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## INTEREST AS DAMAGES IN COLORADO

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The purpose of this study is to inquire into the law of Colorado with respect to the rights of a party litigant to recover interest on, or as, damages for the injury to, or the detention, loss or destruction of, property, where the interest claimed is for a period of time prior to judgment. Discussion of interest on damages for personal injuries occasioned by the tort of another is eliminated, except to note, in passing, that such interest is recoverable from the time suit is filed by virtue of chapter 50, section 5, of the 1935 Colorado Statutes Annotated.

It is convenient, and perhaps necessary to an orderly approach to the question of interest, to consider, first, chapter 88, section 2, of the 1935 Colorado Statutes Annotated, which, while enumerating the circumstances under which interest will be allowed, in effect provides that interest, where there is no conflicting agreement, shall be allowed on all claims for money due where the amount of the claim is liquidated. In substance, this statute provides that creditors shall be allowed to receive interest, when there is no agreement as to rate, at the rate of six per cent. per annum for all moneys after they become due on:

- (1) any bill, bond, promissory note, or other instrument in writing from the time the same becomes due;
- (2) any judgment from the date of the entry of the judgment;
- (3) money due on mutual settlement of accounts from the date of such settlement;
- (4) money due on account from the date the same became due;
- (5) money received to the use of another and retained without the owner's consent, from the time of the receipt thereof; and
- (6) on money taken or retained and fraudulently converted to the taker's use, from the time of the taking.

This statute, as now embodied in our statutes, although since its origin has been subjected to minor amendments, is substantially the same as the statutes which were in effect at the time the cases hereinafter cited were decided.

Perhaps the import of the above statute, with respect to interest on claims for unliquidated damages, can in no way be better manifested than in quoting from the opinion in *Denver, South Park & Pacific R. R. Co. v. Conway*,<sup>1</sup> a leading case on this question. This was an action to recover damages for injury to property as a result of a fire caused by the defendant's negligence. A claim for interest on the damages was disallowed, the court holding that: "Interest in this state is a creature of statute and regulated thereby. It is only recoverable, in absence of contract, in the

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<sup>1</sup> 8 Colo. 1, 5 P. 142 (1884).

cases enumerated in the statute, and damages to property arising from the wrong or negligence of a defendant is not one of the enumerated cases.”<sup>2</sup>

#### WHERE DAMAGES ARE UNLIQUIDATED

There are several cases in Colorado which have seemingly allowed interest on a claim for unliquidated damages, and which do not come under any of the circumstances enumerated in the interest statute. At first blush, these cases appear to conflict with the rule set forth in *Railroad v. Conway*, supra; but, upon examination, it will be found that in all these cases there was a *wrongful detention* of property. While an equivalent of interest on the value of the property detained was recovered, it was not recovered as interest, as such, but as damages for the detention of the property, the legal rate of interest being used merely as a convenient measure of the plaintiff's loss occasioned by the detention of his property by the defendant. The distinction is emphasized in the following cases.

*Machette v. Wanless*<sup>3</sup> was an action of replevin for grain in which the plaintiff was permitted to recover, as damages for the detention of the grain, an amount equal to legal interest on the value of the property for the period of the detention. The court used the interest rate as a convenient measure of the damages for the detention, and not to allow recovery of interest as such. This is brought out in the following quotation.

Where the property is domestic animals, valuable for service only, the value of the use of the animals is, of course, the measure of compensation; but where, as in this case, the article is intended for consumption, interest upon the value of it would seem to be the true compensation. If the owner of grain should wish to obtain the like quantity, he must purchase in the market, at current prices, and he would be deprived of the use of the money thus invested. The best estimate of his loss is interest upon the amount of money which he would, for that purpose, be compelled to pay out.<sup>4</sup>

*Omaha & Grant Smelting & Ref. Co. v. Tabor*<sup>5</sup> was an action to recover damages for the conversion of ore, in which the plaintiff was denied, by the trial court, interest as damages for the detention. The Supreme Court of Colorado, in reversing for this error, said:

It is true, as stated by the learned Judge, “that interest in this state is a creature of statute and regulated thereby; that it is only recoverable, in the absence of contract, in cases enumerated in the statute; and that damages to property arising from a wrong or negligence of defendant is not one of the enumerated cases.” This [case] could not come under the last clause of the instruction. It is not for damages to property. It is for the wrongful detention of money [since to detain the ore or the money into which it was converted was indirectly to detain the money] belonging to plaintiff.

