issues had been raised in the Court below and evidence led under protest, which issues had not been raised in the pleadings, the Court of Appeal could, upon application by an interested party, amend the pleadings. In stating his reasons for allowing the pleadings to be amended Lord Green, M.R., at p. 583 in that case stated, "on the particular facts in this case, having regard to what took place at the trial we come to the conclusion that, in the circumstances, no real injustice will be done by allowing the amendment."

In the present case the respondent's clerk who made the contract as the respondents' agent gave evidence that the appellant, after he became aware of the promissory note, again reiterated his willingness to pay. No objection was made by the appellant to the admission of this evidence. The appellant himself when he gave evidence showed clearly that he was relying not on any technical question of the extension by the promissory note of time to pay, but that the principal debtor, by executing the promissory note, had undertaken to pay the debt and thereby had discharged the appellant from his liability. In our view, no injustice can be done in this case by allowing the reply of the respondent to be amended. Since we have allowed this amendment to be made, there is in fact and in law no ground upon which the judgment of the trial Court can be disturbed.

The appeal is therefore dismissed. Since it was necessary to amend the pleadings before full justice could be done to the respondents we only allow half of the costs of this appeal to the respondents.

[LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW AND MR. L. M. D. DE SILVA]

(October 17, 1955)

A. G. PATIKI & CO. AND OTHERS, *Appellants*,

v.

DEMETRA GEORGHIOU PATIKI, *Respondent*.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

(Privy Council Appeal No. 26 of 1954)

The facts are summarized in the head-note to the report of the judgments in the District Court and in the Supreme Court at page 36 of Part I of this volume.

Patiki & Co. appealed to the Privy Council upon three issues:

(1) Whether D. G. P., the respondent, could sue without a grant of administration to G. A. Patiki, deceased.

(2) Whether the Supreme Court was correct in holding that the value of the partnership assets should be

ascertained by taking an account of the fair value to the firm of all the assets on 5th June, 1946.

(3) Whether the Supreme Court was right in awarding to the respondent interest at the rate of 9 per cent. from the date of death on the amount found due to her.

Held: As to (1), even assuming that the Statute Law of Cyprus (including the Wills and Succession Law, 1895, s. 18) made no provision for the vesting of property of a deceased on his death intestate, the Common Law of England [applicable at the date of A. G. Patiki's death under section 28 of the Court of Justice Law, (Cap. 11)*], contained nothing to prevent the operation of the general rule that a person entitled to property can maintain an action to recover it when it is withheld by another. No grant of administration was therefore necessary.

As to (2), although the partnership agreement contained a provision that upon the retirement or death of partners, they "shall be paid every sum they will be entitled to in accordance with" the books, this did not import into the settlement of accounts at death a special method of valuation of assets in place of a fair valuation. A usage relating to settlement of accounts at death or retirement cannot be established unless death or retirement has actually occurred.

As to (3), the surviving partners had not complied with the terms of the option to purchase the share of A. G. Patiki, deceased, so that interest at 9 per cent was payable under section 44 of the Partnership Law on the amount found due to the respondent.

Ruling of District Court and Supreme Court upheld on the first issue.

Ruling of Supreme Court upheld on the second and third issues.

* Now repealed by Law No. 40 of 1953.

The arguments appear sufficiently from the judgment of the Judicial Committee delivered by:

Mr. L.M.D. DE SILVA: This is an appeal from a judgment of the Supreme Court of Cyprus dated the 22nd January, 1954, which in part affirmed and in part varied a judgment of the District Court of Limassol dated the 28th February, 1953.

The respondent is the adopted daughter of G. A. Patiki who died intestate on the 5th June, 1946. It was found by the Courts below, and it is not now disputed, that she is the sole heir of G. A. Patiki and has inherited all his movable property in Cyprus, which included an interest in the business of the firm of A. G. Patiki & Co. of which he had been a partner. The partners who survived him were those of the appellants who are referred to as

defendants B in the writ issued by the District Court of Limassol.

The other appellant is referred to as defendant A in the said writ and is described as "The Firm of A. G. Patiki & Co." The surviving partners (namely the defendants B) are the present partners of this firm. The fact that the action was brought in this manner against two sets of defendants is immaterial to the questions argued before their Lordships and will not be referred to further.

