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UNJUST ENRICHMENT: THE APPLICABLE STATUTE OF LIMITATIONS†

VICTOR HOUSE*

The subject matter of this article is the applicable statute of limitations in certain cases where a single transaction and its aftermath may result in a variety of claims. Since the New York statutory scheme of limitations is widely followed, it is used as a base of reference in what follows.

In *Schmidt v. Merchants Despatch Transp. Co.*, Judge, later Chief Judge, Lehman stated the following rule: 2

A single wrongful act which is asserted as the basis of recovery may constitute the breach of a number of obligations of diverse nature and origin. Then it may rest with the plaintiff whether he will assert as the basis of his right to damages the breach of one or more of such obligations; and the single right to recover such damages may then be alleged in different forms, each asserting as a basis of liability the breach of some duty or obligation. Each so-called "separate and distinct cause of action" becomes in effect a "count" in the allegation of a single wrong; and whether the statute (of limitations) bars recovery under any count depends upon the nature and origin of the liability asserted in that count.

Despite a possible confusion resulting from the use of the word "damages", to which we shall hereafter refer, this would seem to be a sufficiently clear exposition of a plaintiff’s right to enforce alternative remedies sanctioned by law, with the full benefits incident to each; but Judge Lehman himself, in the same decision, injected another factor, to complicate the problem. This he termed the factor of the "very gist and essence" of the plaintiff’s cause; more recently, it has come to be referred to, quite generally, as the factor of the "real gravamen", or simply "gravamen," of the action. 5

† The author of this article was counsel for plaintiff in the case of *Bernstein v. Holland-America Line*, cited in note 14, *infra*, and in the text, page 811. The District Court decision in that case, to which the article refers, was in effect made moot on appeal (173 F. 2d 71). Although Mr. House’s position may contribute emphasis to his discussion, the Editors of QUARTERLY, whose opinion this article does not necessarily reflect, are convinced that what he has written constitutes a significant contribution to legal literature.

* Member of the New York Bar.
1 270 N. Y. 287, 200 N. E. 824 (1936).
2 Id. at 299, 200 N. E. at 826.
3 See note 36 *infra*, also text, p. 808, *infra*.
4 270 N. Y. at 300, 200 N. E. at 827.
5 Corash v. Texas Co., 264 App. Div. 292, 35 N. Y. S. 2d 334 (1st Dep’t 1942) seems to be the first New York case since *Schmidt v. Merchants Despatch Transp. Co.* to employ the word "gravamen" to express the thought involved. Concerning the Corash case see note 44 *infra*.
Thus, *Schmidt v. Merchants Despatch Transp. Co.* was an action to recover damages for a lung ailment contracted by the plaintiff from the inhalation of injurious dust particles while working in defendant's manufacturing plant. In addition to a count claiming damages resulting from defendant's negligence, governed concededly by the three-year statute of limitations, plaintiff sought alternatively, in separate counts, to recover damages caused by defendant's maintenance of a nuisance, breach of contract to provide a safe working place, fraudulent misrepresentation concerning the safety of the working conditions, and failure to comply with statutory safeguards, and contended that to each of these latter counts the six-year statute applied.

The Court of Appeals in this case held that the alleged injury to the plaintiff was a single injury, for which there could be only a single recovery; that the imposition of statutory safeguards did not create a new liability, but merely defined a degree of care to be exercised under specified circumstances, in the public interest; that the claims in form *ex contractu* were in *substance* for damages resulting from an injury caused by negligence; and that the three-year statute of limitations accordingly governed all the counts of the complaint. This ruling was consistent with prior decisions cited in its support, and has been consistently followed in negligence cases since.

Assuming the law to be thus settled in regard to the basis of recovery for personal injuries caused by negligence, we pass to claims involving property. There a quite different situation presents itself, and divergencies have developed to which this article addresses itself primarily.

In what may be termed the typical case, A wrongfully takes B's property. B may sue to recover (a) his property or (b) damages for its conversion. This is clear. It should be noted, however, that in such jurisdictions as New York, a six-year statute of limitations applies in actions for the recovery of a chattel; whereas conversion is construed to be an "injury to property," governed by a three-year statute.

