WHAT IS ACCOUNT STATED?

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What is an account stated? What work did it do? What is its significance now? These questions bear some investigation: the more so, indeed, since a remark of Lord Abinger's appears even truer today than in his own day: "there is a good deal of confusion in the books on questions of account stated,—not the older books, but the modern ones."[1]

I

As the name shows, account stated has an obvious connection with the old action of account. In the thirteenth century the purpose of the latter was to compel manorial bailiffs to render accounts, usually before auditors who, though appointed by the manorial lord, had a power of arrest and with this power could therefore enforce compliance with the payment of an account.[2] A century later, the old action widens in scope when it begins to be used in cases of agency and partnership. At the same time, however, it also becomes settled that in this non-manorial sphere the auditors have no power of arrest;[3] and this was to have profound significance. In non-manorial or commercial situations, not only would the account take place between the parties themselves or before auditors voluntarily accepted by them, but the amount thus accounted would have to be recovered by a separate action of debt, simply because these auditors could not enforce payment of the balance struck.[4] It is at this point that what became known as account stated separates from the action of account. For the latter becomes increasingly concerned not with the recovery of money but with establishing whether a defendant is accountable at all, while to speak of an account stated is as yet not to name an action, but rather to describe an activity, namely that the parties voluntarily accounted between themselves, and an accounting, moreover, that had certain legal effects. As the accounting involved a mutual set-off, it would constitute payment (technically described "payment by a retainer"), so as to extinguish or reduce a debtor's existing liability to the creditor.[5] Again, the actual recovery in debt of the balance struck would bar further demands in respect of claims forming part of the same stated account.[6]

Soon other developments were to occur. When debt is being replaced by assumpsit, the question arises whether assumpsit will also lie on a balance struck. In *Eagles* v. *Vane*,[7] which seems the first case, it is strongly argued that a mutual accounting cannot constitute a cause or consideration to support an assumpsit; yet assumpsit is held to lie. In *Dalby* v. *Cooke*[8] assumpsit is again

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[1] *Lubbock* v. *Tribe* (1838) 3 M. & W. 607, 612. For modern discussions of account stated, see mainly Sir P. H. Winfield, *Province of the Law of Tort* (1931) 167; R. M. Jackson, *History of Quasi-Contract* (1936) 27, 105; S. Williston, 6 *Contracts* (Rev. ed. 1936-45) §§ 1862 *et seq.*; A. T. Corbin, 6 *Contracts* (Rev. ed. 1950) §§ 1303 *et seq.*

[2] See generally E. O. Belsheim, *The Old Action of Account* (1932) 45 *Harvard L.R.* 466; T. F. T. Plucknett, *Legislation of Edward I* (1949), 151.

[3] (1371) Y.B. 45 Edw. 3, 14, 13; (1405) Y.B. 7 Hen. 4, 14, 17.

[4] See *Humberstone* v. *Hertfield* (1389) Y.B. 13 Rich. 2 (Ames Found.) 20; and *Shymplyng* v. *Parfey*, ibid. at xlviii, 95.

[5] Co. Litt. 123a; *Hayford* v. *Andrews* (1598) Cro. Eliz. 697.

[6] (1456) Y.B. 34 Hen. 6, 43, 4.

[7] (1605) Cro. Jac. 69, Yelv. 70.

[8] (1609) Cro. Jac. 234.

approved, though the claim is recognised as traversable, that is, D might show that he has already discharged his liability, by, for example, paying off the balance found. This new assumpsit is quickly identifying itself not of the special but of the indebitatus kind, and for very good reason since what the plaintiff is trying to enforce is not an executory promise but an executed consideration, an existing indebtedness. Like other indebitatus counts, furthermore, this action too adopts abbreviated or abridged pleadings, more suitable for the recovery of ascertained amounts as distinct from the recovery of damages. As early as 1587 a court remarks that it is customary to declare in such cases without the words "*in consideratione*";[9] while in 1620, when objected that the plaintiff (P) merely declared in a general indebitatus count without showing how exactly the defendant (D) was indebted, the court simply replies that "accounting together, and he (D) promising to pay was a sufficient cause of his action".[10] In this way, also, account stated begins to mark itself off from other indebitatus counts, in that the present claim is not for money lent, or money had and received, or goods sold and delivered, but is a claim in respect of "several matters" that are "reduced to a sum certain", a sum appearing "upon the foot of the account".[11] In this way, in short, this particular count not only assumes a special role, but account stated becomes its distinctive name.

