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The Action of Account in a Code State

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The large corporation is seemingly the necessary development of our present social and economic order. How strange it is to find Mr. Justice Holmes[14] arrayed on the side of the foes of such a development.

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PLEADING—AN ACTION OF ACCOUNT IN A CODE STATE.—[Missouri] A recent decision[1] by the Supreme Court of Missouri illustrates some of the inherent difficulties and uncertainties in determining the character of a given action, or the precise cause of action pleaded, where the common law forms of action have been abolished by the usual code provision[2] that there shall be but one form of action.

The plaintiff corporation brought an action in the probate court against the administrator of the deceased manager of its branch office, and alleged:

"That as such agent and local manager said Milton H. Losee had at all times in his possession and under his control funds of the company and collected from time to time sums of money due said company; that without authority and without its knowledge or consent said Milton H. Losee used funds of the company under his control for his own personal uses and transactions, and failed to report or in any way account to the company for the collection and receipt of large sums of money belonging to it; that the company did not discover until after the death of said Milton H. Losee the fact that he had used funds of the company for his own personal uses and transactions and had failed to report or account for moneys collected and received by him for the company; that by reason of having used funds belonging to said Sandwich Manufacturing Company without its authority, knowledge, or consent for his own personal uses and transactions as aforesaid, said Milton H. Losee was at the time of his death, and his estate still is, indebted to said company in the sum of $30,465.45.

"Wherefore, your petitioner asks that its claim be allowed against the estate of said deceased for the sum of $30,465.45."

After appeal to the circuit court, where the case stood for trial de novo, the plaintiff filed an amended complaint which made the following statement of the claim:

"That as such agent and local manager said Milton H. Losee had at all times in his possession and under his control funds of the company, and collected from time to time money due said company, for all of which funds and money said Milton H. Losee

14. For a charming and thorough discussion of the opinions of the learned Justice relating to constitutional law see *Frankfurter* "Twenty Years of Mr. Justice Holmes' Constitutional Opinions" (1923) 36 Harv. Law Rev. 909.

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1. *Sandwich Mfg. Co.* v. *Bogie* (Mo. 1927) 298 S. W. 56.
2. Mo. Rev. Sts. 1919 sec. 1153.

was as such agent and manager bound to account to said company; that between the 15th day of April, 1913, and that date of his death, said Losee, among many other transactions as agent and manager, collected on behalf of the company various sums of money, being more than 130 items and totalling $29,303.03; that said collections were made for merchandise of said company sold by said Losee as its agent, in part on open accounts, etc., and in part on notes given by customers, etc. . . . That none of said collections were entered upon the books of the company kept by said Losee, or under his direction, except upon the bank books showing the accounts in the name of the company, hereinafter referred to, and that no report or account was made or rendered by said Losee to said company covering said collections; that said collections were deposited by said Losee in the bank accounts of said company, but no report of any kind was made to said company thereof; that said Losee from time to time, without the knowledge of consent of said company, drew moneys from said bank accounts and disbursed the same for his own personal uses and transactions, with the result that no accounting of said items so collected was ever made to said company; that said Losee and his estate has been and now is indebted to said company by reason of the matters set forth in this paragraph in an amount exceeding $29,303.03."

Other paragraphs set out additional items, and concluded: "Wherefore, claimant asks that its claim upon this accounting aforesaid be allowed against the estate of said deceased for the sum of $30,465.45."

The defendant set up the statute of limitations as a defence to the amended complaint on the theory that it presented a different cause of action, as to which the running of the statute was not interrupted by the original action. The plaintiff recovered and the defendant appealed. The Missouri Supreme Court held that the action as originally brought was a common law action of account or, at least, an action at law for an accounting, and that the amended complaint set up a different cause of action, either for money collected, or for failure to report collections by reason of which they were lost to the plaintiff, and that in consequence the claim was barred by the statute, and accordingly ordered judgment entered for defendant.

It is somewhat startling to learn that the obsolete common law action of account has survived in the formless civil action of the code. And it is equally startling to learn that a slip in the choice of actions today may be as disastrous as it was two hundred years ago when substantive rights were completely dominated by the ancient writs. Apparently the pleader may inadvertently state a case which will tie him to the theory of some particular common law action which he would not have chosen when such actions were safely labeled.

