

[HOUSE OF LORDS.]

THE LONDON, CHATHAM AND DOVER	} APPELLANTS ;	H. L. (E.)
RAILWAY COMPANY		
AND		
THE SOUTH EASTERN RAILWAY COM-	} RESPONDENTS.	1893
PANY		<u>July 28</u>

*Interest—Money payable at Time depending on a Future Contingent Event—
Time depending on Verification of Accounts—Damages for detention of Debt
—3 & 4 Wm. 4, c. 42, s. 28.*

An award made upon a joint traffic agreement between two railway companies determined that accounts should be rendered by each company to the other in May ; that a payment of not less than 75 per cent. should be made on account of the balance appearing to be due on the face of the accounts so exchanged, and that this payment should be made as soon after the 1st of June as possible and not later than the 15th of June. A large balance became due from one of the companies to the other, to recover which an action was brought and interest claimed :—

Held, affirming the decision of the Court of Appeal ([1892] 1 Ch. 120), that no interest could be recovered under 3 & 4 Wm. 4, c. 42, s. 28 ; since there was no “debt or sum certain payable by virtue of a written instrument at a certain time,” within the meaning of that statute : nor had any demand of payment claiming interest been made in writing : and that interest could not be given by way of damages for detention of the debt, the law upon that subject, unsatisfactory as it is, having been too long settled to be now departed from.

APPEAL from an order of the Court of Appeal ([1892] 1 Ch. 120). Disputes having arisen upon a joint traffic agreement made in 1865 between the appellant and respondent companies they were referred to Mr. Smithells. The only question with which this report is concerned arose upon that part of his award made on the 22nd of September 1868 by which he determined as follows :—

“That for the future rendering, examining, and settling of the joint traffic agreement accounts between the two companies, they shall be made up monthly, and completed within a reasonable period, and as early as possible. For example: 1st. The ordinary accounts for the month of February shall be rendered

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"2nd. The joint agreement account, compiled from the ordinary account, shall be exchanged between the companies by the end of the same month (May).

"3rd. A payment of not less than 75 per cent. shall be made on account of the balance appearing to be due on the face of the accounts so exchanged, and this payment shall be made as soon after the 1st of June as possible, and not later than the 15th of June. . . ."

Disputes having arisen as to the accounts under the award the appellants brought an action in 1884 against the respondents, claiming an account. The official referee who took the account found a large sum due from the defendants to the plaintiffs, of which about £36,000 was for interest which he allowed under 3 & 4 Wm. 4, c. 42. Kekewich J. allowed the interest: the Court of Appeal (Lindley, Bowen and Kay L.JJ.) disallowed it (1). The plaintiffs appealed upon this point and upon another question not relevant to this report.

By 3 & 4 Wm. 4, c. 42, s. 28, it is enacted "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 certain 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."

July 11, 13, 14, 21, 24, 27. Sir *Horace Davey* Q.C. and *Haldane* Q.C. (*Levett* Q.C. and *Warrington* with them) for the appellants:—

The Court of Appeal felt bound to follow *Merchant Shipping Company v. Armitage* (2) in which interest was refused on money

(1) [1892] 1 Ch. 120.

(2) Law Rep. 9 Q. B. at p. 114.

