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DEMETRA G. PATIKI
v.
A. G. PATIKI AND CO. AND OTHERS.

[HALLINAN, C.J., AND GRIFFITH WILLIAMS, J.]
(January 22, 1954)

DEMETRA GEORGHIOU PATIKI, MINOR, BY HER NEXT FRIEND AND JUDICIAL AND NATURAL GUARDIAN THRASYVOULOS PAPADOPOULOS OF KARDITSA, *Plaintiff*,

v.

THE FIRM A. G. PATIKI AND CO. OF LIMASSOL AND OTHERS, *Defendants*.

(*Civil Appeal No.* 4027)

Wills and Succession Law, 1895, *section* 18—*Beneficiary suing without grant of administration—Private International Law—Adoption by person domiciled in Greece—Claim by adopted child to personal property in Cyprus of deceased adopter—Partnership—Partnership property descends as personalty—Construction of partnership deed—Value of assets to be ascertained from book values or from fair value of the assets to the firm—Claim to share of surplus assets shown as reserve funds—Partnership Law* (*Cap.*196), *section* 44—*Payment of interest on deceased partner's share.*

G. A. Patiki, a Greek subject and domiciled in Greece, died in Athens on 5th June, 1946, leaving property in Cyprus, namely, his share as a partner in A. G. Patiki and Co. At the time of his death he was a widower and had no issue but in 1935 he had adopted the plaintiff Demetra G. Patiki as his daughter. According to Greek law, Demetra G. Patiki has the status of a child lawfully begotten by G. A. Patiki and as his only descendant was entitled to succeed to his estate both movable and immovable wherever found. The defence denied that G. A. Patiki had died intestate but there was no evidence that he left a will.

The partnership was constituted by an agreement made in 1923. *Inter alia*, it was agreed that regular commercial books be kept of all partnership transactions and these books would be "balanced and closed on 1st July and/or every six months and the profits and loss of the Company" determined. Article (*k*) provided *inter alia* that on the death of a partner, his heir might with the other partners' consent retire and the value of the deceased's share ascertained as if he was a retiring partner. On the retirement of a partner "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 15% on his allotted share of the credits to third persons deriving from goods and tobacco and less 10% on the existing goods".

The books had been balanced and closed as on 31st December, 1945. The deceased had this balance sheet in his possession in May, 1946, and had not disputed the figures therein. The "Liabilities" side of the balance-sheet showed that the assets were appropriated to the partners' Capital, Loan and Current accounts, and the Reserve account—the latter amounting to some £35,000.

The District Court held:

(1) Despite the wording of the Wills and Succession Law, 1895, section 18, upon an intestacy a person having a beneficial interest in an estate may sue without a grant of letters of admi-

nistration. *Papadopoulos* v. *The Law Union and Rock Insurance Company*, 10 C.L.R., 65, followed.

(2) G. A. Patiki being a Greek subject was domiciled in Greece, the family status of his adopted daughter is to be determined by Greek law. *Tano and another* v. *Tano*, 9 C.L.R., 94, discussed.

(3) Although part of the partnership assets were immovable property, the deceased's share in the partnership devolved as personalty; since G. A. Patiki died domiciled in Greece, the succession to his personal property must be determined according to Greek law; and, under that law, his adopted daughter Demetra G. Patiki was entitled as sole heir.

(4) The statement of the assets in the balance-sheet of 31st December, 1945, bound the heir and could not be re-opened. Under the partnership agreement the items in the assets for credit to third persons and for stock in hand must be reduced by 15% and 10% respectively when ascertaining the deceased's share therein. The plaintiff was also entitled to an account for the period of 1st January to 5th June, 1946.

(5) The plaintiff was entitled to share in the surplus assets represented by the reserve funds "shown in the statement of liabilities".

The Court directed certain accounts and adjourned the action for further consideration.

Upon appeal,

Held: The decision of the District Court was upheld as to (1), (2) and (3) above. As to (4) it was held that the plaintiff is entitled to an account of the fair value to the firm of the partnership assets as on 5th June, 1946; the values in the account taken as on 31st December, 1945, are not binding on the plaintiff. *Cruikshank* v. *Sutherland* (1923) 92 L.J. 136 applied. The plaintiff was also entitled to one-fifth share in the surplus assets subject to certain deductions; and in so far as the decision of the trial Court as to the "reserve funds" conflicted with this declaration, it should be varied.

The plaintiff's claim included a demand for interest at 9 per cent on the deceased's share from the date of his death. This claim was not determined by the trial Court but was by consent determined by the Supreme Court upon appeal. Held that, in the circumstances of the case, the continuing partners had not complied in all material respects with the terms of any option enabling them to purchase the interest of the deceased partner, and that the proviso to the Partnership Law (Cap. 196), section 44, did not therefore apply: under that section the plaintiff's claim for interest must be allowed.

The Supreme Court ordered certain accounts to be taken by a referee whose report in due course should come before the District Court on further consideration.

Note: An appeal by the defendants to the Privy Council in this case is pending.*

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* For judgment of Privy Council see Part II of this volume.

The judgment of the District Court of Limassol was delivered by the President of that Court:

ZANNETIDES, P.D.C.: The plaintiff in this case, Demetra Georghiou Patiki, is a Greek girl, born, domiciled and residing in Greece, and being a minor at the date of the institution of the action on the 30th November, 1949, she instituted the proceedings by her next friend and judicial and natural guardian, as she described him in the Writ of Summons, her father Thrasyvoulos Papadopoullos of Greece.

The claim in the Writ of Summons is for a declaration by this Court that she is the sole heir of Georghios A. Patiki, who died in Athens on the 5th June, 1946, leaving property here in Cyprus in the Limassol District, and, as such sole heir, entitled to succeed to all movable and immovable property of the deceased found in Cyprus. There are other claims as well in the action but they are all dependent on the above main claim.

The action was originally brought against the firm A. G. Patiki and Company of Limassol, as defendant A, and against its partners, as such and personally, as defendants B (1), B (2), B (3) and B (4). All the above defendants entered an appearance and delivered their defence in which, apart from other defences to the claim, they denied that the plaintiff was the sole heir, or an heir at all, of the deceased and gave the names of four other persons who, besides themselves, were, according to them, the heirs entitled to the estate of the deceased.

The plaintiff then made an application to the Court on the 11th June, 1949, for the addition of all the names of those persons mentioned in the defence as defendants to the action and for the amendment of the title of the action under Rule 10 of Order 9 of the Rules of Court, 1938, and an order was made accordingly by the Court on the 13th June, 1949. The four new defendants were added as defendants C (1), C (2), C (3) and C (4). Defendants C (2), C (3) and C (4) delivered their defence denying, as the former defendants did, plaintiff's right to succeed and alleging that they were entitled to succeed to the estate of the deceased, along with the original defendants B (1), B (2), B (3) and B (4).

When the case came for hearing on the 12th December, 1950, the defendant C (1) had died, without having delivered a defence and counsel of all parties agreed that her only heirs were the defendants B (2), B (3), B (4), C (2) and C (3) and nobody else. The Court thought right to go on with the case after making an order that the above-mentioned defendants be sued and also in their capacity as heirs of defendant C (1) deceased, under r. 4 of Order 12 of the Rules

of Court, 1938, and that the case should go on, and so the hearing of the case went on.

The pleadings raised a lot of points for consideration and the Court derived great help from the ability with which counsel of all parties conducted their case.

The first point, of paramount importance, is whether the plaintiff is, or is not, the sole heir of the deceased, and her case is this: (*a*) that the deceased was a Greek National, domiciled in Greece down to his death on the 5th June, 1946; (*b*) that he adopted her in 1935 in Greece, in accordance with the Greek law; (*c*) that in accordance with the Greek law the adopted child has, from the time of the adoption, with regard to the adoptant, the status of a genuine child; (*d*) that in accordance with the Greek law, as heirs *ab intestato* in the first place, are called the descendants of the deceased; (*e*) that she was the only descendant of the deceased and therefore entitled to succeed to his estate, both movable and immovable, wherever found.

It was admitted in the defence that the deceased died in Greece on the 5th June, 1946, and that he died a widower and left no offspring. As to his having died intestate, although there was in the defence a denial of this fact, the whole case went all along without any suggestion on behalf of the defence that he did not die intestate, and as if he had, in fact, so died, and we assume that he did die intestate.

