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### Recovery of Property by Trustees in Bankruptcy in the Federal Courts

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# University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School,  
at 34th and Chestnut Streets, Philadelphia, Pa.

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VOL. 78

FEBRUARY, 1930.

No. 4

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## RECOVERY OF PROPERTY BY TRUSTEES IN BANK- RUPTCY IN THE FEDERAL COURTS

FOWLER VINCENT HARPER

### INTRODUCTION

The trustee in bankruptcy may have occasion to recover money or property for the benefit of the creditors of the bankrupt, either upon the ground that the property was transferred, or the money paid, in fraud of creditors or that the same constituted a preference of one creditor over the others. There are three sections of the Bankruptcy Act<sup>1</sup> pertinent to these problems. Section 60 provides for the recovery of preferences obtained by one creditor within the next preceding four months from the filing of the petition in bankruptcy. The theory here, of course, is to distribute the assets of the bankrupt equitably among all the creditors rather than to permit one creditor to obtain a greater share than his fellows. The recovery is supposed to be allowed solely by reason of the principle of equitable distribution. However, if the creditor can show that upon reasonable grounds he was ignorant of the fact that a preference would be effected at the time he received the preference, he will not be liable therefor. This is a practical compromise, to avoid embarrassing and unfair results to a creditor who has taken what

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<sup>1</sup> 30 STAT. 544 (1898), 11 U. S. C. (Supp. 1928).

he thought he was entitled to take, in payment of a bona fide debt and in ignorance of the fact that other creditors would not obtain payment of their claims.

Sections 67 and 70 provide for the recovery of money or property transferred to a person under circumstances which make it a fraudulent transfer as to the bankrupt's creditors. The former section incorporates into bankruptcy law the common law, which had its origin, or at least was crystallized, in the statute of 13 Elizabeth.<sup>2</sup> It also provides for the avoiding of transfers fraudulent under the state law. Section 67 restricts the trustee's remedy to property conveyed within the next preceding four months; but Section 70 provides for the recovery of any property which could be recovered by any creditor of the bankrupt under the state law. This section does not limit the recovery to property transferred within the next preceding four months, but permits the trustee to attack any transfer which a creditor of the bankrupt could have impeached, had there been no bankruptcy adjudication.

Thus it is that under these three sections the trustee may have occasion to recover for the benefit of the estate property conveyed either to a creditor or to a third person, on the theory that the transfer or payment of money is either constructively or actually fraudulent as to some of the creditors or all of them. It is to be noticed, however, that the section on preferences is based upon a technical rather than an actual fraud, as there is ordinarily no culpable conduct involved in a creditor's taking money or property in payment of a debt actually due. The section is prompted by commercial expediency rather than personal morality. The sections on fraudulent conveyances, on the other hand, involve actual fraud except in so far as the technicalities of the state law of fraudulent transfers render a recovery permissible under Section 70, in the absence of actual fraud.<sup>3</sup>

Originally, under the Bankruptcy Act of 1898, the trustee was required to bring his action in the state courts, except under

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<sup>2</sup> 13 ELIZ. c. 5 (1570).

<sup>3</sup> See *Coder v. Arts*, 213 U. S. 223, 239, 29 Sup. Ct. 436, 442 (1909); cf. 2 COLLIER, BANKRUPTCY (13th ed. 1923) 1561.

conditions or circumstances that would have entitled the bankrupt to have prosecuted the claim in the federal courts had not bankruptcy intervened, or except with the defendant's consent in the bankruptcy court.<sup>4</sup> In other words, the trustee had to rely upon diversity of citizenship in order to prosecute a claim against an adverse claimant in the federal courts.<sup>5</sup> Amendments to Sections 60b, 67e and 70e now enable the trustee to sue in the federal courts in all actions to recover property from an adverse claimant, brought under the respective sections, irrespective of the citizenship of the parties to the action.<sup>6</sup>

In a recent case it was said:

"The three exceptions referred to are suits for the recovery of preferences given by the bankrupt within four months before the filing of the petition in bankruptcy, suits to set aside conveyances or transfers made by the bankrupt within four months prior to the filing of the petition, and suits to avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided. Unless a case falls within one of these three exceptions, a suit of this kind cannot be prosecuted in a federal court, unless there is the requisite diversity of citizenship between the bankrupt and the defendants."<sup>7</sup>

This is a correct statement of the law. There is a great deal of confusion in the cases, and some bad law, as a result of the provision in Section 23b for the "consent" of the defendant. The section is as follows:

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<sup>4</sup> 30 STAT. 552 (1898). *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000 (1900).

<sup>5</sup> The federal courts never did have, nor do they yet have, jurisdiction over third parties, without their consent, who have had no transactions with the bankrupt, unless there is diversity of citizenship. The amendments to §§ 60b, 67e and 70e pertain only to persons who have received property from the bankrupt. Actions against wrongdoers who have appropriated the bankrupt's property and who have engaged in no transactions or negotiations with the bankrupt do not fall within these amendments. See *Parke v. Cameron*, 237 U. S. 616, 35 Sup. Ct. 719 (1915); *cf. Kelly v. Gill*, 245 U. S. 116, 38 Sup. Ct. 38 (1917); *Williams v. Brownstein*, 1 F. (2d) 470 (D. Me. 1924). Nor does an action lie in the federal courts against one who holds property for the bankrupt estate but who wrongfully refuses to surrender it. *Harris v. First National Bank*, 216 U. S. 382, 30 Sup. Ct. 296 (1910).

<sup>6</sup> See (1923) 36 HARV. L. REV. 615.

<sup>7</sup> *Matthew v. Coppin*, 32 F. (2d) 100, 101 (C. C. A. 9th, 1929).

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by the consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e."

Now it seems clear that the "consent" of the defendant should not have the effect of enlarging the jurisdiction of a federal court over the subject matter of the action.<sup>8</sup> There are two explanations of the use of the provision for the "consent" in the Act. It may be regarded as referring to consent to the local jurisdiction or venue.<sup>9</sup> This, however, seems a false construction, as the same result would ensue without the provision, since a failure to object to venue is always a waiver. Again, it may be regarded as referring only to actions in the district court sitting in bankruptcy, with no application whatever to federal district courts generally.<sup>10</sup>

It is to be remembered that the confusion incident to the use of the term "jurisdiction" with reference to the district courts complicates the discussion in the cases. While the federal courts insist that diversity of citizenship is a jurisdictional matter and must appear upon the face of the record, objection may be made for the first time upon appeal, and a want thereof may serve as the basis for dismissal on motion of the court;<sup>11</sup> still, a judgment cannot be collaterally attacked on the ground that there was no diversity of citizenship, although jurisdiction depended upon the existence of such diversity.<sup>12</sup>

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<sup>8</sup> See *Lovell v. Newman*, 227 U. S. 412, 426, 33 Sup. Ct. 375, 380 (1913).

<sup>9</sup> *Matthew v. Coppin*, *supra* note 7.

<sup>10</sup> *Operators' Piano Co. v. First Wisconsin Trust Co.*, 283 Fed. 904 (C. C. A. 7th, 1922).

<sup>11</sup> See *Interior Construction Co. v. Gibney*, 160 U. S. 217, 219, 16 Sup. Ct. 272 (1895).

<sup>12</sup> See *Evers v. Watson*, 156 U. S. 527, 533, 15 Sup. Ct. 430, 432 (1895).

## INADEQUATE REMEDY AT LAW AS BASIS FOR JURISDICTION

If the trustee sues in the state courts, it may be immaterial whether the suit is brought at law or in equity. In the federal courts, however, there is a definite problem. The statute provides that,

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."<sup>13</sup>

Thus, though the fusion of law and equity be complete in the state open to the trustee, it is immaterial if the trustee sues in the federal courts, for he cannot avoid the distinction which prevails in our federal judiciary, in the light of the constitutional provision for a jury trial.<sup>14</sup>

The fact that the suit pertains to and arises out of bankruptcy, where the courts are empowered with equity jurisdiction, is of no consequence in a plenary action to recover property.

