

4-1-1931

Interest As Damages

Charles T. McCormick

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Charles T. McCormick, *Interest As Damages*, 9 N.C. L. REV. 237 (1931).Available at: <http://scholarship.law.unc.edu/nclr/vol9/iss3/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

INTEREST AS DAMAGES*

CHARLES T. McCORMICK**

1. *Interest as Damages Distinguished from Contractual Interest.*

"Interest" is compensation allowed by law or fixed by the parties for the use or detention of money,¹ or allowed by law as additional damages for loss of the use of money due as damages during the lapse of time since the accrual of the claim. It is customarily computed as a certain annual percentage of the principal sum or claim. For our present purposes a sharp distinction must be taken between interest which is agreed to be paid as one of the terms of a contract, and interest not based on promise but given by law for the withholding of money or compensation due. Questions often arise as to the effect, interpretation and validity of promises to pay interest, but they are not questions of the law of damages, and we are not primarily concerned with them here, but will direct our attention to interest allowed as damages. The two types of interest, the "conventional"² or promised interest on the one hand, and interest as damages, on the other, are similar in result, and shade into each other along their border line. For example, is interest allowed after maturity upon a note which bears interest "from date," based upon an implicit promise to pay such interest, or upon a duty to pay damages for breach of the promise to pay at maturity? Usually, however, the difference in origin of the two kinds of interest is readily discernible, and it is of practical importance to distinguish them. Upon such distinction may depend, for example, whether the interest to be allowed shall be at one rate or another,³ whether the interest is allowable as of right or

* This article will form the basis of a chapter in an elementary textbook on Damages, which will be published by the West Publishing Company, St. Paul, Minn.

** Dean and Professor of Law, University of North Carolina.

¹ *Kishi v. Humble Oil & Ref. Co.*, 10 F. (2d) 356, 357 (C. C. A., 5th, 1926). CAL. CIV. CODE (Deering, 1927) §1915, contains this definition which has been embodied in many other codes: "Interest is the compensation allowed for the use, or forbearance, or detention of money, or its equivalent." This definition, like most others in the decisions and statutes, is defective in ignoring interest allowed as compensation for delay in satisfying unliquidated claims.

² See *Bell v. Gerlach*, 205 S. W. 470 (Tex. Civ. App. 1917).

³ Thus, where a note bears interest at a certain rate until its due date, but is silent as to the rate of interest to be paid thereafter, is a promise to be inferred to pay interest at the same rate after as before maturity, or is the interest after maturity allowable only as damages, and at the legal rate? The authorities are divided on the question; see *Holden v. Freedmens' Savings* etc.

in the jury's discretion,⁴ or whether the interest claimed shall be included in the sum by which the jurisdiction of the particular court is fixed.⁵

2. *Historical Development of the Modern Law as to Interest.*

The history of interest in English law is a curious chapter in the story of the adjustment of law to changing social and economic demands.⁶ In a primitive agricultural society, the borrowers of money are chiefly those who are weak and necessitous and thus are exposed to the over-reaching of the shrewd and unscrupulous. In this early pastoral stage, the highest ethical standards enjoined the giving of charity to those in need, or at least the making of gratuitous loans, and frowned upon the taking of recompense for lending to the needy. Since the needy were the only borrowers, the practice of "usury"—receiving any recompense for money lent—was condemned outright. Thus Plato⁷ and Aristotle⁸ in Greece regarded lending on interest as unworthy, and Moses⁹ invoked the sanction of religion against the practice. Philosophy and religion were reinforced by the power of a sounding metaphor, "money cannot breed money."¹⁰ The Christian church zealously espoused this moral concept and throughout the medieval period the canon law absolutely forbade the receipt by

Co., 100 U. S. 72, 25 L. ed. 567 (1879) (legal rate governs in District of Columbia), and *Ohio v. Frank*, 103 U. S. 697, 26 L. ed. 531 (1880) (contractual rate governs in Illinois), and cases collected in DECENNIAL DIGESTS, "Interest," §37 (1).

⁴ See §§6 and 7 of this article.

⁵ Thus where a justice's court was limited in its jurisdiction to cases involving "\$200 or less, exclusive of interest," an action to recover \$200 obtained from plaintiff by fraud, with interest thereon as damages, was not within the jurisdictional limit, which referred to contractual interest and not to interest as damages. *McElroy v. Industrial Petroleum Co.*, 260 S. W. 693, 694 (Tex. Civ. App. 1924).

⁶ Sir W. S. Holdsworth in the eighth volume of his *HISTORY OF ENGLISH LAW* (2d ed. 1926) 100-112 tells in an illuminating way the absorbing story of the evolution of the medieval law of usury. From this the above text is chiefly derived. In H. H. L. Bellott's *BARGAINS WITH MONEY LENDERS*, chapter 1 (1906) is to be found a resumé and comparison of early moral ideas about usury in various countries. Mr. Justice Porter's opinion in *Marshall v. Beeler*, 104 Kan. 32, 178 Pac. 245 (1919) gives a short and sprightly account of the history of usury.

⁷ *Treatise de Legibus*, v. 742, cited Bellott, *op. cit. supra* note 6, at c. 11.

⁸ *POLITICS*, I, 4, 23.

⁹ *Exodus*, xxii, 25: "If thou lend money to any of my people that is poor by thee, thou shalt not be to him as a usurer, neither shall thou lay upon him usury." But compare the practice as revealed by the reproach to the slothful servant in the parable of the talents: "Thou oughtest therefore to have put my money to the exchangers, and then at my coming I should have received mine own with usury." (*MATTHEW*, xxv, 27.)

¹⁰ "A breed of barren metal" (*MERCHANT OF VENICE*, act 1, scene 3).

Christians of recompense for the lending of money. To this prohibition is traced the emergence of the Jews to a position of power as money lenders. By the end of the medieval period, however, mercantile and industrial enterprise had come to assume an ever increasingly important share in the economic system of Europe. A practice which was oppressive and extortionate when applied to the poor peasant borrower was helpful and stimulating to trade, when applied to the merchant seeking to finance the sale of his wares abroad. In the face of this economic demand, church and state were powerless to prevent the commercial borrower from bargaining for money that he needed and could only get by offering an inducement in return. Among the many inventions to which this necessity gave birth was the idea, apparently indigenous in the Roman law,¹¹ that while recompense for the mere lending is "usury," yet if a loan be made gratuitously but is not repaid promptly according to the agreement, then a recompense may properly be exacted for the lender's losses actually suffered or gains prevented, by the borrower's default in complying with his promise. This compensation for the difference between the lender's position after default and what it would have been if the bargain had been fulfilled, was called "interest" (*id quod interest*, "that which is between") and its collection was approved by Aquinas and the canonists of the later medieval period.¹² We shall see that this exactly corresponds to the allowance of interest as damages for breach of contract in present day common law.

By the sixteenth century the gap between legal and religious theory on the one hand, and commercial practice on the other, was ready to be bridged by a redefinition of terms which should make possible a restatement of the law. It could by then be seen that the real evil was not the taking of payment for the lending of money, but taking such payment in an extortionate or unconscionable amount.¹³ Melancthon and Calvin threw the weight of the new Protestant ethical system to the support of the mercantile practice of bargaining for loans, and though the word "usury" retained its age-old stigma, it changed its content and, as transformed, came to mean *excessive* exactions for

¹¹ J. M. Landis, "Usury." THE ENCYCLOPAEDIA BRITANNICA (14th ed., 1929).

¹² Holdsworth, *op. cit.* *supra* note 6, at 103.

¹³ Compare Bacon's later observations: "... two things are to be reconciled: The one that the tooth of usurie be grinded, that it bite not too much; the other that there be left open a meane to invite moneyed men to lend to the merchants for the continuing and quickening of trade" (ESSAY ON USURY).

the use of money. Legally, this progress was halting and timorous. A statute of 1545¹⁴ condemned "usury" as of yore, but exempted those who charged no more than ten per cent from the penalties of usury. In 1551-52¹⁵ this statute was repealed as too radical, but in 1571 it was revived. In the next century successive statutes reduced the maximum rate from ten to eight, and finally to five per cent. By the nineteenth century, however, the reaction from the abhorrence of the taking of any interest had swung to the opposite extreme and, under the influence of Bentham,¹⁶ the economists came to believe that there should be absolute free trade in money and in 1854 secured from Parliament¹⁷ the repeal of the usury laws. This left as the only curb upon extortionate interest, the somewhat shadowy authority of courts of equity to decline to enforce oppressive bargains of every sort.¹⁸ This extreme liberalization proved equally as impracticable as regards loans to needy individuals as the ancient prohibition of usury had been in respect to loans in aid of commercial enterprise. Consequently, in 1900,¹⁹ 1911,²⁰ and 1927²¹ various Money-lender's Acts were passed in England which subjected loans for personal needs to control by the courts, not by a maximum limit, but by an undefined authority to prevent oppressive exactions.

The reception of English law in America came at the stage when by statute a maximum rate was fixed, and this method of control has been adhered to by nearly all the states. The statutes usually provide for a maximum rate of interest, beyond which is unlawful usury, and usually for a smaller "legal" rate which applies in the absence of specific agreement. Even in the Uniform Small Loans Act a specific maximum of 3½ per cent per month is fixed, and the advantages of a definite limit are obvious.

