1871.
Damodhar Madhavji v. Kalandas Nathandas.

dency town, or in the Mofussil; but we may say this much, that we do not remember any case in which an agreement to advance money in defence of an existing possession of property has been held to be champertous. The decree must be affirmed.

Decree affirmed with costs.

Attorneys for the plaintiff: *Acland, Prentis, and Bishop.*

Attorney for the defendant: *C. Tyabji.*

March 9.

THE ASIATIC BANKING CORPORATION (LIMITED), in Liquidation.....*Plaintiffs.*

AMADOR VIEGAS and another, Administrators of the Estate of Amador Viegas (the younger).....*Defendants*

Administrator—Distribution of Assets—Knowledge of Debt—Actual Knowledge—Calls—Act X. of 1865. *Sec.* 282—*Indian Succession Act.*

Semble that an administrator who pays such debts *as he knows of* otherwise than *equally and rateably as far as the assets of the deceased will extend*, in accordance with the provisions of Sec. 282 of Act X. of 1865, is personally liable for any loss occasioned to a creditor of the deceased by such improper destribution of the assets.

In order to charge such administrator, his knowledge must be actual, as distinguished from a constructive or imputable knowledge.

A liability to pay calls is a debt within the meaning of the above section (282 of Act X. of 1865).

THE facts of this case sufficiently appear from the judgment of the Court.

The case came on for hearing before GREEN, J., on the 13th of January 1871.

Farran (with him *the Honorable A. R. Scoble*, Advocate General), for the plaintiffs:—The defendants, that administrators of Amador Viegas the younger, knew that the intestate was possessed of fifty shares in the plaintiffs' Company for the shares are mentioned in the inventory field by the defendants. They must also have known that the Corporation was being wound up in the early part of 1867, for it was

matter of common notoriety in Bombay, and these shares are actually entered in the defendants' inventory as unsaleable. From these circumstances the Court will infer that they had knowledge of the intestate's liability on these shares, or at least that they had the means of knowing it, as the most cursory inquiry with reference to these shares would have disclosed that they were not fully paid-up shares, and that calls were about to be made upon them. The defendants have given no notices under Sec. 42 of Act XXVIII. of 1866; they have distributed the estate without taking the most ordinary precautions to ascertain the claims upon it. That being so, the Court will presume that they knew what they ought to have known.

1871.

Asiatic Banking Corp. v. Amador Viegas *et al.*

Whatever may have been the law prior to the passing of the English Companies' Act of 1862, since then the liability of a shareholder to contribute to the assets of a company is a debt payable when the calls are made-a *debitum in præsenti in futuro solvendum*: 25 & 26 Vict., c. 89, s. 75; *Williams* v *Harding* (*a*). It is not contended that it is hear a specially debt, but it is a debt, and on which the defendants had knowledge. They were bound them to pay it, or to set apart a sum for the payment of it, propotionately with the other debts of the intestate, so as to carry out the intention of Sec. 282 of the Indian Succession Act, and not having done so the defendants are now personally liable to try the amount which the plaintiff would have received if the assets of the intestate had been rateably divided amongst his creditors.

Macpherson (With him McCulloch), for the defendants :— Admitting, for the purpose of his argument, that this liability is a debt the defendants had not knowledge of it. That is sworn to, and there is no reason why the Court should not believe what is so stated.

Cur. adv. vult.

March 9. GREEN, J.:—This is a suit to recover from the defendants, who are administrators of the estate of the late Amadôr Viegas the younger, the sum of Rs. 15,000 due for

(*a*) Law Rep 1 Eng & 1 App 9.

1871.

Asiatic Banking Corp. v. Amodar Viegas. et al.

calls in respect of fifty new shares in the Asiatic Banking Corporation, of which the said Amandor Viegas the younger was the registered holder at the time of his death.

By an order of the High Court of Chancery in England, dated the 3rd day of November 1866, the Asiatic Banking Corporation, a joint stock company incorporated by Royal Charter, was ordered to be wound up by the said Court under the provisions of the English Companies' Act, 1862. By a certificate of the Chief Clerk dated the 17th of July 1867, the name of Amador Viegas is certified to be included (with others) in the list of contributories to the company as the holder of fifty new shares, and by an order of the said court, dated the 12th of November 1867, a call of £ 10 per share was made on the holders of the new shares' including (amongst others) the said Amador Viegas, and the amount of such call was ordered to be paid into the Oriental Bank at Bombay on or before the 18th day of January 1868. By another order of the said court, dated the 26th of May 1868, a further call of £20 per share was made on the holders of new shares, including the said Amador Viegas, and the same was to be payable to the Oriental Bank at Bombay; as to £8 per share (part of the said call), on or before the 1st of August 1868; as to £6 per share (further part of the said call), on or before the 1st day of February 1869; and as to the sum of £6 (residue of the said call), on or before the 1st day of May 1869.

