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TRUST-FUND DOCTRINE REVISITED

PART I

JAMES R. ELLIS* AND CHARLES L. SAYRE†

FOR MORE THAN HALF a century the critics have been hammering at the trust-fund theory of corporate assets.[1] The result of this effort has not been destruction.[2] The body of rules once termed "the most important"[3] in the law of corporations remains a significant legal structure, reshaped and redefined. A vast majority of the American courts, state and federal, have adhered to the doctrine at one time or another,[4] and no jurisdiction followed it more consistently or extended it further than Washington.[5] We feel it worthwhile to examine the recent developments and appraise the current condition of this corner of the law, although it requires a further pass at a much covered target.

The doctrine had its genesis in the oft-quoted opinion of Justice Storey in *Wood v. Dummer*,[6] wherein the eminent jurist laid it down that the assets of an insolvent corporation were a trust fund for the benefit of its creditors. A scholarly judge has noted that this utterance of the rule was a deliberate innovation by Story under circumstances where he could have adequately solved the case before him on established rules.[7] Be this as it may, impetus was given to a distinct rationale for the treatment of creditors' claims against insolvent corporate debtors, which had far-reaching effect.

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[1] BALLANTINE, CORPORATIONS 348, 349 (Rev. ed. 1946), Hunt, *The Trust Fund Theory and Some Substitutes for It*, 12 YALE L. J. 63, Wickersham, *The Capital of a Corporation*, 22 HARV. L. REV. 319; 2 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 596 (Rev. ed. 1940), Zettler, *The Trust Fund Theory: A Study in Psychology*, 1 WASH. L. REV. 81, POMEROY, EQUITY JURISPRUDENCE § 1046 (4th ed.) STEVENS, CORPORATIONS § 185 (1936), 15A FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS § 7369 (Perm. ed.).

[2] STEVENS, CORPORATIONS § 185 (1936)

[3] WAIT, INSOLVENT CORPORATIONS § 142, 119 (1888).

[4] See 15A FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS § 7369 *et seq.* (Perm. ed.) and state-by-state coverage of cases therein.

[5] Williams v. Davidson, 104 Wash. 315, 176 Pac. 334 (1918), stating at 104 Wash. 320 that the trust fund doctrine had been "followed in an unbroken line of decisions. So that if anything may be said to be settled, this doctrine has become the settled law of this state", Sterrett v. White Pine Sash Co., 176 Wash. 663, 30 P.(2d) 665 (1934).

[6] Wood v. Dummer, 3 Mason 308, Fed. Cas. No. 17, 944 (1824).

[7] Mitchell, J. in Hospes v. Northwestern Manufacturing and Car Co., 48 Minn. 174, 50 N.W 1117 (1892).

Most of the able courts applying the doctrine were quick to concede that the analogy to true trust was at best imperfect.[8] But in the legislative vacuum in which the great depressions of the late nineteenth century occurred, the doctrine offered an effective method of providing fair treatment for general corporate creditors, and of preventing a disordered scramble for assets on a "first come, first served" basis. The expansion of the doctrine in this period has been aptly described as sorely needed "judicial legislation."[9] Certainly in fairness it can not be said that the adoption of the trust fund rationale was a judicial accident perpetuated by stare decisis.

The foundation case in America[10] was an action to restore dividends paid out to shareholders by an insolvent bank, but from limited beginnings the trust-fund doctrine expanded to become a major legal weapon for corporate creditors under a wide variety of conditions. In this discussion we propose to treat separately three major aspects of the trust-fund problem: (1) the status of corporate insolvency, which was a condition precedent to the operation of the rule; (2) the rights of creditors against creditors; and (3) the rights of creditors against shareholders. Our analysis will be confined chiefly to the statutory and case law of the state of Washington with no attempt at detailed treatment of the rules of other courts beyond an incidental comparison. The Federal Bankruptcy Act is excluded from analytical discussion as deserving separate treatment. We undertake no more in that regard than to point out to the practitioner the possibility of using substantive state law to advantage in proceedings under the Federal Act.[11] The body of case authority will be appraised in the light of the various state statutes which apply, and an attempt made to indicate the current place of the trust-fund doctrine in this jurisdiction.

INSOLVENCY

For reasons which are quite apparent, the trust-fund doctrine had no application until a corporation had become insolvent.[12] It is fitting that the discussion of the doctrine itself be prefaced by a definitive treatment of that financial state of affairs which invoked its operation.

