Privy Council Appeal No. 47 of 1932.

Abdullah Bey Chedid and others - - - - - *Appellants*

v.

Tenenbaum - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH OCTOBER, 1933.

Present at the Hearing:

LORD TOMLIN.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[*Delivered by* LORD TOMLIN.]

Comte Selim de Chedid (who will hereafter be referred to as the intestate) died on the 22nd February, 1927, domiciled in Egypt, and a member of the Cairo Maronite Community, without leaving any testamentary disposition of his property.

On the 14th July, 1925, the intestate had entered into a contract with the respondent whereby the intestate agreed to sell and the respondent agreed to purchase certain *miri* land known as Um-ez-Zibale, situate at Haifa in Palestine. The purchase under the contract had not been completed at the death of the intestate, and this appeal arises out of a dispute in relation to the contract between the appellants (who are children of the intestate) and the respondent.

The price fixed by the contract, which was made between the intestate of the first part and the respondent of the second part, was £E.260 per dunum. £E.4,000 was paid on the signing of the contract, and the balance of the price was to be paid at the transfer into the name of the respondent.

The intestate had purchased the land from one Abela, and the transfer from Abela to the intestate was not completed at the date of the contract.

[65] (B 306—8116)T

By article 3 of the contract there was reserved to the respondent the right to delay the transfer of the land into his own name for a period of one year from the date of the transfer from Abela to the intestate.

The contract contained also the following clause :—

> "5. If the 1st party commits breach of any terms of this contract, he shall return to the 2nd party the LE.4000 received by him and shall pay to him LE.10000 as liquidated damages and penalty for the non carrying out of this contract, and if the 2nd party commits breach of any terms of this contract, he shall pay to the first party LE.10000 as liquidated damages and penalty after deduction of the LE.4000 paid."

By two other documents, dated respectively 2nd October, 1925, and the 23rd June, 1926, the parties in effect amplified and varied the contract in the following respects : that is to say :—

1. The area of the land to be sold was agreed at 130 dunums and 634 pics, and the total price was fixed at £E.33,903.
2. Further sums by way of deposit were paid by the respondent, making up the total amount of the deposit paid to £E.6,000.
3. Provision was made for payment of interest on the unpaid part of the purchase price, and the balance of the purchase price with interest capitalised up to 26th June, 1926, was agreed at £E.28,600 . 500 m/ms., and this sum was to carry interest at the rate of 9 per cent. per annum from the 20th June, 1926, until full payment.
4. The prescribed period for the transfer after the payment of the price was postponed with the consent of both parties to 30th November, 1927, with a proviso that the terms of article 3 of the contract should not be affected.

At the death of the intestate the land in question had been transferred to the intestate by Abela and stood registered in his name. The time for the completion of the sale under the contract of the 14th July, 1925, had not arrived.

The intestate had had nine children, namely, the seven appellants, who survived him, a son, Neghib, who predeceased him, leaving two sons and three daughters, and a daughter Mary, who also predeceased him, leaving one son.

On the 23rd February, 1927, the day after the death of the intestate, the Court of the Patriarchate of the Maronite Community in Egypt, at the instance of the first three appellants, issued a certificate to the effect that the appellants were the lawful heirs of the intestate and that all his estate devolved upon them to the exclusion of any others. No reference was made in this certificate to the fact that the estate included land in Palestine, the succession to which would be governed by the *lex loci.*

On the 5th June, 1927, a deed of arrangement was executed, to which the appellants and the grandchildren of the intestate, being the children of his two deceased children, were parties. One of the grandchildren was an infant. The effect of the deed (which contained no reference to the Palestine land) was that

each of the grandchildren was expressed to renounce any interest in the estate of the intestate and was given certain benefits by the appellants. According to this deed, under the law applicable the estate was divisible between sons and daughters to the exclusion of the children of deceased children of the intestate, sons taking shares double those of the daughters.

