

2016

David and Ruth M. Fuller and Fuller's Appliance Parts and Service, LLC, Appellants, vs. Denise Bohne and Western States Insurance Agency, Appellees

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAVID AND RUTH M. FULLER AND
FULLER'S APPLIANCE PARTS AND
SERVICE, LLC,

Appellants,

vs.

DENISE BOHNE AND WESTERN
STATES INSURANCE AGENCY,

Appellees.

Case No. 20150146-CA

APPELLANTS' REPLY BRIEF

On Appeal from the Third Judicial District Court, Salt Lake County
Case No. 100901093, Judge Deno Himonas

Joseph P. Barrett
BARRETT LAW, P.C.
699 East South Temple, Suite 370
Salt Lake City, Utah 84102
Telephone: (801) 438-6704
Facsimile: (801) 438-6133
joseph@utahlawgroup.com

Attorney for Appellees

Stephen K. Christiansen (6512)
CHRISTIANSSEN LAW, PLLC
311 South State Street, Ste. 250
Salt Lake City, Utah 84111
Telephone: 801.716.7016
Facsimile: 801.716.7017
steve@skclawfirm.com

Attorney for Appellants

ORAL ARGUMENT REQUESTED

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Attorney for Appellees

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Salt Lake City, Utah 84111
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REPLY ARGUMENT

Western States' response brief contains a hodgepodge of unpersuasive assertions that are notable for their inaccuracies, inconsistencies, and concessions. The Fullers will reply appropriately. Although the response briefing ignores the conditional nature of the Fullers' appeal points, this brief will reply to the arguments in the order Western States discusses them. On any or all grounds, this Court should reverse and remand for entry of an amended judgment using the legally correct interest rate.

I. THE LEGAL RATE FOR PREJUDGMENT INTEREST OF 10% APPLIES TO THE TORT CLAIMS IN THIS CASE.

Western States suggests the district court did not abuse its discretion in rejecting the legal rate in Utah Code Ann. § 15-1-1(2) (2013). (Aplee. Br. at 7.) Abuse of discretion is not the proper standard of review if the Court reaches this issue. Rather, the proper rate to apply is a legal question reviewed for correctness. *See Francis v. National DME*, 2015 UT App 119, ¶ 21, 350 P.3d 615.

A. The Plain-Language Construction of the Statute Applies the Legal Rate to "Any" Cause of Action, Not Only Those That Are the Subject of a Contract.

The parties are in agreement that Section 15-1-1(2) should be construed according to its plain language. Western States' proffered construction, however, eschews plain language in favor of limiting language that does not appear within the governing provision. While the legal rate in subsection (2) on

its face applies to *any* chose in action, Western States reads it to apply only to choses in action that are the subject of a contract.

Subsections (1) and (2) of Section 15-1-1 provide:

- (1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.
- (2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

These two subsections address different but related concepts. Subsection (1) provides that parties may enter into a contract agreeing to an interest rate between themselves for the loan or forbearance of any money, goods, or choses in action addressed in their contract. Subsection (2), in contrast, provides that unless there is a contract to the contrary, the legal rate will be 10% for the loan or forbearance of *any* money, goods, or choses in action. Only by lifting language out of subsection (1) and imposing it upon subsection (2) can Western States' proffered construction be realized. This would do violence to the statute, however, as the Legislature is presumed to choose its wording advisedly. See *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863.

Here is how Western States would have subsection (2) read:

Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action [that is the subject of their contract] shall be 10% per annum.

The fact the underlined words appear in subsection (1) but not subsection (2) is a distinction with a difference, as the language of subsection (1) is conclusive evidence that the Legislature knew how to use such limiting language if that was the result it intended. *See Marion Energy*, 2011 UT 50, ¶ 14 (appellate courts “seek to give effect to omissions in statutory language by presuming all omissions to be purposeful”). Moreover, Western States’ reading of the statute, implying a phrase that is expressly omitted, is not a natural or persuasive construction. *See Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 17, 133 P.3d 428 (only plausible, reasonable readings need be considered).

Western States’ reading of subsection (2) is that “[i]t only governs contracts addressing loans, forbearance [sic], or chose [sic] in action.” (Aplee. Br. at 9.) Western States suggests an example of a contract addressing a chose in action is found in *Time Finance Corp. v. Johnson Trucking Co.*, 458 P.2d 873 (Utah 1969). That case involved an assignment of a claim from one entity to another. Western States does not explain how interest could ever accrue on such a contract. Moreover, Western States’ description of the *Time Finance* assignment as a “chose in action which is the subject of a contract” (Aplee. Br. at 9) partakes of the very nature of its own criticism: it ignores the statutory link to the word “forbearance” and adds words not actually found in subsection (2).

The Fullers’ approach – which is the one sanctioned by long usage in the courts – better implements the plain language of subsection (2). A “chose in

action” is “[a] proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or *a claim for damages in tort.*” Black’s Law Dictionary 294 (10th ed. 2009) (emphasis added). It is synonymous with “thing in action,” which is the term used in the Utah statutes until 1985. *See id.*; Addend. Ex. 9, at 16.¹

“Forbearance” means “[t]he act of tolerating or abstaining,” or “[t]he act of refraining from enforcing a right, obligation, or debt.” Black’s Law Dictionary 760 (10th ed. 2009). It is “a refraining from the enforcement of something (as a debt, right, or obligation) that is due” or “the act of forbearing: patience.” <http://www.merriam-webster.com/dictionary/forbearance>.

What, then, is “forbearance” of “any . . . chose in action” or, for that matter, of “money”? *It is this case*: the Fullers did not receive money to which they were entitled, because of the defendants’ wrongful conduct, and so sued in tort to recover it. The Fullers’ judgment on their chose in action, received eight years after the money should have been paid, was the very type of “forbearance” contemplated by the statute, as recognized by case law from both the Supreme Court and this Court. *See, e.g., Iron Head Constr. Inc. v. Gurney*, 2009 UT 25, ¶ 10, 207 P.3d 1231 (“[A]n award of prejudgment interest simply serves to compensate a party for the depreciating value of the amount owed over time

¹ The word “chose,” as used here, derives from the French and means “[a] thing, whether tangible or intangible.” Black’s Law Dictionary 294 (10th ed. 2009).

and, as a corollary, deters parties from intentionally withholding an amount that is liquidated and owing.”) (quotations and citation omitted); *Kraatz v. Heritage Imps.*, 2003 UT App 201, ¶ 75, 71 P.3d 188 (“Plaintiffs are entitled to damages for the loss of use of the money that, but for the [defendant]’s breach and ensuing delay, would have been paid to plaintiffs in satisfaction of their . . . claim.”); *Sundial Inc. v. Villages at Wolf Hollow Condo. Homeowner’s Ass’n, Inc.*, 2013 UT App 223, ¶ 8, 310 P.3d 1233 (reading statute to apply legal rate to recovery on a non-contract cause of action).

Lastly, if Western States’ reading were to be adopted by this Court, the judgment should still be reversed and an amended judgment entered in favor of the Fullers on this record. Under Western States’ reading, subsection (2) provides a 10% legal rate for interest when parties have contracted with respect to a chose in action but have not specified an interest rate. Here, the district court concluded that the parties stipulated to an award of prejudgment interest for the Fullers’ breach of agency duty and negligent misrepresentation claims against Western States. (R. 1973, at 12.) That stipulation constitutes a valid contract. According to Western States, the parties’ contract did not include an agreement on the rate. Therefore, under Western States’ proffered reading of the statute, the Court is required to impose a 10% rate because a chose in action was the “subject of their contract.”

The plain-language reading of Section 15-1-1(2) favors the Fullers.

B. The Statutory History of Section 15-1-1(2) Supports the Continued Reading of the Statute to Follow the Rule from *Fell* and *Uinta Pipeline* in Tort Cases.

There is no principled distinction to be made between the historical versions of the prejudgment interest statute. The Fullers submitted the statutes from 1898 to the present so the Court could see the continual thread of statutory law that matches the continual thread of case law during that same period.

(Addend. Ex. 9.) Except for the *Wilcox/ Consolidated Coal* language discussed in this appellate briefing, Utah case law has consistently read these statutes the same way. That is because they are substantively the same.

Like the current statute, the 1898 version at issue in *Fell v. Union Pac. RR*, 88 P. 1003 (Utah 1907), had separate portions dealing with interest – one focused on the interest rate for all claims, another dealing with the interest rates for contracts:

[1] It shall be lawful to take eight per cent interest per annum, when the amount of interest has not been specified or agreed upon. [2][a] But parties may agree in writing for the payment of any rate of interest whatever, on money due or to become due on any contract. [b] Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, which shall be specified in the judgment.

Revised Statutes § 1241 (1898) (bracketed numbers and letters inserted).

The first sentence, marked “[1]” herein, allowed for agreements on interest rates for claims but made the legal rate the default rate in the absence of such an agreement. It is this sentence that *Fell* applied and that corresponds to

the current Section 15-1-1(2). *See*, 88 P. at 1007. The second sentence of Section 1241, marked “[2][a]” herein, dealt specifically with money due on contracts, allowing the parties to provide their own contract rate. This sentence was not at issue in *Fell* (which was a tort case) but corresponds to the current Section 15-1-1(1). The third sentence, marked “[2][b],” provides that the final judgment in a contract case will bear the interest rate of the contract. This corresponds to the current Section 15-1-4(2)(a), providing that the parties’ agreement on an interest rate supplies the prejudgment and post-judgment interest rate in contract actions. *See* Utah Code Ann. § 15-1-4(2)(a) (“ . . . [A] judgment rendered on a lawful contract shall conform to the contract and shall bear the interest agreed upon by the parties, which shall be specified in the judgment.”).

The current statute demarcates these concepts more brightly than the 1898 statute by separating the concepts into different provisions rather than running them together one after the other. But the provisions are all there just the same.

There is no material change to any of the relevant statutory provisions enacted by the Legislature from 1898 to the present, as Western States suggests. (Aplee. Br. at 2, 13-14.) The Supreme Court held the 1898 statute “allow[s] interest in all cases at the legal rate, in the absence of an agreement.” *Fell*, 88 P. at 1007; *see also id.* at 1006 (distinguishing cases in which prejudgment interest is unavailable). This is no different from subsection (2) of the current statute,

which provides the interest rate for prejudgment interest in the absence of an agreement.

The subsequent changes to the statute have refined the language but retained the central meaning all the way through to the present: the statute provides the legal rate unless the parties agree by contract to a different rate. This is evidenced further by consistent application of the *Fell* rule in case law from the time *Fell* was decided to the present, despite variations in the statutory language. (See Aplt. Br. at 30-34, collecting cases.) It is not until Justice Zimmerman engaged in his unbriefed ruminations that this consistent application veered in a different direction.

