The Law Commission

(LAW COM. No. 88)

Law of Contract

REPORT ON INTEREST

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*)
OF THE LAW COMMISSIONS ACT 1965

Presented to Parliament by the Lord High Chancellor,
by Command of Her Majesty
June 1978

LONDON
HER MAJESTY'S STATIONERY OFFICE
£2.10 net

Cmnd. 7229

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Kerr, *Chairman*

Mr. Stephen Edell.

Mr. W. A. B. Forbes, Q.C.

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INTEREST

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THE LAW COMMISSION

INTEREST

To the Right Honourable the Lord Elwyn-Jones, C.H., Lord High Chancellor of Great Britain

PART I

INTRODUCTION

Terms of reference

1. On 21 November 1974 you requested us, pursuant to section 3(1) (*e*) of the Law Commissions Act 1965,

> "To consider the law and practice relating to interest on debt (where interest has not been provided for by contract) and on damages, and to make recommendations."

2. At that time we had already done some work on the subject of interest in two different connections. First, we had considered awards of interest in respect of damages for death or personal injury as part of our work under Item VI of our First Programme. We had considered, in particular, the guide-lines laid down by the Court of Appeal in *Jefford* v. *Gee*[1] and had made a number of recommendations for reform in our Report on Personal Injury Litigation – Assessment of Damages[2]. This Report was submitted to you in 1973 but we understand that the implementation of our recommendations will be considered in the context of the examination of the report of the Royal Commission on Civil Liability and Compensation for Personal Injury[3]. We return to the topic of interest on damages in Part III of this report.

3. Secondly, we had considered the question of interest as part of our work under Item I of the First Programme, the examination of the law of contract with a view to codification. While engaged on this work our attention was drawn by practitioners to practical difficulties in the existing law relating to awards of interest. In addition, we noted the recommendation in the Report of the Payne Committee on the Enforcement of Judgment Debts[4] that "the whole question of interest on claims under contract should be examined". You have now referred the topic to us in terms wide enough to allow general consideration of the principles on which interest should be recoverable on debts and on damages, in contract cases and in other cases too.

4. We should, however, mention the aspects of the law of interest which we have treated as being outside our terms of reference. First, there is the law relating to contractual interest, by which we mean interest payable by one contracting party to the other according to the terms of their agreement. This has been excluded expressly by the terms of reference you have given us[5] and, as a result, we have left the law

[1] [1970] 2 Q.B. 130.
[2] (1973), Law Com. No. 56, paras. 263 to 286.
[3] (1978), Cmnd. 7054; see especially paras. 739 to 756.
[4] (1969), Cmnd. 3909, para. 1165.
[5] Para. 1, above.

relevant to money-lending and the statutory and other restrictions on the recovery of contractual interest entirely out of account in this report.

5. Secondly, there is the law relating to interest on judgement debts. This was considered in some detail by the Payne Committee on the Enforcement of Judgment Debts and was the subject-matter of a number of recommendations in their Report in 1969[6]. We understood from you that we were to omit the law relating to interest on judgment debts from our consideration and we did not discuss it in our consultative document, Working Paper No. 66. However, many of those who commented on the paper commented on the law relating to interest on judgment debts as well. Accordingly, we have some observations to make on them later in this report[7].

6. Thirdly, we have not concerned ourselves with the use of interest rates as a means of apportioning income between tenants for life and remaindermen, and the law relating thereto, the best known case in this branch of the law being *Howe* v. *Lord Dartmouth*[8]. Rather, we have concentrated in this report, as in our Working Paper No. 66, on situations where interest is or should be recoverable as a means of compensating someone for being kept out of his money.

The present law

7. We made a detailed examination of the existing law in Part II of our Working Paper No. 66. No one who sent us comments suggested that there were any serious errors or omissions. It is convenient to start this report with a brief résumé.

8. First, there is the position at common law. The general rule is that interest may not be claimed in respect of the non-payment of a contract debt unless the parties have provided for the payment of interest, either expressly or impliedly[9]. The same rule applies to interest on debts that are actionable in quasi-contract although there are certain situations in which interest may be recovered. For example, where a vendor fails to return the deposit which has been paid by the purchaser in respect of land to which the vendor cannot make title[10]. As for interest on damages, the general rule at common law is that it will only be awarded in contract cases where the parties have provided for the payment of interest, expressly or impliedly. It may not be recovered in tort cases at common law, either as part of the damages or as additional compensation for delay in payment.

9. Secondly, we should mention the recovery of interest in Admiralty cases. The general rule here runs contrary to the common law rule: it is that the plaintiff who is entitled to damages arising out of a collision at sea may recover interest if he has been prejudiced by the defendant's delay in meeting his claim[11].

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[6] Cmnd. 3909, paras. 1168 to 1170.
[7] Part V, paras. 178 to 184, below.
[8] (1802) 7 Ves. Jun. 137; 32 E.R. 56. We understand that this topic is currently being considered by the Law Reform Committee.
[9] *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] A.C. 429.
[10] *De Bernales* v. *Wood* (1812) 3 Camp. 258; 170 E.R. 1375.
[11] See Working Paper No. 66, (1976), paras. 29 to 30.

10. Thirdly, there is the equitable jurisdiction. Interest may be awarded as ancillary relief in respect of equitable remedies such as specific performance, rescission or the taking of an account. Furthermore, the payment of interest may be ordered where money has been obtained and retained by fraud[12], or where it has been withheld or misapplied by an executor or a trustee or anyone else in a fiduciary position[13].

11. Finally, we should mention the cases where interest may be recovered by statutory enactment. Certain rights are provided by statute, such as the right to interest on a judgment debt where the judgment is obtained in the High Court[14], the right to interest on a dishonoured bill of exchange[15] and the partner's right to recover interest on certain moneys advanced by him to the firm, subject to agreement to the contrary[16]. In addition, there is a wide power, accorded to the courts by section 3 of the Law Reform (Miscellaneous Provisions) Act 1934, to include an award of interest in the sum for which judgment is given in any proceedings, tried in any court of record, for the recovery of any debt or damages. The relevant parts of the Act, which is referred to hereafter as "the 1934 Act", are set out at the end of this report as Appendix A. The 1934 Act is most frequently invoked in actions for damages and, in particular, damages in respect of death or personal injury, in which case interest is awarded in accordance with the guidelines laid down in *Jefford* v. *Gee,* to which we referred earlier[17]. Interest may also be awarded under the 1934 Act in respect of debts, usually but not necessarily[18] debts arising in contract.

12. The general principle governing the award of interest under the 1934 Act was described by Lord Denning M.R. in *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.*[19] in the following words:

> "It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."

