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BHINDI & PATEL LTD.

v.

PATEL AGENTS LTD. AND RAM KISSUN

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[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Tompkins J.A.), 24th August, 7th September]

Civil Jurisdiction

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Companies—winding up—action brought by creditor prior to making of compulsory winding up order—creditor lodging proof of debt with liquidators—rejection of proof on ground of failure to produce vouchers and supply explanations—application to court for leave to continue action—on facts the lodging of proof of debt no bar to discretion of judge to give leave to continue action—election—whether rejection of proof an adjudication—Companies (Winding Up) Rules 1929 (Imperial) rr. 1, 89, 90, 99, 105, 106, 115, 223—Companies (Winding Up) Rules 1949 (Imperial) rr. 91, 108, Appendix—Companies Ordinance (Cap. 216) ss. 176, 190(3), 274(1).

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Election—company in liquidation—action by creditor against company pending—proof of debt lodged by creditor—whether adjudicated upon by liquidators—whether election by creditor to accept adjudication by liquidators—Companies (Winding Up) Rules 1929 (Imperial) rr. 1, 89, 90, 99, 105, 106, 115, 223—Companies (Winding Up) Rules 1949 (Imperial) rr.91, 108, Appendix—Companies Ordinance (Cap. 216) ss.176, 190(3), 274(1).

An action in the Supreme Court was commenced by the second respondent against the appellant company on the 31st May, 1965, and a defence E was filed. On the 27th July, 1965, an order was made for the compulsory winding up of the appellant company. The second respondent lodged a proof of debt with the joint liquidators who wrote, calling for the production of vouchers and for certain explanations; when no reply was received the joint liquidators sent notice of rejection of the proof of debt on the ground of the failure to supply such supporting evidence and explanations. The second respondent did not apply under rule 106 of F the Companies (Winding Up) Rules 1929 to have this decision reversed or varied but applied to the Supreme Court for leave to continue the civil action abovementioned. On appeal against the order giving such leave —

Held: 1. *(per Marsack and Tompkins JJ.A.)* (a) On the facts it could not be contended that by proving its debt the second respondent intended G to elect to submit his claim to the adjudication of the joint liquidators, and by rejecting the claim for lack of proof the joint liquidators did not in fact adjudicate upon the claim on the merits. The mere fact of proving in the liquidation did not prevent the judge from exercising his discretion to give leave to proceed in the action.

(b) There was no reason to interfere with the order made by the H judge in the exercise of his discretion under section 176 of the Companies Ordinance.

Craven v. Blackpool Greyhound Stadium & Racecourse Ltd. [1936] 3 All E.R. 513; 81 Sol. Jo. 14, distinguished.

2. *(Per Gould V.P., dissenting.)* The rejection of the proof of debt by the joint liquidators was a valid decision not challenged by any appropriate procedure; the real ground of the decision in *Craven v. Blackpool Greyhound Stadium & Racecourse Ltd.* (supra) was that the judge in the winding up proceedings really had no discretion, as he was faced with a decision binding not only on the liquidator but upon him as a judge in the winding up proceedings until reversed or varied by appeal in the manner provided.

Other cases referred to:

Thames Plate Glass Co. v. Land & Sea Telegraph (1871) L.R.6 Ch. App. 643; 25 L.T. 236.

Loyal Ltd. v. Standard Tobacco Co. Ltd. (in liquidation) [1935] N.Z.L.R. s. 83.

Currie v. Consolidated Kent Collieries Corporation Ltd. [1906] 1 K.B. 134; 94 L.T. 148.

Woods-Gilbert Rail Remodelling Co. Ltd. v. Little [1927] V.L.R. 292; 33 A.L.R. 276.

Lissenden v. Bosch Ltd. [1940] A.C. 412; [1940] 1 All E.R. 425.

General Rolling Stock (Re) (1872) 7 Ch. App. 646; 27 L.T. 88.

Appeal from an order in the Supreme Court giving leave to continue an action against a company after a compulsory winding up order.

C. L. Jamnadas for the appellant company.

S. M. Koya for the respondents.

The facts sufficiently appear from the judgments.

