THE DUTY TO ACCOUNT

Development and Principles

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Holt Prize finalist, 2015

Foreword
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THE FEDERATION PRESS
2016

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Chapter 5

Outline: Taking Accounts

[167] As indicated earlier, the scope of this book is concentrated on the question of the development of account, with a purpose of seeking to identify who is an accounting party, and what principles establish accountability. However, it is convenient to say something about the procedure for an account, including that the cases and questions of accountability following can be considered in that context. In that regard, the procedures for taking account anciently developed have remained remarkably constant down to today. These matters also confirm that the account was – and is – a discrete and complete cause of action in its own right, inclusive of the ultimate remedy howsoever described.[1]

Two stages of account

[168] In the case of the early accounts out of Exchequer, whether, for example, a sheriff was an accountable party was hardly a question of any relevance. In short, he certainly was. However, when the account came to establish itself as a private law writ, it became necessary to treat with the anterior question of whether the subject of the writ was an accounting party at all.[2]

[169] Hence, the writ of account at common law involved two distinct judicial stages: a judgment *to* account (*quod computet*); and a judgment *on* the account (*quod recuperet*).[3] The first judgment followed on from the writ, requiring a determination of whether the defendant was, in fact and law, accountable. The second gave effect to the account, that is, in the form of a judgment for the return of the capital and any profits from its use, or payment of the sum found due.

1 In respect of language, cf *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 (285 FLR 121), [334] (Edelman J referring to the account of administration in common form, wilful default, and account of profits); and at [349], [360]ff (Referring to "substitutive compensation", and "reparative compensation"). Cf J Glover, *Equity, Restitution & Fraud* (LexisNexis Butterworths, Sydney, 2004), 404ff (Account and disgorgement). It is unnecessary to enter that debate.

2 The writ for commencing an account is set out above at [93], which remained the form down to the *Common Law Procedure Act 1852* (UK). See JHH Jacob, *Chitty & Jacob's Queen's Bench Forms* (Sweet & Maxwell, London, 1986), [1590]-[1605] for modern pleadings and the various stages for "an action of account". For examples of pleading in equity, see eg FS Heard, *Precedents of Equity Pleading* (Little, Brown & Co, Boston, 1884); C Langdell, *A Summary of Equity Pleading* (2nd ed, Sever & Co, Cambridge, 1883).

3 See eg *Anonymous* (1388/89) 12 Rich II (Jenk 66) (145 ER 47) for an early example confirming the bifurcated procedure.

[170] The whole process was properly explained in *Willoughby v Small* (1603/1625) 1 Brown & Golds 24 (123 ER 642):[4]

> In this action there are two judgments, *the first judgment is, that the defendant shall account, because he hath not accounted before*; in this first judgment, the plaintiff shall not recover costs or damages, but a capias ad computand shall issue, and if a non est inventus shall be returned thereupon, then an exigent: and when the defendant by the rigor of the law is imprisoned, yet the Court doth in favour of the defendant take bail, *for he shall account before auditors, which the Court shall appoint, which shall be the officers of the Court to audit* the account; and he shall appear from day to day before the auditors at every day and place assigned by the auditors, until the account shall be determined, and before the auditors the plaintiff or defendant may joyn issue or demur upon the plea pleaded before the auditors, and if any of the parties shall make default, and shall not appear, then if after appearance the defendant shall not plead, or if he shall joyn issue, or join in a demurrer, the auditors shall certify that to the Court, and the Court shall proceed to the matter certified by trial of issue, if it be joined, or by arguing the demurrer as the cause shall require; and if the plaintiff shall make default, or shall not prosecute, or if the defendant shall not answer, they may commit him to the Fleet; and if verdict pass for the plaintiff, costs and damages shall be recovered,[5] by reason of the inter-pleadings; *and the plaintiff shall recover his goods or moneys demanded*, with his costs and damages; and a fi. fa. [fieri facias] or elegit, or ca. sa. [capias ad satisfaciendum],[6] shall be awarded, and if a non est inventus be returned, then an out-lawry after judgment.

