

Why you want to put a NOTICE FOR SALE on your car or truck.

ASSUMPSIT

5 Cal Jur 2d, p. 656

C. ELECTION TO WAIVE TORT AND SUE ON IMPLIED CONTRACT

§11. In General. - Under certain circumstances, a person having an action in tort against any wrongdoer may elect to waive the tort and proceed instead on a contract implied by law on the part of the tortfeasor to pay a just remuneration for the damage sustained by the plaintiff. For example, where one person steals the property of another, the owner may treat the theft as a contract of sale and sue on a factitious promise to pay the value of the property. The implied contract arises independent of any contractual relationship between the parties.

Because of the peculiar nature of the contract between parties in some situations, as between a passenger and a carrier, a special duty is superimposed, the violation of which constitutes a tort. The passenger may sue the carrier either in contract for breach of agreement of carriage or in tort for failure to perform its duty. His election to proceed in the contractual action may be termed waiver of tort and suit in assumpsit but is actually a choice between available remedies. Similarly, violation by a bailee of his duty to exercise appropriate care for the preservation and safety of property entrusted to him may be regarded either as a tort or as a breach of an implied condition of his contract. Of course, where the bailee's acts amount to a conversion, the plaintiff may waive the tort and sue for the value of the converted property on the basis of goods sold and not delivered, in which case his action is on a contract implied by law arising upon a waiver of tort.

§12. Where Personal Property Is Converted. - The rule allowing the plaintiff to waive a tort and sue in assumpsit applies to cases involving conversion of personal property. The right of the owner to waive the tort and sue in assumpsit is not limited, as in some jurisdictions, to those cases where the wrongdoer has sold the property or otherwise converted it into money and recovery of the proceeds is sought. The owner may sue for the value of the property converted by proceeding in assumpsit as for goods sold and delivered. The basis of recovery is that he consents to the taking of his property and affirms the act of the wrongdoer. He treats it as a sale, and may recover the value due him as under a contract of sale. This doctrine, however, does not operate to give a person defrauded in an exchange of properties any action on an implied contract for sale of the property surrendered to the wrongdoer at an agreed price. As long as the plaintiff relies on the transfer as one made pursuant to contract, the only consideration to which the defendant may be held is that agreed upon in the express contract.