

1928
 *Mar. 5.
 *April 24.

IN THE MATTER OF THE CONVEYANCING AND
 LAW OF PROPERTY ACT, BEING REVISED STA-
 TUTES OF ONTARIO, 1914, CHAP. 109,

AND IN THE MATTER OF PASSAVANT FRERES,
 OF ST. ETIENNE, LOIRE, FRANCE.

THE CUSTODIAN OF ALIEN ENEMY
 PROPERTY } APPELLANT;

AND

GEORGE CLAUDE PASSAVANT AND }
 E. & S. CURRIE LIMITED..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME
 COURT OF ONTARIO

*Debt of Canadian debtor to alien enemy—Money paid into court—Claims
 by custodian and enemy creditor—Custodian's right to the money—
 Treaty of Peace (Germany) Order, 1920, Parts I and II, especially
 clauses 3, 5, 6, 10, 26, 32, 33, 34, 41—Treaty of Peace of Versailles,
 Arts. 296, 297, 298.*

Before the war, P. F., a German firm, sent to W. Co. in Canada goods on
 consignment for sale on commission. During the war W. Co. sold the
 goods and, shortly afterwards, sold its assets to C. Co. which assumed
 W. Co.'s liabilities, including the liability to P. F. In June, 1920,
 C. Co., having notice of competing claims by P. F. and its sequestrator
 in France, for the amount of said liability, applied for and obtained
 from the Master in Chambers, in the Supreme Court of Ontario, an
 order for the payment of the amount into court. In November,
 1925, P., as attorney for P. F., and the Custodian of Alien Enemy

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

Property each applied for payment to himself of the money in court. Mowat J. (30 O.W.N. 398) ordered payment to the Custodian, but subject to conditions which the Custodian refused to accept, and each party appealed. The Appellate Division (32 O.W.N. 402) ordered payment to P., subject to a right to the Custodian to a further enquiry as to certain facts. The Custodian elected against such an enquiry, and appealed to this Court.

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Held: The Custodian was entitled to the money; it represented an enemy "debt" owing by a debtor in Canada and recoverable by the Custodian under the regulations of Part I of the *Treaty of Peace (Germany) Order, 1920*. There was an adequate remedy at law, as for money had and received. It mattered not, for the purposes of the case, whether P. F. looked to C. Co. or to W. Co. as its debtor; and it was none the less a "debt" because, upon the termination of the war, C. Co., being misinformed as to its duty, paid the money into court for the benefit of P. F. or its estate; the money could not by this means be diverted from its legal destination; nor was the Custodian's right of recovery affected by the fact that, at the time of the payment into court, he, not being aware of the enemy character of the obligation, did not assert his right.

The *Treaty of Peace (Germany) Order, 1920*, Parts I and II, especially clauses 3, 5, 6, 10, 26, 32, 33, 34, 41; the *Treaties of Peace Act of Canada, 1919*, (2nd sess.), c. 30, s. 1 (1), (2); the *Treaty of Peace of Versailles*, arts. 296, 297, 298; the *Consolidated Orders Respecting Trading with the Enemy* (P.C. 1023, 2nd May, 1916), ss. 26, 28, considered.

APPEAL by the Custodian of Alien Enemy Property from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which ordered (no amendment being made to s. 33 of the *Treaty of Peace (Germany) Order, 1920*, in accordance with the suggestion and opportunity given in a previous judgment of the Appellate Division (2)) that certain money in court be paid to the present respondent Passavant, and not to the Custodian, such order being made subject to a right to the Custodian to have a further inquiry directed as to certain facts. The Custodian elected against such an inquiry, and appealed to this Court. The material facts of the case, and the history of the proceedings below, are

(1) (1927) 32 O.W.N. 402, upon re-argument subsequent to the judgment of the Appellate Division noted in 32 O.W.N. 230; see also 32 O.W.N. 4. The judgment of the Appellate Division, in its final result, allowed the appeal of the present respondent Passavant, and dismissed the cross-appeal of the Custodian, from the order of Mowat J., 30 O.W.N. 398.