The hearing of the case began on the 12th December, 1950. The day before, a notice was filed in Court to the effect that the plaintiff, who was a minor at the institution of the action, had attained her 18th year of age on the 18th April, 1950, and that she was adopting the proceedings; this notice was given in accordance with the practice of the English Courts. As the notice was not signed by the plaintiff herself but by her counsel and as she was not present in Cyprus, but was in Greece where the age of majority is admittedly 21 and not 18, we thought of not taking into account the notice, and going on with the case as it stood. Besides, such notice is not, in our mind, indispensable; there is no provision in our rules for giving such a notice, and according to the English practice such notice is not at all indispensable, the object of having a next friend being only to give security for costs to the defendants. (The Annual Practice, 1950, pp. 259–261. Notes to Rule 16 of Order 16 of the Rules of the Supreme Court, 1883).

Besides suing by her father, as her next friend, the plaintiff is also suing through him as her judicial guardian authorised to bring proceedings. The defence denied that her father

was such a guardian of the plaintiff, and that he had proper authority to bring these proceedings.

We considered the points and heard the evidence and examined the exhibits 6 and 7, and we are of the opinion that, as far as the appointment of the guardian is concerned, the matter is governed by Greek law and that it was duly made under that law, and must be recognised by this Court; as to the authorisation to bring these proceedings, if such an authorisation were necessary, which we do not think, the guardian obtained the proper authorisation.

Counsel for both parties very conveniently divided their final addresses into five parts and for the sake of convenience and uniformity, we propose to follow the same line in giving our decision.

INSTITUTION AND FORM OF THE ACTION.

The first part is whether the plaintiff is entitled to bring these proceedings in the form in which the present action was brought.

Sir Panayiotis' submission was that even if the deceased died domiciled in Greece and he left property here in Cyprus, no action could be brought here before a grant by a Court in Cyprus was made. We take Sir Panayiotis' contention to be that the present Court has no jurisdiction to hear plaintiff's 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. In support of his contention Sir Panayiotis argued that this Court had no jurisdiction, neither under Cyprus law, which is, in this case, the Wills and Succession Law, 1895, nor under the Common Law of England.

As to the Wills and Succession Law, 1895, Sir Panayiotis argued that it was not applicable to the case at all, and he cited sections 4 and 5 which, together with the definitions of the words " property ", " movable property " and " immovable property ", in section 2 of that Law, define its scope. He further argued that even if the Wills and Succession Law, 1895, applied, which he denied, then, in accordance with section 18 of that Law, this action could not be maintained before a grant was made by a competent Court in Cyprus. This section 18 runs as follows:—

> " 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 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 they are vested in and devolve upon the persons legally entitled".

This section, which deals with the vesting of the property of the deceased, is very unfortunate; the words between two commas— ", or if no such grant is made,"—were not put by the draftsman in their proper place; they make no sense at all in the place where they are. In the draft Bill which appeared in the *Cyprus Gazette* of the 29.3.1895, these words did not appear at all; they were added when the Bill was passed into Law, published in the *Cyprus Gazette* of the 16th August, 1895, but they were put by the draftsman in the wrong place, to make the section unintelligible, and, to understand section 18, so as to make sense, we have to alter their collocation and put them in their proper place, which is after the words.... "and from and after the administration of the property, or if no such grant is made....." Such mode of construction is allowed: *Maxwell*, on the Interpretation of Statutes, 9th Edition, p. 312.

Section 72 of the Wills and Succession Law, 1945, which repealed and replaced the Law of 1895, cured that defect by putting those words at their proper place as stated above. Moreover, the decision of the Supreme Court of Cyprus in the case of *Eleni K. Papadopoullos* v. *The Law Union and Rock Insurance Co.* reported in Cyprus Law Reports, Vol. 10, p. 65, is clear that the Wills and Succession Law, 1895, imposed no obligation to take out letters of administration in case of intestacy.

As to the Common Law, Sir Panayiotis cited rules 50 and 51 from Dicey's Conflict of Laws, 6th Edition, at pp. 311 and 312.

These rules are correct, so far as English Courts are concerned, but they have no application here and we find the argument of Mr. J. Clerides as to this point correct.

In deciding the point, therefore, whether the action of the plaintiff could be brought and maintained, we are of the opinion and we therefore decide that, as to the point whether the action of the plaintiff could be brought and maintained, neither the Wills and Succession Law, nor the Common Law of England are any obstacle to it, and that an action relating to inheritance to property found in Cyprus, against persons, most of whom are within the jurisdiction, could be brought and maintained here without any previous grant by a Court here.

DOMICILE.

With regard to domicile it must be stated clearly from the outset that it will have to be decided in accordance with the

lex fori, i.e. Cyprus Law (Dicey, Conflict of Laws, 6th Edition, p. 96 .... "any question of domicile arising in litigation falls to be decided by the *lex fori* ...."). And further, at the same page, citing from the decision of the Court of Appeal in *Re Martin* (1900), P. (C.A.) 211, 227 .... "The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognised in this country and are part of its law" ....).

The plaintiff's case is that the deceased at the time of his death, was domiciled in Greece. The evidence as to domicile, which is not a mere question of fact but an inference of law drawn from facts (Dicey, 6th Edition, p. 43), is the evidence of Thrasyvoulos Papadopoullos, the father of the plaintiff, and of Charilaos Ioannou Gikas, both advocates in Greece, the first practising before the Court of First Instance of Karditsa and the other before the " Arios Pagos ", the Supreme Court of Greece.

The evidence of Papadopoullos is to the effect that he knew the deceased before 1920; that he knew his parents who always lived and had their home at Trikala; that the deceased was one of the prominent citizens of Trikala, Greece; that he married there; that he always lived there until 1936 when he went and lived at Athens down to the time of his death; that he served in the Greek Army; that he had a large estate of land and a stock-farm at Trikala, and also that he had bought building sites and shops in Athens.

The evidence of Charilaos Ioannou Gikas as to this point is to the effect that he also knew the deceased personally; that he was from Trikala and a Greek subject.

That the deceased was a Greek subject is also borne out from exhibit 1, the application for registration of the General Partnership, A. G. Patiki and Company, dated the 16.5.1929, where he is described as a Greek subject, merchant, residing at Trikala, Greece.

In exhibit No. 2, which is a statement of a change in the partnership by the death of Georghios Athanassi Patikis, signed by the firm A. G. Patiki and Company, the said Georghios Athanassi Patikis is described as of Trikala, Greece. He is also described as of Trikala, Greece, in the exhibit No. 4, the Judgment of the Court of First instance of Trikala, by which the plaintiff was declared the adopted child of the deceased and his wife, and in the exhibit No. 5, the Certificate of Registration of the adoption, in which he is described as "inhabitant" (κάτοικος) of Trikala. In exhibit No. 12, the deceased described himself as of Trikala, Greece, and also in exhibit No. 41.

This is the evidence adduced by the plaintiff, and Mr. Clerides alleged that it was sufficient to find that the deceased was domiciled in Greece.

Sir Panayiotis contended that this was not sufficient evidence to prove domicile, and that the only way of proving the domicile of the deceased was to prove the domicile of his father at the time of the birth of the deceased; this is, of course, what is called domicile of origin.

We are satisfied that the evidence abundantly proved the two constituent elements of domicile of the deceased, in conformity with the English Common Law which applies in the matter, namely, permanent residence in Greece and *animus manendi* there and we find that the deceased, at the time of his death, was domiciled in Greece.

ADOPTION.

With regard to the adoption, it may be stated from the outset that—

(*a*) there is no statutory provision about adoption here in Cyprus, and

(*b*) that adoption goes to the status of a person.

Sir Panayiotis' argument was that adoption was an institution unknown to the Cyprus Statute Law; that the matter was a matter of Family Law and, as such, governed by the Family Law of the religious community to which the party (the plaintiff) belonged, under section 50 (3) of the Courts of Justice Law, 1935; that both the adopted and the adoptant belonged to the Greek Orthodox Church and consequently, that the Family Law in the case was the Family Law of the Greek Orthodox Church, of which no evidence at all had been given in the case. He went further and submitted that if the law of the religious community of the parties did not apply, there was no question of applying the Common Law of England, because the Common Law in England did not recognise adoption. Adoption was not recognised in England until the passing of the Adoption of Children Act, 1925. He concluded his argument on this topic by submitting that a child validly adopted in a foreign country cannot inherit property in Cyprus because adoption is not recognised here, neither by Statute nor by Common Law.