On the 18th November, 1927, an agreement in writing was entered into between the respondent and the first appellant, who was expressed to be acting for himself and on behalf of the heirs of the intestate. It was thereby recited that the respondent would have to pay £E.28,600 . 500 m/ms. to the heirs of the intestate by the 30th November, 1927, in addition to the annual interest at 9 per cent. per annum as from the 20th June, 1926, in consideration for this transfer into his own name of the land, but that as he did not have the said sum owing to the then present conditions, he asked the first appellant (who accepted) to give a year's period to the 30th November, 1928, under the conditions therein contained.

The conditions in effect provided (1) for the payment then made of an additional deposit of £E.500, (2) for the extension of the time for payment of the balance to 30th November, 1928, and (3) for the reduction of the penalty under clause of the original contract from £E.10,000 to £E.7,000.

On the 8th September, 1928, a certificate was obtained at the instance of one of the intestate's grandchildren from the Maronite Ecclesiastical Court at Haifa to the effect that in the succession to *miri* land in Palestine the intestate's grandchildren took between them *per stirpes* the shares of the deceased children.

On the 19th November, 1928, the respondent, being apparently aware that a title was proposed to be made without regard to the rights of the grandchildren of the intestate, caused a notarial notice to be prepared and served on the first appellant. The notice was addressed to the first appellant " for himself and on behalf of the heirs " of the deceased.

By this notice the respondent notified the first appellant that he was prepared to accept a transfer of the land on the 30th November, 1928, and that he should be present at 10 a.m. on that date at the Land Registry of Haifa, Palestine, for the above purpose, and for the payment of the consideration for the transfer and asked the first appellant to produce all the documents necessary for this transfer. By the same notice the respondent, warned the first appellant that should he fail to comply with the respondent's demand on the date fixed, he would be liable for payment to the respondent of the agreed amount of damages, viz., £E.7,000, together with certain expenses and costs.

A counter notarial notice was served on the respondent by the first appellant, requiring him to attend at the Land Registry office at Haifa at 10 a.m. on the 30th November, 1928, to pay the balance of the purchase and to accept a transfer of the property.

Both parties attended at the time and place specified in the notices and exchanged written documents, by which it was in effect recorded :—

(1) That the first appellant offered a transfer from the appellants only supported by the certificate of the Egyptian Maronite Court.

(2) That the Director of Land had ordered that the certificate might be accepted and acted upon.

(3) That the respondent refused the proffered transfer on the grounds that cases were pending as to the ownership of the land and that there were other heirs not included in the certificate.

(4) That the first appellant alleged that the respondent pretended to come to accept the transfer and to pay the balance of the price, but that his possession of the price was a pretence, and that when challenged to produce the money or a cheque for it he refused.

The purchase was not completed.

On the 29th December, 1928, the appellants procured themselves to be entered on the register at the Land Registry at Haifa as the successors in title of the intestate in accordance with the certificate of the Egyptian Maronite Court, but the shares of sons and daughters were entered as equal, although under article 12 of the deed of arrangement it was stated that under the law applicable the shares of the sons were double those of the daughter.

On the 21st June, 1929, the respondent launched an action in the District Court, Haifa, against the first appellant for himself and on behalf of all the other heirs of the intestate, claiming £E.13,500, being the deposit of £E.6,500 and the damages or penalty of £E.7,000 under clause 5 of the contract as subsequently modified.

The first appellant put in a defence and counterclaim, in which he alleged (*inter alia*) in effect that (1) the Land Department had accepted the certificate of the Egyptian Court and that the respondent was in default in not accepting a transfer in accordance with it, and (2) the real reason of the refusal of the respondent to accept the transfer was that he had no money to pay the balance of the purchase price and he was himself in default, and the first appellant counterclaimed to keep the £E.6,500 deposit and to be paid a further £E.500 to make up the damages or penalty of £E.7,000.

The suit was tried on the 18th March, 1930. No witness gave evidence on either side. Both claim and counterclaim were dismissed.

