RECOVERY OF INTEREST AS DAMAGES

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The recovery of interest as damages is becoming an increasingly important area of the law. This paper provides a detailed and comprehensive review of the law in this area. The author begins by briefly discussing the historical underpinnings of the recovery of interest as damages, and then goes on to examine the various instances in which interest as damages may be recoverable.

I. HISTORICAL

Dodge J. of the Wisconsin Supreme Court succinctly expressed some of the chief problems with the courts handling of interest claims when he observed:[1]

> The question of interest is one much more often passed upon than carefully considered by courts. It is usually presented only incidentally to much more important issues, and often decided one way or the other at the close of exhaustive investigation of the other questions, and with the perhaps unconscious feeling that it is not of sufficient magnitude to justify further serious labour. Again, the elements involved in determining the question are many of them so elastic in their application that cases may be rightly resolved in different ways without the distinction being apparent from the statement of them. The question is also one of those upon which the old reasons and principles have been departed from in deference to modern business methods and views of commercial equity, and upon which the law has progressed in a steady development away from the early precedents.

In the context of contractual stipulations for interest one begins historically with the position, derived from ecclesiastical law, that interest charges were a mortal sin. In their characteristic zealousness to correct the waywardness of the King's subjects, the early ecclesiastical courts took the position that if the person charging interest died "in sin" the King was entitled to take that person's goods by way of penalty. The early attempts of the Church to suppress usury (compensation paid for the "use" of the thing — in this case, money) were described by one author as part of a general theory of wages and profits which looked with favour upon the products of labour while it regarded as suspect the profits of speculation, banking and finance.[2] Indeed, the term "mortgage" comes from the usurious association of the feudal "gage" (or pledge) of land as security for debt:[3]

> "If the profits from the land received by the gagee were applied to reduction of the debt, Glanville tells us the transaction is just and lawful; and if, however, the profits do not reduce the debt burden but are taken by the gagee, then the proceeding is usurious, dishonest and sinful, and is therefore called *mortuum vadium*, a mortgage. The mortgage is, nevertheless, legal as far as the King's Court is concerned, but if the mortgagee dies, his property will forfeit, like that of other usurers".

The demands of commercial exigency[4] eventually outweighed the strictures of moral conscience. The early statutes dealing with interest were in

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1. *Laycock* v. *Parker* (1899) 103 Wis. 161, 79 N.W. 327.
2. T.F. Plucknett, *A Concise History of the Common Law* (5th ed. 1956) 304; W.B. Hagarty, "Concerning Usury" (1965) 8 *Can. B.J.* 185.
3. *Plucknett, supra* n. 2 at 468.
4. Aided somewhat by the sophistic distinctions of Calvinism. *See McGregor on Damages* (14 ed. 1980) 328, 447.

fact introduced in order to permit it to be charged and recovered as such.[5] These first statutes began by allowing interest in the princely sum of ten per cent which later shrank to its present legal level of five per cent.[6]

The early common law courts did award amounts as compensation for the wrongful withholding of money in the form of damages under the old count of debt.[7] The common law did not consider the situation usurious for there had been no bargain that the creditor receive a particular sum for the use of his money. The limits of the action were that the plaintiff must claim a fixed sum that was due to him. Unliquidated amounts as damages for breach of contract could not be claimed in debt.

The courts of equity developed a doctrine that upon ascertainable amounts of money being payable at ascertainable times, the persons entitled to receive the money were entitled to interest upon it from the date due,[8] although it was of course necessary, in order to obtain the benefit of the equitable doctrine, to establish the existence of a state of circumstances that attract the equitable jurisdiction.[9] In addition to this equitable jurisdiction, the common law courts on occasion recognized broader grounds for the allowance for interest, mainly as damages for the unjust detention of a debt where the creditor had made efforts to obtain payment[10] or being implied from the usage of trade, as in the case of mercantile instruments, or other circumstances.[11] Where a person agreed to do something other than merely pay money (such as purchase goods) and he broke his agreement, an action for damages would lie against him. In estimating those damages and as part of them, interest might be calculated on money that would have been payable by him with interest, if he had not broken his agreement and thereby prevented the principal from coming due.[12]

The rule-oriented fashionings of 19th century contract law, coupled with the deep-rooted antipathy to interest derived from earlier times, promoted a progressive ossification of the circumstances in which interest would be allowed at common law. Overriding the broader views of

5. *See* the observations of Lord Mansfield in *Lowe* v. *Waller* (1781) 2 Doug. K.B. 736 at p. 740; 99 E.R. 470.

6. *See* 37 Hen. VIII, c. 9 and 12 Anne., Stat. 2, c. 16.

7. Sir F. Pollock and F.W. Maitland, 2 *History of English Law* (and. ed. 1923) 215-216.

8. *Spartali* v. *Constantinidi* (1872) 20 W.R. 823 at 825. *See also London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.* [1892] 1 Ch. 120 at 142-143 (C.A.).

9. *Hart* v. *Maine & New Brunswick Elec. Ry. Co.* [1929] A.C. 631.

10. *Dent* v. *Dunn* (1812) 3 Camp. 296, 170 E.R. 1388; *Arnott* v. *Redfern* (1826) 3 Bing. 353, 130 E.R. 549. *See also* the cases discussed in the notes to the report of *De Bernales* v. *Fuller* (1810) 2 Camp. 426, 170 E.R. 1206.

11. *Page* v. *Newman* (1829) 9 B. & C. 378, 109 E.R. 140.

12. *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, *supra* n. 8 at 142. *But see McGregor on Damages*, *supra* n. 4 at 331-332; *Higgins* v. *Sargeant* (1823) 107 E.R. 414; *Foster* v. *Weston* (1830) 130 E.R. 1454.

judges such as Lord Mansfield,[13] the English courts, beginning with the pronouncements of Lord Ellenborough C.J. in the early years of the century[14] and continuing through the efforts of Lord Tenterden[15] to the House of Lords judgment in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* [16] developed and maintained a policy that restricted the recovery of interest at common law to cases where:[17]

(1) there is an express agreement to pay interest;

(2) an agreement to pay interest can be implied from the course of dealing between the parties, or from the nature of the transaction or a custom or usage of the trade or profession concerned; or

(3) in certain cases, it is awarded by way of damages for breach of a contract (other than a contract merely to pay money) where the contract, if performed, would to the knowledge of the parties have entitled the plaintiff to receive interest.

More than one nineteenth century justice observed, in denying a claim for interest as damages, that if the plaintiff had wanted interest to be payable on default of the obligation to pay he ought to have contracted for it.[18] This view has not entirely gone the way of the other sentiments of positivistic contractual jurisprudence that accompanied it.[19]

In 1833, spurred on by Jeremy Bentham's attacks on the usury laws,[20] the British Parliament passed the Civil Procedure Act, 1833, better known as Lord Tenterden's Act. This statute provided, in s. 28:

> That upon all Debts or Sums certain, payable at a certain Time or otherwise, the Jury on the Trial of any Issue, or on any Inquisition of Damages, may, if they shall think fit, allow Interest to the Creditor at a Rate not exceeding the current rate of Interest from the Time when such Debts or Sums certain were payable, if such Debts or Sums be payable by virtue of some written Instrument at a certain Time, or if payable otherwise, then from the Time when Demand of Payment shall have been made in Writing, so as such Demand shall give Notice to the Debtor that Interest will be claimed from the Date of such Demand until the Term of Payment; provided that Interest shall be payable in all Cases in which it is now payable by Law."

13. *Eddowes* v. *Hopkins* (1780) 1 Douglas 376, 99 E.R. 242. Lord Mansfield, in *Robinson* v. *Bland*, (1960) 2 Burr. 1077 at 1086; 96 E.R. 141 suggested that in cases where a principal sum was to be paid at a specific time, the basis was an implied agreement, when he observed that:

> "Where money is made payable by an agreement between parties, at a time given for the payment of it, this is a contract to pay the money at a given time, and to pay interest for it from the given day in case of failure of payment at that day. So that the action is, in effect, brought to obtain specific performance of this contract. For pecuniary damages upon a contract for the payment of money, are, from the nature of the thing a specific performance, and the relief is defective so far as all the money is not paid."

But see Lord Selborne in *Cook* v. *Fowler et al* (1874) L.R. 7 H.L. 27; *In re: Dixon* (1900) 2 Ch. 561 per Webster M.R. at p. 562. *See also* Lord Chancellor Thurlow in *Craven* v. *Tickell* (1789) 1 Ves. Jun 60 at 63, 30 E.R. 230; *Boddam* v. *Ryley* (1787) 4 Bro. Parl. Cos 561; 2 E.R. 382 (H.L.); affg. (1785) 1 Bro. C.C. 2; and *see Mountford* v. *Willes* (1800) 2 Bos. & P 337; 126 E.R. 1314.

14. *De Havilland* v. *Bowerbank* (1807) 1 Camp. 50, 170 E.R. 872; *Calton* v. *Bragg* (1812) 104 E.R. 829; where, however, exception was made for "agreements for payment of the principal at a certain time".

15. *Supra* n. 11.

16. [1893] A.C. 429. (H.L.).

17. 32 Halsbury's Laws (4th) 108.

18. *See* Bayley J. in *Higgins* v. *Sargeant*, *supra* n. 12 at 420; Erle J. in *Petre* v. *Duncombe* (1851) 20 L.J. 242 at 244.

19. *See* the dissenting judgment of O'Sullivan J.A. in *Banfield* v. *Hoffer* [1977] 4 W.W.R. 465 at 474.

20. *See London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, *supra* n. 8 at p. 140 *per* Lindley L.J.

The statute was authored by Lord Tenterden, who had previously eschewed the more liberal expressions of earlier judges as to the court's powers to award interest at common law in *Page* v. *Newman.*[21] The strictures of the provision are obvious. Although framed in terms of an expansion of the courts jurisdiction to find interest payable by law, it did not require that an award of interest be made in all cases of valid claims. It only empowered the court to do so. It did not specify the rate of interest (only a limit on it), or the period of time for which it would run. It left that to the court's discretion. It only permitted interest to be awarded in the case of debts or sums certain and did not address other types of claims, except for trover, trespass and insurance policies, which were dealt with in s. 29 of the Act. The reason for claims under insurance policies being dealt with separately was undoubtedly the view that, in many cases, these represented unliquidated claims, not subject to awards of interest under s. 28.[22]

The Law Reform (Miscellaneous Provisions) Act, 1934 s. 3(1) repealed Lord Tenterden's Act and gave English courts the power to award interest on debt or damages, in their discretion. By the Administration of Justice Act, 1969 (U.K.) c. 58 s. 22 the award of interest was made compulsory in personal injury or death cases, unless the court was satisfied that there were special reasons why no interest should be awarded.[23]

The provisions of Lord Tenterden's Act relating to interest were reenacted in Upper Canada in 1837.[24] The words "or in which it has been usual for a jury to allow it" were added to the reenactment of s. 28 and slight modifications were made to the other wording. In 1859, the provisions were changed substantially and these amended provisions were carried forward, with some modifications, into the Judicature Act[25] which provided that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it". In the *Toronto Ry. Co.* v. *City of Toronto,*[26] the Privy Council considered the meaning of these words, then found in the Ontario Judicature Act.[27] After deriving guidance as to the meaning of the concluding words by reference to Ontario and Upper Canada authorities with respect to the practice for awarding interest, Lord Macnaghten states:[28]

> The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

21. *Supra* n. 11.
22. *See Jabbour* v. *Custodian of the State of Israel* [1954] 1 All. E.R. 145 (Q.B.); *Randall* v. *Lithgow* (1883-84) 12 Q.B.D. 525; *Israelson* v. *Dawson* [1933] 1 K.B. 301 at 304 *per* Scrutton L.J.
23. For subsequent English developments see the historical discourse of Lord Denning in *Jefford* v. *Gee* [1970] 1 All. E.R. 1202 (C.A.) at 1203-1208 and *McGregor on Damages, supra* n. 4 at 328-330. For the English courts' later fashionings in the area *see Birkett* v. *Hayes* [1982] 2 All. E.R. 710 (C.A.).
24. 7 Wm IV c. 3 s. 20.
25. R.S.O. 1887, c. 44, ss. 85-86.
26. [1906] A.C. 117.
27. R.S.O. 1897, c. 51.
28. *Supra* n. 26 at 121.

This statement concedes a much broader jurisdiction to the Ontario Courts than they enjoyed under Lord Tenterden's Act.[29]

Prior to 1908, Lord Tenterden's Act was the basis for interest awards by courts in Alberta.[30] Confusion existed as to the effect on that statute of the BNA Act. In 1908, however, the province enacted its first legislation in respect of the courts' powers to award interest, in the form of an amendment to the Judicature Ordinance.[31] This provided as follows:

> In addition to the cases in which interest is by law payable, or may by law be allowed, the court may in all cases where in the opinion of the court the payment of a just debt has been improperly withheld, and it seems to the court fair and equitable that the party in default should make compensation by the payment of interest, allow interest for such time and at such rate as the court may think right.

The provision thus enshrined in legislative form the views of the Privy Council in the *Toronto Ry. Co.* case as to a courts jurisdiction under the Ontario Judicature Act.[32] The occasional peregrinations of the compilators of the Revised Statutes of Alberta have produced the more truncated version now found in s. 15 of the Judicature Act:[33]

> In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

B.C., New Brunswick and Ontario now have specific statutory provisions giving their courts broad powers to award prejudgment interest.[34] Saskatchewan and Manitoba, in their respective Queen's Bench Acts, have provisions similar to those of the Ontario Judicature Act considered in the *Toronto Ry. Co.* case.[35] Accordingly, decisions from those provinces,[36] as well as Ontario cases under the former Judicature Act, are of some assistance in considering an Alberta court's jurisdiction under Section 15 of our Judicature Act.[37]

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29. Perhaps restoring a jurisdiction that, but for some misplaced notions of inconvenience and the doctrine of *stare decisis*, ought to have always been available to the courts. *See Arnott* v. *Redfern*, *supra* n. 10, and Lord Herschell in *London, Chatham, & Dover Ry. Co.* v. *South Eastern Ry. Co.*, *supra* n. 16.

30. *See* Northwest Territories Act, R.S.C. 1886, c. 50, s. 11; The Alberta Act, 4-5 Edward VII, c. 3, s. 16; *Raymond Land* v. *Knight Sugar Co. Ltd.* [1909] 3 Alta. L.R. 157 at 167 *per* Stuart J.; *Marshall-Wells Co.* v. *Eaton* (1915) 8 W.W.R. 787 at 789 *per* Winters J.; J.E. Cote, "The Introduction of English Law" (1964) 3 *Alta. L. Rev.* 262; J.E. Cote, "The Reception of English Law" (1977) 25 *Alta. L. Rev.* 29.

31. S.A. 1908, c. 20, s. 1.

32. *Supra* n. 27; *Granpac Ltd.* v. *American Home Assoc. Co.* (1981) 33 A.R. 212 (C.A.) *per* Laycraft J.A. at 220; *Custodian* v. *Blucher* [1927] S.C.R. 420 at 424 *per* Newcombe J..

33. R.S.A. 1980, c. J-1, s. 15. Other provisions of the Judicature Act are at times used as a basis for awarding interest on damages. *See* s. 17(1); *Morrison* v. *Edmonton* (1982) 36 A.R. 341 at 343-34 *per* Dechene J., 137 P.L.R. (3d) 174; *Wilcox* v. *Ford Motor Co.* (1982) 38 A.R. 361 (Q.B.); *Mazurkewich* v. *The Queen*, unreported, 3rd August 1982, J.D. of Edmonton, 800300 225 (Alta. Q.B.); *cf. Carpenter* v. *Cargill Grain Co. Ltd.* (1982) 36 A.R. 598 (Q.B.). *See also* J.E. Cote, *supra* n. 30 at 277; *Snyder* v. *Harper* [1922] 2 W.W.R. 417 at 420 *et seq. per* Stuart J..

34. Court Order Interest Act, R.S.B.C. 1979, c. 76; The Judicature Act, R.S.N.B. 1973, c. J-2, ss. 45, 46; The Judicature Act R.S.O. 1970, c. 228, s. 38(3); 1977, c. 51, s. 3(1).

35. *Supra* n. 26.

36. *See Gregga* v. *Leippi* [1944] 3 W.W.R. 396 at 400 (Sask. C.A.) *per* Martin C.J.S.; *Chambers* v. *Leech* [1976] 4 W.W.R. 568 (Man. C.A.).

The chief difference between Alberta and other jurisdictions, such as England, New Brunswick, B.C. and Ontario, which have refashioned the statutory basis for interest awards in the general litigation context, is that Alberta retains the concept that interest, in cases permitted under the statute, is awarded as damages[38] not in the sense of compensation for the plaintiff having been kept out of money that he was in law entitled to and whose use has been enjoyed by the defendant in the interim but more in the sense of punishment to the defendant for failing to honour the plaintiff's valid claim when he ought in law to have done so. This attitude is reflected in the basis on which Alberta courts have inclined to disallow awards of interest under the Judicature Act or its equivalent: where there is a *bona fide* dispute as to the plaintiff's legal entitlement, the amount of the claim is difficult to ascertain, the issue is novel, or even where the debtor did not have the means to pay. The focus of the Alberta legislation on the need for "improper withholding" of a just debt and the requirement that the claim, in order to be capable of attracting an award of interest under section 15, must be a debt or liquidated demand, both foster the punitive approach to the application of the provision. The requirement of a liquidated demand is consistent with a punitive provision: it should not be applied in cases where there is uncertainty as to the scope of the defendant's duty. The result, however, is an embarrassing aberration in the machinery of our legal system for providing adequate compensation to a plaintiff for the injury he has suffered by the defendant's breach of his obligation, whether imposed by contract, tort or otherwise.

As more than one learned author has observed, if the defendant does the plaintiff a legal wrong by damaging his property or breaches a contractual obligation, and then disputes liability, only finally relenting to payment after protracted litigation, the defendant has done the plaintiff two wrongs: he has destroyed his property or deprived him of his contractual entitlement, *and* he has failed to make the compensation required by law in a timely fashion.[39]

This is particularly true in inflationary periods where a realistic system for awarding interest can serve to mitigate the prejudice suffered by a plaintiff as a result of the courts' reluctance to adjust damage awards to

37. *But see* the comments of O'Sullivan J.A. dissenting in *Banfield* v. *Hoffer* [1977] 4 W.W.R. 465 (Man. C.A.) as to the difference between the Manitoba and the former Ontario law relating to interest as damages.

38. *See Hoover* v. *Burrows* [1945] 3 W.W.R. 683 (Alta. C.A.).

39. S.M. Waddams, *The Law of Damages* (1983) at 469; *The "Amalia"* (1864) 5 New Rep. 164 per Doctor Lushington.

take account of inflation between the date of the wrong and the date of judgment.[40]

The absurdity and illogic of the law's development in this area is highlighted by the fact that, for over 150 years, admiralty courts have comfortably exercised a jurisdiction to award interest in cases of either contractual or tortious injuries to a plaintiff's goods, on the principle that such jurisdiction was necessary to ensure full compensation to the plaintiff.

Before examining in more detail what the courts have perceived their jurisdiction to be under a provision such as s. 15 of the Judicature Act it is of some interest to examine their jurisdiction to award interest as damages without it, a jurisdiction confirmed by the opening words of the section.

II. CASES WHERE INTEREST MAY BE RECOVERED AS DAMAGES APART FROM THE JUDICATURE ACT

A. CONTRACT

1. Obligations to Pay Money

As noted previously, the increasingly strict notion of contract and the intransigence of the doctrine of *stare decisis* brought a hardening of the courts' position in respect of interest awards on obligations to pay money,[41] to the point where it was accepted as a correct statement of the common law:[42]

> . . . interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of Mercantile Instruments.

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40. *See* S.M. Waddams, *supra* n. 39 at 454-455. As Waddams notes, at p. 470, "interest consists of two elements: compensation for the loss of use of money and compensation for decline in its value". The prevailing doctrine in Alberta appears to be firmly fixed against an allowance in damage awards to take account of inflation between the date of wrong and the date of judgment. See *Miller* v. *Riches and Cline* (unreported, Alta. C.A., App. Nos. 1477, 14795, January 23, 1984) per Lieberman J.A. at pp. 4-8, where the Court of Appeal reversed the trial judge who had applied an inflation factor to a loss of wages claim in order to arrive at "equitable compensation for loss of wages up to date of trial". The Court of Appeal found that, although by *definition* there was a distinction between "interest" and "inflation" as emphasized by Lord Wilberforce in *Pickett*, the application of an inflation factor for the award of prejudgment wages in *Riches* would in reality be an award for prejudgment interest in contravention of Section 15 of the Alberta *Judicature Act*. Mr. Justice Lieberman felt compelled to state "that this ground of appeal demonstrates the need in this jurisdiction for a statutory provision allowing for prejudgment interest in damage awards". See also *Leitch Transport Ltd.* v. *Neonex International Ltd.* (1979) 106 D.L.R. (3rd) 315 27 O.R. (2nd) 363 (Ont. C.A.); *McCaig* v. *Reys* (1978) 90 D.L.R. (3rd) 13 (D.C.C.A.). In both Ontario and British Columbia, however, the courts possess powers to award interest on all awards at commercial rates prior to judgment which rates reflect, in part, commercial expectations as to inflation. *See* Waddams, *supra*, n. 37, at 454. In Alberta, of course, no such power exists in respect of tort damage awards. Generally, *see also* S.A. Rea Jr., "Inflation, Taxation and Damages Assessment" (1980) 58 C.B.R. 280; *Norcen Energy Resources Ltd. and Murphy Oil Company Ltd.* v. *Flint Engineering and Construction Ltd.* (unreported, Alta. Q.B. Calgary No. 8001-17485, January 31, 1984).