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[8] Hollins v. Brierfield Coal and Iron Co., 150 U. S. 371, 14 S. Ct. 127 (1893), Bates v. Brooks, 22 Iowa 1128, 270 N.W 867 (1937), Conover v. Hull, 10 Wash. 673, 39 Pac. 166 (1895).

[9] Zettler, *The Trust Fund Theory: A Study in Psychology,* 1 WASH. L. REV. 81, 85 (1925).

[10] Note 6 *supra.*

[11] 2 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 597, 1030 (Rev. ed.).

[12] 15A FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS § 7386 (Perm. ed.).

As far as preferences to creditors were concerned, attractive arguments have been made to the effect that there should be a distinction drawn between preferences given by corporations which, though insolvent (in the ratio of assets to liabilities sense), were doing business in good faith, hoping eventually to extricate themselves from financial embarrassment, and those which dealt with an eye to pending dissolution.[13] The Washington court, however, did not choose to make a judicial distinction but, rather, settled upon a definition which would apply to all cases, to wit: a corporation was "insolvent" when it was unable to pay its debts "in due course of business."[14] A corporation may be insolvent even though the reasonable value of its assets exceeds the amount of its liabilities.[15] Inherent difficulties in this latter proposition became apparent with the adoption of the 1941 preference act[16] wherein preferences were defined as transactions which, *"at the time made,"*[17] enabled a creditor to obtain a greater percentage of his debt than other creditors of the same class. This, of course, would be mathematically impossible if the realizable value of the corporate assets exceeds its liabilities.

Be that as it may, statutory definition is not lacking modernly The Uniform Business Corporation Act,[18] adopted in Washington in 1933, states that a petition for the involuntary dissolution of a corporation may be entertained by the court where it is shown that "the corporate assets are insufficient to pay all the just demands for which the corporation is liable or to afford reasonable security to those who may deal with it."[19] The word "insolvency" nowhere appears in that section, however. The Uniform Fraudulent Conveyance Act,[20] adopted in Washington in 1945, undertakes specifically to define insolvency as existing "when the present fair salable value of assets is less than the amount that will be required to pay probable liability on existing debts as they become absolute and matured."[21] The discrep-

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[13] 1 WASH. L. REV. 81, 92.

[14] Ronald v. Schoenfeld, 94 Wash. 238, 162 Pac. 43 (1917), Simpson v. Western Metal & Hardware Co., 97 Wash. 626, 167 Pac. 113 (1917), Brooks v. Parsons Co., 124 Wash. 300, 214 Pac. 6 (1923), Guaranty Trust Co. v. Yakima First National Bank, 179 Wash. 615, 38 P.(2d) 384 (1934), Strang v. Puget Sound National Bank, 188 Wash. 503, 63 P.(2d) 373 (1936).

[15] Simpson v. Western Metal & Hardware Co., Brooks v. Parsons Co., note 14 *supra*. Though the court in each case expressed doubt that the facts were as found.

[16] REM. REV. STAT. (1941 Supp.) 5831-4 *et seq.*, Wash. Laws 1945 c. 103.

[17] *Id.* Subsection 4(c). (Emphasis added.)

[18] REM. REV. STAT. § 3803-1 *et seq.*

[19] *Id.* Subsection 50.

[20] REM. REV. STAT. (1945 Supp.) § 6854-40 *et. seq.* Wash. Laws 1945 c. 136.

[21] *Id.* Subsection 41(1). The UFCA applies to corporations ("persons").

ancy, if there be any of substantial importance, would appear to be more the result of the blanket nature of uniform act adoptions than from any real need for a different definition in each instance. A statute of somewhat ancient origin authorizes the appointment of a receiver when a corporation is "insolvent" or is in danger of becoming so.[22] The recent case of *Warren v. Porter Construction Co.*[23] indicates that this statute is in current use and holds that the due course of business test is determinative of the existence of insolvency in proceedings under that statute. Any potential inconsistencies in the later statutory definitions were not discussed in the opinion. Without anticipating possible conflict in application, the desirability of having a single concept and definition is apparent.