Mr. Clerides, for the plaintiff, argued that the adoption being a matter of status, it is governed by Greek law, the law of the domicile of the deceased, the adoptant. In support of his argument, he cited the decision of the Supreme Court of Cyprus in *Tano* v. *Tano*, C.L.R., Vol. IX, p. 101, where it is stated that the family status of a foreign subject is determined by the law of the foreigner's state.

That case was the case of an adopted child of a French father, claiming succession in the immovables (mulk) of his father, found in Cyprus. The Supreme Court held that the question of adoption was governed by French Law, that according to French Law he was the adopted child of his father, but that he was not entitled to inherit the immovables of his father in Cyprus, as not coming within the definition " lawful children ", of section 43 of the Wills and Succession Law, 1895, because under French Law, adopted children, " enfants adoptifs ", constituted a distinct category from the " lawful children ", " enfants legitimes ". The part of that decision which concerns us, while dealing with the question of adoption, is that part at p. 101, which decides that questions of family status of foreigners are determined by the law of the foreigner's State.

We considered the arguments of both sides, and the authorities, and having already found that the deceased was a Greek subject, domiciled in Greece, we are of the opinion that the adoption by him of the plaintiff, who is also a Greek subject, domiciled in Greece, is governed by Greek Law.

From the evidence adduced and from the exhibits produced, we are satisfied that the adoption was validly made according to the Greek Law and that the plaintiff is the adopted child of the deceased, and that, according to Article 1879 of the Greek Civil Code, an adopted child is considered as a genuine child of the adoptant, as defined by Article 1465 of the same Code, and that not only the adopted child is the descendant of the adoptant but also his descendants after the adoption are considered the descendants of the adoptant.

SUCCESSION.

The question now is put: is a validly adopted child under Greek law entitled to inherit to the movable property of his adoptive father, who died domiciled in Greece, leaving movables in Cyprus? Is the adopted child entitled to inherit to these movables? We will deal with the movables only in view of our finding further down, in dealing with the question of the property left by the deceased, that he left no immovables in Cyprus.

Mr. Clerides' argument was this: the plaintiff is the validly adopted child of the deceased under Greek law; under that law the validly adopted child is considered as a genuine child —in other words, the lawful child of the deceased—and, as lawful child of the deceased, the plaintiff comes within category (*a*) of section 43 (1) of the Wills and Succession Law, 1895, and, therefore, entitled to succeed to all his property.

Sir Panayiotis' argument was that the Wills and Succession

Law, 1895, did not apply in the present case and referred the Court to sections 4 and 5 of this Law. Section 4 of this Law, *in conjunction with section 2 of the same Law, containing* the definition of the words "property", "immovable property", and "movable property" defines its scope of application; it reads as follows:—

"This Law shall regulate—

(*a*) the succession to property of all persons domiciled in Cyprus;

(*b*) the succession to immovable property of any person not domiciled in Cyprus."

This section makes the Law 1895 applicable in (*a*) as the *lex domicilii* and in (*b*) as the *lex rei sitae*. It is clear that our case does not come under either (*a*) or (*b*); the deceased was not domiciled in Cyprus, so as to bring the case under (*a*), nor is there question here of immovable property (situate in Cyprus in accordance with the definition in section 2), so as to bring the case under (*b*). Section 5 contains also a piece of Private International Law; it deals with succession to movable property of persons dying in Cyprus but not domiciled in Cyprus. It provides:

"The succession to movable property of persons dying in Cyprus but not domiciled there shall be regulated by the Law of the country in which they had their domicile at the time of their decease".

It makes the *lex domicilii* of the deceased applicable in the case. It is obvious that our case here does not come within the ambit of this section; the deceased did not die here—he died in Greece.

Mr. Clerides asked the Court to find, by *a fortiori* argument that the provision of section 5 applied to the case of movables of a person having his domicile outside Cyprus and dying outside Cyprus. The words of the section are very clear to allow such a construction and we agree with Sir Panayiotis that our case, being a case of succession to movables in Cyprus of a person who died abroad, domiciled abroad, the Wills and Succession Law, 1895, does not apply. In the absence of Statutory Law we have to enquire about the English Common Law and see what it is on the subject.

While at this point we must state that the principles of English Private International Law are part and parcel of the English Common Law and applicable here. The English Common Law on the subject is very clearly stated in Dicey's Conflict of Laws, 6th Edition, at pp. 817, rule 178, which reads as follows:

"The succession to the movables of an intestate is governed by the Law of his domicile at the time of his death, without any reference to the Law of the country where:—(1) he was born; or (2) he died; or (3) he had his domicile of origin; or (4) the movables are, in fact, situate at the time of his death."

Also by G. C. Cheshire in his Private International Law, 3rd Edition, p. 678, where it says:

"The rule has been established for some two hundred years that movable property in the case of intestacy is to be distributed according to the Law of the domicile of the intestate at the time of his death. This law determines the class of persons to take, the relative proportions to which the distributees are entitled, the right of representation, the rights of a surviving spouse, the liability of a distributee for unpaid debts, and all analogous questions".

Applying the above principle of English Common Law, we are of the opinion that the succession to the movable property of the deceased which is here in Cyprus, will have to be regulated by the Greek law, the law of the domicile of the deceased at the time of his death. According to that Law, Article 1579 of the Greek Civil Code, the adoptive child is considered as a genuine child of the adoptant and, according to Article 1813 of the same Code, which gives the rights of inheritance, the persons who are entitled to the intestate succession of the deceased are, in the first place, his descendants. The plaintiff having proved that she is the adoptive child of the deceased, and according to the Greek law considered as his genuine child, in the absence of any other children she is the only descendant entitled to inherit to the movables of the deceased, found in Cyprus.

PROPERTY LEFT BY DECEASED IN CYPRUS.

The fifth and last point for consideration is: what is the property left by the deceased in Cyprus? what does it consist of?

It was admitted by all parties that this property is his share in the partnership A. G. Patiki and Company, Limassol, ascertained in accordance with the provisions of the partnership agreement, exhibit No. 11. The assets of the partnership consisted both of movable and immovable property, but Mr. Clerides argued that the share of the deceased must be considered as movable (personal), although the partnership's property consists also of immovable property. This, he said, is consistent with the Partnership Law, Cap. 196, and the agreement of partnership, exhibit No. 11.

Mr. Houry, for his clients, defendants B (1) and B (2),

argued that the share of the deceased in the movable assets of the partnership is movable property and his share in the immovable assets is immovable property.

We consider that, under our Partnership Law, Cap. 196, and the partnership agreement, exhibit No. 11, the share of the deceased in all the assets of the partnership, both movable (personal) and immovable (real) property, is movable property. The intention of the parties in that exhibit No. 11 is very clear, so as not to leave any doubt.

It may be added that in English law, in Equity, the same principle applies, and what section 22 of the English Partnership Act, 1890, which was cited by Mr. Houry, simply did was to declare the existing principle in equity that a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties. (Lindley on Partnership: 10th Edition, p. 419).

Having thus found that the deceased left only movable property in Cyprus, let us examine now what that property consists of. We said, just above, that this property is the share of the deceased in the firm A. G. Patiki and Company, and it is admitted by all concerned, that it is the one-fifth share.

This partnership A. G. Patiki and Company which is a tobacco and cigarette manufacturing concern, existed before 1923. On the 16th September, 1923, the deceased and defendants B (1), B (2), his brothers, and defendants B (3) and B (4), his cousins, entered into a new partnership agreement, exhibit No. 11, for the continuation of the business under the existing name of A. G. Patiki and Company with the five of them as general partners, in equal shares.

The term of the agreement was for five years, but there was a provision in the articles of the agreement that the partnership might continue after the expiration of the term under the same agreement and, in fact, it so continued until the death of the deceased, on the 5th June, 1946.

Article (*d*) of the agreement provided that books of accounts were to be kept and all partnership transactions concerning the partnership and the partners, entered therein. It also provided that those books ought to be closed and balanced (*i.e.* the accounts), every year, on the 1st July, or every six months, and in fact, the accounts were, without default, closed and a balance-sheet prepared every six months and an inventory of the assets of the partnership made every year:

The two books produced in Court as exhibit 36 contained those balance-sheets and inventories from 1923 down to the death of the deceased. The last inventory and balance-sheet before the death of the deceased was made on the 30th January, 1946, for the year 1945, showing the position of the partnership as on the 31st December, 1945. It is contained in the second book of exhibit 36, pp. 206-222. Copy of that inventory and balance-sheet was found among the effects of the deceased in Athens, after his death; it had been given to him, apparently, in May, 1946, when he came from Greece to Limassol on a short visit. During his short stay here he took interest in the affairs of the partnership, as is shown from his correspondence with the Custodian of Enemy Property (exhibits 33, 34 and 35), and also from the power of attorney which he executed, exhibit No. 41. Plaintiff's guardian, in his evidence, stated that the deceased had brought that copy of the inventory and balance-sheet with him from Limassol fifteen days before his death.

