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1905

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and timothy seed, 45; blueberries and parsnips, 42; currants and gooseberries, 40; cranberries, 36; oats, 32; dried apples and dried peaches, 28; charcoal, 20; bluegrass, orchard grass, and red-top seed, 14; plastering hair, unwashed, 8; plastering hair, washed, 4; coal, 80, but if sold by the ton the weight shall be 2,000 pounds; lime, 80, but if sold by the barrel the weight shall be 200 pounds; and a cord of wood shall mean 128 cubic feet.

Whoever, in buying, shall take any greater number of pounds or cubic feet to the bushel, ton, or cord, as the case may be, than is herein allowed, or in selling shall give any less number, shall be guilty of a misdemeanor. (2203, 2204; '97 c. 31)

2729. Sealing—Every person engaged in any business requiring the use of weights or measures shall cause those used by him to be tested and sealed by the county sealer. Every person who shall buy, sell, or dispose of any goods or commodities by an unsealed weight, measure, or scale kept by him, or shall knowingly use any such weight, measure, or scale which has been sealed, but is incorrect, shall be guilty of a misdemeanor; but no contract of sale shall thereby be rendered void. (2205; '95 c. 43)

67-232, 69+910. Under former statute (39-143, 39+299).

2730. Testing upon request—Upon written request of any person aggrieved, and payment of one dollar, and mileage at the rate of twenty cents per mile going and returning, the county sealer or his deputy shall test any weights, measures, or scales used in his county, whether already sealed or not. If such sealer or deputy shall give to the person complained of prior notice of such testing, he shall be guilty of a misdemeanor. (2205)

2731. Neglect to procure standards—Whenever a county treasurer is requested in writing to procure any standard of weight or measure required by law to be kept by him, he shall procure the same within twenty days thereafter, or forfeit to the county one hundred dollars, at the suit of any interested person. (2206, 2207)

2732. Fines—All fines collected under the provisions of this chapter shall be paid to the county treasurer for the benefit of the school fund of the county where the action is brought. (2205)

CHAPTER 51

INTEREST AND NEGOTIABLE INSTRUMENTS

INTEREST

2733. Rate—The interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing; and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than ten dollars on one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. Contracts shall bear the same rate of interest after they become due as before, and any provision in any contract, note, or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity. (2212; '99 c. 122)

An oral contract for interest in excess of six per cent. is void as to the excess (63-258, 65+452; 72-536, 75+744). A contract in an instrument to pay interest on interest

overdue thereon is illegal (93-4, 100+379; 24-267; 19-67, 45; 4-51, 26; 3-339, 238; 2-350, 302). But interest on overdue interest may be recovered if the contract therefor is in the form of interest coupons (25-314; 29-68, 77, 11+228; 39-122, 124, 39+74, 140; 93-4, 100+379). A contract for a greater rate of interest after maturity is illegal (22-19; 24-43; 33-144, 22+633; 39-122, 39+74, 140; 51-485, 53+767; 3-339, 238; 3-347, 246). But such a stipulation does not render the entire contract void but simply works a forfeiture of all interest (62-498, 65+84; 51-485, 53+767). A note with no provision as to interest bears the legal rate of interest after maturity (18-429, 386). Interest is recoverable at the legal rate on a "legal indebtedness" (15-217, 169; 67-160, 69+715, 1069; 78-129, 133, 80+831). See cases under § 2735.

2734. Usurious interest—Recovery—Every person who for any such loan or forbearance shall have paid or delivered any greater sum or value than in § 2733 allowed to be received may, by himself or his personal representatives, recover in an action against the person who shall have received the same, or his personal representatives, the full amount of interest or premium so paid, with costs, if action therefor be brought within two years after such payment or delivery: Provided, that one-half of the amount so recovered shall be paid by the officer collecting the same into the treasury of the county where collected, for the use of common schools. (2213)

53-191, 54+1062; 61-490, 492, 63+1031.