The action was instituted by the respondent against the appellants in the District Court of Limassol. She claimed that as the heir of G. A. Patiki she was entitled to payment of the value of his share in the partnership property, such value being assessed on the basis of "current prices" at the date of death, less certain deductions required to be made under a partnership agreement of the 15th September, 1923, which was in force at the time of the death of G. A. Patiki. Alternatively she claimed a dissolution and a share of the amount realised on winding-up. She further claimed interest at 9 per cent. from the date of death on the amount found due to her or alternatively to a share of the profits since death.

The appellants in their defence denied on various grounds (no longer relevant) that the respondent was the heir of G. A. Patiki. They further pleaded (i) that even if she was found to be the heir of G. A. Patiki she was not entitled to maintain an action in respect of his interest in the partnership business; (ii) that even if, being the heir, she was entitled to maintain the action, the value of the share of the deceased payable by the surviving partners had, under the partnership agreement, to be assessed not on the basis of current prices at time of death, but on certain valuations appearing in the books of the partnership. They said that in any event she was not entitled to the interest or share of profits claimed by her.

The alternative claim for dissolution was not pursued by the respondent as the appellants pleaded that they had elected to pay the sum due to the estate of the deceased to the persons entitled thereto.

The questions which arise for decision on this appeal are:-

I. Whether the respondent as heir of G. A. Patiki is entitled to maintain this action without first obtaining a grant of representation to his estate or joining a legal representative of the deceased as a party.

Upon this question both courts in Cyprus have held in favour of the respondent.

II. Whether, in the event of finding that the respondent can maintain the action, the order of the Supreme Court of Cyprus as to the manner of taking accounts of the partnership for the purpose of

ascertaining what sum was payable to the estate of the deceased is correct.

The Supreme Court held that the basis of valuation contended for by the respondent was right and that she was "entitled to an account of the fair value to the firm of the partnership assets as on the 5th June, 1946". It varied the order of the District Court which had adopted the basis suggested by the appellants.

III. Whether the Supreme Court was right in awarding to the respondent interest at the rate of 9 per cent. from the date of death on the amount found due to her.

The District Court did not deal with this question.

Upon the first question on this appeal two points are raised by the appellants regarding the constitution of the action. Neither of these points was raised in the pleadings.

The first point though not pleaded was considered by the courts in Cyprus. It was argued before the Trial Judge that the respondent could not maintain the action "before some person is authorised under a grant from a court here in Cyprus to deal with the deceased's property and represent the deceased in respect thereof." Both the Trial Judge and the Supreme Court held against the appellants on this point. Their Lordships are of the opinion that the conclusion arrived at by the courts below was correct.

It is a general rule of law that a person entitled to property can maintain an action to recover it when it is withheld from him by another. In a particular case he may be prevented from doing so by a special provision of law applicable to the particular case. It is no longer disputed that the property which the plaintiff is seeking to recover devolved upon her under the relevant law applicable in Cyprus, and unless there is in that country some rule of law or procedure which prevents her from maintaining the action she can do so.

It was contended by the appellants that an examination of section 18 of the statute known as the "Wills and Succession Law 1895" of Cyprus leads to the conclusion that on an intestacy, where no letters of administation have been granted, the Common Law of England is applicable and that under that law an heir or next of kin may not sue to recover property that has devolved on him.

Section 18 reads:—

"From and after the grant of probate or letters of administration, whether with Will annexed or otherwise, or if no such grant is made, the right and liabilities attaching to the property of a deceased person are vested in and devolve upon the executor

or administrator, as the case may be, until the property is administered; and from and after the administration of the property they are vested in and devolve upon the persons legally entitled."

It was argued that the words "or if no such grant is made" in the place where they occur could be given a meaning in the case of a will but not in the case of an intestacy. It was said that in the case of a will where no grant of probate has been made the section provided that the "rights and liabilities attaching to the property of a deceased person are vested in and devolve upon the executor" named in the will. It was further said that the words "if no such grant is made" in the place where they occur could be given no meaning in the case of an intestacy because the "rights and liabilities attaching to the property of a deceased person" could not become "vested in" or "devolve upon" an administrator as ex hypothesi no grant of administration had been made. It was argued that the section and the statute as a whole made no provision for a case of intestacy in which no letters of administration had been granted and that the case was unprovided for by the statute law of Cyprus. It was then argued that as a consequence the Common Law of England was applicable.