We have seen from the foregoing that the great struggle from ancient through medieval times has been over the power to agree or contract for the payment of interest for the use of money, and that only at the Reformation did the differentiation of reasonable bargaining for compensation for money borrowed, from harsh and ex-

¹⁴ 37 HENRY VIII, c. 9.

¹⁵ 5, 6, EDWARD VI, c. 20.

¹⁶ DEFENCE OF USURY (1787).

¹⁷ 17, 18 VICTORIA, c. 90.

¹⁸ See *Chesterfield v. Janssen*, 1 Atk. 339, 26 Eng. Rep. 191 (1750); *Earl of Aylesford v. Morris* (1883) L. R. 8, Ch. 484, *HOLDSWORTH, op. cit. supra* note 6, at 111.

¹⁹ 63 and 64 VICTORIA, c. 51.

²⁰ 1 and 2 GEORGE V, c. 38.

²¹ 17 and 18 GEORGE V, c. 21.

tortionate exactions for such loans, finally became translated into law. We have noted that one liberalizing idea was the recognition of the justice of compensating the creditor by way of damages for loss of the use of his money if not repaid as agreed. Nevertheless, this notion of allowing interest as damages, imported from Rome, was itself slow in securing practical application by the common law courts even after the enforcement of promises to pay interest had been sanctioned by statute. The stigma of religious and moral taboos, inherited from the dark era of prohibition, remained to stunt and distort the growth of all branches of the legal rules about compensation for delay in paying money or damages. This ancient prejudice has been singularly unfortunate in restricting the rational development of the practice of allowing interest as damages. The ancient evil of unconscionable extortion is wholly absent where the interest is to be exacted by a court and not by a money lender. While there are some early expressions in the English decisions²² which would indicate that interest was to be allowed as damages for the non-payment of every debt, yet by the end of the eighteenth century the common law courts had accepted the view that interest as damages as distinguished from promises to pay interest, express or inferred from conduct or usage, could only be allowed upon a contract for payment of money on a day certain, such as a note or bill of exchange, and seemingly then only in the jury's discretion.²³ This was only slightly extended by Lord Tenderden's Act²⁴ in 1833 which provided that the jury "may, if they shall think fit," allow interest (a) upon written promises to pay sums certain in money at a definite time, from the day fixed, or (b) in case of other promises to pay certain sums from the date of written demand, specifically claiming interest, and (c) in actions of trover and trespass for taking personal property. In a comparatively recent case²⁵ the House of Lords considered that interest on debts generally as damages for their detention ought to be, but is not, allowable at common law, and criticised the statute as too narrow for the purposes of justice. Interest as damages at law as distinguished from the chancery doctrines which we shall later consider,

²² For example, in *Sweatland v. Squire*, 2 Salk. 623, 91 Eng. Rep. 527 (1699). See opinion of Savage, C. J., in *Reid v. Rensselaer Glass Factory*, 3 Cow. 393 (N. Y. 1824), *CRANE, CASES ON DAMAGES* (1928) 307, which gives a review of the early cases in both countries.

²³ *Eddowes v. Hopkins*, 1 Douglas 373, 99 Eng. Rep. 242 (1780).

²⁴ 3 and 4 WILLIAM IV, c. 42. (*THE CIVIL PROCEDURE ACT*, 1833).

²⁵ *London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.*, L. R. (1893) A. C. 429, 437, 440.

has had as is manifest, an abortive development in England. Since the allowance of such damages has been so largely reposed in the discretion of juries, legal rules on the subject have not been worked out there as completely as in this country.

In America where perhaps traditional theology was not so dominant, and mercantile influence was stronger, the courts have from the first manifested a somewhat less intransigent attitude toward the extension of the limits of the recovery of interest as damages. It seems early to have been held that in any case of an obligation to pay a definite, fixed sum of money whether arising from contract or from a wrongful acquisition or detention of another's funds, interest should be allowed as damages for the withholding.²⁶ The subsequent course of the doctrine has been toward the extension of the doctrine to claims for unliquidated amounts, at first in the English form of a permission to the jury to find interest if they should see fit, and later as a matter of right. The tendency is further to relax the rule giving interest as damages only for withholding sums certainly ascertainable, and to regulate the matter by rule rather than discretion, and to confide in the jury's caprice only the allowance of interest on the outer fringe of claims least definable and predictable as to amount. This evolution Sedgwick epitomizes as follows: "The gradual extension of the principles allowing interest as damages is clear. Beginning with a denial of interest in any case except where it was allowed by contract, the law first gave discretion to the jury to give interest as damages, and then allowed it as a matter of law in a constantly increasing number of cases. This has led the Supreme Court of North Carolina²⁷ to say:

'Although it²⁸ has not in cases like this yet been defined by clearly cut rules, and has therefore usually been left to the discretion of a jury, yet in the progress of the law as a science it must and will be so defined; and the question in what cases interest shall be allowed, and in what not, will be recognized as properly coming within the duty of judicial instruction, just as the question of the measure of damages now is, although until recently questions of that sort were considered too versatile and various to admit of being governed by certain principles, and were left, necessarily as was supposed, to the discretion of a jury.'"²⁹

²⁶ Reid v. Rensselaer Glass Co., *supra* note 22.

²⁷ Rodman, J., in Lewis v. Rountree, 79 N. C. 122, 128 (1878).

²⁸ That is, the allowance of interest.

²⁹ 1 SEDGWICK, DAMAGES (9th ed. 1920) §297.

An attempt will be made in the following sections of this chapter to outline the present state of the decisions in this country on the more important aspects of the subject.

3. *Rate at Which Interest, Allowed as Damages.*

Just as in the case when interest is agreed to be paid but no rate is named, so also when interest is awarded as damages at law it is allowed at the "legal" rate fixed by statute.³⁰ Consequently, a written promise to pay money at a certain date without interest, if breached by failure to pay, will carry interest as damages at the statutory rate after maturity.³¹ If the statutory rate is changed after the cause of action accrues, the interest should be allowed at the old rate before, and at the new after, the altering enactment takes effect.³²

In claims of equitable origin for the recovery of funds the courts seem not to confine themselves invariably to the legal rate in allowing interest as compensation, but to take into consideration the amount which the custodian has earned.³³

4. *Compound Interest.*

Compound interest has such possibilities of accumulation that the courts are averse to it.³⁴ Even contracts to pay compound interest are usually denied validity, though they are not *per se* usurious.³⁵ However, in mutual or running accounts an express agreement, or one implied from custom, to strike a balance including accrued interest at annual rest periods as long as the account is current, is en-

³⁰ 1 SEDGWICK, DAMAGES (9th ed. 1920) §324a; DECENNIAL DIGESTS, "Interest," §31.

³¹ *Gale v. Corey*, 112 Ind. 39, 13 N. E. 108, 14 N. E. 362 (1887).

³² *Saling v. Bolander*, 125 Fed. 701 (C. C. A. 9th, 1903); *Reese v. Rutherford*, 90 N. Y. 644 (1882).

³³ *Pryor v. City of Buffalo*, 113 N. Y. Supp. 249, 61 Misc. Rep. 162, modified 118 N. Y. Supp. 1136, 134 App. Div. 911, affirmed 197 N. Y. 123, 90 N. E. 423 (1909) (where the vendor deposits the purchase price in a trust company at 4% and the purchaser suing to cancel ties up the funds, on securing a decree for the return of the money he was allowed only 4% interest and not the statutory rate of 6%).

³⁴ See generally 1 SEDGWICK, DAMAGES (9th ed. 1920) §§343-346; DECENNIAL DIGESTS, "Interest," §§58, 60.

³⁵ *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99 (1876); *Bowman v. Neely*, 151 Ill. 37, 37 N. E. 840 (1894); CRANE, CASES ON DAMAGES (1928) 322; 3 WILLISTON, CONTRACTS (1920) §1417. Apparently in some states the recent tendency is to permit parties to contract for compound interest. *Musser v. Murphy*, 286 Pac. 618 (Idaho, 1930) *semble*; *Palm v. Fancher*, 93 Miss. 785, 48 So. 818, 33 L. R. A. (N. S.) 395 (1909) with note on "Validity of Agreement Made before Interest Becomes Due to Pay Interest on Interest"; and see Note (1925) 37 A. L. R. 327.

forced,³⁶ and renewal notes embodying the balance of principal and accrued interest, and providing for interest upon the total are valid.³⁷

Naturally then, in view of the courts' hostility to compound interest even by agreement, when they come to assess interest as damages, only simple interest and not compound is allowed.³⁸ However, if the installments of interest upon a bond or note are represented by coupons which may be detached and separately negotiated, interest upon these coupons is allowed as upon distinct commercial instruments.³⁹ Likewise, in about one-half the states, when instead of mere general provisions such as "with six per cent interest" the instrument names specific times for the payment of installments of interest before maturity, interest as damages may be allowed on these installments from their due dates.⁴⁰ Whether covered by coupons or by such latter provision, it is only simple interest upon the installment that is allowed, without further compounding. An exception to the rule against compounding interest as damages exists in the flexible equity practice, according to which compound interest may be allowed where exceptional circumstances make it necessary for a just accounting,⁴¹ or by way of preventing a fiduciary from reaping a profit from a breach of trust.⁴²

³⁶ *Boise v. Talcott*, 264 Fed. 61 (C. C. A. 2nd., 1920) (agreement that interest on an account between a principal and factor, should be charged on monthly balances, in which interest was included). See cases collected in Note, "Annual Rests on Book Accounts," (1920) 5 A. L. R. 551. In *New York*, however, it was held that an agreement in advance that interest should be charged on an account current meant simple interest as an advance agreement to compound the interest would be invalid, though later agreements for interest on interest, after the accrual of the interest, as by accounts stated would be effectual if based on consideration. *Newburger-Morris Co. v. Talcott*, 219 N. Y. 505, 114 N. E. 846, 3 A. L. R. 287 (1916).

