

Chapter 82

Interest and Usury

Chapter 82

NOTES OF DECISIONS

1. In general

The usury law of 1862 was constitutional. *Chapman v. State*, (1875) 5 Or 432.

The repeal of a usury statute without a savings clause takes away the remedy provided, even as to previous contracts. (*Alaska*) *Petterson v. Berry*, (1903) 60 CCA 610, 125 Fed 902.

Interest statutes are in derogation of the common law and must be strictly construed. *Holtz v. Olds*, (1917) 84 Or 567, 164 P 583, 1184. But see *In re Pittock*, (1876) 2 Sawy 416, Fed Cas No. 11,189.

2. Governmental subdivisions

The state or a county cannot be compelled to pay interest on its debts without its consent. *Seton v. Hoyt*, (1899) 34 Or 266, 55 P 967, 75 Am St Rep 641, 43 LRA 634; *Shipley v. Hachaney*, (1899) 34 Or 303, 55 P 971; *Monteith v. Parker*, (1899) 36 Or 170, 175, 59 P 192, 78 Am St Rep 768; *Young v. State*, (1900) 36 Or 417, 428, 59 P 812, 60 P 711, 47 LRA 548.

The liability of a city for interest on its debts is the same as that of an individual. *Shipley v. Hachaney*, (1899) 34 Or 303, 55 P 971; *Monteith v. Parker*, (1899) 36 Or 170, 59 P 192.

The United States is not liable for interest except where it assumes the liability by contract or by the express words of a statute or must pay it as part of the just compensation required by the constitution. *Huntley v. So. Ore. Sales*, (1939) 104 F2d 153.

LAW REVIEW CITATIONS: 14 OLR 218; 17 OLR 51; 49 OLR 425.

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NOTES OF DECISIONS

1. In general

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1. In general

In the absence of a contract to pay interest the right to exact it must be found in the statute. *Sorenson v. Ore. Power Co.*, (1905) 47 Or 24, 34, 82 P 10; *Richardson v. Inv. Co.*, (1913) 66 Or 353, 133 P 773; *Sargent v. Am. Bank and*

Trust Co., (1916) 80 Or 16, 154 P 759, 156 P 431; *Holtz v. Olds*, (1917) 84 Or 567, 164 P 583, 1184; *Seaside v. Ore. Sur. & Cas. Co.*, (1918) 87 Or 624, 171 P 396.

This section in mentioning a certain category of transactions in which interest may be allowed excludes all others. *Carnahan Mfg. Co. v. Beebe-Bowles Co.*, (1916) 80 Or 124, 156 P 584; *Looney v. Sears*, (1920) 94 Or 690, 185 P 925, 186 P 548.

Interest may be computed on a lienable demand and a lien awarded for the entire amount. *Willamette Falls Trans. & Milling Co. v. Riley*, (1855) 1 Or 183.

The usury law of 1862 was constitutional. *Chapman v. State*, (1875) 5 Or 432.

It is error to allow interest in excess of the legal rate. *Bremer & Co. v. Fleckenstein & Meyer*, (1881) 9 Or 266.

Prior to 1862 there was no law regulating interest and none was recoverable except where there was a special contract to that effect. *Parkhurst v. Hosford*, (1884) 21 Fed 827.

Where there is a contract to pay interest and no rate is specified this section governs. *Duffy v. McMahon*, (1897) 30 Or 306, 47 P 787.

A justice's court, being limited to claims not exceeding \$250, has no jurisdiction to give interest antedating the judgment when the amount awarded is \$250. *Ferguson v. Reiger*, (1903) 43 Or 505, 73 P 1040.

Interest statutes are in derogation of the common law and must be strictly construed. *Holtz v. Olds*, (1917) 84 Or 567, 164 P 583, 1184. But see *In re Pittock*, (1876) 2 Sawy 416, Fed Cas No. 11,189.

Interest, if not expressed in the agreement, is due only if provided by this section. *Dowling v. Albany Planing Mill, Inc.*, (1964) 238 Or 425, 395 P2d 143.

Nothing in this section requires the accrual of interest on sums not yet due. *United Farm Agency v. McFarland*, (1966) 243 Or 124, 411 P2d 1017.

Where defendant is restrained by an injunction from using money in his possession, interest will not be decreed against him. *Osborn v. Bank of United States*, (1824) 22 US 738, 6 L Ed 204.

The interest plaintiff was required to pay to a third party as a result of defendant's breach of contract was a proper element of damages. *Gordon v. Curtis Bros.*, (1926) 119 Or 55, 248 P 158.

In action for refund of taxes paid on additional assessment of merchandise stock in trade, taxpayer was entitled to interest on refund of taxes paid under protest. *Case v. Chambers*, (1957) 210 Or 680, 314 P2d 256.

This section required payment of interest by state where taxes not legally due were paid under protest. *Id.*

2. Interest "on all moneys after they become due"

A contract to deliver building material of a certain value does not bear interest upon default. *Poppleton v. Jones*, (1902) 42 Or 24, 69 P 919.