7th September 1971

The following judgments were read:

GOULD V.P.:

This is an appeal from an order made in the Supreme Court on the 30th March, 1971, granting (upon terms) the application of Ram Kissun, trading as Ram Kissun and Brothers, for leave to continue Civil Action No. 127 of 1965 against Bhindi & Patel Ltd., now in liquidation.

The writ in the action was issued on the 31st May, 1965 and a defence was filed by the company on the 19th June, 1965. On the 27th July, 1965, an order was made for the compulsory winding up of the company. Some time thereafter Ram Kissun lodged his proof of debt with the Joint Liquidators. On the 4th October, 1967, the Joint Liquidators wrote calling for the production of vouchers in support of the claim and for certain explanations but received no reply. On the 1st April, 1968, the Joint Liquidators sent notice of rejection of the proof of debt on the ground that the supporting evidence and explanation called for had not been supplied. No application under Rule 106 of the Companies (Winding Up) Rules 1929 (Imperial), which are in force in Fiji, was made by Ram Kissun to reverse or vary the decision of the Joint Liquidators.

The Statement of Defence which was filed in the action made allegations of fraud on the part of the plaintiff therein, and the learned Chief Justice who heard the application in the Supreme Court, took this, (among other things) into consideration in his finding that the Supreme Court was the appropriate forum to decide the questions in issue. He therefore granted leave to continue the action in spite of the substantial and unexplained delay on the part of Ram Kissun.

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There were a number of grounds of appeal to this Court, upon which it was claimed that the order of the learned Chief Justice should be reversed, but with respect, I consider that, with one possible exception, they are not sufficiently meritorious to influence this Court to depart from the recognised principle laid down in *Thames Plate Glass Co. v. Land and Sea Telegraph Co.* (1871) L.R. 6 Ch. App. 643, that when leave has been given the Court of Appeal will not in general interfere with the discretion so exercised. I propose therefore to discuss only the one matter which appears to have substance.

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The argument is based entirely upon the decision of the English Court of Appeal in *Craven v. Blackpool Greyhound Stadium & Racecourse, Ltd.* [1936] 3 All E.R. 513, in which case a creditor of a company in voluntary liquidation put in a proof of his claim. The liquidator allowed the proof but not in an amount satisfactory to the creditor, and the latter brought an action on his claim, in the King's Bench Division. The liquidator applied for a stay of proceedings on the ground that the creditor, being dissatisfied with the liquidator's decision, should have appealed to a judge in the Chancery Division under the Winding Up Rules. This submission was upheld on two grounds expressed in the headnote thus :—

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"(i) a creditor who has selected one method of having his claim adjudicated upon, which gives him the right to question the decision, ought not then to be in a position to select another method of adjudication

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(ii) in any event a decision in the action would have no result, as the liquidator's adjudication, until reversed by a judge in the Chancery Division, would be binding in the winding up."

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If this authority applies with full force to the circumstances of the present case, then as it was not quoted before the learned Chief Justice, his decision was to that extent *per incuriam,* and the matter is open for consideration by this Court. It will therefore be helpful to look at the judgment more closely. The crux of the decision of Greer L.J. is, in fact, expressed in the opening words, in which he said that he sympathised strongly with the reasons of Hilbery J. for refusing to stay the action but that —

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"I think he exercised a discretion without due regard to the position that had been created by the fact of the proof having been put in by the creditor and a decision having been reached which was binding upon him, unless appealed from in the manner provided by the proper statutory provisions either of the Act or of the rules."

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Having commented on the general principle that the Court does not allow two sets of proceedings to go on at the same time and in the same matter, he enlarged upon his opening words in the following passage, at p. 516 —

A "I think it sufficient to say that the respondent in this case, having his claim adjudicated upon, which gives him the right to question the decision of the liquidator, ought not then to be in a position to select another method which, in my judgment, would have no result because, even if HILBERY, J., gave him a larger sum than the liquidator had given him, the adjudication by the liquidator would still remain an adjudication which, until it was reversed by a judge in the Chancery Division, would have been binding in the winding up. I

B think, for these reasons, the learned Judge exercised his discretion without due regard to the fact that there had been a claim made in the winding up adjudicated on by the liquidator, though subject to appeal, and, in those circumstances, he really had no option but to stay the proceedings at common law and leave the creditor to his rights in the winding up proceedings."

