (2) that plaintiffs could not succeed as on a claim for use and occupation ; and (3) that in any event all that can be recovered on such a claim is a reasonable sum for the use and occupation of the land calculated upon the market price of similar land, and that the alleged agreement to pay half value of the gems found could not be used as evidence of the *quantum* of compensation.

The District Judge held (1) that the defendants were not entitled to use the Statute of Frauds to protect their own dishonesty ; (2) that the plaintiffs were entitled to recover on the claim for use and occupation ; and (3) that the defendants could not call in question their lessors' title.

Held, that the principle that the Statute of Frauds should not be made an instrument of fraud did not help the plaintiffs in this case, but that they could recover compensation on the footing of a claim for use and occupation, though they had no legal title when they sublet to defendants, and that the agreement might be used as evidence of the *quantum* of compensation.

The equitable doctrine that the Court will not allow the Statute to be made an instrument of fraud (apart from certain minor and infrequent cases) is confined to two classes of cases :—

(*a*) Cases where the defendant has obtained possession of the plaintiff's property, subject to a trust or condition, and claims to hold it free from such trust or condition ;

(*b*) Cases with the equitable doctrine of part performance.

" This case is not a case in which a person who is occupying property subject to a trust or condition fraudulently seeks to retain it free of that trust or condition. The action is not for the

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return of the sapphire, but for rent, or more exactly, for compensation for the use and occupation of the land. Nor is this an action for specific performance."

The doctrine of part performance (with reference to the Statute of Frauds) applies to suits for specific performance only. It has no application to claims for damages. It is confined principally (though not exclusively) to cases of contracts for the sale or purchase of land or for the acquisition of an interest in lands.

There is nothing to prevent the adoption of the doctrine of part performance as part of the legal system of the Colony.

Perera v. Amarasooriya[1] commented upon.

The history and scope of the action for "use and occupation" explained.

THE facts appear from the judgment.

Bawa, K.C., and *H. J. C. Pereira, K.C.* (with them *H. V. Perera*), for first, second, and third defendants, appellants.

A. St. V. Jayawardene, K.C. (with him *Hayley* and *Weerasooriya*), for plaintiffs, respondents.

Charles de Silva, for seventh and eighth defendants, respondents.

Cur. adv. vult.

November 30, 1921. BERTRAM C.J.—

This was an action arising out of a gemming agreement. The plaintiffs purported to let a gem pit to the defendants on terms of receiving half the value of the gems recovered. On the basis of a book kept for this purpose, they claimed a considerable sum, including half the value of a large sapphire said to be worth over Rs. 40,000. The defendants denied that they entered into any such agreement. They denied also that they ever worked at the gem pit said to be let to them, or discovered any such sapphire as that alleged, or any other gems.

There were certain obvious legal difficulties in the plaintiffs' case. They had no title, but held only under informal agreements with the proprietors of the land, reduced to notarial form only after the discovery of the sapphire. The gemming agreement, which they claimed to have made with the defendants, was verbal only, and being an agreement for establishing an interest in land was, under section 2 of Ordinance No. 7 of 1840, of no "force or avail in law." To avoid these difficulties the plaintiffs (though they had never asserted it in their pleadings) were allowed by the District Judge to set up a claim in respect of "use and occupation." But, even so, the question was raised whether they were competent to sue for the use and occupation of land which did not belong to them.

[1] *(1909) 12 N. L. R. 87.*

On the question of title the District Judge ruled that the defendants, as tenants, could not call their lessors' title in question. As to the plea of Ordinance No. 7 of 1840, he ruled that they were "not entitled to use the Statute of Frauds to protect their own dishonesty."

I need not refer further to the facts, as they are fully set out in the judgment of my brother De Sampayo. I agree with his conclusions and the order which he proposes. But the questions of law involved in the case deserve special consideration. The principal question is: To what extent and by virtue of what legal principles are our Courts in such cases entitled to go behind the express words of our local Statute of Frauds, Ordinance No. 7 of 1840? I have such sympathy with District Judges who in remote districts of the Colony are called upon to decide such important questions of law without anything in the nature of law libraries to assist them, that I have decided to summarize the authorities on the subject for future reference, even though in so doing I shall travel outside the immediate necessities of the present case.