No fault can be found with the general doctrine that when an amendment introduces an entirely new cause of action it is not saved from the statutory bar because of the fact that the action

as originally brought was in time. For example, if the original action was for goods sold and delivered, it would not affect the running of the statute on a demand for money loaned, first presented in a count added by amendment after the statutory period. In such cases the rule is eminently just, and as applicable under the code as under common law procedure. How far such a doctrine should be carried is beyond the scope of the present note.

Doubts begin to arise when the new cause of action is the result of a shift in legal theory rather than in the facts or transactions involved. Much might be said in favor of the view that a change in legal theory merely is not the sort of new cause of action which the statute of limitations bars. For example, in a case[3] before the Supreme Court of Missouri, the plaintiff replied fraud in avoidance of a plea of release; later the plaintiff amended the complaint by adding an equitable count setting up the same fraud as the basis for a cancellation of the release; and the court held that the equitable count was not barred, though the statutory period had elapsed before it was added by amendment. That case presented a clear shift in legal theory from fraud as a legal defence to a release to fraud as the basis of an equitable cause of action for rescission.

But assuming for the purposes of this discussion that a change from an action against a financial agent to enforce his common law obligation to account, to some other theory of liability for funds collected and misappropriated[4] would introduce a new cause of action barred by the statute, the question remains whether the original complaint in this case should have been construed as making the action one of account. An agent who received and disbursed funds on behalf of his principal was neither a debtor nor a technical trustee. He differed from a debtor in that he was not entitled to use the funds for his own purposes, and was entitled to credit for losses not due to his fault.[5] He differed from a technical trustee in that the latter's duties and obligations were purely equitable, and could only be enforced by a bill in equity. The peculiar duty of a financial agent was to account, and was enforceable by the common law action of account, though in modern times it is usually enforced by suit in equity because of the inadequacy and difficulties of the obsolete common law action. The legal duty or obligation to account has survived everywhere. The technical action, though rare, is doubtless available in the common law states.[6]

The Revised Statutes of Missouri of 1845, title "Account" recognized and regulated the action of account, and there is one

3. *Courtney* v. *Blackwell* (1899) 150 Mo. 245.

4. A part of the claim embraced in the amended complaint for money wrongfully withdrawn from plaintiff's bank account and misappropriated would not support an action of account. A man did not make himself subject to the action of account by the commission of a tort: *Totenham's* case (1573) 3 Leon. 24.

5. *Vere* v. *Smith* (1671) 2 Lev. 5.

6. *Hughes* v. *Woosley* (1852) 15 Mo. 492 (instituted before the adoption of the code); *Partridge* v. *Ryan* (1890) 134 Ill. 247.

reported case[7] of its use in Missouri shortly before the adoption of the code, though it did not reach the Supreme Court until after that time. The statutes dealing with account, as well as other common law actions, were repealed on the adoption of the code in 1849.

But the abolishment of common law forms of action certainly did not abolish common law liabilities. One form of action was provided as a substitute to enforce all legal and equitable demands. Hence it may still be possible to bring a legal civil action to enforce specifically the common law duty to account.[8] Did the plaintiff bring such action?

Since the complaint had no common law label, i. e., did not begin with a recital that defendant was summoned to answer plaintiff in a plea that he render a reasonable account, etc., that question must be determined by a construction of the entire pleading.

It undoubtedly alleged the necessary facts, though in very general terms, to support an action of account. It alleged that the deceased was the plaintiff's agent, and as such collected various sums of money on its behalf and failed to account therefor. These were the essential facts that appear in a more formal manner in the approved declarations[9] in the ancient common law action.

The complaint was not framed in accordance with the common law form, and a common law court would probably never have

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7. *Hughes* v. *Woosley* (1852) 15 Mo. 492.

8. *Appleby* v. *Brown* (1861) 24 N. Y. 143, semble. In this case the court was of the opinion that the plaintiff could have maintained the common law action, though the code had been adopted, but for the fact that the action involved the accounts of three partners.