payable under a charterparty on the ground that the principal sum was not payable at a time certain, notwithstanding the later case of *Duncombe v. Brighton Club and Norfolk Hotel Company* (1), in which it was held that the day for payment need not be mentioned in the instrument, if an event were fixed the date of which could be ascertained afterwards. The claim for interest must be made out under Lord Tenterden's Act (3 & 4 Wm. 4, c. 42). The sum in this case is certain and payable at a certain time—that is at a date which might be ascertained. In the former case the question of interest was not fully argued. In the latter, Mellor and Lush JJ. held interest to be payable, but Blackburn J. differed. It is a narrow construction to hold that a “certain time” must mean a named day. The maxim *Certum est quod certum reddi potest* applies here. The question of interest was not mentioned in the headnote of the report of *Merchant Shipping Company v. Armitage* (2), and it did not find its way into the Digest. Until the mutual rights of the companies were ascertained no exchange of accounts was possible and without such exchange no interest could be claimed. In *Mackintosh v. Great Western Railway* (3) before Stuart V.C., it was held that interest might be claimed on a sum payable at a certain date when the amount had to be ascertained by the Court. The respondents ought not to be allowed to be in a better position in consequence of their own default. In *Arnott v. Redfern* (1826) (4) it was decided before Lord Tenterden's Act, that a jury might allow interest in the shape of damages when a creditor had been wrongfully kept out of money due under a contract; and in *Hilhouse v. Davis* (5) interest was given on a sum awarded by way of compensation for damage done to property, the interest being in the nature of damages for detention of the money.

The claim for interest may be sustained on four grounds: First that *Armitage's Case* (2) was wrongly decided; secondly, that demand has been made under the statute 3 & 4 Wm. 4, c. 42. To comply with that Act all that is required is that there should

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(1) Law Rep. 10 Q. B. 371.

(3) 4 Giff. 683.

(2) Law Rep. 9 Q. B. at p. 114.

(4) 3 Bing. 353.

(5) 1 M. & S. 169.

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be a debt in existence, which there certainly is. The Act draws a distinction between “debts or sums certain.” Thirdly, on the authority of *Mackintosh’s Case* (1); and fourthly, that interest may be claimed at common law on sums improperly detained, as decided in *Arnott v. Redfern* (2).

*William Willis* Q.C., and *C. T. Mitchell*, for the respondents:—

The moneys paid under this arrangement are not in satisfaction of debt. This is not a sum certain; it is contingent on several events. If *Merchant Shipping Company v. Armitage* (3) is good law it governs this case, and the accounts must be rendered before any money is payable. If the accounts are not exchanged, the day for payment never comes; no demand can be made; the conditions on which alone any sum is to become due have not been fulfilled. The object of Lord Tenterden’s Act was to put all debts of a fixed amount, and due on a fixed day, on the footing of a bill of exchange. In order to make the Act apply there must be an instrument disclosing the amount to be paid. Here there is no contract at all; the parties never got beyond negotiation. As compared with *Merchant Shipping Company v. Armitage* (3) this is an *à fortiori* case, because in that case there was a fixed sum, £5000, due at an ascertainable date, two months after the ship’s arrival. The statute requires the demand of the correct sum. Best C.J. was wrong in his statement of the law as it then was in *Arnott v. Redfern* (2) because he held that the demand in the writ for interest was sufficient, whereas it is settled that there must be a separate demand. In *Page v. Newman* (4) Lord Tenterden C.J. said: “It is a rule sanctioned by the practice of more than half a century that money lent does not carry interest.” There was there a sum secured by a written instrument to pay money within a month after A.’s arrival in England. *Higgins v. Sargent* (5) was cited, in which it was held that life policy moneys did not bear interest. *Arnott v. Redfern* (2) was considered in *Page v. Newman* (4) and disapproved. In *Hilhouse v. Davis* (6) Lord Ellenborough C.J. expressly abstained

(1) 4 Giff. 683.

(2) 3 Bing. 353.

(3) Law Rep. 9 Q. B. at p. 114.

(4) 9 B. & C. 378.

(5) 2 B. & C. 348.

(6) 1 M. & S. 169.

from laying down a general rule and simply declined to disturb the damages given by the jury. In *Foster v. Weston* (1) no interest was allowed on money secured by an instrument under seal. In Selwyn's *Nisi Prius*, edition of 1827, under "Action of Debt," *Arnott v. Redfern* (2) is not referred to, and it was laid down that the damages given in an action of debt were merely nominal. Lord Tenterden's Act fixes the time by the notice required in sect. 28. The necessity for a demand in writing of a sum certain was insisted on in *Hill v. South Staffordshire Railway Company* (3). The appellants did not verify their claim and there has been no conduct on the respondents' part to prevent their doing so. There was no such refusal on the respondents' part to carry out the agreement as would bring the case within *Frost v. Knight* (4), where there was a promise of marriage on a given event and the defendant refused before the happening of the event to carry out his promise and was held liable to damages. The law under this head is explained by Cotton L.J. in *Johnstone v. Milling* (5).