Major criticisms of the present law

13. The 1934 Act may appear, at first glance, to have closed a gap in the common law by enabling the court to award interest on debts and on damages whenever the defendant has kept the plaintiff out of his money. There are, however, a number of situations in which the plaintiff may not recover interest under the 1934 Act even though the defendant has defaulted on his obligations to the prejudice of the plaintiff. Our major criticism of the existing law is that the plaintiff here has no right

[12] *Johnson* v. *R.* [1904] A.C. 817.
[13] *Wallersteiner* v. *Moir* (*No.* 2) [1975] Q.B. 373.
[14] Judgments Act 1838, s.17; Administration of Justice Act 1970, s.44 and statutory instruments made thereunder.
[15] Bills of Exchange Act 1882, s.57. There is a right at common law as well. See para. 23, below.
[16] Partnership Act 1890, s.24(3).
[17] Para. 2, above. They are considered in detail in Part III, at paras. 107 to 120, below.
[18] *The Aldora* [1975] Q.B. 748, 751 *per* Brandon J.
[19] [1970] 1 Q.B. 447, 468.

of redress. The situations are concerned, for the most part, with the non-payment of contract debts and are as follows:—

(*a*) where, before proceedings are started, the debtor tenders payment of the debt, but tenders nothing by way of interest for the period that the debt has been withheld;

(*b*) where the debtor withholds payment for a time but pays the debt, without anything in respect of interest, before a judgment is obtained against him;

(*c*) where the plaintiff obtains a judgment for the debt without a trial, for example, where the debt is admitted or where judgment is obtained in default of appearance or in default of a defence being delivered.

14. The plaintiff usually cannot recover interest in the situations just described although he has been kept out of his money without justification. He may, of course, claim interest where he has a right to it by contract or by statute but, as we mentioned earlier[20], the general rule at common law is that the mere non-payment of a debt does not involve the debtor in an obligation to pay interest. Admittedly, the 1934 Act empowers the courts to make discretionary awards of interest where proceedings are tried and result in a judgment for the plaintiff but for reasons which we consider more fully later[21] the discretionary award is not available in the particular situations outlined in the preceding paragraph. We reached the provisional conclusion at an early stage that the existing law was in these major respects unsatisfactory and ought to be changed[22].

Working Paper No. 66

15. In our working paper (Working Paper No. 66 on Interest) we discussed the reform of the existing law under two main heads, interest on debts and interest on damages. We suggested[23] that the criticisms of the existing law in regard to interest on debts would be most conveniently answered by the introduction of what we described as "statutory interest" on contract debts. The gist of our scheme was that creditors should have a statutory right to be paid interest on contract debts at a prescribed rate, save where the parties had otherwise agreed. This, we thought, would meet the major criticisms of the existing law, described above[24].

16. As for interest on damages, our provisional conclusion was that the existing law was not in general need of reform[25] but that there were a number of respects in which the 1934 Act might be improved[26]. We reminded readers of the criticisms of the *Jefford* v. *Gee* guide-lines that we had made in our Report on Personal Injury Litigation—Assessment

[20] Para. 8, above.
[21] Paras. 31 to 33, below.
[22] Working Paper No. 66, (1976), paras. 38 to 45 and 95(*a*).
[23] *Ibid.*, paras. 65 and 95 (*b*).
[24] At paras. 13 to 14.
[25] Working Paper No. 66, (1976), para. 119.
[26] *Ibid.*, paras. 112 to 114 and 120(*c*).

of Damages[27]. Finally, we suggested[28] a change in Admiralty law and practice, namely that the courts' inherent jurisdiction to award interest in Admiralty cases[29] should be abolished and that awards of interest in such cases should in future be based on the provisions of the 1934 Act.

Results of consultation

17. Our working paper was published on 25 May 1976 and many people and organisations wrote to us with their views. We received comments from trade associations, from commercial organisations in the public and private sectors, from self-employed persons, from legal practitioners, from law teachers and from those representing the consumer interest. A list of the individuals and organisations from whom comments were received appears at the end of this report as Appendix B. We also studied comments on the topic of interest made in national newspapers and in legal and other periodicals where it has been much discussed.

18. We have been greatly assisted by the comments that were sent to us. Most were directed towards the proposals set out in our working paper but some commentators submitted alternative proposals and some drew our attention to problems that we had not discussed in our paper. Taken all in all it was a most valuable and thought-provoking consultation; we are extremely grateful to all those who took part.

19. It is convenient to summarise at this stage the general trend of comments that we received. First, as to interest on debts, there was universal dissatisfaction with the existing law and almost unanimous support for our proposal that a scheme of statutory interest should be introduced[30]. Second, as to interest on damages, there was general support for the view that no radical changes were needed but that the 1934 Act needed to be revised in several respects. A minority argued that interest on damages should be recoverable as of right, a view which we had considered but provisionally rejected in our working paper[31]. Third, as to the recovery of interest in Admiralty cases, there was a division of opinion: some were content with our suggestion that the Admiralty jurisdiction should be absorbed into the wider jurisdiction created by the 1934 Act; others argued strongly that the Admiralty jurisdiction should be retained in its present form.

Aspects of the present law that are not in need of reform

20. Although commentators were generally critical of the existing law, particularly in relation to the recovery of interest on contract debts, there were some aspects of the law which were accepted on all sides as not requiring reform. In Parts II to V of this report we will be concentrating on features of the present law that seem to be unsatisfactory. However, it may help to clear the ground if we mention first those parts of the existing law that we, and those who sent us comments, believe require no reform.

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[27] (1973), Law Com. No. 56, paras. 263 to 286.
[28] Working Paper No. 66, (1976), paras. 107 and 120(*e*) and (*f*).
[29] Para. 9, above.
[30] Para. 15, above.
[31] Working Paper No. 66, (1976), paras. 96 to 107.

(a) The equitable jurisdiction

21. The equitable jurisdiction to award interest and to fix the rate at which it should be paid is extensive. It includes, for example, the power to order the payment of interest where money has been obtained or withheld by fraud or where it has been misapplied by someone in a fiduciary position[32]. In such cases the court has an inherent power to order the payment of interest at whatever rate is equitable in the circumstances and may direct that such interest be compounded at appropriate intervals[33]. Our view is that it would not be appropriate to impose statutory controls upon the exercise of the equitable jurisdiction to award interest, beyond those controls that are already in existence[34]. We invited criticisms of this view in our working paper[35] but no one disagreed with us. Accordingly, we make no recommendations for change in relation to the equitable jurisdiction.