41. *See* Lord Ellenborough's views on the limits in *De Havilland* v. *Bowerbank*, *supra* n. 14; and *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, *supra* n. 16.

42. *Page* v. *Newman*, *supra* n. 11 at 141 *per* Lord Tenterden, accepted with reluctance by Lord Herschell in *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, *supra* n. 16.

One rationale given for this severe limitation on the grounds for which interest could be awarded was that "it was generally presumed not to be within the contemplation of the parties" and was accordingly, on ordinary principles of contract damages, too remote to be relevant.[43] The general rule was acknowledged in *Trans. Trust SPRL* v. *Danubian Trading Co.* [44] by Denning L.J. who went on to note, however, that "when the circumstances are such that there is a special loss foreseeable at the time of the contract as a consequence of non-payment" the loss, which could include interest, might well be recoverable. A contract to provide credit, he found, was different from one to pay money and the special rules applicable to the latter did not reach the former.[45] In cases of the breach of a contract to lend money the actual expenses of the plaintiff in securing financing elsewhere, including interest, are a proper head of damages.[46] The strongest authority for restrictions on a court's capacity to award interest as damages at common law was well aware of the policy considerations and the stirrings of felt injustice that later moved the legislatures to action.[47] Still, the notion that the parties to a contract could well have provided expressly for interest had they contemplated it operated as a convenient justification for the courts' restrictive policies in this area. Other exceptions to the general proscription include contracts of indemnity, contracts where the defendant has promised to pay a sum certain on a day certain with interest at a fixed rate until then[48] and cases of failure to pay a bill of exchange or promissory note. There has been some confusion as to the right to interest at common law where the debtor was simply obliged to pay or repay a sum of money on a day certain and has failed to do so. One Alberta court[49] has stated that the better view seems to be that interest was awarded at common law in such cases although this would appear to be another area in which the zeal to fashion hard rules based on "general principles"[50] overlooked the actual

43. *McGregor on Damages*, *supra* n. 4 at 331 quoting *Bullen and Leake* (3rd ed. 1888) 51.

44. [1952] 1 All. E.R. 970 (C.A.) at 977.

45. *See also Wood* v. *Guarantee Co.* (1976) 64 D.L.R. (3d) 385. In *Wadsworth* v. *Lydall* [1981] 1 W.L.R. 598; [1981] 2 All E.R. 401 (C.A.) the Court allowed a special damage claim for interest on money the plaintiff was forced to borrow as a result of the defendant's delay in paying money as required under a contract between the parties, on the basis that the damage was not too remote on the principle of *Hadley* v. *Baxendale* (1854) 9 Exch. 341, (1843-60) All E.R. Rep. 46. *Cf. Compania Financiera Soleada SA and Others* v. *Hamoor Tanker Corpn. Inc. The Borag* [1981] 1 All E.R. 856 (C.A.). *See* Bennett, "Recent Cases on Claims for Interest" 131 *New L.J.* 1065.

46. *Gen. Securities Ltd.* v. *Don Ingram Ltd.* [1940] S.C.R. 670 at 673 *per* Duff C.J.; *cf. Mennie* v. *Leitch* (1885) 8 O.R. 397 (Q.B.). For the other view as to foreseeability of financial loss due to interest charges *see D. Latimer Engineering* v. *Cassidy* (1980) 71 A.P.R. 633 at 673 *per* Hallett J. *See also Pelletier* v. *Pe Ben Industries Co. Ltd.* [1976] 6 W.W.R. 640 (B.C.S.C.) and *Prince Rupert Sawmills Ltd.* v. *M.C. Logging Ltd.* (1967) 65 D.L.R. (2d) 300 (B.C.C.A.).

47. *See London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, *supra* n. 16 at 437 *per* Lord Herschell.

48. *McGregor on Damages*, *supra* n. 4 at 331.

49. *Stogryn Sales (Edmonton) Ltd.* v. *Roy Johna*, unreported, 7 November 1980, J.D. of Edmonton, 8003-04511 (Alta. Q.B.).

50. *See Higgins* v. *Sargeant*, *supra* n. 12.

pronouncements of earlier courts on which these "principles" purported to be based.[51] Not only must a sum certain be payable under the contract, but also must it be payable at a time certain under the contract.[52] In addition, there is authority that, at least insofar as recovery under Lord Tenterden's Act was concerned, the certain sum payable must be a sum that is due absolutely and in all events from the one party to the other, so that when the amounts payable under a contract depended on the certification and judgment of an engineer and were conditioned upon the defendants receiving payment from a third party, the case was found not to be within the Act.[53]

2. Indemnity and Surety

Where a person has paid for another under an indemnity, express or implied, he is entitled to recover interest from the principal debtor because he would not be fully indemnified unless he were put in the same position pecuniarily as if he had not paid the money.[54] It has been held that sureties will ordinarily be liable for interest on the amount due from them as damage for its detention,[55] although in these cases the awards were under the authority of the respective Judicature Acts and it would seem that sureties' liability for interest, like that of other contracting parties, depends upon the construction of their particular engagement,[56] or the courts general powers in respect of interest awards under the Judicature Act. A surety is only liable for such sums as the principal is legally liable to pay, however, and where suit was brought against a surety for, *inter alia*, invalid interest charges levied against the principal debtor, the surety was not bound by an account stated between the creditor and the principal debtor that included such interest charges.[57] The same rule applies where the illegal interest is exacted by way of a discount of the principal actually advanced.[58]

3. Dishonour of Bill of Exchange or Promissory Note

Section 134 of the Bills of Exchange Act R.S.C. 1970 c. B-5 provides as follows:[59]

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51. *De Havilland* v. *Bowerbank*, *supra* n. 14; *McGregor on Damages*, *supra* n. 4 at 331. *Also see Calton* v. *Bragg* (1812) 15 East 223, 104 E.R. 829; *Rhodes* v. *Rhodes* (1860) 70 E.R. 581.

52. *Sinclair* v. *Preston* (1901) 31 S.C.R. 408.

53. *Id.*; *Maine & New Brunswick Elec. Power Co.* v. *Hart* [1929] A.C. 631.

54. *Petre* v. *Duncombe* (1851) 20 L.J.Q.B. 242; *Smith* v. *McCutcheon* [1922] 1 W.W.R. 306 (Man. C.A.); *Deisler* v. *U.S. Fidelity Co.* [1917] 3 W.W.R. 214 (B.C.C.A.); *affd.* [1917] 3 W.W.R. 1051 (S.C.C.). *See* H.A. deColyar, *A Treatise on the Law of Guarantees and of Principal and Surety*, (3rd ed. 1897) 809.

55. *Standard Bank of Canada* v. *Faber* (1917) 11 Alta. L.R. 96 at 107 (Alta. S.C. App. Div.); *Thomas Fuller Const. Co.* v. *Continental Insur. Co.* (1973) 36 D.L.R. (3d) 336 at 372 (Ont. H.C.J.).

56. *See* D.G.M. Marks and G.S. Moss, *Rowlatt on The Law of Principal and Surety*, (4th ed. 1982) at 106.

57. *Standard Bank of Canada* v. *Faber*, *supra* n. 55 at 105.

58. *Northern Cown Bank* v. *Woodcrafts Limited* (1917) 11 Alta. L.R. 1 at 6 (Alta. S.C. App. Div.) *per* Beck J..

59. R.S.C. 1970, c. B-5. *See* the application of this provision in *Hayden, Clinton National Bank* v. *Dixon* (1916) 9 W.W.R. 1269 at 1274 (Alta S.C. App. Div.) *per* Scott J. where interest was allowed at the rate specified in the note from the maturity of the note until judgment.

> 134. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, are
>
> (a) the amount of the bill;
>
> (b) interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case;
>
> (c) the expenses of noting and protest.

Interest expressly made payable by a bill is part of the debt, and not damages for detaining the money.[60] Falconbridge states:[61]

> The amount of the bill includes interest until maturity and exchange, if these are provided for in the bill (s. 28). Until the maturity of the bill, the interest, if any, is part of the debt; after maturity, interest is payable as damages.
>
> The agreement between the parties for payment of interest after maturity at a certain rate fixes the rate of interest recoverable as damages, however exorbitant it may be, . . . but unless the instrument provides in unequivocal terms for payment of interest at a particular rate *after maturity*, only the statutory rate, namely 5% is payable. . . . Simple, not compound, interest is payable, unless otherwise provided by the instrument. . .
>
> Section 57(3) of the original statute contains the following provision which is omitted from the Canadian statute: 'Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper'.
>
> Since the passing of the statute, when a bill is dishonoured by non-acceptance, interest can be recovered only from the date of maturity, and not from the date of dishonour. This perhaps does not accord with the practice before the statute. Chalmers (1964) 190-191.

A bill that provides for periodic payments of interest prior to the date on which the principal sum in the bill falls due is not considered to be "overdue" within the meaning of sections 56 and 70 of the Bills of Exchange Act[62] simply because a default is the payment of one such interest installment occurs. A surety for the payment of a bill of exchange by the acceptor is liable for interest from the date it becomes due.[63]

4. Sale of Goods

If a seller of goods is able to bring action for the price, the seller may, under s. 49 of the Sale of Goods Act,[64] recover interest on the price of the goods from the date of tender of the goods or from the date on which the price may be payable, in addition to the price of the goods themselves.[65] If the seller, on the other hand, sues for damages for non-acceptance, the basic principles of contract damages may entitle the seller to recover as part of the estimated loss directly and naturally resulting from the buyer's breach of contract, interest on the contract price from the time

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60. A.W. Rogers, *Banking and Bills of Exchange* (7th ed. 1969) at 500.

61. *Id.* at 774-775.

62. *Union Investment Co.* v. *Wells* (1908) 39 S.C.R. 625.

63. *Supra* n. 56 at 107.

64. R.S.A. 1980, c. S-2.

65. *Kemp Ltd.* v. *Tolland* [1956] 2 Lloyd's Rep. 681 at 691 (Q.B.) *per* Devlin J.; *cf. Marsh* v. *Jones* (1889) 40 Ch. D. 563; *Gordon* v. *Swan* (1810) 12 East 419. The seller's normal loss being the loss of use of the money, for which it may claim interest but not damages: *Benjamin's Sale of Goods* (2nd ed.) (London, Sweet & Maxwell, 1981) at p. 678.

delivery should have been made until the seller could, or should, have been able to resell the goods.[66]

The English Court of Appeal had suggested, at one point, that the amount on which interest may be awarded should be reduced by any insurance received by the plaintiff in that interest should run only to the date of the plaintiff's indemnification by his insurer. This approach, however, ignores the fact that the insurer should have the subrogated benefit of the interest and appears to have been reversed by the Court of Appeal for that reason.[67] In cases where a buyer of goods suffers loss as a result of a failure to deliver goods or a breach of warranty or condition on the part of the seller the damages recoverable may also include interest on the costs of replacement,[68] although interest should not be allowed where a recovery for loss of use is awarded.[69] Although some of these decisions have founded the interest awards on the courts' statutory jurisdiction in respect of prejudgment interest it is submitted that general principles for computing damages for breach of contract ought to produce the same results.[70] Interest as damages should also be recoverable, in principle, in cases where the seller has failed to deliver goods and the buyer has not received funds he otherwise would have received, but the amount of actual damages may simply be too difficult to calculate in the circumstances.[71] In cases where a carrier has failed to deliver goods interest on the value of the goods may be awarded.[72]

5. Sale of Land

The measure of damages recoverable by a vendor of real property where a purchaser has committed a breach that goes to the root of the contract is *prima facie* the difference between the contract price and the market price of the land at the time of the breach, including incidental expenses and any special damage,[73] together with interest during the period

66. *Supra* n. 64, s. 54; G.H.L. Fridman, *Sale of Goods in Canada* (2nd ed. 1979) 385-389; *Mathieson* v. *Tremblay* (1912) 12 E.L.R. 79 at 82 (P.E.I. S.C. App. Div.); *Marsh* v. *Jones* (1889) 40 Ch.D. 563 (C.A.); *Popular Industries Ltd.* v. *Frank Stollery Ltd.* (1973) 1 O.R. (2d) 372; *H.T. McGroarty Ltd.* v. *Leigh Instruments Ltd.* (1973) 2 O.R. 792.

67. *H. Cousins and Co. Ltd.* v. *D & C Carriers Ltd.* [1971] 2 Q.B. 230 (C.A.). *See also* S.M. Waddams, *supra* n. 38 at 505, who suggests that in jurisdictions where interest is in the court's discretion, indemnification by an insurer ought to be irrelevant to the award of interest.

68. *Panchaud Freres S.A.* v. *Pagnan* [1974] 1 Lloyd's Rep. 394 at 411 (C.A.) *per* Lord Denning.

69. *McGregor on Damages*, *supra* n. 4 at 332.

70. *Wood* v. *Guarantee Co.*, *supra* n. 45.

71. *Henry Hope & Sons* v. *Sheehy* (1922) 22 O.W.N. 257.

72. *B.C. Lumber & Saw Mill Co.* v. *Nettleship* (1868) L.R. 3 C.P. 499; [1861-73] All E.R. 339 (C.A.).

73. V. Di Castri, *The Law of Vendor and Purchaser* (2nd ed. 1976) 713. *But see* Johnson v. *Agnew* [1979] 2 W.L.R. 487; [1979] 1 All E.R. 883 (H.L.); *306793 Ont. Ltd. in Trust* v. *Rimes* (1980) 10 R.P.R. 258 (Ont. C.A.).

between the original sale and the date of resale,[74] unless the vendor has remained in possession and it would be otherwise inequitable to impose this additional head of damages on the purchaser.[75] Where the purchaser has been let into possession the vendor is, generally speaking, entitled to interest on the purchase price or else a fair rental but not both, as he is only entitled to damages for the loss of use of either the property or the money.[76]

A purchaser found to be entitled to a return of the purchase money in an action for its recovery is entitled to interest on the funds as a *quid pro quo* for being charged for the use and occupation of the premises.[77] Although the rule in *Bain* v. *Fothergill* [78] formerly restricted a purchaser to nominal damages only where the vendor was unable to make title, it is no longer applicable in Torrens system jurisdictions such as Alberta.[79] Where a purchaser is not in default but has a valid ground for repudiation that he is exercising, he in general is not liable to be charged by way of deduction for the period of occupation prior to his repudiation.[80]

If a purchaser of land whose vendor, in breach of the contract, has refused to complete obtains an award of damages based on the value of the land at the date of judgment and the value has increased between the date for performance and the date of judgment the purchaser will be over-compensated unless an allowance is made for the interest that could have been earned on the unpaid purchase price.[81]

In *306193 Ont. Ltd. In Trust* v. *Rimes* [82] the appellant purchaser had been awarded damages in lieu of specific performance at trial in an action for breach of a contract to buy vacant land. The trial judge, in fixing those damages, had deducted the notional carrying charges incurred by the appellant between the date for closing under the contract and the date of trial. The Ontario Court of Appeal held that, subject to certain irrelevant exceptions, the measure of damages in such cases was the same at common law as in equity, accepting the view of the law laid down by

74. *Dobson* v. *Winton & Robbins Ltd.* [1959] S.C.R. 775. *See also Goulet & Sons Ltd.* v. *Lalonde* (1983) 149 D.L.R. (3d) 577 (Man. C.A.) *per* Monnin C.J.M., dissenting in part, at 580; *and see E & B Mortgages Ltd.* v. *Skrivanos* (1980) 118 D.L.R. (3d) 139 (B.C.S.C.) where Esson J. observed, at 143:
No precedent was cited for allowing the interest cost arising out of the six-week delay in completion but, on principle, it seems to be a proper claim. If some such allowance is not made, the plaintiff will not have been put in the same position as if the defendant had performed. The plaintiff had completed the house, it was standing empty, and thus it was a continuing burden until sold. The cost of money to the plaintiff for the delay period is a reasonable measure of the loss to it resulting from the delay.

75. *Goldenberg* v. *Lieberman* [1951] 2 D.L.R. 584.

76. *Id.* at 714; *Tavender* v. *Edwards* (1908) 1 Alta. L.R. 333.

77. *Di Castri, supra* n. 73 at 714.

78. (1874) L.R. 7, H.L. 158 (Ex.).

79. *A.V.G. Mgmt. Science Ltd.* v. *Barwell Dev. Ltd.* [1979] 1 W.W.R. 330 (S.C.C.). *See* M.H. Ogilvie, "Comment" (1980) 58 *Can. Bar. Rev.* 394.

80. *See Walters* v. *Capron* 48 D.L.R. (2d) 569 (B.C.S.C.) *appld.* in *Geldhof* v. *Bakai* (1982) 139 D.L.R. (3d) 527 (Ont. H. C.).

81. *See* S.M. Waddams, *supra*, n. 39, at pp. 64-68, 506-509 and authorities there cited; *Wroth* v. *Tyler* (1974) Ch. 30; S.M. Waddams, "Inflation and Mitigation of Damages" 1 Ox. J.L.S. 134 (1981).

82. (1980) 10 R.P.R. 258 (Ont. C.A.).

Lord Wilberforce in *Johnson* v. *Agnew*.[83] In concluding that no allowance should be made for notional carrying charges in such cases McKinnon A.C.J.O. observed that in his view the plaintiff's true loss was the difference between the original purchase price and the value of the land as of the date of trial and that the respondent "having delayed the closing of the transaction in breach of the agreement, cannot ask for part of the transaction to be back-dated to the original date of closing so it can be relieved of the carrying charges while in possession of the property.[84] The court found that this result was the consequence of the principle that the appellant, in such circumstances, was to be placed, so far as money may do so, in the same position as he would have enjoyed had the breach not occurred.[85] In answer to the suggestion of counsel for the vendor that the purchaser could have invested the money it had committed to this purchase for the approximately 2½ years it was kept out the possession and that to allow it to earn income on this money and at the same time earn a "windfall" profit on the notional sale to it at the date of trial would be inequitable, McKinnon A.C.J.O. noted:[86]

> . . . the plaintiff appears to be a shell company which was to hold the land as bare trustee. It would be the purest speculation to consider that the plaintiff first of all had any investment moneys; and secondly, that it would be able to invest at an interest rate greater than that which it would be paying for the money. Without any evidence to support the proposition argued, it is not persuasive.

McKinnon A.C.J.O. noted that the vendor had at trail abandoned any claim to interest on the moneys due on closing, it having had possession of the land from the agreed closing date, and observed that such a claim had been clearly denied from the date of the earliest authorities.[87]

At least one author has suggested that, in view of the framework in which the case was argued it seems unlikely that *Rimes* will be considered a conclusive authority against making a due allowance for the benefit to the purchaser of the postponed payment of the price.[88]

Clearly, if interest at full rates were to be awarded in addition to the judgment date value of the land the plaintiff would be over-compensated.[89]

6. Generally as Damages for Breach of Contract

The general principle on which interest may be payable as damages for breach of contract is that the plaintiff has been kept out of money he ought to otherwise have been entitled to, or has had to borrow or use money for purposes he would not have had to if not for the defendant's

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83. [1979] 2 W.L.R. 487; [1979] 1 All E.R. 883 (H.L.).

84. (1980) 10 R.P.R. at 264. *See also* John Swann, "Damages, Specific Performance, Inflation and Interest" (1980) 10 R.P.R. 267. *Cf. Tanu* v. *Ray* (1981) 20 R.P.R. 22 (B.C.S.C.).

85. Citing the judgment of Estey J. in *Asamera Oil Corp.* v. *Sea Oil & Gen. Corp.*; *Baud Corp., N.V.* v. *Brook* [1979] 1 S.C.R. 633, 5 B.L.R. 225, [1978] 6 W.W.R. 301, 89 D.L.R. (3d) 1 at 16 and Lord Wilberforce in *Johnson* v. *Agnew*, *supra* n. 83 at (1979) 1 All E.R. 896.

86. *Supra* n. 82 at 266.

87. Citing *Jones* v. *Mudd* (1827) 4 Russ. 118, 38 E.R. 749; *DeVisne* v. *DeVisne* (1849) 1 Mac & G. 336, 41 E.R. 1295; *Hayes* v. *Elmsley* (1893) 23 S.C.R. 623.

88. *See* S.M. Waddams, *supra* n. 39 at 68.

89. *Id.* at 508-509.

wrongful act, and ought to be compensated. It was long recognized as a principle at law that where a person had breached an agreement to do something other than merely to pay money and thereby became liable to pay damages then, in estimating those damages and as part of them, interest may be calculated on money that would have become payable by him with interest if he had not broken his agreement and thereby prevented the principal from falling due.[90] The Court of Chancery followed the common law in dealing with legal claims but usually decreed interest in cases of purely equitable demands such as suits against trustees who misapplied trust monies or suits for equitable waste.