The Western States defendants suggest the word “contract” or the concept of an agreed rate did not appear in any version of the statutes from the time of the *Fell* decision in 1907 until 1989, a date they say marked some sort of watershed moment when the Legislature acted to implement the idea. (Aplee. Br. at 18.) This is simply not true. The statute at issue in *Fell* specifically provided that parties could “agree” to a different rate of interest. Revised Statutes § 1241 (1898), Addend. Ex. 9, at 1-2. When the statute was amended in 1907, breaking one provision into several, the language providing for a “contract” the parties might make for a different rate of interest was moved to a new Section 1241x. (Supplemental Addendum Ex. 10, at 3, attached hereto.) This “contract” wording and concept carried forward in all future versions, as a

separate provision akin to the 1907 version of Section 1241x and as a separate provision akin to the third sentence of the 1898 Revised Statutes § 1241, marked as “[2][b]” in the discussion above, calling for any agreed contract rate to be included as the prejudgment and post-judgment rate in the final judgment. (Suppl. Addend. Ex. 10; Addend. Ex. 9, at 5-18.)

There is a difference through the years in legislative form and style, not in substance, and the case law interpreting the statutes remains constant in adhering to the *Fell* construction throughout these various iterations of the statute. The present statute continues to read this way as well, as Western States acknowledges when it points out that “§ 15-1-4 specifies that cont[r]acting parties may set their own interest rates, and that such rates will apply to prejudgment interest.” Aplee. Br. at 22.

The 1989 statute did not add in a new concept that had never been in the statutes before. Rather, it continued the rate-by-agreement exception to the legal rate, but returned the form to more closely approximate that in the 1898 statute at issue in *Fell*, discussing the legal rate alongside the contractual exception. In fact, the form of the present statute is closer to what it was in *Fell* than in any other version.

It is this sort of history and analysis that Justice Zimmerman glossed over in unilaterally pronouncing his gratuitous dicta. This is the very reason why dicta is unreliable, indulged as it is without briefing. The *Wilcox* Court

unwittingly perpetuated the problem when it glommed on to such dicta and treated it broadly as law, albeit in a limited arena that does not govern here and that can be fully justified on separate statutory grounds. See *Wilcox v. Anchor Wate*, 2007 UT 39, ¶¶ 44-48, 164 P.3d 353. The *ipse dixit* statements made by the Western States defendants about purported statutory history and intent partake of the same nature. They are untrustworthy and do not accurately reflect the continual history of *Fell* and its progeny, and the statutes they interpret, for more than 100 years.²

Case law post-1989 reads the statute the same way as case law pre-1989. (See Aplt. Br. at 30-34.) In fact, 1989 is not even correctly identified as the year the statute moved back toward its present form; 1985 is. (Addend. Ex. 9, at 15-16.) Thus, Western States' argument that *Consolidation Coal* was only the second case to discuss a relevant version of the statute misses the mark. (Aplee. Br. at 18.)³ But even if it were, the divergent opinions in *Consolidation Coal* highlight

² In a later decision that did not touch on prejudgment interest, the Supreme Court emphasized "the unique nature of the claims" in *Wilcox*, noting that its articulation of the rule on unjust enrichment derived from "the unique considerations present in a preferential transfer case." *Rawlings v. Rawlings*, 2010 UT 52, ¶ 47 n.62, 240 P.3d 754. The same can be said for the Supreme Court's prejudgment interest discussion in that same case. See *Wilcox*, 2007 UT 39, ¶ 43 ("The question presented by Anchor Wate's challenge to the interest rate is whether the 10% default rate specified by section 15-1-1(2) is applicable to the Liquidator's judgment obtained pursuant to the voidable preference provisions of the Liquidation Act.").

³ The purported one other case, *Nielsen v. O'Reilly*, 848 P.2d 664 (Utah 1992), later abrogated by statute, is unhelpful because the plaintiff brought forward no

the problem being addressed now: Justice Zimmerman made an off-the-cuff observation, while Judge Bench, sitting by designation, assiduously studied the case law and statutory history and followed decades of precedent in his analysis – including citing numerous cases applying the post-1985 form of the statute. *Compare Consolidation Coal Co. v. Utah Division of State Lands & Forestry*, 886 P.2d 514, 525 n.13 (Utah 1994) (Zimmerman individualized dicta), *with id.* at 528-29 (Bench, J., concurring and dissenting) (surveying case law), *abrogated on other grounds by State ex rel. Sch. & Institutional Trust Land Admin. v. Mathis*, 2009 UT 85, 223 P.3d 1119.

A correct reading of the statute's history confirms the correct result here.

C. Western States' Case Law Discussion Is Wholly Unpersuasive.

Like its statutory argument, Western States' case law discussion is full of sound and fury but does not accurately characterize the jurisprudence it invokes.

claim on which prejudgment interest could be awarded, apparently seeking only a declaratory judgment against his insurer as to insurance policy limits.

1. *Wilcox has not been followed by this Court, let alone with respect to common law tort claims.*

Despite the Western States defendants' assertion, they make no showing that this Court "has followed *Wilcox*," let alone with respect to tort claims. (Aplee. Br. at 7.) The cases Western States cite for this proposition do not support such a contention.

This Court's decision in *Highlands at Jordanelle, LLC v. Wasatch County*, 2015 UT App 173, 355 P.3d 1047, *reh'g denied* (Sept. 8, 2015), does not cite or discuss *Wilcox* and is unhelpful to Western States here. The trial court awarded the plaintiff prejudgment interest of 10% pursuant to Utah Code Ann. § 15-1-1(2) for overpayment of municipal service fees. *Id.* ¶¶ 3-9, 27-31. The Court held the service fees in question were contractual in nature, but did not discuss the operation of the prejudgment interest statute except to note in passing that it "sets a default interest rate for most contracts at 10% per year." *Id.* ¶¶ 30, 31. It did not discuss the application of the statute to tort claims.

Western States also cites to *Francis v. National DME*, which is already fully addressed in the Fullers' opening brief. (Aplt. Br. at 41-43.) *National DME* specifically declined to decide whether *Wilcox* applied because the issue was inadequately briefed.

Neither of the cases Western States cites can be accurately said to have "followed" *Wilcox*, nor are there any other cases from this Court cited for that

broad and unsupported proposition. The Court would undoubtedly be required to follow *Wilcox* in any case where it applies; but that begs the very question now before the Court, as *Wilcox* was not a common law tort case.

The Fullers did not themselves propose the statutory construction they now urge; rather, the Fullers are relying on many decades of statutory interpretation and case law handed down by Utah's appellate courts. That case law overwhelmingly forms the basis for the Fullers' position that Section 15-1-1(2) "set[s] the legal interest rate at 10% per annum or, alternatively, any rate agreed upon by the parties." *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 26, 82 P.3d 1064 (affirming modified jury award of prejudgment interest).

2. *Non-controlling federal court cases are unpersuasive.*

Without responding particularly to the Fullers' appeal points, Western States has essentially cut and paste from the district court briefing its argument invoking unpublished federal cases. (Aplee. Br. at 20-21; cf. R. 1808.) Western States again refers erroneously to these singular decisions applying federal law as "Utah case law." (Aplee. Br. at 20.) The Fullers fully addressed these cases and Western States' argument in their opening brief. (Applt. Br. at 46-49.)

Western States' single new citation to *Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1287 (10th Cir. 2002), highlights the distinction between jurisprudence in the federal courts and in the Utah state courts. (Aplee. Br. at 22.) The Tenth Circuit noted "[m]any circuits have held that courts are not required to use [28

U.S.C.] section 1961 in calculating prejudgment interest and that the calculation rests firmly within the sound discretion of the trial court. We now join them.” *Id.* (citations omitted). That is simply not the law of this state.

3. **Peterson v. Jackson is off point.**

The Fullers pointed out in their opening brief that *Peterson v. Jackson*, 2011 UT App 113, 253 P.3d 1096, cited by Western States below (R. 1809), is unhelpful in this analysis. (Aplt. Br. at 49-50.) The statute in *Peterson* specifically gave the courts equitable discretion to determine the interest rate to be employed in the statutory dissolution of a privately held corporation. See Utah Code Ann. § 16-10a-1434. Because no such statute exists here, *Peterson* is off point. Western States intones a tepid argument based on *Peterson* (Aplee. Br. at 21-22), but it falls flat as having no persuasive force whatsoever in the present context.

In sum, the statutory construction argument favors the Fullers’ position. It is the analysis the Utah appellate courts have employed since 1907. *Wilcox* does not call for a different application here, in this common law tort case. The Court should so hold as a matter of law if it reaches this point in the analysis.

II. **THE PARTIES’ STIPULATION TO USE A 10% PREJUDGMENT INTEREST RATE SHOULD BE ENFORCED.**

As noted in the Fullers’ opening brief, the threshold question is whether the parties stipulated to use a 10% prejudgment interest rate. That question

should be decided in the affirmative. If it is, the Court need not even reach the statutory analysis.

A. The Parties Stipulated to the Rate in Jury Instruction No. 29 and Never Agreed to Have the District Court Decide a Different Rate.

There is no dispute that the parties stipulated to Jury Instruction No. 29 and the district court approved it. (R. 1631; 1969, at 68, 70, 1702.) It identified the agreed prejudgment interest rate as 10%. (R. 1631.) Given its argument, Western States has some responsibility to show where in the record the parties purportedly discussed allowing the judge to determine a different rate. This cannot be shown because it was not done.

The first time a different suggestion was made was after the verdict. (R. 1763-65.) Using terminology that had never been discussed as part of the stipulation, Western States suggested that the parties had merely “agreed that prejudgment interest was ‘in play.’” (R. 1763.) While the district court initially accepted this premise before correcting course (R. 1795-96; 1973, at 1-12), the fallout from this fallacious position included the stipulation on rate being lost in the wreckage.

This Court uses a plain-language approach to the parties’ stipulation, though it may consider any relevant evidence in determining whether the parties’ expressed intent was ambiguous. *See, e.g., State ex rel. H.S. v. State*, 2013 UT App 239, ¶ 11, 314 P.3d 1005; *Yeargin, Inc. v. Auditing Div’n of Utah State Tax*

Comm'n, 2001 UT 11, ¶¶ 39-40, 20 P.3d 287. Western States' after-the-fact explanation is irrelevant in determining intent, as intent may only be measured at the time of entering into the stipulation. See *Yeargin, Inc.*, 2001 UT 11, ¶¶ 39-44. This Court may interpret the intentions of the parties as a matter of law through the language chosen to articulate the agreement. See *id.*; *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 18, 48 P.3d 918.

