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NOTES

CORPORATIONS—FOREIGN—SERVICE IN PERSONAM—TRANSACTIONING BUSINESS THROUGH AGENTS OR OTHER REPRESENTATIVES.—Reported decisions of the present day abound with instances where relief has been granted where none would have been forthcoming at the common law. This innovation is due largely to statutory enactments involving a different philosophy of the law, a change which is only natural, since changing conditions should entail a variation in the administration of the law. The law dealing with corporations is typical, for corporations were not unknown at common law, and jurisdiction over them, particularly over foreign corporations, is especially in point. "At common law a state court has no jurisdiction over a foreign corporation unless it voluntarily appears, except so far as its property may be attached, and then only to the extent

of the property attached. At common law, a state court cannot render a personal judgment against a foreign corporation, there being no statute for service of process. Accordingly at common law a foreign corporation could not be sued by personal service outside of the state creating it, inasmuch as service on its officers was held insufficient. The modern view, however, is that *jurisdiction over a foreign corporation may be acquired in suits on contracts made on business done within the jurisdiction*, by service upon an officer of the corporation, or upon an agent engaged in the state."¹ (Italics are mine.) It is this last which brings to the fore the primary point of discussion: Just to what extent must a foreign corporation operate within a state so that it may be said to be "doing business" in that state so that it will be amenable to service of process in *in personam* actions? The problem and its solution, in general, have been aptly stated: "Questions have frequently arisen as to what constitutes 'doing business' in the state, within the meaning of the statutes relating to foreign corporations, and the answer is not always clear. If a foreign corporation continuously does a substantial part of its business in the state, however, little, it is within the statute. Clearly, it does business in the state if it has an office and sells some of its goods there. And by the better opinion a single act of its ordinary business brings it within the statute. Thus, a corporation organized for the purpose of lending money on real estate mortgage security does business by making a single loan and taking a mortgage to secure it. In like manner an insurance company would do business in the state by issuing a single policy of insurance. Such acts constitute the ordinary business of the company."²

The proposition of "doing business" is of vital importance, and may arise in different ways. It may be that a foreign corporation is operating in the state without a license and it becomes necessary to decide whether the organization is carrying on its activities to the extent that it must comply with statutory requirements and to determine whether it has incurred the penalty for its failure to conform with such obligations. Or it may be that a person defends an action brought against him by a foreign corporation on a contract upon the ground that the plaintiff was not licensed to carry on business in the state and that, consequently, the contract being void, no recovery can be had on it. Or it may be that the corporation is the defendant in such an action and is contesting the service of process upon it within the state, claiming it was not transacting business

¹ 4 COOK, CORPORATIONS (8th ed.) 3336.

² CLARK, PRIVATE CORPORATIONS (1897) 623.

"When a foreign corporation transacts some substantial part of its ordinary business in a state, it is doing, transacting, carrying on, or engaging in business therein, within the meaning of the statutes under consideration." CORPORATIONS, 14A C. J. 1270, and cases cited.

within that particular political subdivision to the extent that service was valid. A recent example of the latter problem is found in the Michigan case of *Malooly v. York Heating & Ventilating Corporation*.³ In this instance, the plaintiffs, engaged in the wholesale meat business in Detroit, had made negotiations with the York Company, a Pennsylvania corporation, regarding the installation of a refrigeration system in their place of business. Despite the defendants' claim, the evidence showed conclusively that the units were purchased directly from the defendant corporation, and were installed under the supervision of York and McConnor, the latter being the Detroit sales representative of York. Because of some undiscoverable defect, the system never was satisfactory, and this suit was brought to recover damages for losses sustained from spoiled meats, loss of business, rental of the premises, and the cost of replacement of equipment. The defendant corporation appeared specially and moved to set aside the service of summons which had been made upon McConnor, but the motion was denied. Upon appeal, the Supreme Court, one of the eight judges dissenting, after deciding that service upon the agent was good, held that since the plaintiffs dealt directly with the corporation and since under the contract the title to the machinery was to remain in the corporation until full payment made, and as McConnor was in the state, not only for the purpose of securing business for his principal, but also to serve his employers in the installation and operation of the equipment, the corporation was "doing business" in the state within the meaning of the statute, and hence was amenable to the service of process. Aside from this case, that the settling of the question is of great consequence will be seen from the following: ". . . it is well-settled that to give the local courts jurisdiction *in personam* in an action against a foreign corporation, it is essential that the corporation be doing business in the state or appear in the action. The doing of business which will render such corporation amenable must occur at the time of service and not before; attempted service of summons on a foreign corporation not doing business in the state is invalid, for it is too well-settled to require extended citation of authority that the courts of a state cannot acquire jurisdiction of an action at law or suit in equity against a foreign corporation, so as to render a personal judgment against it, unless the corporation comes within the jurisdiction of the state, so that process may be served upon it, or unless it voluntarily appears and submits to the jurisdiction, nor can state statutes provide otherwise. . . . it is essential to the legal rendition of a personal judgment against a foreign corporation, otherwise than by its voluntary appearance, that the corporation be doing business within the state."⁴

³ 258 N. W. 622 (Mich. 1935).

⁴ 18 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (1933) § 8643.