"Equity jurisdiction does not attach merely for the reason that a suit relates to bankruptcy; but whether such a suit should be heard and determined on the equity or law side of the court depends, as in other cases, on the nature of the relief sought. . . . Federal courts are bound by the distinction between suits in equity and at law established for their guidance, and are not at liberty to follow state statutes or rules of procedure, which enlarge equity jurisdiction."<sup>15</sup>

Thus it appears that here, as in countless other instances where equitable relief is sought, the plaintiff is under the necessity of mastering the meaning and significance of the magic expression "adequate remedy at law". We may start with the following language from the Supreme Court:

"It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what

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<sup>13</sup> 36 STAT. 1163 (1911), 28 U. S. C. § 384 (1926).

<sup>14</sup> See *Scott v. Neely*, 140 U. S. 106, 112, 11 Sup. Ct. 712, 714 (1891).

<sup>15</sup> *Adams v. Jones*, 11 F. (2d) 759, 760 (C. C. A. 5th, 1926).

should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law."<sup>16</sup>

Upon this general dogma of the equity courts it might seem that suits by trustees to recover specific property or money paid as a preference or in fraud of creditors are clearly within the designation "adequate remedy at law". Especially would this seem the case where a simple money judgment is asked.

In considering the adequacy of the remedy at law in such actions, it may be well to consider what remedy is available to the trustee. He has been permitted in the federal courts to bring an action in trover for the conversion of goods, under Section 70a.<sup>17</sup> He has been allowed to recover in assumpsit the value of goods the transfer of which was preferential.<sup>18</sup> In *Jackman v. Eau Claire National Bank*,<sup>19</sup> where the defendant received from the bankrupt its mortgage interest under chattel mortgages obtained in fraud of the Bankruptcy Act, and its interest by reason of certain lien claims, instead of the property itself, it was held that the remedy of the trustee in bankruptcy was an action in trover. It seems that, under some statutes at least, assumpsit will not lie by the trustee in bankruptcy against one who receives from the bankrupt a fraudulent conveyance of personal property which has not been converted into money or money's worth;<sup>20</sup> but the trustee in such a case may bring an action at law, in trover, and recover the value of the goods. An analagous situation is presented under Section 67f of the Bankruptcy Act, dealing with void attachments. Where a sale has been made under

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<sup>16</sup> *Whitehead v. Shattuck*, 138 U. S. 146, 151, 11 Sup. Ct. 276, 277 (1891).

<sup>17</sup> *Burns v. O'Gorman Co.*, 150 Fed. 226 (C. C. R. I. 1906).

<sup>18</sup> *Reber v. Ellis Bros.*, 185 Fed. 313 (E. D. Pa. 1911) (on theory that the statute created a quasi-contractual liability); cf. *Cohen v. Small*, 120 App. Div. 211, 105 N. Y. Supp. 287 (1907).

<sup>19</sup> 125 Wis. 465, 104 N. W. 98 (1905).

<sup>20</sup> *Lyon v. Clark*, 129 Mich. 381, 88 N. W. 1046 (1902).

such an attachment, trespass has been held the proper remedy against the plaintiffs in attachment, the constable making the sale, and the purchaser thereat, where all three had notice of the adjudication in bankruptcy.<sup>21</sup> It has been held that an action of trover by an assignee, for property supposed to have belonged to a bankrupt, lies in the federal courts against another claiming the title, and the bankrupt may be joined with him.<sup>22</sup> Trover would lie under the Act of 1867 for the recovery of personal property transferred to a creditor under circumstances amounting to a preference or a sale in fraud of the statute.<sup>23</sup> Assumpsit will lie by a trustee to recover goods delivered to a creditor of the bankrupt by way of unlawful preference, although the tort action, it is said, is the usual remedy adopted under such circumstances.<sup>24</sup> Where a preferential transfer consisted of personal property, it was held that the trustee could maintain assumpsit or detinue for the recovery of the specific property transferred;<sup>25</sup> and the trustee may sue in trover for conversion of goods occurring either before or after bankruptcy.<sup>26</sup>

In view of these available remedies, it has been held that where the trustee seeks only a money judgment he cannot sue in equity. Defendant's constitutional guarantee of a jury trial, together with the command of the statute, have been regarded as sufficient to require that such actions be tried by a jury.

In *Warmath v. O'Daniel* <sup>27</sup> the trustee sued to recover a sum of money which it was alleged had been transferred as a preference. It was held that a bill in equity would not lie, for the action should have been brought at law. Judge Severens explained that:

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<sup>21</sup> *Wallace v. Camp*, 200 Pa. 220, 49 Atl. 942 (1901); *cf. Withoft v. Western Meat Co.*, 210 Fed. 986 (N. D. Cal. 1913).

<sup>22</sup> *Carr v. Gale*, Fed. Cas. No. 2435 (C. C. Me. 1847).

<sup>23</sup> *Foster v. Hackley*, Fed. Cas. No. 4971 (C. C. W. D. Mich. 1869).

<sup>24</sup> *Edwards v. Schillinger Bros. Co.*, 153 Ill. App. 219 (1910) (after demand the trustee waived the tort and sued in assumpsit); *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090 (1891).

<sup>25</sup> *Abdo v. Townshend*, 282 Fed. 476 (C. C. A. 4th, 1922).

<sup>26</sup> *Philoan v. Babbitt*, 119 Me. 172, 109 Atl. 817 (1920); *cf. Burns v. O'Gorman Co.*, *supra* note 17.

<sup>27</sup> 159 Fed. 87 (C. C. A. 6th, 1908).



"The judgment sought was for a definite sum of money, precisely that which the court by its decree awarded to the complainants. And the whole sum was recoverable, if any of it was; for the assets of the estate would not come near the amount of the debts. There was no contingency in the liability, or apportionment of the burden among several defendants to be made by the judgment. The response of the court to the demand of the complainant was simply an allowance or a refusal of it. . . . The issue was one which a jury could readily understand and decide under proper instructions from the court in respect to the law. It is suggested that the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers. This is an ingenious but unsubstantial figment. No distinct or formal preliminary action was required or contemplated by the statute. If the defendant had obtained part of the estate which should have come to all the creditors, proof of that fact would entitle the trustee to recover it. Perhaps there may be cases where a declaration of the court may be necessary to completely fulfill all requirements, as where the transfer has been accomplished by a deed or other solemn instrument which may be made matter of record or is a muniment of title, the existence of which, would indicate ownership and the right to sell and convey or mortgage or do such other things with it as belongs to ownership. But in the present case nothing is stated in the bill which makes such a proceeding necessary, nor indeed is anything more required than in any ordinary action at law where the plaintiff is always bound to establish the facts which create the liability, whereupon and without more, the court gives judgment for the sum he is entitled to recover. And that was what occurred in the present instance. There was no preliminary declaration that this transfer be set aside. The suggestion made would be the adoption of a device for evading the statute forbidding resort to a court of equity."

While the cases are not many, *Warmath v. O'Daniel* has been followed and cited several times in the federal courts and by a number of state courts. In a recent case where this rule was followed and extended,<sup>28</sup> the action was by a trustee to re-

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<sup>28</sup> *Adams v. Jones*, *supra* note 15.

cover a payment of money fraudulent under Section 70e of the statute and preferential under Section 60b. It was held that the defendant was entitled to have the action tried at law by a jury and that the district court erred in overruling a motion to transfer the cause to the law side of the docket. This case stands as perhaps the most binding federal decision on the point, as a writ of certiorari was denied by the Supreme Court.<sup>29</sup>

#### FRAUD AS THE BASIS OF JURISDICTION

On the other hand, there are contrary decisions establishing a different line of authorities. In *Off v. Hakes*<sup>30</sup> the court saw little or no difficulty in the trustee's maintaining the bill in equity to recover a preference. "Jurisdiction for recovery of preferences", it was said, "concurrent with that of state courts is expressly conferred upon the bankruptcy court by section 60b, as amended, and its equitable jurisdiction to that end is well recognized."<sup>31</sup> In *Wall v. Cox*,<sup>32</sup> in which the trustee sought to set aside a bill of sale for the transfer of chattels and a decree declaring him to be the owner of the said property, the court said:

"That courts of equity are clothed with full power and authority to entertain suits involving questions of fraud in the conveyance and transfer of property, and the annulling and cancellation of such transfers, is too well and firmly established in the jurisprudence of the country to admit of serious question at this late day. 'It is not enough that there is a remedy at law; it must be plainly adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.' *Boyce v. Grundy*, 3 Pet. 213, 7 L. Ed. 655. In *Clements v. Moore*, 6 Wall. 299, 18 L. Ed. 786, the same being a creditors' bill in the district court to set aside a fraudulent transfer of a stock of goods, the court said that equity is the appropriate remedy, being more flexible and tolerant, and capable of administering justice to fit the particular case, than could

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<sup>29</sup> 271 U. S. 685, 46 Sup. Ct. 637 (1926).