9. In *Godfrey* v. *Saunders* (1770) 3 Wilson 73, the following approved common law declaration appears:

"Thomas Saunders, late of the parish of Saint George, Hanover Square, in the county of Middlesex, Esq., was summoned to answer Thomas Godfrey, Esq., of a plea that he render to the said T. G. a reasonable account of the time in which he and one Solomon Salomons now deceased, and whom the said T. S. hath survived, were the bailiffs of the said T. G. And thereupon the said T. G. by Thomas Life, his attorney, says, that, whereas the said T. S. and the said S. S. now deceased, and whom the said T. S. hath survived, were for a long time (to-wit), from the first day of June, in the year of our Lord 1754, until the first day of May, in the year of our Lord 1755, the bailiffs of the said T. G. (to-wit) at London aforesaid, that is to say, in the parish of Saint Mary le Bow, in the Ward of Cheap; and during that time, had the care and administration of divers goods and merchandises of the said T. G., that is to say, twelve chests of coral beads, containing a large quantity (to-wit), three thousand pounds weight of coral beads of the said T. G. of great value (to-wit), of the value of 12,000 *l.* of lawful money of Great Britain, to be merchandised and made profit of for the said T. G. and to render a reasonable account of the same to the said T. G. when they, the said T. S. and S. S. should be afterwards thereto required; yet the said T. S. and the said S. S. in the life-time of the said S. S. or the said T. S. since the decease of the said S. S. (although often required) have not, nor hath either of them, rendered a reasonable account of the same to the said T. G., but the said T. S. and the said S. S. in the life-time of the said S. S. and the said T. S. since the decease of the said S. S. have altogether refused, and the said T. S. still doth refuse so to do to the said T. G. his damage of 12,000 *l.* and therefore, he brings suit, etc."

thought of it as an action of account. It omitted the words of art, "bailiff" or "receiver," and omitted the ad damnum clause always found in the common law declaration. If the receiver of money to account for it misappropriated the fund, he thereby became a debtor, and the plaintiff could maintain an action of debt[10] at his option. Today no one doubts that a common count in debt or in general assumpsit for money had and received would be available to recover money collected and misappropriated by an agent. In fact the opinion seems to treat the amended complaint as amounting to such a count. The original complaint distinctly alleged that the defendant collected funds of the plaintiff and used the same for his own purposes, and that by reason of such use of the plaintiff's funds he became indebted to plaintiff in the sum of $30,465.45. If the allegations of the relationship of the parties and the collection of money as plaintiff's agent, etc., are sufficient in substance to support an action of account, the subsequent allegations of the misuse of funds by the agent are equally sufficient to support the action of debt, and are impertinent in an action of account. Even under the common law pleading the allegation of non-payment in the standard declaration in debt, was a matter of form, and its omission was not a ground for general demurrer.[11]

If a common count for money had and received would have sufficed to enable the plaintiff to recover the amount collected and misapplied, there could be no objection to a special count expressly alleging the collection and misapplication of the plaintiff's funds by the defendant's intestate.

If the original complaint had been framed as count in debt, stating that the defendant "owes and detains the sum of $30,465.45, lawful money of the United States, for that, as such agent, etc.," setting out the same allegations, a common law court would have had no difficulty in sustaining it as an action of debt, and the amendment as no departure from it, though restricted to transactions within a more limited period. If the original complaint were construed as stating a claim for a debt, none of the allegations need be rejected, for those not absolutely essential to show the creation of an indebtedness are at least proper matter of inducement to the necessary facts. The courts in the code states have usually been quite liberal in construing a complaint so as to sustain the recovery below, where the pleading stated the necessary facts though it may have been framed in a different form or on a different theory.

For example, where a complaint was apparently framed as an action of trespass quare clausum, and alleged that the plaintiff was the owner and in possession, and that the defendant unlawfully entered and destroyed improvements, etc., a recovery was sustained for injuries to the land, though the plaintiff could not have maintained a technical action of trespass for the lack of

10. *Core's* Case (1537) Dyer 20a; *Bretton* v. *Barnet* (1599) Owen 86; *Parkinson* v. *Gilford* (1639) Cro. Car. 539.

11. *Morgan* v. *Sargent* (1797) 1 Bos. & P. 58.

actual possession.[12] So where a complaint was apparently framed as an action on the case for deceit, and alleged a false warranty, scienter and breach, a recovery for breach of warranty merely was sustained.[13] And where a complaint was framed in trespass, and apparently alleged the conversion or destruction of personal property by way of aggravation, a recovery for the conversion alone was sustained.[14] In the principal case the court would seem to have been over strict.

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12. *Brown* v. *Bridges* (1870) 31 Iowa 138; *Rogers* v. *Duhart* (1893) 97 Calif. 500.

13. *Gartner* v. *Corwine* (1897) 57 Ohio St. 206; *Stanley* v. *Day* (1919) 185 Ky. 362.

14. *McGonigle* v. *Atchison* (1885) 33 Kan. 726; *Bruheim* v. *Stratton* (1911) 145 Wis. 271; *Jacobus* v. *Colgate* (1916) 217 N. Y. 35.