Article (*ia*) of the Partnership agreement made provisions for the case of withdrawal of a partner, or partners, after the expiration of the term of five years, and for the case of the death of one or more of the partners during the existence of the partnership whether the death occurred during the original term of five years or after. This article is of paramount importance for the determination of the point under inquiry; it reads as follows:—

" The following are for the purposes of this action, material terms of the said contract:—

Clause 6. " The partnership shall keep regular commercial books in which all transactions relating to the partnership and the partners shall be entered. These books shall be balanced and closed every year on the 1st July, and/or every six months, and the profit or loss shall be determined. Profit or loss shall be divided equally between the partners independently of the capital of each partner. Each partner is bound to withdraw the profit falling to his share every year, and if he leaves it with the partnership he shall not be entitled to any interest, but a partner having smaller capital is entitled to leave his profit in the partnership with interest at the rate of 6% until his capital is made equal to the capital of a partner having larger capital, in which case his profits will be capitalised".

Clause 11. " After the expiration of the period of this contract if one partner or more wish to retire from the partnership they should give at least three months notice in writing to the other partners, when, after the expiration of this notice the books of the Company shall be closed and to the partner or partners retiring shall be paid any

sum to which they shall be entitled in accordance with those books, less 15% on their share from credits to third persons from sales of goods and tobacco, and less 10% on the existing goods, without, however, the retiring partner or partners being entitled to raise any claim for compensation for their share in the title of the business, and in the Trade Marks and the goodwill of the partnership. It is understood that all the above shall be valid if the remaining partners wish to continue the business for their own account, otherwise, the retiring partner or partners can claim only the dissolution of the partnership. The provisions of this article shall be applicable in case of death of one or more partners either during or after the expiration of this contract to his or their heirs who shall be entitled to ask either to retire from the partnership or in case the other partners do not accept, its dissolution. But in no case such heirs shall be entitled to come in as partners in the place of the deceased partner".

Clause 12. " In case of dissolution, either after the expiration of this contract or under clause 11 of this contract, the partners or in case of death of a partner, only the surviving partners shall proceed to the liquidation of all the partnership property, when after the payment of all liabilities of the partnership and the expenses of liquidation the balance shall be divided between the partners in proportion to the capital of each, with the share of each partner in the profit or loss after deducting the sums withdrawn by him in accordance with the books of the partnership".

It is clear from this article that whatever had to be done to find out the share of a retiring partner, the same would have to be done to find out the share of the heirs of a deceased partner.

On the death of the deceased, the remaining partners, defendants B (1), B (2), B (3) and B (4), made clear their intention to continue the business, and sent a notice to that effect to the Registrar of Partnerships, on the day following the death of the deceased. They then closed the accounts as at the date of the death, and prepared a balance-sheet: these accounts and balance-sheet appear in the second book of exhibit 36, at pages 222-235. Copy of that account they delivered to the plaintiff's guardian—and it is exhibit 13. In these accounts and balance-sheet they value the various assets of the partnership, and particularly the immovables, at the value at which they were valued in the previous balance-sheets, and put as Reserve Fund the same amount of £35,000—which appeared as reserve fund in the balance-sheet for the year 1945, and on those data they found what the share of the deceased's shares would be.

Plaintiff's complaint was that the accounts were closed behind her back, that the assets, and particularly the immovables (houses, shops, lands, etc.) had been greatly undervalued and that a disproportionately large amount had been put into the reserve fund.

The defence contended that the accounts were closed and balanced and all assets therein valued according to the long established practice in the partnership since 1923, a practice which became an agreement between the partners and which bound the partners and their heirs; that copy of the statement of the accounts closed, and of the balance-sheet, as at the 31st December, 1945, were given to and kept by the deceased, who did not object to it and must be bound by it and consequently, the valuation of the assets and the amount put aside as reserve fund shown therein bound the deceased and his heirs and that, in any event, the amount of the reserve fund was not unreasonably high. The defence further argued that the statement of the account and balance-sheet prepared as at the death of the deceased, and copy of which had been given to the guardian of the plaintiff, was what Article (*ia*) required.

We considered the arguments of both sides on this difficult point and we find that the closing of the accounts and the balance-sheet, with all valuations therein for the year ending the 31st December, 1945 (exhibit 36, second book, pp. 205–221), were made in accordance with the partnership agreement and the long established practice between the partners and that copy of it had been given to and kept by the deceased while he was in Cyprus and taking an interest in the affairs of the partnership, without any objection on his part to the accounts or valuations.

We therefore find that the accounts, valuations and balance-sheet for the year 1945 bound the deceased and also his heirs and cannot and must not be re-opened.

For the period 1st January, 1946 to 5th June, 1946, the plaintiff is entitled to have an account taken, by means of the partnership books, and in which account the valuation of the assets will be the same as in the balance-sheet for the year 1945. We take the words of Article (*ia*) . . . . " The books of the partnership will be closed and to the retiring partner or partners shall be paid any sum to which he shall be entitled, in accordance with these books . . . . " to mean that the accounts in the partnership books starting from the last closing of the accounts will be posted at the date of the occurrence of the event—in our case the death of the deceased—and the necessary operations (additions, multiplications, etc.) made, and thus find the share, according to the books, to which the retiring partner, or the heirs of the deceased partner, are entitled to get.

As to the closing of the accounts and the balance-sheet prepared by the remaining partners as at the death of the deceased, the only thing we can say is that the valuations of the assets of the partnership therein, so long as they are the same as the valuations in the 1945 accounts, they are correct, and nothing more.

In dealing with the accounts another question arises—the question of the reserve fund. In the 1945 accounts a sum of £35,000 is entered as reserve fund and the same amount was entered in the accounts prepared as at the death of the deceased. This sum was admittedly put aside from the profits, to meet contingent and unascertained liabilities and events and there is nothing wrong in that. No doubt this sum would one day have to be divided between the partners, in case the events, for which it had been put in reserve, did not occur, or in case of dissolution. This sum of £35,000 is made up of the following items—as we take them from the 1945 accounts:—

(*a*) credit to third persons	£4,474.16.3
(*b*) replacement of machinery	8,000. 0.0
(*c*) stock in stores..	8,927. 0.0
(*d*) machinery and accessories	9,981. 0.0
(*e*) extraordinary transactions	259. 3.6
(*f*) furniture	638.14.3½
(*g*) building sites and rural lands	2,718. 4.6½
	£35,000. 0.0

Article (*ia*) of the partnership agreement provides that from the share of a retiring partner, and of course from the share of a deceased partner, there will be deducted 15 per cent. of his share on the credits to third persons, and 10 per cent. on the existing goods. So, on these two items the retiring partner, or the heirs of a deceased partner will get 15 per cent. and 10 per cent. less, thus making their contribution to possible losses from these two items by getting less, and the contingency for these two items must be considered as having occurred, and it would be unfair to hold that they are not entitled to share in the sums which were put in reserve for these two contingencies.

We therefore find that the plaintiff is entitled to share in the two sums, of £4,474.16.3 and £8,927 put in reserve for credits to third persons and for stock in stores, respectively.

As to the remaining items of the reserve fund, so long as the contingencies for which they have been set apart did not occur, the plaintiff is entitled to her share in them. No doubt the remaining partners were entitled to use those items, or part of them, for the purposes for which they had

been set aside, and it will be on them to prove what part has been actually used and what part is necessary to be used to answer the contingencies and events for which those items had been set aside, as at the date of the death of the deceased, and the surplus, if any, will have to be divided between the partners, and the plaintiff to get her share in it.

To end the point as to what is the property left by the deceased, we summarise that it consists of the following:

(*a*) his share, as shown in the accounts for the year 1945, which were closed on the 30th January, 1946;

(*b*) his share in the profits of the partnership for the period 1st January, 1946 to the 5th June, 1946, for which the plaintiff is entitled to have an account taken by means of the partnership books, and for which the remaining partners, defendants B (1), B (2), B (3) and B (4) are accountable to her;

(*c*) his share in the items (*a*) and (*c*) of the Reserve Fund;

(*d*) his share in the surplus, if any, of the other items of the Reserve Fund, *i.e.* Items (*b*), (*d*), (*e*), (*f*) and (*g*), for which the plaintiff is also entitled to an account.