<sup>30</sup> 142 Fed. 364, 366 (C. C. A. 7th, 1905).

<sup>31</sup> *Ibid.* 366.

<sup>32</sup> 101 Fed. 403, 412 (C. C. A. 4th, 1900).

be done under the rules of law. 'It is objected that a court of equity has no jurisdiction of the case, because the law affords a complete remedy in damages. This objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment; and it does not depend on discovery.' *Jones v. Bolles*, 9 Wall. 364, 369, 19 L. Ed. 734. 'Jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.' Mr. Chief Justice Fuller, in *Kilbourn v. Sunderland*, 130 U. S. 505, 515, 9 Sup. Ct. 594, 32 L. Ed. 1005."

Thus the cases turn upon the fact that there is fraud involved. The assumption is made that there is something about fraud which alone is sufficient to lend jurisdiction to a court of equity. This seems to be begging the question. The courts start to determine the question whether or not there is an adequate remedy at law and conclude by declaring that because the action involves fraud a court of equity has jurisdiction.

It is to be observed, however, that the better authorities take the position that fraud alone is not sufficient to confer jurisdiction upon a court of equity, if complete relief may be obtained at law.<sup>33</sup> Equity jurisdiction does not attach to every case of fraud.<sup>34</sup> In *Buzard v. Houston*,<sup>35</sup> Mr. Justice Gray observed that:

"In cases of fraud or mistake as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law. . . ." <sup>36</sup>

<sup>33</sup> 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 178; 2 *ibid.* § 914.

<sup>34</sup> See *Alexander, C. B.*, in *Newham v. May*, 13 Price 749, 752 (Eng. 1824).

<sup>35</sup> 119 U. S. 347, 352, 7 Sup. Ct. 249, 252 (1886).

<sup>36</sup> *Cf. United States v. Bitter Root Development Co.*, 200 U. S. 451, 26 Sup. Ct. 318 (1906); *Equitable Life Assurance Soc. v. Brown*, 213 U. S. 25, 26 Sup. Ct. 318 (1909); *Whitney v. Fairbanks*, 54 Fed. 985 (C. C. Vt. 1893) (bill against vendor of stock for fraud); *Security Savings Ass'n v. Buchanan*, 66 Fed. 799 (C. C. A. 6th, 1895) (bill against agents procuring loan to themselves through fraud); *Shields v. McCandlish*, 73 Fed. 318 (C. C. N. D. Ga. 1896) (bill to recover for fraudulent misapplication of plaintiff's funds); *Alger v. Anderson*, 92 Fed. 696 (C. C. M. D. Tenn. 1899) (bill to rescind sale of land, where rem-

Thus, where there is simply an obligation to pay a sum of money held in trust, which has been definitely ascertained, and when the plaintiff is either entitled to all or none of it, an action at law is the appropriate remedy.<sup>37</sup> It is continually pointed out that fraud alone is not sufficient to invoke the equity jurisdiction of the federal courts. The inadequacy of the relief sought is the significant test.<sup>38</sup> It is said that fraud, instead of being a particular source of concurrent jurisdiction, is to be regarded a fact affecting the cause of action and the relief.<sup>39</sup> This is the position of many of the state courts. Thus it is said that:

"The American doctrine on the subject of equitable jurisdiction restricts courts of equity, as a general rule, to narrower limits than does the English doctrine on that subject. . . . With us the generally accepted doctrine is that the exclusive jurisdiction to grant equitable relief, such as cancellation, will not be exercised and the concurrent jurisdiction to grant pecuniary recoveries does not exist in any case where the legal remedy, either affirmative or defensive, which the injured or defrauded parties might obtain, would be adequate, certain and complete." <sup>40</sup>

Pomeroy says:

"Even when the cause of action . . . does involve or present, or is connected with, some particular feature or incident of the same kind as those over which the concurrent jurisdiction ordinarily extends, such as fraud, accounting,

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edy of damages adequate); *United States v. Midway Northern Oil Co.*, 232 Fed. 619 (S. D. Cal. 1916) (bill in part substantially an action for conversion to recover value of oil purchased by defendants from trespassers); *Watson v. Huntington*, 215 Fed. 472 (C. C. A. 2d, 1914) (bill by stockholder to recover amount paid for stock on ground of fraud); *Godfrey v. McConnell*, 151 Fed. 783 (C. C. Mont. 1906) (bill by stockholder against directors of corporation, alleging conspiracy to defraud the corporation).

<sup>37</sup> See *Miller v. Steele*, 153 Fed. 714, 719 (C. C. A. 6th, 1907).

<sup>38</sup> 5 L. R. A. (N. S.) 1036, 1039 (1907).

<sup>39</sup> *Such v. Bank*, 127 Fed. 450 (C. C. S. D. N. Y. 1904), where a receipt in full in the nature of a release had been given; due, it was alleged, to fraud. A bill for cancellation was denied. "Relief by cancellation", it was said, "is unnecessary, and could in no way benefit the complainant. Except when special reasons require the cancellation of an instrument for the future protection of the party, the courts of the United States will not entertain jurisdiction in equity upon the ground of fraud in the consideration of the instrument."

<sup>40</sup> *Fitzmaurice v. Mosier*, 116 Ind. 363, 365, 16 N. E. 175, 176 (1888).

and the like, still if the legal remedy by action and pecuniary judgment for debt or damages would be complete, sufficient, and certain—that is, would do full justice to the litigant parties in the particular case—the concurrent jurisdiction of equity does not extend to such case.”<sup>41</sup>

In England it seems that equity has exercised its jurisdiction where property has been procured by fraud by raising a constructive trust in spite of the fact that the remedy might be adequate in quasi-contract.<sup>42</sup> In this country, however, the doctrine is not so broad, and, especially in the federal courts, an adequate remedy at law in quasi-contract or tort will prevent equity jurisdiction from attaching.<sup>43</sup> If an action for money had and received will lie, the element of trust does not give jurisdiction.<sup>44</sup>

In the case of the federal equity courts, the statute has been strictly interpreted to impose a negative restriction. Thus it has been repeatedly asserted by the United States Supreme Court that unless it appears that the remedy at law is inadequate or incomplete equity will not act.<sup>45</sup> It is held that there is no concurrent jurisdiction in equity where the issue involved is the mere title to land or the recovery of the possession of land when only the legal title is disputed.<sup>46</sup> If the remedy of equity and law is concurrent, it practically means that equity jurisdiction does not exist at all in the federal courts.<sup>47</sup> Nor will the exclusive jurisdiction of equity be exercised unless the adequacy of the legal remedy is at least doubtful. Mere inconvenience to the plaintiff, attendant collaterally upon his legal remedy, will not be sufficient to permit him to resort to the equity side of the court,

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<sup>41</sup> 1 POMEROY, *op. cit. supra* note 33, § 178; *ibid.* § 188, n. (a).

<sup>42</sup> *Hill v. Lane*, L. R. 11 Eq. 214 (1870).

<sup>43</sup> *Equitable Life Assurance Soc. v. Brown*, *supra* note 36; *Falk v. Hoffman*, 189 App. Div. 832, 179 N. Y. Supp. 428 (1919); (1920) 33 HARV. L. REV. 864.

<sup>44</sup> *Crooker v. Rogers*, 58 Me. 339 (1870); *cf. Franklin Township v. Crane*, 80 N. J. Eq. 509, 85 Atl. 408 (1912).

<sup>45</sup> See cases cited in 1 POMEROY, *op. cit. supra* note 33, § 296.

<sup>46</sup> *Lewis v. Cocks*, 23 Wall. 466 (U. S. 1874); *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232 (1884).