As for the actual allowance of interest as damages for breach of contract in Alberta, however, courts seem to rely on their jurisdiction under s. 15 of the Judicature Act (limited to just debts or other liquidated demands) and have not attempted to develop any broader jurisdiction where interest might otherwise be "payable by law" or "allowed by law".[91]

The general principles on which damages for breach of contract are awarded,[92] are also applicable to interest claims. If it could be established that an interest cost were such as to arise naturally from the breach of contract itself or such as may reasonably be supposed to have been in the contemplation of the parties to the contract at the time it was made, as a probable consequence of its breach, it ought to be recoverable as part of the damages awarded in respect of the breach.[93] One would have thought, if courts were to pursue the grail of placing a party who sustains a loss by virtue of a breach of contract, so far as money can do it, in the same situation as he would have been in if the contract had been performed; however, not in a better financial position or in a position he would

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90. *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, *supra* n. 8 *per* Lindley L.J.; *Hurst* v. *Downard* (1922) 64 D.L.R. 279 (Ont. S.C. App. Div.).

91. *See*, however, *Prime Potash Corp.* v. *Bison Petroleum & Minerals Ltd.* (1969) 1 D.L.R. (3d) 362 (Sask. Q.B.) where Johnson J. allowed interest as compensation for the loss of use of a valuable asset (land) that might have been sold, developed or used and as compensation for interest charges the plaintiff incurred in respect of money borrowed in place of funds that could have been raised by the plaintiff through an underwriting that had been frustrated by the defendant's actions. *See also British Columbia Saw Mill Co.* v. *Nettleship*, *supra* n. 72; *Wood* v. *Guarantee Co.*, *supra* n. 45; *Scott Maritimes Pulp Ltd.* v. *B.F. Goodrich Can. Ltd.* (1977) 72 D.L.R. (3d) 680 (N.S.S.C. App. Div.); *Fairs* v. *Aulik* (unreported, Calgary Q.B. No. 611083) *per* Quigley J.: interest paid on loan plaintiff incurred to rectify deficiencies in defendant's work under contract to build a house was recoverable. Indeed, in order for contract damages to be fairly assessed, interest must always be borne in mind. Where damages are awarded for loss of future profits a discount must be fixed for present payment. If it were not so, an award of interest on these damages may well result in double compensation. *See* Waddams, *supra* n. 39, at pp. 18-19.

92. *Hadley* v. *Baxendale* (1854) 9 Ex. 341, 156 E.R. 148; *Wertheim* v. *Chicoutimi Pulp Co.* [1911] A.C. 301; *Victoria Laundry (Windsor) Ltd.* v. *Newman Ind. Ltd.* [1949] 1 All E.R. 997 at 1002-1003 (C.A.); *Koufos* v. *C. Czarnikow, Ltd.* [1967] 3 All E.R. 686 (H.L.).

93. *See Head* v. *NuWest Dev. Corp* (1978) 5 Alta. L.R. (2d) 309 (Alta. S.C.T.D.); *See also Crown Trust Co.* v. *Higher* (1977) 69 D.L.R. (3d) 404 (S.C.C.) an appeal from Quebec; *Collins* v. *Weninger* [1983] 6 W.W.R. 742 (Sask. Q.B.) where interest on insurance monies that would have been recoverable if the defendant solicitor had submitted proof of claim forms as required were a recoverable item of damage as a result of the solicitor's negligent failure to do so. *And see Wadsworth* v. *Lydall* (1981) 2 All E.R. 401 (C.A.); cf. *Compania Financiera Soleada* v. *Hamoor Tanker Corp.* [1981] 1 All E.R. 856 (C.A.).

have been in if the contact had not been made,[94] that interest would be awarded much more frequently as part of the damages recovered for breach of contract. Yet courts seem constantly to refute such claims on the grounds that they could not have been in the contemplation of the parties, even in commercial cases where the costs of money are an all-too familiar aspect of carrying on business.[95] In *Bausch & Lomb Optical* v. *Maislin Transport*,[96] it was held, in respect of a claim by an owner of goods, against a common carrier for damage to the goods that interest on funds borrowed to replace the goods was not recoverable on ordinary damage principles, not being reasonably foreseeable by the defendants at the time they entered into the contract of carriage with the plaintiff.[97] Similarly, in *Thomas Fuller Const. Co.* v. *Continental Insce. Co.* [98] it was held, by Houlden J.[99] that in that case (a claim against a surety on a performance bond) the interest incurred by the plaintiff in borrowing financing for the completion of the project was not reasonably forseeable by the defendant as the plaintiff was a large, well-established company and "it might well have been in the position to finance the contract from its own resources".

Recent decisions suggest a moderation in this approach, at least where the plaintiff frames his interest claim as one of special damages.

In *Wadsworth* v. *Lydall* [100] the English Court of Appeal held that the evidence clearly showed that the defendant purchaser of the plaintiff's partnership interest knew that the plaintiff required the sum to be paid on closing to finance the purchase of a new firm and that the defendant knew or ought to have known that if the sum was not paid on time the plaintiff would have to borrow and incur interest charges.[101]

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94. *See Bowlay Logging Ltd.* v. *Domtar* [1978] 4 WWR 105 (B.C.S.C.) and *C & P Haulage* v. *Middleton* [1983] 3 All E.R. 94 (C.A.) which must be distinguished from instances of application of another general principle that can be called in aid of claims for interest losses — the principle that wasted expenditure can be recovered when it is wasted by reason of the defendants breach of contract. *See Anglia Television Ltd.* v. *Reed* [1971] 3 All E.R. 690.

95. *See* Donald J. M. Brown "Developments in the Law of Damages for Breach of Contract" (1975) *L.S.U.C. Spec. Lect.* 1; *McDonald* v. *Can. Utilities Ltd.* (1977) 6 A.R. 1 (Alta. Q.B.); *but see Leslie R. Fairn* v. *Colchester Dev. Ltd.* (1975) 11 N.S.R. (2d) 389 (N.S.S.C. App. Div.) *folld* in *Atlantic Salvage Ltd.* v. *City of Halifax* (1978) 94 D.L.R. (3d) 513 (N.S.S.C. App. Div.); *Herrington* v. *Kenco Mgte. & Invt.* (1981) 125 D.L.R. (3d) 377 (B.C.S.C.); *Henry Hope* v. *Richard Sheehy* (1922) 52 O.L.R. 237 (Ont. S.C.). As of interest being a cost in the operation of a property, *see Utah International Inc.* v. *Milbourne* (1977) 1 B.L.R. 223 (B.C.C.A.).

96. (1975) 10 O.R. (2d) 533 (H.C.J.).

97. *See Maughan* v. *Silver's Garage Ltd.* (1979) 6 B.L.R. 303 (N.S.T.D.) *affd.* on other grounds (1980) 112 D.L.R. (3d) 243 (N.S.C.A.). *And compare Hampstead Carpets Ltd.* v. *Ivanovski* (1981) Sask. R. 173 (Sask. Q.B.); *Parta Industries Limited* v. *Canadian Pacific Ltd.* (1975) 48 D.L.R. (3d) 463 (B.C.S.C.); *Gill* v. *Kittler* (1983) 44 A.R. 321 (Alta. Q.B.) *per* Kryczka J. at pp. 358-362.

98. (1970) 36 D.L.R. (3d) 336 (Ont. H. C.).

99. *Id.* at 373.

100. *Wadsworth* v. *Lydall* [1981] 1 W.L.R. 598 (C.A.); *see also* S.M. Waddams, *supra* n. 39 at 474.

101. *See* the previous decision of the Court of Appeal in *H. Parsons Livestock Ltd.* v. *Uttley Ingham & Co.* (1978) 1 All E.R. 525 as to a suggested basis for distinguishing between whether loss is "loss of profit" or "physical damage". *See Compagna Financiera Soleada SA* v. *Hamoor Tanker Corporation Inc., The Borag* (1981) 1 All E.R. 856 (C.A.). *See* generally C. Bennett "Recent Cases on Claims for Interest" (1981) New L.J. 1065.

B. TORT

1. Personal Injury and Death

By virtue of legislative enactments noted previously, English courts are required to award interest in personal injury or death cases, unless the court is satisfied that there were special reasons why interest would not be awarded. In *Birkett* v. *Hayes* [102] Lord Denning M.R. reviewed the English developments in the area.[103] In *Jefford* v. *Gee* [104] the Court of Appeal indicated that interest on damages for pain and suffering and loss of amenities should be awarded from the time of service of the writ commencing the action to the date of trial. On special damages, interest should be awarded on the total sum of special damages from the date of injury to trial, at half the rate to be awarded on general damages, and with allowance for any recoupment. On damages for loss of future earnings, no interest should be awarded prior to judgment because the plaintiff had not been kept out of the money but instead, had received it in advance. In *Cookson* v. *Knowles*,[105] the Court noted that, in view of the inflation being experienced, plaintiffs stood to gain by delays in reaching trial and held that no interest should be awarded on the lump sum awarded at the trial for pain and suffering and loss of amenities — i.e. — non-pecuniary damages. This was overruled by the House of Lords in *Pickett* v. *British Rail Engineering Ltd.* [106] where it was held that interest on general damages was awarded for the purpose of compensating a plaintiff for being kept out of a capital sum between the date of service of the writ and trial. As Lord Wilberforce notes:[107]

> Increase for inflation is designed to preserve the real value of money, interest to compensate for being kept out of that 'real' value. The one has no relation to the other. If the damages claimed remained, nominally, the same, because there was no inflation, interest would normally be given. The same should follow if the damages remain in real terms the same.

The lower courts were left some room to select the appropriate rate of interest to be awarded under *Pickett*, however, the Lords said nothing about the rate at which interest should be allowed, this having been the subject of an agreement between counsel. In *Birkett* v. *Hayes*,[108] Lord Denning expressed the view that if interest was to be awarded on such items from the date of service of the writ, as *Pickett* compelled him to do, the rate should be very low indeed and he suggested two per cent. This is in recognition of the fact that high rates of interest have a large infla-

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102. [1982] 2 All E.R. 710 (C.A.).
103. *See Wright* v. *British Railways Board* [1983] 2 All E.R. 698 (H.L.) *per* Diplock J. at 701.
104. [1970] 1 All E.R. 1202.
105. [1977] 2 All E.R. 820 (C.A.); *affd.* [1978] 2 All E.R. 604 (H.L.).
106. [1979] 1 All E.R. 774.
107. *Id.* at 782. *See* "Comment", (1979) 95 *L.Q. Rev.* 187; S.M. Waddams; *supra* n. 39 at 496-499. The latter author observes that, notwithstanding the views of Lord Wilberforce that if the scale of damages were fully adjusted to take account of inflation, the plaintiff would be over-compensated if he received the full commercial interest rate from the date of his loss since current high rates of interest are composed in part of an allowance for inflation. *And see* S.A. Rea Jr. "Inflation, Taxation and Damages Assessment" (1980) 58 CBR 280.
108. *Supra* n. 102.

tionary element. There will also be discretion, under *Pickett*, as to the period for which interest will be allowed.[109]

In B.C. and Ontario, interest may be awarded on damages for personal injury or death under their respective statutes dealing with prejudgment interest.[110] In Alberta, the general rule is that prejudgment interest may not be awarded in respect of tort claims for unliquidated damages that can only be ascertained after the amount has been determined by the court.[111]

There is, however, a role for interest in such cases under Alberta law. In *Hohol* v. *Pickering*,[112] Mr. Justice Agrios awarded interest at the rate of thirteen per cent per annum on awards for future care and loss of future earnings from the date of judgment at trial to the date of payment, as part of the sum awarded. Mr. Justice Belzil made a similar award of interest at the rate of 10% compounded annually from the date of judgment to the date of payment on awards for loss of pre-trial and future earnings and for cost of future medication, in *Henrikson* v. *Parke*.[113] The rationale for these interest awards has been canvassed in a recent series of cases, including the Supreme Court of Canada decision in *Lewis* v. *Todd* [114]

The basis for such awards of interest is independent of the award of interest to compensate the plaintiff for being kept out of his award, instead it is part of the award itself. The purpose is to maintain the efficacy of the capital sum awarded at trial, based on actuarial computations of the sum required to provide the plaintiff with a future stream of income.[115] If payment of the award is delayed the calculations on which it is based

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109. *Supra* n. 102 at 717 *per* Watkins L.J. The guideline proferred by Denning J. was sanctioned in *Wright* v. *British Railways Board*, *supra* n. 103. *See esp.* Diplock J. at 706-706. The Court of Appeal, in *Jefford* v. *Gee*, *supra* n. 104, laid down the principle that interest should be awarded on the total sum of special damages at half the rate of the interest awarded on the general damages from the date of the accident until the date of the trial, and this principle continues to be applied in England: *See Dexter* v. *Courtaulds Ltd.* (1984) 1 All E.R. 70 (C.A.).

110. The Court Order Interest Act, *supra* n. 34; The Judicature Act, R.S.O. 1970, c. 228, s. 38 as am. 1977, c. 51.

111. *McDonald* v. *Canadian Utilities*, *supra* n. 95; *Bagby* v. *Gustavson Int. Drilling Co.* (1980) 24 A.R. 181 at 197 (C.A.); Waddams, *supra* n. 39 at 495, suggests, however, that the wording of the Judicature Act provisions in Alberta should not be construed to freeze development at the date of enactment of the statute and the injustice to the plaintiff and unjust enrichment of the defendant, in a period of high inflation, of the defendant's wrongfully retaining money owed to the plaintiff militate just as strongly in favour of compensating, by interest awards, the pre-trial losses of a plaintiff who has suffered personal injuries.

112. (1982) 35 A.R. 181 (Q.B.).

113. (1981) 29 A.R. 431 at 449.

114. (1981) 115 D.L.R. (3d) 257. *See also Fenn* v. *City of Peterborough* (1979) 104 D.L.R. (3d) 174 (Ont. C.A.); *Julian* v. *Northern & Central Gas Corp. Ltd.* (1981) 31 O.R. (2d) 388 (C.A.); *Yepremian* v. *Scarborough Gen. Hospital* (1980) 110 D.L.R. (3d) 513 (Ont. C.A.); J.G. Fleming, "Impact of inflation on tort compensation" (1978) 26 *Am. J. Comp. L.* 51; J.W. Pharris, "Pain and suffering damages: a move toward more precision and accuracy" (1977) 56 *Neb. L. Rev.* 910.

115. *See* J.G. Filmer Jr., "Appropriate discount rate to use in estimating financial loss" (1982) 32 *Fed. Ins. Coun. Q.* 263.

become inaccurate and this accuracy may be partially restored by such awards of interest. As Dickson J. noted in *Lewis* v. *Todd*:[116]

> The delay . . . from the date of judgment at trial to the present date has meant that interest which should have accumulated upon, and formed an essential element in the computation of, the award has not been received by plaintiff. The defendant has enjoyed the use of the moneys in the intervening period and earnings thereon.

The award is in the form of a specified rate of interest on the award from the date of judgment at trial to the date of payment. The amount of the adjustment required to preserve the award will be largely a question of fact that must be determined on the evidence in each case.[117] It is an adjustment that a court of appeal has the jurisdiction to make, within the principle in *Nance* v. *B.C. Electric Ry.* [118] The relationship between such an interest "adjustment" and the interest awarded under ss. 12-14 of the Interest Act poses some interesting problems. It was not discussed by Dickson J. in *Lewis* v. *Todd*,[119] but Lambert J.A. in the *Lutz* [120] case, considered the problem in some detail. In cases where it was considered desirable not to allow both the interest adjustment on the award and interest on the judgment debt under the Interest Act, the result could be achieved in B.C. (which, unlike Ontario — see the Judicature Act,[121] does not have a legislative provision permitting the court to deny true interest on a judgment) in at least two ways:

1) by accepting the legal rate of five per cent and settling on a combined rate for both true interest and the adjustment that will produce the desired result.

2) by varying the actual amount of true interest paid under the Interest Act through adjustment of the period for which it runs, under s. 14 of that Act.

In the case before him, however, Lambert J.A. found it unnecessary to make any adjustments of this nature.[122]

For other torts, there does not appear to be any basis for prejudgment interest in Alberta as these, like unliquidated damage claims in contract, do not fall under the aegis of the Judicature Act and there was no authority at common law for awarding interest in such cases.[123]

The general principle was applied by the Manitoba Court of Appeal in *Kernested* v. *Desorcy*,[124] where it was held that interest could not be

116. *Supra* n. 114 at 273.

117. *Lutz* v. *Laroque* [1981] 5 W.W.R. 1 at 14 (B.C.C.A.) *per* Lambert J.A.. As Waddams notes, there seems no reason in principle "why all money judgments should not now be cast in this form whenever allowable prejudgment interest exceeds 5%, for all creditors can make the argument that they are entitled to adequate compensation at the date of its actual payment." *supra* n. 39 at pp. 517-518.

118. [1951] A.C. 601.

119. *Supra* n. 114.

120. *Supra* n. 117.

121. *Supra* n. 110, s. 37.

122. *See* A.S. Dexter, "Inflation, interest rates and indemnity: the economic realities of compensation awards" (1979) 13 *U.B.C. L. Rev.* 298.

123. *See McDonald* v. *Canadian Utilities*, *supra* n. 95. *But see Carpenter* v. *Cargill Grain Co. Ltd.* (1982) 36 A.R. 598 (Alta. Q.B.); *Gano* v. *Martin*, unreported, 21 May 1980, J.D. of Edmonton, (Alta. Q.B.); *Hauch* v. *Combest*, unreported, 12 January 1979, (Alta. Q.B.).

124. [1979] 1 W.W.R. 512.

awarded before judgment in respect of personal injury claims under the Manitoba Queen's Bench Act.

2. Trover and Trespass

Interest could be awarded on claims for trover and trespass *de bonis asportatis* under s. 29 of Lord Tenterden's Act. At least one author suggests that this implies that interest could not be awarded at common law for the misappropriation of chattels, and there do not appear to be any cases of such a recovery at law.[125] The provisions of s. 29 of Lord Tenterden's Act may well have survived the introduction of the predecessor to s. 15 of the Judicature Act in Alberta,[126] in that it is not inconsistent with nor expressly repealed by the provisions of the Judicature Act, although it was repealed in England by the Law Reform (Miscellaneous Provisions) Act.[127] In cases of claims for wrongful occupation or wrongful use of land the damages for the reasonable rental value of the occupation or user make an interest claim redundant.[128]

3. Conversion

An award for the loss of use of goods from the time of conversion is probably equivalent to, and replaces, an interest claim in such cases.[129] The alternative is damages in the amount of the value of the goods at the date of the original conversion plus interest.[130] No authority is apparent at common law for interest on damages for damage to land or goods.[131]

C. ADMIRALTY

Under the principles administered by the Court of Admiralty in England, which are the same as those applied in an admiralty case in the Federal Court of Canada,[132] interest is always paid to the plaintiff when payment in respect of damages to his property, whether resulting from contract or tort, is delayed by the defendant.[133] The principle is based upon the right of the plaintiff to be fully compensated, not by way of indemnification for the loss at the time but because the loss was not paid at the time.[134]

D. RESTITUTIONARY CLAIMS

Traditionally, a plaintiff in an action for money had and received was not entitled to interest even from the time of making a demand for the

125. *McGregor on Damages*, *supra* n. 4 at 459.

126. *See Raymond Land & Inv. Co.* v. *Knight Sugar Co. Ltd.* (1909) 2 Alta. L.R. 157 at 167 (Alta. S.C.).

127. Law Reform (Miscellaneous Provisions) Act, 1934 (U.K.), 24 & 25 Geo. 5, c. 41.

128. *McGregor on Damages*, *supra* n. 4 at 463.

129. *Id.* at 459. *See also* S.M. Waddams, *supra* n. 39 at 510.

130. 2 Halsbury's (4th) 1583; 12 Halsbury's (4th) 1160-1161.

131. *McGregor on Damages*, *supra* n. 4 at 462-463.

132. *See Canadian General Electric Co.* v. *Pickford & Black* (1971) 20 D.L.R. (3d) 432 at 435 (S.C.C.).

133. *McGregor on Damages*, *supra* n. 4 at 460-462.

134. *Supra* n. 132 at 435-436; *The "Pacifico"* v. *Winslow Marine Ry. & Shipbuilding Co.* [1925] 2 D.L.R. 162 at 167; *Bell Can.* v. *The "Mar-Tirenno"* (1974) 52 D.L.R. (3d) 702 (F.C.T.D.) *affd.* 71 D.L.R. (3d) 608 (F.C.App. Div.). *See also* S.M. Waddams *supra* n. 39 at 474-475.

principal unless he could either demonstrate an express promise to pay interest or something from which such a promise could be inferred or prove that the defendant had made interest from the money. Arguments that the plaintiff should be entitled to interest as a measure of the damages he had suffered by reason of the money being withheld from him were not successful.[135] Since this form of action was used in many cases of what are now acknowledged to be restitutionary claims its legacy has been a severe restriction on the recognition of interest as an element of restitutionary relief.