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[LORD WATSON referred to *Mackay v. Dick* (6).]

[They also cited *Taylor v. Holt* (7); *Ward v. Eyre* (8); *Cook v. Fowler* (9); Selwyn's *Nisi Prius*, edition 1842.]

Sir *H. Davey* Q.C. in reply :—

In *Eddowes v. Hopkins* (10) Lord Mansfield C.J. said that interest was payable by the usage of trade, by special agreement or in cases of long delay. In *Craven v. Tickell* (11) Lord Thurlow said it was the constant practice at Guildhall to give interest either by the contract or in damages upon every debt detained. In *Marsh v. Jones* (12) which was a case of vendor and purchaser, Cotton L.J. at p. 566 said it was not a case of interest but of damages. *Cameron v. Smith* (13) and *Hudson v. Fawcett* (14) contain dicta to a like effect.

(1) 6 Bing. 709.

(2) 3 Bing. 353.

(3) Law Rep. 18 Eq. 154.

(4) Law Rep. 7 Ex. 111.

(5) 16 Q. B. D. 460, 469.

(6) 6 App. Cas. 251.

(7) 3 H. & C. 452, 457.

(8) 15 Ch. D. 130.

(9) Law Rep. 7 H. L. 27, 37.

(10) 1 Douglas, 376.

(11) 1 Ves. Jun. 59, 62.

(12) 40 Ch. D. 563.

(13) 2 B. & Ald. 305.

(14) 7 Man. & G. 348.

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My Lords, the official referee allowed interest on the sums he found to be due by virtue of what is known as Lord Tenterden's Act. Kekewich J. was of opinion that he was justified in so doing. The Court of Appeal took a different view. The provisions of that Act (3 & 4 Wm. 4, c. 42, s. 28) are as follows: "That upon all debts, or sums certain, payable at a certain time"—I leave out for the moment the words "or otherwise" because they relate to a different part of the section to which I shall have to refer presently—"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." In order, therefore, to justify the allowance of interest, it must be shewn that there is a debt or sum certain payable at a certain time by virtue of some written instrument. Unless that can be established the case does not come within the words of that part of the section.

In the present case it is contended on behalf of the respondents that there was no debt or sum payable at a certain time under a written instrument. The case on behalf of the appellants rests upon the provisions of Mr. Smithells' award, by which a payment of not less than 75 per cent. was to be made "on account of the balance appearing to be due on the face of the accounts so to be exchanged, and this payment shall be made as soon after the 1st of June as possible, and not later than the 15th of June." It is said that 75 per cent. of the balance, than which the payment was not to be less, was an ascertainable amount by looking at the account, and that therefore it was a "sum certain"; that "as soon after the 1st of June as possible, and not later than the 15th of June," indicated at latest the 15th of June, and that was a "time certain," and therefore you had a sum certain payable at a time certain, namely, the 15th of June, and by virtue of a written instrument, namely, Mr. Smithells' award.

The question which arises has not been without judicial con-

sideration in previous cases. In *Merchant Shipping Company v. Armitage* (1), the Exchequer Chamber came to the conclusion that where a sum of money was payable under a charterparty after the right delivery of the cargo, in cash two months after the date of the ship's report inwards at the custom house, although the time was ascertained and became settled by the event, the money was not payable at a "time certain" within the meaning of the statute. In the case of *Duncombe v. Brighton Club and Norfolk Hotel Company* (2), which was decided more than a year after, but in ignorance of the fact that the Exchequer Chamber had decided in the manner that I have mentioned, Mellor and Lush JJ. came to the conclusion that although you had not the sum or the time actually mentioned in the written instrument, yet if the written instrument contained provisions which on the happening of an event rendered the time or the sum certain, that was sufficient within the meaning of the statute, and interest could be allowed. Blackburn J. differed from the decision at which the majority had arrived. He took the same view of the statute as the Exchequer Chamber had done in the case of *Armitage* in the previous year.