If, as the appellants argue, section 18 has no application to the case of an intestacy where no grant has been made then it leaves unaffected in such a case the right, wherever it exists, of an heir to sue referred to in an earlier paragraph. Their Lordships are of opinion that upon any view of section 18, it did not in terms take away that right.

Proceeding from the point in the argument that neither section 18 nor any other statute law of Cyprus relating directly to the question made provision as to the person who, in case of an intestacy where no grant had been made, was entitled to sue, it was argued that the Common Law of England was applicable to such a case by reason of section 28 of the "Courts of Justice Law 1935" of Cyprus. It was said that under the relevant Common Law of England an heir could not sue where no grant had been made and that equally an heir could not do so in Cyprus. If that proposition were correct then there would be in the law of Cyprus a special provision of law applicable to the case of an heir where no grant had been made, displacing the general rule mentioned in an earlier paragraph with regard to the right of a person to maintain an action to property on the ground that he was entitled to it. The section is to the following effect:—

"*Section* 28.

(1) Every Court in the exercise of its civil or criminal jurisdiction shall apply—

(*a*) the Laws of the Colony;

(*b*) the Ottoman laws set out in the Second Schedule to the extent specified therein;

(*c*) the common law and the rules of equity as in force in England on the 5th day of November, 1914, save in so far as other provision has been or shall be made by any Law of the Colony;

(*d*) the Statutes of the Imperial Parliament applicable either to the Colonies generally or to the Colony save in so far as the same may validly be modified or other provision made by any Law of the Colony."

It will be seen that the Common Law of England which was made applicable where no provision had been made "by any Law of the Colony" was that which was "in force in England on the 5th day of November 1914". In England in 1914 it was statute law which was applicable to the question as to who was entitled to maintain an action in respect of the estate of an intestate person and there was no Common Law applicable to it. The argument need not be considered further because it fails upon this ground.

It was not suggested that there was anything else in the law of Cyprus from which it could be gathered that where no grant had been made an heir could not sue to recover property which has devolved upon him. It follows that an heir can sue in such a case. It was stated by the Supreme Court of Cyprus in the case of *Papadopoulos* v. *The Law Union and Rock Insurance Company* (Vol. X Cyprus Law Reports, p. 67) that in Cyprus

> "The universal practice is for those entitled by inheritance to sue without taking out letters of administration".

Their Lordships are of opinion that this practice is sound under the law of Cyprus. They also agree with the Supreme Court that the Wills and Succession Law 1895 has made no change in the relevant law.

It was suggested that the decision in Papadopoulos was founded on Article 1642 of the Medjelle which was said to have been repealed by The Contract Law 1930 of Cyprus. Their Lordships do not agree. Article 1642 of the Medjelle did not in terms provide that an heir had a right to sue, but it did recognise his right to sue, as did also the several systems of law referred to in the judgment of the Supreme Court of Cyprus in the case mentioned. For the reasons already given by their Lordships the practice that has obtained in Cyprus would have rested on a sound foundation even if Article 1642 of the Medjelle had never existed.

Their Lordships do not find it necessary to deal with the argument, urged by the respondent, that the repeal of

Article 1642 of the Medjelle by the Contract Law 1930 was not a total repeal for all purpose.

In earlier paragraphs the text of section 18 has been considered exactly as it stands in the Law of 1895. In holding against the appellants the Trial Judge, with whom the Supreme Court agreed, in interpreting section 18 transposed the words "or if no such grant is made" from the place where they occur to another place so that the section read thus:—

> "From and after the grant of probate or letters of administration whether with will annexed or otherwise, the rights and liabilities attaching to the property of a deceased person are vested in and devolve upon the executor or administrator, as the case may be, until the property is administered; and from and after the administration of the property, or if no such grant is made, they are vested in and devolve upon the persons legally entitled thereto."

on the ground that the words, where they stood, were not intelligible. After the transposition the section assumes substantially the same form as it now has in section 72 of the Wills and Succession Law 1945, and contains statutory provision that in the absence of a grant an heir is entitled to sue. Their Lordships, in view of what they have said, do not find it necessary to consider this point, or the argument advanced by the respondent that it is the Law of 1945 and not the Law of 1895 that is applicable in this case.