(b) The matrimonial jurisdiction

22. The courts appear to have no jurisdiction to award interest as such in matrimonial cases, except when determining property disputes under section 17 of the Married Women's Property Act 1882[36]. The view that we expressed in our working paper was that the courts should have the power to provide suitable redress for the spouse or other person who was being kept out of money needed for his or her support but that the payment of interest was not necessarily the best way of doing this; we thought a better approach was to allow the courts wide powers to order such lump sum or other financial provision as might be just in the circumstances[37]. We invited criticisms of this approach but none were received. Courts with a divorce jurisdiction already have the sort of powers that we had in mind, as we pointed out in our working paper[38]. As for the magistrates' courts, our recent Report on Matrimonial Proceedings in Magistrates' Courts includes recommendations that those courts should be similarly empowered, although subject to certain restrictions[39]. We do not favour giving the courts the additional power to award interest in matrimonial cases and accordingly make no recommendations for further legislative changes in this area.

(c) Bills of exchange

23. Upon the dishonour of a bill of exchange the plaintiff may claim damages at common law or under section 57 of the Bills of Exchange Act 1882[40]. If he claims damages at common law he may generally

[32] Para. 10, above.
[33] *Wallersteiner* v. *Moir* (*No.* 2) [1975] Q.B. 373.
[34] The equitable jurisdiction to award interest is already regulated by, for example, R.S.C., O. 44, rr. 18 and 19, and C.C.R., O. 29, rr. 14 and 15.
[35] Working Paper No. 66, (1976), para. 35.
[36] The jurisdiction was widened by the Matrimonial Causes (Property and Maintenance) Act 1958, s.7 to include disputes over the proceeds of sale of disputed property, and was extended by the Law Reform (Miscellaneous Provisions) Act 1970, s.2(2) to disputes between formerly engaged couples. For a case in which interest was allowed at first instance but disallowed on appeal see *Harrison* v. *Harrison*, reported at (1975) 5 Family Law 15.
[37] Working Paper No. 66, (1976), paras. 32, 33 and 35.
[38] *Ibid.*, para. 32.
[39] (1976), Law Com. No. 77, paras. 2.30 to 2.39.
[40] *In re Gillespie. Ex parte Robarts* (1885) 16 Q.B.D. 702.

recover interest as part of the award[41]. Likewise, if he claims damages under the Bills of Exchange Act he may recover interest as part of the award although the court may "if justice require it" disallow the claim for interest, wholly or in part[42].

24. In our working paper we suggested that the law and practice relating to the recovery of interest in respect of dishonoured bills of exchange was complicated but well-established and not in need of reform[43]. We invited criticisms of this view but received none. We accordingly make no recommendations for changing the law relating to the recovery of interest upon the dishonour of bills of exchange.

Scope and arrangement of the report

25. In the paragraphs that follow we consider the need for legislative changes in the law and practice relating to interest on debt and on damages, omitting only such aspects of the existing law as appear to be outside our terms of reference[44], or are not thought by us or by anyone who sent us comments to be in need of reform[45].

26. The report is divided up into five further Parts as follows:—

PART II INTEREST ON DEBTS
Our principal concern in this Part is with the formulation of a scheme for the recovery of statutory interest in respect of contract debts.

PART III INTEREST ON DAMAGES
Here we consider (*a*) personal injury litigation and awards of interest, (*b*) awards of interest in Admiralty and (*c*) awards of interest on damages generally.

PART IV THE 1934 ACT
In this Part we consider the jurisdiction which is conferred on courts of record by the 1934 Act and changes that might be made.

PART V OTHER PROBLEMS
We deal, in Part V, with a miscellany of problems in the existing law that cannot be fitted conveniently into Parts II, III or IV.

PART VI SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS
We end the report with a summary of our conclusions and recommendations.

27. There are three Appendices annexed to this report. Appendix A sets out the text of the material parts of the 1934 Act. Appendix B is a list of the individuals and organisations from whom comments on Working Paper No. 66 were received. Appendix C contains a draft Bill with explanatory notes; the Bill puts in legislative form the various recommendations for change in the existing law that are summarised in Part VI.

[41] The right to damages by way of interest upon the dishonour of a bill of exchange has long been established as an exception to the general common law practice of refusing interest. See *De Havilland* v. *Bowerbank* (1807) 1 Camp. 50, 51; 170 E.R. 872, 873, *per* Lord Ellenborough C.J.
[42] Bills of Exchange Act 1882, s.57(3).
[43] Working Paper No. 66, (1976), para. 36.
[44] Paras. 4 to 6, above.
[45] Paras. 20 to 24, above.

PART II INTEREST ON DEBTS

The problem

28. Contract debts are of many kinds, ranging from the price due for goods or services to wages, insurance premiums and bank overdrafts. We do not propose to attempt an exhaustive list but merely to indicate the great variety of situations in which one person may, by contract, become the debtor of another. The two characteristics that all such situations have in common are first, that the basis of the obligation is contractual and secondly, that the obligation relates to an ascertained or ascertainable sum which is payable under a contract (as opposed to "damages" which are payable for breach).

29. Contracting parties may stipulate for the payment of interest in addition to, or as part of, the contract debt. Where the price for goods is made payable over a period of time, by instalments, it is usual for an obligation to pay interest to be included in the contract. With many every-day transactions, however, such as contracts of employment or contracts for the supply of food or fuel, it is unusual for the parties to provide for the payment of interest: it is assumed that the debtor will pay the money on the due date and nothing is said about what will happen if he does not. As for contracts entered into between businessmen, the position is not very different: the parties often agree (expressly or impliedly) when payment is to be made without agreeing what is to happen if there is a default.

30. As we indicated earlier[46], the common law rule is that a contract debt does not carry interest unless the contracting parties have agreed (expressly or impliedly) that it should. If a debtor defaults and the agreement does not provide for the payment of interest the creditor's remedy is to sue him to judgment and to enforce the judgment by such procedures as the law allows. In the case of a High Court judgment the creditor is entitled to interest on the debt between the date of judgment and date of payment but otherwise the creditor has no right to interest (except of course by contract). This means that the common law allows the ordinary debtor in the ordinary case to take a period of interest-free credit, down to the date of judgment, which the creditor never intended him to have: conversely, until judgment is obtained, the creditor is deprived of the use of his money without any right of redress. All those who sent us comments on this aspect of the law agreed that it worked unfairly.