<sup>2</sup> 8 Colo. at p. 16, 5 P. at p. 151, *Accord: Railroad v. Moynahan*, 8 Colo. 56, 5 P. (1884).

<sup>3</sup> 2 Colo. 169 (1873).

<sup>4</sup> 2 Colo. at p. 180.

<sup>5</sup> 13 Colo. 41, 21 P. 925 (1889).

It is clearly distinguishable from *Railroad v. Conway*, 8 Colo. 1. . . . In our state damages for detention of the money equal to the legal interest upon the value of the chattels converted from the time of the conversion has been allowed, not as interest, but as damages.<sup>6</sup>

*Greeley, Salt Lake & Pac. R. Co. v. Yount*<sup>7</sup> was an action to recover damages for the unauthorized appropriation of land, in which it was held, on the authority of *Railroad v. Conway*, supra, that interest was not recoverable. The court, confronted with the decisions in *Machette v. Wanless*, supra, and *Refining Co. v. Tabor*, supra, distinguished these cases on the basis that interest was there allowed, not as interest, but as damages for the detention of personal property. Said the court: "These decisions were not based on the statute, and the statute did not figure in them, except in so far as the rate of interest which it allowed on money was used as a criterion by which the damages might be estimated."<sup>8</sup>

The foregoing cases would seem to sufficiently emphasize the distinction between those cases which have allowed *interest as damages* and those which have disallowed *interest on damages* on an unliquidated claim. In all of the cases in which interest has apparently been recovered on an unliquidated claim it will be found that there was a wrongful detention of the plaintiff's property by the defendant, and the interest was allowed, not as interest, as such, but as damages for the detention.

#### WHERE FRAUD IS INVOLVED

There is another line of cases in Colorado—those dealing with fraud in the sale of property—in which the courts have again seemingly permitted a recovery of interest in conflict with the rule that interest, as such, can only be recovered under the circumstances enumerated in the statute. But, again, a study of these cases will reveal that the interest was not recovered *on damages*, but rather *as damages*. Although in these cases there has not been a detention of property in the technical sense, still, the conduct of the defendant, in a practical sense, is tantamount to a withholding of the plaintiff's property, and the interest has been allowed, as in the conversion cases, as damages for the wrongful withholding of property from the plaintiff. Let us consider some of these cases.

*Mayo v. Wallgreen*<sup>9</sup> was an action for deceit in the purchase of land. The defendant, having an option to buy land at \$100 per acre, falsely represented to the plaintiff that he was to pay \$150 per acre, and induced the plaintiff to join with him in the purchase of the land at the higher figure. The plaintiff, upon learning that the defendant had purchased the land at the lesser figure, while plaintiff's contribution to the defendant had been at the higher figure, sought damages for the deceit. The court held that the plaintiff was entitled to recover the difference between the

<sup>6</sup> 13 Colo. at p. 57, 21 P. at 931.

<sup>7</sup> 7 Colo. App. 189, 42 P. 1023 (1895).

<sup>8</sup> 7 Colo. App. at p. 193, 42 P. at p. 1025.