The association with assumpsit, however, created a specific difficulty that was to remain in debate for the next two hundred years. The question was how an accounting could amount to sufficient consideration, so as to turn the accounting into a binding agreement: was not any consideration here caught by the rule or ramifications of *Pinnel's Case*?[12] For might not the accounting render D liable for a lesser amount than the original debt? This difficulty, it is true, was of little importance so long as the question before the courts was still essentially procedural, namely, whether the action assumpsit could here be made to apply in lieu of the action of debt. But the difficulty became of direct importance when, very soon, the question arose whether the accounting would bar or estop the creditor from any further action, apart from recovering the balance struck. Indeed, this difficulty connected with another problem, and one far too little noticed hitherto. An accounting (to explain this further) could take two rather different forms. On the one hand, the parties could come together to determine their respective liabilities, liabilities which in money terms could be most uncertain so long as accounts were badly kept or payments were not in money but in kind. Here the accounting really became an agreement to liquidate what had so far been rather unliquidated claims. On the other hand, the parties might meet for something rather more clerical or arithmetical: more particularly, since P and D already knew the specific amounts they each other owed, their accounting simply became an occasion for a mutual set-off of fixed items or claims. Again, as bookkeeping became more common, which it did during the seventeenth century, an accounting would more often than not be of the second (arithmetical) than of the first (liquidating) kind. It follows that far from being an agreement to liquidate or discharge claims, an arithmetical accounting would merely amount to a restating of existing debts and liabilities.

That such had indeed become the usual character of an account stated is also shown by another fact. Lord Mansfield pointed out that an account could be mistaken and that a court would hear allegations concerning the mistake.[13] Obviously such a mistake could not arise unless the

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[9] *Whorwood* v. *Gybbons* (1587) Gould. 48.
[10] *Bard* v. *Bard* (1620) Cro. Jac. 602; similarly *Johnson* v. *Cullamore* (1616) 3 Bulst. 208.
[11] *Howes* v. *Savill* (1628) Cro. Car. 116.
[12] (1602) 5 Co. 117a.
[13] *Trueman* v. *Hurst* (1785) 1 T.R. 40.

accounting was arithmetical rather than liquidating in character. For while the parties might erroneously add up debts or bills, or forget a payment already made, they would not similarly err where, instead of counting, they first had to determine what to count by quantifying their respective claims. If, in the latter case, one could indeed talk of mistake, the mistake was one of motive rather than fact, and certainly not the kind of mistake which a court would (then as now) wish to rectify. In strict principle, therefore, what had become the more common form of account stated could not constitute a discharge. Hence D's outstanding liability could not be extinguished except by bond or deed, or by actual payment of the amount due, or by way of some recognised compromise; in short, by accord and satisfaction, the method of discharge applying to all debts.

This general principle, though supported by some cases, remained less clear-cut than it should have been. This is due to *Milward* v. *Ingram*[14] where the matter first arose. P sued D on an indebitatus assumpsit for 40 shillings.[15] D admitted the liability, but said that he and P had accounted together for "divers sums" when D was found to be indebted to P in 3 shillings which he (D) promised to pay, in consideration of which P agreed to discharge D entirely. The Court upheld this discharge. They admitted that it was not sufficient consideration to pay less than one's full debt, but they thought that this rule did not apply: it did not apply because the present accounting covered various items mutually owed, not just "one debt betwixt them".[16] It is easily seen that this distinction between single and "divers" debts was hardly to the point, simply because *Pinnel's Case* really applied to both. But it is this distinction which later reappears, though meanwhile the decision itself was frequently disapproved.[17] In *Atherley* v. *Evans*,[18] for example, P and D settled their accounts relating to several debts, striking a balance of £12 which amount D paid to P. When P sued on the older debt, D pleaded that he had already paid. Rejecting this plea, the courts greatly stressed the broad principle that the paying of a lesser sum cannot discharge the larger debt. Thus the only effect of D's payment of the £12 was to reduce the amount still owing to P: the account stated, in other words, would operate not as a discharge but merely as a set-off between debtor and creditor. In this light, indeed, two statutes, known as the Statutes of Set-Off, 1728 and 1734,[19] assume a particular relevance. As these Acts permitted the defendant or debtor to plead appropriate deductions by way of defence, even without the parties having privately settled accounts, one can see how this reduced the usefulness of account stated as a separate preliminary. For the parties now could state their accounts in (so to speak) a procedural way, as they could now effect their set-off either in the course of exchanging pleadings or at trial in court.

