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

DEMETRA GEORGHIOU PATIKI of Athens

Appellant (Plaintiff),

and

A. THE FIRM A. G. PATIKI & CO. of Limassol

B. 1. IOANNIS G. PATIKIS
2. VASILIOS G. PATIKIS
3. CHRISTOS A. PATIKIS
4. CONSTANTINOS A. PATIKIS of Limassol as partners of the firm A. G. Patikis & Co. of Limassol and/or personally

Respondents (Defendants).

(Civil Appeal No. 4246.)

1958
March 14, 18
April 30

DEMETRA G. PATIKI
v.
THE FIRM A. G. PATIKI & CO. AND OTHERS

Judgment—Official Referee—Courts of Justice Law, 1953, Section 40 (1) and (2)—Judgment for an amount to be ascertained by referee whose report will come in due course before the Court of trial on further consideration.

Partnership—Deceased's partner share in the partnership assets—Payment of, by surviving partners—Partnership Law, Cap. 196 Section 44 and proviso *thereto.*

Judgment declaring rights and directing certain accounts to be taken by a referee—And deductions to be made of sums paid after death by the surviving partners in respect of income tax and estate duty—The Income Tax Law, Cap. 297, Sections 25, 26, 27 and 29—The Estate Duty Law, Cap. 294, Sections 2 (1), 28, 58 (1) 74 (2) and 75 (1).

*Interest at the rate of 9% per annum as from death on the balance to be found due by the surviving partners to the heir of the deceased partner—*Proviso *to Section 44 of the Partnership Law, Cap. 196—How the said sums paid by the surviving partners should be deducted—Construction of the judgment—Principles upon which the judgment must be construed.*

Judgment debt—Interest thereon at the rate of 4% p.a. as from judgment—Civil Procedure Law, Cap. 7, Sect. 2 & 10—Judgment whereby a party is adjudged to pay a sum to be ascertained later on by an Official Referee or otherwise—Date as from which interest at the rate of 4% runs—Time when the judgment debt comes into being—

The Courts of Justice Law, 1953, Sections 39, 40 (1), 41 (2)--Civil Procedure Rules, Order 34 rule 2.

The Appellant is the sole heir of the deceased George Patiki, a partner, at all material times, in the firm of the Respondents. George Patiki died on the 5th June 1946. This Appeal constitutes the last stage of a litigation between the parties which started by an action brought by the Appellant against the Respondents (and another) in the District Court of Limassol (Action No. 999/48). On appeal and cross-appeal from the judgment of the D.C. of Limassol the Supreme Court on the 22nd January 1954 varied the judgment of the trial Court;

See : *Demetra Georghiou Patiki, a minor* v. *The Firm A. G. Patiki and Co. and others,* Civil Appeal No. 4027, 20, I, C.L.R. 36.

The Respondents appealed to the Privy Council. Their Lordships affirmed the judgment of the Supreme Court. (see: *Privy Council,* Appeal No. 26/54, reported in 20, II, C.L.R. 77). The facts are well summarized in the head-notes to the report of the judgment of the Supreme Court (*supra*).

By its judgment in the Civil Appeal No. 4027 referred to hereabove, the Supreme Court, reversing partly the judgment of the D.C. of Limassol, ordered on the 22nd January 1954 that certain accounts be taken before a referee whose report in due course should come before the Court of trial (the District Court of Limassol) on further consideration. The Supreme Court further ordered, *inter alia,* as follows :

"The Plaintiff-Appellant shall receive :

A. Such sums as may be found due to her in the partners' account as on the 5th June of 1946 (Note : date of the death of her father, the deceased partner), together with one-fifth share in the surplus assets, subject to the following deductions : I..... II.....III whatever sums are found to have been paid by the surviving partners for the use of the deceased or the Plaintiff-Appellant in respect of income tax, or estate duty....".

"B. Nine per cent interest as from the 5th June 1946, upon whatever balance is found to be due to the Plaintiff-Appellant under "A" above..... The question of costs in the Court below shall stand over until this action comes up for further consideration in the District Court after the above named referee has filed his report in that Court".