Assume now that A sells B's property, retaining the proceeds. Concededly, B may sue to recover these proceeds. What statute of limitations shall govern his action?

This apparently simple question, with variations in circumstance, has vexed bench and bar and legal scholars for the past half century and more. The result has been a curiously confusing maze of often irreconcilable decisions, through which courts as well as litigants usually are required to chart an uncertain course to an unpredictable outcome.

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5a N. Y. Civ. Prac. Act § 49 (6).
7 Id. § 49 (7).
B's claim to the proceeds has been recognized to lie in *assumpsit*, a form of action equitable in origin, predicated upon a contract implied in law. Ames, tracing its history from the late 17th century, states that under the influence of Lord Mansfield, the action (in *assumpsit*, or *indebitatus assumpsit*) was so much encouraged that it became almost the universal remedy where a defendant had received money which he was "obliged by the ties of natural justice and equity to refund. . . ."

In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment. Surely it would be hard to find a better illustration of the flexibility and power of self-development of the Common Law.

These references to forms of action that the modern practitioner may be inclined to regard as archaic are relevant because contract causes of action are governed, under New York law, by a six-year statute of limitations. If B's claim at law to the proceeds of his misappropriated property is held to be a claim based upon a contract, he has six years within which to sue; if held founded upon a tort, he has only three years. The question of the "gravamen" of the claim, in such cases, accordingly may be vital.

It is the thesis of this article that recent cases purporting to confine B to the three-year statute are fundamentally wrong; that logically, as well as by proper application of the rule of *Schmidt v. Merchants Despatch Transp. Co.*, B has a choice of remedies entitling him, if he so chooses, to the benefit of the six-year statute.

* * *

In 1910 Professor Corbin wrote an article that has contributed notably, down to the present day, to the confusion affecting the subject matter of this essay. It is strange that it should have had this influence,

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8 James Barr Ames, Dean of Harvard Law School, 1895 to 1910.
10 N. Y. CIV. PRAC. ACT § 48 (1).
11 Arthur L. Corbin, Professor and Professor Emeritus at Yale Law School, 1903 to date.
12 Corbin, Waiver of Tort and Suit in Assumpsit, 19 YALE L. J. 221 (1910).
for its conclusions, far from being supported by authority, flout it, and its inconclusive logic is supported largely by Corbin's own *ipse dixits* only. Nevertheless this article has been disturbingly cited of late by high judicial authority, and hence detailed reference to it is necessary here.

Professor Corbin argued, in essence, as though the proposition were novel, that in cases of *assumpsit* or quasi-contract founded on tort, the remedy is not based on a "mutual assent" or "meeting of the minds," and thus may not be regarded as "really contractual." "Since the common law furnished a variety of actions sounding in tort," he says, "it may appear that permission to use *assumpsit* also is entirely unnecessary." He proceeds:

In all cases where a tort is waived, there is in fact no contract. The cause of action is a tort, and the tort exists as the cause of action and must be proved as the cause of action from first to last. No trick or legerdemain on the part of the plaintiff can change the tort into a contract. Neither can the law do this. The law may allow new forms of action, and may call things by new names, but it cannot turn a theft or other conversion of goods into an innocent agreement to sell and to buy. The *assumpsit* alleged in these cases is a mere fiction and is not the cause of action.

Corbin's intimation that the "variety of actions sounding in tort" afforded by the common law made "permission to use *assumpsit* also . . . entirely unnecessary" would appear to be nothing less than a stricture on legal history. Unless we are prepared to discard entirely the contributions of Lord Mansfield and his 17th century British predecessors to "the flexibility and power of self-development of the Common Law,"

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13 Without authority other than his own assertion, he describes as "wholly incorrect" and "faulty" a rule accepted by the Supreme Court of Massachusetts and by William A. Keener, Kent Professor of Law and Dean of the Faculty of Law at Columbia, 1890 to 1903. Stating (contrary to the fact, see note 15 infra) that "sometimes not even the least thought has been given" to the completely non-contractual character he attributes to the remedy in *assumpsit*, he baldly concludes that "the result is unreasonable conflict, bad logic, and bad law."