The colloquy articulating the stipulation is marked by the usual hems, haws, and unrecorded head nods common to an oral colloquy, but the language to which the parties agreed is manifest by the record: the jury instruction would be withdrawn and the judge would make the determination using the agreed 10% rate if the jury awarded property damages to the Fullers:

THE COURT: Well, are you – is there any argument about whether –

MR. BARRETT: No –

THE COURT: -- they're entitled to prejudgment interest?

MR. BARRETT: No, Your Honor.

THE COURT: All right.

MR. BARRETT: If there's a property damage –

MR. CHRISTIANSEN: Okay.

MR. BARRETT: – there's going to be prejudgment interest –

...

THE COURT: . . . I don't see that there's a disagreement about whether they're entitled to it or not. . . .

. . .

THE COURT: . . . [I]t's a simple calculation, so I really didn't care much, because it's a 10 percent calculation and you can do it in your head. I also don't think as I said, there's any - it's - the amount is fine. . . .

MR. CHRISTIANSEN: Thank you, Your Honor.

THE COURT: Yep. Okay, so jury instruction 29 is withdrawn.

(R. 1969, at 71-73.)

Western States has asserted every variation of what the stipulation might mean, other than the real one. Western States opposed any award of prejudgment interest on grounds there was *no stipulation reached on prejudgment interest*, but only that prejudgment interest would somehow be "in play" for the judge to determine starting afresh. (R. 1763-65; R. 1973, at 3-5.) Later, Western States was forced to concede that interest being "in play" is only the phrase it "intended to use" (R. 1973, at 4) and that it "would hope the record would've reflected a reservation to make argument." (R. 1973, at 5.) When this idea failed, Western States argued that it intended to stipulate to prejudgment interest on *contract damages* but not *tort damages*. (R. 1973, at 3-12.) This, too, failed. (R. 1973, at 12.) Western States now takes the position that it stipulated only to the *award* of prejudgment interest but not the *rate* or *date*. (Aplee. Br. at 31.) This Court can

have no confidence in an asserted meaning given to the stipulation that changes based on the perceived needs of the moment.

Western States also argues the *scope* of the stipulation is what is at issue and not the *fact* of the stipulation, and that therefore the intent of the parties is a factual question. (Aplee. Br. at 24-25, 31 n.18.) That is wrong on this record. The stipulation is fairly articulated on the record such that this Court can determine the parties' intent as a matter of law. "Often, the interpretation of the terms of a contract . . . presents a question of law that, as a general matter, may be as readily resolved by an appellate court as by the district court." *Hemingway v. Construction by Design Corp.*, 2015 UT App 10, ¶ 17, 342 P.3d 1135 (citing *Stevensen v. Goodson*, 924 P.2d 339, 346 (Utah 1996) (noting that "appellate courts are in as good a position as trial courts to interpret [legal issues such as] court rulings")). That is the case here.

If the Court nevertheless considers the suggestion, clear error was demonstrated in spades in the Fullers' opening brief and again here in reply to the newly proffered standard of review. The 10% stipulation was made in the agreed and approved jury instruction; that portion of the previously settled stipulation was never "undone"; and the 10% standard was specifically articulated by the court when the parties' stipulation replaced the instruction. (R. 1631; 1969, at 69-73.) In revisiting the question after the verdict, the district court did not review the portion of the transcript reciting the agreed rate as part

of the stipulated instruction withdrawal, overlooking it altogether notwithstanding the vigorous arguments of the Fullers below. (R. 1745-46, 1775-80; 1973 at 6-12.) The district court's failure to enforce the stated intentions of the parties, which the district court itself had previously articulated on the record, is clearly erroneous if this is the proper standard to apply.

Western States argues repeatedly that there was no stipulation reached on *rate* or *date* because a different *date* was subsequently agreed to by the Fullers. (Aplee. Br., *passim*.) This finds no support in the record. The parties stipulated to the date just as they did the rate. (R. 1631.) Consistent with their stipulation, the Fullers submitted for entry their judgment reflecting prejudgment interest beginning on the stipulated date. (R. 1742-51.) The district court nevertheless ruled that *no stipulation had been reached of any kind on prejudgment interest*, required additional briefing on all prejudgment interest issues, and held a hearing to determine the starting date for prejudgment interest. (R. 1795-96.) At that juncture, though the Fullers had an appeal point, the district court's decision was the law of the case. See *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 26, 196 P.3d 588 ("[U]nder the law of the case doctrine, a decision made on an issue during one stage of a case is binding in successive stages of the same litigation.") (quotations and citation omitted).

During the course of the hearing that ensued, the Fullers agreed on the record to a new starting date that was four months after the originally stipulated

date – the date of denial of their insurance claim rather than the date of the fire – and they do not challenge that ruling on appeal. (R. 1973, at 12-13.) This does not mean that no stipulation was originally reached on date. To the contrary, the Fullers simply chose to resolve that issue on a reasonable basis – four months’ difference in time being not worth the effort, and the district court’s reasoning a satisfactory enough basis for doing so – in an attempt to find closure to long-running litigation issues and to focus on the more important rate issue. (R. 1973, at 2, 13.) When the district court failed to properly apply the law on the single issue left for decision, however, the Fullers sought appellate review. This is a prime example of proper litigation conduct consistent with appellate courts’ direction that district court proceedings should decide as many issues as they can, so as to focus issues for appeal. *See, e.g., Hemingway v. Construction by Design Corp.*, 2015 UT App 10, ¶ 17, 342 P.3d 1135 (citing judicial economy as grounds for remanding for further district court proceedings). It is simply not true that the start date for the accrual of interest was “indisputably reserved to the district court.” (Aplee. Br. at 31.)

Western States now argues the judge’s approval of the 10% rate at the time of the stipulation is somehow ambiguous and could be referring to any number of things besides the rate. Here is a quote of the statements Western States now finds ambiguous:

THE COURT: . . . [I]t's a simple calculation, so I really didn't care much, because it's a 10 percent calculation and you can do it in your head. I also don't think as I said, there's any – it's – the amount is fine. . . .

MR. CHRISTIANSEN: Thank you, Your Honor.

THE COURT: Yep. Okay, so jury instruction 29 is withdrawn.

(R. 1969, at 73, emphasis added.) No reasonable argument can be made in this context that the district judge was somehow merely condoning the application of interest “to property damages, but not to rent damages,” or simply approving “the final layout of the Special Verdict form.” (Aplee. Br. at 28.) Nor is there support for the conclusion that the parties were talking solely about pending contract claims but excluding tort claims. (Aplee. Br. at 29.)

The district court's decision letting Western States out of its stipulation was an abuse of discretion that resulted in significant harm to the Fullers. That decision should be reversed and judgment given to the Fullers with prejudgment interest at a 10% rate.

B. The Stipulated 10% Prejudgment Interest Rate Reflected the Parties' Agreed Rate as Well as the Law.

Western States suggests there was no error in ignoring the stipulation because 10% was not the governing legal rate and courts are not bound by stipulations of law or stipulations that reflect erroneous statements of the law. (Aplee. Br. at 32-33.) These arguments do not advance the ball here.

The 10% rate stipulated to in Instruction No. 29 accurately reflects the law. *See supra* Part I; Aplt. Br. at 27-50; Utah Code Ann. § 15-1-1 (setting the “Legal rate”). The Western States defendants would not have agreed to it in the first place otherwise. There was no error of law.

Contrary to Western States’ position, parties resolve legal issues through stipulations all the time; but this is not the same as binding the Court on the law. In *Prinsburg State Bank v. Abundo*, 2012 UT 94, 296 P.3d 709, for example, “the parties stipulated to a list of statements that were consistent with the district court’s findings and conclusions, and additionally to a statement that resolved the remaining claim in favor of the defendants.” *Id.* ¶ 1. Under Western States’ rubric, such a stipulation would be unenforceable because it was a stipulation binding the court on the law. More accurately, it was a stipulation between the parties regarding how they would approach the resolution of pending legal claims. The same can be said for the stipulation in this case. Rather than stipulating to “points of law requiring judicial determination,” *First of Denver Mtge. Inv’rs v. C.N. Zundel & Assocs.*, 600 P.2d 521, 527 (Utah 1979), the parties agreed to the rate to be applied if prejudgment interest were to be awarded, thus obviating the need for further legal proceedings on that issue. (R. 1631; 1969, at 73.)

C. There Is No Proper “Reformation” of the Stipulation Based on “Mutual Mistake.”

Western States seeks to justify the district court’s decision by alleging the court “reformed” the stipulation based on what Western States calls a “mutual mistake that the prejudgment interest rate was stipulated at 10% and that this was the appropriate prejudgment interest rate.” There was neither a mistake nor one that was mutual nor would it have properly been “reformed.” See *Prinsburg*, 2012 UT 94, ¶ 16 (“Prinsburg’s mistaken belief about the effect of the [s]tipulation[] is unfortunate, but it does not change the result.”).

Western States has not set forth authority for the proposition that a district court may properly “reform” a parties’ stipulation after the fact. Nor has it adduced clear and convincing evidence to do so. See *F.D.I.C. v. Taylor*, 2011 UT App 416, ¶ 47, 267 P.3d 949 (party seeking reformation has “the burden of proving by clear and convincing evidence that there was a mutual mistake of fact”) (citation and quotation omitted). This argument is D.O.A.

D. The Fullers Did Not Invite the District Court’s Error.

Western States suggests the Fullers somehow “invited” the district court’s abuse of discretion, though it fails to clearly articulate how this could be so. (Aplee. Br. at 36-39.) Western States suggests it was incumbent upon the Fullers to clarify the rate in question. Surely, a colloquy with the court in which the judge states “it’s a 10 percent calculation and you can do it in your head” should

be sufficient clarification for any party acting reasonably to understand. Rather than “invite error,” the Fullers subsequently sought to implement this ruling in their proposed judgment after the verdict, only to have the ruling undone in a way that exceeded the district court’s appropriate exercise of discretion.

Western States also posits that the district court’s statement that “the amount is fine” is not an appealable ruling. (Aplee. Br. at 37.) The Fullers, however, are not trying to appeal the statement that “the amount is fine.” Rather, that statement was part of an oral ruling in which the learned district judge concluded that a “10% calculation” would be made automatically on prejudgment interest if property damages were awarded and, in exchange, Jury Instruction No. 29 would be withdrawn. (R. 1969, at 71-73.) The Fullers have appealed the district court’s subsequent decision ruling that no such agreement was reached or oral ruling made. (R. 1795-96.) The district court’s latter decision was incorporated into and made part of the final judgment and is properly before this Court on appeal.