³⁷ *Musser v. Murphy*, *supra* note 35.

³⁸ *Cherokee Nation v. United States*, 270 U. S. 476, 46 Sup. Ct. 428, 70 L. ed. 694 (1926); *Blanchard v. Dominion N. Bank*, 130 Va. 633, 108 S. E. 649, 27 A. L. R. 78 (1921).

³⁹ *Parker v. McGinty*, 77 Colo. 458, 239 Pac. 10 (1925); and see Note (1923) 27 A. L. R. 89 *et seq.* Statutes sometimes prevent this result. *Kessler v. Kuhnle*, 176 Mo. App. 397 (1913); *First Savings & Trust Co. v. Cayenoira & S. C. Ry. Co.*, 159 Wis. 344, 150 N. W. 405 (1915). And in any event, the obligor should be able to defeat recovery of interest on the coupon by showing his readiness to pay at maturity and continuously since. *Hamilton v. Wheeling Public Service Co.*, 88 W. Va. 573, 107 S. E. 401, 21 A. L. R. 433 (1921).

⁴⁰ *Bledsoe v. Nixon*, 69 N. C. 89, 12 Am. Rep. 642 (1873). *Contra*: *Blanchard v. Dominion N. Bank*, *supra* note 35. For collection of decisions *pro* and *con*, see 1 SEDGWICK, DAMAGES (9th ed. 1920) §345, note 546 and 547, and Note (1923) 27 A. L. R. 81 *et seq.*

⁴¹ *Ellis v. Sullivan*, 241 Mass. 60, 134 N. E. 695 (1922).

⁴² *Arnold v. Maxwell*, 230 Mass. 441, 119 N. E. 776 (1918); *Silver King Coalition Mines Co. v. S. K. Consol. Mining Co.*, 122 C. C. A. 402, 204 Fed.

5. *Degree of Certainty of Amount of Principal Claim as Affecting Allowance of Interest as Damages. (1) Where Amount is "Liquidated."*

Little or no difficulty is encountered by the courts, except when restrained by statute, in allowing interest as damages for the breach of an obligation to pay a sum of money whose exact amount is fixed and known. Such an amount is termed a liquidated sum. Interest, as a rule is payable for the detention of such a liquidated sum whether the duty to pay springs from a promise, or is one which is imposed by law apart from contract.⁴³ This has been based upon the view that one who has had the use of money owing to another should in justice make compensation for its wrongful detention.⁴⁴ Consequently, where one violates a promise to pay a definite sum at a time named, interest is assessed from that time as damages for the breach.⁴⁵ Moreover, an obligation to pay a fixed amount of money imposed by law carries interest.⁴⁶ Thus, where one wrongfully detains money which has been paid to him by mistake,⁴⁷ or through a diversion of the funds of a principal to the payment of the individual debt of an agent,⁴⁸ or wrongfully detains money received as a stakeholder⁴⁹—in all these cases interest as damages will be added. A railway which collects more than its lawful charges must restore the excess with interest,⁵⁰ and a mortgage creditor who sells the mortgaged property for more than enough to pay the debt, is obliged to

166, Ann. Cas. 1918 B, 571 (C. C. A. 8th, 1913); *Church v. Church*, 122 Me. 459, 120 Atl. 428 (1923).

⁴³ *Cochrane v. Forbes*, 166 N. E. 752 (Mass. 1929) (interest allowed from date of demand for return of money paid by plaintiff to defendant for oil purchased but not delivered because of exhaustion of well).

⁴⁴ *Miller v. Robertson*, 266 U. S. 243, 257, 45 Sup. Ct. 73, 69 L. ed. 265 (1924) ("One who has had the use of money owed to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due.").

⁴⁵ 3 WILLISTON, CONTRACTS (1922) §1413, note 41; for examples of numerous statutory codifications of this rule, see GEORGIA ANN. CODE (Michie, 1926) §3434 ("all liquidated demands, where by agreement or otherwise, the sum to be paid is fixed or certain, bear interest from the time the party is bound to pay them . . ."); MINN. STAT. (Mason, 1927) c. 51, §7036 ("any legal indebtedness").

⁴⁶ 3 WILLISTON, CONTRACTS (1922) §1415, and cases cited under the remaining notes to the present section herein.

⁴⁷ *U. S. v. Skinner & Eddy Corp.*, 28 F. (2d) 373 (W. D. Wash. 1928).

⁴⁸ *Napoleon Hill Cotton Co. v. Stix, Baer & Fuller D. G. Co.*, 203 Mo. App. 25, 217 S. W. 323 (1924); *McMillan v. Nat'l Wool Warehouse & Storage Co.*, 28 F. (2d) 793 (C. C. A. 9th, 1928).

⁴⁹ *Kishi v. Humble Oil Co.*, *supra* note 1.

⁵⁰ *Wabash Ry. Co. v. Koenig*, 274 Fed. 909 (C. C. A. 8th, 1921) *certiorari* denied 257 U. S. 660, 42 Sup. Ct. 186, 66 L. ed. 422 (1921).

pay over the surplus to the debtor, with interest.⁵¹ Similarly, claims for sums of money embezzled or converted,⁵² or procured to be paid by false representations⁵³ will properly include interest. The significance of the fact that the sum claimed is definite is exemplified by a recent New York decision⁵⁴ in which an attorney who sued for his disbursements and for the reasonable value of his services was allowed interest on the amount of the disbursements but not on the amounts allowed for services, the former being definitely ascertained, and the latter not measurable by any certain, accepted standard.

While, as stated above, there is general agreement in the American decisions on the doctrine that a liquidated demand for money bears interest from the time it becomes due, the statement does not reflect complete accord in the actual results of the cases, for the courts are by no means equally so harmonious in their definitions of the term "liquidated."⁵⁵ Doubtless all courts would agree that a specific sum of money named in and covenanted to be paid by an express contract, where the liability to pay the principal sum is undisputed, is a "liquidated" sum. Such admitted claims rarely give rise to any con-

⁵¹ *Meade v. Churchill*, 100 Ore. 701, 197 Pac. 1078 (1921). Similarly, in *Oil-belt Motor Co. v. Hinton*, 11 S. W. (2d) 338 (Tex. Civ. App. 1928) where one who returned his automobile to the dealer for re-sale to pay the amount due was entitled to part of the surplus, it was held that he should recover interest on his portion, from the time of the resale.

⁵² *New York Cloak & Suit House v. Coston*, 270 Pac. 695 (Cal. App. 1928); *Baillie v. Columbia Gold M. Co.*, 86 Ore. 1, 166 Pac. 965, rehearing denied, 167 Pac. 1167 (1917); *Lutz v. Williams*, 84 W. Va. 216, 99 S. E. 440 (1919); compare *Kies v. Wilkinson*, 114 Wash. 89, 194 Pac. 582, 12 A. L. R. 833 (1921) where interest was allowed on claim for unlawful preferential withdrawal of money from an insolvent bank. DECENNIAL DIGESTS, title "Interest," key no. 12.

⁵³ *Shriver v. Union Stock-yards Co.*, 117 Kan. 638, 232 Pac. 1062 (1925). Compare *Citizens' Bank v. Singer*, 109 Okla. 27, 234 Pac. 708 (1925) where interest was allowed against a bank which, after informing the plaintiff that a check offered to him was good, refused to pay it.

⁵⁴ *Dykman v. City of New York*, 183 App. Div. 859, 171 N. Y. Supp. 370 (1918).

⁵⁵ "Broadly speaking, it is generally held that interest on unliquidated demands will not be allowed as damages. Undoubtedly there is a clear distinction between a claim for damages entirely unliquidated, as, for example, claims for damages arising from assault and battery, from seduction, or from slander and libel, which are wholly at large, and a liquidated claim, where there is an express contract to pay a sum certain at a fixed time. In the former cases, the amount of damages is unknown until determined after the presentation of evidence by a decision, award, or verdict. In the contract case, both parties know what the claim is, and when it is due and payable. It is in dealing with cases lying between these extremes, where the distinction is less clear and obvious, that courts have so differed in their interpretation and application of the rule as to interest that their decisions are far from harmonious as to when interest may be allowed," *Pearson v. Ryan*, 42 R. I. 83, 105 Atl. 513, 3 A. L. R. 805 (1919).

trover over interest. Is the claim for such a sum still a "liquidated" demand, where the defendant denies all liability under the contract, or disputes liability for certain items and admits others? It would seem that the existence of a dispute, over the whole or part of the claim should not change the character of the claim from one for a liquidated, to one for an unliquidated sum, and this conclusion finds support in the cases.⁵⁶ Other decisions have rejected this view, however, and would hold that if the defendant in good faith denies liability for all or part of the claim, that the claim then becomes unliquidated, and interest can not be assessed on the basis that it is a liquidated demand.⁵⁷ The same question, of course, arises in connection with any claims whether resting upon contract, tort, or quasi-contract, which have for their basis allegations that money has ac-

⁵⁶ In *McCornack v. Sharples*, 254 Pa. 541, 99 Atl. 155 (1916) the plaintiff sought recovery of royalties agreed to be paid by defendant, the licensee under certain patents. Defendant refused payment because he claimed that plaintiff had agreed to assign the patents to him. The lower court found that defendant must pay the royalties but should not be required to pay interest thereon. The Supreme Court said, "Interest upon the royalties was, however, denied, upon the ground that the controversy was over an honest difference of opinion, and that the refusal to pay was in good faith. We cannot agree that this was a sufficient reason. 'A bona fide dispute as to the amount of indebtedness is no bar to the accruing of interest.' . . . It is a sound principle, equally applicable in equity or at law, that one who retains money, after it is justly due and payable to another should pay interest for the detention. We are therefore of opinion that McCornack was entitled to interest upon the royalties retained by Sharples after they were due, and that the referee was not justified in withholding it."