English jurisprudence on the interpretation and application of the Statute of Frauds has developed certain principles which mitigate the strict rigour of its enactments. It is open to our own Courts to apply these same principles to our own corresponding Ordinance, and it can hardly be contested that it is reasonable that they should do so. When this Ordinance was enacted, these principles had been long in force in England. The legal knowledge of the law officers who promoted the legislation must be imputed to the Legislature, and in thus adopting an English enactment, the Legislature must be taken to have contemplated that it would be interpreted and applied in accordance with English principles, in so far as those principles were capable of being "received" into the legal system of the Colony.

It is true that there is a difference of phrase between the English enactment and our own. The English Statute says that "no action shall be brought" upon the contract. Our own Ordinance says that the contract shall not be "of force or avail in law." This difference has been emphasized (*obiter*) in one of our leading cases *Perera v. Amarasooriya*.[1] It has been minimized in another (*Perera v. Fernando*[2]), where the opinion expressed was essential to the judgment. It is quite true that in some of the English cases (for example, *Maddison v. Alderson*[3]) the fact that the Statute does not make the contract absolutely void at law is adduced as one of the reasons for taking note of it in equity. But this seems to me a circumstance only, and not the real basis of the doctrine under consideration. I find it difficult to believe that the change of phraseology (which dates from Regulation No. 4 of 1817) was

[1] *(1909) 12 N. L. R. 87.*

[2] *(1864) Ram. 1863-68, 83.*

[3] *(1883) 8 A. C. 467.*

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intended to exclude, or has the effect of excluding, the application of the legal principles which have been developed in England. At any rate, so far as actions for use and occupation are concerned, the Full Court decision in *Perera v. Fernando*[1] precludes us from saying so. Note the remarks of Middleton J. in *Perera v. Amarasooriya*;[2] see also the observations of the same Judge in *Gould v. Innasitamby*,[3] and of Lord Halsbury L.C. in *Rochefoucald v. Boustead*,[4] where (speaking of section 2 of Ordinance No. 7 of 1840) he says: "That section does not appear to affect equitable rights."

The classes of cases in which English jurisprudence has mitigated the rigour of the Statute may for all practical purposes be reduced to three. Two of them belong to the sphere of equity, the other to that of the Common law. I will deal with equity first.

It has been frequently said that "Courts of Equity will not permit the Statute to be made an instrument of fraud." Lord Eldon in *Mestaer v. Gillespie*[5] expressed this idea in the most general terms: "Cases in this Court are perfectly familiar deciding that a fraudulent use shall not be made of the Statute," and other high authorities have subsequently enunciated the same proposition. But taken by itself—apart from the cases in connection with which it has been used—this is a dangerous and insidious maxim. It will be found cited—I venture to think, with too great generality—in two cases of our own (*Issan Appu v. Gura*[6] and *Guruhamy v. Subaseris*[7]). As Lord Selborne observed in *Maddison v. Alderson*[8]: "It cannot be meant that equity will relieve against a public Statute of general policy in cases admitted to fall within it." So also Lord Cranworth, in *Caton v. Caton*,[9] said: "It would be a scandal to suppose that when the Legislature has said that no action shall be brought on a parol contract of a particular description, it should be open to one of the contracting parties to escape from the consequence by simply shifting his sphere of operations from a Court of Law to a Court of Equity." The equitable maxim does not simply mean that the Courts will disregard the Statute and admit oral evidence, in all cases where it would be unconscientious of the defendant to set up the Statute, if the plaintiff's case is true. To act thus generally would be to admit the very evils against which the Statute was designed to guard. It would be to decide on oral evidence questions which the Statute declared were only to be determined by evidence in writing. When this maxim is rightly used, it is always used with reference to certain definite classes of cases, and to these its application should be confined. The necessity of confining the maxim within definite limits was long ago realized.

[1] *(1864) Ram. 1863–68, 83.*
[2] *(1909) 12 N. L. R. on p. 92.*
[3] *(1904) 9 N. L. R. on p. 182.*
[4] *(1897) 1 Ch. on p. 203.*
[5] *(1806) 11 Ves. at p. 627.*
[6] *(1910) 13 N. L. R. at p. 106.*
[7] *(1910) 13 N. L. R. at p. 114.*
[8] *(1883) 8 A. C. 467.*
[9] *(1865) 1 Ch. App. at p. 147.*

"The Statute was made," said Lord Redesdale in *Lindsay v. Lynch*,[1] "for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in Courts of Equity than that the relaxation of that Statute has been a ground of much perjury and much fraud. . . . . It is therefore absolutely necessary for Courts of Equity to make a stand, and not carry the decisions further."