Despite the large number of decisions that pertain to the point in hand, it is a much harder task to determine when a corporation is doing business in a state than to decide when it is not. "There is no precise test of the nature or extent of the business that must be done in order to constitute 'doing business.' All that is requisite is that enough business be done to enable the court to say that the corporation is present in the state. . . . But it is not any business activity of a foreign corporation which will justify the conclusion that it is 'doing business' in a district other than that of its residence, so as to make it amenable to service of process there; the transaction of business must be such that the corporation is for the time being within the state in which it is sued."⁵ To enumerate a few of the activities which have been held to constitute doing, transacting, carrying on, or engaging in business in a state, we have: the making of loans,⁶ the carrying on of a real estate brokerage business,⁷ the making of contracts to furnish theatrical entertainments,⁸ the management and operation of a manufacturing plant,⁹ the taking of orders by an agent, subject to the approval of a foreign corporation at its office outside the state,¹⁰ the buying and selling of goods by an authorized agent of a Russian corporation in New York,¹¹ the installation of a sprinkler system involving the employment of labor for weeks, building of tower, tank, and other carpenter work, excavating and filling of trenches, and use of material on the ground and property of a manufacturing company.¹² But, on the other hand, engaging in litigation does not constitute doing business in the state,¹³ nor does the collection of debts by the foreign corporation due it for goods sold or otherwise contracted amount to such.¹⁴ Likewise, the appointment of agents to transact business in the state in the future is not regarded as doing business.¹⁵ Neither does the performance of such acts as the submitting of bids on work to be performed in a state and the entering into a contract to perform such work constitute "doing business" so as to render the contract void for the corporation's failure to comply with statutory regulations.¹⁶

⁵ FLETCHER, *op. cit. supra* note 4, at § 8713.

⁶ People's Building, Loan and Savings Ass'n v. Markley, 27 Ind. App. 128, 60 N. E. 1013 (1901).

⁷ Warren v. Interstate Realty Co., 192 Ill. App. 438 (1915).

⁸ Interstate Amusement Co. v. Albert, 128 Tenn. 417, 161 S. W. 488 (1913).

⁹ Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611 (1903).

¹⁰ Vicksburg, S. & P. Railway v. DeBow, 148 Ga. 738, 98 S. E. 381 (1919).

¹¹ Hunau v. Northern Region Supply Corporation, 262 Fed. 181 (S. D. N. Y. 1920).

¹² U. S. Construction Co. v. Hamilton Nat. Bank of Ft. Wayne, Indiana, 73 Ind. App. 149, 126 N. E. 866 (1920).

¹³ Smith v. Little, 67 Ind. 549 (1879).

¹⁴ Woodall v. People's Nat. Bank, 153 Ala. 576, 45 So. 194 (1907).

¹⁵ Hallowell v. Smith Agricultural Chemical Co., 41 Ind. App. 361, 83 N. E. 772 (1907).

¹⁶ Hogan v. City of St. Louis, 176 Mo. 149, 75 S. W. 604 (1903).

In *Hogan v. City of St. Louis*¹⁷ the Kern Company, a codefendant, was a corporation organized under the laws of New Jersey, and it was without authority to do business in Missouri; it submitted a bid on a street lighting project and was awarded the contract. A suit in equity was brought by a taxpayer of St. Louis to enjoin the city, its officers, and the Kern Company from performing the contract on the ground that the contract was void, having been made with a foreign corporation not licensed to do business in the state. The Supreme Court of Missouri held that the complainant's contention was not supportable, stating, with reference to the foreign corporation: "It is not bound to establish itself here before it can obtain such a contract. Entering into a contract like the one in question undoubtedly is 'transacting business' within the unlimited meaning of the term, but that is not the sense in which the term is used in the statute. . . . As there used, it means carrying on the work for which the corporation was organized, and in its application to the facts of this case, it means performing the work called for by the contract. The Kern Company . . . had the right to enter into the contract in question, and we hold it to be a legal and valid contract."¹⁷ In like manner, a foreign corporation holding the majority of the stock of a domestic corporation is not thereby doing business in the state, it making no effort to control or manage the domestic company;¹⁸ but there is a conflict of views as to whether the sale of corporate stock by a foreign corporation is the exercise of a corporate function constituting the doing of business within the state in which the sale is made.¹⁹

As intimated above, the phrase "doing business" has different implications. When taken in connection with the question as to whether a corporation is amenable to process, a different construction is given to the term than is given when it is used with respect to the tax and qualifying statutes;²⁰ in the former instance, a much narrower interpretation is employed.²¹ The determination of the question as to whether a foreign corporation is doing business within a state so as to be sub-

¹⁷ *Op. cit. supra* note 16. See CORPORATIONS, 14A C. J. 1275-92, for other and similar examples of operations not regarded in the category of "doing business."

¹⁸ *State v. Humble Oil & Refining Co.*, 263 S. W. 319 (Tex. 1924).

¹⁹ *Meir v. Crossley*, 264 S. W. 882, 35 A. L. R. 611 (Mo. 1924) (Expressing the majority rule and holding that such activity is not carrying on business.).

Contra: *Jones v. Martin*, 15 Ala. App. 675, 74 So. 761 (1917). See Annotation, 35 A. L. R. 626, 634, for the majority and minority rules respectively and cases there cited.

²⁰ "It should be remembered, we are not defining the term 'doing business' for the purpose of determining whether the defendant York is taxable or subject to the qualifying laws of this state, but only for the purpose of determining its amenability to service of process." Bushnell, J., in *Malooly v. York Heating & Ventilating Corp.*, *op. cit. supra* note 3, at 625.

²¹ *Cf. Fletcher*, *op. cit. supra* note 4, at § 8712.

ject to suit therein is often a matter of great difficulty. In seeking an answer the courts have enumerated certain general principles, but no hard and fast rule has been established. "It is stated generally that to render a foreign corporation subject to the jurisdiction of a state, the business done by the company in the state must be of such a character and extent as to warrant the inference that the company has subjected itself to the jurisdiction and laws of the state."²² No standards as to the nature or extent of the business that must be done are set by the states which follow this rule;²³ it is sufficient if enough work be done so that the court may conscientiously say that the corporation is present in the state, and that the work be a part of its ordinary business transactions for which it was organized.²⁴