14 Loughman v. Town of Pelham, 126 F. 2d 714 (2d Cir. 1942); Bernstein v. Holland-America Line, 76 F. Supp. 335 (S. D. N. Y. 1948), reversed on other grounds, 173 F. 2d 71 (2d Cir. 1949).

15 It was not. That the remedy in *assumpsit* is not founded on a true contract was a premise generally recognized and accepted long before Corbin wrote. See text, p. 802 infra; cf. Miller v. Schloss, 218 N. Y. 400, 113 N. E. 337 (1916) and cases cited therein at 407, 113 N. E. at 339.

16 Corbin, note 12 *supra*, at 225.

17 Id. at 234.

18 See p. 799 *supra*. 
we must assume with Ames\textsuperscript{19} that the tort remedies were not adequate, and that it is one of the glories of the common law that in the interest of justice it developed \textit{indebitatus assumpsit} as a remedy for the obligations that have come to be termed "quasi-contractual." The broad foundation and scope of this remedy are well set out in \textit{Culbreath v. Culbreath}, an early decision in the Supreme Court of Georgia\textsuperscript{20} involving, it so happens, a claim in quasi-contract without tort foundation. Here, the administrator of an intestate whose nearest kin were seven surviving brothers and sisters and the children of a deceased sister, divided the estate, under a misapprehension of the law, equally between the surviving brothers and sisters, to the exclusion of the children of the deceased sister. After the latter sued the administrator and recovered one-eighth of the estate, he sued two of the distributees to recover back the amount overpaid on account of his mistake. Sustaining his plea, the court said:\textsuperscript{21}

It is difficult to say that an action for the recovery of money paid by mistake of the law, will not lie upon those principles which govern the action of \textit{assumpsit} for money had and received. Those principles are well settled, since the great case of \textit{Moses v. McFarlan}, in 2 Burrow, 1005. The grounds upon which that necessary and most benign remedy goes, are there laid down by Lord Mansfield. This claim falls within the principles there settled, and cannot be distinguished from cases which have been ruled to fall within them, but by an arbitrary exclusion. I am not now using the case of \textit{Moses v. McFarlan}, as the authority of a judgment upon the precise question made in this record; although Lord Mansfield there held, \textit{that money paid by mistake} could be recovered back in this action, without distinguishing between mistake of law and fact. I refer to it, to demonstrate what are the principles upon which the action is founded. It is not founded upon the idea of a \textit{contract}. In answer to the objection, that \textit{assumpsit} would lie only upon a contract, express or implied, Lord Mansfield said, "If the defendant be under \textit{an obligation}, from the ties of \textit{natural justice}, to refund, the law implies a debt, and gives this action, founded in the \textit{equity of the plaintiff's case}, as if it were upon a contract." Again: "One great benefit derived to a suitor from the nature of this action is, that he need not state the special circumstances from which he concludes that, \textit{ex aequo et bono}, the \textit{money received by the defendant ought to be deemed belonging to him}.

"The defendant," says his Lordship, farther, "may defend himself by everything which shows that the plaintiff, \textit{ex aequo et bono}, is not entitled to the whole of his demand, or to any part of it."

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\textsuperscript{19} See note 9 \textit{supra}.
\textsuperscript{20} 7 Ga. 64 (1849)
\textsuperscript{21} \textit{Id.} at 68.
\end{flushleft}
His summary is in the following words: "In one word, the gist of this action is, that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money."

Ames points out\(^22\) that quasi-contractual obligations may be "founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another."

Recognizing fully, moreover, the non-contractual origin of the quasi-contractual obligation, Ames long ago showed also that it lacks that affinity with the delictual that Corbin asserts for it. He says:\(^23\)

It remains to consider the development of Indebitatus Assumpsit as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ from obligations the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *ex contractu* than by our ambiguous "implied contracts."