(2) (1927) 32 O.W.N. 230.

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sufficiently stated in the judgment now reported. The Custodian's appeal to this Court was allowed with costs.

T. Mulvey K.C. for the appellant.

R. H. Sankey for the respondent Passavant.

The judgment of the court was delivered by

NEWCOMBE J.—The parties each assert the exclusive right to receive the sum of \$12,678.32, which was paid into the Supreme Court of Ontario by E. & S. Currie, Ltd., of Toronto, pursuant to leave granted, upon the application of that company, by order of the Master in Chambers of 2nd June, 1920. The order is expressed to have been made "In the matter of Conveyance and Law of Property Act, being R.S.O., 1914, ch. 109." The facts are shown by the affidavits and exhibits which are produced in the case, and I shall endeavour to submit a brief summary.

Upon the application for payment into court, it was disclosed by the affidavit of George Edward Watson, the Secretary of E. & S. Currie, Ltd., sworn 1st June, 1920, that, before the commencement of the war, Watson & Haig, Ltd., of Toronto, had received certain merchandise, which elsewhere appears to have consisted of silk goods, on consignment from the firm of Passavant Frères for sale in Canada on commission; that on 9th November, 1914, Watson & Haig, Ltd., received notice from Alfonse Bory of St. Etienne, in France, that he had been appointed sequestrator of Passavant Frères, whose business affairs had been suspended until further order; that in consequence Watson & Haig, Ltd., had made no payments "in respect of the said merchandise to Passavant Frères," and that shortly afterwards a letter from Passavant Frères, dated 23rd December, 1914, came to the attention of Watson & Haig, Ltd., whereby it was stated that payments due to Passavant Frères, at St. Etienne, must not be paid to the sequestrator, but to their firm at Zurich, Switzerland, and that payments to the sequestrator would not be recognized. It is stated that subsequently E. & S. Currie, Ltd.,

purchased all the assets and assumed the liabilities of the said Watson & Haig, Ltd., including the liability to Frères Passavant aforesaid, and there

is now due and owing to the said Frères Passavant by E. & S. Currie, Ltd., for and on account of Watson & Haig, Ltd., the sum of \$12,678.32.

Mr. Watson deposed further that, from time to time since the year 1914, demands for payment had come from Passavant Frères of New York and Frankfort, and that, on 31st December, 1919, Alfonse Bory, the sequestrator, had demanded payment, submitting at the same time copy of the decree of the Civil Court at St. Etienne, whereby he was appointed; that E. & S. Currie, Ltd., having thus notice of competing claims by Passavant Frères and their sequestrator, had submitted the question of payment to the Custodian, in order to ascertain whether he made any claim, and had received a reply in the negative. Mr. Watson, by the penultimate paragraph of his affidavit, states as follows:

The said E. & S. Currie, Ltd., is ready and willing at all times to answer all such questions relating to the application of the money in question as this Honourable Court or a Judge thereof may make or direct, and is now desirous of paying such moneys into Court subject to the claims of the said two claimants.

Some additional evidence is furnished by the two affidavits of the respondent Passavant, sworn at the City of New York on 19th November, 1924, and 13th October, 1925, respectively; he shows that:

Karl Kotzenberg, Hermann von Passavant and Hans von Passavant have carried on business at St. Etienne, Loire, France; Basle, Switzerland; and Frankfort-on-Maine, Germany, under the partnership names "Passavant Frères" sometimes called "Frères Passavant," "Passavant Fils & Cie" and "Gebruder Passavant G.m.b.H." respectively.