In *Miller* v. *Barlow*[136] the Privy Council held that where, by the wrongful act of the defendant the plaintiff had been deprived of money that was actually making interest, a court of equity would clearly be entitled to award interest and that it was by no means clear that even in a court of law, although the ordinary rule was that in actions for money had and received interest was not allowed, the fact of the defendant having received interest would not be sufficient ground for making the defendant liable to pay interest. In *Pacific Coast Coal Mines Ltd.* v. *Arbuthnot,*[137] moneys that had been paid on account of a trust deed and certain debentures issued in exchange for shares in a company under a complicated settlement agreement between two warring factions of shareholders in the company had been ordered to be repaid to the company by a previous Privy Council decision that found the agreement and all proceedings under it to be *ultra vires.* The Privy Council denied a claim for interest on the moneys ordered to be repaid, noting that while there was no doubt courts had power to direct that moneys received from a company under a claim that was *ultra vires* should be repaid with interest, there was no fixed rule that such should be the case and that the conduct of the directors of the company in delaying steps to impeach the validity of the debentures and continuing to act under what they must have known to be an invalid resolution militated against requiring the defendants to do more than repay the money 'actually received' as they would have been ordered to do in a common-law action.[138]

In cases of recovery of money paid by mistake of fact courts have denied interest[139] on the basis of a principle denying such recovery in cases of overpayments of legatees.[140] A similar approach was taken in the equitable action.[141] The American approach is to allow interest, at the discretion of the court, at least from the time that the defendant had notice of or could have discovered the extent of his obligation.[142] Interest

135. *De Havilland* v. *Bowerbank* (1807) 1 Camp. 50, 170 E.R. 872 at 873. *See* also *Walker* v. *Constable* (1769) 1 B & P 307; 95 E.R. 913 *Tappenden* v. *Randall* (1801) 2 Bos. & P 467.

136. (1871) L.R. 3 P.C. 733 at 750 (P.C.).

137. (1921) 1 W.W.R. 529.

138. *See also McKinnon* v. *Campbell River Lumber Co.* (1922) 2 W.W.R. 556 (B.C.C.A.); *revd.* on other grounds (1923) 64 S.C.R. 396.

139. *Barber* v. *Clark* (1891) 20 O.R. 522.

140. *See* the criticism of this analogy in G.H.L. Fridman and J.G. McLeod, *Restitution* (1982) 130 n. 339.

141. *Re Diplock* [1940] Ch. 465 at 505-507; *affd. Min. of Health* v. *Simpson* [1950] 2 All E.R. 1137 (H.L.); *cf.* Goff & Jones, *The Law of Restitution* (2nd ed. 1978) 451.

142. *Supra* n. 140 at 130.

may be awarded in cases where an equitable jurisdiction to award interest exists, notwithstanding that the action is one for money had and received.[143]

E. EQUITABLE AWARDS

1. Fiduciary Obligations

A trustee who fails in his duty to properly invest trust funds may be liable for the interest rate that could have been earned had the funds been properly invested although the court will inquire as to the nature of the breach of trust before awarding any interest.[144] There is no fixed rate of interest chargeable under all circumstances against a trustee in respect of trust funds in his hands and not properly employed. Under varying circumstances the trustee is chargeable with varying rates of interest with or without annual or semi-annual rests, not by way of punishment to the trustee but by way of compensation to the *cestui que trust* to the extent of the estimated earnings of the trust monies if properly invested.[145] The same principle is applicable to other cases of breach of fiduciary obligations.[146] It is equally well settled that a *cestui que trust* cannot make a trustee liable for losses occasioned by a breach of trust that the beneficiary had authorized and consented to.[147] In cases where a solicitor has breached his fiduciary duty towards his client by taking a benefit as a result of a transaction with the client without adequate disclosure to the client, the client is entitled to recover the full amount of damages sustained which may well include interest.[148]

In *Wallersteiner* v. *Moir (No. 2)* [149] Lord Denning M.R. stated the English Court's powers to award interest under their equitable jurisdiction, apart completely from the statutory base afforded by s. 3(1) of the Law Reform Miscellaneous Provisions Act — noting:

> Equity now prevails in all courts; and equity was in the habit of awarding interest when it was considered equitable to do so. In some cases it awarded simple interest; in others compound interest, i.e. with yearly rests.

Lord Denning observed that, in equity, interest was never awarded by way of punishment, but by way of compensation to the *cestui que trust* for the profit that the trustee who has misapplied trust money for his own benefit is presumed to have made. In addition, interest was awarded in equity whenever a wrongdoer deprived a company of money that it required for use in its business, in which case the company was to be compensated for the loss thereby occasioned to it — simple replacement of the money being inadequate in days of inflation. In such cases, Lord Denning found, it should be presumed that "the company (had it not

143. *See Harsant* v. *Blaine, Macdonald and Co.* (1887) 56 L.J. 511 (C.A.).

144. Trustee Act, R.S.A. 1980, C. T-10, ss. 23, 41.

145. *Toronto General Trusts Co.* v. *Hogg* [1934] S.C.R. 1; *affg.* [1932] O.R. 641 (Ont. C.A.); In *Re McNeill Estate* (1911) 19 W.L.R. 691 (B.C.S.C.).

146. *Burland* v. *Earle* [1905] A.C. 590 at 593 (P.C.).

147. *Chillingworth* v. *Chambers* [1896] 1 Ch. 685.

148. *See London Loan & Savings Co.* v. *Brickenden* [1933] S.C.R. 257; *Osadchuk* v. *National Trust Co.* [1943] S.C.R. 89; *varying* [1942] 1 W.W.R. 163 (Sask. C.A.); *revg.* [1941] 2 W.W.R. 219 (Sask. K.B.); *Bailey* v. *Ornheim* (No. 2) (1962-63) 40 W.W.R. 703 (B.C.S.C.).

149. [1975] 1 All E.R. 848 at 855 (C.A.).

been deprived of the money) would have made the most beneficial use open to it. . .", alternatively "it should be presumed that the wrongdoer made the most beneficial use of it". In either case, in order to give adequate compensation, Lord Denning found that the money should be replaced at interest with yearly rests — compound interest. Buckley L.J. came to the same conclusion, citing authorities that suggested that the justification for charging compound interest where it was established that the defaulting trustee had used the money in a trade normally lay in the fact that profits earned in trade would likely be used as working capital for earning further profits. Although there was no specific evidence of what profit the defendant had actually secured in the case before him, Buckley L.J. found that the transaction complained of was clearly one of a commercial character and, in the absence of evidence to the contrary, the court should assume that it was profitable to him.[150]

The same approach was taken to the equitable jurisdiction in *Brock* v. *Cole*,[151] where the plaintiff had recovered from the defendant solicitors an advance of money made by him to the defendants in trust to be invested for him on certain specified terms. The Ontario Court of Appeal found that s. 36 of the Ontario Judicature Act was not intended to do away with the authority of a court, applying well recognized principles of equity, to award interest, including compound interest, in all cases where it was just and equitable to do so.[152] Although the court in *Brock* found that the evidence before it was not clear as to what use was in fact made of the money advanced to the defendants during the period between the making of the advance and the time when the judgment was paid it found that it could make certain presumptions, namely:

1) Since the plaintiff was seeking secure investment that would yield a good return he would have sought to reinvest the money advanced, along with any interest earned, on similarly favourable terms had he not been deprived of its use by the actions of the defendants. Accordingly, the fact that the mortgage held out to the plaintiff was to be for a limited term of 3 months was not a consideration that ought to limit or restrict his claim to compound interest.
2) It was a reasonable assumption that the money advanced by the plaintiff, whether or not ever in fact placed in the mortgage delivered to the plaintiff, would have been employed by the defen-

150. *Id.* at 863-864. *See also* Scarman J. at 870-871. *Harrison* v. *Mathieson* (1916) 36 O.L.R. 347 (Ont. S.C. App. Div.) at 357.

151. (1983) 142 D.L.R. (3d) 461 (Ont. C.A.).

152. *Id.* at 446. S. 36(5)(f) of the Ontario Judicature Act provided that:
Interest under this section shall not be awarded, . . . (f) where interest is payable by a right other than under this section.
The Court found that this constituted a statutory recognition that there continued to be rights to interest on judgment claims that are found outside the general provisions of s. 36. Moreover, the Court found that once it was established that the conditions that must be met in order to warrant the exercise of the Court's equitable jurisdiction to award compound interest existed it would properly be said that the plaintiff had a "right" to interest of the kind described in s 36(5)(f) and that to hold that there can be no such "right" merely because there was a discretion in the Court to withhold the exercise of such jurisdiction would place too narrow a meaning on the word "right" in the statutory provision, if on the facts before the Court no reason or ground had been advanced upon which the Court, acting judicially, could properly refuse such an order.

dants in a way that could be expected to earn them compound interest, as was the usual case with dealings involving mortgages of varying terms.[153]

If a trustee makes an unauthorized investment that results in the total or partial loss of the trust estate or if he pays over the estate to the wrong persons he must replace the money with interest. A trustee who is guilty of undue delay in investing the trust money will be answerable to the *cestui que trust* for interest during the period of delay. In England the usual rate is historically four per cent unless:

1) the trustee had actually received more than four per cent in which cases he is accountable for the amount actually received;
2) the trustee ought to have recieved more but for his improper action, in which case he is accountable for the interest he ought to have received;
3) the trustee is presumed to have received more, (as in cases where he has traded with the trust monies) in which cases the *cestui que trust* has the option to claim either five per cent interest (usually compound) or the profits actually made; or
4) the trustee is guilty of fraud or serious misconduct in which cases he may be charged with five per cent compound interest with yearly, or even rarely, half-yearly, rates.

It has been suggested that, in view of the recent experience of huge and constantly changing interest rates, it is unrealistic to abide by these modest rates and courts have begun to award interest, whether simple or compound, at commercial rates. In any event, the rate would probably be at least five per cent in Canada, due to s. 3 of the Interest Act.[154]

It is a settled rule of equity to give interest at the rate of four per cent (five per cent here) on all equitable charges, unless otherwise agreed. This is so even if the charge is altogether silent as to any interest being payable.[155] A similar principle is applicable to mortgages, finding its most frequent application in the case of equitable mortgages by deposit of title deeds.[156]

In *Phillips* v. *Homfray* [157] the decision of Kay L.J. referred to the rule that ". . . where a person is made liable in equity on the ground that he has received benefit from a wrong committed by him interest has always been allowed on the amount for which he has been found liable". The rule has also been applied so as to make the estate of a deceased person

153. *See also* the review of authorities in *Wotherspoon* v. *Canadian Pacific Ltd.* (1979) 22 O.R. (2d) 385; 92 D.L.R. (3d) 545 (Ont. H. C.) at pp. 580-83 O.R., pp. 739-42 D.L.R. *varied* (1981) 35 O.R. (2d) 449, 129 D.L.R. (3d) 1 (Ont. C.A.).

154. *See* P.V. Baker and P. St. J. Langan, *Snell's Principles of Equity* (28th ed. 1982) 276-277; *In Re Cox Estate* [1941] 3 W.W.R. 328; *National Trust Co.* v. *Crafts* [1939] 2 W.W.R. 487; *MacDonald* v. *Hauer* [1977] 1 W.W.R. 51 at 73-74 (Sask. C.A.).

155. *Saville* v. *Drax* [1903] 1 Ch. 781; *Snell's Principles of Equity, supra* n. 154 at 428.

156. W.B. Rayner and R.H. McLaren, *Falconbridge on Mortgages* (4th ed. 1977) 659. For a recent Alberta decision in which interest was awarded on an equitable mortgage where there had been no agreement as to interest *see Stuart* v. *Laschuk*; *Laschuk* v. *Stuart*, unreported, 7 Oct. 1982, J.D. of Calgary, 8101-13605, 8101-15736 (Alta. Q.B.).

157. [1892] 1 Ch. D. 465 at 474 (C.A.).

liable, not only for the amount the estate had received through the deceased's wrongful acts but also for interest on that amount at four per cent per annum.[158]

2. Possession of Subject Matter of Contract Before Payment of Purchase Price.

The Court of Chancery developed a rule that, in cases where the courts would grant specific performance of a contract, if the purchaser obtained possession of the subject-matter of the contract before he had paid the purchase price he must, in the absence of an express agreement to the contrary, pay interest on the purchase price from the date he took possession until the date of payment. It has been suggested that the law operated by implying a contract to pay interest in the circumstances;[159] although, as one author notes, if this were the case, the rule should be equally applicable at common law.[160] The basis for the rule was that it would be inequitable for the purchaser to have possession of both the subject-matter of the contract and the purchase money.[161] The rule is wider than merely contracts for the purchase of land.[162] The House of Lords has stated, however, that there is no authority in English law for applying it to a requisition of goods by the state and that in such cases the provisions of Lord Tenterden's Act applied so that until the amount of the compensation had been determined by arbitration under the particular statutory scheme being considered there was no sum certain payable to the owner upon which interest could run.[163] The purchaser may be relieved of the obligation where the vendor was "in wilful default" under the purchase contract and the purchaser had deposited the purchase money in a deposit separate from his general accounts so that he could demonstrate that he was losing the use of the purchase money.[164] He may also escape the rule where it can be shown that there was an enforceable independent collateral agreement that the purchaser would pay rent at an agreed rate for the right to take possession prior to closing.[165] Where a contract has been executed, apart from cases where rescission on the grounds of fraud is sought, there remains nothing to attract the equitable jurisdiction and the parties are left to their remedies at law. Unless the agreement or some statute gives the right to interest none will be allowed.[166]

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158. *Id.* at 743. *See also Duke of Leeds* v. *Lord Amherst* (1846) 14 Sim 357, 367, 60 E.R. 396; *Rumford* v. *Hinton* (1923) 52 O.L.R. 47, [1923] 2 D.L.R. 471 (C.C.A.).

159. *Fludyer* v. *Cocker* (1805) 12 Ves. 25; *Swift & Co.* v. *Board of Trade* [1925] A.C. 520 at 532 (H.L.). *See also Laczko* v. *Patterson* (1971) 22 D.L.R. (3d) 288 (Ont. C.A.); *see also The Law of Vendor and Purchaser*, *supra* n. 73 at 383.

160. F. Gahan, *The Law of Damages* (1936) 164.

161. *See International Ry. Co.* v. *Niagara Parks Comm.* [1941] A.C. 328 (P.C.), [1941] 2 W.W.R. 338 at 347-48; *Calvert* v. *Willis & Willis* [1955] 5 D.L.R. 264 (S.C.C.).

162. *International Ry. Co.* v. *Niagara Parks Comm.*, *supra* n. 161 at 347.

163. *Swift & Co.* v. *Board of Trade*, *supra* n. 159 at 532.

164. *Stevenson* v. *Davis* (1891) 23 S.C.R. 629 at 631-632 *per* Sir Henry Strong C.J..

165. *Westridge Development Ltd.* v. *Can-Am Dev. Corp. Ltd.* (1978) 14 A.R. 318 at 332 (Alta. S.C.T.D.). For additional cases, *see Di Castri*, *supra* n. 73 at 384.

166. *Maine & N.B. Electric Power Co.* v. *Hart* [1929] A.C. 631.

In a recent Supreme Court of Canada decision, *Fred Morton Holdings Ltd.* v. *Davis*,[167] Laskin C.J.C. refused to apply the equitable rule in a case where the purchaser under a contract that depended for its closing upon rezoning of the lands had not taken possession of the property but had granted an option to purchase the property before payment of the purchase price. The Chief Justice stated that he could not see how constructive possession of the "fruits of possession" (the phrase used by Matas J.A. in the Manitoba Court of Appeal)[168] can arise from the granting of an option to purchase any more than it could arise from an assignment by the purchaser of the benefit of the contract. The Chief Justice stated that he was fortified in his conclusion by the fact that there could be no right to specific performance in the case before him until rezoning was obtained.

3. Expropriation of Land

The principle that the act of taking possession implies an agreement on the part of the purchaser to pay interest on the purchase money from the date of taking possession or from when he might safely have done so has been extended to cases involving expropriation of land. If there is no entering into possession interest will not be payable. If, however, some of an owner's land is taken under expropriation proceedings and his remaining land is injuriously affected, the total award is treated as equivalent to purchase money and interest is payable on the full amount of it.[169]

Section 66 of the Expropriation Act,[170] gives the Board broad powers to award interest at such rate as the Board considers just with respect to compensation for the land and severance damages on a partial taking from the date of acquisition of title until payment in full, as well as on damages for disturbance from the date of the award of the damages until payment in full. Where the owner is in possession when the expropriating authority acquires title, however, he is not entitled to interest until he has given up possession. Additional interest may be ordered where the expropriating authority has delayed notifying the owner of the proposed payment beyond the prescribed time or where the amount of the proposed payment is less than eighty per cent of the amount awarded for the interest taken and severance damages, unless the Board is of opinion that these circumstances are not the fault of the expropriating authority.[171]

167. [1979] 1 W.W.R. 549 (S.C.C.).

168. [1978] 1 W.W.R. 61.

169. *Toronto* v. *Toronto Ry. Corp.* [1925] A.C. 177 (P.C.); *Inglewood Pulp and Paper Ltd.* v. *N.B. Electric Power Commn.* [1928] A.C. 492 (P.C.); *International Ry. Co.* v. *Niagara Parks Commn.*, *supra* n. 161; *Hayden Warehouses and Storage Ltd.* v. *Toronto* [1955] O.R. 258; *Re St. Mary and Milk Rivers Development and Murray* (1959) 28 W.W.R. 59 (Alta. S.C. App. Div.) *per* McBride J.A.; *British Pacific Properties Ltd.* v. *B.C. Min. of Hwys.* (1959) 29 W.W.R. 193 (B.C.C.A.); *see also Re Billes and Parkin Architects Planners* (1983) 143 D.L.R. (3d) 55 (Ont. C.A.) where Arnup J.A., speaking for the Court, observed, at 65, in reference to the basis of the decision of Wells J. in *Hayden Warehouses and Storage Ltd.* v. *Toronto*: "If Wells J. relied on the equitable jurisdiction of the court, the kinds of cases to which he referred are all vendor-and-purchaser cases, or expropriation cases. They are not of general application."

170. R.S.A. 1980 C. E-16.

171. *Id.* at s. 66; *and see Amdue Holdings* v. *City of Calgary* (1980) 14 A.R. 361 (Alta. L.C. Bd.); *Abasand Holdings* v. *Alberta* (1980) 15 A.R. 300 (Alta. L.C. Bd.); *Western Estates Ltd.* v. *City of Calgary* (1980) 15 A.R. 387 (Alta. L.C. Bd.).

The Board has consistently ruled that ss. (3), (4) and (5) of s. 66 do not apply in the circumstances where land is acquired under an agreement between an expropriating authority and an owner pursuant to the provisions of Section 30 of the Expropriation Act,[172] unless the agreement itself preserves the owner's right to the provisions of the Expropriation Act respecting the payment of interest "including additional interest".[173] In *Mannix* v. *Province of Alberta*,[174] the Court rejected a submission that compound interest should be awarded at prime bank rates on the amount of the award since the Crown (in this case the expropriating authority) had acted in good faith at all times and made every effort to negotiate a settlement. The court found that simple interest in a per annum basis was just and reasonable having regard to all of the evidence.

4. Other Equitable Claims

Equity requires that interest be paid in a number of other circumstances such as, for example, where an agent has wrongfully retained the money of his principal;[175] where an executor or trustee retains money that he should have invested or paid out to a beneficiary;[176] or in cases where a party has obtained money by fraud.[177] The rule in the case of executors is that where no time for payment of a legacy is fixed by the will, such legacy, if it remains unpaid, bears interest at the rate of five per cent from the expiration of one year from the death of the testator.[178] The rule does not apply to contingent legacies while in suspense except where the contingency is the coming of age of the legatee for whose maintenance provision is made.[179] The general rule is that arrears of annuities do not carry interest,[180] although the inconsistency was noted in *In Re: Hiscoe*,[181] where it was held that, while a court had the discretion to allow interest on arrears of annuity in special circumstances, the established rule was beyond dispute.