CREDITOR AGAINST CREDITOR

THE "EQUALITY" DOCTRINE

In the normal course of business, no creditor is greatly concerned when the claim of another creditor is paid off by the common debtor. But, when such payment is made under conditions which render it less likely that other creditors will be paid, the hue and cry of "preference" is heard if it ultimately devolves in liquidation that there are not sufficient assets to meet all liabilities. Interestingly enough, the common law attached no stigma to preferences given by individual as contrasted with corporate debtors and, to this date, under our *state* law, they are not recoverable.[24] Yet, with regard to preferences given by insolvent corporations, a separate field of law has been erected upon the foundation statement that the assets of an insolvent corporation are a trust fund for all its creditors. The explanations given for this phenomenon are (1) a corporation has a greater repertoire of "tricks" than an individual debtor[25] and (2) it has, as a rule, a larger area of operation in the geographic sense so that those creditors farther away from the core of operation are at a disadvantage to observe the financial status of the company[26] The history of the judicial ideal that there should be equality in distributing the assets of an insolvent corporation has

[22] REM. REV STAT. § 741(5). The provision is substantially the same as that contained in the Laws of Wash., Civil Practice (1854) § 171(5), and in CODE PROC. 1881, § 193(5).

[23] 29 Wn.(2d) 785, 189 P.(2d) 255 (1948).

[24] Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741 (1892), Holt Mfg. Co. v. Bennington, 73 Wash. 467, 132 Pac. 30 (1913), Tomlinson v. Burgess, 185 Wash. 33, 52 P.(2d) 1259 (1935).

[25] GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES, § 596 (Rev. ed.).

[26] 1 WASH. L. REV. 81, 82.

been adequately discussed elsewhere.[27] The object of our discussion here is to set out various aspects of the law of preferences as they crystallized in our common law and to attempt to evaluate their import in light of the modern legislative inroads on this field where the trust-fund theory so long ruled supreme.

Aside from the element of insolvency, there is no reason to believe that the Washington court ever entertained a concept of preferences different from that which was adopted by way of definition in the federal bankruptcy legislation of 1898, in substance, a preference was a course of dealing between an insolvent corporation and one of its creditors which enabled the latter to obtain a larger percentage of his debt than other creditors of the same class.[28]

Since the trust-fund doctrine had as its aim an equality of distribution of the assets of an insolvent corporation, it would seem to follow that the remedy in equity to have a preference set aside could only be accomplished as an incident of liquidation proceedings where the machinery was at hand to effect efficiently and impartially such a distribution. From earliest statehood Washington has had a statute authorizing the appointment of a receiver for insolvent corporations.[29] Early cases which invoked the trust-fund doctrine did so with that statute as a logical starting point.[30] Granting the need for equality of distribution, the agent for its effectuation was tailor-made. Also the remedy of having a receiver appointed appears always to have been available to simple contract creditors, if their claims were not controverted, upon a mere showing that the corporation was insolvent.[31] The advantages were obvious; time and expense involved in bringing a claim to judgment were avoided and the expenses of liquidation were allocated among all creditors.

In 1933 the Uniform Business Corporations Act[32] invaded the field of corporate receivership. Section 51 of this act provides, in part, that a creditor whose claim has been reduced to judgment or is admit-

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[27] 1 WASH. L. REV. 81, 82.

[28] *See* Simpson v. Western Metal & Hardware Co., note 14 *supra,* at 97 Wash. 631, the court discusses discrepancy between federal and state concepts of insolvency.

[29] Note 22 *supra.*

[30] Thompson v. Huron Lumber Co., note 12 *supra,* Oleson v. Bank of Tacoma, 15 Wash. 148, 45 Pac. 734 (1896), Express statutory authority offsets the argument that remedy through receiver is "drastic and harsh." *See,* however, the dissenting opinion in Kreide v. Independence League, 188 Wash. 376, 62 P.(2d) 1101 (1936).

[31] Davis v. Consolidated Coal Co., 41 Wash. 480, 84 Pac. 22 (1906), Snyder v. Yakima Finance Corp., 174 Wash. 499, 25 P.(2d) 108 (1933), Kreide v. Independence League, note 30 *supra.*

[32] Note 18 *supra.*

ted by the corporation may petition for the involuntary dissolution of such corporation on the grounds specified therein (presumably a definition of "insolvency"). Section 53 states that the court "may" appoint a liquidating receiver upon the filing of such a petition after process has issued against the corporation and the claims admitted by answer or proved against it. It is interesting to note that in *Kreide v. Independence League of America*,[33] the right of a judgment creditor to the remedy of a receiver was challenged in a dissenting opinion by Judge Blake on the ground that a judgment creditor should be required first to exhaust his legal remedies by way of execution. Yet, just three years prior to that case, Judge Blake had subscribed to the statement in *Snyder v. Yakima Finance Corporation*[34] to the effect that it was the *duty* of the court to appoint a receiver of an insolvent corporation whenever an interested party asked for the remedy and made a satisfactory showing of insolvency[35] It should further be observed that the *Kreide* case was decided three years after the adoption of the Uniform Business Corporation Act, and without any reference thereto; instead, the court relied upon the old receivership statute.