2735. Usurious contracts invalid—Exceptions—All bonds, bills, notes, mortgages, and all other contracts and securities whatsoever, and all deposits of goods, or any other thing, whereupon or whereby there shall be reserved, secured, or taken any greater sum or value for the loan or forbearance of any money, goods, or things in action than hereinbefore prescribed, shall be void, except as to bona fide purchasers of negotiable paper, in good faith, for a valuable consideration and before maturity, as hereinafter provided. But no merely clerical error in the computation of interest, made without intent to avoid the provisions of this chapter, shall constitute usury. Interest at the rate of one-twelfth of ten per cent. for every thirty days shall not be construed to exceed ten per cent. per annum; nor shall the payment of interest in advance for one year, or any less time, at a rate not exceeding ten per cent. per annum, constitute usury; and nothing herein shall prevent the purchase of negotiable mercantile paper, usurious or otherwise, for a valuable consideration, by an innocent purchaser, at any price before the maturity of the same, when there has been no intent to evade the provisions of this chapter, or where such purchase has not been a part of the original usurious transaction; but where the original holder of a usurious note sells the same to an innocent purchaser, the maker thereof, or his representatives, may recover back from the original holder the amount of principal and interest paid by him on said note. (2214)

1. In general—Usury is the taking of a greater rate of interest for the loan or forbearance of money, goods, or things in action, than is allowed by law (28-211, 9+734. See 35-312, 29+134; 35-456, 29+154; 46-360, 365, 49+55). The three essentials of usury are (1) a loan; (2) an agreement for its return at all events; and (3) an agreement to pay more than the legal rate of interest for the use of it (59-468, 475, 61+560). There can be no usury without a loan of money (53-350, 353, 55+555; 69-199, 71+913); or without a contract (35-312, 29+134). The test is, will the contract, if performed, result in producing to the lender a rate of interest greater than is allowed by law, and was that result intended by the lender? (55-520, 526, 57+311). To be usurious a contract must be so when it is made (55-520, 526, 57+311; 55-466, 57+205). A contract to pay for the past use of money cannot be usurious (21-530; 68-210, 70+978). Usury laws are enacted to protect the weak and necessitous from oppression (37-441, 443, 35+265).

2. Intent—Presumptions—It is of the essence of usury that there be a corrupt intent to take or reserve a greater compensation for the future use of money than is allowed by law (31-304, 17+630; 49-496, 498, 52+135; 66-343, 69+3; 42-438, 44+316; 70-380, 388, 73+165). But the law raises a presumption of usury from the fact that the lender reserves greater compensation than the law allows (46-400, 49+189), and the rule that a person is presumed to have intended the necessary consequences of his acts applies (92-128, 133, 99+415). The intent or knowledge of the borrower is immaterial (37-441, 35+265; 42-438, 44+316; 46-400, 49+189).

3. Usurious contracts void—Except as to bona fide purchasers usurious contracts are absolutely void as well as all security given therefor (31-495, 18+450; 36-306, 31+213; 63-258, 65+452). Executory usurious contracts are non-enforceable (21-415). Any amount however small above the lawful rate is fatal (49-496, 52+135).

4. Form not controlling—Forms and names are not controlling. Courts look to the

substance and effect of transactions. There is no shift or device on the part of the lender to evade the statute under or behind which the law will not look in order to ascertain the real object of the transaction (37-441, 35+265; 40-329, 42+20; 42-438, 44+316; 52-356, 54+591; 34-409, 26+229; 60-303, 62+260; 69-199, 202, 71+913; 89-386, 390, 94+1088; 92-128, 99+415; 59-468, 61+560; 83-114, 117, 85+939). Unusual clauses always excite suspicion (52-356, 54+591; 59-468, 61+560).

5. **Question of fact**—Whether a transaction is usurious is a question of fact (49-111, 51+816; 59-468, 474, 61+560; 46-360, 49+55; 56-155, 57+462; 64-162, 66+269; 70-89, 72+817; 64-3, 65+959; 66-343, 69+3), to be submitted to the jury (35-312, 29+134; 49-496, 52+135), except where only one reasonable inference can be drawn from the evidence (60-422, 62+544; 40-329, 42+20).