Going a little further, there are some jurisdictions which hold that it is necessary that the foreign corporation transact a substantial portion of its ordinary business in the state.²⁵ "The question as to what kind of business by a foreign corporation within a state will justify a finding that it is engaged in business therein, and validate a service upon its agent, has been very thoroughly and elaborately discussed in the circuit courts of the United States, and the general consensus of opinion is that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state."²⁶ In the case of *Frontier S. S. Co. v. Franklin S. S. Co.*²⁷ the defendant, a foreign corporation, during and prior to the year 1915, was owner of several vessels engaged in transporting merchandise on the Great Lakes, and operated a line of ships carrying cargoes in interstate commerce to and from Buffalo, coming to this port periodically during the season of navigation. At this place freights were collected by local agents, crews paid off, and vessels fitted out, repaired, or laid up for the winter, as necessary, all of this being done within the jurisdiction of the court. It was held, on motion to quash service of summons, that the defendant was at the time "transacting business" within the state, and that service upon an officer was good even though

²² CORPORATIONS, 14A C. J. 1372; *Knapp v. Bullock Tractor Co.*, 242 Fed. 543 (S. D. Cal. 1917); *Smithson v. Roneo*, 231 Fed. 349 (E. D. N. Y. 1916); *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, Ann. Cas. 1918C, 537 (1918). See, also, *Pembleton v. Illinois Commercial Men's Ass'n*, 289 Ill. 99, 124 N. E. 355 (1919), and cases there cited.

²³ *Tanza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917).

²⁴ *Booz v. Texas & Pacific Railway Co.*, 250 Ill. 376, 95 N. E. 460 (1911).

²⁵ *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289 (1906); *Painter v. Colorado Springs & Cripple Creek Dist. Ry. Co.*, 127 Mo. App. 248, 104 S. W. 1139 (1907); *Doctor v. Desmond*, 80 N. J. Eq. 77, 82 Atl. 522 (1912).

²⁶ *Hawley, J.*, in *Doe v. Springfield Boiler Mfg. Co.*, 104 Fed. 684 (C. C. A. 9th, 1900).

²⁷ 233 Fed. 127 (W. D. N. Y. 1916).

none of the vessels happened to be in port at the time of serving the writ. Another group of courts, "while recognizing that the transaction of a substantial portion of the business of the corporation by authorized agents in the state is sufficient to render the corporation subject to the jurisdiction of the courts of the state, hold that it is not necessary that the transactions in the state of the foreign corporation shall be the performance of those particular acts which constitute the characteristic feature of the business for which it was organized, or that the chief or principal part of the business of the corporation shall be transacted in the state."²⁸ In the case *Pomeroy v. Hocking Valley Railway Company*²⁹ an Ohio corporation, which had never obtained permission to do business in New York and had its property and principal office entirely outside the state, maintaining no business agents within the state, but renting an office in the state, holding meetings of its board of directors therein and there keeping the office of its secretary who conducted correspondence and transfers of stock in such office, was held to be doing business within the state so that service of a civil summons on such corporation by delivery to such secretary was valid. Despite their disagreements as to the character of the work, the courts are practically unanimous to the effect that a single isolated act or transaction does not constitute a doing of business within the state.³⁰ The course of business must be continuous, not absolutely so, but sufficiently so as to take it out of the realm of casual transactions.³¹ There are, however, a few jurisdictions which hold that intermittent business, or even a single act or transaction, may be sufficient to render the corporation subject to the jurisdiction of the courts as to the business actually done in the state.³² There are several other considerations with regard to jurisdiction in an action *in personam*. First of all, it is generally conceded that the presence of an officer or agent of the corporation in the state and engaged in the business of the corporation brings the corporation within the jurisdiction of the courts

²⁸ CORPORATIONS, 14A C. J. 1373.

²⁹ 218 N. Y. 530, 113 N. E. 504 (1916).

³⁰ *Jameson v. Simonds Saw Co.*, *op. cit. supra* note 25 (Writing letter accepting offer of services.); *Doctor v. Desmond*, *op. cit. supra* note 25 (Voting of stock owned by the foreign corporation in a domestic corporation.); *Crook v. Girard Iron & Metal Co.*, 87 Md. 138, 39 Atl. 94, 67 Am. St. Rep. 325 (1898) (Purchase of personalty at a sheriff's sale.).

"The words [doing business] as used in the various statutes refer to the general transaction of business, and not to an isolated transaction, without the intention of continuing business." ELLIOTT, THE LAW OF PRIVATE CORPORATIONS (4th ed.) 338, 339.

³¹ *Rich v. Chicago, B. & Q. Ry. Co.*, 34 Wash. 14, 74 Pac. 1008 (1904); *Knapp v. Bullock Tractor Co.*, *op. cit. supra* note 22.

³² *Colorado Iron Works v. Sierra Grande Mining Co.*, 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433 (1890) (Contracting a debt.); *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597 (1898) (Loaning money and taking a mortgage as security.).

of the state.³³ Secondly, where a corporation goes into another state and there establishes a place of business from which, by means of its authorized agents, its business is transacted, it must be regarded as within that jurisdiction for purposes of suit. Finally, the time of doing business is of great importance. It is the rule in the federal courts and in a few of the states that in order that jurisdiction *in personam* be acquired over a foreign corporation, such corporation must be present in the state or doing business in the state at the time of service of process.³⁴ In other states, a foreign corporation, even though it has withdrawn and has ceased to do business within the state, is still subject to service of process and suit on causes of action already accrued on contracts made in the state, but not on causes of action which arose subsequently to withdrawal from the state.³⁵

The scope of the problem can be seen from the foregoing discussion. Decisions on the point are numerous, and they are not all in accord. Some of the opposing decisions are irreconcilable, and the only explanation lies in the wording of the various statutes and in the interpretation of the facts. Such being the case, it would be a difficult and profitless task, for purposes here, to list such decisions, and in the absence of a set rule, the following must suffice: "The general rule to be adduced from the better considered and majority of a multitude of cases involving the question when is a foreign corporation 'doing business,' 'carrying on,' 'transacting,' or 'engaged in,' business in a state,—the phraseology affording but slight ground for distinction,—is that such is the case only when some substantial part of its ordinary business is conducted within the jurisdiction; single acts, or occasional and sporadic acts, or acts relating to the internal affairs of the corporation, not usually being regarded as falling within the operation of the rule." ³⁶

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³³ "According to the general rule, the service upon a foreign corporation can only be made upon an agent who is representing a corporation which is engaged in business in the state. The corporation must be in the state for the purpose of doing business, and it is not enough that the agent or representative of the corporation is simply within the limits of the state. This doctrine is too well established to require the citation of many authorities." ELLIOTT, *op. cit.* *supra* note 30, at 356.

