PART XI

WINDING UP

PRELIMINARY

297. *Modes of winding up.* (1) The winding up of a company may be either--

(*i*) by the Court; or

(*ii*) voluntary; or

(*iii*) subject to the supervision of the Court.

(2) Save as otherwise expressly provided, the provisions of this Ordinance with respect to winding up shall apply to the winding up of a company in any of the modes specified in sub-section (1).

Synopsis

1. Scope. 2. Winding up by Court.

1. Scope. Section 412 applies to all the modes of winding up enumerated under the section.[1]

Martial Law Regulation No. 125 of 1972--effect of. MLR 125 is not in conflict with or contrary to provisions of Part X, Companies Ord., 1984. Provisions of Part X, therefore, are not impliedly repealed by it.[2]

2. Winding up by Court. Where a company which was struck off the register after it went into voluntary liquidation, was again restored to the register by an order of Court and after such restoration it was ordered by the Court to be wound up; it was held that the case was not one of voluntary liquidation but a liquidation by the Court.[3]

Notices to parties. Winding up orders are not administrative orders. Therefore notice of the proceedings for winding up must be given to the parties. Where that was not done, the order was illegal.[4]

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1. AIR 1950 Mad. 68=ILR 1950 Mad. 68 (DB).
2. PLD 1985 Kar. 193.
3. AIR 1947 Mad. 247=48 Cr.L.J. 14.
4. PLD 1976 Kar. 85=PLJ 1976 Kar. 104 (DB).

CONTRIBUTORIES

298. *Liability as contributories of present and past members.* (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of section 299, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following, that is to say,--

(*i*) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;

(*ii*) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;

(*iii*) a past member shall not be liable to contribute unless it appears to the Court that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Ordinance;

(*iv*) in the case of a company limited by shares, no contribution shall be required from any past or present members exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member;

(*v*) in the case of a company limited by guarantee, no contribution shall, subject to the provisions of sub-section (2), be required from any past or present member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;

(*vi*) nothing in this Ordinance shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract; and

(*vii*) a sum due to any past or present member of a company in his character as such, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between

himself and any other creditor not being a member of the company, but any such sum may be taken into account for the purposes of the final adjustments of the rights of the contributories among themselves.

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sum unpaid on any shares held by him, as if the company were a company limited by shares.

Synopsis

1. Contributories.
2. Members, liability of.
3. Minor's liability.
4. Subscribers to Memorandum of Association, liability of.
5. Past members, liability of.
6. Transferor of shares.
7. Unpaid calls.
8. Company limited by guarantee.
9. Foreign creditor.
10. Interest.
11. Limitation.

1. Contributories. Section 298 proceeds on the assumption that the contributories are all innocent parties and that they must contribute equally towards the loss sustained by the company for no fault of theirs, subject however to certain equities which are contained in the exceptions to that section.[5] But the liability to contribute under the section cannot be enforced against the contributories regardless of the consideration whether that is necessary for the purposes mentioned in the section.[6] Moreover when a company carries on a business which is *ultra vires* and incurs losses, such transaction creates no debt either legal or equitable. "Contributories" are not liable to pay such debts when the company is being liquidated.[7]

2. Members, liability of. Once a member is upon the list of contributories unless he shows he is wrongly placed, he is liable to contribute to the assets for payment of debts and winding up expenses.[8] The liability of a member under section 298 in respect of the shares is absolute and flows from the fact of his being on the register in respect of those shares. The original contract may supply the reason for his name having been placed on the register, but after the winding up his liability arises *ex lege* and not *ex contructu*.[9] The plea of voidability or illegality of

5. AIR 1943 Sind. 39.
6. 1957 MPLJ 77 (DB) (Nag) (Hence amount for which call should issue depends on the facts of each case. A call for the whole amount remaining unpaid cannot be made solely on the ground that it is only a very small amount) + AIR 1930 All. 617.
7. AIR 1931 Mad. 792.
8. AIR 1916 All. 317 = 38 All. 347 (DB).
9. AIR 1932 PC 240 + AIR 1951 Assam 86 (DB) (Transfer of shares--Transferee's name not registered in place of transferor--Transferor also not getting the register rectified under

contract to take shares cannot be taken after winding up to avoid liability as a contributory. The contract so vitiated should be sought to be set aside before the company goes into liquidation.[10] It must however be noted that a person can be made liable as a contributory only when on the date of the winding up his status as a member of the company under an already concluded contract, which may either be express or implied, is unquestionable. Where on the relevant date there was nothing more than an offer from him to purchase shares and the company had not yet accepted the offer by allotting to him the shares, it would be impossible to put him on the register of members and make him liable as a contributory.[11] Therefore a person cannot be settled on the list of contributories if before the commencement of winding up he has not only repudiated his shares but has also asserted his rights to repudiate them in an action by the company to enforce calls upon him.[12] Where under an underwriting agreement the underwriters could be treated as share-holders for a certain number of shares only when they failed to subscribe or find subscribers for those shares on being requested to do so and they had been placed on the register of the company without any such request followed by a failure; it was held that their names ought to be removed from the list of contributors.[13]

Person illegally removed from Register of share-holders. Where the forfeiture of shares by the managing director is *ultra vires* his powers, his act cannot bind the company and the share-holders may be placed on the list of contributories in spite of such forfeiture.[14]

Contract to avoid liability. The statutory liability to contribute in the event of winding up cannot be avoided by a contract with the directors.[15] The directors of a company agreed to allow a share-holder, who was a signatory to the deed of settlement of the company, to retire on conditions other than those laid down in the deed of settlement and a subsequently passed resolution of the company and removed his name from the register of the company on his fulfilling the conditions. The terms of the agreement on which he was allowed to retire were not communicated to the other share-holders. When the company went into liquidation long thereafter; it was held in spite of such removal and his subsequent non-participation in the affairs of the company that his name could be rightly placed on

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section 38 before winding up--Transferor cannot avoid liability as contributory under section 156)+AIR 1956 Mad. 448 (DB)+AIR 1956 Nag. 204+AIR 1951 Mad. 890 (DB)+AIR 1950 Bom. 386 (DB)+1960-20 Com Cas 15 (Bom.)

10. AIR 1932 PC 240+AIR 1936 Lah. 480 (Person holding out as share-holder cannot deny that he is a share-holder when the company has gone into liquidation)+AIR 1936 Lah. 700 (DB) (Conditional application for shares--Shares allotted without compliance with conditions. Acquiescence or allottee. He cannot repudiate shares at the time of winding up)+AIR 1934 Sind 39 (Fraud or misrepresentation by managing agent not a plea on which liability can be avoided)+AIR 1924 Lah. 649 (DB)+AIR 1915 Lah. 404 (DB)+AIR 1914 Lah. 480 (DB) (Liability cannot be avoided by pleading that he was led into the purchase by deceit or that the company which was a pledge of the shares was the real owner of them)+AIR 1914 Lah. 483 (DB).
11. AIR 1958 Bom. 198 (DB)+AIR 1914 All. 471 (DB).
12. AIR 1915 Lah. 404+AIR 1950 All. 508 (DB).
13. (1894) 1894-2 Ch 474.
14. AIR 1915 Lah. 109=1915 Pun Re. No. 37.
15. AIR 1932 Cal. 691=52 Cal 1099 (DB).

the list of contributories.[16] Where the resolution of a general meeting of share-holders authorised the company to allow any dissenting share-holder to retire subject to certain conditions of which one was that he should express his desire in that behalf before a certain date. One such share-holder was allowed by the directors to retire even though he has not fulfilled that condition. Later on the company having gone into liquidation; it was held that the share-holder could not escape being placed on the list of contributories because the directors had no power to receive proposals after the expiry of the prescribed date and allow him to retire.[17]

A collateral arrangement promised by the promoters of a company as a motive for inducing a person to purchase shares does not constitute the consideration or the condition on which the shares are purchased and therefore the failure or the breach of that arrangement can in no way affect the liability of the share-holder as a contributory in the event of a winding up of the company.[18]

3. Minor's liability. Where a father with his son's own money purchases share of company for his minor sons and signs the application form on behalf of his sons; the father must be considered as owner of the shares and must be placed on the list of contributories. The same principle applies where the father purchases by transfer shares by signing his minor son's names on the transfer form as transferee through himself.[19] Where, however an application is made by the father as guardian of his minor daughter for shares and the company issues shares in the name of the daughter describing her as minor, the transaction is void. The father cannot be said to have contracted for the shares and cannot be placed on the list of contributories.[20]

4. Subscribers to Memorandum of Association, liability of. Subscribers to the memorandum of association become members of the company *ipso facto* on the incorporation of the company and take the share or shares shown against their names even without an allotment. If their name continues to appear on the register on the date of the winding up, they are bound to be placed on the list of contributories.[1] A subscriber to the memorandum of association can escape liability for being placed on the list of contributories only where he has validly surrendered the shares or has paid for the shares. A refusal by him to pay the value of the shares cannot amount to a surrender which has been accepted by the company.[2] It follows that a person signing Memorandum of Association on the understanding that he would be given certain number of shares as fully paid up in consideration of assets transferred to the company, is not liable as contributory by the subsequent cancellation of the contract to give such paid-up shares.[3]

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16. (1868) 3 H L 171.
17. (1868) 3 L H 263.
18. AIR 1933 All. 357=52 All. 406 (DB).
19. AIR 1939 Lah. 515=ILR 1939 Lah. 299 (DB).
20. AIR 1942 Mad. 470=ILR 1942 Mad. 875 (DB).
1. AIR 1938 Sind 187 (DB)+1958-28 Com Cas 155 (Punj) (Absence of allotment in such cases cannot render them as cases of names being on the register without a contract between the parties).
2. AIR 1931 All. 701.
3. AIR 1926 All. 524=48 All. 508 (DB).

5. **Past member's liability of.** A share-holder is liable even after a transfer, forfeiture or surrender of the shares, if the liquidation takes place within one year of such transfer, etc. and if he is on the list of contributories.[4] But the liability to contribute does not arise until all the existing members have been called upon to do so.[5]

Extent of liability. Forfeiture of shares does not save a member from liability under section 298 to contribute as a past member but the liability is limited only to the extent of the amount which remains unpaid on the forfeited shares.[6]

Death of members. A member of a company does not by his death become a past member within the meaning of section 298. Though he dies, his estate continues to be liable as a member.[7]

6. **Transferor of shares.** A person transferring shares remains liable until transferee's name is entered in the register.[8]

Transfer to person under legal incapacity. Where the sale of his shares by a person is void because it is in favour of a person who is under a legal incapacity to purchase, he does not cease to be the legal owner and remains subject to the liabilities attaching to his membership.[9]

Benami transfer. A transferee of shares whose name has been duly brought on the register with his consent and knowledge cannot avoid his liability under section 298 on the ground that the consideration for the transfer was paid by somebody else and not by him.[10]

7. **Unpaid calls.** In the case of companies limited by shares the liability of its members to contribute in the winding up extends to the whole amount due on the shares irrespective of whether calls to pay the amount have been made or not.[11] But section 298 imposes new liabilities upon share-holders in respect of the unpaid calls as soon as the liquidation proceedings start.[12] On a winding up order being made, the liability of a contributory to contribute to the assets of the company to the extent set out in section 298 becomes an absolute liability which arise by reason of statute and not be reason of contract. Hence, the liability to pay calls which was a contractual debt as between the share-holders and the company becomes a statutory liability to contribute to the assets of the company when the winding up order is

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4. AIR 1924 Mad. 703.
5. AIR 1936 Lah. 739 (DB) (AIR 1936 Lah. 226. *Reversed*).
6. AIR 1936 Lah. 266 (There is no liability as to interest on such amount).
7. AIR 1933 All. 334 (DB) (Son as legal representative becomes liable to be placed on the list of contributories).
8. AIR 1915 Lah. 320+AIR 1936 Bom. 24+1955 B L J R 72 (Transferor must take steps to get register rectified before the winding up)+AIR 1950 Bom. 217 (DB) (Where transferee fails to get his name put on the register, the transferor himself must obtain rectification under S. 38 before liquidation).
9. AIR 1943 Mad. 111 (Sale of shares to the company itself is *ultra vires* and void and cannot relieve the share-holder of his liability to contribute).
10. AIR 1936 Bom. 24=60 Bom. 297.
11. AIR 1950 Bom. 386 (DB).
12. AIR 1935 Lah. 335=16 Lah. 1055 (DB).

made.[13] The unpaid or uncalled capital upon issued shares forms part of the capital or assets of a company irrespective of the fact that it has not been called up before the winding up and remains unpaid until the liquidator exercises his right under section 298.[14] A share-holders of a joint stock company or a friendly society with limited liability cannot when it goes into liquidation, set off against the debt due from him to the company or society, the sums paid by him as share-holder against calls and pay only the balance.[15]

8. Company limited by guarantee. A member of a company limited by guarantee can be put on the list of contributories only for the amount which he has undertaken by the Memorandum of Association to contribute and not also for sums which he may be bound to pay under the articles of the company.[16]

9. Foreign creditor. Foreign creditors of a company which is incorporated outside Pakistan (in England) and carried on business in Pakistan can prove their claims in the winding up proceedings of the company as an unregistered company in Pakistan.[17]

10. Interest. The liability created by section 298 is new and no provision is made for interest therein. It may be that when a Court makes a payment order under that section, it could direct future interest on the amount fixed in the payment order until realization; but it cannot include interest prior to that time.[18]

11. Limitation. If the liquidator wants to recover a debt which is a statutory debt created by reason of section 298, he cannot recover it by any other method except by the mode laid down in section 342.[19] To a suit, therefore, brought by the liquidator to enforce this statutory liability and recover the balance of call money, Art. 120 and not Art. 112 of the Limitation Act applies.[20] However, unpaid calls can be recovered even though they are barred by limitation when the winding up order was made. The liability of the member is not extinguished on the expiry of the period of limitation for enforcing the calls made by the company before liquidation.[21]

299. *Liability of directors whose liability is unlimited.* In the winding up of a limited company any director, whether past or present, whose liability is, in pursuance of this Ordinance, unlimited, shall, in addition to his liability, if any, to contribute as an ordinary

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13. AIR 1962 Pun. 526 (DB).
14. AIR 1941 Mad. 806+AIR 1963 Mys. 61.
15. AIR 1918 Mad. 995 (DB) (Friendly society--Share-holder to pay in that capacity monthly a specified sum for a prescribed period--Loans taken by member repayable at any time at member's choice and if not so paid to be adjusted against the payments made as share-holder at the end of prescribed period--Share-holder taking loan on mortgage--Society winding up after some years--Mortgage cannot be redeemed by paying balance after deducting monthly subscriptions so far paid.).
16. (1899) 1899-2 Ch 593.
17. AIR 1962 SC 500.
18. AIR 1936 Lah. 739 (DB) (AIR 1936 Lah. 226, *affirmed*).
19. AIR 1962 Punj. 526 (DB).
20. AIR 1963 Mys. 61.
21. AIR 1962 Pun. 526 (DB)+AIR 1950 Bom. 386.

member, be liable to make a further contribution as if he were, at the commencement of the winding up, a member of a unlimited company:

Provided that--

(*i*) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up;

(*ii*) A past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;

(*iii*) subject to the articles, a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.

300. *Definition of "contributory"*. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of any shares which are fully paid-up; and, in all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.

Synopsis

1. Contributory--meaning of.
2. Member of company.
3. Person making conditional application for shares.
4. Debtor of company.

1. Contributory--meaning of. The term "contributory" in section 300 means every person liable to contribute to assets of company in event of its being wound up and includes holder of any shares which were fully paid up; and, in all proceedings for determining, and all proceedings prior to final determination of, persons who were deemed to be contributories, would include any person alleged to be contributory.[22] The contributory does not necessarily mean a person whose liability as a contributory has been established. It includes any person alleged to be a contributory.[1] A person alleging that he was a contributory is to be deemed to be a contributory. Every share-holder of a company was primarily liable to contribute.

22. 1997 CLC 456=PLJ 1977 Kar. 220.
1. AIR 1920 Lah. 43=1 Lah 237.

subject to proviso limiting the amount which he could be called upon to pay, being a holder of fully paid-up shares.[2]

2. Member of company. A member of a company is clearly a contributory under section 300.[3] Therefore the person whose name is on the register of the members must be treated as a contributory in the event of the company's winding up, even though he is entitled to the shares only as a trustee.[4] His liability would begin from that date when contract was entered into whereby he became member.[5]

Member who has not paid consideration for the shares. A purchaser of shares by transfer whose name is entered on the register of the company as the owner of the shares is a contributory in respect of those shares irrespective of the fact that the consideration for those shares was not paid by him.[6]

Share-holder entitled to repudiate his shares. Though a person who has become a share-holder of a company relying on the prospectus might repudiate his shares on the ground that the memorandum of association differed from the prospectus on which it is professed to be founded, he cannot do so after the failure of the company and relieve himself from liability to contribute to the debts of the association.[7]

Transferee of shares. A transferee of shares whose name does not appear in the register, is not a contributory.[8]

Holder of fully paid up shares. The term "contributory" as defined in section 300 includes a share-holder who holds fully paid up shares only.[9] But such members are not liable to contribute anything and so will not be placed on the list of contributories unless they so wish.[10]

3. Person making conditional application for shares. If an application for shares is subject to a condition precedent, the applicant incurs no liability if the condition remains unfulfilled, and more so when the company goes into liquidation before any shares have been allotted to him.[11]

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2. PLD 1984 Kar. 541.
3. AIR 1948 Mad. 162.
4. AIR 1952 Punj. 411 (As such he alone will be entitled to receive the share money ordered by the Court to be paid to the share-holders in the course of distribution of assets).
5. 1997 CLC 456=PLJ 1997 Kar. 220.
6. AIR 1936 Bom. 24=60 Bom. 297.
7. (1867) 2 H L 325.
8. AIR 1934 Mad 476=57 Mad. 955 (DB).
9. AIR 1916 Lah. 78 (Fully paid up share-holders can present petition for the winding up of the company)+(1866) 1 Ch App 555+AIR 1938 All. 613 (The same meaning must be attached to the word wherever it is mentioned in the Act) AIR 1952 Mad. 557 (Fully paid up share-holders are entitled to apply under S. 166)+AIR 1934 Mad. 476 (DB) (They are entitled to adjustment of their rights under S. 192)+AIR 1930 Mad. 240 (DB). (Hence his application under S. 166 cannot therefore be objected to by a person who has no *locus standi*).
10. 1955 B L J 79.
11. AIR 1928 Lah. 236+AIR 1928 Lah. 234.

4. Debtor of company. A mere debtor of a company in liquidation is not a 'contributory' of the company.[12]

301. *Nature of liability of contributory.* (1) The liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the time specified in calls made on him for enforcing the liability.

(2) No claim founded on the liability of a contributory shall be congnizable by any Court of Small Causes.

Synopsis

1. Liability of members.
2. Contributory--nature of liability.
3. When liability arises.
4. Limitation for recovery from contributories.
5. Interest on debt.
6. Forum for suit.

1. Liability of members. Any member of a company whose name is on the list of contributories is liable for all the matters in respect of which he may be charged in the event of the company being wound up unless he can successfully show as against the liquidator that he should not have been put on the list of contributories.[13] Where the person sought to be charged as contributory had made a conditional purchase of shares and the condition precedent had not been fulfilled he could not be made liable as a contributory when the company goes into liquidation before the fulfilment of the condition and allotment of shares.[14]

'Ultra vires' transactions. Ultra vires transactions would create no debt, either legal or equitable; contributors were not liable to pay such debts.[15]

2. Contributory--nature of liability. The contribution dealt with under this section is in itself a sort of correlative duty to the right which the share-holder has and therefore his liability for the debt or expense which the company may have incurred in the winding up cannot by itself be said to be a debt but for the fact that the Ordinance has required it to be deemed to be so for the purpose of recovering the amount from the contributories.[16] As the debt under the statute is a new creation, quite distinct and apart from any pre-existing contractual liability, the liquidator's claim to recover from the share-holder, as a contributory in the winding up, the unpaid shares money will not be affected by the fact that prior to the winding up the company had issued calls for the amount and allowed the recovery under those calls to become timebarred.[17] However the call money does not

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12. AIR 1926 All. 101 (His liability to pay does not arise on the company going into liquidation)+(1878) 8 Ch 679.
13. AIR 1916 All. 317=38 All. 347 (DB).
14. AIR 1928 Lah. 236.
15. 1997 CLC 456=PLJ 1997 Kar. 220.
16. AIR 1916 All. 317=38 All. 347 (DB).
17. AIR 1936 Lah. 226+AIR 1935 Lah. 335 (DB)+AIR 1934 Lah. 1015+AIR 1941 Cal. 143+AIR 1941 Mad. 565=AIR 1941 Pat. 44 (DB)+AIR 1916 All. 317 (DB) (The liquidator enforces, when the company is wound up, not any right of the company but only

constitute a book debt of the company and hence no suit for such call money can lie at the instance of the purchaser of the book debts of the company from the liquidator.[18]

3. When liability arises. The statutory liability of a contributory for payment of debts would arise only after making winding-up order by Court whereby Court might make order on any contributor to pay in manner directed by order, any money due from him or from estate of person whom he was representing, to company exclusive of any money payable by him or estate by virtue of any call in pursuance of Companies Ordinance, 1984.[19] It can arise only under a call validly made, *i.e.* a call made by the Court and not by the liquidator himself.[20]

Voluntary liquidation. In a voluntary winding up, the liquidator can make calls without the sanction of the Court and recover the statutory debt by an ordinary suit and without recourse to the special procedure provided in section 391.[21]

Calls made by Directors prior to winding up order. The calls made by the directors before the winding up order and which remain unpaid at the time of the order become recoverable as a debt by the liquidator through a suit. The contributory's liability in such cases to pay the amount does not depend upon the issue of a call by the liquidator and therefore the suit cannot be thrown out on the ground of absence of cause of action because there has been no call made by the liquidator in respect of the amount.[22]

4. Limitation for recovery from contributories. A suit for the recovery of the debt newly created under section 301 is governed by Art. 120 of the Limitation Act, the limitation commences to run from the time specified for payment in the calls made by the liquidator.[1] Thus a liquidator can recover the unpaid calls made by the company as a contractual debt but to enable him to obtain a decree the calls must have been made within three years from the date of his suit.[2]

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the right which the creditors have to enforce an obligation undertaken by the contributories even at the time when they originally subscribed for the shares).

18. 1959-1 Mad LJ 305.
19. 1997 CLC 456=PLJ 1997 Kar. 220.
20. AIR 1950 Bom. 386 (DB).
21. AIR 1956 Nag. 204=ILR 1956 Nag. 556.
22. 1920-20 Com Cas 15 (Bom) (*Affirmed in* AIR 1950 Bom. 386--Section 159 only provides that in case of calls made after liquidation time for payment would be the time specified in the calls and does not deal with calls made by the directors before winding-up).

1. AIR 1935 Lah. 335 (DB)+AIR 1956 Nag. 304+AIR 1956 Mad. 448 (DB) (Liquidator's right to make a call and settle a list of contributories being a new right he has a period of six years to file a suit for enforcing the liability against the share-holders)+10 Bom. 483 (Such suits are governed by Art. 120 and not by Art. 112 of the Limitation Act).

2. AIR 1936 Lah. 226 (Call on shares and subsequent forfeiture--Liquidator if he relies on original debt created by the call and not on the new liability, under S. 156 Companies Act, to recover amount would not be able to do so when the company's right to recover the debt had become barred by limitation)+AIR 1950 Bom. 386 (DB) (Suit by liquidator to realise unpaid calls--Calls not made by Court under S. 187, Companies Act, but by the company before winding up and more than three years from date of suit--Suit must fail whether treated as one to enforce constructual liability or the statutory liability, in the first case on the ground of limitation and in the latter case on the ground of calls from the Court--1950-20 Com Cas 15 (Bom), *affirmed*)+AIR 1916 All. 317=38 All. 347 (DB) (Original debt based

5. Interest on debt. Although the Ordinance itself does not provide for payment of interest on the unpaid calls, the liquidator can invoke the provisions of section 3 of the Interest Act and recover interest provided he had intimated the contributory when sending notice that the call if not paid within the specified date would carry interest till payment.[3]

6. Forum for suit. A suit against a share-holder for balance due on his shares is not cognizable by a Small Cause Court even where due claim is for an amount less than Rs. 500.[4]

302. *Contributories in case of death of member.* (1) If a contributory dies either before or after he has been placed on the list of contributories, his legal representatives shall be liable, in a due course of administration, to contribute to the assets of the company in discharge of his liability, and shall be contributories accordingly.

(2) If the legal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, and of compelling payment thereout of the money due.

Synopsis

1. Legal representative of deceased share-holder, liability of.
2. Administrator of deceased's estate.
3. Court of ward, estate vesting in.
4. Death of member not placed on list of contributories.

1. Legal representative of deceased share-holder, liability of. The fact that a payment order has been passed against a deceased contributory and it cannot be executed because it is a nullity does not in any way affect the liability of the estate of the deceased for the amount which arises under section 302. That liability arises from the fact that the deceased had been placed on the list of contributories and not from the payment order passed.[5] There can be no doubt that upon the death of a contributory his estate becomes liable for the balance due from him as a contributory but to pass an effective order fixing the estate with that liability it is necessary to bring on record the persons who represent the estate.[6] The devolution of the contributory's liability on the representative under section 302 takes place

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on call made by company before winding up barred by limitation--Liquidator's suit for recovery based on that debt cannot succeed).

3. 1957 MPLJ 77 (DB) (Nag) (Where such notice had been given Court may be moved to award interest before ordering recovery of the amount of the call).
4. AIR 1932 Cal. 716 (Hence second appeal lies against the decision).
5. AIR 1941 Lah. 480=II.R 1942 Lah. 807 (DB).
6. AIR 1930 All. 503=52 All. 439 (DB).

automatically. The substitution of the representative for the deceased within the period prescribed by the Limitation Act is not necessary for the purpose.[7]

When liability arises. Where the liability of the personal representative to contribute in due course of administration is established, it begins to operate only if and when a winding up supervenes.[8]

Extent of liability. The liability of the representative of a deceased contributory is limited to the extent of the assets, if any, of the deceased which have come into his hands.[9]

All legal representatives not brought on record. The omission of the official liquidator to place on the list of contributories all the representatives of a deceased share-holder does not in any way affect the liability of the representative of a deceased share-holder does not in any way affect the liability of the representative who has been placed on the list by him.[10]

Legal representatives of legal representatives, liability of. The expression "legal representative and heirs" in section 302 is not confined to the legal representatives and heirs of the person primarily interested but also includes the legal representatives and heirs of his legal representatives and heirs.[11]

2. Administrator of deceased's estate. An administrator who represents the legal estate in the shares which forms part of the assets of the deceased contributory must himself be regarded as a contributory.[12]

3. Court of ward, estate vesting in. Where the estate of the contributory is taken over by the Court of Wards, the collector's name can be placed on the list of contributories in lieu of the name of that ward.[13]

4. Death of member not placed on list of contributories. Upon the death of a share-holder before his name is placed on the list of contributories, the payment order made by the Court for the balance can be enforced against the legal representatives not personally but only by taking proceeding for the administration of the estate of the deceased.[14]

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7. AIR 1932 Lah. 648+AIR 1938 Pat. 287 (*Held* that Limitation Act did not apply to the case. It was *further held* that the plea of representatives that deceased himself was not liable as a contributory on the ground that on his repudiation of the application the company had forfeited the shares was not substantiated by evidence).
8. (1956) 1956-1 All E.R 799.
9. AIR 1931 Pat. 44 (DB) (Case decided before sub-section (3) was added to S. 160, Companies Act, in this case the son's liability as contributory when his father who was a share-holder died was decided by an application of the principles of Hindu law)+AIR 1933 All 334 (DB) (Case decided before sub-section (1) was added to S. 160, Companies Act, son's liability as contributory when the father who was the share-holder died was decided by an application of the principles of Hindu law).
10. 20 Bom. 654 (DB)+AIR 1948 Mad. 162.
11. AIR 1948 Mad. 162.
12. AIR 1937 Oudh 377 (The shares must be deemed to have devolved on the administrator through the death of the contributory when letters of administration were granted to him).
13. AIR 1930 All. 617.
14. AIR 1934 Bom. 469.

303. *Contributory in case of insolvency of member.* If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then--

(*a*) his assignees in insolvency shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to proof against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(*b*) there may be proved against the estate of the insolvent the estimated value of liability to future calls as well as calls already made.

1. **Scope.** Section 303 comes into operation only when a winding up order is in existence. It does not confer any right on the trustee in bankruptcy of a shareholder to present a petition for winding up of the company.[15]

304. *Contributories in case of winding up of a body corporate which is a member.* If a body corporate which is a contributory is ordered to be wound up, either before or after it has been placed on the list of contributories--

(*a*) the liquidator of the body corporate shall represent it for all purposes of the winding up of the company and shall be a contributory accordingly, and may be called on to admit to proof against the assets of the body corporate, or otherwise to allow to be paid out of its assets in due course of law, any money due from the body corporate in respect of its liability to contribute to the assets of the company; and

(*b*) there may be proved against the assets of the body corporate the estimated value of its liability to future calls as well as calls already made.

WINDING UP BY COURT

CASES IN WHICH COMPANIES MAY BE WOUND UP BY COURT

305. *Circumstances in which company may be wound up by Court.* A company may be wound up by the Court--

15. (1956) 1956-1 All E R 799.

(*a*) if the company has, by special resolution, resolved that the company be wound up by the Court;

(*b*) if default is made in delivering the statutory report to the registrar or in holding the statutory meeting or any two consecutive annual general meetings;

(*c*) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(*d*) if the number of members is reduced, in the case of private company, below two or, in the case of any other company, below seven;

(*e*) if the company is unable to pay its debts;

(*f*) if the company is--

(*i*) conceived or brought forth for, or is or has been carrying on, unlawful or fraudulent activities;

(*ii*) carrying on business not authorised by the memorandum;

(*iii*) conducting its business in a manner oppressive to any of its members or persons concerned with the formation or promotion of the company or the minority share-holders;

(*iv*) run and managed by persons who fail to maintain proper and true accounts, or commit fraud, misfeasance or malfeasance in relation to the company; or

(*v*) managed by persons who refuse to act according to the requirements of the memorandum or articles or the provisions of this Ordinance or fail to carry out the directions or decisions of the Court or Registrar or the Authority given in the exercise of powers under this Ordinance;

(*g*) if, being a listed company, it ceases to be such company; or

(*h*) if the Court is of opinion that it is just and equitable that the company should be wound up.

Explanation I. The promotion or the carrying on of any scheme or business, except the business carried on under the provisions of the

Insurance Act, 1938 (IV of 1938), howsoever described, whereby, in return for a deposit or contribution, whether periodically or otherwise, of a sum of money in cash or by means of coupons, certificates, tickets or other documents, payment, at future date or dates of money or grant of property, right or benefit, directly or indirectly, and whether with or without any other right or benefit, determined by chance or lottery or any other like manner, is assured or promised shall be deemed to be an unlawful activity.

Explanation II. "Minority share-holders" means share-holders together holding not less than twenty per cent of the equity share capital of the company.

Synopsis

1. Scope.
2. Petition for winding up.
3. Voluntary winding up.
4. Private limited company.
5. Winding up on resolution of the Company.
6. Business not commenced.
7. Suspension of business.
8. "Inability to pay debts."
9. Commercial insolvency.
10. Disputed debts, non-payment of.
11. Just and equitable--clause (*h*).
12. Disappearance of substratum of company.
13. Complaints relating to management.
14. Other grounds for winding up.
15. Insurance company.
16. Receiver, appointment of.
17. Liquidator appointed by Court.
18. Procedure.
19. Stay of proceedings.

1. **Scope.** Order for winding up of company can be sought or made on all or any of the grounds enumerated in section 305.[16] The object of winding up a company is to realise the assets of the company and pay its debts expeditiously and in accordance with the law.[17]

Winding up cannot be prohibited by Rules. A rule of the company which prohibits its winding up except by voluntary winding up with assistance of Court is devoid of effect as being *ultra vires*.[18]

Defunct-company. A company can be wound up under section 305 even though its name which has been struck off the register under section 439 has not been subsequently restored to the register.[19] But during the pendency of proceedings under section 305 in the High Court, it was not open to any of the share-holders to have the company declared defunct under section 439 of this Ordinance. Such being the case and liquidation proceedings having already commenced under section 305

16. PLD 1996 Lah. 633.
17. AIR 1953 Punj. 145=ILR 1952 Punj. 349.
18. 29 Cal. 688 (DB).
19. ILR 1955 Mad. 635 (DB).

the Registrar was clearly in error in striking off the company from the register on the ground that it had become defunct.[20]

Banks, applicability of. Provisions of this section do not apply to Banks. Therefore winding up of Bank may be proceeded with under Specific provisions provided in the Banking Companies Ordinance.[1]

Voluntary liquidation. Voluntary liquidation of the company does not bar its compulsory winding up under section 305 at the instance of the creditors or the contributories as laid down in section 394.[2]

Jurisdiction of Court. A company can be wound up by the Court on any of the grounds mentioned in section 305.[3] But the court has no jurisdiction under this section to entertain an application for the winding up of a company whose formation contravenes the provisions of section 14 of the Ordinance.[4] However, a voluntary winding up is not a legal bar to the jurisdiction of the court to order compulsory winding up of the company on the application of a share-holder.[5]

The jurisdiction of a Court to entertain and adjudicate on an application for the winding up of a company which has its registered office inside the area coming under its jurisdiction is not in any way affected because a portion of its business was done through branch offices situated in an area which has become a part of the territory belonging to a foreign Government.[6] But the Court will not exercise its discretion and order winding up when all the assets of the company lie within the jurisdiction of a different Court and it would be therefore more convenient for that other Court to deal with the matter and administer the assets through its own liquidators.[7]

Discretion of Court. The section vests a discretion in the Court to order winding up of a company or not even where the ground has been satisfactorily proved.[8] The Court will not exercise its discretion to wind up a company on an application which is not bona fide.[9] Therefore winding up will not be ordered where substantial dividends have been regularly paid, balance sheets and profit and loss accounts have been prepared and duly passed, the Directors' report and their

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20. 1974 SCMR 15.
1. 1987 CLC 1876=PLJ 1987 Lah. 541 (DB).
2. 55 Mys HCR 107 (DB) (Voluntary liquidation void *ab initio*--Even a contributory can apply for compulsory winding up under S. 162, Companies Act, irrespective of whether he had been prejudiced by the voluntary liquidation or not).
3. PLD 1990 SC 768=1990 PSC 1225.
4. AIR 1954 All. 555.
5. (1900) 1900-2 Ch 230.
6. 53 Cal W. N. 165 (DB).
7. 57 Cal. W.N. 61.
8. AIR 1943 Cal. 583=ILR (1955) 2 Cal. 378 (DB) (But in the case of a banking company where the ground alleged is inability to pay debts the Court has no such discretion in view of the provisions of S. 38 (1) of the Banking Companies Act of 1949)+57 Cal W N 61.
9. PLJ 1979 Kar. 295 (Petition made with an ulterior view of bringing pressure on company to pay debt) AIR 1952 Trav-Co. 435 (DB) (Do).

answers to the Auditor's comments have been duly approved by the share-holders at the Annual General Meetings which have been duly held.[10]

Want of assets of company. Want of assets may be an element in determining whether a petition for winding up presented by a member of the company is bona fide or not but except to that extent it would not be a relevant consideration for deciding whether winding up should be ordered or not.[11]

Res judicata, application of principle. A company which suffers a winding up order without opposing the petition on the ground that the petitioner has no *locus standi* because he is not a creditor as claimed by him will be barred by *res judicata* from questioning the petitioner's status at any subsequent stage of the winding up.[12]

Cost in proceedings. The Court has discretion to award costs to the successful party contesting the winding up petition.[13] When a petition for the winding up of a company is dismissed, the company, the opposing share-holder and the opposing creditors are entitled, each one of them, to one set of costs. But where the same solicitor instructs the counsel on behalf of all of them, the question of allowing costs of separate counsel is within the discretion of the Court.[14]

2. Petition for winding up. A petition for winding up may be made by a share-holder, or a creditor of the company or by the company itself. Where it is made by a person other than the company, the Court has to see whether he is a person aggrieved. A fully paid up share-holder is a contributory, he is entitled to bring an application for winding up, but the fact remains that ordinarily he has nothing to lose by the continuance of the Company and nothing to gain by its winding up, or, in other words, he has no interest in winding up the company. Therefore the Court is not readily moved to exercise its discretion by a person who is not really aggrieved; nor is it readily persuaded by such a person that it is just and equitable that a company should be wound up.[15]

Contributory, petition for winding-up by. Contributory, in order to invoke discretionary powers of Court must not only establish that circumstances were such that winding-up of company was the only alternative but also that no other remedy was available.[16]

Secured creditor, petition by. Secured creditor can maintain a petition for winding up. Merely because debt has been secured would be no ground to hold that winding up of Company at the instance of such creditor could not be maintained.[17]

'Locus standi' to be judged as on date of application. When some share-holders made an application for winding up a company but other share-holders in

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10. AIR 1965 Cal. 98.
11. ILR 1955 Mad. 635 (DB) (Petition cannot be thrown out when case for winding up has been made merely on the ground that the petitioner has not shown that there will be surplus assets for distribution).
12. AIR 1952 Punj. 99.
13. AIR 1949 Mad. 675=ILR 1950 Mad. 59 (DB).
14. AIR 1942 Bom. 231.
15. 1976 Dhaka LR 133+AIR 1965 Ker. 241.
16. 1997 CLC 456=PLJ 1997 Kar. 220.
17. PLD 1996 Lah. 633.

exercise of the company's lien over their shares forfeited them and sold them to other persons and claimed on the basis of the forfeiture that the application of the share-holders had become infructuous. It was held that the rights of the parties in this matter are to be adjudged according to the legal position prevailing on the date of the institution of the proceedings for winding up and not on the basis of changes which have since been introduced without the consent of the appellants *pendente lite* by the unilateral acts of the others. Secondly because it appears that the validity of the action taken by the company in forfeiting the shares of the appellant and selling them to others is still under challenge in another suit, the application would not be considered to be infructuous.[18]

Notice to the Company. In case of failure to serve notice for winding up of the Company at the Registered Office of the Company, if stage for adducing evidence has not yet reached, it would be undesirable to say whether petitioner was or was not entitled to the presumption afforded by clause (*a*) of subsection (1) of section 306, Companies Ordinance, 1984, that demand notice had been served at the company's registered office. Such question was left to be decided at the appropriate stage.[19]

Other remedy available. Mere availability of other remedy did not have adverse effect on maintainability of winding up petition. Therefore pendency of civil suit in relation to debt on basis of which winding up petition was filed does not debar a winding up petition.[20]

Mala fide petition. The contention that winding up action was *in terrorem* against Company and was filed as retaliatory action to terrorise Company to abandon or give up suit proceedings instituted against petitioners, cannot be gone into at interlocutory stage when no final order has been passed on main proceedings arising out of winding up petition.[21]

State, application by. The State is entitled to present an application for winding up of, a company to enforce a debt due in respect of arrears of revenue and the High Court has jurisdiction under section 7 to entertain such application.[1]

Secured creditor, application by. A secured creditor may make an application for winding up a company if he feels that the company would not be able to pay his debt.[2]

Workers Union, application by. The Company's Workers Union has itself no *locus standi* to present an application for winding up.[3]

Ground for winding up. For winding up of a company the Court may consider the following grounds: (*a*) Whether the substratum of the company is deemed to be gone; (*b*) the object for which it was incorporated, had substantially failed; (*c*)

18. PLD 1965 SC 221=17 DLR (SC) 52.
19. 1994 CLC 2202=NLR 1994 UC 448.
20. PLD 1996 Lah. 633.
21. NLR 1991 Civ. 776.
1. AIR 1952 Cal. 323 (DB).
2. 1986 SCMR 1126.
3. AIR 1964 Orissa 191.

whether it is impossible to carry on the business of the company except at a loss; (*d*) that there is no reasonable hope that the object of the trading at profit can be attained, or (*e*) that existing or probable assets are insufficient to meet the existing liabilities.[4]

Particulars to be given in petition. In a winding up petition grounds and particulars which are relied upon by the petitioner must be set out in the petition itself and not in the affidavit-in-reply.[5] The company must know what are the charges of fraud and mismanagement brought against it by the petitioner. It is not part of the duty of the Court to collect materials for a petitioner in a winding up petition on vague and uncertain charges made in the petition, so that the petitioner may be able to get an order for winding up.[6] Therefore the winding up petition must contain all the grounds on which an order is sought. The petitioner cannot claim to collect materials upon inspection of the company's documents to supplement the grounds which he has urged in the petition.[7] Where at the hearing of a petition for winding up of a company, The petitioner wished to introduce a further ground that the company had suspended its business and that there was no hope of its carrying on business. It was held that the petitioner could not be allowed to go beyond the statements contained in his petition. He was confined strictly to the grounds expressly taken in the petition: and was not permitted to extend or enlarge upon the grounds taken in the petition.[8] Where the matter had been pending for more than a year, affidavits of all the parties had been completed long ago, arguments on behalf of the Company's counsel had been concluded and it was only then that a vital defect in the petition was sought to be rectified by an affidavit. It was held that to allow the affidavit to be filed at this stage would be to re-open the whole matter from the very beginning, because leave had to be given to the company to meet the charges contained in the affidavit.[9]

Amendment of petition. In the ordinary circumstances the petitioners for winding up must be kept confined within the bounds of the allegations made by them in the petition. Where, however, an extraordinary situation has arisen on account of subsequent events and when it is possible for the Court to consider the new material in the existing petition itself, it would not be proper to drive the petitioners to file a fresh petition merely on the technical ground that the amendment would introduce new matter when neither the company nor the shareholders were likely to be taken by surprise, if the amendment was allowed.[10]

Relief in alternate under section 290 and section 305. Where the main relief sought in the petition was under section 290, and the relief of winding up was only an alternative relief, the petitioner may not press for the relief under section 290 but confine his arguments to the alternative relief for winding up. This he can do because even for claiming relief under section 290, the petitioner has to establish that the facts were such as would justify the making of a winding up order on the

4. PLJ 1979 Kar. 295
5. AIR 1964 Cal. 91
6. AIR 1965 Cal. 98
7. AIR 1965 Cal. 98 + AIR 1942 bom. 231
8. AIR 1964 Orissa 191
9. AIR 1965 Cal. 98
10. AIR 1962 Bom. 133.

ground that it was just and equitable that the company should be wound up. The petitioner has in any event to establish that it was just and equitable to wind up the company. If the facts are such as justified the making of a winding up order on the ground that it was just and equitable to do so, the petitioner can always abandon the relief under section 290 and ask the Court to make an order for compulsory winding up of the Company. The only point which the Court has, therefore, to consider in such a case is whether there are sufficient reasons for making a compulsory winding up order against the company on the ground that it is just and equitable that the company should be wound up.[11]

3. Voluntary winding up. Voluntary winding up is not a legal bar to the jurisdiction of the Court to order compulsory winding up of the company on the application of a share-holder.[12] A share-holder of a company, as a general rule, cannot obtain an order for compulsory, winding up of a company where a resolution for its voluntary winding up has already been passed. But this rule will not apply where the resolution itself had been fraudulently passed or the petition is supported by creditors also.[13] Even where the resolution for the voluntary winding up is passed after the presentation of a petition for a compulsory order, the Courts will not make a compulsory order unless they are satisfied that the rights of the creditors will be prejudiced by voluntary winding up.[14]

4. Private limited company. In the case of a private limited company the tendency of the Courts has uniformly been to treat it more or less as a partnership and to apply the same principles in the winding up of a private limited company as would entitle a partner to have a partnership firm dissolved.[15] Therefore such circumstances as would justify dissolution of a firm under section 44, Partnership Act, 1932, on the ground that it was just and equitable to order a firm to be dissolved, would also justify winding up of a private company.[16] It has been held that following grounds, which are available to a partner for having a partnership firm dissolved, are also available to a share-holder for the winding up of a private limited company under the just and equitable clause: (*a*) Exclusion of a partner from the management of a firm; (*b*) The existence of a state of deadlock between the partners; and (*c*) Justifiable lack of confidence in the management.[17] If the company is a private limited company and the parties are looking upon it as a partnership rather than a joint stock company it will not be "just and equitable", in the circumstance, to wind it up merely for the reason that technical requirements of law have not been or are not being satisfied.[18] Thus where winding up sought under "just and equitable" clause of section 305(*h*) on grounds: deadlock and lack of confidence in management and under section 305(*c*) on ground that Company was

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11. AIR 1962 Guj. 269.
12. (1900) 1900-2 Ch 230.
13. (1879) 11 Ch D 701.
14. (1894) 1894-1 Ch 444.
15. NLR 1987 UC 381+1985 CLC 1239+PLD 1983 Kar. 45+1984 Dhaka (SC) 47+PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB)+PLD 1965 S C 221+AIR 1962 Bom. 133=57 Cal W N 220 (DB)+AIR 1958 AP 259.
16. 1992 CLC 2445.
17. 1985 CLC 1239 (Kar).
18. PLD 1967 Kar. 44 (DB).

unable to pay its debts. It was held that winding up petition constituted abuse of legal process and merited dismissal.[19]

Commonly the exclusion of a partner from the management of the firm, the existence of a state of deadlock between the partners or the justifiable lack of confidence in the management have been regarded as just and proper grounds for dissolving a private limited company.[20] Where a two-man private limited company was formed. After the death of one of them, the other share-holder had serious disputes and differences with his legal representative. The mutual trust and reliance so essential for smooth running of the company was wanting and a deadlock was created. So much so that even according to the version of the respondents, the directors could not meet for about a year in spite of the three successive meetings of the Board summoned by them. It was held that prima facie, the petition for the winding up of the company under clause (*b*) of section 305 appeared to be tenable. Irrespective of the fact whether or not a deadlock existed, the circumstances were such that prima facie the analogy of the partnership law ought to be applied and it should be held that the company was now in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible.[1] Where a private limited company was being run and managed as if it were a partnership firm. Five brothers who were the only share-holders of the company held equal shares in the company. Till dispute arose all directors had powers to operate bank account of the company. No dividend was declared but share in profits of company were apparently distributed amongst brothers through remuneration or other methods. It was held that if it was established that the petitioner had been excluded legally and/or physically from management of the company, and if the company was treated to be a partnership firm for the purposes of winding-up, petitioner's case for winding-up under the just and equitable clause, would stand proved.[2]

Managing Director debarred from acting. Resolution by Company with a device to render Managing Director ineffective and to prevent him from participation in affairs of Company, cannot be relied upon to challenge winding up order passed under clause (*h*).[3] Where the applicant director of the company was wrongfully excluded from participation in the management of the affairs of the company and indeed a deadlock was thereafter created by the refusal of the other directors to allow him to participate in the management. The subsequent conduct of the other co-directors and the appellant left no room for doubt that feelings had become so embittered that conciliation was well nigh impossible. They were determined to exclude the appellant completely. Indeed, they had gone even to the extent of forfeiting his shares and selling them to others, the Court ordered the company to be wound up.[4]

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19. NLR 1993 Civ. 526=PLJ 1992 Kar. 363=PLD 1992 Kar. 249.
20. PLD 1965 SC 221=17 DLR (SC) 52+1988 CLC 1955+1985 CLC 1239+AIR 1962 Bom. 133+1979 Dhaka LR 28+1976 Dhaka LR 133.
1. PLD 1970 Lah. 539+1979 Dhaka LR 28.
2. 1985 CLC 1239 (Kar).
3. NLR 1989 AC 195=1987 CLC 2263 (DB).
4. PLD 1965 SC 221=17 (SC) 52.

Differences between management. The majority in a private limited company has not only the right to overrule minority in all decisions on behalf of the company but also the right to exclude minority for taking part in management of the company.[5] Therefore, general allegation regarding the oppression of the minority by the majority is of no avail in an action for winding up. That is a question relating to internal management of the Company and it is a settled principle that it is the right of the majority to carry on the management of the company. The mere fact that differences have arisen between one group of directors and the other by itself is not sufficient to lead the Court to the conclusion that a situation similar to that of deadlock has arisen in the affairs of the company.[6] Moreover, a petitioner should not be allowed to take advantage of his own wrong by passing it as a ground for winding up the company.[7] Thus where a member who had mismanaged the company's business as its managing director and had set up another company as a rival company applied for the winding up of the company. It was held that it was not just and equitable that the company be wound up because there was no equity in favour of the applicant and the winding-up was in the interest not of the company but of the rival business of the applicant.[8] But where a case of oppression was clearly made out as where a resolution was passed by majority share-holders for reduction of directors' number from five to three. This was patently made by the majority for the purpose of getting rid of petitioner, holding 20% shares, as a director. It was held that the Court will not permit such exercise of right by majority to deprive petitioner of directorship and of right to be part of management of the Company, and that the petitioner had made out a case under just and equitable clause for winding-up of company.[9] Similarly exclusion of a minority from management, existence of a state of deadlock and justifiable lack of confidence in management are grounds covered by clause (*b*) of this section.[10]

Management of family partnership converted into Private Limited Company. Where a family business partnership was converted into a private limited company on basis of personal relationship or certain understanding as to the extent of participation by members of family in management of company. Any attempt to exclude any member from participation in management of company would be a ground to wind up such private limited company on the ground that it is just and equitable. Court in such a case can lift veil of incorporation in order to ascertain real nature of working of private limited company floated by members of a family or more than one family.[11]

Subsequent events may be looked at. While considering a petition for winding up a private limited company the Court can allow petitioner to refer to subsequent events and can rely upon such subsequent events, for deciding winding-up petition

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5. 1985 CLC 1239 (Kar).
6. AIR 1962 Bom. 133.
7. AIR 1965 Cal. 98+(1881) 18 Ch D. 855.
8. PLD 1956 Lah. 925=PLR 1956 Lah. 1447 (DB).
9. PLD 1983 Kar. 45.
10. NLR 1987 UC 381.
11. NLR 1989 AC 195=1987 CLC 2263 (DB).

in appropriate cases, in the interest of justice and for compelling reasons or for shortening litigation.[12]

Diversion of funds. Where winding-up is sought on the ground of diversions of funds, the allegation has to be established by definite evidence on record.[13]

5. Winding up on resolution of the Company. Generally speaking a majority of three-fourths at one meeting confirmed by an absolute majority at a second meeting can require the company to be compulsorily wound up under the first sub-section of section 305.[14]

Directors petition for winding up. In the absence of a resolution passed by the members at a general meeting, a petition for winding up made in the name of the company by the directors must be held to be one without authority.[15] However, prior sanction by the members given at a general meeting is not a condition precedent to the directors having authority to file a petition in the name of the company for its winding up. Therefore when such a petition is before it, the Court should not dismiss the petition but must adjourn it to enable the directors to convene a meeting of the members and obtain their authority.[16]

6. Business not commenced. The Court may wind up a company where it has not commenced any business within one year of its incorporation. Where the Company had been making false statements to confuse the date of its incorporation but it was clear from the record that it had not commenced business as required by law, liquidation was ordered even without framing a specific issue on the matter.[17] However the Court is not bound to order winding up in all cases where the company has not commenced business within one year of its incorporation. The matter is in its discretion.[18] The Court will not exercise the discretionary power conferred on it to wind up a company which has not commenced its business within a year of its incorporation, where the delay has been sufficiently accounted for, and there is no evidence of any improbability of its commencing its business within a reasonable time.[19] A company will not be so moribund as to warrant winding up under section 162, Cl. (*iii*), unless it has ceased to carry on all of its main objects or has never carried on any of them. In discovering what is the company's business, regard must be had to its memorandum of association alone, and if its memorandum contains several main objects, the Company will not be wound up, even if some of its objects have not yet been attained, on the other hand, a company does not carry on business, unless it genuinely attempts to achieve the objects for which it was formed, so that it will not carry on business merely by its Directors holding board meetings, nor by them exercising the ancillary powers set out in the objects clause of its memorandum; even if the Company's memorandum provides that each of the

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12. 1985 CLC 1239 (Kar).
13. 1985 CLC 1239 (Kar)
14. AIR 1922 Cal. 365=49 Cal. 399 (DB).
15. AIR 1953 Papsu 195 (Decision taken at a combined meeting of the contributories and the creditors cannot substitute such resolution).
16. AIR 1956 Mad. 131=ILR 1956 Mad. 440 (DB).
17. NLR 1980 Lah. 896.
18. NLR 1994 Civ. 15+NLR 1980 Civ. 898 (DB)+ILR 1947 Cal. 654.
19. AIR 1965 Ker. 35 (DB).

powers in the object class shall be deemed a main object, the Court will discover what objects the company was really formed to attain, and will wind it up if they have been abandoned. If it is obvious that the company will never have sufficient resources to commence business, the Court will wind it up within a year. But, even if the company has not carried on business for a year, the Court will not wind it up if there are reasonable prospects of its doing so at not too remote a date, and there are good reasons for the delay.[20]

7. Suspension of business. The Courts will not exercise their discretion to wind up a company on the ground of suspension of business where, such suspension is not intended to be indefinite but is only due to certain temporary difficulties.[21] But where a company had ceased to function and being unable to pay its debts, case for its winding up was made out. Petition was allowed and company was ordered to be wound up.[1] Therefore, if the Court is satisfied, that no business has been or is likely to be commenced, it should pass an order for winding up of the company on the petition of the share-holders. Suspension of business for a whole year is usually deemed as an indication of intention not to carry on the business, unless suspension has been satisfactorily accounted for.[2] Thus where relationship between parties was that of partnership firm in the form of company limited by shares with equal shareholding. Two directors from each of parties with 50 per cent. shareholding indicated that company itself was incorporated by two brothers a family concern. Conduct and attitude of parties towards each other indicated that there was complete lack of faith and confidence and business of company was at standstill for more than two and half years. A fit case for winding up had been made out on several grounds amongst others that there was complete dead-lock in relation to conduct of affairs of company and that affairs of company were not being conducted in accordance with provisions of Companies Ordinance, 1984 nor were they be likely to be so conducted.[3] Similarly where business of company had remained suspended for eight years to repudiate its obligations under contract. It was held that the contract was not entirely abrogated by such repudiation but had only relieved the injured party of duty of further fulfilling obligations undertaken by it in favour of repudiating party under contract.[4] Prolonged non-function of a company, its mounting liabilities, both secured and unsecured, disputed and undisputed and conduct of its Managing Director justifying the conclusion that the company was in a morbid state with little a chance of recovery would justify a winding order.[5] However the mere fact that the company has leased out its factory does not prove that the company has suspended its business. Thus a company closing its business and leasing out the factory does not make an independent ground under section 305(*c*) for winding up but is a circumstance showing that it was just and equitable that company should be wound

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20. AIR 1963 Orissa 1.
21. AIR 1920 Cal. 722 (DB) (Deadlock in business due to dissolution of firm of managing agents--Efforts made by company to appoint new managing agents is clear indication of the absence of intention to close down business)+AIR 1962 Punj. 151.
1. 1991 CLC 1854.
2. PLD 1970 Lah. 60 (DB)+AIR 1962 Punj. 151.
3. PLD 1997 Kar. 376.
4. PLJ 1986 SC 389=PLD 1986 SC 698.
5. 1986 SCMR 1126.

up. In this case upon construction of Memorandum of Association it could not be said that the company had ceased to carry on business.[6] Similarly allegation in petition that business of company was a standstill and that its main plants had not been operating since several years did not amount to the same thing as "the company suspending its business for a whole year", and therefore was not a ground for winding up the company.[7]

8. **"Inability to pay debts."** The word "debts" refers to all the creditors as a class and not separately to the interest of each individual creditor. For the application of this section there should, firstly, exist a debt, secondly, it should not be the subject of an honest-dispute, and, thirdly, the company should be unable to pay it.[8] This is so because the main object of these proceedings is to find out solvency or insolvency of the company and not to settle the claims of creditors.[9] Mere unwillingness on the part of a company to pay its debts,[10] or wilful avoidance or neglect to pay the debt does not amount to non-payment because of inability to pay. The inability must be proved with reference to existing available assets of the company in relation to its debts.[11]

Company Judge has a discretion to order winding up of a company if it is unable to pay its 'debts' and in spite of demand made by the creditors the debt remains unpaid.[12] Where company was unable to pay its debts, policy of Court would be to welcome revival where it showed signs of such revival rather than affirm death of company and for that purpose Court must make a direct exercise. Where there was no reasonable prospects of company reviving its normal operations or business, proceedings of winding up should not be prolonged. Putting off final decision would only lead to reduce distributable surplus of company for passage of time would increase liabilities of company without there being any increase in its assets.[13]

In winding up proceedings under section 305(*e*) a creditor has to establish that the "company" is unable to pay its debts". The word "unable" does not mean "unwilling".[14] A company is deemed unable to pay its debts: (*a*) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one per cent of its paid up capital or fifty thousand rupees, whichever is less, than due, has served on the company, by causing the same to be delivered by registered post or otherwise, at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for thirty days, thereafter, neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or (*b*) if execution or other process issued on a decree or order of any Court or any other competent authority in favour of a creditor of the

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6. AIR 1962 Guj. 269.
7. PLD 1985 Kar. 193
8. PLD 1971 Kar. 597.
9. PLD 1986 Kar. 409+PLJ 1979 Kar. 295+AIR 1925 Mad. 199.
10. 1997 CLC 230=PLJ 1997 Kar. 233.
11. 1991 MLD 124+AIR 1954 Cal. 499 (DB).
12. 1992 SCMR 1006=NLR 1992 Civ. 507=1992 Law Notes 368+PLJ 1992 Kar. 363=PLD 1992 Kar. 249+1991 MLD 124.
13. 1997 MLD 1966.
14. 1989 CLC 1167+PLJ 1979 Kar. 295+PLD 1971 Kar. 597.

company is returned unsatisfied in whole or in part; or (*c*) if it is proved to the satisfaction of the Court that the company is unable to pay its debts.[15] Where petitioner Corporation had granted respondent (Company) foreign currency loan in terms of agreement which respondent failed to pay back. Petitioner served on respondent notice in terms of section 306 but it failed to appear. Application was fully advertised in terms of R. 781 Sindh Chief Court Rules but no objection was received from any quarter. Respondent (Company) was, thus, deemed to be unable to pay its debts and was, therefore, ordered to be wound up.[16]

It must also be kept in view that the fact that the liabilities of the company far exceed its assets does not by itself mean that the company is unable to pay its debts. A company may have liabilities more than its assets and yet in particular circumstances it may have the capacity to meet the demands of its creditors, and in that case it cannot be wound up on that ground.[17] Therefore, winding up on ground that company is unable to pay its debts, would not be ordered merely because company has obtained loan and has no or insufficient ready cash with it. Contingent and prospective liabilities of company in terms of section 306(*c*) would also not justify winding up order when nothing tangible or definite has been brought on record.[18]

Winding up proceedings to recover debt. The object of the section was not to coerce company to make payment to unpaid creditor, but to secure discontinuation of functions of such company, which had ceased to be commercially solvent.[19] Whereas the object of a petition for winding up of company is to secure an order of winding up of company on account of its inability to pay its debts, which means that company has ceased to be commercially solvent and viable, and its continuation will be prejudicial to its creditors and share-holder.[20] Winding up petition by a creditor is not a substitute for recovery of debts. It would merit dismissal when object of a creditor is to bring pressure on a debtor company, as in such case winding up petition would be abuse of legal process and would by itself be sufficient to displace prima facie position that a creditor is entitled to *ex debito justitiae* to winding up order. Proper course for petitioner would be to file suit for recovery of its dues from Company rather than pressurise the Company to pay its alleged debt by filing winding up petition.[21] But Lahore view is that a winding up petition is a legitimate method of enforcing payment of a just debt. A creditor who is unable to obtain the payment of his debt has a right *ex debito justitiae* to a winding up order.[22] Therefore where only object of the creditor is to recover his debt out of assets available and he has no mala fide and the company is not in a position to pay the debt, the creditor is prima facie entitled to an order of winding up,[23] and the inability of the company to pay a particular debt enures to the benefit

15. PLD 1990 SC 768=1990 PSC 1225.
16. 1996 CLC 799=NLR 1996 UC 319.
17. AIR 1964 Mad. 191.
18. NLR 1994 Civ. 15=PLD 1993 Kar. 322.
19. 1997 CLC 230=PLJ 1997 Kar. 233.
20. PLD 1986 Kar. 409=NLR 1986 Civ. 899.
21. 1997 MLD 149=PLJ 1997 Kar. 44+NLR 1993 Civ. 526=PLD 1992 Kar. 249=PLJ 1992 Kar. 363.
22. PLD 1969 Lah. 194.
23. AIR 1929 Lah. 651=11 Lah. 80 (DB).

of its other creditors also.[1] In such case the principles on which the Court acts are firstly, the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, thirdly the company adduces prima facie proof of the facts on which the defence depends.[2] It must be noted that the forum created by this section is not a substitute for a suit to recover debts. Main object of winding up proceeding is to find out solvency or insolvency of Company and not to settle claims of creditors.[3]

Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. Where there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed, the Court will make a winding up order without requiring the creditor to quantify debt precisely.[4] Where however the company is in a position to pay the debt and the creditors can recover it by resort to a civil suit they are clearly in error in entertaining the view that winding up proceedings are a substitute for a suit to recover their debt.[5] But in case of petition for winding up of a company by Industrial Development Bank of Pakistan on the ground that company was unable to pay the debt due to it in spite of service of notice for payment of the dues on the expiry of statutory period. It was held that unless a debtor bona fide disputed the claim of the creditor or was able to show that notwithstanding the dispute he was in a position to pay his debts, the plea that Industrial Development Bank of Pakistan should have proceeded under section 38 of the Industrial Development Bank of Pakistan Ordinance, 1961 and not by way of petition for winding up of company was not of much substance. When there had been a failure to pay a debt in accordance with the statutory notice of demand, insolvency was to be presumed though no doubt it might also be proved in other ways.[6]

A petition for winding up can be refused when the claim of the petitioner is bona fide disputed by the company. Where the petition is filed out of improper motive to coerce the company and for satisfying some groundless claim made against it by the petitioner, the Court will refuse to pass an order inasmuch as the petition was presented out of improper motive.[7] It is wrong to unnecessarily resort to winding up proceedings because there is an implied threat in them to bring disaster to the company and because an odium is also attached to such proceedings. Where the petitioner had agreed with the Directors to become a share-holder of the company and it was with that understanding that he spent some money. The petitioner would either be entitled to the shares in accordance with the agreement, or in case the agreement has not been honoured the respective rights and liabilities of the parties thereunder shall have to be determined.[8]

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1. 55 Mys H C R 107 (DB).
2. PLD 1986 Kar. 409=NLR 1986 Civ. 899.
3. 1989 CLC 1167.
4. PLD 1986 Kar. 409=NLR 1986 Civ. 899.
5. PLD 1971 Kar. 597.
6. PLD 1990 SC 768=1990 PSC 1225.
7. 1997 CLC 230=PLJ 1997 Kar. 233+1991 MLD 124=NLR 1991 Civ. 582.
8. PLD 1982 Lah. 103=PLJ 1982 Lah. 4=NLR 1982 CLJ 12.

A creditor who has unsuccessfully prosecuted an application for winding up on the ground, of company's inability to pay his debt cannot claim the exclusion of the time spent on such prosecution in determining whether his subsequent suit for recovery of the debt is within the period of limitation. As the causes of action in these proceedings are not the same, his case cannot be governed by section 14, Limitation Act.[9]

Change in management. Change of management of company would not make any material difference so far as question of repayment of debt was concerned nor would it affect the question whether such company be wound up or not.[10]

No defence offered by Company. Where in case of a winding up petition on grounds *inter alia* that company was unable to pay its debts. Despite service company did not appear to defend the petition nor filed a counter-affidavit. Circumstances enumerated in petition made out a prima facie case of winding up. Petition was granted and company was ordered to be wound up.[11]

Proof of inability to pay debts. Where no documentary proof worth consideration was furnished by the debtor to show that his establishment was commercially solvent. Record, however, indicated that debtor owed large sums of money to creditor which it had neglected to repay. Presumption was that debtor was unable to pay its debts.[12]

Debt not due. A demand and a failure to pay a debt which is not presently payable does not amount to an inability to pay the debt and therefore cannot support an application for winding up brought on that ground.[13] For the same reason if on the date of application for winding up of a company, the claim of the petitioning creditor against the company, is time barred, his petition, based on the notice of demand for payment and failure to comply with it, is not maintainable.[14]

Non-payment of income tax, etc. The Income-Tax Ordinance and Sales Tax Act provide a machinery for realisation of taxes and if a company makes defaults, certificate proceedings would be commenced for non-payment of taxes. The fact that the company did not pay its income tax or sales tax liabilities would not be a ground for winding up a company on a charge of insolvency.[15]

Delay in payment. Where a debt has been paid, although after some delay, before the filing of the winding up petition, the delay cannot be relied upon as a ground to show that the company is unable to pay its debts.[16] In such proceedings even an offer by the company to pay the debts, may according to the circumstances

9. AIR 1951 Nag. 255=ILR 1950 Nag. 562 (DB).
10. 1995 CLC 1483 (SC AJ&K).
11. NLR 1993 CLJ 28.
12. 1990 CLC 1030=NLR 1990 UC 552.
13. AIR 1936 Cal. 628=62 Cal. 295.
14. AIR 1964 Mad 191.
15. AIR 1965 Cal. 98.
16. AIR 1955 Orissa 34=ILR 1955 Cut 363.

of the case induce the Court to adjourn the application and grant time to the company to do so.[17]

Deliberate non-payment of debt. Deliberate failure of a company to pay the amount which it is liable to pay under the law and for which company admits liability in a claim made by a creditor, would entail company's liquidation. Fact that respondent company was a public limited company would justify conditional winding up order that wind up petition shall be deemed to have been refused in case company deposits in court the amount claimed by the creditor within a given time.[18]

Default in payment according to scheme sanctioned by Courts. In the case of a company for which a scheme has been sanctioned, its default to pay according to the terms of the scheme, amounts to an inability to pay under section 305.[19]

Foreign company. Where a foreign company proceeded against for winding up, was in no position to meet its liabilities including liabilities to creditors in Pakistan, the company was held, to be liable to be wound up as an unregistered company being insolvent and bankrupt.[20]

Notice for winding up not given. Even in case of failure to serve a notice for winding up of the Company on the Registered Office of the Company, the petitioner would be entitled to prove to the satisfaction of Court that the company was unable to pay its debts.[1]

Notice for repayment of debt not given. Although no statutory notice had been served on the company and as a result, the petitioner was not entitled to take any benefit of the presumption of non-payment or inability to pay, the petitioner could still prove that the company was otherwise unable to pay its debts. The debt of the petitioner was not disputed.[2]

Invalid notice of demand. Any defect in prescribed notice will render winding up proceedings *ab initio* void. Non-compliance with provisions of section 306(*a*) before institution of petition under section 309 would invalidate winding up proceedings.[3] But a creditor can prove by other ways the inability of the company to pay its debts within the meaning of section 305(*e*) where it is found that the notice of demand given by him under section 306(1)(*a*) is invalid.[4]

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17. AIR 1928 Rang. 36 (DB) (Public limited company--Offer to pay the debts would very strongly induce Court to grant time--But not so where the company is a private company and it has very large debts and practically no assets excepting the estates transferred to it by its predominant share-holder who himself has been declared an insolvent immediately after such transfer).
18. NLR 1989 Civ. 29=PLJ 1989 Kar. 8=1989 CLC 30.
19. AIR 1948 Cal. 335 (Petition for winding up on ground of inability to pay adjourned *sine die* and scheme sanctioned--Default in payment accordingly revives original debt and petitioner is entitled to proceed with the adjourned petition).
20. 1988 CLC 2933.
1. 1994 CLC 2202=NLR 1994 UC 448.
2. 1991 MLD 124=NLR 1991 Civ. 582.
3. NLR 1990 UC 540=PLD 1990 Kar. 191.
4. AIR 1954 Cal. 499 (DB).