31. The unfairness of the common law has been mitigated in part by the 1934 Act. This Act empowers any court of record to order that interest shall be included in the sum for which judgment is given at such rate as it thinks fit, on the whole or any part of the debt, for the whole or any part of the period between the date when the cause of action arose and the date of judgment[47]. However, the jurisdiction to make a discretionary award of interest may only be exercised "in any proceedings *tried* in any court of record"[48] and the 1934 Act provides that interest may

[46] Para. 8, above.
[47] The text is set out in Appendix A.
[48] Emphasis has been added.

be "included in the sum for which judgment is given" rather than that it may be "awarded". Accordingly, where the debtor contests his liability, loses the case and has judgment entered against him for the full debt, it is plain that the 1934 Act empowers the court to order him to pay interest on the debt at an appropriate rate from the date when it fell due down to judgment. It is, however, less plain what power the court has if the debtor does not contest his liability but consents to judgment, or admits liability, or allows judgment to be entered against him in default of appearance or of defence. Here, there is no "trial" of the proceedings and consequently no jurisdiction in the court to enter judgment for interest under the 1934 Act. It may be possible to obtain an assessment of interest following a default judgment in the High Court[49] but it does not appear that such a procedure is available in the county court which is where over three quarters of all default judgments are obtained[50]. Now that the jurisdiction of the county court in contract cases has been raised from £1,000 to £2,000[51], the county courts will, presumably, be taking a greater share of the debt-collecting litigation than they were before.

32. Apart from the difficulties raised by the requirement of the 1934 Act that the proceedings in question be "tried", there is another problem that we touched on earlier[52]. Since the Act provides that interest may be "included in the sum for which judgment is given" it seems to follow that if there is no sum for which judgment is given, there can be no order for interest to be paid. A judgment may not be obtained in respect of a debt that has been paid, so the creditor may not apply for interest under the 1934 Act in respect of a debt, however long withheld, that is paid before judgment. Moreover, it seems from the decision in *The Medina Princess*[53] that if the debt or debts are satisfied in part and judgment is entered for the outstanding balance the interest may only be awarded in respect of the balance.

33. Finally, there is the case where the debtor tenders payment of the debt before proceedings are brought. Unless the creditor is entitled to interest by the terms of the contract, the tender of the debt is valid even though nothing is tendered in respect of the loss caused to the creditor by the earlier non-payment. If the creditor refuses to accept a valid tender of the money and brings proceedings the debtor may rely on the tender as a complete defence; the creditor has thus no way of obtaining a judgment and, as a consequence, no way of obtaining an award of interest under the 1934 Act.

34. It is our conclusion that the 1934 Act only went part of the way towards remedying the unfairness of the common law; there are still

[49] Supreme Court Practice, para. 6/2/7A (1976 ed.).
[50] Judicial Statistics (1976), Cmnd. 6875 show that in 1976 99,560 judgments were obtained in the Queen's Bench Division of the High Court by default or under Order 14 and that in the same year 825,611 judgments were entered in the county courts without a court hearing; in 1975 there were 110,609 such judgments in the High Court as against 903,959 in the county court.
[51] The County Court (Amendment) Rules 1977, S.I. 1977, No. 604.
[52] Paras. 13(*a*) and (*b*), above.
[53] [1962] 2 Lloyd's Rep. 17.

substantial loopholes in the law which allow the bad payer to withhold payment to his personal advantage and to the detriment both of the creditor and of those who pay their debts on time. In times of high interest rates the injustice occasioned by this defect in the law is particularly acute and all those who sent us their views on the situation said that it was unsatisfactory and needed to be changed by legislation. We agree.

Possible solutions

35. Having identified the problem we have considered various ways of solving it. As we said in our working paper[54], there are two main ways of reforming the existing law: one would be by widening the scope of the 1934 Act so as to allow the courts greater discretionary powers; the other would be by providing the creditor with a statutory entitlement to interest in respect of unpaid debts. It would, of course, be possible to provide for both. In the paragraphs that follow we examine first the case for leaving the award of interest to the discretion of the court, as under the 1934 Act, but increasing the ambit of the court's jurisdiction. Secondly, we consider the case for introducing a statutory right to interest on unpaid contract debts. Thirdly, we comment on the provisions of other legal systems. We end up with our conclusions on the best way of proceeding.

(a) A wider discretion

36. Some commentators argued that the loophole in the existing law would be effectively closed simply by giving the courts wider discretionary powers so that they could make awards of interest even in cases where there had been no trial and no judgment. In favour of this approach it was said that it would allow the courts latitude to award interest (or refuse it) at whatever rate and over whatever period might appear, in the circumstances, to be just.

37. It was pointed out that some people make a deliberate policy of withholding payment as long as possible although they have the means to pay, whereas others fail to pay for no other reason than that they do not have the necessary financial resources. If the courts had a wide discretion they could exercise it leniently in the latter case, on the principle that "the wind should be tempered to the shorn lamb"[55] but could order the payment of interest at a higher rate or over a longer period in the case of the wilful defaulter. A scheme for making contract debts carry statutory interest at a prescribed rate would, in contrast, make no distinction between the wilful defaulter and the debtor who wanted to pay but was unable to; each would be liable to pay interest at the same rate over the same period which would, it is argued, be unjust. This, in summary, is the case put to us in favour of a wider discretion in the matter of interest as the only necessary reform.

(b) A statutory entitlement

38. As for allowing a creditor a statutory entitlement to interest, rather than the right to apply to the courts for a discretionary award,

[54] Working Paper No. 66, (1976), paras. 47 and 48.
[55] *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447, 468, *per* Lord Denning M.R.

the strongest points in its favour are that it would be simple to administer, it would be quick and it would be cheap in terms of legal costs. In cases where the debt was undisputed, as is the position in all but a very small proportion of cases[56], statutory interest would be recoverable by the same default procedure as the debt itself without a court hearing. The exercise of the court's discretion, on the other hand, would involve a court hearing, the submission of evidence and argument, even in undefended cases, all of which would add to the legal costs which either the creditor or the debtor would have to pay. As for the argument that it would be unfair to treat the rich debtor and the poor debtor in the same way, it is urged that the creditor's loss is the same in either case and that his right to redress should not depend upon the debtor's ability to provide it.

39. A further point may be made in favour of allowing a creditor a statutory entitlement to interest. It would make for greater certainty. The debtor would know what he had to pay and the creditor would know what he was entitled to receive; there would be less room for dispute than under a system of discretionary awards and there would be a further saving in costs. Interest would be recoverable in many cases without recourse to legal proceedings.

(c) The provisions of other legal systems

40. In our working paper we made a survey of other legal systems[57] including, in particular, the laws of countries within the European Economic Community, the laws of the United States of America and the new laws in Sweden which came into effect on 1 January 1976.