³⁴ *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914); *Golden, Belknap & Swartz v. Connersville Wheel Co.*, 252 Fed. 904 (E. D. Mich. 1918); *International Cotton-Seed Oil Co. v. Wheelock*, 124 Ala. 367, 27 So. 517 (1900); *Carpenter v. Bradford*, 23 Cal. App. 560, 138 Pac. 946 (1913).

³⁵ *Groel v. United Electric Co. of New Jersey*, 69 N. J. Eq. 397, 60 Atl. 822 (1905); *Gerrick & Gerrick Co. v. Llewellyn Iron works*, 177 Pac. 692 (Wash. 1919).

³⁶ Annotation, 35 A. L. R. 625, 626.

FRAUDS, STATUTE OF—SPECIFIC PERFORMANCE.—In *Gillespie v. Loge*¹ the Appellate Court of Ohio was presented with a case on appeal growing out of an action in partition filed by Clara Gillespie, one of the devisees under the will of Anna Kaufmann. The executor and devisees under the will were made parties defendant, among whom was Lillian Adams. This defendant filed an answer and cross-petition in the case in which she set up claim to the fee of three parcels of land under an oral contract claimed to have been entered into with the deceased, Mrs. Kaufmann, whereby it was agreed that, in consideration of Lillian Adams living with deceased and caring for her during her life, and performing other services, the deceased would convey to her the above mentioned property. Lillian Adams had lived in the Kaufmann household since childhood but on becoming married had established a home of her own. Later the couple were asked to live again with Anna Kaufmann without compensation and a written agreement was drawn up giving either party the right to withdraw from the agreement. Lillian Adams and her husband took advantage of this provision and left the home of Anna Kaufmann. To induce them to return Anna Kaufmann orally contracted to convey to them certain real estate—this is the oral promise in question. The Adamses again became dissatisfied and were moving out when Anna Kaufmann hurriedly caused the power of attorney to be drawn up. The validity and legal effect of this instrument is discussed more fully later on in this note. Let it suffice to say that the power of attorney was insufficient under the law to empower the attorney to convey the lands after the death of Anna Kaufmann. Soon after her death the action in partition concerning seventeen parcels of real estate was started, and the present cross-petition was filed by Lillian Adams.

After a perusal of the facts it is evident that three major propositions or questions confronted the Appellate Court of Ohio. The first of these may be stated thus: Will performance of a contract to provide personal and domestic services merit specific performance of the promise to convey real estate in consideration therefor?

There have been numerous cases on this point. In a leading Nebraska case² a girl about seventeen months old was given by her parents to her uncle and aunt under an agreement that they would adopt her, and rear, nurture and educate her, and that she was to be as their own child, and at their death to receive or be left all the property which they might own. She lived with them until they died, some ten years afterwards but the title to the property which they owned at their death was never transferred to the child, either by will or deed. The Nebraska court held that there was such performance of the contract by the party plaintiff as entitled her to a

¹ 194 N. E. 376 (Ohio 1934).

² *Kofka v. Rosicky*, 59 N. W. 788, 25 L. R. A. 207 (Neb. 1894).

decree giving her the title to the property by way of specific performance. This decision has been followed in Nebraska since 1894 and is the case establishing the equitable doctrine in that State in force today.

A question almost identical with the instant case arose on appeal before the Michigan court in 1913.³ The plaintiff had orally agreed to manage the farm and care for the defendant, an aged lady, until her death. In return the defendant promised to convey certain real estate to the plaintiff. The court, in holding for the plaintiff, avoided the question of the statute of frauds with seemingly studied care and held that since the plaintiff had shown the contract with unusual clarity, its acceptance and performance by himself, and the enjoyment of its beneficial provisions by the deceased during a long series of years, equity demanded its specific performance.

In *Gordon v. Spellman*⁴ it was held that an oral contract to devise land falls within the statute of frauds. This is a uniform rule established by all courts. But it was also decided that where a party in whose favor the will is to be made has performed his part of the contract, and the other party dies leaving a will in which no devise is made pursuant to the oral contract to devise land, then the performing party may, in a proper case, apply to a court of equity for specific performance.

Further exposition of this equitable doctrine is found in the interesting case of *Lang v. Chase*,⁵ where evidence was presented which showed an oral agreement between the plaintiff and the intestate, whereby the former was to receive half of the latter's property for caring for the intestate during his life. The court held that the plaintiff was entitled to charge the estate with a trust. The court did not act upon the ground that it had the power to compel the actual execution of a will but rather the court proceeded to construe the agreement only as binding the property so as to fasten or impress a trust on it in favor of the promisee.

These few cases illustrate the tendency of many courts to allow specific performance of oral contracts to convey or devise real property in return for personal services rendered. However, there is authority to the contrary. Some courts have flatly refused to convey title to land as the result of a decree of specific performance. Others have declined to specifically enforce such contracts because the part or full performance of the contract was not considered sufficient to take it out of the operation of the statute of frauds, or because of adequacy of consideration, or because conditions and circumstances were such as to render a decree of specific performance inequitable.

³ *Howe v. Benedict*, 142 N. W. 768 (Mich. 1913).

⁴ 145 Ga. 682, 89 S. E. 749, Ann. Cas. 1918A, 852 (1916).

⁵ 155 Atl. 273 (Me. 1931).