9. Commercial insolvency. The purpose of the provision of clause (*c*) of section 305 read with clause (*c*) of sub-section (1) of section 306 of the Ordinance is to determine the basic question of the commercial solvency of the company and there is no reason why that determination should be put off to so uncertain a date as the hearing of the winding up petition.[5] A company may be wound up where the company is not commercially solvent nor is there any reasonable chance of its doing business in the near future at a profit,[6] because the basis of an order to wind up a company on the ground of its inability to pay its debts is always insolvency,[7] and the failure of a company to comply with the statutory notice of demand for the payment of debt raises a presumption of its insolvency,[8] because such refusal is usually accompanied by a state of insolvency.[9] Thus a company which closed its business for a year because of its inability to pay electricity bills was ordered to be wound up on the ground of commercial insolvency.[10] But where balance-sheet of a company did not indicate that financial position of company was such that it should be wound-up. Mere increase of liability of company by itself was no ground for winding-up. What had to be established was that it was impossible to carry on the business of company except at a loss or that existing assets were insufficient to meet existing liabilities.[11]

Commercial insolvency, what is. A company shall be called commercially insolvent, if it is unable to pay its debts or liabilities as they arise in the ordinary course of business.[12] Mere non-payment of debt due on the service of notice of Company by fiction of law would be deemed to be Company's inability to pay its debts for the purpose of section 305 as regards ground for winding up of Company on account of its inability to pay its debts.[13] The expression "commercially insolvent" is not to be understood in any technical sense. It means that the company is plainly and commercially insolvent, that is to say that its existing and probable assets are such as to make the Court feel satisfied that they would be insufficient to meet the existing liabilities.[14] For this the question whether assets of company exceed its liabilities or not, is not a relevant question.[15] However fixed assets, plants and machinery are not to be ignored in assessing the solvency of the company. For deciding the question whether the company is commercially insolvent, it has to be determined whether it is unable to pay current demands. The share capital, though shown as liability of the company for the purposes of balance-sheet, cannot be considered to be a liability within the meaning of section 306(1)(*c*).[16] In such cases what has to be ascertained is not whether the company, if

5. 1991 MLD 124=NLR 1991 Civ. 582.
6. 1993 CLC 642+PLD 1990 SC 763+1976 Dhaka LR 133+PLD 1959 Dacca 389+AIR 1933 Lah. 301.
7. PLD 1971 Kar. 597+AIR 1955 Cal. 273=ILR (1956) 2 Cal. 95 (DB)+AIR 1963 AP 243.
8. PLD 1982 Kar. 94=PLJ 1981 Kar. 659+AIR 1965 Cal. 273 (DB).
9. PLD 1971 Kar. 599.
10. PLD 1977 Lah. 787.
11. 1985 CLC 1239 (Kar).
12. 1995 CLC 1483 (SC AJ&K)+1991 MLD 124=NLR 1991 Civ. 582.
13. PLD 1996 Lah. 633.
14. AIR 1963 AP 243+(1869) 19 Eq. 122+AIR 1933 Lah. 301+AIR 1950 East Punj. 142+AIR 1942 Bom. 231+AIR 1959 Tripura 41.
15. 1995 CLC 1483 (SC AJ&K).
16. 1991 MLD 124=NLR 1991 Civ. 582.

it converted all its assets into cash, would be able to discharge its debts, but whether in a commercial sense the company is solvent.[17] In other words a company may be rich, yet it may be commercially insolvent. The real criterion is whether it could meet its liabilities. The Court has to see whether the company is commercially insolvent i.e., whether it is unable to meet its current demands although the assets when realised may exceed its liabilities. If the company is commercially insolvent it may be wound up.[18]

Assets--what are. It is the liquid assets of a firm at the time of application for its winding up that must be taken into consideration in finding out whether it is able to pay off its debts, and not its other assets, such as, its wealth locked up in investment, which could not be presently realisable.[19] As to the unpaid capital the position is that while it is not possible to regard the entire unpaid capital as available to the creditors at its face value it is equally wrong to leave it out of consideration altogether regardless of the position and solvency of the share-holders. On the one hand, allowance must be made for the fact that some of the share-holders may not be able to meet the call when made: and those who have the means may not be willing to pay too readily.[20]

'Liabilities'--what are. A company does not owe its members the share money paid by them, and the members have no right to ask for the return of the money paid by them. Even in a winding up what the members get if they get anything at all, is not a return of their share-money, but their rateable share of any surplus left after satisfying the creditors, and this share may be less or more than the share money paid. It is true that ordinarily the Court does not go behind the company's balance sheet to ascertain its financial position, but this does not mean that the mere fact that a particular item appears in the balance sheet under the head "liabilities" conclusively establishes that that item is a liability of the company in the sense in which the word "liability" is used here.[1] As a rule in ascertaining the debts of the company, the sums under items such as "calls in advance", "share suspense", "forfeited shares account" and "deposit against premium" which the company could not be called upon to pay immediately cannot be taken into account. The items such as "loans", "advances" and "outstanding liabilities" must however, be considered.[2] The company judge may also take into account any liabilities that may arise after the application for winding up is made.[3]

Inability to earn profits. Besides being in possession of readily realizable assets sufficient to discharge its debts, a company to be considered commercially solvent must have on the date of winding up petition reasonable hope of attaining the object of trading at a profit.[4] Where a company has been a losing concern for long and there is no likelihood of its gaining commercial solvency, it is a fit case in

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17. AIR 1941 Pat. 603=20 Pat. 538+AIR 1942 Bom. 231 ((1869) 19 Eq. 122, *Rel on*).
18. PLD 1990 SC 763.
19. 55 Mys H C R 107 (DB).
20. AIR 1959 Tripura 41.
1. AIR 1965 Ker. 241.
2. AIR 1941 Pat. 603=20 Pat. 538.
3. PLD 1973 Lah. 60 (DB).
4. AIR 1942 Bom. 231.

which winding up of the company may be ordered.[5] However one should not lose sight of the principle laid down by Lord Cairns in *In re: Suburban Hotel Co.* (1867) 2 Ch. App. 737, that it is not permissible to argue from the mere fact that a company has consistently made losses in the past that it has no reasonable prospects of earning profits in the future, has been repeatedly affirmed and the decision itself has been taken to have established the fact that a company "has lost, is losing and will continue to lose" does not of itself justify a winding up order, at least when the capital has not been exhausted.[6] Therefore where the indications, both because of the reduction in losses and the increase in sales and because of orders placed by the Government and the railways, seem to be that the company can make profits, and, in any case, this is a matter which is primarily for the members of the company to decide. It is not the business of the Court to manage the affairs of a company and the winding up process of the Court cannot be used and ought not to be used, as the means of evoking a decision as to the probable success or non-success of a company as a commercial speculation. It is only in very extreme cases, if at all, that the Court will take upon itself the unaccustomed duty of choosing between conflicting views in order to settle what is really of the nature of a business problem.[7]

10. Disputed debts, non-payment of. A company cannot be said to be unable to pay its debts where the non-payment is due to a bona fide dispute it has, as to its liability for the amount.[8] Court was required to examine whether dispute regarding payability of debt in order to oppose winding up petition had been raised bona fidely and on substantial grounds on account of which Court was satisfied that proper remedy would be to file civil suit in given circumstances. Question of ability or inability of Company to pay its debt which had become due would be determined with reference to conduct of Company and income or profits earned by it from business. Where Company had not earned sufficient profits to pay its debt or where such Company had earned profits but was unable to pay its debts or its management had acted in a manner that instead of paying debts, profits were applied to some other use, such conduct would be deemed to be inability of Company to pay debt as contemplated by section 306, Companies Ordinance.[9] The Courts would refuse to wind up a company when it is able to show that the debt of the petitioner is bona fide disputed by it.[10] Therefore in case of denial of company, to pay alleged debts, based on triable issues and neither frivolous nor merely a cloak to avoid payment but based on substantial ground. Remedy by way of winding up order of company was neither equitable nor justified.[11] There may be a company which is in reality under an obligation to pay huge debts but may be honestly disputing them and, therefore, refusing to pay them. In such circumstances, if the winding up proceedings were continued, they would be converted into proof and disproof of the

5. PLD 1970 Kar. 229+PLD 1959 Dacca 389.
6. AIR 1965 Ker. 241+AIR 1962 Ker. 148.
7. AIR 1965 Ker. 241+(1936) 1 All E R 299+(1927) 2 K B 9+(1876) 2 Ch. 737.
8. 1993 CLC 642+1992 SCMR 1006+1992 Law Notes 368+PLD 1971 Kar. 597+AIR 1955 Mys. 122 (DB)+AIR 1920 Cal. 1004 (DB) (Failure to comply with statutory demand).
9. PLD 1996 Lah. 633.
10. 1993 CLC 642+PLD 1986 Kar. 409+1955 Raj. L W 66+AIR 1929 Mad. 265 (Mere failure to comply with statutory demand cannot entitle creditor to obtain winding up as a matter of right)+AIR 1925 Rang 128 (DB) (Application must be dismissed).
11. PLD 1986 Kar. 409=NLR 1986 Civ. 899.

debts and the main object which is scrutiny into the solvency or insolvency of the company will be relegated to the background.[12]

Where there is bona fide dispute as to the company's liability to pay the debt, the creditor must sue for recovery in a civil Court, he would not be allowed to take advantage of the Companies Ordinance.[13] The presentation of a petition for winding up is an abuse of the process of the Court if the debt on which the petition is founded is disputed bona fide.[14] Therefore where the creditor whose debt is disputed by the company files an application for winding up and excepting his general allegation in the application there is no circumstance or evidence against the solvency of the company, the application should be dismissed as an abuse of the process of the Court.[15] But onus to show that company had a bona fide dispute in regard to its liability to pay to creditors would be on the company. Such onus could not be discharged merely by the fact that company had filed a suit against the creditors claiming damages from the creditors. Unless evidence had been led in the suit and company's claim had been established, it could not be said that company had a bona fide claim against creditors.[16] Where company has made serious allegations against petitioner and has claimed more than nine crores of rupees from it in suit. Petitioner who seeks winding up of company is alleged to have carried on business in competition with the company and made huge profits at the cost of the company. Proper course for petitioner would have been to file a suit for recovery of its dues rather than to presurrise the company to pay its alleged debt by filing winding up petition.[17] Therefore, an objection by the company that a debt was time barred would not be a ground for a winding up order, but where the company protracted the proceedings, raised objections it could not substantiate and withhold information in spite of orders of Court, an order of winding up was justified.[18]

Duty of Court. In all cases where an application under section 305 is based on the allegation that the respondent company is unable to pay its debts, the question always arises whether the respondent-company is not in a position to pay its debt and whether the company concerned has a bona fide dispute with the petitioner who has come to the Court.[19] Therefore where in a petition for winding up based on the ground of the company's inability to pay its debts, the defence is that the debt is disputed, all that the Court has to see first is whether on the face of it that dispute is a mere cloak to cover its inability to pay or a genuine one.[20] To establish the bona fide of the dispute it is not sufficient to rely on the fact that the petitioner's action on the debt, the company was given unconditional leave to defend; there should be other evidence in addition to establish that.[1] Where the dispute is not a cloak to hide its inability to pay but a bona fide one, the application to wind up the company on

12. PLD 1971 Kar. 597.
13. 1993 CLC 642+PLD 1982 Lah. 103=NLR 1982 CLJ 12=PLJ 1982 Lah. 4+AIR 1929 Mad. 265.
14. 56 Cal W N 29.
15. (1883) 23 Ch. D. 210.
16. 1993 CLC 642=NLR 1993 CLJ 1.
17. PLJ 1992 Kar. 363=PLD 1992 Kar. 249=NLR 1993 Civ. 526.
18. 1986 SCMR 1126.
19. 1969 DLC 596=22 DLR 170.
20. AIR 1914 Bom. 251=39 Bom. 47 (DB).
1. 1955 Raj. L W 66.

the ground of its inability to pay its debts must not be admitted.[2] Thus where the debt of the petitioner which is made a ground for the petition of winding up is a knotty and constituted debt and the evidence produced on behalf of the respondents fully establishes that the financial position of the company is quite sound and it can easily meet its liabilities, the application for winding up the company cannot be granted.[3]

Dispute as to debt pending before arbitrator. Where the allegation that has been made by the applicants against the company is that cheques of the company of the value of four lacs and five lacs of rupees have been dishonoured and that Rs. 13,29,638 and Rs. 9,46,092.40 are due and recoverable from the company. It is also alleged that notices in terms of section 306 have been duly given to the company, but the company has neglected to give any reply to them. It was held that as there was a dispute between the company and the creditors which was pending before an arbitrator, the order of winding up must be stayed for one month subject to a security for the payment of Rs. 22 lacs being given.[4]

Premature demand for debt. Petition for winding up would not be maintainable unless debt was payable on the date of filing of winding up petition.[5] Where the company disputes the debt itself or the right of the creditor to make a demand then, on the ground that the time for its payment has not matured, and there is nothing to show that if the dispute is settled the company would not be able to pay the debt, there would be no proof of its insolvency and hence no ground for its winding up.[6]

Dispute as to part of debt. Where out of the two debts relied upon in a petition under Cl. (*e*) there was a bona fide dispute with regard to one which was substantial; it was held that from the delay in payment of the other which was negligible, it was not possible to infer an inability to pay.[7]

11. Just and equitable--clause (*h*). Before passing final order of winding up Court remains under legal obligation to form an opinion under clause (*h*) whether it is just and equitable that Company should be wound up.[8] The words "Just and equitable" in clause (*h*) of section 305 are not *ejusdem generis* with the grounds mentioned in clauses (*a*) to (*e*) of the section.[9] However, the Court before acting under Cl. (*h*) to wind up a company would require grounds, although not of a like nature with those specified in the preceding clauses, yet of a like magnitude,[10] and it should not only bear in mind the interests of the company, its directors and share-

2. PLJ 1997 Kar. 47=1969 DLC 596=22 DLR 170+AIR 1949 Assam 45=ILR (1949) 1 Assam 216.
3. PLD 1962 Kar. 71=PLR 1962 (1) W P 237.
4. PLD 1967 Kar. 156.
5. PLD 1996 Lah. 633.
6. AIR 1955 Cal. 273 (DB)+AIR 1952 Cal. 323 (DB).
7. 1955 Raj L W 66.
8. NLR 1994 Civ. 35=1993 CLC 1540+1991 MLD 124.
9. PLD 1985 Kar. 193+PLD 1967 Kar. 44 (DB)+PLD 1956 S C (Ind) 226+AIR 1956 S C 213+AIR 1956 Pepsu 89+AIR 1949 Mad. 675 (DB)+AIR 1929 Bom. 8+AIR 1925 Mad. 489 (DB)+1924 AC 783+AIR 1965 Cal. 98+AIR 1958 AP 259.
10. AIR 1919 Low Bur 29.

holders but also that of the general public.[11] A company would not be wound up if winding up of company would unfairly prejudice not only share-holders but also creditors.[12]

The words 'just and equitable' are words of the widest significance and do not limit the jurisdiction of the Court to any case. It is a question of fact and each case must depend on its circumstances. No general rule can be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase "just and equitable" for the purposes of winding up.[13] The petitioner has to satisfy the Court that the circumstances of the company are such as to make it just and equitable for the Court to order compulsory winding up of the company.[14]

The Court is to examine the factual position as it is on the date of the presentation of the petition for winding up, that is to say, as to what actually then the position is, and not what the position should have been or could have been. It is not for the Court to assess or apportion the blame by reason of which the company had been brought to such a position that it has become just and equitable that the company should be wound up.[15] It is just and equitable to wind up a company when its substratum is gone although majority of the share-holders desire to continue to carry on the business or where the company is a "Bubble" company or where there is a complete deadlock in the management of the company's business, unless the deadlock is only temporary, or where the company was formed to carry on an illegal business or where the company was conceived and brought forth in fraud. But facts showing circumstances whereby petitioners apprehend loss of their interest in company cannot be considered to be impairment of the company itself and are, therefore, not relevant for deciding whether the company should be wound up or not.[16]

Three categories of cases shall fall under "just and equitable" clause, namely, (*a*) exclusion of a partner from management, (*b*) existence of a state of deadlock, and (*c*) justifiable lack of confidence in management.[17] The Court has in the first place to see that the interests of the share-holders are not being adversely affected. Where the Director has not done anything against the interests of the share-holders, the mere fact that they are dishonest or that they have not paid taxes,[18] or that they have entered into *ultra vires* transactions or the mere holding of a majority of shares by a member of the company has never been recognised as a ground for its compulsory winding up when no positive act on the part of any such individual

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11. AIR 1949 Mad. 675=ILR 1950 Mad. 59 (DB).
12. NLR 1996 UC 796.
13. AIR 1963 Orissa 1.
14. AIR 1962 Ker. 148=AIR 1956 S.C. 213.
15. AIR 1963 Orissa 1.
16. PLD 1967 Kar. 44 (DB).
17. 1996 CLC 1863=NLR 1996 Civ. 315+NLR 1993 Civ. 526=PLD 1992 Kar. 249=PLJ 1992 Kar. 363.
18. PLD 1975 Kar. 40=PLJ 1975 Kar. 90.

member to the prejudice of the other share-holders has been made out or even alleged.[19]

Discretion of Court. Where although no statutory notice has been served on the company and as a result, the petitioner is not entitled to take any benefit of the presumption of non-payment or inability to pay, the petitioner may still prove that the company is otherwise unable to pay its debts. The debt of the petitioner is not disputed.[20]

Deadlock in management. State of deadlock arising from equal division of voting powers between petitioner seeking winding up and respondent opposing winding up, would justify winding up of company on "just and equitable" ground.[21] Where relationship between parties was that of partnership firm in the form of company limited by shares with equal shareholding. Two Directors from each of the parties with 50 per cent shareholding indicated that company itself was incorporated by two brothers as family concern. Conduct and attitude of parties towards each other indicated that there was complete lack of faith and confidence and business of company was at standstill for more than two and half years. A fit case for winding up had been made out on several grounds amongst others that there was complete dead-lock in relation to conduct of affairs of company and that affairs of company were not being conducted in accordance with provisions of Companies Ordinance, 1984 nor were they be likely to be so conducted.[1] Similarly where a company would be wound up on just and equitable grounds where company was a family concern analoguous to partnership firm and respondents (Directors) had committed several acts of commission and omission rendering the company liable under various provisions of section 305, Companies Ordinance; as where partners were excluded from the management of the company; and there was complete dead lock among the parties.[2]

Majority of share-holders opposing winding up petition. In determining whether it is just and equitable to wind up a company all the circumstances connected with the formation and the carrying on of the company are relevant. The decision must take into consideration the interests of all the clauses of share-holders of the company and not merely of particular class ignoring that of the others.[3] As between share-holders the wishes of majority shall prevail. It is very important that the Court should not, unless a very strong case is made, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. There must be strong ground for exercising the power of interference at the instance of a share-holder. The Ordinance creates as between share-holders a domestic tribunal and the Court would be slow to withdraw from it the decision as to whether the company's business shall be carried on or the company shall be wound up. The fact that the majority of the share-holders including an independent share-holder like the Government are against the winding

19. AIR 1962 Kar. 148+AIR 1932 PC 1.
20. 1991 MLD 124=NLR 1991 Civ. 582.
21. NLR 1994 Civ. 15=PLD 1993 Kar. 322.
1. PLD 1997 Kar. 376.
2. 1996 CLC 1863=NLR 1996 Civ. 315.
3. AIR 1936 PC 114.

up of the company and desire the company to continue is an important circumstance which must weigh with the Court in deciding whether it should or should not make a compulsory winding up order against the company.[4] Thus the Court will not exercise its discretion under Cl. (*h*) of section 305 and wind up a company against the wishes of the majority to continue it unless there are strong reasons such as that the majority, which have voted have exercised their power of voting to their own commercial interest outside the company and in disregard of the interest of the minority.[5] However, the Court's jurisdiction to wind up a company under the "just and equitable" clause can in no way be affected by the fact that the majority of the share-holders oppose the winding up.[6] Thus where the substratum of the company is gone, the Court would not pay heed to the wishes of the majority of the members to keep the company afloat.[7]

Want of confidence amongst groups of shareholders. Mere loss of confidence between different groups of share-holders would not come within the relevant clause of section 305 or section 290 unless it was shown that such lack of confidence had resulted as a consequence of the oppression of the minority in the management and affairs of the Company and that there was at least an element of lack of probity or fair dealing in a member in the matter of his proprietary rights as a share-holder.[8] Therefore applicant cannot invoke "just and equitable" clause for company on ground of lack of confidence while, in fact, the only interest of applicant is to receive his alleged dues.[9]

Future prospects to be considered. Whether a case comes within the phrase "just and equitable" for the purpose of winding up mainly depends on the answer to the question whether on the date of the petition for winding up there is any reasonable hope that the object of trading at a profit with a view to which the company was formed can be attained.[10] There is obviously a great difference between a question of positive fact, such as the pecuniary position of a trading company at a particular date and a question of the prospects of the company in the future, a matter which must depend on all sorts of views as to the state of market, the confidence of the public and such other points which depend very largely on other considerations very difficult to summarise or to define. It is not the function of a Court to determine such a matter on its own views as to the probable success or failure, but to form the best opinion it can upon the expert advice given by persons with a practical knowledge of the trade in question.[11] In this context following tests are to be applied to determine whether the Company commercially is solvent or insolvent: (*i*) Whether the substratum of the Company is deemed to be gone? (*ii*) Whether the object for which it is incorporated has substantially failed? (*iii*) Whether it is impossible to carry on the business of the company except at a loss?

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4. AIR 1962 Guj. 269.
5. 1976 Dhaka LR 133+AIR 1952 Punj. 132+AIR 1956 Pepsu 89+AIR 1917 All. 347.
6. AIR 1929 Bom. 8.
7. PLD 1967 Kar. 44 (DB)+AIR 1962 Guj. 269.
8. PLD 1988 Lah. 1=PLJ 1988 Lah. 42=NLR 1988 SD 403+NLR 1993 Civ. 526=PLD 1992 Kar. 249=PLJ 1992 Kar. 363.
9. NLR 1993 Civ. 526=PLJ 1992 Kar. 363=PLD 1992 Kar. 249.
10. 1976 Dhaka LR 133+AIR 1936 PC 114 (Case from New South Wales, Australia)+AIR 1950 East Punj. 142+AIR 1936 AP 243+AIR 1936 Orissa 1.
11. AIR 1963 Orissa 1+AIR 1936 PC 114.

(*iv*) There is no reasonable hope that the object of the trading at a profit can be achieved? (*v*) The existing and probable assets are insufficient to meet the existing liability. These tests can be applied only if convincing evidence has been produced at the time of hearing, as such in absence of the evidence it is not possible to determine that the respondent Company is commercially insolvent and there are no chances of its future prospects.[12] Therefore where according to the report of the experts the company is in such a predicament that there is no reasonable hope of the company running its business and for want of finance, the attainment of the main object of the Company has become impracticable, the share-holders may fairly claim that they ought not to be forced to risk their property in going on. particularly when it is impossible to carry on the business of the company except at a loss.[13]

Creditor bank, views of. Bank's interest is to get the money which it has advanced to a company by way of loan, in the normal course of the banking business. Although the entire assets of the Company stand mortgaged to it, its apprehension that its interest will be seriously affected as its security will be deteriorated if the Company be wound up cannot be ignored. In winding up under just and equitable clause the Court will have greater regard to the interest of the creditors than that of the share-holder and greater weight is to be attached to their views.[14]

Delay in making petition. Where the winding up petition is made after 6 to 7 years; the company must know what are the charges of fraud and mismanagement brought against it by the petitioner.[15]

12. Disappearance of substratum of company. If the substratum of the company is gone and there is no reasonable chance of the company starting business again it is just and convenient that the company should be wound up,[16] even when a majority of the share-holder wishes that the company may not be wound up.[17] This is particularly so when the majority is a deceptive one.[18]

Substratum, when deemed to be gone. The substratum of the company is deemed to be gone when (*a*) the subject-matter of the company is gone, or (*b*) the object for which it was incorporated has substantially failed, or (*c*) it is impossible to carry on the business of the company except at a loss which means that there is no reasonable hope that the object of trading at profit can be attained, or (*d*) the existing and probable assets are insufficient to meet the existing liabilities.[19] When none of these four tests can apply to the facts of the case, the company cannot be wound up. It is for the petitioner for winding up to prove that the test is satisfied.[20]

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12. NLR 1994 Civ. 35=1993 CLC 1540.
13. AIR 1963 Orissa 1 (AIR 1936 PC 114, *Explained* and *distinguished*)+AIR 1963 AP 243.
14. 1976 Dhaka LR 133.
15. AIR 1965 Cal. 98.
16. 1995 CLC 1483 (SC AJ&K)+PLD 1985 Kar. 193+PLD 1967 Kar. 44 (DB)+AIR 1954 Cal. 195 (DB)+AIR 1931 Cal. 692.
17. PLD 1967 Kar. 44 (DB)+AIR 1962 Guj. 269.
18. PLD 1967 Kar. 637=PLR 1968 (1) WP 643.
19. NLR 1994 Civ. 15+PLD 1985 Kar. 193+AIR 1942 Bom. 231.
20. PLD 1985 Kar. 193+AIR 1942 Bom. 231.

Where any one of the above-stated tests is satisfied the company may be wound up.[1] Thus where a creditor under the provisions of an onerous contract seizes the plant and machinery and thereby renders the company unable to carry on its business and to pay its debts; it is just and equitable to wind up the company.[2] Where owing to the absence of funds and inability to obtain loans the company is not only unable to pay its debts but its business also is completely at a standstill with no prospects of resumption in the near future, the Court should order its winding up.[3] Where business of a company was at stand still and main plants had not been operating since several years. The company throughout its operation had incurred losses both in private management and public management. Paid-up capital of company was totally wiped out. The company had contracted heavy debts and it was on the verge of collapse. It was held that productive fixed assets of the company should be disposed of on the best available price and thereafter the company should be wound up.[4] But every case of mismanagement by the directors would not give a just and equitable cause to wind up the company. The question whether there should be winding up in such a case would depend upon the facts of the case.[5]

Impossible to carry on objects of company. It is when the whole of the business which the company was incorporated to carry on, had become impossible, that the Court might order the company to be wound up. The main or primary object for which the company is formed may become impossible either by reason of the subject-matter of the company being gone or for any other reason, in either case the substratum of the Company would be deemed to be gone because the share-holders having come together and subscribed money for a particular object, they cannot on the failure of such object be compelled by the votes of their fellow share-holders to continue to risk their money on some quite different project or speculation.[6] Object which is found to be main, sole and paramount object of Company would make other objects subservient to it, although other objects are incorporated as independent, separate and equal objects in Memorandum of Association. These other objects would remain subservient and ancillary to main object and would exist side by side with it. With destruction of main object of company, other objects which are subservient to main object would have no independent existence of their own. Destruction of main object would mean that substratum of company has gone and would justify order of winding up under section 305(*b*).[7] The impossibility must be either physical or legal or it may even amount to reasonable probability of the company not being able to carry out the main or dominant object. It is, however, necessary for the application of the principle that the main or primary object must have become impossible of fulfillment. It is not sufficient that the main or dominant object should have been

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1. AIR 1962 Punj. 151.
2. AIR 1941 PC 106.
3. PLD 1973 Lah. 60 (DB)+AIR 1930 Lah. 777 (DB).
4. PLD 1985 Kar. 193.
5. PLD 1962 Kar. 71+AIR 1956 SC 123 (In case of a sound running concern misappropriation by directors would by itself unaccompanied by other circumstances which render the winding up desirable will not constitute just and equitable cause).
6. (1867) 2 Ch A 737+(1882) 20 Ch. D 151+(1947) 2 All E R 104+(1882) 20 Ch D 169+(1889) 61 LT 785+(1947) SC 446+AIR 1961 Cal. 144+AIR 1962 Guj. 269.
7. NLR 1994 Civ. 15=PLD 1993 Kar. 322.

abandoned. The abandonment of the main or dominant object may be treated as one of the circumstances leading up to the commercial impossibility of the venture but it is not sufficient to support a petition for winding up on the ground that the substratum of the company is gone. The intention of the Board of Directors or share-holders of a company as regard continuance or abandonment of a particular business which is the main or dominant object of the company is entirely irrelevant in considering whether the substratum of the company is gone. What the Board of Directors or share-holders of a company may have abandoned today may be resumed by them tomorrow and though they may have considered at one time that the business should not be continued, they may later on find that the conditions have changed and that it is profitable to carry on the business and may accordingly resume the business.[8]

The substratum of a company cannot be said to have gone even where there has been loss of certain means through which it has been carrying out the objects of the company when those objects could still be carried on through other means or by the employment of other agencies.[9] The difficulty in many cases is to determine which is the main or primary object or purpose or the substance of the venture, particularly having regard to the fact that the objects clause of the Memorandum is usually drawn in a very wide form. A special rule of construction is in some cases applied where the objects of a company are expressed in a series of paragraphs, and according to the rule of construction one or more paragraphs are taken as embodying the main or dominant object of the Company, and, all other paragraphs are treated as merely ancillary to this main object and as limited and controlled thereby. The rule may be referred to as the main object's rule of construction.[10] Thus where the main object of the company was to generate and supply electric energy but the generation of electric energy was undertaken by the Government and the company has only been distributing electric energy purchased from the Government and although there were other objects stated in the Memorandum of Association there was no chance of carrying them out, the order to wind up the company was held just and equitable.[11]

Company capable of carrying on business though main object gone. Where the main object of the company is gone. The question as to whether the company is really in a position to start a new business is very relevant in considering the question as to whether the substrutum has disappeared. The existence or non-existence of a concrete scheme at the time the petition comes before the Court is wholly irrelevant.[12] The fact that the Company sold one of the estates it was formed to acquire and a substantial portion of the remaining estate, does not mean that its substratum has gone so long as it has acquired other estates and is in a position to carry on the business it is authorised by its memorandum to do. Even where the sole undertaking of a company has been actually sold, it cannot be said that its substratum has disappeared so long as there is some other business it can carry on coming within the objects stated in its memorandum. When on the date of the

8. AIR 1962 Guj. 269 ((1946) 1 All E R 435, *Relied on*).
9. AIR 1920 Cal. 722=47 Cal. 654 (DB).
10. AIR 1962 Guj. 269.
11. 1957 Andh L T 728.
12. AIR 1962 Bom. 133.

winding up petition, the Company owns undertaking to carry on business, the fact that the Company at one time thought that it might be desirable to dispose of one of its undertakings and subsequently thought that it might be desirable to dispose of the other undertaking, also, and sold them is very far from saying that its substratum was disappearing.[13]

Where a company was formed to generate and supply electricity and did so at *C* for 34 years whereafter the Provincial Government directed the company to sell the undertaking to the Provincial Electricity Board, which the company did. It was therefore sought that the company be wound up as its substratum had gone. It was held that the main and paramount object of the company was to carry on the business of an electric light and power company in all its branches. If the company would have started a similar type of business immediately then it would have been quite impossible to say that the substratum of the company had gone. It might be a good or a bad transaction for the company to enter into from a business point of view; but the Court was not concerned with it in winding up cases. The fact that there was no concrete scheme before the Court for dealing with the proceeds of sale, was no ground for making a winding up order. For, existence or non-existence of a concrete scheme at the time winding up position comes before the Court was a wholly irrelevant matter. Even on a narrow construction of the memorandum of association as limiting the business of the company to the town of *C* only as its primary object and other objects as merely ancillary, it was open to the company to embark on a business of electric light and power company in all its branches within the area authorised by the memorandum of association. It could not be said that the substratum of the company was gone merely because it sold its undertaking at *C*.[14]

13. Complaints relating to management. Every case of mismanagement by the directors would not give a just and equitable cause to wind up the company. The question whether there should be winding up in such a case would depend upon the facts of the case.[15] Courts will not intervene at the instance of share-holders in matters of internal management and will not interfere with the management of the company by its Directors so long as they are acting within the power conferred on them by the Articles of the company.[16] It has been held that the misconduct of directors and the fact that the business has been carried on at a heavy loss, are *per se* no grounds on which the Court would order a winding up of the Company.[17] The misconduct of Directors may provide grounds for a suit but is not a ground for winding up unless such misconduct produces insolvency. Where the company is not only solvent but is enjoying a large measure of prosperity, that is enough to stop the winding up proceedings.[18]

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13. AIR 1964 Ker. 212+(1946) 1 All ER 435+(1946) 1 All E R 765.
14. AIR 1964 Orissa 191+(1946) 1 All E R 435+(1882) 20 Ch. D. 169+(1882) 2 Ch. A. 737+(1946) 2 All E R 763.
15. AIR 1956 SC 213. (In the case of a sound running concern misappropriation of directors would by itself unaccompanied by other circumstances which render the wind up desirable will not constitute just and equitable cause).
16. AIR 1956 SC 213+AIR 1965 Cal. 98.
17. AIR 1942 Bom. 231.
18. AIR 1956 SC 213+AIR 1965 Cal. 98+(1866) 2 Eq. 1.

The fact that the majority of directors outvote one of the directors or single him out is not a ground for winding up the company in the absence of any allegation and proof of malversation of funds by the directors or the conduct of the affairs of the company by them to advance their own personal interest.[19] Similarly the just and equitable clause cannot be invoked to wind up the company, in the absence of malversation or misappropriation of funds, only because there is a mere incompatibility of good relations between the rival factions in the directorate.[20] Where there have been minor irregularities, such as delay in making entries of loans in the books, or that the loan was not utilized for the purpose for which it was obtained from Finance Corporation; it was held that there were minor irregularities, and the petitioner should have raised matters in Annual General Meeting. It is by no means a charge on which any order, much less an order for winding up the company, can be made by the Court on just and equitable grounds.[1] But where the irregularities in the working of a company and the factions in its directorate led to its incapacity to pay its debts and also imperilled its property; it was held that in the interest of its share-holders and creditors the only just and convenient way of dealing with the situation was to order that the company should be officially wound up.[2] Similarly the fact that a scheme has failed with regard to that part of it which provided for the resuscitation of the company would not by itself justify the Court in passing an order for the winding up of the company. But if in addition the directors in giving effect to that part of the scheme which contained an arrangement for the collection of debts and payment to creditors have brought about a moribund state of affairs by destroying the very foundation of the scheme by deliberately acting against its terms, there is not only every justification for winding up the company but it becomes the duty of the Court to do so.[3]

Removal of Director. The removal of a person from the office of working director, does not amount to oppression or exclusion of the minority shareholders from the management or control and affairs of the company.[4]

Want of confidence in Directors. To justify a winding up on the "just and equitable" rule it is necessary to prove a lack of confidence in the conduct and management of the company's affairs by the directors.[5] Where the circumstances of the case show that the conduct of the Directors and of the Officers of the Company needs investigation. That purpose can only be obtained in winding up through Court.[6] In such cases the real question for determination will be whether the

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19. AIR 1956 Pepsu 89.
20. AIR 1949 Mad. 675=ILR 1950 Mad. 59 (DB).
1. AIR 1965 Cal. 98.
2. AIR 1932 Lah. 571=13 Lah. 603.
3. AIR 1935 Lah. 779=16 Lah. 1029 (DB).
4. PLD 1988 Lah. 1=PLJ 1988 Lah. 42=NLR 1988 SD 403.
5. AIR 1932 PC 1 (AIR 1925 Mad. 633, *Reversed*)+AIR 1935 Lah. 779 (SB) (*Prima facie* case of dishonesty established against officers--Company should be compulsorily wound up)+AIR 1937 Oudh 337 (Dishonesty and mismanagement of officers of company--Charges can be investigated properly only in winding up proceedings. If established they constitute grounds for ordering winding up)+AIR 1925 Mad. 489 (DB). (Lack of confidence in management and conduct of company's affairs based on ground of absence of probity on the part of directors--Winding up justified).
6. PLD 1970 Lah. 235.

confidence of the share-holder is lost not only in the policy but also in the probity of directors, and if that is so, it will be a good case for winding it up.[7] Where the facts in a case showed that the chairman of the company had on two occasions leased out the business of the company under circumstances which rendered the transactions improper and had further involved the company into suits by members for non-payment of dividends by withdrawing the amounts himself and passing unauthorised receipts on their behalf; it was held that there was ample ground for ordering the winding up of the company under clause (*h*) of section 305.[8]

Deadlock in management. A deadlock in the management is not a ground on which a company can be ordered to be wound up,[9] especially where it is found that even long after the filing of the petition on that ground, the company is earning profit and there is no deterioration in the management.[10] In such cases the decisive question must be whether on the date of the presentation of the winding up petition there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed, could be attained, or that there was such a deadlock between the various share-holders of the company which was bound to frustrate the object for which the company was formed. In the latter case the company may be ordered to be wound up.[11] Where although Company was technically a "Public Company", yet it was in substance a partnership. Petitioners (share-holders) although possessed fifty per cent shares of the Company yet they were excluded from the management thereof, thus, a state of deadlock and justifiable lack of confidence in the management existed. Winding up of company was ordered.[12]

Oppressive management. The mere fact that the directors had a preponderating voting power and that they have not allowed other share-holders to joint in the management of the company is no ground to order its winding up.[13] Even in a case in which the Court finds that the business of a company is being carried on in a manner oppressive to some part of its members, the Court would not order the winding up of a company in view of section 290, under the "just and equitable clause" when it is shown to its satisfaction that the business itself could be continued to be conducted after removing the oppression complained of.[14] Similarly close relationship between several directors of a company is no ground for winding up of the Company although it is a factor to be considered in cases where that close relationship has fostered misconduct and mismanagement and has enabled the directors to dominate the other share-holders and monopolise the company for their own individual benefit.[15] Where however, the petitioner is legally entitled to a part in the management of a company and without his assent the business of the

7. PLD 1962 Kar. 71 = PLR 1952 (1) W.P. 237.
8. AIR 1930 Mad. 240 = 53 Mad. 38 (DB).
9. 1982 Dhaka LR (SC) 47 + 1976 Dhaka LR 133 + AIR 1950 Pat. 237.
10. AIR 1949 Mad. 673 = ILR 1950 Mad. 59 (DB).
11. PLD 1962 Kar. 71 = PLR (1952) 1 WP 237.
12. PLD 1993 Kar. 322 = NLR 1994 Civ. 15.
13. PLD 1962 Kar. 71 = PLR (1952) 1 WP 237.
14. AIR 1942 Trav-Co. 243 (DB). (*But* S. 153-C, Companies Act, 1913, could be invoked only when the arrangement aimed at remedying the complaint was placed before the Court before it passed the order for the winding up).
15. AIR 1964 Ker. 212.

company cannot be carried on, and the relations between the parties are such that they cannot possibly carry on joint business. The petitioner has by illegal and improper means been deprived of his part in the management of the company as well as of his emoluments as a director and the other party have taken improper control of the management of the company. They have also been receiving improper payments in the form of their own salaries. In addition to this they have passed resolutions forfeiting the petitioners' shares and then selling them so that he is now said to be not a share-holder at all. It would be proper to wind up the company.[16] It has been held that an attempt to oust a shareholder or to induct any third party in its place behind shareholders' back, would by itself be an act of oppression which cannot be overlooked and must be given effect to by ordering winding up of company.[17]

Minority, oppression of. The word "oppressive" used in section 305(1)(*iii*) would include oppression of minority in management and affairs of company. Therefore a petition is competent for winding up on ground that business of Company was being run in a manner oppressive to some members or persons associated with formation or promotion of Company or minority shareholders of Company. Thus where petitioner's group has two directors as against five directors of respondent's group on Board of Directors of Company. Respondent's group took complete control over the affairs of the company and acted ruthlessly against the interest of petitioner group. This was tantamount to oppression on part of respondent group within meaning of section 305(1)(*iii*).[18]

Holding of major shares by one person. Mere holding of a majority of shares by a member of the company has never been recognised as a ground for its compulsory winding up when no positive act on the part of any such individual member to the prejudice of the other share-holders has been made out or even alleged.[19] Therefore the fact that a managing director has a preponderating voice in the company by reason of his owning or controlling a large number of shares or that the dividends have not been paid regularly is by itself no reason for winding up a company.[20] But where the majority of shares of a certain company were held by the members of a family and the directors of the company were their nominees. All the funds of the company were invested in concerns in which the majority group of share-holders had very large interest. Debts due to the company remained unpaid for a long time and no attempts were made to realise them. Unrealisable debts were also mounting up. The company had been doing little or no business for some time and there was also no possibility of engaging in any fresh business unless the debtors paid up. The situation of the company had become such that the minority share-holders were not getting anything unless the majority share-holders took pity on them. In those circumstances it was held that it was proper that the company should be wound up both on the ground that the substratum of the company was

16. PLD 1956 Lah. 731 = PLR 1956 Lah. 1407.
17. NLR 1994 Civ. 15 = PLD 1993 Kar. 322.
18. NLR 1994 Civ. 15 = PLD 1993 Kar. 322.
19. AIR 1932 PC 1 + AIR 1965 Cal. 98 + AIR 1945 Mad. 675 (DB) + AIR 1962 Ker. 148.
20. AIR 1932 PC 1 (*Reversing* AIR 1925 Mad. 633).

gone as well as on the broad ground that it was just and equitable that the company should not be allowed to continue.[21]

'Ultra vires' transaction by Directors. An *ultra vires* transaction on the part of directors is of itself not sufficient reason for a winding up order since other remedies are available to the aggrieved share-holders.[22] There is no just and equitable ground to wind up the company simply because, in the past, the Directors had carried on unauthorised business when that business had only resulted in profit to the company. It is well settled that an *ultra vires* transaction on the part of the directors is by itself no ground for a winding up order. It follows that an *ultra vires* transaction which was to the benefit of the company and its share-holders would still less be sufficient justification for a winding up order.[1] Similarly the question of directors exceeding the borrowing powers given by the articles is a question of internal management and in a petition for winding up, the Court will not go into it especially when since filing of the petition, the Company had passed a resolution ratifying the borrowings of the directors taking the view that they have acted in the best interest of the Company.[2]

Misfeasance or breach of trust by Managing Director. As regards the acts of misfeasance or breach of trust by a Managing Director or Director, *etc.*, while a company is in liquidation, it is for the liquidator or any of the creditors or contributories to apply to the Court which appointed the Liquidator and in which the winding-up proceedings are pending to compel the Managing Director or Director or Manager, as the case may, to repay or restore the money or property or any part thereof or to the contribute such sums to the assets of the company by way of compensation in respect of misapplication, retainer, misfeasance or breach of trust as the Court thinks fit as provided in section 412, and not for a shareholder or member of a Company to move the Court. A creditor could also move the Court for relief in this behalf.[3]

Mismanagement by previous Board of Directors. Misconduct and mismanagement are not by themselves sufficient for a winding up order, especially where almost all the alleged acts of misconduct and mismanagement related to periods before the new Board of Directors took charge. Even if there was mismanagement in the past, the new Board should be given sufficient time to manage the affairs of the company properly and free it from the results of the past mismanagement.[4]

14. Other grounds for winding up. Absence of sufficient credit in the market, and paucity of means even to pay its employees is a just and equitable ground on which company can be wound up.[5]

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21. AIR 1961 Cal. 144.
22. AIR 1932 PC 1=58 Ind App. 416+AIR 1962 Ker. 48.
1. AIR 1959 All. 276 (DB).
2. AIR 1942 Bom. 231.
3. PLD 1989 SC 435=PLJ 1989 SC 353.
4. AIR 1964 Ker. 212.
5. AIR 1950 East Punj. 142.

Default in holding Annual General Meeting or in delivering statutory report to Registrar. Where default was made in delivering statutory report to Registrar or in holding statutory meeting, Court would not generally make the order of winding up in first instance but would desire such company to file statutory report or to hold statutory meeting or to hold annual general meeting and would extend time therefor. If company had failed to comply with the order then Court would wind up company. Directors in that case would be deemed to be personally liable for costs.[6]

Suspension of business. Where a company had suspended its business for the whole year, then discretion had been given to Court to wind up such company.[7]

Non-payment of dividends. The fact that dividends has not been paid regularly is no ground for winding up the Company.[8] It will not bring the case within the purview of S. 420, P.P.C. In the absence of any allegation of cheating by the Company as defined by S. 415, P.P.C. no case whatsoever under S. 420, P.P.C. would be made out.[9] Where one of the grounds for winding up was that company had been incurring losses for the last decade. Respondents had contested petitioner's allegations and claimed that the company had earned profits to the tune of millions of rupees and they could have paid dividends to its shareholders but it decided to improve its business and had established a five star hotel by spending profits earned by it. Accounts presented by respondents clearly indicated that company had earned net profits which was about 32 per cent of the total paid-up capital of the Company. Company had further clarified that substantial loans of Bank had already been paid. Prima facie respondent Conipany appeared to be making profits and going forward. Company, thus, could not be wound up on that ground.[10]

Illegal object of company. Where the main objects of a company is illegal business, the mere fact that some of its other objects were philanthropic will not prevent the company from being ordered to be wound up as being one formed for illegal purposes.[11] But where the object of a company by itself is unassailable, it cannot be wound up on the ground that the rules and bye-laws intended for regulating the manner of carrying out that object are susceptible of being misused to carry on business illegally under the guise of that object.[12]

Fraud. Where a company is sought to be wound up by a contributory on just and equitable grounds and fraud is alleged in the petition, then such fraud should be fraud committed at the initiation of the company or fraud by the company in carrying on its business.[13]

Fraud in promotion. Fraud in the promotion of a company or a fraudulent misrepresentation in the prospectus is not a sufficient cause for winding up a

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6. 1997 MLD 1966.
7. 1997 MLD 1966.
8. PLD 1989 SC 435=PLJ 1989 SC 353+1976 Dhaka LR 133.
9. PLD 1989 SC 435=PLJ 1989 SC 353.
10. PLD 1996 Kar. 300.
11. AIR 1953 Mad. 16=56 Mad. 26=33 Cr. L.J. 792 (DB).
12. AIR 1952 Trav-Co. 435.
13. AIR 1965 Cal. 98.

company because such fraud or misrepresentation may be waived by the majority of share-holders.[14]

Losses. Consistent losses cannot justify an order for winding up the company.[15]

Filing criminal complaints. Filing of criminal cases/complaints against petitioner does not give petitioner any right to move the Court for winding up of Company under section 305 or for taking action under section 290.[16]

15. Insurance company. When an Insurance Company is sought to be wound up under section 305(*h*) the Court must satisfy itself by evidence whether there was any reasonable hope of trading at a profit. In the absence of such evidence, the fact that the Insurance Superintendent has not taken any steps deserves consideration, though it is not a deciding factor, in determining whether a contributory's petition for winding up should be granted or not. While considering the question whether an Insurance company is unable to pay its debts, its assets in the form of motor-cars, library, stock of stationery, balances with its agents, amounts outstanding on account of unpaid premia and monies or securities deposited with the State Bank cannot be considered as assets available to discharge the debts. But ordinary bank balances, interest due from the State Bank on the investments and the balance of money which can be called up on account of shares can all be considered as assets available to discharge the debts.[17]

Payments made within time. If before expiry of 3 months, payment has been made by insurance company, a winding up petition will not be maintainable under clause (*ii*), but a petition filed by Controller under other grounds available to him under section 53 Insurance Act, would be otherwise maintainable. It is to be noted that period of 3 months as a pre-condition for maintaining a winding up petition is restricted to clause (*ii*) of section 53(2)(*b*) of Insurance Act.[18]

False statement by Company. Provision of penalty under section 104, Insurance Act (1938) against registered insurance company for making false statement, does not debar Controller of Insurance from maintaining winding up if action of Insurance Company is covered by a ground for winding up.[19]

Continuance of Company prejudicial to interest of policy holders. Insurance company whose continuance is prejudicial to interests of policy holders on account of its defaults and fraudulent actions, would be liable to winding up under section 305, on petition by Controller of Insurance.[20]

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14. AIR 1922 Cal. 365=49 Cal. 399 (DB).
15. AIR 1965 Ker. 241.
16. PLD 1983 Kar. 45.
17. AIR 1941 Pat. 603=20 Pat. 538.
18. PLJ 1994 Kar. 121=PLD 1993 Kar. 720
19. NLR 1994 CLJ 725=PLJ 1994 Kar. 121.
20. NLR 1994 CLJ 725=PLJ 1994 Kar. 121.

Sanction for winding up. A petition by Controller of Insurance for winding up of insurance company registered under Insurance Act (1938), does not require previous sanction under section 309.[1]

Forum for winding up. Petition before Lahore High Court under section 305 for winding up of an Insurance Company is not entertainable as Lahore High Court is not a High Court which has got ordinary original civil jurisdiction within meaning of section 53(1), Insurance Act (1938). Such petition would lie before the District Court.[2]

16. Receiver, appointment of. Where a set of circumstances does not for the time being attract the provisions of the Companies Ordinance, but attracts the provisions of Order 40, Rule 1 of the C.P. Code, there can be no objection to applying the latter provisions to appoint a Receiver who may take up the business of the company and the management of its property and its property affairs pending the decision of the Court in the litigation.[3] However if a company is well run and its Board of Directors is functioning, the appointment of an interim Receiver would result in drastic interference with its business and might do untold harm. On the other hand, the interests of the aggrieved party can be protected by methods other than the appointment of an interim Receiver, therefore, in the absence of any binding authority the Court refused to appoint an interim Receiver or a provisional liquidator on the plea of exclusion simpliciter. The Court directed the respondent to prepare, at the end of every calendar month, a statement of a Company's sales and expenses and to send a copy of it to the petitioner within two weeks of the preparation of the statement and this was held sufficient to protect his legitimate interests.[4]

17. Liquidator appointed by Court. Where the Court orders winding up of a company and a liquidator is appointed, the latter must act in accordance with directions of Court that are given or may be given or in the absence of any such direction in accordance with law.[5] Where a suit to enforce a mortgage or security upon the company's property is filed normally leave to proceed with the suit is granted particularly in cases where a guarantor or guarantors are also joined as parties to the suit because presence of both the company in liquidation represented by liquidator and guarantor or guarantors is either necessary or proper in order to effectually and completely decide all questions involved in the suit.[6] Where High Court allowed a suit against a company under liquidation to proceed subject to the condition that execution against property of company was to be with the permission of the Court. Official Liquidator of the company was however, not impleaded as party in the suit nor did such liquidator himself apply to be impleaded to defend the company. It was held: that continuance of proceedings in suit (before Special Judge (Banking)) having been permitted by the High Court in the presence of Official Liquidator, the decree ultimately passed could not be denied recognition unless

1. NLR 1994 CLJ 725=PLJ 1994 Kar. 121.
2. NLR 1995 CLJ 165=PLD 1995 Lah. 290.
3. PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB)+PLD 1967 Kar. 44 (DB) (*Rel.* AIR 1946 Lah. 193).
4. PLD 1973 Kar. 491.
5. PLD 1985 Kar. 193.
6. PLD 1988 Kar. 72.

miscarriage of justice had taken place. Execution of decree was allowed in this case.[7]

Agreement between opposite parties as to conditions of appointment. Where parties to winding up proceedings had agreed to conditions regarding the appointment of provisional liquidator. The order of appointment was modified so as to incorporate those conditions in it.[8]

18. Procedure. Winding up proceedings are judicial and not administrative proceedings. Therefore any order passed in such proceedings without notice to the parties are illegal and must be set aside.[9]

A petition under section 305 is not a suit for the recovery of a debt, and should not be treated by the company as such. The petition is to be decided on the basis of the provisions contained in section 305, ordinarily with the help of affidavits submitted in accordance with statutory rules. But the Court may take oral evidence if it deems it necessary to do so, but it will not, as a rule, order a petition to stand over for a long period as it would not be just to the company. Expedition is the very essence of winding up proceedings and the interests not only of the company but an element of public policy in regard to commercial morality also, should be considered in the disposal of winding up petitions.[10] But there is no inflexible rule or practice prohibiting the adducing of oral evidence or cross-examination in winding up applications. Where necessity suggests or experience requires, it is open to the judge to allow oral evidence. But where the application for calling oral evidence is not only belated but is intended to retard and delay the progress of the winding up application, oral evidence should be refused as expedition in winding up is absolutely necessary. Where some of the allegations though true are far from sufficient for a winding up order on just and equitable grounds and some other allegations are false and cannot be relied on, there is neither necessity nor scope for taking oral evidence.[11]

Suit against liquidation. Suit against company's liquidation can continue after commencement of liquidation. Secured creditor (Bank) may also be given permission to file another suit against company under liquidation. Court's permission is not required if suit is filed against directors of company. Execution of decree against company under liquidation would be permissible if prior permission is obtained from the Court.[12]

19. Stay of proceedings. The Court in exercise of its inherent powers can make an order for stay of all further proceedings including publication of advertisement of the winding up petition, on the ground that the winding up petition is an abuse of the process of the Court. The order for advertisement cannot, at all affect the Court's power to make an order for stay of further proceedings for the ends of justice or to prevent an abuse of the process of the Court. The Court's

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7. PLJ 1984 Lah. 510=PLD 1984 Lah. 415=1984 Law Notes 927.
8. 1983 CLC 600 (DB).
9. PLD 1976 Kar. 183=PLJ 1976 Kar. 104 (DB).
10. PLD 1970 Kar. 229.
11. AIR 1965 Cal. 98+AIR 1949 Mad. 675.
12. NLR 1989 UC 687.

powers to make orders for the ends of justice and to prevent abuse of the process of the Court have been expressly recognised by the rules.[13]

The principles which govern stay or dismissal of a suit on the ground that it is vexatious are entirely different from the principles which govern the Court in dealing with an application for stay of a winding up petition on the ground that it is an abuse of the process of the Court. Then again the winding up petition is vastly different, from an action at law. The former is an attempt to put an end to the company's existence as such. Steps which the law requires to be taken before a winding up petition is brought to a hearing, necessarily involves very wide publicity. If the charges are false and frivolous such publicity by advertisements is bound to do enormous mischief and injury to the company. On the other hand, if the plaintiff's allegations in an action are false, the action is liable to be dismissed but no further injury is caused to the defendant in the action. The decisive question must be the question whether on the date of winding up petition there was any reasonable hope of the Company's trading at a profit, for which the company was formed. Where the company is earning large profits and the prospect of future business is also fairly bright, the winding up petition should be stopped. Where winding up petition is made by a contributory and most of the charges made by him relate to internal management of the company the opinion of the share-holders should be taken into account in determining the question whether the winding up proceedings initiated by the petitioner should be allowed to be proceeded with or stayed by an order of the Court. In an application for stay of winding up the ground of the abuse of process, and the motive of a contributory who present the petition are very material.[14] Where the winding up petition has been moved solely for the purpose of putting pressure upon the Company by threats of advertisements and not for the purpose of getting a winding up order, the winding up petition should be stopped, and advertisements ought not to be allowed to be published.[15]

The company should not be deprived of its remedies merely because the particular section has been wrongly mentioned, if grounds for relief have been set out in the company's petition for stay of winding up proceedings and if the Court has jurisdiction to entertain and make an order in that application.[16]

Stay to give time for appeal. Although there is no provision in the Ordinance to stay proceedings for giving time to the Company to file an appeal against the order of winding, yet the Court in view of Order 41, Rule 5(1), C.P.C. read with section 141, C.P.C. ordered the stay of proceedings for ten days to give time to the Company to file an appeal against the order.[17]

306. *Company when deemed unable to pay its debts.* (1) A company shall be deemed to be unable to pay its debts,--

(*a*) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one per cent of its

13. NLR 1985 CLJ 166=PLD 1984 Pesh. 133+AIR 1965 Cal. 98.
14. AIR 1965 Cal. 98.
15. AIR 1965 Cal. 98+(1875) 19 Eq 444+(1894) 2 Ch. 349.
16. AIR 1965 Cal. 98+AIR 1957 Cal. 198+ILR 33 Bom. 698.
17. PLD 1982 Kar. 94=PLJ 1981 Kar. 659.

paid-up capital or fifty thousand rupees, whichever is less, than due, has served on the company, by causing the same to be delivered by registered post or otherwise, at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for thirty days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(*b*) if execution or other process issued on a decree or order of any Court or any other competent authority in favour of a creditor of a company is returned unsatisfied in whole or in part; or

(*c*) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (*a*) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by such agent or legal adviser or by any member of the firm on behalf of the firm.

Synopsis

1. Scope.
2. Notice of demand.
3. Non-satisfaction of decree.
4. Inability of company to pay debts.

1. **Scope.** The provisions of sub-section (1) apply to all companies including banking companies.[18] All the clauses of section 306(1) are disjunctive and can operate independently of each other.[19]

2. **Notice of demand.** Statutory notice under S. 306(*a*) is a highly formal and important document. Such notice on the face of it must be clear and unambiguous and should unequivocally state that the person sending the notice is a creditor of the company demanding a specific amount of money from the company. Any defect in the notice will render the winding up proceedings on this ground *ab initio* defective.[20]

Where notice has not been served but stage for adducing evidence has not yet reached, it would be undesirable to say whether petitioner was or was not entitled

18. AIR 1954 Cal. 583 = ILR (1955) 2 Cal. 378 + AIR 1949 Tripura 41.
19. 1990 CLC 1030 = NLR 1990 UC 552.
20. PLD 1990 Kar. 191 = NLR 1990 UC 540.

to the presumption afforded by clause (*a*) of subsection (1) of section 306, that demand notice had been served at the company's registered office. Such question was left to be decided at the appropriate stage.[1]

Default after notice of demand. Object of legislature in enacting section 306(1)(*a*) of the Ordinance, was to create a fiction for determining when a company was to be considered unable to pay its debts. Fiction so created has to be given full effect. A company which fails to pay or secure or compound debt within thirty days after receipt of statutory notice, falls within terms of section 306(1)(*a*) and must be treated as unable to pay its debts even though it may not, in fact, be insolvent.[2] In other words failure to pay an undisputed debt would as a rule be conclusive of the fact that the company is unable to pay its debts.[3] A company shall be deemed to be unable to pay its debts if its creditor has served on it, a demand requiring it to pay to him the sum due and the company has for thirty days thereafter neglected to pay the sum or to secure or compound the same to the reasonable satisfaction of the creditor.[4] Clause (a) of sub-section (1) lays down a special rule of evidence the effect of which is that once the notice contemplated by it has been given and there has been a default as prescribed by it, then it would be deemed that the company is unable to pay its debts[5] and the debtor company would be barred from making any attempt to show its position to pay the debt.[6] In other words, when there has been a failure to pay a debt in accordance with the statutory notice of demand, insolvency is to be presumed though no doubt it may also be proved in other ways.[7] Therefore a company can be wound up on the petition of a creditor for its inability to pay his claim after proper demand had been made by him and on the lapse of thirty days from the date of service of such demand, even though the company is commercially solvent.[8] In such a case it will be really unnecessary to enquire whether the company is in fact solvent, or not.[9] But a company cannot be ordered to be wound up where the petitioner has not complied with the statutory provisions of section 306(*a*) of the Ordinance.[10] But when no debt is due to the petitioner, and evidence is required to be recorded for determining the liability of the Company, if any, the Court would not interfere under this section.[11]

Clause (*b*) of section 306(1) provides that if execution or other process issued on a decree or order of any Court in favour of a creditor of a company is returned unsatisfied in whole or in part, it shall be deemed that the company is unable to pay its debts. Clause (*c*) further provides that if a Court is satisfied that the company is unable to pay its debts, then also the company will be deemed to be unable to pay its debts. All the three clauses, mentioned above, are disjunctive and if the petitioner is able to establish the circumstances, mentioned in clause (*a*) or (*b*) or

1. 1994 CLC 2202=NLR 1994 UC 448.
2. PLJ 1993 Kar. 90=NLR 1993 CLJ 231=1993 MLD 94.
3. AIR 1931 Cal. 612=58 Cal. 716.
4. 1990 CLC 1030=NLR 1990 UC 552.
5. 1991 MLD 124=NLR 1991 Civ. 582.
6. AIR 1927 Rang. 306=5 Rang. 483.
7. PLD 1982 Kar. 94=PLJ 1981 Kar. 659.
8. PLD 1990 Kar. 191=NLR 1990 UC 540+AIR 1964 Mad. 519 (DB).
9. AIR 1964 Mad. 519 (DB)+AIR 1927 Cal. 625+AIR 1964 Mad. 367+(1882) 49 LT 147.
10. PLD 1990 Kar. 191=NLR 1990 UC 540.
11. NLR 1982 CLJ 12=PLD 1982 Lah. 103=PLJ 1982 Lah. 4.

(*c*), it would be deemed that the company is unable to pay its debts. If a notice given under clause (*a*) is held to be invalid, then too, it would be open to the petitioner to satisfy the Court that the company is unable to pay its debts.[12] Clause (*a*) is distinct from clause (*c*) which relates to the state of commercial insolvency. No doubt in the latter case, it will be open to the Court to find out on a consideration of any value of the existing assets and liabilities of the company whether it is really in solvent circumstances. But in the former case neither such investigation is called for nor it can be undertaken.[13]

Debt must be due when notice is given. The mere service of a notice of demand and default in payment thereafter during the prescribed period would not by themselves set at rest the question of inability to pay unless there was an initial default in the payment of the debt which had become presently payable even before the notice was issued.[14]

Demand necessary. The statutory demand under clause (*a*) of subsection (1) of section 306 of the Companies Ordinance must be in strict compliance with the provisions of that clause.[15] Unless the statutory demand has been made in strict compliance with the provisions of sub-section (1)(*a*) the neglect of the company to pay the debt cannot be made the basis of a presumption that the company is unable to pay its debts.[16] Even if notice of demand refers to other remedies available to creditor under the law, but contains no specific reference to provisions of S. 306, Companies Ordinance, 1984, it may be construed as a notice under S. 306, Companies Ordinance, 1984 for winding up proceedings against a defaulting company.[17]

Defect of notice. Any defect in prescribed notice will render winding up proceedings *ab initio* void. Non-compliance with provisions of S. 306(1) before institution of petition under section 309 would invalidate winding up proceedings.[18] However, the invalidity of the notice issued under this section, does not bar the creditor from proving otherwise the company's inability to pay the debts.[19]

Letter of demand. Clause (*a*) of sub-section (1) of section 306 of the Ordinance imposes a penal obligation upon the company and has, therefore, to be strictly construed. A letter of demand to make repayment of loan cannot constitute a valid notice under section 306(1)(*a*) and no winding up proceedings can be maintained on the basis of the letter.[20]

Notice of demand, delivery of. A creditor is required to deliver notice in terms of S. 306, Companies Ordinance, by registered post or otherwise at the registered

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12. 1991 MLD 124 = NLR 1991 Civ. 582.
13. AIR 1964 Mad. 519 (DB).
14. AIR 1927 Cal. 625 = 54 Cal. 345 (DB).
15. 1991 MLD 124 = NLR 1991 Civ. 582.
16. 1991 MLD 124 + AIR 1936 All. 840 (The clause imposes a penal obligation on the company and has therefore to be strictly construed) + AIR 1931 Cal. 692 + AIR 1959 Tripura 41.
17. 1990 CLC 1030 = NLR 1990 UC 552.
18. NLR 1990 UC 540 = PLD 1990 Kar. 191.
19. 1991 MLD 124 + AIR 1948 Cal. 335 (Effect of invalidity would be only to prevent the presumption arising under the section) + AIR 1931 Cal 692 + AIR 1959 Tripura 41.
20. 1991 MLD 124 = NLR 1991 Civ. 582.

office of the Company to repay the outstanding amount.[1] Where a demand notice has been properly addressed to the registered office of a company and its acknowledgement by the company has been returned to the creditor a rebuttable presumption that the notice had been duly delivered arises.[2] But a notice of demand when it has not been delivered to the company at its registered office cannot operate as a valid statutory notice under section 306(1)(*a*).[3] Where a registered letter of demand, which is properly addressed to the company, comes back with the endorsement of refusal made by the postal peon, the ordinary presumption which arises in the case of service by registered post under section 27 of the General Clauses Act and sections 129 and 115 of Qanun-e-Shahadat is available to the creditor and the creditor can rely on the endorsement of refusal for proof of the fact that the letter had been duly delivered or tendered to the company, but it refused to accept the letter.[4]

The denial of the receipt of a registered letter by the addressee, by itself, does not rebut the normal presumption unless the Court believes the fact that the registered letter is not received by the addressee or delivered to the addressee. A letter of demand cannot be said to be not properly addressed by mere omission of the word "Private" in the name of a private limited company, if there is no other company of similar name at the address given.[5] As far as service of the statutory notice is concerned that has got great significance because on the basis of the service of notice it would be presumed that the company is unable to discharged its debts as has been enumerated under section 305. Hence the procedure laid down for effective service has to be followed strictly because any violation thereof can entail serious consequences; including the winding up of the Company. Therefore, convincing evidence has to be produced before the Court to establish that notice was duly served.[6]

Where demand may be made. Even if a part of a company's business has been shifted to some other place, in the absence of a notification of such change to the Registrar, the notice under the section should be served only at its registered office when it continues to exist at its usual place.[7]

Notice of demand not fixing date of payment. No obligation has been placed by the section upon the creditor to demand payment within a particular period of time or to intimate to the company that in case it fails to make payment or compound or secure the debt a presumption as contemplated by section 306 would be drawn or proceedings for its winding up would be initiated against it. Consequently, even if no period is specified in the notice by the creditor within which compliance is demanded by him or the period mentioned is other than that of thirty days, the law would still take its course and a presumption under section 306 may still be drawn. Therefore, it was held that notwithstanding the fact that the period referred to in the notice, for compliance with the petitioner's demand was

1. 1993 CLC 1540=NLR 1994 Civ. 35.
2. AIR 1953 Cal. 387.
3. AIR 1954 Cal. 499 (DB).
4. AIR 1961 Cal. 439 (DB).
5. AIR 1961 Cal. 439 (DB).
6. 1993 CLC 1540=NLR 1994 Civ. 35.
7. AIR 1931 Cal. 692=58 Cal. 716.

only of seven days and no option was given to the respondent to compound or secure the debt, still presumption under section 306 of the Ordinance could be drawn.[8]

Who may send notice. Any creditor of the company may send a notice of demand to the company. The word 'creditor' is not defined in the Companies Ordinance and therefore that term must be construed in the ordinary broad sense, as including one who has a pecuniary claim against the company.[9] Where the creditor is a public limited company a demand issued under the hand of an officer of the company who is entitled in the ordinary course of his duties to demand the debt due to the company must be deemed to be a demand made under its own hand.[10]

Disputed debt, demand as to. Failure to pay debt, by company on service of statutory notice was not the only condition for passing order of winding up against such company.[11] This is so because in this section 'debt' refers to the undisputed amounts payable by the company and not those which may be in dispute bona fide, more so when immediately on receipt of notice under section 306 the creditor is informed of the reason why the alleged debt is disputed and the matter is taken to the Court of law for adjudication. Refusal for cause to pay such debts cannot be regarded as negligence to pay as contemplated under section 306 of the Ordinance.[12] No presumption against a company can arise under sub-section (1)(*a*) simply because the amount had not been paid within the prescribed time when the company bona fide disputes the debt itself or where the debt is so small that it would be impossible to conceive of the non-payment as due to an inability to pay.[13] Where claim of creditor was doubtful and where company was disputing such claim bona fidely then in such circumstances creditor was not entitled to seek winding up of company.[14] When a debtor company bona fide believes, even if wrongly, that it is justified in law to refuse to pay the debt demanded, such a refusal cannot be regarded as neglect to pay as contemplated by section 306(1).[15] Where in a petition for winding up, based on the ground of the company's failure to comply with the notice demanding payment of an instalment of debt, payable according to a scheme, the company raised a contention which involved substantial construction of the scheme, to decide whether the instalment had become payable or not; it was held that the petition should be dismissed on the ground that there was a bona fide dispute regarding the debt.[16] However the refusal to pay is based on a counterclaim by the company and it is contended that there can be no debt presently payable by it unless accounts are taken between it and the petitioning creditor, does not amount

8. 1990 CLC 1030=NLR 1990 UC 552.
9. AIR 1959 Tripura 41.
10. AIR 1936 All. 840=ILR 1937 All. 210.
11. 1997 CLC 230=PLJ 1997 Kar. 233.
12. 1992 SCMR 1006=NLR 1992 Civ. 507=1992 Law Notes 368.
13. 1997 MLD 149=PLJ 1997 Kar. 44+1955 (3) Raj LW 66.
14. 1997 CLC 230=PLJ 1997 Kar. 233.
15. AIR 1949 Assam 45+AIR 1936 All. 840 (An application for winding up in such circumstances must be regarded as an abuse of process of Court and dismissed)+AIR 1920 Cal. 1004 (DB).
16. AIR 1955 Cal. 273=ILR (1956) 2 Cal. 95 (DB).

to a bona fide dispute in regard to the debt, which can save the company from the consequences of the non-payment.[17]

Proof that debt is bona fide disputed. The onus to show that company has a bona fide dispute in regard to its liability to pay to petitioner lies on the company. The onus cannot be discharged merely by the fact that company had filed a suit against petitioner claiming damages from him. Unless evidence has been led in a suit and company's claim has been established it could not be said that company had bona fide claim against petitioner.[18] In other words even if a company has put forward a claim against the decree-holder and the claim is pending adjudication by the Court, it does not make the claim based on the judgment-debt which arises out of a decree passed after contest, a disputed debt.[19]

Judgment-debt. The provisions of sub-section (1)(*a*), in general terms apply to all sorts of debts including judgment-debts. Therefore it is open to a decree-holder to make a demand under this clause for the payment of the judgment-debt without having recourse to execution proceedings and claim the benefit of the presumption under the section if the debt remains unpaid after the expiry of the prescribed period.[20] The mere fact that an appeal is pending does not prevent a judgment-debt from being made the foundation of a winding up petition unless stay of execution of the decree is obtained pending the disposal of the appeal.[21]

Other remedy available. If the claim is genuine and the motive is also genuine, the liquidation of the company cannot be refused simply on the ground of another remedy being open. Where the Company is not doing any business at all nor is it likely to carry on its business in view of the considerable debts outstanding against it. The winding up can be a better remedy in which the creditors of the Company, in accordance with priorities laid down in section 405 can have a better chance of getting their debts satisfied.[22]

3. **Non-satisfaction of decree.** Where, execution or other process issued after decree passed by Court in favour of creditor of company remained unsatisfied then order for winding up would have to be passed.[23] Therefore in case of inability or failure of Company to satisfy decree passed against it in suits filed by Banks and its default in paying back loans advanced by various Banks, a prima facie case for winding up of Company, is made out.[24] In cases falling under clauses (*a*) and (*b*) of sub-section (i) it is necessary as it is in cases falling under clause (*c*) to prove that the company is unable to pay its debts to the satisfaction of the Court. Therefore where there is a decree and there is also no dispute that it still remains unsatisfied even after the attachment of properties, it has to be deemed without further proof that the company is unable to pay its debts. But where the company challenges the decree on the ground of fraud or collusion and also shows a strong prima facie case

17. AIR 1950 East Punj. 142.
18. NLR 1993 CLJ 1=1993 CLC 642.
19. AIR 1961 Cal. 439 (DB).
20. AIR 1936 All. 840=ILR 1937 All. 210.
21. AIR 1961 Cal. 439 (DB).
22. PLD 1977 Lah. 787.
23. 1997 CLC 230=PLJ 1997 Kar. 233.
24. PLD 1994 Lah. 160=PLJ 1994 Lah. 229=1994 Law Notes 129.

and gives an undertaking to take appropriate action for getting the decree set aside, the Court can allow the petition to stand over until the matter is decided in an action.[25]

Provisions of S. 306(*b*) are available only to a decree holder whose decree has remained unsatisfied in execution thereof but will not extend to any other class of creditors.[1]

Foreign award, non-satisfaction of. Creditor seeking winding up of company on basis of foreign award must show that such award had legal sanctity and that same was binding on the company and that execution of such award was returned unsatisfied.[2]

4. Inability of company to pay debts. Mere unwillingness on the part of company to pay its debts would not mean inability. Where company had persistently failed to pay its debts, only then it was liable to be wound up at the instance of its creditors.[3] Therefore under clause (*c*) it should be proved to the satisfaction of the Court that the company is unable to pay its debts. All the clauses of section 306(1) are disjunctive and can operate independently of each other.[4] A petition for winding up containing only on a general allegation of insolvency should be dismissed at once even on the simple denial of the allegation by the company unless there is something on the record itself which can justify a finding that the company is unable to pay the debts. In such a case the Court ought not to allow the application to stand over for giving an opportunity to adduce evidence to prove the insolvency.[5]

If it is established that the company is unable to pay its debts as deemed under section 306(1)(*a*) of the Ordinance, it is called as a commercial insolvent and, as such, liable to be wound up after the Court takes into account the contingent and the prospective liabilities of the Company.[6] In the other words if the Court is satisfied on a general perusal of the company's balance-sheet that it cannot pay its debts, or, that its assets are not sufficient to satisfy its liabilities, that would enable the Court to order its winding up.[7] It is to be noted in this context that the fixed assets and the plant and machinery which are necessary for carrying on the business of the Company, cannot be ignored. The question to be considered is whether the company is able to meet its current demands and whether its existing and probable assets would suffice to meet future demands. That, if all the demands were forthwith made upon it, it would be able to meet the demands only by mortgaging or selling its capital assets, perhaps closing down, does not mean that it is insolvent.[8]

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25. AIR 1953 Cal. 387.
1. PLD 1990 Kar. 191 = NLR 1990 UC 540.
2. 1997 CLC 230 = PLJ 1997 Kar. 233.
3. 1997 CLC 230 = PLJ 1997 Kar. 233.
4. 1990 CLC 1030 = NLR 1990 UC 552 + 1993 CLC 1540 = NLR 1993 Civ. 35.
5. AIR 1931 Rang. 306 = 9 Rang. 323 (DB).
6. 1991 MLD 124 = NLR 1991 Civ. 582.
7. 34 Bom. 533 (Under the Act of 1882).
8. AIR 1965 Ker. 241 + AIR 1941 Pat. 603 + AIR 1927 Cal. 625 + AIR 1942 Bom. 231.

Company admitting inability to pay debts. Where the indebtedness had not been denied by the company but allegation was levelled that winding up petition was not bona fide, burden to prove such allegation was on the party alleging the mala fides. Company had admitted that it had no working capital and if Rs. 62 million was provided, then it would be in a position to manage the affairs and pay the debt in five years which clearly showed that the company was not a commercially solvent company and that by furnishing a huge working capital it would be re-organised and steadily pay the debts in time to come. Such grounds could hardly be considered for defeating the winding up petition.[9]

Commercial insolvency, determination of. A company shall be called commercially insolvent, if it is unable to pay its debts or liabilities as they arise in the ordinary course of business. Fixed assets, plants and machinery are not to be ignored in assessing the solvency of the company. For deciding the question whether the company is commercially insolvent, it has to be determined whether it is unable to pay current demands. The share capital, though shown as liability of the company for the purposes of balance-sheet, cannot be considered to be a liability within the meaning of section 306(1)(*c*) of the Ordinance.[10]

Liabilities. Notwithstanding that the word "liabilities" and not the word "debt" is used in this provision when referring to the contingent and prospective liabilities of the company, it is quite apparent that the liability referred to therein must be a debt which the company has, or might or will have, or to pay, something which cannot be said with regard to its paid-up share capital.[11]

Court not to go behind balance-sheet of company. In a petition for winding up of a company the Court will not go behind the balance sheet duly audited by the auditors, more so, when it was open to the petitioner share-holder to question the same in other proceedings.[12]

Petition for winding up by creditors. Petition for winding up of the company by creditors during pendency of suit for recovery of debt is no bar to filing a petition for winding up unless it is proved that it has been filed merely to pressurise the debtors and without bona fide intention. Burden to prove such alleged mala fides is on the debtor.[13]

TRANSFER OF PROCEEDINGS

307. *Transfer of proceedings to other Courts.* Where the High Court makes an order for winding up a company under this Ordinance, it may, if it thinks fit, direct all subsequent proceedings to be had in a civil court empowered by the Federal Government under sub-section (1) of section 7 or, with the consent of any other High Court, in such High Court, or in a civil court subordinate thereto,

9. PLD 1996 SC 601 = PLJ 1996 SC 1502 = NLR 1996 Civ. 559.
10. 1991 MLD 124 = NLR 1991 Civ. 582.
11. AIR 1965 Ker. 241 = (1869) 9 Eq. 122.
12. AIR 1942 Bom. 231.
13. PLD 1996 SC 601 = PLJ 1996 SC 1502 = NLR 1996 Civ. 559.

and thereupon, for the purposes of the winding up of the company, such High Court or civil court, as the case may be, shall be deemed to be the "Court" within the meaning of this Ordinance and shall have all the powers and jurisdiction of the Court thereunder.

Synopsis

1. Powers of Civil Court. 2. Jurisdiction of High Court.

1. **Powers of Civil Court.** A Judge who exercise jurisdiction in a liquidation proceedings under section 307 may order attachment of immovable property situated outside his jurisdiction inasmuch as his powers in such a case are co-extensive with that of the High Court itself and the High Court's power to order such attachment is indisputable.[14]

2. **Jurisdiction of High Court.** Where High Court which had already made order for winding up of a company in its wisdom might solicit consent of another High Court for the purpose of winding up of the Company and after obtaining consent, transfer proceeding to that other Court. On that score alone, transferee High Court would have jurisdiction in the matter.[15]

Enforcement of payment order of another High Court. When applications are made to High Court for directing Civil Courts concerned to enforce payment orders made by another High Court in the matter of winding up the company, the High Court cannot authorise the official liquidator to apply to the Courts for enforcing the order under section 307. The proper procedure is that the payment orders should be treated in the same manner as a decree passed by the High Court in which it is filed and transferred for execution to the respective District Courts.[16]

308. *Withdrawal and transfer of winding up from one Court to another.* If, during the progress of a winding up in a civil court, it is made to appear to the High Court that the same could be more conveniently proceeded with in the High Court or in any civil court empowered by the Federal Government under sub-section (1) of section 7 the High Court may, as the case may require,--

(*a*) withdraw the case and proceed with the winding up itself; or

(*b*) transfer the case to such civil court, and thereafter the winding up shall proceed in such civil court.

PETITION FOR WINDING UP

309. *Provisions as to applications for winding up.* An application to the Court for the winding up of a company shall be by petition

14. AIR 1928 Lah. 376.
15. PLD 1989 Lah. 106=PLJ 1989 Lah. 107.
16. AIR 1927 Mad. 271.

presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), or by any contributory or contributories or by all or any of the aforesaid parties, together or separately, or by the Registrar or by the Authority or by a person authorised by the Authority in that behalf:

Provided that--

(*a*) a contributory shall not be entitled to present a petition for winding up a company unless--

(*i*) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven; or

(*ii*) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder;

(*b*) the registrar shall not be entitled to present a petition for the winding up of a company unless the previous sanction of the Authority has been obtained to the presentation of the petition:

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of making a representation and of being heard;

(*c*) the Authority or a person authorised by the Authority in that behalf shall not be entitled to present a petition for the winding up of a company unless an investigation into the affairs of the company has revealed that it was formed for any fraudulent or unlawful purpose or that it is carrying on a business not authorised by its memorandum or that its business is being conducted in a manner oppressive to any of its members or persons concerned in the formation of the company or that its management has been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; and such petition shall not be presented or authorised to be presented by the Authority

unless the company has been afforded an opportunity of making a representation and of being heard;

(*d*) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court;

(*e*) the Court shall not give a hearing to a petition for winding up a company by the company until the company has furnished with its petition, in the prescribed manner, the particulars of its assets and liabilities and business operations and the suits or proceedings pending against it.

Synopsis

1. Scope.
2. Form of application.
3. Application by company.
4. Creditor's application.
5. Contributory, application by.
6. Registrar, application by.

1. **Scope.** For a petition for winding up of company, compliance with statutory provisions of S.306(1)(*a*) of the Ordinance is necessary.[17]

A society the existence of which is not legal because it has not been registered as a company as required by the Companies Ordinance cannot be wound up by the Court under the Ordinance.[18] But where constitution of the unregistered company is not illegal, it may be wound up under this section. Hence an application under the section would lie in relation to a foreign company, where that company is one which could be wound up under the Ordinance as an unregistered company.[19]

Discretion of Court to admit application. Where an application for winding up a company is presented to the Court, it is not bound to admit it. It has a discretion also to refuse to admit the petition or give notice to the company to enable it to take such steps by which it can restrain the petitioner from proceeding with the application.[20]

Application under section 396 pending. Where one of the petitioners for winding up under section 309 has previously filed an application under section 396 for winding up subject to supervision of Court which is still pending it cannot be regarded as a bar to the application under section 309.[1]

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17. PLD 1990 Kar. 191 = NLR 1990 UC 540.
18. 1901-1 Ch. 102.
19. AIR 1956 Mad. 131 = ILR 1956 Mad. 440.
20. 56 Cal W N 29 (The order for admission is judicial order which may be made *ex parte* or on notice to and in the presence of the company which is vitally affected by the order) + AIR 1914 Bom. 190.
1. AIR 1955 Pepsu 136 = ILR 1955 Pat. 551.

Applications in different Courts. The pendency of an application for winding up of a company in one Court is no bar to the presentation by the petition, therein, jointly with others of a similar application in another Court of competent jurisdiction.[2]

Amendment of application. An application for amendment of a petition for winding up can be decided on the principles governing amendment of pleadings under Order 6, Rule 17, Civil P.C.[3] In the ordinary circumstances the petitioners for winding up must be kept confined within the bounds of the allegation made by them in the petition. Where, however an extraordinary situation has arisen on account of subsequent events and when it is possible for the Court to consider the new material in the existing petition itself, it would not be proper to derive the petitioners to file a fresh petition merely on the technical ground that the amendment would introduce a new matter when neither the company nor the shareholders were likely to be taken by surprise, if the amendment was allowed.[4]

Parties to petition. A contributory or creditor becomes a party to the proceedings only when he gives a notice of his intention to appear in the proceedings.[5] It is in the discretion of the Court to allow or not to allow the substitution of a person as the petitioner under the Rules framed under section 246. The mere desire of the person seeking to prosecute the petition in the place of the original petitioner does not decide the matter. Thus the Court is entitled to refuse the substitution in an application made in pursuance of a resolution passed at the general meeting unless it is shown that the majority in passing the resolution has used their voting power for their own commercial interest and not in the interests of the company.[6]

2. Form of application. The Court would refuse to treat an application as one for the compulsory winding up of a company where it has not complied with the rules of the Court governing the making of such application.[7] Where, however, though the winding up petition was not in order in that it did not comply with the Rules made by the Court and the prescribed form but the petition was admitted by consent without any objection as to its form; it was held that it was a fit case where the irregularities should be condoned.[8]

Application not signed. The legal consequence of a petition for winding up not being properly signed by the petitioner is a mere irregularity which can be cured at any time.[9]

Verification. Where a petition alleges several facts, and it is not affirmed by the petitioner so as to clearly state which of those facts are alleged by him as true to his knowledge and which others as true to his belief only, the Court would not ordinarily act upon it and order a winding up. But the defect is one that the Court

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2. AIR 1954 Punj. 94=ILR 1954 Punj. 757 (DB).
3. AIR 1955 Nag. 78=ILR 1955 Nag. 437 (DB).
4. AIR 1962 Bom. 133.
5. AIR 1949 Cal. 69=ILR (1948) 2 Cal. 503.
6. AIR 1952 Punj. 132.
7. AIR 1936 Pat. 468.
8. AIR 1948 Cal. 335=ILR (1948) 2 Cal. 422.
9. AIR 1959 Bom. 386=ILR 1959 Bom. 295 (DB).

can excuse and the Appellate Court cannot interfere with the order that was made, on that ground.[10]

Mistake. A party which had obtained a judgment against a company with the name of the company misspelt by an innocent mistake applied for winding up on the basis of the judgment. The company which defended the action entered appearance not in its correct name but in the name which had been spelt. When the winding up order was passed it was found that it could not be entered against the company due to the mistake. Then the Court on being moved held that it had the powers to put the matter in order by treating the petition as amended to show the correct name of the company wherever there was a reference to it and pass a winding up order accordingly.[11]

3. **Application by company.** The Directors of a company have the authority independently of any resolution under clause (a) of section 305 to apply for the winding up of the company under clauses (*b*) to (*h*) of that section.[12]

4. **Creditors' application.** Before an order for winding up is made on the petition of an alleged creditor it must be made out that the petitioner is in fact a creditor of the company. Every creditor of the company is entitled to appear at the hearing and oppose the winding up order. If the petition is liable to be dismissed on the ground that the petitioners are not creditors of the company or on the ground that there is a serious dispute on that question and that dispute cannot be resolved on the affidavits. That contention is open to all those who are entitled to oppose that petition.[13] If on the date of application for winding up of a company, the claim of the petitioning creditor against the company is time barred, his petition, based on the notice of demand for payment and failure to comply with it, is not maintainable.[14] Where a creditor has transferred his debt, it is the transferee and not the transferor of the debt who has a *locus standi* to move the Court under this section.[15] However, the Courts will not uphold a plea of absence of *locus standi* in the person petitioning as a creditor when the company puts forward only a vague plea, unsupported by details, that the debt claimed by the petitioner is not presently due to him.[16]

The right of a creditor to a winding up order is not his individual right but a representative right.[17]

Contingent creditor. Petitioner who is a guarantor of loan to a company, is a contingent creditor and as a contingent creditor he can move an application for winding up of the Company.[18]

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10. AIR 1954 Cal. 195 (DB).
11. (1958) 1958-1 W L R 519.
12. 1956 Mad. 131 = ILR 1956 Mad. 440 (DB).
13. AIR 1960 Cal. 764 (DB).
14. AIR 1964 Mad. 191.
15. AIR 1965 Ker. 241.
16. AIR 1950 East Punj. 142.
17. AIR 1952 Cal. 323 (DB).
18. PLD 1994 Lah. 160 = PLJ 1994 Lah. 229 = 1994 Law Notes 129.