While, as indicated, there is some confusion on the subject, it appears that, upon a satisfactory showing of insolvency, the appointment of a receiver will, after application therefor by a creditor, follow as a matter of course.

THE EFFECT OF GOOD FAITH

In keeping with trust concepts, the satisfaction of a pre-existing debt did not constitute a creditor a bona fide purchaser so as to cut off the equities of other creditors in the assets of the insolvent corporation.[36] Thus, if at the time of the satisfaction of the debt, the debtor corporation was insolvent, no amount of good faith on the part of the creditor who was paid would prevent recovery of the preference at the suit of the other creditors.[37] A similar rule would seem applicable to judgment creditors,[38] although our court in *Conover v. Hull*[39] appeared to

[33] 188 Wash. 376, 62 P.(2d) 1101 (1936).
[34] Note 31 *supra.*
[35] Oleson v. Bank of Tacoma, note 30 *supra; but see* 23 WASH. L. REV. 60.
[36] Malm v. Griffith, 109 Wash. 30, 186 Pac. 647 (1919), Thomas v. Grote-Rankin Co., 75 Wash. 280, 134 Pac. 919 (1913), Tucker v. Brown, 20 Wn.(2d) 740, 150 P.(2d) 604 (1944).
[37] Thompson v. Huron Lumber Co., note 24 *supra,* Sterrett v. White Pine Sash Co., note 5 *supra.*
[38] SCOTT ON TRUSTS § 308.1 *citing* Ransom v. Wickstrom, 84 Wash. 419, 146 Pac. 1041 (1915), Banks v. Morse, 17 Wn.(2d) 18, 134 P.(2d) 952 (1943).
[39] 10 Wash. 373, 39 Pac. 166 (1895).

rely heavily upon the collusive nature of the judgment in setting it aside as a preference. Recent cases, however, indicate that Washington does not treat judgment creditors as purchasers "for value," so good faith alone will not cut off equities.[40] The statutes insofar as they deal with judgments state that they are preferences if "procured or suffered" by an insolvent corporation. The question whether these words could be treated as synonymous with "collusive or by confession" has not been answered in this jurisdiction. A literal interpretation of "trust," however, would appear to make such an inquiry irrelevant.

TIME LIMITATION

Again, by analogy to trust law, the right to recover trust property is limited by, and coextensive with, the right of the trustee. If the statute of limitation has run against him, it has run against all others in the absence of bad faith on the part of the transferee.[41] None of the early Washington cases dealt with this point concerning the setting aside of preferences. In *Peeples v. Hayes*,[42] however, it was held that the appointment of a receiver created no new cause of action and that therefore the statute of limitation commenced to run at the time the transfer took place regardless of when the other creditors discovered the transaction. This was so even though the creditor had reasonable cause to know he was receiving a preference.

THE 1931 PREFERENCE STATUTE

In 1931, the Washington Legislature enacted what was termed by our court[43] the "trust fund statute" which dealt specifically with corporate preferences.[44] As construed by our court in *Post v. Fischer*,[45] this statute enabled the receiver to recover a preference made or suffered within a period of four months prior to the date of filing of the petition for his appointment regardless of the good faith of the creditor who received it. As to preferences made or suffered prior to the four months' period, there must be a showing that the creditor had "reasonable cause to believe" that a preference was thereby effected at the time he received it. As to recovery under the latter proposition, the *Peeples* case held that the normal statutes of limitation would apply

[40] Banks v. Morse, note 38 *supra* (purchase by judgment creditor at execution sale).
[41] 2 SCOTT ON TRUSTS § 327.2.
[42] 4 Wn.(2d) 253, 104 P.(2d) 305 (1940). It was not there necessary to decide which statute of limitation applied, the court assumed that the "ordinary" statutes of limitation were applicable.
[43] Whiting v. Rubinstein, 7 Wn.(2d) 204, 109 P.(2d) 846 (1941).
[44] REM. REV. STAT. § 5831-1 *et seq.*
[45] 191 Wash. 577, 71 P.(2d) 659 (1937).