I do not think it is necessary to express any decided opinion as to which of those views is the correct one. Undoubtedly the decision of the Exchequer Chamber, supported as it is by the concurrence of Blackburn J., arrived at independently and in ignorance of the decision of the Exchequer Chamber, is authority of very great weight; and I should not dissent from such a body of authority without very serious consideration. But, my Lords, in the present case I do not think it necessary to decide between those two differing views, because even if the view of the law taken in *Duncombe's Case* (2) by the majority be more accurate than the view expressed by Blackburn J. in that case, and by the Exchequer Chamber in *Armitage's Case* (1), I do not think that here it can be said that there was a sum certain payable at a time certain by virtue of a written instrument. There are several difficulties in the way of so holding. For example, the time of payment is to be "as soon after the 1st of June as possible, and not later than the

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(1) Law Rep. 9 Q. B. at p. 114.

(2) Law Rep. 10 Q. B. 371.

H. L. (E.) 15th of June." It is a little difficult to say that that is a time certain even as regards the 15th of June; but upon that I do not dwell. The real difficulty is this—although the words of the statute are "debts or sums certain payable," I think that the certain sum payable must be a certain sum which is due absolutely and in all events from the one party to the other, though it may not come, strictly speaking, within the term "debt." But here the payment of this 75 per cent. was really provisional only. No doubt it was contemplated as very unlikely that there would be any rectification or verification of the accounts which would make a difference of more than 25 per cent. Nevertheless, if it had appeared that in reality, owing to errors in the accounts, 75 per cent. exceeded the amount due, that would have had to be adjusted by some kind of repayment or rectification in a subsequent account; and, therefore, this is not really a provision for the payment of a debt or a sum certain absolutely from one party to the other; it is at best a provisional payment which may have to be undone by a subsequent adjustment. My Lords, for these reasons I do not think it can be held in the present case that there is a sum certain payable at a certain time by virtue of a written instrument.

Then the statute provides for another case in which interest may be allowed, namely, if a demand has been made in writing for the amount with notice that interest will be claimed. In the present case that has not been complied with. It has been said that there was not an opportunity of complying with it because for a time the respondents refused to exchange accounts and to proceed under the agreement at all. In certain cases that might in equity entitle the party who was in the right in the contest to treat the matter as if he had given such notice; if, for example, he had written, "It is impossible to ascertain the exact amount because you will not give me a proper account; but I give you notice that I claim whatever is the amount, with interest from this date." I think if he had taken such a step as that, although it would not have been at law a compliance with the terms of the statute, in equity he would have been regarded and ought to have been regarded as being in the same position as if he had complied with the statute.

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But in the present case there was no attempt, as far as I can see, to do anything of the kind. There was nothing like a notice given that a certain sum was due and that interest would be claimed, and that the only reason why the amount was not stated was that there had been a failure to deliver the necessary accounts. Therefore at law the case is clearly not within the second part of sect. 28 of Lord Tenterden's Act, nor do I think that in equity a sufficient case has been established to entitle the appellants to interest.

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But, my Lords, the appellants contended that even although they might not under the terms of Lord Tenterden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of their debt. I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; and for this reason, that I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events. But I have come to the conclusion, upon a consideration of the authorities, agreeing with the Court below, that it is not possible to do so, although no doubt in early times the view was expressed that interest might be given under such circumstances by way of damages.

The first case to which we were referred was *Eddowes v. Hopkins* (1), where Lord Mansfield held, "that though by the common law book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade or of a special agreement" (which of course is beyond question), "or

(1) 1 Douglas, 376.