[171] It might be noted that *Willoughby* also referred to the return of goods. Given its origins, it is unsurprising that the account could apply in respect of chattels, or the management of property, as well as the more usual case of money today.[7]

[172] In any event, for these purposes, the two stages of accounting continued into equity, with the substitution of masters for auditors.[8] There, as in law, one or other of

4 No date is indicated in the report. It appears amongst other account cases in the reign of James I (1603-1625).

5 "Damages" refers to interest, not compensation: below n 62.

6 Below [205].

7 That is, in the development of the sheriff's accountability, and the early accounting for victuals: Ch 2, [28]ff above. For some other examples, see eg *William Gernun et al* (1156/76) 22 Hen II (Bigelow, 272 (Account for, and debet, one hawk); *The Case of the Fugitives* (1165/6) 12 Hen II (Bigelow, 268) ("account of the *chattels* of fugitives and of those who perished in the trial by water"); *Feritate v Wack* (1232/33) Case No 796 (Notebook, 611, 661) (Concerning a share in a diamond worth £18); *Anonymous* (1369/70) 43 Edw III, 21 (Viner, 175) ("Account as receiver, and counted that he bailed him two tuns of wine to sell); *Dr Hackwell v Eustman* (1616) Cro Jac 410 (79 ER 350) (Dovecote, pigeons). See also below Ch 6, [266] (Bailees). In Chancery, see eg *Jones v Prior* (1674) Rep Temp Finch 175 (23 ER 96) (Trust property, stock and goods); *Turner v Wright* (1862) 2 NSWSCR Eq 9 (Account for short muster of cattle being sold). As to management of property, see eg below Ch 6, esp [217] (Bailiffs). In respect of money, eg *Anonymous* (1573) 3 Leo 38 (74 ER 526) ("yet the property is in the bailee, and the bailee *cannot have an action for mony, but only accompt* against the bailee"); and again the cases referred to in Ch 6, esp [282]ff (Failure of consideration, and subsequent categories). The account, of course, was not limited to these. For a summary, see below Ch 8, [465] (The language and premises of account).

8 *Ex parte Bax* (1751) 2 Ves Sen 388 (28 ER 248) per Hardwicke LC ("whenever an account is to be taken, the court by its ancient constitution is to be aided in taking it by some proper officer

of rational and reasoned judgment informed by the circumstances. There are not fixed and prescriptive rules.

Knowledge

[192] The corollary point for these purposes is shortly stated, but of large importance. The prima facie obligation on the defendant on account is to return the whole of the capital and any proceeds from its use consistently with the conditional nature of the receipt or dealing. However, if the defendant no longer has control of the whole property or is for some other reason unable to return all of it, then a distinction is drawn in the circumstances. If the property is lost or diminished for reasons other than the conduct of the defendant (such as theft), then the defendant would usually have that allowance.[44] But in respect of the defendant's own dealings with the property, a defendant will usually only be liable to make good a loss or diminution of the capital out of his, her or its own assets where the defendant *knew* or *ought to have known* of the plaintiff's interests, and the concomitant conditional entitlement to deal with the property in question.[45] At a general level, there is a difference between requiring a defendant to return capital still in the defendant's control, and requiring the defendant to make good any loss on that account. A party innocent of any restriction has an allowable explanation; a party who knows the right to deal with the property is conditional obviously must take that risk.

[193] There is, therefore a further distinction to be made in respect of the account and what it means or contemplates in practice. That is, in one sense the defendant accounts by *explaining* dealings with the property the subject of the account. However

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according to the capital on the one side, and to debit the estate on the other side with 'just allowances', which of course includes everything which the Court might think just and proper"); Gibbs CJ in *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251, 268 ("the emphasis on justice and equity in both old and modern authority on this subject supports the view that the action [of money had and received] will not lie unless the defendant in justice and equity ought to pay the money to the plaintiff"). See also below Ch 9, [482] (Money had and received).