C Scott L.J. took an even strong line. He said, at pp. 516 - 7 :—

"First, I agree with GREER, L.J., that in a voluntary winding up, after the winding up has begun, a creditor of a company has really an option as to his remedy for the purpose of enforcing a claim which he has against the company. He may either issue a writ, subject to the chance of that action being stayed on good grounds, or he may prove in the winding up. If he proves in the winding up, in my view,

D he loses his right of action. I think the fact that he has proved in the winding up would be a ground of defence in the action, probably from the moment of proving; but, at any rate, after the liquidator in the winding up has dealt with the proof and rejected it wholly or in part, then to the extent to which it is rejected, wholly or in part, the creditor, in my view, loses his cause of action. It disappears. It merges in the proof, and to the extent to which the proof is not

E admitted it is gone. His only remedy then, in my view, is to treat the act of the liquidator in rejecting the proof, in whole or in part, as a decision — the word appled to it in the winding up rules — and then appeal to the court, which, I think, is a proceeding which would be heard in open Court."

I would pause to say that insofar as that passage suggests that the

F mere filing of a proof would be a good defence I would be reluctant to accept it. Greer L.J. adverted in his judgment to the possibility of the proof being withdrawn, and in the New Zealand case of *Loyal Limited v. Stanard Tobacco Company Ltd.* (In Liquidation) [1935] N.Z.L.R. s. 83 (a winding up by the Court) where a dispute between a creditor and the liquidator had continued for six months without any decision, leave was given to commence an action to determine the matter. The point, how-

G ever, is not in issue in the present case.

I think that while the learned judges in *Craven's* case based themselves in some measure upon the rule against duel proceedings in a Court (involving perhaps the common law doctrine of election) the real ground of the decision was that Hilbery J. really had no discretion, for he was faced with a decision which was binding not only on the liquidator but upon

H him as a judge in the winding up proceedings, until it was reversed or varied by appeal in the manner provided.

Before coming to the question whether any distinction is to be drawn because the present case is one of winding up by the Court, I will deal

with an argument relied upon by counsel for Ram Kissun to off-set the effect of Craven's case. He sought to show by reference to affidavits on the record that the Joint Liquidators were in breach of Rule 115 of the companies (Winding Up) Rules, which requires a liquidator, within twenty-eight days after receiving a proof, to admit or reject it in writing in whole or in part, or require further evidence in support of it. In the present case there was a request for further evidence, but it is said that it was not made within the prescribed time limit. This, I think, could only be of avail if the result was that the subsequent rejection of the proof was thereby rendered null and void. This question was not argued before us in any detail, but I am unable to find that any such result would follow. The substantive duty of examining proofs and of admitting, rejecting or requiring further evidence is placed upon a liquidator by a separate rule, viz. Rule 105. That would be mandatory, but the time limits imposed by Rule 115 are in my judgment directory and a failure in strict compliance would merely be an irregularity within the meaning of Rule 223. In the absence of any consequent injustice (and none has been shown) Rule 223 would operate to prevent any invalidity. I am strengthened in this opinion by Section 274(1) of the Companies Ordinance (Cap. 216) which reads :—

> "274.(1) If any liquidator, who has made any default in filing, delivering or making any return, account or other document, or in giving any notice which he is by law required to file, deliver, make or give, fails to make good the default within fourteen days after the service on him of a notice requiring him to do so, the court may, on an application made to the court by any contributory or creditor of the company or by the registrar, make an order directing the liquidator to make good the default within such time as may be specified in the order."

This power to enforce late compliance by a liquidator indicates, to my mind, that late compliance without such an order must (at least in the absence of injustice) be valid.

A further argument on rather similar lines by counsel for Ram Kissun was that as the Joint Liquidators had rejected the proof for non-compliance with a request for further evidence there was no decision on the merits. I think the answer to that is that there was a decision, and the authorised way to attach it was by application under Rule 106. It is to be noted also that by Section 190(3) of the Ordinance, the exercise of the Joint Liquidators' powers was subject to the control of the court, and even before the rejection of the proof Ram Kissun could have brought the matter to the Court's attention. In my view therefore the rejection of the proof was a valid decision as yet unchallenged by any appropriate procedure.