Western States’ citation to *Braun v. Nevada Chemicals, Inc.*, 2010 UT App 188, 236 P3d 176, is not on point. There was no appealable decision made in *Braun*, as the plaintiff had voluntarily dismissed his complaint. *Id.* ¶ 14. Here, in contrast, the district court specifically ruled that the 10% rate agreed to by the parties and articulated by the court as part of the stipulated oral ruling would not be enforced.

The Western States defendants also say error was invited because the Fullers withdrew the jury instruction without clarifying the scope of the agreement. (Aplee. Br. at 38.) This is not invited error, nor does it have a sound factual premise. The Fullers had the benefit of the district court actually articulating on the record that a 10% calculation would be used. If they are not entitled to rely on this, then the English language carries no meaning.

E. The Court Should Reject Western States' Untoward Accusations.

In this appeal, Western States now purports to take umbrage with the Fullers' description of what happened in the district court. (Aplee. Br. at 39-40.) This is a tempest in a teapot. The same appropriately descriptive idioms drew no objection from Western States in the district court when properly used to describe Western States' redirection of its litigation strategy after receiving an unfavorable verdict. (R. 1775-80.) Contrary to Western States' argument, this Court should not strike anything from the record. Nor are the Fullers asking the Court to make a finding of fraudulent inducement.

Western States suggests here, as it did below, that it in fact *meant* something different from what it *said* when entering the stipulation. (E.g., Aplee. Br. at 29 nn. 15-16.) The Fullers are justified in arguing that if Western States had meant something different, it had the obligation to say so when the district court articulated in open court the 10% standard that would be applied and not to

wait until after the Fullers relied on their statements before asserting a contrary meaning.

A finding of wrongdoing by Western States is not a necessary prerequisite to a proper decision here, and the Fullers do not suggest it is. But neither can Western States advance a justifiable basis for making statements on the record inducing the Fullers to forgo an approved jury instruction, then going back on that agreement by claiming *there had never been an agreement of any kind other than to transfer all prejudgment interest decisions to the judge*. That position proved insupportable in the end, and Western States found itself required to retreat to alternative positions, as it continues to do now on appeal. Given the actual state of the record, not to mention the strong rhetoric sprinkled liberally throughout its own appeal brief, Western States protests too much. The district court recognized the Fullers had been “led into withdrawing that instruction” through representations the Western States defendants later tried to repudiate. (R. 1973, at 6-7.)

Nor are the Fullers impugning the integrity of the district court in the least. To the contrary, they have taken great pains to point out that the district court’s exercise of discretion exceeding appropriate judicial bounds was more than likely unintentional. (Aplt. Br. at 25 n.5.) District judges are busy, with much on their judicial plates. The judge did not have the benefit of a written transcript when making his rulings, as this Court does. (R. 1973, at 7-12.) He

went back and forth on his recollection of what had taken place, first agreeing, then disagreeing, then reagreeing in part. (R. 1971, at 14-15; 1795-96; 1973, at 1-12). He made his decision while juggling multiple other post-trial issues in the case, handling a trial judge's full docket, and preparing for senatorial review of an appointment to the state appellate courts. (R. 1792-96; 1970, at 3; 1973, at 1-2.) Despite the Fullers' urging, the district judge overlooked or omitted to recognize that portion of the record where he had articulated the 10% standard in connection with the parties' agreement. While the oversight is understandable, it does not change the nature of the prejudicial error. This is the very reason why appellate review is necessary.

F. Western States Confuses Preservation With Estoppel.

In a final point about the stipulation, Western States argues that it preserved its arguments on the interest rate and therefore is not estopped from raising them. (Aplee. Br. at 41.) Western States confuses preservation with estoppel. *See Prinsburg*, 2012 UT 94, ¶ 19 (distinguishing preservation of a challenge to a stipulation with estoppel from challenging one). This argument does not advance the ball. The Fullers have not suggested that Western States failed to preserve any arguments it makes in its response brief.

In sum, Western States advances no persuasive argument in its attacks on the stipulation. That agreement should be enforced as first articulated by the district court at the time the stipulation was made: it's a simple 10% calculation,

and you can do it in your head. This Court should reverse and remand for that simple calculation to be done.

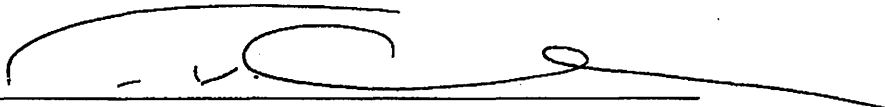
CONCLUSION

This Court should reverse the district court's decision and remand with an order that prejudgment interest should be applied using the 10% legal rate agreed to by the parties and dictated by statute. If the Court disagrees, it should nevertheless reverse the district court's decision and remand with an order to consider and articulate the appropriate interest rate that should apply under all the circumstances of this case.⁴

⁴ There is no basis for an award of fees and costs to the Western States defendants. (Aplee. Br. at 43.) The district court awarded costs to the Fullers as the prevailing party, and Western States has not appealed that decision. (R. 1951.)

DATED this 8th day of February, 2016.

STEPHEN K. CHRISTIANSEN, ATTORNEY AT LAW

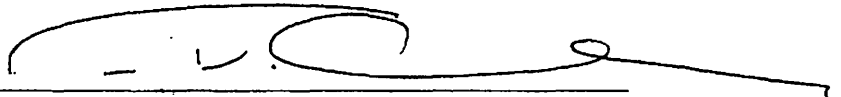
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Stephen K. Christiansen
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 6,948 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B). This brief complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011, Version 14.4.7, in Book Antiqua 13.

DATED this 8th day of February, 2016.



Stephen K. Christiansen

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2016, I caused two (2) true and correct copies of the within and foregoing document to be sent via U.S. mail, first class postage prepaid, upon the following counsel of record:

Joseph P. Barrett
BARRETT LAW, P.C.
699 East South Temple, Suite 370
Salt Lake City, Utah 84102



Supplemental
Addendum Exhibit 10:
Utah Interest Statutes

1907
Compiled Laws of Utah §§ 1241x and 1241x9

TITLE 38.

INTEREST.

1241. Legal rate of interest. The legal rate of interest upon the loan or forbearance of any money, goods, or things in action shall be eight per cent per annum. But nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the taking effect of this title. Am'd '07, p. 43.

Judgment to include interest, § 3353.

The usury law of 1907 was taken almost verbatim from the statutes of New York.

Usurious bond and mortgage enforced. In a state where there is a statute making usury penal but not declaring the contract void, a usurious bond and mortgage may be enforced for the amount actually due.

Bernheisel v. Firman, 89 U. S. 170; not reported in Utah reports.

Interest to maturity of note. An agreement to pay interest on a note which provides for "interest at the rate of two per cent per month from date," does not extend beyond the time said note becomes due and payable by its terms.

Perry v. Taylor, 1 U. 63.

An account stated carries interest from the day of its liquidation.

Godbe v. Young, 1 U. 55; affirmed 82 U. S. 562.

Interest on judgment is statutory. Without the authority of a statute it is error for a judgment to direct that the judgment bear interest.

Reece v. Knott, 3 U. 451; 24 P. 757.

Rule of partial payments. The rule for computing interest when there have been partial payments is to apply the payment to the discharge of the interest due, and if the payment exceeds the interest, the surplus goes toward discharging the principal; if the payment be less than the interest, the surplus of the interest due must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied toward discharging the principal.

Perry v. Taylor, 1 U. 63.

Compound interest. In a decree of foreclosure of trust deed, compound interest is not allowable,

1241x. Maximum rate. Exceptions. The parties to any contract may agree in writing for the payment of interest, for the loan or forbearance of any money, goods, or things in action, not to exceed twelve per cent. per annum; *provided*, that on loans of money only to the amount of \$100 or less, it may be agreed in writing to take or receive as interest on said loan not to exceed \$1 for the first month only of said loan, but thereafter no greater interest shall be contracted for, taken or received than is allowed in this section. This proviso shall not be construed so as to allow or permit the splitting up of transactions for the loan of money into small amounts for the purpose of evading the provisions of this title. '07, p. 43.

Prior to adoption of §§ 1241-1241x11, an agreement for any rate of interest was lawful in Utah.

1241x1. Id. No person, association, or corporation shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum or greater value for the loan or forbearance of any money, goods, or things in action, than is prescribed in § 1241x. '07, p. 43.

and the decree should allow interest only on the principal at the stipulated rate of 18 per cent.

Stevens Imp. Co. v. South Ogden L. B. & I. Co., 20 U. 267; 58 P. 843.

Where the evidence in the record is not sufficient to justify the computation of interest upon an account current, by monthly rests, it is error to allow such computation.

Jones v. Galligher, 9 U. 126; 33 P. 417.

INTEREST AS DAMAGES:

If a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time, by way of compensation for the delay in payment.

Young v. Godbe, 82 U. S. 502.

Where a purchaser agrees to pay into court the purchase price of a mine concerning which the vendor has litigation, the former will be liable for interest during the time he withholds the money.

Wasatch Mining Co. v. Crescent Mining Co., 7 U. 8; 24 P. 586; affirmed 151 U. S. 317.

Where interest is recoverable as damages for delay in payment, it is a matter largely in the discretion of the court.

Culmer v. Caine, 22 U. 216; 61 P. 1008.

In tort for unliquidated damages, plaintiff held entitled to interest from time of bringing action.

Woodland v. U. P. Ry., 27 U. 543; 26 P. 298; decided 1891 but not reported.

In tort for unliquidated damages, interest on the damages assessed from the date of the commencement of the action up to the date of the verdict is not recoverable.

Lester v. Highland Boy G. M. Co., 27 U. 470; 56 P. 341.

Nichols v. U. P. R. R. Co., 7 U. 510; 27 P. 693.

contracts or securities delivered up if in possession of the defendant in the action; and if the same be in the possession of the plaintiff, provision shall be made in the judgment or decree in the action removing the cloud of such usurious contracts or securities from the title to such property. '07, p. 45.

1241x9. Interest before and after judgment. Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum, which shall be specified in the judgment. R. S. '98, § 1241; '07, p. 45.

Judgment to include interest after verdict or decision, § 3353.

1241x10. Not usurious, when. The discount, sale, and transfer in the regular course of business of negotiable paper by one not the maker thereof without intent to violate this title shall not be construed as usurious. '07, p. 45.

1241x11. Bona fide lease upon shares of real and personal property not usurious. The bona fide lease upon shares of real and personal property by the owner thereof shall not be construed as a usurious contract. '07, p. 45.