The report-award of the Referee was filed with the D.C. of Limassol on the 18th April, 1957, and, eventually, the Court entered judgment on the 21st Dec., 1957 whereby it was ordered that the sums found to have been paid by the surviving partners should, after being aggregated, be deducted straight from the amount found to represent the value of the deceased partner's share in the firm at the time of his death viz. on the 5th June 1946 and that such balance should carry interest at 9% per annum as from that date till the judgment of the District Court

of the 21st December 1957 and thereafter at the rate of 4% per annum. It was contended by the Appellant that the payments made by the surviving partners after death (i.e. after the 5th June 1946) but before the judgment of the Supreme Court dated the 22nd January 1954 (*supra*) in respect of income tax and estate duty should not have been aggregated and deducted straight from the share of the deceased partner in the assets of the firm at the time of his death viz. on the 5th June 1946, but that the sum representing that share on that date should carry interest at 9% p.a. up to the date of each payment made by the surviving partners as aforesaid and after appropriating each such payment first towards the interest accrued on the above sum and the balance, if any, towards the principal, and computing in the same way 9% interest to the date of each subsequent payment by applying the same scheme of appropriation until we get to the date of the judgment of the Supreme Court of the 22nd January 1954. No dispute arose as to the payments made after that judgment. The Respondents, while agreeing in the way the D. Court of Limassol proceeded to make the aforementioned deductions, argued, however, upon their cross-appeal that the Lower Court erred in allowing interest at the rate of 9% as from the 5th June 1946 (date of the death of the deceased partner) till the date of its order of the 21.12.1957 upon the referee's report. The Court, in the submission of the Respondents, ought instead to have allowed interest at the rate of 9% as from the date of the death of the deceased partner (viz. as from the 5th June 1946) till the judgment of the Supreme Court of the 22nd January 1954 (*supra*)—that being the date, it was alleged, of the final judgment—and at the rate of 4% thereafter in accordance with Section 10 of the Civit Procedure Law, Cap. 7. Section 10 reads as follows : " Every judgment debt shall carry interest at 4% per annum from the date on which the judgment is pronounced...".

Held, dismissing the Appeal :

(1) In the absence of any allegation of fraud or mistake the Court is not concerned with the correctness of the order itself dated the 22nd January, 1954 (*supra*) but only with its correct reading, that is with its true construction. It is only if the order is open to some other construction or it is ambiguous in its terms that argument on the merits of the case might offer some help.

Gordon v. *Gonda* (1955) 2 All E.R. 762, *referred to.*

(2) The order in question is free from any ambiguity and the plain meaning attibutable to it is that 9% interest should be paid on the balance found and that balance could only be ascertained and arrived at after the deductions specified in part A of the order had been made. Plainly, those sums, after being aggregated, should be deducted straight from the amount found by the Referee to represent the value of the share of the deceased's partner at the time of his death.

Per curiam : (a) The Respondents were ordered to pay interest at 9% for the share of the deceased partner (the Appellant being the sole heir) because they unduly withheld the share of the deceased from the Appellant, the person entitled to it. (see Partnership Law, Cap. 196 s. 44).

(b) However, the payments effected by the surviving partners were made to meet the income tax due by the deceased and the estate duty payable out of his estate to the authorities. It cannot be said that the amounts have been withheld from the heir until the date of their payment. The sums involved were or ought to have been earmarked for the purpose they have been paid from the date of the death of the deceased partner.

(c) Those or similar considerations might have been present in the mind of the Supreme Court when the order in question of the 22nd of January 1954 was made.

Held, dismissing the cross-appeal :

(1) A judgment or order may be final for one purpose and interlocutory for another. The order of reference of the Supreme Court, dated the 22nd January 1954, is in the nature of an interlocutory order made under a judgment directing how the declarations of right already given are to be worked out. The judgment, as far as the declarations of rights are concerned, is a final judgment. In the instant case the rights of the parties were declared by the Judgment of the Supreme Court of the 22nd January 1954, which, after being affirmed by the Privy Council (*supra*), became final. As far as the issue of the order of the reference itself is concerned, that also became final. But the directions of the Supreme Court, embodied in the order in question, which relate to the ascertainment of the balance in favour of the appellant by the referee and to the judgment which was to be entered by the District Court consequent upon the filing of the report or award, were interlocutory in nature.

(2) The order of reference under review was made under Section 40 (1) of the Courts of Justice Law, 1953. The reference made by the Supreme Court on the 22nd January 1954 was a reference for trial and the award of the Referee had under Section 41 (2) of that law to be filed in Court and the Court on the application of the parties or on its own motion could direct that such report or award be set aside or entered as a judgment of the Court. This clearly indicates that the judgment debt envisaged by the order of reference of the Supreme Court came into existence only after the District Court in this case directed on the 21st Dec. 1957 judgment to be entered, as per award of the referee, in favour of the Appellant.