I turn now to the question whether the obvious distinction between the present case and Craven's case is a material one. The distinction is that the winding up now under consideration was by order of the Court, while in Craven's case it was voluntary. There is the difference that in the case of a compulsory winding up all actions are, by Section 176, automatically stayed except by leave of the Court, whereas in a voluntary

A winding up, under Section 250, actions are only stayed if a Court so orders. The result is in each case that a creditor has an option whether to seek to continue his proceedings or to prove in the liquidation.

This must, I think, be so under the terms of the Ordinance even though the Winding Up Rules seem to require all creditors in a compulsory winding up to prove. Rule 89 reads as follows :—

B "89. Proof of debt. — In a winding-up by the Court every creditor shall subject as hereinafter provided prove his debt, unless the Judge in any particular winding-up shall give directions that any creditors or class of creditors shall be admitted without proof."

The terms of Rule 1 of the same Rules indicates that Rule 99 does not apply to voluntary liquidations. Rule 90, on the other hand, which pre-
C scribes the manner in which debts "may be proved" applies to all liquidations. Nevertheless it does not appear that Rule 89 precludes an option in the case of a compulsory liquidation, for a judge has power to give directions as to admission without proof; and presumably by giving leave to continue an action, he would cover this question.

If the matter hinged entirely upon the question of election I would be left in some doubt to the position, but as I have indicated, the judges
D in Craven's case based themselves more upon the effect of the rejection of the proof as a decision, binding in the liquidation and on the Court having control of the liquidation, until it is set aside by appeal under Rule 106.

It has been suggested that the procedure in the Court of Chancery is inappropriate for settlement of such problems as are here in issue. In
E Fiji the difference between divisions of the Court may be thought to be more theoretical than actual and there is no doubt that on the Chancery side witnesses can be examined and cross-examined if necessary. Counsel on both sides in *Currie v. Consolidated Kent Collieries Corporation Ltd.* [1906] 1 K.B. 134, were agreed on this, and Romer L.J. said that the hearing in the Chancery Division would really be in substance though not in form the trial of an action. From the point of view of convenience he
F preferred that the action in the King's Bench should proceed, but there was no question in that case of a proof of debt having been lodged and dealt with. If the approach of the Court in Craven's case is correct, it would seem that the question of principle would override any matter of convenience.

I have not found any case of a winding up by the Court in which this
G particular question has been decided. There is one Australian case prior to Craven's case in which, in a voluntary liquidation, the rejection of a proof appears not to have been regarded as requiring the Court to stay an action subsequently commenced. The case is *Woods-Gilbert Rail Remodelling Co. Ltd. v. Little* [1927] V.L.R. 292: 33 A.L.R. 276, the headnote of which appears in the Australian Digest (2nd Edn). Vol 4 p. 630, but the report is not available in Fiji. It appears probable that had the
H point taken in Craven's case been argued it would have been reflected in the headnote.

On full consideration I am of opinion that the principle of Craven's case should be applied; the editors of *Buckley on the Companies Act* (13th Edn.) who said, at p. 1057, after stating the effect of the decision

"Presumably, also, when a compulsory order has been made, the Court would not grant him leave under S.231," appear to be of the same opinion. I think that, had Craven's case been called to his attention, the learned Chief Justice would not have granted leave to continue the action, and for the reasons I have given I would allow the appeal, set aside the order in the Supreme Court and substitute an order that the application be refused.

As the majority of the court, for the reasons expressed in their judgments, are of opinion that the appeal should be dismissed, the order of the court is accordingly that the appeal is dismissed with costs to the respondent.

MARSACK J.A.:

The decision from which this appeal is brought is one given in the exercise of the Judge's discretion. It is well established by the authorities — including the Thames Plate Glass Company case cited by the learned Vice President in his judgment — that when a matter has been left by the Legislature to the discretion of the Court, an appellate tribunal will not in normal circumstances, interfere with the exercise of that discretion. Aliter, if the Judge purported to exercise a discretion which in strict law he did not in that particular case possess.

In my view therefore it is necessary to ascertain if the Judge had a discretion in the matter; and, if so, whether there were present exceptional circumstances by reason of which this Court should interfere with his exercise of that discretion.