The Court held that as the Land Registry was ready to act upon the certificate of the Egyptian Court the respondent was bound to accept a transfer in accordance with the certificate, and that his claim must fail. The reason for the dismissal of the counterclaim does not clearly appear in the reasoned judgment.

The respondent appealed to the Supreme Court at Jerusalem, and there was a cross-appeal by the first appellant, in which it was alleged that the respondent failed to pay the purchase price, alleging as a pretext that the Egyptian certificate accepted by the Registrar was defective and that the true fact was that the respondent had no intention of taking the land and failed to produce and did not possess the money, and merely used the certificate as a pretext for evading his obligation under the contract and for an attempt to recover liquidated damages from the appellants.

The appeal was heard in March, 1931, by the Chief Justice, Mr. Justice Baker, and Mr. Justice Jarallah. Judgment was delivered on the 28th May, 1931. The Chief Justice and Mr. Justice Baker concurred in one judgment, in which they held that the Egyptian certificate was of no validity in Palestine, and that the acceptance of the certificate by the Land Registrar did not improve matters, and that the title was defective, and that the first appellant was in default and was liable to return the deposit of £E.6,500, with legal interest from the date of action, and to pay liquidated damages of £E.7,000. These two Judges held that it did not affect the issues before them whether or not the respondent was in a position to complete. On these findings the cross-appeal necessarily failed. Mr. Justice Jarallah gave a judgment to the same effect, in the course of which he said that he did not find that what the first appellant said concerning the attempt by the respondent to avoid the contract was far from being true, but that he found that the steps taken by the respondent to cause the Registrar to accept the Egyptian certificate, with the resulting failure on the respondent's part to accept the transfer, had created an opportunity for the respondent to safeguard his interests, meaning, as their Lordships apprehend it, that if once the respondent established the first appellant's default, his own readiness and willingness to perform his part was immaterial.

On appeal to His Majesty in Council all the children of the intestate, by special leave, appear as appellants.

Before stating what their Lordships consider to be the real issues in this case it will be convenient to refer to the provisions of the law applicable.

By the Palestine Order in Council, 1922, His Majesty, by virtue and in exercise of the powers in that behalf, by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, was pleased by and with the advice of His Privy Council to make provision for the government of the territories to which the Mandate for Palestine applied.

By clause 38 of the Order it was provided that the Civil Courts thereinafter described were subject to the provisions of the part of the Order in which clause 38 appeared to exercise jurisdiction in all matters and over all persons in Palestine.

Clause 46 of the Order was as follows :—

"46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary.

The following further provisions of the Order are material, that is to say :—

"47. The Civil Courts shall further have jurisdiction, subject to the provisions contained in this Part of this Order, in matters of personal status as defined in Article 51 of persons in Palestine. Such jurisdiction shall be exercised in conformity with any law Ordinances or Regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable.

Where in any civil or criminal cause brought before the Civil Court a question of personal status incidentally arises, the determination of which is necessary for the purposes of the cause, the Civil Court may determine the question, and may to that end take the opinion, by such means as may seem most convenient, of a competent jurist having knowledge of the personal law applicable.

* * * * *

51. Subject to the provisions of Articles 64 to 67 inclusive jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this Part by the Courts of the religious communities established and exercising jurisdiction at the date of this Order. For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

* * * * *

54. The Courts of the several Christian communites shall have :—

(i) Exclusive jurisdiction in matters of marriage and divorce, alimony, and confirmation of wills of members of their community other than foreigners as defined in Article 59.

(ii) Jurisdiction in any other matters of personal status of such persons, where all the parties to the action consent to their jurisdiction.

(iii) Exclusive jurisdiction over any case concerning the constitution or internal administration of a Wakf or religious endowment constituted before the Religious Court according to the religious law of the community, if such exists.

* * * * *

58. The Civil Courts shall exercise jurisdiction over foreigners, subject to the following provisions :—

59. For the purpose of this part of the Order the expression " foreigner " means any person who is a national or subject of a European or American State or of Japan, but shall not include :—

(i) Native inhabitants of a territory protected by or administered under a Mandate granted to a European State.