<sup>47</sup> See 1 POMEROY, *op. cit. supra* note 33, § 296, n. 2.

even where the jurisdiction invoked is of the exclusive type in equity.<sup>48</sup>

Upon the foregoing principles, consider now the case of the trustee suing for the recovery of money paid by the bankrupt under circumstances amounting to a fraudulent transfer, or money paid by the bankrupt to a creditor within the four months immediately preceding the petition in bankruptcy. The trustee seeks a simple money judgment which he claims belongs to the estate of the bankrupt. It was said by the Supreme Court:

"Whenever one person has in his hands money equitably belonging to another that other person may recover it by assumpsit for money had and received. . . . The remedy at law is adequate and complete".<sup>49</sup>

Where the action was against several defendants for the foreclosure of a mortgage and against two defendants for fraud, the bill was dismissed as to the latter defendants.<sup>50</sup> The court found that, although fraud was the ground upon which a court of equity was accustomed to afford relief in a great variety of circumstances, nevertheless it would not assume jurisdiction where there was an adequate remedy at law, as in that case. So also, in view of the strict distinction between suits at law and in equity, a bill in which the purchaser of stock in a corporation sought relief against his vendor, because of fraud in the transaction between them, was held defective, because it failed to show more than a right to pecuniary damages for alleged misrepresentations with respect to the stock.<sup>51</sup> In a Michigan case, where the action was brought in equity by a corporation against its former officers to recover money alleged to have been wrongfully and fraudulently converted to their own use, equity had no jurisdiction because the courts of law were capable of affording just as effec-

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<sup>48</sup> *Insurance Co. v. Bailey*, 13 Wall. 616 (U. S. 1871); *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74 (1903).

<sup>49</sup> *Gaines v. Miller*, 111 U. S. 395, 397, 4 Sup. Ct. 426, 427 (1884).

<sup>50</sup> *Security Savings and Loan Ass'n v. Buchanan*, 66 Fed. 799 (C. C. A. 6th, 1895).

<sup>51</sup> *Whitney v. Fairbanks*, 54 Fed. 985 (C. C. Vt. 1893).

tual relief.<sup>52</sup> The view of the court was not altered by reason of the fact that the right of action grew out of the fraud of the defendants, nor by the fact that the plaintiffs and defendants at the time had been in a fiduciary relationship to each other.<sup>53</sup>

The same principle is applicable to situations involving a fiduciary relationship. A federal court has said:

"Wherever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment affording a plain, adequate and complete remedy, the constitutional right of a trial by jury may not be abridged by resort to a court of equity".<sup>54</sup>

Here a bookkeeper had misappropriated funds. The employer sought to enjoin third persons from paying defendant bookkeeper money or turning over property alleged to belong to him, pending an accounting. It was held that the fact that the bookkeeper sustained a fiduciary relationship to the plaintiff was not alone sufficient to confer equity jurisdiction.

#### THE STATE OF THE AUTHORITIES

In the light of these principles, let us examine the decisions pertaining to suits by trustees to recover money or property fraudulently or preferentially transferred by the bankrupt. We find a number of decisions holding that the trustee must proceed at law—the remedy there being as complete and adequate as need be.<sup>55</sup> On the other hand, a number of decisions have upheld the right of a trustee to proceed in equity.<sup>56</sup> In *Garrison v. Markley*,<sup>57</sup>

<sup>52</sup> Bay City Bridge Co. v. Van Etten, 36 Mich. 210 (1877).

<sup>53</sup> Cf. Austin v. Daniel, 4 Denio 299 (N. Y. 1847); Rottenberg v. Englander, 183 App. Div. 893, 172 N. Y. Supp. 641 (1918). In the latter case defendant was held entitled to a jury trial in an action to recover payments in violation of the stock corporation act.

<sup>54</sup> Grant v. Giuffrida, 267 Fed. 330, 331 (Ct. of App. D. C. 1920).

<sup>55</sup> Warmath v. O'Daniel, *supra* note 27; Sessler v. Nemcos, 183 Fed. 656 (E. D. Pa. 1910); First State Bank of Milliken v. Spencer, 219 Fed. 503 (C. C. A. 8th, 1915); Adams v. Jones, *supra* note 15; Morris v. Neumann, 293 Fed. 974 (C. C. A. 8th, 1923).

<sup>56</sup> Wall v. Cox, 101 Fed. 403 (C. C. A. 4th, 1910), *semble*; Off v. Hakes, *supra* note 30; Parker v. Black, 143 Fed. 560 (W. D. N. Y. 1906), *aff'd*, 151 Fed. 18 (C. C. A. 2d, 1907); Parker v. Sherman, 212 Fed. 917 (C. C. A. 2d, 1914).

<sup>57</sup> Fed. Cas. No. 5256 (E. D. Mich. 1872).

the court declined jurisdiction of a bill filed by an assignee in bankruptcy, to recover the value of a stock of goods alleged to have been transferred by the bankrupt to a creditor within the statutory period, amounting to a preference. The court thought that, although the question of fraud was involved, the remedy at law was plain and adequate. A similar result was reached in *Gray v. Beck*,<sup>58</sup> where the assignees in bankruptcy sought to recover the value of personal property alleged to have been given to defendant by the bankrupt with a view to placing it beyond the reach of creditors. Equity had no jurisdiction, the court declaring that, even in matters of fraud, equity could not be resorted to where there was complete relief at law.

Where money has been fraudulently paid by the bankrupt to induce creditors to sign a composition agreement, a bill has been sustained.<sup>59</sup> Where matters involving partnership as well as fraud were involved, equity has entertained the bill.<sup>60</sup> Equity has imposed a constructive trust, where, under the Act of 1867, the suit, except for the form of the bill, was nothing more than an action of indebitatus assumpsit for money had and received.<sup>61</sup> Where the bill was directed against the president and principal stockholder of a bankrupt corporation, to recover a preference and reach assets in his hands, the bill was upheld;<sup>62</sup> and where the court thought it was necessary to "set aside" accounts receivable, in a suit to recover a preference, the bill was held to lie.<sup>63</sup> In one case the trustee maintained a bill in equity to recover the amount of a check paid by the teller of an insolvent

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<sup>58</sup> 6 Fed. 595 (C. C. N. J. 1881).

<sup>59</sup> *Bean v. Brookmire*, Fed. Cas. No. 1169 (C. C. Mo. 1871).

<sup>60</sup> *Taylor v. Rasch*, Fed. Cas. No. 13,801 (E. D. Mich. 1871).

<sup>61</sup> *Harmanson v. Bain*, Fed. Cas. No. 6072 (E. D. Va. 1877).

<sup>62</sup> *Walker v. Wilkinson*, 3 F. (2d) 867 (C. C. A. 5th, 1925), certiorari denied, 268 U. S. 701, 45 Sup. Ct. 636 (1925).

<sup>63</sup> *Eyges v. Boylston Nat. Bank*, 294 Fed. 286 (D. Mass. 1923). Cf. the curious case of *Westall v. Avery*, 171 Fed. 626 (C. C. A. 4th, 1909), where the cause was first started as an action at law, submitted to a jury, withdrawn by consent, referred to an arbitrator by consent, and finally adjudicated by a decree in equity and taken to the Circuit Court of Appeals for review, under a combined writ of error and appeal.



bank for an amount which he claimed as a creditor of the bank, on the ground, it was said, that the "main cause of action . . . is not legal, but equitable."<sup>64</sup>

A suit in equity by a trustee to set aside a fraudulent conveyance has been said to be merely a creditor's bill and hence clearly within equity jurisdiction,<sup>65</sup> but this is not accurate. A judgment creditor's bill, strictly speaking, is a bill to satisfy a judgment out of the debtor's equitable assets which could not be reached by execution. This is not the situation where the trustee in bankruptcy seeks to avoid a conveyance. He does not seek to reach the debtor's *equitable* assets, but rather the *legal* assets of the debtor to which the creditor is equitably entitled.<sup>66</sup> In a genuine creditor's bill, the complaining creditor ought to show that execution had issued and been returned unsatisfied. Otherwise there might be an adequate remedy at law.<sup>67</sup> In an action to challenge a fraudulent conveyance, while there is a conflict of authority as to how far it is necessary for the creditor to have proceeded at law before filing his bill,<sup>68</sup> the better rule seems to be that all that is necessary is for the creditor to have acquired a lien upon the property sought to be reached.<sup>69</sup>

In the state courts a similar conflict exists. Some cases allow a recovery by a bill in equity, where payments or property have been transferred in fraud of creditors,<sup>70</sup> and the proper action, it is said, to recover a preference is a bill for an account-

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<sup>64</sup> *In re Plant*, 148 Fed. 37, 38 (S. D. Ga. 1906).