Likewise, in *Pearson v. Ryan*, *supra* note 51, the plaintiff, a contractor, sued defendant for the unpaid balance of an amount agreed to be paid upon the completion of a house for defendant. Defendant admitted the contract and the completion of the house but asserted that he was entitled to have the recovery reduced because of unsatisfactory work and materials. This was disputed, but the court below allowed the reduction, but also allowed interest on the balance found to be recoverable. Defendant appealed from the allowance of interest. The decree was affirmed, and the opinion recites: "This is clearly a liquidated claim under the rule." Similarly in *Smith Brothers & Cooper v. Hanson*, 106 Kan. 32, 187 Pac. 262, 265 (1920) the court said: "We do not concur in the view that the denial of liability, however vigorously made, renders a contract debtor immune from the payment of interest, even in the absence of an affirmative finding of bad faith. The question of good faith becomes a test in some situations, as where an account is to be settled or cross-denials are to be adjusted. But when the question is simply whether at a given time a debt for a fixed amount was owing, and this is decided in the affirmative, the obligation to pay interest follows as a matter of course." Cases on the question are collected in *DECENNIAL DIGESTS*, "Interest," §19 (3).

⁵⁷ See, for example, *Baker County v. Huntington*, 48 Ore. 593, 603, 89 Pac. 144 (on rehearing) (1907). In that case action was brought for defalcations of a sheriff, against the sureties on his bond, who admitted the amount of the defalcations but contested their liability therefor on the bond. Interest was not allowed and the court said on appeal: "When the right to recover in an action is in good faith denied, interest will not be allowed on the demand, prior to its liquidation by the judgment."

tually been received or dealt with under such circumstances that a definite sum is due to the plaintiff. In these cases also the sum is still "liquidated" according to what is believed to be the better view, although the sum is not fixed by agreement and although the facts upon which the claim is based may be disputed, and even though the adversary successfully challenges the amount, and succeeds in reducing it.⁵⁸

Under this view, only those claims would be termed "unliquidated" where the exact amount of the sum to be allowed can not be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed. If this be so, a claim for the full amount of a note for \$1000 is "liquidated" though the defendant claims, and the evidence is in dispute on such defence, that he has paid half this sum. So also a claim for \$1000 alleged to have been in small amounts at different times embezzled by a bank cashier should be considered "liquidated" though the fact and amount of each separate taking is disputed. In short, it is the character of the claim and not of the defence that is determinative of the question whether an amount of money sued for, is a "liquidated sum."

It follows from the foregoing that where the amount sued for may be arrived at by a process of measurement or computation from the data given by the proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear interest.⁵⁹

⁵⁸ Compare *Pearson v. Ryan*, *supra* note 52.

⁵⁹ Thus, in *Becker v. New York*, 77 App. Div. 635, 78 N. Y. Supp. 1064 (1902) modified on other grounds, 176 N. Y. 441, 68 N. E. 855, it was held that a claim for compensation for a certain number of cubic yards of excavation under a contract fixing the price per cubic yard was liquidated, and interest could properly be allowed. Cases involving the allowance of interest where the amount due is ascertainable by compensation are collected in DECENNIAL DIGESTS, "Interest," §19 (2). In *Smith Brothers & Cooper v. Hanson*, *supra* note 54, the amount to be recovered depended upon the facts as to the number of tons in a certain quantity of hay sold by defendant to plaintiff, as to which plaintiff claimed he had made an over-payment according to the agreed method of estimating the weight. The facts were in dispute, but as stated above, interest on the amount found to be the overpayment was allowed. Compare *Miller v. Robertson*, 266 U. S. 243, 45 Sup. Ct. 73, 69 L. ed. 265 (1924) where a buyer refused to accept ore, and the seller sued for the difference between the contract price and the lesser price obtained when the seller re-sold the ore after the buyer's refusal. The Supreme Court held the claim was a "debt" and said the lower court properly allowed interest, but intimated that it was within its discretion. A somewhat similar action by a seller in which interest was al-

In this country, though not in England,⁶⁰ interest upon debts and liquidated claims generally, is allowed as a matter of right and is not dependent upon the discretion of judge or jury.⁶¹

While the authorities are not in concord, the better view seems to be that interest upon stipulated or liquidated damages will be allowed from the time of the accrual of the claim for stipulated damages.⁶²

6. *Certainty of Amount. (2) Where Amount Is Not "Liquidated" But Is Based on Valuation of Property or Services Having Pecuniary Value.*

The next previous section has dealt with the situation where, when the physical facts, however disputed, are finally ascertained, there is then no possible room for disagreement as to the exact sum due. In such cases interest is customarily allowed. Differing from these cases only slightly in degree of certainty, are the numerous situations where the amount to be awarded, when all the concrete facts are ascertained depends only upon the judge or jury's opinion in the light of the evidence, as to the *pecuniary value*, ascertained by market prices or current standards, of property or services. Within this field are included claims for the destruction or other conversion of personal property, which of course entitle the person injured to the value of the property at the time of the wrong. In the same class are cases where the plaintiff sues for the reasonable value of goods or services which the defendant has the duty to pay for by reason of a contract wherein the price was not named, or by reason of having received the benefit of the same under circumstances which give rise to a quasi-contractual duty to pay their value. Other instances where the law measures the award by market or current values of

lowed as a matter of law is *Central Oil Co. v. So. Ref. Co.*, 154 Cal. 165, 97 Pac. 177 (1908).

⁶⁰ See the statute cited in note 24, *supra*.

⁶¹ *State v. Lott*, 69 Ala. 147, 155 (1881), "Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for the failure to keep a contract, interest attaches as an incident." *Sanderson v. Trump Mfg. Co.*, 180 Ind. 197, 102 N. E. 2 (1913) (interest as damages recoverable as of right, upon balance of price due to seller from buyer); *Reading & P. R. Co. v. Balthasar*, 126 Pa. 1, 17 Atl. 518 (1889) "The learned judge said to the jury: 'After you have ascertained that there is any damage you will allow interest on that sum from May 19, 1885 to the present time.' This would have been an appropriate direction in an action *ex contractu*, because interest is a legal incident of a debt, but is not justifiable in an action of trespass."); *McCall Co. v. Icks*, 107 Wis. 232, 83 N. W. 300 (1900).

⁶² *Chicago & S. E. Ry. Co. v. McEwen*, 35 Ind. App. 251, 71 N. E. 926 (1904); 17 C. J. 967, 968 notes 60 and 61.

property or services are varied and numerous. Where this is so, while the person who is charged with the duty of paying this valuation could probably not have known when the duty to pay arose, with entire exactness, the precise figure at which the value would be fixed, he could have estimated it within a narrow range of possible variation.⁶³ It seems fair and equitable, therefore, to require him to pay interest on the sum found to be due from the time when the duty to make compensation arose, and the view which gives interest as a matter of right in such cases seems to be gaining ground in recent years. In 1918 the New York Court of Appeals thus described the growth of the law on this subject: "The rule on this subject has been in evolution. Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by compu-

⁶³ As to how definite and precise the value must be, see *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327 (1899) where in the course of a discriminating opinion by Dodge, J., the court said: "As would be expected, courts have varied greatly in applying these rules to individual cases; but it may be safely said that the tendency has been in favor of allowing interest rather than against it, and that the degree of certainty or ease with which the approximate amount can be ascertained has grown less and less stringent. . . . The true principle, which is based on the sense of justice in the business community and on our statute, is that he who retains money which he ought to pay to another should be charged interest upon it. The difficulty is that it cannot well be said one ought to pay money, unless he can ascertain how much he ought to pay with reasonable exactness. Mere difference of opinion as to amount is, however, no more a reason to excuse him from interest than difference of opinion, whether he legally ought to pay at all, which has never been held an excuse. When one is held liable, say, on a promissory note, to which his defense has raised a doubtful question of law, he must pay the interest with it, because, theoretically at least, there was a fixed standard of legal obligation, which, if correctly applied, would have made his duty clear. So, if there be a reasonably certain standard of measurement by the correct application of which one can ascertain the amount he owes, he should equally be held responsible for making such application correctly and liable for interest if he does not. The New York courts have adopted as designation of such a standard 'market value,' and in a broad use of the term this is perhaps the safest test to apply. It must, not however, be restrained to definite quotations on a board of trade, or to such degree of certainty that no difference of opinion could exist. If one having a commodity to purchase or certain services to hire can by inquiry among those familiar with the subject learn approximately the current prices which he would have to pay therefor, a market value can well be said to exist, so that no serious inequity will result from the application of the foregoing rule to those who desire to act justly; especially in view of the other rule of law that a debtor can always stop interest by making and keeping good an unconditional tender, thus giving him a substantial advantage over a creditor, who has no such option."

tations alone or by computation in connection with established market values, or other generally recognized standards?"⁶⁴

Thus, an early case⁶⁵ from that state was an action brought by one of the old patroons for failure by a tenant to pay rent in the form of "eighteen bushels of wheat, four fat hens, and one day's service with carriage and horses," and a verdict was directed for the value of the goods and services with interest from the due dates. On appeal this was approved and the court said: "Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged."