We must ascertain, therefore, the limits within which this equitable principle is to be applied. Apart from certain infrequent cases, to which I will presently refer, it will be found that its application is confined to two classes of cases :—

(*a*) Cases where the defendant has obtained possession of the plaintiff's property, subject to a trust or condition, and claims to hold it free from such trust or condition ;

(*b*) Cases within the equitable doctrine of "part performance."

Of class (*a*), an illustration may be found in our own reports, *Gould v. Innasitamby*,[2] where the principle is fully explained by Moncreiff J. There the defendant bought land with the plaintiff's money in his own name under a promise to re-convey to plaintiff, and then repudiated his promise. There are numerous striking English cases. See *Lincoln v. Wright*,[3] where defendant insisted on a conveyance as absolute, when it had been agreed that it should be a mortgage ; *Haigh v. Kaye*,[4] where the defendant claimed to hold property free of a trust under which he admitted it was conveyed to him ; *In re Duke of Marlborough*,[5] where the Duchess of Marlborough assigned a house to the Duke to enable him to raise money by mortgage under a promise to re-convey, and where, after the Duke's death, his creditors claimed it as the absolute property of the Duke. In this case all the previous authorities were collected and discussed by Stirling J. See also a local case (*Rochefoucauld v. Boustead*[6]), where the plaintiff's husband had received a conveyance of an estate in Ceylon in trust for his wife, but subject to a lien for his advances, and his trustee in bankruptcy claimed to hold them as his absolute property. Lindley L.J. there said : "It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud, and that it is a fraud on the part of a person to whom land is conveyed as a trustee and who knows it was so conveyed to deny the trust and claim the land himself." Our own law on the necessity of trusts of immovables being in writing will now be found in the Trusts Ordinance, No. 9 of 1917, sections 5 and 113. Section 8 of the Statute of Frauds makes an exception in favour of resulting trusts, but as

[1] *2 Sch. & Lefr. 4.*
[2] *(1904) 9 N. L. R. 177.*
[3] *(1859) 4 de G. & J. 16.*
[4] *(1872) 7 Ch. App. 469.*
[5] *(1894) 2 Ch. D. 133.*
[6] *(1897) 1 Ch. 196.*

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Moncreiff J. says in *Gould v. Innasitamby*,[1] "these cases were quite independent of that section." This principle is firmly established and clearly defined.

The second class of cases referred to under head (*b*) above are cases within the equitable doctrine of "part performance." This doctrine applies to suits for specific performance only. It has no application to claims for damages. (See per Chitty J. in *Lavery v. Pursell*.[2]) It is confined principally (though not exclusively) to cases of contracts for the sale or purchase of land or for the acquisition of an interest in lands. (See per Kay J. in *McManus v. Cooke*.[3]) The principle is that equity will enforce even a verbal contract where the purchaser has performed his part of the contract to such an extent and under such circumstances that the parties cannot be restored to their original position, provided that the existence of the contract is demonstrated by the acts of performance themselves, and that they are "unequivocally referable to the contract." Payment of the purchase price is in itself not enough, as that can always be recovered. (See *Story, Equity Jurisprudence, section 760.*) The acts relied on must be such as have in some way altered the purchaser's position to his prejudice. As Story puts it (*Equity Jurisprudence, section 761*): "Nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed." In such a case, as Lord Selborne explains in *Maddison v. Alderson*,[4] "the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not . . . . . upon the contract itself." A condensed discussion of the doctrine will be found in *Pollock on Contract, chapter XIII.*, and perhaps its best exposition, in the judgment of Lord Selborne, in *Maddison v. Alderson*[4] just referred to. See also the judgment of Kay J. in *McManus v. Cooke*,[3] where the leading cases are also discussed.