Keener, too, recognizing as early as 1893 the fictional nature of the promise in actions in *assumpsit* to enforce non-contractual rights of action, pointed out\(^24\) the necessity of the element of unjust enrichment in the so-called "waiver of tort" cases, citing the scholarly Rapallo, J.,\(^25\) as follows:

To maintain such an action it is necessary to establish that the defendants have received money belonging to the plaintiff or to which it is entitled. *That is the fundamental fact upon which the right of action depends*. It is not sufficient to show that they have by fraud or wrongful conduct caused the plaintiff to pay money to others, or to sustain loss or damage. That is not the issue presented in this action. . . . If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money,

\(^{22}\) See note 9 *supra*, at 292.
\(^{23}\) *Ibid*.
\(^{24}\) KEENER, TREATISE ON THE LAW OF QUASI-CONTRACTS 160 (1893).
\(^{25}\) National Trust Co. v. Gleason, 77 N. Y. 400, 403, 408 (1879).
he may maintain trespass for the forcible injury, or waiving the
tort altogether he may sue for money had and received. . . . [Italics
supplied].

Keener also discerningly pointed out that "the desire to give a remedy
in *assumpsit* begot the fiction, and not the fiction the desire"; that "the
plaintiff’s right to the proceeds of property arising from a sale thereof
presupposes a *right in the property* itself, and a failure to establish such
right will be fatal to a recovery," and that it is "fallacious" to say
that "by suing in *assumpsit*, one in some mysterious way converts that
which was until then simply a tort into a contract;" that "in truth one
has an election of remedies because he has independent rights, and does
not acquire rights . . . by electing remedies." (Italics supplied.)

If more were necessary to demonstrate the inconclusiveness of Corbin’s
conclusion that the quasi-contractual obligation which the common law
permitted to be enforced by *indebitatus assumpsit* has as its *essence* a
tort foundation, we find it in ample measure in the American Law Insti-
tute’s Restatement of the Law of Restitution, which has this to say:

Actions of tort are . . . based primarily upon wrongdoing and
ordinarily, through the payment of money, compensate the injured
person for the harm suffered by him as a result of the wrongful
conduct, irrespective of the receipt of anything by the defendant.
If the defendant received nothing of value, the person who has
suffered has merely a tort remedy. . . .

. . . There are a number of differences between a tort action which,
though restitutory, is based primarily on wrongdoing, and a
quasi-contractual action in which the wrong by the defendant is
only incidental to his unjust enrichment. The common law dis-
tinctions between tort actions and the action of general assumpsit
by which quasi-contractual rights were enforced have been pre-
served in substance even in States in which there are no forms
of action. These differences between the two types of actions some-
times make it advantageous for the injured person to seek a quasi-
contractual remedy. The tort remedy, formerly at least, terminated
on the death of either of the two parties, while the action of general
assumpsit and its modern successors are unaffected by death.
Furthermore, States which do not permit a tort action to be brought
against them may permit a person to sue for restitution. Claims
based upon the receipt of benefits may be provable in bankruptcy
proceedings when claims based merely upon a wrong may not be.
The distinction between the two bases of liability may likewise be

26 *TREATISE ON THE LAW OF QUASI-CONTRACTS* 172 (1893).
27 *Id.* at 176.
of importance where a set-off is claimed, where the period for the statute of limitations differs for the two types of actions, and where an attachment or arrest is allowed for one type of action and not for the other.

More need scarcely be said to demonstrate that Professor Corbin has indulged in a considerable and misleading over-simplification in identifying quasi-contractual actions to recover for an unjust enrichment so completely with the tort ingredient frequently (but not always or necessarily) found as a constituent element of them. It were better to recognize, it would seem, that the genius of the common law here achieved a form of relief for a separate class of cases that had for their gravamen neither tort nor contract alone, but possessed attributes of each, as well as of equitable right.