However, this drastic limitation of the scope of account stated was not really perceived. The belief rather persisted that account stated continued somehow as before and, in any case, very much as a separate thing.[20] There were two reasons for this. One simpler reason is that account stated had not only remained on the books, but that (as we shall shortly see further) in the early nineteenth century it was to revert to its first rôle, that of an action for the

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[14] (1675) 1 Mod. 205, 2 Mod. 43.

[15] The sums claimed differ in the two reports; but of course nothing turns on this.

[16] (1675) 1 Mod. 205, 206.

[17] See *Mayor of Scarborough* v. *Butler* (1603) 3 Lev. 237; *May* v. *King* (1701) 12 Mod. 537, 1 Ld. Raym. 680; *Anon.* (1729) Fitz. 44; *Rolles* v. *Barnes* (1756) 1 W. Bl. 65, 1 Burr. 9.

[18] (1755) Say. 269.

[19] For a recent discussion of these, see *Hanak* v. *Green* (1958) 2 Q.B. 9.

[20] See, e.g., *Fidgett* v. *Penny* (1834) 1 C.M. & R. 108 where the distinction between set-off and account stated is most carefully drawn.

recovery of money, a rôle which gave it a whole new prominence. Another reason has to do with the fact that, for the better part of the nineteenth century, the rules relating to *Pinnel's Case* came again to be regarded as unsettled and thus inviting circumvention wherever possible. In particular, consideration was seen as sufficient if a debtor, while paying less, could be said to give something "different" or to be compromising some "doubtful" claim. On this basis, it was not at all surprising that an account stated, too, should be regarded as settling upon something "different" or "doubtful", particularly (and these were but echoes of *Milward* v. *Ingram*) if the accounting related to "cross demands"[21] or to "several items of claim on either side".[22] On stricter analysis, of course, this was an entirely faulty approach. It was faulty (to repeat) because the mere settling of cross demands was nothing but arithmetical, a point at least implicitly recognised in those eighteenth century decisions that had so clearly denied that such an accounting could be a discharge.[23]

Moreover, even as limited to cross demands, such an account stated could have very obscuring effects. In one case,[24] for example, P sued D on three bills of exchange of about £300 each. D defended that after the accruing of the causes of action, but before commencement of the suit, P and D accounted together in respect of these causes of action as well as of certain other claims of P against D and D against P, after which they found that £50 and no more was due from D to P, which money, to be sure, D paid to P in full satisfaction and discharge. On special demurrer, this defence was held to be good, though it is by no means clear what precisely the defence consisted of. Certainly the defence was good if by paying the £50, D had in fact paid all that he owed to P.[25] Again, the defence was justified if, some of the claims having really been doubtful, the balance represented a genuine compromise. But the decision was hardly supportable if the so-called accounting was merely a concession by P to D, for in that case the accounting could not operate as a discharge. In other words, the defence of account stated, in failing to specify with any precision what sort of discharge the defendant claimed, thus obscured the distinction between, on the one hand, the settling of a debt for a lesser sum, which was no bar, and, on the other, a genuine compromise which was a good discharge, though in fact a genuine compromise had by now become as unlikely as the accounting itself had usually become purely arithmetical. When, as is well-known, *Foakes* v. *Beer*[26] reaffirmed this distinction with renewed clarity, a debtor was no longer discharged without showing a proper accord and satisfaction, henceforth even more strictly construed. And this also seems the real explanation why from now on less and less is heard of account stated as a method of discharge.

II

We return to account stated as recovery-action, which (as we have seen) had been its earliest rôle, even if for a long time the emphasis of account stated

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[21] *Smith* v. *Page* (1846) 15 M. & W. 683. Some of these ideas go back to *Kearslake* v. *Morgan* (1794) 5 T.R. 513.

[22] *Laycock* v. *Pickles* (1863) 4 B. & S. 497. In *Perry* v. *Attwood* (1856) 6 E. & B. 691 it was even suggested that an account stated arose where under a mining lease D being liable to pay a variable annual rent, the accounting merely consisted in determining the annual rent due. This suggestion the court however dismissed on the ground that it did not include cross demands.