(ii) Ottoman subjects.

(iii) Persons who have lost Ottoman nationality, and have not acquired any other nationality.

" The term ' subject ' or ' national ' shall include corporations constituted under the law of a foreign state and religious or charitable bodies or institutions wholly or mainly composed of the subjects or citizens of such a state."

The relevant provisions of the Succession Ordinance, 1923, are as follows :—

" 2. In this Ordinance the following words and expressions shall have the following meanings :—

* * * * *

(*b*) Immovable property includes Miri land and Mulk land as herein defined ;

(*j*) ' Civil court ' means a Court established by and sitting under the authority of the Government of Palestine but does not include a Religious Court ;

(*k*) ' Court of a Community ' means a Court sitting in virtue of the jurisdiction conferred upon the authorities of a Religious Community, but does not include a Moslem Religious Court ;

(*l*) ' Religious Community ' and ' Community ' mean a community specified in the First Schedule to this Ordinance or such other Community as may from time to time be specified by the High Commissioner ;

(*m*) ' Foreigner ' means any person who is a foreigner within the meaning of Article 59 of the Palestine Order in Council 1922 ;

(*n*) ' The Ottoman Law ' shall mean the provisional law relating to the Succession to Immovable Property dated 3 Rabi El Awal 1331 A.H. as set forth in the Second Schedule hereto.

3.—(1) The Civil Courts shall have exclusive jurisdiction in all matters relating to the succession to, and the confirmation of Wills of, every Palestinian citizen and any other person not being a foreigner within the meaning of this Ordinance, provided that such citizen or other person was not at the time of his death either a Moslem or a member of one of the religious communities specified in the First Schedule hereto and of such other communities as may from time to time be specified by the High Commissioner.

(3) They shall have jurisdiction concurrently with the Courts of the specified Religious Communities in matters relating to the succession to members of the specified Religious Communities other than foreigners, except where exclusive jurisdiction is by this Ordinance conferred upon the Courts of the Community.

4. Subject to the provisions of Secton 21 hereof a Civil Court shall distribute successions within its jurisdiction according to the rules set forth in this section :—

* * * * *

(*c*) Where the deceased was either a foreigner or, not being a foreigner within the meaning of this Ordinance, was neither a Palestinian citizen nor a member of one of the specified religious communities, the following rules shall apply :—

(i) Mulk land and movables of the deceased shall be distributed in accordance with the National law of the deceased;

* * * * *

21. Every Court having jurisdiction in matters of succession shall, in all cases, determine the rights of succession to Miri land in accordance with the provisions of the Ottoman Law set forth in the Second Schedule hereto, and the said provisions shall be applied notwithstanding any disposition made or power of attorney given by the deceased intended to take effect after death, whether by way of Will or otherwise.

* * * * *

THE FIRST SCHEDULE.

The Eastern (Orthodox) Community.
The Latin (Catholic) Community.
The Gregorian Armenian Community.
The Armenian (Catholic) Community.
The Syrian (Catholic) Community.
The Chaldean (Uniate) Community.
*The Greek Catholic Melkite Community.
†The Maronite Community.
The Jewish Community.

* * * * *

SECOND SCHEDULE.

PROVISIONAL LAW RELATING TO INHERITANCE OF IMMOVABLE PROPERTY.

* * * * *

ART. 2.—The heirs of the first degree are the descendants of the deceased, *i.e.*, his children and grandchildren. The right of succession within this degree belongs in the first place to the children and then to the grandchildren who are their descendants and then to the children's grandchildren. Therefore when a man dies, the descendants of his surviving descendants lose their right of succession, as it is through this surviving descendant that they are related to the deceased. If a descendant dies before the deceased, his descendants represent him and take the share which he would have taken. If all the children of the deceased die before him the share of each will pass to his descendants who are through him related to the deceased. If any of the children of the deceased have died without descendants the right of succession will be conferred upon the other children and their descendants only. The same rules will be applied where there are several descendants. Sons and daughters, grandsons and granddaughters have equal rights.