The second point raised by the appellants regarding the constitution of the action is that Temporary Letters of Administration had been issued by the Court under section 49 of the Wills and Succession Act 1895 (Section 73 of the Law of 1945), and that where such letters had issued an heir was not entitled to sue. It was said that by reason of the provision in section 49 that where Temporary Letters had issued "all the rights and duties of an executor or administrator shall for that time devolve upon the person so appointed" the person appointed Temporary Administrator was in the same position with regard to the property of the deceased as a person appointed under section 18. It was argued that under section 18 where an administrator had in fact been appointed "the rights and liabilities attaching to the property of a deceased person" became "vested and devolved" upon him and that therefore the heir had no right to sue in respect of that property.

The point referred to in the preceding paragraph was not only not pleaded, it was not raised in the Courts below. Consequently their Lordships have not had the assistance of the Courts in Cyprus as to the effect under the law of Cyprus of an appointment of a Temporary Administrator under section 49. The point moreover rests upon the factual basis that at the time the action was instituted

there was a Temporary Administrator in office. There are references in the evidence and documents to the appointment of a Temporary Administrator and some material upon which it can be suggested that he was in office when the action was instituted. But upon this there was, and is, no admission by the respondent and no finding by the Courts below. Further the person said to have been in the office at the time of the institution of the action was counsel for the appellants in the Courts of Cyprus but did not raise the point in those Courts. In the circumstances their Lordships do not feel that they ought to permit the point to be raised for the first time before them.

The question whether the Supreme Court was right in directing as part of its order that there be taken "An account of the fair value to the firm" of all the assets (with two exceptions as to which there is no dispute) on the 5th June, 1946 will now be considered.

Upon the death of a partner in the absence of special agreement between the partners, the partnership will stand dissolved, the assets of the partnership will be sold, the debts and liabilities will be paid and discharged and the estate of the deceased will be entitled to a share of the nett sum realised proportionate to the share which had been held by him. In a settlement of accounts the estate will receive the benefit of the assets at current market price. Their Lordships have now to consider whether the terms of the partnership agreement of the 15th September, 1923, affect that benefit and if so, in what way.

The relevant portions of the agreement are to be found in clauses (F) and (K) which are:—

> (F) The Company will keep regular commercial books in which will be entered all the transactions concerning the company and the partners. These books will be balanced and closed every year on the 1st July and/or every six months and the profits and loss of the Company will be determined. This profit and loss will be divided equally among the partners in equal shares and irrespective of the amount of the capital of each one. Each partner is bound to withdraw every year the profits allotted to him and if he leaves them with the company he will not be entitled to any interest thereon with the exception of the partner with the smaller capital who is entitled to leave it with interest at six per cent. until his capital becomes equal to that of the partner with the immediately higher capital whereupon it will be capitalised.
>
> (K) After the expiration of the duration of the present contract, should one or more of the partners wish to retire from the company they shall give notice thereof in writing to the other partners at least three

months earlier after the expiration of which the books of the Company shall be closed and the retiring partner or partners shall be paid every sum they will be entitled to in accordance with these books, less fifteen per cent. on his allotted share of the credits to third persons deriving from goods and tobacco and less ten per cent. on the existing goods, but the retiring partner or partners shall not be entitled to raise a claim for damages for their share with the Firm name, the trade marks and good will of the company. It is understood that the foregoing shall apply in case the other partners wish to continue the operations for their account otherwise the retiring partner or partners can apply only for the dissolution of the company. The provisions of this clause shall apply also in the case of the death of one or more partners at or after the expiration of the present contract in respect of his or their heirs who shall be entitled to ask either that they may retire from the company or, in case of non-acceptance by the other partners, that the company be dissolved. In no case, however, will such heirs be entitled to step into the shoes of the deceased partner.