This section applies to balances due on corporate subscriptions. *Mountain Timber Co. v. Case*, (1913) 65 Or 417, 133 P 92.

Where a joint indorser paid a note in full after maturity

he could recover from a coindorser his proportionate part plus interest. *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422.

(1) **When interest begins generally.** Interest on unliquidated damages does not begin to run until judgment. *Smith v. Turner*, (1898) 33 Or 379, 54 P 166; *Sorenson v. Ore. Power Co.*, (1905) 47 Or 24, 82 P 10; *Richardson v. Inv. Co.*, (1913) 66 Or 353, 133 P 773.

When the right to recover is in good faith denied, interest will not be allowed on the claim prior to judgment. *Baker County v. Huntington*, (1906) 48 Or 593, 87 P 1036; *Sargent v. Am. Bank and Trust Co.*, (1916) 80 Or 16, 154 P 759, 156 P 431.

In a purchaser's suit for rescission for fraud, interest is allowable only from the date of the decree. *Copeland v. Tweedle*, (1912) 61 Or 303, 122 P 302; *Boyer v. Edgemont Inv. Co.*, (1931) 135 Or 161, 295 P 471.

Unpaid instalments on subscriptions to corporate stock bear interest from the date they become due. *Hawkins v. Citizen's Inv. Co.*, (1901) 38 Or 544, 64 P 320.

Call depositors are entitled to interest on their claims against an insolvent bank from the time of the allowance thereof by the court. *Baker v. Williams Banking Co.*, (1902) 42 Or 213, 70 P 711.

Where a grantor collects rental to which the grantee is entitled, interest runs on the amount from the date of the collection. *Winn v. Taylor*, (1921) 98 Or 556, 190 P 342, 194 P 857.

Interest was recoverable upon each instalment of rent from its maturity. *May Stores, Inc. v. Bishop*, (1930) 131 Or 670, 282 P 1080.

Interest is not payable prior to maturity on a note which by its terms specifies that interest is to begin at the date of maturity. *Union Cent. Life Ins. Co. v. LaFollette*, (1935) 150 Or 455, 44 P2d 165.

Prejudgment interest may be awarded if: (1) the exact pecuniary amount is ascertained or ascertainable by simple computation, or by reference to generally recognized standards, such as market price, and (2) a time of definite default is ascertainable. *Soderhamn Mach. Mfg. Co. v. Martin Bros. Container & Tbr. Prod. Corp.*, (1969) 415 F2d 1058.

Interest was recoverable upon insurance benefits from the date they were due. *Watson v. Pac. Mut. Life Ins. Co.*, (1933) 144 Or 413, 21 P2d 201, 25 P2d 162; *Security Sav. & Trust Co. v. Commercial Cas. Ins. Co.*, (1934) 147 Or 193, 32 P2d 582.

Where plaintiff sued for the balance of the contract price for the construction of a sidewalk, he could not recover interest for the period prior to the judgment. *Richardson v. Inv. Co.*, (1913) 66 Or 353, 133 P 773.

Where notes were given in settlement of an account the account did not become due and payable until the notes matured. *Hammer v. Campbell Gas Burner Co.*, (1914) 74 Or 126, 144 P 396.

On an official bond of a defaulting city treasurer not stipulating for interest, there could be no recovery of interest until after judgment. *Seaside v. Ore. Sur. & Cas. Co.*, (1918) 87 Or 624, 171 P 396.

By the terms of this section wages earned by plaintiff became due when he was discharged. *Carlson v. New Amsterdam Cas. Co.*, (1926) 118 Or 542, 247 P 804.

Where county's contested award to road contractor was insufficient, he was entitled to interest on balance due from date award was payable. *North Pac. Constr. Co. v. Wallowa County*, (1926) 119 Or 565, 249 P 1100.

Where plaintiff was allowed to recover for reasonable value of services rendered and the proof showed a contract for a specific amount, he was entitled to interest from date services were rendered. *Hill v. Wilson*, (1928) 123 Or 193, 261 P 422.

Where money due on claim for breach of contract was to be ascertained and payable on a specific date, interest

was allowable from that date. *Northern Pac. Ry. v. Twohy Bros. Co.*, (1938) 95 F2d 220.

Interest was allowed on an award for breach of contract from the date of the breach where the only controversy was which provision of the contract fixed amount due. *Id.*

Where the exact amount of unliquidated damages for breach of contract was ascertainable by simple computation or reference to generally recognized standards, interest was allowed from the date of breach. *Public Market Co. v. Portland*, (1943) 171 Or 522, 130 P2d 624, 138 P2d 916.

Interest on a claim based on an implied promise to pay the reasonable value of services rendered was not allowed until after judgment. *Tracy v. Pioneer Trust Co.*, (1944) 175 Or 28, 149 P2d 980, 151 P2d 459.