<sup>9</sup> 9 Colo. App. 506, 50 P. 40 (1897).

the two prices with interest from the time plaintiff gave defendant the money until the date of recovery. Said the court:

In this state, in the absence of some statutory provision permitting interest to be recovered, it may not generally enter into or form a part of the damages which a party may receive if he gets judgment. The general rule is subject to some exceptions, and we are of the opinion that this case is brought within the exception sanctioned by the Supreme Court. *Omaha & Grant Smelting and Ref. Co. v. Tabor*, 13 Colo. 41.<sup>10</sup> [*supra*].

The opinion is devoid of any discussion, other than the language above quoted, of the exception to the general interest rule under which this case was held to come. It is clear, however, that the Court of Appeals was referring to the rule of the conversion and detention cases as the exception to the general interest rule. This is manifest in the court's citation of *Refining Co. v. Tabor*, discussed *supra*, as authority for its holding.

Three later cases apparently *contra* to the *Mayo* case are *Clark v. Giacomini*,<sup>11</sup> *Keeney v. Angell*,<sup>12</sup> and *Otis v. Grimes*.<sup>13</sup> These were actions to recover damages for false representations inducing an exchange of property, indistinguishable in fact, to this writer's mind, from the *Mayo* case. Apparently ignoring the *Mayo* case, or else tacitly declining to follow it, our Supreme Court held that interest was not recoverable, making no distinction between interest *on* and interest *as* damages.

But a still later case dealing with fraud in the exchange of property, in which the distinction between interest *on* and interest *as* damages has again been observed, is *Bankers Trust Co. v. International Trust Co.*<sup>14</sup> This was an action against a trust company to recover money paid for mortgage notes, the purchase of which was allegedly induced by the misrepresentation of the value of the mortgage security. The plaintiff waived the action in tort for deceit and, instead, rescinded the contract for fraud, and sued in quasi-contract to recover the money paid for the notes. The court held that the plaintiff was entitled to recover interest from the time of the transaction until restitution was made.

The court, although citing the *Clark*, *Keeney* and *Otis* cases, *supra*, for the proposition that interest could not be recovered in actions for damages for deceit, neither expressly overruled these cases, nor did it distinguish them. Nor was the case brought within the purview of the interest statute. But, rather, the interest was allowed under the authority of the conversion and detention cases, discussed *supra*, which permit the recovery of interest *as* damages for the detention of property. This is clear from the following language in the opinion:

Notwithstanding that in this jurisdiction the decisions are uniform in holding that interest is a creature of statute, and, in

<sup>10</sup> 9 Colo. App. at p. 518, 50 P. at p. 45.

<sup>11</sup> 85 Colo. 530, 277 P. 306 (1929).

<sup>12</sup> 92 Colo. 213, 19 P. 2d 215 (1933).

<sup>13</sup> 97 Colo. 219, 48 P. 2d 788 (1935).

<sup>14</sup> 108 Colo. 15, 113 P. 2d 656 (1941).

absence of contract, is recoverable as such only in such cases as are enumerated in the state, [citations omitted] . . . the courts of this state, even when interest is not recoverable under the statute, by distinguishing between interest as such, and interest as damages, many times have allowed the equivalent of interest in the way of damages for the tortious taking and detention of money or property.<sup>10</sup>

To bring the case within the rule of the conversion and detention cases, the court reasoned that where, as here, the defrauded party rescinds the contract, the rescission relates back to the time of the fraudulent transaction; that there is a duty upon the defendant to make restitution, and a concurrent breach of that duty, as of the time of the fraudulent transaction; and that (although this is not expressly stated by the court, it seems a necessary and proper inference from that which was expressly stated) the breach of the duty to make restitution was tantamount to a detention of the plaintiff's money.