TITLE 39.

INTOXICATING LIQUORS.

1242. License necessary. No person shall manufacture, sell, barter, deal out, or otherwise dispose of any spirituous, vinous, malt, or other intoxicating liquors, without first obtaining from the board of county commissioners of the county, or city council of the city, or board of trustees of the town in which he intends to do business, a license therefor, as hereinafter provided.

Powers granted to city council, § 206, sub. 41.

Powers granted to board of county commissioners, § 511, sub. 11.

1243. Id. Who may grant. Petition. Bond. The boards of county commissioners in their respective counties, and the city councils in their respective cities, and the boards of trustees in their respective towns, are hereby authorized to grant licenses, as contemplated in § 1242, to any person over the age of twenty-one years, upon an application being made for such license, by petition signed by the applicant and filed with the county clerk, city recorder, or town clerk, as the case may be. Said petition must state definitely the particular place at which any of the liquors named in § 1242 are intended to be manufactured, sold, bartered, dealt out, or otherwise disposed of, and whether the applicant intends to carry on a retail or wholesale business. Before a license is granted to the applicant he shall execute a bond to the county, city, or town, as the case may be, conditioned that during the continuance of his license he will keep an orderly and well-regulated house; that he will not allow gambling with cards, dice, or any other device or implements used in gambling, within his house, out-house, yard, or other premises under his control; that he will pay all damages, fines, and forfeitures which may be adjudged against him under any of the provisions of this title. Said bond shall be fixed by the board of county commissioners, city council, or board of trustees of the town, as the case may be, in any sum not less than \$500, nor more

1917
Compiled Laws of Utah §§ 3321 and 3330

3316. Continuation of benefits. In the event of the termination of membership in the society by the person responsible for the support of any child, on whose account a certificate may have been issued, as provided herein, the certificate may be continued for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child, who shall assume the payment of the required contributions.

TITLE 53.

INTEREST.

3320. (1241.) Legal rate of interest. The legal rate of interest upon the loan or forbearance of any money, goods, or things in action shall be eight per cent per annum. But nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the taking effect of this title. Am'd '07, p. 43.

Judgment to include interest, § 7050.
The usury law of 1907 was taken almost verbatim from the statutes of New York.

Interest on small loans, § 4384.
Public funds to draw interest, § 4500.
In a state where there is a statute making usury penal but not declaring the contract void, a usurious bond and mortgage may be enforced for the amount actually due.

Bernheisel v. Kirman, 89 U. S. 170; not reported in Utah reports.

An agreement to pay interest on a note which provides for "interest at the rate of two per cent per month from date," does not extend beyond the time said note becomes due and payable by its terms.

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An account stated carries interest from the day of its liquidation.

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The rule for computing interest when there have been partial payments is to apply the payment to the discharge of the interest due, and if the payment exceeds the interest, the surplus goes toward discharging the principal; if the payment be less than the interest, the surplus of the interest due must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied toward discharging the principal.

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In a decree of foreclosure of trust deed, compound interest is not allowable, and the decree should allow interest only on the principal at the stipulated rate of 18 per cent.

Stevens Imp. Co. v. South Ogden L. B. & I. Co., 20 U. 267; 58 P. 843.

Where the evidence in the record is not sufficient to justify the computation of interest upon an account current, by monthly rests, it is error to allow such computation.

Jones v. Gulligher, 9 U. 126; 33 P. 417.

Where a note provides for interest in regular instalments and the maker defaulted, he is liable for interest on the sums in default at the rate of 8 per cent.

Jensen v. Lichtenstein, 45 U. 320; 145 P. 1036.
Recovery for money loaned denied as unconscionable, where there has been repaid a sum

amounting to principal and 15 per cent per annum interest.

Carter v. West, 38 U. 381; 113 P. 1026.

Engert v. Chadwick, 40 U. 239; 120 P. 323.

In an action against a city, for extras under a contract, interest should be allowed at least from the time the claim was presented.

Wilson v. S. L. City, 61 U. —; 173 P. —.

INTEREST AS DAMAGES:

If a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time, by way of compensation for the delay in payment.

Young v. Godhe, 82 U. S. 562.

Where a purchaser agrees to pay into court the purchase price of a mine concerning which the vendor has litigation, the former will be liable for interest during the time he withholds the money.

Wasatch Mining Co. v. Crescent Mining Co., 7 U. 8; 24 P. 586; affirmed 161 U. S. 317.

Where interest is recoverable as damages for delay in payment, it is a matter largely in the discretion of the court.

Culmer v. Caine, 22 U. 216; 61 P. 1008.

In tort for unliquidated damages, plaintiff held entitled to interest from time of bringing action.

Woodland v. U. P. Ry., 27 U. 543; 26 P. 298; decided 1891 but not reported.

In tort for unliquidated damages, interest on the damages assessed from the date of the commencement of the action up to the date of the verdict is not recoverable.

Lester v. Highland Boy G. M. Co., 27 U. 470; 76 P. 341.

Nichols v. U. P. R. R. Co., 7 U. 510; 27 P. 693.

Damages for injury to a shipment while in transit is the amount of loss, with interest, from the time of delivery; the fact that the damages are unliquidated not being by itself reason for not allowing interest.

Fel v. U. P. Ry. Co., 32 U. 101; 88 P. 1003.

Interest on damages for land condemned should be computed from the time the company takes possession.

S. P. L. A. & S. L. R. Co. v. Bd. of Education, 32 U. 101; 99 P. 263.

Where interest is a legal consequence of a demand without stipulation it may be recovered, though not claimed in the pleadings, and interest is allowed in a tort, where personal property is destroyed, from the date of the destruction.

Wheatley v. O. S. L., 49 P. 105; 102 P. 86.

3321. (1241x.) Maximum rate. Exceptions. The parties to any contract may agree in writing for the payment of interest, for the loan or forbearance of any money, goods, or things in action, not to exceed twelve per cent per annum; *provided*, that on loans of money only to the amount of \$100 or less it may be agreed in writing to take or receive as interest on said loan not to exceed \$1 for the first month only of said loan, but thereafter no greater

interest shall be contracted for, taken or received than is allowed in this section. This proviso shall not be construed so as to allow or permit the splitting up of transactions for the loan of money into small amounts for the purpose of evading the provisions of this title. '07, p. 43.

Prior to §§ 3320-3332, an agreement for any rate of interest was lawful in Utah.

Interest on small loans, § 4392.

Where money was lent by a principal with an agent to be loaned, and the agent took usury

without the knowledge of the principal, and the principal received no part of the usury, the principal was not chargeable with the effects of the agent's misconduct.

Brown v. Johnson, 43 U. 1; 134 P. 590.

3322. (1241x1.) Id. Penalty. No person, association, or corporation shall, directly or indirectly, take or receive any money, goods, or things in action, or in any other way, any greater sum or greater value for the loan or forbearance of any money, goods, or things in action than is prescribed in § 3321. Any person, association, or corporation, their or its agents, servants, employees, clerks, or attorneys, violating any of the provisions of this section is guilty of a misdemeanor. '07, p. 43; am'd '09, p. 180.

If two constructions are possible, the court will take the one against usury, and a corrupt or unlawful intent to violate the usury law on the part of the lender is essential to render the contract usurious.

Cobb v. Hartenstein, 47 U. 174; 152 P. 424.

Where a lender refused to make a loan be-

cause the interest would not pay him for looking up the security, and the borrower agreed to pay a reasonable amount for examining the securities, the acceptance of such an amount does not constitute usury.

Fisher v. Adamson et al., 47 U. 3; 161 P. 351.

3323. (1241x2.) May recover usurious loans or forbearance. Every person who, for any such loan or forbearance, shall pay or deliver any sum or value than is above allowed to be received, or the principal or any part thereof of said usurious loan or forbearance, and his personal representatives, may recover in an action against the person who shall have taken or received the same, and his personal representative, the amount of money so paid or value delivered, both as principal and interest, if such action be brought within one year after such payment or delivery. If such action be not brought within said one year and prosecuted with diligence, then the said sum may be sued for and recovered with costs at any time within three years after the said one year by any county superintendent of schools of the county where such payment may have been made, for the use and benefit of the county school fund, and when collected shall be forthwith paid into said fund. '07, p. 43.

In an action to recover back the plaintiff is not bound to establish the usury beyond a reasonable doubt. This act is constitutional.

Cobb v. Hartenstein, 47 U. 174; 152 P. 424.

This section is not applicable to an action to recover pledged property.

Conner v. Smith, 50 U. —; 169 P. 168.

3324. (1241x3.) Bonds, etc., void, when. All bonds, bills, notes, assurances, conveyances, mortgages, deeds of trust, all other contracts or securities whatsoever, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of any money, goods, or other things in action than is above prescribed, shall be void; but this title shall not affect such contracts as have been made previous to the time it shall take effect. '07, p. 44.

Cited in Culmer Paint & Glass Co. v. Gleason et al., 42 U. 344; 130 P. 66.

A negotiable note, tainted with usury is not void as against an innocent purchaser for value before maturity.

Rosenblum v. Gomoll et al., 51 U. —; 173 P. 243.

To forfeit a note for usury the proof must be clear and convincing.

Id.

3325. (1241x4.) When complaint is filed for discovery of money, etc., borrower need not offer to pay interest, etc. Whenever any borrower of any money, goods, or things in action shall file a complaint for the discovery of the money, goods, or things in action taken or received in violation of this title, it shall not be necessary for him to pay or offer to pay any interest whatever on the sum or thing loaned; nor shall any court require or compel the payment or deposit of the principal sum or thing, or any part thereof, as a condition to the granting of relief to the borrower in any case of a usurious loan forbidden by this title. '07, p. 44.

3326. (1241x5.) Interest, how calculated. Whenever in any statute, act, deed, written or verbal contract, or in any public or private instrument

whatever, any certain rate of interest is or shall be mentioned and no period of time is stated for which such rate is to be calculated, interest shall be calculated at the rate mentioned by the year, in the same manner as if the words per annum or by the year had been added to such a rate. '07, p. 44.

3327. (1241x6.) Defendant may call and examine plaintiff. Whenever in any action the defendant shall plead or give notice of the defense of usury and shall verify the truth of his plea or notice by affidavit, he may, for the purpose of proving the usury, call and examine the plaintiff as a witness in the same manner as other witnesses may be called and examined. '07, p. 44.

3328. (1241x7.) Offender to answer to any complaint filed against him. Every person offending against the provisions of this title may be compelled to answer on oath any complaint that shall be filed against him in any court for relief. '07, p. 44.

