below(73) that where the section does not apply to an obligation, satisfaction of the obligation made to the insolvent is not void, and if this view is correct it follows, it is thought, that the legislature would have intended s 22 to preserve all claims in favour of the insolvent estate as at sequestration rather than only those in respect of which the entire cause of action had arisen prior to sequestration.

(c) Obligations the cause of which arises after sequestration

As pointed out in the previous section, s 22 only applies to obligations the cause of which arose before the sequestration. What is the position in regard to the satisfaction of obligations the cause of which arises after the sequestration?

Property acquired by an insolvent after sequestration falls into his insolvent estate,(74) subject only to certain specific exceptions such as pensions, damages for defamation or personal injury and remuneration for work done.(75) It follows that if an insolvent deposits money with a bank the right to repayment vests in his trustee unless the monies fall within the excepted categories. At first sight, therefore, it would appear to follow that repayment of non-exempted monies could only validly be made to the trustee, and inasmuch as s 22 only applies to obligations which arose before sequestration the bank would not even be protected where it made payment to the insolvent in ignorance of the sequestration.

This would, however, be a surprising result because it would mean that the bank would be in a better position in regard to monies

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(73) See the next section.

(74) Sections 20(1)(a), 20(2)(b) and 23(1) of the Insolvency Act.

(75) Sections 23(7)-(9), subject, in the case of remuneration, to the trustee's right to a contribution - s 23(5).

deposited before sequestration than monies deposited after sequestration, whereas one would have expected precisely the reverse. As Galgut J, as he then was, said in Wessels v De Klerk & Anor,(76) in relation to s 24(1) which expressly recognises this distinction :

> 'Inasmuch as additional assets may be acquired by an insolvent after his sequestration and which fall into his estate, the Legislature, in respect of such additional assets and such assets only, has detracted from the rights of the creditors in so far as the insolvent may have alienated such additional assets to a bona fide third party without the consent of his *trustee (see sec. 24(1) of the Act). The reason for this latter provision is based on the fact that in equity such assets were not available to the creditors at the time of his insolvency and, therefore, a person who bona fide acquired such an asset (i.e. a new asset after insolvency) is protected.'*

(The underlining has been added).

The answer to the apparent anomaly referred to above is, it is *thought, to be found in the rule of interpretation* expressio unius est exclusio alterius.(77) When s 22 expressly declares satisfaction of a pre-sequestration debt to be void if made to the *insolvent* it by implication recognises the validity of the satisfaction of a post-presentation debt made to the insolvent.(78)

In certain circumstances the bank may also be protected by s 24(1) which provides :

> 'If an insolvent purports to alienate, for valuable consideration, without the consent of the *trustee of his* estate any property which he acquired after the sequestration of his estate (and which by virtue of such acquisition became part of his sequestrated estate) or any right to any such property to a person who proves that he was not aware and had no reason to

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(76) 1960 (4) SA 310 (T) at 314H.

(77) See eg Johannesburg Town Council v Crown Mines Ltd 1971(1) SA 709(A) at 720H; Steyn Uitleg 50 ff.

(78) But cf Mars Insolvency # 8.17.

> suspect that the estate of the insolvent was under sequestration the alienation shall nevertheless be valid.'

If an insolvent deposits money with a bank he alienates the money to the bank for valuable consideration (the right to repayment); accordingly, if the bank is unaware of his sequestration the deposit of monies acquired after the sequestration will be valid. It follows, it is considered, that repayment to the insolvent will likewise be valid. It has, however, been held(79) that for the section to apply the alienated asset must be an entirely new asset acquired by the insolvent and not merely an asset acquired in substitution for an asset forming part of the insolvent estate. The bank will therefore only be entitled to the protection of the section where this requirement is met.

The position in regard to satisfaction made to the insolvent of post-sequestration debts does not appear to have been considered in any case under the 1916 and 1936 Insolvency Acts or by the Roman-Dutch authors.(80) Two cases under the 1843 Cape Insolvent Estates Ordinance,(81) however, call for consideration. This Ordinance contained provisions(82) which, although differently worded, were broadly similar in effect to the provisions referred to above of the current Act, save in certain respects which will be dealt with below.

In the first of these cases, Davis' Trustee v Standard Bank,(83) the insolvent had deposited money with the defendant

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(79) Wessels v De Klerk & Anor supra at 315F.

(80) See eg Grotius 3.51; Van Leeuwen 4.41; Van der Keessel Voorlesinge thh 883ff; Voet 42.3 ff; Van der Linden 3.7.

(81) 6 of 1843 (C).

(82) Sections 48, 49, 93 and 94.

(83) (1885) 5 EDC 48.

bank after sequestration and had thereafter withdrawn the money again. The court held the bank liable to account to the trustee for the deposits on the ground that all property of the insolvent whether acquired before or after sequestration vested in the trustee,(84) subject only to certain exceptions which were not relevant,(85) and s 93 expressly invalidated any alienation of any such property.(86) The bank could therefore only validly make payment to the trustee. Barry JP held that it had to be taken that the bank had notice of the sequestration but Cole J held that it did not matter whether the bank had notice or not.(87)

The court apparently did not consider the possible application of the <u>expressio unius est exclusio alterius</u> rule of interpretation to the counterpart(88) of s 22 in the Ordinance, perhaps because s 93 expressly provided further that :

> '...all acquittances, surrenders, and discharges of any just debt due to such insolvent estate...made by any insolvent after any order for the sequestration of his estate... shall be...void....'

The current Act does not contain any similar express provision, although, as already pointed out, it is necessarily implicit in the vesting of the insolvent's estate in the trustee that debts owed to the insolvent must <u>prima facie</u> be paid to the trustee. Nevertheless,

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(84) Sections 48 and 49.

(85) Section 49.

(86) The current Act contains no counterpart of s 93 but such alienation is clearly impliedly prohibited by the vesting of the property in the trustee.

(87) Cf too <u>Sieg's Trustees v Spilhaus & Co & Sieg</u> 1911 CPD 750 at 770-2.

(88) Section 94.

it is thought that the view taken above is correct that in the case of post-sequestration debts the opposite conclusion can be reached on the basis of the expressio unius rule, namely that payment can validly be made to the insolvent.(89)

The facts in the second case, Baylis's Trustees v Cape of Good Hope Bank,(90) were similar. The matter came before the court on exception, the plaintiff having excepted to the bank's plea that it had paid out the money again in ignorance of the sequestration, as disclosing no defence. The court relied heavily on s 25 of the Ordinance which provided for the publication in the Government Gazette of notice of sequestration and that 'such publication shall be deemed notice thereof to all persons who may reasonably be presumed to have seen the same'. Lord De Villiers CJ held that it followed that it was necessary that the plea should aver that the bank's want of knowledge of the insolvency was through no fault of its own and in the absence of such an averment the exception had to be upheld. However, in the course of his judgment he said, without further motivation and without referring to the Davis' Trustee case :(91)

> '[The bank's] contract was with the insolvent, and therefore until the bank knew, or must be legally presumed to have known, of the insolvency it would have been quite justified in repaying the money to the insolvent or to the payees of any cheques drawn by the insolvent.'

With respect, however, it is difficult to reconcile this statement with the principles of our insolvency law.

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(89) It may be noted that the counterpart of s 24(1, in the Ordinance - s 93, second proviso - was limited to purchases and sales and therefore had no application in the case of post-sequestration deposits; accordingly, the judgment must be read subject to this difference in the case of the current Act.

(90) (1886) 4 SC 439.

(91) At 442.

Is the position in winding-up similar to the position in insolvency? Unlike s 20(1) of the Insolvency Act which divests an insolvent of his assets and vests them in his trustee, the Companies Act does not divest a company of its assets on winding-up - unless the court specifically so orders - but instead divests the ordinary organs of management of the company of the *control of the* assets.(92) It has, however, been held(93) that the effect of *the winding-up provisions* of the Act is also to establish a <u>concursus creditorum</u> as in the case of sequestration. The view has moreover already been taken(94) that s 22 of the Insolvency Act also applies to windings-up, and the same is, it is thought, true of s 24(1) of the Insolvency Act. True, in the case of sequestration the insolv[illegible]*inues to exist, to enter into contracts,*(95) to acquire [illegible] of assets,(96) etc and the need for the protection [illegible] by s 24(1) to bona fide third parties is therefore greater than in the case of winding-up where the end result of winding-up is that the company ceases to exist. It is doubted, however, whether this is a sufficient reason for holding that s 24(1) is inapplicable to windings-up. Although circumstances *giving rise to the need for the protection afforded* by the section will only rarely occur in the case of windings-up, the protection should, it is thought, nevertheless be granted where it is needed.

(d) <u>Applicability of s 22 to payments to third parties</u>

Section 22 refers to 'the satisfaction...of any obligation ...

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(92) See 165 above.

(93) See 168 above.

(94) See 185-9 above.

(95) Section 23(2) of the Insolvency Act.

(96) See eg ss 23(7)-(9).

made to the insolvent'.(97) Can payment to a third party in accordance with the directions of the insolvent be regarded as payment to the insolvent for the purposes of the section? The answer is, it is thought, in the affirmative. Payment by a debtor to a third party in accordance with his creditor's instructions should, it is considered, be seen as 2 payments: a payment by the debtor to his creditor and a payment by the creditor to the third party.(98) The first payment would therefore be protected by s 22 but the second would not and should generally be recoverable by the creditor's trustee. Section 22 is designed to protect persons who unwittingly make payment or other performance to an insolvent in ignorance of the sequestration, and in this context no valid distinction can be drawn between payments direct to the insolvent and payments to a third party in accordance with the insolvent's directions.(99)

(e) Application of principles to the bank customer relationship

In applying the principles dealt with in the preceding sections to the honouring by a bank of a customer's payment instructions in ignorance of the customer's sequestration or winding-up several situations require to be distinguished.

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(97) Cf the Insolvent Estates Ordinance 6 of 1843(C), s 94 of which protected any payment in ignorance of the sequestration to the insolvent or 'to any person legally entitled to receive the same on his behalf, before such sequestration'.

(98) See 381-91 below where this analysis of such a payment is examined in detail.

(99) Cf also the position of an employee or independent contractor who continues working in the absence of the employer and in ignorance of the employer's sequestration or winding-up. Here too s 22 should, it is thought, be liberally interpreted so that the services are held to have been rendered to the insolvent, even though the insolvent was not present and it may therefore be difficult on the facts to say that the services were rendered to him if a narrow construction is placed on this expression.

(i) <u>*Payment instructions given against a credit which existed on sequestration or winding-up*</u>

If the customer's account was in credit on sequestration or winding-up and prior to sequestration or winding-up the bank had received a payment instruction given by the customer *within* the scope of the credit, payment pursuant to the payment instruction *clearly constitutes* the satisfaction of an obligation the cause of which arose before the sequestration and s 22 therefore clearly applies, and due to the bank's ignorance of the sequestration or winding-up the payment pursuant to the payment instruction is valid and serves to discharge the bank's indebtedness to the customer <u>pro tanto</u>.

Where the payment instruction is only received by the bank after the sequestration or winding-up the customer's cause of action for payment pursuant to the payment instruction was incomplete as at sequestration or winding-up. The view has, however, already been taken(100) that the reference in s 22 to the cause of an obligation *must be construed in the case of a* contractual obligation as a reference to the contract from which the obligation arises and not to every fact that must be proved to establish a cause of action; accordingly, s 22 applies. It does not make a difference whether the payment instruction was given before or after the sequestration or winding-up.(101)

The position is the same whether the payment instruction is in favour of the customer or a third party.(102)

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(100) See 189-90 above.

(101) <u>Ibid</u>.

(102) See 196-6 above.

What is the position in regard to the bank's charges? The bank's right to its charges flows from the fact that the customer exercises the right to avail himself or itself of the services the bank agreed to render pursuant to the bank customer contract. A similar question arises in regard to the bank's right to repayment of the monies advanced by it together with the agreed interest where it honours a payment instruction given within the scope of an overdraft facility. The bank's *right to repayment of such monies together with the* agreed interest flows from the fact that the customer exercises the right to borrow the monies that the bank agreed to lend pursuant to the grant of the overdraft facility. The bank's right to such repayment is dealt with below(103) and it suffices to note here that the conclusion reached there is that if the payment instruction was given before sequestration, whether it was received by the bank *before or after sequestration,* the bank is entitled to prove a claim against the insolvent estate or company for the monies paid together with the agreed interest, but that if the payment instruction was given after the sequestration or winding-up the bank is unable to prove such a claim, although it may claim from the insolvent, or the signatory in the case of the company, personally. *The same is, it is* considered, true of the bank's charges.

A more difficult question is whether the bank's right, if any, to prove a claim for its charges can be set off against any remaining credit in the account, but it is suggested, albeit with some diffidence, that where the section validates the satisfaction of an obligation it is implicit *in such validation* that all the normal consequences will flow from the satisfaction of the obligation ie set-off is permitted.

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(103) See 199-205 below.

(ii) Payment instructions given against a credit which arose after sequestration or winding-up

If the customer makes deposits to his or its account after sequestration or winding-up s 22 does not apply, but the view has already been taken(104) that in accordance with the expressio unius rule of interpretation payment of post-sequestration or post-winding-up debts to the insolvent or the company is not void. It follows that if the bank discharges its indebtedness arising from the deposits by payment to the customer the payment is valid. The same applies if payment is made to a third party as directed by the customer.(105) It does not, it is thought, make a difference whether the payment instruction was given before or after the sequestration.

The bank would also be entitled to its charges and to set them off against the credit in the account.(106)

(iii) Payment instructions given within the scope of an overdraft facility

If a payment instruction is given within the scope of an overdraft facility it constitutes in the first instance the exercise of an option to borrow, and a contract of loan comes into existence on receipt by the bank of the payment instruction.(107) In seeking to determine the effect of s 22 in this context, 3 situations need to be distinguished.

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(104) See 190-5 above.

(105) See 195-6 above.

(106) Cf 198 above.

(107) See 22-3 above.

Firstly, if the payment instruction was received by the bank before the sequestration or winding-up, a contract of loan had come into existence and the bank was under an obligation as at sequestration or winding-up to advance the monies lent. Section 22 therefore clearly applies to the satisfaction of the obligation. As the contract of loan does not lapse on the sequestration or winding-up(108) and as the performance by the bank of its obligation to advance the monies lent is valid, all the requirements are present for the proof by the bank of a claim for repayment of the loan and the agreed interest. Moreover, if the bank holds security for the customer's indebtedness the claim will, it is thought, be secured by the security.(109) The bank is likewise entitled to include its charges in its claim.(110)

Secondly, the payment instruction may have been given before, but may only have been received by the bank after, the sequestration or winding-up. It is convenient, however, to deal with the third situation first and then to return to this situation.

Thirdly, the payment instruction may have only been given after the sequestration or winding-up. Such a purported exercise of the option to borrow would not, it is thought, give rise to a claim provable against the insolvent estate or the company under winding-up for repayment of the loan with the agreed interest.(111) In the case of an individual s 23(2) of the

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(108) See 170 above.

(109) Cf the position regarding set-off of the bank's charges against any credit in the account, dealt with at 198 above.

(110) Cf 198 above.

(111) It is conceivable that the bank may have a claim based on unjust enrichment.

Insolvency Act expressly prohibits(112) the insolvent from entering into any contract whereby his estate is or is likely to be adversely affected, and the estate would be likely to be adversely affected by having a further liability imposed on it if the insolvent's purported exercise of the option were to give rise to a claim provable against the estate. Similarly, the power of the ordinary organs of management of the company to represent it ceases when the company is placed in winding-up.(113)

Can the contrary be argued from the fact that the view has already been taken(114) that the proper interpretation of the bank customer contract is that apparently regular payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act? The answer is, it is thought, in the negative because this term of the bank customer contract is in conflict with the principles of a *concursus creditorum* and it is not possible to contract out of the consequences of the establishment of a *concursus*.

This principle is well-illustrated by the case of *Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (in liquidation)*.(115) The respondent had prior to its winding-up contracted to erect a building for the appellant and had done so. The contract provided:(116)

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(112) Although the section does not expressly so state, it is considered clear that the effect of the prohibition is that any contract which the insolvent purports to enter into in contravention of the prohibition is not binding on the estate.

(113) See 165 above.

(114) See 76-91 above.

(115) 1969(1) SA 660(A).

(116) See at 668[illegible].

> 'Before the issue of any payment to the contractor he shall ... furnish reasonable proof that all nominated sub-contractors' accounts ... have been duly discharged. Should the contractor be in default ... the Administrator may make a direct payment to the nominated sub-contractor and deduct the amount of such payment from any sums due to the contractor.'

After the commencement of the winding-up the appellant paid 2 sub-contractors and deducted the amount paid from the balance owing under the contract and paid the remainder to the liquidator. The liquidator claimed the amount deducted and when the defendant pleaded that the facts set out excused him from liability the liquidator excepted to the plea as disclosing no defence.

Ogilvie-Thompson JA, as he then was, in delivering the judgment of the majority(117) affirming the court *a quo's* judgment(118) which had upheld the exception said:(119)

> 'In upholding the exception in the Court below, Caney, J., based his judgment mainly upon the principles applicable in a *concursus creditorum*. While I am in substantial accord with much that the learned Judge *a quo* said, it should, I think, be borne in mind that defendant was plaintiff's debtor and, in that sense, was outside the *concursus* ....

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(117) Wessels JA dissented on the ground that, on the wording of the clause, the liquidator's claim was conditional upon payment of the sub-contractors (at 673-4).

(118) *Magill, Grant & Nell (Pty) Ltd v Administrator, Natal* 1968(4) SA 44 (D&CLD) in which Caney J said at 48C and 49F:

> 'The effect of the clause ... appears to me to be that the authority conferred by the plaintiff company on the defendant to pay the nominated sub-contractors is a mandate not revocable at the will of the plaintiff company, because it is a material term of the contract .... It appears to me not to be a matter of insolvency of a principal terminating the authority of his agent so that the latter can no longer act under the authority conferred upon him, but the answer in my opinion is that the law intervenes to assure that rights and liabilities of all persons concerned in a *concursus creditorum* are given effect to.'

(119) At 671B-672C.

> 'Included among plaintiff company's concurrent creditors were the two aforementioned nominated sub-contractors. Defendant's action in paying them direct, and in thereafter deducting the amount so paid from his indebtedness to the plaintiff, not only converted the two nominated sub-contractors into preferent creditors receiving payment in full, but, as is obvious, it also reduced the amount available for distribution by the liquidator amongst the general body of concurrent creditors .... Accordingly ... defendant's payment to the nominated sub-contractors ... disturbed both the realisation and the distribution of the plaintiff company's assets as prescribed by the law relating to liquidations. Were this Court now to uphold the validity of the election exercised by the defendant in the present case, the door would be opened to contractual stipulations expressly designed to accord, on insolvency or liquidation, preference to selected creditors who would otherwise be merely concurrent. These are considerations which the Court must take into account, notwithstanding that no such express design obtained in the present case.'

It is true that in *Magill's* case the Administrator was aware of the winding-up and sought to exercise his right to pay to the third party in full knowledge of the winding-up, whereas in the bank's case it would be acting in ignorance of the fact that its actions would disturb the *concursus*. However, it is thought that the principles of a *concursus* operate independently of good or bad faith and that therefore the bank's good faith will not avail it.(120)

A second argument against the conclusion reached above that a claim cannot be proved against the insolvent estate or company in liquidation also merits consideration. Where a bank has granted an overdraft facility it is under an obligation as at sequestration or winding-up to lend and advance monies up to the amount of the facility. Could it be argued that this is an obligation to which s 22 applies and that therefore if the bank advances monies within the scope of the facility, the advance is protected by s 22?

The answer is, it is thought, in the negative. Although it is true that at sequestration or winding-up the bank was under an

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(120) Cf the *Davis' Trustees*, *Baylis's Trustees* and *Sieg's Trustees* cases dealt with at 192-4 above.

obligation to lend and advance monies up to the amount of the overdraft facility, this obligation was conditional upon the due exercise of the option to borrow and as already pointed out the payment instruction cannot constitute the due exercise of the option.

The position is materially different from the position where the payment instruction is given within the scope of a credit in the customer's account. In the latter case the bank's obligation to repay the monies deposited with it is subject only to a formal requirement, namely a demand, and it can therefore readily be concluded that the bank's obligation is one to which s 22 applies. Where the account is in overdraft, on the other hand, the obligation is conditional upon the exercise of the option to borrow and it is not possible, it is thought, to construe the obligation to advance the monies as one the cause of which arose before sequestration or winding-up. The cause of the obligation is the contract of loan and only part of the contract - the offer to lend - arose before sequestration or winding-up.

This does not mean that the bank is remedyless. In the case of an individual the payment instruction should, it is thought, be construed as an offer by the insolvent to borrow and the bank would be entitled to recover the loan from the insolvent as opposed to from his estate,(121) and in the case of a company the signatory on behalf of the company would be personally liable for breach of his implied warranty of authority.(122)

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(121) Section 23(2) of the Insolvency Act; Trust Bank of Africa Ltd v Wassenaar 1972(3) SA 139 (D & CLD) at 142G-H. Such a claim may be cold comfort for the bank especially if it held good security from the insolvent for his pre-sequestration indebtedness.

(122) See 107 n 202 above. Similarly, where the customer is an individual and a representative signed on his behalf the representative may be personally liable.

It remains to return to the second situation, namely where the payment instruction is given before, but only received by the bank after, the sequestration or winding-up. In many respects this situation resembles the third situation but it differs in the important respect that the customer had full capacity at the time of giving the payment instruction. Does this fact lead to a different conclusion, more especially as the view has already been taken(123) that the general rule is that it is only necessary that the customer have capacity to act at the time of giving the payment instruction and not also at the time of receipt thereof by the bank? The answer is, it is suggested, that it does lead to a different conclusion. The taking effect of the payment instruction is conditional upon its being received by the bank but once the condition is fulfilled the payment instruction should, it is suggested, be seen as dating back to the time it was given.(124) If this view is correct, the position will be the same as in the first situation dealt with above ie where the payment instruction was given and received before the sequestration or winding-up. If, however, this view is wrong the position will be the same as in the third situation dealt with above except that the bank may be remedyless save for such claims as it may have based on unjust enrichment,(125) as there would not seem to be any basis on which it could claim from the insolvent or the signatory in the case of a company.

(iv) <u>Payment instructions given outside the scope of a credit or overdraft facility</u>

If a payment instruction is given outside the scope of any credit in the customer's account and of any overdraft facility

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(123) See 132-5 above.

(124) See 135 n 275 above.

(125) Such claims would, however, be preferent - see 208 n 136 below.

granted by the bank it is in the first instance an offer to *borrow*,(126) *which* generally is only accepted when the bank actually honours the payment instruction.(127)

If the payment instruction is given after the sequestration or winding-up it cannot bind the insolvent estate or the company in winding-up because the insolvent *lacks the capacity to bind* the insolvent estate and the company's ordinary organs of management to bind the company.(128) The fact that the bank customer contract provides *otherwise is not effective* after the establishment of the concursus creditorum.(129) However, the insolvent in the case of an individual or the signatory in the case of a company will be *personally* liable.(130)

If the payment instruction was *given before*, *but the offer* to borrow had still not been accepted as at, the sequestration or winding-up the payment instruction likewise cannot, it is thought, bind the *insolvent estate or the company* in winding-up. An offer lapses on the offeror's loss of capacity to act(131) and it is thought that sequestration and winding-up are, as in the case of

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(126) See *20* above.

(127) See 145 above.

(128) See 164-5 above.

(129) See 169 and 201-3 above.

(130) Cf 204 above.

(131) See 72 above.

lapsing of a mandate on the mandant's sequestration or winding-up,(132) a sufficient change of status to cause the offer to lapse.(133)

The view has already been taken(134) that if an offeree purports to accept an offer and performs his obligations under the resulting 'contract' in ignorance of the lapsing of the offer due to the offeror's loss of capacity to act, he is entitled to be indemnified for his negative interest. Can the bank prove a claim against the insolvent estate or the company in winding-up for this negative interest? The answer is, it is suggested, in the negative. The claim arises from the bank's act of honouring the payment instruction after sequestration or winding-up and to allow the claim would be to allow the act of a creditor to disturb the concursus.

Can the bank hold the insolvent, or the signatory of the payment instruction in the case of a company, personally liable?

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(132) See 166 above.

(133) Cf Wessels Contract # 250:

> 'An offer by a person who becomes bankrupt, which relates to his property if accepted after the order of sequestration, lapses, for the property over which the bankrupt proposed to dispose had already vested in his trustee at the moment of acceptance, and it was therefore not possible for the offeror to dispose of it.'

It is thought, however, that the rule can he stated more generally to apply not only to offers relating to property of the insolvent estate but also to offers which would affect the estate in any other way eg by resulting in the incurrence of an additional liability.

(134) See 109-126 above.

An insolvent is not deprived of his capacity to contract but the question arises whether an offer which related to the insolvent's pre-sequestration affairs can simply be imputed to his new post-sequestration estate. The answer is, it is thought, in the negative, at least where the payment instruction was in favour of a third party such as a creditor of the insolvent estate. But what if it was in favour of the insolvent himself and payment was duly made to, and accepted by, him? The answer is, it is suggested, that the tender of payment by the bank should be seen as a new offer by the bank to lend to the insolvent which was accepted by him rendering him personally liable.

In the case of winding-up there would not seem to be any basis for holding the signatory liable. It is true that he impliedly warrants his authority(135) but it is thought that he only does so as at the time of making the offer and that the warranty does not continue until the offer is accepted.

If the bank cannot claim in contract it will be limited to such claims as it may have based on unjust enrichment, and it is suggested that to the extent these claims lie against the insolvent estate or the company in winding-up they will be preferent.(136)

(f) <u>The bank's duty</u>

The effect of s 22 is, loosely, to preserve intact the bank's authority to honour a customer's payment instructions in the circumstances set out in the section. However, the section does not deal with the bank's duty. What is the position in this regard?

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(135) See 107 n 202 above.

(136) If the claim were concurrent only the estate would still be unjustly enriched because it would have the full benefit of the enrichment but would only have to pay a dividend thereon to the bank.

The view has already been taken(137) that on the better interpretation of the bank customer contract the bank's duty and authority do not terminate until the bank receives notice of the customer's loss of capacity to act. The view has, however, also been taken(138) that in the case of the bank's authority this is overridden by the principles of a <u>concursus creditorum</u>, and accordingly that the bank's authority terminates on the customer's being placed in sequestration or winding-up. It follows that if the bank has no authority to pay it can have no duty to do so either; in other words, the bank's duty terminates on the customer's being placed in sequestration or winding-up. True, where s 22 applies, in a sense the bank's authority continues, but it is considered that s 22 should rather be seen as giving the bank certain protection despite the fact that its authority has terminated, than as preserving its authority intact.

(g) <u>Good faith</u>

Section 22 requires that for the satisfaction of an obligation made to the insolvent to be valid it should have been made in good faith. What will constitute good faith? Apparently mere absence of knowledge of the sequestration will not suffice because this is a separate requirement. Presumably the legislature intended that if the satisfaction of the obligation is in some way tainted with turpitude - one can only speculate as to how this might occur - the protection afforded by the section should be withheld as a sanction for that turpitude.(139)

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(137) See 76-91 above.

(138) See 201-3 above.

(139) Cf 530 n 143 below.

The section also does not specify to whom the good faith is owed, *but it is suggested that* it is owed to the general body of creditors.(140)

(*h*) Interrelationship between s 22 and ss 348 and 341(2) of the Companies Act

Can a conflict arise in the case of windings-up between s 22 as applied to windings-up by s 339 of the Companies Act and ss 348 and 341(2) of the *Companies Act? The answer is,* it is thought, in the negative. Section 22 deals with the satisfaction of obligations made to the company, whereas the view is taken below(141) that ss 348 and 341(2) *do not* affect the satisfaction of obligations made to the company. Should this view be wrong, it is considered that, as in the case of s 73(c), s 22 will take precedence *in accordance with the* principle that a specific statutory provision takes precedence over a general provision.(142)

The question also arises as to whether a bank will be regarded as having knowledge of a customer's winding-up for the purposes of s 22 *if it has knowledge that* a winding-up application has been presented against the customer, in view of the fact that s 348 of the Companies Act deems a winding-up to commence on presentation of the application. A similar question has already been considered(143) in relation to s 73(c) of the Bills of Exchange

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(140) Cf In re Dalton Ex p Herrington & Carmichael v The Trustee [1963] Ch 336 at 354 in relation to the requirement of *good* faith under s 46 of the English Bankruptcy Act 1914.

(141) See 375-81 below.

(142) See 181 above. See further 230-1 below regarding the question whether s 22 applies during the period between presentation of the winding-up application and the grant of the *winding-up* order.

(143) See 181-3 above.

Act, and the conclusion reached was that notice of the presentation of a winding-up application against a customer will not constitute notice of the customer's insolvency for the purposes of s 73(c). It is considered that the same conclusion applies for the same reasons to s 22.

(i) Onus of proof

Unlike s 73(c) of the Bills of Exchange Act, s 22 deals expressly with the question of onus of proof, vesting the onus of proving both good faith and absence of knowledge of the sequestration in the bank.

(j) Discharge of the customer from sequestration or winding-up

If the sequestration or winding-up is discharged by the non-confirmation of a provisional order or the setting aside of a final order or otherwise, the bank's duty and authority will, it is considered, revive if the payment instruction has not already been dishonoured.(144)

(4) What constitutes notice of sequestration or winding-up?

(a) Preliminary

On the view taken above(145) that the expression 'having become insolvent' in s 73(c) of the Bills of Exchange Act similarly refers to the placing of the customer in sequestration or winding-up and not factual insolvency and in view of the fact that s 22 of the Insolvency Act expressly refers to notice of the

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(144) Cf 183 above.

(145) See 176-8 above.

sequestration,(146) the bank is only concerned with the question of whether or not a sequestration or winding-up order has been granted in respect of the customer, or a voluntary winding-up resolution has been passed by the customer, and the bank need not make an assessment of its own regarding the factual solvency of the customer.

What is the bank's position if it receives information indicating that a customer has been placed in sequestration or winding-up, but the information is not conclusive or subsequently proves to be incorrect? As already mentioned,(147) Cowen,(148) citing Paget,(149) says in relation to notice of a customer's death for the purposes of s 73(b) of the Bills of Exchange Act:

> 'Actual knowledge of the customer's death, however acquired, terminates the banker's authority; formal notice, though sufficient, is not necessary. On the other hand, mere rumour would be insufficient for the banker to act upon, though he could not safely disregard any reliable information, for instance, an announcement in a responsible newspaper.'

The position is, however, more complex than this and calls for an examination firstly of the question whether the bank must make further enquiry if it receives information which is not conclusive, and secondly of the question whether the bank will be entitled to any protection if it reasonably but wrongly concludes that the customer has or has not been placed in sequestration or winding-up and if it acts accordingly. These questions will be considered separately in what follows.

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(146) At common law, moreover, a mandate is terminated by the sequestration or winding-up of the mandant and not by his factual insolvency - see 166-7 above.

(147) See 155 above.

(148) Negotiable Instruments 417.

(149) Banking 6th ed (1961) at 259-60. The statement relied on does not appear in the 9th ed.

Consideration will also be given to the question of whether a bank will be deemed to have constructive notice of the placing of a customer in sequestration or winding-up, especially having regard in the case of windings-up to the company law doctrine of constructive notice.

(b) Duty to make further enquiry

If a bank receives information which causes it to suspect, or which would cause a reasonable person to suspect, that a customer has been placed in sequestration or winding-up, must the bank make further enquiry on pain of forfeiture, if it does not do so, of the protection accorded to a bank if it honours a customer's cheques and other payment instructions without knowledge that the customer has been placed in sequestration or winding-up?

The view has already been taken(150) that to qualify for the protection the bank is entitled to at common law the bank must make further enquiry, and it is considered that the same is true of the protection accorded by s 73(c) of the *Bills of Exchange Act* and s 22 of the Insolvency Act. The effect of both these sections is to place the bank in a significantly better position than it would otherwise be in, and it is considered that it is implicit in the grant of this privilege to the bank that the bank must act reasonably to be entitled to the privilege, and that this duty to act reasonably extends to the making of further enquiries where the bank has reason to suspect that the customer may have been placed in sequestration or winding-up.(151)

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(150) *See 156-7 above.*

(151) The express requirement of good faith in s 22 reinforces this conclusion in the case of s 22.

Whether or not the customer has been placed in sequestration or winding-up is readily ascertainable: in the case of sequestration this will appear from various sources such as the court records,(152) the records in the office of the Master of the Supreme Court(153) and the Government Gazette;(154) compulsory windings-up will appear from the court records, (155) the records in the office of the Master of the Supreme Court,(156) the records in the office of the Registrar of Companies(157) and the Government Gazette(158) and voluntary windings-up will appear from the records in the office of the Registrar of Companies,(159) the records in the office of the Master of the Supreme Court (160) and the Government Gazette.(161) In each case the information will be available from the first source listed immediately the customer is placed in sequestration or winding-up, but there will be a time lapse before it is available from the other sources.

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(152) Abt v Registrar of the Supreme Court & Others (1899) 16 SC 476; Nathan Barnett Uniform Rules 370-2.

(153) Section 17(1)(a) of the Insolvency Act.

(154) Section 17(4) of the Insolvency Act.

(155) Abt v Registrar of the Supreme Court & Others (1899) 16 SC 476; Nathan Barnett Uniform Rules 370-2.

(156) Section 14 of the Companies Act.

(157) Sections 9 and 14 of the Companies Act.

(158) Section 356(1) of the Companies Act.

(159) Sections 9, 200 and 349 of the Companies Act.

(160) Section 356(2)(a) of the Companies Act.

(161) Section 356(2) (b) of the Companies Act.

(c) What is the bank's position if it reasonably but wrongly concludes that a customer has, or has not, been placed in sequestration or winding-up?

It may happen that a bank reasonably but wrongly concludes that a customer has or has not been placed in sequestration or winding-up and that it acts accordingly, honouring the customer's cheques and other payment instructions despite the fact that the customer has been placed in sequestration or winding-up, or dishonouring the customer's cheques and other payment instructions despite the fact that the customer has not been placed in sequestration or winding-up. For example, a rumour may reach the bank that a customer has been placed in sequestration or winding-up and the bank may check the court records to confirm the rumour but due to an indexing error may find no record of the sequestration or winding-up. Or a notice may be wrongly published in the Government Gazette that a customer has been placed in sequestration or winding-up and the bank may freeze the customer's account on the strength of the notice. The question accordingly arises as to whether the bank is entitled to any protection by reason of the fact that it acted reasonably albeit wrongly.

The position at common law has been considered above(162) and it is not necessary to repeat here what is said there.

Section 73(c) of the Bills of Exchange Act refers to 'notice of the customer having become insolvent' and it could be argued that if the bank receives notice of a customer's sequestration or winding-up this will constitute notice for the purposes of the section irrespective of whether it is correct or not, especially if it emanates from an official source such as the Government Gazette.

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(162) See 158-9 above.

However, it is considered that the better view is that for s 73(c) to apply the customer must in fact be in sequestration or winding-up and that an erroneous notice is therefore void; in other words, if the bank reasonably but wrongly concludes that the customer has been placed in sequestration or winding-up the bank will not be protected by s 73(c).

If the customer has in fact been placed in sequestration or winding-up the criterion as to whether the information in the bank's possession will constitute notice for the purposes of s 73(c) is, it is considered, whether a reasonable person would regard the information as sufficient to conclude that the customer is in sequestration or winding-up; in other words, if the bank reasonably but wrongly concludes that the customer has not been placed in sequestration or winding-up the bank will be in the same position it would have been in had it not received any information indicating that the customer had been placed in sequestration or winding-up.

Section 22 of the Insolvency Act refers to 'knowledge of the sequestration' and clearly therefore the customer must have been placed in sequestration or winding-up for the section to come into operation. The criterion as to whether the information in the bank's possession will constitute notice for the purposes of the section is, it is considered, again whether a reasonable person would regard the information as sufficient to conclude that the customer is in sequestration or winding-up.

(d) Constructive notice - general

The question of whether all the world is deemed to have constructive notice of orders of court has been considered above(163) and the conclusion reached there was that there is no

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(163) See 159-61 above.

such rule. It is, moreover, considered that the same is true, for the same reasons, of the records in the offices of the Master of the *Supreme Court and the Registrar of Companies.*(164)

What is the position in regard to the notice required to be published in the Government Gazette of sequestration orders*(165)* and winding-up orders and resolutions?(166) Is the publication of such notice to be regarded as notice to all the world of its contents? Or is publication to be regarded merely as a means of *bringing the sequestration or* winding-up to the attention of as many persons as possible?

Cowen(167) states in relation to s 73(c) of the Bills of Exchange Act:

> 'Formerly, by virtue of the Cape Insolvency Ordinance,(168) publication by the Master of a sequestration order in the *Government Gazette was deemed to be notice* thereof to all persons who might reasonably be presumed to have seen the notice. No similar provision appears in the present Insolvency Act; and apparently actual notice of the sequestration is now required to terminate the banker's duty and authority.'

Malan(169) is of the same view:

> 'The subsections refer specifically to "receipt of notice". Thus *constructive notice is insufficient.*'(170)

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(164) See further 217-9 below in regard to the company law doctrine of constructive notice.

(165) Section 17(4) of the Insolvency Act.

(166) Section 356 of the Companies Act.

(167) Negotiable Instruments 417.

(168) 6 of 1843(C), s 25.

(169) Bills of Exchange # 328 n 149.

(170) Cf 220-2 below.

It is considered, however, that it is not necessary to have recourse to the words 'receipt of notice' to reach this conclusion, and that the reason is simply that, as in the case of court records, there is no rule that all the world is deemed to have constructive notice of all matters published in the Government Gazette.

The effect of publication in the English official gazette was in issue in Fryer & Others v Ewart & Others.(171) A landlord had accepted rent after publication of a winding-up resolution. The acceptance of rent after notice of a winding-up resolution was deemed to be a waiver of the right to forfeiture of the lease. The landlord had no actual notice of the resolution and the question arose as to whether the landlord must be deemed to have constructive notice by virtue of the publication in the gazette. Lord MacNaghten summarily dismissed this argument as follows:

> 'There were two other points suggested on behalf of the appellants: (1.) that without proof of actual notice publication in the Gazette is notice to all the world, as Lord Romilly seems to have held (Emmerson's Case) .... These points were only faintly argued, and hardly require serious consideration.'

In Emmerson's Case(172) Lord Romilly MR had said in relation to the publication in the gazette of notice of the presentation of a winding-up petition:

> 'I have hitherto held (and further consideration of the subject confirms me in the correctness of my opinion) that the first appearance of the advertisement determines ipso facto the position of all the parties, and that it must be treated as notice to all the world; not that it necessarily informs the

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(171) [1902] AC 187 (HLE) at 193.

(172) In re London, Hamburg and Continental Exchange Bank Emmerson's Case (1866) 2 Eq 231 at 233. See also Millar v The National Bank of Scotland Ltd & Others (1891) 28 ScLR 884 at 889, but cf The National Bank's Case (1873) 28 LT (Eur Arb) 92; In re Oriental Bank Corporation Ex p Guillemin (1885) 28 ChD 634 at 640.

> persons who are dealing with the shares of the company of what has occurred, but because I am of opinion that everybody who sells such shares ought to satisfy himself previously whether any such Petition has been presented....'

This case, however, related to the English counterparts of ss 348 and 341(1) of the Companies Act which apply independently of notice and it is suggested, therefore, that Lord Romilly may have intended to convey no more than this fact, and not that where notice is the criterion publication will constitute such notice.

In the case of ss 73(c) and 22 the additional consideration arises that both sections are designed to protect persons who unwittingly deal with others without knowledge that the persons they are dealing with have been placed in sequestration or winding-up, and it is doubted whether the legislature would have intended to give this protection with one hand and to take back much of it with the other by imputing constructive notice of the sequestration or winding-up to the persons to be benefited by the sections.

Section 22, unlike s 73(c), appears in the same Act as the statutory requirement of publication. Could it be argued that it can be inferred from this that when s 22 refers to knowledge of the sequestration such knowledge must be imputed to any person dealing with the insolvent after publication? While the argument is not entirely without force, it is considered that it is insufficiently cogent to displace the considerations dealt with above. Moreover, the fact that the Cape Insolvency Ordinance(173) used to deem publication of a sequestration order in the Government Gazette to be notice thereof to all persons who might reasonably be presumed to have seen the notice, but that this was deleted in the first Union Insolvency Act(174) and the deletion has been maintained in the

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(173) See 217 above.

(174) 32 of 1916.

current Act, is, it is considered, an indication that the legislature did not intend publication to constitute notice to all the world for all purposes.

(e) Constructive notice - the company law doctrine of

(i) Preliminary

In the case of companies,(175) a specific doctrine of constructive notice in relation to the public documents of the *company* has been developed by the courts, and it is necessary to examine whether constructive notice of the winding-up of a customer will be imputed to the bank pursuant to this doctrine for the purposes of s 73(c) of the Bills of Exchange Act, s 22 of the Insolvency Act as applied to companies by s 339 of the Companies Act and the common law relating to the termination of the bank's duty and authority to honour a customer's cheques and other payment instructions.

The doctrine is linked to the ultra vires rule: a person dealing with a company is deemed to have constructive notice of the contents of the public documents of the company and the company is not bound by any act outside the capacity of the company or outside the authority of the persons *purporting to represent* it.(176) *In* the case of acts outside the capacity of the company the ultra vires rule has been largely abolished by s 36 of the Companies Act, and in *the case of acts outside* the authority of the persons purporting to represent the company the rule only applies if the lack of authority

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(175) And other bodies whose constitutions are similarly available to the public - The Mine Workers Union v Prinsloo 1948(3) SA 831(A) at 847; Oranje Benefit Society v Central Merchant Bank Ltd 1976(4) SA 659(A) at 673A.

(176) Ernest v Nicholls (1857) 6 HLC 401 at 418-9.

appears ex facie the public documents and is further subject to the qualification that persons dealing with the company may assume that internal procedures have been duly complied with.(177)

Two questions arise: Is a winding-up order or resolution a 'public document' within the meaning of the doctrine? And, if so, does the doctrine operate to deem anyone dealing with the company to have knowledge of the winding-up for the purposes of s 73(c) of the Bills of Exchange Act, s 22 of the Insolvency Act and the common law relating to the termination of the bank's duty and authority?

(ii) Is a winding-up order or resolution a 'public document'?

Precisely what documents are included in the concept of 'public documents' is not clear.(178) Clearly the memorandum and articles of association, being the primary source of the capacity of the company and the authority of its officers, are included, and no doubt the same would be true of any document incorporated therein by reference, or referred to therein as bearing upon the capacity of the company and the authority of its officers, provided that it is also publicly available. Any amendment thereto would similarly be included. On the other hand, it is doubted whether the welter of other documents which a company is required to lodge with the Registrar of Companies throughout its existence are included within the ambit of the doctrine, notwithstanding that they may constitute secondary sources of the capacity of the company and the authority of its officers.

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(177) The Royal British Bank v Turquand (1855) 5 E&B 248.

(178) See eg MJ Oosthuizen Die Turquand-reël in die Suid-Afrikaanse Maatskappyereg (LLD Thesis Unisa 1976) 152-160; LCB Gower et alii Gower's Principles of Modern Company Law 4th ed (London 1979) 190-1; CM Schmitthoff et alii Palmer's Company Law 23rd ed (London 1982) #28-02.

However, whatever limitations may be appropriate in regard to the concept of public documents, it is considered that there is no basis for excluding winding-up orders and resolutions. A copy of every winding-up order and resolution is required to be transmitted to the Registrar of Companies(179) where it becomes a part of the public records kept by him relating to the company. Winding-up orders and resolutions, moreover, directly affect both the capacity of the company and the authority of its officers;(180) in fact, they largely supersede the memorandum and articles. It follows, it is considered, that it would be anomalous to impute constructive notice of the contents of the memorandum and articles to a person dealing with the company but not of a winding-up order or resolution.

(iii) Does the doctrine apply to s 73(c), s 22 and the common law relating to the termination of a bank's duty and authority?

Despite the fact that the better view is that a winding-up order or resolution is a public document within the ambit of the doctrine, it is considered for a number or reasons that the doctrine does not operate to deem anyone dealing with the company to have knowledge of the winding-up for the purposes of s 73(c) of the Bills of Exchange Act, s 22 of the Insolvency Act and the common law relating to the termination of the bank's duty and authority.

Firstly, in the case of ss 73(c) and 22, both sections are intended to protect persons who unwittingly deal with others without

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(179) Section 14 of the Companies Act.

(180) Chapter XIV of the Companies Act; Attorney-General v Blumenthal 1961(4) SA 313(T) at 314G-315G; Volkskas Bpk v Darrenwood Electrical (Pty) Ltd 1973(2) SA 386(T) at 389H-390C; S v Cope 1970(3) SA 605(T) at 608D-E.

knowledge that they have been placed in sequestration or winding-up, and it is considered likely in this context that the legislature would have intended the protection to extend to all persons without actual knowledge of the sequestration or winding-up. To apply the constructive notice doctrine to ss 73(c) and 22 would have the effect of significantly limiting the protection afforded by the sections and it is doubted whether the legislature would have intended such a limitation. As the sections are capable of bearing either meaning, it follows, it is considered, that the interpretation should be favoured which extends the protection afforded by the sections to all persons without actual knowledge of the sequestration or winding-up.(181)

Secondly, the doctrine of constructive notice is, it is considered, in any event limited in its application to the ultra vires rule. It does not operate to deem all the world to have notice of the contents of the public documents of a company for all purposes. The doctrine serves to invalidate(182) acts which under the constitution of the company are outside the capacity of the company or the authority of the persons purporting to represent it, and the question to arise is whether the area of application of the doctrine should be extended to a materially different situation, namely the withdrawal of the protection afforded by s 73(c), s 22 and the common law relating to the termination of the bank's duty and authority. The answer to this question is, it is considered, in

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(181) Malan Bills of Exchange # 328 n 149 reaches the same conclusion on the wording of s 73(c) - see 217 above.

