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## ORDER XXVI COMMISSIONS

### Commissions to Examine Witnesses

[See Sections 75 to 78]

**1. Cases in which Court may issue commission to examine witness.**--Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

#### COMMENTS

**Power of the Court to issue Commissions.** In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount or any *mesne profits*, or damages or annual profits, the Court may under this Rule issue a commission to such person as it thinks fit directing him to make such investigation and report thereon to the Court. [PLD 2009 S.C. 16].

**2. Order for commission.**--An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

**3. Where witness resides within Court's jurisdiction.**--A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

**4. Persons for whose examination commission may issue.**--(1) Any Court may in any suit issue a commission for the examination of--

- (a) any person resident beyond the local limits of its jurisdiction;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and
- (c) <sup>1</sup>[any person in the service of the <sup>2</sup>[State] who cannot, in the opinion of the Court, attend without detriment to the public service.

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1. Subs. by the A.O., 1937, for "any civil or military officer of the Government."

2. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Sch. (w.e.f. the 23rd March, 1956), for "Crown".

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

**5. Commission or request to examine witness not within Pakistan.**--Where any Court to which application is made for the issue of commission for the examination of a person residing at any place not within <sup>3</sup>[Pakistan] is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

#### COMMENTS

**Examination of witness through local commission.** Court in appropriate cases, where it is not convenient to appear in Court and give evidence, if sufficient cause is shown can order for examination of witness on commission through interrogatories. [2009 CLC 149].

**Revision.** Refusal of Court to appoint commission for examination of witness. A "case decided" and amenable to revisional jurisdiction. [PLD 1997 Lah. 480]

**6. Court to examine witness pursuant to commission.**--Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

#### COMMENTS

**Mesne profit.** A Local Commissioner can be appointed by the Court to assess mesne profit, in absence of any objection such report can be approved. [1998 MLD 225].

**7. Return of commission with depositions of witnesses.**--Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provision of the next following rule) form part of the record of the suit.

**8. When depositions may be read in evidence.**--Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless--

3. Subs. by the Central Laws (Statute Reform) Ord. 1960 (21 of 1960), Section 3 and Second Sch. (w.e.f. the 14th October 1955), for "the Provinces and the Capital of the Federation" which were subs. by the A.O. 1949, for "British India".

- (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a <sup>4</sup>[person in the service of the <sup>5</sup>[State]] who cannot, in the opinion of the Court, attend without detriment to the public service, or
- (b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

### Commissions for Local Investigations

**9. Commissions to make local investigations.**--In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount or any *mesne profits* or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the <sup>6</sup>[Provincial Government] has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

### COMMENTS

**Appointment of Local Commissioner.** In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property or the amount or any means profit or damages or annual profits, the Court may under O.XXVI, R.9 C.P.C., issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. [PLD 2009 SC 16].

Legally there is no impediment in appointing a Local Commission when the evidence brought on record alone is not capable to resolve the controversy. [PLJ 2009-SC 307] Court can appoint a commission to make local inspection and its report is subject to scrutiny by the Court. [PLJ 2011 Peshawar 179]

**Duty of Court.** It was duty of Court to determine the amount of compensation. Recourse to Order XXVI, Rule 9 of CPC could have been made even without on application by any party. [PLJ 2009 SC 307]

4. Subs. by the A.O., 1937, for "civil or military officer of the Government."

5. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Sch. (w.e.f. the 23rd March, (1956) for "Crown".

6. Subs. by the A.O. 1937 for "L.G."

Boundaries of land. Dispute regarding determination of boundaries of land, Local Commissioner appointed to resolve the dispute, judgment and decree not tenable [1999 YLR 1979].

**Appointment of Local Commissioner at Appellate stage.** Appellate Court has power to issue Commission for local investigation. [1981 CLC 368]. But Local Commissioner cannot be appointed by Appellate Court just in routine without judicial application of mind to the facts of a particular case. [1994 CLC 1343].