3329. (1241x8.) Court shall declare any bond, etc., void, when. Whenever it shall satisfactorily appear by the admission of the party, or by proof, that any bond, bill, note, assurance, pledge, conveyance, mortgage, deed of trust, contract, security, or other evidence of debt has been taken or received in violation of the provision of this title, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled, and any property, real or personal, embraced within the term of said contracts or securities delivered up if in possession of the defendant in the action; and if the same be in the possession of the plaintiff, provision shall be made in the judgment or decree in the action removing the cloud of such usurious contracts or securities from the title to such property. '07, p. 45.

A forfeiture for usury will not be declared except on clear and convincing evidence that the lender participated in or benefited by the transaction.

Brown v. Johnson, 43 U. 1; 134 P. 590.

Forfeitures hereunder enforced only when proof is clear and convincing.

Culmer Paint & Glass Co. v. Gleason et al., 42 U. 344; 130 P. 66.

Rosenblum v. Gomoll, 51 U. —; 173 P. 213.

3330. (1241x9.) Interest before and after judgment. Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum, which shall be specified in the judgment. R. S. '98, § 1241; '07, p. 45.

Judgment to include interest after verdict or decision, § 7050.

3331. (1241x10.) Not usurious, when. The discount, sale, and transfer in the regular course of business of negotiable paper by one not the maker thereof without intent to violate this title shall not be construed as usurious. '07, p. 45.

A holder without knowledge of previous usurious transactions may recover on the note.

Rosenblum vs. Gomoll, 51 U. —; 173 P. 213.

3332. (1241x11.) Bona fide lease upon shares of real and personal property not usurious. The bona fide lease upon shares of real and personal property by the owner thereof shall not be construed as a usurious contract.

'07, p. 45.

One pledging property to secure the payment of a usurious loan, and making payments aggregating more than the money borrowed, has a right, under this section, to recover the

pledged property. If such action is subject to any period of limitation it is that fixed by the general statutes.

Conner v. Smith, 51 U. —; 169 P. 158.

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TITLE 44

INTEREST

44-0-1. Legal Rate.

The legal rate of interest for the loan or forbearance of any money, goods or things in action shall be eight per cent per annum. But nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the 14th day of May, 1907.

(C. L. 17, § 3320.)

44-0-2. Maximum Rates.

The parties to any contract may agree in writing for the payment of interest for the loan or forbearance of any money, goods or things in action, not to exceed, except as otherwise provided by law, twelve per cent per annum; *provided*, that on loans of money only, to the amount of \$100 or less, it may be agreed in writing to take or receive as interest on such loan not to exceed \$1 for the first month only of such loan, but thereafter no greater interest shall be contracted for, taken or received than is allowed in this section. This proviso shall not be construed to allow or permit the splitting up of transactions for the loan of money into small amounts for the purpose of evading the provisions of this title.

(C. L. 17, § 3321.)

Rate of interest allowed: On Small Loans, 7-8-5; To Industrial Loan Corporations, 7-6-3; To Pawnbrokers, 70-0-2.

12% per annum and 1% per month, the same. *Brown v. Johnson*, 134 P. 690, 43 U. 1, 29 A. L. R. 1109.

44-0-3. Calculated by the Year.

Whenever in any statute or deed, or written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is mentioned and no period of time is stated, interest shall be calculated at the rate mentioned by the year.

(C. L. 17, § 3326.)

44-0-4. Interest on Judgments.

Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum.

(C. L. 17, § 3330.)

Interest to be included in judgment entered, 104-14-16.

This section has no application except to personal judgments. *Sidney Stevens Imp. Co. v. So. Orden L. B. & Imp. Co.*, 58 P. 843, 20 U. 267.

44-0-5. Usury—Taking Excessive Interest a Misdemeanor.

No person shall, directly or indirectly, take or receive in services, money or other property, any greater sum or greater value for the loan or for-

bearance of any money, goods or things in action than is prescribed in section 44-0-2. Any person violating any of the provisions of this section is guilty of a misdemeanor. (C. L. 17, § 3322.)

44-0-6. Id. Contracts Void.

All bonds, bills, notes, assurances, conveyances, stocks, pledges, mortgages and deeds of trust, and all other contracts and securities whatsoever, and all deposits of goods or other things whatsoever, whereon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken or secured, any greater sum or greater value for a loan or forbearance of any money, goods or things in action than is above prescribed shall be void. (C. L. 17, § 3324.)

44-0-7. Id. Recovery of Payments—Limitation of Action.

Every person, or in the event of his death his personal representatives, who shall pay or deliver any greater sum or value than is allowed by this title to be received for or on any loan or forbearance, or who shall pay the principal or any part thereof of a usurious loan or forbearance, may recover from the person who shall have taken or received the same the amount of money so paid or value delivered, both of principal and interest, provided action is brought within one year after such payment or delivery. If such action is not brought within said one year and prosecuted with diligence, then the superintendent of public instruction may sue for and recover such sums, with costs, at any time within three years after said one year, for the use and benefit of the state district school fund, and the sum so collected shall be forthwith paid into said fund.

(C. L. 17, § 3323.)

Although this section gives the right of recovery to the borrower or his personal representatives, in view of 102-11-9 a surviving partner may maintain the action. *Cobb v. Hartenstein*, 132 P. 424, 47 U. 174.

44-0-8. Id. Repayment of Consideration Not a Condition Precedent.

Whenever any borrower of money, goods or things in action shall file a complaint for the recovery of the money, goods or things in action taken or received in violation of this title, it shall not be necessary for him to pay or offer to pay any interest whatever on the sum or thing loaned; nor shall any court require or compel the payment or deposit of the principal sum or thing, or any part thereof, as a condition to the granting of relief to the borrower in any case of a usurious loan.

(C. L. 17, § 3325.)

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fixing different rate, allowing interest at rate of "six cents on the hundred" by the year).

Iowa Code 1939, § 9404 ("five cents on the hundred" by the year unless parties agree in writing for payment of interest not exceeding "seven cents on the hundred" by the year).

Mont. Rev. Codes, § 7725 (in absence of express contract in writing fixing different rate, six per cent per annum "except [as to] a judgment").

Cross-references.

Regulation by special laws prohibited, Const. Art. VI, § 26; payment of interest as extending statute of limitations, 104-2-45.

1. Former rate.

Thus it will be seen that former rate was ten per cent per annum. *Openshaw v. Utah & N. Ry. Co.*, 6 U. 208, 21 P. 909.

2. Pawnbrokers and money lenders.

So far as 7-6-3 conflicts with this section and title it must prevail, for the former legislation is a special and subsequent act, and repeals "all laws in conflict" therewith. *People's Finance & Thrift Co. v. Varney*, 75 U. 365, 285 P. 304.

3. Instalments.

Where a note provided for payment of interest in regular instalments and maker defaulted, such maker was liable for interest on sums in default at rate of eight per cent, as fixed by this section. *Jensen v. Lichtenstein*, 45 U. 320, 145 P. 1036.

4. Debts overdue.

In Utah, interest is allowed on debts overdue, even in absence of statute or contract providing therefor. *Wasatch Min. Co. v. Crescent Min. Co.*, 7 U. 8, 16, 24 P. 586, aff'd 151 U. S. 317, 38 L. Ed. 177, 14 S. Ct. 348.

5. School districts.

School district, where it has received benefit of goods, should pay legal rate of interest from date it received benefit of its contract. *Baker Lumber Co. v. A. A. Clark Co.*, 53 U. 336, 178 P. 764.

6. Extent of recovery by borrower.

Where one loaning money had received full amount of money loaned and interest at rate of 15 per cent per annum, debt was fully paid, and lender could not recover anything in addition. *Carter v. West*, 38 U. 381, 113 P. 1025.

44-0-2. Maximum Rates.

The parties to any contract may agree in writing for the payment of interest for the loan or forbearance of any money, goods or things in action, not to exceed, except as otherwise provided by law, ten per cent

7. Determination of earning power of money.

This rate cannot be used as a basis of arriving at the reasonable earning power of money, in estimating damages plaintiff is entitled to in action for personal injuries. *Klinge v. Southern Pac. R. Co.*, 89 U. 284, 286, 57 P.2d 367, 105 A. L. R. 204.

Decisions from other jurisdictions.

— Federal.

County bonds payable in New York, held to draw interest after maturity under the laws of Iowa and not under those of New York. *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681.

— Iowa.

Where a contract is made in one state to be performed in another, the interest will be computed according to the law of the place of performance, but the parties may stipulate that interest shall be calculated according to the laws of the place where the contract is made. *Butters v. Olds*, 11 Iowa 1.

Interest at seven per cent according to the law of another state is properly allowed on money due under a contract made in that state to avoid a will contest. *Benson v. Sawyer*, 216 Iowa 841, 249 N. W. 424.

A stipulation for a higher rate of interest after maturity is properly enforced. *Penn Mut. Life Ins. Co. v. Orr*, 217 Iowa 1022, 252 N. W. 745.

A. L. R. notes.

Agreement to receive something other than money for loan, 95 A. L. R. 1231.

Expenses or charges (including taxes) incident to loan of money, 63 A. L. R. 823.

Law of the forum as governing the right to and rate of interest as damages for delay in payment of money or discharge of other obligations, 78 A. L. R. 1047.

Rate of interest after maturity on contract naming rate but not employing term "until paid," or similar phrase, 75 A. L. R. 390.

Rate of interest after maturity on contracts fixing rate "until payment," 6 A. L. R. 1106.

Statutes in relation to interest as obnoxious to constitutional provision against impairing obligation of contracts, 87 A. L. R. 462.

Validity and effect of anticipatory provision in contract in relation to rate of interest in event of default, 12 A. L. R. 367.

per annum; *provided*, that on loans of money only, to the amount of \$100 or less, it may be agreed in writing to take or receive as interest on such loan not to exceed \$1 for the first month only of such loan, but thereafter no greater interest shall be contracted for, taken or received than is allowed in this section. This proviso shall not be construed to allow or permit the splitting up of transactions for the loan of money into small amounts for the purpose of evading the provisions of this title.

No contract for the purchase of any goods, wares or merchandise or loan or forbearance of money, shall contain any provision providing for a handling or service charge on any said contract, or any commercial charge on said contract, or any charge whatsoever, which when taken together with the interest charged on said contract for the sale of goods, wares or merchandise, or for the loan or forbearance of money, exceeds ten per cent per annum of the unpaid principal sum of said loan or contract, except; (a) a contract may specifically provide for a service charge, which charge shall not exceed four per cent per annum of the unpaid balance of the said principal sum, such service charge to be applied but once on any transaction and shall not be again applied in case of refunding or renewal of contract between the parties concerned with the original transaction nor shall such service charge be subject to any additional service charge, interest charge or penalty; (b) a reasonable attorney's fee in case of collection by an attorney; and (c) such exceptions as are otherwise provided by law.

