1916.

Present: De Sampayo J.

SANKARA AYAR *v.* BECKET.

33—C. R. Colombo, 47,802.

Joint Stock company—Call made by directors from shareholders—Compulsory winding-up proceedings—Prescription.

The directors of a joint stock company registered in India under the Indian Companies Act, 1882, made a call in 1908 for the balance due on defendant's shares, but the defendant did not pay it. In 1911 an order was made for the compulsory winding up of the company by the District Court of Tinnevelly (India). On October 9, 1912, the Court made order that the defendant should pay the balance due on his shares within four days of the service of the order. The defendant not having paid the amount, this action was instituted on October 7, 1915.

Held, that the claim was not barred by prescription. The ordinary liability of a shareholder to contribute his share of capital arises under the articles, but on a winding up it is converted into a statutory liability under section 61 of the Indian Companies Act, 1882.

The amount of contribution ordered by the Court can be recovered, though the claim on the basis of calls originally made by the directors may have been barred by limitation before the winding up.

THE facts are set out in the judgment.

A. St. V. Jayewardene (with him *Mahadeva*), for plaintiff, appellant.

Keuneman, for defendant, respondent.

Cur. adv. vult.

March 1, 1916. DE SAMPAYO J.—

The plaintiff, as the official liquidator of the Swadeshi Steam Navigation Company, sues the defendant, who is the holder of three shares in the company, for the recovery of Rs. 86.20 as the amount of contribution, with interest, due by him towards the assets in the winding up of the company. Though the amount claimed is small, the case involves an important point in the law relating to limitation of actions.

The Swadeshi Steam Navigation Company is a company registered in India under the Indian Companies Act, 1882. In September, 1907, the defendant was, on his application, allotted three shares of Rs. 25 each, for which he made the initial payment of Rs. 15. In 1908 the directors made a call for the balance due on the shares, but the defendant did not pay it. In 1911, the Company being in difficulty, the District Court of Tinnevelly made an order for its compulsory winding up, and the plaintiff was appointed official

liquidator. In September, 1912, the Court settled the list of contributors, and in the list the defendant was included as a contributory in respect of the balance due by him on his shares. On October 9, 1912, the Court made order that the defendant should pay the amount to the plaintiff within four days of the service of the order. The evidence is, and the Commissioner is satisfied, that the order was served on the defendant on October 10 or 11, 1912, and the defendant not having paid the amount this action was instituted on October 7, 1915.

If the date of the order or of its service is taken as the time when the cause of action arose, this action cannot be said to have been prescribed. The Commissioner, however, on the footing that the cause of action arose in 1908, when the directors made the call, held that the action was barred by prescription, and dismissed it. He is clearly wrong in taking no account of the winding-up proceedings. Section 61 of the Indian Companies Act, 1882, which corresponds to section 38 of the English Companies Act of 1862 and to section 123 of the Companies (Consolidation) Act, 1908, enacts that "In the event of the company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company," &c.

It is true that the ordinary liability of a shareholder to contribute his share of capital arises under the articles, but on a winding up it is converted into a statutory liability under the above section. The liability of a contributory as such is distinct from his previous liability as a shareholder. It is a new liability under the statute. *In re Whitehouse & Co.*,[1] *In re West of England Bank*,[2] *Burgess's case*.[3] This interpretation of the statute has been adopted in India. *The Parell Spinning and Weaving Co. v. Manek Haji*,[4] *Sorabji Jemsetji v. Ishwardas Jugiwandas*.[5] It is therefore clear that the circumstance that the directors made a call in 1908 before the winding-up order makes no difference as regards the defendant's present liability. From the fact that the statutory liability is a new one, it follows that the amount of contribution ordered by the Court to be paid can be recovered, though the claim on the basis of calls originally made by the directors may have been barred by limitation before the winding up. *Vaidiswara Ayyan v. Siva Subramania Mudaliyar*.[6] Section 125 of the English Companies (Consolidation) Act, 1908, corresponding to section 125 of the Indian Companies Act, 1882, emphasizes the nature and extent of the liability by declaring that "the liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the time when calls are made enforcing the liability." Now, the way in which calls are made for enforcing the liability is by order

[1] (1878) *L. R. 9 Ch. D. at page 599.*
[2] (1879) *48 L. J. Ch. at page 464.*
[3] (1880) *L. R. Ch. D. at page 511.*
[4] *I. L. R. 10 Bombay 483.*
[5] *I. L. R. 20 Bombay 654.*
[6] *I. L. R. 31 Madras 66.*

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of Court under section 166 of the English Act, corresponding to section 151 of the Indian Act. Consequently the cause of action against the defendant arose when the order of the Tinnevelly Court was served on the defendant, and when, therefore, the debt became payable. As regards the period of prescription, the cause of action not being otherwise provided for by the Ordinance No. 22 of 1871, section 11 of the Ordinance governs, and as this action has been instituted within three years from the time when the cause of action accrued, it is not barred by prescription.

I may note that counsel for the defendant contended that no liability arose under the statute so far as the defendant was concerned, because the liquidator had not given him notice in connection with the settlement of the list of contributors. But this point was not raised in the Court below, and no evidence was directed to it. The defendant, for the purpose of proving that he had not received the order of Court, did swear generally that he had not received any notice or communication from the company or the liquidator since his application for shares, but the Commissioner did not believe him there. Moreover, if the defendant was wrongly put on the list of contributories, his remedy, I think, is to apply in that behalf to the Court in the winding-up proceedings.

The appeal is allowed, and judgment will be entered for the plaintiff as claimed, with costs of the action and of this appeal.

Appeal allowed.