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COMMON LAW PLEADING IN MISSOURI—THE ACTION OF GENERAL ASSUMPSIT FOR MONEY HAD AND RECEIVED.

"The action for money had and received has always been one favored in the law, and the tendency is to widen its scope—it being a flexible form of action, levying tribute on equitable as well as strictly legal doctrines; so that it has become axiomatic that the action lies where the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff."

Judge Lamm, in *Clifford Banking Company v. Donovan Commission Company*, 195 Mo. 1. c. 288.

In Common Law Pleading the action of "General Assumpsit lies where the plaintiff, instead of declaring on an express province, declares generally, as for a debt or pecuniary demand, founded upon an executed consideration. The basis of the action is the promise implied by law from the execution of the consideration, or from a legal duty resting upon the defendant. A promise is implied either where the law presumes it, as a matter of fact, from acts voluntarily done or suffered by the defendant which warrant the inference that an agreement actually existed; or where the law raises a fictitious promise, as a legal presumption, from a legal obligation resting upon the defendant."

Shipman's *Common Law Pleading*, page 12.

In General Assumpsit, the action for money had and received is one of the money counts of the common courts. It has been recognized and used from time immemorial and, as we shall presently see, is still used practically in its ancient form in the Code States—particularly in Missouri.

We often hear the law student say: "Why should I study Common Law Pleading when I expect to practice in a Code State? That is an old and obsolete system and will in no wise benefit me in the actual practice of the law in the State where I expect to engage in my life's work."

So, too, might the student of the science of government say: "Why should I study the governments of the ancients—the Greeks, the Romans, the Hebrews, the Egyptians and all those other antiquities? I want to be up-to-date and put in my time studying the governments of today and not waste it on those which passed into history centuries ago."

The science of pleading, however, like the science of government, is the product of growth, of evolution, and he who would know his pleading well must needs study it from the beginning, for he will find, when he gets into actual practice, that he is constantly meeting his old friend, "Common Law Pleading," who, despite the numerous attempts to abolish him by legislation, still survives and flourishes.

Moreover, the Legislature of Missouri has wisely prescribed that Common Law Pleading shall be a subject in which every applicant for a license to practice law in this State shall be proficient before he shall receive the coveted certificate.¹

That the rules, and even the forms of Common Law Pleading still flourish in Missouri is no more clearly demonstrated than in the steps taken by the Bench and Bar of this State with reference to that court, in the Action of General Assumpsit, known as the Court for Money Had and Received.

That this form of action has been so widely adopted by the bar of this State is certainly not without justification, for as Judge Lamm said (*supra*): "It lies when the defendant has received or obtained possession of plaintiff's money which in equity and good conscience he ought to pay over."

It is a flexible form and the modern tendency is to widen its scope. Under it the plaintiff needs only to show that defendant received his money, and that so far as plaintiff is concerned, he (plaintiff) received no value for it. That being shown, the burden is cast upon defendant² to show that he is innocent in the transaction and has given value for plaintiff's money to some one who apparently had the right thereto. Hence the form of the action is so flexible that the defendant has the advantage of being able, under the gen-

¹ 1 R. S. Mo., 1909, Sec. 944.

² Clifford Banking Co. v. Donovan Commission Co., *supra*, l. c. 285.

eral denial, to introduce evidence tending to show that in equity and good conscience, he is entitled to retain the money.³

It will be seen from the above quoted citation from Shipman that the action of General Assumpsit, which includes Money Had and Received, will not lie unless it is founded on an executed consideration. That is, the right of action must be complete in that the money held by the defendant is the money of plaintiff and is not subject to any claims or conditions, and that the duty of defendant to turn the money over to plaintiff is complete and unqualified. It has, therefore, been held that although the beneficiary of a trust, constructive⁴ or express,⁵ may sue the trustee in an action for Money Had and Received, but the action "will not lie when the trust is still open."⁶

The availability and flexibility of the action is illustrated by the widely different states of fact on which the action has been successfully based.

Thus, in *Drumm Floto Commission Company v. Bank*,⁷ it was held that, where a bank received the proceeds of mortgaged personalty sold by a third party, it would be liable to the mortgagee for money had and received if, after notice of his claim and before he had a reasonable opportunity to assert his right, the bank paid the money over to the one for whom the money was collected.

