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the Privy Council held that the only qualification of the Official Assignee's title to after-acquired property (apart from a qualification not material to the present case) was "that if the insolvent carries on trade at a subsequent period with the assent of the assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade will be subject, in equity, to the charge of the creditors in that trade, in priority to the claim of the assignee under the first insolvency." There is nothing in *Cohen v. Mitchell* which applies to an agreement by which a scheduled creditor accepts a present cash payment and a promise of a further payment in settlement of the debt from an undischarged insolvent not shown to have carried on any trade or business, and without the assent or knowledge of the Official Assignee. For these reasons I think that section 23 of the Contract Act applies to the case, and that the third question must be answered in the affirmative. - Costs will be costs in the case.

Mr. Justice Parsons authorizes me to say that he concurs in this judgment.

Attorneys for the plaintiff:—Messrs. *Frámji, Moos and Mehta*.

Attorneys for the defendant:—Messrs. *Dikshit and Dhunjishaw*.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

SORA'BJI JAMSETJI, APPELLANT, v. ISHWARDA'S JUGJIWANDA'S STORE AND ANOTHER, RESPONDENTS.*

Company—Indian Companies' Act (VI of 1882), Secs. 61, 126, 144, Cl. g—Contributory—Liability of the heirs of a deceased contributory—Calls—Calls made before the winding up—Limitation—Official liquidators not bound to take out letters of administration to the estate of a deceased contributory before settling the list of contributories—Shares duly issued, cancellation of—Reduction of capital.

Section 61, Indian Companies' Act (VI of 1882) (corresponding with section 38 of the English Companies' Act of 1862) creates a new liability in the shareholders, and that liability includes contribution, not only in respect of calls made since the winding up, but also in respect of unpaid calls made before the date of the winding up, whether barred by limitation at that date or not.

* Appeal, No. 112 of 1894.

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The official liquidator need not take out letters of administration to the estate of a deceased shareholder before settling the list of contributories.

There is nothing in sections 126 and 148 requiring the official liquidator to place on the list all the persons who may as representatives be liable to contribute in discharge of the liability of a deceased shareholder as contemplated by section 126. Nor can the liability, under that section, of a person who has been placed on the list as his representative be affected by the omission of the official liquidator to do so.

Directors have no power to cancel shares duly issued to a shareholder at his request and so reduce the capital of the company.

Bhimbhái v. Ishwardás Jugjiwandás⁽¹⁾ followed.

APPEAL from the order of T. Hamilton, District Judge of Surat.

The Nawáb of Baila Spinning and Weaving Company, Limited, was registered under the Indian Companies' Act, 1866

The appellant's father Jamsetji signed the memorandum of association of the company and subscribed for twenty-five shares, which were duly allotted to him. On allotment he paid Rs. 25 per share and his name was entered in the register of shareholders. Shortly afterwards he sold the shares to one Amirbhai and handed over to him the receipts which he had obtained for the sums paid on allotment. The directors, however, refused to transfer the shares to Amirbhai's name, as the transfer was not made in the manner required by the company's articles of association, and on Amirbhai's application the directors on the 14th June, 1882, passed a resolution cancelling the shares and directing the money which he had paid for the shares to be paid to him.

The first call payable on these shares was due on 31st January, 1882; the second call on 5th May, 1882; the third call on 8th August, 1882, and the last call on 15th November, 1882.

On the 30th October, 1886, the Court made an order to wind up the company.

On 28th April, 1888, Jamsetji died intestate, leaving him surviving two sons (one of whom was the appellant Sorábji) and four daughters.

(1) I. L. R., 18 Bom., 152.

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On 8th July, 1888, the official liquidators served a notice on the appellant, calling upon him to show cause why he should not be placed on the list of contributories as heir of his father Jamsetji, the original shareholder.

The appellant contended that his father Jamsetji had ceased to be a shareholder of the company long before the date of the winding up; and that in any case his liability to pay calls was barred by limitation.

The District Judge overruled these objections and passed an order placing him on the list of contributories for Rs. 5,625, the unpaid balance due on the twenty-five shares.

Against this order the present appeal was brought.