We, therefore, order that the following accounts be taken, that is to say:

(*a*) an account of all partnership dealings and transactions for the period 1st January, 1946 to the 5th June, 1946;

(*b*) an account of credits to third persons for goods and tobacco as at the 5th June, 1946;

(*c*) an account of the existing goods as at the 5th June, 1946;

(*d*) an account of the expenses made, or necessary to be made as at the 5th June, 1946, out of the items (*b*), (*d*), (*e*), (*f*) and (*g*) of the Reserve Fund.

The further consideration of the action is adjourned and the parties are to be at liberty to apply.

This concludes the fifth and last point of our decision.

It would be an omission on our part if we concluded our decision without mentioning our appreciation for the help we derived from the counsel of all parties and also from the eminent Greek barrister, Mr. Charilaos Ioannou Gikas, who was called as an expert witness on the Greek law, and whose evidence, clear and always to the point, was a great help to us.

Appeal by plaintiff from the judgment of the District Court of Limassol (Action No. 999/48).

J. Clerides, Q.C., *J. Potamitis* and *A. Zenon* for plaintiff.

Sir Panayiotis Cacoyiannis, *M. Houry* and *J. Eliades* for defendants.

Judgment was delivered by the Chief Justice:

HALLINAN, C.J.: These proceedings concern the share of Mr. G. A. Patiki in the partnership of A. G. Patiki and Co. When Mr. G. A. Patiki died on the 5th June, 1946, a dispute arose as to who should inherit his share in the partnership and as to how the value of that share should be ascertained.

The questions arising on the issue as to inheritance can be disposed of in this appeal in a few words. I consider that the judgment of the trial Court reached a correct conclusion and for the right reasons on all the questions of law and fact relevant to the issue in a lucid and able judgment. Briefly the conclusions so reached are as follows: That the plaintiff-appellant who is the adopted daughter of the deceased is entitled to claim her inheritance in Cyprus without obtaining letters of administration; that there is no burden of proof on her to establish that the deceased died intestate; that she is, according to the law of Greece, the adopted daughter of the deceased and as such is the heir of the deceased; that the deceased was domiciled in Greece at the time of his death and that, under the common law which is in force in Cyprus, the property of the deceased devolves according to the law of his domicile; and finally that the deceased's share in the partnership assets devolves as personalty even though some of these assets are real property.

The other principal issue is more difficult, namely, the question as to how the deceased's share should be ascertained.

The points in dispute in this issue are two. The first point can best be put in the words of Lord Wrenbury when the same question arose in the case of *Cruikshank* v. *Sutherland* (1923) 92 L.J. 136 at page 137. He said:

> " The question between the parties is, whether, so far as property is concerned, this is to be an account of its property at its fair value to the firm, or an account in which the property must be taken at the values appearing in the books of the partnership."

The second question concerns the appellant's right to a share in the reserve fund.

In determining the method to be followed in valuing the shares of a deceased partner Lindley on Partnership, 11th Edition at page 524, after citing a number of cases states:

> " These cases not only afford good illustrations of the rule that in construing partnership articles regard must be had to the conduct of the partners, even where a circumstance has arisen of which the partners had no previous experience, but they also show that this rule will not be applied unfairly."

The articles in the partnership agreement of 1923 which relate to the mode of valuation are articles (*f*) and (*k*). The first sentence of article (*f*) reads:—

"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."

Article (*k*) is as follows:—

"(*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's name, the trade marks and goodwill 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."

Half-yearly accounts appear to have been taken in accordance with article (*f*), the last taken before the deceased's death being that for the year ending 31st December, 1945. The trial Court held: "The accounts, valuations and balance sheet for the year 1945 bound the deceased and also his heirs and cannot and must not be re-opened. For the period 1st January, 1946 to 5th June, 1946, the plaintiff is entitled to have an account taken by means of the partnership books, and in which account the valuation of the assets will be the same as in the balance sheet for the year 1945." The meaning of this passage is made clear later in the judgment when the deceased's share is held to consist of: his share as revealed by the accounts taken at the end of 1945, the profits between 1st January and the 5th June, 1946, and his share in the reserve fund.

Before attempting to construe the true intention of the partners from the partnership agreement, from their conduct, and from the decided cases, I must record my astonishment that no expert in accountancy was called as a witness by any of the parties to this action. It is possible that had we

had this expert opinion, my conclusion as to the intention of the partners might have been different. Courts can do no more than decide cases upon the material before them.

Now the value of the assets of the partnership must be ascertained as on a certain day, and that day is the 5th June, 1946, when G. A Patiki died. On that day according to article (*k*) " the books of the Company should be closed ", which phrase I take to mean that transactions after that date are disregarded for the purpose of the account. But when books are closed, the accounts, valuations and balance-sheet cannot be prepared by merely abstracting figures from the books; in particular an evaluation must be made of the fixed assets such as immovable property, plant and machinery, and of the current assets such as stock-in-trade and money due from debtors. I stress this aspect of accountancy for two reasons: First, because the trial Court appears to have thought that the assets were to be ascertained as on 31st December, 1945, together with profits up to the date of the death and a share in the reserve. This is clearly wrong, for the value of the assets must be ascertained as they were on 5th June. Secondly, because counsel for the respondents has relied much on the phrase in the articles that the books must be closed, as if accountants in evaluating assets look only to the books and do not consider such factors as the state or market value of physical assets, the solvency of debtors and so forth. I do not think that any conclusions one way or the other can be drawn from the phrase about closing the books. The real question at issue on this part of the case is this: if, before the 5th June, 1946, it had been the practice to insert values in the balance-sheet which were not the fair values of such property to the firm but merely " book " values, are we to assume that the partners intended to accept that method of valuation when G. A. Patiki died ? As I see it, the acceptance of the 1945 accounts by the deceased as correct has no relevancy except in so far as by accepting the past practice in evaluating assets he can be considered to have recognised the intention of the partners as to how the books should be made up when one of them died.

Courts should not construe an agreement so that the results are unjust unless compelled to do so by the terms of the agreement. It is easy to perceive that where a retiring partner or the estate of a deceased partner is entitled to a fifth share and that such share is ascertained by taking " book " values which are not fair values to the firm, the retiring partner's or deceased partner's estate may receive far more or far less than one-fifth of the true value of the assets because of arbitrary "book" values which do not correspond to actual values. I conclude therefore that, in the absence of agreement, the property of a partnership

should be brought in at its fair value when ascertaining the share of a deceased partner. Now the partnership agreement in the present case merely states that the books be closed and that the heir of the deceased partner shall receive such sum as he is entitled to in accordance with the books. We are not told anything about the method of valuation. It is submitted for the respondents that we must assume that the partners intended that the same method should be adopted when one died as when the accounts were made up half-yearly. But why should we? As Lord Wrenbury says in Cruikshank's case at page 138: "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 . . . . ".

The case of *Coventry* v. *Barclay*, 46 E.R. 659, has been relied on for the respondents, since in that case the executors of a deceased partner were held bound by the valuation of the assets in the last annual account preceding the deceased's death. But it is not difficult to distinguish that case from Cruikshank's case and from the present case. For in Coventry's case Article 38 of the partnership agreement clearly stated that the value of the deceased's share should be " according to the last account or rest preceding the death of each partner". Neither in Cruikshank's case nor in the present one is there any such provision. By taking the last accounts before Mr. Patiki's death as the basis on which his share should be valued, the trial Court appears to have followed the procedure in Coventry's case without any stipulation in the partnership agreement to warrant this being done.

I conclude therefore that the plaintiff is entitled to an account of the fair value to the firm of the partnership assets as on 5th June, 1946; and that the values given to the several assets in the account for the year ending 31st December, 1945, are not binding on the plaintiff.

Coming now to the second question as to the method of valuation, I shall consider the plaintiff's right, if any, to a share in the reserve fund. The defendants contend that the reserve fund is made up of undistributed profits which have been irrevocably allocated by the partners (including the deceased) to such matters as the replacement of machinery, the writing off of bad debts, or a fall in the value of stock-in-trade. The trial Court, in my view, rightly rejected this contention, for it seems to me to rest on a confusion between a right to profits, and a right to a share in the assets of the partnership upon the retirement or death of a partner. The liabilities side of the balance-sheets show how the net assets are allocated: the major portion is appropriated to

specific sums to which the partners are entitled in the Partners' Capital, Loan and Current accounts; the balance of the net assets are called Reserves—they are in fact surplus assets.

