Present : De Sampayo and Porter JJ.

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THE LIQUIDATORS OF THE ENEMY FIRM OF FREUDENBERG & CO. *v.* SOMASUNDARAM.

484—D. C. Colombo, 1,954.

Enemy Firms Liquidation Ordinance, No. 20 of 1916—Trading with the Enemy Ordinance, No. 20 of 1914—Debt due to enemy firm before the war—Peace Treaty—Clearing house established—Liquidators' right to maintain action—Prescription.

Plaintiffs were appointed controllers of the business and trade of an enemy firm in 1914 under the Trading with the Enemy Ordinance, 1914. Their status was subsequently converted into that of liquidators by virtue of section 8 of the Enemy Firms Liquidation Ordinance of 1916. They brought this action on July 11, 1921, as liquidators for the recovery of a sum of money due by defendant to the enemy firm for goods supplied in June, 1914. Objection was taken to the right of the plaintiffs as liquidators to maintain this action, on the ground that since the establishment of a clearing house in pursuance of the Peace Treaty and the Order in Council (August 18, 1919) any debts which became due to the enemy firm before the war by any British nationals residing in Ceylon can only be recovered by the clearing office.

Held, that the action was maintainable by the plaintiffs as liquidators.

Held, further, that Article 300 of the Peace Treaty, which suspended periods of prescription for the duration of the war and for their beginning to run again at the earliest three months (eighteen months under Ordinance No. 8 of 1921) after the coming into force of the Peace Treaty, applied only between enemies, and that as plaintiffs and defendants were both British nationals, the action was barred by prescription.

THE facts are set out in the judgment.

A. St. V. Jayawardene, K.C. (with him *Arulanandan*), for defendant, appellant.

Drieberg, K.C. (with him *Bartholomeusz*), for plaintiffs, respondents.

June 27, 1922. DE SAMPAYO J.—

There are two questions raised in this case, viz.: (1) Whether the plaintiffs can maintain this action; and (2) whether the plaintiffs' claim is barred by limitation of action.

The plaintiffs are the liquidators of the enemy firm of Freudenberg & Co. They are, in fact, partners of Messrs. Ford, Rhodes, Thornton & Co., a firm of accountants carrying on business in

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Colombo. They were first appointed controllers of the business and trade of Freudenberg & Co. by order of the District Court of Colombo on October 24, 1914, under the provisions of the Trading with the Enemy Ordinance, No. 20 of 1914. Their status was subsequently converted into that of liquidators by virtue of section 8 (1) and (2) of the Enemy Firms Liquidation Ordinance, No. 20 of 1916. This action is brought by them as such liquidators for the recovery of the sum of Rs. 1,146·13 due by the defendant M. Somasundaram to Freudenberg & Co. for manure supplied in June, 1914. The Treaty of Peace was signed at Versailles on June 28, 1919, and was brought into operation on January 10, 1920. Article 296 of the Treaty provides, *inter alia*, that debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory, shall be settled through the intervention of clearing offices to be established by each of the High Contracting Parties. The Annex to Article 296 provides that each of the High Contracting Parties will establish a clearing office for the collection and payment of enemy debts, and that a local clearing office may be established for any particular portion of the territories of the High Contracting Parties. For the purpose of giving effect to the above Article and Annex, His Majesty the King on August 18, 1919, made an Order in Council enacting, *inter alia*, that in the event of a local clearing office being established in any part of His Majesty's dominions outside the United Kingdom, the provisions relating to the clearing office thereinafter contained shall apply thereto for the purpose of the functions authorized to be performed by a local clearing office. One of the provisions here referred to is that it shall not be lawful for any person to pay or accept payment of any enemy debt (except in certain cases which are not relevant to the present case) otherwise than through the clearing office, that it shall not be lawful for any person to take proceedings in any Court for the recovery of any enemy debt (except in certain circumstances not applicable to this case), and that the clearing office shall have power to enforce the payment of any enemy debt against the person by whom the debt is due; and for that purpose shall have all such rights and powers as if they were the creditor. The Order in Council further empowered the Legislature of any part of His Majesty's dominions to make such modifications in the said Order as are necessary to adapt it to the circumstances thereof. Accordingly, the Legislative Council of Ceylon passed the Treaty of Peace (Enforcement) Ordinance, No. 7 of 1920, which made certain formal modifications, and likewise enacted that "there shall be established in Ceylon a clearing office under the control and management of the Custodian of Enemy Property appointed under the provisions of the Enemy Firms Liquidation Ordinance, No. 20 of 1916, and that there shall be attached thereto such officers and servants as the Governor may

determine." By notification published in the *Ceylon Government Gazette* of June 15, 1920, the Governor notified that a clearing office for Ceylon was established in accordance with provisions of the Ordinance No. 7 of 1920.