A practical argument emphasizes the soundness of such a recognition. As Ames points out, the obligation in quasi-contract may be founded upon a record or upon a statutory, official or customary duty, as well as upon the doctrine of unjust enrichment. Keener cites many cases involving unjust enrichment without a tort. Corbin himself recognizes that the tort in some classes of unjust enrichment may be entirely independent of the quasi-contractual claim, and thus need not be waived in order to enforce the quasi-contractual claim. Thus, in reference to duress, he states:

The term has been used to denote violence or imprisonment, actual or threatened, sufficient to render voidable a contract otherwise valid. Where such violence or imprisonment amounts to a tort, it is doubtful whether a suit in *assumpsit* to recover money obtained by the *duress*, would amount to a waiver of the tort at all. It could not be such a waiver where the violence was toward a third person, some near relative of the person whose will was overpowered. An action of *assumpsit* by the latter would be quite consistent with the contemporaneous action of trespass by the third person. Further, it does not appear that they would be inconsistent if maintained at the same time by the same person.

Corbin, thus, distinguishes *assumpsit* in duress cases from *assumpsit* arising from other categories of wrongs, where a “waiver of the tort is a prerequisite to the quasi-contractual action.”

If we are to follow Corbin, then, it would seem that quasi-contractual obligations would have to be subdivided into categories, some founded on tort, some not; some predicated in logic on waiver of the tort, others

29 Ames, op. cit. supra, note 9 at 292.
30 E.g., Culbreath v. Culbreath, note 20 supra.
31 Corbin, supra, note 12 at 230.
not. Obviously, the same reason does not exist for classifying the latter categories as essentially tort claims as exists, according to Corbin, for so classifying the former. The foundation on which Corbin predicates tort treatment for quasi-contractual claims is thus undermined so far as regards large categories of such claims. Corbin neither suggests how, practically, to distinguish the categories, nor justifies their like treatment. Thus, failing to recognize the quasi-contractual obligation as founding a distinct character of claim, in substance differing from both tort and contract, he contributes to that very "confusion of thought" that he attributes to others.\textsuperscript{32}

It is submitted that Corbin reaches by specious reasoning his conclusion that quasi-contractual claims arising from wrongful takings of property, and involving an election to proceed in quasi-contract, rather than to claim damages in tort, are nevertheless essentially tort claims in character.\textsuperscript{33} The wrongful taking is an element in the quasi-contractual claim, and not, as Corbin would have it, "the cause of action." Where A wrongfully takes B's property, B's right to his own property is in logic the basis of his claim for its restoration to his possession; A's wrong is an element of B's claim, rather than its sole foundation; though that wrong might well serve as the sole foundation of a claim for damages for a trespass.\textsuperscript{34} And if A disposes of B's property, B's claim for its proceeds has as its foundation B's right to the proceeds of his own property,\textsuperscript{35} A's wrong being merely an element of B's claim,—an element perhaps independently actionable as a tort but, where B elects to sue not for damages, but in quasi-contract for the proceeds, not "the cause of action from first to last," as Corbin would have it.\textsuperscript{36}

* * *

Having the foregoing in mind, we come to Corbin's conclusions relative to the subject matter of this article, the statute of limitations properly applicable to quasi-contractual claims. Corbin says on this score:\textsuperscript{37}

Statutes of limitation very generally fix one period of time as "sufficient" to bar an action on a contract, and a different period of time to bar an action for a tort. In case a tort is waived and suit brought in assumpsit, which period applies? Of course the intention of the legislature should control, but unfortunately the legislature usually has no intention, and the meaning of the law

\textsuperscript{32} Ibid.

\textsuperscript{33} Id. at 234.

\textsuperscript{34} Cf. text referred to in notes 25, 27, 28 supra.


\textsuperscript{36} Ibid. It should be noted that "damages" recoverable in tort are unliquidated, whereas in assumpsit, as in true contract, the claim is for an ascertainable, fixed amount.

\textsuperscript{37} Corbin, supra, note 12 at 234.
must be determined by the reasonable construction of the words. The statutory words may mean "after the existence of a cause of action," or they may mean "after the availability of a form of action." If the words have the latter meaning, no difficulty will arise, and the right to sue in assumpsit will be barred after the number of years specifically allowed for actions of assumpsit. However, statutes are not usually so worded as to refer to forms of action; they usually classify cases according to the cause of action. Perhaps no difficulty should arise in construing this sort of a statute either, but difficulties have arisen.