In *Marshall & Ilsley Bank v. Schuerbrock*⁶ the court said: "It is well-established in this State that an oral agreement to devise lands is not taken out of the statute by the performance of services in reliance upon it, although they be of a personal nature. . . . Upon principle, the same rule must apply to a contract to convey, and such is the great weight of authority except in those cases where a denial of the right to specific performance would operate as a hardship and fraud upon the party claiming the right."

To illustrate the recognized dangers resulting from the misapplication of this equitable principle we quote with approval from *Kinney v. Murray*⁷ the following: "When . . . a court of equity is called upon to establish and enforce a contract . . . in the teeth of the statute of wills and of the statute of frauds and perjuries, and to set aside the disposition of valuable property made in conformity with the requirements of these statutes, there is devolved upon the Chancellor the gravest responsibility, perhaps, that ever attaches to his high office. And nothing short of the inherent justice of the claim, supported by evidence that can be relied upon with the utmost confidence, proving the existence of the [oral] contract, its terms and conditions, and a substantial and meritorious compliance therewith, with such certainty and definiteness *as to leave no room for reasonable doubt*, can ever justify the exercise of such an extraordinary prerogative." (Italics are mine.)

The above statement of the Missouri court is the true basis for the intervention of equity to decree specific performance of an oral contract to convey or devise property in return for personal services. Although some states, such as Wisconsin,⁸ have not adopted the rule that performance must be established beyond a reasonable doubt, nevertheless upon reason and authority the rule ought not to be further relaxed.⁹

The memorandum referred to in the early part of this discussion was as follows:

"November 4, 1926.

"Mr. Cliff Brown: As my attorney I direct you to at my death deed to Albert Heimert, the lot on Central Av., Lockland. I purchased from Dollman and deed to Lillian Adams these properties known as the Goodwin, Griffen and Carson, all of which are located on Mill Street, Lockland. As payment in full for services rendered my husband, Joseph Kaufmann, and myself during our lifetime.

"Anna Kaufmann."

⁶ 217 N. W. 416, 419 (Wis. 1928).

⁷ 170 Mo. 700, 71 S. W. 197, 202 (1902).

⁸ *Marshall & Ilsley Bank v. Schuerbrock*, *op. cit. supra* note 6.

⁹ 5 POMEROY'S EQUITY JURISPRUDENCE (4th ed.) §§ 2248, 2252.

The second important question in the present case is whether the above memorandum was sufficient to take the promise to convey real estate out of the statute of frauds, it being insufficient as a power of attorney after her death.

The form of the writing is immaterial according to the prevailing view. A memorandum wholly untechnical in form may be sufficient.¹⁰ The description of the property here was adequate as it describes the land to be conveyed in such fashion as to render possible the location of it, and the determination of its condition and appearance for the purpose of identification. The necessity for such a description is illustrated in *Jackson v. Stearns*,¹¹ where it was held that letters passing between an alleged vendor and vendee cannot be read together to constitute a contract for the sale of (or conveyance) of real estate, if they do not identify the land which is intended to be the subject matter of the contract, as to which there is a dispute, so that parol evidence would be required to substantiate the truth of the matter.

The memorandum capable of taking the contract out of the statute of frauds must state the consideration or at least a consideration for the promise of the defendant. The necessity for a statement of consideration is set out in the Note accompanying *Tagger v. Hunter*,¹² where it is said that "In most jurisdictions the rule is laid down that in a contract which is within the statute of frauds the failure to state a price or consideration . . . will render the contract fatally defective." The memorandum here complies with this provision.

The memorandum was signed and executed by Anna Kaufmann thus fulfilling this requirement. The fact that the writing was intended for some other purpose does not prevent its being a sufficient memorandum to meet the requirements of the statute of frauds.¹³

The Ohio court did not find it absolutely necessary, in the principal case, to declare the memorandum sufficient to take the contract out of the statute of frauds because there was sufficient performance to validate the agreement. The court, however, did say that "if necessary to support the contract there must be a memorandum, we are of the opinion that the memorandum is sufficient to satisfy the statute." In summary then, a memorandum possessed of no definite form, but setting out the description of the property, the consideration involved, the parties interested, and itself being signed is sufficient to take an oral contract to convey land out of the statute of frauds.

There remains one more question presented by the instant decision. Can domestic services rendered over a period of years be as-

¹⁰ *Singleton v. Hill*, 64 N. W. 588, 51 Am. St. Rep. 868 (Wis. 1895).

¹¹ 113 Pac. 30 (Ore. 1911).

¹² Note, Ann. Cas. 1818A, 134, 135.

¹³ *First Presbyterian Church v. Swanson*, 100 Ill. App. 39 (1901).

certained with reasonable certainty so as to give an adequate remedy at law in an action on *quantum meruit*? The rule is that where services performed can be adequately compensated at law, or where the promisee shows no substantial change for the worse in his position in consequence of the agreement, specific performance will be denied.¹⁴ In a very recent Illinois case,¹⁵ the remedy at law was declared to be inadequate because of the impossibility of ascertaining damages incurred by the plaintiff when, in reliance upon decedent's oral promise to convey land to him, he gave up his own home, carried out his part of the agreement without compensation, rendered services over a period of practically three years which impaired his health, and exposed him to a resulting financial detriment. It was held that the damages could not be ascertained so as to give the plaintiff a cause of action in *quantum meruit*.

The companionship and family relationship extended to Anna Kaufmann in the instant case was valuable, and, under the facts, is not compensable in money damages in an action at law. "The general equity rule is that the value of intimate companionship and personal care and attention, such as is common among members of a family living together, cannot be measured in money so as to be recoverable in an action at law."¹⁶ The Minnesota court has perhaps gone as far as any of the courts in so holding.¹⁷ In the instant case the services were rendered over a nine year period. They consisted of commercial services, companionship, bookkeeping, serving, dressing and undressing, bathing, cleaning, clerking, making wearing apparel, nursing, giving advice, looking after the real estate, and collecting rents. It would hardly be possible to gauge the value of these services to the decedent, Anna Kaufmann. Specific performance is essential in the present case to prevent the commission of a fraud.

