

(13) *Article 296 of the Treaty of Versailles.—Mixed Partnerships.*

The case of a so-called "mixed partnership" was considered by the Tribunal (First Division) in *Aykroyd v. Peinemann* (No. 2249), (*Recueil*, v, p. 662), in which a claim was made by a British creditor under Article 296 (1) against the debtor as the German partner resident within German territory in the mixed partnership known as Duckitt & Co. in England and as Detering & Peinemann in Germany. The claim was also directed against Peinemann, as the representative of Detering, another German partner in the partnership, who was killed in the war. The said German partnership comprised four partners, two of whom were German and two were British nationals. Applying the principles of *Hardt v. Stern* (*Recueil*, iii, p. 12), the British nationals would receive 63 per cent. and the German partners 37 per cent. of the assets. On the 2nd June, 1919, one of the two British partners paid to the creditors the sum of £680, and on the 14th September, 1920, he paid a second instalment of £680 on account of the debt.

In the opinion of the Tribunal, the creditors were entitled to succeed, the only questions to be decided being, in the first place, as to the effect to be given to the part payment, and, in the second place, as to the amount on which interest should run. As to the first question, the Tribunal accepted the view of both Clearing Offices—namely, that where part-payment during the war had been made by a partner in a debtor firm which is a mixed partnership to a creditor, the amount of such payment would be inadmissible for the purposes of the claim by the creditor against the mixed partnership, and the claim would consist only of the amount outstanding on the 10th January, 1920. In making an award on that footing the Tribunal stated that it should not affect the rights of the creditors as to the balance of the debt which might be outstanding, or the adjustment of liability between the surviving members and the late members of the debtor partnership. As to the second question, the Tribunal were of opinion that in those proceedings interest should run only on the amount of the debt outstanding on the 10th January, 1920, such claim being dependent solely on paragraph 22 of Section III, Part X, and not being based on contract, law, or custom.

The principle of the mixed partnership was also applied by the First Division in a somewhat complicated case of *Commerz & Privatbank A.G. v. Pena Copper-mines, Ltd.* (No. 2763), in which the creditors were one of a group of firms consisting of the *Crédit Foncier d'Algérie*, a French company, the creditors, and the *Société Anonyme Cuivre et Pyrites*, a French company. Certain advances had been made by the above-mentioned group of firms to the debtors, and, by way of contest to the claim of the German member of the group for the proportionate amount of the debt due to such member, the debtors contended that the liability was a joint one to the three members, and that it was not severable, and, further, that if any debt was due from them to the creditors, the currency applicable was the French currency in which the advances were made. The latter contention was opposed at the hearing by the British Government Agent, who represented that any credit must be in sterling, and was not seriously maintained by the debtors.

In the opinion of the Tribunal, although the group could not be regarded as a partnership under English law, the three members had undertaken a joint liability, and were jointly entitled to the benefits arising from the agreement with the debtors. After referring to the cases of *Hardt v. Stern*, *Fischer & Co. v. Biehn*, and *Aykroyd v. Peinemann* as showing that when a debt was due from a mixed partnership the share of the debt applicable to partners not subject to the clearing procedure drops out, and only the share of the other partners is dealt with in the clearing, the Tribunal expressed their opinion that the same methods were to be employed in dealing with a debt due to a mixed partnership. The Tribunal further expressed their opinion that corresponding principles must govern cases, similar to the present, of joint liability or of joint rights, where the debtors, jointly liable, or the creditors, jointly entitled, were not all subject to the clearing procedure. Under English municipal law the joint creditors should sue jointly, but this would not be possible before the Tribunal, as two of them by the Treaty were excluded from the clearing procedure. On the other hand, under German municipal law similar considerations would apply.

In these circumstances it was necessary to adjust the English and German municipal laws to the principles of the Treaty. According to these principles, the shares of the creditors jointly entitled who were not subject to clearing procedure should be eliminated, and the creditors who under the Treaty were entitled to the benefits of the clearing procedure should recover their portion of the amount due. In the present case the main claim of the creditors represented their share of the joint debt, and this the Tribunal held they were entitled to recover.

(14) *Dissolution of Contract under Article 299 (a) of the Treaty of Versailles.—"Pecuniary Obligation."*

The question as to whether, upon the dissolution of a contract under which one of the parties had obtained a benefit at the expense of the other party, there remained a pecuniary obligation within the meaning of Article 299 (a) came before the Tribunal in the case of *Burroughs Wellcome v. Chemische Fabrik auf Actien* (No. 3958), (*Recueil*, vi, p. 13). The British creditors had purchased urotropine before the war upon the terms that, in addition to a cash rebate, they should be entitled to a 10-per-cent. goods bonus, under which the debtors at the end of each year had to deliver free of charge a quantity of urotropine equivalent to 10 per cent. of the amount purchased by the creditors during the year. The creditors claimed, by way of return of the purchase price paid, the cash value of the amount of urotropine to which they would have been entitled as bonus in respect of purchases for the period up to the 4th August, 1914.

The Third Division found that, under German and Scottish law, when a contract becomes impossible of performance, the party who has obtained a benefit at the expense of the other party must make repayment; and they held that, whether the contract was governed by English or German law, it was within the intention of the Treaty that, upon dissolution by Article 299 (a), the party who has obtained a benefit at the expense of the other party shall thereby be subject to a pecuniary obligation within the exception contained in Article 299 (a). This does not mean that a party who has received payment under a contract will necessarily have to make repayment in case the contract has not been fully performed, or that a party who has partly performed the contract will always be entitled to remuneration, as the parties may have contracted in such terms as to show the intention that part-performance should be at the risk of the party performing. In the present contract, however, the parties had made no special provisions for circumstances in which the further performance became impossible, and the creditors were therefore entitled to repayment.

In the case of *Davidson v. Dammann* (No. 2441) the British creditor had at various times before the outbreak of the war instructed the debtors to purchase securities for him, but, following the course of business between the parties, he did not find the whole of the purchase price, the necessary money being advanced by the debtors, who placed the amount to the creditor's debit in his current account, charging him interest thereon. Another bank in Germany at which the creditor's account was in credit succeeded, after obtaining permission from the proper German authorities, in applying part of that balance in discharge of the debit balance with the debtors, and on the 1st February, 1919, the necessary payment was made and accepted by the debtors.

The Tribunal held that on the outbreak of war the contract between the parties was dissolved, and the creditor lost the right to have the securities delivered to him; a pecuniary obligation, however, remained, and in the circumstances of the case the extent of that pecuniary obligation was to be ascertained under German law.

In the view of the Tribunal the question was governed by paragraphs 812 and 818 of the German Civil Code. The debtors had obtained a benefit which had no longer any legal ground, and was usually described as "unjustified enrichment." Having regard to Article 296, the Tribunal held that the proper date for the ascertainment of the capital amount of the debt was that of the coming into force of the Treaty—10th January, 1920. The Tribunal refused to hold that the payment of the 1st February, 1919, having been made with the assent of the German authorities, was invalid, and distinguished the case on the facts from *Meyer & Sohn v. Joseph* (No. 2690), where a payment made in October, 1919, was not accepted in discharge of a debt. The Tribunal therefore gave directions with a view to ascertaining the amount of the debtors' enrichment on the 10th January, 1920.