6. **Burden of proof**—The burden of proving usury is on him who asserts it (64-162, 164, 66+269; 70-89, 93, 72+817; 49-111, 118, 51+816; 40-200, 41+1030). He must negative by his proof every supposable fact which if true would render the transaction lawful (60-422, 62+544). The burden rests on a principal to prove that the acts of his general agent in taking unlawful interest were without his knowledge or consent (43-307, 310, 45+439; 48-69, 50+1015; 85-242, 88+845).

7. **Degree of proof required**—All that is required to prove usury is a fair preponderance of evidence (37-441, 35+265; 40-329, 42+20; 43-307, 45+439; 60-303, 62+260). But as usury works an absolute forfeiture of the entire debt the proofs on which it rests should be scrutinized and the rule as to the effect of a fair preponderance of evidence applied, with more strictness than in ordinary civil actions (61-452, 63+1093; 64-162, 167, 66+269). Especially is this true where the adverse party is dead (80-419, 83+379). The evidence must warrant something more than a mere suspicion (40-329, 42+20. See 59-468, 61+560). Evidence may be wholly circumstantial (59-468, 61+560).

8. **Effect of commission or bonus to lender**—55-520, 57+311; 58-473, 59+1103; 43-517, 45+1100; 34-409, 26+229; 35-312, 29+134; 40-200, 41+1030; 60-303, 62+260; 64-3, 65+959; 64-457, 67+355; 90-377, 97+113.

9. **Sale of property as a cover for usury**—43-307, 45+439; 49-111, 51+816; 51-523, 53+754; 61-83, 63+250; 64-162, 66+269; 70-89, 72+817; 83-114, 85+939; *Barry v. Taranto*, Filed Feb. 9, 1906.

10. **Effect of collateral contract**—49-111, 51+816; 55-466, 57+205; 90-377, 97+113.

11. **Effect of including in note more than received**—46-400, 49+189; 49-496, 52+135; 34-409, 26+229; 35-312, 29+134; 44-121, 46+327; 49-111, 51+816; 46-8, 48+412; 60-534, 63+108; 83-203, 85+1012; 84-286, 87+774; 90-377, 97+113.

12. **Liability of principal for acts of agent**—85-242, 88+845; 43-307, 45+439; 44-121, 46+327; 49-431, 52+39; 37-441, 35+265; 44-218, 46+360; 60-534, 63+108. See cases under Note 13.

13. **Effect of commission or bonus to loan agent**—28-211, 9+734; 31-495, 18+450; 33-194, 22+295; 35-513, 29+337; 35-456, 29+154; 40-329, 42+20; 43-307, 45+439; 44-121, 46+327; 44-218, 46+360; 45-448, 48+185; 46-360, 49+55; 48-69, 50+1015; 49-431, 52+39; 58-137, 59+985; 58-487, 60+132; 62-295, 64+898; 66-343, 69+3; 89-386, 94+1088; 85-242, 88+845; 70-542, 73+514; 92-149, 99+641.

14. **Repayment contingent**—59-468, 61+560; 69-318, 72+121.

15. **Payment of interest in advance**—55-520, 527, 57+311; 70-380, 73+165; 89-386, 391, 94+1088.

16. **Miscellaneous**—Delay in delivering loan (43-517, 45+1100). Retention of part of loan for past services (51-276, 53+648). Note for services in procuring loan (39-339, 40+358). Provision for attorney's fees (31-182, 17+274; 55-341, 56+1119). Renewal of note (44-419, 46+908; 49-496, 52+135). Removal of taint of usury (37-182, 33+567). Pretended agency (52-356, 54+591).

17. **Effect of new security**—Where a new contract is substituted for a usurious one the taint of usury will affect the new security (31-495, 18+450; 37-441, 35+265).

18. **Clerical mistake**—31-304, 17+630. See 69-178, 71+929.

19. **Extensions**—If a note is not originally usurious it cannot be made so by a subsequent extension granted in consideration of usurious interest (35-456, 29+154; 68-210, 70+978; 65-37, 67+655). An agreement at the time of the original loan for an extension at the option of the borrower at an illegal rate does not render the original loan usurious if not intended as an evasion of the usury law (44-218, 46+360).

