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guaranteed by the New York Constitution¹⁷ and statutes¹⁸ were needlessly sacrificed to the ends of summary law enforcement, since his arraignment as a material witness afforded the police an opportunity to keep him in custody and thereby easily obtain a confession. When officers delay in taking a defendant before a magistrate for the purpose of obtaining a confession, they are in reality violating the constitutional provision that "no courts save those provided for in this Constitution shall be established."¹⁹ It is submitted that a confession obtained by criminal means should not be introduced into evidence, thereby denying a defendant the specific protection afforded by statutes.

TORTS — WAIVER NOT PERMITTED TO EXTEND STATUTE OF LIMITATIONS WHERE LIBEL IS BASIS OF ACTION

An action was brought to recover from the defendant the proceeds of a book which allegedly libeled the plaintiff. The one year statute of limitations¹ barred an action for recovery of damages for libel. Plaintiff brought this action under the six year statute² for money had and received. *Held*, complaint dismissed. The remedy for libel does not embrace the right to waive the tort and sue in assumpsit. *Hart v. E. P. Dutton & Co.*, 93 N.Y.S.2d 871 (Sup. Ct. 1949).

In situations where an election of remedies is allowed, the effect of waiving the tort and suing in assumpsit is to make the "contract" statute of limitations applicable.³ Since the election of remedies is not granted automatically at the option of the plaintiff, the nature of the tort he chooses to waive is important. Generally, a waiver has been permitted in cases of conversion,⁴ deceit and fraud⁵ to allow recovery from the defendant for anything which had been taken from the plaintiff.⁶ Usually, however, the election is denied in negligence⁷ and trespass,⁸ especially where there has been no benefit to the defendant.

17. N.Y. CONST., Art. I, § 6.

18. N.Y. CODE OF CRIM. PROC. § 165, 395.

19. *Commonwealth v. Mayhew*, 178 S.W.2d 928, 934 (Ky. 1943).

1. N.Y. CIVIL PRACTICE ACT § 51.

2. *Id.* at § 48.

3. *Dougherty v. Norlin*, 147 Kan. 565, 78 P.2d 65 (1938). *But cf.* *Schlick v. N.Y. Dugan Bros., Inc.*, 175 Misc. 182, 22 N.Y.S.2d 238 (N.Y. City Ct. 1940).

4. *See Terry v. Munger*, 121 N.Y. 161, 24 N.E. 272 (1890).

5. *McCall v. Superior Court*, 1 Cal.2d 527, 36 P.2d 642 (1934); *Addy v. Stewart*, 69 Idaho 357, 207 P.2d 498 (1949). *But see Brevard County Bldg. & Loan v. Sumrall*, 101 Fla. 1189, 1197, 133 So. 888, 891 (1931).

6. *See Wilson v. Shrader*, 79 S.E. 1083, 1086 (W.Va. 1913).

7. *Trimming v. Howard*, 52 Idaho 412, 16 P.2d 661 (1932).

8. *Tightmeyer v. Mongold*, 20 Kan. 90 (1875).

Recovery in assumpsit is based on the obligation created by law that one person shall not enrich himself at the expense of another.⁹ So, when the plaintiff has suffered a loss, the court will grant relief in assumpsit on the fiction of an implied agreement to compensate.¹⁰ It seems that the loss suffered by the plaintiff must be tangible.¹¹ Resort to the fiction of contract will be denied where the relief asked for is damages; the sole remedy for the recovery of damages is by a suit in tort.¹² The duty of the tortfeasor to pay damages does not imply a promise upon which assumpsit may be maintained,¹³ since the individual is under no contractual duty to refrain from the commission of a tort.¹⁴

The remedy for libel had its origin in the common law form of an action on the case, where damage was the gist of the action.¹⁵ The main elements of the action are the wrongful act of the defendant and the injury to the plaintiff.¹⁶ The injury is frequently one to personality, affecting feelings and sensibilities, though it may be an injury to substance.¹⁷ An analogy has been suggested between libel and the invasion of privacy, both of which have generally been referred to as injuries personal in nature.¹⁸ The basic difference between the two is that the right to privacy concerns one's peace of mind while the right to freedom from defamation primarily affects one's reputation.¹⁹ Although the right to privacy has been treated as a personal and not a property right in most instances, it has been the basis for relief in cases involving the use of photographs on the theory of breach of an implied contract.²⁰ Similarly, equity has enjoined defamation where the resultant damage could be connected with a property interest, such as the writer's letters²¹ or a retailer's business,²² as distinguished from an injury to personal feelings.