Bank. Companies Ordinance and the IDBP Ordinance do not occupy the same field. No doubt, the Bank, in order to recover its debt from an industrial concern etc., can have resort to any of the remedies referred to in sections 38, 39 40 or 41 of the IDBP Ordinance, which by no means are less effective, but nothing can be spelt out from the said provisions to suggest that they are in derogation of the provisions of the Ordinance. The Ordinance itself is a special enactment which provides for special remedies in the form of section 309 thereof, since no intention has been expressed either in the IDBP Ordinance or in the Companies Ordinance that the provisions contained therein are in derogation of any other law.[19]

Petition for winding up by Bank, who may make. A petition for winding up of company signed, verified and filed by Senior Vice President of the petitioner (Bank) who was an authorised officer of the Bank, is competent.[20]

Secured creditor. A secured creditor has as much right as an unsecured one to file an application under this section for the winding up of a company. He is entitled to exercise the right even without surrendering the security or making an averment that the security is insufficient to pay off his debts.[21]

Debenture-holder. A debenture-holder of a company is entitled to apply for winding up of the company if the debentures contain a personal covenant by the company to pay to the debenture-holders.[1]

Creditor bound by scheme. A creditor who is bound by a scheme sanctioned by the Court under section 284 cannot ask for the winding up of the company on the ground that the company is unable to pay its debts or has failed to pay them after the statutory notice under section 306. But he is not barred from presenting a petition for winding up of the company on the ground that it has made a default in filing the statutory report or in holding the statutory meeting or on the ground that it would be just and equitable to wind up the company.[2]

'Substratum gone' not sufficient to give 'locus standi' to creditor. The disappearance of the substratum of a company, unless it imperils the recovery of his dues, is not a ground on which a creditor could be permitted to bring and succeed on a petition for the winding up of the company.[3]

5. Contributory, application by. Section 309 proviso (*a*) provides that any contributory would not be entitled to present petition for winding-up the company unless; either number of members was reduced, in case of private company; below two, or in case of any other company, below seven or shares in respect of which he was contributory or some of them either were originally allotted to him or had been kept by him and registered in his name for at least six months during eighteen

19. 1990 CLC 1030=NLR 1990 UC 552.
20. 1994 CLC 2334.
21. AIR 1955 Mad. 582=ILR 1954 Mad. 1187.
1. AIR 1955 Bom. 355=ILR 1955 Bom. 550 (DB).
2. 51 Cal. W N 791.
3. AIR 1954 Cal. 449 (There is however no technical or legal bar to a creditor urging that ground and the Court in refusing to hear him urge that ground does so for the reason that it is not a proper ground for creditor to urge except in very special circumstances).

months before commencement of winding up, or had devolved on him through death of former holder.[4]

Person member at time of dissolution under S. 439. Any person who was a member at the time of the dissolution of a company under section 439 can apply for its winding up under this section.[5]

Fully paid-up share-holder. A fully paid-up share-holder is a contributory for the purpose of the provisions of section 309 in spite of the fact that he is not liable to contribute anything.[6] However as he has nothing to lose by a winding up order the Court is not readily moved to exercise its discretion by a person who is not really aggrieved; nor is it readily persuaded by such a person that it is just and equitable that a company should be wound up.[7]

Share-holder who has not paid calls. A contributory's right to maintain an application under section 309 will in no way be adversely affected by his failure to pay the further calls made on him, especially when such failure is due to his denial of the validity and legality of those calls on grounds which are not frivolous, but require careful scrutiny of the Court.[8]

Share-holders whose shares have been forfeited. A person whose shares have been forfeited would also be entitled to apply for the winding up of the company within one year from such forfeiture provided that those shares had been registered in his name and were held by him for more than six months during the period of 18 months before the commencement of the winding up.[9]

Deceased share-holder. A power-of-attorney holder from the executors of a deceased share-holder, who as such had obtained letters of administration with the will attached, is entitled to apply as a contributory for the winding up of the company.[10] Similarly heirs of a deceased share-holder are entitled to make an application under this section.[11] But the trustee in bankruptcy of a share-holder cannot apply for the winding up of the company as representing the contributory.[12]

Share-holder need not show tangible surplus will be left on winding up. A share-holder can ask for a winding up order under this section and maintain his petition even though he is unable to plead and show prima facie that there will be a tangible surplus which will be available to him toward payment of his share

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4. 1997 CLC 456=PLJ 1997 Kar. 220.
5. AIR 1928 Nag. 194=24 Nag L R 100 (DB) (Dissolution under section 247 (5) is no bar to the subsequent winding up of the company).
6. AIR 1933 Mad. 240 (DB)+AIR 1955 Pepsu 136+ILR 1955 Mad. 635 (DB)+AIR 1952 Mad. 557.
7. AIR 1965 Ker. 241.
8. AIR 1949 Lah. 9 (Section which specifies the several disqualifications of the contributory makes no mention about failure to pay further calls as one)+AIR 1963 Orissa 1+(1879) 13 Ch. D. 400+(1892) 1 Ch. D. 408.
9. AIR 1932 Lah. 571.
10. AIR 1957 Oudh 377 (Inasmuch as the legal estate in the shares should be deemed to have devolved on him the note in the share register constituted sufficient compliance with the necessity for the shares being registered in his name).
11. PLD 1959 Dacca 389+AIR 1948 Mad. 162.
12. (1956) 1956-1 All ER 799.

capital.[13] The absence of surplus assets may be taken into account for the purpose of determining whether the share-holder's application is bona fide or not but as regards the question whether the company should be wound up or not on such application it is absolutely irrelevant.[14] However this does not debar the Court from taking into consideration that fact and refusing reliefs to the petitioner. But where the application of the contributory is supported also by the creditors of the company, the fact of absence of assets would lose all its significance.[15]

Majority opposed to winding up. As between share-holders the wishes of the majority shall prevail. It is very important that the Court should not, unless a very strong case is made out, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. There must be strong ground for exercising the power of interference at the instance of a share-holder. The Ordinance creates as between share-holders a domestic tribunal and the Court would be slow to withdraw from it the decision as to whether the company's business shall be carried on or the company shall be wound up. The fact that the majority of share-holders including an independent share-holder like the Government are against the winding up of the company and desire the company to continue, is an important circumstance which must weigh with the Court in deciding whether it should or should not make a compulsory winding up order against the company. Of course if it holds that the substratum of the company is gone, the consideration would be entirely irrelevant for in such a case the majority cannot force the minority to continue the company.[16]

6. Registrar, application by. A petition filed by the Registrar for winding up with the sanction of the Government must be filed within a reasonable time of obtaining of such sanction, failing which the Court will refuse to recognise the sanction as a valid sanction. Moreover the sanction must be obtained in relation to the facts on which the petition is based, and if sanction is obtained in relation to one set of facts and the petition is based on another set of facts, the Court will refuse to consider the sanction as valid.[17]

The registrar's right to seek compulsory winding up of a company under this section will cease where the company has been already wound up voluntarily.[18]

Insurance Company. Proviso (*b*) in section 309 lays down that Registrar shall not be entitled to present a petition for winding up of a company unless previous

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13. AIR 1952 Mad. 557. (Application by fully paid-up share-holder)+AIR 1955 Pepsu 136+ILR 1955 Mad. 635 (Right of contributory which is unqualified under the section cannot be curtailed by the annexation of any condition)+AIR 1942 Bom. 231.
14. ILR 1955 Mad. 635. (Petitioner making out case for winding up--Petition not liable to be thrown out on the ground that he has not established that there would be surplus assets).
15. AIR 1954 Cal. 195. (Application by fully paid-up share-holder supported by creditors--Company resisting it must prove that no benefit will accrue to petitioner because no assets will be left over after the winding up).
16. AIR 1962 Guj. 269+AIR 1942 Bom. 231+AIR 1914 Bom. 196+(1867) 2 Ch. A 737+(1871) 6 Ch A 641+(1877) 5 Ch. D. 669.
17. AIR 1953 Bom. 270.
18. AIR 1955 J&K 32 (DB). (Section 218 Companies Act, 1913, while it saves the right of the contributory or a share-holder under this section makes no exception in favour of the Registrar)+AIR 1954 J&K 10.

sanction of Corporate Law Authority has been obtained. Section 309 does not require prior sanction by other persons or Controller of Insurance, where application is for winding up of an Insurance Company.[19]

310. *Right to present winding up petition where company is being wound up voluntarily or subject to Court's supervision.* (1) Where a company is being wound up voluntarily or subject to the supervision of the Court, a petition for its winding up by the Court may be presented by any person authorised to do so under section 309 and subject to the provisions of that section.

(2) The Court shall not make a winding up order on a petition presented to it under sub-section (1) unless it is satisfied that the voluntary winding up or winding up subject to the supervision of the Court cannot be continued with due regard to the interests of the creditors or contributories or both.

1. **Scope.** Under section 310, voluntary winding up of a company is no bar to the right of any creditor or contributory to have it wound up by the Court.[20] However a creditor is not entitled as a right to ask a Court to convert voluntary winding up into a compulsory winding up. Before he can obtain such an order he must show that he as creditor, could obtain, had there been no voluntary winding up, an order compulsorily winding up the company. A creditor on the other hand who could have asked in the first instance for a compulsory winding up order can always come to Court and ask that the voluntary winding up should be converted into a compulsory one.[1] The rule still prevails that the Court in such a case is bound to pay regard not only to the wishes of the petitioning creditor but also to those of all the creditors. But the majority in such a case means majority in value.[2]

COMMENCEMENT OF WINDING UP

311. *Commencement of winding up by Court.* A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

Synopsis

1. Object and scope.
2. Transaction after petition for winding up.
3. Debt not barred by time at time of application.
4. Interest on debts.

1. **Object and scope.** This section has introduced a statutory fiction that a winding up of a company by the Court shall be deemed to commence at the time of

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19. PLJ 1994 Kar. 121 = PLD 1993 Kar. 720.
20. (1950) 54 CWN 514.
1. AIR 1938 All. 623.
2. (1950) 54 CWN 514.

presentation of the petition for winding up.[3] The object of this section is to prevent fraudulent preference and other abuses attendant on transfer of assets of a company in contemplation of its liquidation. The principle of relation back contained in section 311 does not operate to extend the bar imposed by section 316 against suits, appeals, etc., against the company from the date of presentation of the winding up application.[4]

Permission to commence or continue suit. No permission from the Company Judge would be needed for commencing or continuing a suit or any other legal proceedings against a company until such time, an order of winding up was made by the Court or a Provisional Liquidator of the company was appointed. Where no order of winding up has been made, consequences provided in sections 406 and 410, would not follow. Therefore, sale of property by the Tax Recovery Officer during winding up proceedings, was held unexceptionable.[5]

2. **Transaction after petition for winding up.** Winding up of company by Court is deemed to commence from date of filing of winding up petition.[6] A transaction entered into by the company subsequent to the date of presentation of the petition for its winding up will not bind the liquidator unless there is specific sanction of the Court to the contrary.[7] In other words the effect of the provision *inter alia* is that disposition of property of the company made after presentation of the petition for compulsory winding up shall, unless the Court otherwise directs, be void.[8]

3. **Debt not barred by time at time of application.** A debt, which was recoverable and provable on the date of the filing of a winding up petition but becomes barred by time before the order of winding up is made, is a debt which can be proved under the provisions of the Companies Ordinance.[9] As the decree in favour of a Bank was passed by the Civil Court on 12.2.1979 therefore the maximum period of six years for making fresh application for execution of the decree was to expire after 11.2.1985. This being so the date on which the petition for winding up was filed i.e. 6.11.1984 from which date the winding up of company is deemed to have commenced, the remedy of the said Bank for execution of decree by presenting subsequent application on 2.5.1984 had not become barred by time.[10]

4. **Interest on debts.** The interest payable on a debt due by the company will not cease to run on its winding up unless its assets are insufficient to pay its debts in full.[11] It follows that where a company in liquidation turns out to be solvent in the sense that its assets are more than its liabilities, the creditors whose debts carry

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3. PLD 1986 Lah. 18 (DB)+PLD 1981 Lah. 322=PLJ 1981 Lah. 282+AIR 1926 Cal. 781.
4. PLD 1986 Lah. 18 (DB)+AIR 1958 Punj. 341.
5. PLD 1993 SC 404=NLR 1993 SC 580=1993 Law Notes 458.
6. NLR 1996 CLJ 222.
7. AIR 1954 Orissa 7=ILR 1952 Cut. 309+AIR 1962 Punjab 433.
8. PLD 1981 Lah. 322=PLJ 1981 Lah. 282+AIR 1932 PC 1.
9. AIR 1933 Lah. 688+AIR 1961 Punj. 84 (DB) (AIR 1958 Punj. 341, *Reversed*; AIR 1936 Bom. 130+AIR 1937 Mad. 577+AIR 1957 All. 443. *Rel on*).
10. NLR 1996 CLJ 222.
11. AIR 1930 Mad. 1012=54 Mad. 324.

interest by agreement or otherwise are entitled, out of the surplus assets, to the payment of interest, accruing after the commencement of liquidation, till payment is made of the principal debts. This concession, however, is not permissible to such creditors whose debts did not carry any interest under any contract.[12]

POWERS OF COURT HEARING APPLICATION

312. *Hearing of winding up petition by the Court.* A petition for winding up of a company shall come up for regular hearing, be proceeded with and decided in the manner laid down in section 9.

313. *Court may grant injunction.* The Court may, at any time after presentation of the petition for winding up a company under this Ordinance, and before making an order for its winding up, upon the application of the company itself or any of its creditors or contributories, restrain further proceedings in any suit or proceedings against the company, upon such terms as the Court thinks fit.

Synopsis

1. Object.
2. Restraining order prior to winding up order.
3. Winding up order, effect of.

1. Object. The policy of law in enacting sections 313, 316 and 410 is to protect the assets of a company for equitable distribution among those entitled and to prevent the administration being embarrassed by a general scramble of creditors.[13]

2. Restraining order prior to winding up order. While the stay contemplated by section 316 is of peremptory nature, the Court under this section has a discretion in the matter of restraining proceedings against a company.[14] After the Court has admitted a petition, it can on being moved for the purpose by the company or some other interested person, stay proceedings and revoke the admission.[15]

Execution of decree against company, stay of. The Court has power under his section read with sections 362 and 390 to stay execution of a decree passed against a company after its voluntary liquidation in a suit pending on the date of such liquidation.[16] The Court as a general rule, and unless there are exceptional circumstances, will exercise its discretion to stay an execution which was pending when the company went into voluntary liquidation, on the application of a creditor who subsequent to such voluntary liquidation has presented a petition for winding

12. PLJ 1982 Lah. 202=PLD 1982 Lah. 236=1982 Law Notes 163.
13. AIR 1959 Madh Pra. 95 (DB).
14. AIR 1958 Punj. 341.
15. AIR 1964 Ker. 212.
16. AIR 1925 Oudh 630=28 Oudh Cas. 197 (DB).

up by the Court.[17] But it will not do so where the equities are against the company. Thus the Court refused to stay a sale under section 46, Income-Tax Act, 1922, on the ground that the company after obtaining an adjournment of the sale by trick went into voluntary liquidation.[18]

3. **Winding up order, effect of.** After the passing of the winding up order the Court cannot invoke its powers under section 313 and restrain by an injunction any proceedings. The operation of the section is confined to the stages between the presentation of a winding petition and the making of the order for the winding up.[19] However, an interim stay order restraining any proceedings during the pendency of the winding up petition becomes automatically confirmed upon the passing of the winding up order without the necessity for a formal order to that effect.[20]

314. *Powers of Court on hearing petition.* (1) On hearing a winding up petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally subject to the limitation imposed in section 9 or make any interim order, or an order for winding up the company or any other order that it deems just; but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the Court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(3) Where the petition is presented on the ground of default in delivering the statutory report or in holding the statutory meeting or any two consecutive annual general meetings, the Court may, instead of making a winding up order, direct that the statutory report shall be delivered or that a meeting shall be held, and order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

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17. ILR (1937) 1 Cal. 632. (Mere attachment of property not yet completed by sale before the voluntary liquidation cannot be treated as an execution which has terminated before such winding up).
18. AIR 1950 East Punj. 210 (DB) (*Held* that although there was much force in the contention that the Court could not act under section 169 after a winding up order had been passed the Court was still entitled to permit the Income-tax authorities to proceed with the sale under section 171 which entitled it to sanction such leave).
19. AIR 1946 FC 16=1946 FCR 40.
20. AIR 1958 Punj. 455 (DB) (Interim stay of execution of decree).

(4) If, on hearing a petition, the Court is of opinion that, although the facts would justify the making of a winding up order, the making of such order would unfairly prejudice the members or the creditors, the Court may, instead of making an order for winding up the company, make such order as it thinks fit in the circumstances for regulating the conduct of the affairs of the company and bringing to an end the matters complained of, including an order for a change in the management of the company.

(5) Where the Court makes an order for the winding up of a company, it shall forthwith cause intimation thereof to be sent to the official liquidator appointed by it and to the registrar.

Synopsis

1. Scope.
2. Discretion of Court.
3. Motive for application.
4. Decision on application.
5. Successive petitions.
6. Costs.

1. Scope. The object and effect of an order for the compulsory winding up of a company is the closing down of its business and such an order is passed because it is deemed expedient that the company should come to an end and no longer remain in existence as a business undertaking.[1] The Court in ordering liquidation and appointing an official liquidator acts in the interests of the general body of shareholders, and naturally, therefore, has to pass such orders as would protect the interests of all the parties concerned. Such order cannot be passed by consent of the parties.[2]

Funds for winding up. Where there were no funds available to carry on winding up proceedings official liquidator could move the Court for directions, whereupon the Court could issue notice *inter alia* to persons who had applied for winding up order requiring them to show cause why they should not be made to pay a reasonable amount to carry on winding up proceedings. Where an applicant is directed to pay to official liquidator, a specified amount for defraying day to day expenses for carrying on winding up proceedings. Such amount, however, would be the first charge on assets of the company to be reimbursed by official liquidators as soon as proceeds of sale of attached property is received by them.[3]

2. Discretion of Court. The winding up of a company is in the discretion of the Court which is required to be exercised judiciously on application of mind to facts and circumstances of each case and in particular to conduct of defaulting party.[4] The Court may refuse to exercise for winding up of a Company if petition is presented on the ground that it is just and equitable that the company should be wound up. But for exercising discretion against a petitioner first the Court has to come to the conclusion that some other remedy is available to the petitioner and that

1. AIR 1932 Rang. 75=10 Rang. 143 (DB).
2. AIR 1953 Nag. 288=ILR 1953 Nag. 787 (DB).
3. PLD 1989 Lah. 24.
4. PLD 1996 Lah. 633.

they are acting unreasonably in seeking to have the company wound up instead of pursuing other remedy.[5] The Court may refuse to wind up a company having regard to the wishes of the majority or on the ground that it is beneficial only to the petitioning creditor and not to all the creditors generally.[6] Winding up order may not be made if it would unfairly prejudice not only members but also creditors of the Company.[7] The question whether in any particular case the Court ought to pass a winding up order will depend on the circumstances of that case. The wishes of the majority of the creditors although it is a matter which ought to receive serious consideration from the Court will not be binding on it.[8] Where the Court felt inclined to permit withdrawal of winding up petitions with approval of change in management of the Company, but creditor opposed withdrawal and change in management. Dispute was referred to sole Arbitrator whose verdict was made to be final and binding on parties.[9] Court is empowered to reject highest offer on ground of inadequacy of consideration in a sale by official liquidator. Where official Liquidator made an application to Court for consideration and approval of offers received from prospective purchaser. Secured creditors of company opposed acceptance of offer of highest bidder on ground on inadequacy of consideration. High Court sustaining objection of secured creditors, rejected highest offer and directed Official Liquidator to issue fresh sale notice.[10]

Alternate remedy available. High Court is vested with jurisdiction to pass order of winding up in terms of section 314(1). But jurisdiction to pass such order being discretionary, High Court can decline to pass order of winding up in its discretion where it is found that petitioner should follow and pursue alternate remedy available to him.[11]

Other relief possible. Where the petitioner can be given any relief other than winding up of the company, the Court would do so. Where a company refused to enter the name of the petitioner as share-holder although he had contributed Rs.100,000 towards its share-capital. It was held that the petitioner succeeded in proving that he was a share-holder, and the respondent company was directed under section 152 to enter his name as a share-holder.[12]

Appointment of administrator. It is open to a Court when it is satisfied that a case under section 305 has been made out, to exercise its discretion under section 290 and appoint an administrator to manage the affairs of the company instead of ordering its winding up.[13]

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5. PLD 1990 SC 763.
6. AIR 1955 Mad. 582=ILR 1954 Mad. 1187 (DB).
7. NLR 1989 Civ. 705.
8. AIR 1932 Rang. 75=10 Rang. 143 (DB).
9. NLR 1989 Civ. 705.
10. NLR 1989 UC 84=PLJ 1988 Kar. 102=1987 CLC 2109=KLR 1988 CC 154.
11. PLD 1996 Lah. 633.
12. PLD 1982 Lah. 634=PLJ 1982 Lah. 235=NLR 1982 Civ. 371.
13. AIR 1956 SC 213 (The action of the Court under section 153 cannot be challenged on the ground that it is an interference of the Court with the internal management of the company. The rule against interference has no scope where the Court is dealing with the company in liquidation).

Company running at loss. Where the company was undisputedly running in loss year after year and the mills of the company had remained closed for seven years. The Court was justified in coming to the conclusion that it was just and equitable that the company be wound up.[14]

3. Motive for application. When on the facts and circumstances established by the petitioner there is a clear case for ordering winding up, the court will not refuse the order on the ground that the petitioner instituting the proceedings had been induced by improper motive.[15] However, petitions for winding up which are made to obtain an unfair advantage over other creditors at a time when the company is not known to be insolvent amount to an abuse of the process of the Court and should be dismissed.[16] Similarly where the object of the creditor's petition to wind up the company is to bring pressure upon the company in order to make it pay the creditor's debt cheaply and expeditiously which the company desires to dispute in the Civil Court,[17] or where a winding up petition against a company is presented for putting pressure on a company, the Court has an inherent jurisdiction to restrain the advertisement of the petition and to stay all proceedings upon it.[18]

Benefit to applicant. A contributory who on merits has succeeded cannot be refused an order for winding up solely on the ground that he has not established a prima facie case that there are assets of the company of such amount that will be available in the winding up and in which he will have a tangible interest.[19] But the section does not stand in the way of the Court taking into consideration the fact that there is no surplus assets for coming to the conclusion that the application of the fully paid up share-holder is not a bona fide one and dismissing it on that ground.[20]

4. Decision on application. The Court will not, except in special circumstances, order a winding up petition to stand over for a long period. It will either make an order or dismiss the petition; for if, after adjournments, a winding up order is made, the order would date back to the presentation of the petition, and therefore avoid or imperil anything done by the company in the meantime. Besides it is not fair to a company that winding up petition should be kept hanging over its head indefinitely.[1] The Court will refuse to order the immediate winding up of even an indisputably insolvent company where in its opinion it would be more

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14. PLD 1990 SC 763.
15. AIR 1955 Bom. 355 = ILR 1955 Bom. 550 (DB).
16. AIR 1925 Mad. 199 = 48 Mad. 267 (DB).
17. AIR 1925 Mad. 199 (DB) + AIR 1914 Bom. 251 (DB).
18. AIR 1952 Cal. 325.
19. AIR 1952 Mad. 537 + ILR 1955 Mad. 635.
20. AIR 1954 Cal. 195 (DB) (Absence of allegation and proof from the petitioner as to surplus assets would in any event be immaterial where the petition is also supported by persons who are admittedly creditors of the company. In such a case the petition is in substance a creditor's petition and the onus of proving that the winding up will not be beneficial to the unsecured creditors on the ground that there will be no assets will be on the persons opposing the application).
1. AIR 1949 All. 276 (DB).

advantageous to all the share-holders and the creditors to order the petition to stand over.[2]

Disputed debt. When the justice of the case requires it, the Court will refuse to summarily dismiss the creditor's application, even if the validity of the debt on which it is based is bona fide disputed, and stay the petition till that question, which is also in issue in the civil suit simultaneously instituted for the recovery of the debt, is determined.[3]

Application to seek early decision. Where a winding up petition by a creditor has been adjourned *sine die* but is pending, a subsequent application by the creditor asking for direction on the petition and praying for proceeding with it, need not be made by a petition but may be made on affidavit.[4]

5. Successive petitions. The dismissal of a petition for the compulsory winding up of a company as premature is no bar to a subsequent petition for the same purpose if it is not vitiated by a similar defect.[5]

6. Costs. Costs in a winding up proceeding is in the discretion of the Court and in exercising that discretion it would act on the general principle that the successful party is entitled to his costs in his favour.[6] On the dismissal of an application for winding up the Court has discretion in a proper case to award separate costs to the company and the opposing share-holders.[7] But a creditor appearing in a winding up petition is not entitled to his costs as a matter of right. To entitle him to cost he must show a reasonable ground for appearing.[8] It has also been held that where a judgment-creditor presenting a petition for winding up is deprived of an order, which he would otherwise have got *ex debito justitiae* by the circumstance that an overwhelming majority of the creditors or a majority of the creditors oppose the application, he should not be ordered by the Court, while dismissing the petition, to pay costs of the petition.[9]

315. *Copy of winding up order to be filed with registrar.* (1) Within fifteen days from the date of the making of the winding up order, the petitioner in the winding up proceedings and the company shall file a certified copy of the order with registrar.

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2. AIR 1924 Rang. 108 (Company entering into agreement for sale of assets--Sale if carried out would be advantageous to all--Debt due to petitioning creditor only very small in comparison with consideration for sale--Order for petition to stand over till date in agreement passed).
3. 1956 Raj. L W 66.
4. AIR 1948 Cal. 335=ILR (1948) 2 Cal. 422.
5. AIR 1949 Lah. 9.
6. AIR 1949 Mad. 675 (Contesting respondents successful--Costs ordered to them--Discretion not improperly exercised).
7. AIR 1942 Bom. 231 (Same solicitor instructing counsel for company as well as share-holders--Costs of separate counsel may not be allowed especially where share-holders have adopted company's affidavits).
8. AIR 1938 Mad. 96 (DB) (Notice served on creditors under rules of Court only to enable their appearance to oppose petition--Creditor appearing in support of petition but unwilling to adopt it when petitioning creditor withdraws--Dismissal of petition--Creditor appearing in support not entitled to costs).
9. (1957) 1957-1 All E R 737.

(2) If default is made in complying with the foregoing provision, the petitioner or, as the case may require, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees for each day during which the default continues.

(3) On the filing of a certified copy of a winding up order, the registrar shall forthwith make a minute thereof in his books relating to the company, and shall simultaneously notify in the official Gazette that such an order has been made.

(4) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.

316. *Suits stayed on winding up order.* (1) When a winding up order has been made or a provisional manager has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of, any suit or proceeding by or against the company.

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by the Court.

Synopsis

1. Scope and applicability.
2. Other legal proceedings.
3. Suit or proceedings against the company.
4. Defensive actions.
5. Leave is in discretion of Court.
6. Leave subject to condition.
7. Application of secured creditors.
8. Leave granted subsequent to institution of suit or proceeding.
9. Revocation of leave.
10. Limitation.
11. Waiver of leave by liquidator.
12. Appeal.
13. Disobedience of stay order.

1. Scope and applicability. Each subsection of section 316 is not independent of the other. Subsection (1) of section 316 of the Ordinance, is an overriding provision and controls subsections (2) and (3) thereof which cannot be read in isolation. No doubt subsections (2) and (3) of section 316 confer special

jurisdiction on a Company Judge to try and transfer suits and other proceedings by or against the Company but this jurisdiction comes into play when there is already an order under subsection (1) thereof.[10]

Section 316 applies to liquidation under Court's supervision as well as to liquidation by the Court.[11] But where neither any order for winding up was made nor was Provisional Liquidator appointed until sale of property of company by Income-tax Department against recovery of arrears of Income-tax due from the company. Section 316 was not attracted and no leave of winding-up Court for sale of such property was required by Income-tax Officer.[12]

The intention of the section is to safeguard the company's assets against wasteful or expensive litigation in regard to matters which are capable of being determined more expeditiously and more cheaply in winding up proceeding.[13] Therefore section 316 must be construed with reference to other sections of the Ordinance and the general scheme of administration of the assets of the company in liquidation laid down by the Ordinance.[14]

Bar of proceedings when becomes effective. Powers under section 316, can only be exercised by Company Judge when already there is an order for winding up of the Company or of appointment of provisional liquidator made by him under subsection (1) of section 316.[15] Therefore, when a winding up order has been made in respect of a company or a provisional liquidator manager has been appointed in respect of such company, no suit or other legal proceedings can be continued or commenced against it, except by leave of the Court subject to such terms as may be imposed.[16] In this context the appointment of the Board of Administrators has been held to be equivalent to the appointment of a provisional manager.[17]

Bar contained in section 316 does not become operative on presentation of petition for winding-up or on commencement of winding up of company. It becomes operative only when the order for winding-up is made or the provisional manager is appointed. Before that stage is reached, section 313 takes care of the situation as it gives power to the Court to restrain further proceedings in any suit or proceeding against the Company during the period between the presentation of the petition and the passing of an order for the winding-up of the Company. Power under section 313 is discretionary and is to be exercised on the application either of the company or of any of its creditors or contributories.[18]

Time-barred claims. Section 316 cannot be read with section 311 so as to save claims which have become barred by limitation during the pendency of the winding up petition and render them admissible in proof in the winding-up. This section is

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10. 1990 CLC 1329.
11. AIR 1928 All. 165=50 All 419.
12. PLD 1986 Lah. 18 (DB).
13. AIR 1955 Mad. 449.
14. AIR 1946 F C 16=1946 F C R 40=ILR 1946 Kar. (FC) 7.
15. 1990 CLC 1329.
16. 1997 CLC 734=1996 Law Notes 124=NLR 1996 AC 444+1990 CLC 206.
17. 1997 CLC 734=1996 Law Notes 124=NLR 1996 AC 444.
18. PLD 1986 Lah. 18 (DB).

in no way controlled by section 311 for the purposes of suspension or exclusion of the period of limitation allowed for the enforcement of the claim.[19]

The stay of suits and other legal proceeding contemplated by section 316 is of a pre-emptory nature while the Courts have a discretion under section 311 in the matter of restraining them during the pendency of the winding up petition.[20]

Knowledge of winding up order not necessary. A proceeding initiated after the winding up order without the leave of Court will be hit by the provisions of section 316 irrespective of whether the person who instituted it was aware of the existence of the winding up order or not.[1]

Contravention of section. The safeguard which is provided in section 316 is only for the protection of those who are parties to the proceeding in liquidation. As such, if the contravention of that section is to make the proceeding voidable, then the only person who can take advantage of this section in challenging that proceeding on the ground of its being voidable is the person who is a party to the proceeding like the liquidator and not a third party who has no concern with the liquidation proceeding.[2] The bar created by this section cannot be waived. Hence a liquidator, even if he had not objected to the process of a suit against the company on the ground that there was no leave to continue it, will not be prevented from subsequently claiming that the decree which was passed in that suit is a nullity.[3] However, an objection as to want of leave which was not taken in the Court of first instance, should not be allowed to be raised in appeal.[4]

Continuation of proceedings. The section applies equally whether an insolvency proceeding is sought to be initiated or it is sought to be continued. Hence whether the discharge proceedings in an insolvency are considered to be independent proceedings or as merely the continuation of the insolvency proceedings which have already taken place, leave of Court would be necessary to make an application for discharge.[5]

Sale by receiver. A private sale effected by the receiver for a debenture-holder or a mortgagee in pursuance of the power vested in him in that behalf by the mortgage deed or the debenture trust deed is not a legal proceeding which cannot be commenced or continued without the sanction of the Court under section 316.[6]

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19. AIR 1958 Punj. 341 (The statutory bar contained in this section which commences only from the date of the winding up order cannot be related back to the date of the petition by the application of the principles of S. 168, Companies Act, 1913. Section 196, Companies Act, 1913, which deals with the particular period does not bar the institution of suit to enforce the claim. Hence if the claim is allowed to become time-barred the claimant has to blame himself for it).
20. AIR 1958 Punj. 341.
1. AIR 1916 Pat. 47 (DB) (Sale held in contravention of section is voidable at the option of the liquidator).
2. 1959 B L J R 475.
3. AIR 1928 All. 165=50 All. 419.
4. AIR 1933 Cal. 899 (DB).
5. 39 Pun. LR 717.
6. AIR 1955 Mad. 331 (DB).

Execution of decree. An application by the transferee of a decree against a company which has since gone into liquidation, for substitution as decree-holder under section 47(3), Civil P.C. must in spite of the provision of section 316, be made to the execution Court and not to the winding up Court.[7]

Statutory proceedings. Section 316 does not apply to enquiries, investigations and orders made either by the Government or statutory bodies in exercise of statutory powers.[8] A Magistrate is not bound to obtain leave of the Court under section 316 for drawing up proceedings against a liquidator under section 145, Criminal P.C. The prohibition contained in section 316 is not meant to override the exercise of statutory duties under express enactments like those found in section 145, Criminal P.C.[9] The Government is not bound to obtain leave under this section before it makes a reference under section 10(1) of the Industrial Disputes Act, in discharge of the statutory duty imposed on it by that section.[10] The making of an order under section 15(2) of the Industrial Disputes Act is a mere mechanical act of the Government and not a legal proceeding. Hence, it is not necessary for the Government to obtain leave before making such an order.[11]

Suit against Director. Where the plaintiffs are not seeking any relief against the company, under the contract of allotment of shares or otherwise but are content to sue the directors as individuals on the ground that they have suffered damage on account of the fraud practised by them on the plaintiffs such a suit against the directors and agent of the company who actually practised the fraud is not barred under section 316.[12]

Suit by company. The section does not bar the institution or continuation of a suit by the company.[13] Therefore where winding up order is passed after an adverse decision has been given against the company in a suit and it is the company which is interested in prosecuting a protective proceeding to relieve itself from the effect of that adverse decision, no leave is necessary.[14] Similarly where an *ex parte* order has been made in favour of a company, no leave of the Court is necessary for challenging that order under Order 9, Rule 13, C.P.C.[15]

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7. AIR 1919 All. 337=41 All. 432 (DB).
8. AIR 1951 Mad. 987 (DB).
9. AIR 1933 Cal. 433 (DB). (In this case the Judge without deciding the question expressed the opinion that though the liquidator happens to be a party in the proceedings only in his character as such liquidator yet for the purposes of those proceedings he is separate personality responsible for his own action. Hence in that sense it may be said that there are no proceedings against the company).
10. AIR 1957 Pat. 722 (DB). (Court held that even on the assumption that the proceedings are legal proceedings leave is not necessary inasmuch as there is a statutory compulsion on the Government to take such proceedings).
11. AIR 1915 Mad. 987 (DB).
12. AIR 1969 Madh. 323 (DB).
13. AIR 1955 All. 169=ILR (1954) 2 All. 484 (FB).
14. AIR 1959 Madh Pra. 95 (DB).
15. PLD 1965 Dacca 418.

Powers of Court hearing application. A Judge to whom application for leave under section 316 is presented can adjudicate upon question of title raised by an unsecured creditor whose claim is disputed by the Manager.[16]

2. Other legal proceedings. The expression "or other legal proceeding" in section 316 is not confined to original proceedings in a Court of first instance analogous to a suit instituted by means of a petition similar to a plaint.[17] An appeal or an application for revision is a legal proceeding within the meaning of section 316.[18]

Execution proceedings. The words "or other legal proceeding" can and should be held to cover distress and execution proceedings in ordinary Courts.[19] Grant of permission by the High Court is necessary for execution of a decree against a company in liquidation. The underlying principle is that the property remains vested in the company but the liquidator is only a trustee for the benefit of all the creditors, and, therefore, one creditor cannot be placed at an advantageous position and permitted to derive benefit to the exclusion of other creditors. So when permission is required, the Court considers the claims of all the creditors and orders the distribution of the assets of the company as it may deem fit and possible. No creditor can be permitted to have priority over the other.[20] An application to continue execution proceedings against a company in liquidation was refused as it would have meant giving undue preference to the decree-holder, who is not a secured creditor, over the other creditor, of the company.[1]

There is no exception to section 316 and leave of the Court is essential for the purpose of proceeding in execution even in case of a decree obtained by the Government in respect of a debt due to the State.[2] The State must comply with its provisions when it seeks to levy execution against a company in liquidation for recovering an amount as a public demand.[3] A decree may be one passed by the company Court itself and for that reason is executable under section 199 in the same manner as any other order or decree of the company Court but if it is sought to be executed not by a petition for winding up, but by instituting proceedings in some other Courts, leave under section 316 would be required.[4]

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16. AIR 1942 Oudh 417=18 Luck. 110 (DB).
17. AIR 1946 F C 16 (AIR 1945 All. 354 *Affirmed:* Observations of Tekchand, C.J. in AIR 1941 Lah. 392 (FB). *Overruled:* AIR 1948 Pat. 398 in so far as it has *relied on* AIR 1941 Lah. 392 (FB) cannot be considered to be authoritative)+AIR 1955 All. 169 (FB).
18. AIR 1918 Lah. 181 (FB)+AIR 1941 All. 335=I.L.R 1941 All. 565.
19. PLD 1972 Kar. 287+AIR 1946 F C 16+AIR 1960 Andh Pra. 74 (DB). (Leave is a condition precedent to levying execution of a decree even in a case where leave had already been obtained for continuing the suit)+AIR 1955 Mad. 449+AIR 1944 Mad. 84 (Leave is necessary to continue execution proceedings).
20. PLD 1972 Kar. 287.
1. PLD 1964 Lah. 326.
2. AIR 1932 Pat. 1 (DB).
3. AIR 1946 F C 16 (Proceedings under S. 46, Income-tax Act for summary collection of tax claimed can be commenced or continued against a company after its winding up only with the leave of Court; AIR 1945 All. 354, *Affirmed.* AIR 1926 Cal. 781, *implied overruled*)+AIR 1932 Cal. 430.
4. AIR 1956 All. 586 (DB). (Claim for rent of premises subsequent to winding up decided by company Court by consent of parties. Leave to initiate proceeding in company Court may be

Suit to enforce security. Suit to enforce security upon company's property after passing of liquidation order is maintainable, on the condition that plaintiff shall not claim costs of suit against company in liquidation.[5]

Income-tax, proceedings for recovery of. The phrase "other legal proceedings" in section 316, would cover proceedings taken by Income-tax Recovery Officer for recovery of Income-tax arrears. Therefore such proceedings may be commenced or continued without leave of the Court.[6]

Sale by Customs Authorities. Sale of machinery through public auction by Customs Authorities to a subsidiary of company whose management had gone under the supervision of Court was not sustainable in law for the reason that the management of the company on whose behalf bid was accepted vested in the Board of Administrators appointed by the High Court. Neither any reference relating to such action was made by Customs Authorities to the Board of Administrators nor to the High Court. Auction in question, without seeking permission of the High Court was not warranted. The whole exercise of putting of machinery in question in auction for sale, conduct of auction and acceptance of bid were declared to have been done, illegally and unauthorisedly. The machinery in question, which was lying sealed at the premises of respondent was directed to be retrieved and taken possession of by Collector of Customs in presence of representatives of petitioner and respondent by preparing a proper inventory and payment of necessary dues. It may be subsequently released to the petitioner company.[7]

Executive acts. Action of an authority which is purely his executive act is not a legal proceeding within section 316 and hence it is not necessary before such action is taken to obtain leave of the Court.[8]

Proceedings under constitutional jurisdiction. Proceedings in the nature of a constitutional petition are not proceedings under this section.[9]

Proceedings not against company. Where after a company has gone into liquidation and the liquidator has leased out a factory belonging to the company and a dispute between the factory and its workers is referred for adjudication under the Industrial Disputes Act, the lessees of the factory and not the company are the parties to the reference and hence no question whether the reference is a legal proceeding within the meaning of section 316 of the Companies Ordinance can arise at all in such a case.[10]

3. Suit or proceedings against the company. The language of section 316 is clear and explicit and signifies a will in conferring upon a Company Judge domain over all kinds of suits and proceedings pending by or against the Company in any Court irrespective of its being a subordinate Court or a High Court exercising

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assumed to be implicit--But no such implied leave can be spelt out for initiating execution proceedings on the decision in some other Court).

5. NLR 1988 UC 270.
6. PLD 1986 Lah. 18 (DB).
7. 1994 CLC 1763=NLR 1994 CLJ 347.
8. AIR 1950 East Punj. 204 (DB).
9. 1983 CLC 460.
10. AIR 1959 S C 230=1959 Supp 1 SCR 254=38 Pat. 495.

extraordinary original civil jurisdiction.[11] A proceeding to be "against the company" must be one where a liability is intended to be fastened on the company or its assets. It is not every proceeding in which the company is arranged as the opposite party that can be treated as a proceeding against the company for the purposes of the section.[12] If a company, which as a puisne mortgagee had been made a party to the mortgage decree, is impleaded in the execution of that decree then the proceedings in execution are against the company also inasmuch as it is liable to pay the debt due under the decree. Leave to continue the execution would be necessary.[13] A suit by a person employed by the voluntary liquidator to recover his arrears of salary is a suit against the company even though it is filed against the voluntary liquidator. Hence it would require leave of the Court where it is filed after the winding up order.[14]

The section does not apply and no leave is consequently necessary where the suit or proceedings is not against the company. Thus an application by some shareholders of a company being wound up for the issue of an order under Article 199 of the Constitution of Pakistan, 1973 to quash certain notifications published by the Government for closing down the factory of the company and opening its own factory in the premises is not a proceeding against the company under section 316.[15] A criminal proceeding against an employee of the company for an offence which requires *mens rea* cannot be considered to be a proceeding against the company even if the act which is complained of as an offence, was done by him on behalf of the company.[16]

4. Defensive actions. The defendant in an action by the Company need not obtain leave of the Court before he takes any proceeding against the Company by way of defence or for disproving the company's claim or for getting vacated some order passed in favour of the company.[17] Where the two applications before the Company Judge arose out of the liquidation proceedings under which the property in which the appellants claimed interest was being taken over as the property of the Company and the appellants were acting in defence in the same winding up proceedings before the same Court. There was no necessity for the defendant to take leave of the Court.[18]

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11. 1990 CLC 1329.
12. AIR 1955 All. 169=ILR (1954) 2 All. 484 (FB).
13. AIR 1963 Mad. 308 (DB)+AIR 1944 Mad. 84.
14. AIR 1917 Oudh 322 (*Held further* that the fact that the claim relates to a period prior to the winding up order does not affect applicability of S. 316, Companies Act, 1913 because every claim against a company which is being wound up generally relates to some period prior to the making of the winding up order).
15. AIR 1952 Trav-Co. 14=1950 Trav-Co. LR 162.
16. AIR 1949 Cal. 689. (Manager making representations on behalf of company--Prosecution for cheating--Proceedings are not against company even if his acts may render company civilly liable. Hence no leave necessary to continue the proceedings)+AIR 1948 Cal. 42. (Prosecution of directors for default under Ss. 32 and 134 of Companies Act, 1913)+AIR 1944 Oudh 147 (Prosecution of agents and manager of an Insurance Company under S.104, Insurance Act for wilfully making false entries in the reports and accounts of the company).
17. PLD 1980 Lah. 86=NLR 1980 AC 9 (DB)+AIR 1955 All. 169 (FB).
18. PLD 1980 Lah. 86=NLR 1980 AC 9 (DB).

An appeal or an application for revision of a decision obtained by the Company as the plaintiff in an action brought by it can be instituted or proceeded with without the leave of the Court under the section.[19] An application of the judgment-debtor for the review of a decree obtained by the company is not a legal proceeding commenced against the company and hence does not require the leave of the Court under this section.[20] Similarly a person who desires to raise objections under Order 21, Rule 58, Civil P.C. to the attachment of his property in the execution commenced by the company need not obtain leave under this section to do so.[1] An application by an auction-purchaser under Order 21, Rule 91, to set aside the sale in his favour based on the ground that the judgment-debtor had no salable interest in the property sold is a defensive application and hence no leave under the section is necessary to make the application.[2] No leave is necessary to raise a plea of set off in answer to a suit by the official liquidator as the defendant by raising such plea does not commence or proceed with a suit or other proceeding against the company.[3] However, a suit under Order 21, Rule 63 against a company in liquidation being a suit within the meaning of section 171, cannot be commenced without the leave of the Court which had ordered the winding up.[4]

5. Leave is in discretion of Court. Where winding up order had been made or provisional Manager had been appointed, no suit or legal proceedings could be proceeded with or commenced against the company except by leave of the Court which had passed the winding up order or appointed the provisional Manager.[5] The Court has a discretion in granting leave under the section which it has to exercise reasonably as the facts of each case warrant and not arbitrarily or capriciously.[6] Therefore where a share-holder bona fide commences his action against the company and its directors or promoters for rescission of his contract to take shares and for rectification of the register of the company before the winding up, then ordinarily leave ought to be granted for continuing the action. But where the action is commenced long after the cause of action had arisen and also subsequent to the commencement of the proceedings for winding up and in anticipation of the winding up order, the leave ordinarily ought not to be granted. This is particularly so where it is fully realised that the question of settlement of list of contributories is bound to come up for consideration before the winding up Court.[7]

The Court will grant leave to proceed with a suit where it finds that the balance of convenience is in favour of having the matter involved decided in the

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19. PLD 1962 Dacca 1042 (DB)+AIR 1918 Lah. 181 (FB) (AIR 1916 Lah. 24 *Overruled*)+AIR 1948 Pat. 388 (DB)+AIR 1938 Lah. 754+AIR 1937 Lah. 926 (DB). (The appeal in such a case cannot be considered to a proceeding instituted against the company)+AIR 1936 Pesh. 97.
20. AIR 1955 All. 169=ILR (1954) 2 All. 484 (FB).
1. AIR 1936 Pesh. 185 (Order refusing to entertain the objection on the ground of absence of leave is open to interference in revision)+AIR 1951 Mad. 348.
2. AIR 1948 Pat. 398=26 Pat. 470 (DB).
3. AIR 1951 Mad. 783=ILR 1952 Mad. 60 (DB).
4. AIR 1941 Lah. 392 (FB)+AIR 1919 Lah. 200 (DB) (The suit is not a continuation of the execution proceedings in which the company has attached his property).
5. PLD 1994 Kar. 358=NLR 1994 CLJ 528 (DB).
6. PLD 1964 Lah. 326+AIR 1955 Mad. 449+AIR 1932 Lah. 475 (DB).
7. AIR 1959 Madh Pra. 316.

suit itself.[8] Where the claim against the company involves heavy contest which cannot be conveniently and properly decided in the winding up, the Court would invariably leave it to be decided by a suit in the ordinary way.[9] The Court should ordinarily grant an application for leave to implead a company as a defendant where it finds that it is a proper party to the suit. On such application, the Court cannot with propriety make summary enquiry as to whether there is any likelihood of the company being held liable in the suit and reject the application on a negative finding on that point.[10] But the Courts will refuse to grant leave under the section to commence or continue a suit in which an adjudication is sought on a matter which falls peculiarly within their jurisdiction as winding up Courts.[11]

Leave granted--effect. Leave to bring a suit given under the section covers all subsidiary legal proceedings necessarily arising out of the suit.[12] Therefore once a litigation is started by Provisional Manager with the leave of the Court no further leave need be taken by any party to a suit in proceeding other than by Provisional Manager for preferring an appeal or motion, as the case may be, against a decision given in such a suit or proceeding. By an amendment or rectification of the misdescription of the plaintiff in the plaint, a new party is not brought on the record and as such no question of limitation arises.[13]

Interest of creditors. The main principle deducible from the legal provisions and the case-law appears to be that the Court must keep in view the interest of creditors and make sure that no undue preference is given to one at the cost of others.[14]

Objection to continuation of proceedings who may raise. Objection if any against continuation of suit proceedings with leave of Court under section 316(1), can be raised either by previous management or Official Liquidator and not by one of the creditors of the company under liquidation. Decree in such suit without impleadment of Official Liquidator would not be void but would be voidable at the instance of the Official Liquidator.[15]

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8. AIR 1932 Cal. 76 (Suit by secured creditors pending--Convenience in favour of getting amount due on mortgage ascertained in the suit itself--Objection to granting leave also not made--Court allowed suit to proceed).
9. PLD 1964 Lah. 326+(1867) 36 L J Ch. 312+AIR 1927 Bom. 167 (DB)+AIR 1955 Mad. 449 (Proceedings involving rights of third parties who have not come in and claimed a share in the winding up--Question involved also in the exclusive jurisdiction of a statutory tribunal and hence one on which the winding up Court cannot pass any order--Leave to institute the proceedings in the tribunal must be given.
10. PLD 1964 Lah. 326+AIR 1934 Lah. 328 (Suit on promissory note against its executant--Company in liquidation sought to be made defendant as endorser of the note--Leave should be given as company would be proper party to suit--Question whether it would be liable as endorser or not immaterial)+(1868) LT 535.
11. PLD 1963 Lah. 326+AIR 1917 Lah. 391 (Adjudication of contributories liability to pay calls on shares)+AIR 1955 Mad. 449+AIR 1918 Lah. 364+(1874) Eq. 268+(1863) 33 Bear 123.
12. AIR 1919 All. 337=41 All. 432 (DB).
13. PLR 1962 Dacca 1042 (DB).
14. 1982 CLC 2462=NLR 1982 Civ. 549+AIR 1932 Pat. 1 (DB).
15. NLR 1996 CLJ 222.

Constitutional jurisdiction. Where a Banking Tribunal orders stay of cases against company pending before it in deference to various directives issued by the High Court pertaining to affairs of company. The stay would continue till the plaintiff seeks leave of the High Court for proceeding with the suits. If such permission was granted by the High Court, dispute would end, if not, controversy could be taken by plaintiff to Supreme Court. Such matter could not be disposed of by the High Court in its Constitutional jurisdiction.[16]

6. Leave subject to condition. The Court may in the exercise of its discretion grant leave unconditionally or may impose terms as a condition for granting leave.[17] Where leave is sought to continue a suit in which the reliefs are claimed alternatively and the Court finds that one of those reliefs, if granted, would be against the provisions of the Ordinance, then it can grant leave subject to the condition that the plaintiff must elect to proceed with the suit only as regards the other relief to the obtaining of which there can be no objection.[18] In cases where a company is a necessary party to the action but there are other defendants as well, the Court will generally grant leave but subject to the condition that he will not enforce against the company without leave any judgment which he may obtain.[19]

7. Application of secured creditors. A secured creditor cannot be compelled to prove his debt in liquidation; such person can stand outside the winding up proceedings and rely upon security.[20] He can enforce his security or his decree subject to the condition that he obtains the leave of the winding up judge to proceed.[1] Where such person asks for leave to sue, his prayer should ordinarily be granted unless there are special grounds to support the contrary course. It was held in a case that leave could not be refused on the ground that suits were pending in different Courts at different places and Official Liquidator would incur expenses in pursuing those suits. Applicants were granted leave to proceed with their respective suits subject to the conditions that result of suits would be reported to the Court; that decree, if any, passed in favour of applicants would not be executed against the Company under Liquidation without order of the High Court; and if suits were decreed with costs, decree-holders would not claim the same (costs) against the company in question.[2]

Where a secured creditor applies for leave to enforce his security or decree, outside the winding up, the Court should ordinarily refuse leave only temporarily for such period as may be required by it to consider whether it should give the leave

16. PLD 1994 Kar. 358=NLR 1994 CLJ 528 (DB).
17. AIR 1955 Mad. 449.
18. AIR 1927 Bom. 167 (DB) (Money advanced to company under agreement that it would execute a mortgage of its assets—Lender suing alternatively for specific performance of the agreement and a money decree—Court can grant him leave subject to condition that he first elects to prosecute only his money claim and suitably amend his plaint).
19. PLD 1964 Lah. 326+(1867) 15 L T 495+(1867) W N 75+AIR 1955 Mad. 449.
20. PLD 1993 Lah. 691=PLJ 1993 Lah. 452.
1. AIR 1929 All. 353 (FB)+1951-1 Cal L Jour 233+AIR 1951 Punj. (Simla) 292. (In the case of a secured creditor an offer by the company of all he is entitled to foreclosure or sale, as the case may be, at once without any proceedings in the action is a ground for refusing the leave)+AIR 1932 Lah. 475 (DB) (Court has however power to impose conditions as the circumstances of the case may require while granting the leave).
2. PLD 1993 Lah. 691=PLJ 1993 Lah. 452.

or give directions to the liquidator in the matter, and if so, what those directions should be. In such cases the Court should not, in the absence of exceptional grounds, refuse the leave absolutely because such refusal would amount only to a guise for annulling or modifying the security or the decree of the applicant.[3] It is to be noted that a secured creditor who without resorting to a suit or other legal proceeding seeks to realise his security by a sale of the mortgaged property by private treaty or by public auction is not bound to obtain leave under this section.[4]

8. Leave granted subsequent to institution of suit or proceeding. The Court has jurisdiction under the section to grant leave to the parties to continue a suit or proceeding even if that suit or proceeding, had been instituted by them without leave only after winding up order was made.[5] The suit cannot be dismissed on the ground that before it commenced no leave had been obtained.[6] Thus it is not necessary to dismiss the suit which was instituted without leave where subsequent to such institution and within the period of limitation for the suit leave has been obtained under the section.[7] The leave granted on an application made within the period of limitation for the suit which had been instituted without leave would save it from dismissal even though the leave was granted by the Court only after the expiry of the period of limitation.[8]

An application for leave in the case of an appeal instituted without such leave after the winding up order must be treated as an application for leave to commence the appeal and rejected, if on that date the institution of the appeal has become barred by limitation.[9]

9. Revocation of leave. In a proper case a Court may revoke the leave already granted.[10] The leave given by the Court to a secured creditor to proceed with his suit to enforce the charge in his favour cannot be revoked only on the ground that the charged properties have been subsequently sold away by the Court where the sale was not in fact carried out with any intention to prejudice the claims of the secured creditors or the proceedings which they might take to enforce their securities are only for the sake of covenience and with the object of obtaining the best price for the properties.[11]

Where Directors after passing of winding up order filed application under section 316, for withdrawal of winding up order on the ground that they had arranged requisite funds for discharge of company's liabilities. High Court

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3. AIR 1929 All. 353=51 All. 595.
4. AIR 1955 SC 604 (Such a sale does not fall within the mischief of S. 232 also).
5. 54 Cal W N 832 (DB) (40 Cal W N 312 and AIR 1940 Cal. 166, *Overruled*).
6. AIR 1930 All. 503=52 All. 430 (DB).
7. AIR 1936 Lah. 401 (DB).
8. AIR 1942 Lah. 289 (FB) (Absence of leave does not render the institution of suit itself a nullity—Hence the suit should not be dismissed but only stayed so as to enable the plaintiff to obtain the necessary leave) (AIR 1936 Lah. 401 *overruled*).
9. AIR 1941 All. 335=ILR 1941 All. 565.
10. PLD 1964 Lah. 326+AIR 1955 Mad. 449.
11. AIR 1925 Cal. 916.

accepting offer of Directors, withdrew winding up order and dropped winding up proceedings subject to terms incorporated in its order.[12]

10. Limitation. Where a claim was lodged before the Manager. On its dismissal by the Manager the creditor sought leave to file a suit against the company, the suit for the purpose of limitation would be deemed to have been instituted on the date on which claim was made before the Manager. Thus where the plaintiff first lodged a claim for damages for breach of contract against a company which was being wound up by the Court, before the joint liquidators on 14.6.1952. On a reference by the Manager of the claim to the District Judge who was dealing with the winding up, the same was investigated and dismissed on 30.4.1955, on the ground that the claim could not be disposed of summarily in the liquidation proceedings. After obtaining leave of the District Judge to file a suit for the claim, the plaintiff filed the suit for damages on 6.6.1955. It was held, that, for purposes of limitation the suit though in truth instituted on 6.6.1955, was by virtue of the Explanation to section 3, Limitation Act, in law instituted on 14.6.1952, the date when the plaintiff lodged his claim in the first instance before the Manager.[13]

11. Waiver of leave by liquidator. The requirement as to leave of Court mentioned in section 316 can for certain purpose be waived by the official Liquidator of the company. The effect of waiver of the requirement as to leave would not compel the Manager to admit a claim rendered ineffective or inoperative by reason of the bar imposed by section 316. Section 410 really should be read jointly with section 316. It merely lays down the effect upon any sale held without the leave of the Court any of the properties of the company after the commencement of the winding up proceeding. No doubt it says that such sale shall be void. It means that if no leave of Court was obtained for the proceeding in which the sale resulted, and there was no waiver by the Manager or by the company of the requirement as to leave, the resulting sale or attachment would be void. But it could not govern the operation of a case where either leave was obtained or the want of leave was validly waived by the Manager of the company.[14]

12. Appeal. An order granting leave under the section or revoking any such leave can be challenged only by an appeal directed against the order itself and not in any other collateral proceedings.[15] An appellate Court will not ordinarily interfere with the leave granted by the lower Court except where the order is wholly wrong.[16]

13. Disobedience of stay order. A party who in contravention of a stay under section 316 executes his decree is guilty of contempt of Court even if he, in executing the decree, had acted under a bona fide belief, based on advice, that the section did not govern his case and therefore the stay order was erroneous.[17]

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12. NLR 1989 CLJ 418.
13. AIR 1964 Bom. 76 (DB)+AIR 1933 PC 63.
14. AIR 1963 Mad. 308 (DB)+AIR 1928 All. 165.
15. AIR 1930 All. 503=52 All. 430 (DB).
16. AIR 1917 Lah. 391=1917 Pun. Re. No. 13.
17. AIR 1958 Punj. 445=ILR 1958 Punj. 2014 (DB).

317. *Court may require expeditious disposal of suits, etc.* (1) Notwithstanding anything contained in any other law,--

(*a*) If any suit or proceedings, including an appeal, by or against the company which is allowed to be proceeded with in any Court other than the Court in which winding up of the company is proceeding, the Court may issue direction to that other Court if that Court is subordinate to it and, in any other case, make a request that other Court for expeditious disposal of the pending suit or proceedings by or against the company; and

(*b*) If any proceedings, including proceedings for assessment or recovery of any tax, duty or levies or appeal or review petitions against any order is pending or is likely to be instituted, before any officer, tribunal, authority or other body, the Court may issue directions to that officer, tribunal, authority or other body for expeditious action and disposal of the said proceedings.

(2) Upon issue of a direction or making of a request as aforesaid, the Court, officer, authority or body to whom the same is addressed shall, notwithstanding anything contained in any other law, proceed to dispose of the said suit or other proceedings expeditiously by according it special priority and adopting such measures as may be necessary in this behalf, and shall inform the Court issuing the direction or making the request of the action taken.

318. *Effect of winding up order.* An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

Synopsis

1. Scope.
2. Foreign company, winding up of.

1. Scope. An order under section 318 of the Ordinance, for winding up a company shall operate in favour of all the creditors and all the contributories of the company, and no suit or other proceeding shall be proceeded with or commenced[18] against a company which is being wound up except with the consent of the winding up Court.[19]

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18. 1980 Dhaka L R 45.
19. PLD 1982 Lah. 810+PLD 1964 Lah. 726+AIR 1916 Lah. 24=1916 Pun Re. No. 91 (DB).

Guarantor, rights of. Section 318 provides that any order for winding up of company operates in favour of all the creditors and contributories of the company. Where, therefore, defendant had become liable to pay by virtue of his guarantee, he would be entitled to claim payment from liquidator of company. Suit by such guarantor against company which had been ordered to be wound up, was, thus, competent.[20]

Limitation for recovery of loan. If on the date of institution of winding up petition, the remedy of any creditor to recover its loan under the law before the ordinary Court had not become barred by time the said creditor could recover by lodging claim before the Official Liquidator and get it verified no matter if the order for winding up of company was made at any time after the expiry of period of limitation for recovery of such loan before the ordinary Court.[1]

2. Foreign company, winding up of. Even where there is a winding up under Part XI of the Ordinance, the liquidator appointed has to find out the entire body of creditors wherever they may be resident and the foreign creditors are to be allowed to prove their claims in the winding up proceedings in Pakistan. As all the creditors have to be recognised as being entitled to be paid out of the assets of the company the location or the place where the debts were incurred cannot be considered as a prime factor.[2] The Indian Courts, however against all cannons of justice have taken up the position that Pakistani creditors of companies incorporated in India should be treated on a different footing as compared to other foreign creditors and it has been held that having regard to the peculiar conditions prevailing in India and Pakistan and in view of the absence of reciprocity between the two countries the unqualified application of the English rule of equal distribution of Indian assets among all creditors, Pakistani and Indian, will not be reasonable or equitable. At the same time an arbitrary exclusion of all the Pakistani creditors from the Indian liquidation would also strike at the very root of international comity. Hence the reasonable method is to lessen the rigour of the rule which requires the giving of equal opportunities to the foreign and the Indian creditors in an Indian liquidation and allow only such Pakistani creditors to prove their claims in the winding up whose debts are properly recoverable in the Union of India according to the principles of International Law of "*lex situs*" or the "proper law of contract".[3] Where the applicant had a saving bank account in a Pakistan branch of an Indian Bank, in respect of which an Indian High Court had sanctioned a scheme. The Pakistan High Court refusing to recognise the scheme made winding up order in respect of the Branch. The applicant applied to the Indian High Court for getting the benefit of the scheme. It was held that he should participate in the winding up proceedings in the Pakistan High Court and that he could not get the benefit of the scheme sanctioned by the Indian High Court.[4]

319. *Power of Court to stay winding up, etc.* (1) The Court may at any time not later than three years after an order for winding up,

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20. 1996 CLC 106=PLJ 1996 Kar. 485.
1. NLR 1996 CLJ 222.
2. AIR 1952 Mad. 136 (*Affirmed in* AIR 1962 SC 500).
3. AIR 1959 Cal. 762 (SB).
4. AIR 1954 Cal. 45.

on the application of any creditor or contributory or of the registrar or the Authority or a person authorised by it, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, withdrawn, cancelled or revoked, make an order accordingly on such terms and conditions as the Court thinks fit.

(2) On any application under sub-section (1), the Court may, before making an order, require the official liquidator to furnish to the Court a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under sub-section (1) shall forthwith be forwarded by the Court to the registrar, who shall make a minute of the order in his books relating to the company.

Synopsis

1. Scope.
2. Validity of winding up order cannot be challenged.

1. Scope. The person alleging that he was a contributory is to be deemed to be a contributory. Every share-holder of company was primarily liable to contribute, subject to proviso limiting the amount which he could be called upon to pay, being a holder of fully paid-up share, was a "contributory".[5] Courts in exercising their jurisdiction to stay winding up proceedings act so far as possible on the same principles on which jurisdiction is exercised to rescind a receiving order or annul an adjudication in bankruptcy against an individual. Hence the Courts dealing with the application for stay would refuse to act on the mere assent of the creditors where the granting of the stay will not be conducive to or will be detrimental to commercial morality and to the interests of the public at large.[6] But where a meeting of the creditors was called and wishes of creditors were ascertained and all creditors including secured creditors except the petitioners and Income-tax Department assented to the scheme. The Court while staying winding up proceedings for two years and sanctioning scheme; held that if interest of petitioners and Income-tax Department were safeguarded, public interest would outweigh the consideration of alleged withdrawal of Rs. one crore for which a condition could be imposed for submission of required statement of affairs by Managing Director according to law. Share-holders/Director could also be directed to pay dues with such interest as would be determined by Court.[7]

5. PLD 1984 Kar. 541.
6. PLD 1984 Kar. 541 + AIR 1919 Lah. 305 (DB) + AIR 1949 Cal. 60 + (1903) 2 Ch. 174.
7. PLD 1984 Kar. 541.

The Courts can under section 390 read with section 319 stay proceedings under a voluntary winding up also.[8]

2. Validity of winding up order cannot be challenged. In an application under section 319 by the creditors or contributories for the stay of winding up proceedings the company independently of its liquidator has no *locus standi*. Section 319 which comes into play after an order for winding up has been made presupposes a good and valid order. There is no scope for attacking the order on an application under the section [9]

320. *Court to have regard to wishes of creditors or contributories.* The Court shall, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

Synopsis

1. Wishes of creditors and contributories.
2. Scheme sanctioned by Court.
3. Hearing of parties.
4. Discretion of Court.

1. Wishes of creditors and contributories. The rule as generally applied in England, that the opinion of the creditors and share-holders in meeting, regarding the carrying on of the liquidation, should be followed, should not apply so strictly to Pakistan.[10] But the Court would definitely pay due defence to the wishes of the contributories and creditors in the matter of winding up. The Court would not order the winding up by overriding the considered opinion of the share-holders who were present at meeting, and of the share-holders who were represented by Counsel as regards the future prospects of the company in favour of the petitioner who had only five shares.[11] For the same reason in the winding up of a solvent company, the Court as well as the Official Liquidator should have particular regard to the wishes of the contributories in all matters affecting them as a class.[12]

2. Scheme sanctioned by Court. In an application for sanctioning a scheme approved by a statutory majority of the creditors of a company in liquidation for payment of its debts and management of its affairs in future, the Court has to see whether the provisions of the statute have been complied with, whether the majority are acting bona fide, whether they are coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and whether the scheme is a reasonable one.[13] When at a meeting of creditors, a scheme has been approved, the Court cannot either at the time of sanction or at any time thereafter,

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8. AIR 1919 Lah. 305 (DB) (Resolution for voluntary winding up passed to start company again after all creditors are satisfied--Proceedings stayed subject to condition that share-holders should be given option to continue as its members or retire).
9. AIR 1949 Cal. 69=ILR (1948) 2 Cal. 503.
10. AIR 1935 Lah. 779=16 Lah. 1029=158 Ind. Cas. 816 (SB).
11. NLR 1989 Civ. 705+AIR 1942 Bom. 231=44 Bom LR 387=203 Ind. Cas. 116.
12. AIR 1932 PC 1=136 Ind Cas. 114.
13. (1910) 12 Bom. LR 525=7 Ind. Cas. 452.

alter the terms of the scheme without consulting those who agreed to it and without their sanction. The Court has no power, either at the time of sanction or at any time thereafter, to expunge any part of the scheme or to modify it in any way without consulting those who passed it originally and without obtaining their consent. All that the Court can do is to refuse to sanction the scheme, or possibly to withdraw the sanction which has already been given. The latter, however, would be a serious step to take unless taken within a very short time after sanction had originally been given.[14]

Where one Judge of the Court has sanctioned the scheme, it is clearly not within the power of another Judge exercising equal jurisdiction to declare in effect that the order sanctioning the scheme is, to the extent that it affects a particular person a nullity.[15]

3. **Hearing of parties.** A fully paid-up share-holder is entitled to appear and to be heard upon an application to wind up the company. But it is entirely improper to allow the company to come in and fight the battle or the grievances of any individual share-holder, and the company is not competent to appeal from a compulsory winding up order upon the ground that a fully paid up share-holder who was desirous of being heard at the time the winding up order was made, was not heard.[16]

Creditors must be heard. While giving sanction to any bids for the purchase of a Company in liquidation, the Company Judge must give an opportunity of being heard to the major creditors who are vitally interested in the fate of the Company. An order made without giving an opportunity of being heard to a creditor who has a claim of crores of rupees against the Company is illegal.[17]

4. Discretion of Court. The Court has discretion to sanction or refuse to sanction sale of the goods and property of a Company in liquidation. But the discretion must be exercised judicially. Where neither any particulars of the machinery or its approximate value nor the tenure of leasehold rights of the land offered for sale were made known to the public/intending purchasers. In the advertisements issued by the Official Liquidator inviting bids the machinery was described as lying packed in wooden crates on "as it is where it is basis". In such circumstances and without offering even an opportunity of inspection by opening crates, could hardly by conducive to bring the best possible offers. Merely stating in the advertisement that premises of the mills at Kotri would remain open for inspection by prospective purchasers between 10 a.m. and 2 p.m. and further details could be had from Official Liquidator at Karachi, was also, totally inadequate to bring proper offers. Where no attempt was made either to ascertain its real market value, or to bring to the notice of the Court the value of the assets as per preliminary report or its market value. Had this been done, the discretion of the company Judge in accepting bid of Rs.2,31,000 for property worth over Rs.4,48,000 as per preliminary report, a difference of over Rs.2,17,000, would not

14. AIR 1937 Cal. 401=172 Ind. Cas. 717.
15. AIR 1937 Cal. 401=172 Ind. Cas. 717.
16. AIR 1931 Cal. 391=58 Cal. 62=132 Ind. Cas. 633 (DB).
17. PLD 1982 Kar. 1 (DB).

have been exercised. The order of the Court was set aside and fresh bids were ordered to be called.[18]

OFFICIAL LIQUIDATORS

321. *Appointment of official liquidator.* (1) For the purposes of this Ordinance, so far as it relates to the winding up of companies by the Court, the Court shall maintain, from amongst persons recommended by the Authority, a panel of persons from whom it shall appoint a provisional manager or official liquidator of a company ordered to be wound up by the Court.

(2) In the order winding up a company the Court shall appoint one or more of the persons on the panel maintained as aforesaid to act as official liquidator of the company and thereupon such person or persons shall, unless, within three days of the communication of the order, he or they inform or informs the Court of his or their inability to act as such, forthwith start performing the duties and functions of official liquidator in relation to that company and continue to perform such duties and functions till the conclusion of winding up proceedings.

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act by this Ordinance required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons.

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment.

(5) Any vacancy in the office of an official liquidator shall be filled up by the Court by the appointment of another person on the panel referred to in sub-section (1).

(6) Notwithstanding anything contained in sub-section (1) or sub-section (5), the Court may, if it considers it necessary so to do for reasons to be recorded, or on the application of creditors to whom amounts not less than sixty per cent of the issued share capital of the company being wound up are due, after notice to the registrar, appoint a person (other than the official receiver) whose name does not appear on the panel maintained for the purpose, to be the official liquidator.

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18. PLD 1982 Kar. 1 (DB).

Synopsis

1. Official liquidator.
2. Effect of appointment.
3. Joint liquidators.
4. Revision of order.

1. Official liquidator. An official liquidator is an official of the Court having definite powers conferred on him by this Ordinance and as such a public officer within the meaning of section 2(17)(*d*) and 80 of the Civil P.C.[19] An advocate of a company or of a creditor of the company must cease to represent the company or creditor as an advocate, once he is appointed liquidator of the said company.[20] The official liquidator must act with complete impartiality between different creditors contending for priority of their debts and refuse to take sides.[1] The official liquidator representing a company is in so different position from any one else against whom a stranger or a third party makes a claim. His only duty is to consider and if he thinks it is an admissible claim, to admit it, and if he thinks it an inadmissible claim to reject it; and accordingly the Official Liquidator is not bound to call on the claimant to appear before him and make an enquiry.[2]

Appeal against winding up order. In an appeal against a winding up order, from which alone his own authority arises, it is the duty of the official liquidator to assume a position of complete impartiality and to inform the Court, when asked, for any facts and circumstances in relation to the company's affairs, which in his judgment the Court ought to know. In such a case there is absolutely no jurisdiction in him to identify himself with the parties to the dispute and support the order for winding up.[3]

Bank guarantee by official liquidator. The official liquidator remains under the control direction and supervision of the Court till his duty is discharged and under the circumstances no bank guarantee was required to be furnished by the official liquidator.[4]

2. Effect of appointment. The effect of the provisions of sections 330 and 333 is that the directors and managing directors are left with very little to do on behalf of the company subsequent to its winding up and hence it can be said that their office comes to an end and they cease to hold it subsequent to the order for winding up.[5] But so far as contracts made by the company are concerned, they can be enforced and acted upon by the liquidator.[6] Therefore where a creditor of a company in liquidation had brought a suit for the recovery of his debt, any amount paid to the creditor by the liquidator has to be adjusted so as to reduce the amount of the suit.[7]

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19. AIR 1934 Oudh 158 (Hence notice under section 80, Civil P.C. is necessary to file a suit against him).
20. 9 All. 180 (DB).
1. AIR 1957 Mad. 169 (DB).
2. AIR 1939 Rang. 46=180 Ind. Cas. 69 (DB).
3. AIR 1932 PC 1=58 Ind App. 416=55 Mad. 180.
4. 1979 SCMR 10=PLJ 1979 SC 296.
5. AIR 1957 All. 143 (DB)+AIR 1917 Mad. 260 (DB).
6. PLD 1960 Dacca 308.
7. 1985 CLC 2176.

Proceedings commenced prior to winding up, prosecution of. Where Chairman of a Company had filed a complaint before Wafaqi Mohtasib before order of winding up was made, Wafaqi Mohtasib decided to continue proceedings before him on the ground that complaint before him had been filed prior to petition for winding up. Former Chairman of the company after its winding up appeared before Mohtasib and continued prosecuting the complaint. An application for contempt of Court was made against the Chairman of the Company. It was held that order of winding up had not been violated and no interference in winding up proceedings had been caused by former Chairman of Company by prosecuting the complaint before Wafaqi Mohtasib. Application for contempt of Court was not maintainable.[8]

3. **Joint liquidators.** Where two persons are appointed liquidators jointly the refusal of one of them to act renders abortive the resolution appointing them. One of them cannot take up the work alone, it clearly being the intention of the share-holders that they should act jointly and not separately.[9]

4. **Revision of order.** Liquidation proceedings are judicial in character but the Liquidation Judge has on several occasions to make decisions which have a strong colour of being administrative than strictly judicial, because the proceedings take place primarily under his own guidance and sometimes even his direction. Moreover, they are carried on with the assistance of the Judge's own officer--the Official Liquidator, in a situation in which the company's officers, its members and claimants represent partial interest only. The Court which has the power of making an order according to law and for the benefit of partially represented interests should be presumed to have the power to change it so as to make it convey his real intention and to prevent it from going wrong by reason of legal or factual misrepresentation whether deliberate or not.[10]

322. *Resignation, removal, filling up vacancies, etc. of official liquidator.* (1) An official liquidator shall not resign or quit his office as official liquidator before conclusion of the winding up proceedings except for reasons of personal disability to the satisfaction of the Court:

Provided that an official liquidator may at any time be removed by the Court for reasons to be recorded.

(2) Any vacancy in the office of an official liquidator shall be filled up by the Court by the appointment of another person from the panel maintained under section 321; and, until the person so appointed in his stead takes charge, the outgoing official liquidator shall, unless the Court directs otherwise, continue to act as the official liquidator.

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8. PLD 1994 Kar. 186=NLR 1994 UC 184.
9. AIR 1928 All. 165=109 Ind. Cas. 22=50 All. 419.
10. PLD 1968 Kar. 231.

Synopsis

1. Removal of Liquidator. 2. Appeal.

1. Removal of Liquidator. The Court has absolute discretion in the matter of removal of a liquidator subject only to the condition that reasons for the same must be recorded. An Official Liquidator must maintain a position of complete impartiality between all persons involved in the winding up. Where this is not done the Judge in charge of the winding up may remove such Liquidator and appoint in his place a person from whom an attitude of unqualified detachment can be expected.[11]

2. Appeal. An order removing a liquidator cannot be said to be an order determining the final rights of the parties. No appeal lies against an order passed by the District Judge under section 322 as it is not an appealable order.[12]

323. *Remuneration of official liquidator.* (1) An official liquidator, not being a salaried officer of Government or of Court, shall be entitled to such remuneration by way of percentage of the amount realised by him by disposal of assets or otherwise as may be fixed by the Court having regard to the amount and nature of the work actually done and subject to such limits as may be prescribed:

Provided that different percentage rates may be fixed for different types of assets and items.

(2) In addition to the remuneration payable under sub-section (1), the Court may permit payment of a monthly allowance to the official liquidator, for meeting the expenses of the winding up for a period not exceeding twelve months from the date of the winding up order.

(3) The remuneration fixed as aforesaid shall not be enhanced subsequently but may be reduced by the Court at any time.

(4) If the official liquidator resigns, is removed from office or otherwise ceases to hold office before conclusion of the winding up proceedings, he shall not be entitled to any remuneration and the remuneration already received by him if any, shall be refunded by him to the company.

324. *Style of official liquidator.* An official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he acts, and not by his individual name.

1. **Scope.** Even if the proceedings are not in the name and on behalf of the company, they must be deemed to be by the company through its liquidators when

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11. AIR 1932 PC 1 = 136 Ind. Cas. 114.
12. AIR 1963 All. 605.

the official liquidators have taken the proceedings in the matter of the company in liquidation.[13]

325. *Appointment and powers of provisional manager.* (1) At any time after the presentation of winding up petition and before the making of a winding up order, the Court may appoint a person eligible for appointment as official liquidator under section 321 to be provisional manager.

(2) Before appointing a provisional manager, the Court shall give notice to the company and afford to it a reasonable opportunity to make its representations, if any, unless for special reason to be recorded, the Court thinks fit to dispense with such notice.

(3) Where a provisional manager is appointed by the Court, the Court may limit and restrict his powers by the order appointing him or by a subsequent order; but otherwise he shall have the same powers as a liquidator.

(4) Unless the Court directs otherwise the provisional manager shall cease to hold office as provisional manager on the winding up order being made.

Synopsis

1. Appointment of Provisional Manager.
2. Management, complaints against.
3. Procedure for appointment.
4. Postponement of taking over the company by Provisional Manager.