41. Within the European Economic Community the general rule is that where no provision has been made for the payment of contractual interest a creditor is entitled to claim interest at a rate prescribed by law. A formal demand for payment is a general requirement by the laws of Belgium, France, Luxembourg and the Netherlands. However, in Denmark, Germany and Italy the entitlement to interest accrues without a demand provided that the contracting parties have agreed on a date for payment of the debt. There is no entitlement to interest prior to judgment in Ireland, except for contractual interest. In Scotland interest is recoverable as of right at a rate determined by the courts where a debt has been withheld following a request for payment[58]. As for the United States of America, the laws of most States provide that a creditor is entitled to recover interest at a prescribed rate on unpaid contract debts; some require that there should be a formal demand for payment and a period of "grace" before interest will start to run. In Sweden there have been recent changes in the law. The creditor is now entitled to interest on contract debts at a prescribed rate, calculated

[56] Report of the Payne Committee on the Enforcement of Judgment Debts (1969), Cmnd. 3909, paras. 61 to 64.

[57] Working Paper No. 66, (1976), paras. 57 to 64.

[58] *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* [1893] A.C. 429, 443, *per* Lord Shand; *Riches* v. *Westminster Bank Ltd.* [1947] A.C. 390, 412, *per* Lord Normand. However, we understand that where there is no stipulation, express or implied, for interest, it must be concluded for in the summons and will only be awarded, at the earliest, from the date of citation.

from the date fixed for payment or, where no date has been fixed, from one month after the making of a formal demand for payment.

(d) Our preference

42. The great majority of those who commented on our working paper said that a wider discretion to award interest was not, by itself, enough: what was needed was a scheme whereby creditors could recover interest on unpaid debts at a prescribed rate. We were told by many that terms as to payment are frequently abused and that the only satisfactory way of checking such abuses and of providing adequate redress for the creditor would be by the introduction of statutory interest on the lines indicated in our working paper. There was no dissent on the main theme of our proposals from those representing the interests of consumers.

43. We believe that the introduction of statutory interest is appropriate and necessary. The points made in its favour[59] are, we think, sound and it would bring the law of this country into line with the laws of most western countries with which we have close trading links. A step in this direction has already been taken with the enactment of the Uniform Laws on International Sales Act 1967. This Act provides that, in international sales to which the Act applies[60], the seller is entitled to interest on the contract price, where the buyer delays payment in breach of contract, at 1 per cent over the official discount rate in the country in which the seller carries on business or, if he has no place of business, in the country where he resides[61].

44. Although we recommend the introduction of statutory interest, we also believe that the courts should have a discretion to award or refuse interest in situations that fall outside such a scheme. Where the defendant has obtained money by fraud or has misapplied or withheld funds entrusted to him in a fiduciary capacity the equitable jurisdiction[62] should be preserved. Moreover a residuary discretion, such as is provided by the 1934 Act, would still be needed to cover situations in which statutory interest would not be recoverable, for example, in relation to claims for damages and in connection with debts to which the scheme would not apply[63]. The question of interest on damages is considered in greater detail in Part III and the reform of the 1934 Act is the subject-matter of Part IV.

Statutory interest on contract debts

(a) The scheme in outline

45. In the remainder of this Part we consider the scope and the details of the scheme for statutory interest that we would like to see introduced. It may be helpful to start with an outline of the main features of the scheme and an explanation of its interrelation with other rights and remedies.

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[59] See paras. 38 and 39, above.
[60] Section 1(3) and (5) and Orders in Council made thereunder. The following countries are now Contracting States: Belgium, Israel, Italy, the Netherlands, San Marino and the United Kingdom.
[61] Uniform Laws on International Sales Act 1967, Sch. I, Art. 83.
[62] See para. 10, above.
[63] See Part IV, para. 147.

46. No one who commented on our working paper denied that the basis of an award of interest was to compensate the plaintiff for being kept out of his money by the defendant: most endorsed this view expressly and emphatically, as we do. We believe that it should be adopted as the basis of the scheme that we recommend. The other fundamental principle which has guided our thoughts is that contracting parties should not be prevented from agreeing on terms as to credit and as to the payment of interest that are different from those provided by the scheme. We would like the statutory right to interest on unpaid contract debts to take effect as if it were a term in the contract except where the parties have agreed that it should not or have provided for contractual interest instead. This would accord with a further element of the scheme we propose, namely that it should only apply to debts payable under a contract.

47. Our view is that the scheme should provide for the payment of interest at a rate which is, in commercial terms, realistic, and from a date by which, in a commercial setting, persons acting honestly and reasonably would be expected to have paid the debt[64]. This has led us to the conclusion that the right to interest should accrue from the date for payment of the debt where a date for payment has been agreed; otherwise it should accrue from shortly after the receipt by the debtor of a demand for payment. There are, however, some circumstances in which persons acting honestly and reasonably might be expected to withhold payment of the debt; in these circumstances, we believe that the courts should have a discretion to suspend or stop the running of statutory interest. These are the main characteristics of the scheme that we are recommending.

(b) The preservation of existing rights and remedies

48. As for the interrelation of rights under the recommended scheme with existing rights and remedies, there are four points that we wish to make clear, some of which may have been misunderstood by some of those who commented on the provisional proposals in our working paper.

49. First, we do not intend our recommendations to prevent contracting parties from agreeing on terms as to interest that are different from those provided by the scheme. Statutory interest is not to override contractual interest but is to fill the gaps where interest has not been provided for at all. This raises the question whether the parties should be free to contract out of the scheme or whether contracting out should be subject to regulation or judicial control. We have reached the conclusion, for reasons that are considered in detail later[65], that there should be no such regulation or control of contracting out.

[64] This accords with the principles applied by the courts in commercial cases in making discretionary awards of interest under the 1934 Act. See *Kemp* v. *Tolland* [1956] 2 Lloyd's Rep. 681, 691, *per* Devlin J; *The Rosarino* [1973] 1 Lloyd's Rep. 21, 27, *per* Mocatta J; *General Tire & Rubber Co.* v. *Firestone Tyre & Rubber Co. Ltd.* [1975] 1 W.L.R. 819, 836 to 837, *per* Lord Wilberforce.

[65] See paras. 95 to 99.

50. Secondly, we intend that the equitable jurisdiction to award interest should remain in its existing form[66]. However, this proposition needs to be qualified in one minor respect. It is theoretically possible for a contract debt to be eligible for an equitable award of interest, whether or not a right to interest is provided at law. For example, where money is lent for specified purposes there may be an obligation at law to repay and, at the same time, a duty in equity to account[67]. If the debt were to carry interest at law under our scheme (or indeed by contract[68]) the equitable jurisdiction to require the payment of interest would be subject to, although not necessarily displaced entirely by, the obligation to pay interest at law. Thus, by improving the creditor's chances of recovering interest at law our scheme would, in a sense, reduce the scope of the equitable remedy. We do not regard this as a curtailment of the equitable jurisdiction so much as an improvement in the remedies available at law.