Interest was allowed on claim against decedent's estate from the time the claim was filed with executor. *Richter v. Ritchie*, (1947) 181 Or 360, 175 P2d 997, 181 P2d 133, 182 P2d 378.

Plaintiff was not entitled to interest for unliquidated tortious damages prior to judgment. *Calcagno v. Holcomb*, (1947) 181 Or 603, 185 P2d 251.

The rule relative to the recovery of interest on unliquidated damages for breach of contract was never intended to apply to tort actions for unliquidated damages. *Id.*

In an action seeking specific performance, an award of interest from date of possession, rather than from date of default of vendee, accorded with equity observance of the position assumed by the parties as well as contractual rights. *Bembridge v. Miller*, (1963) 235 Or 396, 385 P2d 172.

The amount due was not ascertained or ascertainable until the date of the arbitration award. *Lundgren v. Freeman*, (1962) 307 F2d 104.

Court's allowance of six percent interest from the date of default in mortgage foreclosure action was proper under this section. *Lenske v. Steinberg*, (1969) 415 F2d 711.

Attorney, who at her request paid property taxes on client's property to avoid a tax foreclosure, was entitled to interest from the date taxes were paid. *Sandblast v. Williams*, (1969) 254 Or 395, 460 P2d 1014.

(2) **Interest after demand for payment.** Under a contract for the sale of property to be paid for on demand, interest begins to run from the time such demand is made. *Savage v. Salem Mills Co.*, (1906) 48 Or 1, 85 P 69, 10 Ann Cas 1065.

Interest was allowed from date of demand notwithstanding the right to recover the money was denied in good faith. *Gellert v. Bank of Calif., Nat. Assn.*, (1923) 107 Or 162, 214 P 377.

A surety could not be charged with interest until the amount of loss had been determined and a demand made therefor. *Title & Trust Co. v. United States Fid. & Guar. Co.*, (1932) 138 Or 467, 1 P2d 1100, 7 P2d 805.

3. "Open account"

If a balance is never ascertained on mutual accounts, interest is not allowable. *Catlin v. Knott*, (1868) 2 Or 321; *Pengra v. Wheeler*, (1893) 24 Or 532, 34 P 354, 21 LRA 726; *Raski v. Wise*, (1910) 56 Or 72, 107 P 984.

Interest is allowable on a matured account with the balance ascertained. *Coleman v. Elmore*, (1887) 12 Sawy 463, 31 Fed 391.

A contractor's surety is liable for interest on amount due the materialmen from the date of settlement. *Pendleton v. Jeffery & Bufton*, (1920) 95 Or 447, 188 P 176.

4. Judgments, decrees and verdicts

(1) **In general.** A counterclaim for unliquidated damages in an action on a note cuts off the interest on the note only from the verdict, unless damages are previously liquidated. *Smith v. Turner*, (1898) 33 Or 379, 381, 54 P 166.

An order directing that certain claims against an insolvent estate be allowed as presented is not a "judgment"

within the meaning of this section. *Baker v. Williams Banking Co.*, (1902) 42 Or 213, 70 P 711.

The addition of interest to a judgment entered pursuant to a mandate of the Supreme Court not mentioning interest is not erroneous. *Wolfgang v. Henry Thiele Catering Co.*, (1932) 141 Or 280, 17 P2d 313.

Interest for delay in satisfying a judgment is determined by the law of the place where the judgment was rendered. *Kern v. Fletcher*, (1944) 174 Or 87, 147 P2d 498.

This section applies to judgments in rem determining ownership of interpleaded funds. *Western Bank v. Morrill*, (1967) 246 Or 88, 424 P2d 243.

Where a delay between the verdict and judgment was caused by defendant's motion for a new trial, plaintiff was entitled to interest on the verdict. *Dowell v. Griswold*, (1877) 5 Sawy 23, Fed Cas No. 4,040.

Where there is an affirmance of a judgment on appeal the mandate should not direct the lower court to include in the judgment interest on the amount of interest due when the judgment was first rendered. *Brauer v. Portland*, (1899) 35 Or 471, 58 P 861, 59 P 117, 60 P 379.

Where judgment was modified plaintiff was entitled to interest on amount of judgment for unliquidated damages only from date of determination on petition for rehearing. *Compton v. Hammond Lbr. Co.*, (1936) 154 Or 650, 61 P2d 1257.

Where judgment was affirmed without modification on petition for rehearing, interest was allowable on amount of judgment from date of judgment in trial court and interest on costs allowed by circuit court from date of judgment of that court. Id.

(2) **On contracts bearing more than six percent interest.** It is presumed on appeal that a judgment providing for 10 percent interest was rendered upon a contract bearing 10 percent interest. *Duffy v. McMahon*, (1897) 30 Or 306, 47 P 787.

A provision for higher interest after maturity, which is still less than the highest legal rate, is for liquidated damages and is enforceable. *Close v. Riddle*, (1902) 40 Or 592, 67 P 932, 91 Am St Rep 580.