It should be noted that it is only acts of performance of the purchaser that are material. Acts of the vendor for this purpose have no effect. It is no ground for calling upon the vendor to fulfil his contract that he has partly performed it already. (See per Lord Cranworth L.C. in *Caton v. Caton*.[5]) There are, indeed, some cases which seem to suggest that it is quite a sufficient basis for the action if the vendor has put the purchaser into possession on the ground that this of itself proves the existence of the contract. See in particular *Ungley v. Ungley*;[6] *Britain v. Rossiter*;[7] *Morpeth v. Jones*;[8] and *Dale v. Hamilton*.[9] See also *Leake on Contract, 5th ed., p. 203*, and *Story, Equity Jurisprudence, section 763*. But in view of the opinion of Lord Cranworth cited above, and the explanation

[1] (*1904*) *9 N. L. R. 177.*
[2] (*1888*) *39 Ch. D. 518.*
[3] (*1887*) *35 Ch. D. 681.*
[4] (*1883*) *8 A. C. 467.*
[5] (*1865*) *1 Ch. App. at p. 147.*
[6] (*1887*) *5 Ch. D. 887.*
[7] (*1879*) *11 Q. B. D. at p. 131.*
[8] *1 S. W. 181.*
[9] *5 H[illegible] 381.*

of the doctrine given by Lord Selborne in *Maddison v. Alderson*,[1] I think that, in spite of the high authority of the Judges who have stated the doctrine in this way, it must be taken that such possession by the purchaser is only relevant when in consequence of the possession, and in pursuance of or in reliance on the contract he has expended money on buildings or improvements, or has otherwise altered his position to his prejudice. The case then becomes that put in the well-known case of *Ramsden v. Dyson*,[2] where Lord Kingsdown states the rule of equity thus: "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

Should occasion arise, I see nothing to prevent the adoption of this doctrine of "part performance" as part of the legal system of the Colony. Too much must not be made of the observations of Wendt J. and the other Judges in *Perera v. Amarasooriya*.[3] These observations are wholly *obiter*, as the action in that case was not an action for specific performance, but an action for damages, and was not therefore an action in which the doctrine of "part performance" could come into the question at all. It is difficult to read the judgments without feeling that the real nature of the doctrine had not been fully considered, and in particular that the point last mentioned had not been appreciated either in the arguments or in the judgments. It seems to me that if the case arises, the way is open to this Court to take whatever course it considers required. Scotch law, which like our own is based on the Roman, has independently developed a precisely similar doctrine. (See *Maddison v. Alderson*.[4])

This, then, is the doctrine of "part performance," which, it is hardly necessary to point out, has no application to the present case. The other minor classes of cases in which equity on the ground of fraud has relieved against the Statute are cases where the person who sets up the Statute has fraudulently prevented a written agreement from coming into existence (see *Fry on Specific Performance, section 574*), and cases where the written memorandum put forward does not, in fact, represent the full agreement between the parties, and a fraudulent attempt is made to represent it as doing so. (*Ibid., section 573.*) These cases, however, are of comparatively rare occurrence.

It will thus be seen that the equitable doctrine, that the Court will not allow the Statute to be made an instrument of fraud, considered

[1] *(1883) 8 A. C. 467.*
[2] *L. R. 1 H. L. 129.*
[3] *(1909) 12 N. L. R. 87.*
[4] *(1883) 8 A. C. on p. 476.*

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in connection with the limitations under which it applies, has no application to the present case. This case is not a case in which a person who is occupying property subject to a trust or condition fraudulently seeks to retain it free of that trust or condition. The action is not for the return of the sapphire, but for rent, or more exactly, for compensation for the use and occupation of the land. Nor is this action an action for specific performance. The judgment of the learned District Judge, therefore, in so far, as it is based upon his ruling that the defendants were "not entitled to use the Statute of Frauds to protect their own dishonesty," must be considered as not justified by authority. The ruling is, however, as a matter of fact, superfluous, for the learned Judge has further ruled that the plaintiffs are entitled to recover on the claim for use and occupation, and I will proceed to consider this aspect of the question.