So, too, where the receiver, assignee or trustee in Bankruptcy for a bankrupt corporation finds that an officer of such corporation, although authorized to sign its checks, has used checks drawn upon the corporate funds to pay his private debts, he may recover from the payee in an action for Money Had and Received.⁸

And when it is shown that the checks were received by the defendant in payment of the officer's private debt, the burden is on the defendant to show the officer's authority to draw upon the corporate funds for his private purposes.⁹

In 1917, however,¹⁰ the Missouri Legislature prescribed that there should be no recovery under such circumstances unless the plaintiff could show that, when collecting the proceeds of the check, defendant had actual knowledge that it was issued without authority from the corporation.

³ *Richardson, Admin. v. Moffett West Drug Co.*, 92 Mo. App. at p. 521.

⁴ *Clifford, etc., v. Donovan, etc.*, supra, l. c. 290.

⁵ *Zeideman v. Molasky*, 118 Mo. App. 106.

⁶ *Zeideman v. Molasky*, l. c. 119.

⁷ 92 Mo. App. and 107 Mo. App. 426.

⁸ *McCullam v. Buckingham Hotel Co.*, 198 Mo. App. 107.

⁹ *Idem*, l. c. 116. See also *St. Louis Charcoal Co. v. Lewis*, 154 Mo. App. 548; *Coleman v. Stocke*, 159 Mo. App. 43.

¹⁰ *Laws of 1917*, p. 143.

In the Buckingham case (*supra*), it was held that the Act of 1917 did not apply, however, to checks issued prior to its passage.

It has also been held that the action will lie against one who, as payee thereof, has received the proceeds of a bank draft drawn by its cashier on the bank's correspondent in payment of the cashier's obligation to the defendant, although the cashier had authority to sign drafts.¹¹

In such a case the payee (defendant) accepts the drafts at his peril. He must show the actual authority of the cashier to draw that particular draft.¹²

In the case of Blake, Trustee in Bankruptcy, etc. v. Third National Bank,¹³ it was held that where the defendant had received from one partner funds of his (the partner's) firm to discharge such partner's individual obligation, without the knowledge or consent of the other member of the firm, the defendant who received such partnership funds could be liable to the firm's trustee in bankruptcy for Money Had and Received.

In the Clifford Banking Company case, *supra*, it was held that the action would lie against a commission company to recover the proceeds of certain bank drafts, bearing the valid signature of the cashier of the bank, which had been forged by a clerk in the bank, by the insertion therein of defendant's name as payee thereof, the proceeds being credited to the clerk's individual account with the commission company.

In Walton v. Chalmers (Kansas City Court of Appeals, 1918),¹⁴ plaintiff, as trustee in bankruptcy for a corporation, was allowed to receive, as for money had and received, money of the corporation which its president had paid to a bank to take up the president's individual notes which the defendant had pledged with the bank as collateral security for the payment of his (defendant's) note to the bank. Judge Ellison said, l. c. 91: "The important thing is that the funds of the paint corporation were used by Hughes, its president, to pay his individual debt. If this was done with defendant's knowledge, he can be made to return it to the corporation—he runs 'the risk of being called upon to restore it.'"

In Reynolds, Receiver, v. Whittemore (St. Louis App. 1916),¹⁵ the defendant, who, through the indorsement of a corporations' secretary on a cashier check payable to the corporation, had procured the

¹¹ Kitchens v. Teasdale Commission Co. 105 Mo. App. 463.

¹² St. Charles Savings Bank v. Edwards, 243 Mo. 533; See also, *Idem* v. Orthwein, etc. 160 Mo. App. 369.

¹³ 219 Mo. 644.

¹⁴ 205 S. W. 90.

¹⁵ 190 S. W. 594.

funds of the corporation in payment of the secretary's personal obligation, was held liable to the corporations' receiver in an action for Money Had and Received.

In *Whitecotton v. Wilson* (St. Louis Court of Appeals, 1917),¹⁶ it was held that a Trust Company, defendant, was liable to plaintiff in an action for money had and received where its depositor had deposited with it money which the latter had procured by means of a deed of trust on real estate the title to which had been procured by the depositor who, acting as agent for plaintiff, had traded plaintiff's land for such real estate, plaintiff having notified the Trust Company that the money so deposited rightfully belonged to him. The notice was merely verbal, but, plaintiff having been prompt in the institution of the suit, Judge Reynolds said, l. c. 171: "After that notice the Trust Company must be adjudged to have held the money then on hand and of his deposit to the use of plaintiff. If, after that notice, the Trust Company paid out any part of it to Wilson, it did so at its peril."

It was held that the action could be maintained against a county for plaintiff's money deposited by her with a third party as security for another who, with plaintiff, had signed, as surety, a recognizance on which a forfeiture had been declared but on which no judgment had been entered because, before judgment, the prisoner had been produced, such holder of the money having paid it into the county treasury.¹⁷

In *Skinner v. Henderson*,¹⁸ it was held that the action will lie to recover back money paid on an *unexecuted* illegal contract.