**Power of High Court.** High Court is fully competent to modify the order passed by lower Court if the circumstances of the case so justified and for that purpose the Court could pass any incidental order, including the order to appoint a Commissioner to inspect the site, to satisfy itself if the condition of the premise was such that it required modification of the *status quo* order passed in the case. [1993 SCMR 1473].

**Procedure to appoint commissions.** Procedure of commissioner appointed for local investigations. [PLJ 2011 Lahore 67]

**10. Procedure of Commissioner.--**(1) The Commissioner after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

(2) **Report and depositions to be evidence in suit--** Commissioner may be examined in person.--The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

### COMMENTS

**Scope.** Rule 10 of O. XXVI provides that the Commissioner should submit his report alongwith the evidence taken by him on local inspection to the Court which should form part of record as evidence subject to examination by the parties. Any issue for inquiry can be referred to Local Commissioner under this rule and his report is evidence in the suit. [PLD 2001 Lah. 135].

### Commissions to Examine Accounts

**11. Commission to examine or adjust accounts.--**In any suit in which an examination or adjustment of accounts is necessary, the

Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

**12. Court to give Commissioner necessary instructions.--**

(1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) Proceedings and report to be evidence. Court may direct further inquiry.--The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

**Commission to make Partitions**

**13. Commission to make partition of immovable property.--**Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by the Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

**14. Procedure of Commissioner.--**(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

**General Provisions**

**15. Expenses of commissions to be paid into Court.--**Before issuing any commission under this Order, the Court may order

such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

**16. Powers of Commissioners.**--Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,--

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;
- (b) call for and examine documents and other things relevant to the subject of inquiry;
- (c) at any reasonable time enter upon or into any land or building mentioned in the order.

#### COMMENTS

**Report of Local Commissioner.** Cannot be treated as a report of referee. [2004 YLR 1155].

**17. Attendance and examination of witnesses before Commissioner.**--The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of <sup>7</sup>[Pakistan], and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

**18. Parties to appear before Commissioner.**--(1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

7. Subs. by the Central Laws (Statute Reform) Ord., 1960 (21 of 1960), S. 3 and Second Sch. (w.e.f. the 14th October, 1955), for "the Provinces and the Capital of Federation" which were subs. by the A.O., 1949, for "British India".

**19. Cases in which High Court may issue commission to examine witness.--**(1) If a High Court is satisfied--

- (a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,
- (b) that the proceeding is of a civil nature, and
- (c) that the witness is residing within the limits of the High Court's appellate jurisdiction,

it may subject to the provisions of Rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1)--

- (a) by a certificate signed by the consular officer of the foreign country of the highest rank in <sup>8</sup>[Pakistan] and transmitted to the High Court through the <sup>9</sup>[Federal Government], or
- (b) by a letter of request issued by the foreign Court and transmitted to the High Court through the <sup>10</sup>[Federal Government], or
- (c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding.

**20. Application for commission.--**The High Court may issue a Commission under Rule 19--

- (a) upon application by a party to the proceeding before the foreign Court, or
- (b) upon an application by a law officer of the <sup>11</sup>[Provincial Government] acting under instructions from the <sup>12</sup>[Provincial Government].

**21. To whom commission may be issued.--**A commission under Rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where <sup>13\*\*\*</sup> the witness resides within the local limits of [the ordinary original civil jurisdiction

8. Subs. by the A.O., 1949 for "India".

9. Subs. by the A.O., 1937 for "G. G. in-C". Federal subs. by P.O. 4 of 1975.

10. Subs. by the A.O., 1937 for "G. G. in-C". Federal subs. by P.O. 4 of 1975.

11. Subs. *ibid.*, for "L.G."

12. Subs. *ibid.*, for "L.G."

13. The words "the High Court is established under the Indian High Courts Act, 1861, or the G. of 1 Act, 1915, and" rep., *ibid.*

of the High Court], to any person whom the Court thinks fit to execute the commission.

22. Issue, execution and return of commissions, and transmission of evidence to foreign Court. The provisions of Rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the <sup>1</sup>[Federal Government], along with the letter of request for transmission to the foreign Court.