The shareholder Amador Viegas died before the winding-up order, and on the 25th of September 1866, intestate. Shortly after his death, and on the 12th of November 1866, the defendants applied for, and on the 12th of February 1867 obtained, from this court, a grant of administration to the estate of Amador Viegas the younger. On the 18th of November 1867 the liquidators in London sent a circular addressed to the deceased at Bombay, giving notice of the call made by the order of the 12th day of the same month. This circular, which is not now produced, appears to have come to the hands of the defendants, as by a letter, dated the 8th of January 1868, and addressed to the liquidators, they

acknowledge its receipt, and write as follows:—"We are in receipt of your circular, dated the 18th of November last, in respect to calls on the shares held by the deceased Amador Viegas, junior. In reply, we beg to state that he died in September 1866, intestate and insolvent. The undersigned obtained letters of administration from the High Court, and realised the title property he had, together with a few shares in different joint-stock companies. The deceased's liabilities amounted to nearly Rs 55,000, and his assests realised only Rs. 37,000. We, accordingly, compromised with his creditors in the best way we could possibly do it, closed the accounts, and handed them to the court in August last. The balance in favour of the estate in Rs. 202-4-7, at your disposal. The deceased left a widow and three children unprovided for, and we are obliged to maintain them at our own and other friends' expense." On the 20th of April 1866 the solicitor in Bombay of the liquidators wrote to the defendants, requiring payment of the call, and the defendants, on the 27th of the same month, wrote to the same effect as their letter of the 8th of January 1868 already mentioned. No steps seem to have been taken for some time after the death on the intestate, and after the grant of administration to the defendants to substitute their names for that of the deceased in the list of contributories of the corporation, though the fact of such grant of administration came to the knowledge of the liquidators in January or February 1868; but by an order of the Court of Chancery, dated the 6th of April 1869, it was ordered that the list should be amended by striking out the name of Amador Viegas, and substituting the names of Amador Viegas the elder and Gabriel Viegas, as the administrators of the said Amandor Viegas, deceased, in respect of the fifty new shares standing in his name, and that a call of £30 per share be made upon the said Amador Viegas the elder and Gabriel Viegas as such administrators of the said Amador Viegas, deceased, and that the said Amador Viegas the elder and Gabriel Viegas, as such administrators as aforesaid, on or before the 21st day of June 1869, or within four days after service of that order, should, out of the assests of the said Amador Viegas, deceased, in due course of

1871.

Asiatic Banking Corp. v. Amodar Viegas *et al.*

administration, pay into the Oriental Bank at Bombay the amount which would be due from the estate of the said Amador Viegás, deceased, in respect of such call.

By the plaint in this suit, which was filed on the 14th of June 1870, the contention is put forward that the liberty of the estate of the intestate to pay calls in respect of the said fifty new shares was of the nature of a specially debt and that the defendants ought to have retained sufficient assets of the deceased to pay the said calls in priority to liabilities of the said estate on simple contract, which the defendants did not do, and that so far as the defendants have not sufficient assets of the deceased to satisfy the liability of the said deceased in respect of the said calls, they ought to be held personally liabile to satisfy the same. The relief prayed by the plaint is that the defendants, as administrators of the said Amador Viegas, deceased, may be decread to pay to the plaintiffs the sum of Rs. 15,000 due for calls, with interest at nine per cent. per annum from the 22nd of June 1869, and that, if the defendants shall not admit assets come to their hands sufficient to pay the said amount, that an account may be taken of the estate and effects of the said intestate come to their hands, and of their application thereof, and that if it shall appear that the defendants have improperly paid away or disposed of the same, or any part thereof, in priority or performance over the plaintiffs' claim, the defendants may be personally charged with, and ordered to pay to the plaintiffs, the amount so improperly paid away or disposed of, or so much thereof as may be sufficient to satisfy the plaintiffs' claim in this suit.