1. Appointment of Provisional Manager. Under subsection (1) of section 325 company judge may appoint a provisional manager of a company in respect whereof a winding up petition had been presented before him pending order of winding up of that company and appointment of official liquidator. However, the power of appointment of provisional manager in winding up cases could not be exercised lightly, as the provisional manager appointed by the Court under section 325 has the same power as an official liquidator appointed by the Court consequent upon an order of winding up of the Company, unless the Court at the time of appointment of provisional manager specifies the extent of the powers of provisional manager.[14]

The object in appointing a provisional Manager is to ensure that there will be a fair distribution of the assets of the company and that one creditor will not be permitted to benefit at the expense of the others.[15] The Court would appoint a provisional Manager only when it is required in the interest of all persons

13. AIR 1953 Mad. 595=1953 Cr. L.J. 1142 (DB).
14. PLD 1992 Kar. 29=NLR 1991 Civ. 776 (DB).
15. AIR 1950 Pat. 237+1958 Punj. 341+PLD 1969 Lah. 194.

concerned.[16] Section 325(1) which empowers the Court to appoint a provisional Manager in so far as its terms go is general in character and absolutely unqualified. This shows that no hard and fast rule is laid down in this respect and the question must be determined by the Court with reference to the facts and circumstances of each particular case. This power, however, should not be exercised arbitrarily or capriciously, but reasonably and in accordance with the recognised principles of natural justice. While appointing a provisional Manager it must be borne in mind that the consequences that may flow from it may well be very grave. It may paralyse the affairs of the Company permanently and disrupt it while it still has all the prospects of being run smoothly and solvently. It is a very drastic step which must only be taken when absolutely essential and as a last resort.[17] The consequences flowing from a wrong order in the appointment of the Provisional Liquidator are far more serious, if afterwards the Court finds that the company was not at all liable to be wound up. By the time the business may have come to a stop and the company may not be able to survive the shock. Therefore in general, the Courts do not appoint a Provisional Liquidator unless it is clear that the company was bound to be wound up and its liquidation has become inevitable.[18]

The Court would, as a rule of practice, refuse to appoint a provisional Manager, even in the face of serious allegations made in the petition, where there is opposition to the winding up. But where there is no such opposition or where the company itself applies for the appointment, the Court would make the appointment even on the presentation of the application.[19] But in a given case, enough material might be brought forth in the petition to satisfying the Court that unless such a drastic step is taken, the consequences would be more damaging and, obviously, more drastic for all concerned including the Company and would justify appointment of a Provisional Manager. Conversely, there might be circumstances where, the request for the appointment of Provisional Manager may be the result of one or more disgruntled share-holders' spite. That would require a high degree of circumspection so as to avoid dangerous consequences. In that case it is not necessary for the Court to consult all the creditors.[20]

Section 320 makes it the statutory duty of a Court on all matters relating to winding up to have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. Although the word used in this section is 'shall' the very insertion of this section in the Companies Ordinance shows that the Court must give serious consideration to the wishes of the majority of the creditors or contributories. The use of the word 'shall' shows that the Court has no discretion to disregard such wishes.

A provisional Manager is not ordinarily appointed except on the petition of a creditor who has been unable to obtain payment of his money, or on the petition of the company or on the agreement of the company to the appointment.[1]

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16. AIR 1949 Mad. 107.
17. PLD 1976 Lah. 1538+PLD 1974 Lah. 844+PLD 1969 Lah. 194+PLD 1970 Lah. 539.
18. PLD 1970 Lah. 539.
19. AIR 1949 Lah. 9+AIR 1914 Lah. 117=1914 Pun. Re. No. 31.
20. PLD 1976 Lah. 1538.
1. AIR 1960 Pat. 237.

Official assignee, appointment of as Provisional Manager. Court would not interfere with order of appointment of official assignee as provisional manager except for the clarification that if appellants had any objection to the report of official assignee they would be free to raise the same before High Court who would hear and dispose of the same in accordance with law.[2]

Solvency of company. There is sufficient ground for the appointment of a provisional manager where the company is commercially insolvent and there is also no opposition to such an appointment.[3] The Courts generally have not appointed a provisional Manager unless the company is plainly, commercially and technically insolvent. If the company suspends its business and refuse to pay its creditors and no doubt whatsoever is left that it must got into liquidation, then it is plainly, commercially and technically insolvent, and therefore, the appointment of a provisional Manager is urgently called for. Such an appointment is also necessary if the directors of the Company themselves demand it or do not oppose it. Again in cases where it is quite apparent that the Directors or the servants of the Company are tempering with the records or destroying them or are misappropriating the company's money then it may become necessary in the larger interests of the contributories and the creditors to appoint a provisional Manager in order to protect the assets of the Company. Such a Manager may also be appointed if a fair majority of share-holders passed a genuine resolution that the company should be wound up or the creditors in spite of their best efforts to have not been able to realise their debts and this can by clear evidence be attributed to the financial difficulties of the company.[4] Where it is prima facie established that the company has incurred debts which are more than its paid up capital, it has refused to pay the debts which necessitated the institution of suits by several banks and that it has not functioned for more than three years without any plausible reason. It is just and proper that a Provisional Manager should be appointed who should take over the management and the assets of the company. The petition for the appointment of Provisional Manager has to be decided on affidavits whereas whether or not the winding up order should be passed depends on the evidence which the parties may produce. It is for this reason that any observation which is made in an order appointing the Provisional Manager will have no bearing on the order which is ultimately passed on a petition for winding up.[5]

2. Management, complaints against. A complaint against the management that a particular project has been abandoned or indefinitely postponed, is not a sufficient reason for appointing a provisional Manager. Similarly a limited company will not be wound up on the ground of a deadlock in its management and hence pending an application for its winding up based on that ground no provisional liquidator with full powers to manage its business will be appointed.[6]

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2. PLD 1992 Kar. 29=NLR 1991 Civ. 776 (DB).
3. AIR 1914 Lah. 117=1914 Pun. Re. No. 31+AIR 1949 Mad. 107.
4. PLD 1957 Lah. 844=PLR 1958 (1) WP 783.
5. PLD 1969 Lah. 194.
6. AIR 1950 Pat. 237.

3. Procedure for appointment. An application for appointment of a provisional Manager may be decided on affidavits.[7] Notice of such application must be given to the company. An order appointing a provisional Manager in the absence of the notice to the company and without recording reasons for the dispensation of the notice is bad.[8]

The appointment of a Manager is a matter purely in the discretion of the trial Court and that decision should not be interfered with except under very special circumstances.[9]

Company must be heard before passing of order. As the appointment of "provisional manager" is fraught with serious and drastic consequences for a running company, the legislature as a safeguard has provided in section 325(2) that before appointing the provisional manager, the Court would hear and afford an opportunity to the company to make its representation against such appointment. No doubt in cases of extreme urgency and in extraordinary circumstances where Court was of the opinion that by giving the notice to the respondents, the object of the appointment of provisional manager would be defeated, it could dispense with such notice but in that case the Court must record its reasons for this extraordinary measure in the order.[10] In the absence of special reasons which justified *ex parte* appointment of provisional manager of company and which the Court was bound to record in his order, the appointment of provisional manager could not be sustained in law.[11]

4. Postponement of taking over the company by Provisional Manager. The induction of and taking over by the Provisional Manager can be postponed in proper cases. The expression "at any time" used in section 325 is unqualified. After taking the decision in principle the Court can for good reasons, including a further opportunity to the company and its functionaries to come out of slumberous or motivated complacency and/or to show bona fides now if not earlier, postpone its taking over by the Provisional Liquidator.[12]

326. *General provisions as to liquidators.* (1) The official liquidator shall conduct the proceedings in winding up the company and perform such duties in reference thereto as the Court may impose.

(2) The acts of a liquidator shall be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification:

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7. PLD 1976 Lah. 1538+PLD 1973 Kar. 491.
8. AIR 1949 East Punj. 139 (DB).
9. AIR 1923 Rang. 36=107 Ind. Cas. 360=5 Rang. 685 (DB).
10. PLD 1992 Kar. 29=NLR 1991 Civ. 776.
11. PLD 1992 Kar. 29=NLR 1991 Civ. 776+1991 MLD 1456 (DB).
12. PLD 1976 Lah. 1538.

Provided that nothing in this sub-section shall be deemed to give validity to acts done by a liquidator after his appointment has been shown to be invalid.

(3) The winding up proceedings shall be completed by the official liquidator within a period of one year from the date of commencement of winding up:

Provided that the Court may, on the application of the official liquidator, grant extension by one month at any one time but the extensions so granted shall not exceed a period of six months in all and shall be allowed only for the reason that any proceedings for or against the company are pending in a court superior to the Court in which liquidation proceedings are in progress.

(4) If an official liquidator is convicted of misfeasance, or breach of duty or other lapse or default in relation to winding up proceedings of a company, he shall cease to be the official liquidator of the company and shall also become disqualified, for a period of five years from such conviction, from being the liquidator or to hold any other office including that of a director, in any company and if he already holds any such office he shall forthwith be deemed to have ceased to hold such office.

(5) The registrar and the Authority shall take cognizance of any lapse, delay or other irregularity on the part of the official liquidator and may, without prejudice to any other action under the law, report the same to the Court.

1. **Official liquidator.** An official liquidator is an official of the Court having definite powers conferred on him by this Ordinance and as such a public officer within the meaning of sections 2 (17)(*d*) and 80 of the Civil P.C.[13] An advocate of a company or of a creditor of the company must cease to represent the company or creditor as an advocate, once he is appointed liquidator of the said company.[14] The official liquidator must act with complete impartiality between different creditors contending for the priority of their debts and refuse to take sides.[15] The official liquidator representing a company is in no different position from any one else against whom a stranger or a third party makes a claim. His only duty is to consider it, and if he thinks it is an admissible claim, to admit it, and if he thinks it an inadmissible claim to reject it; and accordingly the Official

13. AIR 1934 Oudh 158 (Hence notice under section 80, Civil P.C. is necessary to file a suit against him).
14. 9 All. 180 (DB).
15. AIR 1957 Mad. 169 (DB).

Liquidator is not bound to call on the claimant to appear before him and make enquiry.[16]

Appeal against winding up order. In an appeal against a winding up order, from which alone his own authority arises, it is the duty of the official liquidator to assume a position of complete impartiality and to inform the Court, when asked for any facts and circumstances in relation to the company's affairs, which in his judgment the Court ought to know. In such a case there is absolutely no justification for him to identify himself with the parties to the dispute and support the order for winding up at the charge of the assets of the company.[17]

Bank guarantee by official liquidator. The official liquidator remains under the control, direction and supervision of the Court till his duty is discharged and under the circumstances no bank guarantee was required to be furnished by the official liquidator.[18]

327. *Receiver not to be appointed of assets with liquidator.* A receiver shall not be appointed of assets in the hands of a liquidator except by, or with the leave of the Court.

1. **Receiver and liquidator.** There is nothing to prevent a Court to appoint a Receiver in a fit case by resort to the provision contained in Order 30, rule 1 of the C.P. Code in the interest of a Company and its business, except where the official liquidator has taken over the assets. It is well recognized that the appointment of Liquidator is meant more for preservation of the assets of the Company for distribution following the winding up than for the conduct of day-to-day business of the Company. For the latter purpose, the appointment of a Receiver appears to be an appropriate remedy. The appointment of a Liquidator, it may be pointed out, should be taken by the contracts of a Company more adversely than appointment of a Receiver because the former implies that the Company is bound to be liquidated whilst the appointment of a Receiver still leaves a hope that the Company may survive. Therefore where it was clear that a Company was being mismanaged, but there was hope that it could survive if managed properly, it was better for the Court to appoint a Receiver with power to manage the affairs of the company and if it is beneficial for the company to complete contracts already entered into by its management.[19]

In case of competition between a liquidator and a receiver appointed by Court at the instance of a secured creditor the Court will ordinarily in exercise of its discretion, give preference to the liquidator.[20]

328. *Statement of affairs to be made to official liquidator.* (1) Where the Court has made a winding up order or appointed an official liquidator or provisional manager, there shall be made out and submitted to the official liquidator or provisional manager a

16. AIR 1939 Rang. 46=180 Ind. Cas. 69 (DB).
17. AIR 1932 PC 1=58 Ind App. 416=55 Mad. 180.
18. 1979 SCMR 10=PLJ 1979 SC 296.
19. PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB).
20. AIR 1932 Cal. 76=58 Cal. 946.

statement as to the affairs of the company in the prescribed form, verified by an affidavit, and containing the following particulars, namely:--

(*a*) the assets of the company, stating separately the cash balance in hand and at the bank, if any, and the negotiable securities, if any held by the company;

(*b*) the debts and liabilities of the company;

(*c*) the names, residences and occupation of the creditors of the company, stating separately the amount of secured debts and unsecured debts, and, in the case of secured debts, particulars of the securities given, their value and the dates when they were given;

(*d*) the debts due to the company and names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom;

(*e*) where any property of the company is not in its custody or possession, the place where and the person in whose custody or possession such property is;

(*f*) full address of the places where the business of the company was conducted during the six months preceding the relevant date and the names and particulars of the persons in charge of the same;

(*g*) details of any pending suits or proceedings in which the company is a party; and

(*h*) such other particulars as may be prescribed or as the Court may order or the official liquidator or provisional manager may require in writing, including any information relating to secret reserves and personal assets of directors.

(2) The statement shall be submitted and verified by persons who are at the relevant date the directors and by the persons who are at that date the chief executive and secretary of the company, or by such of the persons hereafter in this sub-section mentioned as the official liquidator or provisional manager, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons--

(*a*) who are or have been directors, chief executives or officers of the company within one year from the relevant date;

(*b*) who have taken part in the formation of the company at any time within one year before the relevant date;

(*c*) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the official liquidator or provisional manager capable of giving the information required;

(*d*) who are or have been within the year said officers of, or in the employment of, a company which is, or within the said year was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time not exceeding forty-five days from that date as the official liquidator or provisional manager or the Court may, for special reasons, appoint.

(4) Any person making, or concurring in making, the statement and affidavit required by this section shall be allowed, and shall be paid by the official liquidator or provisional manager, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official liquidator or provisional manager may consider reasonable, subject to an appeal to the Court.

(5) If any person, without reasonable excuse, makes default in complying with the requirement of this section, he shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

(6) Without prejudice to the operation of any provisions imposing penalties in respect of any such default as aforesaid, the court which makes the winding up order or appoints a provisional manager may take cognizance of an offence under sub-section (5) and try the offence itself in accordance with the procedure laid down in the Code of Criminal Procedure, 1898 (Act V of 1898), for the trial of cases by Magistrates and further direct the persons concerned to comply with the provisions of this section within such time as may be specified by it.

(7) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

(8) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Pakistan Penal Code, 1860 (Act XLV of 1860), and shall, on the application of the official liquidator or provisional manager, be punishable accordingly.

(9) In this section, the expression "the relevant date" means, in a case where a provisional manager is appointed, the date of his appointment, and in a case where no such appointment is made, the date of the winding up order.

Synopsis

1. Scope.
2. Accounts to be submitted by outgoing liquidator.

1. Scope. Where a company which had gone into voluntary liquidation and had been struck off the register is restored to the register by the direction of the Court and after such restoration the Court ordered it to be wound up, it is a case of winding up by Court and not a voluntary winding up. Section 328 would therefore apply to such a case and hence a person who is bound to furnish information to the official liquidator under the section would become liable to the punishment prescribed by sub-section (5) by his failure to furnish the required information.[1]

2. Accounts to be submitted by outgoing liquidator. The official liquidators also are officers of the company within the meaning of section 328 (2) (*a*), and hence when, after their resignation, they are required by their successor to furnish an account of the assets and papers of the company which were in their possession, they cannot as a condition precedent to their compliance with the request insist upon their successor obtaining a direction from the Court ordering them to furnish the information.[2]

329. *Report by official liquidator.* (1) In a case where a winding up order is made, the official liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 328 and not later than thirty days, or such further period not exceeding thirty days as the Court may allow, from the date of the winding up order submit a preliminary report to the Court--

(*a*) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities, giving separately, under the heading of assets, particulars of--

(*i*) cash, bank balances and negotiable securities;

(*ii*) debts due from contributories;

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1. AIR 1947 Mad. 247=48 Cr.L.J. 14.
2. AIR 1947 Mad. 247=48 Cr.L.J. 14.

(*iii*) debts due to the company and securities, if any, available in respect thereof;

(*iv*) movable and immovable properties belonging to the company;

(*v*) unpaid calls; and

(*b*) if the company has failed, as to the causes of the failure; and

(*c*) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of its business.

(2) The official liquidator may also, if he thinks fit, make a further report, or further reports stating the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since its formation, and any other matter which is in his opinion, if it is desirable to bring to the notice of the Court.

(3) If the official liquidator states in any such report or further report that in his opinion a fraud has been committed as aforesaid, the Court shall have the further power provided in sections 351, 253 and 353.

(4) A certified copy of the reports aforesaid shall also be sent to the registrar simultaneously with their submission to the Court.

1. Scope. The non-submission of the report under sub-section (2) of this section does not bar the official liquidator from making an application under section 253 or the Court from passing an order thereon.[3]

330. *Custody of company's property.* (1) The provisional manager or official liquidator, as the case may be, shall take into his custody or under his control, all the books and papers, property, effects and actionable claims belonging to or to which the company is or appears to be entitled and all persons who are or have been directors, chief executives, managers, officers, servants, bankers, auditors or agents of the company and who may be having in their knowledge, custody, control or charge, directly or under them any such books or papers, property, effects and actionable claims, shall forthwith report and hand over or cause to be handed over possession

3. AIR 1949 Bom. 339 (DB).

to the liquidator of all such items and furnish to the liquidator such information and explanations as he may require and any default or failure on their part shall be punishable with imprisonment of either description which may extend to one year and with fine which may extend to ten thousand rupees and the Court may direct the books or papers, property and effects to be delivered to the liquidator in case of default or failure, and in the event of non-compliance with the directive, to order the person in default to pay further amount by way of compensation equal to the value of the property as the Court may determine.

(2) For the purpose of enabling the provisional manager or the official liquidator, as the case may be, to take into his custody or under his control any property, effects, actionable claims or books of account or other documents to which the company is or appears to be entitled, the provisional manager or the official liquidator, as the case may be, may by writing request the District Magistrate within whose jurisdiction such property, effects, or actionable claims or books of account or other documents may be found to take possession thereof, and the District Magistrate shall thereupon, after such notice as he may think fit to give to any party, take possession of such property, effects, actionable claims, books of accounts or other documents and deliver possession thereof to the provisional manager or the official liquidator, as the case may be.

(3) For the purpose of securing compliance with the provisions of sub-section (2) the District Magistrate may take or cause to be taken such steps, and use or cause to be used such force, as may in his opinion be necessary.

(4) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company.

Synopsis

1. Powers and rights of liquidator.
2. Directors, powers of.
3. Creditors, rights of.

1. **Powers and rights of liquidator.** The estate of the company which is wound up does not vest either in the Court or the official liquidator as the estate of an insolvent vests in the official receiver under the bankruptcy law. On the other hand the estate continues to remain in the company itself while the Court or the liquidator has only the custody of the estate.[4] The official liquidator is the statutory custodian although sub-section (2) of the section provides that the property and

4. AIR 1941 Lah. 134=ILR 1941 Lah. 680 (DB)+AIR 1954 Trav-Co. 40

effect of the company shall be deemed to be in the custody of the Court. The custody of the Court contemplated by sub-section (2) is only the notional custody.[5] Thus the right which a company has to be in possession of a piece of land under a subsisting lease passes on its winding up to the official liquidator.[6]

Collection and realization of assets of company. It is obvious from the provisions of section 330 that the property, effects and actionable claims to which the company is or appears to be entitled have to be taken into custody by the official liquidator and they shall be in the custody of the Court as from the date of the order for winding up of the company.[7] It is one of the primary concerns of the liquidator to collect or realise the assets of the company and bring them into the fund for the payment of debts or distribution among the share-holders and that any proceedings which he takes for that purpose is a proceeding which he is required to take in the course and for the purpose of the winding up.[8]

Sale of assets of company. In a compulsory winding up the company is put into liquidation against its will by force of law and the order of the Court and a sale is made by the liquidator acting under the control of the Court and with its sanction. That is the dictate of the law. The sale is therefore really by the Court acting through the liquidator and the company has no hand in the matter.[9]

Suit against company without impleading liquidator. The Court was only Custodian of property of the company and ownership of property continued to vest in the company under a winding up order. Company retains its entity to sue or to be sued even under a winding up order. When a party sued a company under a winding up order but did not implead the official liquidator. Permission to proceed with such suit was granted by the Court in the presence of such official liquidator. Money suit was based on registered deed and liability with normal interest was admitted by counsel of company. A consent decree was passed and nothing else could have been done on behalf of company in defence of the suit. Official liquidator in the circumstances of the case even if had appeared to defend the suit could have hardly done any better. There was no justification to withhold permission for execution of decree well based on merits only for the formality of impleading the official liquidator.[10]

2. **Directors, powers of.** The combined effect of sections 330 and 333 is that after a winding up order is made it is the liquidator alone who can function on behalf of the company in almost all matters and the directors and managing director have very little to do. Hence in that view of the matter it can be said that the order

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5. AIR 1960 Cal. 199.
6. AIR 1952 Cal. 207 (Clause in lease for the term that the lease will be determined if the company went into liquidation before expiry of term—It amounts only to a forfeiture clause. Lease not determined by proper notice by lessor after liquidation. Application to recover possession cannot succeed—Official liquidator is entitled to possession of land).
7. PLJ 1982 Lah. 439=PLD 1982 Lah. 810=NLR 1982 Civ. 549=1982 CLC 2462.
8. AIR 1952 Cal. 732.
9. AIR 1959 Cal. 181.
10. PLD 1984 Lah. 415=PLJ 1984 Lah. 510=1984 Law Notes 927.

virtually brings their offices to an end and that they cease to hold their office thereafter.[11]

3. Creditors, rights of. The custody which the Court gets under section 330 over the properties and assets of a company is for the benefit of all its creditors in general and not only for those at any particular place. Hence the creditors of one particular place will also have a right to share in the assets of the company at other places.[12]

331. *Committee of inspection in compulsory winding up.* (1) When a winding up order has been made by the Court, the liquidator shall within thirty days summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of the committee if appointed:

Provided that, where the winding up order has been made on the ground that the company is unable to pay its debts, it shall not be necessary for the liquidator to summon a meeting of the contributories.

(2) The Court may make any appointment and order required to give effect to any such determinations, and if there is a difference between the determination, of the meetings of the creditors and contributories in respect of the matters aforesaid the Court shall decide the difference and make such order thereon as the court may think fit.

332. *Constitution and proceedings of committee of inspection.* (1) A committee of inspection appointed under section 331 shall consist of creditors and contributories of the company or persons, holding general powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories or as, in case of difference, may be determined by the Court:

Provided that, where a winding up order has been made on the grounds that a company is unable to pay its debts, the committee shall consist of creditor or persons holding general powers of attorney from creditors.

(2) The committee shall meet at such times as it may from time to time appoint, and, failing such appointment, at least once a month,

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11. AIR 1957 All. 143=ILR (1958) 1 All. 407 (DB)+AIR 1962 Punj. 433.
12. 2 Sau L R 12 (DB).

and the liquidator or any member of the committee may also call a meeting of the Committee as and when he thinks necessary.

(3) The committee may act by a majority of its members present at a meeting but shall not act unless a majority of the members of the committee are present.

(4) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(5) If a member of the committee becomes bankrupt or compounds or arranges with his creditors or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories as the case may be, his office shall thereupon become vacant.

(6) A member of the committee may be removed by an ordinary resolution at a meeting of creditors, if he represents creditors, or at a meeting of contributories, if he represents contributories, of which seven days' notice has been given, stating the object of the meeting.

(7) On a vacancy occurring in the committee the official liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy:

Provided that, if the official liquidator, having regard to the position in the winding up, is of the opinion that it is unnecessary for the vacancy to be filled, he may apply to the Court and the Court may make an order that the vacancy shall not be filled, or shall not be filled except in such circumstances as may be specified in the order.

(8) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.

Comments on sections 331 and 332

1. **Scope.** The duty of the committee of inspection is in essence to assist in the administration of the assets of the company in liquidation. The liability of a member of the committee rests not on the express provisions of the Ordinance or Rules but is founded on general equitable principles. His position impresses him with a fiduciary character and as a trustee for sale he is debarred from buying or trafficking in the trust property. The official liquidator is entitled to the return of

the property where a member buys without full disclosure in spite of the fact that a fair price was paid for it.[13]

333. *Powers of official liquidator.* (1) The liquidator in a winding up by the Court shall have power, with the sanction either of the Court or of the committee of inspection,--

(*a*) to institute or defend any suit, action, prosecution or other legal proceeding, civil or criminal, in the name and on behalf, of the company;

(*b*) to carry on the business of the company so far as may be necessary for the beneficial winding up thereof;

(*c*) to pay any classes of creditors in full;

(*d*) to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable,

(*e*) to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such calls, debt, liability or claim and give a complete discharge in respect thereof;

(*f*) to sell the movable and immovable property and things in action of the company by public auction or private contract, with powers to transfer the whole thereof to any person or company or to sell the same in parcels.

(2) Subject to any general or special direction of the Court or of the committee of inspection, the liquidator in winding up by the Court shall have power:--

13. AIR 1959 All. 196=ILR (1959) 1 All. 1.

(*a*) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal;

(*b*) to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and ratable with the other separate creditors;

(*c*) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(*d*) to raise on the security of the assets of the company any money requisite;

(*e*) to take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company; and in all such cases the money due shall, for the purposes of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself;

(*f*) to appoint an agent to do any business which the liquidator is unable to do himself; and

(*g*) to do all such other acts and things as may be necessary for winding up the affairs of the company and distributing its assets.

(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory or the registrar may apply to the Court with respect to any exercise or proposed exercise of any of the said powers.

Synopsis

1. Liquidator, position of.
2. Sanction of Court.
3. Institution or continuance of suits and proceedings.
4. Sanction to institute or continue proceedings.
5. Criminal prosecution.
6. Restriction on powers.
7. Carrying on business for beneficial winding up.
8. Sale of property.
9. Negotiable instruments, powers of liquidator.
10. Mortgage of company's property.
11. Arbitrator, reference of dispute to.

1. Liquidator, position of. A liquidator is an agent employed for the purpose of the winding up of the company and he acts in the winding up not merely for the creditors but also for the contributories and the company.[14] He may be an officer of the Court in that he acts under its direction but thereby he does not become the representative of the Court. On the other hand he is only the representative of the company which is being wound up, with a status recognised by the statute and powers and functions which are not identical with those of the Court. The fact that some of those powers can be exercised by him only with the sanction of the Court is not sufficient to establish an identity between him and the Court.[15] The official liquidator does not act improperly in rejecting a claim which he thinks is inadmissible even though he does not summon the claimant and call for documents or otherwise make any public judicial enquiry. His position dealing with the claims is not different from that of any other individual against whom a claim has been made.[16] As a decree passed in favour of a company does not vest in the official liquidator on its going into liquidation he is not a transferee of that decree within the meaning or Order 21, Rule 16. Hence his application for execution made to the Court to which that decree had been transferred cannot be thrown out as incompetent.[17]

Liquidator has no right of audience in any proceeding in a suit brought by the Company in the ordinary original jurisdiction of the High Court.[18]

Trustee for creditors. The liquidator of a company is a trustee for the creditors of the company.[19] But he holds that office for the general body of the creditors of the company and not for each individual creditor.[20]

2. Sanction of Court. The sanction under the section is in the discretion of the Court which is to be exercised judicially, having regard to the interest of the company and its creditors.[1] A judge in winding up, in authorising proceedings on behalf of the company, should be careful to see that any action taken in the

14. AIR 1953 Punj. 145=ILR 1952 Punj. 349.
15. AIR 1948 All. 447=ILR (1958) 1 All. 549 (DB).
16. AIR 1939 Rang. 46 (DB).
17. AIR 1936 Lah. 152.
18. ILR (1937) 2 Cal. 173.
19. AIR 1927 All. 161 (FB) (The winding up does not revive a claim for money which became barred by limitation before the winding up and hence such a claim must not be admitted).
20. AIR 1953 Punj. 145=ILR 1952 Punj. 349.
1. 1996 SCMR 88+AIR 1921 Mad. 286 (DB).

company's name under his authority is not merely vexatious or oppressive.[2] But the Court in disposing of an application under section 333 for leave to file a suit cannot take into consideration the merits of the proposed suit.[3] The Court has jurisdiction to sanction any reasonable step which the liquidator may desire to take in the interest of the winding up in which the primary concern is the interest of the creditors and share-holders.[4] Sanction under section 333 is in the discretion of the Court and hence the Court cannot be compelled by an order under Art.199 of the Constitution, 1973 to exercise that discretion in any particular manner.[5]

Restrictions may be imposed while granting sanction. The Court in giving a power under the section to the official liquidator has the discretion to restrict that power either as regards its extent or as regards the manner of its exercise.[6]

Permission to bid at auction sale. A judge in winding up cannot grant the liquidator leave to bid, it being clearly a matter for the execution Court, but he can sanction that the liquidator may apply to the execution Court either in particular or generally in all cases for leave to bid as a decree-holder.[7]

Appeal. An order granting a sanction or revoking a sanction which had been granted is appealable.[8]

3. Institution or continuance of suits and proceedings. Provisions of section 333 have been made only to check and control the Official Liquidator, so that no unnecessary litigation is started by the Official Liquidator and no flimsy defence is put up by him.[9]

Only liquidator can sue or continue proceedings. The privilege of instituting suits and proceedings in the name of or on behalf of a company in winding up belongs exclusively to the official liquidator and it cannot be taken advantage of by third parties.[10] A company in liquidation retains its corporate powers including the powers to sue, and such powers are exercised by the liquidator who has to sue in the name of the company. A share-holder is not entitled to maintain an action when a liquidator is functioning. He may possibly move the Court to give directions to the liquidator to sue. Therefore where a suit by official liquidator is dismissed, a share-holder cannot, on his own, appeal against the order.[11]

A proceeding initiated by the liquidator is actually a proceeding by the company through its liquidator and not merely a proceeding continued personally

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2. AIR 1936 PC 322.
3. AIR 1952 Mad. 58 (DB).
4. AIR 1927 All. 681 = 50 All. 173.
5. AIR 1958 All. 447 = ILR (1958) 1 All. 549 (DB).
6. AIR 1953 Cal. 153 (Power to institute criminal prosecutions—Court may restrict its extent by excluding from its scope prosecutions of certain persons or impose a restriction on its exercise by requiring explicit sanction in each case to institute the prosecution).
7. AIR 1927 All. 681 = 50 All. 173.
8. AIR 1921 Mad. 286 (DB). (Power of appellate Court to interfere with the sanction is not affected by the fact that the purchaser has executed his part since his purchase is subject to the risk of failing, on the sanction being set aside).
9. PLR 1962 Dacca 1042 (DB) + AIR 1952 Mad. 58 (DB).
10. AIR 1921 Lah. 140 (DB).
11. AIR 1965 Ker. 14 (DB).

by the liquidator in the interest of the company.[12] This is so even though the pleadings themselves do not describe it as one instituted in the name and on behalf of the company.[13] A plaint or a petition which describes the suit or proceeding to enforce the claim of the company as one brought in the name of its liquidators is not in accordance with the provisions of clause 1(*a*) of section 333.[14]

More than one liquidator. Where there is more than one liquidator at least two of them must act together to institute a suit or proceeding in the name of and on behalf of the company. A suit instituted by one of them alone is *ab initio* incompetent in spite of a resolution of the Board of the Directors giving him such authority and the institution of the suit cannot be validated by getting another liquidator also to sign the plaint.[15]

Voluntary winding up. The frame of suit by a liquidator in a voluntary winding up also must comply with the requirements of clause 1(*a*) of section 333 and therefore must be instituted in the name and on behalf of the company.[16]

Proceedings not under the Ordinance. Where the proceeding in question is not one under the Ordinance, the failure of the liquidator to institute it in the name and on behalf of the company would affect only his right to have the cost out of the estate of the company but not the validity of the proceedings.[17]

Bidding at auction sale. The act of the liquidator seeking leave under Order 21, Rule 72 of the Civil P.C. to bid as a decree-holder is covered by clause 1(*a*) of section 333 which deals with the institution of a suit in the name of the company.[18]

Appeal. Where pending an appeal by the company in a suit against a share-holder to recover the call not paid by him the company goes into liquidation, the appeal should not be continued by impleading the liquidator as the appellant on the ground that he is the representative of that company.[19]

4. Sanction to institute or continue proceedings. A sanction under section 333 is necessary only for the actual institution of a suit or proceedings and not for taking preliminary steps by way of preparation to such institution, such as issuing the suit notices and preparing the plaint.[20] The sanction cannot be treated as a mere permission to use the name of the company. On the other hand the order in fact empowers the liquidator to institute or defend legal proceedings and to do so in the name of the company.[1]

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12. AIR 1933 All. 789=55 All. 912 (DB).
13. AIR 1953 Mad. 595=1953 Cr. L.J. 1142 (DB).
14. AIR 1951 Punj. (Simla) 144 (Petitioners were allowed to amend their petition so as to bring it in conformity with section 179 (*a*)).
15. AIR 1958 Him Pra. 1.
16. AIR 1956 Nag. 204=ILR 1956 Nag. 556.
17. AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB).
18. AIR 1927 All. 681=50 All. 173.
19. AIR 1956 Mad. 448=ILR 1956 Mad. 858 (DB).
20. AIR 1952 Mad. 58 (DB).
1. AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB).

Continuance of proceedings. The official liquidator requires the sanction of the Court even to continue a proceeding which had already been instituted by the company for recovery of money due to it.[2]

Appeal. The liquidator appointed in a winding up by the Court ought not to appeal in any case without the permission of the winding up Court and if he does so, he runs the risk of being personally saddled with the cost in the event of the failure of the appeal.[3]

'Ex post facto' sanction. The sanction necessary under the section can be validly granted even subsequent to the institution of the proceedings during its pendency.[4]

Proceedings for sanction. The party against whom the suit is to be instituted has no right either to a notice of the application under section 333 or to an opportunity to appear and oppose the application.[5]

Revocation of sanction. The Court cannot revoke the permission it gave the official liquidator to compromise certain suit after he had acted upon the same and obtained a decree in terms of the compromise.[6]

Voluntary winding up. The liquidator in a voluntary winding up does not require sanction under clause 1(*a*) of section 179 to institute a suit for the recovery of the unpaid share money from a contributory.[7]

5. Criminal prosecution. The provisions of the Ordinance which deal with the subject of the liquidator taking criminal proceedings are concerned only with the powers of the liquidator and not with the powers of the criminal court. At any rate, with regard to the offences under the Ordinance which are also offences under the Penal Code, the Court is not barred from entertaining complaints made by any private person also where they allege only an offence under the Penal Code.[8] Hence for a prosecution for breach of trust even by the director of a company no leave under the section would be necessary unless it is one initiated in the name and on behalf of the company by the official liquidator who has to incur expenses out of the funds of the company.[9] Similarly sanction of the company court is not necessary for prosecution of the promoter and managing agent for offences alleged to have been committed by him under sub-section 409 and 477-A, Penal Code. Sections 333 and 418(1) of the Companies Ordinance, are merely intended for the control of the Company Court over the liquidator in the discharge of his functions under the Ordinance and have no bearing on the validity of proceedings instituted by the liquidator in other Courts. No doubt in order to determine whether leave ought to

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2. AIR 1953 Punj. 145=ILR 1952 Punj. 349. (Even in such cases considerations such as whether money could be expended to continue the proceedings usefully or the claim should be compromised or given up arise and they require the due deliberation of the Court).
3. AIR 1921 All. 149=43 All. 433 (DB).
4. ILR (1951) 2 All. 191 (DB)+AIR 1953 Mad. 595=1953 Cr. L.J. 1142 (DB).
5. AIR 1952 Mad. 58 (DB).
6. AIR 1940 Mad. 179 (DB).
7. AIR 1956 Nag. 204=ILR 1956 Nag. 556.
8. AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB)+AIR 1958 Cal. 163.
9. AIR 1965 SC 575=1956 SCR 483=1956 Cr. L.J. 1116.

be given to institute criminal proceedings, under section 418(1), a Court has to consider whether it is a case in which a good citizen desirous of doing his duty to the State thinks that he ought at his own expense, institute a prosecution. The Company Court acts incorrectly if it finds solely on the fact that there is a prima facie case with regard to the offence.[10] The failure to mention in the complaint the order of the Court sanctioning the institution of the prosecution is not even a technical defect and hence the prosecution cannot be thrown out on that ground.[11]

The absence of direction under section 333 does not render the prosecution launched by the liquidator illegal or invalid because he also in common with any other citizen has the right to file a complaint in Court alleging that another person has committed a criminal offence. The only effect of the absence of direction will be that the official liquidator might have to bear personally the costs, if any, incurred in the proceedings.[12] Section 333 deals with the powers of the liquidators to institute or defend proceedings, and section 418(1) deals with the powers of the Court to give directions for prosecution of delinquent directors, etc. But neither section 333 nor section 418 indicates that if the liquidator takes action without the direction of the Court the action would be illegal or invalid or it would invalidate a prosecution.[13]

A general sanction given under this section to the official liquidator to institute legal proceedings cannot be limited in its operation as authorising the proceedings against outsiders only. Hence where there is such an order it is not necessary for the official liquidator to obtain the permission of the company Court under section 418(1) to prosecute the directors and officers of the company for offences under the Penal Code even if the assumption that permission of Court is essential to the validity of the prosecution, where such offences are also offences under this Ordinance, is correct.[14]

6. Restriction on powers. The Court in giving power to the official liquidator to institute criminal prosecution on behalf of the company may exclude from the scope of that power the prosecution of certain class of persons or impose a restriction as to the manner of its exercise by requiring the explicit sanction of the Court in each case to institute the prosecution.[15]

7. Carrying on business for beneficial winding up. A liquidator who applies under Order 21, Rule 72, Civil P.C. for leave to bid as a decree-holder can be said to be acting under clause 1(*b*) of section 333 which deals with the carrying on of the business of the company so far as it may be necessary for the winding up.[16]

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10. AIR 1961 AP 493+AIR 1955 Cal. 29+AIR 1947 Mad. 343.
11. AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB). (It is for the accused who challenges the prosecution on the ground of absence of legal authority to show such absence of authority).
12. AIR 1953 Cal. 153=1953 Cr. L.J. 389+AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB).
13. AIR 1959 SC 51=1959 SCR 1263=1959 Cr. L.J. 242.
14. AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB).
15. AIR 1955 Cal. 153 (But where the power conferred is general and unlimited the liquidator is not required to obtain sanction of Court every time he institutes a prosecution).
16. AIR 1927 All. 681=50 All. 173.

8. Sale of property. The sale of the properties of a company by the Court itself should be avoided in all cases. Further where the Court decides upon a sale by tender it should see that the sale is made on the same basis as a sale in auction, that is to say, to the highest tenderer.[17]

Official Liquidator has been vested with powers to sell the movable and immovable property and things in action of the company by public auction or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels. Such powers of the Official Liquidator are subject to the sanction either of the Court or of the Committee of Inspection as the case may be.[18] The power of the official liquidator to sell the properties of a company during winding up proceedings cannot in any way be limited or circumscribed by anything found in the Articles of Association. Once the Court sanctions the proposed sale by the official liquidator and that person acted upon such sanction, it will thereafter be only a case of exercise of the statutory power by the Liquidator which cannot be limited by the terms of the Articles of Association. Generally speaking the Articles of Association regulate only the rights of the share-holders *inter se*. To some extent they may also extend to evidence an enforceable contract between the company and its members. Beyond these, the Articles of Association will not have the effect of limiting the statutory powers conferred by the various sections of the Ordinance on the liquidator. He will therefore be entitled to sell any property of the company if he considers it necessary for administration, the sale however being subject to sanction of the Court.[19] Where the terms and conditions asking for bids published in different newspapers clearly indicated that offers of the sale of the assets etc were subject to acceptance by the Court, and Court had not yet accepted the offer of the higher bidder, no right, could be said to have vested in the said bidder to enforce the sale in its favour. Court had complete discretion to sanction the sale or not. Such discretion of the Court was to be exercised judiciously having regard to the interest of the company and its creditors. Directions of Court for fresh offer in the interest of company and creditors was thus in consonance with law.[20]

The section means that the liquidator can finally dispose of the property once he has got the sanction of the Court, and it does not mean that he has power merely to invite offers and to submit them to the Court for approval. The fact that the sale is subject to the confirmation of the Court does not mean that the Court can refuse to accept the highest bid because at a later stage some one on second thought says that he is willing to pay more. The subsequent offer of a higher bid should not be a ground for refusing confirmation of the sale provided the price is adequate.[1]

Tenancy rights of a liquidated company may not be an asset for liquidation proceedings in certain circumstances.[2]

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17. AIR 1943 Mad. 365 (DB) (The advertisement calling for tender must itself clearly state that subject to the confirmation the highest tender would get the properties provided his offer is above the reserve price mentioned in the advertisement).
18. 1996 SCMR 88=PLJ 1995 SC 656=NLR 1996 SCJ 91=1995 Law Notes 953.
19. AIR 1963 Mad. 409 (DB).
20. 1996 SCMR 88=PLJ 1995 SC 656=NLR 1996 SCJ 91=1995 Law Notes 953.
1. AIR 1960 Andh Pra. 429.
2. 1994 SCMR 439 (SC Ind.)

Powers of Court. The Court permitting an official liquidator to sell a property in public auction, but subject to its confirmation, has the discretion to confirm or refuse such confirmation after the sale has taken place. But in exercising that discretion it is bound to act judicially.[3] Where the Court sanctions the sale of properties subject to its confirmation, it has the power, when the matter comes up for confirmation, to enquire into any allegation of the misconduct of the liquidator in relation to the sale, whether those allegations come before it on the complaint of an aggrieved or interested person or otherwise.[4]

The Court which sanctioned in general terms the sale of the properties of the company for not less than a certain price cannot revoke that sanction so as to nullify a concluded contract of sale where the price fetched is also far in excess of the price reserved in that sanction.[5]

The sanction given by a Court for particular sale cannot be set aside by the higher Court simply on the ground that there would have been better offers for the purchase of that property if the Court had not committed certain initial mistakes in the prior dealings relating to that property.[6]

Where the purchaser agreed before High Court to abide by the terms as fixed by the Court. It was held that Supreme Court, in appeal, could modify terms of settlement taking into account all the relevant facts and circumstances of the case including the interest of the financial institutions, the interest of the workers who had since been re-employed by the purchaser and the fact that the purchasers had already invested substantial amount to revive the company.[7]

Sale by private negotiation. The Court should not sanction private sale of a property unless it is satisfied that the price fixed is the best that can be obtained for it.[8] Where sale by auction was widely advertised but none of the creditors took any interest and none made any bid. The liquidator was authorised to make sale by negotiation, whereupon the creditors objected to it on the ground that no proper notice for sale was given to them. It was held that inviting objection of creditors at later stage, would further lengthen the process and further mount up liability of company in liquidation and as creditors had no genuine interest in disposal of assets, notice to them was not necessary.[9]

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3. AIR 1952 All. 133 (DB) (A higher offer given after the auction has taken place is not a ground on which the Court can refuse to confirm the sale in favour of the successful bidder at the auction sale).
4. AIR 1953 Trav-Co. 580=ILR 1953 Trav-Co. 589 (DB).
5. AIR 1940 Mad. 179 (DB).
6. AIR 1922 PC 361. (Lease of property by liquidator for a term subject to prior termination after notice for a specified period–Notice served on lessee but subsequently withdrawn by leave of Court and conceding certain advantages to lessee–Property put up for sale–No buyer offering to purchase at a price higher than that offered by lessee himself in view of the fact that present possession was not available–Court sanctioning sale to lessee–Leave cannot be set aside on the ground that the Court erred in permitting withdrawal of notice and in explaining to prospective buyers that their purchase would be subject to lessee's right and the possible risk of litigation by him).
7. 1993 SCMR 2163 (SC. Ind.).
8. AIR 1921 Mad. 286 (DB).
9. 1982 CLC 1749 (Kar).

Sale by Tax Recovery Officer. Where a Tax Recovery Officer intended to sell a company's property after due publication to recover tax payable by the company, the Secretary of the Company through a letter informed the Tax Recovery Officer that the said property of the Company could be sold for a specified amount, whereupon Tax Recovery Officer sold the property through auction for a price which was more than that which the Secretary of the Company had described in his letter. Finding of Courts below that sale was not fraudulent was, thus, not open to question.[10]

Conditional offers by bidders. Where the question is one of suitability of one of the two burdened with conditions fulfilment whereof was dependent bidders, a bid upon consent of another agency was not accepted and that of the other bidder which was without any condition was accepted.[11] Where an offer was accepted on the condition that the bidder should make it unconditional the bidder agreed to do so but neither appeared in Court on the next hearing nor made his bid unconditional. However his bid was accepted by the official liquidator. The first bidder challenged the order. It was held that since lot of time had already been spent in obtaining best possible offer it was proper to allow the Official Liquidator to accept the offer if the condition of making payment at the time of delivery of property was deleted. In those circumstances not only a just and fair order was passed but no prejudice was caused to the applicant for his offer was in any case liable to be rejected as he wanted to pay the price in instalments.[12]

Properties in foreign country. An official liquidator can sell the assets of the company including its immovable properties in foreign territories and where such sales have the sanction of the Court and conform to the requirements of the *lex situs* their validity cannot be called in question on the ground of lack of authority in the official liquidator to make them. His authority to sell even the foreign properties arises because he takes the place of the Board of Directors and could exercise all their powers and not because there is any vesting of the properties of the company in him. Hence the question whether in view of the rules of private international law under which the foreign properties of a bankrupt cannot vest in the official receiver such properties can vest in the official liquidator in a winding up is absolutely irrelevant to the consideration whether the official liquidator has the authority to sell those properties.[13]

Breaches in contract of sale by purchaser, condonation of. The Court is possessed with the power to condone the breach and if it so elects allow the sale to be completed despite the breach committed by purchaser if in its opinion to do so would be in the best interest of all the parties concerned.[14] Therefore, breaches committed by the purchaser of property of a company under liquidation, both with regard to furnishing of Bank guarantee and payment of instalments within the stipulated period could be waived in view of Ss. 55 & 63 of Contract Act, 1872.[15]

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10. PLD 1993 SC 404=NLR 1993 SCJ 580=1993 Law Notes 458.
11. 1982 CLC 1749 (Kar).
12. 1982 CLC 1689 (Kar).
13. AIR 1954 Trav-Co. 40=ILR 1952 Trav-Co. 373 (DB).
14. 1988 SCMR 1717=1988 SCMR 1027=1988 PSC 445+1988 CLC 2147 (DB).
15. 1988 CLC 2147 (DB).

Notice of sale, contents of. Notice of sale has to prescribe the number and duration of instalments which would be granted to the purchaser and other allied terms like Bank-guarantee, nature and terms of default clause, and payment of interest on instamlents, etc.[16]

'Ex parte' order of sale. No order sanctioning a sale to the prejudice of contributors or creditors can be made *ex parte* on the application of the official liquidator.[17]

Civil Procedure Code not applicable to sales. The principles of Order 21, Rule 90, Civil P.C. do not apply to the auction sales by the official liquidator and hence those sales cannot be set aside on the ground that they offend those principles.[18]

9. Negotiable instruments, powers of liquidator. The official liquidator cannot validly delegate to an agent the power to endorse promissory notes given to him by the section.[19]

10. Mortgage of company's property. An offer to take a mortgage of the property of the company in liquidation when it is accepted by the Court becomes a binding contract between the offeror and the official liquidator where the acceptance of the Court was made on behalf of the liquidator.[20]

11. Arbitrator, reference of dispute to. The liquidator has no power, whether inherent or as incidental to any of the powers expressly conferred on him by the Ordinance, to refer a dispute on behalf of the company to arbitration.[1]

334. *Discretion of official liquidator.* The Court may provide by any order that the official liquidator may, where there is no committee of inspection, exercise any of the powers mentioned in paragraph (*a*) or paragraph (*b*) of sub-section (1) of section 333 without the sanction or intervention of the Court.

335. *Provision for assistance to official liquidator.* The official liquidator may, with the sanction of the committee of inspection or, where there is no committee of inspection, with the sanction of the Court, appoint a person entitled to appear before the Court or such

16. 1993 SCMR 2163 (SC. Ind.).
17. AIR 1921 Mad. 286 (DB).
18. AIR 1938 Mad. 176 (DB) (Decrees in favour of company and sold by auction and assigned to purchasers after sanction of Court–Sale cannot be set aside on the ground that there was no proper advertisement or that the assets sold were doubtful assets–*Held further* that even on the assumption that Order 21, Rule 90 applied the facts did not disclose a case for setting aside the sale).
19. AIR 1940 Mad. 882 (Assignment by agent is *ab initio* void and cannot be ratified by the official liquidator).
20. AIR 1930 All. 330 (DB).
1. AIR 1947 Lah. 355 (FB) (Such a right cannot be implied from the general words employed to define the executive and residuary powers of a liquidator in clauses (*d*) and (*i*) of section 179)+AIR 1928 All. 553.

person as may be prescribed to assist him in the performance of his duties:

Provided that, where the official liquidator is an advocate, he shall not appoint his partner unless the latter consents to act without remuneration.

1. **Solicitor for liquidators.** A committee of inspection or Court generally follows the practice of approving the appointment of an Advocate who represent the petitioning creditors as Advocate for the liquidator also. But there is nothing which prevents them, when the facts of a case so require it; to refer the firm representing the creditors to a different Advocate.[2] Where the official liquidator had obtained the sanction of the Court for instituting a suit his omission to obtain sanction for the appointment of an Advocate cannot affect the validity of the acts done by the Advocate in instituting the suit or conducting the case.[3]

Remuneration of legal adviser. Legal adviser is an employee of the liquidator and an order fixing his remuneration by the Court being a purely ministerial order, is not appealable.[4]

336. *Liquidator to keep books containing proceedings of meetings, etc.* The official liquidator of a company which is being wound up by the Court shall keep, in the manner prescribed proper books and papers in which he shall cause to be made entries or minutes of proceedings at meetings and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books.

337. *Liquidator's account.* (1) Every official liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments and dealings as liquidator, together with such further information as may be prescribed.

(2) The account and information as aforesaid shall be in the prescribed form, shall be made in duplicate, and shall be verified by a declaration in the prescribed form.

(3) The Court shall cause the account and the books and papers of the official liquidator to be audited in such manner as it thinks fit and for the purpose of the audit the liquidator shall furnish the Court

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2. AIR 1935 Bom. 337 (Petitioning creditors well acquainted with the proceedings--Appointment of different firm likely to cause delay--Former only should be appointed as solicitors for the liquidators also).
3. AIR 1925 Lah. 222 = 5 Lah. 414 (DB).
4. AIR 1943 Sind 82 = ILR 1942 Kar. 496 (DB).

with such books and papers and information as the Court may require, and the Court may at any time require the production of and inspect or cause to be inspected any books or papers kept by the liquidator.

(4) When the account and the books and papers have been audited, one copy thereof alongwith the auditor's report shall be filed and kept by the Court, and the other copy alongwith the auditor's report shall be delivered to the registrar for filing; and each copy shall be open to the inspection of any person on payment of prescribed fee.

(5) The official liquidator shall cause a copy of the account when audited or a summary thereof to be sent by post to every creditor and contributory.

(6) The Federal Government may, by notification in the official Gazette, require that the accounts and information referred to in sub-section (1) shall be furnished to an officer to be designated by it for the purpose and that such officer shall cause the accounts to be audited; and, upon the publication of such notification, reference to "Court" in the preceding provisions of this section shall be construed as a reference to such officer.

338. *Exercise and control of liquidator's powers.* (1) Subject to the provisions of this Ordinance, the official liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.

(2) The official liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

(3) The official liquidator may apply to the Court for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Ordinance, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors.

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances.

Synopsis

1. Liquidator, position of. 2. Sale by liquidator.

3. Administration and distribution of assets.

1. Liquidator, position of. `Liquidators might be officers of Court as they act under its directions but strictly speaking they represent not the Court but the company which is being wound up. The liquidators possess a status recognised by statute and their powers and functions defined by the statute are not identical with the powers of the Court. The mere fact that some of their powers could be exercised by them with the sanction of the Court is not enough to establish an identity between them and the Court and to consider their acts as the acts of the Court.[5]

It is the duty of the liquidator to act with complete impartiality between the contending creditors and not to take sides.[6]

2. Sale by liquidator. Where no prejudice to the interest of the members of the company is caused by the sale of the assets of the company under liquidation for cash and shares in another company, the Court can sanction such a sale under its discretionary powers. The High Court would not be justified in interfering with the exercise of such discretion by the District Judge and ordering the sale of the assets by public auction.[7] Where, as a result of compulsory winding up of a company, the Official Liquidator under direction of Court sells a decree standing in the name of the directors by auction and assigns the decree to the purchaser the principles of Order 21, Rules 90, Civil P.C. do not apply and the Court has no right to set aside the sale.[8]

Appeal against order. Where the Court confirmed the winding up sale after hearing two view points by two contending parties or interests, and the order confirming the sale vitally affected the rights of the parties, the Court acted in a judicial way and the order was not merely procedural but judicial and therefore not inherently incapable of being brought up in appeal.[9]

3. Administration and distribution of assets. The act of the Liquidator in drawn up a list of creditors is an "act" as well as a "decision" within the meaning of

5. AIR 1958 All. 447=ILR (1958) 1 All. 549 (DB).
6. AIR 1967 Mad. 169.
7. AIR 1955 SC 655.
8. AIR 1938 Mad. 176 (DB).
9. AIR 1965 SC 507.

Section 338(5) of the Ordinance and an aggrieved person may apply under sub-section (5) to challenge that order. A contributory who challenges the claims of certain creditors included in the list drawn up by the 'liquidator' is a "person aggrieved" and so has a right to apply under sub-section (5) against the inclusion of these claims.[10] It is however to be noted that sub-section (5) does not apply to the case of an act done or a decision made by the official liquidator in pursuance of the express sanction of the Court.[11] The petitioning creditors are "aggrieved persons" within the meaning of sub-section (5) of Section 338 for the purpose of applying for the review of an *ex parte* order appointing a particular firm as attorneys for the liquidator.[12]

Debenture holders. When the official liquidator who is entitled to seek the instructions of Court as to how certain debenture holders are to be ranked in the winding up; those debenture holders can in the winding up proceedings itself obtain a declaration that their debentures are valid.[13]

Right of set off against creditor. Where a creditor of a company in winding up preferred a claim for a certain amount to the official liquidator without giving credit for the amount of debt due by him to the company and the same was allowed by the official Liquidator. The appellant who had purchased the assets and good-will of the company subject to its liabilities preferred an application to vacate the order of the Official Liquidator. The application was disallowed on the ground that the appellant's claim to set off the debt due to the company from the creditor was then barred. On appeal, it was held that it is imperative on the part of the creditor to claim only the balance of the account in regard to the mutual dealings between him and the bankrupt company. He is under a duty to set off any sum due from him to the insolvent against his demand. This principle is based upon equitable considerations. The section also places the Official Liquidator or the Official Receiver under a duty not to pay anything more than what is due to a creditor after setting off any amount due by him to the insolvent or the bankrupt company. It was further held that the plea that set off should have been given effect to as a debt due to the Company from the creditor was not barred when the creditor preferred his claim to the official liquidator and the fact that the debt was barred by limitation when the application was heard by the Judge was not relevant.[14]

POWERS OF COURT

339. *Settlement of list of contributories and application of assets.* (1) As soon as may be after making a winding up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Ordinance and shall cause the assets of the company to be collected and applied in discharge of its liabilities:

10. AIR 1951 Nag. 275=ILR 1950 Nag. 783 (DB).
11. AIR 1940 Mad. 179 (DB).
12. AIR 1935 Bom. 337.
13. AIR 1940 All. 458=ILR 1940 All. 568 (DB).
14. AIR 1964 AP. 88 (DB).

Provided that, where it appears to the Court that it will not be necessary to make calls on or adjust the rights of contributories the Court may dispense with the settlement of a list of contributories.

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of, or liable for the debts of, others.

Synopsis

1. Scope.
2. Settlement of list of contributories.
3. Transferor of shares.
4. Notice to contributory.
5. Contributory may challenge order.
6. *Ultra vires* transfers.
7. Transfer of proceedings.

1. Scope. All proceedings consequent upon winding up order are the offshoots of that order. Proceedings under sections 339, 340, 351 and 354 are begun after the winding up order is passed. As they stem from the winding up order passed under section 305 they cannot have a separate and independent existence. These proceedings become necessary during the progress of winding up and in fact they themselves are in the nature of winding up.[15]

2. Settlement of list of contributories. Section 339 is, subject to proviso to sub-section (1), imperative and imposes a duty on the Court to settle the list of contributories. It is not necessary that any application should be made by the liquidator to the Court for settling such list.[16] Where the name of a person is found in the register of share-holders, it is prima facie evidence that he is a share-holder. The official liquidator is competent to include a share-holder whose name appears in the share register in the list of contributories in respect of the share money due from him, *albeit* there has been a valid mortgage (English mortgage) created over such call money by the company while it was functioning. By the execution of the English mortgage over the unpaid call money it cannot be said that the liquidator has lost all rights to call in the money and therefore the liquidator cannot include such share-holder in the list of contributories.[17]

Matters to be considered by Court. In settling the list of contributories it is the duty of the Court to go into all questions of law and facts which may be raised in order to ascertain the question of liability. Liability means the liability existing at the time of making the order.[18]

Rectification of register. The Court is not bound by the register of share-holders and has authority to rectify the register and may go into the question, both of law and fact, and determine who is the real owner of the shares. The Court is

15. AIR 1961 Punj. 87.
16. AIR 1937 All. 826=58 All. 742 (FB).
17. AIR 1963 Mad. 149 (DB).
18. ILR 1960 Mad. 290.

competent to alter the list at any time whenever it finds it just that it should be so altered.[19] The Court has discretion to decide any question relating to the title of the aggrieved person to have his name omitted from the register of members and generally to decide any question necessary or expedient for rectification of the register.[20] But the power to rectify the register of members is conferred by section 339 only in those cases where a rectification of the register may be made under section 152.[1] Where by mistake or oversight a company omitted to register a transfer of shares in spite of the transferee having sent in his transfer and subsequently passed a resolution for a voluntary winding up with a view to reconstruction; it was held that the transferee whose dissent had been discharged on the ground of his not being a member was entitled to have the register rectified so as to include his name as on the day prior to the resolution for the winding up.[2]

Delay in application. Application for rectification of the share register and for rectification of the list of contributories filed by a member of the company after a delay of seven years from the date of the inclusion of his name in the list of contributories and after the order of winding up of the company had been passed in liquidation proceedings, are liable to be summarily dismissed as not maintainable, especially so when the member had ample opportunity of repudiating his liability before the final order was passed in the liquidation proceedings. The simple reason is that once a winding up order is passed, a member has no right to file an application for the rectification of the register.[3]

3. **Transferor of shares.** A transferor cannot avoid liability in the winding up as a contributory if his name continues to appear as a share-holder on the register notwithstanding the transfer unless he can establish that the non-registration of the transfer was due entirely to the default of the company. When the share-holder is himself in default then his default will bar the share-holder's right to relief after the winding up notwithstanding any superadded default of the company. But when the share-holder is not in default but the company alone is, then the default will not avail as against the share-holder although it may as against the company.[4]

Finality of list. An order by the Court bringing the name of a person as a contributory, if not appealed against, becomes final and the question as to the liability of such person as contributory cannot be reopened.[5]

Court of Wards, estate of share-holder in hands of. Where the estate of a contributory is taken over by the Court of Wards, the Court can, unless there is anything in the Court of Wards Act, itself to prevent it, alter the list of contributories by placing on it the name of the collector in lieu of the name of the contributory.[6]

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19. ILR 1960 Mad. 290.
20. AIR 1956 Bom. 24=60 Bom. 297.
1. AIR 1950 Bom. 217 (DB).
2. (1904) 1904 1 Ch. 598.
3. AIR 1963 Mad. 287.
4. AIR 1959 Cal. 335+(1869) 4 App. 768+(1868) 6 Eq. 30.
5. AIR 1926 Lah. 414.
6. AIR 1930 All. 617.

Bank share-holder. A bank advanced money to a company on deposit of shares by the later. Latter on, in order to make the shares immune from any dealing by the depositors, it obtained the transfer of the shares in its name and hence it was registered as the share-holder. The depositor company was later on wound up. It was then held that the bank could be rightly placed in the list of contributories for though the buying of shares of another company as a speculation would have been *ultra vires* it was within the power of the banking company as bankers to advance money on deposit of shares and to do all such acts as were responsible and proper for making the security available.[7]

Holder of fully paid shares. The word contributory includes holders of fully paid shares.[8] But the latter though they owe debts to the company, cannot be settled on the list of contributories.[9]

4. Notice to contributory. The liquidator must send a notice to the contributory who is placed on the list of contributories. Where a certain bank was appointed liquidator and notice signed by the manager of the bank was sent to a person stating that his name was included in the list of the contributories; it was held that the notice was valid.[10]

5. Contributory may challenge order. The exercise of jurisdiction given by the section is discretionary. But the Court must be set in motion by the party who wants to contest the liability or by the liquidator as the case may be, and it is not for the Court to act *ex mero motu suo*.[11] Where contributories dispute their liability, in the winding up, onus is on them at least to go into the box and if they cannot give definite evidence, to submit themselves at any rate to cross-examination by the liquidator and by the Court to enable the real facts to be ascertained.[12] The question must be decided on merits. Where notice was issued to put forth his objection but objection was disallowed as he failed to get his name registered as per Rule 85 framed by the Lahore High Court. It was held that the case should have been decided on merits and application of Rule 85 was held doubtful.[13]

Costs. The costs of a contest by a person disputing his liability as a contributory and failing, must, except under very exceptional circumstances, be paid by such contributory. The ordinary rule that a party failing must pay the costs applies to such cases.[14]

6. 'Ultra vires' transfers. A transferee under an *ultra vires* transfer of shares cannot be placed on the list of contributories.[15] An agreement to release a share-holder from all liability on his shares being contrary to law and *ultra vires* the powers of the company, cannot save the share-holder from payment in full for those

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7. (1869) 4 Ch. App. 252.
8. (1957) 1957-3 All E R 218.
9. (1868) 5 Eq. 365.
10. AIR 1935 Lah. 645.
11. ILR 1960 Mad. 290.
12. AIR 1921 All. 135 (DB).
13. AIR 1932 Lah. 123.
14. AIR 1936 Bom. 24=60 Bom. 297.
15. (1878) 8 Ch. D. 679.

shares on winding up.[16] Where the forfeiture of the shares is void the holder of those shares must be settled on the list of contributories.[17]

7. Transfer of proceedings. Proceedings under Section 339, 340, 331 and 354 pending before the District Judge; may be validly transferred by the High Court to itself and the High Court would become validly seized of the proceedings and have jurisdiction to try and dispose of the same.[18]

340. *Power to require delivery of property.* Without prejudice to the obligation imposed under any other provisions, the Court may, at any time after making a winding up order, require any contributory for the time being on the list of contributories and any trustee, receiver, banker, agent, officer or employee or past officer or employee or auditor of the company to pay, deliver, convey, surrender or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or books and papers including documents in his banks to which the company is *prima facie* entitled.

Synopsis

1. Object and scope.
2. Powers of Court.
3. Scheme for reduction of capital.
4. Restitution.

1. Object and scope. The object of the section appears to be to prevent expensive litigation and to substitute therefor a summary procedure.[19] The section no doubt does not contemplate an elaborate enquiry but still it leaves discretion to the Court to decide whether any particular case can or cannot be dealt with conveniently under the section. The counter-claimant who objects to the proceedings under section 340 on the ground that the claim in view of its contested nature cannot be conveniently dealt with in the proceedings must do so in the lower Court itself. If he fails and submits to the jurisdiction of the Court he cannot make out a grievance on that ground in an appeal against the payment order passed against him by the Court.[20] Where the allegations in the petition under section 340 by the official liquidator itself showed that the entries in the books of the company relating to various amounts in the free gift account were false and had been fraudulently made with a view to avoid threatened action under section 52-A, Insurance Act, by the Controller of Insurance, and that payments and withdrawals in the books were fictitious and in reality nothing was given and nothing was withdrawn. The proceedings under section 340 were misconceived and could not be

16. (1903) 19 T L R 341.
17. (1868) 6 Eq. 77.
18. AIR 1960 Punj. 87.
19. AIR 1953 Pat. 390 (DB).
20. AIR 1937 Mad. 401 (DB).

resorted to by the official liquidator ordering the Managing Director to pay back the amount alleged to be in his hands.[1]

2. Powers of Court. The section gives summary power to the Court to take steps to preserve *pendente lite* that which prima facie appears to it to belong to the company and protect it from misappropriation or waste by persons who stand or have stood in a fiduciary position towards it. The Court has a discretion to take summary action in the matter and it will exercise that discretion wherever it can do so without injustice.[2] Section 340 authorises the Court to make an order for delivery of property to the liquidator if it thinks that the company is prima facie entitled to it though its title is not admitted. The final decision of title may be made subsequently under section 341 or section 412.[3] The Court may also order on advocate employed by a company to deliver to the liquidator all documents which came into his hands before the winding up and over which the directors had no power to create a lien which could interfere with their being used by the company for its purpose. So also it could order him to deliver the documents which came into his hands pending the winding up where the exercise of lien over them would interfere with the prosecution of the winding up. But no such order can be passed in respect of other documents over which a valid lien was existing even at the time of the prosecution of the winding up petition.[4]

Inquiry under the section when criminal proceedings pending. Where the official liquidator filed a petition against a managing director (the respondent) praying that he be ordered to repay a certain sum belonging to the company, which was wrongly held by him, to the petitioner. At that time, the respondent, along with others, was also being prosecuted in a criminal Court on certain charges. It was admitted that the subject-matter of the criminal charges included the subject-matter of the application under section 340. After the official liquidator had closed his evidence, on the date fixed for recording the evidence for the respondent, he (the respondent) made an application for adjournment of the proceedings till after decision of the criminal case, on the ground that, if the respondent made any statement in the Court, the prosecution was bound to take advantage of it and it would seriously prejudice the defence of the respondent in the criminal case. On these grounds, it was stated that he should not be compelled to depose to facts which were alleged against him in the criminal case, otherwise the protection guaranteed to him by the Constitution would be violated. It was held that if the respondent volunteers to be his own witness, he can only claim such rights as fall within the ambit of the proviso to section 15, Qanun-e-Shahadat. Such answer as a witness is compelled to give cannot be proved against him in any criminal proceedings, but they may not save him from a prosecution for perjury.[5]

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1. AIR 1962 Punj. 543.
2. AIR 1933 Lah. 437=14 Lah. 68 (There is no absolute bar to the applicability of the section to every case in which the person in the fiduciary position claims a lien on the property)+AIR 1962 Punj. 543.
3. AIR 1936 Lah. 408 (DB) (Chairman of bank illegally converting money of the bank by purchase of property in his own name–Chairman being trustees of bank's money liquidator is prima facie entitled to possession under S. 185).
4. (1883) 24 Ch. D. 408.
5. AIR 1962 Punj. 101.

Against whom orders may be passed. The power conferred upon the Court under the section to order delivery of property of a company to the official liquidator can only be used against the persons specified therein and not against third parties.[6] Where an amount is due from a third party under a contract entered into by him with the liquidator and not from a person who is a contributory, trustee, etc. mentioned in section 340, the company judge has no jurisdiction under the section to order the payment of that amount to the liquidator and to enforce the same. The only course open to the liquidator in such a case is to file a suit in the regular way for the recovery of the amount.[7] A person may be a director of a company but unless he has received any money in his capacity as a director the provisions of section 340 would not be attracted. Hence where the liquidator has paid certain amounts due to the directors of the company not in their capacity as directors but as creditors of the company, section 340 does not apply and they cannot be ordered to refund the money.[8] However, the mere fact that the managing agent of a company had ceased to be an agent before the commencement of the liquidation proceedings will not exclude action being taken against him under section 340. The test is whether the moneys, claimed came into his hands in his character as agent or not.[9]

The counter-claimant who objects to the proceedings under section 340 on the ground that the claim in view of its contested nature cannot be conveniently dealt with in the proceedings must do so in the lower Court itself. If he fails and submits to the jurisdiction of the Court he cannot make out a grievance on that ground in an appeal against the payment order passed against him by the Court.[10]

There is nothing in section 340 which entitles the Court to require a contributory to pay rent in respect of property in possession of the contributory.[11]

Past officer, employee or auditor. The present section has brought even past officer, employees and auditors under its pale. Therefore an order under it can be made against them.

3. Scheme for reduction of capital. A scheme for reduction of share capital by payment to preference share-holders remains a mere proposal when it has been approved by the Board of Directors only and has not been sanctioned by the share-

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6. AIR 1950 East Punj. 204 (DB) (No order under section 185 of this Act can be passed against the custodian of evacuee property who assumes control or possession over the property of a company in liquidation under Bombay Evacuees (Administration of Property) Act, 24 of 1949)+AIR 1940 All. 514+AIR 1915 Lah. 223 (DB) (In this case, which was decided under section 149 of the Act of 1882, it was held, that the court had no jurisdiction to pass a summary order under that section against a person who did not fall under any of the categories mentioned in the section and therefore no such order could be passed against a creditor who obtained payment of his debt by undue influence or fraudulent preference. It was held that the creditor could not be regarded as a trustee in regard to the amount for the company or the other creditors represented by the official liquidator in order to justify the order under section 149).
7. AIR 1936 All. 808=58 All. 925 (DB).
8. AIR 1959 Bom. 414.
9. AIR 1937 Mad. 401 (DB).
10. AIR 1937 Mad. 401 (DB).
11. AIR 1960 Bom. 516 (DB).

holders and the Court also. Such a proposal does not divest the company of its title to the assets earmarked for meeting the payment and vest it in the persons who would become the trustees for implementing the scheme when the stage therefor, arises on the requisite sanction being obtained. Hence those persons in selling and realising the sale proceeds of the earmarked assets, in anticipation of the sanction, having been entrusted with those assets by the company for that purpose, act only as its agents and not in their right as trustees. And if after the realization of the sale proceeds by them the scheme is never sanctioned and the company is wound up they can be ordered to pay the amount to the liquidator under section 340, as the amount remained in their custody as agents of the company.[12]

4. **Restitution.** Where order for delivery of property under S. 340 is reversed on appeal, restitution ought to be granted under section 151, Civil Procedure Code.[13]

341. *Power to order payment of debts by contributory.* (1) The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Ordinance.

(2) The Court in making such an order may--

(*a*) in the case of an unlimited company, allow to the contributory by way of set-off, any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and

(*b*) in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance.

(3) In the case of any company, whether limited or unlimited, when all the directors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

Synopsis

1. Scope.
2. Non-contributories payment, order against.
3. Person entitled to apply.
4. Defence open to the contributory.

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12. AIR 1955 SC 441 (AIR 1953 Pat. 390, *Reversed*).
13. AIR 1944 Pat. 192=23 Pat. 24 (DB).

5. Barred claims, recovery of. 6. Limitation.

7. Set off.

1. Scope. Under this section a contributory can be summarily directed to pay the amount due from him whether his liability for that amount arose on the ground of his being a contributory or otherwise.[14] Orders under section 341 can be passed by the winding up Court even against contributories who are resident of foreign countries.[15]

Discretion of Court. The power of the Court under the section to order payment is discretionary.[16] But when a case is made out for the exercise of discretion it should not be declined unless very cogent reasons to the contrary are shown.[17] However, a payment order made after the assets of the company have been sold is a nullity and it does not bind the debtor.[18]

The Court cannot make an order under section 341 overriding the provisions of section 86 of the Civil P.C.[19]

Purpose of realization. Under section 341, the Court cannot question the liquidator as the purpose for which debt is being realised or withhold payment thereof though under section 342, the Court can consider whether the liquidator really needs money.[20]

Notice to debtor. The Court should not make an *ex parte* payment order against a contributory without giving him notice to show cause why the order should not by made.[1]

Firm, realization of debt from. To recover money from a firm, summary procedure can be availed of by selecting from among the partners one who is a

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14. AIR 1915 Lah. 271 (DB). (In this case it was held that a contributory could be summarily directed under section 150 to pay a debt due under a promissory note executed by him)+AIR 1915 Lah. 198.
15. AIR 1934 Lah. 362=15 Lah. 302.
16. AIR 1933 PC 63+AIR 1940 All. 544 (FB) (AIR 1938 All. 613, *overruled*)+AIR 1933 All. 789 (FB) (The fact that an application is necessary for the Court to act under the section does not mean that the Court is bound to enquire into the conduct of the person complained against or that the applicant is entitled to an order. The entire matter is left to the discretion of the Court and the application has merely the significance of an act bringing the irregularities or misconduct to the notice of the Court)+AIR 1950 Bom. 386 (DB).
17. AIR 1915 Lah. 271=1916 Pun. Re. No. 36 (DB) (In this case it was held that the fact that the person who had also signed the pronote in question as a surety is not amenable to the summary jurisdiction and is not before the Court was not a sufficient reason to exercise the jurisdiction when the opposite party admitted the debt due under the pronote).
18. AIR 1921 Lah. 57 (In this case it was held that the Court whose help to execute the order against the debtor is sought by the purchaser of the debt may disregard the order even though it has not been set aside in any proceedings).
19. AIR 1936 All. 826=58 All. 742 (FB).
20. AIR 1942 All. 136+AIR 1950 Bom. 386 (DB).
1. ILR 1955 Punj. 1050.

contributory and calling upon him to liquidate the whole debt. The principle of section 43, Contract Act applies.[2]

Call money. The share money which has been called by the directors but not paid will still be call money, though it can be said that it is only an arrear of call money. Both in respect of a claim in regard to a call made prior to winding up and that made subsequently a suit would lie. Sections 341 and 342 provide a summary remedy as an alternative to the normal remedy by way of suit. It can be presumed that the Legislature intended sections 341 and 342 for different categories of cases, thus avoiding a duplication of summary remedies. Section 343 would apply also to cases of calls made before liquidation. Therefore those calls should fall outside section 341. Section 342 specifically excludes from its operation call monies, due under the Ordinance. Thus section 341 would apply only to the case of a claim *ex contractu* other than call money whether due or yet to be called, while section 342 would apply for the recovery of all call monies whether exigible at the time of liquidation or otherwise.[3] The liquidator seeking the recovery of the entire balance of the share money which remains unpaid and not merely the amount which had been called in by a resolution of the Board of Directors but remains unpaid, cannot have recourse to the provisions of section 342.[4]

Refusal to make order, remedy. If the Court refuses to make an order under section 341, the liquidator, in order to enforce his claim against the contributory, must proceed by way of a civil suit in which the contributory is entitled to maintain the ordinary legal defences to such a claim.[5]

2. **Non-contributories payment, order against.** The section is concerned only with monies, other than call monies, due from a contributory.[6] There is no provision in the Ordinance which permits a liquidator to recover debts from a mere debtor who is not a contributory by summary proceedings such as an application to the company judge.[7]

3. **Person entitled to apply.** An application under the section by the transferee from the liquidator of the debts and calls due from the contributories is not maintainable as the special privileges conferred by the section cannot be taken advantage of by third parties.[8]

Contributories, when authorised to do so, have the *locus standi* to file an appeal against an order dismissing the application of the liquidator under section 341: hence the appeal cannot be rejected as incompetent.[9]

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2. AIR 1924 Lah. 148 (DB) (Principal partner of firm executing pronote on behalf of firm settled on the list of contributory—He can be ordered under section 186 to pay entire b debt—AIR 1923 Lah 85. *Reversed*).
3. AIR 1962 Mad. 192 (DB) (AIR 1942 All. 136+AIR 1950 Bom. 386 *not foll*)+AIR 1958 Mad. 34.
4. AIR 1960 Bom. 516 (DB).
5. AIR 1940 All. 544 (AIR 1938 All. 613, *overruled*).
6. AIR 1933 PC 63 (Debts due from non-contribu..ories—Suit is the only remedy)+ILR (1931) 2 Cal. 396 (DB).
7. ILR (1951) 2 Cal. 396 (DB).
8. AIR 1921 Lah. 140 (DB).
9. 2 Sau L R 193 (DB).