This section is inapplicable where the contract provides for less than six percent per annum interest. *Portland v. State Bank*, (1923) 107 Or 267, 214 P 813.

When the litigation involves a definite sum, the Supreme Court has the power to order that interest be paid from the due date of the debt when they reverse a judgment in favor of the debtor. *Weiss v. Gumbert*, (1951) 191 Or 119, 227 P2d 812, 228 P2d 800.

Ore. Const. Art. VII, §3 authorized the Supreme Court to issue a judgment nunc pro tunc, when they reverse the decision of the trial court, and to order the payment of interest from the date that the lower court initially entered judgment. *Gow v. Multnomah Hotel Inc.*, (1951) 191 Or 45, 224 P2d 552, 228 P2d 791.

5. "Money received to the use of another"

When the statute speaks of the consent of the owner it necessarily signifies that some person other than the holder of the money is in fact, and not by reason of a fiction, the owner. *Holtz v. Olds*, (1917) 84 Or 567, 580, 164 P 583, 1184.

Mortgagee refusing to pay owner excess of that required to satisfy the foreclosure decree is liable for interest. *Meade v. Churchill*, (1921) 100 Or 701, 197 P 1078.

Interest was allowed from the time money was received to the use of another and not from the date of the demand. *Graham v. Merchant*, (1903) 43 Or 294, 72 P 1088.

On money deposited as security for the purchase of stock under a void contract, plaintiffs were not entitled to interest. *Holtz v. Olds*, (1917) 84 Or 567, 580, 164 P 583, 1184.

This section was not applicable where the record owner who had redeemed from a tax sale paid taxes on land in

the adverse possession of another. *Looney v. Sears*, (1920) 94 Or 690, 185 P 925, 186 P 548.

6. "Where there is a contract to pay interest"

A stipulation for the payment of an increased rate of interest after maturity is enforceable. *Law Trust Socy. v. Hogue*, (1901) 37 Or 544, 62 P 380, 63 P 690; *Close v. Riddle*, (1902) 40 Or 592, 67 P 932; *Union Cent. Life Ins. Co. v. LaFollette*, (1935) 150 Or 455, 44 P2d 165.

Money deposited at two percent interest bears interest at six percent after it becomes due for payment. *Portland v. State Bank*, (1923) 107 Or 267, 214 P 813.

Where a contract does not specify the rate of interest but fixes the interest at a lump sum, subsection (5) governs. *Prudential Sav. & Loan Assn. v. Stevens*, (1933) 144 Or 298, 14 P2d 296, 23 P2d 901.

Interest notes drew interest at the agreed rate from the date of maturity. *New England Mtg. Sec. Co. v. Vader*, (1886) 28 Fed 265.

Where a loan contract specified the rate of interest and other charges which rendered the loan usurious, the lender could recover only the interest contracted for and not the highest legal rate. *Hubert v. Wash. Inv. Assn.*, (1903) 42 Or 71, 71 P 64.

Where a guarantor thereof paid a note which provided for eight percent interest he could recover only six percent interest from the date of payment. *Noble v. Beeman-Spaulling-Woodward Co.*, (1913) 65 Or 93, 131 P 1006.

(1) **No more than 10 percent per annum.** Ten percent interest per annum is the highest rate allowed by law in this state. *Beach v. Guar. Sav. Assn.*, (1904) 44 Or 530, 76 P 16; *Anderson v. Griffith*, (1908) 51 Or 116, 93 P 934.

An agreement to pay eight percent per annum on deferred instalments of a note, 10 percent having been deducted in advance, was not in violation of this section. *Burkitt v. Vail*, (1922) 106 Or 41, 210 P 861.

7. Application to governmental subdivisions

The state or a county cannot be compelled to pay interest on its debts without its consent. *Seton v. Hoyt*, (1899) 34 Or 266, 55 P 967, 75 Am St Rep 641, 43 LRA 634; *Shiple v. Hacheny*, (1899) 34 Or 303, 55 P 971; *Monteith v. Parker*, (1899) 36 Or 170, 175, 59 P 192, 78 Am St Rep 768; *Young v. State*, (1900) 36 Or 417, 428, 59 P 812, 60 P 711, 47 LRA 548.

The liability of a city for interest on its debts is the same as that of an individual. *Shiple v. Hacheny*, (1899) 34 Or 303, 55 P 971; *Monteith v. Parker*, (1899) 36 Or 170, 59 P 192.

Interest is not allowed upon the recovery by the state from a county of a balance of unpaid taxes. *State v. Multnomah County*, (1886) 13 Or 287, 10 P 635.

The United States is not liable for interest except where it assumes the liability by contract or by the express words of a statute or must pay it as part of the just compensation required by the United States Constitution. *Huntley v. So. Ore. Sales*, (1939) 104 F2d 153.