51. Thirdly, we do not intend that the right to recover statutory interest should affect the scope or exercise of other rights and remedies under the contract. For example, the right of a building contractor to claim statutory interest on sums certified due for building work should not prejudice his other rights upon default in payment. Similarly, the right to statutory interest of a person who has hired out goods should not prejudice such rights as he may have to re-take possession of them for non-payment of the instalments.

52. Finally, we should explain that the creditor's right to statutory interest in situations falling within the recommended scheme is to be exercisable at his option; we are not suggesting that he should be under a duty to collect it as if it were something like Value Added Tax. The creditor's rights and duties in relation to the recovery of statutory interest should be the same as in relation to contractual interest.

Debts to which the scheme should apply

53. There are many different kinds of contract debt[69]. However, the considerations justifying the introduction of statutory interest seem to apply to all kinds of contract debt in the same way. In our working paper we suggested that no distinction should be drawn between debts incurred in the course of business (commercial debts) and those not so incurred (non-commercial debts)[70]. Everyone who sent us comments agreed with us on this point. We canvassed the idea of excluding small debts from the scheme by providing a cut-off point, say £100, below which debts should not carry statutory interest[71]. The almost universal response was that the exclusion of small debts by means of an arbitrary limit would create anomalies and injustice and was not desirable. The general reaction was that the case for statutory interest on small debts was at least as strong as in relation to large ones; some maintained that

[66] See the recommendation made in para. 21, above.
[67] *Barclays Bank Ltd.* v. *Quistclose Investments Ltd.* [1970] A.C. 567.
[68] *Mellersh* v. *Brown* [1890] 45 Ch.D. 225.
[69] See para. 28, above.
[70] Working Paper No. 66, (1976), para. 74.
[71] *Ibid.*, paras. 72-73.

it was stronger. A further suggestion was that with some contracts, such as for the supply of fuel, price rises could catch consumers unawares and the imposition of statutory interest on top would sometimes cause hardship; to meet this, it was suggested that legislation should allow for the exemption from statutory interest of such contracts as may be prescribed from time to time by statutory instrument. We do not favour this suggestion. There are many other ways of helping consumers to balance their household budgets, such as subsidies, income supplement, social security and so on. We think it would be more appropriate for problems concerning the payment of household bills to be dealt with by these means than by exempting such debts from carrying statutory interest.

54. Next, we should mention a kind of contract debt that attracted special comment on consultation, namely the sum payable under a contract as agreed damages for breach. The best known example is the so-called "penalty" clause although, of course, such a clause creates no binding obligation if its effect is to impose a penalty for breach rather than to make a sum payable which is a genuine pre-estimate of the damage likely to be occasioned. If we assume that the clause is binding at all[72], its effect is to create a debt payable under the contract and it ought, accordingly, to be included within our scheme for statutory interest. The same may be said of another kind of "penalty" clause, the provision for the payment of demurrage. Provided that the obligation to pay demurrage is binding, it creates a contract debt which ought, in our view, to be included within the scheme. We do not think that special provision for such clauses needs to be made in the Bill as they fall within our general approach to contract debts. We only mention them at this stage because of the concern expressed by some commentators that money due under such clauses should not be exempted from bearing statutory interest.

55. It is appropriate at this stage to refer to the effect of our scheme where a contract debt has been assigned. The right to be paid a contract debt (and indeed contractual interest) is a chose in action which may be assigned in whole or in part to a third person[73]. Moreover, the right to be paid a debt which has not been assigned forms part of the creditor's estate if he dies and it passes to his trustee if he is made bankrupt. As for statutory interest in respect of a contract debt, we intend that the creditor's right to it under our scheme should pass and should be assignable in the same way and subject to the same incidents as contractual interest.

[72] We discussed and commented on the existing law relating to penalty clauses in our Working Paper No. 61, (1975), on *Penalty Clauses and Forfeiture of Monies Paid* at paras. 6 to 48.

[73] Not all debts are capable of assignment but the general rule is that "any absolute assignment by writing under the hand of the assignor . . . of any debt or other legal thing in action, of which express notice in writing has been given to the debtor . . . is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice (*a*) the legal right to such debt or thing in action; (*b*) all legal and other remedies for the same . . ."; Law of Property Act 1925, s.136(1).

Debts to which the scheme should not apply

(a) Rent

56. Rent and other sums payable by a tenant to his landlord do not fit easily into our scheme. A landlord kept out of his money should, *prima facie,* be entitled to compensation in the same way as any other creditor kept out of his money. But there are two important considerations sufficient, in our view, to suggest that arrears of rent should not attract statutory interest in the same way as other unpaid contract debts. The first is that rent may not always be payable under a contract, and the second is that the payment and recovery of rent involves policies peculiar to the law of landlord and tenant which differ from those underlying our scheme. We elaborate upon these considerations in the following paragraphs.

57. The scheme for statutory interest which we have outlined above[74] is a scheme for interest on contract debts only, and we have indicated that we would like the statutory right to interest to take effect as if it were a term in the contract[75]. The relationship between landlord and tenant may, however, continue to exist even though the contract of tenancy between them has come to an end: it may be replaced by a tenancy created by statute. The most significant instance is where a statutory tenancy replaces a contractual tenancy which is protected for the purposes of the Rent Act 1977[76]. Another example is where a landlord gives his tenant notice to terminate a long tenancy of a dwelling house at a low rent to which Part I of the Landlord and Tenant Act 1954 applies: the tenant may be unwilling to give up possession and, if he is, the contractual tenancy may be replaced by a statutory one[77]. The factor common to statutory tenancies is that the obligation on the tenant in possession to pay rent to his landlord does not, *stricto sensu,* arise under a contract: the rent so payable is not therefore a contract debt to which our scheme would apply.

58. The essential position of the tenant is the same whether his rent is payable under a contractual tenancy or under a statutory tenancy and there seems little to justify drawing a distinction between them for the purpose of statutory interest. However, to include rent payable under statutory tenancies within our scheme would mean, to that extent, abandoning its basic principle which limits its application to contractual debts. On the other hand, distinguishing between rent payable under contractual and under statutory tenancies does not solve the difficulties over rent either. For even in the case of a contractual tenant, no convenient line can be drawn between "contractual" and "statutory" rent. Where rent is payable under a contract of tenancy of residential premises, the tenancy will very often be protected for the purposes of the Rent Act 1977[78]. One consequence of the tenancy being

[74] At paras. 45 to 47, above.
[75] At para. 46, above.
[76] Rent Act 1977, ss. 1 and 2.
[77] Landlord and Tenant Act 1954, s.6: however, if the landlord can establish any of the grounds for possession set out in cases 1-10 in Part I to Schedule 15 to the Rent Act 1977 the court may make an order for possession in his favour: see Rent Act 1977, s.98(1).
[78] Provided that, *inter alia,* certain conditions as to the rateable value of the premises and the amount of rent are satisfied.

protected is that either the landlord or the tenant is entitled, during the currency of the contract, to apply to the rent officer for a fair rent to be registered for the premises in question[79]. The tenant cannot after registration be compelled to pay more than the fair rent[80]. Where the recoverable rent is fixed, not by an agreement between the parties, but by a third party acting in pursuance of a statutory procedure, it can be argued that the sum due and payable as rent is not fixed by the contract and should not therefore be within our scheme. This is one illustration of the type of difficulty that arises where rent is payable under a statutory provision rather than under a contract.