## ORDER XXVII

### SUIT BY OR AGAINST <sup>2</sup>[THE <sup>3</sup>GOVERNMENT]] OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

[See Sections 79 to 82]

1. Suits by or against Government.--In any suit by or against <sup>4</sup>[the <sup>5</sup>Government]], the plaint or written statement shall be signed by such person as <sup>6</sup>[Government] may, by general or special order, appoint in this behalf, and shall be verified by any person whom <sup>7</sup>[the Government] may so appoint and who is acquainted with the facts of the case.

### COMMENTS

Suit for recovery by Government. Limitation. Period of 60 years has been prescribed under Art. 149, Limitation Act, 1908, for suit for recovery of amount by Government. [2003 YLR 1686].

2. Persons authorized to act for Government.--Persons being ex-officio or otherwise authorized to act for <sup>8</sup>[the <sup>9</sup>Government] in respect of any judicial proceeding shall be deemed to be recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of <sup>10</sup>[the <sup>11</sup>Government]].

1. Subs. by the A.O., 1939 for "G.G. in-C". Federal subs. by P.O. 4 of 1975.
2. Subs. by the A.O., 1937, for "the Government".
3. Subs. by the P.O., 1961 (1 of 1961), Art. 3 and Table (w.e.f. the 23rd March, 1956), for "Crown".
4. Subs. by the A.O., 1937 for "the Secretary of State for India in Council".
5. Subs. by the P.O., 1961 (1 of 1961), Art. 3 and Table (w.e.f. the 23rd March, 1956), for "Crown".
6. Subs. by the P.O., 1961 (1 of 1961), Art. 3 and Table (w.e.f. the 23rd March, 1956), for "Crown".
7. Subs. by the A.O., 1937, for "the Government".
8. Subs. by the A.O., 1937, for "the Government".
9. Subs. by the P.O., 1961 (1 of 1961), Art. 3 and Table (w.e.f. the 23rd March, 1956), for "Crown".
10. Subs. by the A.O., 1937, for "the Government".
11. Subs. by the P.O., 1961 (1 of 1961), Art. 3 and Table (w.e.f. the 23rd March, 1956), for "Crown".



## COMMENTS

**Authorization.** Rule 2, O. XXVII of the Code provides for not only an ex-officio appointment but also an authorization to act for the Government in respect of any judicial proceeding. When such an authorization is made, the person so authorized becomes a recognized agent for the purpose of appearance, acts and applications under the Code. This view of the meaning of R. 2 is further supported by the words "Government may appoint, whether generally or specially, for the purpose of this Order" used in clause (a) or R. 8-B of Order XXVII of the Code which shows that the Government can make a general or special appointment for the purpose of O. XXVII of the Code. [PLD 1969 Kar. 566].

**Government pleader.** "Government pleader" includes any officer appointed by the Provincial Government to perform all or any of the functions expressly imposed by Code of Civil Procedure on the Government pleader and also any pleader acting under the directions of the Government pleader. [PLD 1990 SC 800]. Signing of pleadings by a functionary is not enough. District Attorney/Deputy Attorney in their *ex-officio* capacity can act, on behalf of the Government and can perform all such acts which are required to be performed by the Government in a judicial proceedings. [PLD 2000 Lah. 70; PLJ 1999 Lah. 1200]. Written statement duly signed by Deputy District Attorney on record. Striking off defence of the Government in ignorance of provision of O. XXVII, R. 2 of no avail. [PLD 2000 Lah. 70].

**3. Plaints in suits by or against Government.**--In suits by or <sup>12</sup>[against the <sup>13</sup>[Government]], instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert <sup>14</sup>[the appropriate name as provided in Section 79 <sup>15</sup>[\*\*\*] ].

## COMMENTS

**Suit based on negotiable instrument.** Suit based on negotiable instrument, execution of pronote standing proved by admission of the defendant, making of payment before scribe is of no consequence. [PLJ 2000 Lah. 2194].