Macpherson (with him *K. D. Shroff*) for appellant:—The shares allotted to Jamsetji were cancelled by the directors. From the date of the cancellation Jamsetji ceased to be a shareholder and was no longer liable to pay calls. The cancellation of the shares operated, no doubt, as a reduction of the capital of the company, and so far the resolution of the directors is invalid. But the directors ought to have put the name of Amirbhai on the register. Their omission to do so cannot prejudice our rights. See section 29 of Act VI of 1882.

Next we say that the calls were barred by limitation at the date of the order to wind up—article 178 of the Limitation Act (XV of 1877). The winding up cannot revive the liability to pay them.

Lastly, we say that the appellant's father Jamsetji having died intestate, the official liquidators cannot recover without letters of administration to the estate of the deceased. Section 190 of the Indian Succession Act (X of 1865) applies. If it does not apply, then the liquidators must proceed against *all* the heirs of the deceased shareholder. They have no right to proceed against one of the heirs alone.

Ganpat Sadashiv Rao for respondents:—Section 148 of the Companies' Act (VI of 1882) does not require the official liquidators to take out letters of administration to the estate of a deceased shareholder at the time of settling the list of contribu-

ories. Under section 126 the heirs of a deceased contributory are liable both jointly and severally. Any one of them can be proceeded against, and he may sue the rest for contribution.

As to limitation, the winding-up order creates new rights and new liabilities. Under section 61 of the Indian Companies' Act (VI of 1882) the liability of a shareholder to contribute to the assets of the company is a new liability—a liability to pay calls made both before and after the winding up—*The Parell Spinning and Weaving Company, Limited v. Mánék*⁽¹⁾; *In re Whitehouse & Co.*⁽²⁾. The claim is, therefore, not time-barred.

Lastly, as to cancellation of shares, the directors had no power to cancel shares which had once been allotted. Such cancellation amounts to a reduction of the capital, and is, therefore, illegal. The appellant's father Jamsetji signed the memorandum of association, and paid a deposit of Rs. 25 on each share. His name was entered in the register. He was, therefore, a member of the company and remained so till the date of the winding up. He is, therefore, liable as a contributory. His transfer of the shares to Amirbhai not being in accordance with the articles of association, the directors were not bound to recognize it. Section 29 of Act VI of 1882 does not, therefore, apply.

SARGENT, C. J.:—The appellant's father Jamsetji, who was an original allottee of twenty-five shares, never ceased to be the legal holder of them and liable for calls. The agreement to transfer the shares to Amirbhai in February, 1882, was not carried into effect in accordance with article 28 of the company's articles of association or assented to by the company, and the cancellation of the shares by the company was beyond their powers. See the decision of this Court in *Bhimbhái v. Ishwardás Jugjiwandás*⁽³⁾. Jamsetji was, therefore, the legal holder of the shares at the date of the winding-up order.

As to the calls being barred, it is to be remarked that section 61 of the Companies' Act (VI of 1882) makes every member of the company liable to contribute to the assets of the company to an amount necessary for the payment of the debts and liabilities.

(1) I. L. R., 10 Bom., 483.

(2) 9 Ch. D., 595.

(3) I. L. R., 18 Bom., 152.

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ties of the company, the costs, charges and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves; and by sub-clause (d) in the case of a company limited by shares no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is at present a member. This section corresponds with section 38 of the English Companies' Act of 1862, the effect of which was fully considered by Sir George Jessel in *In re Whitehouse & Co.* (1). After pointing out that the section creates a new liability as regards the shareholders, the Master of the Rolls held that the contribution under the section includes unpaid calls made before the winding up as well as those made after the winding up. "It is true," he says, "that a call made before the winding up is a debt due to the company, but that does not affect the new liability to contribute." Nor can it in this view of the section affect the liability created by the section that the debt was barred.

As to the objection that letters of administration to the estate of the appellant's deceased father Jamsetji have not been taken out under Act X of 1865, it may or may not be necessary in the future for official liquidators to take them out as contemplated by section 144, sub-clause (g), but there is no obligation to do so before settling the list of contributories. As to placing on the list all the persons who may as representatives be liable to contribute in discharge of the deceased's liability as contemplated by section 126, there is nothing in that section or in section 148 which requires it to be done, nor can the omission to do so affect the appellant's liability under section 126.

For the above reasons we must confirm the order of the Court below with costs on appellant.

Order confirmed.

(1) 9 Ch. D., 595 at p. 600.