In *Craven v. Blackpool Greyhound Stadium and Racecourses Ltd.* [1936] 3 All E.R. 513, upon which the appellant strongly relied, Greer L.J. in his judgment refers to the exercise of a discretion by the Judge in the Court below, but finds that he did so without due regard to the position that had been created by what had taken place between the creditor and the liquidator. The learned Vice President has expressed the view that the real ground of that decision was that the Judge really had no discretion in the circumstances of the case.

As I see it, on an application by a creditor for leave to proceed with an action against the liquidator of a company in liquidation, the granting of such leave is a matter within the discretion of the Judge unless there is a statutory provision inhibiting the exercise of such a discretion. Section 176 of the Companies Ordinance Cap. 216 provides:

> "176. When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose."

This, on the face of it, gives authority to a Judge to grant leave to pursue an action already commenced.

I can find no statutory provision to the effect that an action already commenced before the liquidation is automatically struck out when the order for liquidation is made. On the contrary, section 176 makes it clear that the action may proceed if the leave of Court is obtained. There is nothing in the Ordinance or the Winding-Up Rules to indicate that the

A lodging of a proof of debt — as was done in this case on the written request of the liquidators — operates as a discontinuance of an action previously commenced.

In the result I think that there is no statutory bar to the exercise of a judicial discretion which is in fact conferred on the Court by sec. 176. In the present case the learned Judge in the Court below gave full consideration to the unusual facts put before him, and then in the exercise B of his discretion made the order from which this appeal is brought. This Court should then, in the circumstances, be reluctant to interfere with the exercise of that discretion.

There is, of course, no doubt that this Court would have the power, and even the duty, to intervene if it could be shown that the Judge in the Court below had acted on a wrong principle or had misapplied the law relating to the matter. This, in my view, is the basis of the decision C in Craven's case. If the facts in the present case were similar to those in Craven, we should be bound to follow that decision and to overrule the Judge of the Court below. But in my opinion that case is definitely distinguishable. The reasons given by my brother Tompkins to support his opinion to that effect I also accept, and I do not think it necessary to set them out again in detail. The essential difference between the two cases is made clear in this passage from the judgment of Eve J. at p. 517:

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> "In this case the creditor is in a position from which he desires to have the benefit of two endeavours to fix the amount of the indebtedness at a figure satisfactory to himself."

Here there was no adjudication on the merits by the liquidators; respondents made no attempt to establish his claim by producing his evidence E to the liquidators; he had already chosen a forum for the determination of his claim, and at no time had he given any indication that he wanted that claim adjudicated upon in any other forum.

In the result I am of opinion that the Judge had a discretion to make the order appealed from, and that there is nothing in Craven's case to compel us to hold that he exercised that discretion upon a wrong prin-F ciple or contrary to the express provisions of the laws. Accordingly I would dismiss the appeal, with costs to the respondent.

TOMPKINS J.A.:

This is an appeal from the order of the learned Chief Justice made on 30th March, 1971, granting (upon terms) the application of Ram Kissun, trading as Ram Kissun and Brothers, for leave to continue Civil Action G No. 127 of 1965 against Bhindi & Patel Limited now in liquidation.

This writ was issued on 31st May, 1965. The appellant company lodged a defence in which it denied liability on three grounds: first, on the facts; secondly and alternatively, that the debt was incurred by fraud; and thirdly and as a further alternative defence that a director of appellant company acted outside his authority, in dealing with the res-H pondents. However, before this case came to trial, namely on 27th July, 1965, an order was made on the petition of the respondents for compulsory winding up of the company. The debts alleged in the petition included the debt sued for, but the appellant company clearly reiterated its denial of liability in regard to the whole amount claimed in the writ,

and the order for compulsory winding up was made on the debt owing to the company of Patel Agents Ltd. one of the Petitioning Creditors. The court appointed ROBERT SAMUEL KAY of Suva, public accountant, and PRABHUDAS KALYANJI BHINDI, one of the directors of Bhindi and Patel Limited, to be Joint Liquidators of that company.