* * * * *

The Transfer of Land Ordinance, 1920–21, contains the following relevant provisions:—

"2. In this Ordinance and in all regulations made hereunder, unless there is something repugnant in the context:—

'Disposition' means a sale, mortgage, gift, dedication of waqf of every description, and any other disposition of immovable property except a devise by Will or a lease for a term not exceeding three years and includes a transfer of mortgage and a lease containing an option by virtue of which the term may exceed three years;

'Court' includes any Civil or Religious Court competent to deal with actions concerning land, as well as any Land Settlement Court which may be established.

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* *See Order published in Official Gazette of 1st September*, 1923.

† *See Order published in Official Gazette of 1st September*, 1924.

4. No disposition of immovable property shall be valid until the provisions of this Ordinance have been complied with.

5.—(1) Any person wishing to make a disposition of immovable property must first obtain the written consent of the Government.

(2) In order to obtain this consent, a petition must be presented to the Director of Lands through the Land Registry Office of the District in which the land is situated, setting out the terms of the disposition intended to be made, and applying for his consent to the disposition. The petition must be accompanied by proof of the title of the transferor, and must contain an application for registration of a deed to be executed for the purpose of carrying into effect the terms of the disposition. The petition may also include a clause fixing the damages to be paid by either party who refuses to complete the disposition if it is approved.

8.—(1) * * * *

(2) After the title has been examined and the consent of the Government has been obtained, a deed shall be executed in the form prescribed by rules made hereunder, and shall be registered in the Land Registry.

(3) No guarantee of title or of the validity of the transaction is implied by the consent of the Government and the registration of the deed.

* * * * *

12. When any immovable property passes by operation of a Will or by inheritance, the legatees or heirs as the case may be shall be jointly and severally responsible for the registration of the immovable property in the name of the legatees or heirs within a year of the death of the registered owner. The registration shall be made upon the certificate of a competent Court stating that the persons acquiring registration are legatees or heirs, or upon a certificate signed by the Mukhtar or Imam and two notables."

Article 1642 of the Megelle contains provisions as to action by and against the heirs of a deceased person, from which it appears that the original form of the action against one only of the heirs was justified.

Now the issues which appear to their Lordships to fall for determination in relation to the claim for damages on either side are :—

(1) In the action :—

(*a*) Whether the first appellant made default in not presenting a transfer on the 30th November, 1928, which the respondent was bound to accept.

(*b*) Whether the respondent was at the same time ready and willing to perform his part of the contract ; that is to say, to pay the balance due from him. And

(2) In the counterclaim :—

(*a*) Whether the respondent made default in paying the balance due from him ; and

(*b*) Whether the first appellant was at the same time ready and willing to perform his part, namely, present a transfer which the respondent was bound to accept.

There is therefore both in the action and counterclaim a common issue, namely, whether the transfer presented by the first appellant was one which the respondent was bound to accept.

Their Lordships without hesitation reach the conclusion that this question must be answered in the negative.

It is impossible to maintain that the Egyptian Maronite Court had any jurisdiction in the matter. The religious Courts in Palestine are the only religious Courts which have jurisdiction under the Succession Ordinance, 1923.

The intestate was neither a foreigner nor a Palestinian subject, nor a member of a religious community within the meaning of the Ordinance, and as his land in Palestine was *Miri* land, its descent was governed by article 2 of the second schedule to the Ordinance. Under that article the grandchildren of the intestate succeeded to the shares of the children who predeceased the intestate. This difficulty was not got over by any reference to the deed of arrangement, the validity of which, if it affected the land in Palestine at all, was in dispute between the children and grandchildren of the intestate.

The requirements of the Land Ordinance, 1920–21, were not complied with. The heirs did not, as they should have done, themselves obtain registration, nor did they obtain a certificate of a competent Court within the meaning of section 12 of the last-mentioned Ordinance.

The Director of Lands and the Registrar of Lands appear to have acted under a misapprehension as to the effect of this law, and having regard to section 8 (3) of the Ordinance, their action cannot have given any validity to a title which in point of law was bad.