The instant case is in accord with the prevailing view as to the specific performance of oral contracts to convey or devise land. The facts present an exceptionally strong case as the courts will usually decree specific performance when the agreement is partly performed, that alone being sufficient, while here the memorandum, although intended for another purpose, was sufficient to take the contract out of the statute.

In the last analysis, the equity court attaches its jurisdiction on the ground of fraud in a case such as the present; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense. "If the defendant knowingly permits the plaintiff to do acts in part performance of the verbal agreement, acts done in reliance on the agreement, which

¹⁴ Yager v. Lyons, 337 Ill. 271, 169 N. E. 222 (1929).

¹⁵ Fierke v. Elgin City Banking Co., 194 N. E. 528 (Ill. 1935).

¹⁶ Happel v. Happel, 238 N. W. 783, 784 (Minn. 1931).

¹⁷ Colby v. Street, 146 Minn. 290, 178 N. W. 599 (1920).

changes the relations of the parties and prevent a restoration to their former condition, it would be a virtual fraud for the defendant to interpose the statute as a defense, and thus to secure for himself the benefit of the acts of part performance, while the plaintiff would be left not only without adequate remedy at law, but also liable for damages as a trespasser."¹⁸ It follows from this, of course, that the acts of part performance must be done by the party seeking to enforce the contract, the acts must be done in pursuance of the contract, with the idea in mind of executing that contract, and with the consent, express or implied, or knowledge of the other party.

The doctrine has been subjected to severe criticism on the grounds that it openly violates the statute of frauds and opens the door to frequent and flagrant abuses. It is a departure from the statute and a few courts openly have stated that "equity will make the case an exception to the statute,"¹⁹ although the majority of the courts have seemingly been loath to term it an exception. Whether or not the statute of frauds is to be used as a sword in the commission of a fraud, or whether it is to be available as a shield to prevent it has proved a perplexing question. The majority of the courts to-day, however, apply the statute so as to attain the latter result. Such an application is undoubtedly the more equitable and expedient as long as kept within bounds but it is submitted that only the clearest and most convincing case should warrant a decree of specific performance, and that further relaxation of the rule should be frowned upon by the equity courts.

John J. Locher, Jr.

TRUSTS—ESTABLISHMENT AND ENFORCEMENT OF TRUST—RIGHT TO FOLLOW TRUST PROPERTY OR PROCEEDS THEREOF—IDENTIFICATION OF PROPERTY.—In a recent Pennsylvania case, *In re Gordon*,¹ the plaintiff employed the Manayunk Trust Company to act as her agent in selling a mortgage for her. The Trust Company sold the mortgage to one Alexander for \$1,524.50. Alexander had a deposit account with the Trust Company at the time, and the purchase price of the mortgage was debited to this deposit account and credited to a miscellaneous account for the purpose of setting it aside for the plaintiff. The Trust Company then drew a check on the miscellaneous account payable to the plaintiff, and sent it to her. Before the plaintiff had an opportunity to cash the check the bank closed. The plaintiff sought a preference over the general creditors for the amount of the check. At all times

¹⁸ 4 POMEROY'S EQUITY JURISPRUDENCE (4th ed.) § 1409.

¹⁹ *Happel v. Happel*, *op. cit. supra* note 16, at 785.

¹ 176 Atl. 52 (Pa. 1934).

from the payment of the \$1,524.50 by Alexander until the closing of the Trust Company there was a greater credit in the miscellaneous account than the amount of the check. The court held that the Trust Company acted wrongfully in failing to keep the money collected for the plaintiff separate from its other funds, and that the plaintiff was entitled to a preference over the general creditors. The court said: "In the case at bar, the money was not deposited in the general funds of the bank, but, as stated, in a 'Miscellaneous Account.' The money received by the trust company was readily traced to this particular account. There was no trouble in identifying or locating it, and there was sufficient money in that special account to pay the appellant." There is a vigorous dissenting opinion in the case in which the view is taken that this was merely a bookkeeping transaction and no trust could be established by it.

The United States Circuit Court of Appeals, for the eighth circuit, had a somewhat similar case before it in *Rorebeck v. Benedict Flour & Feed Co.*² There the plaintiff sent a draft for \$1,113.75, drawn on Emil Anderson, to the First National Bank of Forest City, Iowa, for collection. Anderson paid this draft by check against his account in the Forest City Bank. The bank charged the amount of the check to Anderson's account, and drew a draft on the Federal Reserve Bank payable to the plaintiff for the amount collected. The Forest City Bank became insolvent before this draft was paid. The court held that the plaintiff was not entitled to a preference over the general creditors for the amount collected, saying: "As to this branch of the case the recent decisions of this court in *Larabee Flour Mills v. First National Bank of Henryetta, Okla.*, and *Farmers' National Bank of Burlington, Kan. v. Kansas Flour Mills Co.*, decided June 12, 1926, and reported as one case in 13 F. (2d) 330, are squarely in point. In a similar state of facts it was there said: 'It is difficult to explain or understand by what equitable right one who has not contributed to the creation of a fund should be given a special and superior interest therein, though some of the state courts seem to so hold. The collecting banks acted as agents (*Commercial Bank v. Armstrong*, 148 U. S. 50, 13 S. Ct. 533, 37 L. Ed. 363), and had they collected and retained the funds called for by the drafts, as was their duty on account of insolvency, the equities of claimants would be plain; but, instead of doing so, they merely shifted credits on their books and records. No part of the funds in the bank when they failed was placed there by claimants, or by anyone for them. In each case the draft was paid by check on the insolvent. No additional funds were brought into the bank by either transaction. If the drafts which they held for collection had been paid in currency or by check on some other bank, the insolvents' assets would have been increased that much, when thereafter their remittance drafts were dishonored; and in that event equity

² 26 Fed. (2d) 440 (C. C. A. 8th, 1928).

would have regarded the collections as trust funds, followed them into the increased assets, and to the extent of the increase applied them first in discharge of these claims. This is our conception of the rule and the reason for it, applied in the federal courts. It has been repeatedly announced by this court.'"

