

able if the property were present at the place of transfer is not a tort on the part of the transferee with knowledge. However, in view of the uncrystallized notions concerning the nature of fraudulent conveyances and voidable preferences, a court convinced that a statutory or common law rule rendering preferential or fraudulent conveyances voidable is expressive of a strong desire for creditor equality might well impose personal liability upon transferees with knowledge. Such reasoning would not apply to preferences voidable under the Bankruptcy Act but not under state laws since the imposition of tort liability would, in effect, repeal the four month limitation.

It is noteworthy that the court in the instant case might have imposed personal liability upon the preferred creditors by a slightly different use of the statute. Section 114 expressly imposes personal liability upon directors for "illegal" transfers made when the corporation is insolvent. If "illegal" were construed as being merely descriptive, then the directors would clearly be liable for preferential transfers of foreign land even though valid at the situs. Consequently, personal liability could be imposed on transferees with knowledge as participants in wrongful conduct. See Harper, Torts § 302 (1933).

Once the common law or statutory rule proscribing fraudulent conveyances or preferential transfers is construed as imposing personal liability upon transferees of foreign property, the problem raised is akin to that of *Lord Cranston v. Johnson*, 3 Ves. 170 (1796). In that case a reconveyance was ordered against a creditor who obtained title to foreign land at his own execution sale, after assuring his debtor by conduct in the forum that he would not satisfy the debt by proceeding against the property. Although the court in the *Cranston* case did not articulate its rationale, it must have proceeded on the assumption that a conveyance may have both a property and a tort aspect; and that, although the law of the situs determines the property consequences of a conveyance, the law of the place of the transfer determines its tort consequences. See 2 Beale, Conflict of Laws 954 ff (1935). It is arguable that the *Cranston* case is distinguishable from the instant case in that the defendant's misrepresentations constituted wrongful conduct separable from the conveyance. However, since it is the conveyance which causes damage to the creditors and since the forum is primarily concerned with equitable distribution for resident creditors, this difference is not significant. By holding that a fraudulent or preferred transferee of foreign property is a tortfeasor under the law of the place where the conveyance was made and by applying the doctrine of the *Cranston* case, a court may limit the *lex situs* doctrine and may prevent the accidental fact of the location of property from determining whether or not there is redress for transactions admittedly contrary to the law of the place where they were consummated.

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Constitutional Law—War Powers of Congress—Withholding of Seized Alien Enemy Property—[Federal].—Property of plaintiff's predecessor was seized during the World War by the United States as alien enemy property and placed in trust with the Alien Property Custodian. Congress, after termination of the war, authorized the return of such property; whereupon the Custodian determined that the plaintiff was entitled to it. Subsequently, and while the property was tied up by attachment proceedings later dismissed, Congress passed a resolution suspending its former return authorization until German debts had been paid to the United States. In a suit to compel conveyance *held*, for the plaintiff. Confiscation of the property had never been intended by

Congress. Therefore, the authorization for return constituted a "vested right" or at least "a gratuity supported by moral consideration" within the protection of the due process clause of the Fifth Amendment of the federal Constitution. The war powers of Congress did not continue operative after ratification of the peace treaty so as to authorize later withholding of the property. *Deutsche Bank v. Cummings*, 83 F. (2d) 554 (App. D.C. 1936).

Confiscation was not the policy or practice of the government with respect to this alien property. Hearings of Senate Committee on Commerce, 65th Congress, 1st session, May 29, 1917, Report no. 113, p. 13. *United States v. Percheman*, 7 Pet. (U.S.) 51 (1833). The plaintiff therefore retained a beneficial interest in the property similar to that of a cestui que trust. *Orenstein v. Industrial Car Co.*, 38 F. (2d) 532 (App. D.C. 1930). See also Trading With Enemy Act, 40 Stat. 423 (1917); 40 Stat. 460 (1918); 50 U.S.C.A. § 12 (appendix 1928). The Custodian, however, was not bound by rules ordinarily applicable to fiduciaries of trust property. *United States v. Chemical Foundation*, 272 U.S. 1 (1926). This fact might cast doubt upon the sufficiency of the plaintiff's interest to bring him within the protection of the due process clause of the Fifth Amendment. However, applicants for government land patents acquire very complete interests upon allowance of claims. Acquisition of this interest precedes final conveyance by patent, and includes all ordinary incidents of land ownership. *Wirth v. Branson*, 98 U.S. 118 (1878); *Colm v. Francis*, 159 Pac. 237 (Cal. 1916). By analogy, the plaintiff may be said to have received a comparable interest upon allowance of his claim by the Custodian, although final conveyance had not been made.

If the plaintiff was entitled to protection of this interest under the due process clause, subsequent withholding of his property could be justified only as an exercise of the war powers of Congress, reasonably necessary to protect general economic welfare by coercing Germany into payment of her obligations. Though constitutional limitations generally remain effective despite the existence of war or other emergencies, the war powers of Congress on occasion justify measures not constitutionally orthodox in the absence of necessitating emergency. *United States v. Russell*, 13 Wall. (U.S.) 623 (1871); *Juragua Iron Co. v. United States*, 212 U.S. 297 (1908). And, though there is dictum in the principal case denying the existence of such power, the Supreme Court apparently has never held that war powers may not legitimately be exercised after legal termination of war to mitigate the results or to control situations created thereby. See *Stewart v. Kahn*, 11 Wall. (U.S.) 493, 507 (1870); 3 Willoughby, Constitution of the United States § 1036 (2d ed. 1923). Such latitude in the scope of the war powers finds justification in the importance of protecting public welfare even at the sacrifice of relatively less important private interests. This sacrifice however, should be reasonably necessary to achieve a result, which, in turn, should satisfy a determination that the need is acute in view of all the circumstances out of which the situation arose. The test is unavoidably flexible and vague, but so it should remain until the cases setting its limits arise for decision.

In the principal case, the delay in payment of the German obligations would not apparently presage any immediate threat to American peace or economic welfare justifying further encroachments on individual property rights. Such a measure of international duress is probably an abuse of the war power which the courts should avoid. Thus the result in the principal case seems justified, but the assertion that no power exists to allow seizure of alien property after the legal termination of war seems unnecessary.