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.

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& S. 826) or under s. 56 (2) of the Contract Law (Cap. 192) the contract was void because of a supervening impossibility of performance, the action was dismissed

Held: (i) Although s 56 (2) is not the same as the English doctrine of the implied term, the spirit of the English authorities should be followed· Sec 56 (2) only applies to an impossibility which destroys the foundation of the contract. Inability to perform the special term in the present case did not render the contract as a whole impossible to perform

(ii) Where the performance becomes in part impossible but is not void it is for the purchaser to treat the contract as at an end or as still open for further performance, the vendor cannot repudiate the contract

Appeal allowed

Appeal by plaintiff from the judgment of the District Court of Limassol (Action No. 837/54).

M. Houry, L. Clerides and *J. Jones* for the appellant.

Sir Panayiotis Cacoyannis and *A Myrianthis* for the respondent.

The facts sufficiently appear in the judgment delivered by:

HALLINAN, C.J.: The parties in this case entered into a contract of sale (Exhibit 7) whereby it was agreed that the defendant-respondent would sell to the plaintiff a donum of land which formed part of a parcel of land of 4 donums and 3 evleks belonging to the defendant situated on the outskirts of Limassol, where a bye-pass road was being constructed. The contract contained special terms and three of these are particularly relevant to the issues in this appeal. These are as follows:

"(1) The above transaction will not take place immediately with a view to transfer the one donum piece of land by the vendor to the purchaser because it is mutually agreed that such transfer is to take place as soon as the vendor is authorised by the appropriate authority to divide the said field into building sites. The division is hindered by the fact that that part of the bye-pass which crosses the property has not yet taken its final direction and position.

(2) As soon as the authorities allow the division of the above described property into building sites the vendor is bound to take all appropriate steps and means for the normal division to enable him to transfer the one donum piece of land under sale or of the building sites equivalent in extent, which are estimated at 2, to the purchaser.

(3) The piece of one donum under sale shall have the bye-pass as its boundary and the vendor, therefore, is bound upon the division of the property into

building sites either to transfer two building sites with frontage and boundary on the bye-pass or of one building site with frontage and boundary on the bye-pass and the other one behind the first one."

When the bye-pass was constructed, the portion of the four donums and three evleks which had a frontage on the bye-pass was too small to permit of even one building site having a frontage on the bye-pass sufficient to comply with Regulation 4 of the Streets and Buildings Regulations (Subsidiary Legislation of Cyprus, Vol. I, p. 307). As things then stood it would only have been possible for the defendant to obtain a permit to divide his land, into building plots if he had opened a road from the bye-pass into his land so that buildings should have a frontage onto this road; or if he procured a small strip of land between his own land and the bye-pass. During 1951 the defendant informed the plaintiff that he was endeavouring to obtain a strip of land adjoining the 4 donums and 3 evleks, which would give that land a frontage on the bye-pass. This information was contained in letter Exhibit 9. Finally, in 1953, the defendant by exchanging some land of his with the land of another person, acquired this strip of land which gave him the frontage on the bye-pass which he required.

In January, 1954, the plaintiff wrote to the defendant requiring him to fulfil the contract, and on the defendant failing to do so these proceedings were commenced. The plaintiff claimed either specific performance or damages, but the only issue on this appeal is whether he is entitled to damages.

The trial Court was of opinion that when the final direction and position of the bye-pass was determined, the lack of a proper frontage on it constituted a supervening impossibility which went to the root of the contract and absolved the defendant from fulfilling his obligations. In English Law the general rule is that a man is bound by his contract. If he does not choose to limit his liability, he must take the consequences of being unable to perform his obligation. This general rule has in modern times been modified by the principle established in *Taylor* v. *Caldwell* (3 B. & S. 826 decided in 1863). This principle is that where an event happens which was quite unforeseen by the parties, and which if it had been foreseen the parties would have provided that upon its happening the contract would have been at an end, then the Courts will construe the contract as if there was an implied condition for its cancellation when the event happened. The trial Court applied this principle in the present case in the following passage in their judgment:

"The supervening event, i.e. the final position and direction of the bye-pass, rendered the performance of the contract impossible by the defendant and we

are of opinion that it is just and reasonable that an implied term ought to be inserted in the contract, that if the final direction and position of the bye-pass would leave sufficient frontage (we think this is a slip and that the Court means insufficient) for even one building site, the defendant would be exonerated from performing his contract."

In a note to their judgment the trial Court stated that they might well have based their judgment on section 56 (2) of the Contract Law (Cap. 192), without relying on the doctrine of an implied term. Section 56 (2) is as follows:

> "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promissor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

This section corresponds with the second paragraph of section 56 of the Indian Contract Law. In the notes to this section in Pollock and Mullah, 6th edition, p. 327, it is stated that the section varies the common law to a large extent: "English authorities, therefore, can be of very little use as guides to the literal application of the section. The tendency, however, is to follow their spirit."