H. L. (E.) in cases of long delay under vexatious and oppressive circumstances if a jury in their discretion shall think fit to allow it." That is somewhat vague; the jury would have to consider whether there had been a long delay and whether the circumstances were vexatious and oppressive, and some difficulty might be felt in determining either what was sufficiently long to satisfy the rule or what was vexatious and oppressive.

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In a subsequent case, *De Havilland v. Bowerbank* (1), Lord Ellenborough laid down a somewhat different rule; he said that interest ought only to be allowed, (1.) where there is a contract for payment on a day certain, as on bills of exchange; (2.) where there is an express promise; (3.) where it may be inferred from the course of dealing; and (4.) where the money has been actually used and interest made of it. This is much more limited than the doctrine laid down by Lord Mansfield, and there seems a good deal in the point made by the then Attorney-General with reference to the last ground, that the damages would be estimated by what the defendant had gained, not by what the plaintiff had lost. I cannot say that the rules laid down by Lord Ellenborough are very satisfactory.

In the case of *Arnott v. Redfern* (2) the question came before the Court of Common Pleas, presided over by Best C.J., the other judges being Park, Burrough, and Gaselee, JJ. That was a case in which a judgment had been obtained in a Scotch Court, and interest had been given, practically speaking, I think from the time when the debt had become due. The question was whether in a declaration on this judgment in this country the part of the claim relating to interest should be allowed. Best C.J., in giving the judgment of the Court, considered whether interest could have been given under such circumstances according to the law of England. He quoted the case of *Eddowes v. Hopkins* (3), and he also quoted the passage cited by the learned counsel yesterday in argument, where the Lord Chancellor said, in the case of *Craven v. Tickell* (4): "From conversations which I have had with the judges, interest is given either by the contract or in damages upon every debt

(1) 1 Camp. 50.

(2) 3 Bing. 353.

(3) 1 Douglas, 376.

(4) 1 Ves. Jun. 60.

detained." And in his judgment Best C.J. says: "If it had appeared by evidence that the plaintiff had taken no steps for so many years to recover his debt, interest could not have been recovered for it in this country; and the question would have arisen whether we could have carried into execution the judgment of the Scotch Court which gave interest in a case where our law did not allow it." "But we have no right to conclude that the plaintiff quietly permitted the debt due to him to remain in the hands of the defendant. In many cases it is presumed that when nothing is proved to have been done nothing has been done"; but that he says was not the case before him. Then he says: "However a debt is contracted, if it has been wrongfully withheld by the defendant after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money." Now, that is a very clear expression of principle and a rule sufficiently definite. The only difficulty which might arise is in construing what is meant by "endeavouring to obtain payment of it." If it were confined to endeavouring to obtain payment by process of law, there would not be the slightest difficulty, and the rule might well have been worked out. But I think from the expressions used that probably the Chief Justice did mean to refer, not merely to endeavouring to obtain it by litigation, but endeavouring to obtain it by demand or otherwise. If that general proposition had been regarded as law, I think that it might have justified in the present case allowing interest to some extent to the appellants.

But in the case of *Page v. Newman* (1) the matter was considered by the Court of King's Bench, presided over by Lord Tenterden, the other judges sitting with him being certainly judges of high authority, namely, Bayley, Littledale, and Parke JJ. He there referred to the language of Best C.J., which I have just read, and he said: "If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in *Arnott v. Redfern* (2) would seem to warrant, viz., that interest is due wherever the debt has been wrongfully withheld after the plaintiff has

(1) 9 B. &amp; C. 378.

(2) 3 Bing. 353.