It appears that under the agreement the method of valuation of assets at death was to be the same as on retirement. It is clear that if the words "in accordance with these books" had not been used, then, in carrying out the provision that a retiring partner or the heirs "shall be paid every sum they will be entitled to" a fair valuation of the assets would have to be made. The appellants contend that by the use of the words "in accordance with these books" the partnership agreement makes provision for another method of valuation, namely at certain values appearing in the books of the partnership. A reference to the balance sheet for the half-year ending 30 June, 1946 (Exhibit 38), in which this method has been adopted, shows that these values are mostly at cost, the value of assets under item "stocks" being at cost or current market price whichever is less. It has been pointed out by the Supreme Court that the value of the immovable property of the firm "still stands at the value at which it was taken in 1923." The question for decision is whether the words "in accordance with these books" makes the difference contended for.

The following passage from the judgment of Lord Wrenbury in the case of *Cruikshank and others* v. *Sutherland and others* (1923. 92. L.J. 136) was referred to by the learned Chief Justice and is of relevance to the question under consideration.

"An account stated for one purpose is not necessarily stated for another purpose. The fact is, that in this partnership an account has never been stated with a

view to fitting the case of a retiring partner, or a deceased partner."

It was said by the Supreme Court that "the whole object of the yearly accounts was to find out the profits for division among the partners". This is a fair view and it follows that the yearly accounts are not necessarily appropriate for the purpose of settling accounts on the death of a partner. Lord Wrenbury in deciding what was due to the estate of a deceased partner, upon a consideration of the language used in the partnership agreement before him, refused to adopt a special method of valuation of assets which appeared in the accounts and held that a fair valuation of the assets had to be made. But partners can by sufficiently effective language adopt "an account stated for one purpose" for any other purpose; and the question their Lordships have to decide is whether by the language used in the partnership agreement in the case before them the partners have done so in the manner contended for by the appellants.

The case of *Coventry* v. *Barclay* (1864 3 De G. J. & S. p. 320) referred to in *Cruikshank's* case was relied on by the appellants. Article 10 of the agreement in that case provided:—

> "That once in every year during the co-partnership, viz., on or about the 5th of July, or as soon after as conveniently might be, the partners should make, cast up and fully finish between them a true, perfect and particular rest or reckoning in writing of all their joint-stock then in co-partnership, and of the value thereof."

Article 11 provided:—

> "That every such rest or account should be entered into one book, which book should be signed by all the partners and that each partner who should require should have a copy of this book; and that such account or rest, when finished and signed in the manner aforesaid, should be binding and conclusive upon all the partners, their heirs, executors and administrators."

Article 38 provided that in the event of the surviving partners becoming purchasers of the interest of the deceased partner they should pay to his executors or administrators:—

> "so much money as the value of the share or shares, according to the last annual account or rest next preceding the death of such partner or partners."

The language was clear and unequivocal in its bearing on the point before their Lordships. It was not even argued that accounts and valuations properly made in the accounts were not, on the language of the agreement,

binding on the estate. What was argued without success, was (i) that the valuations had been made contrary to the Articles and therefore had not been properly made; (ii) that though previous valuations, improperly made, might have been agreed to and signed on each occasion of making, the last valuation was neither properly made nor agreed to and signed, and therefore was not binding on the estate. With these arguments and the decisions on them their Lordships are not concerned. It is not suggested in the case before them that the valuations in the books were made contrary to the Articles or improperly made for any other reason. The question for decision is whether the language of the agreement before their Lordships makes applicable to a settlement of accounts at death valuations in the books regarded as properly made on the occasions when they were made.

Their Lorships will now consider the language of the agreement before them, and in particular the words "in accordance with these books" upon which the case for the appellants rests. In their opinion, in the context in which they appear, these words are not sufficient to establish an intention on the part of the partners to import into the settlement of accounts at death a special method of valuation of assets in place of a fair valuation. It was argued with some force that on an interpretation other than the one urged by the appellants, they would be redundant. Even if that argument be accepted their Lordships would still feel unable to agree that the words had the effect contended for by the appellants. It could be said that the words "in accordance with these books" were used to associate the settlement of the accounts with the closing of the books referred to in the sentence in which the words occur. It would not be surprising to find such a use of language in a partnership agreement. But an assosiation of this sort would not, by itself, in their Lordships' opinion, be sufficient to establish an intention to adopt the artificial valuations found in the books.