<sup>16</sup>[**4. Agent for Government to receive process.**--The <sup>17</sup>[Government] pleader in any Court shall be the agent of the <sup>18</sup>[Government] for the purpose of receiving processes against the <sup>19</sup>[Government] issued by such Court.]

12. Subs. by A.O. 1937, for "against the Secretary of State for India in Council".

13. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".

14. Subs. *ibid*, for the words "The Secretary of State for India in Council".

15. The words "or, if the suit is against the Secretary of State, the words "the Secretary of State" omitted by the A.O. 1949.

16. Subs. by A.O. 1938, for the original Rule 4.

17. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".

18. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".

19. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".

Process against the Government. Recognized modes of process of service against Government are through the Government pleader, through recognized agent or through persons authorized to accept service apart from delivering the notice to the party concerned. [1989 SCMR 1407].

5. Fixing of day for appearance on behalf of Government.--The Court, in fixing the day for <sup>20</sup>[the <sup>21</sup>Government]] to answer to the plaint, shall allow a reasonable time for the necessary communication <sup>22</sup>[with the <sup>23</sup>Government]] through the proper channel, and for the issue of instructions to the <sup>24</sup>[<sup>25</sup>Government] Pleader] to appear and answer on behalf of <sup>26</sup>[the <sup>27</sup>Government]] <sup>28</sup>[\*\*\*], and may extend the time at its discretion.

6. Attendance of person able to answer questions relating to suit against Government.--The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Government, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

7. Extension of time to enable public officer to make reference to Government.--(1) Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government, before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

8. Procedure in suits against public officer.--(1) When the Government undertakes the defence of a suit against a public officer the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

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20. Subs. by the A.O., 1937, for "the Secretary of State for India in Council."  
 21. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".  
 22. Subs. by the A.O., 1937, for "with the Government".  
 23. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".  
 24. Subs. by the A.O., 1937, for "Government Pleader".  
 25. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".  
 26. Subs. by the A.O., 1937, for "the Secretary of State for India in Council."  
 27. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".  
 28. The words "or the Government" omitted by the A.O. 1949

(2) Where no application under sub-rule (1) is made by <sup>15</sup>[the <sup>13</sup>Government] pleader] on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties:

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

### COMMENTS

**Suit against public functionaries.** Suit against public functionaries is deemed to be between private parties. [1985 CLC 1680].

<sup>29</sup>[8A. No security to be required from Government or a public officer in certain cases.--No such security as is mentioned in Rules 5 and 6 of Order XLI shall be required from the <sup>30</sup>Government] or, where the <sup>31</sup>Government] has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

### COMMENTS

**Scope.** Provisions of R. 8-A, O. XXVII of the Code can only be invoked where Appellate Court orders stay of execution, but not where stay is refused. [1987 MLD 2588]. Where appeal is filed by the Government or any public officer, there cannot be automatic grant of stay of execution of decree. [2001 SCMR 377].

<sup>32</sup>[8B. Definitions of "Government" and "Government Pleader".--In this Order <sup>33</sup>Government]" and <sup>34</sup>Government] pleader" means respectively--

(a) in relation to any suit by or against <sup>35</sup>[\*\*\*] the Federal Government, or against a public officer in the service of that Government, the Federal Government and such pleader as that Government may appoint whether generally or specially for the purposes of this Order;

(b) <sup>36</sup>[\*\*\*\*]

(c) in relation to any suit by or against a Provincial Government or against a public officer in the service of a Province, the

29. Rule 8A ins. by A.O., 1937.

30. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".

31. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".

32. Rule 8B ins. A.O., 1937.

33. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".

34. Subs. by the P.O., 1961 (1 of 1961), Art. 2 and Table (w.e.f. the 23rd March, 1956), for "Crown".

35. The words "the Secretary of State or" omitted by the A.O., 1949.

36. Cl. (b) omitted *ibid.*

*Civil Major Acts*

[Order XXVII-A

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Provincial Government and the Government pleader, or such other pleader as the Provincial Government may appoint, whether generally or specially for the purposes of this Order.]