In our view whether a Court applies the statutory rule concerning impossibility of performance contained in s. 56 (2) or applies the English doctrine of an implied term, in order that a supervening impossibility of performance should excuse the non-performance of a contract, the underlying principle for not enforcing the contract is the same. This principle was stated by Lord Haldane in *Tamplin S. S. Co.* v. *The Anglo-Mexican Petroleum Products Co.* (1916) (2 A. C. 397 at 406): "The occurrence itself" (i.e. the occurrence preventing the performance of the contract) "may yet be of a character and an extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with that foundation". We consider that the spirit of the English authorities should be followed and that section 56 (2) only applies to an impossibility which destroys the foundation of the contract.

Can it be said in the present case that the absence of frontage on a bye-pass when the direction and position of that road was determined was of such fundamental importance in the contract that the foundation of what the parties are deemed to have in contemplation had disappeared? We think not. The substance of what the parties had in contemplation was the sale of one donum of land out of a parcel of four donums and three evleks. That one of the building sites should have a frontage on the bye-pass was a special term in the contract but did

not render the contract as a whole impossible of performance. If a road were opened by the defendant from the bye-pass into his land and the plaintiff given a building site fronting on that road, he might well have been satisfied. In fact the defendant himself in his letter Exhibit 9 indicates that he does not regard the want of frontage as rendering the performance of the contract impossible.

When the performance of the special term in the contract became impossible the position of the parties was analogous to their position when one party fails to perform a condition precedent. The position is stated in 7 Halsbury's Laws of England, 2nd edition, p. 223, thus:—

> "The failure of one party to perform a condition precedent only operates as a discharge of the contract if the other party elects to treat the contract as being still open for further performance, and if he elects to do this he will be taken to have waived the performance of the condition precedent, and can only rely on it as a breach of warranty which entitles him to damages."

We have said that the position is analogous, not the same; for on a reasonable construction of a contract whose performance becomes in part impossible, the promissee, on waiving performance of such part might not be entitled to as much damages as he might obtain upon breach of warranty. Assuming, for example, that it was impossible for either party in the present case to procure a strip of land that would give the seller's land a frontage on the bye-pass, and the buyer had insisted on a road being opened into the seller's land from the bye-pass so that he (the buyer) could have a frontage on that road, then the buyer could not expect much, if any, damages because of the seller's failure to give him a frontage on the bye-pass. But the analogy certainly holds good to this extent: When it became impossible to perform the special term, this did not operate to discharge the seller from all liability under the contract; it was for the buyer to treat this contract as at an end or as still open for further performance.

Such was the position in 1951 when the direction of the bye-pass was determined. Then, while the contract was still in being, the circumstances altered again. The seller acquired a strip of land so that he could now give the buyer a donum of land with a frontage on the bye-pass. The Court would undoubtedly consider the contract performed if the seller had given very nearly a donum out of the 4 donums 3 evleks plus a small adjoining strip fronting on the bye-pass; and undoubtedly the buyer would have accepted this. In 1954 when the defendant eventually refused to perform the contract he was in a position to perform it in substance. In these circumstances it is surely absurd that the seller (seeing that the land

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has increased in value many times since the sale) should escape from his bargain or be in a better position than any other promissor who has failed to perform his promise when he could do so. The Court must say to such a person: Having acquired a small strip of land by way of exchange and at little or no cost, you have the power substantially to perform your promise, and you must do so; for the contract is not void or impossible to perform and the general rule of Law applies, namely, that a man must fulfil his promise, or pay damages for his failure to do so; even though the performance costs him something more than he foresaw.

For these reasons, the order of the trial Court dismissing the suit is set aside. The plaintiff is entitled to damage estimated on the value of two building sites one of which has a frontage on the bye-pass, less the contract price of £200 and the cost of a road giving access to the second site. On this basis the Court awards the plaintiff £1,400 damages with costs here and below.

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[HALLINAN, C.J. and ZEKIA, J.]

(December 9, 1955)

ISMET ARIF of Pano Lefkara, *Appellant,*

v.

KIAMIL HUSSEIN of Orta Keuy, *Respondent.*

(Turkish Family Court Appeal No. 3/55)

Turkish Family (Marriage and Divorce) Law, 1951— Maintenance after divorce — Wife not destitute— Maintenance granted under Sec. 33.

Notwithstanding the provisions of section 31 of the Turkish Family (Marriage and Divorce) Law, 1951, a Court under section 33 of that Law may, when granting a divorce, order maintenance even when the wife, as a result of the divorce, has not become destitute.

Appeal by claimant from the judgment of the Turkish Family Court of Limassol (Action No. 13/55).

H. Orek for the appellant.

L. Clerides for the respondent.

The facts sufficiently appear in the judgment of this Court which was delivered by:

HALLINAN, C. J.: In this case the claimant-appellant sued her husband for divorce and a decree was granted by the trial Court on the ground that relations between the parties had become so strained as to make their lives together impossible or intolerable. The Court awarded compensation of £50 to the wife and it is against that