<sup>65</sup> *Pond v. New York Exchange Bank*, 124 Fed. 992 (S. D. N. Y. 1903).

<sup>66</sup> See the clear explanation of this distinction by Mitchel, J., in *Wadsworth v. Schisselbauer*, 32 Minn. 84, 19 N. W. 390 (1884).

<sup>67</sup> *Reed v. Wheaton*, 7 Paige 663 (N. Y. 1839).

<sup>68</sup> BIGELOW, *FRAUDULENT CONVEYANCES* (Knowlton's ed. 1911) 152, n. 2.

<sup>69</sup> *Wadsworth v. Schisselbauer*, *supra* note 66; *BUMP, FRAUDULENT CONVEYANCES* (4th ed. 1896) 523. *Contra*: *Adsit v. Butler*, 87 N. Y. 585 (1885); *cf.* *Feldstein v. Fusco*, 238 N. Y. 58, 143 N. E. 790 (1924).

<sup>70</sup> *Andrews v. Mather*, 134 Ala. 358, 32 So. 738 (1902); *Thompson v. Bank*, 84 Miss. 54, 36 So. 65 (1904); *Gnichtel v. Bank*, 66 N. J. Eq. 88, 53 Atl. 1041 (1902). In *Skillin v. Maibrunn*, 78 N. Y. Supp. 436 (1902), *aff'd*, 176 N. Y. 588, 68 N. E. 1124 (1904), the bill in equity was brought to set aside a fraudulent conveyance of realty by the bankrupt. It appeared that the property had been conveyed by the bankrupt's grantee to a *bona fide* purchaser before commencement of the action. Held, the court had jurisdiction to render a judgment for damages against the bankrupt's fraudulent grantee.

ing.<sup>71</sup> In New Jersey, after commenting upon the contrary rule, the court has declared that:

" . . . in this state the jurisdiction of equity is not excluded in all cases where there is an adequate remedy at law. . . . The remedy at law may be perfectly adequate, and yet the jurisdiction of a court of equity to afford relief exists, although it is not always exercised." <sup>72</sup>

On the other hand, some state tribunals deny relief where an action for money had and received will do just as well.<sup>73</sup> If the action discloses no necessity for an injunction or discovery or specific performance or reformation or cancellation, the action must be brought at law.<sup>74</sup> Where a marshaling of assets is necessary, however, the bill will lie to recover a preferential payment.<sup>75</sup>

A distinction has been taken by the federal courts between an action brought by the trustee to recover from the defendant property transferred in fraud of creditors, or, in the alternative, judgment against the defendant for the value of the property, and an action to recover the amount of an alleged preference.<sup>76</sup> The court here transferred the action to recover the preference to the law side of the docket, but retained the count for the fraudulent transfer, as equity had jurisdiction in such an action. Apparently this decision rests upon the ground that fraud alone is sufficient to invoke equity jurisdiction. Careful distinctions were drawn between the theories of the recoveries allowed by Section 67e of the Bankruptcy Act and Section 60b. The court thought that, as to the recovery of the preference, plaintiff had a plain,

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<sup>71</sup> *Houghton v. Stiner*, 92 App. Div. 171, 87 N. Y. Supp. 10 (1904).

<sup>72</sup> *Gnichtel v. Bank*, *supra* note 70, at 69, 53 Atl. at 1041.

<sup>73</sup> *Maxwell v. Davis Trust Co.*, 69 W. Va. 276, 71 S. E. 270 (1911); *cf.* *Arnold v. Knapp*, 75 W. Va. 804, 84 S. E. 895 (1915); *Irons v. Bias*, 85 W. Va. 493, 102 S. E. 126 (1920).

<sup>74</sup> *Detroit Trust Co. v. Old Nat. Bank*, 155 Mich. 61, 118 N. W. 729 (1908); *cf.* *Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529 (1906); *Cohen v. Small*, 120 App. Div. 211, 105 N. Y. Supp. 287 (1907); *Merritt v. Halliday*, 107 App. Div. 596, 95 N. Y. Supp. 331 (1905); *Stern v. Mayer*, 99 App. Div. 427, 91 N. Y. Supp. 292 (1904); *Coudert v. Jarvis*, 188 N. Y. 584, 81 N. E. 1162 (1907); *Allen v. Gray*, 201 N. Y. 504, 94 N. E. 652, ANN. CAS. [1912B] 123 (1911).

<sup>75</sup> *Johnson v. Harrison*, 199 Mich. 221, 165 N. W. 773 (1917).

<sup>76</sup> *Simpson v. Western Hardware & Metal Co.*, 227 Fed. 304 (W. D. Wash. 1915).

adequate, complete remedy at law and the defendant had a right to have the issue of fact determined by the jury; but, as to the count for the fraudulent transfer, since fraud was the essence of the charge, equity courts were peculiarly adapted to deal with such actions.

It is to be noted that there is very good reason and some authority for making the distinction here, with the opposite result, allowing the recovery of a preference in equity, but requiring the recovery on the grounds of fraud at law. The statute permits the trustee to *avoid* a preference (that is, it makes a preferential payment voidable only), but as to the fraud such transfers or payments are entirely void. Thus it might be argued that, although equity had no jurisdiction in the suit based upon fraud, since the transfer was utterly void, it did have jurisdiction in the case of a preference, since there was something to set aside.<sup>77</sup> This is the basis of at least one decision where it was held that, since the Act made a preference *voidable* rather than *void*, an action to recover the proceeds of property transferred to creditors within the next preceeding four months should be in equity, so that the court could set aside the transfer itself.<sup>78</sup>

In *First State Bank of Millikin v. Spencer*<sup>79</sup> the Circuit Court of Appeals, in an elaborate opinion, held that an action by a trustee to recover a preference could not be brought in equity where the relief sought was a simple money judgment. The cases are reviewed in part and some of the contrary holdings disposed of. Thus one leading precedent was excluded because it appeared that the objection to equity jurisdiction was not seasonably taken.<sup>80</sup> Another, it was discovered, had been subsequently re-

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<sup>77</sup> In *Houghton v. Stiner*, *supra* note 71, the court distinguished *Garrison v. Markley*, *supra* note 57, on the ground that under the Bankruptcy Act of 1867 such transfers within the 'four months' period were absolutely void, whereas under the present Act they were merely voidable.

<sup>78</sup> *Dyer v. Kratzenstein*, 103 App. Div. 404, 92 N. Y. Supp. 1012 (1905), holding that where the bankrupt transferred property to a trustee to convert it into cash and divide among some, but not all, of his creditors, such a transfer is voidable rather than void, requiring the trustee to sue in equity to set aside the transfer, although the trustee sought only a money judgment against the creditors receiving the proceeds and though the bankrupt's transferee was not a party to the action.

<sup>79</sup> 219 Fed. 503 (C. C. A. 8th, 1915).

<sup>80</sup> *Off v. Hakes*, *supra* note 30.

versed by the Supreme Court on another point.<sup>81</sup> Other cases, based in part upon these earlier decisions, had been followed for the sake of uniformity.<sup>82</sup> The court expressed itself aptly, in this connection, by observing:

"We are not persuaded that a court may set aside the expressed command of a statute for the sake of uniformity of decision."

Supporting this decision is *Turner v. Schaeffer*,<sup>83</sup> holding that an action to recover money only, paid as an alleged preference, was an action at law, and, as such, properly brought to the Circuit Court of Appeals by writ of error. On the other hand, in *Reed v. Guaranty Security Corp.*,<sup>84</sup> the trustee was permitted to recover a preference in equity. The court followed the earlier cases, saying:

"The rule which prevails in this circuit seems to me to be supported by the better reasoning. Bankruptcy is equitable in its nature. A preference is a creature of the bankruptcy statute, and was unknown to the common law. It is a technical fraud and was developed by the equity judges of England and did not appear in any statute there until 1869. The amendment of 1903 to the bankruptcy act which was passed on account of the decision in the case of *Bardes v. Bank* (178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175), provided that suits to set aside preferences might be brought in courts of bankruptcy which, except in the few instances mentioned in the bankruptcy act, are courts of equitable powers only."