III. JUDICATURE ACT

It has been held that the former Ontario provision equivalent to s. 15 of the Alberta Judicature Act was not a matter of procedure but dealt with substantive law.[182]

The language in section 15[183] of the Judicature Act confers authority on the courts to award interest in the circumstances set forth in the sec-

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172. *Kerr* v. *Min. of Transportation (No. 1)* (1981) 20 L.C.R. 67.
173. *Marlo Properties* v. *Edmonton* (1982) 40 A.R. 510 (Alta. L.C. Bd.).
174. (1983) 47 A.R. 81 (Alta. Q.B.).
175. *Harsant* v. *Blaine* (1887) 56 L.J.P.B. 511; *Barclay* v. *Harns* (1915) 85 L.J.K.B. 115.
176. *Bloggs* v. *Johnson* (1867) L.R. 2 Ch. 225; *Re Cox Estate, supra* n. 154; *National Trust Co. Ltd.* v. *Crafts, supra* n. 154.
177. *Johnson* v. *The King* [1904] A.C. 817 (P.C.); *Rumford* v. *Hinton, supra* n. 158.
178. *National Trust Co. Ltd.* v. *Crafts, supra* n. 154; *Re Cox Estate, supra* n. 154.
179. *Gahan on Damages, supra* n. 160.
180. *Bloggs* v. *Johnson, supra* n. 176.
181. (1902) 71 L.J. Ch. 347, *per* Kekewich J..
182. R.S.A. 1980, c. J-1; *see Consolidated Distillers* v. *The King* [1932] S.C.R. 419 at 424 *per* Duff J; *revd.* [1933] 2 W.W.R. 430.
183. Judicature Act, *supra* n. 182.

tion "in addition to the cases in which interest is payable by law or may be allowed by law" and operates as an expansion on the courts' jurisdiction. The provision is only operative where, "in the opinion of the court", "payment of a just debt" has been improperly withheld. The term "debt" has been held to mean "a sum payable in respect of a liquidated money demand, recoverable by action,"[184] or "an ascertained sum of money due from one person to another."[185] Ontario authority indicates that the same phrase, used in the Privy Council's statement of a courts' authority under the previous Ontario Judicature Act, "includes any claim, legal or equitable, on contract, express or implied, or under a statute on which a certain sum of money, not being unliquidated damages, is due and payable, though an inquiry be necessary to ascertain the exact amount due.[186] No interest is allowable under this provision on a damage award that is not ascertained until trial,[187] but such interest has been allowed on liquidated damages claims in contract.[188] The provision has been applied to award interest on a claim against a surety.[189] The test which must be met before an award of interest may be made under s. 15 is that the amount due must at least be ascertainable, though not necessarily precisely so, by reference to a contract or agreement between the parties, and not only as damages after the amount has been determined by the court.[190] The jurisdiction under the section extends only to cases in which "the sum is either exactly ascertained or may be determined merely by computation, the basis of which has been agreed". Where the amount withheld was payable under contract and not as damages, "it is no answer to contend that the sum was in dispute and not ascertained on the due date".[191]

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184. *Diewold* v. *Diewold* [1941] S.C.R. 35.

185. *Noble* v. *Lashbrook* [1918] 1 W.W.R. 918 (Sask. C.A.).

186. R.S.O. 1927, c. 88; *see Boldrick* v. *Salz* [1952] O.W.N. 487 (Ont. C.A.); *see also Sinclair* v. *Preston* (1961) 31 S.C.R. 408.

187. *McDonald* v. *Can. Utilities* (1978) 6 A.R. (2d) 1 (Alta. S.C.) *per* Cavanagh J.; *Custodian* v. *Blucher*, *supra* n. 32; *Poon Estate* v. *Dickson* (1982) 35 A.R. 609 (Alta. C.A.); *Bagby* v. *Gustavson Int. Drilling Co. Ltd.*, *supra* n. 111 at 196; *but see Greenshields Inc.* v. *Johnston* (1981) 35 A.R. 48 at 491 (Alta. C.A.) *per* Lieberman J.A., who suggests *Bagby* must be read in light of *Prince Albert Pulp* v. *Foundation Co.* [1976] 4 W.W.R. 586 (S.C.C.), where interest was allowed on an amount claimed under a contract that was reduced by setting off a counterclaim for damages; an amount that had been arrived at by something less than precise computation. *See also Pratt* v. *Beaman* [1930] S.C.R. 284 at 287; *R.* v. *MacKay* [1930] S.C.R. 130. *See* S.M. Waddams, *supra* n. 39 at 479-482.

188. *Banman* v. *Aberdeen* [1978] 2 W.W.R. 673 at 683 (Sask. Dist. Ct.) *per* Walker D.C.J.; *Lorring Realty* v. *Comprop Holdings Ltd.* (1982) 38 A.R. 230 (Alta. Q.B.); *Dominion Chain* v. *Eastern Const. Co.* (1974) 3 O.R. (2d) 481 at 519 (Ont. H.C.J.) *per* Lerner J.; *revd.* on other grounds (1976) 12 O.R. (2d) 201; appeal dismissed (1978) 84 D.L.R. (3d) 344 (S.C.C.), where it was stated that the payment of damages for negligence or breach of contract cannot be considered to be the payment of a just debt that has been improperly withheld.

189. *Standard Bank of Canada* v. *Alta. Engineering Co. Ltd.* [1917] 1 W.W.R. 1177 (Alta. S.C. App. Div.) *per* Stuart J. at 1182.

190. *Eyben* v. *K.R. Ranches (1970) Ltd.* (1982) 20 Alta. L.R. (2d) 270 at 275 (Alta. C.A.) *per* McGillivray C.J.A.; *London, Chatham & Dover Ry. Co.* v. *S.E. Ry. Co.*, *supra* n. 8 (C.A.) at 144. *See also* S.M. Waddams *supra* n. 39 at 482. *See Kernested* v. *Desorcy* (1979) 1 W.W.R. 512 (Man. C.A.); *Lamont* v. *Pederson* (1981) 2 W.W.R. 24 (Sask. C.A.).

191. *Granpac Ltd.* v. *American Home Assoc. Co.*, *supra* n. 32 at 78. *See Brumer* v. *Gunn* (1983) 1 W.W.R. 424 (Man. Q.B.) per Morse J. at 434-436.

It has been held that the phrase "improperly withheld" means "incorrectly, unsuitably or unbecomingly" although there is no requirement of moral turpitude before the withholding will be improper and the fact that the defendant acted fairly and honestly should not bar the plaintiff's right to interest if he is entitled to it otherwise.[192] There must be something improper about the failure to pay the debt beyond the mere fact that it is due and not paid.[193] Where a payment is delayed by an unreasonable or exaggerated counterclaim, or where a dispute is seen not to be genuine, the court will experience little difficulty in assessing interest.[194] Courts have held, however, that it is not proper to allow interest under such a provision where the amount is difficult to ascertain or where each party is acting in good faith in the presentation of its particular claim,[195] where there were issues involved that the defendant was entitled to have tried and considered by a court,[196] where the liability of the defendant arose because of a technicality only,[197] where the issue is novel,[198] where the issue involves a serious question of foreign law,[199] or where the determination of the justness of the debt occupied "the attention of the court and four able counsel for five days".[200] Nor should it be

192. *Ottawa* v. *Ottawa Electric Co.* [1936] 4 D.L.R. 539 (Ont. S.C.); *affd.* [1937] 2 D.L.R. 534 (Ont. C.A.).

193. *Eyben* v. *K.R. Ranches, supra* n. 190 at 276; *Jones* v. *Shaw* [1921] 1 W.W.R. 293 (Sask. C.A.). Although as Waddams notes: "the defendant, however genuine his defence, will have profited by receiving interest (or an equivalent benefit) from what has now been found to be the plaintiff's money" S.M. Waddams *supra* n. 39 at 482.

194. *Granpac Ltd.* v. *American Home Assoc. Co., supra* n. 32 at 222.

195. *Savioli and Morgan Co.* v. *Vroom Const. Ltd.* (1976) 10 O.R. (2d) 381; *Lee* v. *Hill* [1978] 6 W.W.R. 522 (Sask. Dist. Ct.); *Maron* v. *R.A.E. Trucking Ltd.* (1981) 31 A.R. 234 at 237 (Alta. Q.B.) *per* Purvis J., referring with approval to the even stronger language of Hamilton J. of the Manitoba Court of Queen's Bench in *Banfield* v. *Hoffer* [1976] W.W.R. 182; *revd.* on the point [1977] 4 W.W.R. 465 (Man. C.A.) (although the *Maron* case was arguably a case where interest could not be awarded under s. 34(15) in any event being a tortious claim for damages); *Granpac Ltd.* v. *American Home supra* n. 32 *per* Laycraft J.A.; *QCTV Ltd.* v. *Edmonton* (1983) 27 Alta. L.R. (2d) 362 (Alta. Q.B.) at 381. In *Farries Enterprises Ltd.* v. *Commercial Union Assur. Co.* (1982) I.L.R. 1-1558, 101 A.P.R. 489, 36 Nfld. & P.E.I.R. 489 (P.E.I.S.C.), the Court found that both parties were equally responsible for the delay in determining the amounts payable under insurance policies and awarded one-half of the interest it would otherwise have awarded on the proceeds due under the policies.

196. *Evergreen Irrigation* v. *Belgium Farms Ltd.* (1976) 3 A.R. 248 at 257 (Alta. S.C.T.D.) *per* Brennan J.; *Kenting Drilling Ltd.* v. *Gen. Accident Ass.* (1980) 102 D.L.R. (3d) 99 (Alta. Q.B.), which awarded interest in order to achieve full compensation. This must now be considered to be an unavailable contention in view of the *Eyben* case, *supra* n. 190; *see Smith and/or Irdo Holdings Ltd.* v. *Royal Insurance Co.* (1983) 42 A.R. 38 at 45.

197. *Martinelle* v. *Travellers Indemnity Co. of Can. Ltd.* (1977) 72 D.L.R. (3d) 620 at 625 (Ont. H.C.J.) *per* Griffiths J..

198. *Capital City Oil Well Services Co. Ltd.* v. *Non-Marine Underwriters of Lloyds* (1959) 27 W.W.R. 241 (Alta. S.C.T.D.); *Nissan Auto* v. *The Cont. Shopper* [1974] 1 F.C. 88; *Rombeek* v. *CIAG* (1978) 4 C.P.C. 69 (Ont. H.C.J.).

199. *Bauch & Lomb Optical* v. *Maislin Transport supra* n. 96.

200. *Taylor* v. *Western Union Ins. Co.* [1946] 1 W.W.R. 692 (Alta. S.C.T.D.). *See also QCTV Ltd.* v. *Edmonton, supra* n. 195 at 381; *B.D. Appliance and Radio Lab Ltd.* v. *United Enterprises Ltd.* (1982) 18 Sask. L.R. 197 (Sask. Q.B.) (interest claim denied where case depended entirely on credibility of witnesses, defence was arguable and defendant acted reasonably in withholding payment). For an approach more consonant with compensatory notions, *see Leontowicz* v. *Seaboard Life Insurance Co.* (1983) 48 A.R. 60 (Alta. Q.B.) per Dea, J. at 63-64.

allowed, it has been suggested, where the debtor did not have the means to pay.[201] In an era of high rates of interest, however, even the existence of a genuine dispute may not preclude a court from determining that it is fair and equitable that there be compensation by way of interest as the creditor's prejudice from the loss of use of his money is apparent as is the debtor's advantage from retaining it if compensation by way of interest is not ordered.[202] Cases where the failure to pay is "nothing more than a deliberate attempt to reap the benefit of high interest rates or to put economic pressure on the creditor so as to induce him to take for immediate payment a sum less than he might otherwise receive" may be considered examples of an improper withholding of a just debt and where it is fair and reasonable that the creditor receive appropriate interest.[203] Similarly, where a defendant knew that he owed the plaintiff a certain amount of money but attempted to take advantage of the latter's mistake in that regard[204] or where, the defendant, once the plaintiff made his demand, ought to have recognized, knowing the facts as it did, that it owed the money,[205] interest has been awarded under section 15.

The requirement that it "seems to the court fair and equitable" in the circumstances that interest be awarded is an additional requirement to the need for a "just debt" that has been "improperly withheld" and must be present before an award can be made under section 15.[206]

The phrase "compensation by the payment of interest" makes it clear that the award is one of damages.[207] Accordingly, it has been held that the Master in Alberta does not have authority to make such an award.[208] Although section 15 states that, in the prescribed circumstances, the court "may allow interest" early Alberta authority is to the effect that the court has a "duty" to award interest where it seems to it fair and equitable to do so.[209]

Interest under s. 15 may be granted at any time before or after the statement of claim is issued and up to judgment — the period is entirely

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201. *Eyben* v. *K.R. Ranches*, *supra* n. 190 at 343 *per* McGillivray C.J.A.; *see also Suss Woodcraft* v. *Abbey Glen Property Corp* [1975] 5 W.W.R. 57 (Alta. S.C.); *Taylor* v. *Western Union Ins. Co.*, *supra* n. 200 at 700; *Poon Estate* v. *Dickson*, *supra* n. 187 at 614, *per* Moir J.A.; *Fowle* v. *Klassen* (1980) 31 A.R. 494 at 498 (Alta. Q.B.) *per* Cavanagh, J.; mere non payment not evidence of improper withholding; *D. Latimer Eng. Ltd.* v. *Cassidy* (1980) 71 A.P.R. 663 (N.S.T.D.); *Bank of Montreal* v. *Inco Ltd.* (1979) 10 C.P.C. 205 (Ont. H.C.J.) (where a number of creditors competing for funds ultimately paid into court on an interpleader, not unreasonable for defendant to withhold funds until claims resolved); *Banfield, McFarlane, Evans, Real Estate Ltd.* v. *Hoffer*, *supra* n. 19; *Harrand* v. *Sask. Govt. Ins. Co.* (1978) 88 D.L.R. (3d) 388; *affd.* [1979] 4 W.W.R. 478 (Sask. C.A.).

202. *Granpac Ltd.* v. *American Home Assc.*, *supra* n. 32 at 222 *per* Laycraft J.A..

203. *Eyben* v. *K.R. Ranches*, *supra* n. 190 at 276 *per* McGillivray C.J.A..

204. *Pacific Petroleums Ltd.* v. *Concordia Propane Gas Marketers Ltd.* (1977) 5 A.R. 421 (Alta. Q.B.).

205. *Sheehy* v. *Edmonton World Hockey Ent. Ltd.* (1979) 22 A.R. 1 (Alta. Q.B.).

206. *Granpac Ltd.* v. *American Home Assc.*, *supra* n. 32 *per* Laycraft J.A..

207. *Hoover* v. *Burrows* [1945] 3 W.W.R. 683 (Alta. C.A.); *Valade* v. *McEwen* [1930] 2 W.W.R. 490 (Sask. C.A.).

208. *Lucy* v. *Interbuild Development Ltd.* (1974) 48 D.L.R. (3d) 150 (Alta. S.C.T.D.); *Covlin* v. *Mitchell*, unreported, Edmonton No. 8003-24323, Master Funduk, November 1980.

209. *Walker* v. *Card* (1915) 7 W.W.R. 1145 at 1146 (Alta. S.C.T.D.) *per* Harvey C.J..

discretionary.[210] The practice of courts in Alberta varies. In some cases interest may be awarded from the date the obligation to pay arose.[211] In others the period for which interest runs does not commence until issuance of the statement of claim.[212] It may even be that the interest awarded, in order to do justice, will not begin to run until the date of an appellate court judgment,[213] although this would no longer appear to be possible in view of Alberta Supreme Court Rule 520. It would seem clear from the provisions of s. 13 of the Interest Act[214] that interest on a judgment debt from rendering until satisfaction is at five per cent only unless adequate contractual language preserves the rate contracted for after judgment as well.[215]

It was originally suggested that because of the federal Interest Act interest could only be awarded under provisions such as s. 15 at the rate prescribed by the federal Interest Act.[216] This view, however, was rejected by the Supreme Court of Canada.[217] As to the actual rate to be awarded, the Privy Council has suggested that the rate to be awarded is the rate that the court thinks proper in the circumstances.[218] It was suggested in *Sinclair* v. *Tomic* that the rate should be "the rate of interest that will result in fair compensation" to the plaintiff.[219] In that case, Mr. Justice Waite awarded interest at the prime rate charged by the successful party's bank up to the time it had been necessary for that party to secure a loan because of the transaction and thereafter at the rate of interest that they paid on the loan. At least one case has suggested that the rate awarded should be that rate of interest which is recovered by the Clerk of the Court on special interest bearing accounts administered by him.[220] An

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210. *King Pin Investments* v. *Melton Real Estate* (1978) 7 A.R. 567 at 585 (Q.B.); *see also Chambers* v. *Leech*, *supra* n. 36.

211. *Speiss Earth Const. Ltd.* v. *Cominco Ltd.*, *infra* n. 222; *Permasteel Eng. Ltd.* v. *McIntyre Mines Ltd.*, *infra* n. 225.

212. *Northern Asbestos* v. *Building Supplies Ltd.* (1977) 1 A.R. 426 (Alta. S.C.T.D.); *see also Chambers* v. *Leech*, *supra* n. 36.

213. *Burland* v. *Earle*, *supra* n. 146 at 594 *per* Lord Davey.

214. R.S.C. 1970, C. I-18.

215. *Prince Albert Pulp Co. Ltd.* v. *Foundation Co. of Can. Ltd.*, *supra* n. 187 at 595 *per* Maitland J.; *Bank of Nova Scotia* v. *U.P.C. Holdings Ltd.* (1979) 11 Alta. L.R. (2d) 331 (Q.B.); *but see Wertland Transport Service Ltd.* v. *Phoenix Assoc. Co.* (1973) 38 D.L.R. (3d) 639 at 640 (Alta. S.C. App. Div.) *per* Prowse J.A.; *Toron Const.* v. *Continental Ins. Co.* (1982) 34 A.R. 456 (Alta. Q.B.); and *International Harvester* v. *Hogan* [1917] 1 W.W.R. 857 (Alta. S.C. App. Div.). It has been suggested, in some quarters, that no contractual language can override s. 13 of the Interest Act: see *Norfolk Trust* v. *Wolcoski* [1982] 6 W.W.R. 189 (B.C.C.A.); *Pacific Savings and Mgte. Corpn.* v. *Forest Hill Development and Investments Company Ltd.* (1980) 25 B.C.L.R. 171 (B.C.S.C.).

216. *See Fuller Const. Co.* v. *Continental Ins. Co.*, *supra* n. 55.

217. *Prince Albert Pulp Co. Ltd.* v. *Foundation Co. of Can. Ltd.*, *supra* n. 187 at 595 *per* Maitland J.; *see also Phoenix Press Co.* v. *Vinto Eng. Ltd.* (1982) 34 A.R. 244 at 255; *Guthrie McLaren Drilling Ltd.* v. *Inland Dev. Co. Ltd.* (1977) 2 A.R. 519 (Alta. S.C.T.D.); *Granpac Ltd.* v. *American Home Assoc. Co.*, *supra* n. 32 *per* Laycraft J.A.; *Nor-Min Supplies Ltd.* v. *C.N.R.* (1980) 106 D.L.R. (3d) 325 at 329 (Ont. C.A.); *Kenting Drilling Ltd.* v. *Gen. Accident Assurance Co.*, *supra* n. 196; *and see* the review of the various methods of choosing rates in *Chambers* v. *Leech*, *supra* n. 36 at 579 *per* Matas J.A..

218. *Toronto Railway Co.* v. *Toronto* [1906] A.C. 117 at 120 (P.C.).

219. (1982) 47 A.R. 189 (Alta. Q.B.) at 206.

220. *Morrison* v. *Edmonton*, *supra* n. 33 at 345 *per* Dechene J..

early pronouncement on the section's predecessor opined that, in circumstances where the plaintiff had been deprived of his money and the defendants have had the use of it and there was nothing to show that the plaintiff had had any compensation, the fact that the parties had agreed to a certain rate before default indicated that it ought to be more rather than less after, since "the vendor might be put to much inconvenience by not receiving it when expected" in light of then current financial conditions.[221] The fact that the defendant has co-operated to a considerable extent in the proceedings to determine the validity of the plaintiff's claims has been taken into account in determining the rate that is "just and equitable",[222] as has the defendant's refusal to adjust accounts between itself and the plaintiff after it must have known (or ought to have known) of the excess amount due to the plaintiff.[223] The fact that the plaintiff's illegal stipulation for interest has made it necessary to resort to the Judicature Act may be a reason for restricting interest to the legal rate of five per cent.[224] Where the contract between the parties only allowed interest to be calculated after the representative of the defendant approved the plaintiff's invoices and the invoices had not been approved that may also be a factor to be taken into account in fixing the rate.[225] Recent decisions of the Alberta Court of Appeal suggest that the proper rate is either the rate the claimant pays to his bank, if the claimant is indebted to a bank, or the rate of interest the claimant could obtain on a guaranteed investment certificate or some other form of investment, if the claimant would have invested the money.[226] If the sum in dispute between the parties has been invested in trust upon terms that the interest earned thereon became payable to the successful party upon a judgment in their favour, the interest so earned may be taken into account in determining the amount of interest for which they shall have judgment.[227]

It is clear that the allowance of interest under section 15, the rate to be awarded and the period for which it will be awarded are in the trial judge's discretion,[228] but it has been held it is equally clear that these mat-

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221. *Walker* v. *Card*, *supra* n. 209 at 1146 *per* Harvey C.J.; *Kennedy* v. *Inman* [1920] 3 W.W.R. 564 at 566 (Alta. S.C. App. Div.) *per* Ives J.A.; In the recent case of *Memco Ltd.* v. *Vellama* (1982) 47 A.R. 302 (Alta. Q.B.) Mr. Justice Power found the fact that the contract between the parties did not provide for interest militated against any award under Section 34(16) of the former Judicature Act.

222. *Speiss Earth Construction Ltd.* v. *Cominco Ltd.* (1978) 6 Alta. L.R. (2d) 330 at 334 (Alta. S.C.T.D.) *per* Moore J..

223. *St. Vital Flooring Ltd.* v. *Inducan Const. Ltd.* (1975) 56 D.L.R. (3d) 601 at 610 (Man. Q.B.) *per* Wilson J..

224. *Standard Bank of Canada* v. *Faber*, *supra* n. 55 *per* Stuart J..

225. *Permasteel Engineering* v. *McIntyre Mines Ltd.* (1978) 11 A.R. 416 at 438 (Alta S.C.T.D.) *per* Miller J..