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The Respondent, Ram Kissun, trading as Ram Kissun and Brothers, (which I shall for convenience call hereinafter the "Respondent") presumably made a claim by letter to the liquidators of the amount originally sued for, because the Joint Liquidators wrote to it in the month of April, 1967, a letter informing it that, before the claim could be admitted against the company, a proof of debt must be made for the amount. For that purpose the liquidator enclosed a form of affidavit. No doubt this affidavit was FORM 59 of the Appendix to the Companies (Winding Up) Rules, 1949 (Imperial) (which I shall hereinafter call the Winding Up Rules) which is in force in Fiji. In response to this request respondent lodged its proof on 10th May, 1967. On 4th October, 1967 the Joint Liquidators wrote to the respondent a letter as follows :—

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"We refer to the Proof of Debt and General Proxy Form lodged by you.

Before adjudicating on your claim we will require vouchers in support thereof and explanations as to why the following payments were made by you to Bhindi & Patel Limited;

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24th September, 1964	£2,000. 0. 0
18th December, 1964	£ 500. 0. 0
12th January, 1965	£ 400. 0. 0

Would you please forward the above information without delay."

The respondent claims that he never received this letter but, be this as it may, the vouchers and explanations were not forwarded to the liquidators. On 1st April, 1968, the Joint Liquidators forwarded to the respondent a Notice of Rejection of Proof of Debt in the following terms :—

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NOTICE OF REJECTION OF PROOF OF DEBT
IN THE SUPREME COURT OF FIJI
CIVIL CASE NO. 144 OF 1965

F

RE BHINDI & PATEL LTD (IN LIQUIDATION)

Take Notice that as Liquidators of the above named Company we have this day rejected your claim against the Company on the following grounds :—

THE SUPPORTING EVIDENCE AND EXPLANATION
ASKED FOR BY US HAVE NOT BEEN SUPPLIED

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And further take notice that, subject to the power of the Court to extend the time, no application to reverse or vary our decision in rejecting your proof will be entertained after the expiry of twenty-one days from this date.

Dated this 1st day of April, 1968.

H

JOINT LIQUIDATORS.

To Ram Kissun Bros
C/- 8 Marks Lane
Suva.

No application under Rule 106 of the Winding Up Rules was made by respondent to reverse or vary the decision of the Joint Liquidators.

On these facts the appellant submits that the respondent has elected to refer its claim to the adjudication of the liquidators; that, having failed to appeal within 21 days after the rejection of the proof it has lost its right to appeal, unless the court exercises its power to extend the time under Rule 108; that the respondent's right of action in view of his election is gone.

On the face of it this seems a somewhat startling submission. The respondent did nothing more than lodge a proof of debt in a disputed claim. The submission amounts to this, that because the respondent refused to submit the evidence asked for to the Joint Liquidators, and because it failed, within the time stipulated by the Winding Up Rules, to lodge any appeal against its rejection, it has lost all rights to establish its claim.

The appellant relies upon the authority of *Craven v. Blackpool Stadium* [1936] 3 All E.R. 513. In that case the plaintiff, a director of the defendant Company, which had gone into voluntary liquidation, put in a proof in the liquidation in respect of arrears of salary and of unliquidated damages for wrongful dismissal. The liquidator allowed the proof for the arrears of salary and also admitted the claim for wrongful dismissal and allowed for damages the sum of £1109.0.0. The director was dissatisfied with the amount awarded to him and asked for leave to bring an action in the King's Bench Division. The Court of Appeal, stayed the action. The Headnote, which I think correctly summarises its reasons for so doing, says :—

> "Held : (i) a creditor who has selected one method of having his claim adjudicated upon, which gives him the right to question the decision, ought not then to be in a position to select another method of adjudication;
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> (ii) in any event a decision in the action would have no result, as the liquidator's adjudication, until reversed by a judge in the Chancery Division would be binding in the winding up."

I agree with counsel that, unless this case can be distinguished, it is conclusive against the respondent.

Greer L.J. at 515 said :—

> "It seems to me, on general principles, that a person who selects one method of having his claim adjudicated upon, if he is dissatisfied with the way in which that adjudication has been decided, should not be allowed to select another method of having it adjudicated. It is common knowledge in these matters that the court does not allow two sets of proceedings to go on at the same time in the same matter; it will stay either one or the other in order that there may not be a waste of costs in asking two tribunals to decide the same question."