Courts adopting this view have allowed interest in an action against a contractor for failure to complete, upon the additional cost to the owner of completing the work⁶⁶ and upon the amount found due where the action is upon a contract for the sale or delivery of goods having an established market value, and the claim is for the value of goods paid for and not delivered,⁶⁷ or where payment has not been made for the difference between the agreed price and the value.⁶⁸ Similarly one who sues upon *quantum meruit* for the value of services rendered, would under this view be entitled to interest as of right from the time payment for the services should have been made, provided the services are such as have a standard current rate of pay, as in case of laborers, clerks, or factory operatives, but not where the services are of a unique or unusual character for which no

⁶⁴ *Faber v. City of New York*, 222 N. Y. 255, 118 N. E. 609, 611 (1918) (interest on additional compensation due to contractor for excavations not shown in the contract plan, not allowed, where no current established rates for such work).

⁶⁵ *Van Rensselaer v. Jewett*, 2 N. Y. 141 (1849).

⁶⁶ *Horseshoe Lake Drainage Dist. v. Fred M. Crane Co.*, 112 Neb. 323, 199 N. W. 526 (1924).

⁶⁷ *Andrews v. Clark*, 72 Md. 396, 20 Atl. 429 (1890); 1 SEDGWICK, DAMAGES (9th ed. 1920) §313a. Compare *State Trust & Svgs. Bank v. Hermosa Co.*, 30 N. M. 566, 240 Pac. 469 (1925) where interest was allowed to purchaser on damages for shortage of cattle sold.

⁶⁸ *Thomas v. Wells*, 140 Mass. 517, 5 N. E. 485 (1886). Compare *Spencer Kellogg & Sons v. Providence Churning Co.*, 45 R. I. 180, 121 Atl. 123 (1923) refusing to disturb jury's allowance of interest against purchaser who fails to accept the goods and carry out the purchase.

customary standard of charges has found acceptance, as in case of certain services of lawyers and doctors.⁶⁹

These courts likewise take the same stand with reference to claims sounding in tort, for the value of property converted or destroyed,⁷⁰ or for the diminution in value of property injured⁷¹ by defendant's wrong—that is, interest is allowed as of right from the time when compensation ought to have been made (generally the time of the wrong), if the values destroyed are ascertainable with reference to known market prices.

Nevertheless, there remains strongly entrenched in many jurisdictions a reluctance to extend the allowance of interest as a matter of right beyond the traditional boundary of liquidated claims. This reluctance may be a survival of the general attitude of semi-religious disfavor toward interest, which as has been seen, has its roots deep in the soil of history. The result is a compromise. Most courts

⁶⁹ *Gearhart v. Hyde*, 39 S. D. 273, 164 N. W. 58 (1917) (medical services, interest denied); *Dykman v. City of New York*, 183 App. Div. 859, 171 N. Y. Supp. 370 (1918) (legal services, interest denied). Compare *Thomas v. Piedmont Realty Co.*, 195 N. C. 591, 143 S. E. 144 (1928), allowing interest as a matter of right upon a real estate broker's claim for the reasonable value of his services.

⁷⁰ *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620 (1866); *Howell v. Lehigh V. Ry. Co.*, 94 N. J. L. 213, 109 Atl. 309 (1920) (Interest allowed on value of sugar destroyed by fire caused by defendant's negligent failure to guard explosives. The court said: "The market value was 5¼ cents a pound, and therefore the exact loss was ascertainable by mere computation. To illustrate: If a quantity of that sugar had been sold on that day to a customer, but without a price fixed therefor, there can be no doubt that in an action to recover for the value of the sugar, even though the price and quantity delivered be disputed by the defendant, the plaintiff would nevertheless be entitled to recover its market value at the time the sugar was sold and found to have been delivered, and, unless sold on credit, would be entitled to interest from the date of the shipment. It is to be observed that in such a case, as was done in the present, not only the value of the sugar would have to be ascertained by reference to established market values, but also the quantity actually delivered, in order to ascertain the amount due to the plaintiff. There can, therefore, be no rational basis on which the allowance of interest may be made in the one case and not in the other."); *Sayre v. Detroit G. H. & M. Ry. Co.*, 205 Mich. 294, 171 N. W. 502 (1919); *Pittsburgh etc. Gas Co. v. Pentiers Gas Co.*, 84 W. Va. 449, 100 S. E. 296 (1919). See 1 SEDGWICK, DAMAGES (9th ed., 1920) §§316-320; DECENNIAL DIGESTS, "Interest" §19, "Damages" §69, and "Trove" §53. Where the doctrine of highest intermediate value is applied, interest should not be allowed. See CALIF. CIV. CODE (Deering, 1923) §3336.

⁷¹ *Collins v. Gleason Coal Co.*, 140 Iowa 114, 115 N. W. 497, 118 N. W. 36, 18 L. R. A. (N. S.) 736 (1908) (damage to land by removal of support); *Independent Five & Ten Cent Stores v. Heller*, 189 Ind. 554, 127 N. E. 439 (1920) (interest as of right allowed upon amount of damages to property of lessee of upper floor due to collapse of building); *Smith v. Waterbury Co.*, 99 Conn. 446, 121 Atl. 873 (1923) (where automobile damaged by collision due to defendant's negligence, interest allowed on amount necessary to repair the automobile).

which deny interest as a matter of right where the amount due is not liquidated but is ascertainable by reference to established market values, will nevertheless permit the jury in its discretion to award interest as a matter of grace. As will be seen, a rule might be defended which would permit a jury to disallow interest in such cases for any period of delay caused by plaintiff's own fault. A rule, however, which leaves the award of this important element of compensation to the unbridled caprice of the jury, in cases where a fairly measurable sum has been withheld from plaintiff, seems hard to support. It lends encouragement to that tendency of jurors to preserve a specious semblance of fairness by conceding something to each side, though the right is all on one side. Nevertheless, numerous courts hold that even though the amount recoverable is fixed by established market values, the jury has a discretion to withhold or allow interest thereon. This practice finds wide acceptance in actions both for breach of contract,⁷² and in tort,⁷³ especially for conversion or destruction of personal property,⁷⁴ or for injury to real⁷⁵ or personal⁷⁶ property.

Interest as damages is sometimes awarded for the loss of the use of land or chattels where the plaintiff has been wrongfully deprived of the use of his property for a period but not permanently. Here interest on the value of the property for the period of deprivation may be given as a substitute for an attempt to measure the rental value or the value of the use of the property.⁷⁷

⁷² *Chicago Ry. Equipment Co. v. Superior Iron Co.*, 12 F. (2d) 235 (C. C. A. 6th, 1926) (interest on damages for buyer's repudiation of contract to purchase pig iron in installments); *Bucher v. Fed. Baseball Club*, 130 Md. 635, 101 Atl. 534 (1917); *Ben Cheeseman Realty Co. v. Thompson*, 112 So. 151 (Ala., 1927).

⁷³ *United Mine Workers v. Coronado Coal Co.*, 169 C. C. A. 549, 258 Fed. 829, 846 (C. C. A. 8th, 1919) reversed on other grounds, 259 U. S. 344, 42 Sup. Ct. 570, 66 L. ed. 975, 27 A. L. R. 762 (1921).

⁷⁴ *Asadorian v. Sayman*, 233 S. W. 467 (Mo., 1921) (applying Mo. Rev. Stat. (1919) §4222); *White v. Riddle*, 198 N. C. 511, 152 S. E. 501 (1930); *Royal Insurance Co. v. Atl. C. L. Ry. Co.*, 198 N. C. 518, 152 S. E. 503 (1930) (negligent destruction of cotton by fire); *Western & A. Ry. Co. v. Calhoun*, 104 Ga. 384, 30 S. E. 868 (1898) (negligent killing of horse).

⁷⁵ *Knight v. Sullivan Power Co.*, 140 S. C. 296, 138 S. E. 818 (1927) (damage to upper land caused by construction of dam).

⁷⁶ *L. & N. Ry. Co. v. Faust*, 30 Ga. App. 310, 117 S. E. 761 (1923) (damage to automobile struck by train); *Wilson v. City of Troy*, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817 (1892) (damage to horse).

⁷⁷ *Cincinnati & C. Traction Co. v. American Bridge Co.*, 120 C. C. A. 398, 202 Fed. 184 (C. C. A. 6th, 1913); *Schulte v. Tomsville & N. R. Co.*, 128 Ky. 627, 108 S. W. 941 (1908).