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H. L. (E.) endeavoured to obtain payment of it, it might frequently be made a question at nisi prius whether proper means had been used to obtain payment of the debt and such as the party ought to have used. That would be productive of great inconvenience. I think that we ought not to depart from the long-established rule that 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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Now, my Lords, I cannot profess to be altogether satisfied with the reason which Lord Tenterden gives, although of course for so eminent a judge one entertains the greatest respect. To say that it might be made a question at nisi prius whether proper means had been used, and that it might be productive of great inconvenience, does not seem to me a satisfactory reason for excluding altogether any claim to interest by way of damages in cases where justice requires that it should be awarded. There might be inconvenience; but it seems to me that such inconvenience might reasonably be submitted to, and ought to be submitted to, if it is necessary for the purpose of applying a sound principle in a just manner. There are a great many things at nisi prius which are decidedly inconvenient; no doubt one would desire always to avoid inconvenience in determining questions between litigants; but it cannot be avoided, and therefore I do not profess to be altogether satisfied with the reason which Lord Tenterden gives. Nevertheless, so far as I am aware, from that time down to the present the rule which Lord Tenterden lays down has been followed, and no attempt has been made (or at all events has received the sanction of the Courts) to revert to the earlier and, as I think, more liberal views of those who preceded him. And one cannot shut one's eyes to the fact that Lord Tenterden, who presided and delivered that judgment, was the author of the statute to which I have been directing the attention of your Lordships under which interest can now be allowed; and when he dealt with the allowance of interest in this statute he certainly introduced language which kept such claims within very narrow limits; speaking for myself, they seem to be too narrow for the purposes

of justice. Nevertheless, having regard to the view of the law laid down by the Court of King's Bench in the case which I have just mentioned, and to the statute passed subsequently with obvious reference to it by the Legislature, and the absence since that time of any case in which the doctrine of Lord Mansfield or of Best C.J. has received practical effect in any decision in any of the courts, I do not think it would be possible nowadays to reopen the question, even in this House, and to hold that interest under such circumstances could be awarded.

My Lords, for these reasons I have come to the conclusion that the Court below were right upon the question of interest, and that their judgment in that respect must be affirmed. Inasmuch as I move your Lordships to reverse that judgment so far as it relates to the £30,000 item and to affirm it so far as it relates to interest, I would advise your Lordships that no costs should be given either in this House or in the Court of Appeal, but that here and in the Court of Appeal each party should bear their own costs.

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LORD WATSON:—

My Lords, upon both questions raised in this appeal I have had little difficulty in coming to the same conclusion with the Lord Chancellor. My noble and learned friend has dealt with the case, in all its aspects, so fully and satisfactorily, that I shall content myself with briefly indicating the leading considerations which have influenced my opinion.

Upon the second question I see no reason to doubt that the decision of the Court of Appeal is right. Whatever might be said in regard to the older authorities upon the matter of interest, I am of opinion that the law laid down by Lord Tenterden in *Page v. Newman* (1), to the effect that “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,” is not now open to question. The Act 3 & 4 Will. 4, c. 42, is evidently framed upon the assumption that the law was correctly stated by Lord

(1) 9 B. & C. at p. 381.

H. L. (E.) Tenterden in that case ; and in dubio such a statutory recognition is not unimportant. Besides, Lord Tenterden's rule, 1893  
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except in cases when it has been relaxed by the statute, appears to have been followed in the decisions since its date.

The appellants cannot in my opinion bring their claim for interest within the first branch ; and whilst I approve of the equitable rule to which Stuart V.C. gave effect in *Mackintosh v. Great Western Railway Company* (1), I do not think it can be strained so far as to give them the benefit of the second branch of the statute. I regret that I am unable to differ from your Lordships upon the question whether interest could be given in this case by way of damages ; I think it clearly cannot, for the reasons which have been sufficiently expressed by the Lord Chancellor and by the learned judges of the Appeal Court. To my mind the state of the law as settled by statute and decisions is not altogether satisfactory.

LORD MORRIS :—

My Lords, I concur in the judgment which has been moved ; and I desire to add that on the construction of 3 & 4 Will. 4, c. 42 I entirely concur in the judgment of the Exchequer Chamber in the case of *Merchant Shipping Company v. Armitage* (2).