Interest accruing on loans, contracts, forbearance of money, goods, or things in action, under sections 44-0-1 and 44-0-2, Revised Statutes of Utah, 1933, when paid in advance or otherwise shall not exceed the rate of ten per cent per annum. (C. L. 17, § 3321.)

History.

As amended by L. 35, ch. 42, eff. June 15, substituting "ten," in third line, for "twelve," and adding last two paragraphs.

The present section bears little similarity to its predecessors, except that it has always been provided that there may be a conventional rate. R. S. 1898, § 1241; Comp. Laws 1907, § 1241x.

Comparable provisions.

Idaho Code, 1940 Supp., § 26-1905 (not to exceed eight per cent per annum by agreement in writing; on loan of \$100 or less, where interest charged for duration of loan is less than \$1, service charge may be made equal to difference between sum of \$1 and interest charged; judgment on such contract, interest at six per cent per annum).

Mont. Rev. Codes, § 7726 (not to exceed ten per cent per annum by written agreement).

Cross-references.

Rate allowed on small loans, 7-8-5, 7-8-8B; to industrial loan corporations, 7-8-3; to pawnbrokers, 70-0-2; to cooperative banks, 7-7-16.

1. Loan for less than one year.

Under former section one per cent a month was precisely 12 per cent per annum, and this was especially so where the loan was for less than a whole year. *Brown v. Johnson*, 43 U. 1, 7, 134 P. 690, 46 L. R. A. (N. S.) 1157, Ann. Cas. 1916 C 321.

2. Defense of usury.

In suit to foreclose corporate mortgage, stockholder of mortgagor cannot interpose defense of usury predicated on gifts of stock to mortgagee by other stockholders which, if added to interest provided in mortgage, would make it usurious, since defense of usury is personal to mortgagor. *Rospigioni v. Glenallen Min. Co. (Grace et al., interveners)*, 69 U. 41, 252 P. 276.

3. Recovery on usurious contract.

In action against finance company to recover principal and interest on alleged usurious loan, demurrer to complaint should have been sustained in absence of allegation that contract was made in Utah or was subject to its laws. *Farrar v. Atlas Acceptance Corp.*, 97 U. 261, 92 P.2d 720.

44-0-3. Calculated by the Year.

Whenever in any statute or deed, or written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is mentioned and no period of time is stated, interest shall be calculated at the rate mentioned by the year. (C. L. 17, § 3326.)

A. L. R. notes.

Construction of contractual provisions as to interest as regards time from which interest is to be computed, 60 A.

L. R. 958; time at which interest is payable under will or contract providing for payment of interest, 10 A. L. R. 997.

44-0-4. Interest on Judgments.

Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum. (C. L. 17, § 3330.)

History.

The first part of this section is almost identical with R. S. 1898, § 1241; and this section is exactly identical with Comp. Laws 1907, 1241x9.

Comparable provisions.

Iowa Code 1939, § 9405 (5 cents on 100 by the year, unless different rate is fixed by contract on which judgment or decree is rendered, in which case interest according to contract but not exceeding 7 cents on 100 by the year).

Cross-references.

Interest to be included in judgment entry, 104-44-16.

1. General applicability of section.

It is only to personal judgments that this section applies. *Sidney Stevens Implement Co. v. South Ogden Land, Building & Improvement Co.*, 20 U. 267, 58 P. 843.

2. Allowance of interest before judgment.

The true test to be applied as to whether interest should be allowed before judgment in given case or not is not whether damages are unliquidated or otherwise, but whether injury and consequent damages are complete and must be ascertained as of particular time and in accordance with fixed rules of evidence. *Fell v. Union Pac. Ry. Co.*, 32 U. 101, 88 P. 1003, 28 L. R. A. (N. S.) 1, 13 Ann. Cas. 1137.

3. Interest on damages.

Award of interest on damages suffered by reason of breach of building contract from time they were suffered at legal rate held proper as against contention that since damages were unliquidated, no interest could be allowed until after judgment. *Bingham Coal & Lumber Co. v. Board of Education of Jordan School Dist. of Salt Lake County*, 61 U. 149, 211 P. 981.

4. Estates of decedents.

Where widower and executrix both claimed certain moneys on deposit in bank and stipulated that such money should remain in bank at four per cent interest until outcome of litigation to determine rights to such money, executrix was not entitled to additional four per cent on judgment from time it was rendered to time remittitur was filed after appeal by widower. *Evancovich v. Schiller*, 83 U. 1, 26 P.2d 830.

5. Amendment of judgment.

Judgment revised to include interest at statutory rate where supreme court had inadvertently omitted it from its opinion. *Keller v. Chournos*, 95 U. 31, 79 P.2d 86.

Decisions from other jurisdictions.**— Iowa.**

In an action in equity, interest may be discretionarily allowed though not claimed in pleadings. *Johnson v. Roberts*, 229 Iowa 1184, 206 N. W. 358.

44-0-5. Usury—Taking Excessive Interest a Misdemeanor.

No person shall, directly or indirectly, take or receive in services, money or other property, any greater sum or greater value for the loan or forbearance of any money, goods or things in action than is prescribed in section 44-0-2. Any person violating any of the provisions of this section is guilty of a misdemeanor. (C. L. 17, § 3322.)

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Law of the forum as governing the right to and rate of interest as damages for delay in payment of money or discharge of other obligations, 78 A. L. R. 1047.

Rate of interest after maturity on contract naming rate but not employing term "until paid," or similar phrase, 75 A. L. R. 399.

Rate of interest after maturity on contracts fixing rate "until payment," 6 A. L. R. 1196.

Rate of interest after maturity on obligation which fixes rate of interest expressly until maturity, 16 A. L. R. 2d 902.

Statutes in relation to interest as obnoxious to constitutional provision against impairing obligation of contracts, 87 A. L. R. 462.

Validity and effect of anticipatory provision in contract in relation to rate of interest in event of default, 12 A. L. R. 367.

15-1-2. Maximum rates.—The parties to any contract may agree in writing for the payment of interest for the loan or forbearance of any money, goods or things in action, not to exceed, except as otherwise provided by law, ten per cent per annum; provided, that on loans of money only, to the amount of \$100 or less, it may be agreed in writing to take or receive as interest on such loan not to exceed \$1 for the first month only of such loan, but thereafter no greater interest shall be contracted for, taken or received than is allowed in this section. This proviso shall not be construed to allow or permit the splitting up of transactions for the loan of money into small amounts for the purpose of evading the provisions of this chapter.

No contract for the purchase of any goods, wares or merchandise or loan or forbearance of money, shall contain any provision providing for a handling or service charge on any said contract, or any commercial charge on said contract, or any charge whatsoever, which when taken together with the interest charged on said contract for the sale of goods, wares or merchandise, or for the loan or forbearance of money, exceeds ten per cent per annum of the unpaid principal sum of said loan or contract, except; (a) a contract may specifically provide for a service charge, which charge shall not exceed four per cent per annum of the unpaid balance of the said principal sum, such service charge to be applied but once on any transaction and shall not be again applied in case of refunding or renewal of contract between the parties concerned with the original transaction nor shall such service charge be subject to any additional service charge, interest charge or penalty; (b) a reasonable attorney's fee in case of collection by an attorney; and (c) such exceptions as are otherwise provided by law.

Interest accruing on loans, contracts, forbearance of money, goods, or things in action, under sections 15-1-1 and 15-1-2, when paid in advance or otherwise shall not exceed the rate of ten per cent per annum.

History: L. 1907, ch. 46, § 2; C. L. 1907, § 1241x; C. L. 1917, § 3321; R. S. 1933, 44-0-2; L. 1935, ch. 42, § 1; C. 1943, 44-0-2.

Compiler's Notes.

The 1935 amendment reduced the rate specified in the first sentence from 12 per cent to 10 per cent, and added the last two paragraphs.

The reference at the end of the first paragraph to "this chapter" appeared in the act as "this title." The reference in the last paragraph to "sections 15-1-1 and

15-1-2" appeared in the act as "sections 44-0-1 and 44-0-2, Revised Statutes of Utah, 1933."

The present section bears little similarity to its predecessors, except that it has always been provided that there may be a conventional rate. R. S. 1898, § 1241 (now repealed); Comp. Laws 1907, § 1241x.

Effective Date.

Section 2 of Laws 1935, ch. 42 provided that said act should take effect June 15, 1935.

Collateral References.

Interest—29.
 47 C.J.S. Interest § 32.
 Rate of interest, 30 Am. Jur. 25, Interest § 31 et seq.

Retrospective application and effect of statutory provision for interest or changed rate of interest, 4 A. L. R. 2d 932.

Law Reviews.

Usury in California, by William Tristram Coffin, 16 Cal. Law Review 281, 387.
 Usury, by Raymond B. McConlogue, 1 So. Cal. Law Review 253.

15-1-3. Calculated by the year.—Whenever in any statute or deed, or written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is mentioned and no period of time is stated, interest shall be calculated at the rate mentioned by the year.

History: L. 1907, ch. 46, § 7; C. L. 1907, § 1241x5; C. L. 1917, § 3326; R. S. 1933 & C. 1943, 44-0-3.

Collateral References.

Interest—40.
 47 C.J.S. Interest § 42.

Construction of contractual provisions as to interest as regards time from which interest is to be computed, 69 A. L. R. 958.

Time at which interest is payable under will or contract providing for payment of interest, 10 A. L. R. 997.

15-1-4. Interest on judgments.—Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum.

History: L. 1907, ch. 46, § 11; C. L. 1907, § 1241x9; C. L. 1917, § 3330; R. S. 1933 & C. 1943, 44-0-4.

Winters, 114 U. 502, 201 P. 2d 494, construing this section.

Compiler's Note.

The first part of this section is almost identical with R. S. 1898, § 1241; and this section is exactly identical with Comp. Laws 1907, § 1241x9.

Comparable Provision.

Iowa Code 1950, § 535.3 (5 cents on 100 by the year, unless different rate is fixed by contract on which judgment or decree is rendered, in which case interest is according to contract but not exceeding 7 cents on 100 by the year).

Cross-Reference.

Interest to be included in judgment entry, Rules of Civil Procedure, Rule 54(e).

1. Construction and operation generally.

It is only to personal judgments that this section applies. *Sidney Stevens Implement Co. v. South Ogden Land, Bldg. & Improvement Co.*, 20 U. 267, 58 P. 843.