226. *Poon Estate* v. *Dickson*, *supra* n. 187 at 614 *per* Moir J.A.; *Eyben* v. *K.R. Ranches*, *supra* n. 190 at 347 *per* McGillivray C.J.A.; *see also Janse-Mitchell Construction Co.* v. *Calgary* [1919] 1 W.W.R. 142 at 160 (Alta. C.A.) *per* Beck J.A.; *affd.* [1919] 3 W.W.R. 150; *and see Prince Albert Pulp* v. *Foundation*, *supra* n. 187; *Nor-Min Supplies Ltd.* v. *C.N.R.*, 106 D.L.R. (3rd) 325 *per* Houlden J.A.. As to the investment rate being proper where the plaintiff would not have to borrow *see Sheehy* v. *Edmonton World Hockey Ent. Ltd.*, *supra* n. 205.

227. *Sinclair* v. *Tomic* *supra* n. 219 at 306.

228. *Burland* v. *Earle*, *supra* n. 146.

ters are as much in the discretion of the court of appeal as in that of the trial judge.[229]

IV. INTEREST ON JUDGMENTS

S. 13 of the Interest Act, provides that:[230]

> every judgment debt shall bear interest at the rate of five per cent per annum until it is satisfied.

S. 14 of that Act provides:[231]

> Unless it is otherwise ordered by the court, such interest shall be calculated from the time of the rendering of the verdict or the giving of the judgment, as the case may be, notwithstanding that the entry of judgment upon the verdict or upon the giving of the judgment has been suspended by any proceedings either in the same court or in appeal.

S. 15 provides that:[232]

> Any sum of money or any costs, charges, or expenses made payable by or under any judgment, decree, rule or order of any court whatsoever in any civil proceeding shall for the purposes of this Act be deemed to be a judgment debt.

Notwithstanding provisions in the B.C. Arbitration Act[233] to the effect that an award might, by leave of a court or judge, be enforced in the same manner as a judgment or order to the same effect, it has been held that an award by an arbitrator does not have the interest-bearing qualities conferred by ss. 13 and 15 of the Interest Act.[234] The English Arbitration Act 1950 provides, in s. 20, that "A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt."[235] Ontario authority has held, however, that where an arbitration award provided that a sum certain was to be paid at a particular time it was a sum certain payable by virtue of a written instrument on which interest was to be allowed at law.[236] A similar approach seems to have been taken in the recent B.C. Court of Appeal decision in *Westcoast Transmission Co. Ltd.* v. *Majestic Wiley Contractors Ltd.* [237] In that case, a dispute as to an "equitable adjustment" for increased costs resulting from delays was referred to arbitration under a construction contract. The panel awarded interest from the declaration of completion under the contract to the date

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229. *Re St. Mary & Milk Rivers Dev., supra* n. 169 at 172 *per* McBride J.A.; *Janse-Mitchell Const. Co.* v. *Calgary, supra* n. 226 at 160, *per* Beck J.A.; although it may be that the general principles applicable to instances of reversal by a Court of Appeal of an order made in the exercise of a trial judge's discretion are applicable; *see Charles Osenton & Co.* v. *Johnston* [1941] 2 All E.R. 245 at 250 (H.L.) *per* Viscount Simon; *O'Hanlon* v. *Foothills Mun. Ast. No. 31* (1979) 17 A.R. (2d) 477 at 483 (Alta. C.A.) *per* Clement J.A..

230. *Supra* n. 214.

231. *Id.* s. 14.

232. *Id.* s. 15.

233. R.S.B.C. 1979, c. 18, s. 15; equivalent to s. 12 of the Arbitration Act, R.S.A. 1980, C. A-43.

234. *Supra* n. 214; *see Re Vancouver Incorporation Act, 1921* (1960) 35 W.W.R. 374 (B.C.S.C.); *Re Telford* (1904) 11 B.C.R. 355; *cf.* 9 B.C.R. 373.

235. 14 Geo. 6 c. 27; *see The Myron* [1969] 1 Lloyds Law Rep. 411 at 418 (Q.B.D.) *per* Donaldson J.. As to the English position prior to that provision, introduced in the Arbitration Act, 1934 (U.K.) c. 14, s. 11 see the discussion in *Re Billes and Parkin Partnership Architects Planners* (1983) 143 D.L.R. (3d) 55 (Ont. C.A.) at 59-62.

236. *See* Holmstead & Gale, *Judicature Act* at p. 450, authorities discussed.

237. [1982] 6 W.W.R. 149.

of their award. The Court of Appeal did not express a view on whether, as the trial judge had held, the arbitrators were bound to award interest under the Court Order Interest Act.[238]. It did find, after extensive reference to English authorities,[239] that the arbitrators were to decide the dispute according to the existing law of contract and that every right and discretionary remedy given to a court of law could be exercised by them. Accordingly, the court held that after the coming into force of the Court Order Interest Act, an arbitrator in B.C. had the power conferred on the appropriate court in that Act, without stating whether arbitrators were, or were not, bound to award interest.

The Ontario Court of Appeal has recently held that when the Supreme Court of Ontario is asked to enforce an arbitration award pursuant to the Arbitration Act,[240] the court has jurisdiction to grant leave with interest on the award from the date of the award as if the award were a judgment pursuant to the Judicature Act.[241] The Ontario Court of Appeal was not concerned with the question of whether the arbitrator would have had power to award interest,[242] but concluded, after a detailed review of the authorities, that the right, under s. 13 of the Arbitration Act, to have the award, by leave of a judge, enforced in the same manner carried a concomitant right to interest on the award calculated as if it were a judgment to like effect, from the date of the award to the date on which the principal amount was tendered to the plaintiff.

A judgment in Alberta is effective from the date it is pronounced in court.[243] This is on the basis of a long-established principle of law that also holds that the subsequent signing of the judgment is a mere form in obedience to the order of the court.[244] Interest, under s. 13 and s. 15 of the Interest Act[245] begins to run as soon as the amount payable under the judgment becomes ascertained.[246] Thus, the wording of a judgment directing a reference to determine damages may result in no interest upon the amount of damages being recoverable until the amount is ascertained.[247]

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238. R.S.B.C. 1979 c. 76; 31 B.C.L.R. 174.

239. *Chandris* v. *Isbrandtsen-Moller Co. Ltd.* [1951] 1 K.B. 240 (C.A.); *Techno-Impex* v. *Gebr. Van Weelde Sheepraart Kantoor B.V.* [1981] 1 Q.B. 648, [1981] 2 W.L.R. 821 (C.A.); *Podar Trading Co. Ltd., Bombay* v. *Francois Tagher, Barcelona* [1949] 2 All E.R. 62 (Div. Ct.).

240. R.S.O. 1970 c. 25 s. 13. *See also* s. 12 Alta. Arbitration Act.

241. R.S.O. 1980 c. 223, s. 37. *See Re Bills and Parkin Partnership* (1983) 43 D.L.R. (3d) 55.

242. *Id.* at 58. The Court noted, parenthetically, that if the question should arise in some other case, consideration would have to be given to the recent decision of the English Court of Appeal in *Techno-Impes, supra*, and the commentary thereon in Roger A. Bowles and Christopher J. Whelan, "Arbitrators and Awards of Interest", 44 *Mod. L. Rev.* 702 (1982).

243. *International Harvester Co.* v. *McCurrach* (1920) 1 W.W.R. 158 (Alta. S.C.); *see also* Form F of the Alberta Supreme Court Rules.

244. *See* the authorities discussed in *Canadian Aero Service Ltd.* v. *O'Malley* (1973) 2 O.R. (2d) 92 at 93 (Ont. H.C.J.).

245. *Supra* n. 214.

246. *Preload Co. of Canada Ltd.* v. *Regina (City) No. 2* (1961) 35 W.W.R. 529 (Sask. C.A.); *affd.* (1962) 37 W.W.R. 299 (S.C.C.).

247. *Toronto Hockey Club* v. *Arena Gardens of Toronto Ltd.* (1927) 32 O.W.N. 109 (Ont. Co. Ct.).

In *Engel* v. *Lautner* [248] a trial judge had found the defendant liable in a tort action and directed a reference to determine damages. An award was made by the local master. After an unsuccessful attempt to vary the master's order and subsequent application for leave to appeal the matter went back before the trial judge who directed judgment in the amount awarded by the master and costs. The plaintiff entered judgment in that amount but dated it as of the date the original judgment has been awarded and directed the sheriff to levy interest on the amount from that date. Both ss. 13-15 of the Interest Act[249] and the applicable provisions of the Saskatchewan Queen's Bench Act[250] provided that interest would be calculated from, or recovered from "the time of the rendering of the verdict or the giving of the judgment, as the case may be". Gordon J.A., speaking for the Saskatchewan Court of Appeal, found that the judgment was not complete until the last order of the original trial judge, noting that it would have been quite proper for the trial judge to have dealt with the matter finally after the trial and directed that judgment be entered for such sum as the local registrar might find as the amount of damages, but this had not been done.[251] English authority supports the concept that the event from which interest is to run depends upon the wording of the judgment that directs the reference.[252]

In *Baud Corpn. N.V.* v. *Brook (No. 2)* [253] the appellant had been awarded damages in the amount of $250,000 at trial. The appeal to the Alberta Supreme Court Appellate Division had been dismissed but the award of damages, on appeal to the Supreme Court of Canada, had been increased to $812,500. On the application before the Court pursuant to Supreme Court Rule 61(b), the issue was whether interest should run on the entire $812,500 from the date of the trial judgment. At the date of the hearing before the Supreme Court of Canada, Section 52 of the Supreme Court Act provided:[254]

> 52. Unless otherwise ordered by the Court, a judgment of the Court bears interest at the rate and from the date applicable to the judgment in the same matter of the court of original jurisdiction or at the rate and from the date that would have been applicable to that judgment if it had included a money award.

This section was introduced following the decisions in *Workmen's Comp. Bd.* v. *Greer* [255] and *Stewart* v. *Routhier* [256] where the Supreme Court had used its right to antedate its judgments to achieve the same results.

The Supreme Court of Canada found that, by virtue of the opening words of s. 52, it had discretion to vary the entitlement to interest under the section. In the circumstances, having regard to the delays by the ap-

248. (1954) 11 W.W.R. 485 (Sask. C.A.).

249. *Supra* n. 214.

250. R.S.S. 1978, c. Q-1, as am. S.S. 1983, c. 59.

251. *Supra* n. 248 at 487.

252. *Ashover Fluor Spar Mines* v. *Jackson* [1911] 2 Ch. 355 (Q.B.); *supra* n. 236 at 468-69.

253. [1979] 3 W.W.R. 93 (S.C.C.).

254. R.S.C. 1970, c. S-19, as am. S.C. 1974-75-76, c. 18, s. 7.

255. [1975] 1 S.C.R. 359.

256. [1975] 1 S.C.R. 588.

pellant (which had in fact increased its ultimate recovery), the Court limited the interest accrual between the date of the judgment at trial and the delivery of reasons for judgment of the Supreme Court of Canada to the amount awarded at trial and allowed the accumulation of interest on the total award granted in the Supreme Court of Canada from the date of its reasons. The Supreme Court observed:[257]

> By reason of the terminology adopted by Parliament in s. 52 as enacted in 1976, successful counsel need not invoke Supreme Court Rule 61 if in the circumstances of the proceedings the automatic operation of the statute is appropriate. Where the circumstances arising in a proceeding may otherwise invite the intervention of the Court by the exercise of its discretion under s. 52, an application as made in these proceedings is appropriate.

Rule 520 of the Alberta Supreme Court Rules provides that "if the judgment of the court below is reversed or varied and the judgment which is directed to be entered is one for a sum of money, it should bear interest from the date of the judgment at trial". There is no discretion left in the court under this Rule — the five per cent rate prescribed by s. 13 of the Interest Act[258] must be given, unless a higher rate has been provided for by contract. This is unlike the situation in British Columbia where it would appear that the Court of Appeal can award prejudgment interest for the period between trial judgment and the judgment on appeal although the same result may well obtain as the B.C. Court of Appeal has held that only interest at the legal rate should be awarded for the period since the plaintiff who loses at trial but succeeds on appeal should be in the same position as if he had succeeded at trial.[259]

In *Stark* v. *Stark*,[260] Mr. Justice Brennan awarded interest at five per cent per annum on the amount of an Alberta judgment for the balance owing to the plaintiff under an Illinois judgment, on the grounds that the amounts had been improperly withheld. The interest was to be calculated on each of the payments required to be made by the defendant pursuant

257. *Supra* n. 253 at 610.

258. *Supra* n. 214.

259. *Lewis Realty Ltd.* v. *Skalbania* (1980) 25 B.C.L.R. 17 (B.C.C.A.); as to the Federal Court *see* The Federal Court Act, R.S.C. 1970 (2nd Supp.) c. 10, s. 40, which provides that unless otherwise ordered by the Court, a judgment, including a judgment against the Crown, bears interest from the time of giving the judgment at the rate prescribed by s. 3 of the Interest Act.

260. (1978) 13 A.R. 339 (Alta. S.C. App. Div.); affg. (1978) 12 A.R. 353 (Alta. S.C.T.D.).

to the Illinois judgment from the date of default in those payments to the date of the Alberta judgment.[261]

In *Valley Forest Products Ltd.* v. *Reinsurance*,[262] it was held that the amount of the judgment debt on which interest accrues under s. 13 of the Interest Act[263] includes both the principal amount for which judgment was given and the "compensation" awarded in terms of interest under the predecessor to s. 15 of the Judicature Act, as well as the costs awarded to the plaintiff, once taxed.[264] Interest cannot be recovered on costs until the date of taxation and, by virtue of s. 53 of the Supreme Court Act, the same rule is applicable in respect of costs awarded by the Supreme Court of Canada.[265] The English Court of Appeal recently reconsidered the allowance of interest on costs and, in particular, the point from which interest should run, and concluded that, on the true construction of ss. 17 and 18 of the Judgements Act, 1838, interest on an

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261. The whole question of conversion in the case of foreign debts to Canadian currency for the purposes of judgment has recently been reconsidered in *Airtemp Corp.* v. *Chrysler Airtemp Canada Ltd.* (1980) 11 B.L.R. 47 (Ont. S.C.) affd. 1981 31 O.R. 2d 481 (Div. Ct.), where Montgomery J. followed the lead of the House of Lords in *Miliangos* v. *George Frank (Textiles) Ltd.* [1975] 3 All E.R. 801, who had rejected the former rule that conversion should take place at the date of breach (*see Custodian* v. *Blucher* [1927] S.C.R. 420; [1927] 3 D.L.R. 40; *Gatineau Power* v. *Crown Life Insce. Co.* [1945] S.C.R. 655; [1946] 4 D.L.R. 1; *United Rwys. of Havana and Regla Warehouses Ltd.* [1961] A.C. 1007 (H.L.)) in light of modern conditions of currency fluctuations and directed that conversion occur at the date of judgment. Conversion was ordered in *Airtemp* at the most reasonable date — the date of the issuance of the writ. *See Batavia Times Publishing Co.* v. *Davis* (1977) 82 D.L.R. (3d) 247 and (1978) 88 D.L.R. (3d) 144 (Ont. H.C.) affd. (1979) 102 D.L.R. (3d) 192 and at 105 D.L.R. (3d) 192 (Ont. C.A.) where the conversion date of a foreign judgment was the date when its enforcement was sought through domestic judgment, and *Baumgartner* v. *Carsley Silk Co.* (1971) 23 D.L.R. (2d) 255 (Que. C.A.). *See also Minister of State of the Principality of Monaco* v. *Project Planning Associates (Intl.)* (1980) 32 O.R. (2d) 438 (Div. Ct.) affd. loc. cit. (C.A.), leave to appeal to S.C.C. refused loc. cit.; *Clinton* v. *Ford* (1982) 137 D.L.R. (3d) 281, 37 O.R. (2d) 448 (Ont. C.A.); *see also* Currency and Exchange Act R.S.C. 1977 cc-39, S-11, S.M. Waddams, *supra*, n. 39 at pp. 455-469; *Williams and Glyn's Bk.* v. *Belkin Packaging Ltd.* (1979) 108 D.L.R. (3d) 585 (B.C.S.C.) *revd* (1981) 123 D.L.R. (3d) 612 (B.C.C.A.), affd. (1983) 21 B.L.R. 282 (S.C.C.). *See Am-pac Forest Products* v. *Phoenix Doors Ltd. et al* (1979) 14 B.C.L.R. 63 (B.C.S.C.). As Waddams notes, *supra* n. 39, at p. 464, where the currency of the jurisdiction in which the judgment is obtained depreciates between the date of wrong or breach and the date of judgment, the problem is analogous to that of a purchaser of property that increases in value in the same period. In cases where the obligation is owed in a foreign currency that has strengthened in respect of Canadian currency between breach or wrong and trial, it would, as Waddams suggested p. 507, be "over-compensatory for the plaintiff to recovery judgment in foreign currency (or a sum converted at judgment date) and also prejudgment interest at Canadian rates where these exceed the foreign currency rate", since weak currencies attract high interest rates. The reverse would be the case where the foreign currency had declined in value in relation to Canadian currency for the relevant period. Again, Alberta courts are severely handicapped, in comparison with the courts of other jurisdictions, by their lack of discretion in respect of prejudgment interest awards.

262. (1977) 3 Alta. L.R. (2d) 106 (Alta. S.C.T.D.).

263. *Supra* n. 214.

264. *Supra* n. 182; *see also Prince Albert Pulp Co.* v. *Foundation Co.*, *supra* n. 187 at 595 *per* Maitland J..

265. *Supra* n. 214; *Canadian Aero Services* v. *O'Malley*, *supra* n. 244.

order for costs runs from the date of taxation and the court had no jurisdiction to award interest from an earlier date.[266]

The provisions of the Interest Act do not permit interest to be accrued on amounts directed to be paid out of a fund or estate, although, where there was no doubt that the fund had earned interest since its creation, simple justice would require that the interest earned on the amount directed to be paid out of the fund should go to the party entitled to it.[267] In *Regina Steam Laundry* v. *Saskatchewan Govt. Insur.*,[268] the Court of Appeal rejected, as contrary to of ss. 13 and 15 of the Interest Act, an attempt by the trial judge to increase the return to the plaintiff from the judgment proceeds from the legal rate of five per cent by ordering the amount of a judgment that had been appealed and was subject to a stay of execution to be paid into court for deposit into a special account. In *Rockwood Enterprises Ltd.* v. *Grain Ins. & Guar. Co.*,[269] Huband J.A., in chambers, did permit an imposition of terms as to interest as the price of an order for stay of proceedings pending appeal noting that he was satisfied that in the absence of a stay, and assuming the plaintiff (who had garnisheed the defendants bank) received funds to satisfy the judgment, there was a real danger the funds would be disposed of prior to the hearing of an appeal, thus rendering the appeal process nugatory. While securing the plaintiff's position would not be a valid reason for the imposition of terms in view of the defendant's position, terms would be imposed to assure the plaintiff that, should the judgment be sustained on appeal, the plaintiff would recover adequate interest pending the appeal hearing. Huband J.A. stated that it was "simply inequitable" to deny the plaintiff payment of his judgment, limiting him to interest at five per cent pending the appeal, while the defendant retained the use of the funds in order to earn a substantially higher return. The imposition of terms upon a stay of proceedings motion did not constitute a breach of the Interest Act, as suggested by the majority in *Regina Steam Laundry* but was instead the legitimate price of obtaining a stay. As a result, the amount of the judgment was directed to be deposited in an interest bearing account in a chartered bank, in the name of the defendant's solicitors, in trust for the plaintiff and defendant, pending disposition of the appeal.

British Columbia courts have obtained similar results by ordering the judgment amount to be paid to the plaintiff (who might then obtain a higher rate of return by investing it) and requiring him to give security for its repayment in the event of reversal on appeal,[270] or ordering the judgment to be paid into court where it would be invested to earn a higher rate

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266. 1 & 2 Vic., c. 110; *see Ervin Warnink B.V.* v. *J. Townsend & Sons* [1982] 3 All E.R. 312 (C.A.); contrast the situation in the Federal Court of Canada where interest on costs runs from the date of the original judgment; *see M.N.R.* v. *Bethlehem Copper Ltd.* (1976) 71 D.L.R. (3d) 313 (F.C.A.).

267. *Earl E. Wakefield Co.* v. *Oil City Petroleums (No. 2)* (1960) 31 W.W.R. 376 (Alta. C.A.).

268. [1971] 1 W.W.R. 97 (Sask. C.A.); *see also McLean* v. *C.P.R.* (1923) 53 O.L.R. 533 (App. Div.).

269. (1980) 15 C.P.C. 121 (Sask. C.A.).