59. The second consideration militating against arrears of rent carrying statutory interest is that there are special social policies involved in the rules as to the payment and recovery of rent which are at present either embodied in the general law of landlord and tenant or, as we have seen above, are effected by statutory intervention in the landlord-tenant relationship. This intervention has been particularly extensive in relation to residential tenancies: one of its objects has been to strike a balance between the interests of both parties. A provision that rent should carry statutory interest might well upset this balance. Indeed, it has been represented to us that such a proposal would, at least in relation to residential tenancies, be undesirable.

60. In the light both of these representations and of the practical and theoretical difficulties of accommodating the statutory regulation of tenancies within our general scheme, we do not think it appropriate to include rent in any form within the statutory scheme we are proposing for contract debts. However, we understand that the Department of the Environment are currently reviewing the Rent Acts after extensive consultation, and they will doubtless wish to consider the matter of interest on unpaid rent in the light of the proposals in this report. Additionally, we are working on codification of the law of landlord and tenant and we shall, in due course, be able to consider, after consultation, the special problems of interest on contractual rent.

61. Our recommendation therefore is that rent and other sums payable under a contract of tenancy should be excluded from our statutory scheme. Furthermore, we believe that it would be anomalous if sums payable by way of rentcharge were treated any differently from rent[81] and we recommend that they too should be excluded from our scheme. This will not, of course, necessarily result in landlords who are kept out of their money being deprived of interest on arrears of rent. They will still be able to make provision for interest in the contract itself, and indeed we understand that it is becoming an increasingly common practice for landlords of business premises to do this. If no

[79] Rent Act 1977, s.67; similarly, under the Agricultural Holdings Act 1948, s.8, either the landlord or the tenant may demand a reference to arbitration of the question of what rent should properly be payable in respect of the holding and the arbitrator can increase or reduce the rent previously payable or direct that it continue unchanged.

[80] Rent Act 1977, s.44.

[81] By Rentcharges Act 1977, s.2, only a very limited class of rentcharges may be created after 22 August 1977.

such provision has been made, the landlord will still be entitled to ask the court to exercise its discretion to award him interest on arrears under the 1934 Act as modified by our proposals[82].

(b) Foreign money liabilities

62. Contracts that contain a foreign element can create problems. One is that the recoverability of contractual interest depends on the proper law of the contract which may be foreign[83]. We intend the right to statutory interest on contract debts to have the same incidents as contractual interest[84]; accordingly, contract debts should only carry statutory interest under our scheme where the proper law of the contract is English. Where the proper law is foreign the scheme should not apply; the recovery of interest as a contractual entitlement should depend on the relevant foreign law.

63. There is another problem with contracts containing a foreign element. Although the proper law of the contract may be English, the contract may provide for money to be paid in a foreign currency, or may give one of the parties the right to choose the currency of payment. If, prior to payment, the value of the foreign currency rises or falls against the pound, the payment in a foreign currency will be more or less valuable than if the debt had been payable in pounds sterling. If there are further currency fluctuations while payment is being wrongfully withheld, difficult questions are posed as to what, if any, interest ought to be payable and what, if any, adjustment should be made in the interest rate to take account of the rise or fall in the value of the currency of payment. It also raises other more general problems which we are at present considering under a different context (Foreign Money Liabilities) and on which we intend to report at a later date[85]. We propose to deal with interest problems in that report when advising on foreign money liabilities generally and have accordingly decided to exclude from our present recommendations anything to do with interest on contract debts where the debt is or may be payable in a foreign currency. We should, however, say something about the existing law.

64. At present, under the 1934 Act, the courts have a wide discretion as to the rate of interest to be applied in relation to the recovery of contract debts. This latitude enables the courts to choose a rate appropriate to the currency of payment where the currency is foreign[86] if this is what the justice of the case requires. We are content to leave the question of interest on foreign money liabilities to the exercise of the courts' discretion until we are in a position to report on the other and larger problems in this area.

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[82] Part IV, paras. 146 to 148, below.
[83] Dicey and Morris, *Conflict of Laws* (9th ed., 1973), pp. 866 to 869; *Montreal Trust Co.* v. *Stanrock Uranium Mines Ltd.* (1965) 53 D.L.R. (2d) 594.
[84] See para. 46, above.
[85] Twelfth Annual Report (1976 to 1977), Law Com. No. 85, para. 44.
[86] *Miliangos* v. *George Frank (Textiles) Ltd. (No. 2)* [1977] Q.B. 489; *Helmsing Schiffarts G.m.b.h.* v. *Malta Dry Docks Corporation* [1977] 2 Lloyd's Rep. 444.

(c) Quasi-contract

65. In our working paper we proposed that statutory interest should be recoverable on debts arising in contract *or in quasi-contract*[87]. We did not discuss the implications of the latter part of this proposal in any detail and it attracted little comment from those we consulted. On reflection, however, it seems to us that the inclusion of quasi-contractual obligations within the scheme would cause serious difficulties.

66. The most serious obstacle to inclusion is that there are so many variegated categories of quasi-contractual claim, some of them clear, some not, some arising between contracting parties and some not[88]. Troublesome cases that may or may not be examples of quasi-contract include, for example, (*a*) where one surety claims a contribution from another surety with whom he has no contract (*b*) where someone seeks to be paid for services rendered under a contract that turns out to be void[89] (*c*) where a judgment creditor brings an action to recover a judgment debt[90]. A scheme for making all quasi-contractual obligations carry statutory interest would be extremely complicated and we doubt whether it would be an improvement in the law. There is also a difficulty of principle. Our idea that the right to statutory interest should take effect as if it were a term in the contract is hard to apply to money recoverable independently of the contract, or, indeed, without there being a contract at all. This reinforces our view that the scheme should only be applicable to contract debts.