[23] In the 19th century all this is but seldom seen. However, an exception is Sergeant Manning: "In a real account stated, the extinction of cross demands *per confusionem*,—not the bare act of accounting,—appears to form the consideration of the promise to pay the balance:" *Cocking* v. *Ward* (1845) 1 C.B. 858, 869 n.

[24] *Callander* v. *Howard* (1850) 10 C.B. 290.

[25] Perhaps this may appear from Wilde, C.J.'s remarks, *ibid.* at 302, but one cannot be very sure. For payment as a defence, see also *Learmonth* v. *Grandine* (1839) 4 M. & W. 658, 661.

[26] (1884) 9 App. Cas. 605.

is not on recovery but is on its function of discharge. In the late eighteenth century, however, the major emphasis again switches to recovery. How is this explained? Very simply by the emergence of a number of money-claims which, though they beckoned enforcement, had no appropriate remedy. They had no appropriate remedy since they were outside the scope of other money or indebitatus counts, such as money had and received or money paid, as well as outside the ambit of strictly contractual claims. The new claims can be seen to fall easily into two distinctive groups.

The first deals with claims against fiduciaries of all kinds. Consider *Foster* v. *Allanson*,[27] an early but vital instance. Two partners struck a balance in respect of their trading and their mutual personal debts. Could P recover this balance by way of account stated? D objected that P's action was in covenant, as their deed of partnership included a covenant to account.[28] This objection the court dismissed:

> by the stating of the account, and introducing other articles not relating to the partnership, the nature of the demand is changed, and a new cause of action arose independent of the articles of covenant.[29]

The short effect of this was to turn account stated into what was virtually a claim for contribution at common law. This was the more significant since the only other remedy, the count for money paid, had been viewed as inapplicable in this sort of relationship: inapplicable because the money in question was advanced not directly for the other partner, but on behalf of the firm or partnership.[30] Important though it was, this innovation remained largely concealed. For not only did it remain more or less confined to partnership,[31] later cases began to clothe the new remedy in contractual garb: so it was said that, upon the dissolution of a partnership, an implied promise arises to pay whatever balance one partner is found to hold on behalf of the partnership.[32]

Very similar were claims against other fiduciaries. Here there was never any doubt that these persons could not permanently keep money which they held merely for or on behalf of other persons or beneficiaries. Against such fiduciaries, indeed, there existed even a common law remedy, that of money had and received, although in the early nineteenth century the availability of this remedy had, for extraneous reasons, been put in doubt.[33] Yet if money had and received seemed unavailable, what about account stated, a related indebitatus count? Could one not say that inasmuch as the money in a fiduciary's hands might be unascertained in amount (as he might himself have certain claims on this money, or have claims on behalf of other beneficiaries), that some accounting or, at any rate, some admission by the fiduciary would be necessary to specify or ascertain the sum which a beneficiary might claim at all? No such theory, it is true, was ever stated explicitly; but it goes some way in explaining why we find virtually no actions in account stated against ordinary agents (for here the principal would usually know what the agent held),[34] whereas we do find such actions brought against trustees[35] or

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[27] (1788) 2 T.R. 479.

[28] This on the wider principle that a liability merged in the higher security, so that an assumpsit was displaced by a bond or deed. Though largely superseded, the rule survived in connection with loans secured by bond: *Middleditch* v. *Ellis* (1848) 2 Ex. 623; Jackson, *op. cit.* 108.

[29] (1788) 2 T.R. 479, 482.

[30] *Brown* v. *Tapscott* (1840) 6 M. & W. 119, 123; but compare *Holmes* v. *Higgins* (1822) 1 B. & C. 74.

[31] In *Scholey* v. *Walton* (1844) 12 M. & W. 510, the court refused its extension to co-executors.

[32] See *Rackstraw* v. *Imber* (1816) Holt N.P. 368; *Clark* v. *Glennie* (1820) 3 Stark. 10; and also *Wray* v. *Milestone* (1839) 5 M. & W. 21, 24.

[33] Largely because of difficulties connected with the growing requirement that there had to be "privity" as between P and D. But this is another story.

[34] See *Tomkins* v. *Willsheare* (1814) 5 Taunt. 431. And see further below.