270. *See Morrison-Knudsen Co.* v. *B.C. Hydro and Power Authority* (1976) 67 D.L.R. (3d) 147 (B.C.S.C.) (*affd.* B.C.C.A., unreported); *Robitaille* v. *Vancouver Hockey Club Ltd.* (1980) 16 C.P.C. 87 (B.C.S.C.).

of return than the legal rate.[271] An attempt to secure greater returns to the plaintiff between trial and appeal was unsuccessful, however, in *Wells* v. *Chrysler Can. Ltd.*,[272] where the trial judge had made an order staying execution conditional upon the defendant (appellant) obtaining a bond with a corporate surety in an amount sufficient to secure the judgment with interest at 9% until the entry of the Court of Appeal judgment, and then ordered the defendant to pay interest at nine per cent per annum on the amount of the trial judgment, upheld on appeal, from the date for commencement of prejudgment interest under the trial judgment to the date of entry of the Court of Appeal judgment. The B.C. Court of Appeal found that there was nothing in the Court of Appeal Act[273] and nothing in the Prejudgment Interest Act[274] that sanctioned the payment of interest greater than five per cent on a postjudgment basis.[275]

Ontario has provisions in its Judicature Act,[276] that provide for interest on a verdict or judgment from the time of the rendering of the verdict, or the giving of the judgment at the prime rate established in the same manner as for the prejudgment interest provisions in that Act, notwithstanding that the entry of judgment has been suspended by a proceedings in the action, including an appeal. Where a judge considers it just to do so in the circumstances he may in respect of all or part of the judgment, disallow interest under the section, fix a rate other than the prime rate or fix a date other than the date of judgment from which interest is to run.

The provisions in ss. 13-15 of the Interest Act[277] are a vestige of the frontier past of the western provinces and it is expected that they will eventually go the way of the Red River cart. Indeed, it is understood that one of the reasons for the delay in enactment of a Prejudgment Interest Act in Alberta is the desire to have the Federal government follow through on their expressed intent to remove the shackles of ss. 13-15 of the Interest Act[278] so that the provincial legislature may act in a comprehensive manner to deal with prejudgment and postjudgment interest in Alberta in one statute.

Although earlier Ontario cases held that a jury should allow the same rate of interest after maturity as was provided for before maturity by a note,[279] later English courts held that, notwithstanding a covenant to pay interest before maturity at a higher rate, the statutory provision in section 17 of the Judgments Act 1838[280] and the doctrine of merger had the effect

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271. *LeBlanc* v. *Corp. of the City of Penticton* (1980) 16 C.P.C. 94 (B.C.S.C.).
272. (1980) 16 C.P.C. 57 (B.C.C.A.).
273. R.S.B.C. 1979, c. 74.
274. S.B.C. 1974, c. 65; now: Court Order Interest Act, R.S.B.C. c. 76.
275. *See Baart* v. *Kumar* [1983] 4 W.W.R. 419 (B.C.S.C.) at 430.
276. R.S.O. 1970, c. 22, s. 37.
277. R.S.C. 1970, c. I-18.
278. *Supra* n. 214.
279. *Howland* v. *Jennings* (1861) 11 U.C.C.P. 272 (H.C.J.); *Montgomery* v. *Boucher* (1864) 14 U.C.C.P. 45 (H.C.J.).
280. Which provided that "every judgment debt shall carry interest at the rate of four per centum per annum from the time of entering up the judgment . . .".

of reducing the rate from date of judgment.[281] The effect under the Interest Act,[282] s. 13 is the same.[283] It is possible however, to express the covenant in such terms that it is not merged in a judgment for the principal. To provide, in a separate covenant, that the taking of a judgment on any of the covenants does not operate as a merger, will probably not be sufficient, absent an express covenant to pay interest at the mortgage rate after judgment. The effect of any particular provision becomes a matter of its construction.[284] A provision in a document requiring interest to be paid at a certain rate "until paid" only applies until maturity and only the legal rate may be exacted after maturity, unless there is an explicit provision for the rate to continue after maturity.[285] The same result will follow from the use of phrases such as "until payment in full" or "until such principal money and interest shall be fully paid and satisfied".[286] Where an obligation carries interest "payable . . . as well after as before maturity" or words to similar effect it may be effective to preserve the payee's entitlement to interest at the rate specified after default,[287] but not after judgment without express words to that effect.[288] Although interest runs at the mortgage rate on the *in rem* judgment — the order nisi/order for sale — by virtue of the equitable requirement as a condition of the mortgagor's right to redeem, and for the purposes of realization from the sale proceeds of the land, equity plays no part in the action on the covenant to pay, being a debt action and governed by common law principles.[289] In particular, a covenant in a mortgage against merger of the covenants by virtue of a judgment simply prevents the covenants from merging in the *in rem* judgment in equity and is not sufficient, in an action at common law on the covenant to pay, to continue interest at the mortgage rate, after an *in personam* judgment, on the judg-

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281. *See Cook* v. *Fowler* (1874) L.R. 7 H.L. 27; *Re European Central Ry.* (1876) 4 Ch. D. 33; *Re Sneyd; Ex. P. Fewings* (1883) 25 Ch. D. 338.

282. *Supra* n. 277.

283. *See Spenrath Construction Ltd.* v. *206763 Holdings Ltd.* (1981) 32 A.R. 216 at 232 (Alta. Q.B.); *Earl F. Wakefield Co.* v. *Oil City Petroleums (Leduc) Ltd.*, *supra* n. 267 at 378.

284. *Ex. P. Fewings*, *supra* n. 281; *Economic Life Assoc. Society* v. *Osborne* [1902] A.C. 147, (1901) 71 L.J.P.C. 34 at 36 (J.C.P.C.); *see* the recent review of the area in *Spenrath Construction Ltd.*, *supra* n. 283; *see also Maple Credit Ltd.* v. *Xomox Inv. Ltd.* (1982) 21 Alta. L.R. (2d) 289; *St. John* v. *Rykert* (1884) 10 S.C.R. 278; *Chin-Si-Thoo* v. *Burry* [1978] 2 W.W.R. 641 (Man. Q.B.); *Re Heller-Natofin (Western) Ltd. and Carlton Developments Ltd.* (1981) 105 D.L.R. (3d) 669 (B.C.S.C.); *Coronation Credit Corp. Ltd.* v. *Industrial Mtge. & Finance Corp. Ltd.* (1967) 64 D.L.R. (2d) 752 (B.C.S.C.); *Edelweiss Credit Union* v. *Boehme* (1980) 6 R.P.R. 349 (B.C.S.C.).

285. See *Hossack* v. *Shaw* (1918) 56 S.C.R. 581; *Beaver Lumber Co.* v. *Hophauf* (1932) W.W.R. 357 (Sask. C.A.); *Dominion Meat Co.* v. *Jamieson* [1917] 3 W.W.R. 929 (Alta. S.C. App. Div.).

286. See *Powell* v. *Peck* (1888) 15 O.A.R. 138 (Ont. C.A.); *Peoples Loan & Deposit Co.* v. *Grant* (1890) 18 S.C.R. 262.

287. *Trusts & Guarantee Co. Ltd.* v. *Cont. Supply Co. Ltd.* [1932] W.W.R. 921 (Alta. S.C.); *Royal Bank* v. *Dwigans* [1933] W.W.R. 672 (Alta. S.C. App. Div.); *B.C. Land & Inv. Agency Ltd.* v. *Robinson* [1923] 3 W.W.R. 113 (B.C.C.A.); *affg.* [1922] 2 W.W.R. 1185; *see also Peters* v. *Perras* (1908) 8 W.L.R. 162 (Alta. S.C.T.D.).

288. *Bank of Nova Scotia* v. *U.P.C. Holdings Ltd.* (1979) 6 Alta. L.R. 83, 25 A.R. 117 (Q.B.); *Maple Credit Ltd.* v. *Xomox Investments Ltd.*, *supra* n. 284, *Holland* v. *Wilmac Development Corporation Ltd.* [1967] O.R. 395 (S.C.).

289. *Maple Credit Ltd.* v. *Xomox Investments Ltd.*, *supra* n. 284.

ment itself. In British Columbia, a personal judgment obtained on a mortgage and not vacated before the order approving the sale, notwithstanding words in the mortgage to the effect that "the taking of judgment or judgments on any of the covenants contained herein shall not operate as a merger of such covenants or affect the mortgagee's right to interest at the rate aforesaid" was found to be one to which sections 13 to 15 of the Interest Act were applicable and overrode the provisions in the mortgage contract.[290] Early Alberta authority[291] suggests, however, that even where there is no covenant to pay interest after default, interest should nevertheless be directed to be paid under the predecessor to s. 15 of the Judicature Act, where there was no equitable ground for withholding interest.[292] Rule 361 of the Alberta Supreme Court Rules provides that every writ of execution for the recovery of money is to be endorsed with a direction to the sheriff or other officer or person to whom the writ is directed to, *inter alia*, levy interest on the amount of the judgment, if sought to be recovered, at the rate provided by law from the time when the judgment was entered. The Rule goes on to provide, however, that where there is an agreement between the parties that a higher rate of interest shall be secured by the judgment, the endorsement may be to levy at the rate so agreed.

A surety for the payment of interest under a contract between principal and a creditor is not liable for the interest carried by the judgment debt if the creditor obtains judgment against the principal on the contract.[293]

V. SOME SPECIAL CASES

A. BUILDER'S LIENS

There is Alberta authority to the effect that interest is incidental to a claim for a mechanics' lien and should be allowed on the lien claim, entirely apart from the Interest Act, from the date of filing the lien claim even though interest is not mentioned in the statement of lien filed.[294] In that case, however, the owner of the land had actually signed promissory notes agreeing to pay interest and giving a charge on the land in question for the amount of the debt.[295] Where there is an agreement to pay interest from the date payments are due under the contract that gives rise to the

290. *Supra* n. 214; *Norfolk Trust* v. *Wolcoski:* [1982] 6 W.W.R. 189 at 192 (B.C.C.A.). *Cf. Bank of British Columbia* v. *Ballance* [1983] 2 W.W.R. 556 (B.C.S.C.). *See also Canada Permanent Trust Co.* v. *G.H. Management Group* (1982) 20 Man. R. (2d) 84 (Man. Q.B.); *Martens* v. *First National Mortgage Co. Ltd.* (1982) 138 D.L.R. (3d) 180 (B.C.S.C.).

291. An Ordinance of the Northwest Territories that purported to permit the court to fix post-judgment interest at a rate higher than that fixed by s. 13 of the Interest Act has been found to be inoperative in the face of the federal provision. *See Governor and Company of Adventurers of England* v. *Bland* (1982) 136 D.L.R. (3d) 702 (N.W.T.S. Ct.).

292. *Walker* v. *Card*, *supra* n. 209.

293. D.G. Marks and G.S. Moss, *Rowlatt on The Law of Principal and Surety*, (4th ed. 1982) at 107.

294. *Imperial Lumber Co.* v. *Johnson* [1923] W.W.R. 920 at 921 (Alta. C.A.).

295. *See also A.B. Crushing Mills Ltd.* v. *Barker* (1952) 5 W.W.R. (N.S.) 170 (Alta. S.C.); *R. v. McKay* [1930] S.C.R. 130; *and see* the review of conflicting authorities in *MacDonald Rowe Woodworking Co.* v. *Saunders* (1980) 117 D.L.R. (3d) 690 (P.E.I.S.C.).

lien claim, interest will be recoverable on realization of the lien claim,[296] although doubts have been expressed in some quarters as to whether the "price" of the work or materials that founds the lien claim under ss. 4(1) of the Alberta Builders' Lien Act,[297] can properly be interpreted as including interest payable on the principal amount due in respect of such work or materials if it is not paid as provided under the contract.[298] The view in Alberta, is now settled to the contrary by virtue of the Alberta Court of Appeal's decision in *Tricat Enterprises Ltd.* v. *Calgary Regional Planning Commission*,[299] where the contract that gave rise to the builders' lien provided that interest was payable at the rate of fifteen per cent per annum in respect of overdue payments, and the lien claimant had included an interest claim at that rate.

After making reference to the *Imperial Lumber* case and noting that the weight of Canadian authority allowed interest in such cases if provided for in the contract and claimed in the lien itself, Moir J.A., speaking for the Court of Appeal in *Tricat*, alluded to the need for certainty in property law unless the decision of the highest Alberta appellate court in *Imperial Lumber*, which had stood unchallenged for 60 years, was overruled by the Supreme Court of Canada or changed by the legislature. He found that the fifteen per cent interest claimed in the lien was recoverable as part of the lien because it was part of the price.[300]

The Judicature Act may[301] or may not[302] afford relief. The interest should probably run from the date the claim should have been paid,[303] but it may not begin to run until the date of filing the statement of lien or the date of commencement of the action to realize on the lien.[304] Interest that can only be recovered under the Judicature Act cannot be used to increase the amount that a party is required to pay into court in order to obtain the cancellation of a builders' lien under s. 35 of the Alberta Builders Lien Act, which is limited to security for the amount of the lien and costs,[305] although of course the lien claim form would permit an interest claim to be added and it is suggested that if interest were properly claimed in the lien statement itself an allowance should be made for it on an application for payment in under s. 35(1)(a).[306]

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296. *Clarke* v. *Moore* (1908) Alta. L.R. 50 (Alta. S.C.); *Hectors Ltd.* v. *th Avenue Estates Ltd.*, (1963) 39 D.L.R. (2d) 493 (Alta. S.C.).

297. R.S.A. 1980 c. B-12.

298. *Colonial Park* v. *Sirucek*, unreported, Edmonton Q.B., Feb. 7, 1980.

299. (1983) 44 A.R. 90; [1983] 3 W.W.R. 213.

300. *See also Coneco Equipment* v. *Raven Rentals Oilfield Constr.*, (unreported, Edmonton Q.B. No. 8103 00106.).

301. *Lumber Mfrs. Yards Ltd.* v. *Weisgerber* [1925] W.W.R. 1026 (Sask. C.A.).

302. *Evergreen Irrigation Ltd.* v. *Belgium Farms Ltd.* (1976) 3 A.R. 248 (Alta. S.C.T.D.).

303. *Gustavson Internat. Drilling Co.* v. *B.P. Explorations Ltd.* (1977) 3 A.R. 221 (Alta. S.C.).

304. *Imperial Lumber Co.* v. *Johnson*, *supra* n. 294; *see generally* Macklem & Bristow, *Mechanics Liens in Canada* (4th ed.) at 388-393.

305. *Jacobsen* v. *Peter Unruh Const. Co. Ltd.* (1980) 15 R.P.R. 284 at 286 (Alta. Q.B.).

306. *Tricat Enterprises Ltd.* v. *Calgary Regional Planning Commission* (1983) 44 A.R. 90.

No interest was allowed on mechanics' lien claims under the B.C. mechanics' lien statute in *Re: Victoria Bed and Mattress (No. 2).*[307] As to the current law in British Columbia, see *North Star Services Ltd.* v. *Indust. Mgte. & Finance Corpn. Ltd.* [308]

B. QUANTUM MERUIT

In *Ackerman* v. *Hawrish* [309] an accountant who had provided professional service at the request of the defendant but without specific agreement on the rates of charge was held entitled to recover on the basis of a *quantum meruit.* Interest was awarded under the Saskatchewan equivalent to s. 15 of the Judicature Act and the *Prince Albert Pulp Co. Ltd.* v. *Foundation* [310] case without specific consideration being given to the question of whether a *quantum meruit* claim constituted a "debt". The question of the characterization of a *quantum meruit* claim has recently received a thorough analysis at the hands of the B.C. Courts in a series of hospital cases, culminating in *Aberdeen Private Hospital* v. *The City of Victoria,*[311] and it would seem that a strong case can be made for considering *quantum meruit* claims to constitute such a liquidated claim as will come within the courts jurisdiction under the Judicature Act. This approach was apparently accepted, without explicit approbation, by Moore J. in *Speiss Earth Constr.* v. *Cominco Ltd.* [312]

C. INSURANCE

Amounts due under insurance policies did not bear interest at common law.[313] Section 29 of Lord Tenterden's Act, 1833 permitted courts to award interest on amounts payable under insurance policies.[314] This provision was probably necessary in view of the principle that amounts payable under many types of insurance policies are not liquidated demands because the plaintiff has to prove the amount and even after an adjustment of the amount the plaintiff (unless he chooses to sue on an account stated) must still prove the amount, using the adjustment as evidence although, like other evidence, that might be rebutted.[315] A claim for indemnity under an insurance policy is not a debt.[316] There is Ontario authority stating that where amounts for which an insurer is liable on a claim under a fidelity bond have not been definitely ascertained the insurer is not liable for an award of interest under the then Ontario

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307. (1960) 35 W.W.R. 259 (B.C.S.C.); *see also Fitzgerald* v. *Apperley* (1926) 2 W.W.R. 689 at 698 (B.C.S.C.); *Triangle Storage Ltd.* v. *Porter* [1941] 3 W.W.R. 892 (B.C.C.A.).

308. (1964) 48 W.W.R. 570 at 574 (B.C.Co. Ct.).

309. (1976) 2 C.P.C. (Sask. Dist. Ct.).

310. *Supra* n. 187.

311. (1973) 45 D.L.R. (3d) 160 (S.C.C.); 42 D.L.R. (3d) 720 (B.C.C.A.).

312. (1978) 6 Alta. L.R. (2d) 330 at 334; *see also Muhlenfeld* v. *N. Alta. Rapeseed Producers Co-op.* (1980) 13 Alta. L.R. (2d) 105.

313. *Higgins* v. *Sargent* [1823] 2 B.&C. 348, 107 E.R. 419; *MacGillivray & Parkington on Insurance Law* (1981 7th ed.) at 531-535; E.R. Hardy, *General Principles of Insurance Law* (1979, 4th ed.) at 466-468.

314. 3. William IV.

315. *See Jabbour* v. *Custodian, supra* n. 22 for a review of the cases.

316. *Randall* v. *Lithgow* (1884) 12 Q.B.D. 525; *Israelson* v. *Dawson, supra* n. 22.

equivalent to s. 15 of the Judicature Act.[317] The former Ontario Judicature Act, however, in s. 39(3), tracked the provisions of s. 29 of Lord Tenterden's Act and permitted the award of interest as damages in actions on insurance policies over and above the money recoverable thereon.[318] Where an insurer failed to issue a policy as contracted for the court found that the plaintiff could have sued for specific performance on the contract of insurance and thereby forced the defendant to issue a policy. Applying the equitable principle that equity looks on that as done that ought to be done the court proceeded as if the policy had been issued and awarded interest as damages under the Ontario Judicature Act.[319]

It appears open to question whether s. 29 of Lord Tenterden's Act, 1833 survives in Alberta.[320] If so, interest on amounts payable under all insurance policies may be awarded by the courts. If not, it could be argued that jurisdiction to award interest in respect of insurance policies under s. 15 of the Judicature Act is restricted to cases where the amounts payable represent a debt or liquidated demand. The Alberta Court of Appeal has held that, where an amount withheld is payable under a contract and not as damages, it was no answer to a claim under s. 15 of the Judicature Act that the amount was in dispute and not ascertained on the due date.[321]

D. COMPANIES AND PARTNERSHIPS

Where the memorandum of association of a company gave the directors of the company the power to fix a rate of interest on an amount remaining unpaid on shares, a shareholder whose share certificate provided that he held the shares represented by it subject to the memorandum and articles of association was liable for the interest fixed by the directors.[322]

In *Redekop* v. *Robco Const. Ltd.*,[323] Meredith J. held that a claim for a valuation of shares of a shareholder under s. 221 of the B.C. Companies Act was a cause of action and an order fixing the value a pecuniary judgment, so as to permit application of the B.C. Prejudgment Interest Act,[324] and thereby allow interest to be awarded on the value.[325] An in-

317. *Mooney* v. *Pearl Assurance Co.* [1943] 4 D.L.R. 93 (Ont. C.A.).

318. *See* The Judicature Act, R.S.O. 1970, c. 228, s. 39(3).

319. *Wood* v. *Guarantee Co. of North America* (1975) 64 D.L.R. (3d) 385 (Ont. H.C.J.).

320. J.E. Cote, *supra* n. 30.

321. *Granpac Ltd.* v. *American Home Assurance Co.*, *supra* n. 32 at 220; *Bagby* v. *Gustavson International Drilling Co.*, *supra* n. 111 at 197; *see also Earl F. Wakefield Co.* v. *Oil City Petroleums (Leduc) Ltd. (No. 2)*, *supra* n. 267; *McMurray Mobile Home Park Ltd.* v. *Halifax Insurance Co.* (1979) 17 A.R. 40 (Alta. S.C.T.D.); *Kenting Drilling Ltd.* v. *General Accident Assurance Co.*, *supra* n. 196; *Inn. Cor. International Ltd.* v. *American Home Assurance Co.* (1973) 2 O.R. (2d) 64 (Ont. C.A.); *Harrad* v. *Saskatchewan Government Insurance Office* (1979) 100 D.L.R. (3d) 504 (Sask. C.A.); *Astro Tire & Rubber Co.* v. *Western Assurance Co.* (1979) 97 D.L.R. (3d) 515 (Ont. C.A.); *Qualico Developments Ltd.* v. *Aronovitch & Leipsic Ltd.* (1980) 109 D.L.R. (3d) 208 (Man. C.A.); *Hornburg* v. *Toole, Peet & Co.* (1980) 28 A.R. 546 (Alta. Q.B.).

322. *Canada West Loan Co.* v. *Virtue* [1921] 1 W.W.R. 730 (B.C.S.C.T.D.).

323. (1980) 22 B.C.L.R. 80 (B.C.S.C.).