So also, may there be recovery from the stockholder of a bet before the bet has been determined.¹⁹

An attorney receiving notes for collection will be liable in an action against him by his client for money had and received where, in satisfaction of such notes, he has received from the debtor notes of other persons.²⁰

In *Tamm v. Kellogg*²¹ it was held that the action would lie to recover money paid by the City of St. Louis to the defendant for land condemned for street purposes, the ownership of such land being, at the time of payment, in dispute between defendant and plaintiff, the latter having been found to be the rightful owner.

¹⁶ 197 S. W. 168.

¹⁷ *Meekins v. Sullivan County*, 154 Mo. 136.

¹⁸ 10 Mo. 205, and 13 Mo. 99.

¹⁹ *Humphreys v. Magee*, 13 Mo. 435.

²⁰ *Heux v. Russell*, 10 Mo. 246.

²¹ 49 Mo. 118.

In *Third National Bank v. Allen*,²² it was held that the drawee (a bank) could recover from the payee of a forged check, not known by either to be forged, money paid by the former to the latter on the ground that "as money paid under a mistake of fact may always be recovered back, one who pays money on forged paper, by discounting it or cashing it, can always recover it back, provided he has not materially contributed to the mistake himself, and has given sufficiently early notice of the mistake to the other party after he has discovered it." (l. c. 313.)

The case of *Maguire v. The State Savings Association, Respondent, and the County Court of St. Louis County, appellant*,²³ is quite interesting. Maguire was the County Collector. As such he held for collection certain tax bills against the respondent. He had the power to enforce collection and demanded interest on the bills. Respondent, under protest, paid the tax bills and \$10,372.54 as interest thereon. It then sued Maguire, in an action for money had and received, to recover the interest thus paid. Pending the action, the County Court made claim to the money. Maguire filed his petition, in the nature of a Bill of Interpleader, to require the County Court to interplead. This was done and, on trial, respondent recovered. The court held that the tax bills did not bear interest and that the money thus illegally exacted could be recovered as for money had and received.

In the case of *Cool Co. v. Estate of Slevin*,²⁴ it was held that the Probate Court had jurisdiction of such an action asserted as a claim against an estate in process of administration even if the Probate Court did have no jurisdiction in equity cases, and the action did involve the enforcement of a constructive trust.

In *Chase, etc. v. Willman, etc.*,²⁵ where an attorney held for collection against a debtor claims of plaintiff and of defendant and, collecting plaintiff's claim, by mistake, paid the money over to defendant, the latter would be liable to the former for money had and received.

In *Missouri Pacific Railway Co. v. McLiney*,²⁶ defendant was the shipper of a car load of flour. He procured negotiable bills of lading and attached them to drafts which he discounted with a bank. Plaintiff delivered the flour to the consignee without taking up the drafts and bills of lading. The consignee paid for the flour

²² 59 Mo. 310.

²³ 62 Mo. 344.

²⁴ 56 Mo. App. 107.

²⁵ 63 Mo. App. 482.

²⁶ 32 Mo. App. 166.

to the shipper (defendant). Plaintiff, being liable to the bank, paid it and took from it an assignment of the drafts and bills of lading.

It was held that plaintiff, the Railway Company, could recover from the defendant, the shipper, for money had and received.

In *Richardson, administrator, v. Moffett West Drug Co.*,²⁷ it was held that one who has collected the proceeds of an insurance policy on the life of the deceased is liable, as for money had and received, for the proceeds thereof so collected unless defendant shows his right thereto.

Judge Goode said, l. c. 521: "The simplicity of the action is what commends it to the favor of the courts. A plaintiff is exonerated from the necessity of stating the special circumstances of his case and, therefore, from the danger of a nonsuit by a variance between his allegations and the proof; while as to the defendant: 'It is the most favorable way in which he can be sued; he can be liable no further than the money he has received, and against that may go every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff *ex aequo et bono* is not entitled to the whole of his demand.' *Mose v. Macferlan*, 2 Burr, 1005. Such was the eonium pronounced by Lord Mansfield more than a century ago."

In this action, however, the facts must be shown that *in equity and good conscience* the plaintiff is entitled to the money for which he sues.

The case of *Henderson, Probate Judge v. Koenig, Probate Clerk, and the City of St. Louis*,²⁸ illustrates this rule.