8. Effect of statutory change of legal rate

The rate on county or city warrants is that prevailing at the date of indorsement and cannot afterwards be reduced by the legislature. *Seton v. Hoyt*, (1899) 34 Or 266, 55 P 967, 43 LRA 634; *Shiple v. Hacheny*, (1899) 34 Or 303, 55 P 971.

If the statutory rate of interest is changed, interest not contractual is computed at the old rate to the date of change and at the new rate thereafter. *Graham v. Merchant*, (1903) 43 Or 294, 311, 72 P 1088; *In re Roach's Estate*, (1907) 50 Or 179, 92 P 118; *Saling v. Bolander*, (1903) 60 CCA 469, 125 Fed 701.

A contract specifying a rate of interest is not affected by a change of the legal rate if the specified rate is under

the maximum allowed. *Neal v. Foster*, (1888) 13 Sawy 236, 36 Fed 29.

A judgment with interest thereon at the legal rate is not affected by subsequent legislation reducing the legal rate unless the statute so declares. *Brauer v. Portland*, (1899) 35 Or 471, 58 P 861, 59 P 117, 60 P 379.

9. Pleading and proof

Interest after the breach of a contract is recoverable only as damages and failure to demand same in the complaint renders the judgment therefor erroneous. *Ferguson v. Reiger*, (1903) 43 Or 505, 73 P 1040.

An allegation that the money became due supported by the statement at the time the labor was performed and when it terminated is more than a conclusion of law. *Carlson v. New Amsterdam Cas. Co.*, (1926) 118 Or 542, 247 P 804.

An objection to the allowance of interest could not be made for the first time on appeal. *Id.*

FURTHER CITATIONS: *Chappelle v. Olney*, (1870) 1 Sawy 401, Fed Cas No. 2,613; *Balfour v. Davis*, (1886) 14 Or 47, 12 P 89; *Pacific Bldg. Co. v. Hill*, (1901) 40 Or 280, 67 P 103, 91 Am St Rep 477, 56 LRA 163; *Pacific Bldg. Co. v. Spurrier*, (1902) 40 Or 620, 68 P 1135; *Thompson v. Purdy*, (1904) 45 Or 197, 77 P 113, 83 P 139; *Coast Fin. Corp. v. Powers Furniture Co.*, (1922) 105 Or 339, 209 P 614, 24 ALR 855; *State v. Johnson Contract Co.*, (1927) 120 Or 633, 253 P 520; *Portland Loan Co. v. La France*, (1932) 139 Or 565, 9 P2d 1051; *Ford v. Bates*, (1935) 150 Or 672, 679, 47 P2d 951; *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959; *Portland Trust & Sav. Bank v. Lincoln Realty*, (1949) 187 Or 443, 211 P2d 736; *New York Life Ins. Co. v. Lee*, (1956) 232 F2d 811; *Kohler v. Gilbert*, (1959) 216 Or 483, 339 P2d 1102; *Platt v. Henderson*, (1961) 227 Or 212, 361 P2d 73; *Lanners v. Whitney*, (1967) 247 Or 223, 428 P2d 398; *Lithia Lbr. Co. v. Lamb*, (1968) 250 Or 444, 443 P2d 647.

ATTY. GEN. OPINIONS: Industrial loan company limited to 10 percent interest, 1926-28, p 600; warrants drawn by county school superintendent, 1930-32, p 399; state deposits in insolvent banks, 1930-32, p 764; state warrants, 1932-34, p 25; county funds in an insolvent bank, 1932-34, p 111; state deposits in national banks, 1932-34, p 191; taxes as debts, 1934-36, p 658; amounts paid by state for taxes on mortgaged land, 1936-38, p 11; interest on instalments on loans and from common school funds, 1938-40, p 98; interest on bonds after maturity, 1940-42, p 220; delinquent taxes, 1940-42, p 585; interest on charges imposed for the destruction of weeds, 1954-56, p 191; cause of action for interest after payment of principal, 1958-60, p 293; collection of interest on overdue accounts by soil conservation districts, 1958-60, p 293; loans under Consumer Finance Act, 1962-64, p 232; applicability of usury laws to national bank's BankAmericard program, 1966-68, p 160.

LAW REVIEW CITATIONS: 17 OLR 51; 35 OLR 20; 37 OLR 78; 44 OLR 105; 49 OLR 97-99.

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NOTES OF DECISIONS

1. In general
2. What constitutes a loan
3. Corrupt intent
4. What constitutes usurious interest
5. Compound interest
6. Attorney's fees
7. Pleading and proof

1. In general

To constitute usury there must be a loan expressed or

implied, an understanding between the parties that the money shall be returned, a payment of or agreement to pay a greater rate of interest than is allowed by law, a corrupt intent to take more than the legal rate for the use of the sum loaned. *Balfour v. Davis*, (1886) 14 Or 47, 12 P 89; *Lorber v. Marshall*, (1928) 124 Or 272, 264 P 926.