Chadwick v. *Holt* (1856) 8 De G. and M. 584, *considered.*

Borthwick v. *Elderslie Steamship Co.* (1905) 74 L.J. K.B. 772, *distinguished.*

(3) It is true that no appeal lies from the award of the referee. But in the concluding paragraph of the order of reference it is stated that the action should be taken before the District Court for further considerations after the report is filed, and this amounts to providing for liberty to apply, which is another indication that the parties could object to the award being entered as a judgment. The decision of the District

Court for setting aside the award or entering a judgment is, of course, subject to appeal. It is difficult indeed in the circumstances of this case to assume that there was a judgment debt prior to the order of the District Court turning the award of the referee into such a judgment.

Appeal and Cross-Appeal dismissed.

Cases referred to :

Gordon v. *Gonda* (1955) 2 All E.R. 762. C.A.

Borthwick v. *Elderslie Steamship Co. Ltd.* (1905) 74 L.J. K.B. 772.

Light v. *William West and Sons Ltd.* (1926) 2 K.B. 238. C.A.

Ashover Fluor Spar Mines Ltd. v. *Jackson* (1911) 2 Ch. 355.

The Caledonian Railway Company v. *Sir Williams Carmichael* (1870) L.R. 2 Sc. and Div. 56.

Attorney General v. *Lord Carrington* 6 Beav. 454; S.C. 12 L.J.Ch. 453; 49, E.R. 901—904.

Chadwick v. *Holt* (1856) 8 De G. and M. 584.

Appeal and Cross-Appeal.

Against the judgment of the District Court of Limassol (Zenon P.D.C. and Kakathymis D.J.) dated the 21st December 1957 (Action No. 999/48) in an application for judgment for the Plaintiff (Appellant) against the Defendants-Respondents on the basis of the report of the Official Referee as directed by the Supreme Court on the 22nd January 1954 in Civil Appeal No. 4027 (see 20 Part I, C.L.R. 36), which decision of the Supreme Court was upheld by the Privy Council (see Privy Council Appeal No. 26/54, 20 Part II C.L.R. 77.).

J. Clerides Q.C. with *J. Potamitis* for the Appellant.

Sir Panayiotis Cacoyiannis for the Respondents.

Cur. Adv. Vult.

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

ZEKIA, J. : The present appeal arose from the interpretation of an order constituting part of the judgment of the Court of Appeal given in this case on the 22nd January, 1954, by which part of the judgment of the Court below was substituted for by the following order :

"THIS COURT..... DOTH AFFIRM the judgment of the Court below except that part of the judgment which adjudged the manner in which the deceased's share in

the partnership assets should be ascertained and for that part of the judgment the following order be substituted:

That Wilfrid Patrick Normand, of Russell and Co., Nicosia, be and is hereby appointed a referee under section 40 (1) 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 - appellant and the other half by defendants - respondents A and B, 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 to 1953. Any application by the referee for the aid of the Court under Order 49, rule 14, shall 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 good-will and trade-marks;

3. An account of the sums due to the deceased G. A. Patikis 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 sums paid to the plaintiff's guardian for her use.

The plaintiff - appellant shall 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 fifteen 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 - appellant 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 - appellant under "A" above.

AND THIS COURT DOTH ORDER that the cross - appeals of defendants - respondents A and B be dismissed.

AND THIS COURT DOTH FURTHER ORDER that the plaintiff - appellant be paid her costs of the appeal by defendants - respondents A and B.

The question of costs in the Court below shall stand over until this action comes up for further consideration in the District Court after the abovenamed referee has filed his report in the Court.

Dated the 22nd day of January, 1954.

(Sgd.) E. Hallinan,
Chief Justice."

In pursuance of the said order, Mr. Normand, the referee appointed, filed on the 18th April, 1957, with the District Court of Limassol his award which consisted of a statement of the share of the deceased partner in the surplus assets of the firm A. G. Patiki & Co. of Limassol as on the 5th June, 1946, and as valued by the said referee. It was agreed by the parties that the payments made by the respondents on different dates after the death of the partner and prior to the judgment of the Supreme Court aggregated £18,257. 533 mils and payments made after the judgment amounted to £22,200.000.

Payments were made as follows:

Prior to judgment

On the 18.11.46:	For income tax of the deceased (45)	£7,814.250	mils
On the 20.11.46:	Estate duty on account	4,753.000	"

On the 29. 4.47:	Income Tax 1947 (46)	£2,581.450	Mils
On the 17. 7.48:	To the guardian of the appellant	100.000	"
On the 10. 8.48:	For Estate duty	1,500.000	"
On the 10.11.48:	" " "	1,000.000	"
On the 3. 2.49:	" " "	508.833	"

After judgment

On the 29.7.55:	£18,200.000	Mils
On the 1.12.55:	4,000.000	"

The issues involved in this appeal are two: (1) Whether the payments made prior to the judgment of the Supreme Court after being aggregated should be deducted straight from the share of the deceased in the assets of the firm as valued on the 5th June, 1946, or whether the sum of £38,909.995 mils — representing the share of the deceased in the surplus of assets of the firm on the date of his death as found by the referee — should carry 9% interest up to the date of each payment and after appropriating each payment first towards the interest accrued on the above sum and the balance, if any, towards the payment of the principal, and that computing in the same way, 9% interest to the date of each subsequent payment by applying the same scheme of appropriation until we get to the date of the judgment of the Court of Appeal.