20. **Who may assail**—44-218, 46+360; 70-380, 73+165; 71-351, 74+146.

21. **Estoppel**—36-57, 29+674; 42-438, 44+316; 71-351, 74+146.

22. **Bona fide purchasers**—The term "innocent purchaser" means a bona fide in-dorsee or bearer within the law merchant (62-62, 64+90; 62-295, 64+898; 61-490, 63+1031; 27-87, 6+422. See 40-329, 42+20; 53-267, 55+123). Exception in favor of bona fide purchasers limited to negotiable paper. Does not extend to mortgages securing negotiable paper (36-460, 32+89, 864; 55-520, 57+311). A bona fide purchaser at a foreclosure sale of a usurious mortgage is protected (31-495, 18+450; 53-350, 55+555).

23. **Discounting commercial paper**—53-350, 55+555; 63-459, 65+928.

24. **Liability of national banks**—66-257, 68+1092; 76-458, 79+509; 79-266, 82+1118.

25. **Conflict of laws**—36-333, 31+348; 55-520, 57+311; 74-335, 77+230.

26. **Pleading**—60-422, 424, 62+544; 72-229, 75+106; 46-8, 48+412; 45-448, 48+185; 90-377, 97+1113; 36-333, 31+348; 64-3, 65+959; 58-385, 59+1038; 66-257, 68+1092; 61-490, 63+1031. See § 2737.

27. **Evidence**—46-360, 49+55; 67-510, 70+799.

28. Chattel mortgages held usurious—35-496, 29+196; 36-123, 30+439; 43-270, 45+443; 45-448, 48+185; 78-94, 80+862; 52-356, 54+591.

29. Real estate mortgages held usurious—37-182, 33+567; 55-520, 57+311; 70-542, 73+514; 83-114, 85+939; 85-242, 88+845; 92-128, 99+415.

30. Real estate mortgages held not usurious—43-517, 45+1100; 64-162, 66+269; 68-210, 70+978; 68-183, 70+1077; 69-178, 71+929; 77-97, 79+609; 40-200, 41+1030; 89-386, 94+1088.

2736. Offenders to answer on oath—Every person offending against the provisions of this chapter shall be compelled to answer on oath the complaint in any action brought against him in the district court of the proper county for the discovery of any sum of money, goods, or things in action so taken, accepted, or received in violation of any of the foregoing provisions. (2215)

2737. Usurious contracts—Cancellation—Whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security, or evidence of debt has been taken or received in violation of the provisions of this chapter, it shall declare the same to be void, enjoin any proceeding thereon, and order it to be canceled and given up. (2217)

Plaintiff need not repay what he has received (36-460, 32+89, 864; 37-182, 33+567; 69-318, 72+121; 77 Fed. 32; 172 U. S. 351). Requisites of complaint (51-274, 53+647; 69-318, 72+121; 71-112, 73+513). Cited (68-183, 70+1077).

2738. Agreements to share profits—Building associations—Nothing in this chapter shall be construed as in any way affecting any contract whereby one party advances money to be used in business or other ventures mutually determined upon, and whereby the party receiving such money agrees to refund the same, with lawful stipulated interest, and in addition thereto agrees to share, equally or otherwise, with the party so advancing the money, the profits of such business or ventures; nor shall its provisions apply to mutual building associations. (2218, 2219)

60-422, 62+544; 77-97, 79+609.

NEGOTIABLE INSTRUMENTS

2739. Contracts due on holidays, etc.—Bills of exchange, promissory notes, and other contracts payable or to be performed on Sunday, Good Friday, Thanksgiving Day, or on any legal holiday, shall be payable or performable on the next succeeding business day. (2230; '97 c. 51; '03 c. 261 s. 2)

See 1905 c. 345

2740. Corporate bonds—Seal—Bonds and other obligations under seal for payment of money to bearer, or to some designated person or bearer, or to order, issued by any corporation or joint stock company, shall be negotiable in the same manner and to the same extent as promissory notes. (2220)

28-291, 9+799.