Before proceeding to the illustration Corbin gives of these "difficulties," it is proper to point out, first, that Corbin here begs the question, for he assumes assumpsit in the class of cases mentioned to be merely a "form" of action, without distinctive substance to constitute it what he terms a "cause of action,"—an assumption negatived by the foregoing analysis and supported by no authority other than Corbin's own assertion; second, that after denying intention on the part of legislatures, Corbin resorts to semantics, mere word play, to attribute to their statutes the intention for which he contends. The "usual classification" of cases according to "causes" of action may as readily be construed to depend on the form as on the substance; but whichever construction one adopts, we have still the begged question whether assumpsit is merely a "form" of action, or in truth is what Corbin terms a "cause" of action. It is pertinent to quote the observation on this score of the New York Court of Appeals:

Where a statute regulates causes of action based upon contract, definition of the scope of the statute should perhaps be wide enough to include the entire field where at common law remedy for a wrong might be sought by action which even in form was based on contract. . . . Refinement of definition may introduce undesirable technicality into the administration of justice not intended by the legislature.

The illustration which Corbin utilizes to illustrate "difficulties" that "have arisen" in construing his "sort of a statute" illustrates, rather, the difficulties consequent on his own reasoning. He says:

Suppose a statute limits actions for damages for a tort to three years after the commission of the tort, and actions on contracts to six years after the accrual of the cause of action. Then if B converts A's chattel in 1900, sells it to C in 1901, and receives the price from C in 1902, how soon is A's remedy barred by the statute? It is clear that A could sue in trespass, trover, or replevin no later than 1903. But it has been held that A could sue B in a count for

38 Kittredge v. Grammis, 244 N. Y. 182, 189, 155 N. E. 93, 95 (1926).
39 Corbin, supra, note 12 at 234.
goods sold, as late as 1906; and in a count for money had and received, as late as 1908. The reason has been given thus: "since to maintain an action for money had and received in this class of cases, the plaintiff must prove the receipt of money by the defendant as well as a wrongful conversion, his cause of action does not arise until the receipt of the proceeds of the sale; and therefore the \textit{statute of limitations} begins to run only from that time." Professor Keener adds a limitation to the above rule to the effect that if B should keep A's chattel until 1904 and then sell it for money, A could not sue in \textit{assumpsit} for that money. This limitation has been sustained in one excellent decision (Currier v. Studley, 159 Mass. 12) and this writer has no quarrel with it. But it is submitted that the rule which it limits is wholly incorrect, and that the decisions sustaining the rule are faulty unless they can be justified by the peculiar wording of the particular statute to be applied. A's right to sue in \textit{assumpsit} should be barred at the same time as is his right to sue in a tort action.

In New York, however,—unhappily for Corbin's argument,—the period for an action for the recovery of a chattel,—the statutory equivalent of replevin, one of Corbin's "variety of actions sounding in tort,"—is six years. The New York action "to recover damages for an injury to property,"—the statutory equivalent of trespass or trover,—remains governed by a three-year statute of limitations. Assuming Corbin's premises, which of these two tort periods would he prescribe for \textit{assumpsit}?

* * *

It should by now be evident that, viewed from any of several angles, Corbin's contribution serves to confuse, and not to clarify, the underlying question; that his theses do not withstand analysis, and if adopted multiply rather than eliminate perplexities.