(182) Subject to the qualifications mentioned in 220-1 above.

the negative. The doctrine has been widely criticised,(183) and the courts may therefore be expected to be loath to extend its application to a new field in the absence of good reason, and the view has already been taken in the preceding paragraph that the sections themselves tend against rather than in favour of such an extension.

Thirdly, it is doubted whether the doctrine and the concomitant ultra vires rule were ever intended to apply to changes in a company's capacity, or in the authority of its officers, during a dealing or course of dealing. Were it otherwise, the absurdity would arise that a person dealing with a company would have to verify the capacity of the company and the authority of the persons purporting to represent it before making every payment or discharging every other obligation under the contract, before giving any notice to the company or acting upon any notice purporting to be from the company, before entering into any other transaction in the course of the dealings, etc. The extent of the absurdity is well illustrated by the bank customer relationship where the bank would have to verify the capacity of a company customer and the authority of the persons purporting to represent it before honouring each cheque or other

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(183) See eg Oosthuizen op cit 159; SJ Naudé 'Company Contracts: The Effect of Section 36 of the New Act' (1974) 91 SALJ 315 at 315-6; Gower Company Law 177-9; RR Pennington Company Law 4th ed (London 1979) 96ff; WE Paterson, HH Ednie & H A J Ford Australian Company Law 3rd ed (Butterworths October 1984) vol 3 # 68.12; RP Eickhoff & JH Schneider Fletcher Cyclopaedia of the Law of Private Corporations (Illinois 1978) vol 7A #3427. Charles E Carpenter 'Should the Doctrine of Ultra Vires be Discarded?' 33 Yale Law Journal 49 (1923-4) puts the position bluntly:

> 'It is submitted that in so far as the doctrine of notice in ultra vires contracts goes beyond agency and partnership law, it is unfair, unreasonable, and uncalled for upon any ground of public policy';

but cf Palmer Company Law #28-01.

payment instruction. The courts will, it is suggested, strain to avoid such an absurdity.(184)

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(184) Cf Oranje Benefit Society v Central Merchant Bank Ltd 1976(4) SA 659(A) at 673D-674F where the court refused to allow the *rule* to be used to enable the defendant to escape liability in delict for damages. See also The Central Railway Company of Venezuela v Kisch (1867) 2 English & Irish Appeals 99(HL) at 120 *in relation* to misrepresentation.

PART II

SECTIONS 348 AND 341(2) OF THE COMPANIES ACT

CHAPTER 5 - INTRODUCTION TO SECTIONS 348 AND 341(2) OF THE COMPANIES ACT

Synopsis

Section 348 deems a winding-up to commence on presentation of the winding-up application and s 341(2) provides that any *disposition by a company of its property* thereafter is void unless the court otherwise orders. The view has already been taken in chapter 4 that s 73(c) of the Bills of Exchange Act takes precedence over ss 348 and 341(2) in the case of cheques. However s 73(c) has no application to payment *instructions given* otherwise than by cheque and such payment instructions are therefore directly affected by ss 348 and 341(2). The sections also affect many other transactions between banks and their customers.

The Companies Act makes extensive provision apart from ss 348 and *341(2)* for the *impeachment of dispositions for no or* inadequate value, voidable and undue preferences and collusive dealings, and ss 348 and 341(2) therefore contribute little, if anything, further to the attainment of the object of a fair distribution of the company's assets. On the other hand, the sections can be the source of considerable hardship both to the company itself and to third parties, and the court's discretion to validate dispositions has *in practice not proved an* adequate safeguard against such hardship in other countries with similar legislation; accordingly, if other factors are not decisive, the sections should be interpreted restrictively rather than extensively.

Similar sections are to be found in the companies legislation of *a number of other countries*, notably England on whose Act our Act was originally modelled, and an extensive case law has developed in regard to these counterparts elsewhere of ss 348 and 341(2). These decisions are of considerable persuasive value in seeking to interpret ss 348 and *341(2), although the broadly* different statutory and common law contexts detract from the weight to be accorded to the decisions. In the case of authoritative interpretations of the English sections before their adoption here, there is a presumption that our legislature intended to adopt them as so interpreted, and the weight to be accorded to such interpretations is accordingly greater, although still not decisive.

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Sections 348 and 341 of the Companies Act(1) provide:

> '348 A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.'
>
> '341(2) Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.'(2)

In seeking to determine what effect these sections have on a bank's duty and authority to honour a company(3) customer's cheques and other payment instructions a number of questions arise: What is the interrelationship between the sections and s 73(c) of the Bills of Exchange Act and s 22 of the Insolvency Act? Does s 348 backdate the commencement of a winding-up for all purposes or for

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(1) 61 of 1973, referred to in this chapter as 'the Companies Act' or 'the 1973 Act' or simply 'the Act'.

(2) The Afrikaans text, the official text, reads:

> '348 'n Likwidasie van 'n maatskappy deur die Hof word geag te begin op die tydstip van die voorlegging aan die Hof van die aansoek om likwidasie.'
>
> '341(2) Elke vervreemding van sy goed (insluitende vorderingsregte) deur 'n maatskappy wat gelikwideer word en nie sy skulde kan betaal nie, wat gemaak is na die aanvang van die likwidasie, is nietig tensy die Hof anders beveel.'

(3) The sections also apply to corporate bodies other than companies (s 337) if they have a registered office or place of business in this country - Lawclaims (Pty) Ltd v Rea Shipping Co SA 1979(4) SA 745(N) at 751E, save insofar as may be provided in another Act. See also the specific exclusions set out in s 3.

some purposes only? When is a winding-up application 'presented'? When is a company 'unable to pay its debts' for the purposes of s 341(2)? Is a disposition void or merely voidable? Does the honouring of a payment instruction entail a disposition within the meaning of s 341(2)? If so, in what circumstances will the court validate the disposition, and what are the consequences if it does not? If the bank learns that a winding-up application has been presented against a customer may it freeze the customer's account without fear of a claim for damages for wrongful dishonour if the application does not result in a winding-up order? These questions will be examined in what follows together with various incidental questions that arise. Moreover, in view of the fact that banks also engage in a wide range of other transactions over and above the providing of current accounts, the effect of the sections on these other transactions will also be touched on.

The scope and effect of s 73(c)(4) and its interrelationship with ss 348 and 341(2) are dealt with in chapter 4(5) and it suffices to note here that the principal conclusions reached there are that s 73(c) applies to company customers despite the fact that it refers to 'notice of the customer having become insolvent', that s 73(c) takes precedence over ss 348 and 341(2), that therefore ss 348 and 341(2) only apply to payment instructions other than

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(4) 'The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by:

...

(c) receipt of notice of the customer having become insolvent.'

(5) At 161ff above.

cheques,(6) and that notice of the grant of a winding-up order and not notice of the presentation of a winding-up application constitutes notice of insolvency for the purposes of s 73(c).

The question of whether any conflict can arise between s 22(7) of the Insolvency Act as applied to windings-up by s 339 of the Companies Act on the one hand and ss 348 and 341(2) on the other has been considered above,(8) and the view taken there is that the answer is in the negative inasmuch as s 22 deals with the satisfaction of obligations made to the company whereas ss 348 and 341(2) do not affect the satisfaction of obligations made to the company because payment, eg, to the company is not a disposition by the company.(9) The view was further taken that if this view is incorrect s 22 will take precedence.

Does s 22 apply during the period from presentation of the winding-up application until the grant of the winding-up order? The answer is, it is thought, in the negative. The scope of the backdating of a winding-up by s 348 is considered below(10) and the conclusion reached there is that s 348 does not backdate a winding-up for all purposes but only for the purposes of s 341(2)

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(6) As defined in the Bills of Exchange Act. Although the view taken was that s 73(c) also protects the bank's rights to its charges and its right to be secured by any security it may hold - see 179-80 above - should the contrary view be upheld ss 348 and 341(2) will also apply to cheques insofar as the bank's charges and security are concerned.

(7) 'Every satisfaction in whole or in part of any obligation the fulfilment whereof was due or the cause of which arose before the sequestration of the creditor's estate shall, if made to the insolvent after such sequestration, be void, unless the debtor proves that it was made in good faith and without knowledge of the sequestration.'

(8) See 210-11 above.

(9) See 375-81 below.

(10) See 255-73 below.

and, probably, s 359(1)(b). It follows that satisfaction of an obligation can only be regarded as having taken place after winding-up for the purposes of s 22 if it took place after the grant of the order and that during the period from presentation of the winding-up application until the grant of the order ss 348 and 341(2) alone apply. After the grant of the order, on the other hand, both s 22 and ss 348 and 341(2) apply and s 22 would take precedence in the event of a conflict.

Before turning to the other questions listed above, it is conveniet to deal with 2 preliminary points: Firstly, where the sections are susceptible of more than one meaning, should they be interpreted restrictively or extensively if other considerations are not decisive? And, secondly, to what extent are authorities on similarly worded statutory provisions in other legal systems persuasive authority in relation to the interpretation of ss 348 and 341(2)?

(1) Should ss 348 and 341(2) be restrictively or extensively interpreted?

The original forerunners of ss 348 and 341(2) were ss 84(11) and 153(12) of the English Companies Act 1862 and the mischief aimed at by these sections was stated by Cairns L J in In re Wiltshire Iron Company Ex p Pearson(13) to be as follows:

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(11) '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.'

(12) 'Where any company is being wound up by the court or subject to the supervision of the court, all dispositions of the property, effects and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company, made between the commencement of the winding-up and the order for winding-up, shall, unless the court otherwise orders, be void

(13) (1868) 3 Ch App 443 at 446-7.

> 'This is a wholesome and necessary provision, [ie s 153 read with s 84] to prevent, during the period which must elapse before a Petition can be heard, the improper alienation and dissipation of the property of a company *in extremis*.'(14)

This approach is echoed by Snyman J in *Lief NO v Western Credit (Africa) (Pty) Limited*(15) in which he described the mischief aimed at by the corresponding sections(16) in the Companies Act 1926(17) as:

> 'a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the

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(14) The drafters of the United States Bankruptcy Code of 1978 (11 USC) set out the object of anti-preference provisions as follows:

> 'The purpose of the preference section is two-fold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter the 'race of diligence' of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section - that of equality of distribution.'

(Quoted by J Wm Moore *et alii* *Collier on Bankruptcy* 14th ed (New York 1978) #547.16.3.)

(15) 1966(3) SA 344(W) at 347B, quoted with approval in *Vermeulen & Anor v CC Bauermeister (Edms) Bpk & Others* 1982(4) SA 159(T) at 161F-G.

(16) 115 and 178(2).

(17) 46 of 1926, referred to in this chapter as 'the 1926 Act'.

> period between the presentation of the petition for the winding-up order and the granting of that order by a Court.'(18)

However, whether the sections in issue in Lief's case in fact contributed to the attainment of this object, and whether the current sections do likewise, may be doubted. At the time the concept embodied in the sections was first introduced not only in England but also in Natal,(19) the Cape,(20) the Orange Free

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(18) It may be noted that the South African sections are less efficacious in seeking to achieve this object than their English counterparts in that here, unlike in England, service of a winding-up application normally precedes filing of the application in court so that even if 'presentation' means filing - see 274-302 below - there will be a period during which the mischief can occur. In any event, the directors will probably have been aware for some time, especially if a demand has been served under s 345, that winding-up is inevitable and the horse may therefore well have bolted by the time ss 348 and 341(2) close the door. Cf the English Bankruptcy Act 1914, ss 37 and 45 of which deem a bankruptcy to commence when the first act of bankruptcy was committed, with protection for persons who dealt with the bankrupt without notice of the act of bankruptcy.

(19) Section 46 of the Winding-up Law 19 of 1866 (N) which applied the English law.

(20) Sections 138 and 196 of the Companies Act 25 of 1892(C):

> '138. A winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for winding-up on which any order for winding-up shall be made.'
>
> '196. Where any company is being wound up by the court, all dispositions of the property, effects and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company, made between the commencement of the winding-up and the order for winding-up, shall, unless the court otherwise orders, be void.'

State(21) and the Transvaal(22) the other anti-preference provisions under the Companies Acts concerned were more limited in scope than their counterparts under the 1926 and 1973 Acts,(23) under which extensive provision is made for the setting aside of

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(21) Sections 5 and 38 of the Wet op Liquideeren van Naamlooze Vennootschappen 2 of 1892(O):

> '5. Wanneer eene order tot liquidatie eener vennootschap wordt verkregen, zal die vennootschap worden beschouwd in staat van liquidatie te zijn van af den dag waarop applicatie daartoe werd gemaakt.'
>
> '38. Waar eene vennootschap onder deze wet geliquideerd wordt zullen alle beschikkingen over de eigendommen, effecten, geoderen en aanspraken der vennootschap in rechten, en eenig transport van aandeelen of verandering in den status der leden of aandeelhebbers der vennootschap die gemaakt zullen zijn tusschen het begin der liquidatie en de order tot liquidatie, van onwaarde zijn, tenzij het hof anders gelaste.'.

(22) Sections 116 and 178(2) of the Companies Act 31 of 1909(T):

> '116. 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.'
>
> '178(2) In the case of a winding-up by or subject to the supervision of the court, every disposition of the property (including rights of action) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding-up, shall, unless the court otherwise orders, be void.'

(23) See s 46 of the Winding-Up Law 19 of 1866(N) read with s 164 of the English Companies Act 1862 and *Halsbury* vol 3 'Bankruptcy and Insolvency' #908 n3; s 208 of the Companies Act 25 of 1892(C) read with ss 83ff of Ordinance 6 of 1843(C); s 46 of the Wet op Liquideeren van Naamlooze Vennootschappen 2 of 1892(O) read with ss 83ff of chapter 104, Wet over de Insolventie, of the Wetboek; s 182 of the Companies Act 31 of 1909(T) read with ss 33ff of the Insolventiewet 13 of 1895(T); and *Fenhalls v Ebrahim & Others* 1956(4) SA 723 (D&CLD) at 727D-G; Mars *Insolvency* #12.19 in regard to the *actio Pauliana*.

dispositions for no or inadequate value, voidable and undue preferences and collusive dealings;(24) accordingly, any disposition which would constitute, in Snyman J's words, 'an attempt to snatch some unfair advantage' would no doubt be impeachable under these other provisions without the assistance of ss 348 and 341(2). What further mischief the legislature sought to eliminate by ss 348 and 341(2) is therefore not clear.(25) There are no similar provisions in the Insolvency Act and it is noteworthy that the English counterparts of the sections find no place in the sweeping reforms of the English bankruptcy and winding-up laws proposed by the Cork Commission on Insolvency Law and Practice in England.(26)

The sections can, on the other hand, be the source of considerable hardship both to persons dealing with the company and to the company itself.

Persons dealing with companies generally have no means of ascertaining whether a winding-up application has been presented

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(24) Section 181 of the 1926 Act read with ss 24, 27, 28 and 29 of the Insolvency Act 32 of 1916 and s 340 of the 1973 Act read with ss 26, 29, 30 and 31 of the Insolvency Act 24 of 1936.

(25) Unless the legislature intended to strike down bona fide transactions in the ordinary course of business. Such transactions are not impeachable under the other anti-preference provisions but they are hit by ss 348 and 341(2). Sections 348 and 341(2) can also assist a liquidator by in effect transferring the onus of proof to the other party even in those cases where the liquidator would bear the onus under the other anti-preference sections, but this would seem a small benefit for the many disadvantages of the sections.

(26) Report of the Insolvency Law and Practice Review Committee under the chairmanship of Sir Kenneth Cork Command 8558 (London 1982) # 1280.

against the company concerned,(27) with the result that they may only later learn that an entirely normal and proper transaction is void under ss 348 and 341(2). True, s 341(2) empowers the court to validate any disposition, but an application for such an order is costly and cumbersome and, as the cases show, of uncertain prospects of success. No guidelines are laid down in the section for the exercise by the court of its discretion and despite over a century of case law in England and elsewhere no clear guidelines have emerged. As Harman LJ said in In re Clifton Place Garage Limited(28) in relation to the English counterpart of s 341(2) :

> 'That is an extremely jejune direction to the court, and it is not surprising that the cases do not seem to give very much help.'

The United States experience, where the courts exercised an analogous equitable discretion prior to 1938, is described by Harlan J in Bank of Marin v England:(29)

> 'The courts were ... free to devise protective rules to reconcile the competing interests of the estate and of those who dealt with the bankrupt in this period .... The result ... was that "no consistent theory of protected transactions has been developed," and the situation was "conducive to confusion and

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(27) The position is different in England where the fact that a winding-up petition has been presented against a company is advertised in the official gazette - see 249 below.

(28) [1970] Ch 477(CA) at 490 C, quoted with approval in Commercial Grain Producers Association v Tobacco Sales Ltd 1983(1) SA 826 (ZS) at 830 G.

(29) 385 US 99 (1966) at 106-7; see also Hal M Bateman 'Post-Bankruptcy Transfers: An Old Problem in Need of a New Solution' 53 Cornell Law Rev 280 (1968) at 305 and FE Holahan and EC Fisch 'Post Bankruptcy Payment of Checks: Bank of Marin v England' 28 Univ of Pittsburgh Law Rev 579 (1967) at 579.

> uncertainty, with potentialities for argument, 'bluffing', litigation, expense and delay." (McLaughlan, Amendment of the Bankruptcy Act (pts 1 & 2) 40 Harv. L.R. 341, 583, at 615. The same conclusions are reached by Weinstein, The Bankruptcy Law of 1938, at 161.) The law consisted essentially of "nebulous vagaries." (4 Collier, Bankruptcy # 70.66, at 1495) [The purpose of the 1938 amendments to the Act] was to provide "a clear statutory basis" to the issues of title and protected transactions, in "lieu of a crazy quilt of contradictory judicial statements." (Hearing before the House Committee on the Judiciary on H.R. 6439, 75th Cong., 1st Sess., 212.)'

This type of uncertainty is, it is thought, an almost inevitable consequence of as wide a discretion as is conferred by s 341(2). In Gunn & Anor NNO v Barclays Bank DCO(30) it was argued that the then s 29(2) of the Insolvency Act conferred a discretion of similar width and Steyn CJ referred to the 'uncertainty implicit in so wide a discretion' and to the fact that such a discretion enables 'facts unrelated to any defence recognised in law, and for that reason within a somewhat unpredictable range' to be proved.(31) Even if a person proposing to have dealings with a company against which a winding-up application has been presented is willing to consider taking the risk of having to seek validation in due course there is almost no way in which he can be sure that he is in possession of all the facts a court may subsequently take into account. It follows that he is not in a position to make a proper assessment of the risk.

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(30) 1962(3) SA 678 (A) at 685C and 686C.

(31) Lord Penzance's words in Morgan v Morgan & Porter (1869) 1 P & D 644 at 647 bear repeating:

> 'A loose and unfettered discretion ... is a dangerous weapon to entrust to any court, still more so to a single judge. Its exercise is likely to be the refuge of vagueness in decision and the harbour of half-formed thought .... This invites public criticism, and shakes public confidence in the justice of the tribunal.'

Although this was not said in relation to the English counterpart of s 341(2), the history of judicial decision in this field with respect amply justifies the fears expressed by Lord Penzance.

The disadvantages inherent in such uncertainty are manifest. As McPherson(32) states:

> 'Since neither the company, nor any person dealing with it, can be sure that the petition will be dismissed, or, if it succeeds, that a disposition of property made by the company will be validated by the courts, the effect is to discourage transactions with the company for as long as this state of uncertainty exists. This in turn tends to make the company's position deteriorate even more rapidly.'

Even where the winding-up application is entirely unfounded, the mere presentation of the application may therefore harm the company.

The prejudicial consequences of this uncertainty are well illustrated by the In re Clifton Place Garage Ltd(33) and Re Gray's Inn Construction Co Ltd(34) cases. In the Clifton Place case, Phillimore L.J. said:

> 'This is a very harsh section as applied. We are told that the first result of a petition seeking an order for the winding-up of a company by the court is that its bank refuses to honour its cheques, although it will continue to accept receipts in its favour. It follows that, even in the case of a company where the court ultimately refuses the order, serious damage may have resulted from the petition. After all, one of the results of a petition and of such action of the bank is that a company may have great difficulty in paying its employees, and, if it does pay them, the payments if derived from the funds of the company are prima facie void .... in my judgment the court should extend indulgence to any disposition by a company honestly designed to ensure that its employees are paid their wages or which was made to enable it to carry on its business and perhaps "turn the

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(32) BH McPherson The Law of Company Liquidation 2nd ed (Sydney 1980) 144-5. See also Re Atlas Truck Service (Pty) Ltd (1974) 4 ACTR 19 at 20 (35-40).

(33) Supra.

(34) Infra.

> corner"; provided always that it was a reasonable disposition and not dishonest or reckless. I question also whether this rigid practice of the banks in all cases is right, or whether, particularly if they were aware that the court would look with indulgence on such cases, it would not be possible, after proper enquiry, at any rate in some cases, to cash cheques for a company, even if only against current receipts on a day-to-day basis.'

The Journal of Business Law(35) commented wryly on this advice:

> 'It will be interesting to see whether bankers have the courage to follow this advice, and, if they do, whether the sentiments expressed by Phillimore L.J. will prove to be shared by all his fellow judges.'

One bank,(36) the National Westminster Bank Ltd, apparently took the advice for it allowed company customers to continue to operate their bank accounts after presentation of a winding-up application against them, subject to safeguards to ensure that the continued operation of the account was in the ordinary course of the company's business. They were, however, no doubt to rue their decision when the Court of Appeal in Re Gray's Inn Construction Co Ltd(37) held these safeguards to be inadequate in that the bank should also have instituted safeguards to ensure that the company was only permitted to continue to operate its account as long as it traded at a profit and to ensure that no payments were made to pre-presentation creditors.

The company in fact traded at a loss and the court held the bank liable for the trading loss by refusing to validate transactions on

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(35) 1970 JBL 124 at 128: 'Avoidance of Disposition by Receiver after Commencement of Winding-up' by C M Schmitthoff & J H Thompson.

(36) Most banks, it is understood from the solicitor who acted for the Bank in the Gray's Inn case referred to below, did not take the advice. See also McPherson Liquidation 143.

(37) [1980] 1 All ER 814 (CA); see also 583-92 below where the case is dealt with in detail.

the bank account up to the amount of the loss. The court also held the bank to be vulnerable to repay to the liquidator all amounts paid to pre-presentation creditors insofar as the amounts exceeded the dividends they would otherwise have received, but that the excess should primarily be recovered from the creditors to whom it was paid.

The court did not suggest what safeguards it would have regarded as adequate but it did say that it did not think that its approach would increase the dilemma facing a bank when a company requests the continuation of banking facilities after the presentation of a winding-up application against it. Not surprisingly, it is understood(38) that the bank did not agree and has now joined the other English banks in freezing a company's account if a winding-up petition is presented against the company, unless a validation order is obtained in advance.

To sum up, ss 348 and 341(2) are a blunt instrument which does not discriminate between tainted and untainted transactions, and although the court has a discretion to validate transactions this has not proved a satisfactory protection against hardship. Were the section to be fundamental to the achievement of the object of a fair distribution of the estate this would be a cogent reason for placing as wide an interpretation on the sections as the wording would permit and as would promote the achievement of this object, but since 1926 the concept embodied in the section has contributed little, if anything, to the achievement of this object in this country, and there is therefore no reason to give the sections any wider a meaning than necessary. On the contrary, the capacity for causing hardship inherent in the sections, both to the company

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(38) From the solicitor who acted for the bank.

itself and to persons dealing with the company, is a compelling reason for giving the sections no wider a meaning than necessary.(39) Snyman J focussed on an aspect of this in Lief's case(40) when he said:

> '.... normally statutes must be interpreted in such a way as to cause a minimum of interference with, or deprivation of, rights. Sec. 115 on occasion may be an interference with the rights of people who have legitimately acquired rights after the presentation of the petition for winding-up, but before the order is granted by the Court'.

What Mansefield CJ said nearly 2 centuries ago in Coles v Wright(41) in relation to a provision in the English Bankruptcy Act relating the commencement of the bankruptcy back to the first act of bankruptcy is, it is considered, still apposite today in relation to ss 348 and 341(2), although the harshness of the sections is mitigated to some extent by the fact that the court has the power to validate dispositions :

> '... the doctrine ... is in all cases extremely hard, and in many shocking, and it is not to be carried further than we are compelled to carry it....'

Historically, the counterparts of ss 348 and 341(2) in earlier legislation had a raison d'être in the absence of adequate specific provisions for the impeachment of improper dispositions, but with the enactment of adequate specific impeachment provisions this raison d'être fell away and the sections became an anachronism. Their repeal is therefore desirable(42) and until this occurs they should be interpreted no more widely than is necessary.

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(39) See generally Steyn Uitleg 103-5 and 115-16.

(40) Supra, 1966(3)SA 344(W) at 349B-C.

(41) (1811) 4 Taunt 198 at 199; 128 ER 305.

(42) See further 673-6 below.

(2) What weight is to be accorded to authorities on similar provisions elsewhere?

The concept embodied in ss 348 and 341(2) was first introduced in the English Companies Act 1862(43) and has since been re-enacted in substantially similar form in successive English Companies Acts.(44)

Similar provisions are also to be found in the companies legislation of a number of other countries(45) which have modelled their companies laws on the English Companies Act, although again with slight variations in wording from country to country and from time to time.

An extensive case law has developed in regard to these other provisions - notably in the United Kingdom, Australia and

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(43) Sections 84 and 153.

(44) Sections 139 and 205(2) of the Companies (Consolidation) Act 1908; ss 175(2) and 173 of the Companies Act 1929; ss 227 and 229(2) of the Companies Act 1948. These last sections provide :

> '227. In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.'
>
> '229(2) ... the 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.'

(45) See eg ss 365(2) anu 368 of the Australian Companies Act 1981(Cth); ss 441(2) and 536(2) of the Indian Companies Act 1 of 1956; ss 183(2) and 186(c) of the Zimbabwe Companies Act Cap 190; ss 224(2) and 222 of the New Zealand Companies Act 1955. The Canadian Bankruptcy Act RSC 1970 c B-3 contains a provision (s 50(4)) equivalent to s 348 but no counterpart of s 341(2) - see 263-5 below.

India(46) - and this gives rise to the question of what weight is properly to be accorded to authorities on these other provisions in seeking to interpret ss 348 and 341(2).

In Herrigel NO v Bon Roads Construction Co (Pty) Ltd & Anor(47) Lichtenberg J said:

> 'There is ... English authority in regard to a similar provision in s 227 of the English Companies Act which said section corresponds to s 341 of the South African Companies Act. English law is, of course, not binding upon me, but, in view of the similarity of the South African and English sections, it is not inappropriate to refer to such English authority as exists in regard to the said English section as a matter of persuasive interest, provided that our law does not differ from English law on the point on which guidance is sought from judicial pronouncements emanating from English Courts; see SA Wire Co (Pty) Ltd v Durban Wire and Plastics (Pty) Ltd 1968(2) SA 777(D) at 781D; Trust Bank van Afrika Bpk v Eksteen 1964(3) SA 402(A) at 411D; S v Moodie 1961(4) SA 752(A) at 757F.'

Lichtenberg J did not, however, proceed to consider whether there are differences between English and South African law on the point in question, and as will be shown below there are significant differences despite the apparent similarity of the wording of the corresponding sections in the English and South African Acts.

The weight to be accorded to English decisions on provisions taken over from the English Companies Act was set out by Solomon CJ in Roodepoort United Main Reef GM Co Ltd & Anor v Du Toit NO:(48)

> 'Although ... there is force in the argument that as our Companies Act is taken over from the English Act, we should be

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(46) But not New Zealand and Sri Lanka. References to 'Indian' cases will include cases decided in areas which are now part of Pakistan or Bangladesh.

(47) 1980(4) SA 669 (SWA) at 678 B-C.

(48) 1928 AD 66 at 71-2.

> guided in our interpretation of it by decisions of English Courts on identical sections, the argument cannot be pressed too far, and does not justify us in adopting any English decision which is based upon legal principles which are foreign to our system of law.'

It must be borne in mind, however, that this was said in relation to the 1926 Act which was closely modelled via the Transvaal Companies Act 1909(49) on the English Companies (Consolidation) Act 1908.(50) The 1973 Act, on the other hand, marks 'a divergence of English and South African company law, which has been buttressed by England as a consequence of its involvement with the harmonisation of the company laws of the member states of the EEC',(51) and greater caution is therefore necessary now in seeking to apply English decisions to the interpretation of the 1973 Act.

Where a provision in the English Act had been authoritatively interpreted by the English courts prior to its adoption here the question arises as to whether there is a presumption that it was adopted as so interpreted. Stratford JA, as he then was, took the view in Osaka Mercantile Steamship Co Ltd v S A Railways and Harbours(52) that there is such a presumption :

> 'If this country adopts an English enactment the presumption is that the adoption is with full recognition of the sense which judicial interpretation has given it.'(53)

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(49) 31 of 1909(T).

(50) H S Cilliers & H L Benade Company Law 4th ed (Durban 1982) #2.27. The principal differences insofar as ss 348 and 341(2) are concerned are examined below.

(51) Cilliers & Benade op cit #2.32.

(52) 1938 AD 146 at 174.

(53) Watermeyer AJA (as he then was) apparently agreed (at 178).

Curlewis CJ, on the other hand, appears to have doubted the existence of such a presumption, for, after concluding that the section in question in that case had not in fact been borrowed from the English legislation,(54) he said :(55)

> 'It therefore does not seem to me right or proper to contend that the draughtsman or our Legislature must be presumed to have known in passing our sec. 3(u)(A) of the judicial interpretation which had been placed in England on sec. 56 of the English Act of 1847, even assuming for the moment that there is a presumption (a very big presumption indeed) that our Legislature must be taken to be acquainted with authoritative judicial interpretation given to the language of a statute not only by the Court (sic) of the Union but also by English Courts.'

In Van Rhyn v Du Plessis(56) Rumpff ACJ (as he then was) commented on Stratford JA's statement as follows :

> 'Sonder om af te doen aan die oorredingskrag, in sommige gevalle, van Engelse uitsprake, moet hierdie stelling van Regter Stratford gelees word in die lig van wat daaromtrent gesê word in Steyn, Die Uitleg van Wette, 3de uitg. op bl. 125 e.v.'

Steyn(57) criticises Stratford JA's statement on the grounds that it is incorrect to presume the legislature to be aware of decisions in other countries, that it fails to take into account the different common law context in which the Companies Acts of the 2 countries occur and that it would entail attributing to the legislature the intention to adopt the foreign common law to the extent it bears upon any matter dealt with in the statute. It may be doubted, however, whether Stratford JA intended to convey any more

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(54) At 159.

(55) At 160.

(56) 1974 (3) SA 605 (A) at 619H-620A.

(57) Fifth edition 131-2. See also Van Zyl v Euodia Trust (Pty) Ltd 1983(3) SA 394(T) at 397D-F.

than that if our legislature adopts an English enactment it is unlikely to have ignored authoritative interpretations placed on it by the higher English courts. It does not follow that the legislature *ipso facto* intended to adopt the interpretation of the English courts : even where the wording of the statutes is identical their common law and statutory contexts are too different for any such automatic assumption. But if there are no material differences either in the wording of the statutes concerned or in their contexts, whether common law or statutory, it is thought that it is likely that the legislature would have intended to adopt the interpretation placed on the English model by the English courts.(58)

In the case of the English and South African Companies Acts, however, not only are their common law and statutory contexts different but there are also broad differences in the wording of the Acts themselves despite their general similarity, and, as will be shown below, a number of these differences are directly relevant to ss 348 and 341(2). It is considered therefore that while decisions of the higher courts in England prior to the adoption in South Africa of the concept embodied in ss 348 and 341(2) do carry greater weight than later decisions, they too must nevertheless be approached with caution.

At what date, then, can the concept embodied in ss 348 and 341(2) be said to have been adopted in South Africa for the purposes of this distinction? The 1973 Act was based on the 1926 Act which was in turn based on the Transvaal Companies Act 1909(59) and this

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(58) Cf *Tolima (Pty) Ltd v Cugacius Motor Accessories (Pty) Ltd* 1983(3) SA 504(W) at 510F-511E.

(59) 31 of 1909(T).

last Act was modelled on the English Companies (Consolidation) Act 1908;(60) accordingly, it is suggested that decisions of the English courts prior to the enactment of the 1909 Transvaal Act would fall within the ambit of the presumption.(61)

The decisions of the courts of countries other than England on similarly worded statutory provisions are likewise of persuasive value in seeking to interpret our Act, although regard must again be had to differences in the wording of the Acts concerned and in their common law and statutory contexts.(62) There is, however, clearly no presumption that our legislature was aware of, or intended to adopt, interpretations placed by the courts of such other countries on their Acts prior to 1909.

How dissimilar, then, are the wording and context of our Act and of the Acts of other countries which have provisions similar to ss 348 and 341(2)?

For most purposes the wording of the equivalent English provisions from time to time has been substantially similar to the wording of ss 348 and 341(2) but there are differences, eg s 341(2) refers to every 'disposition of its property ... by any company' whereas s 227 of the English Act refers to any 'disposition of the property of the company', with possible differences of meaning especially in the case of involuntary dispositions.(63) These

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(60) Cilliers & Benade Company Law #2.27.

(61) Despite the fact that the concept was adopted earlier in Natal (1866), the Cape (1892) and the Orange Free State (1892) - see notes 19-21 above.

(62) See also generally Steyn Uitleg 128 ff.

(63) See 356-61 below.

differences in wording will be examined when dealing with the points to which they are relevant.

Differences are, moreover, to be found in the common law and statutory contexts in which ss 348 and 341(2) and their English counterparts occur. With the passage of time our companies legislation has steadily diverged from the English legislation, and the fact that there is a divergence, and that it has varied from time to time, must be borne in mind, as must the different common law systems of the 2 countries. The principal differences for present purposes are as follows.

The word 'disposition' as used in the English counterparts of s 341(2) is not defined and has been held(64) to exclude the mere conclusion of a contract; for example, the conclusion of a sale is not a disposition without the transfer of either legal or equitable ownership of the property sold. In South Africa, on the other hand, 'disposition' is very widely defined in the Insolvency Act(65) and if, as would appear to be the better view,(66) the definition applies to s 341(2), the conclusion of contracts is clearly included, and the scope of s 341(2) is much greater than its English counterpart. Even if the Insolvency Act definition does not apply, the scope of s 341(2) will be different from its English counterpart because equitable ownership is not known to our law and the requirements for the transfer of ownership in our law are different from the requirements for the transfer of either legal or equitable ownership in Common Law systems.(67)

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(64) See 341-6 below.

(65) Section 2.

(66) See 325-34 below.

(67) Cf Wille Principles 201 ff and Halsbury vol 35 'Personal Property' ## 1156-7. See further 344-5 below.

In England the fact that a winding-up petition has been presented against a company is advertised in the official gazette(68) giving persons dealing with the company the opportunity of deciding whether they wish to run the risk of their dealings being invalid or at least of their having to incur the inconvenience and expense of applying for a validation order. In South Africa, however, not only is there no equivalent requirement, but in addition the court records relating to the application are not available for inspection by the public until the matter is called in open court.(69) The result is that no official or unofficial publicity is given to the fact that a winding-up application has been launched until the provisional winding-up order is granted, when notice is published in the Government Gazette(70) and when commercial publication takes place in the various credit journals.

The effect of this is that a person dealing with a company will in the ordinary course be unaware that an application has been launched for the winding-up of the company. He may in consequence unwittingly enter into transactions which, while entirely normal and proper, will be void in terms of s 341(2). On the other hand, the company itself benefits markedly by the absence of publicity.

In England the court may appoint a provisional liquidator at any time after the presentation of a winding-up petition, ie even before

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(68) Rule 28 of the English Companies (Winding-up) Rules 1949 (SI 1949) 330. (Application may be made to restrain advertisement where advertisement would cause injustice: see 632 below.)

(69) Rule 62(7) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa, GN R48 of 12 January 1965, as amended; Abt v Registrar of Supreme Court & Others (1899) 16 SC 476; Nathan Barnett Uniform Rules 370. In England the Companies (Winding-up) Rules 1949 expressly entitle every creditor to inspect the court file : rule 19.

(70) Section 356 read with s 14.

the granting of any order,(71) whereas in South Africa a *provisional liquidator may* only be appointed after a provisional winding-up order has been granted.(72) Although s 341(2) and its English counterpart do not expressly provide that they do not apply to dispositions by the liquidator,(73) this must be so as otherwise the liquidator would be unable to liquidate and distribute the company's assets. Assuming that in England this also applies to a provisional liquidator appointed before the grant of an order,(74) it follows that the English Companies Act provides a simple mechanism for the company to continue to operate after presentation of a winding-up petition against it if third parties are not willing to run the risk of invalidity, whereas *in South* Africa this could only be achieved by the cumbersome method of one or more advance applications for validation.(75)

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(71) Rule 32 of the English Companies (Winding-up) Rules 1949 (SI 1949) 330.

(72) Section 368.

(73) In South Africa the words 'by any company' can perhaps be construed as excluding dispositions by the liquidator. In Australia dispositions by the liquidator are expressly excluded - see s 368 of the Companies Act 1981(Cth).

(74) Chitty J did not make this assumption in Re Llangennech Coal Company (1887) 56 LT 475(Ch) but his conclusion is similar in effect from a practical point of view (at 476):

> '... if I appointed a provisional liquidator for the *purposes of carrying on the company*'s business, I should consider it was a matter of course to confirm all that he had done in good faith and in the ordinary course of business.'

(75) *It is doubted whether the problem can be circumvented by* seeking the appointment of a judicial manager because even dispositions by a judicial manager would appear to be hit by s 341(2) - see 300-302. It may also be noted that any application in advance for validation would result in the loss of the confidentiality accorded to winding-up applications

(Footnote continued on next page)

Sections 348 and 341(2) and their English counterparts must be seen as part of a group of anti-preference provisions aimed at securing a fair distribution of the company's assets. Section 340 of the South African Act incorporates the extensive provisions(76) of the Insolvency Act for the impeachment of dispositions for no or inadequate value, voidable and undue preferences, and collusive dealings, and there is in addition the common law actio Pauliana.(77) The corresponding position in England is that the only impeachable transactions are preferences given with a view to preferring a creditor during the 6 months preceding filing of the winding-up petition(78) and fraudulent conveyances.(79)

The procedure for obtaining a validation order is also markedly different in England and this country. In this country there are no

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(Footnote continued from previous page)
before they are heard in open court. The Australian Act, which also permits the appointment of a provisional liquidator, in addition expressly empowers the court to validate the continued conduct of the company's business - see ss 372(2) and 368(2) of the Companies Act 1981 (Cth). The Report of the Company Law Committee under the chairmanship of Lord Jenkins Command 1749 (London 1962) # 503(k) recommended that the English Act be amended to include a similar provision but the recommendation was not implemented.

(76) Sections 26, 29, 30 and 31.

(77) See eg Fenhalls v Ebrahim & Others 1956(4) SA 723 (D & CLD) at 727D-G; Mars Insolvency # 12.19. It is therefore difficult to see what further transactions the South African legislature would have wished to render invalid under s 341(2) - see further 231-42 above.

(78) Section 320 of the Companies Act 1948 read with s 44 of the Bankruptcy Act 1914; Halsbury vol 7 'Companies' ## 1332 ff, vol 3 'Bankruptcy' ## 908 ff - see further 648-51 below.

(79) Section 172 of the Law of Property Act 1925; Halsbury vol 18 'Family Arrangements, Undue Influence, Voidable Conveyances' ## 358 ff.

special rules of court or winding-up rules dealing with proceedings for validation and the question of the appropriate form of proceedings accordingly falls to be answered according to general principles and the general rules of court. In effect this means that proceedings will take the form of either a trial action or motion proceedings in the supreme court depending upon whether or not there is a material dispute of fact between the parties. This may be contrasted with the position in England where the proceedings are heard by a registrar in chambers on a summons requiring the person against whom an order is sought to attend the hearing.(80)

The question of the point in time at which a winding-up application is 'presented' may also be mentioned in this context because of its importance and the fact that it may differ in South Africa and England, although the view will in fact be taken that it does not differ.(81) In England it is clear that 'presentation' means the filing of the petition with the registrar of the court and this is simply assumed in the cases on the English counterparts of ss 348 and 341(2). In South Africa, on the other hand, this is not entirely clear and arguments of some cogency can be made out in support of the argument that 'presentation' means the moving of the application in open court, although the view will be taken that 'presentation' in section 348 does in fact also refer to the filing of the application with the registrar. Should this view be incorrect, however, this will constitute a significant difference between the positions in the 2 countries.

The consequences of the avoidance of a disposition are also different. Neither s 341(2) nor its counterparts in England, Australia and India specify what the consequences are to be beyond

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(80) See 615 below.

(81) See 274-302 below.

stating that the disposition is void. Matters such as the position of a bona fide third party who has acquired property which was disposed of to his predecessor in title pursuant to an avoided transaction therefore require to be dealt with according to the general principles of the legal system concerned, with differing conclusions in different systems.(82)

There are also many smaller differences which will be referred to where they are relevant, such as the fact that in South Africa, unlike in England, service of a winding-up application normally precedes filing of the application with the registrar.(83)

Broadly analogous differences exist between the wording and context of ss 348 and 341(2) and the wording and context of their Australian and Indian counterparts,(84) which generally tend to be fairly close to their English counterparts.(85)

What conclusion is to be drawn from the aforegoing? The answer is, it is considered, that circumspection is necessary in seeking to apply authorities on similar provisions elsewhere to ss 348 and 341(2). Where the wording or context is directly different this is

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(82) See 626 below.

(83) See 276-7 below.

(84) See eg ss 365, 368, 372(2) and 451 of the Australian Companies Act 1981 (Cth) and McPherson Liquidation 138ff and ss 441(2), 450, 531, 531A and 536(2) of the Indian Companies Act 1 of 1956 and rule 99 of the Indian Companies (Court) Rules 1959.

(85) Except for the other anti-preference provisions which differ in material respects - see eg s 451 of the Australian Companies Act read with ss 122-3 of the Australian Bankruptcy Act 1966 and ss 531 and 531A of the Indian Companies Act read with ss 56-7 of the Indian Presidency-Towns Insolvency Act 3 of 1909 and ss 54-5 of the Indian Provincial Insolvency Act 5 of 1920 - see further 651-5 below.

obvious, but it is suggested that even where there is no direct difference the broadly different common law and statutory contexts detract from the weight to be accorded to such authorities, although they are nevertheless of considerable persuasive value. Where, however, the English sections had been authoritatively interpreted by the higher English courts prior to 1909, such interpretation will carry greater, though still not decisive, weight.

CHAPTER 6 - DOES s 348 BACKDATE A WINDING-UP FOR ALL PURPOSES OR SOME ONLY?

Synopsis

The effect of s 348 is not that a winding-up is deemed to commence as soon as the winding-up application is presented but that once a winding-up order has been granted the winding-up is deemed to have commenced on presentation of the application. At first sight it would appear that the deemed backdating is for all purposes ie the concursus creditorum is established on presentati[illegible] the application, the rights and obligations of credit[illegible]ors are crystallised at that time and all dealings [illegible] any thereafter are void. The better view is, however, [illegible] only function of s 348 is to define the *commencement* [illegible] winding-up for the purposes of s 341(2) and, probably, s 358(1)(b).

This question has not come before our courts, although support for each interpretation is to be found in the cases in England and elsewhere. However, there are a number of *indications that the extended interpretation was not intended by* the legislature. On the extended interpretation a number of other sections, notably s 341(2), would be redundant and a number of anomalies would arise in seeking to apply the provisions of the insolvency laws to windings-up in accordance with s 339. Moreover, in practice a winding-up is not treated as if it had commenced at the date of presentation of the winding-up application and the concept embodied in s 348 has been re-enacted since the practice was established, giving rise to the presumption that the legislature intended the words to have the meaning that had been put on them in practice.

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Section 348 deems a winding-up to commence on presentation of *the application for winding-up*. This does not mean that as soon as a winding-up application is presented the company is in winding-up, but that if and when a winding-up order is granted the winding-up will be deemed retrospectively to have commenced on presentation of the application :

> 'Section 348 refers expressly to a winding-up by the Court, and that is the event which is deemed to commence at an earlier stage. Thus, before the deeming provision can operate there must be a winding-up by the Court. By the deeming provision, Parliament has antedated the operation of a winding-up by the Court, but without such a winding-up there is nothing to antedate. To hold the contrary would lead to manifest absurdity, in that the mere filing of an application for a winding-up order, however ill-founded or even vexatious, would ipso jure have the effect of a winding-up order'

(per Margo J in Vermeulen & Anor v CC Bauermeister (Edms) Bpk & Others(1)).

The question arises, however, as to whether once an order has been granted, the winding-up is deemed to have commenced on presentation for all purposes or for certain limited purposes only eg for the purpose only of those other sections of the Act, notably s 341(2), which expressly refer to the commencement of the winding-up.

Taken literally s 348 would appear to backdate the commencement of a winding-up to the date of presentation for all purposes. This would be the date of the establishment of the concursus creditorum, ie the date of crystallisation of the rights and obligations of debtors and creditors, and the date of cessation of the directors' powers. All acts of the directors thereafter would be void and all contracts concluded by the company, all payments made to or by the company, all deliveries of goods to or by the company, etc would be void.