As to the appropriation of the sums paid after the said judgment there is no dispute and it is conceded that the respondents are entitled to deduct the £22,200 — the total amount of payments effected after judgment — from the principal.

The second issue relates to the rate of interest to be charged on the balance found in favour of the appellant, on the date of the judgment of the Supreme Court, namely, whether the balance found due to the appellant on such date should continue to carry interest at 9% up to the filing of the award by the referee with the District Court, that is up to 21st December, 1957, and, thereafter, 4% until payment or whether the said balance should carry only 4% interest after the date of the judgment of the Supreme Court, that is, 22nd January, 1954, to the date of payment

irrespective of the fact that the award of the referee was not filed until the 21st December, 1957.

The answer to the first issue depends upon the construction to be placed on the order given by the Supreme Court. In the absence of any allegation of fraud or mistake we are not here concerned with the correctness of the order itself but only with the correct reading, that is, with the true construction of the order. The reasons given by the Court in support of the order therefore are only relevant in helping to construe the order where its terms are open to more than one interpretation. It is only if the order is open to some other construction or it is ambiguous in its terms that argument on the merits of the case might offer some help. (see: *Gordon* v. *Gonda* (1955) 2 All E.R. 762. C.A.).

The learned Counsel of the appellant argued that the order relating to the payment of interest should be read together with the judgment as a whole and such interpretation should be placed on the order which is consistent with the rest of the judgment and, since the appellant was entitled to 9% interest or profit on the share of the deceased in the assets of the firm as from the date of the decease, it would be contrary to the intention expressed in the judgment to read and construe the order in the way the president of the Lower Court did, namely, that the payments made prior to the judgment of the Supreme Court irrespective of the dates they have been effected should be deducted from the share of the deceased in the assets of the firm valued at the time of his death without charging the respondents with 9% interest up to the date of each payment.

It was further argued that, since these payments were made without any appropriation, the rule that payments should first be applied against interest and then, if any balance, against principal, ought to have been followed.

The material part of the order reads: "The plaintiff-appellant shall 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 fifteen 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 - appellant 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 - appellant under 'A' above."

I agree with the view taken by the learned President of the District Court of Limassol that the order in question is free from any ambiguity and the plain meaning attributable to it is that 9% interest should be paid on the balance found only and that balance could only be ascertained and arrived at after the deductions specified in Part 'A' of the order. Part 'A' comprises three items. It is not and cannot be disputed that sums to be deducted under item (i) and (ii) should be deducted straight from the share of the deceased in the assets of the firm as valued on the date of the decease. The payments made under item (iii) are plainly treated in the same way as previous items, as deductions to be made. There is nothing in the order to differentiate between these items. The payments made by the surviving partners to the use of the deceased or the plaintiff - appellant, with the exception of the sum of £100 paid to the guardian, were made for the purpose of defraying income tax and estate duty of the deceased partner.

In the instant case the contract of partnership gave an option to the surviving partners to purchase the interest of the deceased partner in the firm. The appellant as the sole heir of the deceased partner was considered entitled to 9% interest on the share of the deceased in the partnership assets as from the date of decease under the proviso to section 44 of the Partnership Law, Cap. 196.

That section contemplates the use of the share of the deceased after his death by the surviving or continuing partners where the option to purchase the share by the latter does not exist. The proviso to the section is applicable where such an option exists but in its exercise the surviving partners do not in material respects comply with the terms of the option specified in the contract. Respondents were ordered to pay interest for the share of the deceased in the assets because they unduly withheld the share of the deceased from the appellant, the person entitled to it.

The payments effected however, with the exception of an insignificant sum of £100, were made to meet the income tax due by the deceased and the estate duty payable out of his estate to the authorities. Could it be said that the amount covered by these payments was withheld from the heir until the dates of their payment? The sums involved were or ought to have been earmarked for the purpose they have been paid, from the date of the death of the partner and the interests of the appellant in the sums paid, if any, were not likely to be affected. The deceased at the material period was living in Athens; he was a non-resident partner of the firm. The appellant, a minor at the time, was living with him in Greece. The resident (surviving) partners were managing the business of the firm carried on in Cyprus.