At the hearing of the suit the defendants' counsel admitted that the intestate was a shareholder in the bank to the extent alleged, and also that the winding-up order and orders for call had been made as alleged, and the only issue settled or asked for was as follows:—Whether the plaintiffs are entitled to recover from the defendants any and what sum in addition to the sum of Rs. 202-4-7 in respect of the cause of action mentioned in the plaint. It was also agreed

by the counsel for the plaintiffs and defendants respectively, that in the event of the court holding that the defendants are liable in respect of their mode of distribution of the intestate's estate, the amount of such liability should be taken at Rs. 7,000, without further going into the accounts of the administration; but the plaintiffs' counsel reserved and insisted on the right of the plaintiffs, in case the opinion of the court should be against them on that question, to have the accounts taken in the ordinary way.

1871.

Asiatic Banking Corp. v. Am... Viegas et al.

The plaintiff's counsel abandoned—and, I think, properly—the contention set up in the plaint, that the liability to pay calls is, as against these defendants, of the nature of a specialty debt, and one which on that account ought to have been provided for before the debts of the intestate on simple contract were paid or satisfied. The 75th section of the English Companies' Act, 1862, which provides that the liability of a person to contribute to the assets of a company winding up under that Act shall be of the nature of a specialty debt, is restricted to England and Ireland; and as the intestate in this case was, at the time of his death, domiciled in the Bombay Presidency and resided at Bándorá, the liability of his estate to pay the call ought not, I think, to be deemed to be of the nature of a specialty debt, on the ground that the law of distribution of assets of a deceased person (including questions of preferential claims by particular creditors of the estate to payment) is the law of the domicile of the intestaet, and by this law specialty debts have no priority over others (*a*). By Sec. 282 of the Indian Succession Act, 1865, it is provided, "save as aforesaid" (*i.e.*, save in respect of funeral expenses, deathbed charges, testamentary and administrator's expenses, and certain wages), "no creditor is to have a right of priority over another by reason that his debt is secured by an instrument under seal, or on any other account. But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend."

(*a*) See *Pardo* v. *Bingham*, L. R. 6 Eq. 485.

1871.

Asiatic Banking Corp. v. Amador Viegas *et al.*

Now having regard to Sec. 75 of the English Companies' Act, 1862, it is clear that there was a debt due from the deceased, at the time of his decease, to the extent of the uncalled amount of the shares held by him, but payable at the time or respective times of making calls for enforcing such liability; and the question on the present hearing really seems to turn on this, whether, when the defendants satisfied the claims of other creditors of the intestate, or otherwise dispcsed of his assets, they knew of the claim of the plaintiffs? In all cases of doubt it is much better and safer for executors and administrators to advertise for claims, as provided by Sec. 320 of the Act above cited, and Sec. 42 of Act XXVIII. of 1865. But the Acts just cited do not provide that an executor or administrator not resorting to the course pointed out in those sections shall be deemed to have had notice of any claims which such advertisements might have called forth, and the present case, as I have said, in my opinion, really turns on Sec. 282 of the firstnamed Act. By the law as it stood before the Indian Succession Act, 1865, an executor or administrator might safely pay a debt by simple contract if he had no notice of the existence of a debt of a superior degree, as of a debt by specialty. And the notice of the debt of a supeiror degree necessary to be shown on the part of the executor or administrator, in order to charge him by reason of improper payment of simple contract debts, was *actual* notice (*see* Williams on the Law of Executors and Administrators, 5th ed., P. 930), though it seems not to have been necessary that a suit to enforce such higher debt should have been brought in order that the executor or administrator should be deemed to have had notice of that debt (*see* the observations of Parke and Patteson, JJ., in the case of *Oxenham* v. *Clapp* (*b*). I think this affords a guide to the proper interpretation to be put on Sec. 282 of the Indian Succession Act, and I am of opinion that the knowledge there intended must be deemed to be an actual, as distinguished from a constructive or imputable knowledge —knowledge of a call having been actually made at the time

(*b*) 2 B. &. Ad. 312.

the defendants disposed of the intestate's estate. Of that there can, of course, be no question here, as the order for the first call is dated the 12th of November 1867, and the defendants allege that the estate of the deceased had been already disposed of in or previously to the month of August in that year, in the manner shown by the inventory signed by them on the 31st of August 1867, and filed in court on the 14th of December 1867. Of the call made by the order of the 12th of November 1867, they seem to have had actual knowledge some time in December 1867, by means of the circular of the liquidators in England dated the 18th of November 1867, and already referred to.