Thus, if we were to adopt in New York now the three-year "injury to property" statute as the statute of limitations governing \textit{assumpsit}, a premium would promptly be placed on the early disposition of wrongfully appropriated property by the taker; for if he retained the property, its owner would have six years within which to proceed for its recovery, whereas if he parted with it, the owner's right to claim its proceeds would be pared down to three years. Thus, the tortfeasor would have it in his own power, by compounding his original wrong, to secure the benefit of a shorter statute of limitations. This would seem contrary to fundamental legal concepts.\footnote{\cite{40} N. Y. Civ. Prac. Act § 48 (1). \cite{41} Id. § 49 (7). \cite{42} Cf. U. S. v. Whited and Wheless, 246 U. S. 552, 564 (1918); Ganley v. Troy City National Bank, 98 N. Y. 487 (1885).}
The confusions and perplexities above indicated are all avoided by recognizing the quasi-contractual obligation as the basis of a right founded upon neither tort nor contract alone, but having elements of kinship to each, as well as to equity, and by decreeing for its enforcement either a distinct statute of limitations or else definitely classifying it,—as for historical as well as practical reasons seems completely appropriate,—with contract. The latter course has been adopted in New York. Thus, in Gottfried v. Gottfried, the court declared:

Money had and received is a form of remedy resting on the theory of implied contract. It arises upon "... an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which \textit{ex aequo et bono} belongs to another. ... Where credit has been obtained it may be the equivalent of money, and if property is taken and converted into money, it is deemed a like equivalent...." As was said in Wood on Limitations, § 57b, p. 203: "... Where the complaint will support an action in form either \textit{ex contractu} or \textit{ex delicto}, and the former is not barred, relief will not be denied, though the action would be barred if treated as in form \textit{ex delicto}.

Other recent New York cases have reiterated the rule in a variety of circumstances. In at least two of these, the distinction between "damages" recoverable in conversion and other tort actions and amounts claimed in \textit{assumpsit} as moneys had and received to which the plaintiff is specifically entitled, is clearly stated. The language of the New York statutes, Corbin to the possible contrary notwithstanding, would seem to bear out a legislative recognition of an intention to draw the distinction, as one of substance as well as form. For many years prior to 1936, the six-year statute of limitations in New York governed not

\textit{43} 269 App. Div. 413, 56 N. Y. S. 2d 50 (1st Dep't 1945).
\textit{44} Id. at 418, 422, 56 N. Y. S. 2d at 56, 59. At page 422, the court in the Gottfried case distinguished Corash v. Texas Co., note 5 supra, saying that there "the action was by a stockholder of a subsidiary corporation to recover in its behalf and in behalf of the parent company, from various directors and officers damages growing out of the transfer of certain oil and mineral rights as well as for rescission;" \textit{i.e.}, that the action was not one in assumpsit.
\textit{46} Fidelity and Deposit Co. of Md. v. Regan and Gidden v. Chase National Bank, note 45 supra.
only "an action upon a contract obligation or liability express or implied," but also "an action to recover damages for an injury to property." In that year, the legislature changed the period of the latter action to three years, but specifically excepted cases "where a different period is expressly prescribed." Had its intention been to omit contracts implied in law, and to confine the six-year contract limitation period to express contracts and contracts "implied in fact" only, an amendment of the contract statute of limitations so to provide might reasonably be looked for. None was made, and the contract statute of limitations remains as it was prior to 1936. Furthermore, the New York General Construction Law defines injury to property as "an actionable act, whereby the estate of another is lessened, other than a personal injury or the breach of a contract." Accepting conversion as constituting, under the authorities, an "injury to property," New York's highest court in 1926 negatived any legislative intention to limit the term "contract" to exclude contracts implied in law, and the legislature's failure to enact such an exclusion at the time of the 1936 amendment referred to would appear to confirm its recognition of the right to claim the proceeds of a conversion within the contract statute of limitations period.

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Professor Corbin's reasoning and conclusions in his dissertation of forty years ago are not of merely theoretical interest. By a strange perversity, the road that Keener and Ames charted so clearly long before Corbin wrote has been by-passed of late in two federal decisions in New York that have taken instead the path that Corbin essayed in his comparative youth, but interestingly enough appears never to have resurveyed later. No other authority is cited or has been discovered by the writer to justify this digression, and the resuscitation of Corbin's illogic from the limbo of the years in these recent federal decisions appears somewhat of a judicial reaching out to substitute limitations for adjudication of the merits as a basis of legal decision: a reaching-out that does little to commend the law as an instrumentality of justice.