[35] *Roper* v. *Holland* (1835) 3 Ad. & E. 99; but see *Bond* v. *Nurse* (1847) 10 Q.B. 244.

executors.[36] Still, even the latter actions were always relatively few. Perhaps claims against these fiduciaries began to be regarded as the business of other courts.

A second type of recovery by account has to do with claims that were unenforceable because of technical impediments, such as the Statute of Frauds. The first steps were taken by Lord Ellenborough,[37] but the first important case is *Seago* v. *Deane*.[38] D had agreed to pay P a specified sum for repairs of a house which P intended to lease from D. P took the house and did the repairs, but when he asked to be paid, D. objected that their agreement lacked writing as this was a contract for an interest in land. This, said Best, C.J., "is one of the most iniquitous objections ever made. The contract has been clearly proved, and the objection is purely technical".[39] Similarly, in *Cocking* v. *Ward*,[40] D orally promised to pay P £100 if he (P) would surrender a farm to V and endeavour to induce V to demise the farm to D. P did both, but D then refused to pay by reason of the Statute of Frauds. Again the Court admitted recovery on the basis of account stated. As before, there was little doubt about "the justice of the demand", or that D was "morally, if not legally, bound to pay".[41] And, in any case, even if the contract itself was unenforceable, the agreement clearly showed that D had acknowledged and admitted his pecuniary liability for the things that were given or done for him.

Similar admissions were recognised in a variety of other instances. In particular, account stated was held to lie where a claim was vitiated by some technical flaw in connection with a bill of exchange,[42] or where the claim was voidable because of infancy,[43] or where the demand was flawed by some other requirement,[44] or where the claimant lacked some credential, though there was no doubt that he was the proper person to sue,[45] or where the plaintiff could not "go out of his particulars", though the pleadings showed that plaintiff was entitled to more money than he had claimed,[46] or where a contract was tainted by the usury laws,[47] or by betting laws,[48] or where an agreement became ineffective being in restraint of trade.[49]

Curiously, rather more difficulty was felt about claims barred by the Statute of Limitations. In *Ashby* v. *James*,[50] P and D met to account and struck a balance in P's favour, though one of the items taken into account against D was a claim over 6 years old. Despite the objection that the latter claim was statute-barred, the Court let it succeed. This because the accounting included "items on both sides" and because there was "evidence of an agreement" that all the items on one side were to be set off against the items on the

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[36] *Hart* v. *Minors* (1834) 2 Cr. & M. 700; and see also *Topham* v. *Morecroft* (1858) 8 E. & B. 972.

[37] *Knowles* v. *Michel* (1811) 13 East 249, 250; and see also *Peacock* v. *Harris* (1808) 10 East 104; *Pinchon* v. *Chilcott* (1827) 3 C. & P. 236.

[38] (1828) 4 Bing. 459.

[39] *Ibid.* at 460.

[40] (1845) 1 C.B. 858.

[41] *Ibid.* at 871.

[42] *Highmore* v. *Primrose* (1816) 5 M. & S. 65; *Croxon* v. *Worthen* (1839) 5 M. & W. 5.

[43] *Williams* v. *Moor* (1843) 11 M. & W. 256, where an infant ratified a contract after age, an acknowledgment which the court considered distinguished it from *Trueman* v. *Hurst* (1785) 1 T.R. 40. Such ratification is, of course, now precluded under the Infants' Relief Act, 1874.

[44] *Turner* v. *Willis* (1905) 1 K.B. 468, where a claim by a solicitor was not in writing as a special statute required.

[45] *Peacock* v. *Harris* (1808) 10 East 104.

[46] *Hurst* v. *Watkins* (1807) 1 Camp 68; *Fisher* v. *Wainwright* (1836) 1 M. & W. 480.

[47] *Flight* v. *Reed* (1863) 1 H. & C. 703.

[48] *Guggenheim* v. *Ladbroke Ltd.* (1947) 1 All E.R. 292; *Day* v. *William Hill Ltd.* (1949) 1 All E.R. 219.

[49] *Evans* v. *Heathcote* (1918) 1 K.B. 418.