The argument on behalf of the defendant is that by the establishment of a clearing office, in pursuance of the Peace Treaty and the Order in Council, the liquidation of the business of Freudenberg & Co. was superseded, and that thereafter any debts which became due to Freudenberg & Co. before the war by any British nationals residing in Ceylon can only be recovered by the clearing office, and that therefore this action, which was instituted on July 11, 1921, cannot be maintained by the liquidators. But in this connection Article 297 of the Treaty of Peace must be taken into account. Under paragraphs (*a*) and (*b*) and (*d*) of that Article, while the exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex) taken by Germany with respect of the property rights and interests of nationals of the Allied or Associated Powers were immediately to be discontinued and stayed, the Allied and Associated Powers reserved the right to retain and liquidate all property, rights, and interests belonging to German nationals, and the liquidation is to be carried out in accordance with the laws of the Allied or Associated State concerned, and, as between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures or measures of transfer are to be considered as final and binding upon all persons. By the Annex, paragraph (1), the validity of vesting orders and of orders for the winding up of businesses, and of any other orders, directions, decisions, or instructions of any Court or any department of the Government of any of the High Contracting Parties made or given in pursuance of war legislation with regard to enemy property, rights, and interests is confirmed. Under paragraph 9 of the Annex, until completion of the liquidation provided for by Article 297, paragraph (*b*), the property, rights, and interests of German nationals are to continue to be subject to exceptional war measures that have been "or will be taken with regard to them."

The expression "exceptional war measures" is defined by paragraph 3 of the Annex as including measures of all kinds, legislative, administrative, judicial, or others that have been taken "or will be taken thereafter" with regard to enemy property . . . . or measures which have or will have as an object the seizure of, the use of, or the interference with, enemy assets, for whatsoever motive, under whatsoever form, or in whatsoever place. And "measures of transfers" are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner and without his consent, such as measures directing sale, liquidation, or devolution of ownership in enemy property or the cancelling of titles or securities.

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There is no doubt that the Trading with the Enemy Ordinance, No. 20 of 1914, under which the plaintiffs were appointed controllers of the business of Freudenberg & Co., and the Enemy Firms Liquidation Ordinance, No. 20 of 1916, by which their status was converted into that of liquidators, were war legislation, and the liquidation was an "exceptional war measure" as defined in paragraph 3 of the Annex to Article 297 of the Peace Treaty. As exceptional war measures include those "that will be taken hereafter," that is to say, after the date of the Treaty, and as by Article 297, paragraph (*b*) itself, Great Britain, together with the other Allied and Associated Powers, reserved the right to retain and liquidate all property, rights, and interests belonging to German nationals, the provisions of Article 296 of the Peace Treaty with regard to clearing offices cannot be considered to have superseded the liquidation or put an end to the right of the liquidators to collect, recover, or realize enemy debts. See the judgment of Eve J. in *Meyer & Co. v. Faber*,[1] where it was decided that the provisions of Article 296 of the Peace Treaty, which declared that enemy debts were to be settled through the clearing offices to be established after the Treaty came into operation, were qualified by Article 297, and that the provisions of that Article and its Annex validated all acts done or proceedings taken thereafter in the execution of exceptional war measures, and an action brought some months after the Treaty came into operation by the Controller to recover the assets of the business of an enemy firm was held to have been properly brought. Great stress was laid on behalf of the defendant on the judgment of Russel J. in the earlier case *In re Nierhaus*.[2] That case was cited at the argument of *Meyer & Co. v. Faber* (*supra*), but the interpretation therein given of Articles 296 and 297 was not followed. Moreover, it was the case of an application to Court by the creditor of an enemy that the custodian in whom enemy debts had been vested be directed to pay the claim of the applicant, and the specific point decided was that the power conferred on the Court by the Trading with the Enemy (Amendment) Act, 1914, section 5 (2), to authorize the custodian to pay out of property paid to him in respect of any enemy debt came to an end by reason of the Treaty of Peace Act, 1919, such payments having to be made thereafter only through the clearing office. *Meyer & Co. v. Faber* (*supra*) is the case that has the most direct bearing on the present case, and should, I think, be followed.

Further, sub-section (1) of section 3 of the Enemy Firms Liquidation Ordinance, No. 20 of 1916, vests all the property of the enemy firm, movable and immovable, in the liquidator, and sub-section (2) provides that every liquidator "shall, for all purposes whatsoever, have as full rights as if the whole of the trade previously carried on by such firm . . . . . and all the property of every

[1] (1922) *L. R. 2 Ch. 226.*

[2] (1921) *L. R. 1 Ch. 269.*

description of the firm, had been absolutely assigned to such liquidator for valuable consideration, and as if all the contracts of such trade had originally been entered into with such liquidator." Thus, the pre-war debt due by the defendant to Freudenberg & Co. ceased to be an enemy debt, and became due to the liquidators, who are British nationals, by the defendant, who is also a British national. Consequently, Article 296 of the Peace Treaty, which provides for pre-war debts due by a national of one of the Contracting Powers to a national of an Opposing Power being settled through the clearing office alone, has no application to the present case.