If the issue merely concerned the right of a deceased partner to profits, it might be argued that it had been agreed not to distribute certain profits allocated to reserve; but here we are concerned with the right of the deceased partner to a share in the assets, and he cannot be denied his right to share in surplus assets merely because they are surplus and have not been allocated on the liabilities side of the balance-sheet to the partners' personal accounts.

I conclude therefore that the estate of the deceased partner is entitled to a fifth share in these surplus assets together with such specific sums as may stand to the credit of the deceased partner in the Partners' accounts; these sums presumably will be the same as on the 31st December, 1945, together with the deceased's share of the profits between the 1st January and the 5th June, 1946. From the total amount due to the deceased from the Partners' Accounts and from the surplus assets must be made the deductions provided in article (*k*), that is to say, fifteen per cent. from the value of the debts due for the sale of tobacco and goods and ten per cent. from the value of the stock-in-trade.

Referring to items in the reserve fund other than those items liable to deduction under article (*k*), the trial Court in its judgment said:

> "No doubt the remaining partners were entitled to use those items, or part of them, for the purpose for which they had been set aside, and it will be on them to prove what part has been actually used and what part is necessary to be used to answer the contingencies and events for which those items had been set aside, as at the date of the death of the deceased, and the surplus, if any, will have to be divided between the partners, and the plaintiff to get her share in it."

I am not certain what precisely the trial Court meant by this direction, but in so far as it conflicts with the views which I express in this paragraph, this direction should not be followed.

After Mr. Justice Griffith Williams has delivered the judgment which he is about to read, the Court will hear counsel on the claim made in paragraph 9 D (*c*) of the statement of claim. *The judgment of the trial Court should accordingly be confirmed except that the order for accounts must be varied in the particular manner which we shall presently determine.*

A separate judgment was also delivered by:

GRIFFITH WILLIAMS, J.: This action arose out of the decease of one George Patikis, a partner of the firm of A. G. Patiki and Co., tobacco merchants and manufacturers of Limassol. The deceased, who was a Greek subject domiciled in Greece, left no child born in wedlock; but during his lifetime he had adopted the daughter of a Greek family in Greece, who by this action is claiming to inherit the property left by the deceased in Cyprus. It was proved by expert evidence, and accepted by the lower Court, that in Greek law a form of legal adoption was recognised which gave the adopted child the same rights of inheritance as an heir. The trial Court accepted the evidence of adoption and held that the plaintiff Demetra Georghiou was the deceased's legally adopted daughter, and sole heir. Though this finding was appealed against, during the course of the hearing before us, Mr. Houry (for respondents B 1, B 2, B 3 and B 4) said he would not challenge the finding that appellant was the adopted child of the deceased according to Greek law and by that law an heir. This finding therefore of the trial Court stands.

It is common ground that the only assets of the deceased in Cyprus consisted of his share in the partnership firm of A. G. Patiki and Co. and that this partnership was based on an agreement in writing (exhibit 11) made on 15th September, 1923, between Ioannis G. Patiki, Georghios A. Patiki (the deceased), Vassilios G. Patiki, Christos A. Patiki and Constantinos A. Patiki, who took over the business of A. G. Patiki and Co. from the other retiring partners. The business prospered and the partnership continued without interruption or change in its members, until the death of George A. Patiki (herein called the deceased) on the 5th June, 1946.

This action was originally brought against the firm of A. G. Patiki and Co. and the remaining partners personally; but as these parties all defended the action, and, moreover, alleged that the plaintiff was not the sole heir, or even an heir of the deceased, and named four other persons as heirs, an amendment was made in the title adding these four persons as additional defendants. For the sake of convenience the defendants were arranged in three groups: (*a*) the firm of A. G. Patiki and Co. (*b*) the remaining partners in A. G. Patiki and Co. and (*c*) the four heirs or next of kin of the deceased George A. Patiki added after action brought. Of these latter the first named in the title has since died; but it is agreed that her only heirs are three of the partners in the firm, who are included in group B and two of the heirs in group C. Her interest is therefore represented in the action.

Apart from the question of whether the plaintiff-appellant

was the legal heir of the deceased, the following further issues were raised in the action:

(i) That the action was not maintainable without someone having obtained representation to the deceased's property in Cyprus;

(ii) That even if the appellant were the legal heir by the law of Greece this would not enable her to claim to inherit property of the deceased in Cyprus, where no law of adoption is recognised;

(iii) Even if held that as regards movables the *lex domicilii* applied (*i.e.* the law of Greece) this could not apply to the immovable property owned by the partnership. That in the case of immovable property the *lex fori* (the law of Cyprus) applied, and by Cyprus law adoption was not recognised; so

(iv) Whether the accounts made up to the 30th June, 1953, contained a complete statement of all the assets of the partnership in which the representatives of the deceased partner were entitled to share under the partnership agreement.

The learned President of the District Court in a very careful judgment considerd each of the issues raised in turn. After dealing with the questions of domicile and adoption as already mentioned he passed to the four issues outlined above, and decided them as follows:—

In answer to (i) he held that by a proper reading of the Wills and Succession Law, section 18, there is no obligation imposed to take out Letters of Administration in Cyprus. That neither the English common law nor the above mentioned section are any obstacle to the plaintiff-appellant bringing her action without a grant of representation.

In answer to (ii) "The principles of English Private International Law are part and parcel of the English Common Law and applicable here", there being no provision in the Wills and Succession Law, 1895, for the distribution of properties of one domiciled abroad and dying abroad. That by private International Law in case of intestacy movable property is distributable according to the law of domicile of the intestate at the time of his death. Consequently the succession to the movable property of the deceased must be regulated by Greek law, the law of his domicile at death; and the appellant, his adopted daughter, being sole heir, is entitled to inherit his movable property in Cyprus.

In answer to (iii) the assets of the partnership both movable

and immovable must be considered as movable. That the partnership agreement left no doubt that the intention of the partners was that the immovable property of the partnership was to be treated as movables. That in English Law, in Equity the same principle applied and that section 22 of the Partnership Act, 1890, did no more than declare that a share in a partnership, whether the partnership property consisted of land or not, must be deemed to be personal for the purpose of inheritance. Its omission from the Cyprus Partnership Law cannot therefore be regarded as excluding this principle which is part of the law of Cyprus by section 28 of the Courts of Justice Law (Cap. 11).

In answer to (iv), (*a*) that the balance-sheet made up to 31st December, 1945, bound the deceased and his heirs with regard to all the accounts included therein and could not be re-opened; (*b*) that for the period 1st January, 1946, to 5th June, 1946, appellant was entitled to have an account taken by means of the partnership books; (*c*) that out of the reserves accumulated from profits and entered under different items in the 1945 account of which the total amounted to £35,000, and which were repeated in the 1946 account made up to the 30th June, 1946, the appellant was entitled to share in the items of £4,474.16.3 and £8,927 put in reserve respectively for credits to third persons and for store materials written off.

That as to the other items of the Reserve Fund, the appellant was entitled to her share in such part of them as was not required for the purposes for which they had been set aside; and that it was for the remaining partners to prove what part of the reserves had been used and what part required for contingencies as at the date of death.

The further hearing of this action was adjourned until the accounts ordered had been taken. The claim of the appellant to interest on the amount due from the date it became payable was also left in abeyance by the Court.

The plaintiff represented by Mr. J. Clerides, Q.C., appealed against so much of the judgment as adjudged how the share of the deceased Georghios A. Patiki in the partnership was to be calculated. In particular she alleged (1) that the Court had given a wrong construction to the words in Article (*k*) of the Partnership Agreement: "The Books of the Partnership will be closed and to the retiring partner or partners shall be paid any sum to which he shall be entitled in accordance with those books." And argued that the fact that the previous yearly accounts and balance-sheets were made on the book values was not conclusive for the purpose of finding the share of a deceased partner; because they were only made for the purpose of ascertaining the distributable profits between the partners and not the

capital value of each partner's share. She consequently contested the accuracy of the account for the year 1945 as well as the account for the period 1st January—6th June, 1946.

(2) The appellant opposed the taking of any account respecting the items specified in the judgment, namely those sums mentioned on Liabilities side of the Balance Sheet as reserves, alleging that these items existed intact at the time of the deceased's death, and that she was entitled to 1/5th share in all of them.