324. Prejudgment Interest Act, S.B.C. 1974, c. 65.

325. *See Diligenti* v. *RWMD Operations Kelowna Ltd. (No. 2)* (1977) 4 B.C.L.R. 134 (B.C.S.C.); *cf. Re Anderson and Atlantic Enterprises Ltd.* (1979) 107 D.L.R. (3d) 566 (B.C.S.C.).

terest factor has also been added on an application under s. 122 of the Securities Act[326] 1978 (Ont.) c. 47 to the share price required for the purposes of a follow-up offer under s. 91(1) of that *Act* in order to make the value of the offer at least equal to the consideration paid on the original purchase.[327]

Numerous corporate statutes provide for a valuation of shares of the dissenting shareholders in specified circumstances.[328] It would appear, on the authority of the Supreme Court of Canada decision in *British Pacific Properties* v. *Minister of Hwys. and Public Wrks.* [329] that the rate of interest awarded pursuant to such provisions is prescribed by law within the meaning of s. 3 of the Interest Act, and therefore not restricted to five per cent by virtue of that provision.

The Partnership Act[330] specifically provides for interest on payments or advances by a partner, to the extent that they exceed the amount of capital that he has agreed to subscribe, from the date of the payment or advance. As no rate is prescribed and no machinery is in place under the statute to fix the rate, the interest recoverable under such a provision would appear to be restricted to five per cent by virtue of s. 3 of the Interest Act.

E. INTEREST UPON INTEREST

Where part of the claim includes a liquidated demand in respect of interest, interest, if not provided in contract to continue at a particular rate may be awarded under section 15 of the Judicature Act on interest. This is unlike the English provisions and provisions under the B.C., Ontario and Draft Uniform Prejudgment Acts where the court is not to award interest on interest.[331]

F. TENANTS IN COMMON

Interest may be recovered by a tenant in common, who managed the common property, for monies properly expended by him for repairs, improvements and interest on an encumbrance in respect of the common property.[332]

G. MAINTENANCE

Alberta is a unique jurisdiction in this regard. In *Zilka* v. *Zilka*,[333] a couple had been divorced in Alberta in 1971. The husband had been ordered to pay monthly maintenance to support his wife and children but by the end of May 1976 was $15,100 in arrears. The Court of Appeal

326. Securities Act, 1978, S.O. 1978, c. 47.

327. *See Ontario Securities Comm.* v. *McLaughlin* (1981) 16 B.L.R. 82 (Ont. S.C.).

328. Canada Business Corporations Act, S.C. 1974-76, c. 33, s. 184 as am.

329. (1980) 112 D.L.R. (3d) 1.

330. R.S.A. 1980, c. P-2, s. 27(c).

331. *See Valley Forest Products Ltd.* v. *Reinsurance & Excess Ltd.* (1977) 3 Alta. L.R. (2d) 106 (Alta. S.C.T.D.); *Bushwall Properties Ltd.* v. *Vortex Properties Ltd.* [1975] 2 All E.R. 214 (Ch. D.); *revd.* [1976] 2 All E.R. 283 (C.A.); *Imperial Trusts Co.* v. *New York Security and Trust Co.* (1905) 10 O.L.R. 289 (Ont. Div. Ct.).

332. *Curry* v. *Curry* (1898) 25 O.A.R. 267 (Ont. C.A.).

333. (1978) 5 Alta. L.R. (2d) 358 (Alta. S.C. App. Div.).

cancelled $6,000 of the arrears. The trial judge had awarded interest on the arrears at the legal rate under s. 34(16) of the Judicature Act. Mr. Justice Sinclair, for the majority, stated that this provision did not apply to awards of maintenance made pursuant to a decree of divorce as an award under s. 34(16) was more in the nature of damages. The calculation of interest on arrears of maintenance fell to be determined, he felt, under the provisions of sections 13-15 of the Interest Act, since a sum of periodic maintenance awarded under s. 11 of the Divorce Act,[334] fell within the definition of a "judgment debt" found in s. 15 of the Interest Act. As a result simple interest was to be calculated at the rate of five per cent on each periodic payment of $250 not paid, from the date it should have been paid until payment was made or the sum was otherwise satisfied.[335] In *Harris* v. *Harris* [336] Anderson LJSC declined to make any award of interest on substantial arrears of maintenance under a California divorce decree, distinguishing the *Zilka* decision on the basis that, in the case before him, the amount of such interest would be so great that there would be no reasonable likelihood the husband would ever be in a position to pay and the calculation of such interest would present a virtually impossible task, as there had been a number of payments made on account of arrears but applied indiscriminately to the total arrears. It does not appear that, if there is a judgment debt within the meaning of s. 13, there is any discretion in the court as to whether or not interest will be awarded — merely a discretion as to when the interest will be calculated from under s. 14.

H. CROWN LIABILITY

Historically the Crown was not liable for interest unless a statute or contract provided for it.[337] This is still the case in respect of actions against the Federal Crown, by virtue of s. 35 of the Federal Court Act,[338] although s. 40 of that Act directs that, unless otherwise ordered by the court, interest runs on a judgment, including a judgment against the Crown, from the time of giving the judgment, at the rate prescribed by s. 3 of the Interest Act. Claims originating in Quebec, founded on tort and governed by the Crown Liability Act,[339] may be dealt with differently from claims originating in another province and there is authority that interest can be allowed in such cases.[340] In *Canadian Industrial Gas & Oil Ltd.* v. *Government of Saskatchewan* [341] the Supreme Court considered the question of remedies against the provincial Crown in Saskatchewan

334. R.S.C. 1970, c. D-8.

335. *See In Re Salvin Worseley* v. *Marshall* [1912] 1 Ch. 322 referred to by Sinclair J.A., where interest was allowed on arrears on an annuity, to be calculated as at the date of judgment for that part of the arrears that had accumulated at the time of judgment and from the date of accrual for the parts that accrued subsequently.

336. (1980) 21 B.C.L.R. 145 (B.C.S.C.).

337. *R.* v. *Carroll* [1948] S.C.R. 126 at 132 *per* Taschereau J.; *R.* v. *Roger Miller & Sons Ltd.* [1930] S.C.R. 293 at 299.

338. R.S.C. 1970 (2nd supp.), c. 10; *Eaton* v. *The Queen* (1972) 31 D.L.R. (3d) 723 at 730 (F.C.T.D.) *per* Kerr J..

339. R.S.C. 1970, c. C-38.

340. *R.* v. *Nord-Deutsche Versigherungsgesellschaft* (1971) 20 D.L.R. (3d) 444 (S.C.C.).

341. [1978] 6 W.W.R. 477.

under the Proceedings Against the Crown Act.[342] That statute, like its Alberta[343] and B.C. equivalents, provides, in effect, that in proceedings against the Crown the rights of the parties are as nearly as possible the same as in a suit between person and person and the court may make any order that it may make in proceedings between persons and otherwise give such appropriate relief as the case may require. The Supreme Court found that, by virtue of the statute, a court's jurisdiction to award interest under s. 46 of the Saskatchewan's Queen's Bench Act (the Saskatchewan equivalent to the Alberta Judicature Act, s. 15) also extended to claims against the provincial Crown.[344]

VI. PLEADINGS AND PROOF

Although the traditional view has been that a plaintiff is generally not required to plead an interest claim[345] unless he is claiming interest as of right under an express or implied agreement or by virtue of some statute such as the Bills of Exchange Act s. 57,[346] the Alberta Court of Appeal has recently expressed the view that, because of the increase of claims for interest, interest should be claimed in the prayer for relief.[347] Lack of a proper pleading can present problems on noting in default or default judgment,[348] although these problems are not as severe as formerly was the case.[349] In cases where a statement of claim includes a claim for a debt or liquidated demand with or without interest (whether as debt or damages) and any defendant fails to defend or demand notice as to that debt or demand or any part of it, Rule 148 of the Alberta Supreme Court Rules now permits the plaintiff to enter judgment against the defendant for a sum not in excess of the amount in respect of which there is no defence or demand of notice and costs, together with such interest indebtedness as is justified by the statement of claim, except that, if interest is claimed by way of damages (whether under statute or otherwise) judgment for the interest may only be entered by leave of the court, which may direct that the interest claim be determined on an assessment in the manner provided by Rule 152. The reference to "such interest indebtedness as is justified by the statement of claim" would appear applicable only to claims of interest on a contractual basis whether express,

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342. R.S.S. 1965, c. 87.

343. Proceedings Against the Crown Act, R.S.A. 1980, C. P-18.

344. *Crown Zellerbach Canada Ltd.* v. *The Queen* (1979) 101 D.L.R. (3d) 240 at 244 (B.C.C.A.).

345. *See Riches* v. *Westminster Bank Ltd.* [1947] A.C. 390 (H.L.); *affg.* [1943] 2 All E.R. 725; *Burland* v. *Earle, supra* n. 146; *Jefford* v. *Gee* [1970] 1 All E.R. 1202 at 1206 *per* Denning M.R.; Chitty's p. 772 footnotes 37 and 38. In *Sheba Gold Mining Co.* v. *Trubshawe* (1892) 1 Q.B. 674 at 682 it was suggested that where interest was sought to be recovered as a debt due under either contract or statute, the specifics of the contract, or the facts that brought the case within the statute, ought to be plead in the statement of claim.

346. *See Greenshields Inc.* v. *Johnston* (1981) 35 A.R. 487 (Alta. C.A.); Bullen and Leake, *Precedents & Pleadings* (13th ed.) 579.

347. *Eyben* v. *K.R. Ranches (1970) Ltd., supra* n. 190 at 347 *per* McGillivray, J.A..

348. *See Green* v. *George* (1907) 42 S.C.R. 219; *Veilleux* v. *Herron* [1926] 2 W.W.R. 383 (Alta. S.C.T.D.); *Fowle* v. *Klassen, supra* n. 202.

349. *Hoover* v. *Burrows* [1945] 3 W.W.R. 683 (Alta. S.C.); *Ewing* v. *Latimer* (1903) 5 Terr. L.R. 499.

implied or by virtue of custom or usage. Claims for interest pursuant to section 15 of the Judicature Act can only be the subject of default judgment with leave of the court. The Alberta Court of Appeal has indicated that it would be better to plead the facts that establish an improper withholding and a proper rate.[350] and that it is fair and equitable that the party in default should make compensation by way of interest.[351] Although judicial notice may be taken of high interest rates and the cost of money[352] it would be better to lead relevant evidence as to rates, which may be either the rate the claimant pays to his bank, if the claimant is indebted to the bank or the rate of interest the claimant could obtain on a guaranteed investment certificate or some other form of investment, if the claimant intended to invest the money.[353] Failure to plead or lead evidence as to appropriate rates coupled with delay in bringing the action may well prejudice the plaintiff in terms of the rate awarded,[354] and "the judge should not be left to pull interest rates from the folds of his gown in the same manner as a magician pulls rabbits out of his hat".[355] Amendments may be allowed on application to plead interest claims at the conclusion of trial.[356] In a default situation an affidavit of a banker or some other person experience in the cost of borrowing money in the period under consideration who can swear as to the going rate of interest in that period may be required in every claim under s. 15 of the Judicature Act.[357] In cases where there are no pleadings in the ordinary sense it may not be appropriate to apply all of the pronouncements of the Court of Appeal in *Eyben*.[358]

VII. STATUTE OF LIMITATIONS

There is authority for the proposition that if a principal amount is irrecoverable by virtue of the expiration of a limitation period so is interest payable on that amount.[359] It has been stated that a claim for interest under the English equivalent to s. 15 of the Judicature Act, apart from any obligation imposed by contract or imposed by law, is not in itself a cause of action or even a part of a cause of action.[360] Under the Limita-

350. *Eyben* v. *K.R. Ranches*, *supra* n. 190 at 347; *Poon Estate* v. *Dickson*, *supra* n. 187.

351. *Eyben* v. *K.R. Ranches*, *supra* n. 190 at 347.

352. *See* Quigley J. in *Phoenix Press Co.* v. *Vinto Eng.* at 25; *cf. Chambers* v. *Leech*, *supra* n. 36.

353. *Eyben* v. *K.R. Ranches*, *supra* n. 190 at 499; *Poon Estate* v. *Dickson*, *supra* n. 187.

354. *Chambers* v. *Leech*, *supra* n. 36.

355. *Ziola* v. *Cooperative Fire & Casualty Co.* [1976] 6 W.W.R. 159 at 169 (Sask. Q.B.) *per* Disbery J..

356. Alta. S.C. Rules, 132; *Central Welding Ltd.* v. *Western Assurance Co.* [1976] 6 W.W.R. 169 (Alta. S.C.); *Gorieu* v. *Simonot* [1982] 6 W.W.R. 221 (Sask. Q.B.).

357. *Fowle* v. *Klassen*, *supra* n. 201 at 499.

358. *Deloitte, Haskins & Sells Ltd.* v. *Bank of Nova Scotia*, (unreported) (Alta. Q.B.) Edmonton.

359. *Cheang Thye Phin* v. *Lam Kin Sang* [1929] A.C. 670 (J.C.P.C.).

360. *See Jefford* v. *Gee*, *supra* n. 345; *Crown Zellerbach Canada Ltd.* v. *The Queen*, *supra* n. 344 at 242; *Ottawa* v. *Ottawa Elec. R. Co.*, *supra* n. 192; *Union Investment Co.* v. *Wells* (1907) 39 S.C.R. 625; *Silver Standard Mines Ltd. (N.P.L.)* v. *Granby Mining Co.* (1971) 19 D.L.R. (3d) 578 (B.C.C.A.); *Royal Bank of Canada* v. *Dodge* [1942] 1 W.W.R. 270 (Alta. S.C.); *McPherson* v. *McBain* [1932] 3 W.W.R. 617 (Alta. S.C.T.D.).

tions of Actions Act,[361] an action for arrears of interest must be brought within six years.[362] In the case of interest on a sum of money charged or payable out of land, a legacy or the personal estate or a share of the personal estate of a person dying intestate that is possessed by his personal representative, the action must be brought within six years after the present right to recover it accrued to a person capable of giving a discharge or release therefor, with extension in the case of part payment or written acknowledgment of the arrears. The limitation period for foreclosure of mortgages or agreements for sale is, of course, 10 years. Where a prior mortgagee has been in possession of land within the one year preceding an action by a subsequent mortgagee on the same land, the subsequent mortgagee can recover the arrears of interest that become due during the whole time the prior mortgagee was in possession or receipt, although that time may have exceeded six years.[363]

VIII. PAYMENT INTO COURT

In *McCallum* v. *Trans North Turbo Air (1971) Ltd.*,[364] the Northwest Territories Supreme Court dealt with the situation where monies had been paid into Court and, some two years later, one day after the death of the plaintiff, solicitors for the plaintiff filed a notice of acceptance which demanded the principal sum paid in plus "accrued interest". The Court found that the notice of acceptance was not a notice of acceptance

361. R.S.A. 1980, c. L-15.

362. *See* s. 4(1)(c) for interest other than interest on debts charged on land and s. 15 for interest on the latter.

363. *See* s. 16.

364. (1978) 8 C.P.C. 1 (N.W.T. S.C.).

within the meaning of the Northwest Territories Rules of Court by virtue of the "rider" with respect to accrued interest included therein.[365]

In *Hardie* v. *Gelleny* [366] the Court considered the question of whom was entitled to interest earned on monies paid into court in satisfaction of the plaintiff's cause of action, liability being denied, and accepted by the plaintiff in satisfaction of his claim exclusive of costs. The Clerk had paid the interest earned on the monies in Court to the defendant's solicitors and the plaintiff had made successful an application directing that interest be paid to the solicitor for the plaintiff. On appeal the Court found that the issue must be decided upon a construction of the rules in Part XII of the Alberta Rules of Court namely:

> 174. A person paying money into court is entitled to credit therefor as of the date on which it was paid to the clerk.
>
> 181. The interest earned on money in court shall be paid to the person entitled thereto on payment out of the principal.

The Court found, that the grammatical construction of Rule 181, its history and the purpose of payment into court with the denial of liability left no doubt that the interest earned on the money so paid in accrued in favour of the persons who paid the money in unless and until the money

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365. The question as to what right a party accepting a payment into court has to additional interest has been considered in several jurisdictions. In *Jefford* v. *Gee*, *supra*, n. 345, Lord Denning observed that since a claim for interest under the successor to Lord Tenterden's Act need not be pleaded and was not part of the cause of action, and since a plaintiff under the British rules was only allowed to make a payment into court "in satisfaction of the cause of action" the payment in should only be in respect of principal — i.e. — sufficient to satisfy the "cause of action" apart from interest. The court's discretion, Lord Denning held, should be exercised as to the difference between the amount paid in and the amount awarded in respect of the cause of action (which would not include interest). The successful party entitled to an amount of money pursuant to the judgment would, in any case, receive the appropriate award of interest regardless of the payment into court. *See also MacDonald* v. *Lockhart* (1980) 118 D.L.R. (3d) 397 (N.S.C. App. Div.) per MacKeigan C.J.N.S. at pp. 422-425 (leave to appeal to S.C.C. refused December 15, 1980 loc. cit.). The result in *Jefford* v. *Gee* was criticized in the *Report on Personal Injury Litigation — Assignment of Damages* (no. 56) London H.M.S.O. 1973 paragraph 284 and the *Law of Contract: Report on Interest* Cmnd. 7229, paragraph 198 (1978). In *Butler* v. *Forestry Commission* (1971) 115 Sol. J.O. 912 (C.A.), the Court of Appeal suggested that the plaintiff could avoid the unfairness that could result from the *Jefford* v. *Gee* doctrine by writing an open letter to the defendant accepting the principal sum paid on the condition that interest be added to it. If the defendant did not accept this conditional acceptance and the plaintiff succeeded in recovering a sum that, with interest, exceeded the amount paid into court, the court would take the plaintiff's letter into account and exercise its discretion in the matter of costs in the plaintiff's favour. *See Vehicle and Gen. Insce. Co. Ltd. (in Liquidation)* v. *H & W Christie Ltd.* (1976) 1 All E.R. 747 (Q.B.). In *Kellner* v. *Greig* (1979) 103 D.L.R. (3d) 244; 15 B.C.L.R. 126 (B.C.C.A.) Mr. Justice Taggart distinguished *Jefford* v. *Gee* on the basis that the B.C. Supreme Court Rules refer to the money paid in being "in satisfaction in whole or in part of the claim for which the plaintiff sues" and, under the then B.C. Prejudgment Interest Act, interest was a "claim for which the plaintiff sues". In Alberta, Rules 165 and 166 of the Rules of Court are at best ambiguous, referring to both "a sum of money in satisfaction of the claim" or "in satisfaction of one or more of the causes of action". Waddams, *supra*, n. 39, at p. 502 suggests that the result in *Kellner* v. *Greig* is sound, and that the result ought not to vary according to the exact wording of the Rule of Court governing payment into Court, the plaintiff being entitled to costs unless the defendant's payment in was sufficient to satisfy the principal amount eventually recovered, with interest earned up to the date of payment in. *See Rushton* v. *Lake Ontario Steel Company* (1980) 112 D.L.R. (3d) 144; 29 O.R. (2d) 68 (Ont. H.C.) cf. *Baker* v. *Gascon* (1981) 26 C.P.C. 43 (Ont. Co. Ct.).

366. (1979) 11 C.P.C. 285 (Alta. S.C. App. Div.).

was accepted in satisfaction of the claim. The Court found that Rule 181 simply determined when the interest on money in court was payable not to whom it was payable. It found that if interest accrued in favour of the person entitled to accept the money in satisfaction of his claims that person would be able to set off the interest against the costs incurred against since the payment into court and, if no such costs had been incurred, such person would have kept the action alive at his profit rather than at its "peril". The imposition of costs against and the concomitant award of interest to the person accepting the money paid into court would at the same time amount to a punishment on the one hand and a reward on the other for not earlier accepting the amount tendered in satisfaction of his claim. That result could be avoided by the more reasonable construction that favoured the party who made the payment in.

IX. CONCLUSION

McGregor has described the early case law upon the recovery of interest as "riddled with inconsistency".[367] Such a description can be applied with equal force to the modern Alberta law on the topic. Stifled by a statutory jurisdiction derived from a poor effort at 19th Century reform and with Alberta judges generally not possessing the temerity of a Lord Denning, Alberta courts have in most cases merely added their own voices to the cacophony resulting from irreconcilable extrapolations of outmoded principles. In surveying the case law on the recovery of interest one is mindful of the words of Benjamin Cardozo in respect of the law generally:[368]

> "The fecundity of our case law would make Malthus stand aghast. Adherence to precedents was once a steadying force, the guarantee as it seemed, of stability and certainty. We would not sacrifice any of the brood, and now the spawning progeny, forgetful of our mercy, are rending those who spared them. Increase of numbers has not made for increase of respect. The output of a multitude of minds must be expected to contain its proportion of vagaries. So vast a brood includes the defective and the helpless."

What the law in Alberta requires as a first step towards resolution of the dilemma can, at this stage of development, only be achieved by the legislature. The efforts of sister provinces in recent years offer invaluable insights into both the benefits and perils of such a legislative initiative. They should be a source of profit rather than of shame.

POSTSCRIPT

Bill 6, the *Pre-Judgment Interest Act*, was introduced into the Alberta Legislature on March 19, 1984.

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367. McGregor on Damages, *supra*, in 4 at 328.

368. Benjamin N. Cardozo, *The Growth of the Law*, (1924) at 4-5.