He says that, sometime after the outbreak of the war, M. Bory was appointed sequestrator of Passavant Frères at St. Etienne; that, "sometime prior to the year 1920, E. & S. Currie, Ltd., of Toronto owed the sum of \$12,678.32 to the firm of Passavant Frères of St. Etienne;" that this sum remains in court to their credit, with accrued interest; that the said Karl Kotzenberg, Hermon von Passavant and Hans von Passavant now carry on business as aforesaid; that they are the only persons entitled by law to receive the money, and that the sequestrator, Alfonse Bory, has no claim thereto. He says that the respondent was appointed general attorney of Passavant Frères by instrument of November, 1924, and he produces a certified copy of a letter from M. Bory, dated 22nd October, 1924, in which he acknowledges that he has for some time

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ceased to be sequestrator of the firm of Passavant Frères, and that his position as such has come to an end. The respondent states also, in one of these affidavits, that it was during the war that Watson & Haig, Ltd., sold the goods consigned to that company which realized the sum in question; and moreover that

Soon after this Messrs. Watson & Haig sold their assets to E. & S. Currie, Limited, and E. & S. Currie Limited assumed the liabilities of Watson & Haig including the liability to Passavant Frères.

The respondent adds, as a statement of fact, that

The former sequestrator of Passavant Frères has been discharged and I verily believe that no successor has been or will be appointed.

The Custodian, by his affidavit of 11th November, 1925, produces correspondence which he has received from the German Clearing Office and Gebruder Passavant, and the claims filed on their behalf by the German Clearing House, also a letter, dated 6th April, 1920, from Mr. A. Hoffman, who describes himself as a former director of the late firm of Frères Passavant, St. Etienne, to Watson & Haig, Ltd., in which Mr. Hoffman states that he is occupied with arrangements concerning the St. Etienne House, and would like to know what became of the goods, etc., which Messrs. Watson & Haig, Ltd., had on consignment; this letter is written from Frankfort, and Mr. Hoffman says "please send your answer to me, or, if you prefer, direct to the firm here in Frankfort." There is no record of any answer to this letter.

The money still remains in court. Meantime, on 13th November, 1925, George Claude Passavant, the respondent, acting under his power of attorney from Passavant Frères, upon notice to the Custodian, applied for payment of the money out of court, and, on the same date, the Custodian, upon notice to the respondent, applied for payment to himself. These applications were heard together by Mowat J. (1), who held the Custodian entitled, subject to certain conditions which the Custodian was not disposed to accept, and each of the applicants appealed. When the case came before the Appellate Division (2), a question was suggested by the Court as to the jurisdiction of the Master, who had directed, not only that E. & S. Currie, Ltd., should be at liberty to pay the

(1) (1926) 30 O.W.N. 398.

(2) (1927) 32 O.W.N. 4.

money into court, but also should, upon such payment, be discharged from all liability. The Court was not satisfied that the Master could discharge the liability, and accordingly ordered that

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the said E. & S. Currie, Limited, be and it is hereby added as a party to these proceedings, and that the said E. & S. Currie, Limited, shall be bound by any future order made in these proceedings. Newcombe J.
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Conformably to this direction, the Currie Company was joined, and the hearing proceeded. Upon this occasion (1), the majority of the court considered that the Custodian's right to payment was not established, because, by clause 33 of The Treaty of Peace (Germany) Order, 1920, the property, rights and interests in Canada, within the meaning of the Order, belonging on 10th January, 1920, to enemies, or theretofore belonging to enemies, were limited to those "in the possession or control of the Custodian" at the date of the Order, and were therefore not vested in or subject to the control of the Custodian, and were therefore excepted from debts to be settled through the Clearing Office. It was suggested, therefore, that an opportunity should be afforded to the Government to amend s. 33, so as to vest the debt in the Custodian. Then the latter applied for and obtained a re-argument of the appeal, and the case came before the Appellate Division for the third time (2), but in the result the Custodian fared no better, except for a dissent. The court remained of opinion that his case was not made out, and that some further inquiries were necessary; that it was not shown that the Currie Company was a debtor of Passavant Frères; that the real debtor might be Watson & Haig, Ltd., and that, if there were to be a further inquiry, that firm should also be added as a party. The Custodian was therefore put to his election as to whether he would proceed with the suggested inquiries, and, he having answered in the negative, the court directed that the money should forthwith be paid to the respondent. The dissenting judge (Ferguson J) was of opinion that it was the duty of the court to determine to whom E. & S. Currie, Ltd., should have paid Watson & Haig's debt, and that it was, by s. 10 of the Treaty of Peace (Germany)

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Order, 1920, made payable to the Custodian, and to him only.