44 See eg above, [266]ff (Bailees); *Southcote's Case* (1601) 4 Co Rep 83 (76 ER 1061). Worse things happen at sea.

45 See eg *Hele v Stowel* (1669) 1 Chan Cas 125 (22 ER 725) ("the Wife having no Notice of the Revocation had paid Legacies charged on the Lands by the Will. Ordered, That she be allowed those"); *Bettenson v Winder* (1772) Dickens 468 (21 ER 351) ("the administratrix to have credit in such account, for such parts of the personal estate as has been applied in payment of simple contract debts before she had actual notice of the plaintiff's demand"); *Edelsten v Edelsten* (1863) 1 De GJ&S 185 (46 ER 72) per Lord Westbury LC ("he [A] is not entitled to any account of profits or compensation, except in respect of any use by B after he came aware of the prior ownership"); see also eg *Black v S Freedman & Co* (1910) 12 CLR 105, 109 per Griffith CJ ("It was pointed out by Sir George Jessel, in a well known case, that a man may at a certain stage be innocent, but that, if he knows that he has got the advantage of a fraud to which he was no party and says he will keep it, then he becomes himself a party to the fraud and is liable to the jurisdiction of the Court of Equity"); *Re Simms* [1934] 1 Ch 1, 20-1, 26-8 (In the context of money had and received); *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, [23] per Windeyer J ("The account of profits is limited to the profits made by the defendant during the period when he knows of the plaintiff's rights"). For more recent confirmation, see *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, [131] per Allsop P.

in the common law.[56] The principle is explained in *Hastynges v Beverley* (1379) YB Pas 2 Rich II, 121, pl 4 (B&M 333):

> Percy. Suppose I was receiver of your money for profiting and trading, and I retained the money in my hands without putting it in trade, so that I neither gain nor lose anything, shall I not be compelled to account for the profits therefrom?
>
> Belknap J. Yes, certainly, for upon the accounting you will be charged that you could have put the money in trade to profit from, and if you cannot excuse yourself of that by oath or otherwise, you shall be charged in respect of reasonable profits.
>
> Skipworth agreed with that, *because he received the money in that case upon condition that he would put the money in trade* if he would, or if it could be done.

[204] The important point for these purposes is that the reach of accountability is determined by the scope of the duty.[57] It is not concerned with compensation for loss caused by intentional, conscious or unconscious wrongdoing.[58] It is rather a question whether, upon the conditions pursuant to which the defendant dealt with the property, he, she or it was required to do some thing with it, the benefit of which was to accrue to the capital.[59] That might be for example, to invest the fund;[60] or properly manage the property, including the commercial use of it.[61] In those circumstances, both law and equity enforced the conditions pursuant to which the defendant received the property. And, accordingly, the courts required the defendant to account for the failure to obtain those advantages, or the fair value of them, as if he, she or it had adhered to that duty.[62]

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56 *Wheeler v Horne* (1740) Willes 208 (125 ER 1135) ("Because a bailiff at common law is answerable not only for his actual receipts but for what he might have made of the lands without his wilful default, as is expressly held in Co Lit 172a, and in many other books"). For other examples, see eg *Hussey v Sir Robert Markham and White* (1676) Rep Temp Finch 258 (23 ER 142) ("Not to be chargeable with any Money but what he or others by his Order shall actually receive; and not be charged with any Loss in putting out Money at Interest, or for Money raised out of the Estate without his wilful negligence and default"); *Attorney-General v Hobert and Johnson* (1676) Rep Temp 258 (23 ER 142) ("The Defendants were decreed to account for what they had or might have received without their wilful default"); *Coventry v Thinn* (1681) 2 Chan Cas 1 (22 ER 851) ("But not all Profits which he did or might receive without his wilful Default, as in some Cases is usual"). For a useful historical summary, see G Spence, *The Equitable Jurisdiction of the Court of Chancery* (Lea and Blanchard, Philadelphia, 1850), Vol II, 923ff.

57 A mere receiver has no such obligation: see eg *Anonymous* (1378) 2 Rich II (Viner, 161). This case is noted again below, [226] (Receiver ad computandum).

58 *Bartlett v Barclays Bank Trust Co Ltd (No 1 & 2)* [1980] Ch 515, 546. See also *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146, [65]–[66] per Giles JA.