It is the purpose of this note to consider whether there is a sufficient distinction between the facts of these two cases to justify the contrary results, and to consider what, on principle, should be the result in such cases. It is often stated that where a trustee wrongfully converts trust money or property into some other form of property the cestui que trust may follow it and recover it in its new form as long as he can identify it as the product of the original trust property.³ James Barr Ames states the rule as follows:⁴ "If a trustee wrongfully sells the trust-res or exchanges it for other property, the cestui que trust may charge him as a constructive trustee of the money or newly acquired property, or of any subsequent product of either; or, if he prefers, he may enforce an equitable lien to the amount of the misappropriation upon any property in the hands of the wrongdoer, which is the traceable product of the original trust-res."

Thus, let us suppose that a trustee wrongfully takes \$1,000 of trust money and purchases a tract of land with it. If the land increases in value from \$1,000 to \$2,000 while in the hands of the trustee the cestui is entitled, nevertheless, to recover the whole tract of land.⁵ It is against the policy of the law to permit a trustee to profit by his breach of trust.⁶ For this reason the cestui may have a constructive trust impressed upon the whole tract. If the land decreases in value from \$1,000 to \$500 while in the hands of the trustee, the cestui may enforce an equitable lien upon the property to the extent of its value, and recover a personal judgment against the trustee for the deficiency.⁷

³ *Pearce v. Dill*, 149 Ind. 136, 48 N. E. 788 (1897); *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909 (1904); *Bevans v. Murray*, 251 Ill. 603, 96 N. E. 546 (1911).

⁴ AMES, LECTURES ON LEGAL HISTORY 412.

⁵ *Kemp v. Elmer Co.*, 56 Fed. (2d) 657 (D. C. S. D. Cal. 1932); *Small v. Hockensmith*, 158 Ala. 234, 48 So. 541 (1908); *Shaler v. Trowbridge*, 28 N. J. Eq. 595 (1877); *Fur & Wool Trading Co., Ltd., v. Fox, Inc.*, 245 N. Y. 215, 156 N. E. 670 (1927); *Spencer v. Pettit*, 2 S. W. (2d) 422 (Comm'n of App. of Tex. 1928).

⁶ In *Magruder v. Drury*, 235 U. S. 106, 59 L. ed. 151, 35 S. Ct. 77 (1914), the court said: "It is a well settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity."

⁷ *Citizens Bank of Paso Robles v. Rucker*, 138 Cal. 606, 72 Pac. 46 (1903); *Hinsey v. Supreme Lodge K. of P.*, 138 Ill. App. 248 (1908), *aff'd*, 241 Ill. 384, 89 N. E. 728 (1908); *In re Mendel's Will*, 164 Wis. 136, 159 N. W. 806 (1916); AMES, *op. cit. supra* note 4, at 412, 413.

We come now to the case where the trustee wrongfully mixes trust property with his own property. Suppose, for example, that a trustee takes \$1,000 of trust money and \$1,000 of his own money and purchases a tract of land with the \$2,000. If the property increases in value to \$3,000 in the hands of the trustee the cestui may have a constructive trust imposed to the extent of a one-half interest in the land, recovering land of a value of \$1,500.⁸ If the property decreases to a value of \$1,000 the cestui may assert an equitable lien upon the land to the extent of its full value.⁹ In other words, where a trustee wrongfully mixes trust money or property with other money or property of the same nature so that the identity of the trust property is lost, the cestui may charge him as a constructive trustee of such a proportion of the mass as the trust property bears to the entire mass; or he may assert an equitable lien upon the mass to the extent of the value of the trust property.

A similar case arises where a bank wrongfully receives money on general deposit, as where it receives public funds on deposit from a public officer who has no authority to make the deposit. Let us suppose that the public officer wrongfully deposits \$1,000 in the bank. The bank wrongfully mixes this \$1,000 with its other cash on hand. The bank becomes a trustee when this wrongful mixing takes place in the proportion that \$1,000 bears to the entire amount of cash in the bank.¹⁰ In the event of the insolvency of the bank the depositor would be entitled to a preference as long as the amount of cash on hand in the bank from the time of the creation of the trust until the time of insolvency was equal to or greater than \$1,000. The trustee would be entitled to assert an equitable lien on the cash fund to the amount of his money wrongfully deposited in the fund.¹¹ If, however,

⁸ *Primeau v. Granfield*, 184 Fed. 480, 482 (C. C. S. D. N. Y. 1911); *Massachusetts Bonding & Insurance Co. v. Josselyn*, 224 Mich. 159, 194 N. W. 548 (1923); *City of Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885 (1902).

⁹ *Gorman v. Littlefield*, 229 U. S. 19, 57 L. ed. 1047, 33 S. Ct. 690 (1913); *Bowling v. Bank of New Haven*, 219 Ky. 731, 294 S. W. 499 (1927); *In re Hallett's Estate*, 13 Ch. D. 696 (1878); *AMES, op. cit. supra* note 4, at 413, 414; *Scott, The Right to Follow Money Mingled with Other Money*, 27 HARV. L. REV. 125, 126.

¹⁰ *City of Centralia v. United States Nat. Bank*, 221 Fed. 755 (W. D. Wash. 1915); *State to Use of Prairie County v. McKee*, 168 Ark. 441, 270 S. W. 513 (1925); *Fire & Water Commissioners v. Wilkinson*, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 893 (1899).

The same result follows when a bank receives a deposit when it knows it is insolvent. *In re Silver*, 208 Fed. 797 (N. D. Ohio 1912); *Furber v. Dane*, 204 Mass. 412, 90 N. E. 859, 27 L. R. A. (N. S.) 808 (1910).