Respondents under sections 25, 26, 27 and 29 of the Income Tax Law were required to render statements of income of the non-resident partner and also liable to pay his income tax. Under section 30 of the same law they had the right to retain out of the money coming to their hands on behalf of the absentee partner an amount sufficient to pay the income tax.

Again under section 58 (1) of the Estate Duty Law a surviving partner may be required to pay the estate duty of the deceased partner.

Under section 28 an executor of the deceased is bound to pay the estate duty. The word 'executor' includes in the definition the administrator of the deceased.

Respondents in the instant case being the persons who had the care, custody, possession, management of property

on behalf of a non-resident person are considered 'agents' under section 2 (1) of the Estate Duty Law and in their capacity as such under section 74 (2) they have to furnish the Commissioner of Estate Duty with information and particulars enabling him to levy estate duty. Under section 75 (1) "any person from whom estate duty is recoverable or has been recovered on behalf of another person may retain out of any assets coming into his possession or control so much thereof as shall be sufficient to produce the amount payable as estate duty". It cannot therefore be said that the respondents withheld from the appellant part of the share of the deceased corresponding to the aforesaid payments.

These or similar considerations might have been present in the mind of the Supreme Court when the order in question was made, I am of the opinion therefore that the appeal should fail.

The second issue constitutes the subject-matter of the cross-appeal and it is more difficult to answer.

This issue relates to the application of section 10 of the Civil Procedure Law to the order under consideration. Section 10 reads: "Every judgment debt shall carry interest at the rate of four per centum per annum from the date on which the judgment is pronounced until the same shall be satisfied and such interest may be levied under a writ of execution on such judgment." This is practically identical with section 17 of the Judgments Act, 1838 (1 and 2 Vict. c. 110).

Sir Panayiotis for the respondents contends that whatever balance found in favour of the appellant as per order of the Supreme Court should carry interest at only 4% as from the date of the judgment of the Supreme Court and not 9% interest until the filing of the award by the referee and 4% thereafter as it has been ordered by the learned President of the District Court. What is a judgment debt and when in this case it has come into being are the crucial points involved. Judgment debt is defined in section 2 as "money ordered by a Judgment to be paid". A pecuniary claim with or without interest when merged in the judgment carries only 4% interest after the judgment is pronounced notwithstanding that a creditor is entitled either

by agreement or statute to a higher rate of interest on the principal sum.

The respondents rely for their cross-appeal mainly on the following :

(a) There was only one judgment in this case and that was the one delivered by the Supreme Court on 22nd January, 1954. That judgment was final and conclusive and dealt with all points involved. The order made under section 40 (1) of the Courts of Justice Law, 1953, was supplementary to the judgment. The District Court of Limassol was directed to receive the report of the referee and see whether the referee complied with the direction of the Supreme Court, but not to give any judgment at all but simply to supplement the judgment of the Supreme Court by inserting the certified sum, that is, the sum ascertained into the original order. The referee was appointed under section 40 (1) of the Courts of Justice Law, 1953. The balance found to be due, and agreed to by both parties, is £20,600. What was left to the Court below to decide is what is provided in section 41 (2). The District Court ought to say "we direct that the amount found to be due by the referee under Para. A of the Judgment of the Supreme Court is £20,600 and we order that this amount shall be deemed to be the amount found to be due under the judgment of the Supreme Court and shall form part of that judgment". The referee was to decide the amount due and to do nothing about interest. The report contained no reference to interest.

If the order given by the President is to be regarded as an independent judgment then there will be two judgments in one case on the same subject-matter which is incomprehensible and the judgment of the District Court should be appealable.

(b) That *Borthwick v. Elderslie Steamship Co. Ltd.* (1905) 74 L.J. K.B. 772 applies on all fours to the present case.

(c) That Order 41 r. 3 of the Rules of the Supreme Court in England (corresponding to 0. 34 r. 2 of our Civil Procedure Rules) and the note to the said rule under the subhead "judgment for amount to be ascertained" which appears in the Annual Practice lends support to the submission.

The main points submitted by Mr. Clerides, Q.C., were:

(a) That a judgment may be final for one purpose and interlocutory for another. Reference was made to Halsbury's, on the Laws of England, 2nd Edition, Vol. 19 p. 209 and *Light* v. *William West & Sons Ltd.* (1926) 2 K.B. 238, was cited. From the nature of the order itself it is clear that it is interlocutory; it directs the referee to ascertain the sum due to the appellant by the respondents. There was no judgment debt until the referee filed his report with the District Court and the order for payment was issued. Had the Court given judgment for the amount to be certified by the referee appointed without recourse to another Court such judgment or order would have been final because the Registrar would merely endorse on the judgment the words "certified so much" and nothing more was needed. This was not the case here.