This reasoning, it will be observed, tends too much to assume the very answer to the difficulty; namely, whether the court has the particular equitable power in question, under the given

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<sup>81</sup> *Wall v. Cox*, *supra* note 56, *rev'd*, 181 U. S. 244, 21 Sup. Ct. 642 (1901), because the lower court had jurisdiction neither at law nor in equity. *Bardes v. Hawarden Bank*, *supra* note 4, had been decided in the meantime.

<sup>82</sup> *Parker v. Sherman*, 212 Fed. 917 (C. C. A. 2d, 1914) following *Parker v. Black*, 151 Fed. 18 (C. C. A. 2d, 1907); the latter case, however, relying upon *Off v. Hakes*, *supra* note 30, and *Wall v. Cox*, *supra* note 56.

<sup>83</sup> 249 Fed. 654 (C. C. A. 6th, 1918).

<sup>84</sup> 291 Fed. 580 (D. Mass. 1923).

circumstances. In a recent case<sup>85</sup> the above rule was reaffirmed in a peculiar situation. Here the action was brought at law to recover an alleged preference. The defendant moved to dismiss the suit, on the ground that a court of law had no jurisdiction in an action to recover a money judgment on the grounds of preference; that since the action was brought under Section 60b of the Bankruptcy Act, it necessarily invoked the equity powers of the court. The court, in denying the motion, took occasion to declare that, had the action been brought in equity, it would have been allowed.

*Andrews v. Lytle*,<sup>86</sup> one of the most recent cases, is difficult to analyze. It allows a bill in equity to recover a money judgment under Section 70e. The court said:

"It is alleged that the bankrupt held property which constituted a trust fund. The following and the administering of trust funds are within equity jurisprudence."<sup>87</sup>

The difficulty here seems to be the usual one. Following trust funds is within equity *jurisprudence*, provided equity has *jurisdiction*. The question is whether, under the federal statute, the equity court has jurisdiction, and this in turn depends upon the adequacy of the remedy at law. The facts in the case raise more serious problems than are dealt with by the court. Money of a bankrupt corporation had been used by its president to pay his personal debts to the defendant. It had been agreed between them, when the defendant sold his stock in the bankrupt corporation, that corporation money should be used to discharge the indebtedness, but not out of the capital stock of said corporation. The defendant had received the alleged fraudulent payments in the form of corporation checks signed by the president. Thus there are two possible views of the proceeding. It may be regarded as an action by the trustee to recover property or money in the hands of a third person who has had no dealings with the bankrupt, in which case the federal courts have no jurisdiction

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<sup>85</sup> *Foster v. Zellman*, 24 F. (2d) 1002 (D. Mass. 1928).

<sup>86</sup> 27 F. (2d) 898 (N. D. Iowa 1928).

<sup>87</sup> *Ibid.* 899.

either at law or in equity.<sup>88</sup> Again, it may be regarded as an ordinary action under Section 70e to recover a fraudulent transfer under the state law.<sup>89</sup> In this event, the question is whether the federal equity rule will permit the imposing of a constructive trust, in view of the adequacy of the legal remedy; not whether the state equity rule imposes such a trust. If the trustee desires to avail himself of the state law in this respect, he must sue in the state tribunal. The case seems, on either analysis, erroneously decided.

The Circuit Court of Appeals affirmed the decision<sup>90</sup> on the ground that the fiduciary relationship raised a trust which brought the case within the "immemorial head of equity jurisdiction". The fallacy here has been pointed out. Under the federal rule this is not enough. It gives the court jurisdiction on its equity side, only if the legal remedy is inadequate.<sup>91</sup>

#### THE LOGICAL DOCTRINE

It is submitted that the true doctrine, under the federal equity rule, and the one which should ultimately prevail out of the mass of conflicting decisions, resolves itself into the following propositions:

1. Where the trustee seeks a simple money judgment under Section 60b, for the recovery of money paid as a preference within Section 60a, equity has no jurisdiction.
2. Where the trustee seeks a simple money judgment for payments made in fraud of creditors, either under Sections 67e or 70e, equity has no jurisdiction.
3. Where the trustee seeks a simple money judgment for the value of property conveyed either as a preference or in fraud of creditors, equity has no jurisdiction.
4. Where the trustee seeks the recovery of chattels or personal property conveyed either as a preference or in

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<sup>88</sup> *Supra* note 5.

<sup>89</sup> Most of the alleged fraudulent and preferential payments had been made more than four months prior to the petition in bankruptcy and hence could not have been impeached under § 67e.

<sup>90</sup> *Lytle v. Andrews*, 34 F. (2d) 252 (C. C. A. 8th, 1929).

<sup>91</sup> *Miller v. Steele*, 153 Fed. 714 (C. C. A. 6th, 1907); *Grant v. Giuffrida*, 267 Fed. 330 (Ct. of App. D. C. 1920); see also *supra* note 43.

fraud of creditors, equity has no jurisdiction unless there is a record of title to be cancelled.

5. Where the trustee seeks to recover the possession of land, equity has jurisdiction, whether it was transferred preferentially to a creditor or conveyed in fraud of creditors.

1. This situation is the easiest of all the possible cases. Since only pecuniary relief is sought and there is no fraud involved in the traditional sense in which that term is used in equity, there seems to be no occasion for equitable relief. The statute, it is true, makes the payments voidable rather than void, but there is nothing to prevent the trustee from avoiding them at law as effectively as in equity.<sup>92</sup> While there is some authority to the contrary,<sup>93</sup> it is probably safe to say that the weight of recent authority definitely supports this conclusion.<sup>94</sup>

2. This situation, on strict principle, should be no harder than the case of a preference. The problem, as has been pointed out, is confused in the cases because of the element of fraud. However, the statute makes such payments void, and, if there is no element of exclusive equity jurisdiction involved, if there is

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<sup>92</sup> "Subdivision b of section 60 of the Bankruptcy Law provides what courts shall have jurisdiction in an action to recover the property, which, of course, includes money, and if we consider the intent and purpose of the Bankruptcy Law, and view the money and property of the bankrupt as constructively in the hands of the trustee at the time it is improperly paid over to the creditor, there would seem to be no good reason why the trustee might not bring a simple action at law to recover the amount so improperly paid over." *Merritt v. Halliday*, *supra* note 74, at 598, 95 N. Y. Supp. at 332.

<sup>93</sup> *Foster v. Zellman*, *supra* note 85; *Reed v. Guaranty Security Corp.*, *supra* note 84; *Pond v. New York Exchange Bank*, *supra* note 65; *Parker v. Black*, *supra* note 56; *Harmanson v. Bain*, *supra* note 61; *Walker v. Wilkinson*, *supra* note 62. In *In Re Plant*, *supra* note 64, apparently the court thought that an order against the defendant to pay the sum to the trustee, enforceable by commitment for contempt, made the remedy in equity "more efficacious" than at law.

In state courts: *Thompson v. First Nat. Bank*, *supra* note 70; *Arnold v. Knapp*, *supra* note 73 (by virtue of special statute); *Johnson v. Harrison*, *supra* note 75.

<sup>94</sup> *Adams v. Jones*, *supra* note 15; *First State Bank of Millikin v. Spencer*, *supra* note 79; *Simpson v. Western Hardware & Metal Co.*, *supra* note 76; *Turner v. Schaeffer*, *supra* note 83.

In state courts: *Irons v. Bias*, *supra* note 73; *Detroit Trust Co. v. Old Nat. Bank*, *supra* note 74; *Cohen v. Small*, *supra* note 74; *Maxwell v. Davis Trust Co.*, *supra* note 73; *Boonville Nat. Bank v. Blakey*, *supra* note 74; *McCormick v. Page*, 96 Ill. App. 447 (1901); *Brock v. Oliver*, 149 Ala. 93, 43 So. 357 (1907).

no accounting necessary, no discovery, no injunction, nor anything to set aside, it is difficult to see how a bill will lie when the relief asked is identical with that which the law affords. Under the federal rule, what are believed the better cases support the result as indicated above, although there is some contrary opinion.<sup>95</sup>

It will throw some light on the conflict of decisions here to examine the origin of the notion that mere fraud alone is sufficient to confer jurisdiction on equity in these cases. Originally, of course, many cases which now fall within the principle of "adequate remedy at law" were exclusively of equitable cognizance. The principle of the adequate legal remedy has seldom operated to oust equity of jurisdiction already acquired. The mere fact that the law subsequently perfects remedies will not destroy equity jurisdiction, and so matters of exclusive jurisdiction will not be lost to chancery because they subsequently become concurrent in law.<sup>96</sup> In a few cases, however, equity has definitely retreated from the field.<sup>97</sup> The statute of 13 Elizabeth<sup>98</sup> provided that all transfers and conveyances that fell within its prohibitions were "clearly and utterly void, frustrate, and of none effect". Under such a statute it would seem that there would be no occasion for equity to afford its remedy of cancellation or any remedial device to set aside such a conveyance. The transfer being void,<sup>99</sup> no right, title, or interest could be conveyed, and the property would be still subject to execution for the satisfaction of the transferor's debts. It has been said that the very purpose of the statute was to "give a plain remedy at law where before there was only one in equity".<sup>100</sup> But equity had been affording relief in such cases prior to the statute, and now its jurisdiction would not be ousted. In *Lillard v. McGee*<sup>101</sup> the court said:

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<sup>95</sup> *Adams v. Jones*, *supra* note 15. *Contra*: *Adams v. Lytle*, *supra* note 86; *Bean v. Brookmire*, *supra* note 59.