4. Defence open to the contributory. Under the section every objection is just as open to the person sought to be charged as it would have been if a suit were filed.[10] But the Court will not go into the question of validity of the liquidation. That question should be raised in proper proceedings.[11] A share-holder settled on the list of contributories cannot in proceedings under section 341 plead that he was improperly so settled.[12] Nor can he challenge the right of the official liquidator to make an application on the ground of illegality of his appointment.[13]

5. Barred claims, recovery of. The section only creates a special procedure for obtaining payment of moneys and creates no new rights.[14] Monies the recovery of which by a suit is barred by limitation on the date of the application under section 341, cannot be ordered to be paid under this section.[15]

6. Limitation. A petition under section 342 of the Companies Ordinance is not a suit nor it is an application covered by explanation to section 3 of the Limitation Act.[16] Therefore an application by liquidator, if otherwise properly made under and within the provisions of section 341, Companies Ordinance, is not one which must be dismissed by reason of section 3, Limitation Act.[17] But the expression "any money due" means that before an order for payment can be made under section 341 the applicant must show that the amount is due, and if under the law of limitation governing actions for recovery of money, the claim would be barred, it cannot be said that the amount is a sum due within the meaning of section 341. The test will be whether if the company were to institute a suit as on the date of an application under section 341, it would or would not be barred by time under Limitation Act.[18]

7. Set off. There is nothing in section 341 which can reasonably be coustrued as a general deprivation of contributories to companies in liquidation of the right of set off.[19] Where as a result of the finalization of the winding up proceedings or the suits for rendition of accounts, if the respondents are found entitled to recover any amount from the company, they might then have the right, subject to the other priorities and conditions, to ratable payment out of the entire assets and funds of the

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10. AIR 1933 PC 63+AIR 1950 Bom. 386 (DB).
11. AIR 1942 All. 136=ILR 1942 All. 26.
12. AIR 1923 Lah. 85.
13. AIR 1936 Lah. 276.
14. AIR 1933 PC 63+AIR 1936 All. 826 (DB)+AIR 1950 Bom. 386 (DB).
15. AIR 1933 PC 63+AIR 1924 Lah. 53 (FB)(The words "at any time" in the section do not refer to the question of limitation and override the provisions of the Limitation Act)+AIR 1958 Mad. 34+AIR 1950 Bom. 386 (DB) (Calls made by directors—Suit by liquidator to recover amount after the winding up—*Held* suit if considered as one to enforce the contractual liability of the share-holder was to be dismissed on the ground of bar of limitation and to be dismissed, if considered as a suit to enforce the statutory liability under section 156, on the ground that there had been no call issued by the court which was necessary to enforce that liability).
16. PLD 1977 Lah. 217.
17. PLD 1977 Lah. 217+AIR 1933 PC 13.
18. AIR 1924 Lah. 53+AIR 1933 PC 63 (AIR 1931 Mad. 58, *applied*)+AIR 1960 Bom. 138 (DB)+AIR 1963 Mad. 306.
19. AIR 1940 All. 544 (FB)+AIR 1938 All. 613, *overruled*).

company.[20] But a contributory cannot set off against his liability for calls a debt due to him from the company. There can be set off only where both the debts are of purely commercial nature.[1] He cannot adjust the dividends or profits due to him against what he has to pay as a contributory.[2] Where a person was on the list of contributories as a member who had transferred his shares within a year before the winding up order. After a call had been made against him by the liquidator he bought certain debts which were due from the company before he transferred his shares and claimed a reduction in his liability under the calls to the extent of those debts. But the Court disallowed the claim on the ground that the contributory's liability came into existence when he became a member and created a debt and when that debt had become payable by a call having been made, it could not be adjusted in that manner. The only way of extinguishing that debt was by payment.[3]

Debtor. There being nothing to the contrary in the Companies Ordinance a non-contributory debtor of a company in liquidation has the right to plead in answer to the suit of the liquidator to recover the amount due from him, that an amount had become payable by the company to him on the date of that suit and that amount should be set off under O.8, R.6 of the Civil P.C. against the claim of the liquidator in the suit.[4] In the case of a debtor who is not a contributory the liquidator has to file an ordinary suit to recover the amount due and the liquidation Court has no jurisdiction to apply the summary process for its recovery. Hence an order of liquidation Court disallowing the claim of the debtor for a set off cannot operate as *res judicata* and prevent the Court from entertaining the plea in the ordinary suit filed by the liquidator to recover the debt.[5]

Adjustment and set off. Where a contributory has not claimed any set off on any independent dealing or contract against the company. His claim is merely that he should be allowed interest in his account on the advance payments of all money made by him. Thereby he is asking for a mere adjustment in the amount and not for a set off on any independent or separate dealing. It was held that the bar imposed by section 341 (2) does not apply to such individual claims.[6]

Voluntary winding up. A contributory cannot in winding up proceeding set off a debt owing to him by the company against a call whether made before or after the winding up. This rule also applies to the case of a voluntary winding up.[7]

342. *Power of Court to make calls.* (1) The Court may at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories

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20. PLD 1977 Lah. 217.
1. AIR 1942 All. 136=ILR 1942 All. 26.
2. AIR 1955 Punj. 1258 (In the face of the specific provisions of section 156 (1) clause (*vii*) which excludes dividends or profits payable from the category of debts of the company no principle of law or equity can be imported to allow an adjustment).
3. (1959) 1959-3 W L R 8.
4. AIR 1915 Lah. 204=1915 Pun. Re. No. 63 (DB).
5. AIR 1919 Lah. 242 (DB).
6. PLD 1972 Lah. 552 (DB).
7. AIR 1963 Punj. 22.

for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

Synopsis

1. Application by liquidator.
2. Powers of Court.
3. Limitation.
4. Call money paid, cannot be claimed back.
5. Transfer of shares.

1. Application by liquidator. The cause of action for the liquidator to realise contribution from the contributories arises on the appointment of the liquidator.[8] The Ordinance provides a form for making an application under section 342. The liquidators should make the application in that particular form and give all the particulars which are required to be mentioned in the application.[9]

2. Powers of Court. Where an application is made to the Court by the liquidator under this section, the Court cannot go into the question of the validity of the liquidation. The matter can only be raised in proper proceedings.[10]

Time-barred calls. The Court has power under this section not only to make original calls but also to call monies which remains unpaid under calls which had already been issued by the company before its winding up.[11] Therefore where a suit to enforce a call made by the company before its liquidation is found to be barred by limitation the official liquidator can enforce the liability against the contributory by getting the Court to make the necessary order for a call under section 342.[12]

Matters to be considered. When an application is made to it under section 342, the Court is bound to consider, before making an order, the sufficiency of the assets or the extent to which the contributories should be called upon to contribute to the funds of the company although when the official liquidator is seeking to enforce a contractual liability by an application under section 341, all such considerations will be irrelevant.[13]

Amount of call. The Court can call upon the contributories under this section to pay only so much of the amount which remains unpaid by them as would be necessary for the purposes mentioned in the section. Independently of the necessity it cannot order the payment of the whole amount whether such amount is small or

8. AIR 1926 All. 550=48 All. 480.
9. AIR 1960 Bom. 516 (DB).
10. AIR 1962 Punj. 190+AIR 1942 All. 136.
11. 12 Ind. Cas. 958=1911 Pun. Re. No. 67 (DB)+AIR 1962 Mad. 192 (DB).
12. AIR 1950 Bom. 386 (DB).
13. AIR 1950 Bom. 386 (DB)+AIR 1942 All. 136=ILR 1942 All. 26.

big.[14] The Court has power to enforce the service liability of a share-holder by ordering him to make payments for the adjustments of the rights of the contributories among themselves. Thus where the Court finds some contributories have paid less and others more than they ought to have, it can order the former to pay more in order to make the burden on all of them equal.[15] However, it is a wise rule that in making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.[16]

Where a contributory has paid the official liquidator with powers under section 333, on a call made by him, before the formal order under section 342 was passed by the Court, the amount cannot be again recovered from that contributory under the order of the Court.[17]

Notice to contributory necessary. An order making a call on the contributories passed in disregard of the rules as to notice under section 438, cannot be maintained.[18]

3. **Limitation.** In enforcing the liability of the contributories the official liquidator does not enforce any rights of the company but only the statutory rights of the creditors to compel the contributories through Court to the performance of the obligations which they as share-holders undertook to discharge, when they originally subscribed, in the event of the subsequent insolvency of the company.[19] There is no time limit for making an application under section 342.[20] Liquidation gives official liquidators a cause of action and unpaid calls though timebarred against the company, can be enforced by them.[1] Art. 112 of the Limitation Act does not apply even where calls had been made on contributories before the winding up order.[2]

Execution of order. An application for execution of an order made under section 342 read with section 355 by the High Court is governed by Art. 183 and not by Art. 182 of the Limitation Act.[3]

4. **Call money paid, cannot be claimed back.** A share-holder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of

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14. 1957 M P L J 77+AIR 1960 Bom. 516 (DB).
15. AIR 1958 Mad. 34.
16. AIR 1963 Punj. 22.
17. AIR 1932 Cal. 691=59 Cal. 1099 (DB).
18. AIR 1981 Lah. 302=1918 Pun. Re. No. 1.
19. AIR 1961 All. 317 (DB)+AIR 1956 Nag. 204 (A suit to recover the debt newly arising on the liquidation is governed by Art. 120 of the Limitation Act. Time will run from the date specified for payment in the call made by the liquidator).
20. AIR 1960 Bom. 516 (DB).
1. AIR 1962 Punj. 526 (DB)+AIR 1928 All. 272 (Similarly the consideration that the claim if it had been made by the company would have been barred by *res judicata* will not affect liquidator's right)+AIR 1941 Mad. 565 (DB)+AIR 1931 Pat. 44 (DB)+AIR 1916 All. 317 (DB).
2. AIR 1962 Pun. 526 (DB).
3. AIR 1962 SC 403+AIR 1951 All. 362 (AIR 1926 Oudh 289 does not lay down correct law).

the company and it is inconsistent with his position as a share-holder, where he remains as such to claim back any of that money.[4]

5. **Transfer of shares.** A transferor cannot avoid liability in the winding up as a contributory if his name continues to appear as a share-holder on the register notwithstanding the transfer unless he can establish that the non-registration of the transfer was due entirely to the default of the company. Transferor's delay or default to have his name removed from the register of members will bar his relief after the company is wound up. On the other hand if he is blameless then the order placing him on the list of contributories and the order making a call on him should be set aside.[5]

Transfer, how may be challenged. The liquidators of a company obtained an order against a contributory and proceeded to execute it by attaching certain shares. But in the execution proceedings it was found that the son of the contributory was registered as the holder of those shares and was in actual possession of them. Thereupon the liquidators sought to prove that the transfer by the contributory in favour of his son was a fraudulent one. It was held that the proper course for the liquidators to follow was to proceed by way of a regular suit under C.P.C. Order 21, Rule 63, if they had reason to believe that the transfer by the contributory was for any reason, ineffective, inoperative and void as against the creditors in the winding up.[6]

343. *Power to order payment into bank.* (1) The court may order any contributory, purchaser or other person from whom any money is due to the company to pay the same into the account of the official liquidator in a scheduled bank instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator.

(2) Information about the amount deposited shall be sent by the person paying it to the official liquidator within three days of the date of payment.

Synopsis

1. Scope. 2. Purchaser.

1. **Scope.** Section 343 does not give the Court power to direct payments from any persons other than those mentioned in section 340.[7] The words "or other

4. AIR 1917 Bom. 132 (DB) (Share-holder entrusting shares to managing director of company for being sold--Managing Director falsely representing that they have been sold paying a certain amount as sale proceeds--Share-holder compelled to pay calls as a contributory. Suit to recover amount paid from company in liquidation as damages--*Held*, he was not entitled to recover).
5. AIR 1959 Cal. 335.
6. AIR 1946 Mad. 174 (AIR 1920 Mad. 748 (FB) *Disting*).
7. AIR 1940 All. 514=AIR 1936 All. 808 (DB).

persons from whom money is due" have reference to a person from whom money is due under section 340.[8]

2. Purchaser. Persons who enter into contracts with the liquidator during the course of liquidation do not come under section 340, and hence an order directing them to pay the liquidator cannot be enforced under section 340. Such an order therefore cannot be enforced under section 343 also.[9] The purchasers referred to by the section are the purchasers of the interest of a contributory.[10]

344. *Regulation of account with Court.* All moneys, bills, *hundis*, notes and other securities paid and delivered into the scheduled bank where the official liquidator of the company may have his account, in the event of a company being wound up by the Court, shall be subject in all respects to the orders of the Court.

345. *Order on contributory conclusive evidence.* (1) An order made by the Court on a contributory shall subject to any right of appeal, be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings whatsoever.

346. *Power to exclude creditors not proving in time.* The court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

Synopsis

1. Scope. 2. Claim made beyond time.

1. **Scope.** There is no provision in law for admitting a debt to proof before the appointment of a liquidator.[11]

2. **Claim made beyond time.** The failure of a claimant to bring forward his claim within the time specified in the notice does not shut him out from proving his claim at any later stage. By his delay he would be compelled only to reduce his claim to a proportionate share of the assets which remain undistributed at the time when his claim is admitted to proof and lose the benefit of the distribution made prior to that. Beyond that the claimant suffers no other penalty.[12] However, a

8. AIR 1936 All. 808=58 All. 925 (DB).
9. AIR 1936 All. 808 (DB) (Matters which arise with third parties owing to transactions entered into by the liquidator are beyond company judge's jurisdiction).
10. AIR 1936 All. 808=58 All. 925 (DB).
11. 9 All. 180 (DB) (Such a procedure is an irregularity which justified the High Court in calling for the record in the winding up).
12. 27 Mad. 496 (FB)+AIR 1942 Mad 349+AIR 1964 Pat. 352 (DB)+(1872) 7 Ch. A. 646.

creditor's claim if not made before the advertised date, should at least be made before all the accounts are written up by the official liquidator. Once the accounts are written up a claim made thereafter should be rejected on the ground of laches.[13]

Income-tax. The Income-tax authorities or any authority of the Government dealing with matters of tax is bound by the provisions of the Companies Ordinance regarding filing of a claim before the Official Liquidator. Where the claim filed under section 346 is belated, it is liable to be rejected. However, if there is sufficient money available with the official liquidator to satisfy the claim, the Court may allow it. But where money is not available the claim cannot be allowed.[14]

Where the Income-tax Officer has filed a claim of Income-tax dues he is presumed to have obtained knowledge and information about liquidation proceedings. He has already done under section 345, what he was expected to do under Income-tax Ordinance. This amounts to waiving by him of his rights, if any, under the last mentioned provision, and he cannot recover Income-tax dues under it.[15]

Personal liability of official liquidator. Once a claim has been submitted and has been allowed and the amount to meet that claim falls short, the official liquidator cannot be held personally liable to pay it.[16]

347. *Adjustment of rights of contributories.* The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

Synopsis

1. Rights of contributories.
2. Assignee of shares.
3. Preference share-holders.
4. Fully paid-up shares.
5. Transferee of shares.
6. Set off.

1. **Rights of contributories.** The share-holders have a right to participate only in the assets of the company which are left over after the winding up is over and not in assets as a whole.[17] Where under the memorandum and articles of association the promoters of the company were entitled to certain benefits out of the profits of the company after the share-holders' claims were fulfilled to a certain extent. It was held that they were not entitled to those privileges when in the voluntary winding up the sale proceeds of the assets of the company which were in excess of its liabilities had to be distributed. The amount was to be distributed only among the share-holders *pro rata* because it was not a profit made in carrying on the business of the company in which the memorandum and the articles conferred the privilege on the promoters.[18]

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13. AIR 1937 Sind 104=ILR 1946 Kar. 205.
14. PLD 1977 Lah. 1218=PLJ 1977 Lah. 664.
15. PLD 1977 Lah. 1218=PLJ 1977 Lah. 664.
16. PLD 1977 Lah. 1218=PLJ 1977 Lah. 664 (In this case official liquidator had died).
17. AIR 1955 SC 74=1955 SCR 876.
18. AIR 1952 Trav-Co. 192=ILR 1951 Trav-Co. 428.

2. **Assignee of shares.** Where in a winding up the equitable assignee of shares sought the payment of the value of those shares and the company resisted his claim on the ground that they had lien on those shares for debts due from the share-holder and hence were entitled to refuse to recognise the transfer under the articles of its association: it was held that the proceedings in relation to those claims amounted clearly to the adjustment of the rights of contributories under section 347.[19]

3. **Preference share-holders.** Where according to the constitution of a company the preference and ordinary stocks and shares rank rateably on a division of the assets in the winding up and the preference have no priority over the ordinary stocks and shares to the repayment of capital, the preference and the ordinary stocks and shares would rank rateably *inter se* subject only to a claim for equalization in respect of those fully paid and those partly paid.[20] Where the preference share-holders are entitled only to a preferential dividend so long as the company is a going concern there is a prima facie presumption of equality of distribution amongst all the share-holders and the surplus assets on a winding up should be distributed among all the share-holders both preferential and ordinary alike, *pro rata* in proportion to the amount paid up on their shares. In the absence of anything in the constitution to the contrary the preferential share-holders cannot be excluded from the distribution.[1] But where the articles of association of a company confer on the preference share-holders a right to be paid both their share money as well as dividends, accruing year after year, but remaining unpaid, and does not make that right dependent on the company having earned profits, then in the winding up of the company the preference share-holders would be entitled to be paid all arrears of dividends from out of the surplus assets of the company after payment of the preference share-capital,[2] even if the company had made no profits.[3] Where, however, under the memorandum of articles of a company the preference share-holders are entitled to a return of capital in a winding up in priority to all other share-holders the unpaid portion of the shares held by the ordinary share-holders can be called up to repay to the preference share-holders the amount of their capital after the payment of all the debts of the company. But the preference share-holders are not entitled to a dividend when the company has made no profits at all.[4]

4. **Fully paid-up shares.** The fully-paid share-holders are also contributories without any qualification and therefore are entitled to have their rights adjusted under Section 347.[5] There is authority under the Ordinance for making calls on the partly paid-up share-holders in order to adjust the rights in the winding up as between them and the fully paid-up share-holders. The Ordinance did not intend

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19. AIR 1934 Mad. 476=57 Mad. 955 (DB).
20. (1921) 1921-1 Ch. 72 (DB) (Mere irregularity in the issue of fully paid stocks must be treated as waived after a long time and the stocks should be admitted to the distribution. But where the issue is *ultra vires* they cannot be included).
1. (1927) 1927-1 Ch. 657.
2. AIR 1957 Mad. 262 (DB).
3. (1920) 1920-1 Ch. 563+(1952) 1952-2 All E R 635=(1952) 1 Ch 913.
4. AIR 1941 Mad. 806.
5. AIR 1934 Mad. 476 (DB)+AIR 1950 East Punj. 328 (But he is not a contributory for purposes of S. 166).

merely to work out the rights of the share-holders as in a contribution suit and not as between partners.[6]

5. Transferee of shares. A transferee of shares whose name has not been entered in the register is not a contributory.[7]

6. Set off. In a suit by a running company to recover the overdrawings of one of its directors no set off of what that director may receive on a winding up of the company will be allowed in his favour.[8]

348. *Power to order costs.* The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.

Synopsis

1. Scope.
2. Creditor of company.
3. Rent of premises occupied by liquidator.
4. Payment of costs, priority.

1. Scope. A successful litigant against a company in liquidation is entitled to be paid his full costs in priority over other ordinary creditors except where there are other creditors in the same position as himself when they and he will rank *pari passu* as regards the funds available for discharge of their debts.[9] On the other hand a petitioner who without bona fides makes an application for winding up of a company and insists upon further proceedings in liquidation must be made to pay the entire cost of the liquidation.[10]

2. Creditor of company. Where upon an application by the official liquidator for direction regarding payment of interest to the creditors of a company a creditor comes in response to the notice issued by the official liquidator at the Court's direction but does not urge that he should receive interest, it will be reasonable to order his costs to be paid out of the assets of the company.[11]

3. Rent of premises occupied by liquidator. Where the liquidators remain in possession of a property of which the company was a tenant not because they required it for the purpose of winding up but because they were unable to get rid of the premises, the rent accruing due since the date of the winding up cannot be

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6. (1866) 1 Co App. 555+(1898) 1898-1 Ch. 451.
7. AIR 1934 Mad. 476=57 Mad. 955 (DB).
8. AIR 1938 Mad. 962=ILR 1939 Mad. 36.
9. AIR 1942 Lah. 13=ILR 1942 Lah. 742 (DB).
10. AIR 1934 Lah. 746 (DB) (Though there is no provision in the Act governing such cases the Court has power under section 35, Civil P.C. read with section 141 thereof to make the order).
11. AIR 1948 Mad. 64.

claimed in priority over the ordinary debts unless the Court passes an order holding that the debt incurred was a part of the costs and expenses of liquidation.[12]

4. Payment of costs, priority. The costs of proceedings granted against the liquidator should be given priority over other costs. Therefore it is just and fair that the costs awarded against him should be paid by him in priority to other claims.[13]

349. *Distribution by official liquidator.* Subject to any directions given by the Court, the official liquidator shall within thirty days of the coming into his hands of funds sufficient to distribute among the creditors or contributories after providing for expenses of the winding up or for other preferential payments as provided in this Ordinance, distribute in accordance with the provisions of this Ordinance:

Provided that such portion of the funds as may be required for meeting any claims against the company which may be *sub judice* or subject-matter of adjudication or assessment shall not be distributed till the claim is finally settled:

Provided further that any amounts retained as aforesaid shall be invested by the official liquidator in Khas Deposit Certificates and the same shall be deposited by him with the Court and the distribution thereof shall be made by him after the pending claims are settled.

350. *Dissolution of company.* When the affairs of a company have been completely wound up, or when the Court is of the opinion that the official liquidator cannot proceed with the winding up of the company for want of funds and assets or any other reason whatsoever and it is just and reasonable in the circumstances of the case that an order of dissolution of the company be made, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly:

Provided that such dissolution of the company shall not extinguish any right of, or debt due to, the company against or from any person.

(2) A copy of the order shall, within fifteen days of the making thereof, be forwarded by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.

(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred rupees for every day during which he is in default.

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12. AIR 1960 SC 332=1960-2 SCR 189.
13. 16 DLR 656 (1913-2 Ch. D 26).

Synopsis

1. Scope.
2. Company in liquidation, status of.
3. Annulment of liquidation.
4. Appeal against order.
5. Revision.

1. Scope. Where the official liquidator stated that affairs of company were finally wound up and there was no outstanding assets and liabilities of company, order of dissolution of the company was passed by High Court.[14] The dissolution order shall not extinguish any right of, or debts due to, company against or from any person.[15]

2. Company in liquidation, status of. A company which has been dissolved no longer exists as a separate entity capable of holding property or of being sued in any Court; but a company in liquidation, although the administration of its affairs had passed to the liquidator, retains its corporate existence.[16] Although, after dissolution, the company and its officers become *functus officio*, yet the liquidator can complete a formal act like giving a transfer in writing for a decree already transferred by him while he was still a liquidator.[17]

3. Annulment of liquidation. If liquidation should be annulled, the company will resume its powers.[18]

4. Appeal against order. Section 10 of Company Ordinance does not limit the right of appeal merely against an order but also confers the right of appeal against a decision. The right conferred is not only a substantial right but a very valuable right and the Court must be anxious not in any way to cut down or impair that right. The order or decision given by the Court in a winding up proceeding to be appealable must be such as would in any way deprive or affect the right of a party and which would impel him to come to a higher Court for getting the order passed rectified.[19] Section 10 confers valuable and important safeguard in respect of orders made in the winding up of a company.[20] The right of appeal conferred by this section extends to all orders and decisions made or given in the matter of the winding up of a company whether the winding up be compulsory, voluntary or under supervision.[1]

Order in winding up cannot be challenged by suit. A question which has been decided by the liquidation Court cannot be re-opened by a regular suit. Appeal is the only remedy,[2] and if that remedy is not availed of, the order becomes *res judicata*. Thus an order overruling the objection of contributories that they had

14. NLR 1992 CLJ 323+PLD 1985 Lah. 404 (2)=PLJ 1985 Lah. 249.
15. NLR 1992 CLJ 323.
16. AIR 1939 Mad. 318.
17. AIR 1928 Mad. 478=51 Mad. 681 (DB).
18. AIR 1939 Mad. 318.
19. PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB).
20. AIR 1959 Bom. 386=ILR 1959 Bom. 295 (DB).
1. 30 Mad. 22+AIR 1935 Lah. 174.
2. AIR 1918 Lah. 45 (Order refusing priority to a debt).

ceased to be share-holders before the company went into liquidation, if not appealed against, becomes final and operates as *res judicata*.[3]

Constitutional petitions. Matters which are sought to be made the subject of extraordinary constitutional petitions such as *certiorari* and prohibition, cannot be adjudicated upon by the winding up Court, so that the aggrieved party may prefer an appeal to the High Court under section 10.[4]

Order "in the winding up". An order or decision on an application under section 316, for leave to institute a suit against the company in liquidation is one in the matter of winding up and is appealable under section 10.[5] Where misfeasance proceedings under section 412 were initiated by the Official Liquidator and in those proceedings the Company Judge tentatively decided to require the presence of some of the Directors of the Company for giving evidence on oath in open Court, after hearing the counsel, directed accordingly by an interlocutory order, an appeal is maintainable against such order.[6] Similarly an order directing a preferential payment to one of the creditors of the Company in liquidation,[7] or an order which dismisses an application by which the claims of certain persons admitted by the liquidator is challenged, is a decision given in the matter of winding up and is therefore appealable.[8]

Orders not passed in winding up. No appeal lies under section 10 from an order made on an application under section 284 where the company which applied is not in the course of being wound up.[9] An order refusing to take the security offered for costs under section 487,[10] or an order under section 439 refusing to restore a Company on to register is not appealable under section 10 as it is not one given in the winding up of a company.[11] But an order appointing an interim receiver in an application under section 290 is open to appeal.[12]

An order by the liquidation Judge fixing the remuneration of the legal adviser for services performed to the liquidators is not one made in the matter of winding up of the company, but is of the nature of a ministerial order settling a dispute as between the liquidators and their employee and therefore is not appealable under section 10.[13]

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3. AIR 1915 Lah. 227.
4. AIR 1952 Trav-Co. 14=1950 Trav-Co. L.R 162
5. AIR 1959 Bom. 41 (DB) (Such an order is not a procedural order but one which affects the valuable right to obtain relief by filing a suit).
6. AIR 1964 Mys. 75 (DB).
7. AIR 1918 All. 342 (DB).
8. AIR 1951 Nag. 275=ILR 1950 Nag. 783 (DB).
9. AIR 1925 Bom. 442 (DB).
10. AIR 1942 Mad. 405 (DB).
11. AIR 1925 Lah. 443 (Order if based on erroneous view of law is open to revision).
12. PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB).
13. AIR 1943 Sind 82 (DB) (Such unappealable ministerial orders may be passed by the Judge when dealing with a company in liquidation)+AIR 1920 Lah. 433 (Order fixing remuneration of employee).

Conditions regulating right of appeal. Section 3 of the Law Reforms Ordinance is not applicable to company cases.[14]

The criterion of appealability is the same as in an order passed by a Judge on the original side of the High Court.[15] The section must be construed as regulating the procedure to be followed in the presentation of the appeal and of hearing it, the period of limitation within which the appeal is to be presented and the forum in which appeal would lie, and not as restricting or impairing the substantive right of appeal which has been conferred by sub-section (2) of section 10.[16] Therefore, orders passed by the District Court or by Single Judge of the High Court in the matter of winding up petitions are appealable independently of the provisions of sections 96 and 104, C.P.C. or that of Letters Patent. It is sufficient if the order is judicial as distinguished from administrative or ministerial order.[17]

Appeals lie against any order made in the matter of winding up of a company provided such an order finally decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal or interlocutory order.[18] Therefore no appeal lies against an order rejecting the liquidator's prayer to compromise with the debtor.[19] Where a petition for compulsory winding up was ordered to be withdrawn from the file if the company gave security to the satisfaction of the Registrars in Insolvency; it was held that the order of the registrar accepting the security furnished could not be reviewed in appeal in the absence of a direction in the order of the Court to the effect that the registrar's decision should be subject to appeal.[20] It is to be noted that unless and until the Court passes an order for winding up, it cannot be said that it has finally determined the rights of parties so as to enable an appeal being filed even though it has expressed its finding on the several points raised before it.[1]

Procedural orders. It is not possible to hold that purely procedural orders passed by the Judge in a winding up can also be appealed against under the section.[2]

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14. PLD 1980 Lah. 86=NLR 1980 AC 9 (DB)+PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB) (*Diss:* AIR 1925 Cal. 817).
15. PLD 1980 Lah. 86=NLR 1980 AC 9 (DB).
16. AIR 1965 SC 507.
17. AIR 1965 SC 507 (AIR 1955 Bom. 355 & AIR 1959 Bom. 386 *Approved:* AIR 1928 Cal. 295, *overruled*) AIR 1961 Mys. 1 (DB).
18. PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB)+PLD 1970 Dacca 648+20 DLR 1206 (DB)+19 DLR 335+AIR 1931 Lah. 8 (Order rejecting objection to being examined under section 195 is a final order and therefore appealable even though the order directing summons to be issued may be only a preliminary order)+AIR 1929 Lah. 707=10 Lah. 806 (FB)+AIR 1956 All. 222=1956 Cr. L.J. 369 (DB) (Application under section 235 by official liquidator--Objection raised on the ground of limitation. Order rejecting objection is merely an interlocutory order)+AIR 1965 SC 507.
19. PLD 1970 Dacca 648 (DB)+20 DLR 1206 (*Rel.* 19 DLR 335; AIR 1929 Lah. 707; AIR 1959 Cal. 324).
20. AIR 1934 Cal. 603=61 Cal. 429.
1. AIR 1952 All. 223 (DB).
2. AIR 1939 Bom. 386 (DB) (Order directing advertisement of winding up petition is fraught with serious consequences to the company and is therefore appealable).

'Ex parte' order. This section has no application to petitions for setting aside *ex parte* decrees and hence the Court which made the *ex parte* order, which is in fact a nullity, can itself discharge the order.[3]

Appealable orders. An order refusing to wind up a company or an order refusing to make a supervision order in a voluntary winding up,[4] or an order granting sanction to the official liquidator to sell the property of the company,[5] or revoking the sanction given is an appealable order.[6] Where the Court ordering the advertisement of the petition for winding up without hearing the company on its objections as to why it should not be proceeded with and further steps should not be taken fails in the exercise of its jurisdiction and hence its order is appealable.[7]

Non-appealable orders. The framing of issues in a winding up or an order which dismisses the objections to the attachment of certain properties as belonging to the defaulting contributory and ordering their sale is not an appealable order.[8]

Party entitled to appeal. Right of appeal under S. 10 is available only to a person who can show that he has got an interest which is adversely affected by the decree, or has got an interest in the subject-matter of the litigation.[9] Therefore any creditor or contributory who is dissatisfied with the winding up may appeal against that order.[10] Where the Court has rejected the application of the liquidator under section 341 to recover the debts due to the company, the contributories can, when authorised to do so, validly file an appeal against the order.[11] However, where in a winding up petition a contributory is also shown as a creditor to whom notice of the proceedings ought to go, he becomes entitled to appeal against the winding up order as a party to the proceedings and his absence in the Court whether deliberate or due to the non-service of the notice does not in any way affect his right.[12]

Company. It is open to a company to appeal against the order of substitution passed by the company judge because in the absence of such an order, the winding up petition should have been dismissed. If it does not do so and allows the appeal to become barred by limitation, it cannot challenge the order in an appeal against a different order passed by the company judge.[13]

Directors of company. An appeal filed by the directors in the name of the company against the winding up order is not incompetent where the directors have

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3. AIR 1920 Lah. 51=1 Lah. 187 (DB).
4. PLD 1980 Lah. 86=NLR 1980 AC 9+AIR 1914 Bom. 251 (DB).
5. 30 Mad 22 (DB).
6. AIR 1921 Mad. 286 (DB).
7. AIR 1959 Bom. 170=ILR 1951 Bom. 1237 (DB).
8. AIR 1927 Lah. 282.
9. AIR 1932 Bom. 78=56 Bom. 16 (DB) (Scheme propounded for carrying out liquidation proceedings--Order refusing sanction--Propounder of the scheme neither a creditor nor a contributory--He has no right to appeal against the order).
10. AIR 1936 Lah. 322 (FB).
11. 2 Sau L R 193 (DB).
12. AIR 1950 East Punj. 142.
13. AIR 1959 Bom. 386=ILR 1959 Bom. 295 (DB).

acted in pursuance of a resolution of the majority of the contributories. Such an appeal is really that of the contributories who are behind it.[14]

Official liquidator. The official liquidator representing the interests of the general body of the share-holders of the company has such an interest in the proceedings which give him a right to file an appeal against the order of the Court below.[15] But the liquidator cannot himself appeal against an order which sets aside the order for winding up under the supervision of Court or which holds that there has been no proper and valid voluntary liquidation. In such a case it is the company and not the liquidator who is really the interested person.[16]

Person not party to proceedings. A person who was not a party to the proceedings for winding up has no right to appeal from an order made in those proceedings.[17]

Necessary parties to appeal. In an appeal against compulsory winding up order, the official liquidator is not a necessary party. But it is desirable that as a general rule he should be made a party to such appeals.[18]

Limitation. An appeal against an order passed by a single Judge of the High Court on Original Side is governed by Art. 151, Limitation Act which is subject to section 12, Limitation Act. The appellant is entitled to deduct time requisite for obtaining copy of the judgment even though under rules and orders of the High Court no copy need be filed with the memo. of appeal.[19]

5. **Revision.** A non-appealable order passed by a District Court under the provisions of the Ordinance is open to revision by the High Court under section 115, Civil P.C.[20]

351. *Power to summon persons suspected of having property of company.* (1) The Court may, at any time after the appointment of a provisional manager or the making of winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property or books or papers of the company, or known or suspected to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, books or papers, affairs or property of the company.

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14. AIR 1932 PC 1=58 Ind. App. 416=55 Mad. 180.
15. AIR 1953 Nag. 288=ILR 1953 Nag. 787 (The petitioning share-holder has no individual interest in the liquidation and therefore the official liquidator is not bound to implead him as a party to the appeal).
16. AIR 1950 East Punj. 355 (DB).
17. AIR 1949 Cal. 69 (Observation of Lord Williams, J., in AIR 1937 Cal. 667 and AIR 1942 Cal. 578, *Dissented from*)+AIR 1931 Cal. 391 (DB) (Proceedings on creditor's petition for winding up—Court wrongly refusing to hear share-holder—Appeal by company which did not appear in the proceedings on the ground of that refusal. *Held* appeal was not maintainable).
18. AIR 1941 Lah. 134=ILR 1941 Lah. 680 (DB).
19. AIR 1931 Lah. 237 (FB) (AIR 1921 Lah. 26, *overruled*).
20. AIR 1935 All. 310 (DB) (Order under section 54).

(2) The Court may examine a person summoned under sub-section (1) on oath concerning the matters aforesaid, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The Court may require a person summoned under sub-section (1) to produce any books and papers in his custody or power relating to the company, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that line, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(4) If any person so summoned, after being paid or tendered a reasonable sum for his expenses, fails to come before the Court at the time appointed, not having a lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may cause him to be apprehended and brought before the Court for examination.

(5) If, on his examination, any officer or person so summoned admits that he is indebted to the company, the Court may order him to pay to the provisional manager or, as the case may be, the liquidator, at such time and in such manner as the Court may direct, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Court thinks fit, with or without costs of the examination.

(6) If, on his examination, any such officer or person admits that he has in his possession any property belonging to the company, the Court may order him to deliver to the provisional manager or, as the case may be, the liquidator, that property or any part thereof, at such time, in such manner and on such terms as the Court may direct.

(7) Orders made under sub-sections (5) and (6) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure, 1908 (Act V of 1908), respectively.

(8) Any person making any payment or delivery in pursuance of an order made under sub-section (5) or sub-section (6) shall by such payment or delivery be unless otherwise directed by such order, discharged from all liability whatsoever in respect of such debt or property.

Synopsis

1. Who may examine.
2. Company Judge.
3. Scope of examination.
4. Persons refusing to give information.
5. Copy of examination, right to.
6. Appeal.

1. Who may examine. Examination under section 351 is private and the petitioning creditor should not be allowed to attend, where the liquidator has conduct of examination; except in extreme cases. Where the latter cannot act, the former may be given the conduct of examination.[1] It is a matter entirely within the discretion of the District Judge whether the services of a counsel should be allowed to an official liquidator in an inquiry under the section.[2]

2. Company Judge. The Company Judge acting under this section is a "Court" within the meaning of section 473, Criminal Procedure Code.[3]

Discretion of Judge. It is in the discretion of the Court conducting the winding up to determine whether it will exercise the powers vested in it by the section but the discretion must be exercised judicially and not without consideration.[4] The powers of Court under the section are very wide and it is not necessary to determine before calling upon him whether the person deemed capable of giving the information possesses it.[5] But before granting application under the section for discovery and inspection of the books and papers of a company and for the examination of certain of its directors, the Court ought to be satisfied that the inquiry is just and beneficial for the purposes of the winding up and not merely intended to harass and annoy the directors and manager.[6] Where the applicant, a fully paid-up share-holder and also a director of the company against which a winding up order had been made, filed an interlocutory application under sections 340 and 351 of the Companies Ordinance, alleging certain act of misfeasance against the managing director of the company and praying for a direction against him to render accounts of his management of the Company and to pay all sums found due by him to the company. It was held that the Court would not grant such an application in the exercise of its discretion under section 340 or 351 at the instance of a party who was himself a director at all material times. If there was any loss to the company the applicant was as much liable to the company as the respondent himself as both were directors. It is highly undesirable that the powers of the Court under sections 340 and 351 should be allowed to be invoked by one director against another director. Further the application was actuated by personal spite and hostility towards the respondent. Moreover, having regard to the conduct of the applicant who was also a party to the resolution sanctioning the impugned

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1. AIR 1924 Rang. 24=1 Rang. 384.
2. AIR 1931 Lah. 8.
3. AIR 1941 Lah. 52=ILR 1940 Lah. 669=42 Cr. L.J. 351 (DB).
4. AIR 1915 Lah. 109=1915 Pun. Re. No. 40 (DB).
5. AIR 1931 Lah. 8.
6. AIR 1915 Lah. 102=1915 Pun. Re. No. 40 (DB) (Annoyance or inconvenience likely to result to the person examined is not a reason for which the Court will refuse to act where it is just and necessary for the benefit of the winding up).

transactions, it was most undesirable that he should be allowed to proceed with the application and obtain any relief against the respondent.[7]

Foreigners, examination of. Although on the language of the section there is nothing to prevent the Court from directing a non-resident foreigner to submit himself for public examination, the Court will refuse to pass such an order on the ground that it is inadvisable to pass the order inasmuch as it may prove ineffective.[8]

3. Scope of examination. The object of the section unlike section 352, is to promote the liquidation proceedings and not an investigation into the conduct of the persons charged with the affairs of the company. The scope of the examination under the section is to seek information on matters which may be just or beneficial for the winding up.[9]

4. Persons refusing to give information. The official liquidation himself, while so acting, is an officer of the Court, charged with investigating the affairs of the company and the acts of its past managing agents and directors and he is entitled to be given all reasonable information as to past transactions. Any creditor who refuses to give such information upon a demand by the official liquidator does so at his peril and becomes liable in the ultimate resort to be summoned under this section or even arrested, if necessary.[10]

5. Copy of examination, right to. A person deposing under the section is entitled to have a copy of his own deposition on an undertaking given by his counsel to see that it is not communicated to the other persons similarly examined under the section or their solicitors or counsel.[11] A public officer investigating into a crime supposed to have been committed by a person who has been examined under the section is entitled to inspect his deposition and take notes therefrom. He is not entitled to a copy of the deposition.[12]

6. Appeal. An order directing the issue of summonses under the section is not an appealable order.[13] But an order dismissing the objection of the persons summoned under the section to their liability for an examination and also to the official liquidator conducting their examination through a counsel amounts to a final order within the meaning of section 10 and is appealable thereunder.[14] Similarly an appeal lies against an order made for the examination of directors. where the order impugned is vexatious or oppressive so far as the appellant is concerned and that it is not necessary or beneficial for the purposes of the winding up.[15]

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7. AIR 1961 Mad. 172 (DB).
8. AIR 1952 Mad. 481.
9. AIR 1931 Lah. 8.
10. AIR 1931 Bom. 2 (DB) (Hence an order depriving the creditor of his costs although successful in the proceedings initiated by the liquidator under section 297 is not unjustified).
11. AIR 1940 Cal. 498 = ILR (1940) I Cal. 28.
12. AIR 1930 Cal. 521 = 37 Cal. 424.
13. AIR 1931 Lah. 8 (Such an order is only a preliminary order and not a final order within the meaning of section 202 of the Act).
14. AIR 1931 Lah. 8.
15. AIR 1915 Lah. 109 = 1915 Pun. Re. No. 40 (DB).

352. *Powers to order public examination of promotors, directors, etc.* (1) When an order has been made for winding up a company by the Court, and the official liquidator has made a report to the Court stating that in his opinion a fraud or other actionable irregularity has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since its formation, the Court may, after consideration of the report, direct that such person, director or other officer shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director, manager or other officer thereof.

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court.

(3) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court.

(4) The Court may put such questions to the person examined as the Court thinks fit.

(5) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(6) A person ordered to be examined under this section--

(*a*) shall, before his examination, be furnished at his own cost with a copy of the official liquidator's report; and

(*b*) may at his own cost employ any person entitled to appear before the Court, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answer given by him:

Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

(7) If any such person applies to the Court to be exculpated from any charges made or suggested against him, it shall be the duty of the official liquidator to appear on the hearing of the application and call

the attention of the Court to any matters which appear to the official liquidator to be relevant, and if the Court, after hearing any evidence given or witnesses called by the official liquidator, grant the application, the Court may allow the applicant such costs as it may think fit.

(8) Notes of the examination shall be taken down in writing and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him and shall be open to the inspection of any creditor or contributory at all reasonable times.

(9) The Court may, if it thinks fit, adjourn the examination from time to time.

(10) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any officer of the Court, being an Official Referee, Master, Registrar, Additional Registrar or Deputy Registrar.

(11) The powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held by virtue of a direction under sub-section (10).

Synopsis

1. Scope and object.
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1. Scope and object. Section 352 is designed for a thorough investigation of the affairs of a company and the actions of its officers.[16] Thus its scope is different from that of section 351 which is intended for the purpose of promoting liquidation.[17]

The Court is itself entitled to exercise its statutory jurisdiction under this section to order a public examination of any person on the application of the liquidator. It is not barred from invoking any jurisdiction pending the submission of a report under section 329 by the official liquidator.[18] The filing of a misfeasance

16. AIR 1933 All. 366 (DB) (English decisions are no authorities on the question of the duties of the liquidator under this section).
17. AIR 1931 Lah. 8+AIR 1926 Lah. 385=27 Cr.L.J. 1383.
18. AIR 1949 Bom. 339 (DB).

application against a director or officer of a company in liquidation does not divest the Court of its jurisdiction to direct the public examination of that person.[19]

Deceased directors. Deceased directors could not be made to discharge their liabilities, therefore it was held that there was no alternative but to discontinue the proceedings against deceased directors.[20]

2. Examination may be ordered in winding up proceedings only. A liquidator in a voluntary winding up of a company may, under section 391, ask the Court for an order under this section.[1] But if a company is not in liquidation according to provisions of the Ordinance, the Court has no power to order the directors to be examined under this section.[2]

3. Fraud necessary. In order that section 352 may apply it is necessary that a fraud must have been committed by any person in the promotion or formation of a company or by any director or officer of the company in the conduct of its affairs.[3] A prima facie case of fraud against a particular person must be made out before an order for public examination can be passed under section 352. General allegation of fraud in Company's management is not sufficient. Charge of fraud need not be set out with the same particularity as in a criminal case.[4] The Court has no power to order public examination of a person who is not charged with fraud, merely because he falls within one of the categories mentioned in the section and another from that category has been charged. The section is directed only against the person who is actually charged and not against every person falling within the categories.[5]

4. Notice to party. The orders for public examination under section 352 should not be passed *ex parte*.[6] The laws of the country and the procedure laid down are grounded on the principles of natural justice which require that no one should be condemned unheard. If a man is going to be charged with fraud and an order is going to be obtained against him for his public examination, at which creditors and contributors will be entitled to appear and put any questions to him, the person sought to be charged cannot be condemned unheard. He must be given the opportunity of challenging the jurisdiction of the Court on the ground that the

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19. AIR 1955 Mad. 30 (DB).
20. PLD 1987 Lah. 618
1. AIR 1920 Bom. 284=44 Bom. 459 (DB)+1955-3 All E R 854.
2. AIR 1934 Rang. 271.
3. 1976 Dhaka L R 402 (DB)+AIR 1958 Andh Pra. 756=ILR 1958 Andh Pra. 651.
4. AIR 1933 All. 366 (DB) (What should be the contents of the application must depend on the facts of each case)+AIR 1949 Bom. 339 (DB) (Where the official liquidator has set out all the necessary facts from which the necessary inference that there is a *prima facie* case of fraud can be drawn by Court, that would be sufficient in law to attract the jurisdiction of the Court)+AIR 1944 Mad. 87 (DB) (An allegation against a director that he was a party to the issue of shares in consideration of promissory notes from the applicants constitutes a *prima facie* charge of fraud which justifies his public examination even though he had resigned before the shares were actually issued).
5. AIR 1949 Bom. 339 (DB)+AIR 1933 All. 366=55 All. 496 (DB) (The Court, on a general allegation of fraud in the management, will not be justified in making an order for public examination of "any person" not directly implicated in the application of the official liquidator)+AIR 1959 Ker. 388.
6. AIR 1949 Bom. 339 (DB) (*See* however AIR 1944 Mad. 87 (DB)).

report does not contain information, which is required by law to be stated, before being condemned to a public examination on charges of fraud.[7]

5. **Who may be examined.** Only certain specified persons can be examined under this section. The cashier of a branch office of a bank is not an officer, promoter, director or auditor of the company and is therefore not liable to public examination under this section.[8]

Legal heirs of Director. Proceedings contemplated under this section are in the nature of misfeasance summons and idea behind is to bring to the book in the summary proceedings all the persons who have been mishandling the assets or property of a company. Such proceedings are judicial proceedings and are essentially of civil nature. Legal heirs of deceased directors as such can be impleaded in these proceedings. In that case the first thing to be established is that there has been benefit to the estate of the deceased director or other person as a consequence of the misfeasance, breach of trust or mis application of funds alleged against him and such an estate which has so been benefited is in possession or enjoyment of the legal representative. The second question is whether the legal representatives who are so found in possession of such an estate can be made to repay or restore the money or any part thereof or to contribute such sum to the alleged misapplication, retainer, misfeasance or breach of trust. There is nothing in section 412 which may be construed as conferring such a power on the Court to take compulsory proceedings as may become necessary against those upon whom, the assets or estate of the deceased delinquent director who may have become liable under section 412, had not devolved.[9]

6. **Nature of examination.** Persons examined under section 352 are not protected under section 15 of Qanun-e-Shahadat, as in these proceedings there is no contest between two parties.[10] Moreover persons examined under this section are not accused persons and they are not entitled to constitutional protection guaranteed by Article 13 of the Constitution of Pakistan 1973.[11] The use of words "in civil proceedings" is meant to make the statement admissible unconditionally in civil proceedings and subject to Art. 15, Qanun-e-Shahadat in criminal proceedings.[12]

7. **Counsel may appear.** A party entitled to conduct examination is entitled to do so with the help of a counsel.[13]

8. **Examination note, who may inspect.** Only creditor, contributory or party to the proceedings is entitled to inspection of note of examination.[14]

9. **Appeal.** Where a company is under liquidation and an order is made under this section imposing a penalty, an appeal lies against the order under section 10.[15]

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7. AIR 1965 Cal. 372.
8. AIR 1959 Ker. 388.
9. PLD 1987 Lah. 618.
10. AIR 1926 Lah. 385=27 Cr.L.J. 1383.
11. AIR 1965 SC 654.
12. AIR 1926 Lah. 385=27 Cr.L.J. 1383.
13. AIR 1931 Lah. 8.
14. AIR 1926 Lah. 246 (DB).
15. 1976 Dhaka L R 402 (DB).

An order under section 352 directing the public examination of the directors,[16] or an order refusing inspection and copies of statements is appealable under section 10.[17]

353. *Powers to arrest absconding contributory.* The Court at any time either before or after making a winding up order, on proof of probable cause for believing that a contributory is about to quit Pakistan or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and movable property to be seized, and him and them to be safely kept until such time as the Court may order.

1. **Scope.** Where appellant contributory was required to furnish adequate security in sum of Rs. 15 lacs but he failed to comply with that orders and absented himself on due date of hearing. Apart from the provisions of section 353 of this Ordinance, the order of arrest of the appellant could also be sustained with reference to the provisions of section 94, C.P.C. which provides that in order to prevent the ends of justice from being defeated, the Court may issue a warrant to arrest of the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with an order for security, commit him to the civil prison.[18]

354. *Saving or other proceedings.* Any powers conferred on the Court by this Ordinance shall be in addition to, and not in derogation of, any existing power of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

1. **Scope.** Section 354 deals with the powers of the Court with regard to the estate of a contributory or a debtor but the section contains no indication that those powers could be exercised in the summary proceedings under section 412.[19]

Voluntary winding up. It is explicit from the provisions of section 354 that the liquidator in a voluntary winding up is not bound to apply to the Court under section 391 for enforcing the call but may proceed by way of a suit for the recovery of the statutory debt.[20]

ENFORCEMENT OF ORDERS

355. *Powers to enforce orders.* All orders made by a Court under this Ordinance may be enforced in the same manner in which decrees of such Court made in any suit may be enforced.

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16. AIR 1944 Mad. 87 (DB).
17. AIR 1926 Lah. 246 (DB).
18. 1986 P. Cr. L.J. 335=NLR 1985 Cr. 394 (DB).
19. AIR 1946 Mad. 304=ILR 1946 Mad. 507.
20. AIR 1956 Nag. 204=ILR 1956 Nag. 556.

Synopsis

1. Scope.
2. Execution outside jurisdiction of Court.
3. Court-fee.
4. Limitation.

1. Scope. A payment order though not a decree is to be executed in the same manner in which a decree can be executed.[1]

2. Execution outside jurisdiction of Court. Where applications are made to the High Court for directing the District Courts concerned to enforce the payment orders made by another High Court in the matter of the winding up of the Company, the proper procedure as indicated by the conjoint effect of sections 355 and 356 is that the order that is filed should be treated in the same manner as a decree passed by the High Court in which it is filed and transferred for execution to the respective District Courts concerned and it is not competent for the High Court to authorize the official liquidator to apply to the District Courts concerned for enforcing the order under section 307.[2]

3. **Court-fee.** There is a distinction, both real and practical, and not merely artificial, between an order that has, by statute, the force of a decree and an order that may, by statute, be enforced in the same manner as a decree. An order that is given by statute the force of a decree is an order that *proprio vigore* stands as a decree whatever the consequence, whereas an order that may, by statute, be enforced as a decree is an order that may be of little or no effect, *proprio vigore*, and only becomes effective, when executed by the method by which a decree may be executed. In other words, it is a mere shadow unless and until life is infused into it by an application for execution. It is a well-recognised rule of interpretation of statute that there is a presumption that the Legislature means different things by different phraseology; and when it describes an order as having the force of a decree, it must mean something different from the description of an order which may be in the same manner as a decree. Hence an executable order of the Liquidation Judge made under Companies Ordinance which, under section 355 can be enforced in the same manner as a decree is not equivalent to an order having the force of a decree under Sch. II, Art. 11, Court Fees Act.[3]

4. Limitation. The application for execution of an order made under section 342 read with section 355 by the High Court is governed by Art. 183 and not by Art. 182 of the Limitation Act.[4]

356. *Order made by any Court to be enforced by other Courts.* Any order made by a Court for, or in the course of, winding up of a company shall be enforceable in any place in Pakistan, and in the same manner in all respects as if such order had been made by a

1. AIR 1921 Lah. 78=3 ILJ 382=67 Ind. Cas. 443 (DB).
2. AIR 1927 Mad. 271 (54 Ind. Cas. 364, *Diss. from*)+AIR 1927 Pat. 182 (DB).
3. AIR 1946 Lah. 146=211 Ind. Cas. 114 (FB).
4. AIR 1962 SC 403+AIR 1954 All. 362.

Court having jurisdiction in respect of that company or a Court to whom the Court refers the order for enforcement.

Synopsis

1. Scope. 2. Procedure.

1. **Scope.** Section 356 applies where an order made by the High Court of one Province is to be enforced in another Province; it can only be enforced by High Court of that other Province.[5] Thus a decree passed by one High Court in liquidation proceedings cannot be sent direct for execution to a District Court within the jurisdiction of another High Court.[6] Similarly where an order for payment in respect of a call is made by the High Court, an application for its enforcement cannot be made directly to the District Court concerned.[7]

Where an application is made to the High Court for directing District Courts concerned to enforce the payment orders made by another High Court in the matter of the winding up of a company, the proper procedure is to treat the order as a decree passed by the High Court in which it is filed and transfer it for execution to respective District Courts. In such cases the High Court cannot authorise the official liquidator to apply to the District Court concerned under section 307.[8]

2. **Procedure.** Where an order under the ordinance by a Court is sought to be enforced in another Court the procedure laid down in section 39 and Order 2, Rules 4 and 5, Civil P.C. need not be followed. An order passed by a Court under the Ordinance can be enforced by another Court on production of a certified copy of the order.[9]

357. *Mode of dealing with orders to be enforced by other Courts.* Where any order made by one Court is to be enforced by another Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such certified copy shall be sufficient evidence of such order having been made; and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, in the same manner as if it were the order of the Court enforcing the same.

1. **Scope.** An order passed by a Court under the Companies Ordinance can be enforced by another Court on a mere production of a certified copy of the order. The order need not be transferred for execution under section 39, Civil P.C.[10]

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5. AIR 1930 Mad. 74=53 Mad. 147 (DB).
6. AIR 1927 Pat. 182 (DB).
7. AIR 1930 Mad. 74=53 Mad. 147 (DB).
8. AIR 1927 Mad. 271.
9. AIR 1943 Sind 89=ILR 1942 Kar. 504 (DB).
10. AIR 1943 Sind 89=ILR 1942 Kar. 504=297 Ind. Cas. 275 (DB).

VOLUNTARY WINDING UP

RESOLUTION FOR, AND COMMENCEMENT OF VOLUNTARY WINDING UP

358. *Circumstances in which company may be wound up voluntarily.* A company may be wound up voluntarily--

(*a*) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

(*b*) if the company resolves by special resolution that the company be wound up voluntarily;

and, in the subsequent provisions of this Part, the expression "resolution for voluntary winding up" means a resolution passed under clause (*a*) or clause (*b*).

Synopsis

1. Compulsory winding up. 2. Voluntary winding up.
3. Appeal.

1. Compulsory winding up. Voluntary liquidation of a company under section 358 is no bar to its being compulsorily wound up under section 305 at the instance of the creditors or contributories under section 394. Where a company goes into voluntary liquidation during the pendency of a petition by the creditors for winding up, the liquidators appointed by the company *pendente lite* cannot contest the order directing the compulsory winding up, in pursuance of the petition.[11]

2. Voluntary winding up. For a voluntary winding up of a company, by a special resolution under clause (2) of the section, no reason need be given at all.[12] But it is necessary that a special resolution for winding up the company must be passed. If that is not done and the undertaking of the company is sold so as to virtually wind up the company, the sale may be held to be invalid and ineffective by the Court.[13]

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11. AIR 1914 Lah. 36 (Cases decided under Act, 1882).
12. 55 Mys H C R 107 (DB). (But the notice of the meeting must specify the intention to pass a special resolution. A notice which merely states that the question of voluntary winding up will be considered at the meeting but says nothing about passing a special resolution cannot amount to sufficient notice).
13. AIR 1964 Ker. 114.

A special resolution for winding up the company does not become invalid because other matters relating to the agreement of amalgamation is also mixed up in the same resolution.[14]

Adjustment of assets and liabilities by mutual arrangement. Where in case of a Finance Company, all affairs of the company had been fully wound up by mutual arrangement as evidenced by relinquishment deed. Directors of the Company who were the only shareholders had among themselves adjusted assets and liabilities of the company. State Bank would had no objection to passing of final dissolution order. Company was ordered to be dissolved.[15]

Powers of company in course of winding up. A company which exists after it has transferred its undertaking, only for the purpose of being wound up has no power, by a vote of the general meeting, to expend a portion of its funds in the payment of gratuities to its servants or directors.[16]

3. **Appeal.** In appeal the Court can pass orders to bring the company back to the state in which it was at the time when it was illegally wound up. Thus where a company was fraudulently wound up by the resolution of its members, and the landlord re-entered into possession of land leased to the company on the ground of a breach of covenant due to the winding up of the company but subsequently the Court declared the resolution to wind up to be void. It was held that the acts done by the landlord such as granting of leases to other persons were not valid.[17]

359. *Commencement of voluntary winding up.* A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.

1. **Commencement of voluntary winding up.** The passing of the resolution which under section 359 commences a voluntary winding up is in law interpreted to take place on the date on which the resolution is confirmed. As a rule a supervision order does not affect the commencement date. In other words, the commencement of the winding up under the supervision of the Court is to be deemed to begin from the same time as a voluntary winding up under section 359. That means, an application made thereafter for the continuance of the winding up under the supervision of the Court does not as a rule bring about any change in the date of the commencement of that proceeding. But that rule has no application for the purposes of section 410 which provides both for winding up by Court and for winding up under supervision of the Court. For the purposes of section 410 a winding up subject to the provision of the section is deemed to commence at the time of the presentation of the petition for the same as contemplated by section 396.[18]

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14. AIR 1925 Bom. 49 (DB).
15. 1986 CLC 2408=NLR 1986 CLJ 196.
16. (1893) 23 Ch D 654+(1905) 21 T L R 685 (Company transferring its undertaking under a scheme and existing only for the purpose of winding up--Gratuities cannot be paid out of the compensation to the servants where there is nothing in the scheme authorising the payment)+(1903) 89 L T 243.
17. AIR 1937 Cal. 129=ILR (1937) 1 Cal. 203 (DB).
18. 38 Pat. 1080 (DB).

CONSEQUENCES OF VOLUNTARY WINDING UP

360. *Effect of voluntary winding up on statutes of company.* In the case of voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

Synopsis

1. Proceedings against company. 2. Suit by company.
3. Reference to arbitration.

1. **Proceedings against company.** The voluntary liquidation of a company does not by itself suspend the right of a person to commence or continue a legal proceeding against the company.[19] The liquidation effects no change in its position in the suit. The only change that happens is that in the conduct of its defence the liquidator will act instead of the directors.[20] However, the liquidation of a company during the pendency of a suit instituted against it does not invalidate, the authority given by its directors to their solicitors by a retainer, before the liquidation.[1]

2. **Suit by company.** The voluntary liquidation of a company brings about only an internal change so that the liquidator would henceforward exercise the powers of the directors in respect of any suit instituted by the company before the commencement of liquidation. But the plaintiff in the suit would still be the company itself and therefore, it is not necessary to substitute the liquidator as the plaintiff.[2]

3. **Reference to arbitration.** Although a voluntary liquidator independently of the company, has no power to refer to arbitration any dispute between the company and any other party, a company can, if so desired, refer matters to arbitration on the ground of expediency, in spite of its having gone into liquidation. But even in the case of voluntary winding up, exercise by the Liquidator of the powers to make a compromise or arrangement with creditors, contributories, etc. is subject to the control of the Court and once the supervision order is made, these powers can be exercised only with the sanction of the Court.[3]

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19. AIR 1931 Cal. 569=58 Cal. 913 (DB).
20. AIR 1935 SC 79=62 Ind. App. 100=13 Rang. 256.
1. AIR 1954 Bom. 35=ILR 1954 Bom. 21 (DB).
2. AIR 1926 Nag. 303.
3. AIR 1947 Lah. 355 (DB)+AIR 1964 Punjab 472.

361. *Notice of resolution to wind up voluntarily.* (1) Notice of any resolution for winding up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the official Gazette, and also in a newspaper circulating in the Province where the registered office of the company is situate and, in the case of a listed company, such notice shall also be published at least in one issue of a daily newspaper in the English language and a daily newspaper in the Urdu language having circulation in the Province in which the stock exchange on which it is listed is situate and a copy thereof shall be sent to the registrar immediately thereafter.

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues; and every officer of the company who without reasonable excuse authorises or permits the default or is a party to the default shall be liable to a like penalty.

(3) For the purpose of this section, a liquidator of a company shall be deemed to be an officer of the company.

1. **Scope.** Non-compliance with the provisions of section 361 does not vitiate the resolution for winding up the company. The failure amounts only to an irregularity and not an illegality.[4]

DECLARATION OF SOLVENCY

362. *Declaration of solvency in case of proposal to wind up voluntarily.* (1) Where it is proposed to wind up a company voluntarily, its directors, or in case the company has more than three directors, the majority of the directors, including the chief executive, may, at a meeting of the board of directors make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company, and that having done so, they have formed the opinion that the company has no debts, or that it will be able to pay all its debts in full within such period not exceeding twelve months from the commencement of the winding up, as may be specified in the declaration.

(2) A declaration made as aforesaid shall have no effect for the purpose of this Ordinance, unless--

4. AIR 1952 Madh B 3.

(a) it is made within the five weeks immediately preceding the date of the passing of the resolution for winding up the company and is delivered to the registrar for registration before that date; and

(b) it is accompanied by a copy of the report of the auditors of the company, prepared, so far as the circumstances admit, in accordance with the provisions of this Ordinance, on the profit and loss account of the company for the period commencing from the date up to which the last such account was prepared and ending with the latest practicable date immediately before the making of the declaration and the balance-sheet of the company made out as on the last mentioned date and also embodies a statement of the company's assets and liabilities as at that date.

(3) Any director of a company making a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the declaration shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both.

(4) If the company is wound up in pursuance of a resolution passed within the period of five weeks after the making of the declaration, but its debts are not paid or provided for in full within the period specified in the declaration; it shall be presumed, until the contrary is shown, that the director did not have reasonable grounds for his opinion.

(5) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Ordinance referred to as "a members' voluntary winding up", and a winding up in the case of which a declaration has not been so made and delivered is in this Ordinance referred to as "a creditors' voluntary winding up".

(6) Sub-sections (1) to (3) shall not apply to a winding up commenced before the commencement of this Ordinance, in which case the provisions applicable immediately before such commencement shall apply.

Synopsis

1. Voluntary members winding up.
2. Affidavit of declaration not necessary.

1. **Voluntary members winding up.** Without compliance with the provisions of section 362 there can be no valid member's voluntary liquidation.[5] If a voluntary winding up is bad in so far as it does not conform to the provisions of section 362, then the appointment of the liquidator himself is bad and *a fortiori* the continuance of the voluntary liquidation with the voluntary liquidator. However, the precise effect of the provisions of section 362 is to divide all voluntary winding up, which are commenced under section 358, into two categories, namely, members' voluntary winding up and creditors' voluntary winding-up.[6] If a certain condition is satisfied namely, that a declaration of solvency has been made by the directors, the winding up qualifies for the description "members winding up" but if this condition is not satisfied, the winding up will be classed as a creditor's winding up. It would thus appear that no winding up commenced as provided by section 358, can be rendered bad by reason of anything appearing in section 362.[7]

2. **Affidavit of declaration not necessary.** Section 362 does not require that there should be an affidavit by each of the directors making the declaration.[8]

PROVISIONS APPLICABLE TO MEMBERS' VOLUNTARY WINDING UP

363. *Provisions applicable to members' voluntary winding up.* The provisions contained in sections 364 to 370, both inclusive, shall, subject to the provisions of section 371 apply in relation to a members' voluntary winding up.

364. *Appointment of liquidators.* (1) The company in general meeting shall appoint one or more liquidators whose written consent to act as such has been obtained in advance, for the purpose of winding up the affairs and distributing the assets of the company.

(2) The liquidator or liquidators shall be entitled to such remuneration by way of percentage of the amount realised by him or them by disposal of assets or otherwise, as the company in general meeting may fix having regard to the amount and nature of the work to be done and subject to the prescribed limits:

Provided that different percentage rates may be fixed for different types of assets and items.

(3) In addition to the remuneration payable under sub-section (2), the company in general meeting may authorise payment of a monthly allowance to the liquidator for meeting the expenses of the winding

5. AIR 1952 Madh B 3+AIR 1950 East Punj. 188 (DB) (Affidavit not making declaration of solvency—No auditor's report—Winding up is not a member's winding up).
6. AIR 1950 East Punj. 188 (DB).
7. PLD 1952 Lah. 148=PLR 1952 Lah. 678.
8. AIR 1948 Oudh 197=23 Luck. 210 (DB).

up for a period not exceeding twelve months from the date of the commencement of winding up.

(4) The remuneration fixed as aforesaid shall not be enhanced subsequently but may be reduced by the Court at any time.

(5) If the liquidator resigns, is removed from office or otherwise ceases to hold office before conclusion of winding up, he shall not be entitled to any remuneration and remuneration already received by him, if any, shall be refunded by him to the company.

(6) On the appointment of a liquidator all the powers of the directors, chief executive and other officers shall cease, except for the purpose of giving notice of resolution to wind up the company and appointment of liquidator and filing of consent of liquidator in pursuance of sections 361 and 366 or in so far as the company in general meeting, or the liquidator sanctions the continuance thereof.

(7) The liquidator shall not resign or quit his office as liquidator before conclusion of the winding up proceedings except for reasons of personal disability to the satisfaction of the Court and may also be removed by the Court for reasons to be recorded.

Synopsis

1. Invalid liquidation.
2. One of liquidators refusing to act.
3. Restriction on liquidator.
4. Director appointed liquidator.

1. **Invalid liquidation.** Where a voluntary liquidation itself is not valid on account of non-compliance with section 362, the appointment of the liquidator also is vitiated.[9]

2. **One of liquidators refusing to act.** Where one of two persons appointed liquidators jointly, refuses to act, the resolution appointing them becomes abortive. One of them cannot take up the work alone.[10]

3. **Restriction on liquidator.** A liquidator in voluntary liquidation must not by the resolution appointing him be restricted in the exercise of his statutory duties. Thus where to work out a scheme of amalgamation the liquidator was appointed in respect of the transferee Company subject to the supervision of the Directors of the transferor and transferee Company; it was held that such restriction was highly objectionable.[11]

9. AIR 1950 East Punjab 188 (DB).
10. AIR 1928 All. 165=50 All. 419.
11. AIR 1928 PC 180=55 Ind. App. 274=52 Bom. 571.

4. Director appointed liquidator. Although a director loses most of his powers on his appointment as liquidator, he does not cease to be a director.[12]

365. *Power to fill vacancy in office of liquidator.* (1) If a vacancy occurs by death, resignation or otherwise in the office of any liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditor, fill the vacancy by appointing a person who has given his written consent to act as liquidator.

(2) For that purpose a general meeting shall be convened by the outgoing liquidator before he ceases to act as liquidator except where the vacancy occurs by death or where there were more liquidators than one, by the continuing liquidator, and failing that may be convened by any contributory, or by the Court on the application of the registrar or any person interested in the winding up of the company.

(3) The meeting shall be held in the manner provided by this Ordinance or by the articles or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court.

(4) If default is made in complying with the provisions of this section, every person, including the outgoing liquidator, who is in default shall be punishable with fine which may extend to one hundred rupees for every day during which the default continues.

366. *Notice of appointment of liquidator to be given to registrar alongwith his consent.* (1) The company shall give notice to the registrar of the appointment of a liquidator or liquidators made by it under sections 364 and 375, of every vacancy occurring in the office of liquidator, and of the name of the liquidator or liquidators appointed to fill every such vacancy under section 365 or a change made under section 368 and shall send therewith the consent of the liquidator to act as such where any appointment is made.

(2) The notice aforesaid shall be given by the company within ten days of the event to which it relates.

(3) If default is made in complying with sub-section (1) or sub-section (2) the company, and every officer of the company (including every liquidator or outgoing or continuing liquidator) who is in

12. AIR 1942 Mad. 702=44 Cr. L.J. 503.

default, shall be punishable with fine which may extend to one hundred rupees for every day during which the default continues.

1. **Scope.** By disputing the validity of his appointment the liquidator cannot save himself from the penalty prescribed under the section for a default in giving a notice of his appointment to the registrar.[13]

367. *Power to liquidator to accept shares, etc., as consideration for sale of property of company.* (1) Where--

(*a*) a company (in this section called the "transferor company") is proposed to be, or is in the course of being, wound up altogether voluntarily; and

(*b*) the whole or a part of its business or property is proposed to be transferred or sold to another body corporate, whether a company within the meaning of this Ordinance or not (in this section called "the transferee company"),

the liquidator of the transferor company may, with the sanction of a special resolution of that company conferring on the liquidator either a general authority or an authority in respect of any particular arrangement,--

(*i*) receive, by way of compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company; or

(*ii*) enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests or in addition thereto, participate in the profits of, or receive any other benefit from, the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either--

(*a*) to abstain from carrying the resolution into effect; or

13. AIR 1917 All. 93=18 Cr. L.J. 510.

(*b*) to purchase his interest at a price to be determined by agreement or by arbitration in the manner hereafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase money shall be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purpose of this section by reason only that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators; but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless it is sanctioned by the Court.

(6) The provisions of the Arbitration Act, 1940 (X of 1940), other than those restricting the application of this Ordinance in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section.

Synopsis

1. Amalgamation of companies. 2. Resolution for amalgamation.
3. Arbitration.

1. Amalgamation of companies. The amalgamation of a company with another company is not confined to formation of new company to carry on business of the old. There must be sale of assets as a whole in return for shares in the purchasing company.[14] It is to be noted that every company has a right of amalgamation with another company irrespective of its own constitution but the amalgamation will not bind the transferee company unless its constitution empowers it to effect such an acquisition.[15]

When amalgamation may be made under this section. The machinery provided by section 284 is available whether there is or is not a winding up in progress whereas this section is applicable only in view or in course of a winding up.[16]

2. Resolution for amalgamation. A resolution mixing voluntary winding up with other matters relating to the agreement of amalgamation with another company is legal. A resolution authorising liquidators to adopt an agreement and carry the same into effect, is quite legal and that authorization need not be in words of the section.[17]

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14. AIR 1925 Bom. 49 (DB).
15. AIR 1928 PC 180=55 Ind. App. 274=52 Bom. 571.
16. AIR 1937 Bom. 423.
17. AIR 1925 Bom. 49 (DB).

3. **Arbitration.** The arbitration contemplated in this section is one between the company in liquidation and one or more of its members. It is an arbitration to settle an internal dispute or difference as distinguished under section 305 which is one between a company and either another company or an individual, a third party.[18] Under section 367(3) what the arbitrator has to determine is the price at which the interest of the dissentient members should be purchased by the liquidator. The price assumes a sale at least notionally. The market may be hypothetical. In fixing the price of a dissentient member's interest the arbitrator certainly will have to take into account the assets of the company and its liabilities but he will have to take into account several other factors as well. It is not possible to give an exhaustive list of such factors. But it is wrong to determine the price by dividing the estimated market value of the net assets of the company by the number of ordinary shares. To adopt such a basis is practically to equate the position of a share-holder to that of a tenant in common along with the other share-holders in respect of the company's assets. The contention of the dissenting member of a transferor company within the meaning of section 369 (3) that at any given point of time a share-holder is notionally entitled to an aliquot part of the net assets of the company is not tenable. It may be that the prospect of distribution such as is contemplated under section 385 at the conclusion of a winding up, would be a material factor in assessing the value of the interest of a share-holder, in virtue of his holding shares in the company. Undoubtedly if the net assets which will be available for distribution are likely to be of considerable value then the value of the interest of the share-holder will also be enhanced. It is not tantamount to saying that the value of the interest is an arithmetical fraction of the estimated market-value of the net assets of the company on the date of the winding up, or on the date when the resolution is passed for the transfer of the business of the company to another company.[19]

368. *Duty of liquidator to call creditors' meeting in case of insolvency.* (1) If, in the case of a winding up commenced after the commencement of this Ordinance, the liquidator is at any time of opinion that the company will not be able to pay its debts in full within the period stated in the declaration under section 362, or that period has expired without the debts having been paid in full, he shall forthwith summon a meeting of the creditors and shall lay before the meeting a statement of the assets and liabilities of the company and such other particulars as may be prescribed.

(2) Where sub-section (1) becomes applicable, the creditors may in their meeting held as aforesaid appoint a different liquidator who has consented to act as such and in that case the person so appointed shall be the liquidator unless otherwise directed by the Court.

(3) A return of convening the creditors meeting as aforesaid alongwith a copy of the notice thereof and a statement of assets and

18. AIR 1940 Cal. 220=ILR (1940) 1 Cal. 358 (DB).
19. AIR 1960 Mad. 43=ILR 1959 Mad. 859 (DB).

liabilities of the company and the minutes of the meeting shall be filed with the registrar within ten days of the date of the meeting.

(4) If the liquidator fails to comply with any of the requirements of this section, he shall be punishable with fine which may extend to five thousand rupees and, in the case of a continuing failure, to a further fine not exceeding one hundred rupees for every day after the first during which the failure continues.

369. *Duty of liquidator to call general meeting at the end of each year.* (1) Subject to the provisions of section 371, in the event of the winding up continuing for more than one year, the liquidator shall—

(*a*) summon a general meeting of the company at the end of the first year from the commencement of the winding up, and, if the proceedings are not concluded during the first year and extension is granted under section 387, within thirty days of such extended period;

(*b*) lay before the meeting an audited account of his receipts and payments and acts and dealings and of the conduct of the winding up during the preceding year together with a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation, including reasons for the delay in finalisation of the winding up, steps taken and being taken to expedite it and the time required for the purposes; and

(*c*) forward by post to every contributory a copy of the account and statement referred to in clause (*b*) together with the auditor's report and notice of the meeting at least ten days before the meeting required to be held under this section.

(2) A return of convening of each general meeting together with a copy of the notice, account and statement as aforesaid and the minutes of the meeting shall be filed by the liquidator with the registrar within ten days of the date of the meeting.

(3) If the liquidator fails to comply with this section, he shall be liable, in respect of each failure, to a fine not exceeding five thousand rupees and, in the case of a continuing failure, to a further fine not exceeding one hundred rupees for every day after the first during which the failure continues.

370. *Final meeting and dissolution.* (1) Subject to the provisions of section 371, as soon as the affairs of the company are fully wound up, the liquidator shall--

(*a*) make up a report and account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of and such other particulars as may be prescribed; and

(*b*) call a general meeting of the company for the purpose of laying the report and account before it, and giving any explanation thereof.

(2) The account referred to in clause (*a*) of sub-section (1) shall be audited and a copy thereof together with a copy of the auditor's report and notice of meeting shall be sent by post to each contributory of the company at least ten days before the meeting required to be held under this section.

(3) The notice of the meeting specifying the time, place and object of the meeting shall also be published at least ten days before the date of the meeting in the manner specified in sub-section (1) of section 361 for publication of a notice under that sub-section.

(4) Within one week after the meeting, the liquidator shall send to the registrar a copy of his report and account, and shall make a return to him of the holding of the meeting alongwith the minutes of the meeting in the prescribed manner.

(5) If a quorum is not present at the meeting, the liquidator shall, in lieu of the return referred to in sub-section (4), make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made within one week after the date fixed for the meeting alongwith a copy of his report and account in the prescribed manner, the provision of sub-section (4) as to the making of the return shall be deemed to have been complied with.

(6) The registrar, on receiving the report and account and either the return mentioned in sub-section (4) or the return mentioned in sub-section (5), shall, after such scrutiny as he may deem fit, register them, and on the expiration of three months from such registration, the company shall be deemed to be dissolved.:

Provided that, if on his scrutiny the registrar considers that the affairs of the company or the liquidation proceedings have been conducted in a manner prejudicial to its interest or the interest of its

creditors and members or that any actionable irregularity has been committed, he may take action in accordance with the provisions of this Ordinance:

Provided further that the Court, may on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect, for such time as the Court thinks fit.

(7) It shall be the duty of the person on whose application an order of the Court under the foregoing proviso is made, within fourteen days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and, if that person fails so to do, he shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues.

(8) If the liquidator fails to comply with any requirements of this section, he shall be punishable with fine which may extend to five thousand rupees and, in the case of a continuing failure, to a further, fine which may extend to one hundred rupees for every day after the first during which the failure continues.

1. Limitation. If the registrar does not do his duty, or the necessary preliminaries which would justify registration not having been observed he insists on something more being done before he takes action the period of three months does not begin to run until he does not take such action. It is not correct to assume that the legislature intended in such cases for the time to run from the date of the filing of the return with the registrar.[20] The Court has also the power under sub-section (6) to extend the period of time even on an application made after the expiry of the period of three months.[1]

371. *Alternative provisions as to annual and final meetings in case of insolvency.* Where section 368 has effect, sections 381 and 382 shall apply to the winding up, to the exclusion of sections 369 and 370, as if the winding up were creditor's voluntary winding up and not a member's voluntary winding up:

Provided that the liquidator shall not be required to summon a meeting of creditors under section 381 at the end of the first year from the commencement of the winding up, unless the meeting held under section 368 has been held more than three months before the end of the year.

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20. AIR 1931 Lah. 500=13 Lah. 190 (DB).
1. AIR 1957 Ker. 189=ILR 1957 Ker. 675.

PROVISIONS APPLICABLE TO CREDITORS' VOLUNTARY WINDING UP

372. *Provisions applicable to creditors' voluntary winding up.* The provisions contained in sections 373 to 382, both inclusive, shall apply in relation to creditors' voluntary winding up.

1. **Irregularity in appointment of liquidator.** Where in a winding up the provisions of sections 364 to 382 had not been observed due to an oversight; it was held that the proper course to follow was to convene a meeting of the creditors after due notice and advertisement under section 361 and consider therein, after placing before it a list of all creditors with an estimate of their claims, all matters arising under those sections.[2] When a creditors' meeting was eventually called, it would be open to the meeting to nominate a liquidator and appoint a committee of inspection.[3]

373. *Meeting of creditors.* (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the general meeting of the company at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notice of the general meeting of the company.