In the first of these decisions, *Loughman v. Town of Pelham*, the

48 Id., § 48 (3), prior to the 1936 amendment.
49 Id., § 49 (7).
50 Id., § 25-a.
52 Kittredge v. Grannis, note 38 *supra*.
53 126 F. 2d 714 (2d Cir. 1942).
Court of Appeals for the Second Circuit had as the "precise question" before it whether in an action in *assumpsit* for the proceeds of converted property the statutory period could be extended to commence on the date of the converter's receipt of the proceeds, rather than on the date of the original conversion. The merits of relating back the *assumpsit* action to the date of the original conversion, as against advancing it to commence with the date of the converter's receipt of the proceeds, will not be treated here; there is something to be said for either view, and practical considerations for perhaps favoring the former, as the court in the *Loughman* case did. It went further, however, and included in its opinion the following dictum:  

In the case at bar, the gist of the action is conversion, even though the form is *assumpsit* for money received. The plaintiff has suffered but a single wrong, for which there can be but one recovery and one satisfaction. The statute of limitations is a statute of repose. . . . In the light of this policy as exemplified in the decisions, we believe the law of New York to be that if the statute of limitations has run against an action sounding in tort for conversion, the plaintiff is also barred from bringing an action sounding in *assumpsit* based on a subsequent sale of the converted property.

The conversion period of limitation applicable in the *Loughman* case, it should be noted, was identical with the six-year contract period of limitation; the 1936 amendment prescribing three years as the limitation period for conversion (i.e., "injury to property") actions in New York was held inapplicable to the "existing" cause of action there. Thus, but for the quoted dictum, the *Loughman* case would not be germane to the subject matter of this article. The dictum relies expressly upon Corbin's 1910 article and its reasoning, and is demonstrably wrong in its every premise. As we have seen, the gist of the action in *assumpsit* for the proceeds of converted property is not conversion, but the plaintiff's right to the proceeds of his own property. A "single wrong" may beget several *independent rights*, even though only "one recovery and one satisfaction" may be had. Though in New York the statute of limitations has run against "an action sounding in tort for conversion," it may not have run to bar "an action to recover a chattel," and therefore should not bar an action to recover the proceeds of that chattel. Finally, as shown, the law of New York, con-

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54 *Id.* at 719.
55 *Id.* at 718 and note thereto.
57 See notes 43 and 45 supra; cf. also Miller v. Schloss, 218 N. Y. 400, 407, 113 N. E. 337, 339 (1916); Kittredge v. Grannis, 244 N. Y. 182, 188-9, 155 N. E. 93, 95 (1926).
trary to the belief expressed by the federal court in the *Loughman* case, recognizes *assumpsit* as an independent right of action governed by the contract statute of limitations; in one of the New York cases cited, the *Loughman* case, expressly referred to in a dissenting opinion, was repudiated by the majority decision.

Nevertheless, in 1948, a federal district court, following the *Loughman* case, disregarded the "rules of decision" principle applicable to federal courts in civil actions, which requires them to accept state law as pronounced by the courts of the state of their situs. In this 1948 case, *Bernstein v. Holland-America Line*, Corbin's 1910 article is largely relied on, and is clearly the genesis of a conclusion in support of which the District Court otherwise cited, in addition to the *Loughman* case, New York cases falling into two entirely different categories: first, cases of personal injury caused by negligence, heretofore distinguished; second, cases where the legal remedy was adequate, but a concurrent equitable remedy was sought in order to take advantage of its longer statute of limitations, or fraud allegations that were clearly surplusage were sought to be introduced for the same purpose. The issue here discussed, of "independent rights" arising from the same transaction, and involving an "election of remedies," arose in none of them.

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58 Wagner v. Armsby, note 45 *supra*.
60 76 F. Supp. 335 (S. D. N. Y. 1948); cf. note 14 *supra*.
61 P. 798 *supra*; see also RESTATEMENT, RESTITUTION, note 28 *supra*.
62 See note 27 *supra*; cf. RESTATEMENT, RESTITUTION, c. 7, INTRODUCTORY NOTE: "The election to bring an action of assumpsit is not, however, a waiver of a tort but is a choice of one of two alternative remedies."