It would be surprising, however, if the legislature had intended such a startling result. In practice, a company against which a winding-up application is presented may be carrying on business at

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(1) 1982 (4) SA 159 (T) at 162 B. See also Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd 1976 (4) SA 75 (W) at 83A; Du Plooy & Anor v Onus (Edms) Bpk & Others 1981(1) PH E2(0) at 5; In re Tumacacori Mining Company (1874)17 Eq 534 at 537.

the time and may continue to do so for some time until a winding-up order is granted on the application. Any attempt to unravel all the dealings of the company between presentation of the winding-up application and the grant of the winding-up order would therefore often be impracticable to implement, and it may be doubted whether the legislature intended such an absurdity :

> '... the degree of absurdity or repugnance is of importance as it bears upon the intention of the enactment under discussion. If, examining results, you find absurdity or repugnance of a kind, which, from a study of the enactment as a whole, you conclude the Legislature never could have intended, then you are entitled so to interpret the enactment as to remove the absurdity or repugnance and give effect to the intention of the Legislature'

(per Stratford JA, as he then was, in Hatch v Koopoomal(2)).

The view will therefore be taken in what follows that in deeming a winding-up to commence on the presentation of the winding-up application the legislature intended no more than that the winding-up would be deemed to commence on presentation in the sense that certain provisions of the Act which are expressly stated to apply from the commencement of the winding-up would operate from presentation,(3) leaving the date of the grant of the order as the date of establishment of the concursus creditorum.

(1) The decided cases in England and elsewhere

One would have expected the case law on s 348 and its counterparts elsewhere to be characterised by attempts to resolve the question of whether the sections concerned should be interpreted literally or whether a more restricted meaning should be placed on

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(2) 1936 AD 190 at 209; see generally Steyn Uitleg 25 ff.

(3) The view will actually be taken that s 348 only applies to certain of the sections which refer to the commencement of the winding-up and that the majority of such sections in fact refer to the grant of the order despite s 348 - see 291-9 below.

them, but this is not so. This does not mean that the issue has not been relevant in any of the cases; on the contrary, the issue has been directly relevant in a considerable number of cases in England and elsewhere (although not in South Africa) and in each such case the court expressly or impliedly adopted either a literal or a restricted interpretation without discussion of the possible alternative interpretation. A notable exception is the Earl of Selbourne's speech in the Mersey Steel case dealt with below.(4)

In In re Wiltshire Iron Company Ex p Pearson,(5) the locus classicus in relation to the English counterparts of ss 348 and 341(2), the company had sold and delivered iron to Pearson after a winding-up petition had been presented against it. On a literal interpretation of the English counterpart of s 348, both the sale and delivery would have been invalid. However, the Court of Appeal held, without discussing the possible broader effect of the English counterpart of s 348, that only the delivery was avoided by the English counterpart of s 341(2).(6)

In Mersey Steel and Iron Company v Naylor Benzon & Co(7) the defendant had agreed to purchase steel from a company, the steel to be delivered in instalments and payment of the price to be made within 3 days of delivery. After delivery of the first instalment

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(4) The Ram Chand case dealt with below may also be regarded as a partial exception.

(5) (1868) 3 Ch App 443.

(6) In this country the better view is that the Insolvency Act definition of 'disposition' applies to s 341(2) - see 325-34 below - and the conclusion of a contract for a transfer of rights is therefore also a disposition; however, 'disposition' in the English counterpart of s 341(2) is undefined and has been construed as referring only to the transfer of rights - see 341-6 below.

(7) (1882) 9 QBD 648 (CA); (1884) 9 AC 434 (HLE).

but before payment, a petition for the winding-up of the company was presented. The defendant was advised by its solicitor that it could not safely pay the price to the company pending the petition without the leave of the court, and asked the company to obtain an order of court sanctioning the payment. The company treated this as a repudiation of the contract, and the issue before the court was whether or not the defendant's action did constitute a repudiation of the contract. Both the Court of Appeal and the House of Lords held that there was no repudiation because the defendant, while willing to pay, was bona fide under the impression that it could not do so until a liquidator had been appointed. Although not part of the ratio decidendi, several of the judgments in both courts touched upon the question of whether the solicitor's advice was correct or not.

In the Court of Appeal Jessel MR(8) and Lindley LJ(9) considered that payment can validly be made to a company against which a winding-up petition has been presented and that the payment will not be invalidated by the subsequent grant of an order on the petition. Lindley LJ's reasoning was that the English counterpart of s 341(2) did not apply to payments to the company. He did not refer to the possibility that the English counterpart of s 348 may backdate the winding-up for all purposes thus affecting its ability, inter alia, to receive payments, although it is implicit in his judgment that he assumed that this is not the effect of the English provision. Jessel MR gave no reasons for his view although it is again implicit in his conclusion that the English counterpart of s 348 does not backdate a winding-up for all purposes. Bower LJ did not find it necessary to refer to the question.

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(8) At 659.

(9) At 665.

In the House of Lords the Earl of Selbourne LC dealt expressly with the question of the extent to which the English counterpart of s 348 backdates the commencement of a winding-up and took the view that it only does so insofar as dispositions of the company's property are concerned:(10)

> 'By the Act of Parliament, in the event of a winding-up order being made, it would date from the time when the petition was presented; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who if there had been no petition would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person and therefore an alienation.'

Lord Blackburn, however, was more cautious:(11)

> 'There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present .... it was a bonâ fide statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment....'

The remaining law lords found it unnecessary to refer to this aspect.

In many subsequent cases on the counterparts elsewhere of ss 348 and 341(2) it is simply tacitly assumed without discussion that the counterparts of s 348 do not backdate a winding-up for all purposes. To name but a few: Re Clifton Place Garage Ltd(12) and Re Gray's Inn Construction Co Ltd(13) (a company may validly borrow monies

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(10) At 440.

(11) At 443.

(12) [1970] Ch 477 (CA).

(13) [1980] 1 All ER 814(CA).

after presentation); and Albion Reid (SA) (Pty) Ltd v Baron Holdings (Pty) Ltd(14) (a company may validly purchase goods after presentation).(15)

In a smaller number of cases the counterparts elsewhere of s 348 have been given their literal meaning. In In re The United Ports and General Insurance Company Ex p The Etna Insurance Company(16) a company had purported to sell its business, including the debts owed to and by it, to another company. The sale was, however, void as the seller had no power to sell its business. Shortly after the purported sale a winding-up petition was presented against the seller and in due course a winding-up order was granted. Both before and after the grant of the order the purchaser collected debts due to, and paid debts due by, the seller. The liquidator of the seller claimed the full amount collected by the purchaser after presentation of the winding-up petition and the purchaser tendered the net amount after deduction of the amounts paid out by it. The court, in upholding the liquidator's claim, held:(17)

> 'A line is drawn at the date of the presentation of the petition. After that the company cannot deal with its assets. The rights of creditors are declared from that time; nobody can interfere with them; no payment of debts can take place without the sanction of the Court.'

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(14) (1973) 7 SASR 564.

(15) Many other cases in which the same assumption is made will be referred to below.

(16) (1887) 46 LJ Ch 403.

(17) At 405-6.

Indian Overseas Bank Ltd v Kalinga Industries Ltd (in liquidation)(18) is to the same effect.(19)

In Ram Chand v Lahore Enamelling and Stamping Co Ltd(20) the Punjabi Court of Appeal held that the effect of the Indian counterpart of s 348 is that the running of prescription is

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(18) (1978) 1 Cut 347 : 'All transactions made and all agreements executed between the Company and the Bank after the commencement of the winding-up proceedings are void and no new rights can after the commencement of the winding-up proceedings be created and no incompleted rights can be completed' (at 353-4).

(19) Millar v The National Bank of Scotland Ltd & Others (1891) 28 Sc LR 884 at 888-9 may at first sight also appear to be to the same effect. The company first deposited an amount to its bank account and then withdrew portion again. The liquidator sued for the full amount of the deposit and the bank tendered the amount less the withdrawals. The court upheld the liquidator's claim saying:

> 'The winding-up commenced [on presentation] and was equivalent to an arrestment in execution and decree of *furthcoming. The bank therefore could not lawfully* ... receive payment of the money for any other purpose than to hold it for the company.'

However, the decision turned on s 3(1) of the Companies Act 1886 which provided:

> '[The winding-up of a Scottish company] shall ... as at the commencement thereof ... be equivalent to an arrestment in execution and decree of forthcoming ...'

An arrestment in execution and a decree of forthcoming are an attachment of the property of a debtor in the hands of a third party and a decree to make the attached property available - A D Gibb Students' Glossary of Scottish Legal Terms (Edinburgh 1946) at 9 and 36. There is no equivalent provision in our Act; accordingly, the decision does not assist in interpreting our Act.

(20) *AIR 1961 Punjab 84 at 87. See also the other cases referred to in the judgment.*

interrupted as at the date of presentation of the winding-up petition and in rejecting the argument that the doctrine of relation back is restricted in scope and cannot be extended for all purposes said:

> '... the final order dates back to the filing of the original petition. This is not a legal fiction but the result of a specific provision of law and must be given full effect to.'

In Dixit v Official Liquidator,(21) however, the Allahabad Court of Appeal declined to follow the Ram Chand judgment and held that prescription is not interrupted by presentation because until the winding-up order is granted a creditor is not debarred from taking action to enforce the debt.(22)

The question of the extent to which a provision such as s 348 backdates the commencement of a winding-up has been most directly in issue in Canada, although it should be noted that the context in which the Canadian counterpart of s 348 appears is significantly different. The Canadian Bankruptcy Act(23) (which applies both to companies(24) and to individuals) provides:(25)

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(21) AIR 1963 Allahabad 284 at 289-90.

(22) See also the conflicting Australian decisions (in relation to prescription in bankruptcy) in Re Narbey; Ex p Official Receiver v Simpson (1961) 19 ABC 201 and Re Lehrain; Official Receiver v Frankston Timber (Pty) Ltd & Others (1975) 24 FLR 407. Whether or not relation back applies for all purposes has also given rise in India to problems in the context of the last day of the period for the impeachment of preferences under the Indian insolvency laws - see Hem Raj & Others v Krishan Lal & Others AIR 1928 Lahore 361 and the conflicting authorities cited there.

(23) RSC 1970 c B-3.

(24) Definition of 'person' in s 2.

(25) Section 54.

> 'The bankruptcy shall be deemed to have relation back to and to commence at the time of the filing of the petition on which a receiving order is made.'(26)

A similarly worded forerunner of this section(27) was in issue in the leading case of R v Louis Minden & Mindens Ltd.(28) The then Act further provided:(29)

> '*Any person who* has been adjudged bankrupt ... shall in each of the cases following be guilty of an indictable offence ....
>
> (p) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to an agreement with reference to his affairs or *to his bankruptcy*.'

(The underlining has been added.) The Ontario Court of Appeal held that the offence could be committed between filing of the bankruptcy *petition and* the *grant* of the order, Middleton JA saying:(30)

> 'After much anxious consideration I have concluded that the combined effect of these statutory provisions(31) is to make the bankruptcy begin at the time of the presentation of the *petition for all purposes*.'(32)

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(26) Despite the similarity of their wording ss 54 and 348 cannot truly be regarded as counterparts because of the broadly different contexts in which they occur. *It is* nevertheless instructive to examine the interpretation placed on s 54.

(27) Section 4(11) of the Bankruptcy Act RSC 1927 ch 11.

(28) (1935) 4 DLR 309 (CA - Ont).

(29) Section 191.

(30) At 312.

(31) *The statutory provisions* referred to are, apparently, ss 4(11) and 191 already referred to.

(32) Leave to appeal to the Supreme Court of Canada was refused by the Supreme Court on the ground that there was no conflicting decision of another court of appeal, such a conflict being a condition *precedent* to *the Supreme Court's having jurisdiction* to entertain the appeal - Minden et al v The King (1935) 4 DLR 593 (SC of Can).

The Canadian Act has no equivalent of s 341(2) but this has not deterred the courts from holding that payments and other transfers of property,(33) including the granting and perfecting of mortgages,(34) by a bankrupt after the filing of the bankruptcy petition are invalid; that a judgment granted against the bankrupt after the filing of the bankruptcy petition is invalid because the bankrupt lacked the capacity after that date to defend;(35) that creditor's rights to priority in payment are determined as at the date of filing of the petition;(36) and that the statutory provision granting a landlord a lien for rent for the 3 months preceding, and the 3 months succeeding, bankruptcy refers to filing and not the grant of the order.(37)

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(33) Perras v Parant (1958) Que QB 466(CA); In re Hansard Spruce Mills Ltd (1953) 33 CBR 217(BC) at 220; In re Soren Brothers (No 2) (1926) 7 CBR 545 (Ont) at 547.

(34) Re Del Bianco (1978) 29 CBR (NS) 83 (BC); Re Martin & Harlock Electric Ltd (1960) 33 WWR 410 (BC) at 413.

(35) Perras v Parant supra at 468:

> '... si l'on accepte la doctrine de la rétroactivité sur l'adjudication de la faillite la débitrice ne pouvait plus défendre à l'action.'

(If one accepts the doctrine of retroactivity of the adjudication of insolvency the debtor was no longer able to defend the action.) See also Bank of Hamilton v Kramer Irwin Co (1912) 1 DLR 475.

(36) In re Shapiro (1954) 34 CBR 205 (Ont).

(37) In re Clayton's Women's Wear Ltd Ex p Louis K Liggett Company Ltd (1933) 14 CBR 361 (CA - Ont); but cf Arthur C Weeks Ltd v Canadian Credit Men's Trust Association (1962) 4 CBR (NS) 182 (CA - BC). L Duncan & JD Honsberger Bankruptcy in Canada 3rd ed (Toronto 1961) summarise the position as follows (at 383):

> 'After [filing] the bankrupt is deemed to have had no title, and no power to convey or charge what had been his property, or to give receipts for moneys paid to him, or

(Footnote continued on next page)

(2) Redundancy of other sections if s 348 backdates winding-up for all purposes

A major objection to interpreting s 348 as backdating the commencement of a *winding-up for all purposes, is that s 341(2)* would then be redundant as all dispositions by the company of its property would in any event be void under s 348, thus offending against the presumption against superfluity in statutory interpretation.(38) Section *359(1)(b)* providing that any attachment or execution after the commencement of the winding-up is void would similarly be redundant.

(Footnote continued from previous page)

> discharges for debts due to him. Nor is a trustee, asserting his title by relation back, estopped by any representation made by the bankrupt after the date to which the title relates back'

although they suggest (at 384) that the severity of the doctrine is mitigated by the rule that 'the Court will not permit its officer to insist on a rule of law or equity in the administration of the estate where insistence would produce an unjust and dishonest result' (quoted in In re Bertone Construction Co Ltd; Grobstein v Watson, Jack, Hopkins Ltd & Others (1961) 2 CBR (NS) 30 (Que) at 35). See also the exceptions - in all cases other sections of the Act - *suggested by LW Houlden & CH Morawetz* Bankruptcy Law of Canada looseleaf ed (Toronto 1984) F88 (the first (1960) edition of which was quoted in Re DC Hunt Construction Ltd; Friedman v McCowan Mobile Mix Company Ltd (1969) 12 CBR (NS) 239 (Ont) at 244-5).

(38) S v Weinberg *1979(3) SA 89(A) at 98E; Steyn Uitleg* 17 *ff.* Could this presumption be rebutted in the case of s 348 by arguing that, despite its form, the true intention of s 341(2) is to give the court the power to validate transactions rendered void by s 348? The answer is, it is considered, in the negative. Not only does the wording of s 341(2) not lend itself to such an interpretation but also not all transactions involve dispositions - eg payments to the company - with the result that the court's power to validate would be incomplete, and it is thought that it is unlikely that this would have been the intention of the legislature.

A further instance of redundancy would be found in ss 340 and 416 which import the impeachment provisions of the Insolvency Act and which in so doing expressly provide that the date of presentation of the winding-up application is to be taken as equivalent to the date of sequestration. If s 348 backdates a winding-up for all purposes, the date of presentation would automatically be equivalent to the date of sequestration and it would be unnecessary to expressly so provide.

(3) Indications arising from the application of the Insolvency Act to windings-up

A further consequence of interpreting s 348 as backdating the commencement of a winding-up for all purposes would be that a number of anomalies would arise in applying the provisions of the Insolvency Act in accordance with s 339 of the Companies Act in respect of any matter not dealt with specifically in the Companies Act. Two examples may be given.(39)

Section 37 of the Insolvency Act empowers a trustee to elect whether to continue or terminate any lease entered into by the insolvent as tenant prior to his insolvency and provides further that the rental from the date of sequestration until the trustee makes his election will be preferent as part of the costs of administration. It follows that if the date of presentation of a winding-up application is equated with the date of sequestration, the rental during the period from presentation until the grant of the order - a period which may run to several months - will be preferent, despite the fact that before the grant of the order there

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(39) For further examples see ss 36(1), 85(2) and 101 of the Insolvency Act.

could be no liquidator in office with power to decide whether the lease should be continued or not.(40)

Section 38 of the Insolvency Act provides that sequestration of an employer's estate terminates the employment of his employees and s 100 confers a preference in respect of the employees' claims for their remuneration and leave pay due up to the date of *sequestration*. If sequestration is equated with the presentation of the winding-up application in the case of a company, the company's employees will not have a claim at all for their remuneration, much less a preferent claim, for the period from presentation until the grant of the order.

Further assistance in seeking to ascertain the legislature's intention in enacting s 348 is, it is suggested, to be had from the provisions of s 342(1) of the Companies Act which enjoins the application of the assets of a company under winding-up:

> '... as nearly as possible as they would be applied ... under the law relating to insolvency ...'

It can, it is suggested, be said that the nearest possible application would involve an adoption of the date of the winding-up order and not of the presentation of the winding-up application as the equivalent of the date of the sequestration order, and that this by implication excludes the interpretation that s 348 backdates the commencement of a winding-up to the date of presentation for all purposes.

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(40) Cf In re Clayton's Women's Wear Ltd Ex p Louis K Liggett Company Ltd (1933) 14 CBR 361 (Ont - CA) in which the Canadian legislation limiting the landlord's lien for rent to the 3 months preceding and the 3 months succeeding bankruptcy was held to refer to the date of filing of the bankruptcy petition and not to the date of the order.

(4) Indications in other sections of the Companies Act

Sections 83(3) and 85(1) also call for consideration because they could be construed as indicating that the legislature did in fact intend to backdate the commencement of a winding-up for all purposes. Both sections relate not to windings-up but to reductions of capital; however, they refer to claims which, if the dates referred to in the sections 'were the commencement of the winding-up of the company, would be admissible in proof against the company'. In other words, the sections contemplate the proof of claims as at the commencement of the winding-up which would only be the case if s 348 backdates the commencement for all purposes. It is doubted, however, whether much weight is to be attached to this indication. Not only do the sections only indirectly relate to winding-up, but also there are a number of other sections in the Act which refer to the commencement of the winding-up but which, despite s 348, clearly refer to the grant of the order, and it is considered that ss 83(3) and 85(1) should similarly be construed as referring to the grant of the order and not to the deemed commencement under s 348. These other sections are examined below.(41)

(5) The practice in relation to the commencement of windings-up

Further support for the interpretation that s 348 does not backdate a winding-up for all purposes is to be had from an examination of the practice in relation to the commencement of windings-up, in the light of the rules of interpretation relating to the interpretation placed in practice on ambiguous legislation.

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(41) See 291-9 below.

In practice, windings-up are treated as being effective from the date of the winding-up order and not the date of presentation of the winding-up application: liquidators do not advise creditors of the date of presentation; claims are proved as at the date of the winding-up order eg including all transactions and interest up to that date; and liquidators do not treat the acts of the company between presentation and the order as invalid.

The significance of the interpretation placed in practice on ambiguous legislation is explained in R v Lloyd:(42)

> 'It was admitted that up to the time of this prosecution the officers of the legal and police departments had acted for over twenty years upon the construction of the law for which the appellant contends. ... Custom, though said to be the best interpreter, does not dictate absolutely the construction of statutes, but where a statute may fairly be interpreted in either of two ways, custom may well be used to tip the balance.'

The significance of the interpretation placed in practice on ambiguous legislation is, moreover, much increased where the legislation is re-enacted without amendment after the practice is well-established, as in the case of s 348 which re-enacts s 115 of the 1926 Act in almost identical words. Where this occurs, the legislature may fairly be presumed to have intended to ratify the interpretation placed on the old provision in practice:

> 'It is quite true, as observed by Griffith C.J., in the above-mentioned case of D'Emden v Pedder, (1904) 1 CLR 91 at 110, that : "When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of

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(42) 1920 AD 474 at 485-6; see further Steyn Uitleg 157 ff.

> construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them"'

(per The Earl of Halsbury in Webb v Outrim(43)).

A possible counterargument would be that s 348 is being ignored, rather than interpreted, in practice,(44) and while a genuine interpretation in practice of a statutory provision can be persuasive in interpreting that provision, the same cannot be said for a practice of ignoring the provision. The effect of recognising a practice of ignoring s 348, if that is the true nature of the practice, would be to allow a provision of a post-Union statute to be abrogated by disuse, which our law does not permit.(45) It is considered, however, that the practice does in fact constitute an interpretation of s 348 and not merely the ignoring of the section.

(6) Other anomalies

Section 348, unlike s 341(2), is not limited to companies which are unable to pay their debts. If, therefore, it were to be interpreted as backdating a winding-up for all purposes the winding-up even of a company which is able to pay its debts would be backdated for all purposes, which would be entirely anomalous.(46)

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(43) [1907] AC 81 (PC) at 89.

(44) Cf the position in regard to s 341(2) which is, it is thought, ignored rather than interpreted.

(45) Section 107 of the Republic of South Africa Constitution Act 32 of 1961; Hahlo & Kahn Legal System 174.

(46) Cf, however, s 359(1)(b) which provides that any attachment or execution after the commencement of the winding-up is void and which applies whether or not the company is able to pay its debts notwithstanding that it only serves a purpose if the company is unable to pay its debts.

(7) Conclusion

Henochsberg(47) also appears to be of the view that s 348 does not backdate the commencement of a winding-up for all purposes for he says:

> 'In the case of a winding-up by the Court the powers of directors cease.... The retrospective effect of s 348 may result in serious consequences but it is submitted that the Courts will be strongly disposed, in the absence of any specific contrary statutory provision, to hold that the directors will continue to be such until a winding-up order has been granted, in the case of a winding-up by the Court.'

It should also be borne in mind that the question in issue is essentially whether s 348 should be extensively or restrictively interpreted. This question has already been considered in I(1) above and the conclusion reached there was that s 348 should be restrictively interpreted where other factors are not decisive, inasmuch as it can be the source of considerable hardship to the company itself and third parties alike while contributing little to the achievement of the object of a fair distribution of the company's estate. It should further be borne in mind that, unlike in England and elsewhere, it is not possible under our Act to appoint a provisional liquidator before the grant of the winding-up order,(48) and it is thought that it is unlikely that the legislature would have intended that a company should be deemed to have been under winding-up for all purposes when, in truth, it was not under winding-up and no steps could be taken for the appointment of a liquidator to control its affairs.

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(47) Henochsberg Companies 615, but see also the conflicting statement at 635-6. Cf, too, the apparently conflicting statements in Paget Banking 62 and 246-7.

(48) See 249-50 above.

To sum up, it is considered that the indications that s 348 was not intended to backdate a winding-up for all purposes considerably outweigh the contra-indications. If this is accepted, it follows, it is thought, that s 348 only backdates the commencement of a winding-up for the limited purpose of those other sections which expressly refer to the commencement of the winding-up. On this basis s 348 is more in the nature of a definition than a substantive provision and serves as a peg on which the other sections are hung. True, the view will be taken in the next section that despite s 348 the majority of these other sections in fact refer to the grant of the winding-up order when they refer to the commencement of the winding-up and that it is probably only ss 341(2) and 359(1)(b) that refer to the commencement as defined in s 348, with the result that the only function of s 348 is to define the commencement of a *winding-up for the purposes of ss* 341(2) and 359(1)(b). This is inelegant drafting, especially when the same expression is used in other sections with a different meaning, but it is considered that this is the proper interpretation of s 348.

CHAPTER 7 - AT WHAT POINT IN TIME IS A WINDING-UP APPLICATION 'PRESENTED'?

Synopsis

Section 348 deems a winding-up to commence on 'presentation' of the winding-up application. However, 'presentation' in its ordinary meaning refers not to a point in time but encompasses all stages of the making of the application. The question therefore arises as to whether in s 348 it refers to the commencement of the making of the application, ie the filing of the application with the registrar of the court, despite the fact that the presentation is incomplete at that stage and is dependent on the applicant's taking further steps to complete it, or to the completion of the presentation, ie the moving of the application in open court.

In England and elsewhere 'presentation' is the ordinary word to refer to the filing of a petition and this was so when the concept embodied in s 348 was adopted here; accordingly, the presumption arises that our legislature probably intended to use 'presentation' in that sense. There are a number of judicial pronouncements in Southern Africa that this is the meaning of 'presentation', although the question has yet to be examined in detail. The corresponding section of the 1926 Act was clear because the Afrikaans text referred to 'indiening'. The Afrikaans text of the 1973 Act, however, refers to 'voorlegging', but the change appears to have been motivated by considerations of style rather than an intention to change the meaning. A rule under the 1926 Act which defined 'presentation' to mean 'filing' has been repealed but it is again doubted whether any inference can be drawn from this fact.

The dictionary definitions do not resolve the difficulty although the basic meaning of 'presentation' is 'the bringing into the presence of' and the basic meaning of 'voorlegging' is 'the laying before', both of which definitions tend to emphasise the final stage of moving the application in open court, rather than the preliminary stage of filing.

'Presentation' is also used in several other sections of the Act but it is likewise not clear in what sense it is used in those sections. The commencement of the winding-up is similarly

> referred to in a number of other sections but in most of these sections the grant of the *winding-up order is, despite s 348*, the point in time referred to, and no inference can therefore be drawn from these sections as to the point in time referred to in s 348. Section 341(2) is an exception in that it clearly does refer to the commencement of the winding-up as defined in s 348. However, no direct inference can be drawn from the section as to whether the legislature intended the filing or the moving of the application in referring to the commencement of the winding-up, although the view has already been taken that where other factors are not decisive ss 348 and 341(2) should be restrictively rather than extensively interpreted.
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> Windings-up preceded by a judicial management call for separate consideration. Under the 1926 Act the sections corresponding to ss 348 and 341(2) were held not to apply to such windings-up. This distinction would, however, appear to no longer be possible under the 1973 Act. This gives rise to the anomaly that the effect of the 1973 Act is to extend the application of ss 348 and 341(2) to a situation where they serve no purpose, but it is *doubted whether any inference can* be drawn from this as to the meaning of ss 348 and 341(2).
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> Weighing up all the relevant factors, the better view is that 'presentation' means filing, although the arguments to the contrary are of considerable *cogency*.

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Henochsberg[1] *states:*

> 'The "presentation" of the application is effected by filing it at the office of the Registrar of the Court accompanied by proof of the lodging of the *application and affidavits with the Master* or other officer designated and by a certificate by the Master that due security has been found, etc., in terms of s.346(3) and (4). Cf. Meaker, N.O. v Campbell's New Quarries (Pvt) Ltd, 1973 (3) S.A. 157(R).'

But can presentation be equated with filing in this way? 'Presentation' is not the ordinary term to describe any particular *point in application proceedings* but refers rather to the making of the application and hence encompasses all stages in the proceedings.

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(1) Companies 615.

The difficulty in seeking to fix the point *in time at which* presentation can be said to occur was alluded to by Graham JP, in a different context,(2) in R v Johnson:(3)

> 'Now when is an indictment "presented"? This section does not use the words "served on the accused", or, "lodged with the Registrar", and there is something to be said in favour of the conclusion that an indictment is only "presented against an accused after the Court is sitting" and prior to the arraignment....'

A similar difficulty arises in relation to the use of the word 'presentation' in s 348.

An application for the winding-up of a company is made to the supreme court on notice of motion supported by affidavit. In practice,(4) the applicant's attorneys generally, though not always, request the registrar of the court to allocate a case number before service of the application and at the same time lodge a copy of the application with him as the nominee of the Master of the Supreme Court in terms of s 346(4). Where the registrar is requested *to allocate a case number before service this is done for* convenience only and the original application is not physically filed with the registrar, but is handed to the sheriff for service. If service is effected, the sheriff normally delivers the application to the registrar together with his return of service.

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(2) Section 141(1) of the Criminal Procedure and Evidence Act 31 of 1917 reading :

> 'Whenever an indictment has been presented against an accused person in a superior court, any judge of the court may ... order that the trial shall be held at some place other than that specified in the indictment....'

(3) 1933 EDL 189 at 190-91. See also Johannesburg Liquor Licensing Board v Hosiosky & Anor 1949 (4) SA 406 (T) at 417 and Alston v Alston [1946] P 203.

(4) The practice set out is that in the Witwatersrand Local Division.

The period between filing of the documents and the hearing may vary from minutes to months.(5) At the hearing, the matter is called in open court and the applicant's counsel moves for an order in terms of the notice of motion (or moves for postponement, amendment or withdrawal of the application). If the order is granted it may be granted immediately or some time later.

At what stage then is the application 'presented' to the court within the meaning of s 348? On Henochsberg's approach presentation would, it is considered, occur when the application is lodged with the registrar either by the sheriff or by the applicant. The prior lodging of a copy with the registrar as the designee of the Master of the Supreme Court would not constitute presentation because it is lodged with him in a different capacity. Nor would the informal request for the allocation of a case number seem to be sufficient.(6) It is thought, however, that there are a number of considerations of some cogency, although probably not of sufficient

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(5) On the undesirability of long postponements see Re Metropolitan Railway Warehousing Company Ltd (1867) 17 LT 108(Ch) at 111; Tulsidas v Industrial Bank of Western India AIR 1931 Bombay 2 at 5; Mohal Lal & Anor v Grain Chamber Ltd & Others AIR 1959 Allahabad 276 at 312-3. The headnote of the last case sums up the position succinctly:

> 'The court will not, except in special circumstances, order a 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 avoid, therefore, or imperil, anything done by the company in the meantime.'

For an extreme example see Dixit v Official Liquidator AIR 1963 Allahabad 284 in which the petition was presented on 17 April 1949 and the order was granted on 21 February 1958.

(6) This may be contrasted with the position in Australia where the winding-up rules expressly require that not only the date but also the time of presentation be endorsed on the petition - McPherson Liquidation 139 n 3.

cogency to outweigh the considerations favouring Henochsberg's approach, indicating that 'presentation' in s 348 in fact refers to the point in time at which the application is moved in open court, which is, after all, the point in time at which the presentation of the application is complete. Until this time no order can or will be granted unless the applicant takes further steps to complete the presentation of the application. The question therefore is essentially whether 'presentation' in s 348 refers to the commencement or the completion of the presentation.

(1) Meaning of 'presentation' in England and elsewhere

In England, presentation is the ordinary term corresponding to the South African term 'filing' in relation to petitions,(7) and the English cases accordingly simply assume, without discussion or reasons, that 'presentation' in the context of the corresponding *provision in the English legislation means filing with the* registrar.(8) The same is true of the Australian and Indian

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(7) Thus rule 27 of the Companies (Winding-up) Rules 1949 provides:

> 'A petition shall be presented at the office or chambers of the Registrar, who shall appoint the time and place at which the petition is to be heard.'

Regulation 3(2) of Order 9 of RSC 1965 (the Supreme Court Rules) is to the same effect:

> '...a petition must be presented by leaving it at the Chancery Registrars' Office ....'

(8) See eg In re Wiltshire Iron Company Ex p Pearson (1868) 3 Ch App 443; In re Liverpool Civil Service Association Ex p Greenwood (1874) 9 Ch App 511; In re Clifton Place Garage Ltd [1970] Ch 477(CA); Re Gray's Inn Construction Co Ltd [1980] 1 All ER 814(CA). But cf In re Oriental Commercial Bank Barge's Case (1868) 5 Eq 420 in which it was argued that 'presentation' meant the answering of the petition, although there is no mention of the point in the judgment. Where a winding-up order is refused by the court a quo but granted on appeal the winding-up nevertheless is deemed to have commenced on presentation of the original application - Re Neath Harbour Smelting and Rolling Works (1887) 56 LT 727 (Ch).

cases.(9) *As already pointed out,*(10) *the concept embodied in* s 348 was taken over from the English Act and the question accordingly arises as to whether our legislature should be presumed to have intended to adopt the English provision with the meaning it had in England. This question is similar to the question dealt with above(11) whether a similar presumption arises in regard to authoritative interpretations placed by the English courts on an English statutory provision prior to its adoption here, and the answer is, it is considered, the same: there is such a presumption but the broadly different statutory and common law contexts of the South African and English provisions restrict the weight to be attached to the presumption.

(2) Existing judicial pronouncements

The question has been alluded to in a number of Southern African decisions:

In Lief NO v Western Credit (Africa) (Pty) Ltd(12) Snyman J said, in an obiter dictum,(13) in relation to s 115 of the 1926 Act:

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(9) See eg Re Omnico Ltd (1976) 1 ACLR 381 (NSW) at 382; Ramesh Chandra v Chopasni Ice Aerated Water and Oil Mills Ltd AIR 1963 Rajasthan 187. The 1981 Australian Companies Act (Cth) expressly refers to *'the filing of the application for winding-up'* - s 365(2).

(10) See 231, 233-4, 242 and 244 above.

(11) See 242-54 above.

(12) 1966 (3) SA 344(W) at 347A-C.

(13) The question in issue was whether s 115 applied where the winding-up was preceded by a judicial management and Snyman J held that it did not apply.

'Sec. 115 of the Act reads:

> "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."

'Rule 3(14) promulgated under the Companies Act, is to the effect that the presentation of the petition is effected by the filing of the petition at the office of the Registrar of the Court, accompanied by proof of the lodging of the petition and affidavit with the Master or other officer designated and by a certificate by the Master or other officer designated, that due security has been found.

'From the scheme of arrangement under the Act, it would seem that sec. 113 provides for the initiation of proceedings for the winding-up of a company and that sec. 115 supplements it by ante-dating the commencing date of the order. The mischief aimed at by sec. 115 is a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court.'(15)

However, the value of this statement is seeking to interpret s 348 is limited by 2 factors: firstly, the Afrikaans text of

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(14) GN 2270 of 10 December 1926, as amended:

> '3. The presentation of a petition in terms of section one hundred and thirteen or sub-section (2) of section one hundred and ninety-five of the Act shall be effected by filing the petition at the office of the registrar of the Court, accompanied by proof of the lodging with *the Master, or the officer designated by him,* of a copy of the petition and of every affidavit confirming the facts stated therein, and, in the case of a petition in terms of the first-mentioned section by the certificate of the Master or a magistrate that security has been found as required by that section.'

(15) Cf too Pols v R Pols - Bouers en Ingenieurs (Edms) Bpk 1953(3) SA 107(T) at 110 C-D.

s 115,(16) unlike s 348,(17) referred to 'indiening', ie filing, thus clarifying the ambiguity in 'presentation' in the English text, and, secondly, the rule referred to was repealed at the time of introduction of the 1973 Act and was not replaced by any equivalent rule.

In Meaker NO v Campbell's New Quarries (Pvt) Ltd & Others(17) the Zimbabwean counterpart of s 348 was in issue and Davies J held:(19)

> 'The first question to be decided is the time of the "commencement of the winding-up" against the company. Mr Pringle, for the applicant, submitted that such winding-up commenced when the petition - admittedly in proper form - was lodged with the Registrar on the afternoon of the 30th November, 1971. Mr Whitaker, for the respondent, did not concede that this was so but presented no argument to the contrary.
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> 'Under the South African Companies Act, as under our Act, a *winding-up is deemed to commence*
>
> > "at the time of the presentation of the petition for the winding-up",
>
> but in South Africa there is a specific Rule promulgated under the Act which provides that presentation of the petition is effected by the filing of the petition with the Registrar, accompanied by proof of the lodging of the petition and

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(16) ' 'n Likwidasie van 'n maatskappy deur die Hof word geag te begin op die tydstip van indiening van die likwidasieversoekskrif.'

(17) The question of whether any inference can be drawn from the fact that the legislature elected to change the Afrikaans text is considered at 285-8 below.

(18) 1973 (3) SA 157(R).

(19) At 159E-160C.

> *affidavit with the Master and a certificate* by the Master that due security has been found for the costs. The only relevant South African decision to which I was referred is Lief, N.O. v. Western Credit (Africa) (Pty.) Ltd., 1966 (3) S.A. 344 (W). At p. 347B of that report SNYMAN, J., states -
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> > "From the scheme of arrangement under the Act, it would seem that sec. 113 provides for the initiation of proceedings for the winding-up of a company and that sec. 115 supplements it by ante-dating the commencement date of the order. The mischief aimed at by sec. 115 is a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court."
>
> 'The view of the learned Judge would thus appear to be that, even without reference to Rule 3 of the South African Rules, a petition is "presented" when it is lodged in proper form with the Registrar, and that, accordingly, when the application is later heard in Court and an order made, the order is back-dated to the time when the petition was lodged. Mr Pringle referred me to a large number of English decisions on analogous provisions of the English Companies Acts. It is, I think, sufficient to note that in all these cases the approach of the Court was that winding-up commences when the petition is lodged with the Court in proper form.
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> 'Giving the words their plain meaning, it seems to me that a petition is "presented" to *the Court when it is filed with the* Registrar in proper form. It is at that moment that the Court is formally requested to consider the matter, and the fact that delay necessarily occurs before the Court can actually adjudicate on the matter is, in my view, irrelevant.
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> 'In the circumstances, I am satisfied that the winding-up proceedings against the company in this case commenced on the afternoon of 1st December, 1971.'

It is doubted, however, for the reasons already advanced, whether Davies J was justified in placing the reliance he did on the English decisions and on Lief's case. Moreover, his statement that the filing of the petition with the registrar is the moment at which the court is formally requested to consider the matter is, with respect, not entirely accurate because, as already pointed out, this *in fact only occurs when the matter is moved in open court.* Until then the court has not been requested to consider the matter, or at *least the request is incomplete and conditional upon the application* being moved in court, and if the applicant does no more no order will ensue.'

In Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd(21) the respondent argued that the applicant was precluded by s 348 from collecting the respondent's debts which had been ceded to applicant, because the applicant had instituted proceedings for the winding-up of the respondent. McEwan J rejected this argument on the ground that s 348 does not grant the company a moratorium for the payment of its debts. In so doing, however, he appears to have assumed that 'presentation' in s 348 refers to the filing of the winding-up application.(22)

In Cessions (Pty) Ltd v Stumrab (Pty) Ltd(23) the applicant applied as a matter of urgency for the winding-up of the respondent, the grounds for urgency being that the respondent had recently received a large insurance payment and was allegedly making preferential payments to other creditors. King J refused to hear the application as a matter of urgency, saying:(24)

> 'The matter, however, is one in which the applicant should, in my view, merely have filed its papers together with a certificate of urgency and enrolled it for the next ordinary

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(20) *It may be noted that the notice of motion prescribed in form* 2(a) of the First Schedule to the Uniform Rules of Court GN R48 of 12 January 1965, as amended, states not that 'application is hereby made' but that the applicant 'intends to make application' and that if no notice of intention to oppose is given 'the application will be made on the ... at ... a.m.'.

(21) 1976 (4) SA 75(W) at 83 A.

(22) He actually referred to the 'launching' of the proceedings.

(23) 1980 (2) SA 361(W).

(24) At 362D-E.

> motion day, viz Tuesday. The provisions of ss 341(2) and 348 of the Companies Act afford the applicant the same protection it now seeks by claiming (a provisional winding-up order) as a matter of urgency this afternoon.'

It seems clear therefore that King J considered filing of the application as 'presentation' for the purposes of s 348, although there is no discussion of the point.

In Herrigel NO v Bon Roads Construction Co (Pty) Ltd & Anor(25) Lichtenberg J said, in an obiter dictum (26) and without discussion:

> 'It is clear that the winding-up of Quickbeton commenced on 26 June 1978, when the application for the winding-up was *presented to the Registrar of this Court; see* s 348 of the Companies Act and Meaker NO v Campbell's New Quarries (Pvt) Ltd & Others 1973(3) SA 157(R).'

In Ruskin NO v Hi-Level Enterprises (Pty) Ltd (27) the issue was whether a company which has been placed in provisional winding-up can oppose confirmation of the order, and the court, in concluding that after the grant of a provisional order a company can only function through the liquidator, remarked that a winding-up commences on presentation of the application which is normally effected by filing the application with the registrar.

The last case is De Wet NO v Mandelie (Edms) Beperk(28) in

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(25) 1980 (4) SA 669 (SWA) at 673 H. See too Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd (in provisional liquidation) 1983 (3) SA 815 (O) at 816 D.

(26) The payment in issue had been made not only after filing of the winding-up application but after the grant of the order.

(27) *1981(1) SA 315(W) at 317 B-C.*

(28) 1983 (1) SA 544(T) at 545H. See also International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd & Anor 1983(1) SA 79(C) at 85A and 83A in which it was common cause that the winding-up commenced on filing of the winding-up application.

which the question arose as to the meaning of 'presentation' in s 346 (4)(a) and the court referred with approval to Henochsberg's statement quoted at the beginning of this section in relation to s 348 and held that 'presentation' has the same meaning in s 346(4)(a). (This will be returned to below(29) where the view will be taken that the correctness of the decision is doubtful.)

The number of judicial pronouncements that presentation means filing is impressive but until the factors for and against this interpretation are thoroughly examined the last word on the subject will remain to be said.

(3) Changes in s 348 of the 1973 Act from s 115 of the 1926 Act

Can any inference be drawn from the fact that 'indiening' in s 115 of the Afrikaans text of the 1926 Act was replaced with 'voorlegging' in the 1973 Act?(30) Ordinarily, altered language in a subsequent statute tends to indicate a change of intention;(31) however, this is not necessarily so(32) eg the change may have been prompted by the draftsman's desire to make the language more linguistically elegant.(33) The Afrikaans text of the 1926 Act

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(29) See 290-1 below.

(30) There is no mention of the reasons for the change, either in the Report of the Commission of Enquiry into the Companies Act under the chairmanship of the Honourable Acting Justice J van Wyk de Vries (Pretoria 1970) which preceded the 1973 Act, or in the Hansard Reports of the Debates of the House Assembly (1973) vol 44.

(31) See eg Collie NO v The Master 1972 (3) SA 623(A) at 629H-630A; Steyn Uitleg 153-5.

(32) See eg R v Shole 1960 (4) SA 781 (A) at 787 B; Steyn Uitleg 153-5.

(33) See eg S v Iveson 1975 (3) SA 90(O) at 92 H; Steyn Uitleg 153-5; Craies on Statute Law 7th ed by S G G Edgar (London 1971) 140-45; Maxwell on Interpretation of Statutes 12th ed by P St J Langan (Bombay 1969).

exhibited many linguistic deficiencies(34) which the 1973 Act seeks to remedy, and it is thought that this is more likely to have been the reason for the change in wording than that the legislature intended to change the meaning of s 348. Had such a change been intended one would have expected this to have been stated more clearly, especially in view of the fact that the English text remained unchanged in this respect.(35)

Section 348 also differs from s 115 of the 1926 Act in that the words 'to the Court' have been added after 'presentation'. Can any inference be drawn from this that the legislature intended thereby to change the meaning of s 348? It can perhaps be argued that the addition tends to emphasise the actual presentation to the court, ie the moving of the application in open court, as opposed to the filing of the application with the registrar, but it is again thought that the more likely reason for the addition was the draftsman's concern with the graces of style. It may be noted, moreover, that the legislature uses the expressions 'presentation' and 'presentation to the court' elsewhere(36) in the Act apparently without change of meaning.

A further difference between the 1926 and 1973 Acts is that the *winding-up regulations under the 1973 Act*,(37) do *not* contain any

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(34) Main Report of the Van Wyk de Vries Commission of Enquiry para 11.01.

(35) This approach accords with the presumption that the legislature does not intend to alter the existing law unless the contrary intention clearly appears - see eg Steyn Uitleg 97-100.

(36) See ss 340(2)(a) and (c), 346(2) and (4)(a), 358 and 436(2). See also 289-91 below where these sections are examined, although from a different point of view.

(37) *GN R 2490 of 28 December 1973, as amended.*

provision similar to rule 3 under the 1926 Act,(38) which, as already mentioned, expressly provided that presentation would be effected by filing the petition with the registrar accompanied by proof of the lodging of a copy with the Master and by a certificate that security had been found. Can any inference be drawn from the repeal of rule 3? In Amalgamated Engineering Union of SA v Minister of Labour(39) Hiemstra J said:

> '...one must be careful not to interpret an Act by means of a regulation.... Where, however, nothing can be found in the Act which conflicts with the [regulation] there is no reason why it cannot serve as a makeweight for a view which is otherwise *supportable*.'

It appears that Hiemstra J considered that if an Act is ambiguous a regulation framed under the Act may be decisive of its correct interpretation; in other words, if the interpretation would be A in the absence of the regulation and B if regard is had to the regulation, B is the correct interpretation. The effect of this, however, is to construe the power to make regulations as including the power to amend the Act where it is ambiguous, and it is doubted whether this is a sound rule.(40) It follows, it is thought, that reference to rule 3 would have been impermissible as an aid to interpreting s 115 and that reference to its repeal is therefore likewise impermissible as an aid to interpreting s 348. If this

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(38) See note 14 above.

(39) 1965(4) SA 94(W) at 96D.