(b) That *Ashover Fluor Spar Mines Ltd.* v. *Jackson* (1911) 2 Ch. 355 is applicable and should be followed. That *Borthwick* v. *Elderslie* (*supra*) was distinguishable from the present case because interest as from the date of the judgment of the Court of Appeal was granted in that case not as a matter of course but on account of the protraction of the proceedings by the defendants. In the present case, unlike the *Borthwick* case, statutory interest provided by section 44 of the Partnership Law started to run as from the date of the death of the partner, that is, 5th June, 1946. The order of the Supreme Court did not create a judgment debt but simply said to what the appellant was entitled and the amount was left to the referee to ascertain and the Lower Court to fix the judgment debt.

(c) That the note under the subhead "judgment for amount to be ascertained" occurring in the Annual Practice under 0. 41, r. 3, should be read as referring to the instances where the full amount found by the referee is to be certified and endorsed by the Registrar only. The Registrar will sign under the judgment "sum certified by the referee so much.". It does not cover instances where the report of the referee will have to come before the Court for the delivery of judgment by which a judgment debt is created.

A short review of the relevant authorities touching the

issue under consideration might not be out of place here. After the passing of the Judgments Act, 1838, the earliest case reported which dealt with section 17 of that Act, the section that enacted that Judgment Debts shall carry 4% interest from the date the Judgment is entered etc., appears to be the case of the *Attorney-General* v. *Lord Carrington*, 49 E.R., p. 901—904. I read the relevant parts:

"By the decree, dated the 13th of December 1842, the lands of the Defendant were declared chargeable with an annuity of £40 a year, and the Master was directed to take an account of the arrears of the annuity of £40; and it was ordered, that what the Master should find to be the amount of such arrears should be paid by the Defendant into the bank.

The Master by his report, made in April 1843, found £917 to be due, which was immediately paid into the bank.

The Attorney-General now contended, that, under the 1 & 2 Vict. c. 110 ss. 17, 18, the Defendant was liable to pay interest at 4% on this sum from the date of the decree to the date of the Master's report.

On the other hand, it was contended, that there was no decree whereby any sum of money was payable, at least until the amount had been ascertained by the Master; and to order interest to be paid would be to vary the decree.

THE MASTER OF THE ROLLS (Lord Lagdale) was of opinion that the Defendant was not chargeable with interest during this period.".

In the *Caledonian Railway Co.* v. *Sir William Carmichael* (1870) L.R. 2 Sc. and Div. 56, it was held that:

"Where a pecuniary claim has been left by the creditor for years unascertained and unexamined, the debtor having always been ready and willing to meet the demand, it was held by the House, reversing the decision below, that the right to interest on the principal sum did not commence until after the debt has been established, and the precise amount settled.".

In *Borthwick* v. *Elderslie Steamship Co.* (1905) 74 L.J. K.B.

772—the case relied on by the respondents—the headnote reads :

"Judgment for defendants at the trial of an action for unliquidated damages was reversed by the Court of Appeal, and it was ordered that instead thereof judgment should be entered for the plaintiff for such sum as damages as should be assessed by a referee to be agreed upon by the parties. The parties subsequently agreed that the damage should be a certain agreed sum and interest. The plaintiff applied to the Court of Appeal that judgment should be entered for him for the agreed amount and interest from the date of the judgment at the trial of the action in the first instance :—

Held, that judgment must be entered for the plaintiff for the agreed amount and interest from the date on which the judgment was pronounced in the Court of Appeal.".

The material parts of the judgment of the Court of Appeal were as follows :

"It is ordered that the plaintiff's appeal be allowed, that the above-mentioned judgment of the Honourable Mr. Justice Walton of the 9th day of March, 1903, be wholly set aside, and instead thereof that *judgment be entered in the action for the plaintiff against the defendants on all issues for such sum as to be agreed upon by the parties,* with costs of action and of this appeal. And it is further ordered that the costs of the said reference be in the discretion of the referee so to be agreed upon. Liberty to apply.".