(2) The company shall cause notice of the meeting of the creditors to be advertised in the manner specified in sub-section (1) of section 361 for the publication of a notice under that sub-section.

(3) The directors and chief executive of the company shall--

(*a*) cause a full statement of the position of the company's affairs and assets and liabilities together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of creditors to be held as aforesaid: and

(*b*) appoint one of their number to preside at the said meeting.

(4) It shall be the duty of the director appointed to preside at the meeting of creditors to attend the meeting and preside thereat.

(5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at

2. PLD 1952 Lah. 148=PLR 1952 Lah. 678+AIR 1941 Cal. 30.
3. PLD 1952 Lah. 148=PLR 1952 Lah. 678.

the meeting of the creditors, held in pursuance of sub-section (1) of this section, shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company.

(6) If default is made--

(*a*) by the company in complying with sub-sections (1) and (2);

(*b*) by the directors and chief executive of the company in complying with sub-section (3);

(*c*) by any director of the company in complying with sub-section (4);

the company, each of the directors or the director or the chief executive, as the case may be, shall be punishable with fine which may extend to five thousand rupees and, in the case of a continuing default, to a further fine which may extend to one hundred rupees for every day after the first during which the default continues, and in the case of default by the company, every officer of the company who is in default shall be liable to the like punishment.

Synopsis

1. Scope.
2. Creditors' meeting, omission to call.

1. **Scope.** Where all the formalities specified in section 373 have been complied with, a mere technical mistake in giving the resolution its proper name, that is to say special or extraordinary, cannot amount to a defect which will in any way vitiate or invalidate the act of voluntary winding up of the Company.[4]

2. **Creditors' meeting, omission to call.** The requirement of section 373, notwithstanding that they are covered by a penal section, should be held to be directory, and not mandatory.[5] An omission to convene a creditors meeting, as provided by section 373, is only an irregularity which can be cured and not an illegality which vitiates the resolution for winding up the company.[6]

374. *Notice of resolution passed by creditors' meeting to be given to registrar.* (1) Notice of any resolution passed at a creditors' meeting in pursuance of section 373 shall be given by the company to

4. AIR 1955 J & K 32 (DB).
5. PLD 1952 Lah. 148=PLR 1952 Lah. 678.
6. PLD 1952 Lah. 148+AIR 1946 Nag. 196 (DB) (Resolution for winding up passed at meeting convened under section 203 before convening creditors meeting--Proper course is to convene creditors' meeting--Resolution for winding up need not be again passed at a fresh meeting--Even if so passed winding up commences from date of first resolution only)+AIR 1962 Punj. 190.

the registrar, along with the consent of the liquidator to act as such, within ten days of the passing thereof.

(2) If default is made in complying with sub-section (1), the company and every officer of the company who is in default shall be punishable with fine which may extend to two hundred rupees for every day during which the default continues.

(3) For the purpose of this section, a liquidator of the company shall be deemed to be an officer of the company.

375. *Appointment of liquidator.* (1) The creditors and the company at their respective meetings mentioned in sections 368 and 373 may nominate a person who has given his written consent to act as such, to be liquidator for the purpose of winding up the affairs and distributing the assets of the company.

(2) If the creditors and company nominate different persons, the person nominated by the creditors shall be liquidator:

Provided that any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors.

(3) If no person is nominated by the creditors, the person, if any, nominated by the company shall be liquidator.

(4) If no person is nominated by the company, the person, if any, nominated by the creditors shall be the liquidator.

(5) The liquidator shall not resign or quit his office as liquidator before conclusion of the winding up proceedings except for reasons of personal disability to the satisfaction of the Court and may also be removed by the Court for reasons to be recorded.

1. Scope. The condition precedent for moving the Court for removal of liquidator is a meeting of creditors where they shall determine whether an application shall be made to the Court for appointment of any person as liquidator in place of, or jointly with, the liquidator appointed by the company.[7]

Where the question was whether the candidate who had been voted for by the majority in number of the creditors present and voting at the meeting or another

7. AIR 1936 Pat. 468.

who had been voted for by the minority in number but possessing the majority in value was validly nominated as the liquidator, the Court answered the question in favour of the former.[8]

376. *Appointment of committee of inspection.* (1) The creditors at the meeting to be held in pursuance of section 368 or 373 or at any subsequent meeting may, if they think fit, appoint a committee of inspection consisting of not more than five persons.

(2) If such a committee is appointed, the company may either at the meeting at which the resolution for voluntary winding up is passed or at any subsequent general meeting, appoint such number of persons, not exceeding five, as they think fit to act as members of the committee:

Provided that the creditors may, if they think fit, resolve that all or any of the person so appointed by the company ought not to be member of the committee of inspection.

(3) If the creditors so resolve, the person mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as a member of the committee.

(4) On any application to the Court for a direction under sub-section (3), the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the creditors' resolution.

(5) Subject to the provisions of sub-sections (2) to (4) and to such rules as may be prescribed, the provisions of section 332, except sub-section (1) thereof, shall apply with respect to a committee of inspection appointed under this section as they apply with respect to a committee of inspection appointed in a winding up by the Court.

377. *Fixing of liquidator's remuneration.* (1) The liquidator shall be entitled to such remuneration by way of percentage of the amount realised by him by disposal of assets or otherwise as the committee of inspection, or if there is no such committee, the creditors may fix having regard to the amount and nature of the work to be done and not exceeding the prescribed limits:

Provided that different percentage rates may be fixed for different types of assets and items.

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8. (1953) 1953-1 All E R 508 (DB).

(2) In addition to the remuneration payable under sub-section (1), the committee of inspection or the creditors, as the case may be, may authorise payment of a monthly allowance to the liquidator for meeting the expenses of the winding up for a period not exceeding twelve months from the date of commencement of winding up.

(3) The remuneration fixed as aforesaid shall not be enhanced subsequently but may be reduced by the Court at any time.

(4) If the liquidator resigns, is removed from office or otherwise ceases to hold office before conclusion of winding up, he shall not be entitled to any remuneration and the remuneration already received by him, if any, shall be refunded by him to the company.

378. *Directors' powers to cease on appointment of liquidators.* On the appointment of a liquidator, all the powers of the directors, chief executive and other officers shall cease, except for the purpose of giving notice of resolution to wind up and appointment of the liquidator and filing of consent of the liquidator as required under this Ordinance and except so far as committee of inspection or if there is no such committee, the creditors, in general meeting may sanction the continuance thereof.

379. *Power to fill vacancy in office of liquidator.* If a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, other than a liquidator appointed by or by the direction of, the Court, the creditors in general meeting may fill the vacancy by appointing a person who has given his written consent to act as liquidator, and for this purpose the provisions of section 365 shall *mutatis mutandis* apply.

380. *Application of section 367 to a creditors' voluntary winding up.* The provisions of section 367 shall apply in the case of a creditors' voluntary winding up as in the case of a members' voluntary winding up with the modification that the powers of the liquidator under the said section shall not be exercised except with the sanction either of the Court or of the committee of inspection.

381. *Duty of liquidator to call meetings of company and of creditors at the end of every year.* (1) In the event of the winding up continuing for more than one year, the liquidator shall--

(*a*) summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of the winding up and, if the proceedings are not concluded

during the first year and extension is granted under section 387, within thirty days of such extended period;

(*b*) lay before the meetings an audited account of his receipts and payments and acts and dealings and of the conduct of winding up during the preceding year together with a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings and position of liquidation including reasons for the delay in finalisation of the winding up, steps taken and being taken to expedite it and the time required for the purpose; and

(*c*) forward by post to every creditor and to every contributory a copy of the account and statement referred to in clause (*b*) together with the auditors' report and notice of the meeting at least ten days before the meeting required to be held under this section.

(2) A return of convening of each general meeting and creditors' meeting together with a copy each of the notices, accounts and statement as aforesaid and the minutes of the meetings shall be filed with the registrar within ten days of the date of the meeting.

(3) If the liquidator fails to comply with this section, he shall be liable in respect of each failure to a fine which may extend to five thousand rupees and, in the case of a continuing failure, to a further fine which may extend to one hundred rupees for every day after the first during which the failure continues.

382. *Final meeting and dissolution.* (1) As soon as the affairs of the company are fully wound up, the liquidator shall--

(*a*) make up a report and account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of and such other particulars as may be prescribed; and

(*b*) call a general meeting of the company and a meeting of the creditors for the purpose of laying the report and account before the meetings and giving any explanation thereof.

(2) The account referred to in clause (*a*) of sub-section (1) shall be audited and a copy thereof together with a copy of the auditor's report and notice of the meeting shall be sent by post to each contributory and creditor of the company at least ten days before the meetings required to be held under this section.

(3) The notice of the meetings referred to in this section specifying the time, place and object thereof shall also be published at least ten days before the meeting in the manner specified in sub-section (1) of section 361 for the publication of a notice under that sub-section.

(4) Within one week after the date of the meetings, or if the meetings are not held on the same date, after the date of the later meeting, the liquidator shall send to the registrar a copy of his report and account, and shall make a return to him of the holding of the meetings alongwith the minutes of the meetings in the prescribed manner.

(5) If a quorum (which for the purpose of this section shall be two persons) is not present at either of such meetings, the liquidator shall, in lieu of the return referred to in sub-section (4), make a return that the meetings were duly summoned and that no quorum was present thereat and, upon such a return being made within one week after the date fixed for the meetings alongwith a copy of his report and account in the prescribed manner, the provisions of sub-section (4) as to making of the return shall, in respect of that meeting, be deemed to have been complied with.

(6) On receiving the report and account and also, in respect of each such meeting either the return mentioned in sub section (4) or the return mentioned in sub-section (5), the registrar shall after such security as he may deem fit, register them, and on the expiration of three months from the registration thereof the company shall be deemed to be dissolved:

Provided that, if on his scrutiny the registrar considers that the affairs of the company or the liquidation proceedings have been conducted in a manner prejudicial to its interests or the interests of its creditors or members or that any actionable irregularity has been committed, he may take action in accordance with the provisions of this Ordinance:

Provided further that the Court may, on the application of the liquidator or any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(7) It shall be the duty of the person on whose application an order is made by the Court under the foregoing proviso, within fourteen days after the making of the order, to deliver to the registrar

a certified copy of the order for registration and, if that person fails so to do, he shall be liable to a fine which may extend to one hundred rupees for every day during which the default continues.

(8) If the liquidator fails to comply with any requirements of this section, he shall be punishable with fine which may extend to five thousand rupees and in the case of a continuing failure, to a further fine which may extend to one hundred rupees for every day after the first during which the failure continues.

Synopsis

1. Dissolution of company.
2. Application for deferring date of dissolution.

1. **Dissolution of company.** A company in liquidation ceases to exist as a separate entity capable of holding the property only when the final meeting under section 382 has taken place. Until then it retains its complete existence so that if the liquidation is annulled at any time before the meeting it will resume its powers.[9]

Creditors of dissolved company, if may sue. The assets of a private company *A* which was in financial difficulties were purchased by a new company which was floated by the secretary of company *A*. After the sale company *A* went into voluntary liquidation. There having been by the deal, an unjust enrichment on the part of the secretary, the plaintiffs who were the share-holders of company *A* instituted a suit against the secretary of the new company and its directors for possession, vesting or reconveyance of the property transferred to the new company through the fraud and influence of the secretary. It was held that such a suit was maintainable even though company *A* had already been dissolved. The basis of such a suit was that under the Company Law the share-holders have a residuary right to the assets of a defunct-corporation. But in such a suit the new company could plead that it had bona fide developed the property as a distinct legal entity and that it was not liable to reconvey the corpus to the plaintiff.[10]

2. **Application for deferring date of dissolution.** A person who claims to be vitally interested in a company which has gone into liquidation by reason of his agreeing to buy fully paid-up shares from a registered share-holder is not entitled to apply under section 386 (*b*) proviso and section 429 nor is he entitled to apply under section 388. Even if he has paid for and got shares from the registered share-holder that will not clothe him with any interest at all because a transfer is only possible after previous sanction from the liquidator. Further, it is only the transferor share-holder who can apply to the liquidator for transfer. The liquidator is not bound to take notice of such application from outsiders, especially when the

9. AIR 1959 All. 245 (Hence a money decree passed can be executed against a company in liquidation).
10. AIR 1960 Mad. 410.

liquidator's case is that the company is fully dissolved and he is no longer the liquidator.[11]

PROVISIONS APPLICABLE TO EVERY VOLUNTARY WINDING UP

383. *Provisions applicable to every voluntary winding up.* The provisions contained in sections 384 to 395, both inclusive, shall apply to every voluntary winding up whether a members' or a creditor's winding up.

384. *Accounts and statements to be audited.* (1) All accounts and statements referred to in sections 369, 370, 381 and 382 shall, before being placed before the meetings of the creditors or contributories, be duly audited by an auditor appointed in the manner provided in section 434.

(2) The auditor's report shall be annexed to the accounts and statements referred to in sub-section (1).

(3) The auditor shall submit his report within two months of the end of the period to which the accounts relate, or within such extended time as may be allowed to him by the registrar.

(4) Whoever fails to comply with any provision of this section shall be punishable with a fine which may extend to five thousand rupees.

385. *Distribution of property of company.* Subject to the provisions of this Ordinance as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

Synopsis

1. Foreign company. 2. Distribution of assets.
3. Creditor's rights.

1. Foreign company. The Courts of a country dealing with the winding up of a company can ordinarily deal with the assets within their jurisdiction and not with the assets of the company outside their jurisdiction. It is therefore necessary that if a company carries on business in countries other than the country in which it is incorporated, the Court's of those countries too should be able to conduct winding

11. 64 Cal W N 991

up proceedings of its business, in their respective countries. Such winding up of the business in a country other than the country in which the company was incorporated is really an ancillary winding up of the main company whose winding up may have already been taken up in that country or may be taken up at the proper time. It is the company incorporated outside Pakistan which is rally wound up as an unregistered company in Pakistan. Section 444 itself says that the company incorporated outside Pakistan may be wound up as an unregistered company when it ceases to carry on business in Pakistan. Where there are no separate creditors or contributories of the so-called unregistered company and there are no separate creditors or contributories of the offices or branches of the company in Pakistan. All the creditors and contributories are readily creditors and contributories of the company incorporated outside Pakistan and therefore all of them on principle, should be able to do what creditors and contributories resident in Pakistan can do in the winding up proceedings.[12]

2. Distribution of assets. There is no warrant in this section for the view that at any given point of time a share-holder is notionally entitled to an aliquot part of the net assets of the company.[13] The section only provides that the property of the company, on its winding up, shall be applied in the *pari passu* satisfaction of its liabilities. This provision is however, subject to other provisions regarding preferential payment.[14]

Provision in the articles as to how dividends are to be distributed while the company is a going concern does not *per se* govern or affect the distribution of surplus assets in a winding up.[15] A company though private, is distinct from the persons composing it and the liquidator cannot in the normal course of a liquidation, pay the creditors merely a part of their debts, when large surplus assets remain in hand, and then allow the contributories without definition of their interests to take possession for themselves of those surplus assets.[16]

Money illegally received by company. Where a company has been receiving monies when it had no right under the law to receive them, such monies cannot form part of its assets. Hence on the company going into liquidation those monies cannot be dealt with under section 385 but must be entirely paid back to the persons who paid them when they are intact and are traceable from the assets of the company.[17]

Decree held by company. A decree held by a company at the time of its liquidation forms part of its assets. Where a decree held by a company was attached in execution of the decree passed against the company after its voluntarily going into liquidation, an application by liquidators for removal of attachment should be granted.[18]

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12. AIR 1963 SC 500.
13. AIR 1960 Mad. 43=ILR 1959 Mad. 859 (DB).
14. PLD 1986 Lah. 18 (DB).
15. AIR 1939 Cal. 126+AIR 1952 Trav-Co. 192.
16. AIR 1931 PC 203.
17. AIR 1946 Nag. 196 (DB) (Company not registered as Insurance Company receiving contributories in its entirety).
18. AIR 1925 Oudh 483.

Scheme by share-holders. Where a company has gone into voluntary liquidation there is nothing illegal or contrary to the provisions of the Ordinance in the share-holders arriving at a scheme of liquidation whereby the debts and liabilities of the company are to be paid and the balance distributed. If the question arises whether the scheme arrived at is one for the discharge of the debts of the company or for the distribution to share-holders before payment of debts in contravention of section 385, the scheme as a whole ought to be looked at. Thus a scheme, the main purpose of which is the discharge of the debts of the company by the sale of its assets to the share-holders, cannot be condemned as amounting to a scheme for the distribution of assets to the share-holders before payment of debts merely because the share-holders are allowed to deduct the value of their shares from the amount paid by them as the price of the assets at their value.[19]

3. Creditor's rights. When a company goes into liquidation, though a voluntary one, the remedy of a creditor is only to take what he can take under the scheme of liquidation and nothing more. A creditor who obtains a decree against the company going into liquidation cannot recover the whole amount due under the decree but only a share of the decree in the terms of the scheme of liquidation.[20] As a mere attachment creates no charge or lien upon the attached property in favour of the attaching creditor until the property is actually sold, an attaching creditor of a company stands on the same footing as one who has a money claim against the judgment-debtor. Hence it would go against the provisions of the section to allow the creditors to proceed with the execution.[1] Where the State obtained a decree for costs against a company, and on the Company going into voluntary liquidation, the Liquidator applied for stay of execution and deposited the amount. The Court directed the withholding of the payment to the State of this amount and leave it to be available for the creditors of the company to be distributed *pari passu* in accordance with the scheme of section 382. The State was directed to prove its debt in accordance with law and claim the amount out of the assets of the company rateably.[2] It must however be noted that this section does not bar execution proceedings against a company gone into voluntary liquidation, unless a competent Court has granted leave for winding up or stay of proceedings. A liquidator, a dissatisfied creditor can move the Court.[3]

The provision that the assets of the Company in voluntary liquidation shall be applied in satisfaction of its liabilities *pari passu* is intended for the guidance of the private liquidator and does not control the Court's power to entertain applications for execution against the assets of the company to the detriment of other creditor.[4] However, except in the case of preferential creditors, the Court will as a matter of course, and in the absence of special circumstances, stay execution proceedings against a company in a voluntary liquidation because the result of allowing a judgment creditor to levy execution would inevitably interfere with the scheme of

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19. AIR 1958 Andh Pra. 666 (DB).
20. AIR 1930 Lah. 299.
1. AIR 1931 Lah. 589+AIR 1963 MP 201+(1924) 2 KB 410.
2. AIR 1963 M P 201.
3. AIR 1916 All. 174=38 All. 407 (DB).
4. AIR 1931 Cal. 569=58 Cal. 913 (DB).

distribution of the assets *pari passu* amongst the creditor in accordance with section 385.[5]

Landlord's right to rent. The owner of a house who has leased it out to a company which has subsequently gone into voluntary liquidation is not entitled to be paid out of the assets of the company the entire amount of rent due from the company for the period anterior to the date of its liquidation. He is entitled in regard to that period only to ratable distribution on the same footing as other creditors. But for the period subsequent to the date of liquidation, during which the liquidator continues to occupy the house for the purposes of liquidation, he is entitled to the full amount due as rent.[6]

386. *Application of sections 328 and 329 to voluntary winding up.* The provisions of sections 328 and 329 shall, so far as may be, apply to every voluntary winding up as they apply to winding up by the Court except that references to--

(*a*) "the Court" shall be omitted;

(*b*) the "official liquidator" or the "provisional manager" shall be construed as references to the liquidator; and

(*c*) the "relevant date" shall be construed as reference to the date of commencement of the winding up; and

the report referred to in section 329 shall be submitted to the registrar instead of the Court.

387. *Powers and duties of liquidator in voluntary winding up.* (1) The liquidator may--

(*a*) in the case of a members' voluntary winding up, with the sanction of a special resolution of the company, and, in the case of a creditors' voluntary winding up, of either the Court or the committee of inspection, or (if there is no such committee) of a meeting of the creditors, exercise any of the powers given by sub-section (1) of section 333 to a liquidator in a winding up by the Court;

(*b*) without the sanction referred to in clause (*a*), exercise any of the other powers given by this Ordinance to the liquidator in a winding up by the Court;

(*c*) exercise the power of the Court under this Ordinance of settling a list of contributories, which shall be *prima facie*

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5. AIR 1931 Cal. 309=ILR (1952) 1 Cal. 160.
6. AIR 1936 Oudh 11=11 Luck. 515 (DB).

evidence of the liabilities of the persons named therein to be contributories;

(*d*) exercise the power of the Court of making calls;

(*e*) summon general meetings of the company and creditors for the purpose of obtaining the sanction of the company by special resolution or for any other purpose he may think fit.

(2) The exercise by the liquidator of the powers given by clause (*a*) of sub-section (1) shall be subject to the control of the Court; and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of the powers conferred by this section.

(3) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

(4) The liquidator shall within thirty days of the coming into his hands of any funds sufficient to distribute among the creditors or contributories after providing for expenses of the winding up or for other preferential payments as provided in this Ordinance, distribute in accordance with the provisions of this Ordinance:

Provided that such portion of the funds as may be required for meeting any claim against the company which may be *sub judice* or subject-matter of adjudication or assessment shall not be distributed till the claim is finally settled:

Provided further that any amounts retained as aforesaid shall be invested by the official liquidator in Khas Deposit Certificates or in such other securities or instruments as may be prescribed and the distribution thereof shall be made by him after the pending claims are settled.

(5) The winding up proceedings shall be completed by the liquidator within a period of one year from the date of commencement of winding up:

Provided that the Court may, on the application of the liquidator, grant extension by one month at any time but such extensions shall not exceed a period of six months in all and shall be allowed only for the reason that any proceedings for or against the company are pending in a Court and the Court shall also have the power to require expeditious disposal of such proceedings as it could under section 317 if the company was being wound up by the Court.

(6) If an official liquidator is convicted of misfeasance, or breach of duty or other lapse or default in relation to winding up proceedings of a company, he shall cease to be the official liquidator of the company and shall also become disqualified, for a period of five years from such conviction, from being the liquidator of, or to hold any other office including that of a director in any company and if he already holds any such office he shall forthwith be deemed to have ceased to hold such office.

(7) When several liquidators are appointed, any power given by this Ordinance may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any two or more of them.

Synopsis

1. Scope.
2. Suit by liquidator.
3. Calls to share-holders.
4. Decree without impleading liquidator.
5. Repudiation of shares.
6. Time limit for winding up proceedings.

1. **Scope.** The meaning to be given to the words such in S. 387 (1)(*b*) must be the same when a company is being wound up in a member's voluntary winding up as in the case when a company is being wound up in creditors' voluntary winding up. It seems fairly clear that so far as a creditors' voluntary winding up is concerned, no sanction of the Court is required for the exercise of the power referred to in section 387 (1)(*b*). The same meaning should be given to the same words when they are applied to a members' voluntary winding up. Reading the provisions of section 387 as a whole, it is not necessary for the liquidators in a voluntary winding up to obtain the sanction of the Court for the sale of the immovable and movable properties of the company.[7]

2. **Suit by liquidator.** The liquidator in a voluntary winding up is entitled by reason of section 333,(1)(*a*) read with section 387 to file a suit in the name and on behalf of the company of which he is the liquidator without obtaining the sanction of the Court.[8] Even in the absence of any express investment of power from the share-holders because he has such power statutorily under the provisions of this section itself.[9]

More than one liquidator. The provisions of sub-section (7) of section 387 are mandatory and they cannot be ignored either on the ground of hardship or on the

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7. 59 Bom L. R 1016 (The Court however can record its sanction to the sale under S. 518 and the Court did so in this case at the request of parties who were anxious to have it in view of the large purchase price involved and the unhappy language of the section).
8. AIR 1956 Nag. 204=ILR 1956 Nag. 556.
9. AIR 1932 All. 342 (DB) (Hence the omission from the resolution of the share-holders conferring certain powers on him of any mention of the power to file suits does not in any way affect the competency of the suits filed by him).

ground that they are merely procedural.[10] Therefore a suit must be instituted, when there are several liquidators, by two of them at least. If one of them alone institutes the suit, it is *ab initio* void and the defect cannot be cured by allowing another liquidator to sign the plaint subsequently.[11]

3. **Calls to share-holders.** After the winding up, the liability to pay the call is *ex lege* and not *ex contractu*.[12] Where the liquidator in a voluntary winding up placed on the list of contributories certain persons who had failed to pay for the shares allotted to them and after making a call upon them to pay what was due applied to the Court under section 391. It was held that the Court was entitled to enforce the call without requiring the liquidator to institute a suit.[13] Where a company had passed a resolution for making a call without appointing a time and place for payment; it was held that the liquidator was entitled to supplement the resolution by giving notice of a time and place.[14]

4. **Decree without impleading liquidator.** Where a decree was obtained against a company in voluntary liquidation not after impleading the firm and an individual who had been appointed as joint liquidator but by impleading only a member of that firm; it was held that the decree was not binding on the liquidators and that they were entitled to repudiate the claim filed in respect of the money due under that decree.[15]

5. **Repudiation of shares.** A share-holder in a company which is voluntarily wound up cannot repudiate his shares or rescind the contract in respect of them or claim back the money paid by him on the ground of any fraudulent representations of the directors which induced him to take the shares.[16]

6. **Time limit for winding up proceedings.** Under section 387(5) winding up proceedings are required to be completed within a period of one year from the commencement of the winding up. But this period can be extended and Court can grant extension for one month at a time but the total period of extension should not exceed six months.[17]

388. *Power of Court to appoint and remove liquidator in voluntary winding up.* (1) If from any cause whatever, there is no liquidator acting, the Court may appoint an official liquidator in accordance with the provisions of section 321 who shall have the same powers, be subject to the same obligations and in all respect

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10. 1958 Him Pra. 1.
11. AIR 1958 Him Pra. 1 (The resolution of the Board of liquidators authorising one of themselves to file the suit can be of no avail because it is against the statutory provision contained both in section 212 (3) of the old Act and section 512 (4) of the present Act).
12. AIR 1962 Punj. 190+AIR 1963 Mys. 61.
13. AIR 1941 Mad. 565 (DB) (*Held* also that the amounts became payable when the calls were made by the liquidator and no question of limitation arose).
14. (1877) 3 C.P.D. 282.
15. AIR 1928 All. 165=50 All. 419.
16. (1877) 3 C.P.D. 282.
17. PLD 1994 Lah. 125=PLJ 1994 Lah. 99.

stand in the same position as an official liquidator appointed by the Court has in winding up by the Court.

(2) The Court may, on cause shown, remove a liquidator and appoint an official liquidator in his place on the application of any creditor or contributory or the registrar or a person authorised by the Authority.

(3) The remuneration to be paid to the official liquidator appointed under sub-section (1) or sub-section (2) shall be fixed by the Court as if the company were being wound up by the Court.

Synopsis

1. Appointment of liquidator. 2. Removal of liquidator.

1. Appointment of liquidator. The person chosen for appointment as liquidator must be one who will act independently, particularly of the persons against whom claims may be pending. He should be a person who will discharge his duties without favouring either side.[18]

Appointment of joint liquidator. The court can extend time for making an application for the appointment of a person as joint liquidator in a voluntary winding up but the Court has no jurisdiction to make an appointment with retrospective effect. When application is made for appointment of a joint liquidator, the Court is not required to register by a formal order the recommendation of the creditor as to the person to be appointed as joint liquidator. The Court may or may not act on the resolution of creditors. The matter is entirely discretionary with the Court. Till an order is made appointing a person to act as joint liquidator such person cannot take upon himself the duties of a joint liquidator and such assumption does not give him any rights whatever.[19]

2. Removal of liquidator. In company's voluntary winding up the liquidator can be removed by Court on cause shown with reference to the interest of liquidation and purpose of his appointment.[20] Section 388(2) does not provide that only a creditor can show due cause for the removal of a liquidator.[1] However, where the creditors seek removal of a liquidator a condition precedent to moving the Court for removal of the liquidator is a meeting of the creditors held in pursuance of sub-section (1) of section 373 in which the creditor should determine whether an application would be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company.[2]

Where removal may be ordered. The due cause shown for the removal of a liquidator is to be measured by reference to the real, substantial honest interests of

18. (1909-10) 26 T L R 132.
19. AIR 1925 Cal. 809=53 Cal. 106.
20. AIR 1924 Bom. 339=48 Bom. 471 (DB).
1. PLD 1960 Lah. 384.
2. AIR 1936 Pat. 468.

liquidation, and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation. Where it was urged that since a number of the share-holders, holding the bulk of the shares, were now opposed to the liquidator and considered that without his replacement, affairs in liquidation could not move properly, it was necessary for the beneficial winding up of the company that another liquidator should be appointed. The Court did not remove the liquidator but ordered that a regular meeting of the creditors be called and that final orders would be passed after ascertaining the views of the creditors expressed through the meeting.[3]

Where real, substantial and honest interest of liquidation and the purpose for which a liquidator is appointed has been defeated by the respondent on account of his more than one act of misfeasance. It is in the interest of winding up proceedings to order his removal.[4] Similarly where the liquidator in a voluntary winding up was intimately connected with the directors who were also directors of other companies and therefore it appeared to the Court; that in the investigations into the dealings between those other companies and that company, he would not be in a position to take an independent course, it removed him from the office of the liquidator and appointed another in his place.[5]

389. *Notice by liquidator of his appointment.* (1) Every liquidator shall, within fourteen days after his appointment, publish in the official Gazette, and deliver to the registrar for registration, a notice of his appointment in the form prescribed.

(2) If the liquidator fails to comply with the requirements of sub-section (1), he shall be liable to a fine not exceeding two hundred rupees for every day during which the default continues.

1. **Scope.** By disputing the validity of his appointment the liquidator cannot save himself from the penalty prescribed under the section for a default in giving a notice of his appointment to the Registrar.[6]

390. *Arrangement when binding on company and creditors.* (1) Any arrangement entered into between a company about to be, or in the course of being wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by a special resolution and on the creditors if acceded to by three-fourth in number and value of the creditors.

(2) Any creditor or contributory may, within twenty-one days from the completion of the arrangement, appeal to the Court against

3. AIR 1952 Lah. 148=PLR 1952 Lah. 678.
4. PLD 1960 Lah. 348.
5. (1909-10) 16 T.L.R 132.
6. AIR 1917 All. 93=39 All. 412=18 Cr. L.J. 510.

it, and the Court may thereupon, as it thinks just, amend, vary, confirm or set aside the arrangement.

1. **Scope.** The provisions of section 390 are mandatory; where they are not complied with, parties cannot seek to enforce the transaction by invoking the doctrine of part performance. Where the original composition deed was modified at a meeting of the debenture holders but it appeared that the resolution was not acceded to by three-fourths in number and value of the creditors. It was held that the resolution was not binding on the creditors, and that the fact that the original scheme was modified by an application to the Court did not matter.[7]

391. *Power to apply to Court to have questions determined or powers exercised.* (1) The liquidator or any contributory or creditor may apply to the Court--

(*a*) to determine any question arising in the winding up of a company; or

(*b*) to exercise as respects the enforcing of calls, the staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the Company were being wound up by the Court.

(2) The liquidator or any contributory may apply to the Court specified in sub-section (3) for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up.

(3) An application under sub-section (2) shall be made--

(*a*) if the attachment, distress or execution is levied or put into force by a High Court, to such High Court, and

(*b*) if the attachment, distress or execution is levied or put into force by any other Court, to the Court having jurisdiction to wind up the company.

(4) The Court, if it is satisfied that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other orders on the application as it thinks just.

(5) A copy of an order staying the proceedings in the winding up, made by virtue of this section, shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar,

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[7] AIR 1931 All. 59 (DB)

who shall make a minute of the order in his books relating to the company.

Synopsis

1. Scope.
2. Right to apply.
3. Validity of winding up
4. When power may be exercised.
5. Dispute regarding title.
6. Stay of execution proceedings.
7. Removal of attachment.
8. Order for payment of calls.
9. Public examination of Directors.
10. Misfeasance proceedings.
11. Miscellaneous.

1. **Scope.** The scope of Section 391 being limited, the High Court in an application under that section, cannot determine questions which primarily involve findings of fact (such as whether the liquidator can validly pay to the auction-purchaser share-holder the first return of dividend and whether if the first return is payable to the original share-holder, the liquidator should refund the purchase-money to the auction-purchaser and exercise lien for dues afresh on the shares of the original share-holder). The Court cannot also give any opinion on any hypothetical proposition.[8]

Adjustment of right of contributories. When the application is in substance and in effect an application for the adjustment of the rights of the contributories *inter se* and for distribution of the surplus amongst the persons entitled thereto. It can be determined even in the case of a company in voluntary liquidation.[9]

2. **Right to apply.** Before passing an order under section 391 the Court must be satisfied that the applicant is a person who is entitled to make an application. For that purpose the Court is entitled to enter into an enquiry either *suo motu* or on the objection of the opposite party, and find out for itself whether the applicant is a creditor or the liquidator as he claims to be. The Court is not bound to accept as a fact the statement of the applicant in that behalf.[10] It has been held that the Registrar of companies has no *locus standi* under the section to apply for the removal of a liquidator in a voluntary winding up.[11]

3. **Validity of winding up.** An applicant seeking the help of the Court under section 391 cannot challenge either the fact or the validity of the voluntary winding up.[12] But a person opposing a petition under section 391 is entitled to challenge the right of the petitioner to apply on the ground that the winding up itself is void.[13]

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8. AIR 1961 Orissa 80.
9. PLD 1959 Dacca 336 = 11 DLR 10.
10. AIR 1952 Madh-B. 3.
11. AIR 1941 Bom. 25 = ILR 1941 Bom. 39
12. PLD 1959 Dacca 366 = 11 DLR 10 + AIR 1941 Madh B. 3 + AIR 1936 Pat. 468.
13. AIR 1952 Madh B. 3.

4. When power may be exercised. The power under section 391 can be exercised only if the Court is satisfied that the exercise of the power would be just and beneficial not only to the petitioner but to all the parties concerned.[14]

5. Dispute regarding title. The Ordinance does not give any power to the Court on an application under section 391 to adjudicate upon questions of title which are in dispute between the liquidator and third parties.[15]

6. Stay of execution proceedings. Sub-section (2) is confined to situations contemplated by sub-section (4). Consequently section 391 does not come to the rescue of the liquidator in cases failing outside the purview of sub-section (4). It is only when the attachment, etc. is levied or put into force either in a High Court or in any other Court, that the stay would be applied for in the High Court or in the other Court having jurisdiction to wind up the Company.[16]

Application for stay necessary. The passing of a resolution for voluntary winding up cannot by itself stay any proceedings or invalidate executions or distress or prevent actions or other proceedings being brought or continued against the company without the leave of the Court.[17] Where the Liquidator without applying for stay under the section, unsuccessfully opposes the execution in the executing Court and in appeal, he cannot afterwards obtain a declaration to the effect that the declaration was invalid.[18]

Stay order, grant of. In the case of a voluntary liquidation, if the liquidator is confronted with a decree which has to be satisfied out of the assets of the company before distribution of the assets among the creditors, his proper remedy is to approach the Court, for proper direction.[19] It is to be noted that while in the case of a compulsory liquidation the creditor has to show special grounds for being permitted to proceed with his action in an ordinary Court in the case of a voluntary winding up the onus is on the liquidator to show reasons for staying the action brought against the company by the creditor.[20] An order for perpetual injunction restraining a decree-holder from executing the decree against the company will be passed even where it is shown that there ought not to have been a decree. It is not necessary to prove fraud or collusion.[1]

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14. PLD 1959 Dacca 366=11 DLR 10+AIR 1952 Mad B. 3 (Exercise of power when the winding up itself is irregular is not a just exercise)+AIR 1936 Pat. 468.
15. AIR 1950 East Punj. 204 (DB).
16. AIR 1965 A P 159 (DB).
17. AIR 1915 Lah. 393+AIR 1935 Lah. 991 (DB)+AIR 1931 Lah. 589.
18. AIR 1915 Lah. 393.
19. AIR 1931 Cal. 569 (DB) (In the absence of a stay granted by the liquidation Court on the application for direction by the liquidator the Court executing the decree cannot stay execution).
20. AIR 1915 Lah. 344 (The proceedings in the action may be stayed when the liability of the company is admitted but there is only a dispute as to the amount due).
1. AIR 1932 Bom. 253 (DB).

It is the invariable practice of the Court to stay execution proceedings against the company in voluntary liquidation unless there are exceptional reasons for exercising its discretion otherwise.[2]

Preferential creditor. The preferential creditor's execution of his decree against a company in voluntary winding up should not be stayed by the Court under this section unless there are special circumstances justifying that course.[3]

Removal of stay. The Court in refusing to stay the execution of a decree under this section has the power to impose terms on the decree-holder.[4]

Supervision order. A voluntary liquidator is entitled to seek protection from proceedings against the company not only through an order of stay but also through a supervision order of the Court.[5]

7. **Removal of attachment.** The Court cannot, under section 391, set aside an order of attachment passed and put into force against the property of the company before the passing of the special resolution for voluntary winding up.[6] But where a Bank has gone into voluntary liquidation and a mortgage decree which it holds has been attached in execution of a decree passed against the Bank after liquidation, the High Court can and ought to order the removal of such attachment as otherwise it would give an advantage to the attaching creditor contrary to the provisions of section 385.[7]

8. **Order for payment of calls.** In a case of voluntary liquidation the liquidator can, by reason of section 387 (1)(*d*) exercise the power of the Court of making calls without its sanction. It is true that he may under section 391 (1) apply to the Court for enforcing the call and the Court may thereupon exercise all or any of the powers which it would exercise if the company were being wound up by the Court.[8] It is therefore clear that the Court can order the payment of a call only on being moved by the liquidator. It cannot act *suo motu* in the absence of such an application.[9] Moreover the liquidator is not bound to resort to the section for the purpose. It is open to him to file a suit for recovering the debt due under the calls.[10]

Jurisdiction of Court. The District Judge within whose jurisdiction the registered office of the company is situate has jurisdiction to pass an order under

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2. AIR 1931 Lah. 589 (Discretion must be exercised according to sound judicial principles--That attachment of property had been made before liquidation is no reason for departing from the ordinary rule of staying execution) + AIR 1928 All. 265.
3. AIR 1953 Cal. 309 = ILR (1952) 1 Cal. 160.
4. AIR 1953 Cal. 309 = ILR (1952) 1 Cal. 160.
5. AIR 1915 Lah. 393.
6. AIR 1952 Madh B. 3 (The expression "after the commencement of the winding-up" in sub-section (2) indicates the time of attachment and not the time of presenting an application under S. 216).
7. AIR 1925 Oudh 483.
8. AIR 1963 Mys. 61.
9. AIR 1915 Lah. 291 (Voluntary liquidation--Application of liquidator to enforce call dismissed--District Judge subsequently reviewing order *suo motu*--*Held* order was wrong).
10. AIR 1950 Nag. 204 + AIR 1928 All. 675 + AIR 1963 Mys. 61 (AIR 1950 Bom. 386 *held* obiter).

section 391 for payment of arrears on the call under section 341 even though the contributories to be ordered reside outside his jurisdiction.[11]

Appeal. Section 391 authroises the liquidator, a contributory or a creditor to take action under section 341 and hence where an application by the liquidator has been dismissed by the Court, a contributory who has been so authorised can bring an appeal against the dismissal in a representative character.[12]

9. Public examination of Directors. The expression "any other matter" in section 391 has been understood *ejusdem generis* with the preceding enumerated matters and in that sense an order under section 352 is not covered by the section. Therefore a voluntary liquidator is not entitled to ask the Court under section 391 to make an order for public examination of Directors, etc. which the Court can make on an application of the official liquidator.[13]

10. Misfeasance proceedings. There is nothing in section 391 which bars an application being made for an order for misfeasance proceedings against directors and liquidators in the course of a voluntary winding up.[14]

11. Miscellaneous. Liquidators dissatisfied with Registrar's decision under section 370 or creditors and contributories dissatisfied with the conduct of the liquidator can apply to the Court under section 391 for a proper order.[15]

392. *Application of liquidator to Court for public examination of promotors, directors, etc.* The liquidator may make a report to the Court stating that in his opinion a fraud or any other actionable irregularity has been committed by any person in the promotion of the company or by any officer of the company in relation to the company since its formation; and the Court may, after considering the report, direct that person or officer shall attend before the Court on a day appointed by it for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as officer thereof, in the manner provided for such examination in the case of winding up of a company by the Court.

393. *Costs of voluntary winding up.* All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall, subject to the rights of secured creditors, if any, be payable out of the assets of the company in priority to all other claims.

1. Scope. In a winding up the Court has a discretion to order the payment of the expenses including liquidator's remuneration, in such order as it may think just,

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11. AIR 1934 Lah. 362=15 Lah. 302.
12. 2 Sau L R 198.
13. AIR 1947 Lah. 283 (DB).
14. AIR 1950 Mad. 68 (DB) (per Viswanatha Sastri, J).
15. AIR 1931 Lah. 500=13 Lah. 190 (DB).

where it finds that the assets are insufficient to discharge the liabilities. Prima facie all expenses should be paid in priority to the liquidator's salary but the Court has to provide for his remuneration.[16]

394. *Saving for right of creditors and contributories.* The voluntary winding up of a company shall not bar the right of any creditors or contributory to have it wound up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.

1. **Scope.** Under section 394, voluntary winding up of a company is no bar to the right of any creditor or contributory to have it wound up by the Court.[17] However a creditor is not entitled as of right to ask a Court to convert voluntary winding up into a compulsory winding up. Before he can obtain such an order he must show that he as creditor, could obtain, had there been no voluntary winding up, an order compulsorily winding up the company. A creditor on the other hand who could have asked in the first instance for a compulsory winding up order can always come to Court and ask that the voluntary winding up should be converted into a compulsory one.[18] The rule still prevails that the Court in such a case is bound to pay regard not only to the wishes of the petitioning creditor but also to those of all the creditors. But the majority in such a case means majority in value.[19]

395. *Power of Court to adopt proceedings of voluntary winding up.* Where a company is being wound up voluntary, and an order is made for winding up by the Court, the Court may, if it thinks fit by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up.

WINDING UP SUBJECT TO SUPERVISION OF COURT

396. *Power to order winding up subject to supervision.* When a company has passed a resolution for voluntary winding up, the Court may of its own motion or on the application of any person entitled to apply to the Court for winding up a company, make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions, as the Court thinks just.

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16. (1934) 103 L.J. Ch. 187.
17. (1950) 54 CWN 514.
18. AIR 1938 All. 623.
19. (1950) 54 CWN 514.

Synopsis

1. Invalid winding up.
2. Jurisdiction of Court.
3. Supervision order, when passed.
4. Powers of Court in supervision.
5. Costs.
6. Appeal.

1. Invalid winding up. An order under this section cannot be made on the basis of a winding up which itself is invalid.[20] However, the fact that the resolution for winding up was passed on insufficient notice may render the order for supervision passed by the Court bad but not a nullity. Such a case is not one in which the Court has no jurisdiction to pass an order.[1]

2. Jurisdiction of Court. An order passed by the Court under this section in the case of a company whose registered office is not within its jurisdiction is a nullity.[2]

3. Supervision order, when passed. The power of the Court to order winding up subject to its supervision, as provided in section 396, is extremely wide and the Court may make such an order whenever it thinks fit and on such terms and conditions as it thinks just.[3] The section vests a discretion in the Court which would be exercised having regard to the facts and the circumstances of the case. The creditor or a contributory cannot as a matter of right obtain such an order, but if it can be shown that the resolution for voluntary winding up has been passed fraudulently or where the creditors support an order for supervision in order to safeguard their interests or where there is preponderating influence of the shareholders whose conduct is impeached or where investigation is required and the assets are large, the Court might pass an order under that section.[4] Where the apprehension of the petitioners, who held only 8 out of 125 shares of the company in liquidation, that their interests might be jeopardized by the award of too little compensation by the voluntary liquidator was natural and likely to be allayed if the Court stepped in to make a supervision order and such an order was also likely to be made for expedition and economy in winding up. It was held that in the circumstances an order of supervision under section 396 was justified.[5]

4. Powers of Court in supervision. The Court in a winding up under supervision has full authority to interfere and to exercise to any extent the power which it might have exercised if an order had been made for winding up the company by the Court.[6] Thus although a voluntary liquidator independently of the company has no power to refer to arbitration any dispute between the company and

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20. AIR 1958 Andh Pra. 666 (DB)+AIR 1952 Madh. B. 3 (Applicant cannot challenge winding up proceedings as void)+AIR 1936 Pat. 468 (Hence the applicant under the section cannot challenge the winding up proceedings as void).
1. AIR 1950 Lah. 721.
2. AIR 1950 East Punj. 188 (DB).
3. AIR 1964 Punj. 472.
4. AIR 1958 Andh Pra. 666 (DB).
5. AIR 1964 Punj. 472.
6. 6 Bom. 640.

any other party, a company can, if so desired refer matters to arbitration on the ground of expediency, in spite of its having gone into liquidation.[7]

5. **Costs.** Where certain creditors who were served with notice under the rules of Court to appear to oppose the petition appeared and supported the petition and further declined to go ahead with the proceedings as petitioners when the original petitioners withdrew; it was held that they were not entitled to any costs.[8]

6. **Appeal.** An order refusing to make a supervision order under this section is appealable under section 10.[9]

397. *Effect of petition for winding up subject to supervision.* A petition for the continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits and other legal proceedings, be deemed to be a petition for winding up by the Court.

398. *Court may have regard to wishes of creditors and contributories.* The court may, in deciding between a winding up by the Court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, but subject to the provisions which would have been applicable had the company been wound up by the Court.

399. *Powers to replace liquidator.* (1) Where an order is made for winding up subject to supervision, the Court shall by that order appoint an official liquidator who shall have the same powers, be subject to the same obligations and in all respects stand in the same position as if he had been appointed by the company.

(2) An application under this section may be made to the Court by any creditor or contributory or the registrar or a person authorised by the Authority in this behalf.

400. *Effect of supervision order.* (1) Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court in the same manner as if the company were being wound up altogether voluntarily.

(2) Except as provided in sub-section (1), and save for the purposes of section 352 an order made by the Court for a winding up

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7. AIR 1964 Punj. 472.
8. AIR 1938 Mad. 96=ILR 1938 Mad. 284 (DB).
9. 30 Mad. 22 (DB).

subject to the supervision of the Court shall for all purposes including the staying of suits and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make call or to enforce calls made by the liquidator, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "Official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court.

(4) Unless otherwise directed by the Court, an order for winding up subject to supervision shall not in any way affect the duties, obligations and liabilities of the liquidator as provided for in respect of voluntary winding up.

Synopsis

1. Powers of liquidator. 2. Appeal.

1. **Powers of liquidator.** A liquidator acting under the supervision of the Court any exercise all powers subject to any restriction imposed by company judge as if the company were being wound up altogether voluntarily. Thus where an insurance broker employed by a company, which had been ordered to be wound up subject to the supervision of the Court, compromised his claim in regard to office expenses with the liquidators and received and retained the payment made by the liquidators under the compromise in part satisfaction of his claim; it was held that he could not thereafter repudiate the arrangement on the ground that the arrangement in question was not sanctioned by the Court. The liquidators, *qua* liquidators might have required the sanction for their own protection. But when they took the risk of making the agreement and the further risk of obtaining the sanction, that was as between the Court and themselves. That did not however detract from the conclusiveness of the agreement as between the broker and them.[10] In case of execution of decrees obtained by the company, the liquidator represents the company, and is therefore one party whereas the judgment-debtor is the other party before the execution Court, and the executing Court while executing the decree, is not concerned with the instruction received by the liquidator from the authority subject to whose control he functions. He is to decide the case on merits on a consideration of facts and relevant law applicable to the matter awaiting his adjudication.[11]

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10. (1870) 23 L T 685.
11. 23 DLR 1 (DB).

2. **Appeal.** Orders passed in winding up proceedings under supervision of Court are appealable.[12]

401. *Appointment of voluntary liquidator as official liquidator in certain cases.* Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding up by the Court, the Court shall by the last mentioned order, appoint the voluntary liquidator, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court.

PROVISION APPLICABLE TO EVERY MODE OF WINDING UP

STATUS OF COMPANIES BEING WOUND UP

402. *Status of companies being wound up, etc.* A company being wound up shall continue to be a company for all purposes till its final dissolution in accordance with the provisions of this Ordinance and, unless otherwise specified all provisions and requirements of this Ordinance relating to companies shall continue to apply *mutatis mutandis* in the case of companies being wound up:

Provided that, from the date of commencement of the winding up of a company, the official liquidator or the liquidator shall be deemed to have taken the place of the directors, chief executive and managing agents of the company as the case may be.

1. **Scope.** Object of appointing a liquidator and his functions including carrying on business of Company, is to take steps to wind up the Company with a view to its eventual dissolution. This object can be achieved by liquidator by exercising powers of directors, who upon order for winding up being made, would be divested of all powers to act on behalf of the company.[13]

PROOF AND RANKING OF CLAIMS, ETC.

403. *Debts of all description to be proved.* In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Ordinance or the law of insolvency) all debts payable on the contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof

12. AIR 1935 Lah. 174.
13. PLD 1994 Kar. 186=NLR 1994 UC 184=PLJ 1994 Kar. 203.

against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason do not bear a certain value.

Synopsis

1. Scope.
2. Secured creditors.
3. Claim before liquidator.
4. Foreign companies.
5. Foreign creditors.
6. Employees, salaries of.
7. Appeal.

1. **Scope.** Reference to the law of insolvency in section 403 has not the effect of importing into company law the whole of the insolvency law. It only means those rules which are given in section 404 of the Ordinance.[14]

Rent of premises. Where the creditor makes a claim under section 403 for rent due for the premises occupied by the company in liquidation and the latter moves for the determination of the standard rent of the premises, the Court is required to determine such standard rent in those proceedings in accordance with the provisions of the relevant Rent Restriction Laws.[15]

Where, since the liquidation of a company, a premises leased out to it continue to be in the possession of the liquidator, the rent of that premises which falls due for the period of such possession is not a debt of the company which is governed by section 403 or section 404.[16]

Preferential share-holders. Where it was provided in the Articles of Association that the surplus assets were to be applied in the first place in repaying to the holder of preference shares, the amount paid up thereon and the residue belonged to the holder of the ordinary shares, it was held that arrears of preferential dividends cannot be treated as 'debts' and therefore be paid out of the assets of the company before the 'surplus assets' are ascertained.[17]

Debenture-holders. Debentures-holders are at liberty to prove with the other creditors against the general asset of the company to the extent to which the property comprised in their charge is unable to satisfy their claims in full.[18]

Negotiable Instruments holders. According to the established banking practice the contract involved in the purchase of a draft is what appears on the fact of the instrument and nothing more, in other words, the terms of the contract are fully embodied in the draft; the custom of the trade does not imply a contract for the carriage of money from one place to another; and therefore the relationship created is that of ordinary debtor and creditor. But there is the possibility of a special

14. AIR 1936 Pesh. 57 (DB) (Section 28 (2) of the Insolvency Act does not apply).
15. AIR 1963 Punj. 164.
16. AIR 1956 All. 586 (DB) (But the rent which fell due before the liquidation is a debt of the company which has to be dealt with under section 228 and paid *pro rata* under S. 229).
17. AIR 1939 Cal. 126=ILR (1938) 2 Cal. 533.
18. (1880) 15 Ch. D. 465.

contract for the carriage of the money, the only written evidence whereof is the draft. In such a case the draft would not embody the terms of the contract and whether the special contract be express or implied, sections 102 and 103 of Qanun-e-Shahadat would be no bar to its proof. Where there is a contract to transmit money there is an agency or trust. Provided a contract of that kind and so understood by both parties, is made out, it is possible to say that a person paying money to a bank under such a contract and on such terms is not in the position of an ordinary creditor, but is rather in the position of a trust or who entrusts the banks with money to be applied to a specific purpose, *viz.*, the purpose of its being carried to the other end and paid out there to the trustors himself or a nominee of his or to his order. Where in such a case the bank goes in liquidation, the purchaser of a draft cannot be ranked as an ordinary creditor but must be given priority.[19]

Directors. The Courts do not look with favour on agreements between directors for their own advantage, and certainly not on those which would prejudice other creditors in the even of liquidation where a director claims by virtue of a promise by a co-director to pay a big sum if anything went wrong with the company. The claim will not be allowed unless the formalities have been observed.[20]

Income tax. In matters relating to the assessment of income-tax the machinery that can be brought into action is the one provided by the Income-tax Ordinance, which is a complete Code by itself. Hence the jurisdiction of the Civil Courts is impliedly barred. Income-tax Ordinance, can expressly bar the institution of a suit in any Civil Court to set aside or modify an assessment made under it. Therefore income-tax authorities can prove their claim under section 403 of the Companies Ordinance, against a company in liquidation by the production of the assessment order of income-tax made by them, and on proof of their claim would be entitled to share the dividends declared after such proof but not to the dividends already declared or paid.[1]

2. Secured creditors. No secured creditor need prove or can be forced to prove his debt. He can stand wholly outside the liquidation proceedings if he so elects and rely upon his security or decree if he has obtained one provided he has obtained leave to proceed from the winding up judge.[2]

3. Claim before liquidator. By virtue of sections 403 and 404 the liquidator must be regarded as a person in whom the property had "become vested in trust for the specific purpose" within the meaning of section 10 of the Limitation Act of 1908.[3] A claim may be made in the winding up before the official liquidator

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19. AIR 1962 Ker. 210.
20. AIR 1935 Lah. 917.
1. PLD 1954 Lah. 551=PLR 1955 Lah. 1 (FB).
2. AIR 1929 All. 353=51 All. 695 (FB).
3. AIR 1962 Mad. 506 (DB)+AIR 1959 Cal. 646 (Hence an application for an order upon the liquidator to admit the claim of the applicant as an ordinary creditor cannot be thrown out on the ground that the period for enforcing the claim, reckoned in accordance with the provisions of Explanation to section 3, Limitation Act, from the date of the filing of the claim before the liquidator, had expired before the date of the Limitation Act does not apply to the case in view of section 10 of that Act).

provided it is not barred by limitation at the date of the winding up, namely the date on which the application for winding up was made.[4] The liquidator and the Court can, in the absence of special reason against it, admit a claim which was not barred at the date of the winding up order but which became so subsequently. In doing so they may also impose the condition that the admission of that claim shall not disturb the dividends already declared and the commitments already incurred by the liquidator.[5]

Liquidation damages claimed. Where it was argued that the claim in this case was incompetent as the claim really sounded in unliquidated damages and until the amount of damages was quantified by a decree in an action, the liquidator was really incompetent to entertain and adjudicate the claim. The Court refused to entertain the contention.[6]

Proof of claim. Where the winding up of a company has arrived at a stage when it has been ascertained that the company is not insolvent, the right of a creditor can only be that given to him under section 403. His proof of debt will be the same as it would have been had it been a proof as between himself and the company. To such a case section 404 has no application.[7] In view of section 403 which allows debts of all description to be put to proof, the holder of a decree for money is entitled to avail himself of the provisions of the Ordinance to recover the amount.[8] In such cases it is the duty of the liquidators to decide what is properly due from the company to various claimants and they are entitled to go behind decrees when they consider that they were not properly obtained.[9] But where a decree is passed after a regular contest against the Company, the official liquidator cannot go behind the decree and reopen the case.[10]

Where a Managing Agent has advanced a loan to the Company then even if he is found to have no authority to incur such loan, his claim against the company in winding up cannot be resisted on the ground of absence of authority. The claim has to be allowed under section 70 of the Contract Act for the cause of action for a claim under that section is not breach of that contract but voluntary acceptance and enjoyment and it is not on the basis of any subsisting contract between the parties, but on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party.[11]

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4. AIR 1957 All. 143 (DB) (Claim by Chairman of Board of Directors for past salary)+AIR 1959 Cal. 646.
5. AIR 1959 Cal. 646.
6. AIR 1964 Ker. 135 (DB).
7. AIR 1948 Mad. 64 (Hence where apart from the liquidation proceeding, a debt would be due to the creditor with interest either under his contract or otherwise he is entitled to prove and receive payment of interest on the debt as well).
8. AIR 1959 All. 245.
9. AIR 1940 All. 514+AIR 1927 All. 426 (Judgment obtained on admission of insolvent—Liquidator can ask for proof).
10. AIR 1927 All. 426=49 All. 728.
11. AIR 1963 Orissa 220 (DB).

Limitation. By virtue of sections 403 and 404 liquidator must be regarded as a person in whom property of company had "become vested in trust for a specific purpose" within the meaning of section 10 of the Limitation Act of 1908.[12]

4. Foreign companies. The Courts of a country dealing with winding up of a company can ordinarily deal with its assets within their jurisdiction and not with the assets of the company outside their jurisdiction. It is therefore necessary that if a company carries on business in countries other than the country in which it is incorporated, the Courts of those countries too should be able to conduct winding up proceedings of its business, in their respective countries. Such winding up of the business in a country other than the country in which the company was incorporated is really an ancillary winding up which may have already been taken up in that country or may be taken up at the proper time. Foreign creditors of a company which is incorporated outside Pakistan (in England) and carried on business in Pakistan can prove their claims in the winding up proceedings of the company as an unregistered company in Pakistan.[13] There is no authority which lays down that in the case of an unregistered company in a Province the creditors of that province alone have the right to share in the assets lying in that Province to the exclusion of all other creditors of the company in other places. All creditors of the company which is being wound up whether they are at the place of its incorporation or in the town where it has branches are entitled to share in the assets and this principle applies in the case of foreign companies also which are being wound up as unregistered companies.[14]

5. Foreign creditors. In liquidation proceedings under Part XIII of the Ordinance even the foreign creditors of the company are entitled to prove their claims.[15] A bank whose registered office was in India was wound up. The Court in Pakistan refused to recognise that winding up and allowed the branches in Pakistan to continue their business as a separate unit. When Pakistani creditors, sought to prove their debts in the winding up in India, Court permitted only such of them whose debts were enforceable in India, under the Private International Law, to prove the debts, refusing to apply to the case the rule of English Law under which all creditors, irrespective of the origin of their debts, are allowed to prove them, subject only to the condition, that they must bring in for distribution assets which they may receive abroad in satisfaction of their debts. The application of that rule, it was held, would be unjust and inequitable in view of the absence of reciprocity between the Courts of India and of Pakistan and also because of the difficulties which confronted a transfer of assets from Pakistan to India.[16]

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12. AIR 1959 Cal. 646 (Hence an application for an order upon the liquidator to admit the claim of the applicant as an ordinary creditor cannot be thrown out on the ground that the period for enforcing the claim, reckoned in accordance with the provisions of Explanation to section 3, Limitation Act, from the date of the filing of the claim before the liquidator, has expired before the date of the application. Section 3, Explanation of the Limitation Act does not apply to the case in view of section 10 of that Act).
13. AIR 1962 S C 500.
14. 2 Sau L R 12 (DB).
15. AIR 1952 Mad. 136.
16. AIR 1959 Cal. 762 (DB).

6. Employees, salaries of. In the winding up of a company its directors are entitled to rank as ordinary creditors in respect of the remuneration due to them under the articles, at the commencement of the winding up.[17] An employee of a company, whose contract of service with the company for a specified period becomes prematurely terminated, due to the winding up of the company, could enforce his claim under the contract against the company in the winding up. But he would not be entitled to the full amount he would have earned as salary, by way of compensation. His debt will have to be evaluated under section 403, as at the date of winding up after making deduction for the fact that he is free to do any business or seek employment as a result of the termination of his services with the company.[18]

7. Appeal. In settling the list of creditors the official liquidator acts in a judicial capacity and his order stands subject to the right of appeal to the judge.[19]

404. *Application of insolvency rules in winding up of insolvent companies.* In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividend out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

Synopsis

1. Rules under insolvency, applicability.
2. Solvent company.
3. Creditors entitled to prove their claims.
4. "Debt provable."
5. Secured and unsecured creditors.
6. Property held in fiduciary capacity.
7. Money deposited for specific purpose.
8. Money realised by bank as agent for collection.
9. Provident Fund of employee.
10. Company acting as selling agent.
11. Trust money deposited in bank.
12. Liquidator's right to go behind decrees and orders.
13. Set off in winding up.

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17. 1898-1 Ch. 324.
18. AIR 1957 All. 143=ILR (1958) 1 All. 407 (DB) (Chairman of Board of Directors holding contract of appointment for 20 years--No compensation for loss of appointment if winding up has been brought about by his own fault).
19. AIR 1944 Mad. 367 (DB) (Hence Advocate appearing before him in connection with proof of debt on behalf of a creditor can apply under Order 5, Rule 20 of Madras High Court O.S. Rules for taxation of his bill of costs).

1. **Rules under insolvency, applicability.** The general law of insolvency applies under section 404 to the winding up of an insolvent company.[20] The word "rule" in this section does not mean the rules under the Insolvency Act. What it means is the provisions laid down in the Insolvency Acts relating to the said subject.[1] The section imports into a winding up proceeding all rules of insolvency whether in the Act, in the rules made under that Act or in the established rules of practice subject only to the conditions that the Companies Ordinance itself contains no provisions to govern the matter or which is in conflict with the rule which is sought to be imported.[2] The provisions of the Ordinance must prevail where there is a conflict between them and the provisions of the Insolvency Act.[3]

Insolvent Company--meaning of. A company would be deemed to be insolvent if it was unable to meet due liabilities or pay off all its creditors in full. Inability of a company to pay its debts would be considered as sufficient circumstance to hold such company as commercially insolvent.[4]

Proof of claim. The section recognises the application of insolvency rules in winding up of insolvent companies. Section 49 of the Provincial Insolvency Act requires that a debt may be proved by delivering or sending by post in a registered cover to the Court an affidavit verifying the debt. It means that proof by means of affidavit is one of the ways for proving a debt. It does not mean that the debt cannot otherwise be proved by an equally satisfactory mode, as for example by the agreement entered into between the parties.[5] However, it is not only the right but it is also the duty of the Court to go behind any entries or accounts stated or agreements or even judgment in order to ascertain the real character of the transaction and in order to find out whether the debt on which the proof is founded has been really incurred. If the circumstances appear to the Court to be suspicious it should require the person making the claim to prove the consideration and on his failure to do so reject the claim. The Court must therefore independently satisfy itself as to the existence of the debt despite admission by the debtor, if any. The law of estoppel may successfully prevent a debtor from denying the admitted debt but there is no law of such estoppel as against the Insolvency Court.[6]

Karachi, law applicable to. The insolvency proceedings in Karachi Division, are governed under the Insolvency (Karachi Division) Act, 1909. In the case of winding up of an insolvent company, the provisions of Insolvency (Karachi Division) Act, 1909, will be applicable.[7]

2. **Solvent company.** A company must be considered to be solvent when its assets on the date of the winding up turn out to be sufficient to discharge all its

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20. AIR 1941 Mad. 18=ILR 1941 Mad. 328 (DB).
1. PLD 1985 Lah. 229=PLJ 1985 Lah. 117=NLR 1985 Civ. 237 (DB).
2. PLD 1985 Lah. 229=PLJ 1985 Lah. 117+AIR 1952 Trav-Co. 315 (DB)+AIR 1953 All. 637+AIR 1942 Oudh 417 (DB) (Word "rules" in section should be understood in the sense of provisions and not in a restricted sense as referring to the rules made under the Insolvency Act)+AIR 1922 All. 353 (FB).
3. AIR 1931 Lah. 351=12 Lah. 678 (DB).
4. 1988 CLC 956=NLR 1989 UC 692.
5. AIR 1963 Punj. 22.
6. AIR 1960 Punj. 402.
7. 1988 CLC 956=NLR 1989 UC 692+PLD 1993 Kar. 671.

liabilities in full. To such a case section 404 does not apply.[8] An insolvent company becomes solvent on discharging its liabilities as they existed on the date of the winding up order.[9] Where a solvent company is wound up claim arising out of a contract is provable debt. It is not necessarily specifically enforceable.[10]

Payment of interest. Where a company in liquidation turns out to be solvent, in the sense that its assets are more than its liabilities, the creditors whose debts carry interest by agreement or otherwise are entitled, out of the surplus assets, to the payment of interest accruing after the commencement of liquidation, till payment is made of the principal debts. This concession, however, is not permissible to such creditors whose debts did not carry any interest under any contract.[11]

3. **Creditors entitled to prove their claims.** All creditors are entitled to prove their claims irrespective of the circumstances in which they became creditors or the company. Thus where the Act incorporating a railway company authorised it to purchase a railway and it purchased it from the promoters and every one interested in the capital of that company concurred in the purchase with full knowledge of all the circumstances: it was held that irrespective of whether the price was excessive or not the promoters were entitled, on the insolvency of the company, to rank as creditors against the sale proceeds.[12]

Creditors obtaining leave to sue. A creditor who obtains leave of Court to file a separate suit for proving his claim and fails to avail himself of that leave will not be allowed to prove the claim in the liquidation proceedings itself.[13]

Foreign company. When the business of the branches of a foreign company in this country are wound up under section 444, the winding up taking place in the country of its incorporation all the creditors of the company including those in the country of incorporation have an equal right with the creditors in the country to prove their debt in the ancillary winding up. The creditors have no exclusive right to the benefits of the assets of the company in this country to the exclusion of the others.[14]

Limitation. Under section 404, the provisions of the Provincial Insolvency Act were automatically applicable in the matter of proof. Under the Provincial Insolvency Act the Court can admit proof of a claim which is not time barred on the date of the presentation of the petition for adjudication even though the claim may become barred on the actual date of adjudication.[15] It is not correct to say that as a result of the Explanation to section 3, Limitation Act, limitation will start from the date when the claim was sent to the Official Liquidator. That Explanation has nothing to do with the matter because that provision relates to a suit which has been instituted in a regular civil Court, where previous to the institution of the suit the

8. AIR 1931 Rang. 334=9 Rang. 318 (DB).
9. AIR 1921 Lah. 346=1 Lah. 368 (DB).
10. PLD 1982 Lah. 810=PLJ 1982 Lah. 439=1982 CLC 2462=NLR 1982 Civ. 549.
11. PLD 1982 Lah. 236=1982 Lah. 202=1982 Law Notes 163=1982 CLC 266.
12. (1911) 1911 App Cas. 498.
13. AIR 1941 Mad. 855 (DB).
14. 2 Sau L R 12 (DB).
15. AIR 1962 Mad. 506 (DB)+AIR 1936 Bom. 130+AIR 1937 Mad. 577+AIR 1951 Punj. 84.

plaintiff has put in a claim against the company to the official liquidator. There is no reason why in a case where the winding up order is made, the creditor should not be allowed to wait and should be forced to file a suit wasting money. In fact it may happen that even if he files and obtains a decree he may not be able to execute it in view of the terms of section 316. The creditor cannot file any claim on the winding up proceedings till after the winding up order is made, and if retrospective effect is not given to the claim the usefulness of the winding up proceedings would be considerably reduced.[16] An application for direction to the liquidator to admit a claim rejected by him is not governed by the explanation to section 3 of the Limitation Act and hence cannot be thrown out as time-barred. The liquidator under section 404 must be regarded as a person in whom the property of the company had become "vested in trust for the specific purpose" within the meaning of section 10 of the Limitation Act.[17]

4. **"Debt provable."** No enforceable liability arises against a company for the money advanced by a person for its formation and its management after the incorporation but before the commencement of the business and therefore the claim for those moneys cannot be proved in the winding up of that company.[18]

Interest. Section 404 is only applicable to insolvent companies and interest accruing after the commencement of liquidation is not a provable debt under the Ordinance.[19]

Where there are surplus assets after the liabilities of an insolvent company, as on the date of the winding up order, have been discharged, the creditors are entitled to be paid before the contributories the interest which became due to them after the date of the winding up order.[20] In such cases where there is an ultimate surplus, accounts must be taken as between the company and the creditors by applying each dividend which has been paid to the payment of interest due at the date of such dividend and the surplus if any to the reduction of capital.[1] It is to be noted that before the preferential share-holders can be paid anything the creditors have got a right to be paid interest on their outstanding debts even for the period subsequent to the date of the winding up.[2]

Money held in trust by insolvent company. Trust money in the hands of the insolvent company, though it entitles the claimant to priority in payment does not give him any better right to interest than that possessed by an ordinary creditor. If the official liquidator has not received or cannot even be presumed to have received by interest thereon and has also not delayed the payment of the amount to the

16. AIR 1962 Mad. 506 (DB)+AIR 1933 PC 63.
17. AIR 1959 Cal. 646.
18. AIR 1959 Cal. 491.
19. PLD 1982 Lah. 236=PLJ 1982 Lah. 202=1982 Law Notes 163+AIR 1931 Rang. 334 (DB)+AIR 1954 All. 129+AIR 1930 Mad. 1012.
20. AIR 1921 Lah. 346=1 Lah. 368 (DB).
1. AIR 1930 Mad. 1012=54 Mad. 324.
2. AIR 1934 All. 189=56 All. 423 (But they are not entitled to the contractual rate as a matter of right. The Court can suitably reduce the rate).

claimant the latter has no right to any interest after the date of the presentation of the winding up petition.[3]

Secured creditors. A secured creditor, though he may claim interest up to the date of payment when he seeks to recover what is due to him from the proceeds of sale of the secured property, must confine his claim when he seeks to prove against the other property as an unsecured creditor to the principal and interest which have accrued upto the date of adjudication or liquidation as the case may be, deducting therefrom the amount realized by the sale of the property.[4]

Claim arising out of contract. Under section 34 of the Provincial Insolvency Act, 1920, a claim arising out of a contract is a provable debt. It is thus not necessarily specifically enforceable. The following principles govern such claims (*i*) that the trustee can disclaim contracts which are onerous, unprofitable or their completion might adversely affect the other creditors: (*ii*) the trustee cannot disclaim a part of the contract. He must, if he wants to, disclaim the contract, as a whole; (*iii*) the purchaser of an immovable property under an uncompleted contract does acquire an equitable right in the property but cannot compel the trustee to specifically enforce the contract if it is found to be onerous to the estate; (*iv*) the purchaser of an uncompleted contract has a lien on the property for his deposit and is to be treated as a secured creditor; (*v*) suits for specific performance filed before the insolvency may be allowed to continue.[5]

Damages for breach of contract. Where the application of a person under section 407 for rescission of a contract and award of damages is dismissed by the Court on the ground that it had no power to make the order because the contract stood already rescinded, the applicant was entitled to prove the loss suffered by him by the breach of contract as a debt in the winding up, in the ordinary way. Hence the Court cannot pass an order directing the applicant to file a regular suit to enforce his claim.[6]

5. Secured and unsecured creditors. By reason of the provisions of section 404 a secured creditor under the Companies Ordinance must mean the same thing as under the Provincial Insolvency Act, 1920.[7] In the winding up of an insolvent company, the same rules are to prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable as are in force for the time being under law of insolvency with respect to the estates of persons adjudged insolvent.[8] Therefore a secured creditor in the case of a liquidation is on the same footing as in insolvency proceedings. The property hypothecated would be liable for the whole claim and it is the liability of the remaining assets that could be affected by the winding up order.[9]

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3. AIR 1954 All. 129.
4. AIR 1930 Rang. 20=7 Rang. 514.
5. 1982 CLC 2462=PLD 1982 Lah. 810=NLR 1982 Civ. 549=PLJ 1982 Lah. 439.
6. AIR 1941 Mad. 18=ILR 1941 Mad. 328 (DB).
7. PLD 1960 Dacca 141=12 DLR 25.
8. 1988 CLC 956=PLD 1985 Lah. 229=PLJ 1985 Lah. 117=NLR 1985 Civ. 237 (DB).
9. AIR 1922 Lah. 281=3 Lah. 59 (DB).

Under Insolvency (Karachi Division) Act (III of 1909), the creditor may realise his security and after deducting the net amount so realised may prove for the balance in the liquidation proceedings before the official liquidator. The creditor may surrender his security to the official liquidator for the general benefit of creditor and then prove for his whole debts. If the creditor neither surrenders his security not realises the same he shall before ranking for dividend state in his proof before the liquidator the particulars of his security, the date when it was given and the value at which he assesses it and shall be entitled to receive dividend only in respect of the balance due to him after deducting the value so assessed. Where the creditor has valued his security, the Official Liquidator may redeem the property at any time on payment of the assessed value to the creditor. If the Official Liquidator is dissatisfied with the value assessed by the creditor, he may require the mortgaged property to be offered for sale at such time and on such terms and conditions as may be agreed upon between the official liquidator and the creditor. In the event of a disagreement between the creditor and the official liquidator with regard to terms and conditions of such sale, it may be sold by the Court. If the sale of mortgaged property is by public auction, the creditor or the official liquidator on behalf of the company may bid or purchase the property. The creditor may, however, at any time by notice in writing require the Official Liquidator to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realised, and if the Official Liquidator does not within six months of receiving the notice, signify in writing to the creditor his election to exercise it, he shall not be entitled to exercise the same thereafter, and the equity of redemption or any other interest in the property comprised in the security which is vested in the Official Liquidator shall vest in the creditor and the amount of his debt shall be reduced by the amount at which the security has been valued. Where the creditor has valued his security he may at any time amend the valuation and proof on showing to the satisfaction of Official Liquidator or Court, that the valuation and proof were based on a bona fide mistake or that the value of the security has increased or decreased since its last valuation; but every such amendment shall be made at the cost of creditor and upon such terms as the Court shall order unless the Official Liquidator allows it without application to Court. Where valuation of the security is amended as stated above, the creditor shall forthwith refund any surplus dividend received in excess of that which he would have received on the amended valuation. Similarly, he shall be entitled to be paid out of the money for the time being available for dividend, any dividend or share of dividend which he has failed to receive by reason of inaccuracy of the original valuation, before that money is applied for payment of any future dividend. But this right of the creditor to receive dividend shall not disturb the distribution of any dividend declared before the date of such amendment in the valuation of property. Where the creditor after having valued his security subsequently realises it, either under Rule 9 or Rule 12 the net amount realised shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor. If the secured creditor does not comply with the foregoing rules, he shall be excluded from all shares in any dividend. No creditor shall be paid in any case more than 16 annas in the rupee and the interest as admissible under Act III of 1909.[10]

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10. 1988 CLC 956=NLR 1989 UC 692.

A secured creditor can stand wholly outside the winding up proceedings if he so elects and rely upon his security or decree, provided that he has obtained leave to proceed from the winding up Judge.[11] The winding up Judge also cannot compel a secured creditor to prove his debt or subject it to his scrutiny. He also has no jurisdiction to annul or modify a secured creditor's security or decree.[12]

Priority of secured debts. Priority of debts not covered by section 405 shall be governed by rules relating to priority of secured and unsecured creditors under Insolvency Act (1920). Creditor holding a mortgage, charge or lien on property of a debtor as a security for repayment of debt is a secured creditor. Secured creditor under the Insolvency Act, 1920 must hold a mortgage, charge or lien on property of debtor and not of any third party. Secured creditor is not entitled to any priority in respect of payment of his secured debt.[13]

Pledge. Creditor holding a pledge on property of company being wound up as security for payment of debt is not entitled to priority over other debts and claims.[14]

Charge. A charge in favour of a person gives him priority over the unsecured creditors of the company in winding up even if it does not amount to a transfer or a mortgage.[15]

Mortgage. The Court shall, either upon the application by any person claiming to be a mortgagee of any part of the company's real or lease-hold estate, whether such mortgage is by a deed or otherwise, and whether the same is of a legal or equitable nature, or upon the application of Official Liquidator with the consent of such person, proceed to inquire whether that person is the mortgagee and for what consideration and under what circumstances and if it is found that such person is the mortgagee, and if no sufficient objection appears to the title of that person to the same claimed by him under mortgage, the Court shall direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal, interest and costs due upon the mortgage, and of the rents and profits, or dividends, interest or other proceeds received by such person or by any other person by his order or for his use in case he is in possession of the property, over which the mortgage extends or any part thereof, and the Court if satisfied that there ought to be a sale, shall direct notice to be given in such newspapers as the Court thinks fit, when and where and by whom and in what way, the said premises or property, or the interest therein so mortgaged, are to be sold, and that the sale be made accordingly and that the official liquidator (unless otherwise ordered) shall have the conduct of the sale. It is however, not necessary for any mortgagee to make such an application to the Court. At any such sale the mortgagee may bid and purchase.[16]

Agreement to purchase property of company. Where petitioner entered into different agreements to purchase immovable property belonging to a company and

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11. AIR 1929 All. 353=51 All. 695 (FB).
12. AIR 1952 Trav-Co. 46=ILR 1951 Trav-Co. 315 (DB).
13. NLR 1992 Civ. 611=1992 SCMR 1731 (SC).
14. NLR 1992 Civ. 611=1992 SCMR 1731 (SC).
15. AIR 1941 Bom. 267 (2) (DB) (Equitable charge in favour of landlord for rent over buildings when they come into existence).
16. 1988 CLC 956=NLR 1989 UC 692.

paid substantial amounts on signing of agreements. Official liquidator was, however, appointed and winding up order passed before deeds could be completed. Petitioner prayed that either sale-deeds be executed by way of specific performance of agreements to sell or leave be granted to file suits for specific performance of such agreements. It was held that such agreements are onerous though Liquidator does not disclaim the same and that allowing specific performance would amount to undue preference and affect other creditors adversely. Therefore petitioners were to rank as secured creditors for their deposits and costs.[17] The following principles govern such claims (*i*) that the trustee can disclaim contracts which are onerous, unprofitable or their completion might adversely affect the other creditors, (*ii*) the trustee cannot disclaim part of the contract. He must, if he wants to, disclaim the contract, as a whole; (*iii*) the pruchaser of an immovable property under an uncompleted contract does acquire an equitable right in the property but cannot compel the trustee to specifically enforce the contract if it is found to be onerous to the estate; (*iv*) the purchaser of an uncompleted contract has a lien on the property for his deposit and is to be treated as a secured creditor; (*v*) suits for specific performance filed before the insolvency may be allowed to continue.[18]

Debenture-holders. Holders of debentures in so far as they are unable to realise their payment in full from the property including in their charge can prove with the other creditors against the general assets of the company.[19] Where the directors mortgaged the property of the company by deposit of title deeds and there were debentures issued by them prior to the mortgage ranking equally as a first charge on the undertaking, hereditaments and effects of the company, it was held that the mortgage had priority over the debentures.[20] A debenture-holder has three options. The first one is that he can realise his security and if there is something left due to him, then to come and prove for the balance. The second option is that he has to give up his security and to come into liquidation ranking with other creditors and take his share in the distribution of the dividends. The third option is to value his security and to come into liquidation and prove for any dues that, according to him, remain outstanding in respect of his debt on the valuation of his security.[1]

Pawnee of shares. Where petitioner as pawnee was although in possession of shares in question, as security for repayment of the debt yet its position was different fro ordinary pawnee under S. 176, Contract Act, 1872 under which a pawnee has a right to sell the pledged goods only after giving the pawnor reasonable notice of sale. Petitioner was, thus, not an ordinary pawnee but was the holder of the duly executed blank transfer deed of shares by the pawnor, the effect of which firstly was that the latter (Pawnor) had waived his right to be given a notice under S. 176, Contract Act, 1872 by the petitioner (pawnee) and secondly he had given further unfettered right to the pawnee to own or transfer the ownership of shares to anyone. Bank guarantee might be as good as cash but it was not cash.