(40) Stephens v Cuckfield Rural District Council [1960] 2 QB 373 (CA) at 381; Steyn Uitleg 154-5 n 105; Maxwell Interpretation 74-5, but cf *Craies Statute Law* 157-8. The position is otherwise where the regulations are made under a provision which declares that they will have the same effect as if enacted in the Act: De Villiers & Anor v Barnard & Others 1958 (3) SA 167(A) at 183 G-H. The enabling section - s 220 - under the 1926 Act did not, however, so provide.

approach is incorrect and reference may properly be made to the regulations under an Act in interpreting ambiguous provisions in the Act, reference to the repeal of a regulation would also be permissible, and in the case of the repeal of rule 3 would, it is thought, constitute some support for the approach that the legislature intended 'presentation' in s 348 to mean something different from what it meant in s 115. It is considered, however, that the support to be derived from this source would in any event at best be slight because, had the legislature intended the same word to have a different meaning in tbe 1973 Act, it could be expected to have said so expressly.

(4) Dictionary definition

The Oxford English Dictionary(41) defines 'present' as follows:

> 'I. To make present to, bring into the presence of....8.Law. To bring or lay before a court ... for consideration or trial....'

The definition does not resolve the difficulty of fixing the point in time at which presentation can be said to occur where one is compelled to fix such a point, as in the case of s 348, but it is noteworthy that the basic meaning is 'bringing into the presence of', which, it is thought, tends to favour the interpretation that the moving of the application in open court is referred to.

'Voorlê' is defined in Verklarende Handwoordeboek van die Afrikaanse Taal(42) as follows :

> 'Voor iemand lê; aan iemand wys, toon; onder iemand se oë of aandag bring; ter oorweging gee; uiteensit: 'n Dokument vir *ondertekening* voorlê. Die hele saak sal aan die bestuur voorgelê moet word. Planne vir goedkeuring aan die Stadsraad voorlê.'

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(41) A *New English Dictionary on Historical Principles* edited by J A H Murray et alii (Oxford 1888-1928).

(42) F F Odendaal et alii 2nd ed (Johannesburg 1979).

This definition also does not resolve the difficulty but again it is noteworthy that the basic meaning is 'laying before', which, it is thought, also tends to indicate the point in time at which the *application is actually* laid before the court by the moving of the application in open court, rather than the preliminary filing of the application which may or may not give rise to its being laid before the court.

(5) 'Presentation' in other sections of the Act

The concept of the presentation of an application to court is also used in a number of other sections and it is appropriate to examine in what sense it is used in those sections.

(i) Section 340(2) applies the impeachment provisions of the Insolvency Act to windings-up and deems the date of presentation of the winding-up application to correspond to the date of sequestration. The effect of this is that dispositions can be impeached under the Insolvency Act provisions until presentation, and under s 341(2) thereafter.(43) The Insolvency Act provisions are subject to time restrictions and accordingly the earlier presentation is held to occur the further back transactions will be impeachable. This would be to the benefit of the body of creditors of the company but to the prejudice of the disponees for whose benefit the periods were laid down. It follows, it is considered, that no inference can be drawn from s 340(2) as to whether the legislature intended presentation to refer to the filing of the application or the moving of the application in open court.

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(43) 'Disposition' is not defined in the Companies Act but the view will be taken below - see 325-34 - that the Insolvency Act definition clearly applies to s 340(2) and that the better view is that it also applies to s 341(2). Should this latter view be wrong, the anomaly will arise that the materially narrower ordinary meaning of '*disposition*' will apply *during* the critical period just before the grant of the winding-up order.

(ii) Section 436 applies the impeachment provisions of the Insolvency Act to judicial managements and again deems the presentation of the judicial management application to correspond to the date of sequestration. However, there are no equivalents of ss 341(2) and 348 in relation to judicial managements and the effect of this provision is therefore that dispositions between the presentation of the application and the grant of the order cannot be impeached under the Act. No doubt this was an oversight on the draftsman's part and it is accordingly doubted whether any inference can be drawn as to the point in time intended by the legislature in referring to the presentation of the application, although it may be noted that if presentation is interpreted to mean the moving of the application in open court this will decrease the anomalous gap during which dispositions are not impeachable.

(iii) Section 346 provides:

> '(2) A member of a company shall not be entitled to present an application for the winding-up of that company unless he has *been registered as a member in* the register of members for a period of at least six months immediately prior to the date of the application ... .
>
> (3) Every application shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings ... .
>
> (4)(a) Before an application for the winding-up of a company is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Master ...'

In De Wet NO v Mandelie (Edms) Bpk(44) Nestadt J, relying on Henochsberg's statement quoted at the beginning of this section,

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(44) 1983(1) SA 544(T) at 545H.

held that presentation occurs on filing and that therefore the date of the application is the date on which the founding affidavit and notice of motion are signed. An objection to this interpretation is that it follows that if the applicant delays after signing the founding affidavit and notice of motion before serving and filing the application, the Master's certificate of security may have been issued some time before the application is served and filed, which is what the legislature seems to have sought to avoid by specifying a period of 10 days. This difficulty would not have arisen if the court had held the date of filing to be the date of the application and the moving of the application in open court to be the presentation of the application.(45)

(iv) Section 358 provides that at 'any time after the presentation of an application for winding-up and before a winding-up order has been made' the court may stay any action or proceeding by or against the company. The earlier presentation is held to occur the greater the benefit to the body of creditors but the greater the prejudice to individual creditors who wish to take action to enforce their claims. One may surmise, however, that the legislature probably intended the body of creditors to enjoy this benefit from the date of filing of the winding-up application despite the prejudice to individual creditors.

(6) 'Commencement of the winding-up' in other sections of the Act

Similarly, 'the commencement of a winding-up' is referred to in a considerable number of sections and it is therefore also appropriate to examine these sections to ascertain whether they give any indication as to what point in time the legislature had in mind in referring to the commencement of a winding-up in s 348 and hence what point in time it may have had in mind in deeming a winding-up to commence on presentation of the winding-up application. These

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(45) It may be noted that s 427 in effect applies s 346 to applications for judicial management, except that no certificate of security is required.

sections will be examined in what follows but, surprisingly, it will be seen that, despite s 348, in almost every case where the legislature referred to the commencement of a winding-up it clearly, or at least *probably, meant the grant of the order and not the* presentation of the application. The only exceptions are ss 341(2) and 359(1)(b) which are dealt with after the other sections. Sections 347(2), (3) and (4), 414(2)(a) and 415(1) are not dealt with as their effect is the same whatever *point in time is referred* to by 'commencement' and therefore no inference can be drawn as to what point in time the legislature may have had in mind.(46)

The sections in which it is considered that commencement either clearly or probably refers to the grant of the winding-up order are as follows:

(i) Sections 83(3) and 85(1). These sections deal with reductions of capital but they refer to claims which, if the dates referred to in the sections 'were the commencement of the winding-up of the company, would be admissible in proof against the company'. As claims are in practice proved as at the date of the order,(47) the legislature apparently intended the date of the order in referring to the commencement of the winding-up.

(ii) Section 338(1). This section provides that the provisions of the 1973 Act do not 'apply to any company if the winding-up was commenced before the commencement of this Act.' Despite the deemed backdating of the commencement of a winding-up in terms of s 348

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(46) 'Commencement of the winding-up' is also referred to in ss 350(1)(b), 352 and 353(1) and (2) in relation to voluntary windings-up, but these sections too will not be dealt with as no inference can be drawn from them as to the point in time at which a winding-up by the court commences.

(47) See 269 above.

there is in fact no winding-up until the order is granted.(48) If, therefore, a winding-up application was pending at the date the 1973 Act came into operation the court would, it is thought, have been required to determine whether the application fulfilled the requirements of the 1973 Act,(49) and it may be doubted whether the legislature would have intended that the proceedings in the winding-up should then take place in accordance with the 1926 Act.(50)

(iii) Section 354(1). This section empowers the court 'at any time after the commencement of a winding-up' to stay or set aside any 'proceedings in relation to winding-up.' Henochsberg(51) considers that 'commencement' means presentation in accordance with s 348. It is doubted, however, whether this is correct for, as already pointed out, until a winding-up order has been granted s 348 has no application. The better view is, it is thought, that 'commencement' in s 354(1) refers to the grant of the order.

(iv) Section 359(2)(a). This section provides that any person who wishes to institute proceedings to enforce a claim that arose before commencement of the winding-up must *give notice to the* liquidator. This must, it is thought, refer to the grant of the order as otherwise the anomaly would arise that no notice would have

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(48) Vermeulen & Anor v CC Bauermeister (Edms) Bpk & Others 1982(4) SA 159(T) at 162B, dealt with in 255-6 above.

(49) Cf Richard R Currie Properties Ltd v Johannesburg City Council 1984(4) SA 195(W).

(50) Section 338(1) may be contrasted with s 1 of the Companies Amendment Act 84 of 1980 sub-s (1) of which substituted the definition of 'Master' in s 1 of the principal Act and sub-s (2) of which provided that sub-s (1) would not apply to companies in respect of which a winding-up application had already been filed with the registrar of the court before the commencement of the section.

(51) Companies 623.

to be given before taking action to enforce a claim that arose after presentation.

(v) Sections 363A(1) and (3). These sections require directors and the secretary to notify the liquidator of changes of address after the commencement of the winding-up, within 14 days of the change or the appointment of the liquidator, whichever is the later. There would be no point in this obligation applying during the period between presentation and the order as there could in any event be no liquidator in office who could be notified. It is thought, therefore, that the legislature probably meant the grant of the order in referring to the commencement of the winding-up, although the effect is in fact the same whether presentation or the grant of the order is referred to.

(vi) Section 372(i). This section disqualifies a person from being liquidator of a company if during the 12 months 'preceding the winding-up' of the company he was a director, officer or auditor of the company. The section does not refer expressly to 'the commencement of the winding-up' but the words in fact used mean the same. It is doubted whether the legislature would have intended that a person who became a director, officer or auditor after presentation should be entitled to be appointed liquidator and it follows that the grant of the order was no doubt the point in time referred to.

(vii) Section 395(2)(a). This section provides that a member of a company limited by guarantee is not liable to contribute to its assets unless at the commencement of the winding-up there is an unsatisfied debt contracted before he ceased to be a member. 'Commencement' here would also appear to refer to the grant of the order as otherwise a past member would be obliged to contribute if at the date of presentation there were an unsatisfied debt contracted during his membership even though the debt had been satisfied by the date of the order. He would then be contributing to the payment of debts contracted after he ceased to be a member which, it is thought, is what s 395(2)(a) seeks to avoid.

(viii) Section 400(1). This section requires the liquidator to ascertain whether any offences appear to have been committed by the directors and officers of the company 'before its winding-up'. Although the section does not expressly use the expression 'the commencement of the winding-up' the words actually used mean the same, and it is considered that it is clear that the grant of the order is referred to.

(ix) Section 402(e). This section requires the liquidator to report to creditors on any legal proceedings pending 'at the date of the commencement of winding-up', and it is again considered that it is clear that the grant of the order is referred to.

(x) Section 415(2)(a). This section provides that the company's banker may be subpoenaed to produce 'any cheque in his possession which was drawn by the company within one year before the commencement of the winding-up'. No doubt the date of the order is referred to.

(xi) Section 421(2). This section requires the liquidator to send particulars to the Registrar of Companies, for a register of directors of dissolved companies, of any person who was a director at any time 'within two years before the commencement of the winding-up'. Again the grant of the order is presumably referred to.

(xii) Section 425. This section provides that a director or officer of a company is guilty of an offence if the act or omission concerned would have been an offence if committed or omitted by a person whose estate was sequestrated 'on the date upon which the winding-up of such company commenced'. No doubt the legislature intended the grant of the order in referring to the commencement of the winding-up, as otherwise acts and omissions between presentation and the order would be exempt.(52)

Could it be that the reference to the commencement of the *winding-up in* s 341(2) is also a reference to the grant of the winding-up order?(53) It is thought not. No special provision is necessary to invalidate dispositions by a company of its property after the grant of a *winding-up order and the section* would therefore be superfluous, thus offending against the presumption

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(52) Section 416 applies ss 66, 67 and 68 of the Insolvency Act to windings-up and sub-s (2)(g) provides that any reference in *the sections*, and in ss 64 and 65 which are referred to in ss 66, 67 and 68, to 'the sequestration of an insolvent estate' is to be construed as a reference to 'the commencement of the winding-up of such company'. There are 3 such *references*, namely in ss 64(2), 65(2) and 67(3). Sections 64(2) and 65(2) have no bearing on windings-up because the same ground is specifically dealt with by ss 414(2) and 415(2)(a) of the Companies Act. Section 67(3) deems a person who was an executor, curator or administrator of an estate prior to sequestration of the estate to be an insolvent for the purposes of ss 64, 65 and 67. Estates under the administration of executors, curators and administrators can, however, not be placed in winding-up under the Companies Act and s 67(3) therefore has no application to windings-up. It follows that the deeming provision in s 416(2)(g) is meaningless.

(53) This was apparently the original view of *Shrand & Keeton:*

> 'The winding-up of a company by the court is deemed to commence at the time of the presentation of the petition for the winding-up. *It is from this date that preferences* are calculated. In ascertaining the date of the presentation of the petition, the practice is to take the date of the provisional order which invariably corresponds *with the date on which the petition is presented.*'

(D Shrand & A A F Keeton The Registration, Management and Winding-up of Companies in South Africa (Cape Town 1956) 193) *but it is noteworthy that this statement* has been omitted from the most recent edition (D Shrand The Law and Practice of Insolvency, Winding-up of Companies and Judicial Management 3rd ed (Cape Town 1977) 238). Such an interpretation would *also avoid the anomaly dealt with* at 300-302 below that where the winding-up is preceded by a judicial management, s 341(2) even invalidates dispositions by the judicial manager.

against superfluity in statutory interpretation.(54) Could this presumption be countered by arguing that, despite its form, the true intention of s 341(2) is to give the court the power to validate transactions which are void because they take place after the grant of the winding-up order? The answer is, it is considered, in the negative. Not only does the wording of s 341(2) not lend itself to such an interpretation but also not all transactions involve dispositions by the company - eg payments to the company - with the result that the court's power to validate would be incomplete, and it is thought that it is unlikely that this would have been the intention of the legislature.

It is also noteworthy that the original forerunner of s 341(2), namely s 153 of the English Companies Act 1862, made it clear that an earlier date was referred to:

> 'Where any company is being wound up by the court...all dispositions of the property... of the company, made between the commencement of the winding up and the order for winding up, shall, unless the court otherwise orders, be void.'

The Cape Companies Act and the Orange Free State Wet op Liquideeren van Naamlooze Vennootschappen did likewise.(55) The English Companies (Consolidation) Act 1908 was the first to substitute a reference to dispositions 'after the commencement of the winding-up' for the reference to dispositions 'between the commencement of the winding-up and the order for winding-up', and this was followed in the Transvaal Companies Act,(56) the 1926 Act and the 1973 Act. The purpose of the change was not, it is thought, to change the

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(54) S v Weinberg 1979(3) SA 89(A) at 98E; Steyn Uitleg 17 ff.

(55) Section 196 of Act 25 of 1892(C) and s 38 of Law 2 of 1892(O).

(56) Section 178(2) of Act 31 of 1909(T)

meaning of the expression 'the commencement of the winding-up' but to avoid any suggestion that dispositions after the grant of the order would not be void.

It follows, it is considered, that if s 341(2) refers to a date earlier than the grant of the order it must refer to the deemed date of commencement under s 348.(57)

Can any inference be drawn from s 341(2) as to whether the legislature intended the date of the filing of the winding-up application or the date of the moving of the application in court, in referring to the presentation of the application in s 348? No direct inference can, it is thought, be drawn. However, the view has already been taken(58) that where other factors are not decisive, ss 348 and 341(2) should be restrictively interpreted inasmuch as they can be the source of considerable hardship both to the company itself and to third parties while contributing little to the achievement of the object of a fair distribution of the company's estate. This consideration therefore favours interpreting 'presentation' to refer to the moving of the application in court.

Section 359(1)(b) provides that any attachment or execution after the commencement of the winding-up is void. As in the case of s 341(2) it is thought that this does not refer to the grant of the order because no special provision would be necessary to invalidate attachments and executions after the grant of a winding-up order and the section would therefore be superfluous, thus offending against the presumption against superfluity in statutory interpretation. It follows, it is considered, that if the section refers to a date

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(57) If the deemed commencement under s 348 does not apply to s 341(2) and s 359(1)(b) - see below - s 348 would be left without any meaning.

(58) See 231-42 above.

earlier than the grant of the order it must refer to the deemed date of commencement under s 348.(59)

Can any inference be drawn from s 359(1)(b) as to whether the legislature intended the date of the filing of the winding-up application or the date of the moving of the application in court in referring to the presentation of the application in s 348? The earlier presentation is held to occur the greater the benefit to the body of creditors but the greater the prejudice to the individual creditors who successfully executed judgments before the grant of the winding-up order.(60) One may surmise, however, that the legislature probably intended the body of creditors to enjoy this benefit from the date of filing of the winding-up application despite the prejudice to individual creditors. This conclusion is, however, cast in some doubt by the fact that sub-s (2)(a) of the same section also refers to the commencement of the winding-up and, as has already been pointed out, appears to clearly refer to the grant of the winding-up order. True, as has already been shown and as will be further shown below,(61) the drafting of the Act reflects that scant attention has been paid to the presumption that similar words have similar meanings and different words have different meanings when they appear in the same enactment, but it would nevertheless be surprising if the legislature intended the same expression in the same section to have different meanings. Still, this appears to have been the legislature's intention in s 359.

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(59) *Cf Pols v R Pols - Bouers en Ingenieurs (Edms) Bpk* 1953(3) SA 107(T) at 110C-D; Ruskin NO v Hi-Level Enterprises (Pty) Ltd 1981(1) SA 315(W) at 317E; M Blackman 'Attachments put in Force before the Commencement of Winding-up' (1980) 97 SALJ 379 at 388-9.

(60) The view will be taken below - see 454-5 - that the execution of a judgment against a company is not void under s 341(2).

(61) See 333-4 below.

(7) Windings-up preceded by a judicial management

The case of windings-up which are preceded by a judicial management calls for separate consideration. In Lief NO v Western Credit (Africa) (Pty) Ltd(62) the question in issue was whether s 115 of the 1926 Act, the counterpart in that Act of s 348, applied where the winding-up was preceded by a judicial management order. Snyman J held that it did not, for the following reasons:

- Windings-up and judicial managements were dealt with in separate chapters of the Act, and a winding-up preceded by a judicial management was dealt with under s 197(h) which fell under the judicial management chapter, while s 115 appeared in the winding-up chapter;
- Section 115 referred to the presentation of a winding-up petition (which, in terms of s 113, was the ordinary form of procedure to obtain a winding-up order), whereas s 197(h) used the word 'apply';
- The mischief aimed at by s 115 is absent where the company has been in judicial management in the period leading up to the winding-up; and
- In the event of ambiguity, a statute must be interpreted in such a way as to cause a minimum of interference with or deprivation of rights.

It is doubted, however, whether this conclusion can be reached under the 1973 Act because the contrast between 'petition' in s 115 and 'apply' in s 197(h) has been eliminated in the corresponding sections(63) of the 1973 Act and it is thought that this was the

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(62) 1966(3) SA 344(W).

(63) Sections 348 and 433(l).

cornerstone of the judgment.(64) If this is correct, the anomaly arises that all dispositions of the company's property by the judicial manager after commencement of the winding-up will be void in terms of s 341(2). In other words, the effect of the 1973 Act is to extend the application of the concept embodied in s 341(2) to windings-up preceded by judicial managements, despite the fact that, as Snyman J pointed out, the mischief aimed at is absent.

This gives rise to the question of whether it could not be argued that the 1973 Act should rather be interpreted not as extending the concept embodied in s 341(2) to windings-up preceded by judicial managements but as limiting the operation of s 341(2) to post-order dispositions in all cases. True, it seems unlikely that the legislature would have intended to extend the application of the concept embodied in s 341(2) to a situation where it would serve no useful purpose, but it is thought that the factors militating against the interpretation that s 341(2) only applies to post-order dispositions outweigh this consideration, and that it must therefore be concluded that this was the legislature's intention, or at least that it is the effect of the words used by the legislature whatever its intention may have been.

Can any support be drawn from the aforegoing for the interpretation that 'presentation' in s 348 refers to the moving of the winding-up application in court and not the filing of the application with the registrar of the court? True, this interpretation would minimise the anomaly that dispositions by the judicial manager are void in terms of s 341(2) after the

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(64) Henochsberg Companies 616. On the other hand, the other reasons given by the court are equally applicable under the new Act and it is arguable that they are sufficient on their own to reach the same conclusion under the new Act.

commencement of the winding-up, but it is considered that any inference that can be drawn from this is slight.

(8) Conclusion

Taking all the indications both ways into consideration, it is considered that the better view is that, although there are arguments of considerable cogency to the contrary, 'presentation' in s 348 refers to the filing of the winding-up application with the registrar of the court and not to the moving of the application in court. True, the effect of this approach is to place an extensive rather than a restrictive interpretation on 'presentation', but it is thought that the factors favouring this interpretation are sufficient to outweigh the consideration dealt with above(65) that if other factors are not decisive the restrictive interpretation should be adopted.

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(65) See 231-42 above.

CHAPTER 8 - WHEN IS A COMPANY 'UNABLE TO PAY ITS DEBTS' FOR THE PURPOSES OF s 341(2)?

Synopsis

> Section 341(2) applies if the company is 'unable to pay its debts'. This refers to factual insolvency, ie the company's liabilities exceeding its assets, not deemed inability to pay its debts under s 345 nor commercial insolvency ie inability to pay its debts as they fall due. It is not necessary that the inability should have been the ground on which the company was placed in winding-up. The inability is determined as at the date of the grant of the winding-up order and is unaffected by subsequent fluctuations in the values of the company's assets.

* * * * * * *

Section 341(2) only applies to the winding-up of a company if it is 'unable to pay its debts'.(1) What meaning is to be attached to these words?(2)

Section 345 provides:

> '(1) A company...shall be deemed to be unable to pay its debts if:
>
> (a) a creditor ... has served on the company ... a demand ... and the company ... has for three weeks thereafter *neglected to pay the sum ...; or*

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(1) No similar limitation appears in the 1926 Act or in the English, Australian and Indian Acts, but the desirability of such a limitation is clear.

(2) See also the analogous discussion at 176-8 above (in relation if s 73(c) of the Bills of Exchange Act) and 185-9 above (in relation to s 22 of the Insolvency Act read with s 339 of the Companies Act).

> (b) any process issued on a judgment ... is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment ...; or
>
> (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.
>
> (2) In determining for the purposes of subs.(1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.'

A company is unable to pay its debts within the meaning of s 345 (1)(c) if it is unable to meet current liabilities in the ordinary course of business ie if it is 'commercially insolvent', whether or not its liabilities exceed its assets.(3)

A number of questions arise : Does the deeming provision in s 345 apply to s 341(2)? Is the reference in s 341(2) to a company's inability to pay its debts a reference to commercial insolvency or to the company's liabilities exceeding its assets ie 'factual insolvency'? Are contingent and unliquidated debts to be taken into account in determining whether or not a company is able to pay its debts? Is it necessary that the company's inability to pay its debts should have been the ground on which it was placed in winding-up? At what point in time must the company have been unable to pay its debts, bearing in mind that the company's ability to pay its debts may fluctuate during the winding-up eg if the value of its assets fluctuates?

It has already been pointed out(4) that most of the references in the Act to the commencement of a winding-up do not refer to the

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(3) See eg In re H C Collison Ltd Ex p Collison (1906) 23 SC 721 at 724; Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D & CLD) at 596F-597H.

(4) See 291-300 above.

deemed commencement in terms of s 348, and it is suggested that the reference in s 341(2) to a company which is unable to pay its debts is likewise not a reference to a company which is deemed by s 345 to be unable to pay its debts. The object of s 345 is clear: a creditor who is unable to get payment of a claim he has against a company and who accordingly wishes to apply for the winding-up of the company may well be unable to prove actual inability to pay its debts because of his lack of knowledge of the company's affairs, and s 345 is designed to obviate this difficulty.

This difficulty does not, however, arise in the case of s 341(2). A liquidator wishing to recover a disposition avoided by the section will have the company's records available to him and he therefore has no need of the deeming provision. It would, moreover, be anomalous if the liquidator could avoid dispositions under s 341(2) even if the company were factually solvent. The object of the section is to ensure that creditors benefit pari passu, and if the company's assets exceed its liabilities with the result that all creditors are paid in full there is no need for the section to apply.

Similar considerations apply in regard to the question whether commercial or factual insolvency is referred to. The inability of a company to meet current liabilities in the ordinary course is, it is suggested, a concept which is only relevant to the question whether or not the company should be placed in winding-up, not to whether or not s 341(2) shall apply. The applicability or otherwise of s 341(2) should, as already pointed out, turn on the question of whether or not the company's liabilities exceed its assets. As Margo J said in Taylor & Steyn NNO v Koekemoer(5) in relation to a similar problem under s 415 of the Act :

> 'The true enquiry .... concerns the ability or inability of the company to pay its debts, not in the ordinary course of

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(5) 1982 (1) SA 374 (T) at 380G. See also at 382B.

business, but in the context of a company which is being wound up.'(6)

Must contingent and unliquidated debts be taken into account in determining whether or not a company is able to pay its debts? The difficulty arises from the fact that the word 'debt' in its ordinary meaning connotes a debt which is due or owing.(7) If the deeming provision in s 345 applies, contingent and unliquidated claims will be included by reason of the provisions of sub-s (2). However, even if the deeming provision does not apply, contingent and unliquidated claims must, it is considered, nevertheless be taken into account not because they are debts but because they affect the company's ability to pay its debts.(8)

The answer to the question whether the company's inability to pay its debts must have been the ground on which it was placed in winding-up is, it is thought, clearly in the negative, and the section will apply even though the company is placed under a compulsory winding-up order, or resolves to be wound up voluntarily, on a ground other than inability to pay its debts.(9)

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(6) The question of whether s 345 applies or not and of whether commercial or factual insolvency is referred to is of limited practical significance because if the company's assets exceed its liabilities the liquidator is unlikely to seek to avoid dispositions made by the company after presentation of the winding-up application, and if he does do so the court is in any event unlikely to refuse to validate the dispositions.

(7) Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd 1980 (1) SA 432 (W) at 442D; the Taylor & Steyn case supra at 379D, although the court found it unnecessary to decide whether this is the meaning of 'debt' in s 415 (at 381H).

(8) See the Taylor & Steyn case supra at 380F - 381G.

(9) In re Hardwood Timber Co Ltd (in liquidation) 1932 NPD 170 at 177ff; Earl Motors (Pty) Ltd v Estany & Co (Pty) Ltd 1963 (2) SA 234 (E) at 236B-G; the Taylor & Steyn case supra at 376F-G.

At what point in time must the company's ability or inability to pay its debts be determined for the purposes of s 341(2)? The value of a company's assets may, for example, increase or *decrease between* the date of commencement of the winding-up and the date of realisation of the assets, with the result that a company which is unable at the commencement of the winding-up to pay its debts may become able to do so, or vice versa.

This question was in issue in the Taylor & Steyn case in relation to s 415 of the Companies Act providing for the interrogation of directors and others at creditors' meetings if the company is unable to pay its debts. The court a quo(10) referred to the fact that the expression 'company unable to pay its debts' also appears in a number of other sections(11) and proceeded :

> 'If one has regard to all of the aforementioned provisions it becomes apparent that the Legislature must have had in mind a *company being wound up as insolvent*. It is inconceivable that the Legislature could have intended those provisions to apply at some stages during such a winding-up and not at others. The effect of the uncertainty and practical inconvenience of a company being unable to pay its debts on one day and able to pay its debts on another is one which could not have been contemplated. One is thus driven to conclude that, in respect of all companies being wound up, it has to be determined as at a fixed date whether such a winding-up is in respect of a company which is unable to pay its debts. The only sensible date for that purpose is the date upon which the winding-up is deemed to have commenced, ie the time of presentation to the Court of the application for winding-up: s 348. Indeed, a provision such as that contained in s 341(2) of the Act would be difficult, if not impossible, to apply, if the date at which it was to be determined whether a company was unable to pay its debts was a date other than that on which the winding-up commenced.'

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(10) Koekemoer v Taylor & Steyn NNO & Anor 1981 (1) SA 267 (W) at 269G-270B.

(11) The court a quo listed (at 269G) ss 337, 339, 340, 341(2), 344, 360, 366(1)(c) 414, 415, 416 and 417. The appeal court added (at 378G) ss 346(4)(d), 421(1) and 425.

The appeal court, however, saw the matter differently :(12)

> '...where a company which is *being wound up is unable to pay its* debts, those provisions could be essential to a proper winding-up, whether the inability to pay existed at the commencement of the winding-up or developed during the course thereof. Those provisions are part of the machinery of the concursus creditorum, and it would be surprising indeed if they were available in the case of a company unable to pay its debts *at the commencement* of the winding-up, but not available where the company develops that inability through, say, the disappearance of assets the following day.'

The court proceeded to consider each section in which the expression 'company unable to pay its debts' occurs and in dealing with s *341(2)* said :(13)

> 'Section 341(2) is not restricted by its language or by any other compelling reason to companies which were unable to pay their debts at the commencement of the winding-up.'

Both judgments are of course obiter dicta *in relation to* s 341(2) because it does not follow that if the expression 'company unable to pay its debts' has a particular meaning in s 415 it necessarily has the same meaning in s 341(2). It has already been pointed out(14) that the expression 'the commencement of a winding-up' has different meanings in different sections and the same may well be true of the expression 'company unable to pay its *debts*'. *There would seem* to be little reason why s 415 should not become applicable during a winding-up if the company becomes unable to pay its debts; in the case of s 341(2), on the other hand, the position is more complex and it is thought that the factors favouring each approach should be weighed up specifically in relation to s *341(2) before consideration is given to the question*

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(12) At 377H - 378A.

(13) At 378D - E.

(14) See 291-9 above.

of whether there is any merit in giving the expression the same meaning in s 341(2) as in s 415.

In favour of the appeal court's approach, insofar as s 341(2) is concerned, is the fact that the object of s 341(2) is to ensure as far as possible that the creditors benefit pari passu.(15) This object is best served if s 341(2) applies even if the company becomes unable to pay its debts after the commencement of the winding-up. If, for example, a creditor was paid in full between presentation of the winding-up application and the grant of the winding-up order while other creditors will not be paid in full because of a decrease in the value of the company's assets after presentation, the creditor who has been preferred would need to disgorge his preference if the object of the section is to be achieved. Also in favour of this approach is the fact that if a company which is unable to pay its debts at the commencement of its winding-up becomes able during the winding-up to do so, there is no reason for s 341(2) to continue to apply; on the contrary, there are, as already pointed out,(16) good reasons for limiting the scope of its application as far as possible.

On the other hand, there are significant objections to this approach. As King J said, in a different context, in Allied Electric (Pty) Ltd v Meyer & Anor:(17)

> 'If a contract is invalid at one point of time but valid at another point in time the contracting parties would be like tennis players playing a game of tennis according to the rules of the game, but with a constantly moving base line.'

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(15) See 497-514 below.

(16) See 231-42 above

(17) 1979 (4) SA 325(W) at 330G-H.

A disposition may have long been valid at the point in time at which the value of the company's assets drops below the aggregate of its liabilities. The disponee may have relied on the validity of the disposition and may stand to suffer serious prejudice if it is avoided. For example, the disponee may have resold goods purchased from the company and may be placed in an invidious position if long afterwards the sale to him becomes retrospectively void. True, the court has the power to validate the disposition but, as already pointed out,(18) the court's power to validate has in practice not proved a satisfactory means of preventing prejudice to disponees. In any event, the uncertainty this approach would introduce into commercial dealings, is, it is considered, itself undesirable. Moreover, if the applicability or otherwise of s 341(2) may fluctuate during the winding-up process the result may well be delays in the winding-up process, and the prospect of an increased dividend may be offset to a greater or lesser extent by the delay in the payment of the dividend.

All in all, it is suggested that the benefits that would flow from Margo J's approach to s 341(2) are more illusory than real in practical terms and are outweighed by the uncertainty and delays that are the inevitable concomitants of the approach. It follows, it is suggested, that it is preferable that insofar as s 341(2) is concerned the company's ability or inability to pay its debts should be determined for once and for all at the commencement of the winding-up. Moreover, the commencement of the winding-up for this purpose would, it is suggested, be the date of the grant of the winding-up order rather than the deemed date of commencement in terms of s 348. The company's financial position may have changed materially between the 2 dates and there is no point in s 341(2)'s applying if the company has become able to pay its debts, and vice versa.

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(18) See 231-42 above.

Is there any reason why the expression 'company unable to pay its debts' in s 341(2) should rather be given the same meaning as in s 415 despite these considerations? No doubt it would be more philosophically satisfying that the same expression should have the same meaning wherever it occurs, but this is not, it is suggested, a sufficient reason for disregarding the considerations pointing in the opposite direction.

If this view is wrong, at what precise time during the winding-up process must the company's ability or inability to pay the debts be determined? In Taylor's case Margo J held(19) that the relevant time for the purposes of s 415(1) is the time when the section is invoked by the liquidator. If this is applied to s 341(2), at what time could the section be said to be 'invoked' by the liquidator? The answer is, it is thought, that the liquidator invokes the section when he elects to avoid the disposition, and it follows that the section will apply if at that date the company is unable to pay its debts and that it will continue to apply even if the company thereafter becomes able to pay its debts.

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(19) At 379B.

CHAPTER 9 - IS A DISPOSITION VOID OR VOIDABLE?

Synopsis

'Void' in s 341(2) means voidable at the instance of the liquidator, not void ab initio. Only the liquidator can therefore avoid the disposition, and third parties who in good faith acquire property from the disponee before the disposition is avoided are protected.

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Section 341(2) declares a disposition which is hit by the section to be 'void', but it is necessary to examine whether the legislature intended this to mean 'void ab initio' or merely 'voidable':

> '... sometimes when acts are said to be void or a nullity the intention is to make them voidable, not absolutely void. It is for this reason and to avoid doing grave injustice to innocent third parties that Courts of law will rather interpret the Legislature to have intended a contract to be voidable than void. Before interpreting the Legislature to have intended to make a contract null and void irrespective of its grave consequences to third parties, it must be clear that the Legislature deliberately intended to do so on grounds of public policy. If such contracts are void they cannot be ratified by the trustee, and this may lead to fraudulent conspiracy on the part of an insolvent as well as to other difficulties easily imaginable'

(per Wessels C J in Fairlie v Raubenheimer,(1) in regard to s 21(1) of the Insolvency Act 32 of 1916).

The principal significance of this question relates to the issue of whether the liquidator can vindicate property disposed of by the company and now in the hands of a third party who has acquired the

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(1) 1935 AD 135 at 145. Cf, too, McPherson Liquidation 144.

property in good faith from the disponee.(2) It is, moreover, also relevant to the question of who can avail himself of the section to avoid a disposition. If the disposition is entirely void it would, it is considered, follow that either the liquidator or the disponee could avoid the disposition, whereas if the disposition is voidable only it would seem implicit that the disposition is voidable at the instance of the liquidator only.(3)

In <u>Herrigel NO v Bon Roads Construction Co (Pty) Ltd & Anor</u>(4) Lichtenberg J said in dealing with the plaintiff's claim for <u>mora</u> interest on a disposition which was void under s 341(2):

> 'The question is, when was first defendant placed <u>in mora</u>? The payment which first defendant received was a <u>disposition</u> of Quickbeton's property which disposition was void <u>ab initio</u>, that is to say that the disposition (ie the payment of R12 518,70 to the first defendant) should never have been made and the first defendant was, therefore, at all relevant times, obliged to repay this amount to plaintiff ...'(5)

In that case it was true that payment should never have been made because the winding-up order had already been granted at the time payment was made and it was therefore void <u>ab initio</u>. Where, however, payment is made after presentation but before the grant of the order the position is more difficult. The payment cannot be void <u>ab initio</u> in the sense used by Lichtenberg J because the payment is clearly valid until the winding-up order is granted, whereupon it is retrospectively deemed to have been 'void'. In any event, it is

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(2) See further 626 below.

(3) Cf generally A M Honoré 'Degrees of Invalidity'(1958) 75 <u>SALJ</u> 32.

(4) 1980(4) SA 669 (SWA) at 683D.

(5) The court nevertheless held that interest did not run from the date of payment but from a reasonable period after demand - see further 630 below.

doubted whether Lichtenberg J's assumption that 'void' in s 341(2) means 'void *ab initio*' is correct.

The following criteria are suggested in *Stroud's Judicial Dictionary* (6) to determine whether the legislature intended 'void' in an enactment to mean 'void *ab initio*' or 'voidable':

> 'In general, it would seem, that where the enactment has relation only to the benefit of particular persons, the word "void" would be understood as "voidable" only, at the election of the persons for whose protection the enactment was made and who are capable of protecting themselves (see *Davis v. Bryan* 6 B.& C.651, cited by Cotton L.J., *Re London Celluloid Co.* 39 Ch.D.203); but that when it relates to persons not capable of protecting themselves, or when it has some object [illegible] public policy in view which requires the strict construction, [illegible] word receives its natural full force and effect (Bayley J., in *R. v. Hipswell* 8 B. & C. 471).'

Section 341(2) is clearly designed for the protection of creditors and on this approach, therefore, 'void' in the section would be construed as meaning 'voidable'.

The case of *Harrismith Board of Executors v Odendaal*, (7) however, is weighty authority to the contrary. In issue in this case was s 33 of the Insolvency Act 32 of 1916 which provided:

> '(1)Every sale or alienation by a trader of any business or of the good-will, book debts, or assets of that business, other than sales of stock in the ordinary course of his trade, shall upon the sequestration of his estate within six months after the sale or alienation, be void against the trustee, unless the seller has previously given fourteen days' notice of such intended sale or alienation by advertisement twice in the *Gazette* and twice in a newspaper circulating in the district in which that business is carried on.'

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(6) J S James *Stroud's Judicial Dictionary of Words and Phrases* 4th ed (London 1974) at 2951-2 para (3) under 'Void'.

(7) 1923 AD 530.

The court held that 'void' meant 'void' and not 'voidable'. Innes CJ, who delivered the judgment of the court, gave a number of reasons for this conclusion.

Firstly, he stated that 'void ab initio' was the obvious meaning of 'void' and that had the legislature intended 'voidable' one could have expected it to have said so in more appropriate language. Secondly, he pointed out that the object of the section was to prevent traders in financial difficulties from disposing of their businesses and dissipating the proceeds and that if the disponee could give good title to the assets of the business until the trustee avoided the alienation this object would be largely def[illegible] [illegible]ly, he distinguished the English cases(8) to the con[illegible] [illegible]milar provisions in the English Bankruptcy Act on the *ground* [illegible] *[illegible]ne periods* under that Act within which a supervening insolvency brought the statutory machinery into play were far longer and on the ground that the historical development of the law in the light of which those decisions were arrived at was of no application in this country. He also considered the position of bona fide third parties who purchased assets of the business from the alienee, but concluded that it had to be inferred from the wording of the Act that the legislature did not intend to extend any protection to bona fide third parties. This is dealt with more fully below.

Clearly, much of this reasoning could equally be applied to s 341(2). There are, however, important distinguishing features.

Section 33 declared an alienation to be 'void against the trustee' and an alienation was therefore only void if the trustee invoked the section.(9) Section 341(2), on the other hand, simply

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(8) Billiter v Young (1856) 6 E & B 1, 119 ER 765;(1860) 8 HLC 682, 11 ER 596, sub nom Young v Billiter; In re Brall Ex p Norton [1893] 2 QB 381; In re Carter and Kenderdine's Contract [1897] 1 Ch 776 (CA).

(9) See the Harrismith Board case supra at 539.

declares a disposition to be void and therefore prima facie either party can set up the invalidity(10) eg the disponee could avoid a disposition which proved to be prejudicial to him despite the fact that it was beneficial to the company. It may be doubted whether the legislature would have intended s 341(2) to have such a startling effect.

Companies against which winding-up applications have been presented generally continue to conduct their businesses during the pendency of the application, a period which may run to weeks or even months. Numerous transactions may have been entered into and completed during this period, and the majority are likely, it is thought, to have been entirely proper. If s 341(2) applies to all these transactions without distinction between those which are prejudicial, and those which are beneficial, to creditors, the inevitable result must, it is suggested, be a proliferation of applications for validation. This will in turn delay the winding-up process and will reduce the free residue available for distribution to creditors by the amount of any costs awarded against the company in the validation applications, or incurred by the company and not awarded against the disponees.(11)

The position of third parties who acquire property in good faith from the disponee also calls for closer examination. In the Harrismith Board case Innes CJ dealt with the position of such third parties as follows:(12)

> 'The provisions of sec. 32(2), though not quoted in argument have not been lost sight of. They safeguard the rights of persons who have acquired in good faith and for value, from some person other than the insolvent, property the disposition of

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(10) Unless 'void' is interpreted to mean 'void ab initio at the instance of the liquidator'.

(11) See further 622-3 below.

(12) Supra at 539.

> which by the latter has been set aside by the Court under certain earlier clauses. It might be argued that the absence of a similar provision in sec. 33 indicated an intention not to interfere with such rights. But that is not a forcible suggestion in view of the strong language of the section. The legislature had been dealing with dispositions of property liable to be set aside by the Court and considered it necessary in regard to them to protect bona fide purchasers. It then proceeded to declare that certain other dispositions should be void against the trustee without any intervention of the Court at all. Can it be doubted that, if it had been intended to place subsequent purchasers in the same position in both cases, a similar safeguard would have been introduced into the later clause? Its absence under the circumstances is eloquent as to the intention of the lawgiver.'

Clearly, the sequence and juxtaposition of ss 32(2) and 33 and the other impeachment sections gave force to this interpretation. The same cannot, however, be said of s 341(2). True, in the 1973 Act it appears immediately after s 340 which incorporates the Insolvency Act impeachment provisions but this was not the case in earlier Acts where the corresponding sections were not consecutive,(13) and it may be doubted whether the legislature intended in enacting s 341(2) to change the meaning of 'void' from the meaning in the corresponding sections of the earlier Acts.

It follows, it is considered, that Innes CJ's reasoning in regard to the position of bona fide third parties cannot be applied to s 341(2) and that the harshness of the 'void ab initio' interpretation becomes an important consideration in seeking to interpret s 341(2), in accordance with the general rule of interpretation that in the event of ambiguity a statutory provision should rather be interpreted in the way that avoids or minimises interference with or deprivation of rights.(14) Clearly the

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(13) See eg ss 181 and 178 of the 1926 Act and see further 231-5 above and 325-34 below.

(14) See 231-42 above.

'voidable' interpretation would accord with this rule of interpretation.(15)

Having regard to these distinctions it is thought that the better view is that the Harrismith Board case should not be applied to the interpretation of s 341(2) and that 'void' should be interpreted as meaning 'voidable at the instance of the liquidator'.

This question has not been considered in any of the cases on s 341(2) and its counterparts in England, Australia and India(16) but it seems that Buckley LJ in Re Gray's Inn Construction Co Ltd(17) was of the view that a disposition is valid until it is avoided by the liquidator for he remarked in regard to the desirability or otherwise of applying in advance for validation:(18)

> '...the beneficial character of the transaction may be so obvious that there is no real prospect of a liquidator seeking

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(15) But see H A J Ford Principles of Company Law 3rd ed (Sydney 1982) #2206 who states that the liquidator has the right to recover property because change of ownership is avoided by the Australian counterpart of s 341(2). Cf too the position under the actio Pauliana where recovery cannot be made from a bona fide third party: Voet 42.8.10.

(16) With the partial exception of Re Freight Transfer (Pty) Ltd (in liquidation) [1974] 1 NSWLR 214 and Re Omnico Ltd (1976) 1 ACLR 381 (NSW) at 389(15) in which the question was alluded to but not decided. Cf too Re J Leslie Engineers Co Ltd [1976] 2 All ER 85 (Ch) at 90j.

(17) [1980] 1 All ER 814(CA).

(18) At 820g.

to set it aside, so that an application to the court would waste time, money and effort.'(19)

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(19) Cf, however, Ram Lal v Official Liquidator, Benares Bank Ltd AIR 1942 Allahabad 141 at 142-3 in which the court described a disposition which is hit by the Indian counterpart of s 341(2) as 'wholly void ab initio'. Cf, too, Rudge v Bowman (1868) 3 QB 689; In re Onward Building Society [1891] 2 QB 463(CA) at 475; Commecial Grain Producers Association v Tobacco Sales Ltd 1983(1) SA 826(ZS) at 831D-F in which it was held that the English and Zimbabwean counterparts of s 341(1) declaring transfers of shares after presentation to be void only rendered them void vis-à-vis the company and not as between the transferor and transferee.

CHAPTER 10 - TRANSACTIONS AVOIDED BY S 341(2)

Synopsis

'Disposition' and 'property' are not defined in the Companies Act but the better view is that the Insolvency Act definitions apply to s 341(2). The question of whether or not the definitions apply is, however, not free from doubt and consideration is therefore also given to the position if the definitions do not apply.

In seeking to determine whether or not a disposition of property has occurred within the meaning of s 341(2) it is not a relevant test to determine whether the company's net deficit has been increased (or net surplus reduced). It is not essential that a disposition be in favour of a creditor. A disposition need not be effected by way of a single transaction: it may also be effected by way of a scheme or arrangement. It is not necessary that either the company or the disponee should have been aware that a disposition was taking place.

The principal significance of the Insolvency Act definition of 'disposition' is that it includes not only the transfer of a real right but also a contract for such a transfer, including in particular a contract for a payment eg a loan or suretyship. If the definition does not apply to s 341(2) the conclusion of a contract is not a disposition within the meaning of the section.