Then can it be said that the administrators had knowledge of the debt created in respect of the uncalled-up amount of the shares in question, by the operation of Sec. 75 of the English Companies' Act, 1862, by reason of their knowledge of the intestate's fifty shares in the bank at the time of his death? That they had this knowledge is clear from the fact that they enter these shares in the inventory as forming part of the assets of the intestate; but there is no sufficient evidence, in my opinion, that they had any actual knowledge that the shares were not fully paid, or that any liability existed in respect of them. By inquiring no doubt they might have discovered that there was such liability, and that it was likely to be enforced; and in that sence, no doubt they had knowledge of the debt. But such a knowledge would not be actual, but constructive knowledge, and, as I have said, in my opinion, Sec. 282 of the Indian Succession Act ought not to be interpreted as including a knowledge which is constructive only. Had there been in the present case any evidence of undue precipitancy in disposing of the assets, or of fraud or anything unfair in their conduct, it would have afforded strong ground for inferring actual knowledge by the administrators of the debt due to the plaintiffs; but, in my opinion, it cannot be justly said that there is such evidence. On the question of what is considered undue precipitancy in paying simple contract debts where it afterwards turns out that specially debts existed, I

1871.

Asiatic Banking Corp. v. Amador Viegas *et al.*

may refer to the case of *Nosotti* v. *Jefferson* (c), where it was held that an executor in England of a testator who died in India, who had paid simple contract debts nine months after the testator's death, not having then notice of a specialty creditor in India, was justified in doing so, and did not thereby bring himself under personal liability to the special creditor.

I am of opinion, therefore, on the question whether the defendants are personally liable to the claim of the plaintiffs by reason of their having paid certain creditors of the deceased, to the exclusion of the plaintiffs' claim, either in full or beyond the equal and rateable proportion according to which such creditors ought to have been paid, having regard to Sec. 282 of the Indian Succession Act, that they are not so liable. But in pronouncing this conclusion I do not, of course, express any judgment or opinion that the defendants can justify all the payments mentioned in the inventory (other than those of debts due from the estate) as against the claim of a creditor and; unless the parties can come to some amicable settlement an account must be taken.

The decree of the court is that the defendants, as administrators of the estate of Amador Viegas, deceased in the course of administration, are liable to pay to the plaintiffs the sum of Rs. 15,000 or on equal and rateable proportion thereof, having regard to the other debts and liabilities of the said Amador Viegas, deceased; and it be referred to the Commissioner to take an account of the estate and effects of the intestate Amador Viegas come to the hands of the defendants or either of them, or of any other person or persons by the order or for the use of the defendants or either of them, and of the application of the same by the defendants or either of them; and that the commissioner do also take an account of the debts of the said intestate, specifying which of them have been paid or satisfied, and which of them, wholly or how much on account thereof, have or has remained due and unsatisfied; and that the said Commissioner do further certify

(c) 9 Jur., N. S., 656.

and report to the Court how far, in his opinion, and having regard to the finding of the Court on the issue settled in this suit, the application by the defendants of the assets of the deceased with which they respectively may be found chargeable has been proper under the circumstances, or otherwise. I reserve further direction and costs.

1871.
Asiatic Banking Corp, v. Amodar Viegas *et al.*

Attorneys for the plaintiffs: *Manisty and Fletcher.*

Attorneys for the defendants: *Dallas and Lynch.*

Original Suit No. 553 *of* 1870.

March 9.

HÁJI JIVÁ NUR MUHAMMAD.....*Plaintiff.*

ÁBUBAKAR IBRÁHIM MEMAN.....*Defendant.*

Attachment before Judgment—Property outside the Jurisdiction of attaching Court—Civ. Proc. Code, Sec. 81.

The High Court has no power to attach before judgment a defendant's property situate outside the limits of its ordinary original civil jurisdiction.

ON the 27th of February 1871, *Latham*, on behalf of the plaintiff, moved before WESTROPP, C.J., and GREEN, J., for an order to attach before judgment certain moveable property of the defendant in his shop at Karáchi. In moving for the rule, *Latham* relied upon the case of *In re R. J. Abraham (a)* and the arguments there used, and Act. XIV. of 1869, Sec. 10.

Cur. adv. vult.

9th March 1871. WESTROPP, C.J.:—This is a suit in respect of a partnership alleged to have existed between four persons, namely, the plaintiff, Náthá Nur Muhammad, Detardiná Nur Muhammad, and the defendant. The plaint states that Náthá Nur Muhemmad and Detardiná Nur Muhammad have retired from the partnership, and assigned their respective interests therein to the plaintiff. The partnership is stated to have been for the sale at Karáchi, in Sind, of

(a) 6 Bom. H. C. Rep., A. C. J. 170.