[50] (1843) 11 M. & W. 542.

other.[51] A settlement of accounts, the Court maintained, is not just an "acknowledgment", it is a "transaction between the parties, out of which a new consideration arises for the promise to pay the balance".[52] Such a contractual explanation was of course not new, going back to the earliest days. As from now, however, a contractual rationale becomes the major explanation of account stated, as though no other explanation would really fit the case.[53]

But this contractual explanation needs further analysis. At first sight, it is true, the explanation seems reasonable enough, for what else could really justify the intervention of account stated in this field. Since the original claim is ineffective because of (say) a statutory requirement, to resort to account stated (that is, to resort to it without more) would simply overlook this requirement. The only alternative therefore is to say that the action now rests on a separate and distinctive liability. So that even if true that the original claim is (for example) statute-barred, this would be no objection to the defendant's subsequent and separate promise to pay. This whole argument, it is easily seen, is beset by various difficulties. For if we suppose that the present liability derives from a separate contract (though awkward questions might still be asked what the supporting consideration is), the defendant's liability then would rest simply on contract, not on account stated as well. In any case, the account stated would only tell us what, as a matter of fact, the parties have done, that they have agreed to set-off various items between themselves. Again, the important question now is why such a contract should be binding, in spite of the fact that it seems to by-pass certain statutory requirements; yet on this point the reference to contract offers us little as it is circular. Still more importantly, to base account stated upon a contractual transaction does not march well with the many cases in which liability in account stated has been put on an admission or acknowledgment of personal indebtedness. Some admissions, admittedly, might be construed as implied contracts;[54] but other admissions have been entirely non-contractual, especially admissions which were said to be inferred. An admission was inferred where D merely told P that he would call and settle,[55] or where D, notwithstanding certain objections, said to P "Go to my agent, he will arrange for payment",[56] or where D, presented with a bill for services or for goods, made a part-payment,[57] or acknowledged only one among several items,[58] or where he made a payment into court.[59] In other cases, furthermore, where the defendant makes an express admission (as in an I.O.U.), the admission, if regarded as contractual, would directly conflict with contractual requirements and thus even defeat its own purposes.[60] These admissions, then, cannot rest on a contractual, but must rest on a different basis.

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[51] *Ibid.* at 544.

[52] *Ibid.*

[53] See *Laycock* v. *Pickles* (1863) 4 B. & S. 497; *La Touche* v. *La Touche* (1865) 3 H. & C. 576; *Siqueira* v. *Noronha* (1934) A.C. 332. In *Laycock* v. *Pickles, supra,* Blackburn, J. explained this in words which have become famous: "An account stated is commonly called an admission of a debt; but it is merely evidence of it. There is a real account stated, called in old law an *insimul computassent,* that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due:" *ibid* at 507.

[54] See on this *Wray* v. *Milestone* (1839) 5 M. & W. 21, 24, *per* Parke, B.

[55] *Clark* v. *Glennie* (1820) 3 Stark. 10; *Taylor* v. *Nicholls* (1876) 1 C.P.D. 242.

[56] *Porter* v. *Cooper* (1834) 1 Cr. M. & R. 387, 394.

[57] *Peacock* v. *Harris* (1808) 10 East 104; *Salmond* v. *Watson* (1819) 4 Moo. C.P. 73.

[58] *Highmore* v. *Primrose* (1816) 5 M. & S. 65.

[59] *Kennedy* v. *Withers* (1832) 3 B. & Ad. 767; *Gretton* v. *Mees* (1878) 7 Ch. D. 839.

[60] See *Curtis* v. *Rickards* (1840) 1 M. & G. 46; *Jacobs* v. *Fisher* (1845) 1 C.B. 178; *Fesenmayer* v. *Adcock* (1847) 16 M. & W. 449, 450 where the Court remarked, that an I.O.U. is not evidence of money lent, or goods sold and delivered, but of account stated, for if not evidence of the latter, "it proves nothing at all".