59 Cf *Re Brogden; Billing v Brogden* (1875) 38 Ch D 546, 567 ("That decides the first question, with regard to which the rule is well laid down by Lord Cottenham in the case of *Clough v Bond* (1838) 3 My & Cr 490 (40 ER 1016), that where a trustee *does not do that which it is his duty to do*, prima facie, he is answerable for any loss occasioned thereby").

60 See eg *Wharton v Masterman* [1895] AC 186, 197 ("the general rule in equity ... imposes upon trustees the duty of investing trust funds in their hands which the testator has not directed an immediate disposition"); JD Heydon, MJ Leeming, *Jacob's Law of Trusts in Australia* (7th ed, Butterworths, Sydney, 2006), 423ff.

61 *Core's Case* (1537) 1 Dyer 20a (73 ER 42, 45), above [198]; *Wheeler v Horne* (1740) Willes 208 (125 ER 1135), above n 56; *Sturton v Richardson* (1844) 13 M&W 16 (153 ER 7) ("It is not necessary therefore in an action against a bailiff to say he has received, but only to shew that it was his duty to do so").

62 "Damages", in the common law sense, cannot be obtained by account. The account was a praecipe writ, not one in the nature of an ostensus quare. See eg *Hastynges v Beverley* (1379)

on the part of the donor. However, for example, the accountability *of the receiver B* in the circumstance of A to B to the use of C does not really depend on any intent of, or privity with, C at all.[127] The better view is that the account was not, and does not, depend on any bargain or acknowledgment. Rather, any description of accountability must grapple with the fact that it may arise by statutory prescription,[128] be implied from the circumstances by law;[129] or result from equitable doctrine including interests in property recognised in that jurisdiction.[130]

[472] Accordingly, the account may arise by intent manifested by the donor, or by reason of privity, or agreement.[131] But that does not exhaust the doctrine. Holt CJ's explanation was that money received "without any reason, occasion, or consideration" is to be treated in default as "originally received to the plaintiff's use".[132] That points to a deeper concern and meaning. Overall, the substance of accountability is better explained as one concentrated on the *quality* of the defendant's *entitlement* to receive, retain or deal with property obtained from another.

[473] Put in more general terms then, the *account* is, simply, that duty recognised at common law and equity requiring anyone who consciously deals with money or property belonging to another (being property not free to his, her or its own use), to keep and deal with it according to the conditional nature of any entitlement. That is, consistent with the circumstances of the dealing, requiring the defendant to adhere to the authorised and proper use.

[474] That is, it is suggested, the essential purpose and principle of the account.

[475] Turning then to some further matters to be treated with in this context.

Further matters

[476] There are five further points to be noted in respect of an overall consideration of the account.

[477] *First*, it is of course acknowledged that much of the jurisprudence in respect of account has been identified as maturing early in the development of the law. In

127 Ch 6, [338].
128 From early, above [73] (c12 *Provisions of Westminster* 1259, c17 *Statute of Marlborough* 1267 (52 Hen III)). For more recent examples, above, [16], fn 49.
129 Eg *Robsert v Andrews* (1580) Cro Eliz 82 (78 ER 341), and the cases at [241].
130 Ch 7, [379]ff (Breadth of account in equity).
131 See eg *Robsert v Andrews* (1580) Cro Eliz 81 (78 ER 341) (Jury finding of intent) discussed above, [345]ff. For a case where the intent was *not* to account, see *Killock v Greg* (1828) 4 Russ 286 (38 ER 813) ("When Messrs Greg and Lindsay received advice from Mr Gillies that Messrs Killock and Maxwell were interested in a moiety of his third share of the Russian adventure, it certainly imposed upon them the duty of accounting with [them] in respect of their portion ... But the subsequent transactions amount to notice to Messrs Greg and Lindsay that it was the intention of Messrs Killock and Maxwell ... that Messrs Greg and Lindsay should account solely with Mr Gillies in respect of the one-third share, as if he continued to be solely interested in it"). Again, note the knowledge requirement, Ch 5, [192] (Taking accounts).
132 Above [454].