Scott L.J. at 516 said :—

> "First, I agree with Greer L. J. that in a voluntary winding up, after the winding up has begun, a creditor of a company has really an option as to his remedy for the purpose of enforcing a claim which

> he has against the company. He may either issue a writ subject to the chance of that action being stayed on good grounds, or he may prove in the winding up. If he proves in the winding-up, in my view he loses his right of action. I think the fact he has proved in the winding up would be a ground of defence in the action, probably from the moment of proving; but, at any rate, after the liquidator in the winding up has dealt with the proof and rejected it, wholly or in part, then to the extent to which it is rejected wholly or in part, the creditor, in my view, loses his cause of action. It disappears."

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Eve J. at 517 said :—

> "In this case the creditor is in a position from which he desires to have the benefit of two endeavours to fix the amount of the indebtedness at a figure satisfactory to himself . . . . . He might have presented a writ and endeavoured to have his true position ascertained by trial before a judge or judge and jury, or he might prove in the winding up, but he cannot have both at the same time, and, so far as his proof which he has put in, and which he has insisted upon and which the liquidator has in part accepted, is concerned, that the court does not interfere with unless one of the parties dissatisfied with the result comes to the court and asks that the matter may be reviewed."

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I agree that in this case the whole basis of the decision is whether the creditor has elected to pursue his claim by accepting the adjudication of the liquidators upon his proof of debt rather than that of the court. I now examine the question as to whether the respondent in the present case has made an election in this way.

In the first place, this is a compulsory winding up and not a voluntary one as was the case in Craven's case.

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I think that the "selection" between two alternative methods of proceeding, referred to by the judges in Craven's case, refers to the common law principle against approbation and reprobation. Halsbury's Laws of England 3rd Edn. Vol. 15 p. 171 para 340 says :—

> "Thus a plaintiff, having two inconsistent claims, who elects to abandon one and pursue the other, may not, in general, afterwards choose to return to the former claim and sue on it; but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show any intention to abandon one of them. The common law principle which puts a man to his election between alternative inconsistent courses of conduct has no connection with the equitable doctrine of election and relates mainly, though not exclusively, to alternative remedies in a court of justice."

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In *Lissenden v. Bosch Ltd.* [1940] 1 All E.R. 425, the House of Lords were considering the principle of approbation and reprobation in relation to workers compensation and common law rights of a worker. *Viscount Maugham* at 430 A said :—

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> "In the fourth place, no person is taken to have made an election until he has had an opportunity of ascertaining his rights, and is aware of their nature and extent. Election, in other words, being an equitable doctrine, is a question of intention based on knowledge."

Lord Atkins said at 436 H:—

A "In cases where the doctrine does apply, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one, he cannot afterwards assert the other."

Applying the principles set out above to the present case it seems to B me that the facts are overwhelming against the respondent company having shown an intention to elect to abandon its action and to rely entirely upon its rights under the rules relating to proof of debts.

Under a compulsory winding up, Rule 91 applies which is as follows :—

"In a winding up by the court every creditor shall, subject as hereinafter provided, prove his debt, unless the judge in any particular C winding up shall give direction that any creditor or class of creditors shall be admitted without proof."

It would take strong evidence to persuade me that any proof lodged under this rule could be said to be lodged as a result of an election by the respondent. It was lodged pursuant to its duty, under Rule 91, to do so. Under that rule it could hardly have refused to lodge its proof unless D it were content to abandon its claim altogether.

It is quite clear that the company did nothing more than lodge its proof at the request of the liquidators, and which, as I have stated above, it was under a duty to do under Rule 91. As regards its intention in lodging the proof, the following facts are relevant. Liability had been denied when the action was started and when the petition for winding up by the court was heard; one of the Joint Liquidators was a party to that E denial of liability on both occasions. It seems impossible seriously to contend that the respondent company intended by proving its debt to submit its claim to the adjudication of the Joint liquidators. It is true that there is a right of appeal against the Liquidator's decision, but the respondent company's rights on an appeal may well be less than it would have on an original hearing before the court. In any case, on a compulsory liquidation, there is a time limit for any appeal (subject only to F the power of the court to extend the time). On the other hand in a voluntary liquidation this time limit does not apply: *Buckley on Companies Acts* 13th Edn. p. 1058. So that, in Craven's case, the creditor still has a right of appeal from the liquidator, notwithstanding the stay of his action. I think all the above facts tend to show that no selection was made by the respondent to accept the decision of the liquidators. It did not deliberately select one of two alternative methods of saving its claim adjudi- G cated upon. I think therefore that the first essential requisite laid down in Craven's case to refusing him the right to proceed with his action is not established.