A *spes* is not 'property' within the meaning of s 341(2). An attorney's trust monies have been held to be his property within the meaning of the Insolvency Act definition but the correctness of this is doubted. The Insolvency Act definition of property embraces all property situate in South Africa except fideicommissary interests. If the definition does not apply to s 341(2) all property everywhere will be included within the meaning of 'property' in the section, but the practical significance of this is limited by the fact that the courts of other countries are unlikely to enforce s 341(2) in relation to property situate within their jurisdiction.

The words 'by any company' appear at first sight to require an act on the part of the company but this would give rise to serious anomalies - eg in the case of set-off - and the better view is that the words should be interpreted as referring not so much to the act of disposing as to the fact that the disposition is of the company's property.

If a disposition is subject to a suspensive condition the fulfilment of which is not in the discretion of either party, the date of the disposition will, if the condition is fulfilled, be the date of conclusion of the contract or the transfer of the real right, as the case may be, not the date of fulfilment of the condition. If the condition is not fulfilled there is no disposition. If the fulfilment of the condition is in the discretion of one party, the disposition (if any) by that party will occur when that party exercises the discretion, but the disposition by the other party will date back to the conclusion of the contract or the transfer of the real right, as the case may be. If the party who has the discretion does not exercise it with the result that that party fails to take the opportunity to acquire the rights that would accrue to it if it were to exercise the discretion, no disposition by that party occurs. If the party elects not to exercise the discretion before expiry of the period to make the election thus relinquishing its right to acquire the rights that would accrue to it if it were to exercise the discretion there will be a disposition of the right to exercise the discretion.

If a disposition is subject to a resolutive condition the date of the conclusion of the contract or of the transfer of the real right, as the case may be, is the date of the disposition, not the date the disposition becomes unconditional. If the condition is fulfilled and the disposition lapses it is not extinguished with retrospective effect but remains a disposition to the extent it was effective despite the lapsing. If the fulfilment of the condition is not in the discretion of either party no further disposition occurs if the condition is fulfilled. If the fulfilment of the condition is in the discretion of one of the parties and that party elects to fulfil the condition a further disposition by that party occurs if the termination results in the loss of rights only or of rights of greater value than the corresponding obligations from which the party is released by the termination. A disposition also occurs if the other party has paid money or delivered other property in terms of the transaction and the money or property is returned pursuant to the termination. On the other hand, no further disposition occurs on the part of the other party who does not have a discretion as to whether or not the condition is fulfilled. If the party who has the discretion does not exercise it with the result that that party fails to take the opportunity to rid itself of a net liability no disposition by that party occurs. If the party elects not to exercise the discretion before expiry of the period to make the election thus relinquishing the right to terminate the contract there will be a disposition of the right to exercise the discretion.

If an option is exercised, the date of the disposition (if any) by the grantor is the date of the grant of the option and the date of the disposition (if any) by the optionholder is the date of the exercise of the option.

If a customer's account is in credit and the bank honours a payment instruction given by the customer in favour of the customer itself no disposition by the customer of its property occurs within the meaning of s 341(2). In seeking to determine the effect of s 341(2) if the payment instruction is in favour of a third party the payment must be analysed into 2 payments: a payment by the bank to the customer and a payment by the customer to the third party. The former payment is not a disposition by the company but the latter payment is. The liquidator's claim for recovery of the payment therefore lies against the third party, not the bank. If the Insolvency Act definition of 'disposition' applies to s 341 (2) the bank's right to its charges for honouring the payment instruction is avoided by the section unless the payment instruction was given before the presentation of the winding-up application, but if the definition does not apply the bank's right to its charges is unaffected by the section. Where the bank is entitled to its charges the set-off of the charges against the credit in the account will be barred by s 341(2).

If a customer's account is in overdraft and the bank honours a payment instruction given by the customer a contract of loan comes into existence. If the Insolvency Act definition of 'disposition' applies to s 341(2) this contract of loan is avoided by the section as a contract for a payment. This is only so if the winding-up application was presented against the customer before the contract came into existence, ie before the payment instruction was given where it is drawn within the scope of an overdraft facility or before the honouring of the payment instruction where it is drawn outside the scope of an overdraft facility. If the Insolvency Act definition of 'disposition' does not apply the contract of loan will be unaffected by the section. Where the contract of loan is not void, payment pursuant to the payment instruction will constitute the advance of the monies lent. If the Insolvency Act definition of 'disposition' applies to s 341(2) the bank's right to its charges for honouring the payment instruction is avoided by the section unless the presentation of the winding-up application against the customer took place after the giving of the payment instruction and also after, in the case of a payment instruction outside the scope of an overdraft facility granted by the bank, the acceptance by the bank of the offer to borrow implicit in the payment instruction. If the definition does not apply the bank's right to its charges is unaffected by the section.

A mortgage or pledge granted by the customer to the bank after presentation of the winding-up application against the customer will be avoided by s 341(2). Even if the mortgage or pledge was granted prior to presentation it will not secure debts which arise after presentation: a mortgage or pledge to secure future debts is a conditional disposition, the condition being that the debts come into existence, and inasmuch as it is within the customer's discretion as to whether or not the debts come into existence the disposition only occurs when the customer exercises its discretion. In the case of payment instructions drawn within the scope of an overdraft facility this means the date when the the payment instruction is given. In the case of payment instructions drawn outside the scope of an overdraft facility the bank also has a discretion as to whether a debt arises and the disposition will therefore only occur when the bank accepts the offer to borrow implicit in the payment instruction. Similar considerations apply to cessions as security but, in addition, if future debts are ceded, s 341(2) will avoid the cession of debts which arise after presentation of the winding-up application against the customer. Notarial bonds only confer a statutory right of preference in respect of the proceeds of the realisation of the bonded property, not a real right in the property itself. Nevertheless, the grant of a notarial bond constitutes a disposition of property within the meaning of s 341(2). Accordingly, notarial bonds are subject to the same considerations as mortgages and pledges, except that in addition, if future property is bonded, s 341(2) will avoid the hypothecation of property which would come within the ambit of the bond after presentation of the winding-up application against the customer. A cash deposit may be taken as security with or without a cession of the customer's rights in the deposit. If there is no cession, the security relies on set-off, and if set-off has not occurred prior to the presentation of the winding-up application against the customer, s 341(2) will prevent the set-off. If there is a cession the position will be the same as in the case of any other cession as security.

Banks are at one time or another involved in most types of transactions with customers, either directly or indirectly through cessions of debts granted to them by customers. Consideration is therefore given to the question of whether various such transactions are avoided by s 341(2). The chief problem areas are transactions involving the grant of a right, either real or personal, less than full ownership (eg usufruct, lease and option), transactions the effect of which is similar to a disposition but which may not normally be referred to as such (eg compromise), the *loss of rights* by breach of duty (eg breach of contract) or by inaction (eg prescription) or by the failure to take up *rights* (*eg failure* to take up a rights issue or option) and involuntary dispositions (eg expropriation, share issues which dilute existing shareholdings, accessio and dispositions in compliance with an order of court).

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Section 341(2) provides:

> 'Every *disposition of its* property (including rights of action) by any company being wound up and unable to pay its debts made *after the commencement* of the winding-up, shall be void unless the Court otherwise orders.'

A number of questions arise: Is a payment by a bank to a customer a disposition by the customer? Is a payment by a bank to a third party *in accordance with* a customer's instructions a disposition by the customer, and if so is the bank liable under s 341(2) to make good the disposition to the liquidator of the customer? If the customer's account is in overdraft, is the *contract of loan arising* from the honouring of the payment instruction a disposition itself, apart from the payment pursuant to the payment instruction? What is the position in regard to the bank's charges? What is the *position in regard* to the numerous other transactions that occur between banks and their customers such as payments to the bank, the taking of security, the taking of suretyships, the giving of guarantees, etc?

Before these questions can be answered, a number of preliminary points call for examination. 'Disposition' is not defined in the Companies Act and the question arises as to whether the Insolvency Act definition can be applied to s 341(2) and what, if it cannot, the meaning of 'disposition' is in s 341(2). Does the Insolvency Act definition of 'property' apply, and if not what is its meaning in s 341(2)? Do the words 'Every disposition ... by any company' exclude involuntary dispositions? What is the position in regard to conditional dispositions and options?

(1) Do the Insolvency Act definitions apply to s 341(2)?

The Insolvency Act defines 'disposition' and 'property' as follows:(1)

> ' "disposition" means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition made in compliance with an order of court'
>
> '"property" means movable or immovable property wherever *situate* within the Republic, and includes contingent interests in property other than the contingent interests of a fideicommissary heir or legatee.'

The definition of 'disposition' is particularly important because it is considerably wider than the ordinary meaning of the word (although, as will be shown,(2) it is still *not* all-embracing). The definition is especially important in that it includes not only the transfer of a real right but also the contract giving rise to the transfer, including any contract for a payment eg a loan or suretyship. The definition of 'property' is also significantly different from the ordinary meaning, although, as will be seen,(3) the difference has fewer practical consequences.

In Herrigel NO v Bon Roads Construction Co (Pty) Ltd(4) the South West Africa Division held that the Insolvency Act definition of 'disposition' applies to s 341(2) on the ground that s 339 of the Act applies the law relating to insolvency to windings-up mutatis

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(1) Section 2.

(2) See 421ff below.

(3) See 351-5 below.

(4) 1980 (4) SA 669 (SWA) at 674A. See, too, International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd & Anor 1983(1) SA 79(C) at 85E.

mutandis.(5) But, with respect, it is doubtful whether the reason given by Lichtenberg J is sufficient on its own to justify this conclusion. Section 339 provides:

> 'In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act.'

Bearing in mind that s 341(2) has no counterpart in the Insolvency Act, it is difficult to accept that a definition in one Act for one purpose can properly be applied to a different Act for a different purpose.(6)

However, there is a further significant indication that the Insolvency Act definitions were intended to apply to s 341(2). This indication arises from the juxtaposition of ss 340 and 341(2) and the fact that it seems clear that 'disposition' in s 340 means 'disposition' as defined in the Insolvency Act. Section 340 provides:

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(5) Henochsberg Companies 595 is of the same view. In commenting on s 341(2) he cross-refers to the comments on 'disposition' under s 340, in regard to which the following is said (at 592):

> 'It is submitted that the intention of the legislature was most probably to use this word as having the same meaning that it has as defined in s.2 of the Insolvency Act, No. 24 of 1936, i.e., that it is wide enough to include, inter alia, sales, leases, pledges and releases. In its ordinary meaning there seems to be no reason why this word should not include any transfer or abandonment of rights....'

(6) It may be noted that s 339 only applies the provisions of the insolvency law insofar as they are applicable, and that s 2 of the Insolvency Act reads: 'In this Act ... "disposition" means ...' (The underlining has been added.) Interestingly, in the same case the court came to the conclusion (at 681E-H) that s 32 of the Insolvency Act providing for the remedies if a disposition is impeachable under ss 26, 29, 30 and 31 of that Act does not apply to s 341(2) because 'the disposition which is void by virtue of the facts postulated in s 341 of the Companies Act is not a disposition which is similar or akin to any one of the impeachable ... dispositions [under] the Insolvency Act ...'.

> '(1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.
>
> (2) For the purpose of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be -
>
> (*a*) In the case of a winding-up by the Court, the presentation of the application....'

One can but agree with Henochsberg(7) that the intention of the legislature was most probably to use 'disposition' here as having the same meaning that it has as defined in the Insolvency Act, especially when s 340 is read in conjunction with s 339. The same is equally true of the expression 'property'.

It is considered, moreover, that it is reasonable to infer that the legislature would have intended 'disposition' and 'property' in

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(7) See note 5. (It may be noted that in the 2nd edition (Durban 1963) at 425 in dealing with the corresponding sections of the 1926 Act, Henochsberg took the view that the Insolvency Act definition 'undoubtedly' applied, whereas in the 3rd edition this has been modified to read 'most probably'.) See also *The Mayor of Portsmouth v Smith & Others* (1885) 10 App Cas 364 (HLE) at 371 in which Lord Blackburn said:

> 'Where a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by way of a proviso or exception on that which is incorporated, that should be referred to. But all others, including the interpretation clause, if there be one, may be referred to.'

s 341(2) to have the *same meaning* as in s 340. Section 340 regulates the avoidance of dispositions of property made prior to the presentation of the winding-up application, and s 341(2) regulates the avoidance of dispositions of property made thereafter, and it would be anomalous indeed if a different, generally wider, range of dispositions could be set aside before presentation of the winding-up application than the range of dispositions that can be set aside thereafter.

This approach is supported by the rule of interpretation that:

> 'Where the Legislature uses the same word ... it may reasonably be supposed that out of a proper concern for the intelligibility of its language, it would intend the word to be understood, where no clear indication to the contrary is given, in the same sense throughout the enactment. This applies with greater force where the same word is repeated in a single sentence'

(per Steyn J A, as he then was, in <u>Minister of the Interior v Machadodorp Investments (Pty) Ltd & Anor</u>(8)).

It is true that 'disposition', 'dispose of' and derivatives thereof are used elsewhere in the Act with varying meanings,(9) but this does not, it is considered, detract materially from the cogency of the reasoning where the same word is used in consecutive sections dealing with the same subject matter.

The principal argument against the application of the Insolvency Act definitions to s 341(2) arises from the historical background to s 341(2). As already mentioned,(10) the concept embodied in

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(8) 1957 (2) SA 395 (A) at 404 [illegible] also Steyn <u>Uitleg</u> 126.

(9) See for example ss [illegible], [illegible], 256(5)(<u>a</u>), 284(1)(<u>b</u>) and 434(1); para (<u>b</u>) of sch [illegible] and paras 36(<u>e</u>), 44(1)(<u>b</u>), 68(<u>c</u>) and 69(<u>c</u>) of sch 4.

(10) See 242-4 above.

s 341(2) had its origin in s 153 of the English Companies Act 1862, reaching the 1973 Act via the English Companies (Consolidation) Act 1908, the Transvaal Companies Act 1909 and the 1926 Act. On the other hand, the definitions of 'disposition' and 'property' in the Insolvency Act are of more recent origin, having been first introduced in the 1916 Act.(11) Moreover, by 1909 'disposition' in the English counterpart of s 341(2) had already been authoritatively interpreted by the English courts as having a much narrower meaning than the definition which was subsequently adopted in the Insolvency Act.(12) The presumption accordingly arises, as already pointed out,(13) that the Transvaal legislature adopted the English legislation as so interpreted. It follows that if the Insolvency Act definitions apply to s 341(2), the meanings of 'disposition' and 'property' in s 341(2) are very different from the meanings in the corresponding section(14) of the Transvaal Act, despite the fact that the wording of the section is identical in all material respects, and it may be questioned whether the legislature would have intended to change the scope of the concept embodied in s 341(2) to such an extent by so indirect and unclear a method.

Tracing the legislature history of a statutory provision as an aid to interpretation is commonly resorted to by the courts,(15) but it has not always met with the favour of the courts. Lord Denning set out the objection to the approach in In re Overseas Aviation Engineering (GB) Ltd:(16)

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(11) 32 of 1916.

(12) See 341-2 below.

(13) See 244-6 above.

(14) Section 178(2).

(15) See eg Principal Immigration Officer v Purshotam 1928 AD 435 at 440; Steyn Uitleg 153; Maxwell Interpretation 47 ff.

(16) [1963] Ch 24 (CA) at 37. See also Administrator-General of Bengal v Prem Lal Mullick (1895) 22 Ind App 107 at 116, quoted (Footnote continued on next page)

> '... we should ascertain the effect of the changes by considering the words actually used rather than thumbing laboriously through the dusty pages of the Acts of 1838, 1864, 1888, 1900 and 1925, as we were invited to do. Parliament has repealed all those Acts or, at any rate, all the relevant parts of them, and has made a new Act to tell people what they are to do to operate the new process. I should have thought it a work of supererogation to ask of judgment creditors, or even of their lawyers: "Now go through all the old statutes in order to see what is the effect of this new one." I well know the familiar argument that Parliament cannot have intended to alter the law unless it says so clearly and expressly. That has often been the means of defeating the intention of the legislature. But that argument does not apply to an Act such as we have here. This is an amending or remedial Act. "It is wrong", said Lord Wright of such an Act, "to construe it in a niggardly and technical spirit, with an eye fixed on the old law," see Earl Fitzwilliam's Collieries Co. v. Phillips (Inspector of Taxes) [1943] AC 570, 580).'

Lord Denning's approach seemingly has the advantage of practicality but, with respect, it overlooks the [illegible] that one must seek to interpret the intention of the legislature at the time of the enactment of the statute(17) when the existing law would have been uppermost in the legislators' minds and would not yet have been

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(Footnote continued from previous page)
in Craies Statute Law 137:

> 'The respondent maintained this singular proposition, that in dealing with a consolidating statute each enactment must be traced to its original source, and when that is discovered must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it down to date in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act was passed.'

(17) See Steyn Uitleg 7 and 156; Kommissaris van Doeane en Aksyns v Mincer Motors Bpk 1959 (1) SA 114(A) at 119G-120F.

relegated to 'dusty pages'. Another objection to Lord Denning's approach is that its result would be that legislation would, without alteration, have different meanings at different times according to then current perceptions. In any event one only has recourse to the historical background of a statute if it is unclear and some guide to the intention is better than none.

If due weight is accorded to the historical approach, can the legislature be said to have intended at some point to introduce the Insolvency Act definitions, despite what is said above?

It is suggested, albeit with some diffidence, that the legislature did in fact intend to introduce the Insolvency Act definitions in the 1926 Act, and that this was carried forward to the 1973 Act.

While it is true that the wording of the section has not been changed materially from the first English Act to the present Act, the context in which the section appears has changed. The close connection between the provisions for the avoidance of pre- and post-presentation transactions was apparently not clearly perceived when the earlier Acts were drafted. For example, the 1892 Cape Act(18) provided, in regard to pre-presentation transactions, for the avoidance of any 'alienation, transfer, cession, delivery, mortgage or pledge ... and any payment',(19) and, in regard to post-presentation transactions, for the avoidance of any 'disposition'.(20) The 1909 Transvaal Act(21) for the first time

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(18) The Companies Act 25 of 1892(C).

(19) Section 208.

(20) Section 196.

(21) The Companies Act 31 of 1909(T), ss 178(2) and 182(1).

used 'disposition' in relation both to pre-presentation and post-presentation transactions but this was really an anomaly because reference was made in dealing with pre-presentation transactions to dispositions which were impeachable under the insolvency laws, while the Insolvency Law[22] referred to 'iedere vervreemding van eenig gedeelte van den boedel en iedere betaling door den insolvent ... en ieder verband of pand door hem ... gevestigd ...'. The 1926 Act similarly uses 'disposition' in both sections[23] and the anomaly under the 1909 Transvaal Act does not arise because the Insolvency Act 1916 had in the meantime been enacted and also referred to 'disposition'. The 1973 Act finally fully recognised the close connection between the sections by placing them one after the other in the Act.[24] It follows, it is considered, that while in the earlier Acts different transactions may have been referred to in the 2 sections, this is unlikely in the current Act. And it is suggested that the grounds mentioned above are sufficient for the courts to decline to perpetuate an anomaly in the earlier Acts which is not compelled by the wording of the current Act.

A question which may be asked is whether 'disposition' in s 340 should not be given the same meaning as in s 341(2) instead of vice versa. It is true that, having regard to the fact that 'disposition' was first used in the precursors to s 341(2) and was only later extended to the precursors to s 340, this would be a logical inference. However, this inference ought, it is considered, to give way to the clear indication in s 340 and its precursor in the 1926 Act that 'disposition' is used in the sense in which it is defined in the Insolvency Act.

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(22) Sections 37 and 38 of Law 13 of 1895(T).

(23) Sections 181 and 178.

(24) Sections 340 and 341. The English Companies Act 1948 still does not use the same term in both sections nor are they adjacent to one another - see ss 227 and 320.

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True, the view has already been taken(25) that where other factors are not decisive s 341(2) should be restrictively interpreted, and in the present context this would entail holding that the Insolvency Act definitions do not apply to the section. It is suggested, however, that there are sufficient indications that the Insolvency Act definitions are intended to apply to the section to exclude this approach.

In the case of 'property' a further point calls for consideration: s 340 refers simply to 'property' while s 341(2) refers to 'property (including rights of action)'. Can it be inferred from the fact that the legislature used different expressions that it intended them to have different meanings? The answer is, it is thought, in the negative. Were it evident that meticulous care had been devoted in the drafting of the Act to the rule of interpretation that the legislature is presumed to have intended different expressions to have different meanings,(26) this would have been an argument of some force, but in fact the Act does not reveal evidence of such meticulous care having been taken. For example, property is referred to elsewhere in the Act variously as 'property, immovable and movable (including rights of action)',(27) 'money or property'(28) 'movable and immovable property',(29) and 'property and assets',(30) apparently with

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(25) See 231-42 above.

(26) Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd 1947 (2) SA 1269(A) at 1279; Steyn Uitleg 155.

(27) Section 361(3).

(28) Section 423.

(29) Paragraph (a) of Schedule 2.

(30) Paragraph (b) of schedule 2. For illustrations of the same looseness of drafting in reverse in the use of the same expression with different meanings see 291-9 above.

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the same meaning in each case.(31)

In conclusion, it is thought that the better view is that the Insolvency Act definitions both of 'disposition' and 'property' do apply to s 341(2). In order to reach the opposite conclusion it would be necessary to hold either that 'disposition' and 'property' have different meanings in ss 340 and 341(2) or that the Insolvency Act definitions do not apply to s 340, and it is thought that the weight of evidence of the legislature's intention is against either of these conclusions. However, the arguments to the contrary are of considerable cogency, and in view of the significant difference the contrary interpretation would have on the scope of s 341(2), consideration will also be given in what follows to the position if the Insolvency Act definitions do not apply.

(2) Meaning of 'disposition'

The meaning of 'disposition' in s 341(2) is significantly different depending upon whether or not the Insolvency Act definition applies, and the definition and the ordinary meaning will therefore be examined separately. There are, however, a number of preliminary points common to both the definition and the ordinary meaning and these are dealt with first.

It is not a relevant test to determine whether the company's net deficit has been increased (or net surplus reduced). For example, the passing of a mortgage bond to secure an existing debt does not increase the company's deficit but is nevertheless a disposition:

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(31) The ordinary meaning, not the meaning as defined in the Insolvency Act.

> 'Mr. Friedman's second contention was that if the payments were made by the company, they were not made without value. He argued that when the company made each payment under the guarantee, it received value because it then had a right of action against Moultrie for the recovery of these amounts. In my view this proposition is unsound. If it were correct it would mean that a loan to a beggar could not be a disposition without value because the lender would have a right of action for repayment. It would also mean that only a donation or a payment under an illegal contract could be a disposition without value. The definition of "disposition" in sec. 2 of the Insolvency Act includes other forms of contract and alienation'

(per Holmes J, as he then was, in Harcourt v Eastman NO(32)). The reasoning is equally applicable if the Insolvency Act definition does not apply.

It is also not necessary that a disposition should be in favour of a creditor, eg it could be in favour of a third party for the benefit of a creditor(33) or it could be a donation.

In Barnett v COT(34) the question arose as to whether 'disposition' in s 9 of the Federal Income Tax Act(35) implied a single, isolated act, or whether a scheme or arrangement involving a number of transactions could constitute a disposition. The court was divided on the question,(36) but it is considered that in the

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(32) 1953(2) SA 424 (N) at 427 D. See also R v Ackerman 1931 OPD 65 at 71-2.

(33) Standard Finance Corporation of S A Ltd v Greenstein 1964 (3) SA 573(A) at 576F-577G.

(34) 1959 (2) SA 713(FC).

(35) 16 of 1954.

(36) At 716A, 719E - 720E and 725 G ff.

context of s 341(2) the courts will readily treat a scheme or arrangement as being a disposition if this is its effect.

Is it necessary that the company should have been aware that it was *making* a disposition? For example, if a company inadvertently erects a building on another's property using its own materials with the result that the materials accede to the land, is there a disposition of the material by the company to the owner of the property? Does it make a difference whether or not the other party was aware that a disposition was taking place? The answer is, it is thought, that it is not necessary that either the disponor or the disponee should have been aware that a disposition was taking place. The object of s 341(2) is to *ensure the pari passu distribution of* the company's assets,(37) not to impose a sanction for moral turpitude, and the intentions of the parties are, therefore, not relevant:(38) the effect alone of the transaction should be looked to.

The word 'disposition' also appears in many other statutes, and cases on its meaning in these other statutes will often be referred to below in seeking to determine whether specific types of transaction are dispositions within the meaning of s 341(2). *However*, it *must* be borne in mind that the value of these cases in seeking to interpret s 341(2) is necessarily limited. As Street CJ said in *Mal Bower's Macquarie Electrical Centre (Pty) Ltd*(39) in relation to the Australian counterpart of s 341(2):

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(37) See 497-514 below.

(38) The parties intentions may of course be relevant to whether or not the court will exercise its discretion to validate the disposition - see 526-45 below

(39) [1974] 1 NSWLR 254 at 258A.

> 'The word "disposition" in one or other of its forms, and in varying contexts, is a commonplace in revenue statutes. There is, however, little guidance to be had from examining such other contexts, apart from noting that the concept associated with the use of such word involves the presence of both a disponor and a disponee.'(40) (41)

(a) If the Insolvency Act definition applies

The principal significance of the Insolvency Act definition of 'disposition' is that it includes not only the transfer of a real right but also a contract for such a transfer. As Watermeyer CJ said in Estate Jager v Whittaker & Anor:(42)

> 'This definition is important. It shows that a disposition may take the form of a contract which creates rights and obligations and may also take the form of an alienation of property.'

The significance of the inclusion of the conclusion of a contract in the meaning of 'disposition' may be illustrated by the

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(40) Even the requirement of a disponee may be questioned - see 443-4 below.

(41) See also Re Dittmer Gold Mines (No 3) [1954] SR (Qld) 275 in which the court said (at 282):

> '"Disposition of property" is a term of the widest significance. Occurring in other statutes an identical phrase has frequently been the subject of judicial decision. I quite recognise the danger, if not the fallacy, of using decisions as to whether a particular transaction comes within the meaning of the phrase when used in one statute as a guide in deciding the question of whether a transaction falls within the meaning of the same words used in another statute not in pari materia. All I think that can safely be gathered from such decisions is really obvious - that the phrase is usually one that should receive no restricted interpretation.'

See also Hill v Sumner 132 US 118 (1889) at 123.

(42) 1944 AD 246 at 250.

case of a sale of goods by a company after presentation of a winding-up application against it. If the conclusion of the contract of sale is itself a disposition within the meaning of s 341(2), the sale will be void and the purchaser will have no remedies based on the contract (unless it is validated by the court under s 341(2)), whereas if the conclusion of the contract is not such a disposition the sale will not be void and the purchaser will have a claim for damages if the liquidator elects not to uphold the contract. The distinction is no less important in the banking sphere eg a bank's right to interest on monies lent after, and the validity of a suretyship taken by a bank after, presentation of a winding-up application against the borrower or surety will depend on whether or not the conclusion of the contract of loan or suretyship is itself a disposition.

Further aspects of the definition will be considered below in examining whether specific types of transactions are dispositions within the meaning of s 341(2).

(b) <u>If the Insolvency Act definition does not apply</u>

If the Insolvency Act definition does not apply, the precise meaning of disposition is less clear, the principal difficulty being to determine whether or not it encompasses the conclusion of a contract.(43)

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(43) 'The words "dispose of" are capable of two meanings. They may connote the actual handing over of the secondhand motor vehicle in pursuance of the contract, or they may connote the conclusion of the contract itself in terms of which such motor vehicle is disposed of. This is clear from the dictionary meaning of the words "dispose of" and the words "van die hand sit" used in the Afrikaans text. It therefore remains to be considered what these words mean in the context of the sub-section and in the general context of

(Footnote continued on next page)

That 'disposition' is a word of wide meaning even in the absence of an express definition, has been held in many cases,(44) including specifically in relation to the English and Australian counterparts of s 341(2):

> 'I see no harm in attributing a wide meaning to that term, because the power of the Court to make orders sanctioning the transaction is sufficient to avoid any injustice being done'

(per Chitty J in In re Capital Fire Insurance Association(45)). McPherson(46) is of the same view on the ground that it follows from the purpose of the section - to ensure that the assets are divided rateably among the creditors and to prevent the improper alienation and dissipation of the property of a company in extremis - that the expression 'disposition of property' is to be given a wide meaning.

It is doubted, however, whether the reasons given by Chitty J and McPherson are valid, at least in this country. The view has

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(Footnote continued from previous page)
the Ordinance having regard to the obvious mischief that it is designed to remedy'

(per Boshoff J delivering the judgment of the Full Bench in Dormehl v The State 1964(2) PH H228(T) at 559 in regard to s 13(2) of the Road Traffic Ordinance 18 of 1957(T). (The word 'acquire' is similarly capable of referring either to the conclusion of the contract or to the transfer of the real right - see Transvaal Investment Co Ltd v Springs Municipality 1922 AD 337 at 341.)

(44) See eg CIR v Estate Kohler & Others 1953(2) SA 584(A) at 600C-F; Ovenstone v SIR 1980(2) SA 721(A) at 734 H; Kinloch ND & Anor v Kinloch 1982 (1) SA 679(A) at 698 A and 700 A; Ward & Others v CIR [1956] AC 391(PC) at 400; Hill v Sumner 132 US 118(1889).

(45) (1883) 24 ChD 408 (CA) at 414. See also Re Dittmer Gold Mines (No 3) [1954] SR (Qld) 275 at 282.

(46) Liquidation 143.

already been taken(47) that s 341(2) can be the source of considerable hardship both to the company itself and to third parties while contributing little to the attainment of the object of a fair distribution of the company's assets, and further that the court's power to validate dispositions has not proved in practice to be an adequate safeguard against such hardship in other countries with similar statutory provisions. The conclusion reached was, therefore, that where other factors are not decisive s 341(2) should be interpreted restrictively rather than extensively. In other words, while 'disposition' clearly has a wide meaning, even on the most restricted interpretation, it should be given no wider a meaning than is necessary.

The principal question requiring to be answered is whether 'disposition' in s 341(2) refers only to the transfer of a real right or whether it also refers to a contract for the transfer of a real right.

The Oxford English Dictionary defines 'disposition' as:

> '4. The action of disposing of, putting away, getting rid of, making over, etc .... bestowal; spec in Law, the action of disponing, bestowal or conveyance by deed or will .... 1861 W. Bell Dict. Law Scot. 292. A disposition is an unilateral deed of alienation, by which a right to property, either heritable or moveable, is conveyed.'

'Dispose of' is defined as:

> '8.c To make over or part with by way of sale or bargain, sell.'

'Dispone' is defined as:

> '4. Sc. Law. To make over, convey, assign, grant officially or in legal form.'

'Vervreem' is defined in Verklarende Handwoordeboek van die Afrikaanse Taal as:

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(47) See 231-42 above.

'Verkoop, in ander hande bring; oordra: Die ou familieplaas het hy vervreem.'

Although these definitions refer to sale, they do not distinguish between the conclusion of the contract of sale and the transfer of the real right pursuant to the sale, and one is left with the impression that both acts together are probably what is referred to. It is therefore difficult to draw any inference from the definitions as to whether 'disposition' may refer to either act separately.

Despite its importance this question has enjoyed little direct judicial attention to date even in countries such as England, Australia and India where an extensive case law has developed in relation to their counterparts of s 341(2).

In In re Wiltshire Iron Company Ex p Pearson(48) the company had sold and delivered certain iron ore to one Pearson after presentation of a winding-up petition against it, and Lord Cairns in delivering the judgment of the Court of Appeal said (without further discussion or motivation):(49)

> '...if before the winding-up order was made there was no change or disposition of property, if the iron remained the property of the company, and all between the company and Pearson continued in contract open and executory, then the 153rd section(50) has no application. Pearson is simply in the position of any other person having a claim against the company on a broken contract...'

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(48) (1868) 3 Ch App 443.

(49) At 447.

(50) The counterpart in the Companies Act 1862 of s 341(2) reading:

> 'Where any company is being wound up by the court ... all dispositions of the property, effects and things in action of the company ... made between the commencement of the winding up and the order for winding up, shall, unless the court otherwise orders, be void.'

Lord Cairns' statement is elaborated by Chitty J in *In re Oriental Bank Corporation Ex p Guillemin*:(51)

> 'In his judgment in that case he states that if before the winding-up order is made there is no change or disposition of property, but the matter still continues in contract open and executory, sect. 153 has no application. As that case originally stood upon the evidence, *Pearson*, after the presentation of the petition but without notice of it, contracted to buy iron of the company, and paid the price, but the iron was not delivered to him, nor did the property in it pass to him before the winding-up order was made; and in these circumstances it was held that inasmuch as the contract was incomplete and rested on contract only, he was not entitled to an order for the delivery of the iron, but had merely a right of proof. On further evidence being subsequently adduced it was held that the property in the iron had passed to him as purchaser before the order to wind up had been made. And it was then held that the transaction being complete as a disposition of property, the Court ought, under the discretionary power conferred by sect. 153, to confirm the transaction. This is an important authority on the construction of sect. 153, and shows that dispositions of property only are affected by the section, and that contracts are left untouched.'(52)

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(51) (1885) 28 ChD 634 at 639. See too *Clarke v West Calder Oil Company* (1882) 9 R 1017 at 1031-3.

(52) See too *In re Canadian Pacific Colonisation Corporation Ltd* (1891) 40 WR 40(Ch) in which the English counterpart of s 341(2) was held not to 'include a proof for services rendered', and *Sabapathi v Sabapathi Press Co Ltd* AIR 1930 Madras 1012 at 1016 in which the purchase of goods was held not to be a disposition, without discussion. In *Barned's Banking Company Ex p The Contract Corporation* (1867) 3 Ch App 105 the entering of The Contract Corporation on the register of members of the bank in respect of certain partly paid-up shares was held not to be a disposition by The Contract Corporation despite the fact that the result of its being so entered on the register was that it became liable for any calls that might be made on the shares. The shares had been registered in the name of a nominee of The Contract Corporation against an indemnity by The Contract Corporation for any calls that might be made on the shares. The effect of the entry of The Contract Corporation on the register of members was therefore that The Contract Corporation became liable directly to the company for any calls on the shares in lieu of the previous liability to indemnify its nominee if any calls were made on the shares. It is not clear, however,

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In Mahesh Co & Anor v The Oil Mills Ltd,(53) on the other hand, the assumption of a liability by a company was held to be a disposition within the meaning of the Indian counterpart of s 341(2) even without payment 'as it was never the intention of law to permit the directors to make a disposition of property in such an indirect manner'. However, only a brief summary of the case is reported and no further details are given.

There are also a number of other cases on the English, Australian and Indian counterparts of s 341(2) which at first sight appear to support the interpretation that 'disposition' encompasses the conclusion of a contract, although the view will be taken that on closer examination it is doubtful whether any of the cases in fact supports this interpretation.

In In re Park Ward and Company Ltd(54) the issue of a debenture was assumed, without discussion, to be a disposition within the meaning of the English counterpart of s 341(2). Now, a

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whether the court considered the assumption of a liability not to be a disposition or whether it considered that no new liability had in fact been assumed:

> 'It was said that entering the Contract Corporation on the register must lead to some subtraction of their property to satisfy their engagements, and, therefore, was in effect a disposition of their property. I apprehend that is not the meaning of the section. If a bill of exchange upon which a company was liable were dishonoured, the notice of dishonour given to the company, if they were indorsers, after their *winding-up, might lead to the subtraction or* disposition of part of their property; but it could not, as it seems to me, be contended that the holder of a bill of exchange could not give notice of the dishonour of it to the company after the winding-up had commenced' (at 118).

(53) AIR 1955 NUC (All) 3576.

(54) [1926] Ch 828.

debenture is a 'document which either creates a debt or acknowledges it'(55) and the issue of a debenture, therefore, relates to the conclusion of the contract (of loan), not to the transfer of a real right. No reasons are given in the judgment for the assumption that a debenture is a disposition, but it may be noted that the report of the case does not indicate whether the debenture was secured or not(56) and this may be the reason for the court's assumption because if the debenture was secured the giving of the security would have been a disposition.(57)

In 3 cases a sale has been treated as a disposition: Re Rushcutters Court (Pty) Ltd,(58) Re Selmar (Pty) Ltd(59) and In re A I Levy (Holdings) Ltd.(60) In the Rushcutters case the court overruled an objection that an agreement of sale was inadmissible in evidence because it was not stamped, the court holding that it was void in terms of the New South Wales equivalent of s 341(2) and therefore did not require to be stamped. However, in seeking to draw inferences from cases in Common Law countries it is necessary to bear in mind that the Common Law recognises 2 forms of ownership, ie

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(55) Levy v Abercorris Slate and Slab Company (1888) 37 ChD 260 at 263-4; Halsbury vol 7 'Companies' #813.

(56) 'The term [debenture] imports a debt - an acknowledgment of debt ... This obligation ... is in most cases at the present day accompanied by some charge or security'

(per Chitty J in Edmonds v Blaina Furnaces Company (1887) 36 ChD 215 at 219).

(57) See 399-404 below.

(58) (1978) 3 ACLR 527 (NSW).

(59) [1978] VR 531.

(60) [1964] Ch 19 at 28-9.

equitable and legal ownership, and that, unlike the transfer of ownership in South Africa, equitable ownership may pass on the mere conclusion of the contract without delivery.(61) Moreover, although equitable interests were originally personal rights they have come to resemble real rights,(62) and as Starke J said in the Selmar case:(63)

> 'I see nothing in the section to require me to limit the words "disposition of property" to a legal as opposed to an equitable disposition.'

The same reasoning, it is thought, underlies the Rushcutters and A I Levy cases. The A I Levy case, in which the court validated the sale of certain leases, can, it is suggested, be additionally explained on the basis that the court did not distinguish between the conclusion of the contract of sale (which under our law would give rise to a personal right only) and the delivery of the leases and the giving of possession of the leased premises pursuant thereto (which under our law would give rise to a real right(64)).

In The Ripon Press and Sugar Mill Co Ltd v Gopal Chetti & Others(65) the court a quo had held, and its judgment had been

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(61) Halsbury vol 16 'Equity' ## 1343-4 and vol 42 'Sale of Land' ## 183 ff.

(62) 'Although at first equitable interests were merely rights in personam against the trustee, they have come to resemble rights in rem or proprietary rights (Baker v. Archer-Shee [1927] A.C. 844)'

(Earl Jowitt & C Walsh Jowitt's Dictionary of English Law 2nd ed by J Burke (London 1977) vol 1, definition of 'Equitable interests' at 711). See also Carter v Carter [1896] 1 Ch 62 at 67.

(63) At 533(50). Cf Re Norman King and Co (Pty) Ltd (1960) 60 SR(NSW) 98 at 102-4. See generally McPherson Liquidation 143-4.

(64) See 436-8 below.

(65) AIR 1932 PC 1. See also Ramesh Chandra v Chopasni Ice Aerated Water and Oil Mills Ltd AIR 1963 Rajasthan 187.

confirmed on appeal, that the granting of a 10 year lease of fixed property should be set aside as a void disposition under the Indian counterpart of s 341(2). On further appeal to the Privy Council, the matter was decided on other grounds but the Privy Council apparently accepted that the granting of a lease is a disposition for it said:(66)

> '...so far from declaring it void under the section, it was a transaction to be confirmed almost as a matter of course.'

However, no distinction was again drawn between the conclusion of the contract of lease and the transfer of the real right by giving the tenant possession of the leased premises and it follows, it is considered, that no inference can be drawn from the case as to whether or not the mere conclusion of a contract of lease is a disposition.

The textbook writers who refer to the matter merely refer to the Wiltshire and Oriental Bank cases without comment.(67)

The word 'vervreemding' appeared without definition in the pre-Union Insolvency Laws of the Transvaal(68) and Orange Free

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(66) At 10.

(67) Pyemont's Company Law of South Africa 6th ed by M A Diemont & M A Boehmke (Cape Town 1953) 429; Lord Wrenbury Buckley on the Companies Acts 14th ed by G B Parker & M Buckley (London 1981) 573; Pennington Company Law 722; Sir F Gore-Browne Gore-Browne on Companies 43rd ed by A J Boyle et alii (Bristol 1984) #32-18; W F Hamilton Company Law 3rd ed (London 1910) 447. Pyemont Company Law 429 and Buckley Companies 575 further state that the acceptance of a bill is not a disposition, ie in effect that the assumption of a contractual obligation to make a payment is not a disposition, and they cite as authority for this statement In re London and Mediterranean Bank: Bolognesi's Case (1870) 5 Ch App 567. However, the court in fact held that the acceptance in issue was not an acceptance by the company because it had not been signed by an authorised signatory - see 427-32 below.

(68) 13 of 1895 (T).

State(69) *and it is therefore appropriate to* examine what meaning was placed on it by the courts in that context.

In Grobler v Trustee Estate de Beer(70) the Appalate Division was called upon to decide whether a payment fell within the scope of 'vervreemding' in s 33 of the Transvaal Insolvency Law which provided:

> '33. Iedere vervreemding van en ieder verband of pand op eenige gedeelte van den boedel, door den insolvent gedaan of gevestigd op eenigen tijd waarop hij de sequestratie van zijn boedel kon verwachten, tenzij zoodanige handeling plaats had ter goeder trouw en op rechtmatige consideratie, is nietig.'

In holding that a payment is a disposition Wessels AJA, as he then was, made the following general remarks regarding the meaning of 'vervreemding':(71)

> 'The Dutch word "vervreemding" which is the word used in the original text of the Insolvency Law is a literal translation of the Latin law term alienatio and this is defined by *Brissonius* as omnis actus per quem dominium transfertur.(72) Every act, therefore, by which an insolvent parts with an asset in his *estate is an alienation, whether that asset is a* corpus, a sum of money or a right of action.'(73)

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(69) Law 104 (O).

(70) 1915 AD 265. See further Cronje NO v Paul Els Investments (Pty) Ltd 1982 (2) SA 179(T) at 187-9 in which the history is *traced of* the use of 'alienation', 'disposition', 'vervreemding' and 'beskikking oor' in the pre- and post-Union insolvency legislation.

(71) At 274.

(72) Every act by which ownership is transferred.

(73) The Digest 50.16.67 expressly excludes the conclusion of the contract:

(Footnote continued on next page)

True, the question of whether the conclusion of a contract may constitute a disposition was not before the court and was not referred to by it, but the emphasis placed by the court on the transfer of the real right is unmistakeable.

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> '"Alienatum" non proprie dicitur, quod adhuc in dominio venditoris manet: "venditum" tamen recte dicetur.'
>
> (*'Anything which remains under the control* ("*in the ownership*" would be a preferable translation) of the vendor is not correctly held to have been alienated, but it still may *properly be said to have been sold*' - Scott's translation.)
>
> See also Digest 18.1.67 and Codex 5.23.1. W Modderman Handboek Voor Het Romeinsch Recht 4th ed by P A Tichelaar (Groningen 1908) sets out the position *in Roman Law as follows (at 238-9)*:
>
> > 'Vervreemding en afstand zijn rechtshandelingen, waardoor *in het algemeen alle rechten* kunnen verloren gaan.
> >
> > 'De uitdrukking vervreemden komt voor in verschillenden zin. Vooreerst beteekent vervreemding eene handeling, waardoor iemand aan een ander eene hem toebehoorende zaak overdraagt of een recht op die zaak vestigt, waardoor het eigendomsrecht wordt beperkt. In ruimeren zin wordt er mede onder verstaan *het prijsgeven van een recht, zij* het ook zonder overdracht. In den ruimsten zin omvat het ook nog het verloren gaan van een recht ten gevolge van de lijdelijkheid van den rechthebbende. Het niet gebruik maken van eene gelegenheid tot vermeerdering van het vermogen valt echter niet onder vervreemding.'
>
> J Sandé A Treatise upon Restraints upon the *Alienation of* Things translated by W S Webber (Cape Town 1892) throughout his treatise treats alienation as the transfer of ownership *(or some lesser real right)* - see eg 1.1.3.16; 1.5.1.3; 1.10.7; 2.1.13; 2.3.5; 3.3.12; 3.4.7. It is true that he does refer to various contracts, eg sale, exchange and donation, as alienations, but he does so in the context of the transfer of ownership, and he apparently means the transfer of ownership pursuant to such contracts - see eg 1.1.3.17-21; 3.3.12; 3.4.7. Paragraph 3.4.7, dealing with testamentary restraints on alienation, is *especially significant*:
>
> > '3.4.7. The first effect, therefore, of this prohibition *is that by the Justinian Law it prevents the*

The question of whether the conclusion of a contract may constitute a disposition independently of the transfer of a real right was directly in issue in Grobler v Grobler's Trustee(74) in relation to the similarly worded s 37(75) of the Insolvency Law, and Innes CJ, delivering the judgment of the Full Bench of the Transvaal Supreme Court, held:

> 'First, we are asked to set aside the sale of the five-sixths as an undue preference. Sec. 37 of the Law, under which this count is brought, refers only to "alienations, payments, mortgages or pledges." It is the parting with or burdening any of the assets of the estate which, under the circumstances detailed in the section, is declared to be a null and void transaction as against the trustee; and for my part I do not understand a prayer to declare a contract null and void as an undue preference, apart from the alienation which purported to be made in pursuance of that contract.'(76)

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transfer of dominium. There remains, however, a valid contract entered into with regard to the alienated property, by which the vendor is liable to the purchaser to carry out the contract, or to be responsible for any loss he may sustain.'

The same, it may be noted, is true of Anglo-American Common Law: In re Hubbel Trust: Hubbel et al v Hubbel et al 113 NW 512 (S C Iowa, 1907) at 515:

> '...any transfer of real estate, short of a conveyance of title, is technically not an alienation of the estate.'

(74) 1908 TS 423 at 426.