It was not only the plaintiff who was dissatisfied with the judgment of the lower Court. The firm of A. G. Patiki and Co. instructed Sir Panayiotis Cacoyiannis to file a cross-appeal asking that the judgment be varied and the individual continuing partners instructed Mr. M. Houry to file a separate cross-appeal. The other parties did not appeal.

The grounds of the two cross-appeals were virtually identical as they raised the same points and for the purpose of this judgment I propose to treat them as one. The plaintiff-appellant having substantially won her case in the Court below it was the cross-appeals that attempted to re-open all the fundamental questions decided by the lower Court; and the respondents, being considered as the real appellants, were accordingly first called upon. The grounds of appeal set out in these cross-appeals raised again practically every issue argued in the lower Court and already set out herein.

To recapitulate: the first three grounds enumerated and decided by the learned President of the District Court were (1) the question of whether an action in the form brought was maintenable; (2) whether the plaintiff-appellant being an heir by adoption according to the law of Greece could claim to inherit property in Cyprus where adoption is not recognised; (3) whether the immovable assets of the partnership could descend as movables or would pass to the next of kin by the *lex loci*. With respect of each of these legal points, which are raised again as grounds of appeal, I find myself in complete agreement with the learned President of the District Court; and I do not think I could add anything to his very clear statement of the law on those points.

I do not however consider that his findings regarding the accounts are equally unassailable. They are attacked from both sides. Mr. Clerides says that both the account for 1945 and that up to 30th June, 1946, should be re-opened. He argues that both accounts were like all the yearly accounts only drawn up for the purpose of finding the distributable profits and not in contemplation of the death or retirement

of a partner; and that consequently the assets of the partnership were not properly valued. In support of this argument he referred us to the case of *Cruikshank and others* v. *Sutherland and others*, 1923, 92 L.J., Ch. 136. The respondents on the other hand contend that the accounts given by them to the appellant were all that she was entitled to under the partnership agreement and appeal against the accounts ordered.

In the case of *Cruikshank and others* v. *Sutherland and others*, the appellants were the executors of Mr. Cruikshank who had been in partnership with the respondents. The partnership was for four years from May 1, 1914. It was a renewal of partnership relations which had subsisted between the partners before, the last preceding partnership having been for two years from May, 1912. In forming the partnership of 1914 the assets of the previous firm were taken over at the values appearing in the partnership books. The accounts of April 30, 1915 and April 30, 1916, were prepared upon the footing of bringing in the assets at their book values. Mr. Cruikshank was a party to the former of these.

The relevant articles of partnership in that case were as follows:

By Article 13 a full and general account of the partnership dealings of the preceding year and of its property, credits and liabilities was to be made up on April 30 in each year.

By Article 15 the share of a retiring partner was to be ascertained by preparation of the annual account in terms of Article 13.

By Article 16 the share of a deceased partner, with share of profits calculated and made up in the usual way up to April 30 next after his decease, was to be ascertained as provided in Article 15.

The executors of Mr. Cruikshank contended that the share of a deceased partner should be ascertained by bringing in the assets at their fair market value to the firm; the surviving partners contended that the share should be calculated on the book values appearing in the account of April 30, 1917. In the Court of first instance and in the Court of Appeal judgment was in favour of the surviving partners, but the House of Lords reversed this decision.

Lord Wrenbury delivering the judgment of the House of Lords commented that there was nothing in the partnership articles to say what principle should be adopted in preparing the full and general account of the property in accordance with Article 13. He states (at page 137):

"It is not I think disputed—and if it were I should be of opinion that it could not successfully be disputed—that a full and general account of the partnership property will be an account at which the property will be brought in at its fair value. The articles are wholly silent as to the principle to be adopted in preparing this full and general account of the property—it remains simply that it must be a proper account of the property, whatever that is." (Lord Wrenbury then goes on to consider the method of arriving at a fair value).

Now let us consider the relevant articles of the partnership agreement in the present case. They will be found in clauses (*f*) and (*k*) which are as follows:

"(*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."

It will be seen that this article first renders obligatory the keeping of regular commercial books, and regulates how often they are to be balanced and closed and how the profits are to be divided. Nothing whatever is mentioned therein regarding any valuation of the firm's assets.

"(*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 goodwill of the company. It is understood that the foregoing shall apply in case the other partners wish to continue the operation 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 is argued by the respondents that the words " 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 " in clause (*k*), binds the representatives of a deceased partner to accept whatever value the assets of the partnership may be entered at in the books. It should have to be noted that the value of the immovable property of the firm has never been altered in the books, but still stands at the value at which it was taken over in 1923.

Now " the books of the company " referred to in clause (*k*) are those that have to be kept in compliance with clause (*f*) which says: "The company will keep regular commercial books in which will be entered all the transactions concerning the company and the partners." It then goes on to say: " These books will be balanced and closed every year, etc., and the profits and loss of the company will be determined." From this clause (*f*) it is clear that the purpose of the books was to keep an exact account of the business transactions of the firm in order to ascertain the divisible profits. And there is nothing in clause (*f*) to make obligatory the keeping of any other accounts. Hence the books referred to in clause (*k*) are those kept for the purpose of determining the profit at the end of each period. The question of the value at which the immovable property of the firm should be entered in the books does not appear to have been in contemplation at the time the partnership agreement was made. For this reason it seems to me that the contention of the respondents that the value of the fixed assets must be taken as that appearing in the books is not sound. And the fact that the deceased partner approved the 1945 accounts—which like all the other yearly accounts were drawn up to ascertain the divisible profits—does not in my view bind him or his heirs from disputing the value of fixed assets in the accounts as they were habitually entered therein at a nominal value.

In the case of a retiring partner three months notice would have to be given under clause (*k*) before the books were closed. Could it be said that the retiring partner would not be entitled to have a valuation of the partnership assets, and the new value inserted in the accounts ? He would not of course be entitled as against the continuing partners to any share in the goodwill, trade marks and so on of the business, as that is provided for in clause (*k*). There is nothing however in the agreement to say that in making up the books for the purpose of a partner being bought out of the firm, a valuation of the assets to ascertain their fair value should not be made before the books of the partnership are closed.

The question of the deduction of 15% from the retiring

partner's share in credits to third persons and of 10 per cent. on the value of the existing goods whether or not the book values of these particular items are taken does not affect the main issue of whether a retiring partner is entitled to have a fair valuation made of the fixed assets of the partnership before the closing of the books.

If a retiring partner is entitled to have the fair value of assets, as they stand on the day the books are closed, entered in those books, then the appellant is likewise entitled to have a fair valuation of the assets made at the date of the death of the partner whose share she represents. It is obvious from the way the accounts were kept and the properties, machinery and so on always entered at cost price, that no proper valuation of the assets was ever made, and that the whole object of the yearly accounts was to find out the profits for division among the partners.

Counsel for the respondents in this appeal relied on the case of *Coventry* v. *Barclay* (3 De G. J. and S at page 327) to establish that as the firm had been in existence for 23 years and the books had always been kept in the same manner and balanced yearly, and the properties of the partnership had always been entered in the books at cost, and as this had been done with the knowledge and consent of the deceased partner, a usage had become established that the value of these properties was the value as entered in the books and must be accepted as correct. They further argued that the closing of the books in accordance with clause (*k*) must be done in the same manner as it was done every year.

This same point was raised in *Cruikshank* v. *Sutherland* where a passage from the judgment of Lord Westbury, L.C., in the case of *Coventry* v. *Barclay* was quoted by Lord Wrenbury as follows:

> "If a usage which on this subject has been uniform and without variation, be not strictly in accordance with the written articles, it becomes evidence of a new agreement by the partners, and is as binding as if it had originally been one and the same for thirty years."

Considering whether this principle could be applied in the case he was dealing with Lord Wrenbury commented as follows:

> "Was there here any usage or course of dealing such as that an inference is to be drawn that on the death of a partner his share is to be paid out on the footing of book values?"

How could there be a practice and without variation to pay a deceased partner's share on the footing of book

values and not of fair values, where no partners had retired before? The only practice which existed—and that only on two occasions, namely, in April, 1915, and April 1916—was to prepare the account—when the interest of all the partners was the same—on the footing of book values. When a partner died or retired, the interests of all partners were not the same . . . . . ".

" Even if there were a usage to state an account for one purpose in one way, that is not a usage to state it for another purpose in the same way . . . . . ".

" 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 . . . . . The partners have never had any such event in view in making the account which they have made".

The position in the present case is substantially the same as in Cruikshank's case and the arguments of Lord Wrenbury apply. Since the foundation of the partnership in 1923 no partner had died or retired, and consequently at no time during the continuance of the partnership had the interests of the partners been conflicting. And as no partner had ever retired or died no usage could have been established as to the way the assets should be valued on the happening of such an event.