¹¹ *Brennan v. Tillinghast*, 201 Fed. 609 (C. C. A. 6th, 1913); *Blair v. Hill*, 50 App. Div. 33, 63 N. Y. S. 670 (1900); *State v. McKinley County Bank*, 32 N. M. 147, 252 Pac. 980 (1927); *Smith v. Fuller*, 86 Ohio St. 57, 99 N. E. 214, L. R. A. 1916C 6 (1912).

the cash fund is reduced at some time to \$500 the cestui can assert a lien or receive a preference only to the amount of \$500;¹² this is true even though the cash on hand at the time the bank is closed is more than \$1,000.¹³

Some courts, especially in the western states, have held that where a trustee wrongfully converts trust money or property to his own use to the general benefit of his estate, the cestui will be given a preference over the general creditors of the trustee even though the trust property cannot be traced into any particular piece of property or fund in the hands of the trustee.¹⁴ In *Meyers v. Board of Education*¹⁵ a treasurer of a board of education wrongfully deposited public money in a bank of which he was manager. The bank funds later became reduced to an amount less than the amount of public money deposited. Upon the bank becoming insolvent it was held that the board of education was entitled to a preference over the general creditors to the full amount of the deposit, and this preference was to be satisfied out of all of the property of the bank. This holding is now generally considered to be taking property which rightfully belongs to the general creditors and giving it to an individual creditor. Professor Ames has the following to say of it:¹⁶ "If the product of the true owner's res is still traceable in the assets of the wrongdoer, in the form of land, chattels, a bank deposit, or the money of a bank, its surrender to the true owner is eminently just. The creditors are left just where they would be if there had been no misappropriation. If the true owner's res was used in paying one of the creditors, the true owner may fairly claim to be subrogated to that creditor's claim, in which case, also, the dividends of the other creditors would not be affected by the misappropriation. The same result is reached if, without subrogation, the true owner is allowed to prove ratably, with the other creditors. But to go further and give the true owner a preference over all the general creditors means an unfair reduction of the dividend of the other creditors."

This minority holding has been quite generally discredited by the courts throughout the country, and even many of the states in which

¹² *Fire & Water Com'rs. v. Wilkinson*, *op. cit. supra* note 10; *Vincent Grain Co. v. Docking*, 124 Kan. 391, 260 Pac. 610 (1927), *aff'd*, 125 Kan. 383, 265 Pac. 38 (1928); *Walker v. First State Bank*, 33 N. M. 565, 273 Pac. 764 (1928).

¹³ *Board of Com'rs. of Crawford County, Ohio, v. Strawn*, 157 Fed. 49, 15 L. R. A. (N. S.) 1100 (C. C. A. 6th, 1907); *Andrew v. State Bank*, 205 Iowa 1064, 217 N. W. 437, 56 A. L. R. 806 (1928). See, also: *James Roscoe (Bolton), Limited v. Winder* [1915] 1 Ch. 62; *AMES, op. cit. supra* note 4, at 421.

¹⁴ *Davenport Plow Co. v. Lamp*, 80 Iowa 722, 45 N. W. 1049 (1890); *Meyers v. Board of Education*, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263 (1893); *The I. X. L. Pressed Brick Co. v. Schoeneich*, 65 Mo. App. 283 (1895); *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173 (1886).

¹⁵ *Op. cit. supra* note 14.

¹⁶ *AMES, op. cit. supra* note 4, at 423.

it gained its foothold have repudiated it. Professor Bogert says:¹⁷ "But the latest cases in Idaho, Iowa, Kansas, Michigan, Missouri, Nebraska, and Wisconsin have either completely abandoned the 'swelling assets' theory and accepted the 'specific property' rule, or have so modified and limited the 'swelling assets' doctrine as to make it differ from the opposing rule only in words."

With the above views in mind let us return to a consideration of our two original cases. The problem before us is to determine whether these cases fall within the class where trust money is wrongfully mixed with other trust money and the fund at all times remains greater than the amount of trust money wrongfully mixed; or whether they fall within the class where the trustee's estate has received some general benefit but the trust money cannot be traced into any particular piece of property or fund. The reasoning adopted by the Pennsylvania court seems to be properly open to the criticism that there was no particular trust res to which a trust could attach. The mere crediting of a miscellaneous account could hardly be considered as an adequate substitute for setting aside a particular amount of money as a trust fund. Neither was there a chose in action which could be considered as the trust res, because the bank could not owe itself money. It is difficult to look upon the crediting of the miscellaneous account as anything other than a mere bookkeeping transaction. As stated in the dissenting opinion,¹⁸ "The opinion of the court in this case . . . runs counter to the rule that has been in force in this state for many years, *viz.*, that a trust creditor, in order to secure a preference over general creditors—and still more, over creditors preferred by statute, such as depositors of a bank—must trace the fund claimed into some specific property, fund, security, or account of the insolvent bank, which has passed into the hands of the receiver, and the proceeds of which are being distributed. And by 'account' in that connection is not meant a mere bookkeeping entry on its own books, but a separate and distinct asset, which is not commingled with the general assets of the insolvent bank, such as an account in another bank, or in the hands of a third person, or, if an account on its own books, that specific assets or property have been set aside for its payment or protection."

If the crediting of the miscellaneous account is not considered as a sufficient setting aside of money to create a trust there would seem to be no material distinction between this Pennsylvania case and *Rorebeck v. Benedict Flour & Feed Co.*,¹⁹ decided in the Federal court. In both cases the bank had assumed the duty of collecting money for a customer. The person from whom the money was to be collected had a deposit in the bank, or, in other words, was a creditor of the bank. Instead of collecting the money in cash the bank merely charged

¹⁷ BOGERT, HANDBOOK ON THE LAW OF TRUSTS 533.

¹⁸ *Op. cit. supra* note 1, at 55.

¹⁹ *Op. cit. supra* note 2.