7. *Certainty of Amount.* (3) *Where the Sum Claimed Is Neither "Liquidated" Nor Based on a Standardized Valuation, But Yet Is Pecuniary in Its Nature.*

There is a class of claims next in the descending scale of exactness of ascertainability of amount, where the compensation to be recovered is subject to a wide range of variation. Judicious men would be likely to give, upon the same evidence, quite different estimates of the proper amount of damage to be allowed. Nevertheless, the situations are such that it is fairly clear that at a given time the claimant has suffered a distinct and measurable financial loss. It is reasonably certain either that his estate has been diminished or that he has wrongfully been prevented from securing a profit which would have increased it. Should he for delay in receiving this compensation be additionally compensated by allowing interest upon the claim? The earlier judges with their distaste for interest upon unliquidated claims where the debtor cannot know the precise sum which the law will exact, frowned upon interest in this class of claims, but the marked tendency today is toward the allowance of interest in such cases. Following out the characteristic evolution of the rules giving interest as damages, the courts have in the main gone only so far as to permit the jury (or the judge where he is sitting without a jury) to grant interest in their discretion, in cases of this type.⁷⁸ Observe, however, the limitation—the damage upon which interest is sought must be given for an injury to the plaintiff's *pecuniary* interests—to his pocket-book, rather than his feelings.

⁷⁸ Language often cited in the recent opinions is the dictum of Butler, J., in *Miller v. Robertson*, 266 U. S. 243, 258, 45 Sup. Ct. 73, 69 L. ed. 265 (1924): "Generally interest is not allowed upon unliquidated damages. *Mowry v. Whitney*, 14 Wall. 620, 653, 20 L. ed. 860 (1871). But when necessary in order to arrive at fair compensation, the court in the exercise of a fair discretion may include interest or its equivalent as an element of damages."

THE RESTATEMENT OF THE LAW OF CONTRACTS by the American Law Institute, tentative draft number 8, §328, is as follows: "If the parties have not by contract determined otherwise, simple interest at the statutory legal rate is recoverable as damages for breach of contract as follows:

(a) Where the defendant commits a breach of a contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant may be entitled.

(b) Where the contract that is broken is of a kind not specified in Clause (a), interest may be allowed in the discretion of the court, if justice clearly requires it, on the amount that the court finds would have been just compensation if it had been paid when performance was due."

In nearly all actions for breach of contract, except for breach of contract of marriage, the claim is for injury to these interests of substance, rather than of personality, and examples of the discretionary allowance of interest in contract cases upon claims for compensation of a rather contingent sort illustrate the tendency mentioned above. Thus, while we find a case⁷⁹ in 1879 by a court unusually liberal in its attitude on interest, denying interest upon a claim for breach of warranty of cabbage seed based upon the difference in value of the crop raised and what would have been raised if the seeds had been as warranted, yet a recent decision⁸⁰ of a Circuit Court of Appeals approved an instruction which permitted the jury to give in its discretion, interest upon a claim for lost profits for breach of a contract to furnish an adequate purifying system to an oil refinery. Even more striking is another recent decision⁸¹ of the same court in a case where the plaintiff, a manufacturer of rubber heels, sought damages for breach of warranty for defendant's delivering oil to be used as a stiffening material in making the rubber composition, which oil was unsuitable and rendered defective the heels made from it. Not only did the compensation awarded include damages for the lessened value of the heels manufactured, but it included damage to plaintiff's good will. Such latter recovery was necessarily based upon estimate and approximation. Nevertheless, the court approved the action of the trial judge in awarding interest from the beginning of the suit as a proper exercise of discretion, upon the damages awarded.

In the realm of torts, and particularly in cases arising from personal injuries, claims for injury to interests of substance, such as loss of earning power, are frequently part of the same cause of action with claims for injury to interests of personality, such as mental suffering and physical pain. Consequently, courts have usually summarily discountenanced interest in all personal injury cases.⁸² This

⁷⁹ *White v. Miller*, 78 N. Y. 393, 34 Am. St. Rep. 544 (1879); *CRANE, CASES ON DAMAGES* (1928) 310. A similar conservative attitude is sometimes found in current decisions, see, for example, *Wyoming Cent. Irr. Co. v. Laport*, 26 Wyo. 249, 182 Pac. 485 (1919); *Gt. No. Ry. Co. v. Phila. & R. Coal Co.*, 242 Fed. 799 (C. C. A. 8th, 1917).

⁸⁰ *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 39 F. (2d) 521 (C. C. A. 1st, 1930). Compare *Gen. Motors Truck Co. v. Shepard Co.*, 47 R. I. 88, 129 Atl. 825 (1925), on rehearing, 47 R. I. 153, 130 Atl. 593 (1925).

⁸¹ *Barrett Co. v. Panther Rubber Mfg. Co.*, 24 F. (2d) 329 (C. C. A. 1st, 1928). While this suit was brought in equity, to set aside a fraudulent conveyance, the claim for damages was of course a legal rather than an equitable one.

⁸² *Burrows v. Townsdales*, 133 Fed. 250 (C. C. A. 9th, 1904); *Western etc. Ry. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320 (1888); *Staley*

generalization (like so many dicta about interest, thrown off hurriedly as relating to a minor feature of the case) is hasty and injudicious. It seems clearly desirable that the jury should at least be permitted, if not required, to add interest as compensation for delay in payment of those purely pecuniary losses which result from an injury to the person. Expenditures for doctor's and nurses' bills and other necessary charges, would come within the classes above of claims liquidated, or those based upon customary valuations of services, and interest should be added as of right.⁸³ Rather more difficult questions arise as to compensation for loss of earning power. Here the loss is purely pecuniary and is based upon reasoned calculations as to earnings. In a case where the plaintiff has recovered from the disability, loss of past earnings certainly seems ascertainable with sufficient definiteness to form the basis of an award of interest.⁸⁴ So also in actions for death injuries in so far as the claim under the particular statute is based upon the financial value to the deceased, or to his dependents, of the period by which his life has been curtailed, the loss again is pecuniary and is not "at large" but is based on calculation and estimate, subject as these may be to many factors of error. Interest from the time of death should be within the jury's discretion, but the decisions are in conflict.⁸⁵ The problem is more complex where the action for personal injuries is brought by a plaintiff who has suffered injury which not only has disabled him in the past but will disable him in the future. In such cases the recovery is assessed, not on the basis of the loss capitalized at the time of the injury (as in death cases) but on the basis of the facts as they appear at the time of trial.⁸⁶ That is, plaintiff recovers for past loss of earnings plus his probable future loss of earnings. Obviously, it

v. Forest, 157 Iowa 188, 138 N. W. 441 (1912); Cochran v. Boston, 211 Mass. 171, 97 N. E. 1100, 39 L. R. A. (n. s.) 120, Ann. Cas. 1913 B 206 (1912); Penny v. A. C. L. Ry. Co., 161 N. C. 523, 77 S. E. 774, Ann. Cas. 1914 D 992 (1913). In Conover v. Bloom, 269 Pa. 548, 112 Atl. 752 (1921) a distinction was taken between the damages for personal injury and those to plaintiff's automobile arising from the same accident, in respect to interest.

⁸³ Compare Washington etc. Ry. Co. v. Hickey, 12 App. (D. C.) 269 (1898) where the jury was allowed to give interest in its discretion, upon such items of damage.

⁸⁴ See Bentz v. Johnson, 21 Pa. Dist. 1068.

⁸⁵ Interest is allowed, for example, in Ga. R. & Banking Co. v. Garr, 57 Ga. 277, 24 Am. St. Rep. 492 (1876) *semble*, and in Burns v. Eminger, 84 Mont. 397, 276 Pac. 437 (1929), but denied in Mobile & O. Ry. Co. v. Williams, 219 Ala. 238, 121 So. 722 (1929) (under Federal Employers' Liability Act, 45 U. S. C. A. §§51-59). Cases are collected in DECENNIAL DIGESTS, "Death," §92.

⁸⁶ McGonnell v. Pittsburgh Rys. Co., 234 Pa. 396, 83 Atl. 282 (1912).

would be error to allow interest for delay in paying the latter sum.⁸⁷ On the contrary, the recovery for loss of future earnings must be reduced under the "present worth" doctrine⁸⁸ because the judgment requires them to be paid before the earnings would actually accrue. If the future earnings are thus to be reduced because the prospect of money to be paid in future is worth less than the same sum in hand, by a parity of reasoning it would seem that interest should be allowed for delay in reimbursing plaintiff for earnings which he should have, but has not, received in the past. Doubtless, due to a fear that undue complexity in instructions to juries and excessive intricacies of calculation might be called for, courts have been slow thus to analyze the damages in personal injury cases into their component parts and authorize interest on some and not on others. Some of them have approached the same result vaguely and indirectly by holding that while interest as such is not allowable, nevertheless the jury may in estimating the damages take into account the length of time since the injury occurred.⁹⁰ A few frankly and properly permit the jury in their discretion to include "interest" in their verdict.⁹¹

8. *Certainty. (4) Interest Not Allowed Upon Compensation for Pain, Humiliation, Disgrace, and Other Injuries to Interests of Personality.*

The cases considered in the three previous sections have all been claims for compensation for injuries to interests of substance. While they differed in the degrees of certainty with which one could predict the amounts by which the injuries would be measured by a court or jury, nevertheless in each class of cases, the attempt was to measure in terms of money an injury to the worldly estate of the claimant, and some fairly understandable criteria could usually be found by which to rationalize the measurement of the injury in money. In such cases, it is usually a just and sensible procedure to allocate the injury to a particular time and to add interest for the delay in securing payment of the compensation. However, when we consider the remedy of money-damages for injuries which have nothing to do with a man's "estate," but concern his "mind" or "body," we are in a different

⁸⁷ See *Duffy v. J. W. Bishop Co.*, 99 Conn. 573, 581, 122 Atl. 121, 124 (1923).

⁸⁸ See §1, *supra*.