Where transactions purporting to be sales were in fact loans, this section applied. *Bjorkman v. Columbia Wrecking & Fuel Co.*, (1929) 130 Or 189, 279 P 633.

Borrower's knowledge of usurious interest will not prevent transaction from being usurious. *Fidelity Sec. Corp. v. Brugman*, (1931) 137 Or 38, 1 P2d 131.

2. What constitutes a loan

An assignment of a sales contract in good faith without intent to exact a usurious rate of interest is not a "loan." *Coast Fin. Corp. v. Powers Furniture Co.*, (1922) 105 Or 339, 209 P 614.

Where a promissory note was executed and delivered for services other than the lending of money, a "loan" had not been made. *Lorber v. Marshall*, (1928) 124 Or 272, 264 P 438.

3. Corrupt intent

An essential element of usury is the making of a loan with the intent to take a rate of interest in excess of the statutory rate. *Washington Inv. Assn. v. Stanley*, (1901) 38 Or 319, 63 P 489; *Lorber v. Marshall*, (1928) 124 Or 272, 264 P 438; *Fidelity Sec. Corp. v. Brugman* (1931) 137 Or 38, 1 P2d 131, 75 ALR 1333.

The knowledge of an officer of a corporation as to usurious terms is imputed to the corporation. *Fidelity Sec. Corp. v. Brugman*, (1931) 137 Or 38, 1 P2d 131, 75 ALR 1333.

Taking a note without consideration except as additional interest upon note already bearing interest would, as a matter of law, evidence corrupt intent to take usurious interest. *Id.*

4. What constitutes usurious interest

Loans from building and loan associations are usurious as to payments under guise of premiums, instalments on stock and interest, when they are in excess of interest permitted by law. *Washington Inv. Assn. v. Stanley*, (1901) 38 Or 319, 63 P 489, 48 Am St Rep 793, 58 LRA 816; *Western Loan & Sav. Co. v. Houston*, (1900) 38 Or 377, 65 P 611; *Pacific Bldg. Co. v. Hill*, (1901) 40 Or 280, 67 P 103, 91 Am St Rep 477, 56 LRA 163; *Pacific Bldg. Co. v. Spurrier*, (1902) 40 Or 620, 68 P 1135; *Hubert v. Wash. Inv. Assn.* (1903) 42 Or 71, 71 P 64; *Irwin v. Wash. Loan Assn.*, (1903) 42 Or 105, 71 P 142; *Prudential Sav. & Loan Assn. v. Stevens*, (1933) 144 Or 298, 14 P2d 296, 23 P2d 901.

It is not necessary that this "greater sum or value" be contracted for or received at the time of making the loan but if received at any time for the use of the money the loan is usurious. *In re Pittock*, (1873) 2 Sawy 416, Fed Cas No. 11,189.

A payment of \$500 for the use of \$2,025 for two years and five months becomes usurious if the entire amount is not retained for that length of time. *Anderson v. Griffith*, (1908) 51 Or 116, 93 P 934.

If note for loan was usurious, another note given for purchase of property and exacted as condition precedent to loan was also usurious though property was worth amount of the note. *Fidelity Sec. Corp. v. Brugman*, (1931) 137 Or 38, 1 P2d 131.

A building and loan association was entitled to charge membership fee of \$2 a share, inspection fee of \$10, cost of title insurance and of recording instrument in addition to legal rate of interest. *Prudential Sav. & Loan Assn. v. Stevens*, (1933) 144 Or 298, 14 P2d 296, 23 P2d 901.

Where \$916 as interest was added to a principal sum of

\$1,550 to be repaid in 120 monthly instalments, the loan was usurious. *Id.*

5. Compound interest

A contract to pay interest on a coupon or interest note after maturity will be enforced. *New England Mtg. Sec. Co. v. Vader*, (1886) 28 Fed 265.

Provision for compound interest was unenforceable. *Prudential Sav. & Loan Assn. v. Stevens*, (1933) 144 Or 298, 14 P2d 296, 23 P2d 901.

Compound interest is not only interest on interest but "is interest on the interest on such interest in cases in which there are more than two rests" in the computation. *Union Cent. Life Ins. Co. v. La Follette*, (1935) 150 Or 455, 44 P2d 165.

Coupons attached to bonds to specify the apportionment of the interest to each bond and themselves to bear interest from maturity do not constitute an arrangement for compounding interest. *Id.*

6. Attorney's fees

A stipulation for reasonable attorney's fees is not interpreted as increasing the rate of interest so as to render a note usurious. *Peysner v. Cole*, (1883) 11 OR 39, 4 P 520, 50 Am Rep 451; *Union Cent. Life Ins. Co. v. La Follette*, (1935) 150 Or 455, 44 P2d 165.

A provision in a mortgage for the payment of 20 percent of the amount due as attorney's fees was in violation of the rule of just compensation. *Balfour v. Davis*, (1886) 14 Or 47, 12 P 89.