As therefore there is nothing in the partnership agreement to restrict valuation of the assets to book values, and there can be no custom by which the book values must be taken, the assets will have to be taken at the fair value to the partnership at the date of death of the deceased, namely 5th June, 1946.

The finding of the Court that the balance-sheet made up to 31st December, 1945, bound the deceased and his heirs with regard to all the accounts included therein must in my opinion be set aside. That account was made up like all the yearly accounts to ascertain the profits, and at a time when the interests of all the partners were identical. On the death of the deceased the interests of his heirs were not the same as those of the continuing partners; and in the absence of very clear provision to the contrary in the partnership agreement the heirs are entitled to have the property of the partnership valued for the purpose of the continuing partners paying out the share of the deceased partner in the same way as for a retiring partner. The finding of the Court as regards the 1946 account, made after the death of the deceased, that the appellant was entitled to have an account taken of the period 1st January to 5th June, 1946, by means of the partnership books if that implies taking the book values for the fixed assets it seems to me

cannot stand. The effect of finding that the balance-sheet up to 31st December, 1945, cannot be challenged as regards the accounts therein is to fix the value of the properties of the partnership at their book value. The effect of finding the appellant entitled to have an account for the period 1st January to 5th June, 1946, taken by means of the partnership books is that the book values of the partnership properties must be accepted in any such account. These findings are in my view contrary to the correct principle on which a retiring partner is entitled to be paid out by his co-partners. In the absence of any agreement he should be bought out at a fair valuation of his share to the partnership. This would normally include a share of the goodwill, but in this case the partnership agreement excludes that. The agreement however does not exclude a share in the value of immovable property and machinery, nor does it provide any means for valuing such assets of the partnership in case of retirement or death.

With regard to the sums shown as reserves in the yearly balance-sheets, these sums represent undistributed profits to which in my mind a retiring partner or the representatives of a deceased partner aside from agreement to the contrary would be entitled to his share.

The judgment of the lower Court should, therefore, be varied in respect of its finding on the accounts, and an account should be taken and balance-sheets prepared as at 5th June, 1946. For the purpose of this account a valuation must be made of all the assets of the partnership based on the consideration of what was their fair value to the partnership. After deducting therefrom 15 per cent. of the deceased's share in credits and 10 per cent. of his share in the stock in hand, both as on 5th June, 1946, the sum found due on such accounts to the deceased partner should be paid to the appellant.

The costs of this appeal should be borne by the respondents who filed cross-appeals.

Arguments by counsel on paragraph 9 D (*c*) of the statement of claim heard.

(The parties agree that in addition to the deductions provided in article (*k*), which must be made from the sum

due to the deceased in the partners' accounts together with his share in the surplus assets, there must also be deducted whatever sums have been paid by the surviving partners for the use of the deceased or the plaintiff in respect of income tax, estate duty or otherwise).

The judgment of the Court was delivered by:

HALLINAN, C.J.: One part of the plaintiff's claim was not dealt with by the trial Court in its judgment; and for the purpose of disposing of all the issues before the Court on the appeal it has been agreed between the parties that this issue can finally be disposed of here on the appeal. This part of the claim is contained in para. 9 D (*c*) of the statement of claim, and is based on section 44 of the Partnership Law (Cap. 196) which provides that where a partner dies and the surviving partners carry on the business of the firm without any final settlement of accounts the estate of the deceased partner is entitled either to the profits from the date of death or to 9 per cent. on the deceased partner's share of the assets of the partnership. The proviso to this section has given rise to the principal arguments on this part of the claim. Under the proviso, where the partnership agreement gives the surviving partners an option to buy out the deceased partner's share, the provisions of section 44 do not apply; but if in the exercise of the option the surviving partners do not in all material respects comply with the terms thereof then the provisions of section 44 do apply.

Sir Panayiotis Cacoyannis for the defendant firm has submitted that section 44 only applies in the case of a dissolution and that where there is an option given to the surviving partners under the partnership agreement the provisions of section 44 cannot apply unless, upon a failure to exercise the option or the wrong exercise of the option, there is dissolution of the partnership. In this case even if the option was not duly exercised, there was no dissolution and therefore section 44 does not apply. We are unable to accept this interpretation of the proviso.

In our view the true meaning of the proviso is that if the option is not duly exercised, then the right to profits or to interest is given to the estate of the deceased partner under section 44, which must be applied *mutatis mutandis* to the period between the death and the final settlement even though there is no dissolution and the surviving partners carry on the business.

The question which has caused us some difficulty is whether in the facts and circumstances of this case the option has been duly exercised; or whether the surviving partners have not in all material respects complied with the terms of the option. Article (*k*) of the partnership agreement provides that the provisions of the clause shall apply in

case of the death of one of the partners and the clause provides that there is an option given to the surviving partners to buy out the share of the deceased partner, and this is to be done by closing the books and by paying to the heirs of the deceased partner whatever the heir is entitled to in accordance with these books. After the death of the deceased partner a dispute arose as to certain tobacco and funds in Greece between the estate of the deceased partner and the surviving partners. We have not been referred to any evidence or correspondence as to the issues raised on the present litigation until these proceedings were begun in November, 1948. In these proceedings the defendants have alleged that the plaintiff is not the heir of the deceased, that she is not entitled to the immovable property of the partnership and that even if she was entitled to this property it must be assessed at its book value; and lastly they alleged that she is not entitled to a share in the reserves. We must assume in the absence of evidence that this was the stand which the surviving partners intended to take when they purported to exercise their option to purchase the deceased's share, and in taking that stand, in our view, they have not complied with the terms of the option which was given to them in article (*k*) of the partnership agreement.

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. We cannot see how this action can relieve them of their liability for paying the deceased's share in the profits since his death or alternatively interest on his share in the assets.

Under section 44 the plaintiff has opted (as she is entitled to do) for interest rather than for profits. We accordingly find that the plaintiff is entitled, under section 44, to nine per cent. on the deceased's share in the assets since the 5th June, 1946, and that the sum on which the 9 per cent. is to be paid will be the sum to which the judgment of the Court on appeal have declared her to be entitled, less whatever sum has been paid by the surviving partners for income tax on the deceased's share in the profits and for estate duty and for any other sum paid to the plaintiff's guardian for her use.

The order of the trial Court will be varied by setting aside that part of the order which directs accounts and by substituting therefor the following:—

Mr. Normand is appointed a referee under section 41 of the Courts of Justice Law, 1953, for the purpose of taking the accounts set out in this order. The referee shall be entitled to an inclusive fee of two hundred guineas, half of which shall be paid by the plaintiff and the other half by the defendants who have filed cross-appeals. The referee shall have the powers and privileges of an arbitrator under

Order 49, rules 10 and 14, of the Rules of Court, 1938. Any application by the referee for the aid of the Court under Order 49, rule 14, should be made to the trial Court.

The accounts to be taken by the referee are as follows:—

1. An account as on the 5th June, 1946, of the fair value to the firm of the debts due for goods and tobacco and of the stock-in-trade;

2. An account of the fair value to the firm of all the assets on the 5th June, 1946, excepting the value of the goodwill and trade-marks;

3. An account of the sums due to the deceased G. A. Patiki in the partners' accounts (including capital, loan, and current) as on the 5th June, 1946, and of the surplus assets on that date; and

4. An account of whatever sums have been paid by the surviving partners for income tax on the deceased's share in the profits, for estate duty, and for any other sum paid to the plaintiff's guardian for her use.

The plaintiff is entitled to receive:

A. Such sums as may be found due to her in the partners' accounts as on the 5th June, 1946, together with one-fifth share in the surplus assets, subject to the following deductions:

(i) A sum equal to 15 per cent. of one-fifth part of the value of the debts due for goods and tobacco on the 5th June, 1946;

(ii) A sum equal to ten per cent. of one-fifth of the value of the stock-in-trade as on the 5th June, 1946;

(iii) Whatever sums are found to have been paid by the surviving partners for the use of the deceased or the plaintiff in respect of income tax, estate duty or otherwise.

B. Nine per cent. interest as from the 5th June, 1946, upon whatever balance is found due to the plaintiff under '*A*' above.

The plaintiff is also entitled to her costs of the appeal as against the defendants who have filed a cross-appeal. The question of costs in the Court below may stand over until this action comes up for further consideration in the District Court after the referee has filed his report in that Court.