Now, let us consider the distinction, if any, between this case and the *Clark, Keeney, and Otis* cases, *supra*. The fact that the *Bankers Trust Co.* case was an action *ex contractu*, following a rescission for fraud, while the latter cases were actions *ex delicto* for deceit, glaringly presents itself to be seized as the point of distinction. It is easy—too easy—to accept this as the basis of distinction and conclude that there is a real difference in fact, when difference there is none. The distinction is in form only. It is illusory, and vanishes as we look to the substance of the respective actions, the substance being the tortious conduct of the defendants upon which their legal liabilities are predicated. In all of these cases the substance—the tortious conduct—was the same, to wit: fraud and misrepresentation in the exchange of property. In all, the plaintiffs were wrongfully deprived of money through the conduct of the defendants which was tantamount to a detention of the plaintiff's money.

True it is, in the law of damages, that the basis of recovery in actions *ex contractu* is not the same as in actions *ex delicto*; the basis of the former being the value of the benefit to the defendant, while the latter is the detriment to the plaintiff. But this distinction, although important in other respects in the law of damages, would seem to be immaterial to the question of interest as damages in fraud cases. Where a defendant has obtained money or other property from a plaintiff through fraud, there is both a benefit to the defendant and a detriment to the plaintiff, the quantum of each, although theoretically different, can be conveniently measured only by using the interest rate as the criterion.

The writer does not disagree with the decision in the *Bankers Trust Co.* case, nor does he doubt the validity of the court's reasoning as a matter of abstract law. He submits, however, that reasoning along the line of rescission and relation back to the time of the fraudulent transaction with a breach of a duty to make resti-

<sup>10</sup> 108 Colo. at p. 33, 113 P. 2d at p. 665.

tution, was not necessary to the decision. The case could have been brought under the rule of the conversion and detention cases, as it was, but without the circuitous reasoning set forth above, upon the authority of *Mayo v. Wallgren*, supra, which, it will be recalled, permitted a recovery of interest in an action *ex delicto* for deceit. Of course, the *Clark*, *Keeney*, and *Otis* cases, supra, which are contra to the *Mayo* case, would have had to have been overruled. But, unless we accept the illusory distinction between actions *ex contractu* and actions *ex delicto* in this respect, these cases have been impliedly overruled anyway by the *Bankers Trust Co.* case.

Be that as it may, the point which all of the cases emphasize is that, if interest is recoverable at all, it is so recoverable because the circumstances of the particular case constrain the court to look upon the defendant's conduct as amounting to a detention, or a withholding, if you please, of the plaintiff's property. Thus, interest is recovered, not as such, but as damages for the withholding of the property.

In summary, the writer has drawn the following conclusions as a result of this study:

1. Interest will be allowed as a matter of right on damages for personal injuries occasioned by the tort of another, pursuant to COLO. STAT. ANN., c. 50, § 5 (1935).

2. Interest will be allowed as a matter of right upon any claim for money due, from the time the same became due until paid in the cases enumerated in COLO. STAT. ANN., c. 88, § 2 (1935). It seems reasonable to conclude that this statute, although it must be strictly construed, is, nevertheless, sufficiently broad to cover all cases of claims for money due where the amount of the claim is liquidated. Of course, if the rate of interest is specified in a contract, the statute would not be applicable.

3. Interest in this state is a matter of statute, not of common law, and is recoverable only in cases enumerated in the statutes, and damages to property arising from the wrong or negligence of a defendant is not enumerated in the statute. Nor will interest be allowed on damages for the unauthorized taking of land, or, stated conversely, in eminent domain proceedings, for any period prior to the judgment or the condemnation award.

4. Where there has been a wrongful detention of property, in an action either in replevin or trover, interest will be allowed from the time of the conversion until the time of recovery, not as interest on damages, but as damages for the detention of the property.

5. In actions involving fraud in the exchange of property, where the circumstances are such that the court can look upon the defendant's conduct as tantamount to a detention of property, the same rule will be applied to permit the plaintiff to recover interest as damages from the time of the fraudulent transaction until the date of recovery.

6. With the exception of interest on damages for personal injuries, and interest as damages for the detention, or what amounts to a detention, of property, interest for any period prior to judgment cannot be recovered in Colorado on an unliquidated claim for damages.