For the above reasons I think the liquidation has not been superseded by the provisions of the Peace Treaty, but can be and ought to be carried through to its final conclusion. The plaintiffs are therefore entitled, so far as their powers are concerned, to maintain this action.

The above view of the position of the plaintiffs as liquidators has a serious effect on the issue as to prescription. Article 300 of the Peace Treaty no doubt provides for all periods of prescription being treated as having been suspended for the duration of the war, and for their beginning to run again at earliest three months after the coming into force of the Treaty. This period of three months was extended by paragraph 18 of the Order in Council to six months, and, again, by Ordinance No. 8 of 1921, section 4, to eighteen months. The above Article 300, however, in providing for the suspension of the periods of prescription, has this express limitation, "so far as regards relations between enemies." But there is no relation of "enemies" between the plaintiffs and the defendant. Both parties are British nationals. The plaintiffs as liquidators are not even agents of Freudenberg & Co. The liquidation is a war measure taken by the British Government. The question of prescription as between the plaintiffs and the defendant must be governed by the ordinary law. By our Ordinance an action for goods sold and delivered cannot be brought after one year. The present action has been brought long after the expiration of that period, and is barred by limitation.

I think that the defendant's plea of prescription must be upheld, and this appeal allowed, with costs, in both Courts.

PORTER J.—

The plaintiffs in this case are described as the liquidators of the enemy firm of Freudenberg & Co. The plaintiffs sued the defendant for the recovery of a sum of Rs. 1,146·13, to wit, Rs. 850 being value of manure supplied by Freudenberg & Co. to the defendant in June, 1914, and Rs. 295·13 being interest at 5 per cent. The matter in issue being the same, this appeal will be a test case to decide appeals numbered 499, 500, and 501 in this Court. The learned Judge in the Court below entered judgment for the plaintiffs for the

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amount claimed, and costs, and held that (1) this action was not prescribed; and (2) that, notwithstanding Ordinance No. 7 of 1920 (which was enacted to bring into force the Treaty of Versailles), section 29 of Ordinance No. 20 of 1916 contemplates that a winding up once commenced under that Ordinance shall be carried to its conclusion. Hence, this action is maintainable in its present form.

I will deal first with the ruling of the learned Judge that this action is not prescribed. For this purpose the following dates are material :—

(1) The debt was incurred on June 19, 1914.
(2) War was declared on August 4, 1914.
(3) The controllers were appointed on October 24, 1914.
(4) The liquidators were appointed by Ordinance No. 20 of 1916 on July 29, 1916.
(5) Peace was declared as from January 10, 1920.
(6) This action was brought on July 11, 1921.

The declaration of peace was embodied in Ordinance No. 7 of 1920. Article 300, section (*a*), sets out that " all periods of prescription, or limitation of right of action, whether they began to run before or after the outbreak of war, shall be treated in the territory of the High Contracting Parties as far as regards relations between enemies as having been suspended for the duration of the war." " They shall begin to run again at earliest three months after coming into force of the present Treaty." This period of three months were subsequently extended to a period of eighteen months from January 10, 1920, that is, July 10, 1921. The deciding question as to prescription in this case is whether this case " regards relations between enemies." The present plaintiffs were appointed liquidators by the Enemy Firms Liquidation Ordinance, No. 20 of 1916. Section 3, sub-section (2), reads : " Every liquidator so appointed (including all persons declared by this Ordinance to be deemed to be so appointed) shall, for all purposes whatsoever, have as full rights as if the whole of the trade previously carried on by such firm, together with the goodwill of such trade and every part thereof, and all the property of every description of the firm has been absolutely assigned to such liquidators for valuable consideration, and as if all the contracts of such trade had originally been entered into with such liquidators."

The Ordinance came into force on July 29, 1916, and, as counsel for both sides has argued, clearly assigned the whole of the rights of the enemy firm of Freudenberg & Co. to the present plaintiffs from that date. It is therefore quite clear that the present plaintiffs might have maintained this action at any time after July 29, 1916, until prescribed. There is nothing in Ordinance No. 7 of 1920 extending the period of prescription to the duration of the war, or any longer period, as regards the present plaintiffs and defendant between themselves, as neither of them are enemies.

I think, therefore, that the learned District Judge was wrong in holding that this debt was not prescribed. It would, therefore, be unnecessary for me to discuss the second point, on which the greater part of the time was spent in arguing this appeal.

I would, however, record on the authority of the case of *Meyer v. Faber* [1] that this is not a debt as defined by Article 296 of the Peace Treaty, and therefore is not one which should be settled through the clearing office, but dealt with under Article 297 of the Peace Treaty. The Treaty contemplates winding up being carried to their logical conclusion. Under the Treaty Germany has to give up her exceptional war rights, England as victor does not. The exceptional war rights given to the plaintiffs by Ordinance No. 20 of 1916 would have enabled the plaintiffs to have maintained this action had it not been that by their delay in bringing this action they are now out of time, and the debt is prescribed.

I would, therefore, set aside the judgment, and enter judgment for the defendants, with costs.

Set aside.