So far we have dealt solely with equitable considerations. We now come to an expedient with which equity has nothing to do, but which was solely an achievement of the Courts of Common law, namely, the use of the action for "use and occupation" as a means of avoiding the hardship of the Statute. The action for use and occupation lay at Common law in respect of "the occupation of land by a person bound to pay some remuneration for it without the amount or time of payment being fixed." As Lord Denman C.J. says in *Gibson v. Kirk*[1]: "Such a case is of rare occurrence." At what period, or how the action came to be used as a means of circumventing the Statute, I have not been able to ascertain. In our own Full Court case (*Perera v. Fernando*[2]) it is said: "After the passing of this Statute it soon became to be explained that the Statute of Frauds is not applicable to any case where the action is brought on an executed consideration, for as the object of the Legislature clearly was to prevent the setting up, by means of fraud and perjury, of contracts or demises by parol, upon which parties might otherwise have been charged for their whole lives, it did not appear unreasonable to limit the Statute to such actions only as were brought to recover damages for the non-performance of contracts." I have unfortunately not been able to find the authority for this interesting explanation, the edition of *Taylor on Evidence*, from which the judgment apparently quotes, being no longer available. The judgment continues, quoting from *Taylor*: "If it has been executed by one party, and the transactions be of such a nature as to admit of an action for use and occupation, or in *indebitatus assumpsit*, the other party, perhaps, will not be permitted to defeat the action by setting up the Statute." The use of the word "perhaps" in this context is singular, as even at the date of the edition cited there can have been no doubt about the matter.

The action had two forms: one in "debt," and the other "on the case," or, "*indebitatus assumpsit*." A distinction existed

[1] (1841) 1 Q. B. 850.

[2] (1864) Ram. 1863-68, 83.

between these two forms of action, the reasons for which are not very apparent. In the case of the latter, though not of the former, the plaintiff could be non-suited on the production of an actual written demise not under seal. (See *Gibson v. Kirk*.[1]) A special enactment was accordingly passed in the 11th year of George II., which expressly declared that where demises were not by deed (as required by the Statute of Frauds), the landlord should recover a reasonable satisfaction for the lands held or occupied by the defendant in an action on the case; that the plaintiff should not be non-suited by the production of a written demise under seal, but that this writing could be used as evidence of the *quantum* of the damages. It might be argued that this shows that in England the action was the creature of Statute, and that as we have no such Statute here, the action cannot here lie. But this is not so. The Statute only relates to one form of the action, that "on the case," that is, *indebitatus assumpsit*. Lord Denman declares in *Gibson v. Kirk*[1] that, where the action was brought "in debt," it was not defeated by the production of a demise, and that, so far as the form of action was concerned, it was unaffected by Statute. Thus, the Statute did not originate the action, it merely removed a difficulty which affected a particular form of it. The reasoning of Lord Denman's judgment is certainly not very convincing, but it must be taken to express the English law.

However this may be, this action was formally and authoritatively adopted into our own system by *Perera v. Fernando*[2]: "We decide that a landowner can in Ceylon recover for use and occupation without a notarial instrument, if there has been actual use and occupation."

Two special points are, however, raised by Mr. Bawa in the present case. In the first place, he argues that the action can only be brought by the "landowner," and that these plaintiffs, at the date of the cause of action, were not landowners, having at that date acquired no legal title. In the second place, he maintains that all that can be recovered in such an action is a reasonable sum for the use and occupation of the land calculated upon the market price of similar land in the same neighbourhood, and that the alleged special agreement, by which defendants were to pay to plaintiffs half the value of all the gems found, could not in this case be used as evidence of the *quantum* of the compensation. In my opinion both these points are bad.

It is nowhere declared in the English cases that only the owner of the legal estate can sue. What is laid down is that, where there has been occupation but no agreement, an agreement with the owner of the legal estate will be implied, but not with the owner of an equitable interest only. But that is quite another thing. I see no reason why a person in the occupation of land to which he has not a complete title should not sue for use and occupation a person

[1] (*1841*) *1 Q. B. 850.*

[2] (*1864*) *Ram. 1863–68, 83.*

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whom he has put into occupation under himself. The important thing is not the title of the plaintiffs, but the existence of the relationship of landlord and tenant between plaintiff and defendant. But quite apart from that, as the District Judge rightly held, the defendants are estopped from disputing the plaintiff's title. This was expressly held in an old English case of use and occupation, *Cooke v. Loxley*.[1] In this case a glebe tenant sought to dispute the incumbent's claim for rent on the ground that he had been "simoniacally presented." Lord Kenyon C.J. said: "In an action for 'use and occupation' it ought not to be permitted to a tenant, who occupies land by the license of another, to call upon that other to show the title under which he let the land." Section 116 of our Evidence Ordinance, 1895, is not to be treated as an exhaustive statement of the law.