In addition, the receiver must have commenced the suit within six months of the filing of the petition for his appointment and this requirement was construed as jurisdictional.

THE 1941 PREFERENCE STATUTE[46]

In 1941, the so-called "trust-fund statute" was repealed and replaced by new legislation which used much stronger language and imposed more stringent limitations. Under this statute, preferences given within the four months' period of the date of filing of the petition for the appointment of a receiver may be set aside by such receiver as a matter of law[47] provided the action is brought within (and not after) six months of the date of such filing.[48] As far as that action is concerned, no subjective inquiry into the good faith of either the preferor or the preferee need ever be made. There can no longer be a recovery of a preference made before the four months' period, "and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded."[49]

The ideal of equality has been to some degree preserved but has been modified by considerations of business stability and the security of titles.

REMEDIES OF INDIVIDUAL CREDITORS

The use of the term "trust fund," is fraught with dangers when conceptually divorced from the "principle of equality." Since the creditors, as a class, were treated as beneficiaries of the assets of an insolvent corporation, class rights would normally exist which could be asserted through a creditor's bill in equity.[50] Under the common law such a proceeding had no advantage over the more efficient remedy through a receiver but, on the contrary, had many unfavorable characteristics as a method for recovering preferences. First, existing concepts of equitable jurisdiction seemed to require that all legal remedies be exhausted, and that would normally entail bringing the claim to

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[46] REM. REV. STAT. (1941 Supp.) § 5831-6.
[47] *See* also 16 WASH. L. REV. 62.
[48] Note 46 *supra* subsection 5.
[49] Note 46 *supra*.
[50] Of course, once a receiver had been appointed, no individual actions could be maintained. Watterson v. Masterson, 15 Wash. 511, 46 Pac. 1041 (1896), Shuey v. Adair, 24 Wash. 378, 64 Pac. 536 (1901), Guaranty Trust Co. v. Satterwhite, 2 Wn.(2d) 252, 97 P.(2d) 1055 (1940).

judgment and a return of execution unsatisfied.[51] Secondly, courts normally viewed such a suit as having been brought on behalf of *all* the creditors, though the expenses of the suit were imposed upon the suing creditor and those who saw fit to join with him in its prosecution.[52] In light of the foregoing, it is not at all strange that little precedent exists for creditor's bills to set aside preferences. *Peeples v. Hayes*[53] purported to shed light on what the old law *might* have been in this regard. That case dealt with a preference given some four and a half years before the filing of the application for the appointment of a receiver. It being necessary, therefore, to determine when the applicable statute of limitation commenced to run, the court concluded that the cause of action arose at the time of the transfer and that, since a receiver could have been applied for at any time thereafter, the action was barred. The court went on to say, however:[54]

> We are not persuaded, however, that the creditors could not have brought individual actions after the transfer had taken place, or that the remedy through a liquidating receivership was the exclusive remedy Such action, of course, would necessarily have been directed to enforcing a re-transfer to the corporation, or it might have been in the nature of a creditor's bill, at all events, an equitable proceeding, grounded upon the fact that the defendants had taken, and were holding, property in which the plaintiff and all other creditors had a trust interest.

The opinion recognized the general rule that a simple contract creditor cannot maintain an action to set aside a "fraudulent conveyance" until he has reduced his claim to judgment, but stated that the better rule, under code pleading would allow a creditor to bring an action on his claim and ask the court to assert its equitable power to pursue property "which could not be reached by an action at law"

The "trust interest" to which the *Peeples* case has reference could be none other than that raised by the de facto insolvency of the corporate debtor at the time of the transfer and is as strong a statement of the trust-fund doctrine as has been encountered in the reports of any jurisdiction. The statement by the court is even more significant in light of the fact that it was construing, almost in the same breath, a statute[55] which might reasonably have been interpreted as placing the

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[51] 5 POMEROY, EQUITY JURISPRUDENCE §§ 2319-2321 (4th ed). *See also* O'Day v. Ambaum, 47 Wash. 684, 92 Pac. 421 (1901) dealing with an insolvent partnership, however.

[52] Biehn v. Aetna Investment Co., 110 Wash. 460, 118 Pac. 489 (1920).