The question, therefore, is: what basis? According to a traditional view, this basis is purely evidentiary. As Le Blanc, J. put it very early:

> I am glad that a medium of proof has been found to sustain the justice of the case. It was a question for the jury to decide, whether by the defendant's having received the account of the tolls, and making no objection to it, he did not recognise that so much was due from him on his account.[61]

Similar things were said by Lord Ellenborough,[62] and later repeated in a number of influential cases.[63] Moreover, putting these evidentiary instances of account stated beside those that could be viewed as contractual, the whole position was summarised by saying: "it thus appears that accounts stated are either admissions or contracts."[64] But the question then is: admissions of what? What liabilities were here capable of being admitted? The broad answer is not every liability but only such representing a "legal debt". More particularly, a defendant could not just admit something; he could not simply say: "Yes, I admit it. I owe you £50."[65]

What this shows again is that, to succeed in any action of account stated, the plaintiff had to show some prior debt or liability, indeed a liability deriving from the two main sources already identified, that is, deriving either from an existing contract, though one invalid because of some technical requirement, or deriving from the fact that the defendant held money not in his own right but as some kind of fiduciary. However, the conditions as well as the reasons for allowing account stated as regards either type of liability were not at all identical. Where account stated was brought against a fiduciary, P had to show that D in fact held a certain amount of his (P's) money and that D had admitted that he held it.[66] Of course, whether or not a fiduciary had actually admitted holding another's money should have made no difference to his duty to return the money to its rightful owner or beneficiary. The trouble was that the appropriate money counts, that is, money had and received and money paid, had for other reasons become somewhat narrow, so that the common law was often quite unable to enforce the desired restitution. The discovery of admissions certainly gave the courts a new platform from which to intervene; and, indeed, account stated rather became an unofficial extension of the two money counts mentioned before. As always, however, such round-about improvements carried their own disadvantage. For the courts began to regard the fact of an admission as though it were a self-sufficient ground of liability. Which led them not only to attach too great importance to the admission itself, it made them less than observant about what had become the specific function of account stated in this field.

Where, on the other hand, the liability derived from some contract, the relevant conditions were rather different. Thus the plaintiff had to show that the contract was entirely executed rather than executory,[67] that accordingly

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[61] *Peacock* v. *Harris* (1808) 10 East 104, 107-8.

[62] *Highmore* v. *Primrose* (1816) 5 M. & S. 65, 67.

[63] See, e.g. *Laycock* v. *Pickles* (1863) 4 B. & S. 506; *Camillo Tank S.S. Co. Ltd.*, v. *Alexandria Engineering Works* (1921) 38 T.L.R. 134.

[64] Jackson, *op. cit.* 110.

[65] *Allen* v. *Cook* (1832) 2 Cowl. 546.

[66] So in *Harmonic Resonator Ltd.* v. *Walton* (1927) 27 S.R. N.S.W. 81, D admitted that he held certain sums for P, but claimed that on balance P owed him more money still. It was rightly held that such an admission could not ground an account stated against D. Similarly it was held that the admission must refer to a liability as between P and D themselves, not as between strangers: *Clarke* v. *Webb* (1834) 1 Cr. M. & R. 29; *Petch* v. *Lyon* (1846) 9 Q.B. 147; or that an indebtedness had to be admitted by the fiduciary as such: *Shaw & Sons* v. *Shaw* (1935) 2 K.B. 113, where D was a company director, and his admission was made in an official rather than a personal capacity.

[67] *Falmouth* v. *Thomas* (1832) 1 Cr. & M. 89.

certain moneys were truly in arrear,[68] that a claim had already arisen,[69] and did not represent a future commitment.[70] Again, it had to be shown (and this was by far the more intriguing condition) that the defendant's indebtedness was not due to a failure of consideration, that is, that the defendant, though having received an advance payment, failed to perform his own part of the bargain and also failed to return plaintiff's money.[71] The indebtedness had to arise because the defendant, having been supplied with goods and services, then refused to pay the price promised on the purely technical ground that the contract was not enforceable. Now in thus allowing recovery of the price by way of account stated, the courts were obviously prepared to hold the payor to the transaction, and this by disregarding, and thus curing, what surely had now to be regarded as a *minor* contractual deficiency. In short, account stated now functioned as a vehicle for enforcing a meritorious but imperfect obligation.[72] All this also explains why account stated became one of the main supports of nineteenth century pleaders. Since pleadings were strict, yet much of the law still in evolution, a claim might often fail, not for a truly substantial reason but because of some technical oversight or some minor obstacle. Hence it was simply an elementary precaution to add to the contractual or other money counts a count of account stated, to pick up claims that might otherwise prove imperfect. Unfortunately, the various appeals to "admissions" or "contract" often obscured just this special function. Indeed, it was sometimes thought that account stated would apply even where the plaintiff had a good contractual remedy. In *Irving* v. *Veitch*,[73] for example, account stated was brought simply because the parties later agreed to repay a single debt in instalments, while in the modern *Camillo Case*[74] account stated was thought appropriate to recover money for repairs done, though there the money could equally well have been recovered in an action for work and labour.