Prior to 1899 the City of St. Louis Probate Judge, elected by the people, was entitled to collect and keep the fees of the office and employ and pay the clerk and his deputies. In that year, by an act of the Legislature, the office of Judge was put on a salary basis and the office of Clerk was made elective, with a fixed salary, both salaries to be paid by the city, which was to receive and enjoy the fees. In the election of 1897, Henderson was elected Judge, and Koenig Clerk. The former, when inducted into office, refused to recognize the act of 1897 as being constitutional and sued to prevent Koenig from collecting and paying the fees into the city's treasury and to prevent the city from receiving the moneys, on the ground that the Act of 1897 was unconstitutional. On appeal from the Circuit Court from a final judgment, in favor of the defendants, on a demurrer to the petition,

²⁷ 92 Mo. App. 515.

²⁸ 192 Mo. 690.

the Supreme Court²⁹ held the act to be unconstitutional and the petition to be good. When the case came back to the lower court the plaintiff amended his petition so as to make it an action for money had and received and claimed therein that he was entitled to all the fees collected by Koenig and that, although Koenig, with his deputies, had performed all of the duties of Probate Clerk and had been paid by the city for such services and although plaintiff had availed himself of such services and, by numerous acts, had recognized Koenig as such Clerk, yet, because under the old law he, as Judge, was entitled to receive all the fees and to employ and pay the Clerk and his deputies, he could now recover all such fees so received by the city.

In ruling against him and holding that, while the Judge was entitled, in this action, to recover such part of the fees as had been received by the city over and above what it had paid to the Clerk and his deputies, he could not recover that part represented by the city's judgments to Koenig and his deputies.

In so ruling, Judge Gantt in his opinion, said: "Recognizing, as he did, the legality of the services rendered by these clerks and deputies, and holding them out to the public as rightful officers, though holding under an unconstitutional act, he cannot appropriate their services and repudiate the authority of the city to pay them. He must be held to have waived the unconstitutionality of the act and ordinance as a whole so far as the Clerks were concerned. This conclusion seems so palpably just and equitable that we have no disposition to interpose barren technical rules, which are salutary in proper cases, to work out a contrary and unjust conclusion.

"Keeping constantly in view that the very foundation of plaintiff's claim to these fees is that he is entitled to them *ex aequo et bono*, we are prepared to say that in equity and good conscience he must be required to do equity and allow the salaries which the city paid out for the performance of the services."

Other Missouri cases illustrative of the scope of this form of action are:

Thurley v. O'Connell, 48 Mo. 27.

Evans v. Hayes, 1 Mo. 697.

Quinnett v. Washington, 10 Mo. 53.

Benoist v. Siter, 9 Mo. 649.

Insurance Co. v. Ford, 10 Mo. 295.

Magaffin v. Muldrow, 12 Mo. 512.

²⁹ 168 Mo. 356.

- Robbins v. Alton M. F. Ins. Co., 12 Mo. 380.
Kanada v. North, 14 Mo. 615.
Columbus Ins. Co. v. Walsh, 18 Mo. 229.
Koontz v. Central Natl. Bank, 51 Mo. 275.
American Brewing Co. v. St. Louis, 187 Mo. 367.
Harrison v. Lakeman, 189 Mo. 581.
Davis v Krum, 12 Mo. App. 279.
Jacoby v. Hearn, 32 Mo. App. 566.
Koopman v Cahorn, 47 Mo. App. 357.
Winningham v. Fancher, 52 Mo. App. 458.
Fisher v. Daring, 53 Mo. App. 549.
Harris v. Dougherty, 68 Mo. App. 105.
Deal v. Bank, 74 Mo. App. 262.
Kelley v. Osborn, 86 Mo. App. 239.
York v. Farmers' Bank, 105 Mo. App. 127.
Fallis v. Gray, 115 Mo. App. 253.
Cornet v. Boyle, 116 Mo. App. 430.
Crigler v. Duncan, 121 Mo. App. 381.
Stout v. Hardware Co., 131 Mo. App. 520.
Roberts v. Neale, 134 Mo. App. 612.
Stuyvaert v. Arnold, 122 Mo. App. 421.
Montgomery v. Wise, 138 Mo. App. 176.
Jenkins v. Clopton, 141 Mo. App. 74.
Central Mfg. Co. v Montgomery, 144 Mo. App. 494.
Bank of Laddonia v. Bright, etc., 139 Mo. App. 110.
Parker v. Harrison, 146 Mo. App. 329.
Wilson v. Duffy, 158 Mo. App. 509.

The authorities herein cited clearly show to the active practitioner the value and availability of this form of action which can be used in a wide scope of cases. It is an action at law, which is assignable and which is of such latitude that it may embrace causes of action and remedies which might, at first flush, be considered to be cognizable in equitable proceedings only.

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