2741. Demand notes—Presentment and dishonor—When a promissory note is payable on demand, presentment for payment must be made within sixty days after the date thereof, or the indorser will be discharged, and if made within said period the presentment and demand shall be deemed to have been made within a reasonable time. Any act, neglect, or other thing, occurring within such sixty days, which by the rules of law and the custom of merchants would excuse presentment of a note payable at a fixed time, shall be deemed a dishonor of such demand note; and the several indorsers thereof, upon due notice of its dishonor, shall be liable in the same manner and to the same effect, and not otherwise, as upon the dishonor of a promissory note payable at a fixed time. (2231, 2232)

Applicable to certificates of deposit (37-335, 33+910). Cited (19-181, 145; 67-370, 69+1098).

2742. Acceptance must be in writing—No person shall be charged as an acceptor on a bill of exchange unless his acceptance is in writing, signed by himself or his authorized agent. (2233)

8-407, 363.

2743. Damages on international bills—Whenever any bill of exchange, drawn or indorsed in the state, and payable without the United States, is duly

protested for non-acceptance or non-payment, the party liable for the contents thereof, on due notice and demand, shall pay the same at the current rate of exchange at the time of the demand, and damages at the rate of ten per cent. upon the contents, together with the interest on such contents, computed from the date of protest. The amount of such contents, damages, and interest shall be in full of all damages, charges, and expenses. (2234)

2744. Rate of damage on interstate bills—Whenever any bill of exchange drawn upon any person out of the state, but within the United States, is duly presented for acceptance or payment, and is protested for non-acceptance or non-payment, the drawer or indorser thereof, after due notice of such dishonor, shall pay said bill according to its tenor, with interest and five per cent. damages, together with charges of protest. (2235)

2745. Notes payable to maker or order—Promissory notes made payable to the order of the maker, or of a fictitious person, if negotiated by the maker, shall have the same effect and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer. (2236)

69-46, 71+822.

2746. No days of grace—All promissory notes, bills of exchange, and other negotiable instruments, except bills payable at sight, shall be payable at the time therein specified without grace. ('03 c. 261 s. 1)

See 1905 c. 345

2747. Instrument obtained by fraud—No person, nor the heirs or personal representatives of any person, whose signature is obtained to any bill of exchange, promissory note, or other paper negotiable under the law merchant, shall be held liable thereon if it be made to appear that the signature was obtained by fraudulent representation, trick, or artifice as to the nature and terms of the contract so signed, that at the time of signing he did not believe it to be a bill of exchange, promissory note, or other paper negotiable under the law merchant, and that he was not guilty of negligence in signing such paper without knowledge of its terms. The question of negligence in any suit on such contract shall in all cases be one of fact for the jury, and the person sought to be charged thereon shall be entitled to have the question of his negligence submitted to a jury. (2239)

51-480, 53+766; 57-391, 59+486; 63-525, 65+952; 88-401, 93+307; 89-473, 477, 95+308.

2747
102-M - 414
104-M - 430
113-NW 1011

CHAPTER 52

PARTITION FENCES

2748. Fence viewers—Supervisors in their respective towns, aldermen of cities in their respective wards, and village trustees in their respective villages shall be fence viewers. (929)

2749. Legal fences—All fences not less than 54 inches high, consisting of boards firmly fastened to well set posts not more than 9 feet apart, the space between the ground and bottom board being not more than 20 inches, and each space between the boards not more than 9 inches; all fences consisting of not less than one smooth and two barbed wires, with at least 40 barbs to the rod, the wires to be firmly fastened to posts not more than 33 feet apart, with two stays between the posts, the top wire to be not more than 52 nor less than 48 inches high, and the bottom wire not less than 16 nor more than 20 inches from the ground; or four smooth wires, the top wire to be not more than 54 nor less than 48 inches high, and the bottom one not less than 16 nor more than 20 inches from the ground, with like posts and stays; and all fences consisting of rails, timbers, wires, boards, stone walls, or any combination thereof, or of streams, lakes, ditches, or hedges, which shall be considered by the fence