To appreciate the special rôle of account stated also gives us a better indication in what respects the action still may or may not have practical relevance. As regards fiduciaries, it is clear, account stated has today but little significance, since a plaintiff will usually be able to claim on an express or implied contract in actions against agents or partners, while actions against other fiduciaries, such as trustees and executors, will now anyhow take place in equity. As regards imperfect liability in contract, the position is generally not too dissimilar. Some of the gaps once filled by account stated are now filled in other ways. Thus there is today rather less difficulty about giving effect to an *executed* transaction merely for lack of writing, or about giving effect to a claim that has become barred by the statute of limitations.[75] Moreover, purely technical and unmeritorious defects are, under modern pleading reforms, much

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[68] *Hopkins* v. *Logan* (1839) 5 M. & W. 241.

[69] *Baker* v. *Heard* (1850) 5 Ex. 959.

[70] *Burgh* v. *Legge* (1839) 5 M. & W. 418. In the same vein it was also held that a party could not merely claim that "something" was due to him: *Lane* v. *Hill* (1852) 18 Q.B. 252, 255, where, however, the principle was too rigidly applied, as in that case there *was* evidence of a fixed amount owing. For earlier cases on the general principle, see *Wayman* v. *Hilliard* (1830) 7 Bing. 101; *Teal* v. *Auty* (1820) 2 B. & B. 99; *Kirton* v. *Wood* (1833) 1 Mood. & R. 253; *Hughes* v. *Thorpe* (1839) 5 M. & W. 656.

[71] See *Wilson* v. *Wilson* (1854) 14 C.B. 616; *Lemere* v. *Elliott* (1861) 6 H. & N. 656; and *Laycock* v. *Pickles* (1863) 4 B. & S. 497, 507, *per* Blackburn, J.

[72] See *Kennedy* v. *Brown* (1863) 13 C.B. N.S. 682, 691, *per* Erle, C.J.; *Evans* v. *Heathcote* (1918) 1 K.B. 418, 435, *per* Scrutton, L.J. In *Kennedy* v. *Brown*, *supra*, the C.J. also pointed out (*ibid.* at 690) that the action would not lie if not really meritorious, i.e. if based on a transaction that was illegal or immoral. For another example, see *Re Home & Colonial Ins. Co.* (1930) 1 Ch. 102, where certain items admitted by D were *wholly* void under the Marine Insurance Act and where therefore account stated was held to be inapplicable.

[73] (1837) 3 M. & W. 90.

[74] *Camillo Tank Steamship Co.* v. *Alexandria Engineering* (1921) 38 T.L.R. 134.

[75] G. C. Cheshire & C. H. S. Fifoot, *Law of Contract* (5 ed. 1960) 524.

less serious; indeed courts are now both more able and willing frankly to qualify a rule or to introduce exceptions than they were under the older system. In one area, however, account stated has continued to have a little more importance. This is the area of illegal or rather semi-illegal contracts. Examples are few, but in one[76] there was a trade agreement which limited the production of certain articles and created a pool of excess profits out of which certain producers were to be compensated. The secretary of the association furnished the plaintiff with a monthly account showing how much he was entitled to in that month out of the pooled profits. Here account stated was held to lie for that sum, since the agreement was held not void, but merely unenforceable.[77] In another example,[78] where the transaction was not semi-illegal but was fully illegal (P had laid bets with D and had won a large sum of money which D first refused but then agreed to pay if P would live up to his own liabilities), it was indeed thought that this too could possibly be an account stated. In the view of another court, however, such actions were frivolous and vexatious and just a brazen attempt to get round the Gaming Act.[79]

[76] *Evans* v. *Heathcote* (1918) 1 K.B. 418.

[77] As Scrutton, L.J. pointed out: "The distinction is between transactions valid but unenforceable owing to some statutory provisions, and transactions which the law would either punish as positively illegal, or would take no notice of at all as void though not punishable or actionable": *ibid.* at 436.

[78] *Guggenheim* v. *Ladbroke & Co. Ltd.* (1947) 1 All E.R. 292.

[79] In *Day* v. *William Hill* [1949] 1 All. E.R. 219.