It follows that, in their Lordships' opinion, the first appellant did not on the 30th November, 1928, proffer a transfer which the respondent was bound to accept, and to that extent the respondent makes good his case and the first appellant fails in his.

There remains the question as to the readiness and willingness of the respondent to perform his part of the contract.

Their Lordships' attention has not been directed to any provision of the Turkish law or any local ordinance which deals with the question whether in an action to recover damages for breach of contract the plaintiff is bound to establish his readiness and willingness to perform his part. In the absence of any such provision their Lordships are of opinion that regard must be had to the English law applicable in the case of concurrent obligations.

Readiness and willingness to carry out his obligation has always been a condition precedent to the plaintiff's right to recover damages in respect of breach of one of two concurrent obligations. It is true that to-day in England it need not be expressly pleaded, but the onus of proving it is nevertheless on the plaintiff. That onus in the absence of any evidence to the contrary adduced by the defendant may be easily discharged, nor is a tender of money necessary in the case of an obligation to pay money. Evidence of inability to discharge the obligation adduced by the defendant may, however, render it necessary for the plaintiff to satisfy the Court that he was at the material

moment in a position to discharge his obligation (see *Jefferson* v. *Paskell* [1916], 1 K.B. 57, at p. 74, and *British and Bemingtons, Ltd.*, v. *North-Western Cachar Tea Co.* [1923], A.C. 48).

The learned Judges of the Supreme Court were, in their Lordships' opinion, in error in regarding the issue of readiness and willingness as irrelevant.

Here there was, in their Lordships' judgment, no repudiation of the contract by the first appellant, and the respondent was insisting on the contract inasmuch as he was suing for the sum recoverable under clause 5. To recover under that clause it was, in their Lordships' judgment, necessary that he should establish his own readiness and willingness to perform his part of the con current obligations.

Throughout the litigation the first appellant set up that the respondent was not in a position to pay and that he utilized the question of title to make for himself by means of damages a profit out of the transaction. To support this charge there was produced a certified copy of the execution minute in an action in the Haifa Court, in which a judgment for about £30 had been recovered in May, 1928, by a creditor against the respondent,

From the certified copy it appeared that on the 12th July, 1928, a petition was presented by the respondent's attorney, alleging that owing to hard times the respondent was prepared to pay off the debt and interest by monthly instalments of £2; that eventually the attorney agreed to pay £2 down and £5 per month, beginning on the 15th September, 1928, and that these instalments of £5 were either not paid in full or, at any rate, were still being paid as late as July, 1929.

It was said on behalf of the first appellant that this was some evidence which, if not displaced, pointed to the respondent's inability on the 30th November, 1928, to pay a sum exceeding £E.28,600.

The point was taken in the pleadings, but the respondent did not himself give or adduce any evidence in respect of it, and their Lordships are satisfied that the proper conclusion is that the respondent has failed to discharge the onus of proving his readiness and willingness to perform his part of the concurrent obligations, although he has established that the first appellant failed to discharge his part.

The result must therefore be that the claim for damages on either side fails.