This section provides that judgment, which is not upon obligation where rate of interest is fixed, shall bear interest at rate of 8 per cent per annum. *McFarlane v. Winters*, 114 U. 502, 201 P. 2d 494.

Utah Code does not prevent inclusion of interest due as part of principal of judgment to be rendered. *McFarlane v.*

2. Allowance of interest before judgment.

The true test to be applied as to whether or not interest should be allowed, before judgment in given case, is not whether damages are unliquidated or otherwise, but whether injury and consequent damages are complete and must be ascertained as of particular time and in accordance with fixed rules of evidence. *Fell v. Union Pac. Ry. Co.*, 32 U. 101, 88 P. 1003, 28 L. R. A. (N. S.) 1, 13 Ann. Cas. 1137.

3. Interest on damages.

Award of interest at legal rate on damages suffered by reason of breach of building contract from time they were suffered, held proper as against contention that since damages were unliquidated, no interest could be allowed until after judgment. *Bingham Coal & Lumber Co. v. Board of Education of Jordan School Dist.*, 61 U. 149, 211 P. 981.

4. Estates of decedents.

Where widower and executrix both claimed certain moneys on deposit in bank and stipulated that such money should remain in bank at four per cent interest until outcome of litigation to determine rights to such money, executrix was not entitled to additional four per cent on judgment from time it was rendered.

1981
Utah Code Ann. § 15-1-4

TITLE 15

CONTRACTS AND OBLIGATIONS IN GENERAL

Chapter

- 15-1. Interest.
- 15-2. Legal capacity of children.
- 15-3. Interparty agreements.
- 15-4. Joint obligations.

CHAPTER 1

INTEREST

Section

- 15-1-1. Legal rate.
- 15-1-4. Interest on judgments.

15-1-1. Legal rate. The legal rate of interest for the loan or forbearance of money, goods or things in action shall be ~~six per cent~~ 10% per annum. But nothing herein contained shall be so construed as to in any way affect any penalty or interest charge which by law applies to delinquent or other taxes or to any contract or obligations made before the 14th day of May, ~~1907~~ 1981.

History: L. 1907, ch. 46, § 1; C.L. 1907, 1935, ch. 42, § 1; C. 1943, 44-0-1; L. 1981, § 1241; C.L. 1917, § 3320; R.S. 1933, 44-0-1; L. 1973, § 1.

15-1-4. Interest on judgments. Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent 12% per annum.

History: L. 1907, ch. 46, § 11; C.L. 1907, § 1241X9; C.L. 1917, § 3330; R.S. 1933 & C. 1943, 44-0-4; L. 1981, ch. 73, § 2.

Late payment of property division in divorce action.

This section does not prohibit a district court from imposing an interest rate of more

than eight percent for late payment of ordered paid in a property division divorce action where the property division award is reasonable and equitable. *Pope* (1978) 589 P 2d 752.

CHAPTER 2

LEGAL CAPACITY OF CHILDREN

Section

- 15-2-1. Period of minority.

1985
Utah Code Ann. § 15-1-4

judgment against owner because of owner's failure to furnish a bond to protect the materialman, materialman was entitled to prejudgment interest from the date of first notice to the owner for demand of payment, and not from the due date indicated on the invoice, where at time the debt was due, credit was being extended to the contractor by the materialman for already past-due debts. Triple I Supply, Inc. v. Sunset Rail, Inc. (1982) 652 P 2d 1298.

Substantial performance.

Doctrine of substantial performance is applicable to this bonding statute; where heating subcontract was substantially completed on December 23, 1968, fact that one minor item, a register representing .0011385 percent of the value of the subcontract, was not furnished until February 19, 1969 does not extend the limitation period for filing action on bond. Carlisle v. Cox (1973) 29 U 2d 136, 506 P 2d 60.

Protect mechanics and materialmen, etc.

Performance bond.

This section provides no authority to award attorney fees to the prevailing party in an action between owners and surety on a performance bond not required by this chapter. Lignell v. Berg (1979) 593 P 2d 800.

TITLE 15

CONTRACTS AND OBLIGATIONS IN GENERAL

Chapter

- 15-1. Interest.
- 15-2. Legal capacity of children.
- 15-6. Prompt Payment Act.
- 15-7. Registered Public Obligations Act.

CHAPTER 1

INTEREST

Section

- 15-1-1. Interest rates — Legal rate — Contracted rate.
- 15-1-4. Interest on judgments.

15-1-1. Interest rates — Legal rate — Contracted rate. (1) Except when parties to a lawful contract agree on a specified rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or [things] chose in action shall be 10% per annum. [But nothing herein contained shall] Nothing in this section may be [so] construed [as] to in any way affect any penalty or interest charge which by law applies to delinquent or other taxes or to any contract or obligations made before [the 14th day of] May 14, 1981.

(2) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action.

History: L. 1907, ch. 46, § 1; C.L. 1907, § 1241; C.L. 1917, § 3320; R.S. 1933, 44-0-1; L. 1935, ch. 42, § 1; C. 1943, 44-0-1; L. 1981, ch. 73, § 1; 1985, ch. 159, § 6.

Compiler's Notes.

The 1981 amendment increased the rate in the first sentence from 6% to 10%; and changed the date at the end of the last sentence from 1907 to 1981.

15-1-4. Interest on judgments. Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of 12% per annum.

History: L. 1907, ch. 46, § 11; C.L. 1907, § 1241X9; C.L. 1917, § 3330; R.S. 1933 & C. 1943, 44-0-4; L. 1981, ch. 73, § 2.

Compiler's Notes.

The 1981 amendment increased the interest rate from 8% to 12%.

Late payment of property division in divorce action.

This section does not prohibit a district court from imposing an interest rate of more

than eight percent for late payment of cash ordered paid in a property division in a divorce action where the property division award is reasonable and equitable. Pope v. Pope (1978) 589 P 2d 752.

Prejudgment interest.

Prejudgment interest is inappropriate as to awards for mental anguish and punitive damages. First Security Bank of Utah v. J.B.J. Feedyards, Inc. (1982) 653 P 2d 591.

2011-Present
Utah Code Ann. § 15-1-4(2)(a)

TITLE 15

CONTRACTS AND OBLIGATIONS IN GENERAL

Chapter

1. Interest.
7. Registered Public Obligations Act.
8. Utah Rental Purchase Agreement Act.
9. Uniform Athlete Agents Act.
10. Service Contracts Act.

CHAPTER 1

INTEREST

Section

15-1-4. Interest on judgments.

15-1-1. Interest rates — Contracted rate — Legal rate.

NOTES TO DECISIONS

Prejudgment interest.

Fire protection district was liable for 10% prejudgment interest on invalid lump-sum service fees the district collected because the fees

were contractual in nature. *Highlands at Jordanelle, LLC v. Wasatch Cnty.*, 2015 UT App 173, 790 Utah Adv. 24, 2015 Utah App. LEXIS 177 (Utah Ct. App. 2015).

15-1-4. Interest on judgments.

(1) As used in this section:

(a) "Federal postjudgment interest rate" means the interest rate established for the federal court system under 28 U.S.C. Sec. 1961, as amended.

(b) "Final judgment" means the judgment rendered when all avenues of appeal have been exhausted.

(2)(a) Except as provided in Subsection (2)(b), a judgment rendered on a lawful contract shall conform to the contract and shall bear the interest agreed upon by the parties, which shall be specified in the judgment.

(b) A judgment rendered on a deferred deposit loan subject to Title 7, Chapter 23, Check Cashing and Deferred Deposit Lending Registration Act, shall bear interest at the rate imposed under Subsection (3) on an amount not exceeding the sum of:

(i) the total of the principal balance of the deferred deposit loan;

(ii) interest at the rate imposed by the deferred deposit loan agreement for a period not exceeding 10 weeks as provided in Subsection 7-23-401(4);

(iii) costs;

(iv) attorney fees; and

(v) other amounts allowed by law and ordered by the court.

(3)(a) Except as otherwise provided by law, all other final civil and criminal judgments of the district court and justice court shall bear interest at the federal postjudgment interest rate as of January 1 of each year, plus 2%.

(b) Except as otherwise provided by law or contract, all final judgments

under \$10,000 in actions regarding the purchase of goods and services shall bear interest at the federal post judgment interest rate as of January 1 of each year, plus 10%.

(c) The postjudgment interest rate in effect at the time of the judgment shall remain the interest rate for the duration of the judgment.

(d) The interest on criminal judgments shall be calculated on the total amount of the judgment.

(e) Interest paid on state revenue shall be deposited in accordance with Section 63A-3-505.

(f) Interest paid on revenue to a county or municipality shall be paid to the general fund of the county or municipality.

HISTORY:

L. 1907, ch. 46, § 11; C.L. 1907, § 1241x9; C.L. 1917, § 3330; R.S. 1933 & C. 1943, 44-0-4; L. 1981, ch. 73, § 2; 1993, ch. 198, § 1; 1999, ch. 279, § 1; 2000, ch. 149, § 1; 2005, ch. 190, § 1; 2008, ch. 96, § 17; 2010, ch. 102, § 4; 2011, ch. 79, § 1; L. 2014, ch. 281, § 1.

Amendment Notes. —

The 2014 amendment, effective May 13, 2014, added (1)(b) and (3)(b); substituted "all other final civil" for "other civil" in (3)(a); and made related changes.

NOTES TO DECISIONS

Prejudgment interest.

Bankruptcy court did not err in interpreting earlier state court judgment, which specified interest at 10%, to include prejudgment interest because the state court complaint contained

a clear date on which the alleged breach occurred and the amount of loss could be calculated with accuracy. *Wardley v. Wardley Corp.*, No. 2:12-CV-1075 TS, 2013 U.S. Dist. LEXIS 80463 (D. Utah June 5, 2013).

CHAPTER 7

REGISTERED PUBLIC OBLIGATIONS ACT

Section

15-7-4. Registration system established by issuer.

15-7-4. Registration system established by issuer.

(1)(a) Each issuer is authorized to establish and maintain a system of registration with respect to each obligation it issues.

(b) The system described in this Subsection (1) may either be;

(i) a system pursuant to which only certificated registered public obligations are issued;

(ii) a system pursuant to which only uncertificated registered public obligations are issued; or

(iii) a system pursuant to which both certificated and uncertificated registered public obligations are issued.

(c) The issuer may amend, discontinue, and reinstitute a system established under this section, from time to time, subject to covenants.

(2) The system shall be established, amended, discontinued, or reinstituted, for the issuer by, and shall be maintained for the issuer as provided by, the official or official body.