LORD SHAND :—

My Lords, I have very little to add to what has been said by your Lordships, concurring as I do in the opinions which have been delivered by the Lord Chancellor and by my noble and learned friend opposite (Lord Watson).

Upon the question of interest, I find that the figures given by the official referee with regard to the amount involved are certainly very considerable. I see that he reported that in his opinion there ought to be an item of £22,171 and another item of £14,574, making together somewhere about £36,000 or £37,000, paid in the name of interest, and that upon the footing that very large sums of money had been retained in the coffers of the respondent company which ought long ago, or at all

(1) 4 Giff. 683.

(2) Law Rep. 9 Q. B. at p. 114.

events in the course of their accounting from time to time, to have been paid to the appellant company. That being the state of matters, I confess that I have looked with very great anxiety to the possibility under the law of England, as I have heard it argued, of giving interest in this case, for I cannot help thinking that a gross injustice is the result of withholding it. It appears to me that it is a defective state of the law that one party should be entitled to retain a large sum such as this (it might have been a smaller sum, but the principle would be the same—it strikes one more forcibly when you come to deal with such sums as this) by simply creating delay in furnishing the requisite accounts and by refusing payment.

My Lords, I am unable to agree with what has fallen from my noble and learned friend near me (Lord Morris) as to the case of *Armitage*; I confess that as the result of the reasoning in those cases and the argument which I have heard, the case of *Duncombe* appeals much more forcibly to my mind than what was said in the *Exchequer Chamber*, and to a certain extent I think said without any reasons being given; but, having regard to the reason which the Lord Chancellor has given as to the provisional character of these payments, I do not think that interest can be allowed. My Lords, I do not venture to express any confident opinion as to the possibility of interest being given in the way of damages. This is a subject with which I am very unfamiliar; but I concur in thinking that authority seems to be against it.

I shall only add that I regret that the law of this country in regard to the running of interest is not like the law of Scotland, with which I am more familiar. In that country it is the common and ordinary practice, in bringing an action for money which is due, to conclude not only for the payment of that money but for the payment of interest upon it from the date of citation or service of the summons, and interest is decreed as a matter of course on whatever balance is found to be due. I may even say that it is a rule which has received general effect, that where money is shewn to have been due and to have been demanded, interest runs if the demand or request of payment is not acceded to. That is the case, even although too large a sum

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may have been demanded. If it be found that a sum short of what was demanded is due, still the law gives interest unless the amount really due has been tendered. It is not necessary that an intimation must be made that interest will be demanded in order that interest shall run, and I cannot help thinking that it is desirable that no such strict law as that expressed in Lord Tenterden's statute should continue to be the rule in this country.

Order appealed from reversed on a point not relevant to this report; in other respects affirmed; the appellants and respondents respectively to bear their own costs in this House and in the Court of Appeal; Cause remitted to the Chancery Division.

Lords' Journals 28th July 1893.

Solicitors for appellants: *C. & S. Harrison & Co.*

Solicitor for respondents: *W. R. Stevens.*

[HOUSE OF LORDS.]

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 July 31.

THE STOCKTON AND MIDDLESBROUGH	} APPELLANTS;
WATER BOARD	
AND	
THE KIRKLEATHAM LOCAL BOARD .	RESPONDENTS.

*Waterworks—Purchase of Mains, Pipes, and Fittings—Principle of Valuation
 —Price without Compensation for Loss of Profits.*

A water board was constituted by a special Act with the right of supplying water within the boundaries of two boroughs and also certain districts beyond those boundaries; provided that when so required by the sanitary authority of any such outlying district the board should sell to such sanitary authority the mains, pipes, and fittings belonging to the board within that district "at a price to be fixed, in default of agreement, by an arbitrator;" and after such sale the board should cease to supply water within such district.

In an arbitration under this provision between the board and an outlying district:—

Held, that upon the true construction of the special Act the word