The Orders respecting Trading with the Enemy were amended and consolidated on 2nd May, 1916, and, by order 26, subsections 1 and 2, of the Consolidation, it was provided as follows:

26. (1) Any person who holds or manages for or on behalf of an enemy any property real or personal (including any rights, whether legal or equitable, in or arising out of property, real or personal), shall, within one month after the publication in the *Canada Gazette* of these orders and regulations, or, if the property comes into his possession or under his control after the said publication, then within one month after the time when it comes into his possession or under his control, by notice in writing communicate the fact to the Custodian, and shall furnish the Custodian with such particulars in relation thereto as the Custodian may require.

(2) The preceding subsection shall extend and apply to balances and deposits standing to the credit of enemies at any bank, and to debts to the amount of one hundred dollars or upwards, which are due, or which, had a state of war not existed, would have been due to enemies, as if such bank or debtor were a person who held property on behalf of an enemy.

Although these subsections remained in force until repealed and superseded by the Treaty of Peace (Germany) Order of 14th April, 1920, it does not appear that any notice in compliance with them was communicated to the Custodian, either on behalf of Watson & Haig, Ltd., or of E. & S. Currie, Ltd., although it was shown that, on 7th May, 1920, the solicitors of the latter had written a letter to the Custodian making some inquiries. This was after the Treaty of Peace (Germany) Order, 1920, came into effect.

By Order 28 of the Consolidated Orders,

28. (1) Any Superior Court of Record within Canada or any Judge thereof may, on the application of any person who appears to the Court or Judge to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the Custodian or any department of the Government of Canada, by order vest in the Custodian any such real or personal property as aforesaid, if the Court or the Judge is satisfied that such vesting is expedient for the purpose of these orders and regulations, and may by the order confer on the Custodian such powers of selling, managing and otherwise dealing with property as to the Court or Judge may seem proper.

The jurisdiction conferred by this clause, although it existed, was not invoked nor exercised with regard to the debt in question.

The Treaty of Peace between the allied and associated powers and Germany was signed at Versailles on 28th June, 1919, and ratified on 10th January, 1920, which was also the date, as declared, of the termination of the war.

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By section III, article 296, of the Treaty, entitled "Debts," it was stipulated provisionally that:

There shall be settled through the intervention of Clearing Offices to be established by each of the High Contracting Parties * * * the following classes of pecuniary obligations:
including

(1) 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;

(2) Debts which became payable during the war to nationals of one Contracting Power residing within its territory and arose out of transactions or contracts with the nationals of an Opposing Power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war.

Clearing offices were established pursuant to these provisions; and, by the stipulated regulations governing the clearing offices, admitted debts, and the debt in question is admitted, are at once to be credited by the debtor clearing office.

By section IV, article 297, entitled "Property, Rights and Interests," it is declared that the question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and the provisions of the annex thereto. By clause (b) of this article, the allied and associated powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the Treaty to German nationals, or companies controlled by them, within their territories, and by clause 14 of the annex it is stipulated that the provisions of this article, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.

By "An Act for carrying into effect the Treaties of Peace between His Majesty and certain Other Powers," enacted by the Parliament of Canada on 10th November, 1919, c. 30 of the second session, referring in the preamble to the Treaties of Peace with Germany and Austria, it is provided by s. 1, subss. 1 and 2, that

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(1) The Governor in Council may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to Him to be necessary for carrying out the said Treaties, and for giving effect to any of the provisions of the said Treaties.

(2) Any Order in Council made under this Act may provide for the imposition by summary process or otherwise of penalties in respect of breaches of the provisions thereof, and shall be laid before Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act, but may be varied or revoked by a subsequent Order in Council.