<sup>96</sup> See CLARK, *EQUITY* (1919) § 396.

<sup>97</sup> *Ibid.* § 16; 1 POMEROY, *op. cit. supra* note 33, §§ 182, 276-281.

<sup>98</sup> *Supra* note 3.

<sup>99</sup> But see *Andrews v. Marshall*, 43 Me. 272, 275 (1857).

<sup>100</sup> BIGELOW, *FRAUDULENT CONVEYANCES* (Knowlton's ed. 1911) 129, n. 1.

<sup>101</sup> 4 Bibb 165, 166 (Ky. 1815).



"It is contended as the statute against frauds and perjuries has declared the conveyance, void, that the party may without the aid of a court of equity take and sell the property by virtue of an execution; and that therefore that court has no jurisdiction. The premises of this argument are no doubt correct; but the inference does not result as a legal consequence. Fraud is one of the main pillars of the jurisdiction of a court of equity and there is no question as to its competency, prior to the statute, to give relief in a case of this sort. Now as the statute is made in affirmance, not in derogation of the common law, it cannot have the effect of taking from a court of equity its jurisdiction, for it is a settled rule that an affirmative statute does not repeal the common law."

This argument, however, is of less weight in the federal courts, in view of the legislation of Congress. It utterly fails to take account of the important distinction between the inadequacy of the remedy at law as the *basis* of jurisdiction and the same doctrine as the reason for the *exercise* of jurisdiction.<sup>102</sup> The federal statute makes inadequacy of the legal remedy the basis and foundation of equity jurisdiction. If there is an adequate remedy at law, there is no jurisdiction. In matters concerning the exclusive jurisdiction of equity, this, of course, is not true. Here the discretion of the court may be exercised, on the merits of the particular case, and the adequacy or inadequacy of the remedy at law will be one factor affecting the exercise of that discretion.<sup>103</sup>

Thus, when it is declared that where equity jurisdiction is concurrent, there is no equity jurisdiction in the federal courts,<sup>104</sup>

<sup>102</sup> 1 POMEROY, *op. cit. supra* note 33, § 139, n. 2.

<sup>103</sup> *Ibid.* §§ 138, 140, n. 1.

<sup>104</sup> *Cf. ibid.* § 296, n. 2. Note the following language: "Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common law side; as, for instance by compelling a specific performance, or the removal of a cloud on the title to real estate, or preventing an injury for which damages are not recoverable at law, as in *Watson v. Sutherland*, 5 Wall. 74; or where an agreement procured by fraud is of a continuing nature, and its rescission will prevent a multiplicity of suits, as in *Boyce v. Grundy*, 3 Pet. 210, 215, and in *Jones v. Bolles*, 9 Wall. 364, 369." Gray, J., in *Buzard v. Houston*, *supra* note 35, at 352, 7 Sup. Ct. at 252.

it is to be understood only as meaning that where the law provides a clear, plain, and adequate remedy to do justice to all the parties there is no concurrent jurisdiction in the federal courts.<sup>105</sup> Pomeroy declares that this should always be regarded as the real basis of concurrent equity jurisdiction, independent of a statute like the federal Act.<sup>106</sup> If this is accurate, it is quite possible to say, as many courts do, that the statute does not restrict equity jurisdiction, but is merely declaratory of the familiar doctrine of equity.<sup>107</sup>

Where the bill in equity demands a cancellation on the ground of fraud, or a reformation on the ground of mistake, it will be observed that the jurisdiction invoked is of the exclusive, rather than the concurrent, jurisdiction, and the inadequacy of the legal remedy operates as a reason for giving the desired decree rather than as a basis or foundation for equity jurisdiction.<sup>108</sup> It has been declared that the adequacy of the legal remedy was to be determined as of the date of the adoption of the Judiciary Act of 1789,<sup>109</sup> at which time the legal remedy under the statute of 13 Elizabeth was clearly established. Where, however, the inadequacy of the legal remedy goes to the reason for the exercise of jurisdiction rather than to the basis or foundation of jurisdiction, as in situations which involve the

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<sup>105</sup> "If, in a particular case, the remedy at law is plain, adequate and complete, then under the statute in such case there can be no concurrent jurisdiction between a court of equity and a court of law, if objection is seasonably made." *First State Bank of Millikin v. Spencer*, *supra* note 79, at 505.

<sup>106</sup> 1 POMEROY, *op. cit. supra* note 33, § 139.

<sup>107</sup> *Boyce's Ex'r v. Grundy*, 3 Pet. 213, 28 U. S. 213 (1830); *Emaus Silk Co. v. McCaughn*, 6 F. (2d) 660 (E. D. Pa. 1925).

<sup>108</sup> 1 POMEROY, *op. cit. supra* note 33, § 140, n. 1.

<sup>109</sup> ROSE, *FEDERAL JURISDICTION AND PROCEDURE* (3 ed. 1926) § 536. "The inquiry . . . is, whether by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States, the relief here sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give." *Brewer, J., in Mississippi Mills v. Cohn*, 150 U. S. 202, 206, 14 Sup. Ct. 75, 77 (1893); *cf. Richardson v. Penn. Co.*, 203 Fed. 743 (M. D. Pa. 1913).

In *Kellogg v. Schauble*, 273 Fed. 1012, 1019 (S. D. Miss. 1921) the court, after quoting from 1 POMEROY, *op. cit. supra* note 33, § 182, with respect to the principle that jurisdiction once acquired in equity is ordinarily not ousted by the subsequent extension of legal remedies, says: "The above principle is subject to this limitation: That if the scope of the common law remedy had been enlarged at the time of the adoption of the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73), then no suit in equity would lie."

exclusive jurisdiction, this rule has no application,<sup>110</sup> and need not be confused with the immediate problem.

3. The mere fact that the actual transfer by the debtor was a transfer of personal property rather than money should not alter the rule where the remedy sought by the trustee is a money judgment. His remedy at law is quite as complete and adequate here as in either of the situations just discussed. The general principle that equity will seldom give a decree for money only, unless there is some feature of exclusive jurisdiction involved,<sup>111</sup> should prevail.<sup>112</sup>

4. Where the trustee seeks the recovery of a chattel, there is no advantage in proceeding in equity unless there is a record of title involved. In the case of a transfer in fraud of creditors, it is clear that title is in the trustee, and all that is necessary is a legal action to recover possession. Where there is no record of title, the same considerations are present when the chattel is

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<sup>110</sup> Nor where new substantive rights are created in equity by state law, as distinguished from new remedies. Thus Mr. Justice Brandeis, in *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, 497, 43 Sup. Ct. 454, 456 (1923): "That a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute is likewise clear, *Scott v. Neeley*, 140 U. S. 106; *Cates v. Allen*, 149 U. S. 451. Nor can it be so narrowed, *Mississippi Mills v. Cohn*, 150 U. S. 202; *Guffey v. Smith*, 237 U. S. 101, 114. The federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court. . . .