I now proceed to consider the second essential requisite to be established, namely that the decision in the action would have no result, as the liquidators adjudication, until reversed by a judge in the Chancery H Division, would be binding in the winding up. I think it is clear from the judgments in Craven's case, that they were based upon there having been an adjudication on the claim which was binding on both parties. I think this is implicit in the passage in the judgment of *Greer L.J.* where he says :—

> "It seems to me on general principles, that a person who selects one method of having his claim adjudicated upon, if he is dissatisfied, should not be allowed to select another method of having it adjudicated."

A

I think *Scott L.J.* meant the same when he said at p. 157:—

> "Consequently, in the present case where the creditor had his proof partly admitted and partly rejected he could not, in my view, issue a writ at all."

B

Furthermore, Eve J. said at 517:—

> "In this case the creditor is in a position from which he desires to have the benefit of two endeavours to fix the amount of indebtedness at a figure satisfactory to himself."

The facts of Craven's case as to the adjudication of the claim are entirely different from those of the present case. In Craven's case the creditor started off — his claim for wrongful dismissal and for unliquidated damages by setting out his claim in a proof of debt and insisting upon the liquidator dealing with it. This is clear from the judgment of *Greer L. J.* at 515 when he says:—

C

> "He did not seek to withdraw his proof but allowed the proof to remain on the file of the liquidation, and he allowed the liquidator to deal with the matter until July 8th 1936 when the liquidator allowed the proof, that is to say for money which had become due and for damages, in the sum of £1109.0.0."

D

Eve J. at 517 says that the creditor insisted upon his proof being dealt with.

The result was that the liquidator in Craven's case made a full adjudication — first that the creditor had established his claim for wrongful dismissal, and then considered and fixed the damages.

E

In the present case, on the other hand, nothing has been done by the creditor, except to lodge its proof. It was not prepared to put any of its evidence in support of the claim before the Joint Liquidator. Furthermore the liquidators, in their notice rejecting its proof, gave as their reason "the supporting evidence and explanation asked for by us have not been supplied" thus, in effect, saying that they are not adjudicating upon the claim at all but are simply rejecting it, for lack of proof. This, in my view, is not such an adjudication as is referred to in Craven's case. Here, the liquidators have not made any real adjudication upon whether the money is owing or not.

F

G

Nor do I think that such a rejection would be a defence to an action in the way that *Scott L.J.* says, at 516, that the liquidator's decision would be in Craven's case. If the claim were proved in Court and it gave judgment for the respondent, and the liquidators persisted in relying upon their rejection, I cannot think there would be any real difficulty in having the rejection reversed or the proof amended to conform with the amount of the judgment, particularly in view of the fact that the rejection was not a decision on the merits of the claim at all.

H

Accordingly, I do not think the facts disclose that the second essential requisite for staying the action is established.

In the result I do not think that appellant has shown that Craven's case applies to the present case, or that the mere fact of proving in the liquidation prevents the judge from exercising his discretion to give leave to proceed.

As to the question of long delay in asking for leave to continue his action, this, in my opinion, is no bar to his now having leave. *Palmer on Company Law* 19th Edn. p. 396 says:—

> "A creditor may come in and prove at any time before final distribution of the assets, but he cannot disturb any dividend already paid."

In Re *General Rolling Stock Co.* (1872) 7 Ch. App. 646 *James L.J.*, in speaking of a very late claim to participate in the assets of the Company, said at 649 :—

> "In the meantime no mischief, therefore, can be done, to the creditors by reason of the delay or laches of any creditor, since if he delays beyond the proper time he must take his chance of what assets he can find for payment of his debt, not disturbing any former dividend."

I think therefore the respondent is not disqualified from obtaining leave to proceed by its long and unexplained delay in applying for it. Accordingly I think the order made by the learned Chief Justice was right. I would dismiss the appeal with costs to the respondent.

Appeal dismissed.