⁸⁹ *Saliba v. Saliba*, 178 Ark. 250, 11 S. W. (2d) 774, 61 A. L. R. 1348 (1928); *Blount v. Montpelier & W. R. Ry.*, 89 Vt. 152, 94 Atl. 106 (1915), *semble*.

⁹¹ *Ell v. No. Pac. Ry. Co.*, 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97 (1891) (under statute allowing interest "in an action for the breach of an obligation not arising from a contract.").

world. It is true that courts award money damages for pain, mental suffering, humiliation, and disgrace, but the process of measurement is in a sense an arbitrary one, in which the court or jury assessing damages exercise a latitude and freedom different in kind from the discretion allowed in the measurement of injuries of a pecuniary sort. Where a jury considers, without any standards except a general standard of reasonableness and restraint, the amount of money to be awarded a plaintiff for the disgrace of being falsely accused of murder, it would serve little purpose to give them specifically a further discretion to add interest, where the figure to be arrived at is almost wholly discretionary or "at large." Consequently, it is generally agreed that juries should not be permitted to allow even as a matter of discretion, interest upon damages given for pain, suffering, humiliation and other like non-pecuniary injuries⁹² in actions for assault, libel or slander, personal injuries, breach of promise of marriage, seduction, malicious prosecution, false imprisonment, or criminal conversation.⁹³ Similar considerations apply to exemplary damages⁹⁴ which are awarded not as compensation at all, but as punishment. As suggested above in connection with claims for personal injuries, whenever it is practical to segregate pecuniary from non-pecuniary injuries in any of these cases, there would seem to be no objection in permitting interest to be allowed on the damages for the former.

Even in cases where the damages are "at large" as in claims for pain or disgrace, there would seem to be some argument for the propriety of a discretion to give a somewhat greater sum at the end of two years of seeking, than at the end of one. Whatever the nature of the claim, a satisfaction by a payment of \$1000 one year after demand is worth more to the claimant than the same sum awarded

⁹² It is submitted that it is the character of the particular damage upon which interest is sought, that should govern the allowance of interest and not the character of the action, as being one of tort or contract. Where an action for false imprisonment, for example, includes a claim for recovery of a sum of money extorted from plaintiff by the restraint, interest should be allowed (as of right, see note 46, 61, *supra*) on the money claim, although not upon accompanying claims for indignity and anguish. In *Taylor v. Coolidge*, 64 Vt. 506, 24 Atl. 656 (1892) this distinction was obscured. In that case, in an action for false imprisonment under a void tax warrant the plaintiff sought recovery of money extorted, and the court held it was error to instruct the jury that interest on the money must be allowed, since in actions of tort interest is discretionary.

⁹³ See *Regan v. N. Y. & N. E. Ry. Co.*, 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306 (1891); *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449 (1892).

⁹⁴ *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 126 N. W. 342, 132 N. W. 371, 36 L. R. A. (N. S.) 263 (1911).

two years after demand. Interest is allowed after judgment on such a claim. Why should not the amount of the later verdict be adjusted to accord with the economic facts? The jury doubtless oftentimes follows this reasoning without any instructions on interest or delay. Consequently, it would seem that if the damages awarded in a case where the damages are "at large" are not excessive on other grounds, appellate courts should not reverse because of an instruction permitting the jury to allow interest as damages.

9. *Fault as a Factor in Determining Liability for Interest.*

Law and morals are distinct, but close akin. Punishment for moral wrong is, according to the ideas of some jurists, an inseparable incident of the assessment of monetary damages. The kinship is illustrated by the doctrines concerning interest.⁹⁵ If one has agreed to pay interest he is liable because of his promise,⁹⁶ and if he has received interest on another's funds he is liable to pay over such interest⁹⁷ because otherwise he would be unjustly enriched. In all other cases, however, which is to say in all cases where interest is sought as damages, it must be based upon an unjustifiable withholding of money due as a debt, or money recoverable as damages.⁹⁸ Thus, if the debtor is prevented from paying by an injunction,⁹⁹ no interest as damages runs during the period of prevention. If, however, payment of the debt, or of the damages if the amount is reasonably certain, is withheld without lawful excuse, we have seen that interest is generally allowed. Even in a state where the last generalization could hardly be made because of the limitations of its interest statute, the legislature has made it a distinct ground of liability for interest that the claim is for "money withheld by an unreasonable and vexatious delay of payment."¹⁰⁰ Furthermore it has been held, most

⁹⁵ The most striking example of this is seen in the provision of some of the codes, *e.g.* CAL. CIV. CODE (Deering, 1923) §3288; N. D. COMP. LAWS ANN. (1913) §7143, that "in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury."

⁹⁶ See section one, *supra*.

⁹⁷ *Bassett v. Kinney*, 24 Conn. 267, 63 Am. Dec. 161 (1855).

⁹⁸ *Dresser v. Bates*, 250 Fed. 525 (C. C. A. 1st, 1918), decree modified 251 U. S. 524, 40 Sup. Ct. 247, 64 L. ed. 388 (1920); *Capital City Lbr. Co. v. Sndarsky*, 95 Conn. 336, 111 Atl. 349 (1920).

⁹⁹ *Ide v. Aetna Ins. Co.*, 232 Mass. 523, 122 N. E. 654 (1919); DECENNIAL DIGESTS "Interest," §52. However, if the debtor enjoined does not hold the money idle and available to meet the payment, he may be charged with interest. *Agnew Co. v. Board of Education*, 83 N. J. Eq. 49, 67, 89 Atl. 1046, 1054 (1914) affirmed 83 N. J. Eq. 336, 90 Atl. 1135 (1914).

¹⁰⁰ ILL. REV. STAT. (Cahill, 1927) c. 74, §2. See DECENNIAL DIGESTS "Interest," §14.

equitably it would seem, that where the amount payable by a railway to a contractor was so uncertain as not ordinarily to be the basis for the allowance of interest, yet if this uncertainty was due to the fact that defendant's engineer failed to make necessary measurements of work done by the contractor, interest would be allowed.¹⁰¹

On the other hand, if the plaintiff's own conduct has substantially contributed to cause the delay in payment this may cause a denial of interest. Consequently, if the debtor tenders the amount due to the creditor who refuses to receive it, no further liability for interest accrues.¹⁰² Likewise, where the plaintiff has demanded damages which are grossly excessive and unreasonable as measured by the amount later awarded in court,¹⁰³ or where the plaintiff has declined to accept¹⁰⁴ a reasonable offer of settlement it has been held that the plaintiff may not recover interest. There is force in the contention that plaintiff should suffer for such over-grasping conduct, if we look upon interest-damages solely as a punishment for a deterrent from stubbornness or greed. If, however, such interest be looked upon as compensation merely, the case is not so clear, for after all the plaintiff has lost and the defendant has gained by the withholding of payment, whoever was morally responsible for the delay. Similarly, where the plaintiff has unduly delayed the prosecution of his principal claim, interest has sometimes been denied¹⁰⁵ though as suggested

¹⁰¹ *McMahon v. N. Y. & E. R. Ry. Co.* 20 N. Y. 463 (1859); *Spalding v. Mason*, 161 U. S. 375, 395, 16 Sup. Ct. 592, 40 L. ed. 738 (1896) where the court as a reason for allowing interest said: "He had in his possession and control the means of determining the amount of such indebtedness, and as to an indebtedness which he ought not to have disputed he should have ascertained the amount due and tendered it without prejudice to a dispute concerning other items."

¹⁰² *Jones v. Kelly*, 203 Ala. 170, 82 So. 420 (1919); *DECENNIAL DIGESTS* "Interest," §50.

¹⁰³ *Pierce v. Lehigh Valley Coal Co.*, 232 Pa. 170, 81 Atl. 142 (1911) (claim of \$50,000 for trespass, damage found by jury at \$6,000, interest denied).

¹⁰⁴ *Thompson v. Boston & M. R. Co.*, 58 N. H. 524 (1879); *CRANE'S CASES ON DAMAGES* (1928) 316.

¹⁰⁵ *White v. United States*, 202 Fed. 501 (C. C. A. 5th, 1913). (Action for conversion of timber, brought many years after the taking and tried thirteen years after the wrong; *held*, jury erroneously permitted to allow interest, in view of the "long and unexplained delay"); *Andrus v. Berkshire Power Co.*, 197 Fed. 1016 (D. C't, Conn. 1912) (Injunction sought against continuance of dam, as trespass; when injunction denied, plaintiff appeals unsuccessfully; *held*, plaintiff on now having damages assessed in equity for the trespass will be denied interest thereon during the delay which was due to his appeal); *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 176, 3 Sup. Ct. 570, 28 L. ed. 109 (1884) (Plaintiff sues for customs duties illegally exacted, and claims interest. "But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld.").

above, such postponement of judgment seldom works anything but benefit for the defendant. Probably no hard and fast rules should be worked out as to the effect of plaintiffs' excessive demands, refusal of offered settlements, or delay in prosecuting suit, and they should only be considered in cases where interest is a matter of discretion, to guide the court or jury in the exercise of that discretion.