" . . . The case is wholly unlike *Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.*, 234 U. S. 369; and other cases in which federal courts, because of a state statute, entertained suits to remove a cloud upon title, which otherwise must have been dismissed. In those cases, as pointed out in *Clark v. Smith*, 13 Pet. 195, 203, the statute changed a rule of substantive law. . . . In such cases, as the statute confers upon the landowner a substantive right, he is entitled to the aid of the federal court for its enforcement. But where a state statute relating to clouds upon title is held merely to enlarge the equitable remedy, it will not support a bill in equity in the federal court. Thus, in *Whitehead v. Shattuck*, 138 U. S. 146, the statute relied upon authorized a suit in equity by one out of possession against one in possession. As an action at law in the nature of ejectment afforded an adequate legal remedy, the bill to quiet title was dismissed."

<sup>111</sup> See *Investor's Guaranty Corp. v. Luikart*, 5 F. (2d) 793 (C. C. A. 8th, 1925).

<sup>112</sup> *Warmath v. O'Daniel*, *supra* note 27; *Garrison v. Markley*, *supra* note 57; *Gray v. Beck*, *supra* note 58; *Grant v. Nat. Bank of Auburn*, 197 Fed. 581 (N. D. N. Y. 1912); *cf.* (in state courts) *Allen v. Gray*, 201 N. Y. 504, 94 N. E. 652 (1913); *Stern v. Mayer*, *supra* note 74. *Contra*: *Blake v. Thwing*, 185 Ill. App. 187 (1914); *Parker v. Sherman*, *supra* note 56; *Simpson v. Western Hardware & Metal Co.*, *supra* note 76; *Schrenkeisen v. Miller*, Fed. Cas. No. 12480 (S. D. N. Y. 1877) *semble*; *Houghten v. Stiner*, *supra* note 71; *Dyer v. Kratzenstein*, 103 App. Div. 404, 92 N. Y. Supp. 1012 (1905).

preferentially transferred as when it is transferred in fraud of creditors. The trustee may avoid the transfer at law as well as in equity.<sup>113</sup> If a record of title is involved, the same considerations for equity jurisdiction are present as are to be found in the case of land,<sup>114</sup> and the exclusive jurisdiction is invoked.

5. In so far as title is concerned, a transfer of land in fraud of creditors is void. It is subject to execution in payment of debts of the transferor in the same manner as though there had been no transfer.<sup>115</sup> If, however, there has been a record of the conveyance, and the legal action in ejectment does not try title, there is no adequate remedy at law,<sup>116</sup> for the title would be doubtful. Thus the bill for a cancellation partakes of the nature of a suit to remove a cloud on title,<sup>117</sup> and is a clear case for the exclusive jurisdiction of equity.<sup>118</sup> Hence, when the trustee seeks to recover land, it is clear that a bill will lie; for, while there is a remedy at law, it is an inadequate one and one that would not do complete justice to the creditors.<sup>119</sup> It has been held that there is no remedy at law in the federal courts to restore possession of

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<sup>113</sup> 1 POMEROY, *op. cit. supra* note 33, § 177, n. 3c. Even in the state courts, while a creditor's bill may serve (5 POMEROY, *op. cit. supra* note 33, at §104), the usual practice is to determine the question in a replevin suit (see cases cited 5 *ibid.* §105, n. 49).

<sup>114</sup> Wall v. Cox, *supra* note 56 (bill of sale of stock of goods involved); Morris v. Newmann, *supra* note 55 (trustee sought to set aside judgment, excessive in amount by collusion between bankrupt and creditor, foreclosing chattel mortgage, and to restore property to bankrupt's estate); Taylor v. Rasch, *supra* note 60; Simpson v. Western Hardware & Metal Co., *supra* note 76 (as to fraudulent conveyance only); Off v. Hakes, *supra* note 30 (surrender of note the proper and appropriate relief); Eyges v. Boylston Nat. Bank, *supra* note 63 (accounts receivable in defendant's hands, the transfer of which was to be set aside).

<sup>115</sup> Bull v. Ford, 66 Cal. 176, 4 Pac. 1175 (1884); Cleland v. Taylor, 3 Mich. 201 (1854); BIGELOW, *op. cit. supra* note 100, at 152, n. 2.

<sup>116</sup> Cf. Kellogg v. Schaeuble, *supra* note 109.

<sup>117</sup> Cf. BIGELOW, *op. cit. supra* note 100, at 127, n. 6. Cf. also the situation where courts allow an appeal from a "void judgment", 48 L. R. A. (N. S.) 779 (1914); and the general rule where cancellation is prayed of a void instrument where its invalidity is not apparent on the face of the instrument. 1 POMEROY, *op. cit. supra* note 33, § 1377.

<sup>118</sup> 1 POMEROY, *op. cit. supra* note 33, § 177 n. (b).

<sup>119</sup> Greenberg v. Pennsylvania Trust Co., 19 F. (2d) 824 (C. C. A. 3d, 1927); Andrews v. Mather, *supra* note 70; Skillum v. Maibrunn, *supra* note 70 *semble*; cf. Booth v. Bates, 215 Ala. 632, 112 So. 209 (1927); Vollkommer v. Frank, 107 App. Div. 594, 95 N. Y. Supp. 324 (1905), *aff'd*, 205 U. S. 521, 27 Sup. Ct. 596 (1906).

land from one who holds it without right to one having the right to possession.<sup>120</sup>

Where the bankrupt has fraudulently purchased real property, taking title in the name of a third person, in many instances there will be compelling reasons for equity to assume jurisdiction, as there would be no remedy whatever at law.<sup>121</sup> Equity, however, can relieve here by impressing a trust for the benefit of creditors,<sup>122</sup> or by viewing the transaction as in fraud of creditors, upon common law principles independent of the statute of Elizabeth.<sup>123</sup> However, in some states, the statute is construed as permitting execution upon such property, although it is difficult to work out a logical reason.<sup>124</sup> In any event, there is as good reason here for equity to give relief as in other cases involving land; namely, to quiet title and afford a complete remedy to the trustee.<sup>125</sup>

### CONCLUSION

It will be seen that jurisdiction is denied to equity in the federal courts on the foregoing analysis, in every situation save that in which its exclusive jurisdiction is involved to cancel a deed or other document of record. Thus the jury trial is preserved in the maximum number of situations.

This, it is submitted, is a thoroughly happy result. At a time when the jury is under close scrutiny, there is some danger lest we fail to recall the merits which this method of trial obviously possesses.<sup>126</sup> There are many questions to be decided which are only in the technical sense strict "questions of law" or "questions of fact". Rather, they are questions the answers to which pre-

<sup>120</sup> *Clarkson Coal Co. v. United Mine Workers*, 23 F. (2d) 208 (S. D. Ohio 1927).

<sup>121</sup> *Walker v. Wilkinson*, *supra* note 62.

<sup>122</sup> *Bridges v. Bidwell*, 20 Neb. 185, 29 N. W. 302 (1886).

<sup>123</sup> *Edmonson v. Meacham*, 50 Miss. 34 (1874); *cf.* *Gowing v. Rich*, 1 Ired. 553 (N. C. 1841).

<sup>124</sup> *Kimmel v. McRight*, 2 Pa. 38 (1845). See discussion in BIGELOW, *op cit.* *supra* note 100, at 127, 128.

<sup>125</sup> *Cf.* BIGELOW, *op cit.* *supra* note 100, at 127, n. 6.

<sup>126</sup> *Cf.* Wigmore, *A Program for the Trial of Jury Trial* (1929) 12 J. AM. JUD. Soc. 166.

scribe the general standard of conduct approved by the community. These questions are, in substance, moral questions, and their answers mark out the limits within which the community will approve or tolerate action in a given direction.

Of this general type are questions of negligence in tort cases, where the problem is to determine whether the conduct of a given individual meets the approval of other members of society in a given place and at a given time. A similar situation involves the problem of apparent authority, in agency, where the test to be applied is to be derived from the actual experience of men in their daily associations with each other. To this class, also, belongs the ordinary question of fraud in the cases under consideration, when what is wanted is to know whether a given individual has gone too far in protecting his own interests, in the light of the criteria of morality in effect in the community. It may well be doubted whether any better method of trial is possible than a jury trial under proper control of the trial judge.

It must be remembered that *fraud*, like *justice* and many other concepts, exist only in the mind, and where the conception, by hypothesis, is delimited by the commonly accepted standards of morality and decency in the community, the jury under appropriate instructions seems indispensable. It seems, therefore, highly desirable for the federal courts to apply, as many of them have done, the statutory limitation upon equity jurisdiction, in actions by trustees in bankruptcy to recover money or property under Sections 60, 67, and 70 of the Bankruptcy Act.