In the principal case the elements of libel are present in the wrongful defamation by the defendant and the injury to the plaintiff's reputation. In

9. See *Miller v. Schloss*, 218 N.Y. 400, 407, 113 N.E. 337, 339 (1916).

10. RESTATEMENT, RESTITUTION, c. 7, p. 522.

11. Reese, *Waiver of Tort in Pennsylvania*, 31 DICK L. REV. 91 (1927).

12. Tightmeyer v. Mongold, *supra*.

13. Cooper v. Cooper, 147 Mass. 370, 373, 17 N.E. 892, 894 (1888).

14. Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221 (1910).

15. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 LAW Q. REV. 302, 304 (1924).

16. See *Atwater v. Morning News Co.*, 67 Conn. 504, 511, 34 Atl. 865, 866 (1896).

17. Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 641 (1916).

18. *James v. Powell*, 154 Va. 96, 152 S.E. 539 (1930) (libel); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) (privacy).

19. See *Themo v. New England Newspaper Pub. Co.*, 27 N.E.2d 753, 755 (Mass. 1940).

20. *McCreery v. Miller's Groceries Co.*, 99 Colo. 499, 64 P.2d 803 (1936); *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo. 544, 17 P.2d 535 (1932).

21. *Grisby v. Breckinridge*, 2 Bush 480 (Ky. 1867).

22. *Menard v. Houle*, 298 Mass. 546, 11 N.E.2d 436 (1937).

order to make the waiver of the remedy possible, the same facts must state a cause of action in either tort or assumpsit.²³ Here the enrichment of the defendant arising indirectly from the injury to the plaintiff does not give rise to a fictional promise implied in law to make reimbursement. Although it might be possible to find a property interest in the plaintiff's reputation, the advisability of excluding libel from the group of torts in which the plaintiff is permitted to waive the tort and substitute the fiction of a promise implied in law is further strengthened in the instant case by the statutory definition of libel as a personal injury.²⁴

It is submitted that the distinction in the cases follows the division of the two general classes of torts, designated as "property torts," implying injuries to real or personal property, and "personal torts," including injuries to the person's reputation, feelings or body²⁵—the election of remedies allowed in the case of "property torts" being further restricted by the requirement of enrichment of the defendant.²⁶

WILLS — CONSTRUCTION — ABSOLUTE OR CONTINGENT

Decedent left a holographic will stating:

Remember me W. W. Bagnall by this. If anything happens to me. While gone. All my belongings go to

The instrument was written before decedent embarked on a hunting trip, from which he returned safely and resumed his affairs until his death eighteen years later. The purported beneficiary, decedent's brother, offered the will for probate, but the will was contested by another brother who contended that the will was contingent and inadmissible. *Held*, on appeal, judgment of the appellate court reversed and that of the county probate and district courts denying the probate of the will affirmed, as the will is not operative due to the failure of the condition to occur. *Bagnall v. Bagnall*, 25 S.W.2d 401 (Texas 1949).

One of the most perplexing problems in testamentary construction relates to conditional or contingent wills. A tremendous amount of legal effort has been expended upon the subject with widely divergent conclusions which cannot be reconciled. All courts agree that whether a will is to be regarded as contingent or absolute depends upon the intention of the

23. *Cooper v. Cooper*, *supra*.

24. N.Y. GENERAL CONSTRUCTION LAW § 37-a.

25. *Mumford v. Wright*, 12 Colo. App. 214, 55 Pac. 744 (1898).

26. *Minor v. Baldrige*, 123 Cal. 187, 55 Pac. 783 (1898); *Soderlin v. Marquette Nat. Bank of Minn.*, 214 Minn. 408, 8 N.W.2d 331 (1943); *Olwell v. Nye & Nissen Co.*, 26 Wash.2d 282, 173 P.2d 652 (1947).