It was pursuant to the powers so conferred that the Treaty of Peace (Germany) Order, 1920, was sanctioned by His Excellency the Administrator in Council on 14th April, 1920. The provisions of this Order, following the preliminary interpretation clauses, are expressed in five Parts. Part I, entitled "Debts and Clearing Office," comprises clauses 3-31 inclusive, and Part II, entitled "Property, Rights and Interests," comprises clauses 32-50 inclusive. The remaining Parts are not material for present purposes. By clause 3 of Part I of this Order "Enemy Debt" is defined to mean:

(a) A debt payable before the war and due to or by a British subject residing in Canada by or to a German national residing in Germany;

(b) A debt which became payable during the war

(i) to a British subject residing in Canada which arose out of a transaction or contract with a German national residing in Germany, or

(ii) to a German national residing in Germany, which arose out of a transaction or contract with a British subject residing in Canada, of which transaction or contract the total or partial execution was suspended on account of the declaration of war.

And "debtor" means a person from whom, and "creditor" a person by whom, an enemy debt is claimed. Provision follows for the establishment in and for Canada, under the control and management of the Custodian, of a local clearing office to perform the functions of a central clearing office for Canada, and to conduct all transactions with the German clearing office through a central clearing office established in the United Kingdom.

By clause 5 of this Order:

Except in cases where recovery of such debt in a Court of law is allowed as hereinafter provided, no person shall pay, or accept payment of, or have any communication with any German national with respect to any enemy debt, otherwise than through the Clearing Office.

By clause 6:

No person shall bring or take in any Court in Canada any action or other proceeding relating to the payment of an enemy debt, except as hereinafter provided.

The exceptions do not apply to a German creditor in the circumstances of this case.

By clause 10:

Every debtor in Canada who admits the whole or part of the debt shall within three months from the date of this Order, unless he has already done so, pay to the Custodian the amount admitted with the interest and in the currency (i.e., Canadian) and at the rate of exchange provided by sections 23 and 24 of this Order.

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In Part II, clause 32, "Enemy" is defined to include a German national who, during the war, resided or carried on business within the territory of a Power at war with His Majesty, and a German national who during the war resided or carried on business within the territory of a Power allied or associated with His Majesty, whose property within such territory has been treated by that Power as enemy property. And, by subs. 2 of the last mentioned clause,

"Property, rights and interests" include debts, credits and accounts to which the provisions of this Part shall apply, subject to the provisions of Part I which regulate the method of payment.

Then follows clause 33, which appears to have led to some confusion in this case. It provides that:

33. All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or heretofore belonging to enemies, and in the possession or control of the Custodian at the date of this Order, are hereby vested in and subject to the control of the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy, such property, right or interest shall be vested in and subject to the control of the Custodian, who shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

By clause 34 all vesting orders purporting to have been made and given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to property, rights and interests of enemies; the sale or management of property, rights or interests; the collection or discharge of debts, etc., "and in general all exceptional war measures, or measures of transfer, or acts done or to be done in the execution of any such measures, are hereby validated and confirmed, and shall be considered as final and binding upon all persons, subject to the provisions of Sections 33 and 41." Clause 41 authorizes the Custodian to take any action or proceeding which he may

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think proper to enforce the provisions of the Treaty of Peace (Germany) Order, 1920, and to get in any property, right or interest vested in him.

Part I regulates the method of collection and payment of enemy debts after the war. That is assigned to the clearing offices, subject to the regulations; I have quoted or referred to the governing ones. I have shown that provisions existed during the war for the recovery of enemy debts by the Custodian, and for reducing them into possession. By articles 297 and 298 of the Treaty, and their annex, vesting orders, winding up orders, and other orders, directions and decisions or instructions in pursuance of war legislation with regard to enemy property, rights and interests were confirmed, and the interests of all persons were declared to have been effectively dealt with. Clauses 33 and 34 of the Treaty of Peace (Germany) Order, 1920, refer to property, rights and interests which were at that time in the possession or control of the Custodian. They were declared to be vested by the effect of the Order, and property, rights or interests previously vested were declared to be held on the same terms and with the same powers and duties as the property, rights and interests vested by the Order. The method of payment of the other German enemy pecuniary obligations, which by subs. 2 of s. 32 of the Order are interpreted to include "debts, credits and accounts," is, as that subsection itself states, regulated by Part I of the Order. These payments must go through the clearing office, and, upon my interpretation, the provisions of the Order to which I have referred are compatible only with the Custodian's right of recovery. There was, I have no doubt, a large area of debts, credits and accounts subject to the provisions of Part I of the Order, and to be administered accordingly, which at the conclusion of the Peace had not been vested in or collected by the Custodian, but which are nevertheless intended to reach the clearing office. This, I hold, is made very plain by the terms of the Order; and moreover, by Clause 26, all sums, which under Part I ought to be paid to the Custodian, shall be recoverable by him in the Exchequer Court.