[53] Note 42 *supra*.

[54] At 4 Wn.(2d) 260.

[55] The 1931 preference statute, note 44 *supra*.

sole cause of action in a receiver and which measured time limitations from the same basic point used in our present day statute, *viz.*, the date of filing an application for appointment of a receiver.

If the statements contained in the *Peeples* case are not to be treated as ill-considered *dicta,* and the somewhat limited repudiation of the trust fund doctrine contained in the 1941 statute is restricted to its immediate context, the following hypothesis is submitted for consideration:

X corporation, being then insolvent, transfers property to *D,* a simple contract creditor, in satisfaction of the pre-existing debt. *P,* another creditor, hears of the transfer five months later (too late to have relief through the appointment of a receiver). Can *P* bring an action on his claim and ask the additional euitable relief suggested in the *Peeples* case that the transfer be set aside and the property reconveyed to the corporation for the benefit of all the creditors? In any event, *P* might argue that the statutory limitation applies only to actions by receivers and that the common law trust fund doctrine continues to apply to creditor's bills. Far from expressly repudiating the doctrine, our court has only recently reiterated that "the trust fund doctrine is part of the common law of this state."[56]

PREFERENCES AS FRAUDULENT CONVEYANCES

There is one more possibility which might operate in favor of creditors against whom the four months' limitation has run. While a preference *per se* cannot be regarded as a fraudulent conveyance,[57] situations may arise where a transaction which has the effect of preferring a creditor also is tinged with the badge of "fraud."[58] Attempts have been made under the federal bankruptcy act to avoid the analogous four months' limitation contained therein by showing that the transaction came within other provisions of the bankruptcy act[59] which are substantially the same as those in the Uniform Fraudulent Conveyances Act[60] adopted in Washington in 1945. Subsection 46, of this latter statute, renders fraudulent any conveyance made with *actual* intent to "hinder, delay, or defraud" creditors, and subsection 48 states that where a conveyance is fraudulent as to a creditor, he may, as against

[56] Whittaker v. Weller, 8 Wn.(2d) 18, 111 P.(2d) 218 (1941).
[57] 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 289, 289(a) (Rev. ed.). Holbrook, Merrill & Stetson v. Peters & Miller Co., 8 Wash. 344, 36 Pac. 256 (1894).
[58] *Id.*
[59] *See, e.g.,* Irving Trust Co. v. Kaminsky, 19 F Supp. 816 (S. D .N. Y. 1937).
[60] Note 20 *supra.*

any person except a purchaser for fair consideration *without knowledge,* have certain remedies,[61] the only pertinent one being the right to have the conveyance set aside.

A brief review of the cases under the federal act indicates that a very strong showing of fraud is required.[62] Not only must it be shown that both transferor and transferee acted with specific intent to hinder, defraud, and delay other creditors,[63] but it has been intimated that there must be a showing that the transferor acted with a purpose to secure some advantage to himself to which the transferee was a party It may, however, be a useful theory in the more extreme case.[64]

CONCLUSION

The trust-fund doctrine as it applied to corporate preferences should be considered alive today only insofar as it has been preserved by statute.[65] The potential area for survival of trust fund theory outside the 1941 act is narrow Our suggestion that the statutory limitations upon a receiver's rights to set aside preferences might be strictly inapplicable to individual creditors' suits is made to emphasize this remaining uncertainty The language of the recent *Whiting*[66] case leaves a feeling that our court may not be receptive to this suggestion, but the existence of such a right of action has not been definitely denied. Except for cases involving fraud in fact (which was never in any real sense a part of the trust-fund doctrine) logically no greater right should exist in an individual creditor than exists in the receiver who purports to act on his behalf.

(To be continued)

[61] Note 20 *supra,* subsections 48, 49.

[62] Irving Trust Co. v. Kaminsky, note 59 *supra,* interpreting "hinder, delay or defraud."

[63] And proof of insolvency at the time of transfer is inconclusive. 4 COLLIER ON BANKRUPTCY ¶ 67.37 (14th ed.).

[64] *Id.*

[65] In Whiting v. Seattle-First National Bank, 13 Wn.(2d) 450, 125 P.(2d) 656 (1942) it was stated that if "the transfer took place more than four months prior to the application for appointment of a receiver, *there was no preference,* within the meaning of our trust fund doctrine" (emphasis added). This would appear to be the more sensible approach.

[66] Note 65 *supra.*