Collins, M.R., relied on the *Caledonian Railway case* cited above in deciding that the judgment of the Court of Appeal in awarding damages subsequently ascertained should not be antedated under the Rules to the date of the judgment of the trial Court which was reversed. On the other hand, the other member of the Court of Appeal, Romer, L.J., refused the antedating of the judgment on different grounds which appear at p. 776 of the report :

"In the present case there was a claim by the plaintiff for unliquidated damages, and the Court of Appeal held, reversing the judgment of the Court below, that the plain-

tiff was entitled to such a sum as damage as should be assessed by a referee. Generally such damages when so ascertained would be regarded as if they had been ascertained in the order of the Court of Appeal. That order of the Court of Appeal must, I think, be taken to be a judgment as of the day when it was pronounced, and not as a judgment of an earlier date, and I cannot see any sufficient ground for antedating the judgment, as we are now asked to do, in such a case as the present.".

In *Ashover Fluor Spar Mines Limited* v. *Jackson* — (*supra*) the case relied upon by the appellant — the facts were:

"By a consent order dated July 18, 1910, an action for an injunction to restrain a trespass on mines and for damages was compromised on the terms that it should be referred to a special referee to ascertain the damages, and the defendants were to pay the amount so found. On June 1, 1911, the special referee reported that £1,515 was payable by the defendants to the plaintiffs. Upon motion by the plaintiffs that the referee's report might be adopted, the question was raised as to whether interest was payable on the damages, and from what date:—

Held, that as the order of July 18, 1910, was not one whereby a sum of money was payable by the defendants to the plaintiffs within s. 18 of the Judgments Act, 1838, inasmuch as a further order was necessary, interest on the damages was not payable from the date of the order.".

Eve, J., distinguished the *Ashover* case from the *Borthwick* case in the following words:

"The order with which the Court of Appeal had to deal was an order of that Court whereby it was ordered that the judgment of the Court below dismissing the action should be wholly set aside, and that in lieu thereof judgment should be entered in the action for the plaintiff against the defendants on all issues for such sum as should be assessed by a referee, and it was conceded by counsel on behalf of the defendants and affirmed in terms by Romer, L.J., that the amount ultimately ascertained was to be treated as if it had been mentioned in the order, with the result that interest thereon ran from the date of the judgment. The order was in fact a judgment for

the sum subsequently ascertained, and on the sum being ascertained and a note of the amount being indorsed upon the judgment, execution would issue.".

The *ratio decidendi* appears in the part of his judgment which follows :-

"But would any such result follow on the order made in this case on July 18, 1910, and the filing of the certificate thereunder ? It belongs to a class of orders with which we are all familiar, and stands somewhere between the two alternative forms in which such orders are usually made. In the first of the two alternative forms the inquiry is directed, and liberty to apply, after the result has been certified, is given. In the second alternative the Court, after directing the inquiry, goes on to order the defendant to pay to the plaintiff the amount certified. The latter of these orders is, in my opinion, within, and the former outside, the provisions of s. 18 of the Judgments Act, 1838. An order which is so framed as to necessitate a further order being made before the obligation to pay arises cannot reasonably be regarded as "an order whereby a sum of money" is payable, and in cases where the form adopted is that which gives the plaintiff liberty to apply, and nothing more, I do not see how any interest can run on the amount certified until the further order to pay has been made.".

The weight of the authorities seems to support the following proposition, that is, if a party in an action by a judgment pronounced or entered is adjudged or ordered to pay a sum subsequently to be ascertained by an official referee or otherwise then the date of such judgment is the one for which 4% interest runs under section 17 of the Judgments Act, 1838, notwithstanding that the date on which the precise amount of debt due is ascertained by referee is long later. A judgment should be entered or an order of payment should be made against a party in unmistakeable terms for a sum to be ascertained later. A declaration of right is not enough for this purpose but the judgment or order should be couched in the usual terms when a party to an action is ordered or adjudged to pay a sum to the other party, *e.g.* an interlocutory judgment entered or pronounced for unliquidated damages where

liability is not disputed but the ascertainment of the amount of damages is referred to an official or special referee. In such cases the certificate, report or award of a master or referee is filed with the registry and the judgment is finally signed with the amount ascertained. On the other hand, an order directing the appointment of a referee with further directions for taking accounts or assessing damages in a particular way and filing the report or award with a Court, notwithstanding that such directions are preceded by a declaratory judgment as to the rights and liabilities of the parties involved, the appointment of the referee and the directions given constitute in substance only an order of reference and such order does not have the effect of a judgment within the Act. Such an order of reference necessitates the making of a further order before the obligation to pay arises and the judgment debt comes into being only after the filing of the report or award by the referee with the Court and after the Court adopts such report or directs a judgment to be entered as per such award.

The order under review is in the nature of an interlocutory order made under a judgment directing how the declarations of rights already given are to be worked out. The judgment, in so far as the declarations of rights of the parties involved are concerned, is a final judgment.