17. PLD 1982 Lah. 810=PLJ 1982 Lah. 439=1982 CLC 2462=NLR 1982 Civ. 549.
18. 1982 CLC 2462=PLD 1982 Lah. 810=NLR 1982 Civ. 549=PLJ 1982 Lah. 439.
19. (1880) 75 Ch. D. 465.
20. (1885) 29 Ch. D. 715.
1. AIR 1963 All. 12 (DB).

Pledged shares coupled with transfer deed and Bank guarantees in favour of Company were, thus, assets of the Company.[2]

Attaching creditor. An attaching creditor is not a secure creditor. An attachment creates no charge in favour of the attaching creditor and confers no right on alienation. The attaching creditor must take *pro rata*.[3] Therefore a decree-holder who attaches under Order 21, Rule 46, Civil P.C. a debt due from a bank to his judgment-debtor and omits to obtain against that bank a garnishee order under Order 21, Rule 63-B of that Code, before its winding up, can rank only as an unsecured creditor of the bank and obtain *pro rata* distribution in the winding up.[4] Where all the money belonging to a Transport Company in the hands of North Western Railway (N.W.R.) was attached in execution of a decree for winding up of the Company. The N.W.R. filed a claim for Rs. 34,000 against the Company which was admitted by the Company Judge. The N.W.R. wanted to adjust that amount against the money attached but which was still in its possession. It was held that as a creditor of the company the appellants are entitled to be paid rateably out of the assets of the liquidated company for their credit of Rs. 34,000 which has been accepted by Company Judge and they cannot set off this amount once again against the debts of the firm.[5]

Director creditor. A contract by which the director of a company lends money to the company and becomes its creditor is in the nature of a contract between a trustee and his *cestui que trust;* the trustee by discharging a small portion of the *cestui que trust's* indebtedness puts himself in the position of a secured creditor and prevents it from paying off his creditors equitably. It is not right that the director should have such rights and therefore he will not be allowed to enforce his security as against an innocent purchaser for value in execution of a debt due to an unsecured creditor.[6]

Transfer of property to unsecured creditor. A transfer of the property of an insolvent company to an unsecured creditor can be annulled by the company Judge under section 53 or 54 of the Provincial Insolvency Act.[7]

Surrender of security to Official Assignee. Where petitioner who was a secured creditor had surrendered his security to official assignee or official liquidator in terms of R. 10 of Second Schedule to Insolvency (Karachi Division and Dacca) Act, 1909 to enable him to proceed in the manner provided under S. 12 thereof. Official assignee could either redeem the security on payment to the creditor of assessed value or he could require that property comprised in any security so valued, might be offered for sale.[8]

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2. PLD 1993 Kar. 671.
3. AIR 1933 Bom. 16.
4. AIR 1942 Pat. 508=21 Pat. 287 (DB).
5. PLD 1967 Lah. 610=19 DLR 97.
6. AIR 1937 Pat. 151=15 Pat. 762 (DB).
7. AIR 1942 Oudh 417 (DB) (Transfer of property belonging to company challenged as fraudulent and either voidable under section 53 or void under section 54, Provincial Insolvency Act).
8. PLD 1993 Kar. 671.

6. Property held in fiduciary capacity. The creditors of an insolvent company cannot claim that a property held by the company in a fiduciary capacity should be brought into distribution because such property is treated as held in trust for the purposes of insolvency law. Where a sum of money is held by a company in trust for itself and another person, the beneficial interest which that company possesses in that money will pass, when the company becomes bankrupt, to its trustee in bankruptcy and become divisible among its creditors.[9]

7. Money deposited for specific purpose. The creditors of an insolvent company cannot claim that a property held by the company for a specific purpose should be brought into distribution because such property must be treated as held in trust for the purposes of insolvency law.[10] Where a sum of money is deposited with a company under a contract on condition that it would carry no interest and becomes returnable to the depositor on the termination of the contract, the deposit contains all the elements of a trust prescribed by section 6 of the Trusts Act. Therefore if the company goes into liquidation the depositor is entitled to preferential payment of his money out of the unsecured assets of the company.[11] But the trust which arises when money is deposited in a bank for a specific purpose is extinguished on the fulfilment of that purpose. If due to such extinguishment there is no longer any trust on the date when that bank goes into liquidation, the person who makes the deposit cannot successfully claim to have become a preferential creditor of that bank in the winding up.[12] Though money is paid to a company for a specific purpose it may not become an amount held in trust by the company when no obligation attaches to the company either to pay that amount to a third person or return it to the person who made the payment on the happening of any event. In such a case even if the consideration for the payment fails owing to liquidation of the company, the person who made the payment cannot successfully claim to be a preferential creditor in the winding up.[13] Money collected by a bank as agent for collection should be treated as trust money and paid in full before payment is made to creditors of the bank.[14]

Money deposited by employee selling agent as security. On the principle that money placed by customer with a bank for a specific purpose is impressed with trust, the deposit by its employee or selling-agent with the company for good behaviour or performance of other obligations must be regarded as trust money unless other terms and conditions show it to be a debt. The mere stipulation for interest on the deposit or the fact that the company would be entitled to liquidate its claim from out of it would not establish the relation of debtor and creditor.[15] The

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9. AIR 1956 Cal. 188 (DB).
10. AIR 1956 Cal. 188 (DB)+60 Cal. W N 999 (DB).
11. AIR 1952 Mad. 481 (*Held* the fact that the directors utilised the amount in the business of the company does not affect the depositor's right where he had neither consented to nor had knowledge of the utilisation).
12. AIR 1953 Punj. 98 (DB).
13. AIR 1942 Mad. 210 (Payment to insurance company for revival of policy--Policy not revived owing to liquidation of company--Policy-holder cannot claim priority for payment of the money).
14. 54 Cal. W N 744+ILR (1950) 1 Cal. 328+55 Cal. W N 747.
15. AIR 1943 Cal. 105 (DB)+AIR 1941 Oudh 126 (DB)+AIR 1939 Mad. 337+AIR 1938 Mad. 651.

test of whether amounts deposited by an employee with a company as security for discharge of his obligation is to be held as a trust fund or not is to see whether it was intended that it should remain a segregated fund or whether it should become the property of the company and be compensated for by the company's covenant to repay it. In the former case only a trust is created, and the depositor can get it back from the company's assets in priority over other creditors.[16] His right is not affected because the deposit was not earmarked by the company but was mixed up with other funds. Whether the deposit is to be treated as a trust or as a loan depends on the facts and circumstances of each case, or on construction of a written contract, if any.[17] Where the agreement under which a selling agent paid money as security for the discharge of his obligation created only a relationship of creditor and debtor and not of *cestui que trust* and trustee between him and the company, the selling agent cannot if he has not been paid back the money at the termination of the agreement, claim any preferential treatment in regard to the payment of that money in the winding up of a company.[18] *Y* on being appointed as the selling agent of a company deposited a certain amount as security for the due discharge of the terms of the agency agreement. *Y* was entitled to receive interest on the amount at a certain percentage and to have the amount invested in Government securities and earmarked in some manner to his satisfaction. On these facts it was held that no fiduciary relation in respect of the amount was created and therefore *Y* was not entitled to claim any preference in the winding up of the company.[19]

8. Money realised by bank as agent for collection. Money collected by a bank as agent for collection should be treated as trust money and paid in full before payment is made to the creditors of the Bank.[20] Where a person who had no accounts with a bank gave it certain bills for collection and the bank went into liquidation after collection; it was held that the bank held that amount after collection as an agent and in a fiduciary capacity. The money being trust money could not become a part of the general assets of the company but had to be paid to the person on whose behalf the bank had collected it.[1] The branch of a bank which collects money under a cheque for a customer of another branch of the same bank, under instruction to remit the amount to the latter branch, holds the amount collected for a special purpose and becomes clothed with a specific trust. Hence that amount cannot be retained by the bank for paying off its creditors.[2] But the bank does not in every case where it collects bills as an agent for a customer hold the proceeds as a trustee. It is a trustee so long as the bill is not realised or not collected. But as soon as the bill is collected it then depends upon the facts of each case whether with regard to the proceeds the bank is a trustee or a debtor. When the bill are realised while the bank is still functioning and there are no instructions from

16. AIR 1942 All. 119=ILR 1942 All. 242 (FB).
17. AIR 1943 Cal. 105 (DB)+AIR 1937 Cal. 221.
18. AIR 1938 All. 574=ILR 1938 All. 896.
19. AIR 1932 Bom. 311.
20. 54 Cal. W N 744+ILR (1950) 1 Cal. 328+54 Cal. W N 747.
1. 53 Cal. W N 649.
2. AIR 1942 Mad. 646=ILR 1943 Mad. 187 (DB).

the customers with regard to the disposal of the amount, the amount becomes a part of the assets of the Bank and the customers become only its creditors.[3]

Bank Draft. 'A bank in the absence of any special circumstances constituting it a trustee for the holder of a draft issued by it stands only in the relationship of a debtor to such holder. If the head office of the bank is insolvent at the time of presentation of the draft, the purchaser of the draft or its holder is not entitled to an order for refund of the consideration but merely to a right of proof.[4]

9. Provident Fund of employee. Provident fund established by a bank for payment to their employees or their legal representatives is in the nature of a trust although interest is paid on the amount by the bank. The fund does not form part of assets of the Bank and cannot be taken into account during administration of assets during liquidation.[5]

10. Company acting as selling agent. Where money is paid to a company which is acting as an agent to obtain supply of goods through it from its principal, the company does not take the money in trust for the person making the payment. If the company misappropriates that amount the remedy of the customer would lie only in a suit for the return of the money or for damages and when the company is wound up to rank as an ordinary creditor. He cannot claim any preferential treatment in respect of the money due to him.[6]

11. Trust money deposited in bank. The money deposited in a bank may be to its knowledge trust money in the hands of the depositor but that fact would not change the nature of the relationship which arises between the bank and the depositor namely that of debtor and creditor and give the latter a rank in the liquidation of the bank in priority to the ordinary creditors.[7]

12. Liquidator's right to go behind decrees and orders. A judgment would always give a prima facie proof of debts. It is only when there are circumstances casting doubt on the correctness of the debt as proved by the judgment that the judgment may be set apart and independent proof may be called for.[8] The liquidator in voluntary winding up, who occupies the same position of a trustee in bankruptcy, is entitled to ask the Court sitting in insolvency jurisdiction to go behind a judgment passed against a company. Fraud need not be shown. It is sufficient if it can be shown that there ought not to have been a judgment.[9] The official liquidator can refuse to accept a debt though it is the subject of a decree

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3. AIR 1958 Bom. 100 (DB) (AIR 1950 Bom. 375 which leads to the inference that the bank becomes the trustee with regard to the collected money was not correct).
4. AIR 1959 Cal. 762 (SB)+54 Cal. W N 744 (The change of relationship takes place from the moment the bank issues the draft without any reference to the time at which the principal receives the draft and whether he accepted them or not).
5. AIR 1939 Mad. 352.
6. AIR 1955 Trav-Co. 139 (DB)+AIR 1925 Mad. 271.
7. AIR 1941 Mad. 48 (DB) (Company's deposit made under section 282-B (1) does not get priority over debts or ordinary creditors)+AIR 1940 Mad. 178 (The effect of such knowledge on the part of the bank is that it comes under an obligation not to participate in a breach of trust by the depositor).
8. AIR 1927 All. 426+AIR 1940 All. 514.
9. AIR 1932 Bom. 252 (DB).

against the insolvent if there is evidence that the decree was fraudulently and collusively obtained and there was no debt at all. But in the absence of fraud and collusion or apparent miscarriage of justice, the official liquidator would have no power to go behind the decrees and the adjudication of competent Courts and Tribunals.[10]

Income-tax assessment. Where a company has been assessed to Income-tax on the basis of the estimated income of the previous year and the order of assessment is not appealed against, the assessment becomes final and cannot be challenged or reopened in liquidation proceedings.[11] Where there is nothing to indicate any fraud vitiating the assessment,[12] or where an assessee wants in winding up proceeding to reopen an assessment which has been made by the Income-tax authorities, it must be established by the assessee that the assessment made is an improper one.[13] A liquidation Court can go behind assessments of Income-tax though the latter are prima facie evidence that certain income was earned and that an amount of tax is due. The onus of proving that the assessment does not represent the real taxable income rests on the liquidator.[14]

13. Set off in winding up. Before a set off can be claimed there must be mutuality of debts or creditors or dealings, *i.e.*, the set off is available only between the same parties in the same right as the claim.[15] Under section 404 it is imperative on the part of the creditor to claim only the balance of the account in regard to the mutual dealings between him and the bankrupt company. He is under a duty to set off any sum due from him to the insolvent against his demand. This principle is based upon equitable considerations. This section also places the official liquidator or the official receiver under a duty not to pay anything more than what is due to the creditor after setting off any amount due by him to the insolvent or the bankrupt company.[16]

Under section 404 read with the provisions of the Insolvency Act the debtor is entitled to claim that as there were mutual dealings between him and the company an account should be taken and the liquidator should claim only the balance if any

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10. AIR 1951 Mad. 987 (DB)+AIR 1927 All. 426 (Judgment not passed on merit after a bona fide contest by company but on its confession of liability--Liquidator can set apart decree and ask for proof of claim).
11. AIR 1941 Oudh 260 (DB) (AIR 1935 Oudh 351, *Overruled*).
12. AIR 1954 Punj. 84=ILR 1954 Punj. 675 (Estimated assessment under section 23 (4). Income-tax relating to years long prior to the winding up order).
13. AIR 1953 Cal. 487.
14. AIR 1943 Lah. 228=ILR 1943 Lah. 706 (SB).
15. NLR 1985 Civ. 237=PLD 1985 Lah. 229=PLJ 1985 Lah. 117 (DB)+AIR 1941 Mad. 654+AIR 1941 Mad. 622 (Bank advancing loan to *G* on the strength of *S* putting up as security the fixed deposit standing in her name--Bank allowed to set off fixed deposit on maturity--Liquidation of Bank before maturity of fixed deposit--*G's* claim to set off cannot be allowed under section 229 as no question of mutual dealings arise in the case)+AIR 1940 All. 490 (DB) (Agreement between *S* and a mill--Mill to spin cotton of *S* at stipulated rate--*S* to advance money at his discretion to keep mill running--Money advanced deducted from spinning charges and balance only paid by *S*--Conduct of parties also showing that they had only a running account--*Held S* was entitled to set off advances and pay only the balance of spinning charges to the liquidator).
16. AIR 1964 AP 88 (DB)

was found in his favour.[17] A person who is indebted to the company under a mortgage is entitled to set off any amount due to him from the company under a matured claim.[18] A person who owes money to a bank in liquidation under his current account is entitled under section 46, Provincial Insolvency Act read with section 404 of the Companies Ordinance to set off against the debt his fixed deposits on the security of which the bank allowed him overdraft on his current account. Such a case is one of mutual dealings between the parties because there are reciprocal demands which in the normal course had to terminate in a debt owing by one party to the other.[19] Where the claims advanced by the official liquidator and the defendant against each other are money claims which fall within the purview of section 404 the set-off claimed by the defendant is really a defence to the plaintiff's claim and hence the defendant need not obtain under section 316 sanction of the company judge to set up the defence.[20]

Surety of debtor. An amount owed by a person to a company as a surety jointly and severally liable and the amount due from the company to such person under an independent and separate transaction are mutual dealings as contemplated by section 46, Provincial Insolvency Act and hence that person has the right to set off the one amount against the other.[1] However the right which a person who is indebted to a company has to set off against the debt an amount due to him from the company is not lost because another person has stood surety for his debt to the company.[2]

Debt barred by limitation. A liquidator has the right to take advantage of the mutual credit clause of the Insolvency Act and set off an amount due from the credit of the company against what is due by the company to that creditor. He can exercise this right even though debt due from the creditor is barred by limitation.[3] The defendant has a right to plead a set-off against the plaintiff's demand provided his claim against the plaintiff was not dead at the time action was laid by the plaintiff and it does not exceed the plaintiff's claim. In such a case, the question of limitation has to be decided with reference to the date on which action has been brought and not with reference to the date when the claim for set off is made. It is only in cases where a counterclaim is made by the defendant against the plaintiff, *i.e.* when the defendant's demand exceeds that of the plaintiff, the point of limitation has to be determined with reference to the date on which the counter-claim is made. But if by adjustment the plaintiff's claim is to be wiped out or

17. PLD 1985 Lah. 229=PLJ 1985 Lah. 117 (DB)=NLR 1985 Civ. 237+AIR 1959 Ker. 11.
18. AIR 1953 Mad. 610.
19. AIR 1954 Orissa 7 (The fact is that the fixed deposits has not matured on the date of the claim for set off did not deprive the claimant of his right to equitable relief by way of set off).
20. AIR 1951 Mad. 783=ILR 1952 Mad. 60 (DB).
1. AIR 1940 Mad. 626+AIR 1951 (A joint promise is also a several promise in India and hence in a suit so enforce such a promise the surety can set off the separate debt due to him from the company).
2. AIR 1940 Mad. 266.
3. AIR 1941 All. 278=ILR 1941 All. 415.

reduced then it is the date of the claim of the plaintiff that is determinative of the question.[4]

Joint and several debt. A joint debt cannot be set-off but a joint and several debt can. According to section 25 of the Partnership Act, every partner is liable jointly with all the other partners, and also severally. It follows that any sum due to one of the partners in a firm from a company in liquidation can be set-off against the debt due to such company from the firm.[5] But there can be no set-off under section 229 read with section 47, Insolvency Act, of a debt due from the company to *A* and *B* jointly against a debt due to that company from *A* alone. In such a case there is no mutual credit between the company and *A*.[6] However, where an amount is payable by *A* in his individual account with a bank and an amount is payable to *A* and *B* in their joint account with the bank, the two accounts can be set-off, if it can be shown that though the joint account is in the name of *A* and *B*, *A* is solely entitled to the amount.[7]

Bank draft. On the issue of a draft a bank enables third parties to acquire rights in it and the draft passes as currency from hand to hand. The bank can no longer treat the amount represented by the Draft as money of the customer in its hands which it can set-off against its other claims against the customer.[8]

Unliquidated damages. In the winding up of insolvent companies the subject-matter of set-off is wider than it is under the general law and unliquidated damages may be set-off against a debt.[9]

Debt not presently payable. A debt, although not presently payable can be set-off against moneys owing to a company in liquidation: such a set-off is not a fraudulent preference.[10]

405. *Preferential payments.* (1) In a winding up, there shall be paid in priority to all other debts--

(*a*) all revenues, taxes, cesses and rates due from the company to the Federal Government or a Provincial Government or to a local authority at the relevant date and having become due and payable within the twelve months next before that date;

(*b*) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date and any compensation payable to any workman under

4. AIR 1964 A P 88 (DB)+AIR 1920 Mad. 819+AIR 1942 Cal. 559 *Rel. on*).
5. 55 Cal. W N 302+AIR 1949 East Punj. 337+AIR 1941 Mad. 654.
6. AIR 1954 Cal. 303 (DB)+AIR 1927 Lah. 228 (DB).
7. AIR 1940 Mad. 436.
8. AIR 1959 Cal. 762 (SB).
9. AIR 1951 Cal. 519=ILR (1952) 2 Cal. 16.
10. AIR 1940 Mad. 157.

any law for the time being in force, subject to the limit specified in sub-section (2);

(*c*) all accrued holiday remuneration becoming payable to any employee or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(*d*) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions towards insurance payable during the twelve months next before relevant date, by the company as employer of any persons, under any other law for the time being in force;

(*e*) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (VIII of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;

(*f*) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and

(*g*) the expenses of any investigation held in pursuance of section 263 or section 265 in so far as they are payable by the company.

(2) The sums to which priority is to be given under clause (*b*) of sub-section (1) shall not, in the case of any one claimant, exceed two thousand rupees:

Provided that, where a claimant is a labourer in husbandry who has entered into contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof as the Court may decide to be due under the contract, proportionate to the time of service up to the relevant date.

(3) Where any compensation under the Workman's Compensation Act, 1923 (VIII of 1923), is a weekly payment, the amount due in respect thereof shall, for the purposes of clause (*e*) of sub-section (1), be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the said Act.

(4) Where any payment has been made--

(*i*) to an employee of a company on account of wages or salary; or

(*ii*) to an employee of a company or, in the case of his death, to any other person in his right, on account of accrued holiday remuneration;

out of money advanced by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee or other person in his right would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(5) The foregoing debts shall--

(*a*) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion; and

(*b*) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(6) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them and, in the case of the debts to which priority is given by clause (*d*) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

(7) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of winding up order, the debts to which

priority is given by the section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(8) For the purposes of this section,--

(*a*) any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period;

(*b*) the expression "accrued holiday remuneration" includes, in relation to any person, all sums which by virtue either of his contract of employment or of any enactment (including any order made or direction given under any enactment), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday had his employment with the company continued until he became entitled to be allowed the holiday; and

(*c*) the expression "the relevant date" means--

(*i*) in the case of a company ordered to be wound up compulsorily by the Court, the date of the appointment (or first appointment) of the provisional manager or, if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound up voluntarily before that date, and

(*ii*) in any other case, the date of the passing of the resolution for the voluntary winding up of the company.

Synopsis

1. State debts.
2. Wages or salaries of employees.
3. Costs and expenses.
4. Arrears of rent.
5. Provident Fund.
6. Preference over debenture debts.
7. Date of commencement of winding up.
8. Orphans or widows.

1. State debts. Debts due to the Federal Government are to be paid in priority to all other debts.[11]

The section gives priority to certain debts due from the company which includes the debts in respect of revenue, taxes, cesses and rates payable to the Government and local authority as also the debts in respect of salaries or wages due to workers, servants, labourers and workmen, etc. All these debts rank equally among themselves for the purposes of payment and have to abate equally if the assets are insufficient to meet them in full.[12] In the liquidation of companies the State is not entitled to any prerogative, priority or preferential rights or treatment, save those expressly conferred and limited by the Ordinance itself, in particular by section 405 and section 410,[13] preferential rights of the claimants for satisfaction of their claims are to be determined in accordance with section 405.[14] Therefore priority given to State debts cannot be extended by importing the provisions of the Insolvency Acts. Since section 404 must be read subject to the provisions of this section it does not justify such importation.[15] Where the State obtained a decree for costs against a company, the Company went into voluntary liquidation. The liquidator applied for stay of execution and deposited the amount. The Court directed the withholding of the payment to the State of this amount and left it to be available for the creditors of the Company to be distributed *pari passu* in accordance with scheme of section 405. The State was directed to prove its debt in accordance with law and claim the amount out of the assets of the company rateably.[16]

Where certain amount is due from the company in respect of the price of the machinery sold, the claim of the Government cannot be treated as a preferential claim.[17]

Priority regarding revenue, etc. The state, when enacting such a provision and confining its preferential claim to "all revenues, taxes, cesses and rates due from the company to the Government...." is deemed to renounce its priority with regard to other claims which may be in the nature of loans, etc.[18] Word "revenue" is not necessarily *ejusdem generis* with the words that follow and means income. The rent of Government telephone lines and also charge for trunk calls is revenue. But a claim for moving the telephone lines is for work and labour done and cannot come within the words "Revenue taxes, cesses and rates" in the section.[19]

Property tax. Where in voluntary winding up of company, tenders for outright sale of fixed as well as movable assets of the Company were invited by Official Liquidator and such assets were sold to the highest bidder. Property was retained by

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11. 1988 CLC 2183=NLR 1988 CLJ 329.
12. PLD 1986 Lah. 18 (DB).
13. PLD 1954 Sind 222+AIR 1946 F C 16+2 Sau L R 93 (DB) (*Held* AIR 1927 Bom. 606 impliedly *overruled* by AIR 1946 F C 16)+(1923) 1923 App Cas. 647+1962 Pb. 519.
14. PLJ 1982 Lah. 439=PLD 1982 Lah. 810=NLR 1982 Civ. 549=1982 CLC 2462.
15. AIR 1931 Lah. 351 (DB)+AIR 1957 Mad. 162+ILR (1937) 1 Cal. 684.
16. AIR 1963 MP. 201+AIR 1931 Lah. 589+(1924) 2 K B 410.
17. AIR 1962 Punj. 520+AIR 1962 Punjab 519.
18. AIR 1962 Punj. 520.
19. AIR 1930 All. 884=53 All. 92.

Official Liquidator for the benefit of company after commencement of winding up to get highest bidder for sale, Official Liquidator, was liable to pay the property tax as expenses in liquidation for the period, the property remained in his lawful custody. Taxing Authority could not claim preferential treatment with respect to the demand raised and recovery through coercive process could not be effected without leave of the Court.[20]

Income-tax. Priority may be claimed for income-tax arrears which had become due for payment from the company on the date specified in the section. Where Income-tax Department attached the property of a Company and sold the same to recover arrears of income-tax before the appointment of Provisional Liquidator. The process of recovery set in motion by the Tax Recovery Officer was, therefore completed and finalised before even the Provisional Liquidator was appointed. There was thus no occasion for the Income-tax Department to have filed its claim before the Liquidator.[1] But Income-tax which does not become payable until after the winding up order has been made is not a debt for which priority can be claimed.[2] The tax demanded in advance is not a tax which is due and payable and hence is not entitled to preferential payment under section 405.[3]

The Income-tax authority can recover only the amount due as income-tax. It can neither impose any penal interest nor could claim its recovery under this Ordinance.[4]

Income-tax on profit after liquidation. The company which continues its business after its liquidation and earns profits is liable to pay income-tax and the income-tax authorities are entitled to call upon the official liquidator to furnish a return in accordance with Income-tax Ordinance. The tax when assessed becomes a state debt and section 316 of this Ordinance does not interfere with the right of the Government to enforce the due against the property of the company in any one of the ways laid down in the law. The right of the State to enforce payment of its dues cannot be taken away, when the statute has not expressly enacted to that effect, but a mere implication.[5]

WAPDA Bills. WAPDA charges do not come within definition of tax or cess. WAPDA as such does not fall within definition of State in Art. 7 of the Constitution. Mere fact that WAPDA charges are made recoverable as arrears of land revenue would not make them land revenue or Government dues. Therefore, WAPDA dues in respect of supply of energy do not have priority over other debts of company under liquidation.[6]

Directors, liability of. The directors of a company cannot be personally proceeded against in respect of revenue, taxes, cesses and rates due from the

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20. PLD 1987 Lah. 520.
1. PLD 1964 Lah. 18 (DB).
2. PLD 1954 Sind 22 + AIR 1943 Lah. 228 = ILR 1943 Lah. 706 (SB).
3. AIR 1953 Cal. 487.
4. PLD 1977 Lah. 1218 = PLJ 1977 Lah. 664.
5. AIR 1934 All. 170 = 56 All. 685 (DB).
6. NLR 1991 Civ. 453 = NLR 1989 Civ. 590 = 1989 CLC 1774.

company. It is implicit in section 405 that these can be recovered only from the assets of the company.[7]

2. Wages or salaries of employees. A change in the management of the company does not change its personality and therefore the services rendered by the employees after the change in the management are still the services rendered to the company within the meaning of section 405.[8] In the case of voluntary winding up followed by compulsory winding up servants of the company who lost their appointments at the date of the voluntary winding up can claim priority in payment of their salary for the period of four months next preceding that date.[9] In such cases the question whether a person claiming preference is a servant or employee or not has to be determined on the facts and circumstances of each case. The question whether the secretary of a company can be described as a clerk or servant, who in respect of his wages has a right to preferential payment in bankruptcy, has to be determined on a consideration of his duties and the services rendered by him. Where his duties are the ordinary duties of a secretary and he has only to attend the director's meetings, attend to the correspondence and callers and keep the minute book, there can be no difficulty in holding him to be a clerk or servant. But if he does not exactly serve the company but only provides services, attending himself occasionally when required, he cannot claim any priority in respect of the remuneration due to him.[10]

Illegal lock-out. When there is an illegal lock-out the right of the workers to their wages being paid with a priority is not lost.[11] But the other view is that compensation awarded in respect of illegal closure is not wages paid for services rendered to the company. Hence the employees have no claim under section 405 for preferential payment of the amount.[12]

Bonus. Bonus does not come under the category of wages. The employees of a company cannot be recognised as preferential creditors within the meaning of section 405 in respect of bonus.[13]

Gratuity. Where an employee of a company in the process of being wound up claimed that he should be treated as a preferential creditors so far as payment of his gratuity was concerned. It was held that it was clear from clause (*a*) of section 405 (1) that in order to be entitled to be paid in priority to all other debts he had to show that there was a gratuity fund being maintained by the company. Where no such fund was maintained, the question of the admission of his claim on any priority basis under section 405 does not arise. But this does not mean that the appellants cannot prove their claims in the winding up even as ordinary creditors. They should have a chance of proving their claims under section 403 of the Companies Ordinance and getting whatever is available in the winding up out of

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7. AIR 1955 Andh. 26=1955 Cr. L.J. 332.
8. AIR 1951 Mad. 987 (DB).
9. AIR 1934 All. 114=56 All. 692.
10. (1906) 1906-2 KB 746.
11. AIR 1951 Mad. 987 (DB).
12. AIR 1937 Andh Pra. 725=ILR 1957 Andh Pra. 631.
13. AIR 1952 Trav-Co. 99=ILR 1951 Trav-Co. 635 (DB).

such assets of the company as are left after meeting the claims of the preferential creditors under section 405.[14]

3. **Costs and expenses.** Where following a winding up a scheme of reconstruction of the company was approved and it was provided therein that the winding up would be stayed on the payment of costs and expenses of liquidation in the first instance; it was held that the person who advanced a loan to the company for the purpose of paying off those costs and expenses was entitled to priority in repayment over all other debts both in view of the terms of the scheme itself and the provisions of section 405.[15]

Cost of litigation. A successful litigant against a company in liquidation is entitled to be paid his costs in full in priority over other ordinary creditors. Where other creditors are in the same position, they rank *pari passu* as regards funds available for the discharge of their debts.[16] Where the costs were to be fixed by the company and another litigant jointly and the latter paid the costs. Thereafter he claimed the share of costs payable by the company. It was held that although the petitioner's claim would be admissible as a creditor along with the other creditors *'pari passu'*, he could not claim any preferential treatment under the provisions contained in this section.[17]

4. **Arrears of rent.** A landlord is entitled to priority in respect of rent due from a company in liquidation only in accordance with this section.[18] Even rent due to Government by the Company does not fall within section 405 and Government cannot claim any priority for recovering the same.[19]

Rent after winding up order. Landlord's right to claim payment of the rent which falls due after the date of winding up on account of the liquidator occupying those premises is not affected and the payment can be claimed in full on the same footing as costs of winding up.[20] Where after the winding up of a banking company the premises which it had been occupying as a tenant remained with the liquidators not for the purpose of liquidation but because the liquidators could not get rid of the premises; it was held that no priority over the other ordinary debts could be claimed in respect of the rent which accrued since the date of winding up.[1]

5. **Provident Fund.** Where an order directs the liquidator to carry on work in a factory engaged in an industry and to sell it as a going concern, the liquidator is liable as an employer and occupier within the meaning of the Employee's Provident Funds Act to make the contributions required by that Act and the scheme framed thereunder.[2] Whether an employee is entitled to be paid out of the provident fund

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14. PLD 1975 S C 306.
15. 50 Cal W N 867.
16. AIR 1942 Lah. 10=ILR 1942 Lah. 742 (DB).
17. AIR 1962 Punj. 530.
18. AIR 1957 Mad. 162 (The mere fact that the premises in question was in *custodia legis* cannot entitle the landlord to priority because the reduction into its custody by the law of any property does not affect the rights *inter se* of the competing claimants).
19. AIR 1963 AP. 159 (DB).
20. AIR 1956 All. 586 (DB)+AIR 1952 Mad. 136.
1. AIR 1960 SC 332=(1960) 2 S C R 189.
2. AIR 1960 Cal. 199.

will depend upon the rules of the fund but so far as the applicability of the section is concerned it is enough if he is an employee on the date of winding up. It is immaterial when he entered service.[3]

Foreign company. When a foreign company is wound up in more jurisdictions than one the Court of each jurisdiction will be governed by the forensic rules which govern the conduct of its own liquidation. Section 405 (1) (*f*) is a forensic rule. It is applicable in the matter of winding up of a foreign bank wound up in Pakistan.[4]

6. Preference over debenture debts. Under the doctrine of substituted security, if the subject of a mortgage or charge is changed or transformed, the mortgage or charge attaches to the new form which it had assumed. Section 73, Transfer of Property Act enacts this doctrine. It has been applied to the case of a charge. The doctrine was also applied to a charge in winding up proceedings. On this principle and in view of the fact that the charged properties were directed to be sold free from encumbrance on the understanding that the debenture-holder shall be paid first out of the sale proceeds, the floating charge under the debentures held by him would attach to the sale proceeds of the charged properties.[5] Where Receiver was appointed on behalf of a debenture-holder, the debenture was secured by fixed as well as floating charge. Priority given to preferential debts such as wages of workman applied only to assets subject to floating charge.[6] Where a company created a fixed charge by mortgaging its immovable properties and also gave the mortgagees floating charge over its book debts, section 405 applied to the floating charge. Consequently, the debts mentioned in section 405(1) were given priority over the floating charge on the book debts.[7] Where in an action by holders of debentures issued by a company under security of fixed and floating charge over its assets, receiver was appointed by the Court, who acting under Court's order obtained loan to pay off arrears of wages of employees on the condition that the lender would be entitled to the same priority on the property of the company as the mill hands themselves had. The lender was held to be entitled to a charge in priority to the debenture-holders.[8]

Section 405 (5)(*b*) only operates if at the moment of the winding up there is still a floating charge created by the company and it only gives the preferential creditors a priority over the claims of the debenture-holders in any property which at that moment of time is comprised in or subject to that charge. Where however the debenture-holders appoint a receiver and such receiver takes possession of the assets of the mortgagor company comprised in the floating charge, that charge becomes crystallised and fixed on those assets and there is no question of any floating charge to which the provisions of section 405(8) can apply after that date.[9]

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3. AIR 1939 Mad. 352.
4. AIR 1939 Mad. 352.
5. AIR 1964 All. 558 (DB).
6. AIR 1938 All. 699 = ILR 1938 All. 869 (*Affirmed* on this point in AIR 1945 PC 121 but reversed on a different point).
7. AIR 1941 Mad. 586 (DB) + AIR 1964 All. 558 (DB).
8. AIR 1945 P C 121 (AIR 1938 All. 609. *Reversed on* the point).
9. AIR 1955 Mad. 331 (DB) + AIR 1957 Mad 169

7. Date of commencement of winding up. Section 311 provides that a winding up of a company by the Court shall be deemed to commence at the time of presentation of the petition for winding up.[10] The date of commencement of winding up in the case of a compulsory winding up preceded by voluntary winding up, is the date on which the resolution for voluntary winding up was passed.[11] In respect of the debts recoverable from a company ordered to be wound up compulsorily, the date material for determining the question of limitation would be the date of the winding up order. Consequently any debts from the company which were barred on the date of the making of the winding up order would be barred and not recoverable in liquidation proceedings.[12] Where the debt sought to be recovered is commission based on the strength of a contract of sole selling agency. Art. 115 of the Limitation Act would apply and benefit of Art. 120 of that Act could not be taken by the creditor.[13]

8. Orphans or widows. The provisions of the Companies Ordinance, as they presently stand, do not permit making payment on priority basis to orphans or widow, etc. on compassionate grounds.[14]

406. *Avoidance of transfers, etc.* Except when an order to the contrary is passed by the Court,--

(*a*) every transfer of shares and alteration in the status of a member made after the commencement of winding up shall, unless approved by the liquidator, be void;

(*b*) any transfer of property, movable or immovable (including actionable claims), or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by or subject to the supervision of the Court or the passing of a resolution for voluntary winding up of the company, shall be void against the liquidator.

Synopsis

1. Scope and object. 2. Validation of transactions.

3. Disposition of property.

1. Scope and object. Provisions of sections 385, 405 and 406 are primarily intended to safeguard the interest of the creditors none of whom came forward to

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10. PLD 1981 Lah. 322=PLJ 1981 Lah. 282.
11. AIR 1934 All. 114=56 All. 692.
12. AIR 1963 All. 284 (DB)+AIR 1959 Cal. 646+(1872) 7 Ch A 646.
13. AIR 1963 All. 284 (DB).
14. NLR 1997 UC 34.

object to the sale in dispute.[15] The appointment of a Provisional Liquidator or the passing of an order for winding up, makes every disposition of property of the company and every transfer of shares or alteration in the status of its members, after the commencement of the winding up, void unless the Court orders otherwise under section 406.[16] The *raisan d'etre* of the provisions contained in section 311 and sub-section (2) of section 406 is to prevent disposition of the property of the company made after the presentation of the petition for compulsory winding up without permission of the Court, with a view to avoid fraudulent preferences and to prevent other abuses attendant on transfer of assets of the company in contemplation of its liquidation.[17] Therefore transactions entered into by a company in respect of its assets, after filing an application for winding up, are void under sub-section (2) of section 406 unless they are bona fide transactions entered into in the ordinary course of its management.[18] Section 406 does not provide for an application to be made to obtain an order that any particular disposition of property or transaction is void nor does it specify the person by whom any such application may be made. The person moving the Court need not first approach the official liquidator and so his having unsuccessfully done so does not deprive him of his independent right to bring the facts to the notice of the Court.[19] However, transactions which take place in pursuance of contracts entered into by the company before the presentation of the petition for winding up are void under sections 406(2).[20]

Insolvency Acts and this section. There is a vital difference in section 57 of Karachi Insolvency Act, and section 406, Companies Ordinance; while bona fide payments to creditors by an insolvent are permissible and valid, payments to creditors by a company from the moment of the presentation of a winding up petition become improper alienations and void.[21] The disposition under section 406(2) is not required to be annulled by the disposition under section 406(2) is not required to be annulled by the Court as in the case falling under section 54 of the Provincial Insolvency Act. On the other hand, an order 'to the otherwise' is required to be made in order to validate the disposition.[1]

Right to apply. The mere fact that an appeal is pending against decrees in favour of petitioning creditors does not change the status of the petitioners as creditors or disentitle them to safeguard their interest by seeking a declaration that

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15. PLD 1986 Lah. 18 (DB).
16. PLJ 1982 Lah. 439=PLD 1982 Lah. 810=NLR 1982 Civ. 549=1982 CLC 2462.
17. AIR 1958 Punj. 341+AIR 1931 Bom. 2 (DB) (Petitioning creditor an unsecured creditor--Security given to petitioner after presentation of petition--Court will not sanction the transaction)+AIR 1930 Mad. 1012.
18. AIR 1956 Mad. 692 (Transfer by company of debt due from *A* to *B* in satisfaction of company's liability to *B* and execution of pronote by *A* to *B* after winding up petition has been filed is void).
19. 1957-27 Com Cas. 581 (Punj). (Section 183 (5) has no application to the case and hence rules framed under section 246 read with section 183 also do not apply).
20. 1957-27 Com Cas. 581 (Punj) (Transfer made in pursuance of pre-winding up contracts of sale)+AIR 1930 Mad. 1012 (They are not hit at by the section especially where they were entered into in ordinary course of business).
21. AIR 1939 Sind 196=ILR 1939 Kar. 460.
1. 1957-27 Com Cas. 581 (Punj).

the sales are void and the properties are liable to be proceeded against in execution of the decrees in their favour.[2]

Lease. Where once a factory owned by a company is leased for a particular period with the approval of the Court entertaining winding up proceedings against the company, the Court has no power to alter or revoke the terms of the lease subsequently, so as to shorten the period of the lease. Once a contract is made by a company, it cannot commit a breach thereof with impunity. Similarly even if a Court is a party to the contract, it is in no better position than any ordinary person unless the authority for revoking the contract in certain circumstances is given by law.[3] Therefore where a petition by some share-holders for winding up is dismissed and the company subsequently grants lease of a certain property by a resolution at a general meeting and a winding up order is made in appeal in the meantime. The lessee is in possession and is paying rent regularly. The lease should not be declared void, where company had no creditors, and the share-holders had by an unopposed resolution approved of the lease.[4]

Long term contract. After winding up petition in respect of a company is presented in the Court, it is not proper for the company to enter into long term contract or make disposition of its property in such a manner as to cause delay in winding up proceedings in case the company is ordered to be wound up by the Court.[5] Directors or other employees who enter into a contract and make payments on behalf of the company during the winding up proceedings do so at their peril, as such payments are unauthorised and amount to a wrongful disposal of the property of the company.[6]

2. Validation of transactions. If a winding up order is made, any transaction which has been entered into since the commencement of the winding up is subject to review by the liquidator. Upon the mere filing of a winding up petition the Court would have no jurisdiction to act under that section. It is not right on the part of the Court to anticipate the performance of his duty by the liquidator, if a liquidator is subsequently appointed, and to deal with the matter not only by implication, but also entirely conditionally. That is something which the section does not entitle the Court to do. If there is no winding up, the order of the Court would be without operation. It would be completely otiose if the winding up petition before the Court is ultimately dismissed or withdrawn. If the petition results is a winding up order, it will be for the liquidator to deal with the matter as he thinks proper.[7]

Section 406(2) is a discretionary section by virtue of the words "unless the Court otherwise directs". That gives the Court discretion at any time to make an order in a proper case validating a disposition, notwithstanding that it is one made after the commencement of the winding up.[8] In other words the absence of previous sanction does not render a transaction *ab initio* void and a nullity inasmuch as the

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2. 1957-27 Com Cas. 581 (Punj).
3. AIR 1963 Raj. 187 (DB).
4. AIR 1932 PC 1 = 58 Ind. App. 416 = 55 Mad. 180.
5. AIR 1963 Raj. 187 (DB).
6. AIR 1962 Punj. 433.
7. (1948) 1948-1 All E R 225.
8. AIR 1942 All. 141 + AIR 1956 Pat. 32 (DB).

Court has jurisdiction under sub-section (2) to sanction the transaction even *ex post facto*, if in its discretion it is necessary to do so.[9]

Discretion of Court. Section 406 does not itself provide any criterion for determining in what cases dispositions of property should be approved and leaves it to the discretion of the Court.[10] The Court should exercise a judicial discretion in allowing or disallowing disposition of property.[11] In exercising discretion under section 406(2) the Court must have in mind the fundamental principle that the assets of the company shall be, so far as is possible and subject to certain well-recognised exceptions, distributed *pari passu* between the creditors, and, subject as aforesaid, no creditor shall obtain an advantage over any other creditor.[12] Transactions which a Court would validate under section 406(2) are transactions bona fide entered into by a company for its benefit and those interested in its assets for preserving its business and not to the detriment of other creditors.[13] Thus the Court will declare valid, acts which are for the benefit of the company, and payments which are made in the ordinary course of business, for to hold otherwise would be to paralyse the company the moment a petition is filed.[14]

The Court would refuse to exercise its direction under the sub-section on an *ex post facto* application where it would have refused to sanction the transaction if the application had been made contemporaneously with it.[15] Payment made to the decree-holder after presentation of petition for winding up cannot be validated merely because he would have recovered the money under the decree before the presentation of the petition but for the delay caused in execution by the company by various means.[16] A certain amount was due to a bank from a customer. The bank on the other hand had to pay under a deposit which had matured. Under an arrangement between the parties to the effect that the depositor should receive her money from the customer suitable entries were made in the books of the bank to adjust the respective liabilities. The evidence established that the transaction was put through only after the presentation of an application for winding up the bank even though it was not clear whether the entries in the books had been made before or after that event. In these circumstances it was held that the transaction was a fraudulent preference and must be set aside.[17]

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9. AIR 1934 All. 161 (Transfer of shares without prior sanction).
10. PLD 1953 Lah. 375=PLR 1953 Lah. 793.
11. AIR 1931 Bom. 2=54 Bom. 718 (DB).
12. PLD 1953 Lah. 375=PLR 1953 Lah. 793+AIR 1942 All. 141+AIR 1931 Bom. 2 (DB).
13. PLD 1953 Lah. 375=PLR 1953 Lah. 793+AIR 1939 Sind 196+1957-1 Mad L. Jour 141+AIR 1955 Mad. 247 (Money advanced to company after appointment of provisional liquidator--Bank advancing money not aware of winding up petition filed--Still the loan transaction will not be upheld where evidence shows that it was entered into for the preservation of the company)+AIR 1940 All. 514+AIR 1931 Bom. 2 (DB).
14. PLD 1953 Lah. 375=PLR 1953 Lah. 793.
15. AIR 1942 All. 141=ILR 1942 All. 86.
16. AIR 1940 All. 514=ILR 1940 All. 730.
17. 1957-27 Com Cas. 404 (Mad).

Bona fides of creditor. The knowledge of presentation of the petition is not necessarily conclusive to show want of bona fides of the creditor to whom preference is alleged to have been shown.[18]

Appeal. The appellate Court can interfere with the discretion exercised by the lower Court under sub-section (2), in appropriate cases.[19] Where an order holding a transaction good is found to be correct and completely justified, the appellate Court would refuse to recall or vacate that order solely on the ground that the order had been passed *ex parte* on the report of the official liquidator.[20]

3. **Disposition of property.** The effect of section 406 (2) is that Director or any other employee who had disposed of the property of the company becomes liable for all monies of the company expended by him since the commencement of the winding up. It is, of course, open to a Court to validate transactions bona fide entered into by the company for its benefit.[1] The Ordinance does not empower the Court to make any order with regard to the property of the Company before the winding up order is passed except by the appointment of a provisional liquidator.[2]

Disposition of property--instances. Where between the commencement of winding up and the date of order of winding up, an insurance company makes payments to some of its policy-holders in respect of their policies, the amount of which had become due, such payments being payments of debts by the company to its creditors, are not only void but cannot be validated as they clearly amount to dispositions of property within the meaning of section 406(2).[3] Where an award orders a company to pay a certain amount as damages and compensation for non-fulfilment of its obligations and creates a first charge on the properties of the company for the payment of the amount, there is clearly a disposal of the property of the company.[4] A bank employed a treasurer and the treasurer in turn, employed a cashier. The cashier furnished security on being so required by the treasurer by charging his deposit account in the Bank in favour of the treasurer. When the treasurer's employment came to an end he ceased to employ the cashier. But the cashier was retained by the Bank by making an arrangement which released the deposit amount from the charge of the treasurer and made it his personal property which was ultimately converted into a deposit security account. This transaction took place between the date of the application for winding up the banking and before the passing of the winding up order. It was held that the transaction amounted to a "disposition" by the company of its property.[5] Payment of deposits or claims of the share-holders by their adjustment against the call money amounts to

18. AIR 1931 Bom. 2 (DB)+AIR 1939 Sind 196 (Absence of knowledge on the part of the creditor of the presentation of the winding up petition is absolutely irrelevant).
19. AIR 1931 Bom. 2=50 Bom. 718 (DB).
20. AIR 1956 Pat. 32=34 Pat. 8 (DB).
1. AIR 1962 Punj. 433.
2. AIR 1963 Raj. 187 (DB).
3. AIR 1939 Sind 196=ILR 1939 Kar. 460.
4. AIR 1959 Punj. 472 (If such an award has been made after the presentation of the winding up the decree of Court passed thereon cannot be sustained and enforced).
5. AIR 1942 All. 141=ILR 1942 All. 86.

disposition of the company's property, and where it was made during the pendency of the petition for winding up, it was hit by S. 406(2) and was therefore void.[6]

407. *Disclaimer of property.* (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or the payment of any sum of money, the liquidator of the company, notwithstanding that he had endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within the twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property:

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within twelve months after he had become aware thereof or such extended period as may be allowed by the Court.

(2) The disclaimer shall operate to determine as from the date of disclaimer, the rights, interests, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(3) The Court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and imposed such terms as a condition of granting leave, and make such other order in the matter as the Court thinks just.

(4) The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator had not, within a period of twenty-eight days after the receipt of the application or such further period as may be allowed by the Court, given notice to the applicant that he intends to apply to the Court for

6. 1957-27 Com Cas. 581 (Pun).

leave to disclaim, and in case the property is a contract, if the liquidator, after such an application as aforesaid, does not within the said period or further period disclaim the contract, the company shall be deemed to have adopted it.

(5) The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payments by or to either party of damages for the non-performance of the contract or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

(6) The Court may on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Ordinance in respect of any disclaimed property, and after hearing any such persons as it thinks fit, make an order for the vesting of the property in, or the delivery of the property to, any person entitled thereto or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and, on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose:

Provided that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the company whether as under-lessee or as mortgagee except upon the terms of making that person:--

(*a*) subject to the same liabilities and obligations as those to which the company was under the lease in respect of the property at the commencement of their winding up; or

(*b*) if the Court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to the person at that date;

and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and, if there is no person claiming under the company who is willing to accept an order upon such terms, the Court shall have

power to vest the estate and interest of the company in the property in any person liable, either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed and discharged from all estates, encumbrances and interests created therein by the company.

(7) Any person injured by the operation of disclaimer under this section shall be deemed to be a creditor of the company to the amount of the compensation or damages payable in respect of the injury, and may accordingly prove the amount as a debt in the winding up.

Synopsis

1. Scope. 2. Executory contracts.

1. **Scope.** Disclaimer must be made in writing and signed by the Liquidator within the period prescribed therein. Where no disclaimer was made by Official Liquidators because they were agreeable to execution of sale-deed. Such disclaimer was made by Companies Judge who under powers of supervision disclaimed the agreements. It was held that the disclaimer would figuratively be treated as that of Liquidator's under section 400 and time would be deemed to have been extended at least upto the date of that order.[7]

A customer of a bank putting in an application under section 407, after an order for the compulsory winding up of the bank is passed, for rescinding a contract between him and the bank and praying for damages is entitled to have his application heard. If the Court then comes to the conclusion that the contract has already been rescinded it would have no power to pass an order on the application and the applicant would have to be relegated to the ordinary procedure provided by the Ordinance for proving any debt in the winding up. The applicant cannot be relegated to the procedure for filing a suit unless he is heard.[8] But where the creditor of a company in liquidation was asked to prove his claim by a suit which he failed to do within time. The Court refused to grant any further extension. The creditors relying on section 407 applied again to the Court to have his claim inquired into and adjudicated in liquidation proceedings. It was held that if the creditor had at the beginning insisted on adjudicating his claim without recourse to the suit, his case would have fallen within section 407.[9]

2. **Executory contracts.** The company's assets on winding up also includ executory contracts. These contracts are liable to be disclaimed if they ar unprofitable under section 407(1) by the Liquidator and rescinded by the Court a the instance of any person who, as against the Liquidator is entitled to any benef or is subject to the burden of the contract, on such terms as the Court thinks jus

7. 1987 CLC 1876=PLJ 1987 Lah. 541 (DB).
8. AIR 1941 Mad. 18=ILR 1941 Mad. 328 (DB).
9. AIR 1941 Mad. 855 (DB).

Any person injured by the disclaimer shall be deemed to be a creditor and he may prove the amount as a debt.[10]

EFFECT OF WINDING UP ON ANTECEDENT AND OTHER TRANSACTIONS

408. *Fraudulent preference.* (1) Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company within six months before the commencement of its winding up which, had it been made or done by or against an individual within six months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly:

Provided that, in relation to things made or done before the commencement of this Ordinance, this sub-section shall have effect as if for the reference therein to "six months" a reference to "three months" were substituted.

(2) Any conveyance of assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Synopsis

1. Scope.
2. Bona fide transactions.
3. Transfer before winding up.
4. Third parties, rights of.
5. Recovery of money paid as fraudulent preference.
6. Court-fee.

1. Scope. Sections 406, 408 and 444 merely lay down the procedure for conducting the winding up. They do not create any substantive rights in favour of the creditors. Hence a claim by the creditors in a particular state in which a foreign company is wound up as an unregistered company that they have a vested right to share the assets in that state to the exclusion of the other creditors elsewhere cannot be justified by a reference to these sections.[11]

Provided the conditions specified by the section are satisfied any act relating to the property and not necessarily a cash payment alone can be impugned under this section as a fraudulent preference.[12] In order to avoid a transaction under the section, it is not sufficient to show that as a consequence thereof a particular

10. PLJ 1982 Lah. 439=NLR 1982 Civ. 549=PLD 1982 Lah. 810=1982 CLC 2462.
11. 2 Sau L R 12 (DB).
12. 1957-27 Com Cas. 404 (Mad).

creditor obtained an advantage but there must be proof to show that the dominant intention behind the transaction was to favour the creditor. The intention can normally be gathered only from all the circumstances surrounding the transaction.[13] The liquidator, when he feels doubtful as to whether he should regard an alienation invalid because it amounts to fraudulent preference, is entitled to apply to the Court under section 408 and obtain a declaration on the matter.[14] Where the bankrupt company had made voluntary payment which in fact gives a creditor a preference, the onus is on the official liquidator who claims to avoid the transaction to satisfy the Court that the real intention of the company was to prefer.[15]

2. Bona fide transactions. Bona fide transfers which are not meant to give fraudulent preference to any of the creditors should neither be regarded as void under section 406 nor be declared invalid under S. 408.[16] It has been held that a debt although not presently payable can be set off against moneys owing to a company in liquidation; such a set off is not fraudulent preference.[17] Contract of purchase entered into by a company between presentation of winding up petition and winding up order will be confirmed if goods were purchased in ordinary course of business and delivery taken and a claim for the price of goods should be allowed by the Court.[18]

Transfer not by free will. Fraudulent preference imports and involves freedom of choice and a transfer which is not voluntary in the sense that it is not the free act of the insolvent cannot be deemed to be fraudulent and void against the liquidator.[19]

3. Transfer before winding up. Transfers which have taken place more than three months preceding the date of the winding up application cannot be avoided by the liquidator as fraudulent preferences under section 408.[20] Where a voluntary winding up by a company is followed by a petition for its winding up by or subject to the supervision of the Court, the crucial date for determining whether a transfer by the company was within three months of the act of insolvency is the date of the petition for compulsory winding up.[1]

4. Third parties, rights of. A winding up Court, unlike an insolvency Court, cannot take cognizance of and adjudicate on the title of third persons except to the limited extent mentioned in sections 408 and 410.[2]

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13. 1957-27 Com Cas. 404 (Mad) (The test to be applied to ascertain the dominant view of the debtor is to see whether it was his voluntary act)+AIR 1952 Mad. 595 (That the transfer was made within the prohibited period does not by itself render it invalid)+AIR 1943 Mad. 54 (DB) (The fact that some creditors though few in number were unheeded while the rest were satisfied justifies an inference as to an intent to prefer).
14. AIR 1954 Trav-Co. 164=ILR 1951 Trav-Co. 700 (DB).
15. 1957-27 Com Cas. 404 (Mad).
16. 1957-27 Com Cas. 581 (Punj).
17. AIR 1940 Mad. 157.
18. AIR 1930 Mad. 1012=54 Mad. 324.
19. 1957-27 Com Cas. 581 (Punj)+AIR 1933 Cal. 809 (DB).
20. AIR 1955 Cal. 338 (DB).
1. AIR 1943 Mad. 54=ILR 1943 Mad. 353 (DB).
2. AIR 1929 All. 353 (FB). (To impeach such title, the liquidators must have recourse to regular suits in ordinary civil Courts).

5. **Recovery of money paid as fraudulent preference.** Where money is paid to a creditor by way of fraudulent preference. There is no summary method of recovering it. A regular suit should be filed by the liquidator.[3]

6. **Court-fee.** Written statements which are filed opposing an application by official liquidator to set aside certain fraudulent transfers need no court-fee stamps.[4]

409. *Liabilities and rights of certain fraudulently preferred persons.* (1) Where, in the case of a company which is being wound up, anything made or done after the commencement of this Ordinance, is invalid under section 408 as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, then (without prejudice to any rights or liabilities arising apart from this provision) the person preferred shall be subject to the same liabilities and shall have the same rights as if he had undertaken to be personally liable as surety for the debt to the extent of the charge on the property or the value of his interest, whichever is less.

(2) The value of the said person's interest shall be determined as at the date of the transaction constituting the fraudulent preference, and shall be determined as if the interest were free of all incumbrances other than those to which the charge for the company's debt was then subject.

(3) On any application made to the Court with respect to any payment on the ground that the payment was a fraudulent preference of a surety or guarantor, the Court shall have jurisdiction to determine any questions with respect to the payment arising between the person to whom the payment was made and the surety or guarantor and to grant relief in respect thereof, notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose may give leave to bring in the surety or guarantor as a third party as in the case of a suit for the recovery of the sum paid.

(4) Sub-section (3) shall apply, with the necessary modifications, in relation to transactions other than the payment of money as it applied in relation to such payments.

410. *Avoidance of certain attachments, executions, etc.* (1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects or any

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3. AIR 1932 Sind 106=26 Sind L R 102.
4. AIR 1934 All. 332=56 All. 747.

sale held without leave of the Court of any of the properties of the company after the commencement of the winding up shall be void.

(2) Nothing in this section applies to proceedings by the Government.

Synopsis

1. Scope and object.
2. Contravention of section.
3. Leave of Court.
4. Voluntary winding up.
5. State, position of.

1. Scope and object. The policy of law in enacting section 410 is to protect the assets of the company for equitable distribution amongst those entitled and to prevent the administration being embarrassed by a general scramble of creditors.[5]

Sales outside winding up. Section 410 does not affect the validity of sales effected by secured creditors outside the winding up and without the intervention of Court.[6] A sale effected by a private treaty cannot be regarded as a sale "held" within the meaning of section 410 even though it had been held by public auction outside the Court.[7]

2. Contravention of section. After the winding up order is made any payment made during the pendency of the winding up petition or after the winding up order, if it contravenes the provisions of section 410 or 406, is invalid.[8] Any disposition of property of the company made after presentation of the petition for compulsory winding up shall, unless the Court otherwise directs, be void.[9] Even any attachment, distress or execution to be in force, without leave of the Court, against the assets or effects of any sale, held without leave of the Court, of any of the properties of the company, after the commencement of the winding up, shall be void.[10]

3. Leave of Court. An execution sale held after the commencement of the winding up is voidable at the instance of the liquidator if there is no permission of the Court under section 316 for the sale.[11] However, leave under this section can be given by the Court even though the proceedings in question had already been initiated without such leave.[12] But in such cases while granting leave primary consideration is whether the Court is satisfied that price fetched is adequate. Where the price fetched at the sale is grossly inadequate and just sufficient to satisfy only secured creditors. The absence of bidders is due to want of adequate publicity to

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5. AIR 1959 Madh Pra. 95 (DB).
6. AIR 1955 SC 604=1955-2 SCR 374+AIR 1955 Mad. 331 (DB).
7. AIR 1955 Mad. 331 (DB).
8. AIR 1948 All. 75=ILR 1947 All. 203 (DB).
9. PLD 1981 Lah. 322=PLJ 1981 Lah. 282.
10. PLJ 1982 Lah. 439=NLR 1982 Civ. 549=PLD 1982 Lah 810=1982 CLC 2462.
11. AIR 1916 Pat. 47 (DB) (The fact that the decree executed had been passed prior to the winding up or that the decree-holder had no knowledge of the winding up order cannot save the sale)+38 Pat. 1080 (DB).
12. 54 Cal W N 832 (DB).

sale by advertisement. The sale should not be confirmed and a fresh sale should be ordered.[13]

4. Voluntary winding up. Any attachment, distress or execution put in force against a company without leave of the Court after the commencement of the winding up shall be void only in cases in which the company is being wound up either by the Court or subject to the supervision of the Court, and a voluntary winding up shall not *ipso facto* put an end to an attachment already in force.[14]

5. State, position of. Sub-section (1) of section 410 provides that any proceedings by way of attachment, execution or sale of any of the properties of the Company without the leave of the Court after commencement of the winding-up shall be void. Sub-section (2) thereof declares in categorical terms, "nothing in this section applies to proceeding by the Government". Sub-section (2) of section 410 saves and protects the action taken and impugned sale made by the Tax Recovery Officer.[15]

411. *Effect of floating charge.* Where a company is being wound up, a floating charge or the undertaking or property of the company created within twelve months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with surcharge on that amount at the rate of one per cent per month or part thereof or such other rate as may be notified by the Authority in the official Gazette:

Provided that, in relation to a charge created more than six months before the commencement of this Ordinance, this section shall have effect as if for the reference therein to "twelve months", a reference to "six months" were substituted.

OFFENCES ANTECEDENT TO OR IN COURSE OF WINDING UP

412. *Power of Court to assess damages against delinquent directors, etc.* (1) If in the course of winding up a company it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, liquidator or officer of the company--

13. AIR 1961 Mysore 1 (DB).
14. AIR 1924 Oudh 406 + AIR 1916 All. 174 (DB).
15. PLD 1986 Lah. 18 (DB).

(*a*) has misapplied or retained or become liable or accountable for any money or property of the company; or

(*b*) has been guilty of any misfeasance or breach of trust in relation to the company,

the Court may, on the application to the official liquidator or the liquidator or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with surcharge at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

(2) An application under sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable.

Synopsis

1. Scope.
2. Jurisdiction of Court.
3. Powers of Court.
4. Against whom orders may be passed.
5. Loss must have been caused.
6. Misapplication, retention or liability to account.
7. Misfeasance or breach of trust.
8. Onus.
9. Sanction to commence proceedings.
10. Application, form and contents of.
11. Non-Joinder of parties.
12. Separate trials.
13. Amendment of petition.
14. Compromise of proceedings.
15. Costs.
16. *Res judicata.*
17. Limitation.
18. Simultaneous proceedings under criminal law and this section.
19. Legal representatives and heirs, proceedings against.
20. Appeal.

1. Scope. The purpose of the application under the section is to draw the attention of the Court to the matters complained against and start an enquiry in the course of the winding up and the section enables the Court to make an order against the person complained against. The section has been designed with a view to provide a summary remedy to the creditors and share-holders of a company which enables them to obtain an order for compelling the delinquent officers of the

company to contribute towards the funds and assets of the company which they have illegally obtained during the course of their management or which have been lost as a result of such management.[16] Under the general law of the land, a right to resort to such summary procedure is not given to any creditor or share-holder of the company whilst the company is in existence. That right is not an absolute or untrammeled right. The right is circumscribed or limited by the conditions mentioned in section 412 and one of the conditions mentioned is that, before an application for examination of the person concerned and an order for compensation are made against him, prima facie evidence must appear against such concerned person in the course of a proceeding under section 290. Therefore, a proceeding under section 412 is an emanation from a proceeding under section 290. All that an applicant under section 412 has to satisfy, when presenting an application under it is that a case for misfeasance has come to light in the course of a petition under section 290.[17]

Section 412 is a procedural section and creates no new offence and gives no new rights. It only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity.[18] An order under section 412 should be made only when a clear case is made out.[19] As intent and purpose under section 412 is to recover loss from the delinquent director or officer for the benefit of share-holders and the creditors, where the share-holders had received the benefits and sufficient funds were available to satisfy the claims of creditors, no reasonable basis, existed for holding the ex-directors liable to pay the sum demanded.[20]

Representative remedy. The application under section 412 is a representative application filed on behalf of a class of persons, and not to enforce any personal remedy or to obtain any exclusive benefit.[1]

Recovery of money. The compensation for misapplication of company's moneys or for misfeasance or breach of trust is only of the reliefs contained in the section. Repayment or restoration of the money or property of the company retained or misapplied by a director can be asked for under the machinery of this section. It cannot be said that what falls within the section is only an unliquidated claim for damages. A claim for recovery of a sum of money is plainly within its compass.[2]

Liquidator. Where proceedings under the section are pending against a director the liquidator can exercise the right of lien which the company has and refuse to pay any share money which has become payable to the director in the

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16. AIR 1933 All. 789=55 All. 912 (DB)+AIR 1944 Bom. 193 (DB).
17. AIR 1964 Guj. 107.
18. AIR 1927 Lah. 433 (DB)+AIR 1923 Lah. 58 (DB)+AIR 1930 Bom. 572 (DB)+AIR 1933 Lah. 58 (FB).
19. AIR 1925 Cal. 825 (The managing director who takes a mortgage in his name representing that the entire money advanced is his own while in fact a part of that money belongs to the company is clearly guilty of breach of trust).
20. PLD 1987 Lah. 618.
1. AIR 1933 All. 798=55 All. 912 (FB).
2. AIR 1964 Mad. 230 (DB).

liquidation.[3] The pendency of an application for his removal does not disqualify the liquidator from making an application under section 412.[4]

Section 412 confers a special right on the creditors and other classes named and apart from that section, it would not be open for them to file a suit against the liquidator to make good the misfeasances committed against the company. The company alone with leave of Court, can file a suit to recover the money misappropriated by the liquidator.[5]

Voluntary winding up. Proceedings under section 412 can be initiated even in the cases of companies which were voluntarily wound up.[6]

Suit, remedy by way of. Proceedings under section 412 are domestic proceedings between the company and its officers and orders are passed therein in a special jurisdiction investing the Court with certain powers over the internal affairs of the company. Hence those orders do not bar a suit against third person who by their wrongful acts have also been responsible for causing the loss in question.[7] The liability of a director to pay or return the company's money or property is a general or a common law liability, if such an expression can be used, with reference to the law in Pakistan. The obligation to restore any money or property to the original owner is not merely common honesty but a legal liability. The fact that the debtor is a director and the creditor a company in liquidation would not affect the true nature of the liability. In such a case, the liability is not one arising under the Companies Ordinance. The relationship between the director and the share-holders of the Company is of a fiduciary character and is analogous to that of a trustee and *cestui que trust*. Of course, a director is not an express trustee. The right of the company to realise its money from the hands of a fraudulent director is in no sense a special statutory right. So long as a right of suit cannot be said to have been taken away expressly or by necessary implication, the suit must be held to be maintainable.[8]

2. **Jurisdiction of Court.** Where a liability not existing at general law is created by a statute, which at the same time gives a special and particular remedy for enforcing it, the remedy provided by the Statute must be followed and it is not competent to the party to proceed by action at general law. Therefore since liquidators are creations of the Companies Ordinance, and their liability along with officers of the company for damages for misfeasance or non-feasance is created by section 412, it is necessarily implied that any share-holder (contributory) who

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3. AIR 1952 Punj. 411 = ILR 1952 Punj. 520.
4. AIR 1956 Cal. 648
5. AIR 1944 Bom. 193 = ILR 1944 Bom. 284.
6. AIR 1959 Mad. 68 = ILR 1950 Mad. 411 (DB).
7. AIR 1935 All. 995 (DB) (The third parties may escape liability to the extent that the losses have been recouped from the officers of the company under section 235 but that does not mean that the cause of action against the third parties disappears on the passing of an order under section 235).
8. AIR 1964 Mad. 230 (DB) + 1919 AC 368 + 1935 AC 532 + AIR 1940 PC 105 + (1859) 6 CB (NS) 336 + AIR 1958 Mad 583.

claims damages under the Ordinance must go to the Court, *i.e.*, the High Court, in order to obtain it.[9]

Director residing outside jurisdiction of Court. Where the director of a company resides in Pakistan, although outside its territorial jurisdiction, the High Court having jurisdiction over that company under section 7 of the Ordinance is entitled to enquire into the conduct of that director under this section[10] An application can be made against a non-resident foreigner and an order passed against him will have the same force as a decree.[11]

No winding up petition pending. Petition against malpractice, misfeasance and breach of trust of delinquent Directors of Company filed by petitioners under sections 412, 417 and 418 would not be maintainable where neither any petition for winding up of company was already pending nor any prayer was made by petitioners for order of winding up of company.[12]

3. **Powers of Court.** Under section 412, the Court cannot proceed *suo motu*.[13]

The Court can finally decide either under section 412 or section 341 any dispute relating to the title to the property which has been ordered to be delivered to the liquidator under section 340.[14] The Court can compel the delinquent to contribute such sums with interest to the assets of the company by way of compensation in respect of the misapplication, retainer or misfeasance irrespective of any consideration of the criminal liability which the delinquent has incurred for such acts.[15]

Discretion of Court. The fact that the application under section 412 has been filed within the prescribed time does not entitle the applicant to obtain an order against the person complained against. The passing of an order is entirely in the discretion of the Court,[16] and it is open to the Court to take the view in any particular case that it would be unjust to hold a director or officer liable for some act of misfeasance which took place long ago.[17]

Section 352, examination under. The pendency of a misfeasance application does not divest the Court of its power to order a public examination of the directors or officers under section 306.[18]

4. **Against whom orders may be passed.** The section is made applicable to any person who has taken part in the formation or promotion of the company, any past and present Directors, Manager or liquidator or any officer of the company.

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9. AIR 1965 Pun. 24.
10. AIR 1937 Pat. 196=15 Pat. 630.
11. AIR 1952 Mad. 481 (*But see* AIR 1937 Pat. 196).
12. 1987 CLC 577=NLR 1987 Civ. 177.
13. AIR 1933 All. 789=55 All. 912 (FB).
14. AIR 1936 Lah. 408 (DB) (Disputes are not decided under section 185. The Court under that section orders delivery where there is a prima facie title in the company).
15. AIR 1956 Cal. 648.
16. AIR 1948 Mad. 51.
17. AIR 1946 All. 269=ILR 1946 All. 461 (DB).
18. AIR 1955 Mad. 30 (DB).