With regard to the other point, it is quite true that there is no case on the books where in an action for use and occupation the compensation has been assessed as a proportion of the profits. But this is not conclusive. Local customs must be regarded. I see no reason why such a method of assessment should not be adopted when the agreement is that a certain proportion of the crops should be paid as rent. Equally, I see no reason why such a course should not be taken when the agreement is for a fixed proportion of the value of gems found. If the agreement can be used as evidence of the *quantum* of compensation when a rent is fixed in the ordinary form, I see no reason why it should not be so used when the rent agreed upon is a proportion of the tenant's revenue derived from the land of whatever character. For the reasons given I would dismiss the appeal, with costs.

DE SAMPAYO J.—

Of the thirty-one plaintiffs, the real plaintiffs are the first six plaintiffs, the other plaintiffs being joined as lessors to them of six-seventh shares of the land Mahagaladeniya. Similarly, the first six defendants are the real defendants. The seventh, eighth, and ninth defendants are joined as the owners of the balance one-seventh share of the land, and no relief is claimed as regards them. The plaint is not very full and explicit, but the plaintiffs' case, as developed in the proceedings, is that at various dates in March and April, 1919, the first six plaintiffs obtained from the other plaintiffs non-notarial written agreements giving them right to gem on the said land on certain terms, and between May 25 and 29, 1919, they further obtained formal leases for the same purpose, and that on or about April 13, 1919, they sublet to the first six defendants and others various parcels of the land for the purpose of digging pits and gemming, on the terms that they should receive by way of rent a half share of all gems found by these sub-tenants, or the value thereof.

[1] (1792) 5 *T. R.* 4.

The plaintiffs' cause of action is that the first six defendants, who were given one parcel of the land and had dug a pit, having in April and May, 1919, found gems there to the value of Rs. 50,000, failed to give to the plaintiffs their share of the gems or to pay the value, namely, Rs. 21,428·57, which they accordingly claim from the first six defendants.

The defendants severed their defences. The first, second, and third defendants raised certain legal questions, and as regards the merits, they denied the alleged sublease, and also denied that they were put in possession of the land by the plaintiffs, or that they gemmed thereon or obtained any gems therefrom. The fourth and fifth defendants admitted that, with the permission of the first six plaintiffs, they, with the first, third, and sixth defendants, gemmed on the land, but raised a dispute as to the share which plaintiffs were to get, and stated that the gems found were kept in the custody of the first and second defendants pending the settlement of accounts and distribution of the gems. The sixth defendant's answer was to the same effect as that of the fourth and fifth defendants. The seventh, eighth, and ninth defendants, who, as stated above, were only joined as owners of the unleased share of the land, supported the plaintiffs, and claimed from the first six defendants their share of the gems.

It will be seen that the contestants are the first, second, and third defendants, and of these, it is the first defendant who is said to have actively carried on the mining operations, and with whose acts the case is chiefly concerned. The first question of fact to be decided is whether the plaintiffs sublet to them any portion of the land for gemming as alleged. The principal witness for the plaintiffs was the fourth plaintiff himself, who appears to have managed the whole business on behalf of the plaintiffs. The plaintiffs constituted a syndicate for the purpose of gemming on this land. After obtaining some of the informal leases, they began gemming about March 12, 1919, but in the beginning of April there was a disturbance, which induced the fourth plaintiff and three others to complain to the first defendant, who is a headman, and to take a report for the purpose of instituting a case. But the matter was settled, and, as the result of that settlement, there was a distribution of pits, the contesting defendants getting the pit now in question. This is the effect of the fourth plaintiff's evidence, with which the District Judge was satisfied.

. . . . . .

His Lordship dealt with the facts at length, and concluded as follows :—

I have above dealt with the questions of fact only. The Chief Justice has so fully considered the legal aspects of the case that it is unnecessary for me to add anything, except to say that, in my opinion, the first six plaintiffs are entitled to maintain this action.

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The District Judge decided the issues of fact in favour of the plaintiffs, but deferred consideration of the amount to be awarded. In view of the facts above stated, we are in a position to enter final judgment.

In my opinion the appeal should be dismissed, with costs, and judgment should be entered for the first six plaintiffs against the first six defendants for six-seventh of half of the said sum of Rs. 35,000, to wit, Rs. 15,000, with costs of action. The fourth, fifth, and sixth defendants, if any part of the judgment is recovered from them, may have a claim for contribution against the contestants, the first, second, and third defendants, but they must seek this remedy in some other proceeding.

Appeal dismissed.