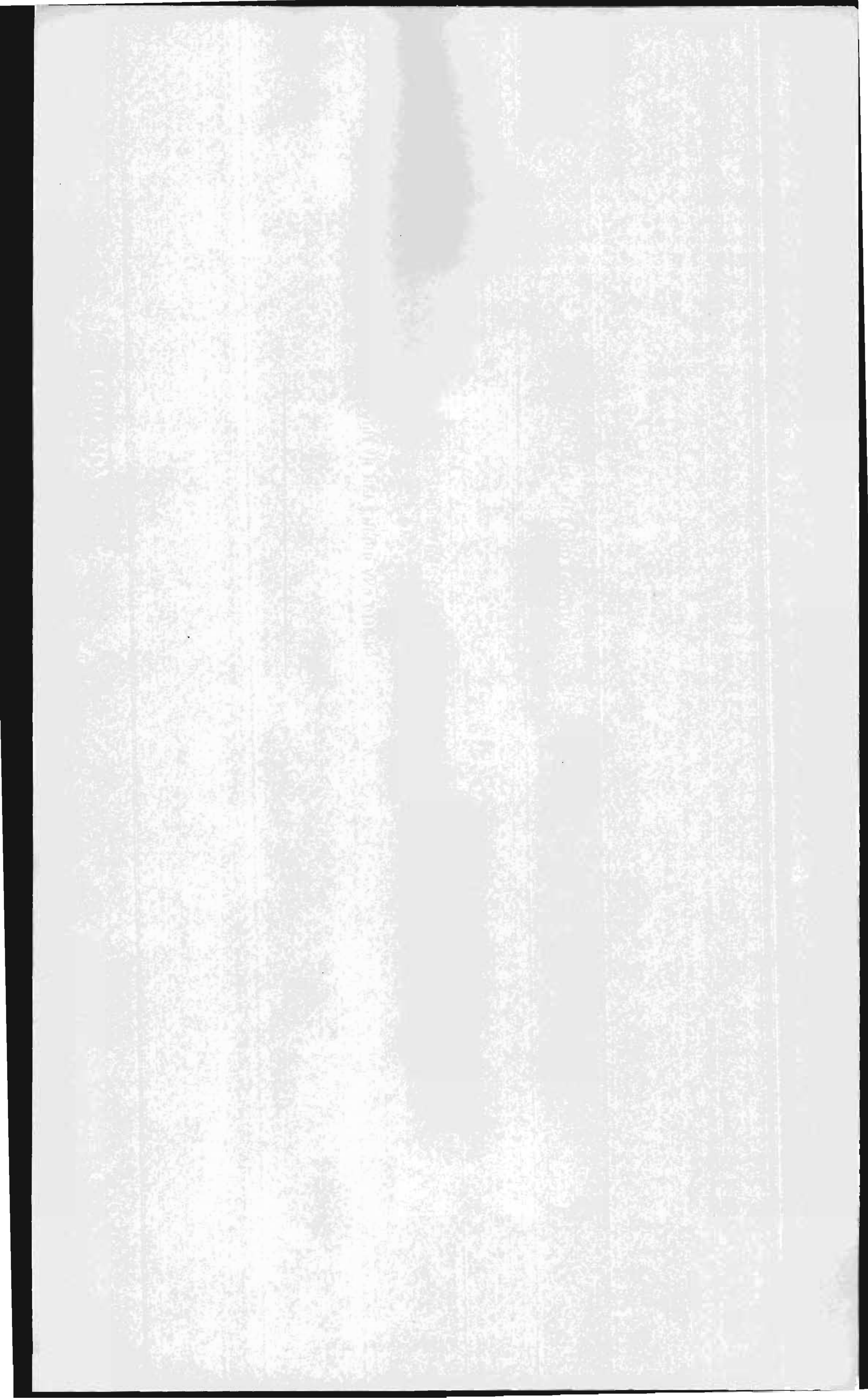
So far, however, as the respondent is concerned he is entitled to recover the money paid as a deposit, as no title has been made to the land.

The appeal must therefore be allowed so far as it concerns the damages or penalty for £E.7,000.

The order of the Supreme Court will therefore stand in regard to the deposit and the counterclaim, but will be set aside in regard to the £E.7,000 claimed in the action, and in respect of that claim the action must be dismissed.

With regard to costs (1) in the Court of first instance, the respondent should receive half his costs of action and his costs of counterclaim and should pay the first appellant half his costs of the action with an appropriate set off ; (2) in the Supreme Court the respondent should receive half his costs of the appeal and his costs of the cross-appeal and should pay the first appellant half his costs of the appeal with an appropriate set off, and (3) before their Lordships' Board the appellants should receive two-thirds of their costs and will pay the respondent one-third of his costs with an appropriate set off.

Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

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v.

TENENBAUM.

DELIVERED BY LORD TOMLIN.

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