(75) '37. Iedere vervreemding van eenig gedeelte van den boedel en iedere betaling door den insolvent aan een crediteur gedaan en ieder verband of pand door hem ten behoeve van een crediteur op eenig gedeelte van den boedel gevestigd, op een tijd dat hij de sequestratie van zijn boedel kon verwachten, met het doel om zoodanigen crediteur direct of indirect boven de andere crediteuren te bevoordeelen, stelt eene onbehoorlijke preferentie daar en is mitsdien nietig...'

(76) See also:

(i) Somers NO v Lange (1895) 2 Off Rep 194 in which the insolvent had, prior to his insolvency, sold and

(Footnote continued on next page)

On the other hand, in Mosly NO v Meyer(77) a suretyship was held by the Full Bench of the Orange River Colony High Court to be a disposition within the meaning of s 83 of the Orange Free State Insolvency Law which provided:

> '83 - Iedere vervreemding, transport, geschenk, cessie, levering, verband of pand van eenige goederen, roerend of onroerend, personeel of reëel, gedaan door eenigen insolvent op eenigen tijd waarop men door bewijs kan aantoonen dat zijne schulden, billijk berekend, zijne baten, billijk gewaardeerd, te boven gingen, tenzij dezelve gemaakt zijn ter goeder trouw en op rechtmatige en geldige consideratie, zullen nul en van geener waarde zijn.'

The Court did not give any reason for its judgment beyond saying that the defendant 'was giving his credit away'. The same section

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delivered goods to the defendant on the same day. The court held that an alienation within the meaning of s 84 of Law 21 of 1880(T) had occurred and set it aside as an undue preference, but held that the defendant's claim should not be forfeit in terms of s 88 of the same Law.

(ii) Transvaal Investment Co Ltd v Springs Municipality 1922 AD 337 in which Innes CJ said, at 341, in relation to 'acquire' (in a different context):

> 'Now, juristically, the word "acquire" connotes ownership; the ordinary legal meaning implies the acquisition of dominium. To acquire a thing is to become the owner of it. No doubt it may be used in a wider sense so as to include the acquisition of a right to obtain the dominium; but the narrower meaning is the accurate and more obvious one.'

(iii) Estate Osman v Registrar of Deeds & Others 1958(3) SA 580(N) at 583D; Dormehl v The State 1964(2) PH H228(T); Kinney et al v Hofman 86 NE 2d 774 (SC Ohio, 1949).

(77) 1908 ORC 93.

was in issue again before the same Bench, now the Full Bench of the Orange Free State Provincial Division, in Trustee of Haddad Bros v Kalim & Ziady(78) and it was again taken for granted, without discussion, that the assumption by a partnership of the liability of one of the partners was a disposition within the meaning of the section.

Strangely, in none of the cases on the Transvaal and Orange Free State Insolvency Laws were any of the other cases referred to.

A question which may also be asked is whether, if the transfer of a real right pursuant to a contract will be void, the conclusion of the contract must not itself be void on the grounds of impossibility. The answer to this question, however, is that impossibility must, in order to render the contract void, be objective impossibility: the mere inability of the debtor to perform, a subjective impossibility, is not sufficient.(79)

The weight of authority is thus in favour of limiting the meaning of 'disposition' in s 341(2) to exclude the conclusion of a contract if the Insolvency Act definition does not apply, and this accords with the view already expressed(79a) that in the event of ambiguity s 341(2) should be interpreted restrictively rather than extensively. The view is accordingly expressed that if the Insolvency Act definition does not apply, 'disposition' in s 341(2) does not include the conclusion of a contract.

(3) Meaning of 'property'

As in the case of 'disposition', the meaning of 'property' in s 341(2) depends upon whether or not the Insolvency Act definition

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(78) 1912 OPD 96.

(79) De Wet & Yeats Kontraktereg 76-7; JTR Gibson South African Mercantile and Company Law 5th ed (Cape Town 1983) 72.

(79a) See 231-41 above.

applies, although, in contrast to the definition of 'disposition', the Insolvency Act definition of 'property' is narrower than the ordinary meaning. The definition and the ordinary meaning will again be examined separately. There are, however, 2 preliminary points common to both the definition and the ordinary meaning and these are dealt with first.

Firstly, the Insolvency Act definition expressly includes contingent interests in property and it is considered clear that the ordinary meaning does likewise. However, a person cannot be said to have a contingent interest in something which another may or may not choose to give or bequeath to him in the future, ie in a spes. Thus, in Stern & Ruskin NO v Appelson(80) the insolvent had been a bookmaker and had become a member of the Transvaal Bookmaker's Association Co-operative Ltd on payment of a substantial entrance fee. The regulations of the company provided for a refund of the entrance fee on the death of the member, payment to be made to any person indicated in writing by the deceased, provided that payment would be in the discretion of the board. The deceased nominated the defendant to receive the refund and the company in fact made payment to the defendant. The court held that the nomination and payment did not constitute a disposition by the insolvent of his property within the meaning of s 26 of the Insolvency Act because no property had been disposed of. The same reasoning is, it is considered, applicable to the ordinary meaning of disposition.

Secondly, the money standing to the credit of an attorney's trust bank account was held in De Villiers NO v Kaplan(81) to be the attorney's property within the meaning of the Insolvency Act definition despite s 33(3) of the Attorneys, Notaries and

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(80) 1951(3) SA 800(W) at 804 ff.

(81) 1960 (4) SA 476(C).

Conveyancers Admission Act(82) which deemed such a credit not to form part of the assets of the attorney (save to the extent of any excess in the account over the attorney's trust liabilities); however, the reasoning employed in the decision is criticised below.(83)

(a) <u>If the Insolvency Act definition applies</u>

The Insolvency Act definition of 'property' embraces all property except property situate outside South Africa and fideicommissary interests. Although the definition does not specifically refer to corporeal and incorporeal property, both are clearly included in the term as used in the Insolvency Act.(84)

In dealing with the question of what assets vest in the trustee, Mars(85) expresses the view that the reference in the definition to 'property wherever situate within the Republic' serves not to exclude property situate outside South Africa but rather to extend the operation of a sequestration order beyond the territorial limits of the particular division of the supreme court granting it. It may be noted, however, that all the decisions relied on by Mars relate to the 1916 Act in which the definition read:

> '"property" shall <u>include</u> movable or immovable property wherever situate within the <u>Union</u> ...'

while, as already pointed out, the definition in the 1936 Act is:

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(82) 23 of 1934; now s 78(7) of the Attorneys Act 53 of 1979.

(83) See 387-90 below.

(84) See eg s 83.

(85) <u>Insolvency</u> #10.6.

> '"property" means movable or immovable property wherever situate within the Republic ...'

(The underlining has been added.)

The latter definition is not, it is thought, susceptible of any interpretation other than that it is limited to property in this country; accordingly, such extraterritorial effect as a sequestration or winding-up order may have is not due to the definition of 'property' but due to the fact that sequestration and winding-up orders in one country are by the comity of nations often recognised as effective in another.(86) However, there would be no reason for another country to enforce s 341(2) in regard to property in that country when the section is expressed to only apply to property situate in this country. In any event, as will be shown in the next section, even if s 341(2) purported to apply to property wherever situate, the better view is that the recognition called for by the comity of nations does not extend to relation back provisions such as s 341(2).

Considerable difficulties can readily be envisaged in seeking to determine the situs of property such as copyright, debts owed by non-residents to the insolvent, goods in transit to and from South Africa, etc, but it is considered that it follows from the wording of the definition that the situs must be determined.

(b) If the Insolvency Act definition does not apply

The ordinary meaning of 'property' is very wide and comprehends all property, movable and immovable, corporeal and incorporeal, conditional and unconditional. The definition in Webster's Dictionary(87) is:

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(86) See eg R v Etberg 1932 AD 142 at 145.

(87) Webster's Third New International Dictionary (Springfield Massachusetts 1971).

> '... something to which a person has a legal title: an estate in tangible assets (as lands, goods, money) or intangible rights (as copyrights, patents) in which or to which a person has a right protected by law.'

Although, unlike in the case of the Insolvency Act definition, property situate outside South Africa is not excluded, the difference in practice may not be as great insofar as s 341(2) is concerned as would at first sight appear to be the case. The reason for this is that the courts of foreign countries are in any event unlikely to recognise the application of s 341(2) to property situate in those countries. As Lord Dunedin said in Galbraith v Grimshaw & Anor(88) in regard to the question of whether the doctrine under English bankruptcy law(89) of relation back of the commencement of a bankruptcy to the first act of bankruptcy applies in foreign countries:

> 'Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be the doctrine at the bottom of the cases of which Goetze v Aders (2 R 150) is only one example. But if you wish to extend that not only to the question of recognising a process of universal distribution but also of introducing the law of relation back, then it seems to me you at once get into rather great difficulties, because the question at once arises, according to which law will you apply the doctrine of relation back? If you take the law of the country of the bankruptcy, then the execution or security in question may be and often is of a kind which is quite foreign to the system of law which you are administering in the Bankruptcy Court. If on the other hand you take the law of the country of the attachment, then you have to administer a law which is quite ignorant of the precise execution or security with which it has to deal.'

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(88) [1910] AC 508 (HLE) at 513. See also Lord Loreburn LC's speech at 510 and Dicey and Morris on the Conflict of Laws 10th ed by JHC Morris (London 1980) at 705.

(89) Section 43 of the Bankruptcy Act 1883, now s 37 of the Bankruptcy Act 1914.

(4) Significance of the words 'by any company' - Involuntary dispositions

Section 341(2) avoids 'every disposition of its property ... *by any company* ...'. This contrasts with the 1926 Companies Act,(90) and the English,(91) Australian(92) and Indian(93) Companies Acts which refer to 'any disposition of the property ... of the company'. Do the underlined words imply the commission by the company of an act, thus excluding dispositions by operation of law (eg set-off, liens, prescription, *accessio*, *commixtio* and *specificatio*(94)), compulsory dispositions (eg judicial attachments, other dispositions in compliance with orders of court and expropriation(95)), the automatic delivery of future property as it comes into existence (eg pursuant to a covering cession of debts as security(96)) and other dispositions not involving an act

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(90) See s 178(2).

(91) See s 227 of the Companies Act 1948.

(92) See s 368 of the Companies Act 1931(Cth). The distinction is alluded to in *Re Dittmer Gold Mines Ltd (No 3)* [1954] SR (Qld) 275 at 283-4 as follows:

> 'Can the attorney, armed with such a power as here exists, lawfully do that which the principal may not lawfully do? The words of the section are plain. It refers to "any disposition of the property of the company" and is not confined to "any disposition by the company of its property." I see no valid reason to read the words in the latter restricted sense.'

With respect, however, a disposition effected by an agent on behalf of the company is in any event a disposition 'by the company' and therefore even in this country where the section does use the words 'by any company' a disposition effected by an agent will fall within the ambit of the section.

(93) See s 536(2) of the Companies Act 1 of 1956.

(94) See 394-5, 440-3, 450-2 and 454 below.

(95) See 454-9 below.

(96) See 411-7 below. See also 417-20 below in regard to notarial bonds which hypothecate all the grantor's movable property from time to time.

on the part of the company (eg the cancellation of a contract by the other contracting party and the dilution of the company's shareholding in another company by the issue of shares to third parties(97)); (98)

The case of Cullinan Properties Ltd v Transvaal Board for the Development of Peri-Urban Areas(99) is a strong authority for the interpretation than an act by the company is necessary. The question in issue in that case was whether an expropriation constituted a disposal within the meaning of s 27(1)(d) of the Transvaal Townships and Town-planning Ordinance(100) which provided:

> '... wherever any erf in a township is disposed of by the owner ... such owner shall pay ... an endowment to the local authority ...'

and in holding that an expropriation did not constitute such a disposal Melamet J said:(101)

> '[The dictionary definitions of "dispose of"] all contemplate or connote an act by the person who has possession of or the right to such property. Expropriation on the other hand contemplates a deprivation of rights without the co-operation of the person having such rights....
>
> 'The term "disposal" as used in sec. 27(1) of Ord. 11 of 1931(T) and as set out above was considered in the Appellate Division by Hoexter, J.A., in relation to the date thereof for purposes of

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(97) See 448-50 and 459-64 below.

(98) At common law a restraint on alienation generally applies to a voluntary alienation only and not one which takes place compulsorily or by operation of law (Digest 23.5.1; Sande Restraints 3.3. 34; Bodasing v Christie NO & Anor 1961 (3) SA 553(A) at 561A-B; M M Corbett et alii The Law of Succession in South Africa (Cape Town 1980) 362, but it is considered that little assistance is to be had from this fact in interpreting s 341(2) in view of the different circumstances.

(99) 1978(1) SA 282(T).

(100) 11 of 1931(T).

(101) At 286A - 287B.

> valuation in *Peri-Urban Areas Health Board v Tomaselli and Another*, 1962(3) S.A. 346(A.D.) at p.351, as follows:
>
> > "*...The disposal of a right connotes some legal act on the part of the person of inherence of that right. In the case of a contract disposing of a right by one party to the other the making of the contract is the legal act which disposes of the right concerned...*"
>
> The italicising above has been done by me insofar that it decides that the disposal connotes some legal act on the part of the person who has the rights, i.e. the township owner ....
>
> 'The interpretation contended for by the respondent ... ignores the words "by the owner" in the section. The section requires an act by the owner. Giving each word in the section a meaning, as is required in a proper interpretation thereof, it is clear that it is only when an erf is disposed of by the owner that endowment is payable. The interpretation of the respondent would give to the verb "dispose" which is an active verb a passive meaning and lead to a straining of the language.
>
> 'The word "dispose" requires an act by the holder of the rights - this is evidenced by the dictionary meanings to which I referred above and in my view is so found by Hoexter, J.A. in the passage to which I have referred above. Any doubt in this regard, is removed, in my view, by the insertion of the words "by the owner"....
>
> 'It is not for me to decide whether in principle there is justification for requiring endowment to be paid on the proceeds of a voluntary transaction by a township owner and not when he is deprived of rights but compensated on the same basis as if a voluntary transaction had taken place. This might well be a *casus omissus* but this Court cannot supplement such condition or section in the Ordinance, its sole duty is to construe the condition and section as it stands.'(102)

On the other hand the courts in the United States, in dealing with a similar problem under the United States Bankruptcy Act 1898,

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(102) See also *Kinloch NO & Anor v Kinloch* 1982(1) SA 679(A) at 697G - 698G; *Neilson v Abernethy* 129 P 847 (SC OKL, 1913), and *Love v Pamplin & Others* 21 F 755 (CC Tenn, 1884); but cf *Watson v Nixon* 113 A 258(C of E & A NJ, 1921).

came decisively to the opposite conclusion. Section 60b of the Act provided:

> 'If a bankrupt shall have ... made a transfer of any of his property ... and the person receiving it ... shall ... have reasonable cause to believe that the ... transfer would effect a preference, it shall be voidable by the trustee'

and 'transfer' was defined(103) as:

> 'the sale and every other and different mode of disposing of ... property.'

In Pirie v Chicago Title & Trust Co(104) the Supreme Court said:

> 'The word ["transfer"] is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished, - a preference enabling a creditor "to obtain a greater percentage of his debt than other creditors of the same class".'

Pirie's case related to the question of whether a payment was a 'transfer' and not to involuntary transfers, but the comprehensive meaning attributed to 'transfer' by the Supreme Court has been held in a number of cases to embrace involuntary transfers.(105)

Which approach are our courts likely to take in regard to s 341(2)?

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(103) Section 1(25)

(104) 182 US 438 (1901) at 444.

(105) See eg Adler v Greenfield 83 F2d 955 (CCA 2, 1936) which refers to involuntary transfers in general and Golden Hill Distilling Co v Logue 243 F 342 (CCA 6, 1917) at 347 and Wheeler v Johnson 26 F2d 455 (CCA 8, 1928) at 457 in which sales in execution were held to be 'transfers'.

Prima facie the words 'by any company' do, it is thought, connote an act on the part of the company. The objection to this approach is, however, that it would give rise to serious anomalies. These anomalies may be illustrated by the case of set-off.(106) If a company simultaneously owes a debt to, and is owed a debt by, another person the parties could either discharge the debts by 2 payments or either of them could invoke set-off. The economic consequences are identical but in the case of set-off there may well have been no act on the part of the company, and if s 341(2) requires such an act the payment by the company of its debt will only be hit by the section if made separately and not if made by way of set-off.

It follows, it is thought, that the courts will endeavour to avoid these anomalies by interpreting s 341(2) as not requiring an act on the part of the company. True, the view has already been taken(107) that if other factors are not decisive s 341(2) should rather be interpreted restrictivey than extensively, but it is thought that the anomalies that would arise if s 341(2) were to be interpreted as requiring an act on the part of the company are such that they outweigh this consideration.

It must be borne in mind, however, that the function of the courts is to interpret the law, not to make it: iudicis est ius dicere non dare.(108) It is therefore only open to the courts to hold that s 341(2) does not require an act on the part of the company if this is a possible interpretation having regard to the words used. If this is a possible interpretation, however, it is

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(106) For further examples see 454-64 below.

(107) See 231-42 above.

(108) R v Tebetha 1959(2) SA 337(A) at 346F; Steyn Uitleg 14 ff.

thought that the courts will not hesitate to adopt it in view of the anomalies that arise if an act on the part of the company is necessary. Is this, then, a possible interpretation? Melamet J in the Cullinan case apparently thought not, but he was concerned with a fiscal provision which by its nature called for a restrictive interpretation in the event of ambiguity,(109) and one may question whether he would have stated his view as categorically had he been dealing with a provision such as s 341(2). The better view is, it is suggested, albeit with some diffidence, that the words 'by any company' can be interpreted as referring not so much to the act of disposing as to the fact that the disposition is of the company's property, and that they should accordingly be given this interpretation.

If this view is incorrect there may nevertheless be a disposition within the meaning of s 341(2) where the involuntary disposition flows from a prior act by the company eg where the company incurs a debt in favour of a person who is already a debtor of the company with the result that set-off operates. No doubt, however, the prior act by the company would itself have to have taken place after the presentation of the winding-up application for s 341(2) to apply.

(5) Conditional dispositions

(a) Suspensive conditions

If a disposition made by the customer prior to presentation of a winding-up application against it is subject to a suspensive condition which is only fulfilled after presentation is the

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(109) Israelsohn v CIR 1952(3) SA 529(A) at 540F-H; Steyn Uitleg 110ff. (It may be noted, however, that Melamet J did not in fact refer to this rule of interpretation.)

disposition avoided by s 341(2)? This question may arise whether the disposition consists of the conclusion of a contract - eg the grant of an overdraft facility may be conditional upon the customer's furnishing security - or consists of the transfer of a real right pursuant to the contract - eg security may be furnished by the customer for its entire indebtedness to the bank on condition that its overdraft facility is increased. Consideration will also be given to the question of what the position is where the condition is not fulfilled.

(i) Condition not in discretion of either party

If a disposition is subject to a suspensive condition the fulfilment of which is not in the discretion of either party, it is considered that the disposition will, if the condition is fulfilled, be regarded for the purposes of s 341(2) as having taken place when the contract was concluded or the property was delivered, as the case may be, and not when the condition is fulfilled.

A similar question arose, in a different context, in Peri-Urban Areas Health Board v Tomaselli & Anor(110) in which the owners of a township donated the erven subject to the suspensive condition that the township should be approved by the Administrator.

It was argued that no disposal could be said to have taken place within the meaning of s 27(1) of the Townships and Town-planning Ordinance(111) until the condition was fulfilled and that therefore the date of disposal was the date of fulfilment of the condition. In rejecting this argument Hoexter J A said:(112)

> 'If the condition is fulfilled, then the making of the contract was the legal act of disposal ... the fulfilment of a casual

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(110) 1962 (3) SA 346(A).

(111) 11 of 1931 (T).

(112) At 351H-352A.

condition can never constitute an act of disposal on the part of either party to a contract.'(113)

The Peri-Urban decision was followed in Cronje NO v Paul Els Investments (Pty) Ltd(114) in which the question arose as to when the 6 month period referred to in s 34(1) of the Insolvency Act commences where a business is sold subject to a suspensive condition. In terms of the section the alienation of a business is void against creditors for 6 months after the alienation if the alienation is not advertised as prescribed in the section. The court, relying on the Peri-Urban case, held that the date of conclusion of the contract and not the date of fulfilment of the condition is the date of the alienation.(115)

Both the Peri-Urban and Cronje cases dealt with dispositions consisting of the conclusion of a contract and the question arises as to whether the principle enunciated in the cases can be applied to dispositions consisting of the transfer of a real right pursuant to a contract. The answer is, it is considered, in the affirmative:

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(113) See also R v De Araujo 1961(3) SA 234(T) in which the accused was held to have disposed of property despite the fact that it was subject to a reservation of ownership; Finger & Others NNO v SIR 1971 (2) SA 411(W) at 418H-419A; but cf In re Baroness Llanover, Herbert v Freshfield [1903] 2 Ch 330, considered in Lorenzo v Estate Rakagiatis & Others 1938 NPD 68 at 75-6, in which a bequest under a will was held not to be a disposition until the testator died.

(114) 1982(2) SA 179(T) at 193-7.

(115) The court also reached the same conclusion on a second ground: although the English text of s 34(1) refers to 'alienation', the Afrikaans text, the official text, refers to 'vervreemding' which, like 'disposition', is defined and includes not only sales but any contract for a sale, and a suspensive sale is a contract for, ie with a view to, a sale. It follows that even though a 'sale' subject to a suspensive condition is not classified in our law as a sale until the condition is fulfilled - see eg Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984(1) SA 1(A) - such a contract is nevertheless a disposition as a contract for a sale.

if the property is delivered subject to the condition that ownership, or whatever other real right is in question, will only pass on the happening of a future event, the transfer of ownership, or the other real right in question, will be deemed, once the condition is fulfilled, to have taken place on delivery of the property.(116)

The reasoning in the Peri-Urban and Cronje judgments is, it is considered, equally applicable to s 341(2) and accordingly if a disposition is subject to a suspensive condition the date of the disposition for the purposes of s 341(2) if the condition is fulfilled is the date of conclusion of the contract or the delivery of the property, as the case may be, and not the date of fulfilment of the condition.

If the condition is not fulfilled, the contract, or the transfer of ownership or of the other real right in question, will not take effect and there will be no disposition.

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(116) An anologous question arises where a seller has reserved ownership of the goods sold pending payment of the purchase price: if the purchaser pays the price after the seller's insolvency does ownership pass to the purchaser? An extensive literature has developed on this question - see eg MA Diemont & PJ Aronstam The Law of Credit Agreements and Hire-Purchase in South Africa (Cape Town 1982) 330ff and the other writers referred to there. The essential question is whether our law recognises conditional real rights and whether the buyer acquires such a real right in the goods sold or only a personal right to receive transfer of the ownership of the goods on payment of the purchase price. Because of the limited practical significance of the question in relation to the operation of a current banking account it is not proposed to enter the debate in this thesis and it suffices to say that the present writer supports the view of those authors who hold that our law does recognise conditional real rights and that the buyer acquires such a real right with the result that ownership does pass, which is in accordance with the views expressed above in relation to s 341(2) on the basis of the Peri-Urban and Cronje cases. See too Wessels Contract # 4919; S Scott The Law of Cession (Cape Town 1980) 40ff; DSP Cronjé Eiendomsvoorbehoud by 'n Huurkoopkontrak van Roerende Sake (unpublished LLD thesis, Rand Afrikaans University 1977).

(ii) Condition in discretion of one of the parties

If a disposition is subject to a suspensive condition the fulfilment of which is in the discretion of one of the parties, it is considered that the disposition (if any) by that party will, if it elects to fulfil the condition, be regarded for the purposes of s 341(2) as having taken place when the election took place, but that the disposition (if any) by the other party will be regarded as having taken place when the contract was concluded or the property was delivered, as the case may be.

An analogous question arose in Heydenryck v Mackie, Young & Co's Trustee & The Standard Bank.(117) The issue before the court was whether mortgage bonds rank according to their dates of registration or the dates the secured debts arise,(118) and De Villiers CJ said:(119)

> 'In that passage,(120) Voet discusses the application of the rule qui prior est tempore potior est jure to the case of a mortgage constituted for a debt which is suspended by a condition, and he does say that where a condition, the fulfilment of which is not dependent on the will of the debtor, is attached to a mortgage, the date of the constitution of the mortgage, and not of the fulfilment of the condition, is the period when the preference takes effect. In such and similar cases he holds that when once the condition comes into existence the bond will have the same effect as if no condition had been attached. He adds, however, that if the obligation to which the condition is attached be of such a nature that it cannot come into existence against the will of the debtor, it must, on the contrary, be held that he must have the preference in whose favour a later mortgage was passed for an unconditional debt before the condition of the first obligation took effect.'

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(117) (1906) 2 Buch AC 279; confirmed on appeal by the Privy Council sub nom Standard Bank v Heydenryck (1907) 3 Buch AC 145(PC).

(118) This was prior to the enactment of s 87(2) of the Insolvency Act 1916 corresponding to s 87 of the Insolvency Act 1936.

(119) At 290.

(120) 20.4.30.

The same is, it is thought, true in relation to the point in time at which a disposition can be said to occur for the purposes of s 341(2) where the disposition is subject to a suspensive condition. If the disponor has a discretion as to whether or not the condition is fulfilled the disponor has an election whether or not to dispose, and it is thought that as long as the disponor is entirely free to dispose or not it is not possible to say that a disposition has taken place. The other party, on the other hand, has no discretion as to whether or not the condition is fulfilled and it makes no difference to him whether the fulfilment of the condition is in the discretion of the first party or of a third party or is subject to chance. The disposition (if any) by him will therefore date back to the date of the conclusion of the contract or the delivery of the property, as the case may be.(121)

If a party is contractually obliged to take steps to secure the fulfilment of a condition can he be said to have a discretion as to whether or not the condition is fulfilled because he could neglect to take the required steps? The answer is, it is thought, in the negative: the fact that he could commit breach of contract cannot be equated with a discretion as to whether or not to fulfil the condition.(122)

What is the position if the party who has the discretion as to whether or not to fulfil the condition fails to exercise the discretion within the period allowed, with the result that the disposition does not take effect? The significance of this question lies in the fact that if the disposition is the conclusion of a

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(121) See also the parallel discussion regarding options at 373-5 below.

(122) Cf too the doctrine of fictional fulfilment of conditions - see eg Scott & Anor v Poupard & Anor 1971(2) SA 373(A) at 378G-H; Kerr Contract 275ff.

contract, the contract may constitute a net asset which is lost if the discretion is not exercised. Despite this, however, it is thought that no disposition occurs when the period within which the discretion must be exercised expires. A distinction must, it is thought, be drawn between the loss of rights by inaction and the failure to take up rights. These situations are dealt with below(123) and the view is taken there that the loss of rights by inaction is a disposition while the failure to take up rights is not, and it is suggested that the situation presently under discussion falls into the latter rather than the former category. Before the discretion is exercised, the discretion is the only right enjoyed by the party concerned and this right simply expires if the discretion is not exercised within the stipulated period. Only if the discretion is exercised do the other rights under the contract come into existence Accordingly, the non-exercise of the discretion is a failure to take up the other rights under the contract, not the loss of those rights by inaction.

What is the position if the party who has the discretion as to whether or not to fulfil the condition elects before expiry of the period within which the discretion must be exercised not to fulfil the condition? If the contract that would have resulted on exercise of the discretion would have constituted a net asset will a disposition of that asset be regarded as having occurred for the purposes of s 341(2)? The answer is, it is thought, that it cannot be said that the asset that the contract would have constituted has been disposed of, but that the discretion is itself an asset which is disposed of by way of abandonment, and if this disposition is avoided by s 341(2) the right to exercise the discretion will be re-instated (unless it has in any event expired in the interim).

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(123) See 450-2 below.

(b) Resolutive conditions

What is the position in regard to a disposition made by the customer if the disposition is subject to a resolutive condition? This question may arise whether the disposition consists of the conclusion of a contract - eg the grant of an overdraft facility may be conditional upon the value of shares pledged as security for the overdraft remaining above a certain amount - or consists of the transfer of a real right pursuant to the contract - eg security furnished by the customer may be conditional upon the bank's not reducing the customer's overdraft below a certain amount.

The first question to arise is whether the disposition will be regarded as having taken place when the contract was concluded or the property was delivered, as the case may be, or when the disposition becomes unconditional. The answer is, it is considered, that the date of the disposition is the date of the conclusion of the contract or the delivery of the property, as the case may be. The view has already been taken(124) that where a disposition is subject to a suspensive condition it will date back to the conclusion of the contract or the delivery of the property, as the case may be, if the condition is fulfilled and this must all the more clearly be the case where a disposition subject to a resolutive condition becomes unconditional.

The second question to arise is whether, if the condition is fulfilled and the disposition lapses, the disposition will be regarded for the purposes of s 341(2) as having been extinguished with retrospective effect, or merely as having expired, if the disposition took effect and remained effective for a period. The

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(124) See 361-7 above.

answer is, it is thought, that there was clearly a *disposition* to the extent the disposition remained effective. For example, if the disposition is a lease, or the giving of occupation pursuant to the lease,(125) and the lease is conditional upon the tenant's trading licence being renewed from time to time and during the currency of the lease a renewal is refused with the result that the lease lapses, the lease or the giving of occupation pursuant to the lease will *nevertheless be a disposition to the extent it remained* effective.

The third question to arise is whether a further disposition occurs within the meaning of s 341(2) if the condition is fulfilled and the disposition lapses. As in the case of suspensive conditions, it is appropriate to examine separately cases where the fulfilment of the condition is not in the discretion of either party and cases where the fulfilment of the condition is in the discretion of one of the parties.

(i) Condition not in discretion of either party

If a disposition is subject to a resolutive condition the fulfilment of which is not in the discretion of either party, it is considered that no further disposition occurs within the meaning of s 341(2) if the condition is fulfilled.

The rights under the contract, or the ownership of or other real right in the property concerned,(126) as the case may be, were at all times subject to the condition and therefore nothing is changed if the condition is fulfilled. True, the rights under the contract terminate, or the ownership of or other real rights in the property

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(125) See 436-8 below.

(126) Assuming that the view taken above - see n 116 - is correct that our law recognises conditional real rights.

concerned reverts,(127) as the case may be, and at first sight there may therefore appear to be a disposition. However, it is thought that the true position is that such termination or reversion was at all times inherent in the rights concerned and therefore nothing has been disposed of: the rights have simply expired. The position is analogous to contracts for a fixed period. If, for example, a lease is entered into for a year, on expiry of the year the lease automatically terminates and the right to possession reverts to the landlord, and it could hardly, it is considered, be contended that the effect of s 341(2) is to prevent the expiry of the lease or the reversion of the right of possession. The same is, it is thought, true of resolutive conditions.(128)

(ii) Condition in discretion of one of the parties

If a disposition is subject to a resolutive condition the fulfilment of which is in the discretion of one of the parties, it is considered that a further disposition by that party will, if it elects to fulfil the condition, occur should the termination result in the loss of rights of greater value than the corresponding obligations, if any, from which the party is released by the termination. A disposition will also occur if the other party has paid money or delivered other property in terms of the disposition and the money or property is returned pursuant to the cancellation.

If the exercise of the discretion results in the loss of rights only, those rights are clearly disposed of by way of

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(127) Even, it is suggested, without redelivery. If redelivery is required to retransfer the ownership or other legal right such redelivery will, it is thought, constitute a disposition.

(128) See also 448 below, dealing with the cancellation of a contract which is terminable by notice.

abandonment.[129] Where, however, the exercise of the discretion results not only in the loss of rights but also of the release of that party from obligations the position is more difficult. Must the position as a whole be looked at to determine whether on balance the party concerned is better or worse off? Or is it sufficient that rights are lost even if the corresponding obligations from which the party is released are greater?

The answer is, it is suggested, albeit with some diffidence, that the position as a whole must be looked at and that therefore there will only be a disposition if the party concerned is worse off. True, the view has already been taken that it is in general not a relevant test in seeking to determine whether a disposition has occurred to examine whether or not there has been a change in the net asset position of the party concerned. For example, if a supplier supplies goods against payment in cash there is no change in the purchaser's net asset position but the payment is nevertheless a disposition. However, it is thought that this situation cannot be extended by analogy to the situation presently under discussion. In the case of the supply of goods one asset is entirely replaced by another, and the conclusion therefore seems inevitable that the replaced asset is disposed of. In the case of the exercise of a discretion resulting in the termination of a contract, on the other hand, it is suggested that all the rights and obligations under the contract are a single net asset or liability. If the contract is a net asset the election to terminate it will be a disposition of that asset, but if it is a net liability no property is disposed of.[130]

If money paid or property delivered by the other party is returned pursuant to the termination of the contract, such return

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(129) See 443-4 below.

(130) The same question arises where a contract is varied, novated or cancelled - see 447-50 below.

will, it is considered, constitute a disposition (whether or not the election to terminate the contract is also a disposition). The terminating party had ownership of, or the other real right in question in, the money or property and such ownership or other real right is relinquished, ie disposed of, pursuant to the termination.

The position of the other party who does not have the discretion as to whether or not the condition is fulfilled is different: he is in the same position as if the fulfilment or otherwise of the condition had not been in the discretion of either party. His rights, whether personal or real, have at all times been subject to the possibility that the condition will be fulfilled and accordingly if the other party elects to terminate, his rights merely expire and there is no disposition by him within the meaning of s 341(2).(131)

If a party is contractually obliged to take steps to prevent the fulfilment of a condition can he be said to have a discretion as to whether or not the condition is fulfilled because he could neglect to take the required steps? The answer is, it is thought, in the negative : the fact that he could commit breach of contract cannot be equated with a discretion as to whether or not to fulfil the condition.(132)

What is the position if the party who has the discretion as to whether or not to fulfil the condition fails to exercise the discretion within the period allowed despite the fact that the exercise of the discretion would have resulted in the party being released from greater obligations than the corresponding rights which would have been lost pursuant to the cancellation? Is there a disposition within the meaning of s 341(2)? The answer is, it is

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(131) See 369-70 above.

(132) Cf 366 above.

thought, in the negative. The view has already been taken(133) that if a disposition is subject to a suspensive condition there will be no disposition if a party elects not to fulfil the condition despite the fact that the resulting rights would have been greater than the resulting obligations, and the same is all the more true of the situation presently under discussion.

What is the position if the party who has the *discretion as to* whether or not to fulfil the condition elects before expiry of the period within which the discretion must be exercised not to fulfil the condition with the result that the right to terminate the contract is lost? If the contract constitutes a net liability will a disposition by that party of the right to rid itself of such liability be regarded as hav[illegible]ed for the purposes of s 341(2)? This gives rise to th[illegible]n of whether the right to rid one's self of a liability is 'property', and the answer to this question is, it is suggested, that such a right is property and therefore that a disposition will be regarded as having occurred, by way of abandonment, of the right; accordingly, if this *disposition* is avoided by s 341(2) the right to exercise the discretion will be re-instated (unless it has in any event expired in the interim).

(6) <u>Options</u>

If an option is granted before, but is only exercised after, the *presentation of a winding-up application against one of the* parties, is the resulting contract avoided by s 341(2) (assuming that the contract is a disposition within the meaning of the section)? This question is of particular importance in the context of the bank

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(133) See 366-7 above.

customer relationship in view of the fact that the view has already been taken(134) that an overdraft facility is an option to borrow.

The position is, it is suggested, directly analogous to the position regarding dispositions subject to a suspensive condition, dealt with above.(135) The conclusion reached there was that if a disposition is subject to a suspensive condition the disposition will, if the condition is fulfilled, date back to the date of the contract, unless it is in the discretion of one of the parties as to whether or not the condition is fulfilled. If either party has such a discretion, the disposition (if any) by that party will occur when the party exercises his election, but the disposition (if any) by the other party who does not have such a discretion will continue to date back to the date of the contract.

An option is directly analogous to a contract subject to a suspensive condition which it is in the discretion of one of the parties to fulfil or not.(136) In the context of the grant of an overdraft facility, the customer acquires the right without any further action on the part of the bank to exercise the option and thus to bring a contract of loan into existence. The customer's contractual obligation to in due course repay the monies lent arises

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(134) See 19-21 above.

(135) See 361-7 above.

(136) As Kahn Contract points out (at 12):

> 'A *possible construction of an option which*, if unsatisfactory to the purist, nevertheless reflects reality, is that it is a contract with the obligation of the grantor subject to a potestative suspensive condition, viz. the exercise of the option by the grantee.'

Cf too Venter v Birchholtz 1972(1) SA 276(A) at 283E-H; Wessels Contract ## 1311ff.

when the option is exercised and it follows, it is thought, that *this is the date of the disposition by the customer.*(137)

If the Insolvency Act definition of 'disposition' does not apply to *s 341(2) the conclusion of a contract is not* a disposition; accordingly the question of the point in time at which the disposition occurs when the contract is preceded by an option does not *arise.*

(7) Honouring of a customer's payment instructions: customer's account in credit

In seeking to determine the extent to which s 341(2) affects the honouring by a bank of a customer's payment instructions where the customer's account is in credit, it is necessary to *distinguish* instructions to make payment to the customer from instructions to make payment to third parties. The bank's right to its charges and to set them off against the credit in the account *also calls for* separate consideration.

(a) Instructions to make payment to the customer

If a bank honours a payment instruction given by a customer in favour of the customer itself it is *considered* that *no disposition*

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(137) It may be noted *that* the *bank's obligation to advance the* monies, on the other hand, arose from the grant of the option. True, its obligation was conditional upon the exercise of the option, but once this condition was fulfilled the bank's obligation must, it is thought, be seen as arising at the time of the grant of the option. It follows that the date of the grant of the overdraft facility is the date of the disposition by the bank.

Cf too *Lindner v National Bakery (Pty) Ltd & Anor* 1961 (1) *SA* 372(O) at 378ff; D S Ribbens 'Disposal of the Undertaking or the Whole or Greater Part of the Assets of a Company' (1976) 39 THRHR 162 at 164-6; Lionel Hodes 'Disposal of Assets - s 228' 1978 SACLJ F6 at 9; Cilliers & Benade Company Law ##22.67-68; H R Hahlo 'Right of Pre-emption and Disposing of the Assets of a Company' (1961) 78 SALJ 135 at 137.

by the customer of its property within the meaning of s 341(2) occurs.

If the Insolvency Act definition of 'disposition' applies it is true that the definition expressly includes payments. It is considered, however, that in context it is only payments made by, not payments made to, the insolvent that are referred to. 'Disposition' is defined as 'any transfer or abandonment of rights to property and includes a ... payment ...', and it is thought that it follows that it is only payments in the nature of a transfer or abandonment of rights by the insolvent that are referred to, not payments to the insolvent.

This was the conclusion reached by the court in R v Goldberg & Anor(138) in which the question of whether the withdrawal of money from a bank account is a disposition by the customer was directly in issue in relation to s 132 of the Insolvency Act, and the Full Bench of the Transvaal Provincial Division, while holding that a withdrawal by partners from the partnership account for their private use is a disposition, held that a withdrawal by a sole owner is not, saying :(139)

> 'When the sole owner withdraws money from his business account for his private purposes he merely changes the position of property which is his alone and of which he alone has control.'

There is also considerable, although not unanimous, authority that payment to a person is not a disposition by that person within the ordinary meaning of 'disposition'.

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(138) 1939 TPD 461.

(139) At 463.

In Von Lindemeyer v National Bank of SA Ltd(140) the question arose as to whether the plaintiff, who had been arrested under Ordinance 63 of 1903(T), was entitled to draw cheques on his bank account in view of s 38 of the Ordinance which provided that any sale, exchange, gift or alienation of his property by a person so arrested was void. Feetham J, as he then was, held:(141)

> 'How does the section ... affect the power of an arrested person to operate on his banking account? It does not debar him from drawing a cheque in his own favour, and obtaining from the bank cash for such cheques, for in so doing he makes no alienation, but is merely collecting from the bank the debt which the bank owes him.'

Whether or not a payment to a company is a disposition by the company within the meaning of the English counterpart of s 341(2) arose in Mersey Steel and Iron Company Ltd v Naylor Benzon & Co.(142) The defendant had agreed to purchase steel from a company to be delivered in instalments, payment to be made within 3 days of delivery. After delivery of the first instalment but before payment, a petition for the winding-up of the company was presented. The defendant was advised by its solicitor that it could not safely pay the company pending the petition without the leave of the court, and asked the company to obtain an order of court sanctioning the payment. The company treated this as a repudiation of the contract and the issue before the court was whether or not the defendant's action did constitute a repudiation of the contract. Both the Court of Appeal and the House of Lords held that there was no repudiation because the defendant, while willing to pay, was bona fide under the impression that it could not do so until a liquidator had been appointed. Although not part of the ratio decidendi, several of the

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(140) 1924 TPD 228.

(141) At 239.

(142) (1882) 9 QBD 648(CA) and (1884) 9 AC 434 (HLE).

judgments in both courts touched upon the question of whether the solicitor's advice was correct or not.

In the Court of Appeal both Jessel MR and Lindley LJ considered that payment can validly be made to a company against which a winding-up petition has been presented and that the payment will not be invalidated by the subsequent grant of an order on the petition. Lindley LJ's reasoning was expressly that payment to a company is not a disposition by the company:(143)

> 'It was overlooked that s. 153(144) applies to dispositions by *the company* of its property, and not to payments to the company.'

Jessel MR gave no reason for his view but it is thought that it is implicit in his conclusion that he too must have considered that *payment to a company* is not a disposition by the company. Bower LJ did not find it necessary to refer to the question.

In the House of Lords the Earl of Selborne LC(145) likewise considered that payment to a company is not a disposition by the company of its property. Lord Blackburn, however, was more cautious:(146)

> 'There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present.... it was a bonâ fide statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment....'

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(143) At 665.

(144) The then English counterpart of s 341(2).

(145) At 440.

(146) At 443.

The remaining law lords found it unnecessary to refer to this question.(147)

The question subsequently arose again in a Scots case, Millar v The National Bank of Scotland Ltd & Others,(148) and the court, without referring to the Mersey Steel case, held that payment cannot be validly made to a company after presentation of a winding-up petition against it. However, the decision largely turned on a statutory provision peculiar to Scottish windings-up providing that the commencement of a winding-up has the effect of an attachment of the company's property in the hands of third parties and an order to make the property available.(149) The decision is therefore of little assistance in relation to the present inquiry.

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(147) This decision may be contrasted with the decision in Ponsford, Baker & Co v Union of London and Smith's Bank Ltd [1906] 2 Ch 444(CA) in which the English Bankruptcy Act 1883 was in issue. Section 43 of the Act (corresponding to s 37(1) of the 1914 Act) provided:

> 'The bankruptcy of a debtor .... shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him ....'

Fletcher Moulton L J said (at 452):

> '... a man who has committed an act of bankruptcy is not entitled to deal with his estate. He has no right to gather it in if it is not already in his hands, or to make payments to his creditors out of that which he has actually at his command. He can give no good discharge to a debtor who pays him with notice of the act of bankruptcy, because the debt may by subsequent bankruptcy proceedings be turned into a debt due to his trustee, and not to himself.'

The reason for the differing conclusions in relation to the similarly worded provisions of the Companies Act and the Bankruptcy Act is not dealt with in Ponsford's case and is obscure.

(148) (1891) 28 ScLR 884 at 889.

(149) See 262 above.

In Re Mal Bower's Macquarie Electrical Centre (Pty) Ltd(150) the New South Wales court held that payment to a company is not a disposition of the company's property within the meaning of the Australian counterpart of s 341(2):(151)

> '...if a company were to send its wages clerk up to the bank to cash the weekly wages cheque and bring back the proceeds for making out the paypackets, the payment of the cheque would involve no disposition of the company's property: the company's property belonged to it just as much when it was in the bank as when it was in the form of cash in the hands of the wages clerk. The element of disposition only enters into the situation when something passes out from the company to a disponee.'

In the United States, on the other hand, the receipt of payment of a debt has been held, although in a different context, to be a disposition:

> 'The basic issue thus presented is, does one who acquires a claim against a third person make a disposition of it when the third person pays it. The dictionary definition of "disposition" is the meaning one usually attributes to the word. It is "The getting rid, or making over, of anything; relinquishment". In this elementary and usual sense of the word, the transaction certainly falls within the statute. The estate had a chose in action, property, which it got rid of or relinquished upon payment'

(per the Circuit Court of Appeals in Herbert's Estate et al v CIR(152)). It has already been pointed out(153) that the substitution of one asset for another will constitute a disposition

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(150) [1974] 1 NSWLR 254.

(151) At 258C-D.

(152) 139 F2d 756 (CCA3, 1943) at 758. See too Bueltermann v United States 155 F2d 597 (CCA8, 1946) and CIR v Sisto Financial Corporation 139 F2d 253 (CCA2, 1943).

(153) See 334-5 above.

of the replaced asset eg if an asset is sold it is disposed of despite the fact that it is replaced by the purchase price. It has also already been pointed out(154) that the discharge of a debt is a bilateral act ie if payment is tendered to a company of a debt due to it it is necessary for the company to accept the payment for it to be effective. *It follows, it is suggested, that it is certainly* possible to conclude that if a company accepts payment of a debt due *to it* it disposes of the right to payment. On the other hand, it is thought that this approach is artificial and forced and that the better view is that the right matures, not that it is disposed of.

(b) Instructions to make payment to third parties

In seeking to determine the effect of s 341(2) on a payment made *by the bank to a third party* in accordance with the customer's instructions, the payment ought, it is suggested, to be seen as consisting of 2 payments: a payment by the bank to the customer and a payment by the customer to the third party.(155) On this approach, the payment by the customer to the third party would clearly be a disposition by the customer but the payment by the bank to the customer would not, as already pointed out,(156) be a

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(154) See 94-97 above.