7. Pleading and proof

Courts go behind form of transaction to determine usury; nor does the parol evidence rule interpose an objection. *Fidelity Sec. Corp. v. Brugman*, (1931) 137 Or 38, 1 P2d 131.

Evidence sustained finding that transaction was a loan not a sale. *Bjorkman v. Columbia Wrecking & Fueling Co.*, (1929) 130 Or 189, 279 P 633.

FURTHER CITATIONS: *Ford v. Bates*, (1935) 150 Or 672, 47 P2d 951; *Kohler v. Gilbert*, (1959) 216 Or 483, 339 P2d 1102.

ATTY. GEN. OPINIONS: Application of this section to building and loan association, 1924-26, p 289; items of expense that may be charged borrower from credit union, 1936-38, p 157; motor vehicle loan, 1940-42, p 271.

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NOTES OF DECISIONS

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1. In general

This section being penal in character must be construed in a strict manner. *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

This section does not authorize the borrower, as plaintiff, to convert the defense into a cause of action and seek entry of judgment against himself in favor of the state. *Id.*

2. Borrower's liability

A borrower must pay the debt either to the lender or

the state where the loan is usurious. *Brayton & Lawbaugh v. Monarch Lbr. Co.*, (1918) 87 Or 365, 169 P 528, 170 P 717; *Burkitt v. Vail* (1922) 106 Or 41, 210 P 861; *Vermont Loan & Trust Co. v. Bramel*, (1924) 111 Or 50, 224 P 1085; *Prudential Sav. & Loan Assn. v. Stevens*, (1933) 144 Or 298, 14 P2d 296, 23 P2d 901; *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

3. Status of the state

A district attorney cannot intervene on behalf of the state in an action upon a debt when it develops that the debt is possibly usurious. *Sujette v. Wilson*, (1886) 13 Or 514, 11 P 267; *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

In so far as the state is concerned its interests are fully conserved without its becoming a party to the litigation. *Barger v. Taylor*, (1895) 30 Or 228, 42 P 615, 47 P 618.

4. Effect of payment of usurious interest

When a borrower knowingly pays excessive interest he thereby waives his personal privilege and is precluded from recovering any part of the sums so paid. *Beach v. Guar. Sav. Assn.*, (1904) 44 Or 530, 76 P 16; *Fidelity Sec. Corp. v. Brugman*, (1931) 137 Or 38, 1 P2d 131; *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

Payments made upon a loan as usurious interest and as commissions for extensions are to be applied on the original debt. *Nunn v. Bird*, (1900) 36 Or 515, 59 P 808.

Where payments made on a usurious loan amount to the sum justly due, the borrower is entitled to have the debt and the mortgage securing it canceled. *Egan v. No. Am. Loan Co.*, (1904) 45 Or 131, 76 P 774, 77 P 392.

5. Equitable relief

A court of equity has power to decree a forfeiture and it is bound in obedience to the statute to exercise it. *Chapman v. State*, (1875) 5 Or 432.

Where injunctive relief is sought on the ground of usury, the finding of the jury is not binding on trial court or Supreme Court. *Griffin v. Rasmussen*, (1934) 149 Or 1, 38 P2d 692.

A court of equity will prevent a lender from selling pledged securities for more than the principal plus the legal rate of interest. *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

A proceeding to recover amounts allegedly overpaid by a borrowing building and loan member was held to be a suit in equity for an accounting. *Beach v. Guar. Sav. Assn.*, (1904) 44 Or 530, 76 P 16.

6. Void or voidable

A usurious loan is not void but voidable. *Hubert v. Wash. Inv. Assn.*, (1903) 42 Or 71, 71 P 64; *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

One purchasing a usurious note had nothing to forfeit since the note was void in its inception and the purchaser had no property in it. *Chapman v. State*, (1875) 5 Or 432. **Distinguished in** *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

7. Commercial paper

After a negotiable instrument has once been validly negotiated by transfer for valuable consideration, the sale of same is not within the letter or spirit of the usury law. *Coast Fin. Corp. v. Powers Furniture Co.*, (1922) 105 Or 339, 209 P 614.

One not a party to the original transaction who purchases notes and mortgages from the mortgagee is not subject to this section. *Bjorkman v. Columbia Wrecking & Fueling Co.*, (1929) 130 Or 189, 279 P 633.

The first negotiation of a note at a usurious rate of discount to one knowing the instrument was not previously

transferred for value from the maker to the payee is a usurious loan and not a sale. *Fidelity Sec. Corp. v. Brugman*, (1931) 137 Or 38, 1 P2d 131.

8. Mortgages

When a usurious loan is forfeited to the state the forfeiture carries the mortgage with the debt. *Chapman v. State*, (1875) 5 Or 432; *Brayton & Lawbaugh v. Monarch Lbr. Co.*, (1918) 87 Or 365, 169 P 528, 170 P 717; *Ford v. Bates*, (1935) 150 Or 672, 47 P2d 951; *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

A purchaser of property subject to a usurious mortgage who assumes to pay same as part of the consideration cannot set up usury in the original transaction as a defense against the mortgage. *Irwin v. Wash. Loan Assn.*, (1903) 42 Or 105, 71 P 142. **Distinguished** in *Egan v. No. Am. Loan Co.*, (1904) 45 Or 131, 76 P 774, 77 P 392.