In the instant case the rights of the parties were declared by the judgment of the Supreme Court which, after being affirmed by the Privy Council, became final. As far as the issue of the order of the reference itself is concerned, that also became final but the directions of the Court embodied in the order in question which relate to the ascertainment of the balance in favour of the appellant by the referee—after taking accounts, hearing evidence on the value of the share of the deceased in the assets of the firm and making certain calculations and deductions as prescribed—and to the judgment which was to be entered by the District Court consequent upon the filing of the report or award were interlocutory in nature.

There is no doubt that a judgment or order may be final for one purpose and interlocutory for another. The terms "judgment" and "order" overlap considerably and are incapable of exact definition. (*See:* Halsbury's, Laws of Eng-

land, 2nd Ed. Vol. 19, p. 205). In the present case if the order of reference can be considered as having the effect of the judgment then the respondents might have a good case. In *Chadwick* v. *Holt* (1856) 8 De G. & M. 584, it was held that "decrees for account and for payment of what shall be found due did not have the effect of a judgment within section 18 of the Judgments Act 1838.".

It must be conceded, however, that the proposition laid down is not easy to reconcile with certain statements appearing in the judgment of Romer, L.J., quoted already from *Borthwick's* case. The immediate point involved in that case, however, was the antedating of a judgment on damages ascertained to the date of the judgment of the Supreme Court instead of to the date of the judgment of the trial Court which was reversed by the former Court. In other words the point in issue was whether the power vested in a Court to antedate its judgment under Order 41, r. 3, of the Supreme Court Rules should be exercised or not. In our corresponding Civil Procedure Rules, 0. 34, r. 2, no express provision for antedating a judgment is to be found. Furthermore, in *Borthwick's* case the judgment of the Supreme Court was in the following terms: "Judgment to be entered in the action for the plaintiff against the defendant on all the issues for such sum as damages as may be assessed by a referee". This is not the case in the present one.

The order under review is made under section 40 (1) of the Courts of Justice Law, 1953. The office copy of the order mentions the appointment of a referee having been made under section 41 but as the power of appointment is given either by section 39 (1) or 40 (1) the reference to the number of the section is obviously a mistake.

Sections 39 and 40 of the Courts of Justice Law, 1953, correspond to sections 88 and 89 of the Supreme Court of Judicature (Consolidation) Act, 1925, respectively. The reference made by the Supreme Court was a reference for trial and the award of the referee had under section 41 (2) to be filed in Court and the Court on the application of the parties or on its own motion might direct that such report or award be set aside or entered as a judgment of

the Court. This clearly indicates, in my view, that the judgment debt envisaged by the order of reference of the Supreme Court came into existence only after the District Court in this case directed judgment to be entered, as per award of the referee, in favour of the appellant.

This view is reinforced from the following: That the order of reference under sections 88 and 89 of the Supreme Court of Judicature Act can only be made if the liability of the defendant in the action is decided upon. The referee in England is empowered subject to the order of the Court to direct a judgment for either party; under our relevant sections of the Courts of Justice Law a judgment can only be entered by the direction of a Court; that an appeal lies from the award of an official referee on a point of law and that the powers of a referee, once the cause or matter is referred to him for trial, are the same as those of a trial Judge and an appeal lies from his orders dealing with interlocutory matter up to his giving of the judgment, and also an order of reference, report or award is open to appeal where improper evidence had been received or where the finding was against the weight of evidence. (see: notes to section 89 of the Supreme Court of Judicature (Consolidation) Act, 1925, at p. 3360—3364(Annual Practice, 1957).

It was one of the points strenuously argued by the learned counsel for the respondents that no appeal lies from the award or report of the referee and all the District Court had therefore to do was to insert the amount arrived at by the referee in his award into the judgment of the Supreme Court as an amount deemed to have existed in the original judgment of the Supreme Court. In the concluding paragraph of the order it is stated that the action should be taken before the Court for further consideration after the report is filed and this amounts to providing for liberty to apply which is another indication that the parties interested could object to the award being entered as a judgment. The decision of the Court for setting aside or entering a judgment, on certain grounds, is open to appeal. It is difficult indeed in the circumstances of this case to assume that there was a judgment debt prior to the direction of the District Court turning the award of the referee into such a judgment.

I am of opinion, therefore, that the cross-appeal should also be dismissed and each party should bear his own costs.

BOURKE, C.J.: I agree. The order of the Court will be as proposed by my brother Zekia, J.

Appeal and Cross-Appeal dismissed. No order as to costs.