A valuation of the assets at the values appearing in the books would in the particular instance before their Lordships be disadvantageous to the estate of the deceased. It was argued that much weight should not be given to this fact because partners at the time of entering into an agreement might contemplate a method of valuation which, though a departure from the method of fair valuation, would be the same for all. Under the agreement the surviving partners had the choice either to have a dissolution or to purchase the interest of the deceased partner. Upon a dissolution there would without question have been a sale at fair value. If, as the appellants contend, on a purchase, the surviving partners could value the assets on a different basis namely that of the valuations in the books, they would in effect have the right by choosing between dissolution and purchase, to select from two

different bases of values whichever was more advantageous to them on any particular occasion. Such a result would be curious, and, though far from conclusive of the question dealt with in the previous paragraph, is of some relevance.

It has been argued by the appellants that for 23 years accounts have been prepared on the basis contended for by them, and that if the partnership agreement does not in terms support their contention it must be regarded as having been varied by accepted usage. A usage relating to settlement of accounts at death or retirement cannot be established unless death or retirement has actually occurred. There is no evidence of this in the case before their Lordships and the argument therefore fails. A similar point arose in the case referred to earlier decided by Lord Wrenbury who disposed of it on the same among other grounds.

The appellants dispute the claim of the respondent to receive under section 44 of the Partnership Law 1928 interest at 9 per cent. from the date of death on the sum found payable to her. There was no finding on this claim by the trial Court but it was upheld by the Supreme Court. Section 44 is to the following effect:—

> "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the opinion of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of nine per centum per annum on the amount of his share of the partnership assets:
>
> Provided that where, by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the preceding provisions of this section."

Where the conditions in the proviso are satisfied it is clearly operative when, as in the present case, there has been no dissolution and sale of assets. Their Lordships agree with the Supreme Court that the proviso must be read *mutatis mutandis* with the earlier part of the section.

Where an "option is given to the surviving partners to purchase the interest of a deceased partner" and the surviving partners though assuming to act in exercise of the option "do not in all material respects comply with the terms thereof", the estate of the deceased can claim from them either a share of the profits or interest at 9 per cent. per annum. The appellants did not recognise the respondent as the person entitled to the deceased's interest, and did not offer to her the sum she was entitled to or any sum at all. There was therefore no compliance with the terms of the option and the respondent is entitled to the interest awarded by the Supreme Court. Their Lordships agree with the view of the Supreme Court that the fact that "in the middle of 1948 the surviving partners lodged in the bank a large sum of money which in their opinion represented the sum to which the deceased's estate was entitled" did not absolve them from liability to pay interest.

The Supreme Court has ordered that "an account be taken of the fair value to the firm of all the assets on the 5th June, 1946." The respondent's claim was that the assets "be valued on the current prices" on the same date. No comment has been made by either side as to the difference, if any, between these two bases of valuation and their Lordships have therefore treated them as being the same.

For the reasons they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants will pay the respondent the costs of this appeal.

[HALLINAN, C.J. and ZEKIA, J.]
(November 21, 1955)

VINCENT DELLA TOLLA of Nicosia *Appellant,*

v.

FIDIAS S. KYRIAKIDES of Limassol. *Respondent.*

(Civil Appeal No. 4141)

Contract — Impossibility of performance — Foundation of contract not destroyed—Contract not avoided—Contract Law (Cap. 192), sec. 56 (2).

The defendant sold to the plaintiff one donum of land (i.e. two building sites) out of a parcel of 4 donums and 3 evleks. The parcel was as yet not divided into building sites awaiting the construction of a bye-pass road through that area. A special term in the contract provided that the donum of land would have enough frontage on the bye-pass for one building site. When the line of the road was finally determined in 1951 the defendant's parcel did not have enough frontage for one building site. Later the defendant acquired a strip of land sufficient to comply with the special term. The trial Court held that either under the rule in *Taylor* v. *Caldwell* (3 B.