But it would also apply to a person other than those stated above, if such person has in collusion with any such persons misappropriated money belonging to the company and the Court can compel him to restore the money or property or any part thereof. Section 67, Banking Companies Ordinance, 1962 also shows that the application must be directed against any promoter, director, manager, liquidator or officer of a Banking Company. But sub-section (2) shows that where any application has been made under section 412, the High Court has power to follow the property whether it stands in the name of the above-mentioned persons or of any other person as the ostensible owner.[19]

A share broker is not an officer of the company for the purposes of section 412 and therefore an application under the section to recover money wrongly paid to him does not lie.[20]

Acts done in different capacity. The section applies only to those acts of a person done by him in his capacity as a director and not in any other capacity such as that of a debtor.[1] Under section 412 a person could be held liable only for his acts and omissions as a director and not for what he had received as a dividend on his shares in his capacity as a share-holder. The dividend may have been wrongly distributed out of capital but a share-holder could not be made to refund the dividend so received by an application under section 412.[2] The section cannot be applied for enforcing sums due under contracts between the company and other persons whether they happen to be directors or not. Therefore arrears of rent due by a director under a contract of tenancy entered into in his private capacity is not recoverable under this section.[3] Where the directors paid a certain amount of money to the company as a loan and not under any obligation which they had incurred as directors under their contract with the company and the same was repaid to them by the liquidator; it was held that the directors could not be ordered to refund the amount under section 412. In such a case no question of those persons as directors having misapplied or retained or become liable or accountable in any way for any money or property of the company or guilty of any misfeasance or breach of trust arose at all.[4]

Personal responsibility necessary. An order under section 412 can be passed only against those directors and officers of the company who are personally responsible for the acts of misfeasance and not against all the directors or officers even though some of them may have nothing to do at all with those acts.[5] A person who signed the prospectus as a director but resigned his directorship before the declaration under section 146 was sent to the Registrar cannot be held guilty of misfeasances, which took place subsequent to his resignation.[6] A person, who beyond signing the memorandum of association and paying for certain shares, took no steps to bring the company into being, cannot be treated as its promoter, merely

19. PLD 1970 Dacca 211=21 DLR 44.
20. AIR 1938 Mad. 154=ILR 1938 Mad. 192 (DB).
1. AIR 1915 Lah. 132=1915 Pun. Re. No. 60.
2. AIR 1962 All. 486 (DB).
3. AIR 1925 Lah. 194=5 Lah. 461 (DB).
4. AIR 1959 Bom. 474.
5. AIR 1959 Cal. 625.
6. AIR 1942 Mad. 365 (DB).

because the money paid by him for the shares had been utilized in defraying the expenses of forming the company.[7]

Deceased Director. Deceased directors cannot be made to discharge their liabilities. In such cases there is no alternative but to discontinue the proceedings against deceased directors.[8]

5. **Loss must have been caused.** Under section 412 of the Companies Ordinance liability can be fixed on the respondents only for the acts amounting to (*i*) Misapplication, (*ii*) retention, (*iii*) becoming liable or accountable for any money or property of the company, (*iv*) misfeasance or (*v*) breach of trust. Though the words "loss to the company" have not been mentioned in the section it is obvious that such loss is implied in all acts of misapplication, retainer, becoming liable for account and breach of trust. Cases of non-feasance are not covered by the section. Only that case of misfeasance will fall under section 412 which involves loss to the company. Before an application under section 412 can, therefore, succeed it is necessary for the liquidator to establish either that the respondents are accountable for some goods or money of the company or that they are guilty of misapplication, retainer or breach of trust. If they are guilty of misfeasance it must also be proved that their misfeasance has resulted in loss to the company which they can be compelled to compensate.[9] The loss to the company in respect of which compensation is asked for should be shown to be the direct and not a remote and more or less a speculative consequence of the misfeasance or the neglect of duty of the director or officer of the company against whom relief is sought.[10] Thus the directors and the managing agents of the company unauthorisedly using the money of the company can be made liable for loss only when the use of the money and the loss are shown to be connected as cause and effect.[11] A person cannot be made liable under this section for his failure to disclose at the time of his appointment as a director, the extent of his indebtedness to the company unless such non-disclosure is shown to have caused loss or damage to the company.[12]

No case of breach of trust or misfeasance can be made out, where amount of loss is calculated on speculations.[13]

6. **Misapplication, retention or liability to account.** Section 412 although it has acquired the rather inadequate description of being called a "misfeasance section" covers misapplication of any money or property of the company or liability or accountability for any money or property of the company in addition to any act of misfeasance or breach of trust.[14] A delinquent Director, who was responsible to invest huge amounts in the purchase of Prize Bonds was held to have misappropriated the amount invested in the purchase of Prize Bonds. He was liable

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7. AIR 1938 Mad. 154=ILR 1938 Mad. 192 (DB).
8. PLD 1987 Lah. 618.
9. PLD 1987 Lah. 618+AIR 1917 Lah. 383 (DB)+AIR 1963 All. 55+AIR 1959 Cal. 625+AIR 1941 Mad. 53 (DB)+AIR 1930 Bom. 572 (DB).
10. AIR 1952 Mad. 481.
11. 3 All W R 222 (DB).
12. AIR 1915 Lah. 132=1915 Pun. Re. No. 60.
13. PLD 1987 Lah. 618.
14. 1993 CLC 1413=NLR 1993 UC 476+PLD 1987 Lah. 618+AIR 1956 Cal. 648.

to contribute specified amount to the assets of the company by way of compensation.[15] Liability or accountability for any stores belonging to the company can also be fastened on the directors only if it is established that they have dealt with some property of the company in an unauthorised manner or that some property of the company which was to be accounted for has not been accounted for and the responsibility of the accounting rested on them.[16]

Directors acting 'ultra vires' their powers. The directors are liable to replace the moneys of the Company which they had applied to a purpose which was *ultra vires*.[17] Distribution of dividends out of capital and other funds not being profits was not only an *ultra vires* act but also amounted to gross mismanagement[18] besides amounting to misapplication of funds.[19] Where Managing Director of a Bank induced share-holders to pay dividend partly out of what was really capital, he 'misapplied' the company's money and was guilty of misfeasance and breach of trust and he could be compelled by the Court to contribute a reasonable sum by way of compensation.[20] Wilful preparation of false accounts of the company so as to save the "goodwill" of the Company, would amount to deliberate act of defrauding the creditors for continuously receiving deposits from the public. Showing of profits when admittedly company was running in losses was a deceitful act. Paying of dividends to the shareholders out of the capital and the money of the depositors was not only an *ultra vires* act but also dishonest and deceitful act of the Directors who were doing so with knowledge and with a view to continue receiving deposits from the public. Material on record sufficiently showed that any person of ordinary prudence would have come to the conclusion that further receipt of deposits from the public would amount to conniving at the fraud which was continuously being practised on the depositors. Directors of the Company were liable to compensate the assets of the company to the extent of specified amount which they had misappropriated and misapplied.[1] But in such cases strict proof is necessary to show that the Directors acted *ultra vires* their powers. Where a company receives deposits from third parties under their contract with the company and there is no prohibition either under the conditions of the deposits or in the rules of the company, the directors cannot be held to have misapplied the money or committed a breach of trust if they utilized it in the business of the company.[2]

7. Misfeasance or breach of trust. The word "misfeasance" in the section covers every misconduct by an officer or director of the company as such for which such officer or director might have been sued apart from the section.[3] In order that

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15. 1993 CLC 1413=NLR 1993 UC 476.
16. AIR 1963 All. 55.
17. 18 Bom. 119 (DB).
18. 1993 CLC 1413=NLR 1993 UC 476.
19. AIR 1925 All. 519 (DB) (The fact that the directors were not dishonest but the misapplication occurred because the manager in whom they trusted betrayed the trust cannot save them from liability for the loss).
20. AIR 1915 Lah. 471 (DB) (Managing Director prosecuted under section 409, Penal Code and fined--*Held*, Court can make over the fine imposed as damages to the company under section 214, Companies Act of 1882).
1. 1993 CLC 1413=NLR 1993 UC 476.
2. AIR 1952 Mad. 481.
3. AIR 1956 Cal. 648.

misconduct may amount to misfeasance it must be wilful misconduct or wilful or culpable negligence.[4] It has been held that a director who is a party to a calculated and deliberate fraud in the floatation of the company and in the conduct of its business is guilty of misfeasance.[5] Where the acts constituting misfeasance are grossly illegal acts, in that they are prohibited by the Ordinance itself, it would be futile for the directors to try to escape liability by pleading that they had acted not out of fraud but bona fide and in good faith believing that those acts would ultimately turn out to be for the good of the company or that they had acted on the ill advice of their manager without being aware of the nature of those acts.[6] Becoming a director by accepting a gift of shares without paying for them is misfeasance.[7] The manager of a company who knowingly advised the directors to lend money to a concern of which they were all partners was liable for misfeasance even though he himself had not retained any such money.[8]

Where in spite of the resolution passed by the Board of Directors that advances should be made only to solvent persons and on adequate security and with proper safeguards and also with the sanction of the Board of Directors in cases where the amount of loans exceeded a particular sum, huge advances were made by the Managing Director and the Secretary in contravention of the resolutions, without consulting the other Directors and the bulk of the advances was shared by the Directors themselves including the Managing Director, and there was total absence of check or supervision by the Directors, who were closely inter-related, due to gross negligence and breach of duty. It was held that the charge of misfeasance had been clearly proved. The fact that some of the Directors repaid the amount advanced, was immaterial, so far as the question of misfeasance was concerned.[9] Where the Manager withdrew an amount in conspiracy and collusion with directors. The withdrawal was illegal being contrary to the provisions of section 412. The Directors were liable equally with the manager. But where directors were not shown to be aware of the withdrawal but only guilty of negligence and want of vigilance, the directors were not directly or vicariously liable. Mere suspicion was not enough to hold them liable.[10]

In the absence of fraud or dishonesty no misfeasance can be found against the directors for having allowed some debts due to the company to become time-barred.[11] Similarly giving advance by directors on a promise to execute a mortgage

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4. AIR 1959 Cal. 625.
5. AIR 1934 All. 855 (DB). (Directors who have themselves not paid the application and allotment money due on their shares commencing business after fraudulently obtaining certificate for commencement of business from Registrar and allotting shares without receiving the minimum subscription or money due on application for shares).
6. AIR 1956 Cal. 648 (Directors lending money of the company to a partnership of which they were all members--The transaction is grossly illegal in that it is in contravention of the provisions of section 86-D)+AIR 1952 Mad. 481.
7. AIR 1942 Mad. 365 (DB).
8. AIR 1956 Cal. 648.
9. AIR 1963 Mad. 464 (DB).
10. AIR 1962 Punj. 433.
11. 56 Pun LR 486 (Fraud on the part of directors must be established by evidence--Suspicion alone cannot support order under section 235).

instead of the mortgage itself,[12] or failure to submit income-tax returns after the company had ceased to carry on any business,[13] or the failure of the director to recover the loans advanced prior to his appointment does not amount to a misfeasance or breach of trust which will attract to him liability under section 412.[14]

Managing Director was a knowing party to preparation of false accounts and also of not maintaining and preparing full and complete accounts. Managing Director who was receiving accounts personally as also under his personal supervision and under the arrangement made by him was, thus, accountable for the sums received in view of his own admission and the other evidence on record.[15]

Wilful neglect or default. Section 412 is premised on the basis that the management, meaning the Directors, Officers and those who are controlling the shareholders own various duties to their corporation and to the community of corporate interest, the shareholders and also to the creditors when the company is representing itself to be a solvent company to act *intra vires* and within their respective authority and also to exercise due care and to observe applicable fiduciary duties. Broadly speaking the duties of management are three-fold in nature: (a) obedience, (*b*) diligence and (*c*) loyalty. When management fulfils such duties by acting *intra vires* and within their respective authority by exercising due care and by observing applicable fiduciary duties, the transaction is usually immune from attack and management rule but the Directors in case of loss to the corporation resulting from their engaging the corporation in *ultra vires* activities are liable and as such become liable to account for the loss so occasioned. The Directors and officer are liable also for acts of mismanagement in addition to the acts of misappropriation and are liable to make compensation for the loss occasioned through their acts of negligence or in failing to act. The Directors are not liable for errors of judgment or mistakes while acting with reasonable skill and prudence. The standard of care has been described as that of a reasonable prudent man or of an ordinary prudent Director in similar business or the same degree of fidelity and care as an ordinary prudent man could exercise in the management of his own affairs of like magnitude and importance. The Director should attend meetings of the Board of Directors, have his views entered in the minutes of the meetings, keep himself well informed on corporate matters, familiarise himself with the financial statements prepared by the corporation accountants and the legal advice rendered by the corporate counsel and resign when he is unable to carry out his responsibility not in silence but by making public the cause of his resignation and dissent so that those who are dealing with the corporation or granted credit to the corporation or the company get timely notice to watch and secure their interest.[16]

An act or omission on the part of the directors or the officers does not amount to a wilful neglect or default unless they know that they are committing and they intend to commit a breach of duty or they are recklessly careless in the sense of not

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12. AIR 1926 Oudh 153.
13. 56 Pun LR 486.
14. AIR 1915 Lah. 132=1915 Pun. Re. No. 60 (A director is not a trustee in respect of such loans).
15. 1993 CLC 1413=NLR 1993 UC 476.
16. 1993 CLC 1413=NLR 1993 UC 476.

caring whether their act or omission is or is not a breach of duty.[17] This Section provides a summary remedy only against such directors or officers as have been personally guilty of some act of misfeasance, breach of trust or wilful neglect or default. Provisions of section 412 do not confer upon the Court power to make an order against the directors *en masse* for all acts of misfeasance etc. without any specific finding against individuals who are actually responsible for the particular acts of misfeasance. Liability arising under misfeasance proceeding is founded on the principle that a person who has caused loss to the company by an act amounting to breach of trust should make good the loss as provision of section 412 is not intended to punish a man who has been found guilty of misfeasance.[18] Directors of a company cannot be held personally liable on the ground that they have trusted the regularly authorised officers of the company and that they have failed to detect, and been misled by misrepresentation or concealment by such officers, if there is no reason for doubting their fidelity.[19] The director-in-charge could not be held guilty of fraud and dishonest conduct if he relied on the officers of the company and assumed the accounts maintained by them to be correct.[20] But directors who are authorised to conduct the business of the company with the assistance of an agent cannot divest themselves of their responsibilities by delegating the whole management to the agent and abstaining from all enquiry. Where they wilfully shut their eyes to the acts of the agents and recklessly sanction them and thereby aid misfeasance or misapplication and falsification of balance-sheet over a number of years they are guilty of misconduct and are liable to pay compensation.[1]

The directors permitting the company to commence business in spite of their knowledge that permission to do so had been obtained by making a false declaration under section 146 are guilty of wilful neglect and are liable under section 412 for the losses suffered by the company.[2]

Transfer of money to unauthorised channels. Where business of the company was being conducted in violation of the Articles of Association and huge amount running into crores of rupees had been converted into unauthorised channels fraudulently the Directors and the Chief Executive were liable to compensate the assets of the company jointly and individually.[3]

Director when not liable. Company by its subsequent act may be estopped from claiming from a director any damages for negligence where company in general meeting had adopted the transaction or took advantage of the transaction initiated by such director.[4]

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17. AIR 1926 Oudh 243 = 1 Luck. 334 (DB).
18. PLD 1987 Lah. 618.
19. AIR 1926 Oudh 243 = 1 Luck. 334 (DB).
20. AIR 1963 All. 55.
1. AIR 1959 Cal. 625 + AIR 1942 Mad. 365 (DB) + AIR 1930 Bom. 572 (DB).
2. AIR 1938 Mad. 124 = ILR 1938 Mad. 292 (DB).
3. 1993 CLC 1413 = NLR 1993 UC 476.
4. PLD 1987 Lah. 618.

Non-feasance. Section 412 does not prima facie exclude non-feasance.[5]

Share-holder directors. Even though the directors who commit fraud and misfeasance in respect of the moneys of the company are its share-holders the liquidator can challenge those dealings under section 412 even at the instance of a person who becomes creditor of the company subsequent to those dealings. In such a case the directors cannot escape liability on any plea of having authorised the transactions in their capacity as share-holders or of having subsequently ratified the fraud in that capacity.[6]

Breach of trust. The managing director who allows overdrafts out of motives of personal gain and conceals the transactions from the other directors is guilty of breach of trust.[7] The directors applying assets of the Company to other than the defined objects are responsible as for a breach of trust.[8]

Auditor. An auditor would become liable under this section for misfeasance where he either knowingly or through failure to use reasonable skill and care certifies accounts which ought not to have been certified and pecuniary damage to the company occurs as a direct result thereof.[9] An auditor who deliberately passes overpayments which are manifestly illegal is guilty of misfeasance under section 412. The auditor is an officer of the company for the purpose of section 412 in view of the definition of an officer.[10] But the fact that an auditor of Company abetted, facilitated and aided carrying on of business by ex-Directors of Company for a fraudulent purpose, would not make him liable under sections 412, 413, 415 when there is no evidence that money or property of Company came in the hands of the auditor which he misapplied or retained.[11]

Private Limited Company. Section 412 (1) does not embrace within its ambit the heirs or the legal representatives of the persons mentioned therein who could be proceeded against under that section. The liability which is enforced under section 412 is a liability in the nature of a tort or a *quasi*-criminal responsibility. Therefore in case of a winding up of a Private Ltd. Company consisting of members of a single family, the widow and sons of one of the members cannot be made responsible in proceedings under section 412 (1), for any thing which her husband did as a Director or in any other capacity for which he could be held responsible under the section.[12]

8. Onus. The onus is on the applicant to prove the facts which bring the case within the section.[13] The applicant has to show not only the misfeasance but also the

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5. AIR 1942 Mad. 365 (DB) (Gross negligence amounts to misfeasance)+AIR 1950 Mad. 208 (DB) (Director not doing his duty in regard to property of company is guilty of misfeasance).
6. AIR 1956 Bom. 681.
7. AIR 1926 Oudh 153.
8. AIR 1937 Pat. 293 (Though directors differ from trustees in some respects they are trustees in respect of the money entrusted to them).
9. AIR 1956 Cal. 648.
10. AIR 1929 All. 826 (DB).
11. NLR 1994 CLJ 618.
12. AIR 1962 All. 88 (DB).
13. AIR 1915 Lah. 132+AIR 1962 Pun. 433.

damage in respect of which the Company is to be compensated. An act of misfeasance will not without damage suffice any justification of action against misfeasor.[14] However strict proof is not required. If the applicant makes out a prima facie case, he has done his duty. If the records does show a prima facie case the task of rebutting that evidence or of exonerating himself from liability would lie upon the person against whom the application has been made, since he is the person who knows about the business of the company and is expected to throw greater light on the points in controversy in order to satisfy the conscience of the Court that no liability should rest on him and that his conduct of the affairs of the Bank has been fair and above board. The initial burden on the applicant, having regard to the very nature of the case, has to be lightly placed so as to compel the officer concerned to dissolve his cards, failing which the claim should be allowed against him.[15] But it must be noted that allegations of misfeasance, misapplication, retainer and breach of trust are serious allegations. It is, therefore, not possible to accept the contention that the only thing which the applicant under the section has to do is to make some sort of allegation good enough to start an enquiry and then seek to make the respondent liable for anything that is discovered in the course of that enquiry. Specific allegations must be made before the Court can start investigation into the conduct of the respondent. Enough particulars must be furnished so that the respondent may meet the charges levelled against him. If something is discovered during the course of the investigation it may in an appropriate case be open to the Court to allow an amendment of the application and then to give the respondent an opportunity of meeting the additional allegations. It will be grossly unfair to him if he is ultimately made liable for something discovered during investigation which he had never been called upon to meet. That the proceedings under the section do not amount to a suit or that a plaint is not required to be filed cannot justify dispensing with the requirement of making definite allegations about the acts complained of in respect of which the respondent has to explain his conduct.[16]

9. Sanction to commence proceedings. The liquidator does not require the sanction or leave of the Court to make an application under section 412.[17]

10. Application, form and contents of. *Prima facie*, an enquiry under section 290 has no connection with the enquiry under section 412 at least in so for as enquiry under the later section is to be directed against the promoters and past officers of the Company. But, at the same time, it cannot be said that there is a complete divorce between the objects of section 290 on the one hand and those of section 412 on the other. In order to make an application under section 412 it is not necessary that a proceeding under section 290 should be subsisting, Petition under section 290 need not be dismissed outright. Once a petition is brought on the file of a Court, it is entirely discretionary with the Court as to when the proceeding therein should terminate.[18]

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14. AIR 1962 Pun. 433.
15. AIR 1962 Raj. 118 (DB).
16. AIR 1963 All. 55.
17. AIR 1956 Cal. 648.
18. AIR 1964 Guj. 107.

Although an application under section 412 is in the nature of a plaint, the provisions of the Civil P. C. are inapplicable to it because express provision for its contents and the formalities connected with it are provided for by the Companies Ordinance and the rules made thereunder.[19] As the amount of compensation has to be assessed by the Court and not by the liquidator the omission of the liquidator to state in the application specific amount claimed cannot render the application bad on the ground that it has failed to make a valid and sufficient statement of the claim.[20] It does not, however, follow from this that the investigation contemplated by section 412 can be a general and roving enquiry into the conduct of the person sought to be made liable and that it can be started without any definite allegations being made which the respondent can be called upon to meet. The procedure to be followed may not be that laid down in the C.P.C. but the enquiry is a judicial one. If there are rules framed under the Companies Ordinance, they will have to be followed. In the absence of such rules the principles of natural justice will have to be followed.[1]

Affidavit. There is nothing in Rule 77 of the Rules framed by the Lahore High Court which requires the affidavit in support of an application under section 412 to be filed with the application itself. Therefore an application under the section is not vitiated by the fact that the affidavit was received by the Court only on a later date.[2]

11. Non-joinder of parties. The non-joinder of some of the directors in an application under section 412 does not make the application not maintainable where those directors are in no way personally responsible for the acts of misfeasance complained of.[3] But where all the Directors even those not joined as parties were guilty of misfeasance. Overall joint liability representing the shortfall in the assets of the company was also determined. Managing Director and other Directors were liable to contribute the determined amount to the assets of the company.[4]

Same parties guilty of misfeasance not impleaded--effect. Proceedings for examining the conduct of Directors and other functionaries of the Company although have the trapping of civil proceedings, yet no discrimination can be claimed on the plea that some others who were party to the loot or misappropriation, etc., had not been proceeded against. Therefore all the Directors cannot be made responsible for acts and omissions of Director-in-charge in the absence of proof that they all knew those acts and omissions not warranted in law and despite that they failed to take steps to mend the matters.[5]

12. Separate trials. Where in a proceeding under section 412 against certain persons, matters alleged against some of them differed entirely from those alleged

19. AIR 1938 Lah. 658 (DB)+AIR 1963 All. 55.
20. AIR 1938 Lah. 658 (DB).
1. AIR 1963 All. 55.
2. AIR 1938 Lah. 658 (DB).
3. AIR 1959 Cal. 625 (General principle of joint tort-feasor cannot apply to misfeasance proceedings).
4. 1993 CLC 1413=NLR 1993 UC 476.
5. 1993 CLC 1413=NLR 1993 UC 476.

against others, it was ordered that the petition be tried separately against each set of the defendants.[5]

13. Amendment of petitions. An order allowing an amendment of petition under section 412 entirely altering its character after a period of two and a half years is highly unjudicial.[7] But a misdescription, describing the company (in liquidation) as the petitioner instead of the official liquidator is not fatal when the verification and other contents of the petition leave no room for doubt that the official liquidator was the petitioner. The misdescription is remediable even when the application for amendment is made beyond the limitation allowed by the section.[8]

When in an application under section 412 to High Court, the names of certain person are added subsequently but documents relating to them fulfilling the requirements of the rule under section 412 are not filed at that time but later on, the date of the application against the added defendant is the date on which the documents are filed.[9]

14. Compromise of proceedings. The liquidator has power to compromise a misfeasance claim subject to the sanction of the Court.[10] Order 23, Rule 3, Civil P.C., applied to misfeasance proceedings and hence a compromise which is fair and proper must be given effect to by the Court in those proceedings.[11]

A sanction to compromise a misfeasance proceedings can be validly given by any Judge of the High Court who according to the allocation of work made by the Chief Justice is entitled to do so. There is nothing in the Ordinance which requires the sanction from the very Judge who is trying the misfeasance summons.[12] Where under administrative arrangement of the Court a misfeasance summons is to be heard by a Judge different from the one dealing with the winding up of the company, the official liquidator has to apply only to the latter Judge for permission to compromise the misfeasance proceedings. Where such permission has been given, the Judge trying the misfeasance summons is not called upon to apply his mind to the question whether the compromise is just and is for the benefit of the general body of creditors and contributories.[13]

15. Costs. Though there was no order as to costs in the unsuccessful appeal filed by the directors against the winding up order they could claim reasonable costs

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6. AIR 1938 Lah. 658 (DB).
7. AIR 1929 Lah. 710 (DB).
8. AIR 1963 Punj. 196.
9. AIR 1938 Lah. 658 (DB) (Per decision of Munroe, J. in the judgment under appeal--Appellate Court after examining the subsequently filed documents dismissed the case against the subsequently added parties on the ground that the documents disclosed no case of fraud, breach of trust or negligence against them).
10. 1953-23 Com Cas. 474 (Bom)+AIR 1954 Bom. 121 (DB).
11. AIR 1954 Bom. 121 (DB) (Proceedings under S. 235 are similar to proceedings in the nature of suits and fall within the scope of section 141, Civil P.C.)+1953-23 Com Cas. 474 (Bom) (Order 23, Rule 3 of Civil P.C. applies to proceedings under section 235 because they are judicial proceedings in a Court of Civil Jurisdiction within the meaning of section 141 of this Code).
12. AIR 1954 Bom. 121=ILR 1954 Bom. 79 (DB).
13. 1953-23 Com Cas. 474 (Bom).

out of the estate of the company where in filing the appeal they had acted in the bona fide belief that it was in the interests of the company. Hence they should not be ordered to make up the company's money in their hands to the extent of reasonable costs.[14]

Security for costs. In view of the fact that a misfeasance proceeding is not a "suit or other legal proceeding" within the meaning of section 487 and also on the ground of public policy an official liquidator who files a misfeasance summons cannot be required to furnish security for costs.[15]

16. 'Res judicata.' If a company is being wound up the remedy against a delinquent director whether for negligence, fraud or misfeasance is under section 412. Where such proceedings have been taken against a director a subsequent suit against him for compensation for fraud or misfeasance is incompetent on the principle of *res judicata*.[16]

17. Limitation. The liquidator has the whole period of limitation within which to move the Court under section 412 and therefore the fact that he delayed the application until the last date of the period of limitation is legally and technically no defence to the proceedings under the section.[17] If on the last day of the prescribed period of limitation for an application under section 412 the Court is closed, it being a Sunday, the applicant is entitled by virtue of section 10 of the General Clauses Act to file the application on the following working day.[18] However the Court has no discretion to entertain an application filed after the end of the period of limitation.[19]

Computation of limitation. Period of five years provided for application under section 412, would commence from the date of winding up, or of the first appointment of the Liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, whichever was longer.[20] In computing the period of limitation for an application under the section the first day, namely the day on which the liquidator was appointed should be excluded under section 9 of the General Clauses Act.[1] Moreover the limitation for an application under section 412 is five years but the period can be counted on an alternative basis. Either the application must be filed within five years of the date of the alleged misfeasance, misappropriation, retainer or misapplication or within five years from the date of the first appointment of the liquidators. Where the liquidators filed the application within five years of their appointment, it was open to the liquidators to charge the ex-directors with responsibility for items misapplied, misappropriated or retained even more than five years earlier. The words "which-ever is longer" only mean "whichever period expires later".[2] Therefore where the official liquidator was

14. AIR 1929 Rang. 139=7 Rang. 34 (DB).
15. AIR 1933 All. 205=55 All. 250 (FB).
16. AIR 1938 Lah. 577 (DB).
17. AIR 1956 Cal. 648.
18. ILR 1955 Mad. 511 (DB).
19. AIR 1962 Punjab 87.
20. 1993 CLC 1413=NLR 1993 UC 476+AIR 1962 All. 88 (DB).
1. ILR 1955 Mad. 511 (DB).
2. AIR 1963 All. 55+AIR 1962 All. 486.

appointed in 1971; breach of trust or misfeasance was alleged to have occurred during the period 1966-71 and an ex-director was not impleaded as respondent in the petitions in the years 1971, 1972, 1973 and questionnaire was served on the said ex-director in pursuance of order of the Court dated 27.5.1988 which was beyond the period of five years prescribed under section 412. Bar of limitation therefore, could be successfully pleaded by such ex-director.[3]

The liquidator referred to in section 412 for the purpose of the commencement of limitation is not the provisional liquidator but the liquidator or liquidators appointed after the company is ordered to be wound up.[4]

Defence. The words of limitation in sub-section (2) are not intended merely for the presentation of the application under the section but for the entire proceeding under the section and hence a defence of limitation under the Limitation Act which might have been available to a person charged if a suit had been filed against him will no longer be open to him in proceedings under this section.[5]

Time-barred suit. The persons who are entitled to apply under section 412 are not the representatives of the company and therefore the fact that a suit by the company against the directors and the managing agents in respect of their acts is barred by limitation does not make an application under the section also time-barred.[6]

Death of applicant. Where a creditor submits a petition under section 412 and later dies, procedure prescribed under Order 22, Rule 3, Civil P.C. ought to be held applicable. If then the procedure under Order 23, Rule 3, C.P. Code is attracted for a petition under section 412 due to section 141, C.P.C. then the provision as to limitation under Art. 176 of the Limitation Act which too is procedural in nature should be taken to be attracted.[7]

18. Simultaneous proceedings under criminal law and this section. A proceeding under this section as well as a criminal prosecution are simultaneously maintainable against a party and the criminal proceedings cannot be quashed on the ground of the proceeding initiated under this section. A party can however obtain stay of one or other of the proceedings were he is embarrassed in his defence by the pendency of both proceedings against him.[8] Where an official liquidator makes an application under section 412 and he is ordered to state particulars of charge as against each of such persons against whom charges are made and to make an affidavit, but instead of complying with the order the official liquidator institutes a criminal complaint under Penal Code, his conduct is a clear attempt to divest the Court of its jurisdiction. High Court cannot permit such an attempt to succeed.[9] But

3. PLD 1987 Lah. 618.
4. AIR 1963 Mad. 464 (DB).
5. AIR 1948 Mad. 51.
6. 3 All W R 227 (DB) (Case decided under section 235 before the amendment of 1936).
7. AIR 1963 MP. 120.
8. AIR 1955 Cal. 29=1955 Cr.L.J. 107 (DB).
9. AIR 1928 Oudh 104 (Order initiating quashed).

criminal proceedings cannot be stayed merely for the fact that proceedings under section 412 are pending.[10]

19. Legal representatives and heirs, proceedings against. Proceedings contemplated by this section are in the nature of misfeasance summons and idea behind is to bring to the book in the summary proceedings all the persons who have been mishandling the assets or property of a company. Such proceedings are judicial proceedings and are essentially of civil nature. Legal heirs of deceased directors as such can be impleaded in these proceedings. In such cases the first thing to be established is that there has been benefit to the estate of the deceased director or other person as a consequence of the misfeasance, breach of trust or misapplication of funds alleged against him and such an estate which has so been benefited is in possession or enjoyment of the legal representative. The second question is whether the legal representatives who are so found in possession of such an estate can be made to reply or restore the money or any part thereof or to contribute such sum to the assets of the company by way of compensation in respect of the alleged misapplication, retainer, misfeasance or breach of trust. There is nothing in section 412 which may be construed as conferring such a power on the Court to take compulsory proceedings as may become necessary against those upon whom the assets or estate of the deceased delinquent director who may have become liable under section 412 had not devolved.[11] Action can be taken against representative of promoter or director only if he comes within the definition of a promoter or director. But the barring of an application under this section does not debar the liquidator from seeking remedy by a regular suit against the representatives.[12]

20. Appeal. An order in a proceeding under section 412 holding the application maintainable, is an order finally deciding points between the parties relating to substantial and important rights and is therefore appealable.[13] Misfeasance proceedings under section 412 were initiated by the Official Liquidator, and in those proceedings the Company Judge tentatively decided to require the presence of some of the Directors of the company for giving evidence on oath in open Court after hearing the counsel. An appeal is maintainable against such order under section 10 of the Companies Ordinance.[14] But the order of the single Judge rejecting the plea of the opposite party that the petition under section 412 is barred by limitation amounts merely to an interlocutory order and is not appealable.[15]

413. *Liability for fraudulent conduct of business.* (1) If in the course of the winding up a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or any other person, or for any fraudulent purpose, the Court, on the application of the official liquidator or the liquidator or

10. AIR 1955 Cal. 247=1955 Cr. L.J. 790 (DB).
11. PLD 1987 Lah. 618.
12. AIR 1926 Lah. 624=8 Lah. 549.
13. AIR 1938 Lah. 658 (DB).
14. AIR 1964 Mysore 75 (DB).
15. AIR 1956 All. 222=1956 Cr.L.J. 369 (FB).

any creditor or contributory of the company, may, if it thinks fit, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company as the Court may direct.

(2) On the hearing of an application under sub-section (1), the official liquidator or the liquidator, as the case may be, may himself give evidence or call witnesses.

(3) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and, in particular, may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may, from time to time, make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.

Explanation. For the purpose of this sub-section, the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(4) Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section 91), every person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to twenty-five thousand rupees, or with both.

(5) This section shall apply, notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made.

Synopsis

1. Scope.
2. Fraudulent conduct of Directors.
3. Joint liability of Directors.

1. Scope. No period of limitation has been prescribed for purposes of obtaining declaration as contemplated by section 413, Companies Ordinance.[16]

2. Fraudulent conduct of Directors. Where Director of a company was conducting business of the company with intent to defraud creditors of the company and for fraudulent purposes, he would render himself liable to be punished under section 413(4). A Direcor's plea that he was not functional; that he used to attend the meetings of the Board of Directors formally and control of the company was in the hands of other Directors could not be accepted.[17]

3. Joint liability of Directors. Where there was misappropriation and misapplication of company's funds by the respective Managing Directors and Directors of the company. Such Directors were jointly liable for the shortfall amounting to specified amount, whereas Director who was guilty of misappropriation of money entrusted to him was liable personally for the stated amount.[18]

414. *Liability under section 412 and 413 to extend to partners or directors in firm or body corporate.* Where an order under section 412 or a declaration under section 413 is or may be made in respect of a firm or body corporate, the Court shall also have power to pass an order undersection 412 or make a declaration under section 413, as the case may be, in respect of any person who was at the relevant time a partner in that firm or a director of that body corporate.

1. Scope. Persons who accept Directorship as "accommodation" or "dummy Director" or as *"sine cures"* for lending their prestige to Board of Director of Company would be liable for any corporate loss resulting from their passive as well as active negligence in view of provisions of section 412 and 413.[19]

415. *Penalty for fraud by officers of companies which have gone into liquidation.* If any person, being at the time of the commission of the alleged offence an officer of a company which is subsequently ordered to be wound up by the Court or which subsequently passes a resolution for voluntary winding up,--

(*a*) has, by false pretences or by means of any other fraud, induced any person to give credit to the company; or

16. 1993 CLC 1413=NLR 1993 UC 476.
17. 1993 CLC 1413=NLR 1993 UC 476.
18. 1993 CLC 1413=NLR 1993 UC 476.
19. NLR 1993 UC 476=1993 CLC 1413.

(*b*) with intent to defraud creditors of the company, has made or caused to be made any gift or transfer of or charge on, or has caused or connived at the levying of any execution against, the property of the company; or

(*c*) with intent to defraud creditors of the company, has concealed or removed any part of the property of the company since, or within two months before, the date of any unsatisfied judgment or order for payment of money obtained against the company;

he shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine.

416. *Liability where proper accounts not kept.* (1) If, where a company is being wound up, it is show that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the winding up, or the period between the incorporation of the company and the commencement of the winding up, whichever is the shorter, every officer of the company who is knowingly and wilfully in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on the default was excusable, be punishable with imprisonment for a term which may extend to two years or with fine which may extend to twenty thousand rupees or with both.

(2) For the purpose of sub-section (1), proper books of account shall be deemed not to have been kept in the case of a company, if there have not been kept,--

(*a*) such books of accounts as are necessary to exhibit and explain the transactions and financial position of the trade or business of the company, including books containing entries from day to day in sufficient detail of all cash received and all cash paid; and

(*b*) where the trade or business has involved dealings in goods, statements of the annual stock takings and (except in the case of goods sold by way of ordinary retail trade) of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified.

417. *Penalty for falsification of books.* If any director, manager, officer, auditor or contributory of any company being wound up

destroys, mutilates, alters or falsifies or fraudulently secrets any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, books or paper belonging to the company with intent to defraud or deceive any person, he shall be liable to imprisonment for a term which may extend to two years, or with fine which may extend to twenty thousand rupees, or with both.

Synopsis

1. Criminal prosecution. 2. Liquidator, prosecution of.

1. Criminal prosecution. The Companies Ordinance nowhere lays down that there can be no prosecution of a criminal charge otherwise than upon a direction by the company judge or judges. There is nothing in the Companies Ordinance to exclude the operation of the general criminal law. Therefore where the promoters of a company were tried and convicted for offences under the Penal Code on specific charges of cheating, attempting to cheat, forgery, falsification of accounts and criminal misappropriation but none of them were awarded a sentence for forgery or falsification of accounts in excess of seven years; it was held that the prosecution of the accused for the offences of forgery and falsification of accounts under the Penal Code was legal.[20]

2. Liquidator, prosecution of. The liquidator of the company which had gone into voluntary liquidation, who was prosecuted under section 417 was also a contributory. It was argued that though the accused was once a director, he ceased to be so when once liquidation proceedings had begun. It was held, that the liquidator was an officer of the company and that whether he acted as director, officer or contributory, section 417 applied.[1]

418. *Prosecution of delinquent directors.* (1) If it appears to the Court in the course of winding up by, or subject to the supervision of, the Court that any past or present director or other officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar.

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager or other officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the registrar and shall furnish to him such information and give to him such access to and facilities for inspecting and taking copies of any documents, being information

20. AIR 1937 All. 714=ILR 1937 All. 779=39 Cr. L.J. 38 (DB).
1. AIR 1942 Mad. 702=44 Cr. L.J. 503.

or documents in the possession or under the control of the liquidator relating to the matter in question, as he may require.

(3) Where any report is made under sub-section (1) or (2) to the registrar, he may, if he thinks fit, refer the matter to the Authority for further inquiry and the Authority may thereupon investigate the matter and may, if it thinks it expedient, appoint one or more competent inspectors to investigate the affairs of the company and to report thereon as if it were a case falling under clause (*c*) of section 263 and thereupon the provisions contained in sections 266 to 280 shall *mutatis mutandis* apply in all respects.

(4) If on any report to the registrar under sub-section (2) it appears to him that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly, giving his reasons, and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.

(5) If it appears to the Court in the course of a voluntary winding up that any past or present director, manager or other officer, or any member, of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the liquidator to the registrar, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such a report and, on a report being made accordingly, the provisions of this section shall have effect as though the report has been made in pursuance of the provisions of sub-section (1) or (2).

(6) If, where any matter is reported or referred to the registrar under this section, he considers that the case is one in which a prosecution ought to be instituted, he shall report the matter to the Authority, and the Authority may, after taking such legal advice as it thinks fit, direct the registrar or the prosecutor appointed under section 480 to institute proceedings:

Provided that no report shall be made by the registrar under this sub-section without first giving the accused person an opportunity of making a statement in writing to the registrar and of being heard thereon.

(7) Notwithstanding anything contained in the Evidence Act, 1872 (I of 1872), when any proceedings are instituted under this section it shall be the duty of the liquidator and of every officer and

agent of the company past and present (other than the defendant in the proceedings) to give all assistance in connection with the prosecution which he is reasonably able to give, and for the purposes of this sub-section the expression agent in relation to a company shall be deemed to include any banker or legal adviser of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.

(8) If any person fails or neglects to give assistance in manner required by sub-section (7), the Court may, on the application of the registrar or the prosecutor, as the case may be, direct that person to comply with the requirements of the said sub-section, and where any such application is made with respect to a liquidator, the Court may, unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.

Synopsis

1. Object and scope.
2. Prosecution.
3. Sanction of Court.
4. Appeal.

1. **Object and scope.** The section is intended to safeguard the interest of the share-holders of the company which has failed by preventing the liquidator from wasting the remainder of the money of the company on unprofitable criminal prosecution.[2]

Criminal offences not covered by Ordinance. The section applies to all offences whether under the general law such as the Penal Code or under the Companies Ordinance.[3] Section 418 is not limited to the criminal liability of the directors under the Ordinance, and hence is not confined to the special offences created under the Ordinance.[4]

Criminal breach of trust. No protection is afforded by section 418 to company promoters and directors against prosecution for criminal breach of trust. Consequently the police do not require any sanction to prosecute any one for that offence.[5]

2. **Prosecution.** This section provides summary procedure for compensating the company in respect of loss occasioned by misfeasance which means a breach of duty resulting in loss.[6] Parties other than the liquidator can move the Court to take

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2. 1937 Mad. W N 1122.
3. AIR 1961 Raj. 48.
4. AIR 1942 Sind 9=43 Cr. L.J. 304+AIR 1953 Cal. 153.
5. 1937 Mad W N 1122+AIR 1961 AP. 493.
6. PLD 1987 Lah. 618.

action under section 418.[7] Where there is no general sanction under section 333 but only a direction under section 418 (1), the complaint filed by the liquidator need not be in the name of and on behalf of the company. The criminal Courts can entertain a prosecution by the liquidator in any other form.[8] High Court should be very slow to interfere under section 421 with the exercise of discretion by the lower Court unless it is satisfied that the discretion was unreasonably exercised.[9]

Procedure for prosecution. The company law does not prescribe any special procedure for enquiry into and trial of offences under the Ordinance and the Criminal Procedure Code must, therefore, govern the enquiry and trial of those offences also. They are intended to regulate the actions of the registrar or liquidator or other authorities under the Company Law in connection with the administration of the Company Law and cannot be taken to regulate the trials by criminal Courts.[10]

3. **Sanction of Court.** The Court, under the directions of which the company is being wound up by the liquidator, must be satisfied that a prosecution is worthwhile before it will allow the liquidator or itself to initiate proceedings and incur expenses.[11] However, it is not necessary for a Court to find that the facts are so plain that a conviction must ensue before it gives direction to the liquidator to prosecute.[12] When granting sanction to prosecute, the Court has to consider whether it is a case in which a good citizen desirous of doing his duty to the state thinks that he ought, at his own expense, institute a prosecution. The Company Court acts incorrectly if it finds solely on the fact that there is a prima facie case with regard to the offence.[13] The Court can direct a prosecution even where no pecuniary benefits would result to the creditors and share-holders. But normally it would be unwilling to sanction the prosecution when the assets are too small and the prosecution may swallow up or most disproportionately reduce such meagre assets.[14] The wishes of the creditor are not decisive on the point whether the Court should direct the liquidator to prosecute or not. The Court can and in a proper case ought to direct prosecution of a delinquent director of a company without the assent and even notwithstanding the dissent of the class or any of the class at whose expense the prosecution would be initiated. It has a discretion to ignore the opposition to the prosecution if in its opinion the object of the opposition was not so much to save the company's funds as to save the guilty director.[15]

Opportunity of being heard before sanction. The Court, before making an order under sub-section (1) giving direction for prosecution by the liquidator or for reference to the Registrar, is not bound to give an opportunity to the offender of being heard.[16]

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7. AIR 1947 Mad. 343 (DB)+AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB).
8. AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB).
9. AIR 1936 Oudh 338=12 Luck. 283 (DB).
10. AIR 1961 Raj. 48.
11. 1937 Mad W N 1122.
12. AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB).
13. AIR 1961 AP. 493=AIR 1955 Cal. 29+AIR 1947 Mad 343.
14. AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB).
15. AIR 1947 Mad. 343 (DB).
16. AIR 1959 SC 51+AIR 1955 Cal. 29 (DB)+AIR 1947 Mad. 343 (DB).

Reasons need not be recorded. The Court is not required to set forth its reasons in the order when directing the liquidator to launch prosecutions.[17]

Proof of sanction. It must be proved that the sanction was given in respect of the facts constituting the offence charged and if the facts did not appear on the face of the sanction, which was desirable, it should be proved by extraneous evidence that they were placed before the sanctioning authority.[18]

Prosecution without sanction. The omission of the liquidator to obtain direction under section 418 before initiating a prosecution against delinquent directors does not render the prosecution illegal or invalid.[19]

4. Appeal. An order passed under section 418 directing the liquidator to prosecute for offences under the penal provisions of the Ordinance is appealable under section 110 of the Ordinance.[20] The order is more of a criminal, than of a civil nature and section 109-C, Civil P.C. is not applicable to it.[1]

419. *Penalty for false evidence.* If any person, upon any examination upon oath authorised under the Ordinance, or in any affidavit, disposition or solemn affirmation, in or about the winding up of any company under this Ordinance, or otherwise in or about any matter arising under this Ordinance, intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to two years, and shall also be liable to fine.

420. *Penal Provisions.* (1) If any person, being a past or present director, chief executive, managing agent, manager, auditor or other officer of a company which at the time of the commission of the alleged offence, is being wound up, whether by or under the provision of the Court or voluntarily or is subsequently ordered to be wound up by the Court or subsequently passes a resolution for voluntary winding up--

(*a*) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the property, real and personal, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary way of the business of the company; or

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17. AIR 1947 Mad. 343 (DB) (Order not necessarily liable to be vacated for not setting forth the reasons for it).
18. AIR 1955 Cal. 29=1955 Cr. L.J. 107 (DB).
19. AIR 1959 SC 51+AIR 1955 Cal. 29 (DB)+AIR 1953 Cal. 153 (Absence of direction might only mean that any costs incurred in such a proceeding might have to be paid by the liquidator personally)+AIR 1937 All. 714 (DB)+AIR 1961 Raj. 48.
20. AIR 1947 Mad. 343 (DB).
1. AIR 1931 Sind 120.

(*b*) does not deliver up to the liquidator, or as he directs all such part of the real and personal property of the company as is in his custody or under his control, and which he is required by law to deliver up; or

(*c*) does not deliver up to the liquidator, or as he directs, all books and papers in his custody or under his control belonging to the company which he is required by law to deliver up; or

(*d*) within twelve months next before the commencement of the winding up or at any time thereafter, conceals any part of the property of the company to the value of one hundred rupees or upwards or conceals any debt due to or from the company; or

(*e*) within twelve months next before the commencement of the winding up or at any time thereafter, fraudulently removes any part of the property of the company to the value of one hundred rupees or upward; or

(*f*) makes any material omission in any statement relating to the affairs of the company; or

(*g*) knowing or believing tha· a false debt has been proved by any person under the winding up, fails for the period of a month to inform the liquidator thereof; or

(*h*) after the commencement of the winding up, prevents the production of any books or papers affecting or relating to the property or affairs of the company; or

(*i*) within twelve months next before the commencement of the winding up or at any time thereafter, conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of, any book or paper affecting or relating to the property or affairs of the company; or

(*j*) within twelve months next before the commencement of the winding up or at any time thereafter, makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the company; or

(*k*) within twelve months next before the commencement of the winding up or at any time thereafter, fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent

parting with, altering or making any omission in, any document affecting or relating to the property or affairs of the company; or

(*l*) after the commencement of the winding up or at any meeting of the creditors of the company within twelve months next before the commencement of the winding up, attempts to account for any part of the property of the company by fictitious losses or expenses; or

(*m*) has within twelve months next before the commencement of the winding up or at any time thereafter, by any false representation or other fraud, obtained any property for or on behalf of the company on credit which the company does not subsequently pay for; or

(*n*) within twelve months next before the commencement of the winding up or at any time thereafter, under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for; or

(*o*) within twelve months next before the commencement of the winding up or at any time thereafter, pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing is in the ordinary way of the business of the company; or

(*p*) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to the affairs of the company or to the winding up;

he shall be punishable, in the case of the offences mentioned respectively in clauses (*m*), (*n*) and (*o*) of this sub-section, with imprisonment for a term which may extent to five years, and, in the case of any other offence, with imprisonment for a term which may extend to two years, and shall also be liable to a fine which may extend to twenty thousand rupees in each case:

Provided that it shall be a good defence, to a charge under any of clauses (*b*), (*c*), (*d*), (*f*), (*n*) and (*o*), if the accused proves that he had no intent to defraud, and to a charge under any of clauses (*a*), (*h*), (*i*) and (*j*), if he proves that he had no intent to conceal the state of affairs of the company or to defeat the law.

(2) Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under clause (*o*) of sub-section (1) every person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in such circumstances as aforesaid shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable to a fine which may extend to twenty thousand rupees.

Synopsis

1. Scope. 2. Limitation.

1. **Scope.** Under section 420 (1)(*b*), the accused must have in his custody or under his control, articles when the company was being wound up.[2]

2. **Limitation.** Prosecution of officers of a company not for offences under the Companies Ordinance but for offences under the Penal Code are not subject to the limitation of time prescribed by section 420 of the Companies Ordinance.[3]

SUPPLEMENTARY PROVISIONS AS TO WINDING UP

421. *Liquidator to exercise certain powers subject to sanction.* (1) The liquidator may, with the sanction of the Court when the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of a special resolution of the company in the case of a voluntary winding up, do the following things or any of them:

(*i*) pay any classes of creditors in full;

(*ii*) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim present or future, whereby the company may be rendered liable;

(*iii*) compromise any calls and liabilites to calls, debts, and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent or subsisting or supposed to subsis between the company and a contributory or alleged contributory other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or liabilities or the winding up of the company, on such terms as may be agreed, and taken any security for the discharge of any calls, debt,

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2. AIR 1944 Mad. 424=46 Cr. L.J. 347.
3. AIR 1958 Cal. 163=(1958) 2 Cal. 381=1958 Cr. L.J. 496.

liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers under sub-section (1) shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

Synopsis

1. Scope.
2. Order for payment to creditors.
3. Compromise.
4. Voluntary winding up.

1. Scope. An official liquidator is not allowed to refer matters in difference to private arbitration under section 421.[4]

High Court, interference by. High Court should be very show to interfere under section 421 with exercise of discretion by the lower Court unless it is satisfied that the discretion was unreasonably exercised.[5]

2. Order for payment to creditors. Though the creditors referred to in section 405 are persons entitled to priority under statute and as of right, the Court has under section 405 a discretion to order payment in full to any class of creditors other than those referred to in section 405.[6]

3. **Compromise.** In order that the compromise entered into by the parties should be given effect to, what is required is a sanction by the Court under section 421 and not a condonation under section 488.[7] For obtaining such sanction the liquidator must show that the compromise will be beneficial to the company. The Court cannot compel an unwilling liquidator to compromise a debt due to the Company.[8]

Misfeasance claim. The liquidator has, under section 421, the power to compromise a misfeasance claim, subject to the sanction of the Court.[9] As to which particular judge should give sanction depends upon the allocation of work made by the Chief Justice, but whichever Judge gives the sanction, he is exercising his power as contemplated by section 421. There is nothing in the Companies Ordinance which requires that the sanction to compromise a misfeasance claim must be given by the very Judge who is trying the misfeasance summons.[10]

4. Voluntary winding up. In cases of voluntary winding up sanction by extraordinary resolution as under this section is necessary in order that a

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4. AIR 1928 All. 553=30 All. 867.
5. AIR 1936 Oudh 338=12 Luck. 283 (DB).
6. AIR 1936 Oudh 338=12 Luck. 283 (DB).
7. AIR 1954 Bom. 121=ILR 1954 Bom. 79 (DB).
8. AIR 1939 Lah. 497=ILR 1939 Lah. 324.
9. 1953-23 Com Cas. 474 (Bom) (Order 23, Rule 3, Civil P.C. applies to misfeasance proceedings).
10. AIR 1954 Bom. 121=ILR 1954 Bom. 79 (DB).

compromise between a liquidator of a company and a contributory should bind the liquidator.[11]

422. *Meetings to ascertain wishes of creditors or contributories.* (1) In all matters relating to the winding up of a company, the Court--

(*a*) shall have regard to the wishes of creditors or contributories of the company, as proved to it by any sufficient evidence;

(*b*) may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs; and

(*c*) may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

(2) When ascertaining the wishes of creditors, regard shall be had to the value of each creditor's debt.

(3) When ascertaining the wishes of contributories, regard shall be had to the number of votes which may be cast by each contributory.

Synopsis

1. Scope. 2. Wishes of share-holders and creditors.

1. Scope. The directors of a company have authority to apply on behalf of the company for its winding up only after its members have sanctioned at a general meeting the presentation of the application. Where there is an initial lack of authority due to the absence of such sanction, it cannot be made good by the support to the winding up expressed by the contributories at a combined meeting of the creditors and themselves convened under section 320.[12]

Application under section 305. In dealing with an application for winding up under section 305, it is not duty of the Court to call a meeting of the creditors and the share-holders to discover their wishes in connection with an arrangement proposed. In such a case it is for the parties before the Court to produce evidence before it of the wishes of the creditors or contributories and then the Court will give full consideration to such wishes.[13]

Matters relating to winding up. It is well within the powers of a Court to direct the holding of a meeting of the share-holders for the purpose of ascertaining

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11. AIR 1924 Lah. 148 (DB)+AIR 1923 Lah. 85 (Voluntary winding up--Compromise by liquidator without sanction--Company is bound so far as third party is concerned--Liquidator becomes personally liable for loss).
12. AIR 1953 Pepsu 195=ILR 1952 Pat. 588.
13. ILR (1954) 4 Raj. 338 (DB).

the wishes either of the creditors or of the share-holders in all matters bearing on the winding up of the company. Scope of the section cannot be restricted only to the actual winding up of the company. Realisation of the assets of the concern are not unrelated to the winding up of the company.[14]

2. Wishes of share-holders and creditors. The Court in coming to a decision as to whether it should wind up the company or not has to take into consideration the opinion of the majority of the share-holders and its creditors.[15] The Court will not ordinarily grant the application for winding up where the majority of the share-holders and creditors are opposed to it.[16]

Share-holders, wishes of. Where in a winding up of a company the contributories are alone interested in its results as there are no creditors, the liquidation is a peculiar one in which the Court, as to all matters affecting the contributories as a class would have regard to their wishes as proved by sufficient evidence.[17] The fact that a person is a fully paid-up share-holder can only result in his desire being treated as comparatively unimportant as against the wishes expressed by the contributories who are still liable for calls. It cannot however disqualify him from being heard at all.[18]

Creditors, wishes of. In an application for compulsory winding up the Court ought to give serious consideration to the wishes of the majority of the creditors although it will not be bound by those wishes.[19] If there is a petition by a creditor who is prima facie entitled to an order for winding up but the majority of the creditors do not desire a winding up then the question is within the discretion of the Court.[20] In such a case regard shall be had to the value of each creditor's debt. In order, therefore, to determine the wishes of the creditors, it will not suffice to merely allow each creditor on vote. The amount due to each creditor will also have to be taken into consideration.[1]

Transferee of claim by creditor. Where a creditor of a company transferred her claim to her husband and the liquidator accepted the claim of the transferee though it was not entered into the books of the company because they were in the Court. It was held; that the mere fact that the transferee was not shown as a creditor in place of his wife, does not affect the question of his competency as creditor, because the books of the company were in the custody of the Court and no entry could be made in them by the voluntary liquidator.[2]

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14. AIR 1961 AP. 259 (DB).
15. AIR 1942 Bom. 231+AIR 1932 Rang. 75=10 Rang. 143 (DB).
16. AIR 1942 Bom. 231+AIR 1952 Cal. 323 (DB) (Court may in its discretion refuse to order winding up where majority of creditors (in value) oppose it)+AIR 1932 Rang. 75 (DB).
17. AIR 1932 PC 1=58 Ind. App. 416=55 Mad. 180.
18. AIR 1931 Cal. 391=58 Cal. 62 (DB).
19. AIR 1935 Lah. 779 (SB) (Opinion expressed by contributories and creditors in favour of liquidation being carried on by the directors themselves does not bar the Court from ordering compulsory winding up where that is desirable)+AIR 1932 Rang. 75 (DB).
20. AIR 1931 Cal. 391=58 Cal. 62 (DB).
1. PLD 1952 Lah. 465.
2. PLD 1952 Lah. 465.

423. *Documents of company to be evidence.* Where any company is being wound up, all books and papers of the company and of the liquidators, shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

1. **Burden or proof.** Onus lies heavily upon those who seek to show that the entries in the books of the company were incorrect and had been made fraudulently or without sufficient cause.[3]

424. *Summary disposal of certain suits by liquidators.* Notwithstanding anything contained in the Code of Civil Procedure, 1908 (Act V of 1908), a liquidator desiring to recover any debt due to the company may apply to the Court in which the proceedings are pending that the same be determined summarily, and the Court may determine it on affidavits but when the Court deems it just and expedient, either on an application made to it in this behalf or of its own motion, it may set down any issue or issues for hearing on other evidence also and pass such orders for discovery of particulars as it may do in a suit.

425. *Limitation.* Notwithstanding anything contained in the Limitation Act, 1908 (IX of 1908), in computing the time within which a liquidator may file a suit for the recovery of any debt due to the company, the period which elapses between the making of the petition for liquidation and the assumption of charge by the liquidator, or a period of one year, whichever be greater, shall be excluded.

426. *Court-fees.* (1) Notwithstanding anything contained in the Court-fees Act, 1870 (VII of 1870), or in the Code of Civil Procedure, 1908 (Act V of 1908), where sufficient funds are not available with the liquidator and it is necessary to file a suit for the recovery of a debt due to the company, no court-fee stamp need be affixed on the plaint.

(2) If the liquidator succeeds in the suit, the Court shall calculate the amount of court-fee which would have been paid by the liquidator if he had not been permitted to sue under sub-section (1), and such amount shall be recoverable by the Court from any party ordered by the decree to pay the same.

(3) Where the liquidator does not succeed, the court-fee shall be payable by him out of other assets, if any, whenever realised.

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3. AIR 1935 Lah. 147 (DB)+AIR 1937 Lah. 61.

427. *Inspection of documents.* (1) After an order for a winding up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just; and any documents in the possession of the company may be inspected by creditors or contributories accordingly.

(2) The order as aforesaid may, in the case of a voluntary winding up, be made by the Authority.

(3) Nothing in sub-section (1) shall be taken as excluding or restricting any rights conferred by any law for the time being in force--

(*a*) on the Federal Government or a Provincial Government; or

(*b*) on the Authority or any officer thereof; or

(*c*) on any person acting under the authority of any such Government or the Authority or officer thereof; or

(*d*) on the registrar.

Synopsis

1. Inspection of documents. 2. Copies of documents.

1. **Inspection of documents.** Section 427 places the matter of ordering inspection of documents entirely in the discretion of the Court and if this discretion has once been exercised in favour of a contributory or creditor, it cannot be interfered with on the ground that he may use the information thus got on inspection, in the interest of directors yet to be examined. This circumstance would not be a bar to the exercise of the right by persons authorised under the law to inspect the documents and other records which the law permits.[4]

2. **Copies of documents.** Where an order was made in the ordinary form giving the applicant leave to inspect the documents in the possession of the liquidator at all the reasonable times and take copies at his own expense; it was held that the applicant had the right to take copies himself without paying for them and not merely for being furnished with copies on paying for the same.[5]

428. *Disposal of books and papers of company.* (1) Subject to any rules made under sub-section (3), when a company has been wound up and is about to be dissolved, the books and papers of the company and of the liquidators may be disposed of as follows, that is to say--

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4. AIR 1937 Lah. 82.
5. (1899) 1899 W N 134.

(*a*) in the case of a winding up by or subject to the supervision of the Court, in such way as the Court directs;

(*b*) in the case of a members' voluntary winding up, in such way as the company by special resolution directs; and

(*c*) in the case of a creditors' voluntary winding up, in such way as the committee of inspection or, if there is no such committee, as the creditors of the company may direct.

(2) After the expiry of three years from the dissolution of the company, no responsibility shall rest on the company, or the liquidators, or any person to whom the custody of the books and papers has been committed, by reason of any book or paper not being forthcoming to any person claiming to be interested therein.

(3) The Federal Government, may by rules, prevent for such period (not exceeding three years from the dissolution of the company) as the Federal Government thinks proper, the destruction of the books and papers of a company which has been wound up, and enable any creditor or contributory of the company to make representations to the Federal Government.

(4) If any person acts in contravention of any such rules or of any direction of the Federal Government thereunder, he shall be punishable with fine which may extend to five thousand rupees.

429. *Power of Court to declare dissolution of company void.* (1) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2) It shall be the duty of the person on whose application the order was made, within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do he shall be punishable with fine which may extend to one hundred rupees for every day during which the default continues.

1. **Scope.** Where a company is fraudulently wound up by a resolution of its members and the landlord re-enters into possession of land leased to the company on ground of breach of covenant due to winding up of the company, and

subsequently the Court declares the resolution as void, the acts done by the landlord such as granting of leases to other persons are not valid.[6]

The dissolution of a company does not debar a liquidator from taking action in respect of the assets realised after the dissolution.[7]

All claims met by company. Where petitioner who was unsecured creditor of the company and at whose instance winding up commenced was paid his claim in full and thus he was not keen to pursue the case any further. Income-tax Department was also paid its dues in full. Only secured creditor of company also entered into compromise with the company which provided for settlement of their claim against company to the satisfaction of all concerned. Share-holders and contributories offered to place at the disposal of Official Liquidator adequate amount to meet 100% claim of the preferential and unsecured creditors of company and offered to deposit in cash the claim of salaries/dues of the staff and workers of the Company and fee claimed by the Official Liquidator. It was held that all these circumstances fully justified for passing of an order by the Court which should have the effect of restoring the company in the position in which it was before the commencement of winding up.[8]

430. *Information as to pending liquidations.* (1) Where a company is being wound up, if the winding up is not concluded within one year after its commencement, the liquidator shall, once in each half year and at intervals of not more than six months, or such shorter period as may be prescribed, until the winding up is concluded, file in the Court or with the registrar, as the case may be a statement in the prescribed form and containing the prescribed particulars with respect to the accounts, proceedings in and position of the liquidation alongwith the report of auditors.

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement and to receive a copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Pakistan Penal Code, 1860 (Act XLV of 1860), and shall be punishable accordingly on the application of the liquidator.

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6. AIR 1937 Cal. 129=ILR (1937) 1 Cal. 203 (DB).
7. AIR 1917 Lah. 383 (DB) (Similarly in an action brought after the complete winding up and dissolutio of a complete winding up and dissolution of a company the Court can treat the liquidator, who refuses to appear on the ground that he is *functus officio*, as a party and pass an *ex parte* order against him).
8. 1987 CLC 1348=NLR 1987 Civ. 653=KLR 1987 CC 646.

(3) When the statement is filed in the Court a copy shall simultaneously be field by the liquidator with the registrar and shall be kept by him alongwith the other records of the company.

(4) If a liquidator fails to comply with requirements of this section, he shall be punishable with fine which may extend to five thousand rupees, and in the case of a continuing failure, to a further fine which may extend to one hundred rupees for every day after the first during which the default continues.

Synopsis

1. "Within one year." 2. Forum.

1. **"Within one year."** The words "within one year" of its commencement in this section mean within one year after the actual commencement of the winding up of the company, that is from the date of the winding up order and not within one year after the notional or fictional commencement envisaged by section 311.[9]

2. **Forum.** The trial of the offences defined and punished by the Companies Ordinance is not assigned to any special Courts created by the Companies Ordinance but to the ordinary criminal Courts exercising jurisdiction under the Code of Criminal Procedure subject to the provisions contained in section 474 of the Ordinance under which the power or jurisdiction to take cognizance of offences defined and punished by the Companies Ordinance can be exercised only by a Magistrate of the First Class and no other Magistrate. A section defining the limits of the jurisdiction of a criminal Court or specifying the conditions for taking cognizance of an offence created by a special statute, cannot be read as a section creating a special Court or designating a particular person to discharge a judicial function.[10]

431. *Payments by liquidator into bank.* (1) Every liquidator of a company shall, in such manner as may be prescribed, pay and keep all moneys received by him or which become available with him or come under his control in his capacity as such in a special account opened by him in that behalf in a scheduled bank in the name of the company.

(2) If any such liquidator at any time retains or allows any money to be not so paid and kept as aforesaid or utilises otherwise for more than three days a sum exceeding five hundred rupees or such other amount as the Court may on the application of the liquidator authorise him to retain them he shall pay surcharge on the amount so retained at the rate of two per cent per month or part thereof and shall be liable to (*a*) disallowance of all or such part of his

9. AIR 1963 AP. 132.
10. AIR 1965 Mysore 274.

remuneration as the Court may think just; (*b*) to make good any loss suffered by the company personally and (*c*) be removed from the office by the Court of its own motion or on application of the registrar or a creditor or contributory of the company, and shall also be liable personally for any loss occasioned by the default.

(3) No liquidator shall pay into his personal account or any account other than the liquidation account of the particular company in liquidation any sums received by him as liquidator.

(4) Every liquidator who makes default in complying with the provisions of this section shall, in addition to his other liabilities, be punishable with imprisonment for a term which may extend to six months and with fine which extend to five thousand rupees.

432. *Unclaimed dividends and undistributed assets to be paid to Companies Liquidation Account.* (1) Where any company is being wound up, if the liquidator has in his hands or under his control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed for six months after the date on which they became payable or refundable, the liquidator shall forthwith pay the said money into the State Bank of Pakistan to the credit of the Federal Government in an account to be called the Companies Liquidation Account, and the liquidator shall, on the dissolution of the company, similarly pay into the said account any money representing unclaimed dividends or undistributed assets in his hands at the date of dissolution.

(2) The liquidator shall when making any payment referred to in sub-section (1) furnish to the registrar or such other officer as the Federal Government may appoint in this behalf a statement in the prescribed form setting forth in respect of all sums included in such payment the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed, alongwith the official receipt of the State Bank of Pakistan.

(3) The receipt of the State Bank of Pakistan for any money paid to it under sub-section (1) shall be an effectual discharge of the liquidator in respect thereof.

(4) The liquidator shall make the payments referred to in sub-section (1) by transfer form his special banking account referred to in section 431.

(5) The liquidator shall, when filing a statement in pursuance of sub-section (1) of section 430 indicate the sum of money which is payable to the State Bank of Pakistan under sub-section (1) which he has had in his hands or under his control during the six months preceding the date to which the said statement is brought down, and shall within fourteen days of the date of filing the said statement, pay that sum into the Companies Liquidation Account.

(6) Any person claiming to be entitled to any money paid into the Companies Liquidation Account in pursuance of this section may apply to the registrar for payment thereof, and the registrar, if satisfied that the person claiming is entitled, may after obtaining approval of the Authority, make the payment to that person of the sum due:

Provided that no claim under this sub-section shall be entertained after a period of fifteen years from the date of deposit of the amount in the State Bank of Pakistan.

(7) Notwithstanding anything contained in any previous Companies Act, any money paid into the Companies Liquidation Account in pursuance of this section which remains unclaimed thereafter for a period of fifteen years, shall be transferred to the general revenue account of the Federal Government.

(8) Any liquidator retaining any money which should have been paid by him into the companies Liquidation Account under this section shall, in addition to such money, pay surcharge on the amount retained at the rate of two per cent per month or part thereof and shall also be liable to pay any expenses or losses occasioned by reason of his default and he shall also be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court on an application by the registrar.

1. **Scope.** The failure of the liquidator to deposit the unclaimed amounts in the State Bank of Pakistan is no doubt a serious default but that by itself does not compel the Court to impose penalty on the liquidator. In fact the Court, before it

imposes any penalty, should consider whether the default was reasonable and where it is so, give relief to the liquidator under section 488.[11]

433. *Books of accounts and other proceedings to be kept by liquidators.* (1) Every liquidator shall maintain at the registered office proper books of accounts in the manner required in the case of companies under section 230 and the provisions of that section shall apply *mutatis mutandis* to companies being wound up.

(2) Every liquidator shall also keep at the registered office proper books and papers in the manner required under section 336.

(3) Any creditor or contributory may, subject to the control of the Court, inspect any books and papers kept by the liquidator under sub-sections (1) and (2).

(4) The Federal Government may alter or add to any requirements of this section by a general or special order in which case the provisions so altered or added shall apply.

(5) If any liquidator contravenes any provisions of this section, he shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to ten thousand rupees.

434. *Application of provisions relating to audit.* The provisions of this Ordinance relating to audit of accounts, rights, powers, duties, liabilities and report of auditors of companies and the duties of companies and their officers as applicable to companies shall apply *mutatis mutandis* to companies being wound up, books of account and books and papers kept by the liquidator and his statement of accounts subject as follows:--

(*a*) all reference therein to officers of the company shall include references to the liquidator;

(*b*) the appointment of auditor shall be made by the Court, members or creditors, as the case may be, who appointed the liquidator, who shall also fix his remuneration which shall be paid by the liquidator from the funds of the company:

Provided that if no appointment of auditor is made by the members or creditors, as the case may be, the liquidator shall apply to the Authority who shall make the appointment and fix his remuneration.

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11. ILR (1955) 2 Cal. 439 (Failure caused by ignorance and inadvertence and not by dishonest motives).

435. *Enforcement of duty of liquidator to make return, etc.* (1) If any liquidator who has made any default in complying with any provisions of this Ordinance or committed any other irregularity in the performance of his duties fails to make good the default or undo the irregularity, as the case may be, within thirty days after the service on him of a notice requiring him to do so, the Court may of its own motion or on an application made to it by any contributory or creditor of the company or by the registrar, make an order directing the liquidator and any other person involved to make good the default or undo the irregularity or otherwise make amends, as the circumstances may require, within such time as may be specified in the order:

Provided that, where an application under this section is made by the registrar, the Court shall dispose of the same within fourteen days of the submission thereof.

(2) Any such order may provide that all costs of, and incidental to, the application shall be borne by the liquidator.

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalty on a liquidator in respect of any such default or irregularity as aforesaid.

436. *Notification that a company is in liquidation.* (1) Where a company is being wound up, whether by or under the supervision of the Court or voluntarily, every advertisement, notice, invoice, order for goods, business letter or other communication or document issued by or on behalf of the company or a liquidator of the company, or a receiver or manager of the property of the company, being a document on or in which the name of the company appears, shall contain a statement that the company is being wound up and about the mode of its winding up.

(2) If default is made in complying with this section, the company and any of the following persons who knowingly and wilfully authorises or permits that default, namely, any officer of the company, any liquidator of the company and any receiver or manager, shall be liable to fine which may extend to two thousand rupees.

437. *Court or person before whom affidavit may be sworn.* (1) Any affidavit required to be sworn under the provisions or for the purposes of this Part may be sworn--

(*a*) in Pakistan, before any Court, Judge, or person lawfully authorised to take and receive affidavits; and

(*b*) elsewhere before a Pakistan Counsel or Vice-Counsel.

(2) All Courts, Judges, justices, commissioners, and persons acting judicially in Pakistan shall take judicial notice of the seal or stamp of signature, as the case may be, of any such Court, judge, person, Counsel or Vice-Counsel, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Part.

COURT RULES

438. *Power to make rules.* (1) The Supreme Court may, in consultation with the High Courts or, where the Supreme Court advise the Federal Government to do so, the Federal Government may in consultation with the High Court, from time to time, make rules, consistent with this Ordinance, concerning the mode of proceedings to be had for winding up a company in a High Court and in the Courts subordinate thereto, and for voluntary winding up (both members and creditors), for the holding of meetings of creditors and members in connection with proceedings under section 284 of this Ordinance, and for giving effect to the provisions as to the reduction of the capital and the scheme of reorganisation of a company and generally for all applications to be made to the Court and all other proceedings or matters coming within the purview or powers or duties of the Courts under the provisions of this Ordinance and shall make rules providing for all matters relating to the winding up of companies which, by this Ordinance, are to be prescribed.

(2) Without prejudice to the generality of the foregoing powers, such rules may enable or require all or any of the powers and duties conferred and imposed on the Court by this Ordinance in respect of the matters following, to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of--

(*a*) holding and conducting meetings to ascertain the wishes of creditors and contributories;

(*b*) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets;

(*c*) requiring delivery of property or documents to the liquidator.

(*d*) making calls;

(*e*) fixing a time within which debts and claims must be proved:

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court.

Synopsis

1. Provident society. 2. Costs.

1. **Provident society.** The winding up of an Incorporated Provident Society is by virtue of the provisions of sub-section (1) and (2) a winding up under the Companies Ordinance to which the rules framed, under S. 438 are applicable.[12]

2. **Costs.** The section gave only a power to make rules concerning the proceedings specified in the section and therefore those rules could not be relied on to regulate the costs in a proceeding which was not one so specified.[13]

REMOVAL OF DEFUNCT-COMPANIES FROM REGISTER

439. *Registrar may strike defunct-company off register.* (1) Where the registrar has reasonable cause to believe that a company is not carrying on business or is, not in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or is in operation.

(2) If the registrar does not within one month of sending the letter receive any answer thereto, he may within thirty days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Official Gazette with a view to striking the name of the company off the register.

(3) If the registrar either receives an answer from the company to the effect that it is not carrying on business or is not in operation, or does not within one month after sending the second letter receive any

12. ILR (1950) 1 Cal. 510.
13. AIR 1915 Bom 66 (DB) (In such cases the matter must be governed by the rules framed by the High Court under the High Courts Act).

answer, he may publish in the Official Gazette, and sent to the company by post a notice that, at the expiration of three months from the date of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) Without prejudice to any other provisions, if, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of three consecutive months after notice by the registrar demanding the return has been sent by post to the company or to the liquidator at his last known place of business, the registrar may publish in the Official Gazette and send to the company a like notice as is provided in last preceding sub-section.

(5) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Official Gazette, and, on the publication in the Official Gazette of this notice, the company shall be dissolved:

Provided that the liability criminal, civil or otherwise (if any) of every director, officer, liquidator and member of the company shall continue and may be enforced as if the company had not been dissolved:

Provided further that nothing in this section shall affect the powers of the Court to wind up a company the name of which has been struck off the register.

(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register the Court, on the application of the company or a member or creditor made before the expiry of three years from the publication in the official Gazette of the notice aforesaid, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register and, upon the filing of certified copy of such order with the registrar, the company shall be deemed to have continued in existence as if its name had not been struck off, and the Court may by the

order give such directions and make such provisions as seem just for placing the company and all other persons in the same position nearly as may be as if the name of the company had not been struck off.

(7) A letter or notice under this section may be addressed to the company at its registered office, or if no office has been registered, to the care of some director, chief executive or other officer of the company whose name and address are known to the registrar or if no such address is known to the registrar, may be sent to each of the persons who subscribed the memorandum. addressed to him at the address mentioned in the memorandum.

(8) The provisions of this section shall not apply to a company which has any known assets and liabilities, and such company shall be proceeded against for winding up.

(9) If due to inadvertence or otherwise the name of any company which had any assets and liabilities or which has been in operation or carrying on business or about whose affairs any enquiry or investigation may be necessary has been struck off the register, the registrar may, after such enquiries as he may deem fit, move the Authority to have the name of the company restored to the register and thereupon the Authority may, if satisfied that it would be just and proper so to do, order the name of the company to be restored in the manner provided in sub-section (6).

(10) The provisions of this section shall *mutatis mutandis* apply to a company established outside Pakistan but having a place of business in Pakistan as they apply to a company registered in Pakistan.

Synopsis

1. Registrar, powers of.
2. Winding up of defunct-company.
3. Restoration of name.

1. Registrar, powers of. The Registrar may strike off the name of a company from the Register of Companies if he finds that a company is not carrying on any business. The Registrar may come to that conclusion when the company specially states so or when the letters addressed to the company are returned with the remarks "left no address" or "refusal to receive". But in the latter case no such order can be passed where the company shows reasons for the return of letters. It must be noted that the intention of this provision is to provide safeguards against hasty actions by the registrar under sub-section (5), for its consequences are disastrous for the company. At every stage time is allowed to the company to answer the enquiry and

further safeguard is provided by directing notice one after the other, first by ordinary post, then by registered post and then again by post and prima facie leaving the publication of the third notice in the Official Gazette to the discretion of the registrar. However, sub-section (3) envisages two situations. In the first situation the company may answer that it is not carrying on business or is not in operation. In the second the company does not answer the notices. Non-reply to the notices may be for a variety of reasons. Notices, may not reach the proper hands, they may be lost during communication and returned, as in the present case, for several reasons such as, closure of the office, refusal to receive the same by some unauthorised person to whom it is offered. If the registrar receives reply that the company is not carrying on business, in such a case no prejudice is likely to cause to the company or its share-holders if notice is not published in the Official Gazette and the registrar in such case, may not publish the same in the official gazette but in the other situation if the registrar passes the order of dissolution of the company and strikes its name off the register without first publishing the notice in the official gazette then the company or its members or creditors may be seriously prejudiced. An example of such prejudice will be found in that the company will not, in such a case, be able to sue for recovery of its dues, or properties as it will no longer be in existence. Therefore the word "may" in section 439(3) has to be considered in the first situation, *viz.* when the company writes on reply to the notice that it is not carrying on business or is not in operation, as permissive, but in the second situation the word "may" acquires force of 'must', for in the absence of publication of such notice in the Official Gazette the company, its members or creditors whose interest is desired to be safeguarded may be seriously prejudiced. It is also possible that directors of a company may not like to continue or may not answer, but members or creditors thereof may be interested in its continuation and in such a case if the company receives notice and does not answer and such notice is not published in the Official Gazette, the members and creditors would not know of such a notice and would not be able to safeguard their interest. In other words the Registrar has discretion to publish or not to publish the notice if the company replies that it is not carrying on business or is not in operation but he has no such discretion in the other case.[14]

The Registrar is not bound to remove the company from the register on discovering that it is not carrying on business or that its members have been reduced to less than seven. The mere fact that the share-holders of a company become less than seven does not render the company defunct.[15]

Company carrying on business. Registrar may not remove a company from Register where the company is carrying on business. Where name of company was removed on the ground that it had ceased to do business. Material on record showed that during relevant years the company was not only functioning but was doing active business as was evident from return of income filed by it for those years and amount of income-tax paid thereon. Petitioner was carrying on business and was in operation at the time its name was struck off from register of companies.[16] Name of

14. PLD 1981 Kar. 447=PLJ 1981 Kar. 54.
15. AIR 1925 Lah. 443.
16. 1988 CLC 1538=PLJ 1988 Kar. 516.

company was ordered to be restored to the Register. Personal representative of a member although not on the register of share-holders can present application that company's name be restored to the register of companies.[17]

Restoration of company. The Registrar can either unconditionally order the restoration of the company to the register or refuse an application for restoration. It has no power to impose any condition and require the company to comply with it as a condition precedent to its being brought on the register.[18]

2. **Winding up of defunct-company.** Although a company has been struck off the register and has not been subsequently restored to the register it can be wound up under section 305.[19] The assets, if any, left of a company which is struck off the register and dissolved are not without owner. If there are no owners the doctrine of *bona vacantia* would be attracted in that contingency and the State would take them over.[20]

3. **Restoration of name.** The power of the Court to restore a company to the register is a discretionary power which it will exercise for a substantial reason and not as a ritual or a ceremony. One such reason which will induce the Court to exercise that discretion is that the company will be in a position to carry on the business after its restoration,[1] or if it finds that it was at the time of the order, doing business or was in operation or on the ground that it is just to do so. A company, if it is operating as a company for doing something in relation to its past obligations or to avoid future pecuniary liability, will be deemed to be in operation.[2] Thus when a suit is actually pending against a company and is being contested by it at the time of the removal of its name from the register, it is proper to direct the restoration of the name of the company particularly when the directors were aware of the fact of the contested litigation and were actually taking part in it.[3]

An order restoring the company to the register cannot be assailed solely on the formal and technical ground that it had been passed on the application of the share-holder at whose instance the company was struck off when the order itself is justified on merits and other share-holders although not *co nominee* parties had supported the application.[4]

Who may apply for restoration. Personal representative of a member although not on the register of share-holders can present application that company's name be restored to the register of companies. But a stranger to a proceedings before the Company Judge has no *locus standi* to apply for restoration of name of a company on Register of companies. Where a suit was filed by *A* (a private limited company)

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17. 1992 MLD 1094.
18. (1957) 1957-3 All E R 232.
19. ILR 1955 Mad. 635 (DB)+AIR 1928 Nag. 194=24 Nag L R 100 (DB).
20. AIR 1959 Cal. 493.
1. AIR 1959 Cal. 493.
2. AIR 1954 Madh B. 70.
3. 1992 MLD 1094+AIR 1954 Madh B. 146+AIR 1954 Madh B. 70.
4. ILR 1955 Mad. 635 (DB).

against *B*. During pendency of suit *A's* name was struck off from Register of Companies making it not possible to pass any decree in the suit. On *A's* approach Court ordered restoration of *A's* name on Register of Companies. Aggrieved by order of Court. *B* filed appeal to High Court. It was held that *B's* appeal was not competent, he was a stranger to proceedings before the Company Judge and mere fact that restoration of *A's* name on Register of Companies would enable Court to proceed with *A's* suit would not make *B* adversely affected by order of Company Judge.[5]

Effect of restoration. It is clear from section 439 (6) that on the restoration of a company back to the register, the company will be deemed to have had its existence all through and the rights of all parties would be as though there had been no cessation or interruption in the existence of the company on account of the striking off and subsequent restoration.[6] The final words in sub-section (6) are intended to give to the Court, where justice requires and the general words by which the company is deemed to have been in continued existence would or might not themselves suffice, the power to put both company and third parties in the same positions as they would have occupied in such cases if the dissolution of the company had not intervened.[7]

Ancillary orders. Where a company was struck off from the Register of Companies for not filing the statutory returns, the Court when restoring the name of the Company on the Register may direct it to file all the returns which it had not filed earlier.[8]

Refusal to restore, order of. An order refusing to restore the company to the register is not an order made or given in the matter of winding up of a company by the Court.[9]

Representation of company in restoration proceedings. An application for restoration of name of a company can only be made by the company, a member or a creditor.[10] The only person who can legally put in an appearance on behalf of a company in proceedings under section 439(6) on the application of a share-holder is either secretary of the company or one of its directors though they may not be parties to original proceedings. The Registrar cannot represent the company.[11] Therefore landlord on whose premises such a company was carrying on its business would have no right to appear and be heard in application presented to Court for restoration of defunct company.[12]

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5. 1992 CLC 1099 (DB).
6. 1992 MLD 1094+AIR 1953 Trav-Co. 161 (DB).
7. (1952) 1952-1 All E R 613.
8. PLD 1981 Kar. 447=PLJ 1981 Kar. 54.
9. AIR 1925 Lah. 443.
10. 1992 MLD 1094+AIR 1959 Cal. 493.
11. AIR 1929 Nag. 185 (DB).
12. 1992 MLD 1094.

Limitation. This section provides a limitation of three years for restoration of name of a company on Register of Companies but where action against a company was taken in period when the Companies Act, 1913 was in force which did not provide any period of limitation for filing such application, an application for restoration may be taken at any time. Bar of limitation does not apply to such cases.[13]

13. 1991 CLC 1520+NLR 1991 UC 1+1988 CLC 1538=PLJ 1988 Kar. 516.