It is said in the respondent's factum that the money in contest is not a debt, although, by the affidavit upon

which E. & S. Currie, Ltd., obtained leave to pay the money into court, it was described as a sum due and owing by that company to Passavant Frères, and it was also so described in the affidavit of the respondent himself upon which he applied to the court for payment out. Apparently it is intended to suggest that, whatever may have been the situation in equity, there was no contract or privity as between E. & S. Currie Co., Ltd., and Passavant Frères. It is not necessary to attribute any special effect or enlarged meaning to the word "debt" in the Treaty or the legislation. There is a debt here upon the ordinary acceptation of the term. It appears that, during the war, Watson & Haig, Ltd., received \$12,678.32, proceeds of the goods of Passavant Frères which would have been payable to the latter, if there had been no war, and that when, also during the war, Watson & Haig, Ltd., assigned their assets to E. & S. Currie, Co., Ltd., the latter became bound to discharge this liability to Passavant Frères. There was thus, during the war, a determinate sum of money in the hands of Watson & Haig, Ltd., and subsequently in the hands of E. & S. Currie, Ltd., which would have been at that time payable to Passavant Frères, if the payment had not been suspended by reason of the war. It matters not, for the purposes of this case, whether Passavant Frères looked to the Currie Company as their debtor, which they evidently did, or to Watson & Haig, Ltd., who still remained liable for the debt. The money was in hand awaiting payment, pending the dispositions which were to attend upon the Peace. By these it fell to the Custodian, if it were a debt, and it was none the less a debt because, upon the termination of the war, E. & S. Currie, Ltd., being misinformed as to its duty, paid the money into court for the benefit of Passavant Frères, or their estate; the money could not by this means be diverted from its legal destination. There is proof of an admitted amount or balance, and that is a debt recoverable upon the money counts. The only trust to execute was that of paying over the money, such as is cognizable at law, as in cases of bailment, and for money had and received for another's use, where there is a plain, adequate and complete remedy at law. "A Court of Equity was cautious of entertaining suits upon a single

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transaction where there were not mutual accounts." Story on Equity, 3rd Ed., pp. 33, 40, 191; *Scott v. Surman* (1); and there are many later authorities.

At the time of the payment into court the Custodian, not being aware of the enemy character of the obligation, did not assert his right. On the contrary, the Assistant Deputy Custodian, by his letter of 19th May, 1920, expressed his willingness that E. & S. Currie, Ltd., "may pay the official sequestrator at St. Etienne the amount owing by them to Passavant Frères, St. Etienne." The E. & S. Currie, Co., Ltd., did not, however, act upon this consent, and the claim of the French sequestrator was subsequently withdrawn. There are now no claims in competition, except that represented by the respondent and that of the Custodian. The money, the subject of the claim, is in court appropriated to the payment of an enemy debt. There are no questions of account, the amount is specific. No question is raised as to the validity of the regulations, and, having regard to the provisions, the Custodian is, in my opinion, certainly entitled to receive the money for the Clearing Office.

There will be a declaration accordingly, the appeal will be allowed, and the costs throughout will be borne by the respondent, not including, of course, the costs of the payment into court.

Appeal allowed with costs.

Solicitors for the appellant: *Wilkie & Delamere.*

Solicitors for the respondent Passavant: *Worrell, Gwynne & Beatty.*

Solicitors for the respondent E. & S. Currie, Limited: *Osler, Hoskin & Harcourt.*