(155) The view is similarly taken below (at 394-5) that set-off ought to be analysed into 2 reciprocal payments. Cf too Ram Lal v Official Liquidator, Benares Bank Ltd AIR 1942 Allahabad 141 at 142f in which money deposited with a bank was converted *by agreement into a trust fund* which accordingly enjoyed a preference on the bank's winding-up. The court held that the agreement could be treated as a notional repayment of the deposit and the immediate redeposit of the same amount on the new basis.

(156) See the previous section.

disposition by the customer; accordingly, the liquidator's claim for recovery of the payment would be against the third party, not the bank.

This was, however, not the approach of the Court of Appeal in the leading English case on the question under the English counterpart of s 341(2). In Re Gray's Inn Construction Co Ltd(157) the Court of Appeal held that a bank is in fact liable under the English counterpart of s 341(2) to refund whatever amounts it pays to third parties pursuant to a company's payment instructions after presentation of a winding-up petition against the company (unless the court otherwise orders). Buckley LJ in delivering the judgment of the court only referred to this question briefly - perhaps

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(157) [1980] 1 All ER 814 (CA). This was not the first time the question had arisen. In In re The United Ports and General Insurance Company Ex p The Etna Insurance Company (1887) 46 LJ Ch 403 a company had purported to purchase another company's business, including the debts owed to and by the seller, but the purchase was in fact void as the seller had no power to sell its business. Shortly after the purported sale a winding-up petition was presented against the seller but the purchaser continued to collect the debts due to the seller and to pay the debts due by the seller, ie to make payment of monies due to the seller to third parties in accordance with the agreement with the seller. The liquidator of the seller claimed the full amount collected by the purchaser after presentation and the purchaser tendered the net amount after deduction of the amounts paid out by it. The court, in upholding the liquidator's claim, held (at 405-6) :

> 'A line is drawn at the date of presentation of the petition. After that the company cannot deal with its assets. The rights of creditors are declared from that time; nobody can interfere with them; no payment of debts can take place without the sanction of the Court.'

It appears, however, that this decision was based on the premise that the English counterpart of s 348 backdates a winding-up to the date of presentation of the winding-up petition for all purposes - an approach which has already been considered and rejected above (at 255-73) - rather than on the premise that payment to a third party in accordance with the company's directions is a disposition. Cf, too, Re J Leslie Engineers Co Ltd [1976] 2 All ER 85(Ch) at 87d and 91g-h.

because the court in any event validated all the payments(158) - as follows :(159)

> 'Counsel for the bank does not dispute that all the payments out of the company's account to third parties ... are dispositions of the company's property .... That all such payments out must be dispositions of the company's property is, I think, indisputable .... It follows ... that unless validated under the section all the payments ... out of the company's account ... were invalid ....
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> 'It seems to me, however, that primarily these sums ... should be recovered from the creditors to whom they were paid, and that the bank should in any event only be required to repay them to the extent that the amounts, if any, which prove to be irrecoverable from those creditors exceed the dividends which would be payable in respect of them.'

The fallacy in this approach, with respect, lies in treating the entire transaction, ie both the payment by the bank to the customer *and the payment* by the customer to the third party, as void when only a readily divisible part of the transaction, ie the payment by *the customer* to the third party, is a disposition. Having approached the matter on this basis but not wishing to hold the bank liable to *refund* all the amounts it had paid out, the court proceeded to grant an order, inter alia, 'validating as between the company and the *bank* all (such) transactions'.(160) The section, however, provides that affected dispositions are 'void unless the court otherwise orders', and this wording does not readily admit of the interpretation that the court can release one of 2 parties liable to restore a void disposition while the other party remains liable.(161) With respect, however, this artificial interpretation became inevitable when the court failed to perceive that the bank

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(158) See generally 583-92 below where the case is dealt with in detail.

(159) At 818h, 819a and 823e.

(160) At 826a.

(161) See further 490-2 below.

had merely made payments on account of its indebtedness to the company and that it had therefore not been a party to any disposition of the company's property.

More satisfactory is the formulation (expressly rejected in the Gray's Inn case) in *Re Mal Bower's Macquarie Electrical Centre (Pty) Ltd*(162) in which the same question arose in relation to the New South Wales counterpart of s 341(2). The liquidator argued that :(163)

> '... the section, in prescribing that any disposition of property shall be void, is not limited so as to protect any actions done by an agent of the company in the course of effectuating a disposition by it of any of its property. He contends that the disposition is void, and that this of necessity avoids the integral steps constituting the *disposition, including, in a case such* as the present, the payment out by the bank in response to the presentation to it of cheques drawn by the company.'

The court rejected this argument as follows:(164)

> 'There is, in my view, great force in [the bank's] argument that the paying by a bank of a company's cheque, presented by a stranger, does not involve the bank in a disposition of the property of the company so as to disentitle *the bank to debit* the amount of the cheque to the company's account. The word "disposition" connotes in my view both a disponor and a *disponee. The section operates* to render the disposition void so far as concerns the disponee. It does not operate to affect the agencies interposing between the company, as disponor, and the recipient of the property, as disponee. As was put in the course of argument, if a company, after presentation of the petition, delivered goods to a carrier consigned to a purchaser, the purchaser would face the avoidance of the transaction under s.*227, but the carrier would not* be placed in the position of a

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(162) [1974] 1 NSWLR 254.

(163) At 256G-257A.

(164) At 258B-F.

> tortious handling of the goods. Again, if a company were to send its wages clerk up to the bank to cash the weekly wages cheque and bring back the proceeds for making out the paypackets, the payment of the cheque would involve no disposition of the company's property : the company's property belonged to it just as much when it was in the bank as when it was in the form of cash in the hands of the wages clerk. The element of disposition only enters into the situation when something passes out from the company to a disponee. It is the passing to the disponee which is the relevant disposition avoided by s.227. Taking further the example of a wages cheque, the giving by a company to the employee of his wages out of the cash brought back by the wages clerk would be disposition of property of the company to the employee. Alternatively, if the company gave to the employee directly a cheque for him to present to collect for himself, the handing over of that cheque would be a conditional disposition within s.227. The intermediary functions fulfilled by the bank in respect of paying cheques drawn by a company in favour of and presented on behalf of a third party do not implicate the bank in the consequences of the statutory avoidance prescribed by s.227.
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> 'The conclusion I have reached is that s.227 avoids in the hands of or as against a disponee any disposition of the property of the company made after the commencement of the winding up by the court. I do not regard this as reading additional words into the section that the legislature has not itself put there. Rather, I consider that the legislative intention, as disclosed by the terms of s.227(1), is such as to require an investigation of what happened to the property, that is to say, what was the disposition, and then to enable the liquidator to recover it upon the basis that the disposition was void. It is recovery from the disponee that forms the basic legislative purpose of s.227.'

This also appears to have been the view of Lichtenberg J in Herrigel NO v Bon Roads Construction Co (Pty) Ltd & Anor.(165) Action had been instituted against the third party payee of a cheque for recovery of the payment as a void disposition under s 341(2) and the bank had been joined as a defendant although no relief was claimed against it. Lichtenberg J remarked:(166)

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(165) 1980(4)SA 669(SWA).

(166) At 681B.

> 'Although Standard Bank was joined as second defendant in this action by plaintiff, there is, rightly in my view, no relief claimed against it by the plaintiff.'

An anologous question arose in Malk (Pty) Ltd v Franks & Solomon NO.(167) The insolvent, Levy, had sold his business to a certain Shatenstein. One of the terms of the sale was that portion of the price was to be paid to certain of the seller's creditors, including the appellant. After the seller's insolvency, his trustees sought to set aside the payments to the creditors as voidable preferences. This gave rise to the question whether any disposition by the insolvent to the creditors had occurred. The court held(168) that such a disposition had occurred in that the insolvent had abandoned portion of his right to the purchase price in favour of the creditors :

> 'Mr. Ramsbottom, for appellant, admitted, as in our opinion he was bound to admit, that the right to receive payment for the stock was abandoned by Levy, but he contended that it was an abandonment in favour of Shatenstein and not of the appellant. If the purchase consideration for the stock had been paid over by Shatenstein to Levy and then pari passu £148 8s.9d. thereof paid by Levy to the appellant there would undoubtedly have been a disposition within the terms of sec.27 of the Act, and it seems to us that in essence the arrangement between the parties was the same; it certainly had the same effect .... Under those circumstances it seems to us idle to contend that the abandonment of the right to get payment for the stock by Levy was an abandonment in favour of Shatenstein and not of the appellant.'

This approach, however, gives rise to a number of difficulties, especially in the context of the honouring by a bank of a payment instruction in favour of a third party. Assuming, as will almost

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(167) 1935 TPD 85.

(168) At 90.

always be the case, that the payment instruction does not effect a cession of a portion of the customer's claim against the bank to the third party, what property of the customer is disposed of to the third party? The claim itself is not transferred and although money is transferred it is the bank's money, not the customer's. Moreover, as will be shown below, the approach is even less satisfactory where the customer's account is in overdraft or where it is not the customer's own account but a trust account such as under the Attorneys Act.(169) In addition, the bank's position under this approach is obscure. This too is dealt with below.

The case of a payment instruction given against a trust account arose in De Villiers NO v Kaplan.(170) The argument that a payment instruction in favour of a third party should be analysed into 2 payments was raised but was rejected by the court :(171)

> 'In my view the hiatus which Mr. Snitcher seeks to conjure up between the abstraction of the amount of the cheque from Katz' trust account and the payment over of the sum to the defendant does not exist. It is only by the act of paying over the sum stated in the cheque to the respondent that the bank discharges its debt to Katz. It cannot, in my view, be taken first to have discharged the debt and then, acting in the capacity of Katz' agent, be regarded as having made a payment on his behalf to defendant.'

The court nevertheless upheld the trustee's claim to set the payment aside as a voidable preference, on the ground that the insolvent had a right of disposal over the amount in his bank account and that this right was disposed of to the payee. With respect, however, this approach led the court into an absurdity. The insolvent was an attorney and the bank account in question was his trust account. The credit in the account was therefore not part of his assets in accordance with s 33(3) of the Attorneys, Notaries and

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(169) 53 of 1979, s 78(7).

(170) 1960 (4) SA 476(C).

(171) At 478G.

Conveyancers Admission Act.(172) The court sought to overcome this difficulty as follows :(173)

> '...even although the amount in the trust account was not, while it was still in such account, an asset belonging to Katz, he had a right of disposal over such amount which right empowered him to deal with it *in such a way as to make it, or an amount* equivalent thereto, part of his assets. Clearly such a right of disposal over amounts in his trust account has a monetary value .... This right constitutes "property" within the meaning of sec.2 of Act 24 of 1936.'

However, the right of disposal referred to by the court was in fact no more than the opportunity to steal from the trust account, and this opportunity cannot be 'property'. The conclusion that the insolvent did dispose of property to the creditor is, of course, correct, but the reasoning cannot be supported.(174)

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(172) 23 of 1934; the precursor of s 78(7) of the Attorneys Act 53 of 1979.

(173) At 479 C.

(174) A similar emphasis on control as opposed to ownership is to be found in R v Goldberg & Anor *1939 TPD 461 at 463 in* which Schreiner J, as he then was, in delivering the judgment of the Full Bench said:

> 'But although a partnership is not a separate persona from the partners when the latter draw money for themselves from the firm account there is a change in the control of the money. Before the transfer *it was under the joint control* of the partners and was available for use in terms of the partnership agreement. After the transfer it is held by the *partners individually* and is no longer available for partnership purposes without some act of restoration. In my opinion the Crown proved a disposition within the meaning of the section.'

With respect, the correct analysis is that when money is paid by a partnership to a partner, the undivided shares of the other partners in the money *are disposed of to the payee*. The disposition is therefore of the shares of the other partners in the money, but not of the share of the partner who is the payee.

Nevertheless the judgment has been followed in Natal in Ensor NO v Nedbank Ltd(175) and in South West Africa in Herrigel NO v Bon *Roads Construction Co (Pty) Ltd & Anor.*(176) It was also followed by Watermeyer J, as he was bound to do, in Rousseau NO v Standard Bank of S A Ltd,(177) but, although he expressly agreed with much that had been said in De Villiers' case, he appears to have had some reservations for he commented:(178)

> 'It may well be that the true position is that when the bank appropriates money out of its own funds to pay the payee named in the cheque it thereby makes the customer the owner of the money which it pays to the payee.... *On this approach* the subject of the disposition would be the customer's money.'

Rousseau's case is also important for another reason : the bank account was in overdraft. The court dealt with the problem of what property of the insolvent's had been disposed of as follows :(179)

> 'Mr. Aaron submitted that all that this meant was that the Company had the right to borrow from the bank and that such a right *did not constitute "property" as defined in* the Act. It had no value, it could not be sold nor would the Company have "abandoned" a right if it told Volkskas it no longer required

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(175) 1978(3) SA 110 (D & CLD) at 113F-G.

(176) 1980 (4) SA 669 (SWA) at 675A-B.

(177) 1976 (4) SA 104(C) at 106F-108A. See too De Hart NO v Kleynhans & Others 1970 (4) SA *383(O)* at *387Dff*; Michalow NO v Premier Milling Ltd 1960 (2) SA 59(W); and especially S v Kotze 1965(1) SA 118 (A) at 125H-126A where the Appellate Division referred with approval to De Villiers' case in connection with the theft of trust monies.

(178) At 107 H.

(179) At 107 E.

> the facility. Whilst this might be so in general terms, it seems to me that the position was altered when once the Company decided to exercise the right by drawing a cheque on the account. Volkskas was contractually obliged to honour the cheque and did so. As a result of the transaction the defendant became richer by the amount of the cheque and the Company became poorer in the sense that it lost its right pro tanto as against Volkskas.(180) This seems to me to be just as much a disposition of property as it would have been had the account been in credit.'

Again, however, it is difficult to see what property of the company was disposed of to the payee. True, once the company had exercised the option to borrow it had a right to receive payment but this right was extinguished, not disposed of to the payee. Money was disposed of, but it was the bank's money.

It is suggested that attention is wrongly focussed in these cases on the practical mechanics of what occurred instead of on the fact that the economic effect of a payment by a debtor to a third party in accordance with the creditor's directions is identical to the economic effect of payment by the debtor to the creditor and in turn by the creditor to the third party. As Van den Heever JA said, in a different context, in R v Sibiya,(181) one should not be 'hypnotised by the concrete mechanics' by means of which a transaction is effected. It is the substance of what occurs, and not the form, which is important and to which regard should be had in determining the legal consequences of the transaction.

Malk's case and its successors were concerned with the position of the third party payee, not the bank: in fact, the bank was

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(180) It is suggested that the company in fact became poorer not because it lost its right pro tanto against the bank but because the bank's claim against it was increased. The distinction becomes material when the payment instruction is not given within the scope of an overdraft facility.

(181) 1955(4) SA 247(A) at 261B, quoted in Ensor's case supra at 114A.

apparently not joined in any of the cases. The question arises, however, whether a claim would have succeeded against the bank had it been joined. On the approach urged above that payment pursuant to a payment instruction in favour of a third party should be analysed into 2 payments, a claim against the bank would not have succeeded because payment by a bank to a customer is not a disposition. However, on the approach actually adopted in the cases, the position is less clear because it would be open to argument that, inasmuch as it is apparently the claim against the bank which is disposed of, if the disposition is void the claim is not extinguished. This would be in accord with the Gray's Inn case.

On the other hand it is by no means clear from the courts' reasoning that this would follow. Moreover, this approach would give rise to anomalies. It has already been pointed out that where a debtor pays his creditor who in turn pays a third party there can be no question of the debtor being liable under s 341(2) to re-imburse to the creditor's liquidator the amount paid by the creditor to the third party. It may be added, moreover, that it is equally clear that the liquidator would have no claim against the debtor where the creditor cedes its claim against the debtor to a third party and the debtor makes payment to the third party pursuant to the cession,(182) or where the debtor issues a cheque, bill or promissory note in payment of the debt and the creditor negotiates it to the third party.(183) These 3 situations are closely analogous to payment by the debtor to the third party in accordance with the creditor's instructions, and it is thought that the courts are likely to seek to avoid the anomaly of holding such a payment to have different consequences for the purposes of s 341(2).

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(182) Estate Fitzpatrick v Estate Frankel & Others 1943 AD 207 at 215.

(183) Illings (Acceptance) Co (Pty) Ltd v Ensor NO 1982(1) SA 570(A) at 579 C-D.

(c) The bank's right to its charges

What is the effect of s 341(2) on the bank's right to its charges for honouring payment instructions given within the scope of *a credit in the customer's account?*

If the Insolvency Act definition of 'disposition' applies to s *341(2), the contract in* terms of which the bank is entitled to its charges will be a disposition as a contract for a payment. Accordingly, if this contract was concluded after presentation of a winding-up application against the customer the contract will be void under s 341(2). This gives rise to the question of when this contract can be said to have been concluded.

The view has already been taken(184) that the bank customer relationship consists of a combination of a contract of mandate - the underlying bank customer contract - and one or more contracts of loan from time to time. The bank's right to make a charge for honouring payment instructions flows from the contract of mandate. This right arises automatically each time the customer exercises its right to direct payment of an amount due by the bank, and it is not necessary to construe a separate contract of mandate in respect of each payment instruction.

If, then, the bank customer contract was concluded prior to the presentation of the winding-up application against the customer but the payment instruction is given after presentation, is the bank's right to its charges unaffected by s 341(2) on the ground that the contract in terms of which it is entitled to its charges was concluded prior to the presentation? The answer is, it is considered, in the negative. The position is directly analogous to

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(184) See 5-21 above.

the position relating to contracts subject to suspensive conditions where the fulfilment or otherwise of the condition is in the discretion of one of the parties. The view has already been taken(185) that the disposition by the party who has the discretion regarding the fulfilment of the condition occurs when the discretion is exercised and the same is, it is thought, true in relation to the bank's right to its charges. The customer has a discretion whether or not to avail itself of the services undertaken by the bank, and it follows that the customer has a discretion whether or not to incur the liability for the bank's charges; accordingly the disposition by the customer occurs when the customer exercises this discretion, ie when the payment instruction is given.(186)

This presupposes that the services relating to each payment instruction are a divisible part of the bank customer contract which can be separately void under s 341(2), but it is considered that this is clearly so. It follows that if the payment instruction is given after the presentation of the winding-up application against the customer the bank's right to its charges will be avoided by s 341(2), but that if the payment instruction is given before the presentation, the bank's right to its charges will be unaffected by the section. On the other hand, the date when the services are rendered, ie when the payment instruction is honoured, is not relevant.

If the Insolvency Act definition of 'disposition' does not apply to s 341(2) the contract in terms of which the bank is entitled to

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(185) See 365-7 above.

(186) The relevant point in time is the time of despatch of the payment instruction to the bank, not the time of receipt by the bank - cf 132-5 above.

its charges is not a disposition and the bank's right to its charges will be unaffected by the section.

(d) Set-off of the bank's charges against the credit in the account

Where the bank's right to its charges is unaffected by s 341(2) is the bank entitled to set off its charges against the credit in the account, after presentation of the winding-up application against the customer?

The answer is, it is considered, in the negative. If the customer were to pay the charges separately the payment would clearly be avoided by s 341(2) and it would be an obvious casus omissus if the discharge of the customer's liability to pay the charges by way of set-off were not to be avoided by the section. The difficulty lies in the words 'by any company' in the section. These words at first sight appear to require an act on the part of the company and such an act may be lacking in the case of set-off. However, the view has already been taken(187) that an act on the part of the company is not required and that it suffices that the company's property has been disposed of. If this view is correct, the only question to arise is whether any of the company's property is disposed of when set-off occurs, and the answer is clearly in the affirmative. The effect of set-off is that a portion of the company's claim against the bank is extinguished ie that portion of the claim is disposed of.

The same conclusion can, it is considered, also be reached on a different basis. In dealing with the honouring by the bank of payment instructions in favour of third parties the view was

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(187) See 356-61 above.

taken(188) that the payment by the bank to the third party must be analysed into 2 payments: a payment by the bank to the customer and a payment by the customer to the third party, and that in seeking to determine the effect of s 341(2) on the bank's payment to the third party the position must be dealt with as if 2 payments had been made. The same is, it is considered, true, for the same reasons, of set-off : in seeking to determine the effect of s 341(2) on the set-off the position must be dealt with as if 2 reciprocal payments had been made.

The question of whether set-off is avoided by the Indian counterpart of s 341(2) was in issue in Naik v Das.(189) The defendant had a fixed deposit with a bank and an overdraft from the bank. The day after presentation of a winding-up petition against the bank the defendant and the bank agreed to set off the fixed deposit against the overdraft even though the fixed deposit had not yet reached maturity. The court held the set-off to be a disposition hit by the Indian counterpart of s 341(2). It must be borne in mind, however, that the position is not necessarily comparable where the set-off operates by operation of law and not by agreement.

(B) Honouring of a customer's payment instructions : customer's account in overdraft

In seeking to determine the extent to which s 341(2) affects the honouring by a bank of a customer's payment instructions where the customer's account is in overdraft it is necessary to determine what effect the section has firstly on the contract of loan arising in connection with the honouring of the payment instruction and

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(188) See 381-91 above.

(189) AIR 1954 Orissa 7 at 9; cf Couve v J Pierre Couve Ltd (in liquidation) & Anor (1933) 49 CLR 486 (HC of A); Official Liquidators Gorakhpur Electric Supply Co Ltd v Siemens (India) Ltd AIR 1940 Allahabad 514 at 516.

secondly on the payment itself. Consideration will also be given to the effect of the section on the bank's claim for its charges and to the question of whether any claim the bank may have arising out of the honouring of the payment instruction will be secured by any security the bank may hold.

(a) <u>The contract of loan</u>

If the customer's account is in overdraft a payment instruction given by the customer is in the first instance either the exercise of an option to borrow (if the payment instruction is within the scope of an overdraft facility granted by the bank) or an offer to borrow (if the payment instruction is outside the scope of such a facility).(190) This gives rise to the question of whether the resulting contract of loan is avoided by section 341(2).

If the Insolvency Act definition of 'disposition' applies to s 341(2), the conclusion of the contract of loan will be a disposition by the customer as a contract for a payment, ie the repayment of the loan together with interest, and s 341(2) will therefore apply if the disposition occurs after the presentation of a winding-up application against the customer. The question of whether, if an option is exercised, the disposition, if any, by the optionholder occurs on exercise of the option or dates back to the grant of the option has already been considered,(191) and the view taken was that the disposition by the optionholder occurs on exercise of the option. The view has, moreover, also already been taken(192) that the exercise of the option by the customer takes

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(190) See 21-4 above.

(191) See 373-5 above.

(192) See 132-5 above.

effect when notice of the exercise of the option is communicated to the bank. This will therefore be the date of the disposition where the payment instruction is given within the scope of an overdraft facility. Where the payment instruction is given outside the scope of such a facility the disposition will occur when the offer to borrow is accepted and the view has also already been taken(193) that this generally occurs when the payment instruction is honoured, although there may be exceptional cases where it occurs earlier.(194)

If the Insolvency Act definition of 'disposition' does not apply to s 341(2), the conclusion of the contract of loan will not be a disposition and the contract will not be avoided by the section.

(b) The payment pursuant to the payment instruction

The view has already been taken(195) that payments to the company itself are not avoided by s 341(2) and that payments to third parties in accordance with the company's directions must be analysed into 2 payments: a payment by the bank to the company, which is not avoided by the section, and a payment by the company to the third party, which is avoided by the section. Accordingly, if the contract of loan is not avoided by s 341(2) the payment pursuant to the payment instruction will constitute the advance of the monies lent. On the other hand, if the contract of loan is avoided by the section the bank will be limited to such claims as it may have based on unjust enrichment.

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(193) See 145 above.

(194) If the contract of loan is void in terms of s 341(2), the bank will be limited to such claims as it may have based on the principles of unjust enrichment - see 629 below.

(195) See 375-91 above.

(c) The bank's right to its charges

As in the case where the customer's account is in credit,(196) the question of whether the bank's right to its charges is avoided by s 341(2) *only* arises if the Insolvency Act definition of 'disposition' applies to the section.

In seeking to determine whether the bank's right to its charges is avoided if the definition applies, it is necessary to distinguish between cases where the payment instruction is within the scope of an overdraft facility granted by the bank and cases where the payment instruction is outside the scope of such a facility.

Where the payment instruction is given within the scope of an overdraft facility granted by the bank the position is similar to the position where the payment instruction is given within the scope of a credit in the customer's account. The customer has the right to borrow up to the amount of the facility and to direct how the amounts borrowed are to be paid. It follows that the customer has a discretion whether or not to incur the liability for the bank's charges; accordingly, the disposition by the customer occurs when the customer exercises this discretion ie when the payment instruction is given. Accordingly, if the payment instruction is given before presentation of the winding-up application, the bank's right to its charges will not be avoided by s 341(2) even if the payment instruction is honoured after presentation, but if the payment instruction is given after presentation the bank's right to its charges will be avoided.

Where the payment instruction is given outside the scope of any overdraft facility granted by the bank the payment instruction is in

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(196) See 392-4 above.

the first instance an offer to borrow and it is only if this offer is accepted by the bank that the customer has the right to direct how the amount borrowed is to be paid. In other words, the payment direction function is conditional upon the acceptance of the offer to borrow; however, even if one accepts that on fulfilment of the condition the disposition inherent in the payment direction dates back, in accordance with the principles dealt with above,(197) to the date the payment instruction was received by the bank, this will not, it is thought, assist the bank in cases where the presentation of the winding-up application against the customer occurs between the time of giving of the payment instruction and the time of the acceptance by the bank of the offer to borrow constituted by the payment instruction. The view has already been taken(198) that the functions of a cheque or other payment instruction are indivisible and it follows that if the offer to borrow function is avoided by s 341(2) the payment direction function will be simultaneously avoided. In other words, if the contract of loan pursuant to the payment instruction is avoided by the section the bank's right to its charges in respect of that payment instruction will likewise be avoided.

(d) Is the bank's claim secured by any security it may hold?

If the bank holds security from the customer for the customer's indebtedness to the bank from time to time, is whatever claim the bank may have arising out of the honouring of the payment instruction secured by the security or does s 341(2) operate to prevent this?

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(197) See 361-7 above.

(198) See 24 and 140-2 above.

(i) Mortgage and pledge

(A) Is the grant of a mortgage or pledge a disposition?

A mortgage of immovable property is constituted by an agreement to create a mortgage coupled with registration of the mortgage. A pledge is constituted by an agreement to pledge coupled with delivery of the pledged goods to the pledgee. The agreement gives rise to personal rights only, while registration of the mortgage and delivery of the pledged goods give rise to a real right.(199)

The Insolvency Act definition of 'disposition' expressly includes both mortgage and pledge. A contract for a mortgage and pledge is likewise included. If, therefore, an agreement to create a mortgage or pledge is concluded, or if the mortgage is registered or the pledged goods are delivered, the agreement or the mortgage or pledge, as the case may be, is a disposition within the meaning of the Insolvency Act definition.

If the Insolvency Act definition of disposition does not apply, the agreement to create a mortgage or pledge is not a disposition within the ordinary meaning of the word. However, it is considered that nothing turns on this because an agreement to create a mortgage or pledge does not on its own confer any security on the mortgagee or pledgee. On the other hand, the registration of the mortgage or delivery of the pledged goods is, it is considered, a disposition within the ordinary meaning of the word :

> 'It appears to me reasonably plain that a transaction by which a debtor converts an unsecured creditor into a secured creditor and thus gives him an advantage is a "disposition of property" .... Bearing in mind the apparent policy of this part of the Act I should think that such a conversion, after the commencement of the winding-up, would be inequitable and unjust'

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(199) See eg Smith v Farrelly's Trustee 1904 TS 949 at 954-5; G Wille The Law of Mortgage and Pledge in South Africa 2nd ed (Cape Town 1961) at 35ff.

(per Townley J in Re Dittmer Gold Mines Ltd (No 3)(200) in relation to the Australian counterpart of s 341(2)). A similar conclusion was reached by L. Ross in Site Preparations Ltd v Buchan Development Co Ltd(201) in relation to the Scottish counterpart of s 341(2):

> '"Disposition" is not defined in the Act, and is plainly not confined to a disposition in the sense of a conveyancing statute. In my opinion, "disposition" must be given its natural meaning. If a company creates in favour of a creditor a security over its property which attaches to the property, it is making a disposition of its property in that it is dealing with or settling or transferring its property to another.'

There are also a number of other cases in England, Australia and India in which it has been accepted, largely without discussion, that the giving of security is a disposition in relation to the counterparts of s 341(2) in those countries.(202)

The point has not been in issue in any reported case in South Africa specifically in relation to s 341(2), but it has arisen in a number of cases in which the power to mortgage or pledge despite a restraint on alienation was in issue.

In Trustees of the Insolvent Estate of Foley, alias Melville v Natal Bank(203) s 13 of the Bank Law 15 of 1875 (N) was in issue. This section required the approval of the bank's directors and

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(200) [1954] SR (Qld) 275 at 282-3.

(201) 1983 SLT 317 at 319.

(202) In re International Life Assurance Society Gibbs and West's Case (1870) 10 Eq 312; Mowatt v Castle Steel and Iron Works Company (1887) 34 ChD 58 (CA); Re Llangennech Coal Company (1887) 56 LT 475(Ch); In re Park Ward and Company Ltd [1926] Ch 828; Re Steane's (Bournemouth) Ltd [1950] 1 All ER 21 (Ch); Re Burton & Deakin Ltd [1977] 1 All ER 631 (Ch) at 634c-d; Albion Reid (SA) (Pty) Ltd v Baron Holdings (Pty) Ltd (1973) 7 SASR 564; Re Omnico Ltd (1976) 1 ACLR 381 (NSW); Tulsidas v Industrial Bank of Western India AIR 1931 Bombay 2 at 4; Anhadra Bank Ltd v Narayana Rao AIR 1955 Madras 247 at 249.

(203) (1883) 4 NLR 26.

certain other formalities for the transfer of the shares of a bank, and the question in issue was whether a pledge of the shares was valid in the absence of the same *approval and formalities.* Connor C J held :(204)

> 'The transfer of shares is conditionally prohibited. It is not to be valid, unless certain forms have been complied with; and it is expressly enacted by the *Code* (4.51.7) that, when *alienation* is prohibited, so also shall *inter alia* be deemed to be prohibited binding by pledge or hypothec. And this enactment seems to be in full force for us (Wis. & Perez. ibi; *Sand. de Prohibit.* 1.1.3(49) citing *Cod.* 4.51.7,8,28 & 34; *Hub. ad Dig.*, 27.9.(2); *Voet*, 27.9.4).'

In *Ex p De Jager*(205) a farm had been bequeathed to the applicant *subject to a restraint against selling it or disposing of* it in any manner. The Full Bench of the Natal Provincial Division held :(206)

> 'A mortgage of the farm would amount to a violation of the express terms of the will, which not only prohibits the sale of the property, but the disposal of it "*in any manner.*" *It is* true that the will does not expressly prohibit mortgage of the property, but it has been decided in this Court by Connor, C.J. in the *Trustees of the Insolvent Estate of Foley v. Natal Bank* [1883] N.L.R., 27, that the mortgage of immovable property amounts to an alienation. I think there is reason in this view, which is supported by authority, for a mortgage is a first step to a sale in execution, if the debt is not repaid. It is true that in the case of *Josef v. Mulder*, [1903] A.C., 198, the *Privy* Council, where the plaintiff sued for cancellation of a mortgage granted to a mortgagee of a property subject to a *fidei commissum*, held that he was not entitled to succeed. But that was a very different case to this.'

In *Ex p Radloff & Anor*(207) the Full Bench of the Orange Free State Provincial Division took the same view, saying :

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(204) At 29.

(205) (1926) 47 NLR 413.

(206) At 414.

(207) 1932 OPD 118 at 119. See also *Ex p Pieterse's Tutrix* 1941 OPD 12 at 14; Wille *Mortgage and Pledge* 25.

'A mortgage is after all, in effect, a conditional alienation ....'

In Josef & Others v Mulder & Others,(208) referred to in De Jager's case, a rather different question arose. A fiduciary had mortgaged the fiduciary property and the question in issue was whether the mortgaging of the property constituted an alienation of the property sufficient to bring into operation the rule that a fiduciary who alienates the fiduciary property forfeits his fiduciary rights. The Privy Council held that it did not :(209)

> 'Although no doubt Sande considers that a mortgage, as being an inchoate and potential alienation, cannot validly be made by a person prohibited from alienation(210)..., yet it does not follow that a mortgage (which is a mere charge not passing the dominium) is a breach of the prohibition of the same nature and entailing the same consequences as an act by which the dominium passes.... Indeed it would appear that if the person prohibited from alienation sells the property with an option of repurchase which he afterwards exercises, that is not a breach of the prohibition.'

In other words, Joseph's case was concerned with whether the technical requirements had been met for the forfeiture by a fiduciary of his rights, ie essentially whether the property had been alienated, and not with the question of whether property, ie any property, had been disposed of, which is the question which arises under s 341(2).(211)

When a customer grants a mortgage or pledge to the bank it transfers a real right in the mortgaged or pledged property to the

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(208) (1903) 20 SC 144 (PC).

(209) At 147.

(210) Restraints 3.3.18. See also 1.1.3.49 and Voet 27.9.4.

(211) See also Alexander's case dealt with at 413-4 below in which a cession as security was held not to be a disposition within the meaning of s 228 of the Companies Act.

bank. This transfer diminishes the customer's rights in the property, and it follows, it is considered, that a part of the property can be said to *have been disposed of by the customer to the* bank. Moreover, the object of s 341(2) is to ensure the pari passu distribution of the customer's assets(212) and this object would be frustrated in a material respect if mortgages and pledges fell outside the scope of the section; accordingly the section ought, in *the event of ambiguity*, to be interpreted so as to include rather than exclude mortgages and pledges.

It follows, it is considered, that if a mortgage bond is registered by the customer in favour of the bank, or if goods are delivered by the customer to the bank in pledge, after the presentation of a winding-up application against the customer, the mortgage or pledge will be avoided by s 341(2) and this is so whether or not the *Insolvency Act definition of* 'disposition' applies to s 341(2).

(B) Does the disposition occur when the mortgage or pledge is constituted or when the secured debt is incurred?

If the customer had already registered a mortgage bond in favour of the bank, or delivered goods to the bank in pledge, prior to the presentation of a winding-up application against the customer and if the mortgage bond or pledge secures future debts, will it secure debts which arise after the presentation or will s 341(2) operate to prevent this?

Security is of an accessory nature and it is hardly possible to speak of a security without the existence of a debt secured by the security :

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(212) See 494-514 below.

> '... it is essential that the mortgage bond should contain ... a description of the principal debt to which it is accessory .... *The real right has neither meaning nor legal efficacy* except in relation to the debt which it was intended to secure'

(per Wessels JA, as he then was, in Thienhaus v Metje & Ziegler Ltd & Anor(213)). If, then, the security is constituted before, but the debt which it secures only arises after, presentation of a winding-up application against the grantor, does the disposition of the real right of mortgage or pledge occur for the purposes of s 341(2) when the security is constituted or when the debt which it secures arises?

The accessory nature of security is well-illustrated by the common law rule(214) that the ranking of 2 or more continuing covering securities over the same property is *determined not by the* dates of establishment of the securities, but by the dates the claims secured by the securities arose :

> 'These debts, it is said, relate back to the respective dates of the registration of the bonds, and their relative priority must be regulated by the dates of the bonds. I cannot, however, find any authority *for such relating back, but, on the contrary*, the opinion expressed in 1 Dutch Consult., 291, is an express authority to the contrary. It is there laid down that where a bond is passed to secure future advances there is no mortgage until the debt is actually incurred, and the jurisconsult (S. van Beaumont) adds that, so far from the creation of the debt being drawn back to the date of the bond, it should rather be held that the constitution of the bond is deferred to the date of the incurring of the debt, on the principle that an *accessory obligation follows the principal*, and not the reverse. A similar doctrine is even more emphatically laid down by three eminent Dutch lawyers (Van Amstelredam, Van Kink and De Quesnoy) in a Consultation reported in 4 Dutch Consult., 134, and their opinion is mentioned with approval by Voet (Comm. 20, 4 30)'

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(213) 1965 (3) SA 25 (A) at 44D-F. See also De Wet & Yeats Kontraktereg 355; C G van der Merwe Sakereg (Durban 1979) at 443 and 462.

(214) Since repealed by s 87 of the Insolvency Act insofar as mortgage bonds are concerned.

(per De Villiers CJ in Heydenryck v Mackie, Young & Co's Trustee & The Standard Bank(215)).

In both the opinions referred to by De Villiers CJ the facts were that a contract had been entered into for the supply of beer, the purchaser had passed a bond in favour of the supplier securing the payment of a fixed amount on termination of the supply contract and also securing the purchase price of such purchases as might take place during the contract, and the purchaser had also passed a subsequent bond in favour of a third party securing a fixed debt which was in existence, or came into existence, on passing of the bond. The question in issue was which bondholder's claim ranked first.

In the second opinion(216) referred to by De Villiers CJ the following is said :

> 'Dunkt (onder correctie) dat naar Rechten wel geoorlooft is te maken zoodanige conventie als hier voren is verhaald ende daar voren te constitueren ende ontvangen respectivelijken speciaal ofte generaal verband van goederen; maar dat nochtans het recht van hypotheque geconstitueert bij den Debiteur voor't gene hij schuldig zoude werden en blijven ter zake van bieren die hem volgens het voorsz. contract zouden geleveert werden niet eer ingegaan en is ende begonnen heeft effect te sorteren dan ten tijde als de leveringe van die meergem. bieren datelijken gescheid ende de schuld daar mede gemaakt is overmits blijkt bij het meergem. Contract dat in't vermogen is geweest van de zelve partijen daar uit te scheiden ende te weigeren bieren te leveren ofte te ontfangen.... Zulks dat een tweede Crediteur die middelertijd ende voor date van de leveringe van die meergem.

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(215) (1906) 2 Buch AC 279 at 289-90; confirmed on appeal by the Privy Council sub nom Standard Bank v Heydenryck (1907) 3 Buch AC 145(PC).

(216) 4 Hollands Consultatien 134 2nd ed (Rotterdam 1648).

> bieren recht van hypotheque verkregen heeft op de goederen van den meergem. Debiteur uit zake van een schuld ten tijde van die constitutie van zoodanige jonger hypotheque datelijken gemaakt recht van preferentie heeft voor den opgem. eersten Crediteur.'(217)

The opinion by S van Beaumont(218) is to the same effect, although the reason given is that inasmuch as the mortgage is an accessory obligation its operation should rather be regarded as deferred until the coming into existence of the principal obligation than vice versa:

> 'Nec possit dici, debiti constitutionem fictione juris retrotrahi ad tempus constitutae hypothecae, quasi & tunc in creditum iverit d. Heerman, cum potius vice versa, hypothecae constitutio ad tempus debiti trahenda sit, & tum primum intercessisse videatur; atque ita secundum vulgare juris enunciatum, *accessorium sequatur suum principale*, non

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(217) It is considered (subject to correction) that by law it is lawful to make such an agreement as is described above and to establish and receive respectively a special or general mortgage of goods for such agreement, but that nevertheless the right of mortgage established by the debtor before he becomes and remains indebted on account of beer to be delivered to him under the said contract does not become of force and only begins to take effect at the time the delivery of the said beer actually takes place and the debt is created thereby, because it appears from the said contract that it was in the power of the same parties to withdraw therefrom and to refuse to deliver or receive beer.... Thus it is that a second creditor who in the meantime and before the date of delivery of the said beer has acquired the right of mortgage in respect of the goods of the said debtor on account of a debt immediately created at the time of the establishment of such later mortgage has a right of preference over the said first creditor.

(218) 1 <u>Hollands Consultatien</u> 291 (Rotterdam 1660).

contra.'(219)

Voet(220) cites these opinions with approval :

> 'On that basis [that the coming into existence of the secured debt was in the discretion of the mortgagee] an opinion was also given *by Jurists of Holland that if a house had been put under* obligation in presence of the law of the place by an innkeeper for indefinite beers or wines which might in future be sold or delivered to the innkeeper by a wine-merchant or brewer, a right of hypothec and a preference did not come into being proportionally except from the time when the sale and delivery of wine or beer had ensued.'

Reference may also be made to Kilburn v Estate Kilburn.(221) *Kilburn* wished to protect his wife in the event of his insolvency and passed a bond in her favour for £500 payable in the event of his insolvency, but there was no intention that this amount should be paid in any other circumstances. Wessels ACJ, as he then was, in holding the bond void, said :(222)

> '...you cannot have a settlement of a security apart from the thing which is secured, be it a money debt or the performance of an act. The settlement of a security divorced from an obligation which it secures seems to me meaningless.'

If a mortgage or pledge only takes effect when the debt it secures arises, it follows, it is thought, that the date of the

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(219) It would not be possible to say that the establishment of the debt is to be taken back by a fiction of law to the time of establishment of the mortgage, for, if and when the said Heerman [the creditor] will have gone into credit, the establishment of the mortgage must be taken forward to the time when the debt may first be seen to have arisen, and not *vice versa*; it being a general principle of the law that the accessory thing should follow its principal and not the reverse.

(220) 20.4.30.

(221) 1931 AD 501.

(222) At 505-506.

disposition for the purposes of s 341(2) must be the date the debt arises, not the date the security is established.

The same conclusion can be reached on another ground. Where the mortgagor or pledgor is not yet indebted to the mortgagee or pledgee at the time of registration of the mortgage or of delivery of the goods in pledge, the mortgage or pledge is a conditional disposition, the condition being that a debt comes into existence. Conditional dispositions have already been considered above(223) and the conclusion reached there was that if the fulfilment or otherwise of the condition is in the discretion of one of the parties, the disposition (if any) by that party occurs when the discretion is exercised. Similarly, if the fulfilment or otherwise of the condition is in the discretion of both the parties, the disposition (if any) by the parties occurs when they both exercise their discretion.

In the context of the bank customer contract, this means that if an overdraft facility has been granted by the bank to the customer the customer alone has a discretion as to whether or not a debt will come into existence and the disposition by the customer therefore occurs when it exercises this discretion ie when the customer gives the payment instruction.(224) If an overdraft facility has not been granted by the bank, the bank and the customer both have a discretion as to whether or not a debt will come into existence and the disposition by the customer therefore occurs when they both exercise this discretion ie when the bank accepts the offer to borrow implicit in the customer's payment instruction.(225)

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(223) See 361-73 above.

(224) Cf 132-4 above.

(225) Cf 145 above.

If more than one debt is incurred which is secured by the mortgage or pledge, a further disposition occurs, it is considered, as each debt is incurred.

This is a harsh interpretation of s 341(2) for banks because a bank's claim in respect of all amounts paid pursuant to a customer's payment instructions after presentation of a winding-up application against the customer will be unsecured (unless the court otherwise orders),(226) but this conclusion would appear to be inevitable on the wording of s 341(2).(227)

It may be noted that the date of performance by the bank of its obligations, ie the date it honours the payment instruction, and the due date of repayment by the customer are not relevant in determining the date of the disposition. The latter point was dealt with in the opinions by Van Amstelredam et al and Beaumont referred to above.(228) The mortgages in favour of the beer suppliers secured not only the price of beer supplied from time to time but also fixed amounts payable on termination of the supply contracts. The opinions given were that the mortgages ranked first in respect of the fixed amounts despite the fact that the amounts concerned only became due and payable after the debt secured by the second bond. The same is, it is considered, true of the performance due by the bank. True, the customer's liability is conditional upon performance by the bank, but the fulfilment or otherwise of this condition is not in the discretion of the customer once the contract

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(226) It may be noted that all the deposits to the account will also be avoided by s 341(2) - see 423-4 below.

(227) See too the discussion in 411-7 below regarding the position where the asset forming the security only comes into existence after presentation, as in a case of a cession as security of all debts from time to time owed to the customer.

(228) See too Voet 20.4.30.

has been concluded and therefore on fulfilment of the condition the disposition dates back to the date of conclusion of the contract, in accordance with the principles dealt with above.(229)

The exercise by the bank of its rights under a mortgage or pledge given to it by the customer - eg the sale of pledged goods pursuant to a right of parate executie - does not constitute a disposition by the *customer*.(230)

(ii) Cession as security

A cession as security is constituted by an agreement to create such a cession coupled with an agreement transferring the ceded right to the cessionary(231) and, it is considered, with delivery of the document embodying the right *if it is embodied in a* document.(232) The agreement to create the cession gives rise only *to a personal right* to receive transfer of the right to be ceded, while the agreement transferring the ceded right, coupled with delivery of the document embodying the right where necessary, transfers the ceded right. The exact nature of the cessionary's

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(229) See 361-7 above.

(230) Sowman & Others v David Samuel Trust Ltd (in liquidation) & Anor [1978] 1 WLR 22 (Ch) at 30 C.

(231) See eg Du Plessis v Nel 1952(1) SA 513(A) at 527A; Smith v Farrelly's Trustee 1904 TS 949 at 955; Scott Cession 5 ff, 35 ff and 135 ff.

(232) See eg Jeffery v Poliak and Freemantle 1938 AD 1 at 22; Lief NO v Dettmann 1964(2) SA 252(A) at 275 ff; the judgments of Van Blerk and Ogilvie-Thompson JJA *in Trust Bank of Africa* Ltd v Standard Bank of S A Ltd 1968(3) SA 166(A) at 172 ff and 185 ff; but see Labuschagne v Denny 1963(3) SA 538(A). See *generally* Scott op cit 19 ff.

right is disputed: one view is that the right is analogous to the right of pledge, while the opposing view is that the right is that of full ownership coupled with a personal obligation to retransfer ownership on discharge of the secured debt;(233) however, it is not necessary for present purposes to take a view on which approach is correct because the same consequences will flow on either approach.