10. *Time From Which Interest as Damages Is Calculated.*

While obviously contractual interest is often agreed to be paid before the maturity of the principal debt, interest as damages can be awarded only for default in paying money when due, or delay in making compensation for some tort or breach of contract or breach of some other obligation.¹⁰⁶ Necessarily, therefore it can be computed for no period earlier than such default or breach,¹⁰⁷ and when the principal amount due by way of debt or compensation is sufficiently certain under the standards discussed in previous sections,¹⁰⁸ the time when it should have been paid is the time from which interest will be computed.¹⁰⁹ Where two parties have had a series of dealings in regular course of business in which one has furnished goods or services to the other, with the expectation that statements covering the prices to be paid will be furnished the debtor, the transaction is often called an "account." The implied understanding may be that the account will not be due, until a final and complete statement constituting a formal demand is made, and meanwhile partial payments in money, or in goods or services may be made from time to time. During this period it is an "open" or "running" account and interest for this period is not recoverable,¹¹⁰ except when otherwise agreed or when local statutes otherwise provide. A demand will mature such an account and interest will run from demand,¹¹¹ and if no previous demand is made the commencement of the suit will constitute the requisite demand, and interest will date from the beginning of suit.

¹⁰⁶ Thus, for example, no interest is allowed against a custodian who is rightfully in possession of a fund until it shall be his duty to pay it over. *Ice v. Kilworth*, 84 Kan. 458, 114 Pac. 857, 35 L. R. A. (N. S.) 220 (1911); 6 PAGE, *CONTRACTS* (2d ed. 1922) §3210, note 5.

¹⁰⁷ "Interest, as a general, I might say, universal rule is never demandable until money is due." *Minard v. Beans*, 64 Pa. 411 (1870).

¹⁰⁸ See §§5, 6, 7, *supra*.

¹⁰⁹ See cases cited in notes 62, 64, 69, *supra*.

¹¹⁰ *Hallowell Granite Works v. Orleans*, 144 La. 419, 80 So. 610 (1919); cases cited in *DECENNIAL DIGESTS*, "Interest" §18 (2).

¹¹¹ *Ledyard v. Bull*, 119 N. Y. 62, 23 N. E. 444 (1890); *Dempsey v. Schawacker*, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100 (1897); 1 SUTHERLAND, *DAMAGES* (4th ed. 1916) §349.

Except as a demand thus maturing a claim payable on demand, there seems to be no reason why the time of suit should be the starting point for interest.¹¹²

In some cases of accounts which are "mutual," that is, where each side has numerous debits and credits, the implied agreement may be that final payment shall be due only upon an examination of the account by both parties and an agreement as to the balance owed. A statement presented by one party and not objected to by the other within a reasonable time constitutes such an agreement.¹¹³ The account then becomes a "stated" or "liquidated" one and interest runs from the time of its liquidation by the parties.¹¹⁴ If no agreement can be reached, interest does not begin until its liquidation by the court in an action. In case of such an account, a mere demand would not mature the obligation.

In any event, when a claim for a debt or damages is finally reduced to judgment, whether or not any interest has been recovered and included in the amount of the judgment, the judgment itself as a general rule bears interest from the date of the judgment.¹¹⁵

11. *Allowance of Interest as Damages in Equity.*

In numerous instances courts in administering equity have occasion to award compensation for the withholding of money, as in suits for accounting, and to award unliquidated damages for injury to property or breach of contract, as in suits for injunction and for specific performance. In these and in many other types of cases in equity, claims for interest as damages are often asserted. Usually such courts "follow the law," in awarding interest as damages¹¹⁶

¹¹² *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544 (1879); *CRANE CASES ON DAMAGES*, (1928) 310. But compare *Childs v. Krey*, 199 Mass. 352, 85 N. E. 442 (1908) where interest on an unliquidated counterclaim was allowed from the time of the commencement of the suit.

¹¹³ *Henderson Cotton Mfg. Co. v. Lowell Mch. Shops*, 86 Ky. 668, 7 S. W. 142 (1888).

¹¹⁴ *Ready v. George*, 220 Mich. 217, 189 N. W. 869 (1922), *Scott v. Reynolds*, 163 N. C. 502, 79 S. E. 960 (1913); and cases collected in *DECENNIAL DIGESTS*, "Interest," §18 (3).

¹¹⁵ While judgments did not at common law always bear interest—see *U. S. v. Jacob Schmidt Brewing Co.*, 254 Fed. 714 (D. N. D. 1918)—yet they usually do by rule or statute to-day in most jurisdictions; as for example, see *U. S. C. A. Title 28, §811* which provides for interest on civil money judgments, and see cases cited in *DECENNIAL DIGESTS*, "Interest," §22.

¹¹⁶ *Latrobe v. Winans*, 89 Md. 636, 43 Atl. 829, 833 (1899); *State Trust and Savings Bank v. Hermosa Land & Cattle Co.*, 30 N. M. 566, 240 Pac. 469 (1925) ("There are numerous decisions to the effect that while equity generally looks to the law for the rule of damages, it will not refuse interest on unliquidated claims where justice requires its allowance"); 4 *SEDGWICK, DAMAGES* (9th ed., 1920, by Beale) §1256k.

unless some reason appears for deviating from legal doctrines. The practice at law of giving interest-damages has been liberalized, first by extending the realm of the jury's discretion, and second (in America) by converting what was allowable in their discretion to a claim collectible as of right, by a rule of law.¹¹⁷ This tendency in respect to claims at law to withdraw the matter from the jury's discretion is probably wholesome, because an untrained body is not likely to exercise such a discretion very wisely or very consistently with results reached by other juries. In equity, however, even where as in England and most states today the same courts administer both law and equity, the judge sits usually without a jury and determines the amount of the damages for himself.¹¹⁸ Consequently, the tendency has always been for equity judges to allow or deny interest as damages with more freedom and flexibility of adjustment to the individual case than in the common law courts, which tend to seek general rules which they can prescribe for the guidance of juries. A few examples will illustrate the methods with which equity has dealt with the problem of interest as damages. In a suit for an accounting between two railroads under a contract relating to their joint business, the complainant claimed a sum in excess of \$200,000 but the court finally allowed recovery of only about \$30,000. Interest was not allowed from the time of the accrual of the latter sum because of the complainant's delay and its failure to make a specific demand before suit, but interest was allowed from the time when the suit was filed and the court, after reviewing the history of the recovery of interest in England and the Federal courts, said: "Indeed, in the United States the active use of money is so general, the holding of it as a special deposit, so that there is no increment, is so rare, that to refuse a plaintiff or complainant interest on money unjustly detained does ordinarily a double injury—it deprives him of the increase to which he was justly entitled, and it violates, in behalf of the defendant, a fundamental maxim of equity, by allowing him to take advantage of his own wrong."¹¹⁹

In a Maryland case the president of a corporation in violation of the terms of a deed of trust securing bonds issued for the purpose of

¹¹⁷ See §§5 and 6, *supra*.

¹¹⁸ While he may refer the matter of damages to a jury or a master, the judge is the final arbiter. See *Mortgage Loan Co. v. Townsend*, 156 S. C. 203, 152 S. E. 878 (1930).

¹¹⁹ *Nashua & Lowell Ry. Corp. v. Boston & Lowell Ry. Corp.*, 61 Fed. 237, 251 (C. C. A. 1st, 1894).

building a plant, expended some of the proceeds in payment of debts of the corporation. Suit was brought by the receiver of the corporation to recover the money as a trust fund and the court allowed the recovery but held that though interest is ordinarily allowable on sums thus withheld, since here the defendants acted in good faith interest would be denied. "The allowance of interest," the court said, "as a general rule, is discretionary with the court in equity cases. They may allow it or not according to the equity and justice between the parties, except in cases where interest is recoverable as a matter of right."¹²⁰

A similar viewpoint is disclosed in cases where a court of equity through its receivers is called upon to administer an estate and distribute it among creditors. Will interest be allowed as damages for the time when the estate is in the hands of the court? Ordinarily no, but even here no hard and fast rule is announced. "In each case," according to a recent New Jersey decision, "the question is what is fair in right and justice."¹²¹ Again, where the equity court is called upon to make compensation for waste or trespass the plaintiff's delay or the defendant's willful fault are likely to be given even more stress than in actions at common law in determining whether interest upon the damages will be included in the decree.¹²² In suits for specific performance of contracts for the sale of land, courts are often faced with difficult problems where the conveyance, due to the fault of one party or the other, or perhaps of neither, has been delayed beyond the time fixed in the contract for completing the purchase. When the vendor claims interest during the delay, upon the purchase money, he may ordinarily recover it, unless he has continued in possession and has received the rents and profits. He cannot have both.¹²³ All in all, however, while equity cases present some special problems, and are dealt with in more flexible and discretionary fashion than at law, the difference in respect to interest is one of degree of procedural freedom rather than any divergence of doctrine.

¹²⁰ *Carrington v. Thomas C. Basshar Co.*, 119 Md. 378, 86 Atl. 1030, 1031 (1913).

¹²¹ *Hoover Steel Ball Co., v. Schaefer Ball Bearing Co.*, 90 N. J. Eq. 515, 107 Atl. 425 (1919).

¹²² *Tate v. Field*, 57 N. J. Eq. 53, 40 Atl. 206 (1898) (waste, in removing building, highest estimated value allowed, with interest, against defendants as willful wrongdoers); *Andrus v. Berkshire Power Co.*, *supra* note 105 (trespass, interest on damages, denied because of plaintiff's delay).

¹²³ See *Minard v. Beans*, 64 Pa. 411 (1870). As to the respective rights to interest and rents and profits as between vendor and purchaser, see 2 COOK, *CASES IN EQUITY* (1925) 627-645; 1 AMES, *CASES IN EQUITY JURISDICTION* (1901-1904) 219, note.