A purchaser of land subject to a usurious mortgage who assumes same is entitled to a reapplication of the excess charges he has paid since purchasing in satisfaction of the principal. *Irwin v. Wash. Loan Assn.*, (1903) 42 Or 105, 71 P 142.

Where enough money has been paid either as usurious interest or otherwise to discharge the real debt, the chattel mortgagee cannot recover possession of the chattel used as security. *Burkitt v. Vail*, (1922) 106 Or 41, 210 P 861.

The grantee of land subject to a usurious mortgage could set up usury as a defense where the grantor was grantee's husband and she was a party to the mortgage and the land was conveyed to her in anticipation of his death. *Egan v. No. Am. Loan Co.*, (1904) 45 Or 131, 76 P 774, 77 P 392.

Relative to the rights of a subsequent judgment creditor, it is immaterial whether or not notes secured by a mortgage were usurious. *Brayton & Lawbaugh v. Monarch Lbr. Co.*, (1918) 87 Or 365, 169 P 528, 170 P 717.

9. Necessity of tender

A borrower who sought surrender of pledged securities was required to make tender of amount borrowed even though he asked for judgment in favor of state. *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

10. Pleading and proof

Clear and cogent allegations and proof are required to establish usury. *Poppleton v. Nelson*, (1885) 12 Or 349, 7 P 492; *Barger v. Taylor*, (1896) 30 Or 228, 42 P 615, 47 P 618; *Nunn v. Bird*, (1900) 36 Or 515, 59 P 808; *Farrell v. Kirkwood*, (1914) 69 Or 413, 139 P 110; *Coast Fin. Corp. v. Powers Furniture Co.*, (1922) 105 Or 339, 209 P 614, 24 ALR 855; *Griffin v. Rasmussen*, (1934) 149 Or 1, 38 P2d 692.

The question of usury cannot be raised except in litigation upon the contract stipulating for a usurious rate of interest. *Holladay v. Holladay*, (1886) 13 Or 523, 11 P 260, 12 P 821; *Brayton & Lawbaugh v. Monarch Lbr. Co.*, (1918) 87 Or

365, 169 P 528, 170 P 717; *Burkitt v. Vail*, (1922) 106 Or 41, 210 P 861.

An allegation that a note was made payable in California for the purpose of evading the usury laws of Oregon is a mere conclusion. *Balfour v. Davis*, (1886) 14 Or 47, 12 P 89.

A building and loan stockholder who paid usurious interest is not estopped to plead usury in the absence of a showing that the association was induced to change its position due to such payments. *Hubert v. Wash. Inv. Assn.*, (1903) 42 Or 71, 71 P 64.

An allegation that the amount plaintiff is seeking to collect is usurious is merely a conclusion of law. *Farrell v. Kirkwood*, (1914) 69 Or 413, 139 P 110.

The parol evidence rule does not preclude the court from going behind the form of the transaction to determine the existence of usury. *Fidelity Sec. Corp. v. Brugman*, (1931) 137 Or 38, 1 P2d 131, 75 ALR 1333.

The plea of usury afforded by this section is a defense only; it is a shield and not a sword. *Crisman v. Corbin*, (1942) 169 Or 332, 128 P2d 959.

Evidence was not sufficient to establish usury. *Sujette v. Wilson*, (1886) 13 Or 514, 11 P 267; *Holladay v. Holladay*, (1886) 13 Or 523, 11 P 260, 12 P 821; *Curtze v. Iron Dyke Min. Co.*, (1905) 46 Or 601, 81 P 815.

Instruction capable of misleading jury into believing that payee could purchase note from maker and that in such case rate of discount would be immaterial was error. *Fidelity Sec. Corp. v. Brugman*, (1931) 137 Or 38, 1 P2d 131.

FURTHER CITATIONS: *Ford v. Bates*, (1935) 150 Or 672, 47 P2d 951.

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NOTES OF DECISIONS

A contract providing that on default of payment of taxes the mortgagee may pay them and add the amount to his mortgage is valid and will be enforced. *New England Mtg. Sec. Co. v. Vader*, (1886) 28 Fed 265.

This section permits a contract to pay taxes and any other charges, so long as the charges and interest, excluding taxes, do not exceed eight percent. *United States Mtg. Co. v. Marquam*, (1902) 41 Or 391, 69 P 37, 41.

By enacting this section the legislature evidenced its intention that a note providing for the payment of taxes should be negotiable. *Page v. Ford*, (1913) 65 Or 450, 131 P 1013, Ann Cas 1915A, 1048, 45 LRA(NS) 247.