Unlike mortgage and pledge, neither cession as security nor even cession itself is referred to by name in the Insolvency Act definition of 'disposition'. Nevertheless it is considered clear that the transfer of a right by cession is covered by inter alia the reference to 'any transfer ... of rights to property'.(234) More difficult is the question of whether the conclusion of the contract to create the cession as security is a disposition.(235) The expression 'or any contract therefor' appears to relate only to the words 'a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation' and not to the words 'any transfer or abandonment of rights to property'. The question therefore arises as to whether a contract to create a cession as security can be said to be such a contract. The answer is, it is thought, that 'delivery' is used not in the sense of physical delivery but in the sense of the legal concept of traditio, ie the transfer of possession required for the transfer of real rights such as ownership, pledge, etc, and that therefore a contract to create a cession as security is a contract for a delivery.(236)

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(233) Scott op cit 135 ff.

(234) Estate Fitzpatrick v Estate Frankel & Others 1943 AD 207 at 215.

(235) This question is probably of no practical significance - see 400 above.

(236) It may also be possible to classify the contract as a contract for a mortgage or pledge.

If the Insolvency Act definition of 'disposition' does not apply to s 341(2) the conclusion of the contract to create the cession *will not be a disposition*. The transfer of the rights by cession, on the other hand, will be a disposition within the meaning of s 341(2) for the same reasons that a mortgage or pledge is such a disposition. True, the contrary conclusion was reached in Alexander & Anor NNO v Standard Merchant Bank Ltd(237) in relation to s 228 of the Companies Act which provides that the directors of a company may not, except with the approval of a general meeting, dispose of substantially the whole of the company's undertaking or the greater part of its assets. Viljoen J held :(238)

> 'During the currency of the cession there is...no disposal in terms of the section because the cessionary cannot freely dispose of the property but is under an obligation to cede the rights back to the cedent upon payment of the debt.'(239)

However, the weight to be accorded to authorities on s 228 in seeking to interpret s 341(2) is, it is considered, limited. The object of s 228 is that investors who have invested in one type of business should not find themselves investors in an entirely different type of business without their consent. The giving of security, on the other hand, is generally resorted to with a view to raising working capital for the promotion of the company's existing business, not for a change in its business. It follows that if s 228 were to be interpreted as applying to the giving of security the

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(237) 1978(4) SA 730(W).

(238) At 741H.

(239) This conclusion had been foreshadowed in Advance Seed Co (Edms) Bpk v Marrok Plase (Edms) Bpk 1974 (4) SA 127 (NC). See also Cilliers & Benade Company Law #22.68; Henochsberg Companies 402; Lionel Hodes 'Disposal of Assets - s 228' 1978 SACLJ F6; but cf DS Ribbens 'Disposal of the Undertaking or the Whole or Greater Part of the Assets of a Company' (1976) 39 THRHR 162 at 165.

effect would be to extend the area of application of s 228 to a field it was never intended to apply to. There were therefore compelling reasons for the court to hold that 'dispose of' in s 228 does not include the giving of security. The same cannot, however, be said of s 341(2). As already pointed out,(240) the object of s 341(2) is to secure the pari passu distribution of the company's assets and this object would be frustrated in a material respect if the giving of security were to be held to be outside the ambit of the section.

If the cession as security secures future debts and the cession is established before, but the secured debts arise after, presentation of a winding-up application against the cedent, the same problems arise as in the case where a continuing covering mortgage or pledge is established before, but the secured debts arise after, presentation(241) and the answer is, it is considered, the same: the date of the disposition is the date each secured debt arises not the date the cession is established.

Moreover, a further similar problem arises where future debts are ceded eg where the cession as security is expressed to be of all debts from time to time owed to the cedent. What is the position if the cession as security is executed before, but the ceded debts arise after, presentation of a winding-up application against the cedent? Is the date of the disposition the date of execution of the cession as security or the date the ceded debts come into existence?

The latter problem does not arise in regard to mortgage bonds inasmuch as a mortgage bond cannot be passed over the mortgagor's immovable property generally from time to time.(242) Nor does it

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(240) See 404 above.

(241) See 404-11 above.

(242) Section 53(1) of the Deeds Registries Act 47 of 1937.

apply to pledges because a pledge is constituted not by agreement alone but by agreement coupled with delivery of the pledged goods. If, therefore, the property to be pledged only comes into existence after presentation, *and hence is only delivered after presentation*, such delivery in pledge will, as already pointed out,(243) constitute a disposition at that date notwithstanding that the agreement of pledge may have been concluded before presentation and may refer to all property delivered from time to time by the debtor to the creditor.

A cession as security differs from a pledge in that there is no physical delivery of the ceded debts, at least where the debts are not embodied in a document. At first sight, therefore, it may seem that the agreement of cession is all that is required to constitute the cession. However, *it is necessary to have regard to the fact* that a cession consists of 2 parts : the agreement in terms of which the cedent undertakes to deliver the ceded debts to the cessionary and the agreement in terms of which the delivery is actually effected. Such delivery is effected by the intention of the parties to divest the cedent of the debts and to vest them in the cessionary, and as Thirion J said in delivering the judgment of the Full Bench of the Natal Provincial Division in Muller NO v Trust Bank of Africa Ltd & Anor:(244)

> 'Now, I fail to see how the parties can have a present intention to divest the cedent of a right and to vest it in the cessionary when the cedent is not at present vested with the right and where the right is as yet not in existence.'(245)

The court accordingly held that where a debt comes into *existence after sequestration it will not be subject to a cession*

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(243) See *400-404* above.

(244) 1981 (2) SA 117(N) at 125H.

(245) Cf too Buckley Companies 573 dealing with general liens.

granted to a creditor prior to sequestration, as this is barred by the fact that a concursus creditorum is established on sequestration and the rights of creditors and the order of the priority of their claims *have to be determined as at that date*.(246)

In the earlier case of Sarwill Agencies (Pty) Ltd v Jordaan NO,(247) not referred to in the Muller case, Myburg J sitting alone in the Transvaal Provincial Division came to the opposite conclusion. True, the case related to a company in liquidation and not an individual, and Myburg J emphasised the fact that in the case of a company in liquidation, unlike the case of an individual, the company's property remains vested in it; despite this, however, it is considered that his reasoning is irreconcilable with that in the Muller case. Myburg J held :(248)

> '...the security was continuous and the liquidation order did not change the continuous nature of the security.... In my view, the concursus creditorum did not terminate the continuous provisions of the security bond.'

With respect, however, Thirion J's approach is to be preferred, especially in relation to s 341(2). A cedent can agree to cede a future debt but the cession can only take place once the debt has come into existence, and it is at that moment, ie the moment that the cession occurs, that the disposition of the company's property takes place. Where the debt is embodied in a document this is clear because the document has to be delivered to the cessionary. Where the debt is not embodied in a document, the delivery may, in accordance with the agreement under which the cedent undertook to deliver the debts, take place automatically without any further

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(246) See 168 above.

(247) 1975 (1) SA 938 (T).

(248) At 943D.

expression of intention by the parties, but the delivery nevertheless occurs, with the result that the company's property is disposed of.(249)

(iii) Notarial bonds

A notarial bond of movables differs from mortgage, pledge and cession as security in that it does not - subject to 2 exceptions dealt with below - confer a real right in the bonded property on the bondholder.(250) Instead, a notarial bond confers a statutory preference(251) in respect of the proceeds of the bonded property. A notarial bond is constituted by an agreement to create the bond coupled with notarial execution and registration in the deeds registry of the bond. The bond is effective from registration. The bonded property is not normally delivered to the bondholder.(252)

The Insolvency Act definition of 'disposition' does not refer to notarial bonds by name but it is considered that it is clear that

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(249) The question may be asked whether it makes a difference if, contrary to the view taken above (at 356-61), it is held that the words 'by any company' in s 341(2) do require an act on the part of the company. The answer is, it is thought, in the negative. Although the delivery of new debts takes place automatically in accordance with the original expression of intention, *such expression of intention should not*, it is thought, be seen as a once and for all act but as a recurring act which recurs each time a new debt comes into existence.

(250) Definitions of 'security' and 'special mortgage' in s 2 of the Insolvency Act; Adolph Mosenthal and Co v The Master & Feinberg's Trustees 1931 CPD 155 at 164; Wille Mortgage and Pledge 55-6.

(251) Section 102 of the Insolvency Act read with s 342(1) of the Companies Act.

(252) If the bonded property is delivered to the bondholder the bond is converted into a pledge - see below.

the expression 'mortgage' is used in the Act in its wider sense encompassing notarial bonds and not in the narrower sense of the mortgage of immovable property.(253) This is clearly evidenced eg in the definition(254) of 'special mortgage':

> '"special mortgage" means a mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section one of the Notarial Bonds (Natal) Act, 1932 (Act No. 18 of 1932), but excludes any other mortgage bond hypothecating movable property.'

It follows that both the agreement to create a notarial bond and the registration of the bond constitute dispositions within the meaning of s 341(2) if the Insolvency Act definition applies.

If the Insolvency Act definition does not apply the question arises as to whether the fact that the statutory right of preference in respect of the proceeds of the sale of the bonded property comes into existence on registration can be said to be a disposition within the ordinary meaning of the word.

If the registration of a notarial bond is not a disposition within the meaning of s 341(2) this would clearly be a casus omissus and a court will strive to avoid this result if at all possible.(255) It is suggested, moreover, that while technically

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(253) In regard to the different meanings of 'mortgage' see generally H Silberberg & J Schoeman The Law of Property 2nd ed (Durban 1983) 427; Wille Mortgage and Pledge 1; Maasdorp's Institutes of South African Law vol II The Law of Property 10th ed by C G Hall (Cape Town 1976) 212. For an example of the narrow meaning see s 102 of the Deeds Registries Act 47 of 1973 which defines 'mortgage bond' as a 'bond ... hypothecating immovable property'.

(254) Section 2.

(255) Dhanabakium v Subramanian & Anor 1943 AD 160 at 170-171; Steyn Uitleg 124.

the rights conferred on the bondholder by a notarial bond may not be real rights at common law, the statutory right of preference is in fact sufficiently analogous to a real right for the conclusion to be reached that notarial bonds can be equated with mortgage bonds for the purposes of s 341(2), and it is thought that this is the conclusion the courts are likely to reach.

Support for this interpretation is, it is thought, to be found in Ram Lal v Official Liquidator, Benares Bank Ltd.(256) The plaintiff had a deposit with the Benares Bank Ltd at the time of presentation of the winding-up petition against the bank; thereafter, before the granting of the winding-up order, the plaintiff entered the employment of the bank and as a term of his employment was required to deposit a similar amount with the bank as security to answer for his good behaviour. This was done by converting the ordinary deposit to a security deposit. Under Indian law such security deposits had the status of a trust fund and therefore enjoyed a preference not enjoyed by ordinary deposits. The court held that a disposition had occurred within the meaning of the Indian counterpart of s 341(2). The effect of registration of a notarial bond is similar and should, it is thought, give rise to the same conclusion.

There are 2 cases where the problem dealt with above does not arise. Firstly, if the mortgagee has possession of the mortgaged assets, the bond will constitute a pledge(257) and will clearly be a disposition as set out above.(258) Secondly, the same is true of

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(256) AIR 1942 Allahabad 141, but cf Site Preparations Ltd v Buchan Development Co Ltd 1983 SLT 317 in which Lord Ross said (at 319) that he was inclined to think that a floating charge is not a disposition because, unlike a fixed charge, it does not attach to the property.

(257) See eg International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd & Anor 1983(1) SA 79(C) at 84D-E; Wille Mortgage and Pledge 55-6.

(258) See 400-404 above.

bonds passed in Natal in terms of the Notarial Bonds (Natal) Act,(259) s 2 of which provides :

> 'Movables specially hypothecated by a notarial bond shall...be deemed to have been pledged to the holder of the bond...'

Moreover, if the mortgaged assets are at any time delivered to the mortgagee thus elevating the mortgagee's rights to those of a pledgee such delivery will constitute a disposition.(260)

If the notarial bond secures future debts and the bond is registered before, but the debts arise after, presentation of a winding-up application against the grantor of the bond, the same problems arise as in the case where a continuing covering mortgage or pledge is established before, but the secured debts arise after, presentation.(261)

If the notarial bond bonds future property eg if it bonds the grantor's stock-in-trade from time to time, when does the disposition occur: on registration of the bond, or on acquisition of the property? The answer is, it is thought, that a disposition occurs on the acquisition of each new item, on analogy with the position regarding cessions of future debts as security.(262)

(iv) Cash deposit

A cash deposit may also be given as security eg a customer may

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(259) 18 of 1932.

(260) International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd & Anor supra at 85C; R v Kruger 1956 (2) SA 201 (A) at 206B. See further 456-7 below.

(261) See 404-11 above.

(262) See 414-7 above.

furnish one of the bank's own fixed deposits as security.(263) The arrangement may take various forms : eg the bank may be satisfied with the mere existence of the deposit, or the bank may require that the customer should undertake not to cede its rights in the deposit to a third party, or the bank may require a cession to itself by the customer of the customer's rights in the deposit as security for its indebtedness to the bank. The security to the bank lies in the fact that it may set off the proceeds of the deposit against its claim. The arrangement may be that the bank may do so at any time, or on maturity of the deposit, or on default by the customer, etc.

Where the customer's rights to the deposit have not been ceded to the bank as security, the arrangement relies entirely on set-off and the view has already been taken(264) that s 341(2) operates to render a set-off void if it occurs after presentation.

Where the customer's rights to the deposit have been ceded to the bank as security,(265) the position will, it is considered, be the same as for any other cession as security.(266)

(9) Other specific transactions

Banks are at one time or another involved in most types of

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(263) Another common form of such a deposit is the deposit a purchaser of a fixed property is commonly required to make before the bank will issue an undertaking to the seller to pay the purchase price of the property on registration of transfer to the purchaser.

(264) *See 394-5 above.*

(265) It is assumed that such a cession is legally possible: see Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd 1968 (3) SA 166(A) at 172 and 184, but cf Farmers Co-op Ltd v The Master 1959 (3) SA 342 (SR) at 345.

(266) *See 411-7 above.*

transactions with customers, either directly or indirectly through cessions of debts granted to them by customers. Consideration will therefore be given in what follows to the question of whether various other transactions are avoided by s 341(2). As will be seen, the answer is often straightforward but all too often this is not so. The chief problem areas are transactions involving the grant of a right, either real or personal, less than full ownership (eg usufruct, lease and option), transactions the effect of which is similar to a disposition but which may not normally be referred to as such (eg compromise), the loss of rights by breach of duty (eg breach of contract) or by inaction (eg prescription) or by the failure to take up rights (such as a rights issue or option) and involuntary dispositions (eg expropriation, share issues which dilute existing shareholdings, accessio and dispositions in compliance with an order of court).

(a) Payment

The view has already been taken(267) that payment to the customer or to a third person in accordance with the customer's directions is not a disposition by the customer within the meaning of s 341(2).

Payment to a person authorised to receive payment on behalf of the customer is likewise not a disposition by the customer, nor is the grant by the customer to the agent of the authority to receive payment,(268) although if the agent seeks to invoke set-off of the payment against a debt owed to him by the customer the set-off will constitute a disposition.(269)

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(267) See 375-91 above.

(268) North West Construction Co (Pty) Ltd v Marian [1965] WAR 206.

(269) See 394-5 above.

Payment to the cessionary of a debt ceded by the customer is similarly not a disposition by the customer, *although the cession* is.(270)

Payment by the customer, on the other hand, is *clearly a* disposition. The Insolvency Act definition expressly includes the making of payments and clearly they are also included in the ordinary meaning of the word :

> 'When a customer's account with his banker is overdrawn he is a debtor to his banker for the amount of the overdraft. When he pays a sum of money into the account, whether in cash or by payment in of a third party's cheque, he discharges his indebtedness to the bank pro tanto. There is clearly in these circumstances, in my judgment, a disposition by the company to *the bank of the amount of the cash or of the* cheque. It may well be the case, as counsel for the bank has submitted, that in clearing a third party's cheque and collecting the amount due on it, the bank acts as the customer's agent, but as soon as it credits the amount collected in reduction of the customer's overdraft, as in the ordinary course of banking business it has authority to do in the absence of any contrary instruction from the customer, it makes a disposition on the customer's behalf in its own favour discharging pro tanto the customer's liability on *the overdraft ....* In the present case the company's account with the bank was overdrawn, so I need not consider what the position would have been if any cheque had been paid in when the account was in credit, but I doubt whether even in those circumstances it could be properly said that the payment in did not constitute a disposition of *the* amount *of the cheque in* favour of the bank'

(per Buckley LJ in Re Gray's Inn Construction Co Ltd(271)). The

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(270) Estate Fitzpatrick v Estate Frankel & Others 1943 AD 207 at 215; Dreyer's Trustee v Hanekom 1919 CPD 196 at 201-2; Trustee Insolvent Estate Klukowski v Hesselmann 1923 SWA 16; Gorringe v Irwell India Rubber and Gutta Percha Works (1887) 34 ChD 128 (CA) at 133 and 135; Re Toocooya Investments (Pty) Ltd 1978 *(3) ACLR 252 (NSW)*.

(271) [1980] 1 All ER 814 (CA) at 818e-h. See too Grobler v Trustee Estate De Beer 1915 AD 265 at 273-4; In re Clifton Place Garage Ltd [1970] Ch 477 (CA) at 483H-484A and 494C. But see The National Bank's Case (1873) 28 LT (Eur Arb) 92 in which
(Footnote continued on next page)

view expressed by Buckley LJ is, it is considered, clearly correct. Even where the customer's account is in credit ownership of the money is transferred to the bank and is replaced by a right against the bank to repayment.(272) The money is therefore disposed of to the bank, just as goods sold and delivered are disposed of even though they are replaced by the purchase price.

Where payment is made by the customer to a person authorised to receive payment on behalf of the creditor the position will be the same as if payment had been made direct to the creditor. Where, however, payment is made to an intermediary as principal and the intermediary in turn makes payment to the creditor, the disposition by the company is to the intermediary and not the creditor. Thus, in Re J Leslie Engineers Co Ltd(273) 2 payments were made to a

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(Footnote continued from previous page)
Lord Westbury, sitting as an arbitrator, said (at 94):

> 'Whether [the English counterpart of s 341(2)] does or does not include the actual payment of a bonâ fide debt may admit of very great doubt; taking the words "effects" and "property", and so on, it would be very difficult to hold that the payment of a bonâ fide debt is the disposition of the property, or effects, or things in action of the company.'

(272) Cf Ovenstone v SIR 1980(2) SA 721(A) at 735B in which Trollip JA said (in the context of s 7(3) of the Income Tax Act 58 of 1962):

> 'Hence, "disposition" in its ordinary, wide sense would include a loan of money (mutuum) even though the borrower has to repay an equivalent sum, for the lender parts with, gives or makes over the rights to or dominium of the money to the borrower when it is advanced to him. Voet 12.1.14 (Gane's trans vol 2 at 768) puts it lucidly:
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> > "The effect of a loan on the side of the lender is that both the ownership in and the risk of consumable things lent passes to the receiver. It is settled that in loan an alienation of the articles lent takes place, and that not the articles themselves which were measured, weighed or counted out, but only others like them ought to go back to the lender".'

(273) [1976] 2 All ER 85 (Ch) at 89h-91c.

creditor of the company. The first payment was drawn by the company's employees from the company's bank account in cash and the cash was used by the employees concerned to purchase money orders in favour of the creditor. The second payment was transferred from the company's bank account to the bank account of a director and a cheque was then drawn by the director on the latter account in favour of the creditor. The court held that the first transaction was a disposition by the company to the creditor and not a disposition by the company to the employees concerned inasmuch as both the cash and the money orders were at all times the property of the company until they passed into the hands of the creditor. On the other hand, the second transaction was a disposition by the company to the director and not a disposition by the company to the creditor inasmuch as the company's moneys first became the property of the director before he in turn disposed of them to the creditor.

(b) Loans of money

Loans of money by the bank to the customer have already been considered(274) and the view taken was that the conclusion of the contract of loan is a disposition by the customer as a contract for a payment (the repayment of the monies lent) if the Insolvency Act definition applies but is not a disposition if the definition does not apply, that the advance of the monies lent is not a disposition and that the repayment of the monies lent is a disposition.

Loans of money by the customer to the bank(275) are subject to similar considerations. The conclusion of the contract of loan is a disposition by the customer as a contract for a payment (the advance

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(274) See 396-7 above.

(275) eg by a deposit to the customer's account at a time when the acccount is in credit.

of moneys lent) if the Insolvency Act definition applies but is not a disposition if the definition does not apply, the advance of the moneys lent is a disposition and the repayment of the moneys lent is not a disposition.

Loans of property other than money for use or consumption are dealt with below.(276)

(c) Suretyship

If the Insolvency Act definition of 'disposition' applies to s 341(2), the conclusion of a contract of suretyship is a disposition as a contract for a payment.(277)

If the definition does not apply, the conclusion of a contract of suretyship is not a disposition. True, in Mosly NO v Meyer(278) dealt with above(279) it was held that the giving of a suretyship was a disposition within the meaning of s 83 of the Orange Free State Insolvency Law, but the view taken above was that the decision is incorrect, at least in relation to s 341(2).

If the suretyship applies to future debts, will it apply to debts which arise after presentation of the winding-up application against the customer or will s 341(2) operate to prevent this? A suretyship for future debts is a conditional disposition, the

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(276) See 438-9 below.

(277) Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd 1965 .2) SA 597 (A).

(278) 1908 ORC 93.

(279) See 350 above.

condition being that the debts in fact arise. Generally, the fulfilment or otherwise of this condition is not in the discretion of the surety; accordingly, once the condition is fulfilled the *disposition will date* back to the date of the conclusion of the contract of suretyship in accordance with the principles dealt with above,(280) and if this date precedes the presentation of the winding-up application s 341(2) will not operate to avoid the suretyship's applying to post-presentation debts. The position is different if it is in the discretion of the surety as to whether or not the guaranteed debts arise: if the surety has such a discretion the date of exercise of the discretion will be the date of the disposition.(281)

If the surety has the right to terminate the suretyship at any time in relation to future debts, can it be said that the surety has a discretion as to whether or not the condition is fulfilled and that therefore s 341(2) will operate to avoid the suretyship's applying to post-presentation debts? It is suggested, albeit with some diffidence, that the answer is in the negative. Direct authority is lacking, but it is thought that an analogy can be drawn with the failure to take up rights. The view taken below(282) is that the failure to take up rights is not a disposition, and if this view is correct, it follows that the failure to rid one's self of an obligation would likewise not be a disposition.

(d) Drawing, acceptance and indorsement of bills and making and indorsement of promissory notes

If a company draws, accepts or indorses a bill of exchange or

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(280) See 361-7 above.

(281) Cf the discussion in regard to security for future debts in 404-11 above.

(282) See 452 below.

makes or indorses a promissory note it assumes an obligation to honour the bill or note. Is this assumption of an obligation a disposition within the meaning of s 341(2)?

If the Insolvency Act definition of 'disposition' applies to the section the assumption of the obligation will be a disposition provided that it can be said to be a contract for a payment.(283) This gives rise to the question of whether a drawer's, acceptor's, indorser's or maker's liability is contractual in nature or not.

Various theories have been put forward to explain the basis of a party's liability on a negotiable instrument.(284) The principal theories can be classified into 2 broad categories: the creation theory and the contract theory.

Malan(285) deals with the creation theory as follows:

> 'The creation theory founds the cambial obligation on a unilateral and abstract act of the debtor, namely his signing the instrument. According to this theory, consensus is not necessary to create liability. Although there are many variations to this theory none of them can be accepted. It is simply not correct to elevate the mere signature on a bill to a declaration of an intention to be bound. The drawer does not intend to pay every holder, regardless of his title. These theories proceed from the exceptional case. They seek to explain the cambial obligation primarily in those cases where the signatory is held liable despite the fact that he never intended to bind himself, or where he delivered the bill for a specific

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(283) See further 466 below dealing with the incurrence of a liability otherwise than by contract.

(284) See eg FR Malan 'Evolusie van die wisselreg' 1976 TSAR 1; Malan Bills of Exchange ##13-16.

(285) Malan Bills of Exchange #14.

> purpose only. They are not based on the normal situation where the signatory binds himself contractually to his immediate party on the bill. A theory founded on exceptionals is unrealistic and impractical; any tenable theory has to proceed from the normal situation.'

To Malan's criticism of the creation theory one may add that the acceptance of the theory would entail the acceptance of a new source of obligations in our law, and it is suggested that the courts are likely to endeavour to classify the liability of a party to a bill under one of the existing sources of obligations rather than to recognise an entirely new source.

The contract theory is dealt with by Malan(286) as follows:

> 'In recognising that the cambial obligation is principally a contractual obligation the contract theories have a more realistic point of departure. Exponents of these theories realise that contract alone does not provide a satisfactory solution for all cases in which liability is imposed on the signatory to a bill, and complement the contract theory by invoking the doctrine of the protection of the good faith (Rechtsscheinprinzip) as a subsidiary source of the cambial obligation.
>
> 'The Bills of Exchange Act 1964 supports this approach: No person is liable as drawer, acceptor or indorser of a bill if he has not signed it as such, but his signature alone does not suffice. Liability is in principle based on contract and no contract on a bill is complete and irrevocable until delivery of the instrument in order to conclude the contract. However, if a bill is in the hands of a holder in due course a valid delivery by all parties prior to him making them liable to him is conclusively presumed. By conclusively presuming delivery to have taken place liability to a holder in due course is rendered independent of contract. Liability to him is founded on the protection of his good faith, not on contract ....'
>
> 'A bill in the hands of a third person creates the appearance that the signatory, whether drawer, acceptor or indorser, has

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(286) Malan Bills of Exchange ##15-16.

> bound himself contractually on it. Having created the appearance of contractual liability, he is held(287) liable to a holder in due course. [The Afrikaans edition(287) reads: 'Aangesien hy die skyn van kontraktuele aanspreeklikheid geskep het, word hy kontraktueel aanspreeklik gehou.'] Liability to a holder in due course is not founded on contract or fault, but rests on objective foundations.'

It is thought, however, that Malan goes too far in saying that the signatory's liability is not based on contract. As he himself says, the signatory is deemed to be bound contractually, and it is suggested that it is preferable to conclude that this contractual liability arises from a contract formed according to special rules applicable to negotiable instruments than that it arises from a special source of obligations.(288) The suggested approach departs less from the general rules of our law and is therefore, it is believed, more likely to find favour with the courts. It is also significant that the courts commonly refer to the liability of a party to a bill or note as being contractual.(289) Furthermore, if the drawing, acceptance or indorsement of a bill or making or indorsement of a note is not a disposition within the Insolvency Act definition this would clearly be a casus omissus and the courts will strive to avoid this result if at all possible.(290)

It follows, it is considered, that the drawing, acceptance or indorsement of a bill or making or indorsement of a note will be

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(287) FR Malan Wisselreg en Tjekreg (Durban 1981) # 16.

(288) The fact that a person may be held liable contractually to an impression created by him even in the absence of consensus ad idem is well recognised in our law - see eg Van Ryn Wine and Spirit Co v Chandos Bar 1928 TPD 417 at 423 - although unanimity on the theoretical basis of such liability has not been achieved: see eg De Wet & Yeats Kontraktereg 7ff.

(289) See eg Saambou-Nasionale Bouvereniging v Friedman 1979(3) SA 978(A) at 990Cff.

(290) *Dhanabakium v Subramanian & Anor 1943 AD 160* at *170;* Steyn Uitleg 124.

held to be a contract for a payment and hence a disposition within the Insolvency Act definition.

If the Insolvency Act definition of 'disposition' does not apply to s 341(2), the assumption of liability to honour a bill or note by the drawer, acceptor, indorser or maker is not a disposition within the meaning of the section because the conclusion of a contract is not a disposition within the ordinary meaning of that term.(291)

Buckley(292) and Pyemont(293) cite In re London and Mediterranean Bank: Bolognesi's Case(294) as authority for the proposition that the acceptance of a bill is not a disposition, but, with respect, the decision was based on other grounds. After the commencement of a voluntary winding-up a director purported to accept a bill on behalf of the company. However, unlike in the case of a compulsory winding-up, the Act expressly provided that the directors' powers ceased on the commencement of a voluntary winding-up, and the court accordingly held that the bill was not the bill of the company and was therefore not a disposition of the company's property within the meaning of the English counterpart of s 341(2).(295) The court did not consider whether an acceptance is a disposition; the judgment is very brief and the court appears to have been content with giving the reason it did for refusing

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(291) Cf Re J Leslie Engineers Co Ltd [1976] 2 All ER 85 (Ch) at 89h-90a and 90g.

(292) Companies 575.

(293) Company Law 429.

(294) (1870) 5 Ch App 567.

(295) The decision is correctly reflected in In re Oriental Bank Corporation Ex p Guillemin (1885) 28 ChD 634 at 639.

validation. It is accordingly doubted whether any inference can be drawn from the judgment regarding whether or not an acceptance is a disposition.

(e) Negotiation of bills and promissory notes

If a company holds a bill or promissory note and negotiates it to another person, the company *thereby transfers its rights* as holder to the other person ie it disposes of those rights. This was held by the Appellate Division to be a disposition as a transfer of rights within the meaning of the Insolvency Act definition in Illings (Acceptance) Co (Pty) Ltd v Ensor NO(296) and no doubt the same is true in regard to the ordinary meaning of '*disposition*'.(297)

(f) Counterindemnities

When a bank gives a guarantee on the customer's behalf, whether by way of suretyship, principal undertaking or otherwise, the bank *is automatically entitled to be indemnified* by the customer *in* respect of any amount it pays out pursuant to the guarantee(298) but generally an express counterindemnity is also obtained. If the Insolvency Act definition of 'disposition' applies, the counterindemnity, whether express or implied, is a disposition as a contract for a payment, but if the definition does not apply it is not, as the giving of an indemnity does not fall within the ordinary meaning of the word.

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(296) 1982 (1) SA 570 (A) at 579C. See also R v Moosa Mohamed 1921 TPD 314; Wessels v De Klerk & Anor 1960 (4) SA 310(T) at 312D.

(297) In re Oriental Commercial Bank Barge's Case (1868) 5 Eq 420 at 426.

(298) Rousseau & Rousseau v Hodgson & Others 1925 AD 97 at 102.

A cash amount is sometimes deposited by the customer with the bank as security for the customer's obligation to indemnify the bank. The effect of s 341(2) on such a deposit is dealt with above.(299)

(g) Sale, donation and exchange

If the Insolvency Act definition of 'disposition' applies to the section the position in regard to sale, donation and exchange is as follows: Sale and donation are referred to by name in the Insolvency Act definition of disposition; accordingly, if a company sells(300) or donates its property to another the conclusion of the contract of sale or donation is a dispo[illegible]n the meaning of s 341(2). The conclusion of a contract [illegible]s purchaser is dealt with in the next section. The conclusion of a contract of donation as donee is not a disposition because no property is disposed of by the donee. The conclusion of a contract of exchange is a disposition by both parties as a contract for a delivery.

If the Insolvency Act definition does not apply the conclusion of a contract of sale, donation or exchange is not a disposition.

The transfer of ownership pursuant to the sale, donation or exchange is dealt with below.(301)

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(299) See 420-1 above.

(300) If a 'sale' is subject to a suspensive condition it is not classified in our law as a sale until the condition is fulfilled - see eg Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984(1) SA 1(A) at 9Bff - but it would nevertheless be a disposition as a contract for a sale: cf Cronje NO v Paul Els Investments (Pty) Ltd 1982(2) SA 179(T) at 193H-196C.

(301) See 434-5 below.

(h) Purchase

If the Insolvency Act definition of 'disposition' applies to s 341(2) the conclusion by a customer of a contract of sale as purchaser constitutes a disposition by the customer as a contract for a payment.

If the Insolvency Act definition does not apply, there is no disposition.

(i) Transfer of ownership

If the company transfers ownership of any of its property a disposition by the company of that property within the meaning of s 341(2) occurs whether ownership is transferred by delivery (movables), transfer (immovables) or cession (incorporeals).

Delivery and transfer are mentioned by name in the Insolvency Act definition of 'disposition' and although cession is not referred to eo nomine it is clearly included in the reference to 'transfer...of rights to property'.(302) It is equally clear that even if the Insolvency Act definition does not apply transfer of ownership is a disposition within the ordinary meaning of that term.(303)

The fact that the contract in terms of which the transfer of ownership takes place may have been entered into before the

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(302) Estate Fitzpatrick v Estate Frankel & Others 1943 AD 207 at 215.

(303) See eg In re Wiltshire Iron Company Ex p Pearson (1868) 3 Ch App 443; Couve v J Pierre Couve Ltd (in liquidation) & Anor (1933) 49 CLR 486 (HC of A) at 494.

presentation of the winding-up application against the company while the transfer of ownership takes place thereafter is *immaterial* : the transfer of ownership is nevertheless a disposition within the context of s 341(2).(304)

Should ownership be transferred to a third party in accordance with the company's directions, it is considered that the transfer must, as in the case of *payments made to third parties as directed* by the company,(305) be analysed into a transfer to the company and a transfer by the company in turn to the third party. The former transfer will *not be a disposition by the company* but the latter will be.

(j) Rendition of services

Neither the conclusion of a contract under which a company *undertakes* to *render services* nor the rendition of those services is, it is considered, affected by s 341(2) because no property is disposed of. Whether or not the conclusion of a contract under which a company employs another to render services is a disposition within the meaning of s 341(2) depends upon whether the Insolvency Act definition applies or not. If the definition applies, the contract is a disposition as a contract for a payment. If it does not apply, the contract does not constitute a disposition within the ordinary meaning of that term.(306)

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(304) Estate Hunt v De Villiers 1940 CPD 79.

(305) *See 381-91 above.*

(306) Cf In re Canadian Pacific Colonisation Corporation Ltd (1891) 40 WR 40 (Ch) at 41 in which the company's accountant did certain work for it both before and after presentation of a winding-up petition against it and the court held (citing In re Wreck Recovery and Salvage Company (1880) 15 ChD 353(CA) and In re Wiltshire Iron Company Ex p Pearson (1868) 3 Ch App 443) that the English counterpart of s 341(2) did not 'include a *proof for* services *rendered* after the winding-up.'

(k) Usufruct, habitatio and usus

If the Insolvency Act definition of 'disposition' applies to s 341(2), both the conclusion of a contract to create, and the creation of, a usufruct or right of habitatio or usus are dispositions. The contract is a disposition as a contract for a delivery and the creation of the usufruct or right of habitatio or usus is a disposition both as a delivery and as a transfer of rights to property.(307)

If the definition does not apply, the contract is not a disposition but the creation of the right is.(308) True, the creation of the right does not effect the disposition of the property subject to the right, but the right itself is property and it is this property that is disposed of.

(l) Servitude

A servitude other than usufruct, habitatio and usus, whether personal or praedial, is subject to the same considerations as usufruct, habitatio and usus.(309)

(m) Lease

Lease is referred to by name in the Insolvency Act definition of 'disposition' and although this only refers, it is thought, to a

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(307) Cf 412 above.

(308) See Sandé Restraints 1.1.3.43 and 3.3.16; Modderman Romeinsch Recht 238-9; Corbett Succession 362-3.

(309) Sandé op cit 1.1.3.42 and 3.3.16; Modderman op cit 238-9; Corbett op cit 362-3.

lease by the company, a lease to the company is a disposition as a contract for a payment. The conclusion of a contract of lease by the *company either as landlord or as tenant is therefore* a disposition by the company if the Insolvency Act definition applies. Moreover, the giving of possession of the leased goods or premises, or the registration of a lease of fixed property, confers a real right on the tenant (310) and this too is a disposition by the landlord as a transfer of rights to property within the definition.

If the Insolvency Act definition does not apply, the conclusion of the contract of lease is not a disposition, but the giving of possession or registration of the lease is, it is thought, a disposition. As the Appellate Division held in Breytenbach v Frankel & Anor(311) (in relation to a long lease) :

> '...such a lease is virtually an alienation [of the leased property]. Its effect is to dispose of a portion of the dominium...'

The question of whether or not a long lease effects a disposition of the leased property, a matter of some contention among the authorities,(312) is not, it is considered, relevant to the question of whether or not there is a disposition within the meaning of s 341(2). Section 341(2) is concerned with the question of whether or not there has been a disposition of any property, not the property. A lease effects, as was pointed out in Breytenbach's

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(310) See eg Kessoopersadh & Anor v Essop & Anor 1970(1) SA 265(A) at 270H; WE Cooper The South African Law of Landlord and Tenant (Juta 1973) 248ff.

(311) 1913 AD 390 at 402. But cf Rhyl Urban Council v Rhyl Amusements Ltd [1959] 1 All ER 257 (Ch) at 264G-I.

(312) See eg Sandê Restraints 1.1.3.45-7, 3.3.19; Cooper Landlord and Tenant 252-3.

case, a disposition of a portion of the dominium and it follows that property has been disposed of.(313)

(n) Loans of property other than money

Loans of property other than money may be either for use or consumption. In the case of a loan for use the same property is returned to the lender at the end of the period of the loan, while in the case of a loan for consumption the property to be returned need merely be of the same type.(314)

In the case of a loan for consumption ownership of the property is transferred to the borrower and such transfer of ownership clearly constitutes a disposition by the lender whether or not the Insolvency Act definition applies. If the definition applies the conclusion of the contract of loan is also a disposition as a contract for a *delivery*.(315)

In the case of a loan for use the position is less clear because ownership of the property is not transferred to the borrower. However, it is considered that the borrower's right is, as in the case of lease,(316) a real right and that the transfer of this real right is a disposition of property within the meaning of s 341(2) whether or not the Insolvency Act definition applies. If

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(313) Where the tenant has the right to remove portion of the property, eg in the case of mineral and mining leases, the position is still clearer.

(314) Voet 13.6.1; 12.1.1,14,18; Lee & Honoré Obligations ## 356 and 364.

(315) Cf 412 above.

(316) See the previous section.

the definition applies the contract of loan is also a disposition as a contract for a delivery.

(o) Depositum

Property may be deposited by or with a company.

If the Insolvency Act definition of 'disposition' applies to s 341(2) the conclusion by a company of a contract of deposit will, if the company is liable to make a payment under the contract, constitute a disposition as a contract for a payment. Less clear, however, is the position if the company is not obliged to make a payment. Can the delivery of the property by the company to the depositary where the company is the depositor, or the return of the property by the company to the depositor where the company is the depositary, be said to be a disposition of property? The answer is, it is thought, in the negative. When property is deposited with a depositary the depositor does not dispose of any rights in the property, and there is therefore no disposition by the depositor of any property. Moreover, if there is no disposition when the property is deposited with the depositary there can be no disposition when it is returned to the depositor. Nor can the conclusion of the contract constitute a disposition.

If the Insolvency Act definition of 'disposition' does not apply to s 341(2) neither the conclusion of the contract of deposit nor the delivery of the property when it is deposited with the depositary or returned to the depositor will constitute a disposition.(317)

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(317) See the next section in regard to the position if the depositary acquires a lien.

(p) Liens

Liens give rise to a number of difficulties in the context of s 341(2).

It is necessary to distinguish enrichment liens on the one hand and debtor and creditor liens on the other. Both confer on the lienholder *the right to retain possession of the property of another* until the lienholder has been compensated for money or labour expended by the lienholder on the property, but there effectively the similarity ends.(318) Enrichment liens arise irrespective of any prior relationship between the parties, whereas debtor and creditor liens are preceded by a contract between the parties. The basis of *enrichment liens* is the owner's enrichment, and the right of retention is limited to ensuring that the lienholder is compensated to the extent of the owner's enrichment. Debtor and creditor liens, on the other hand, are based on a contract, and serve to secure the lienholder's claim to the contract price even if the price differs from the value of the enrichment of the other party.

The Insolvency Act definition of 'disposition' does not refer to liens by name; accordingly, if the definition applies to s 341(2) the question arises whether a transfer of rights to property occurs when a lien comes into existence. If the definition does not apply the question is similar: Has property been disposed of, ie transferred, to another?

In the case of enrichment liens, the value of the company's property is enhanced (either in the sense of increased or in the sense of protected against diminution) and the company must

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(318) See generally Silberberg & Schoeman Property 479 ff and Van der Merwe Sakereg 500 ff.

compensate the lienholder for the value of that enhancement. There is therefore no change in the company's net asset position which could prejudice creditors and accordingly if such liens are not dispositions within the meaning of s 341(2) this would not be a case of a <u>casus omissus</u>.

It is doubted, however, whether one can conclude on this ground that s 341(2) does not apply to enrichment liens. The view has already been taken(319) that the fact that there may be no change in the company's net asset position is not relevant to the question of whether or not there has been a disposition. For example, if a supplier supplies goods to a company against payment in cash the payment is nevertheless a disposition by the company despite the fact that the company's net asset position is unchanged. The true analysis of the position is, it is considered, that when a lien comes into existence the right to possession of the property is transferred to the lienholder and that this is a disposition within the meaning of s 341(2). The position is closely analogous to pledge, in regard to which the view has already been taken(320) that there is a disposition within the meaning of s 341(2). True, in the case of an enrichment lien there is no act by the company but the view has also already been taken(321) that s 341(2) does not require an act on the part of the disponor.

Debtor and creditor liens are subject to different considerations; they serve to secure the contract price which may exceed the enhancement in the value of the property and they may

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(319) See 334-5 above.

(320) See 400-404 above.

(321) See 356-61 above.

thus prejudice creditors by reducing the net asset value of the company. It would therefore be a <u>casus omissus</u> if such liens were to fall outside the ambit of s 341(2).

The existence of a debtor and creditor lien is predicated upon the existence of a preceding, valid contract; accordingly, if the contract itself is void in terms of s 341(2) the lien must suffer the same fate.

If the contract is not void, it is considered that it is necessary to enquire further firstly whether the other contracting party expended the money or labour on existing property of the company or whether the property was brought into existence by the other contracting party, and secondly, in the case of existing property, whether the property was delivered by the company to the other contracting party before or after presentation of the winding-up application against the company.

If the property is brought into existence by the other contracting party, eg where documents are drawn by an attorn- there cannot, it is considered, be said to be a disposition by the company of its property. From the moment the property comes into existence the right of retention vests in the lienholder and it follows that the right of retention cannot be said to have been transferred to the lienholder.

Where, however, a lien arises over existing property a disposition of a portion of that property does, it is considered, occur. This was the conclusion reached by the court <u>a quo</u> in <u>In re Capital Fire Insurance Association</u>.(322) (The Court of Appeal decided the matter on other grounds.) Documents were handed by a company to its solicitor after presentation of a winding-up petition

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(322) (1883) 24 ChD 408 (Ch & CA) at 414-15.

against the company and after the grant of a winding-up order the solicitor claimed a lien on the documents for his fees.(323) It was held that the handing over of the documents 'with the view of creating a lien' was a disposition within the meaning of the English counterpart of s 341(2).

What is the position if the goods are delivered to the lienholder before presentation of the winding-up application against the company but the money or labour is only expended after presentation? Can it be argued that the disposition occurs when the money or labour is expended and therefore the lien is avoided by s 341(2)? It is thought not. The delivery of the goods is a conditional disposition of the lien, the condition being that the money or labour is expended. The fulfilment or otherwise of this condition is not in the discretion of the company and accordingly once the condition is fulfilled the disposition by the company dates back to the date of the delivery, in accordance with the principle dealt with above.(324)

(q) *Abandonment and waiver*

Abandonment may take place unilaterally, as where property is discarded, or bilaterally, as where a right is waived.

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(323) There is no equivalent lien in this country, where an attorney only has a lien in respect of documents prepared by him - Silberberg Property 483. There are a number of other English and Australian decisions concerning liens in the context of their counterparts of s 341(2) - Re Llangennech Coal Company (1887) 56 LT 475 (Ch); Re The Northfield Iron and Steel Company Ltd (1866) 14 LT 695; The Wiltshire Iron Company Ltd v The Great Western Railway Company (1870) 6 QB 101 and 776; North West Construction Co (Pty) Ltd v Marian [1965] WAR 205 - but the liens in issue were too different from the liens found in our law for any assistance to be derived from the cases in regard to the liens found in our law.

(324) See 361-7 above.

The abandonment of rights to property is referred to by name in the Insolvency Act definition of 'disposition', but in any event the abandonment of any property is, it is considered, a disposition of that property within the ordinary meaning of 'disposition'.(325) If a company abandons property, whether corporeal or incorporeal, the company's assets are diminished and this is so whether or not anything passes from the company to another. Where property is abandoned or waived in favour of another person, clearly the property is recoverable from that person if the disposition is avoided by s 341(2). But what is the position if the property is discarded? The answer is, it is suggested, that the discarding of the property is avoided with the result that the property's becoming a *res nullius* is avoided. It follows, it is thought, that if another person has acquired the property by *occupatio* such acquistion is also avoided and the property is recoverable from that person.

The release of security held for a debt likewise constitutes a disposition.(326)

(r) *Compromise*

If a claim is compromised, the performance agreed upon pursuant to the compromise may be less or more than the performance in fact due by the debtor before the compromise. For example, both the claimant and the other party in a claim for damages may be willing to settle the claim on the basis that half the claim is paid, because of uncertainty regarding the validity of the claim.

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(325) Sandé *Restraints* 1.1.3.26,33; Voet 42.8.15; *IRC v Buchanan* [1958] Ch 289 (CA); but see *Re Mal Bower's Macquarie Electrical Centre (Pty) Ltd* [1974] 1 NSWLR 254 at 258A-B in which the court said that there must be a disponor and a disponee.

(326) Voet 42.8.15.

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