(d) The contract debt that is itself interest

67. As we indicated in paragraph 46, statutory interest should not be payable where the parties have provided for contractual interest instead. We must now add that where a right to contractual interest is provided neither the debt *nor the interest* should carry statutory interest under our scheme. Nor, for that matter, should statutory interest itself carry statutory interest. If interest on interest were to be allowed it would lead to complications of the kind discussed later[91] in connection with compound interest. We think that there are practical difficulties in computing interest on interest and, accordingly, recommend that a debt which constitutes interest itself should not carry statutory interest as well.

(e) Sums payable under an obligation to indemnify against loss

68. Indemnity obligations need special consideration. The word "indemnify" has various shades of meaning. It might, in ordinary speech, be equated with "reimburse" and be applied where one contracting party agrees to pay the other a certain sum for his services and, in addition, to "indemnify" him against his out-of-pocket expenses. However, this is not the way the word "indemnify" is normally used in law. The legal meaning of an obligation to indemnify is an obligation

[87] Working Paper No. 66, (1976), para. 69.
[88] cf. *Moses* v. *Macferlan* (1760) 2 Burr. 1005; 97 E.R. 676.
[89] *Craven-Ellis* v. *Canons Ltd.* [1936] 2 K.B. 403.
[90] *Halsbury's Laws of England* (4th ed., 1974), vol. 9, para. 699.
[91] See para. 85, below.

to make good a loss suffered by another[92]. Within this broad definition of an obligation to indemnify are various sub-categories. There is, for example, the obligation of guarantee: this creates a secondary liability to make good the loss and it only comes into effect upon the default of some other person on whom the primary obligation rests. It is sometimes important to distinguish between an obligation of this kind and an obligation to indemnify which creates a primary liability on the indemnifier to make good the loss[93]. For our purposes, however, the points of difference are not of significance. Another sub-category of the obligation to indemnify is indemnity insurance; this sub-category may be divided still further into marine and non-marine indemnity insurance. The factor common to all these sub-categories is the obligation on one contracting party to indemnify the other against his loss.

69. In our working paper we concentrated on indemnity-insurance to the exclusion of other kinds of insurance and other kinds of indemnity. The feature that distinguishes indemnity from non-indemnity insurance is that the obligation of the insurer depends on the insured sustaining a loss; the insurer's duty is to indemnify the insured against that loss to the extent provided by the contract. With non-indemnity insurance (of which life insurance is a good example) the obligation is to pay a sum of money on the happening (or non-happening) of an event, irrespective of whether the event involves the insured in a loss. Of course, it is possible for one insurance policy to contain several obligations some of the indemnity type, some of the non-indemnity type; it is therefore necessary to refer to indemnity *obligations* rather than indemnity *contracts* or indemnity *policies*.

70. In our working paper we suggested[94] that insurance money which was payable under a non-indemnity obligation should carry statutory interest if payment was delayed, whereas insurance money payable under an indemnity obligation should not carry statutory interest: in the latter case there should be no entitlement to statutory interest, only a right to apply for a discretionary award of interest under section 3 of the 1934 Act (as revised). These proposals received general support on consultation and, although two points of difficulty were raised which are considered in the next paragraph, we are confirmed in our provisional view that money payable by insurers under an obligation to indemnify the insured against loss ought not to carry statutory interest.

71. There was a division of opinion about the obligation on insurers to pay money by way of indemnity where the loss has been agreed in advance (the so-called "valued" policy). It was contended by some that because the sum payable was ascertained by agreement it should carry

[92] *Halsbury's Laws of England* (4th ed., 1978), vol. 20, para. 305.

[93] Guarantees are only binding if evidenced in writing in accordance with s.4 of the Statute of Frauds 1677; this requirement does not affect other kinds of indemnity obligation. Also the distinction between guarantees and other kinds of indemnity obligation may be of importance if the loss is occasioned by a failure on the part of a minor to carry out a contract: *Yeoman Credit Ltd.* v. *Latter* [1961] 1 W.L.R. 828.

[94] Working Paper No. 66, (1976), paras. 81 and 82.

statutory interest as a debt. The difficulty with this argument is that even where there has been a valuation it does not follow that the sum arrived at in this way is necessarily payable in full. "The only effect of the valuation is fixing the amount of the prime cost; just as if the parties admitted it at the trial: but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity"[95]. In cases of damage rather than total loss, for instance, the agreed valuation is only one of a number of factors that go to determine what is in fact payable. Accordingly, we think that the so-called "valued" obligation should be treated in the same way, for the purposes of our recommendations on interest, as the "non-valued", provided of course that the money is in either case payable under an obligation to indemnify. We should add that we regard so-called "new for old" insurance in the same way, where insurers agree to indemnify the insured against the loss of "old" goods (such as house-furnishings) on terms that will enable him to replace them with new ones. It seems to us that although the loss is valued in a particular way for the purposes of this kind of insurance the obligation is one of indemnity. The courts have considerable experience of distinguishing indemnity-insurance from other kinds of insurance, for the purposes, for example, of deciding whether rights of subrogation are available[96], and we do not think that our recommendation that indemnity and non-indemnity insurance should be treated in different ways, for the purposes of interest on the sum due, should create special difficulties.

72. However, it now seems to us that we took too narrow an approach to indemnity obligations in our working paper. We discussed indemnity-insurance but not the other forms of indemnity obligation mentioned in paragraph 68, above. On further consideration we have concluded that, for the purposes of statutory interest, no distinction should be drawn between the various forms that an obligation to indemnify a person against his loss may take. In all cases the obligation on the indemnifier is to pay something in respect of someone else's loss. The indemnifier's position is comparable to that of a person who is liable in damages for tort or breach of contract; he is liable to pay something but until the claim has been presented, and he has investigated it, it is not fair to regard him as withholding payment. The sort of notice of demand and "days of grace" that we are recommending for the purpose of starting statutory interest running on other contract debts[97] will not always be appropriate to a claim under an obligation to indemnify, particularly where the contract is one of insurance. They will be particularly inappropriate where the obligation is to indemnify against a claim for damages (of which third party insurance and public liability insurance are typical) or to guarantee the payment by some other person of damages in respect of a breach of contract[98]. For reasons that are

[95] *Lewis* v. *Rucker* (1761) 2 Burr. 1167, 1171; 97 E.R. 769, 771, *per* Lord Mansfield C. J.
[96] *MacGillivray & Parkington on Insurance Law* (6th ed., 1975) paras. 1866 to 1867.
[97] Paras. 76 to 79, below.
[98] *Moschi* v. *Lep Air Services Ltd.* [1973] A.C. 331.

considered more fully in Part III[99] we have decided against recommending that damages should carry statutory interest; interest on damages should be left to the discretion of the court. It would, we believe, be illogical to treat the obligation to *indemnify against* damages differently from the obligation to *pay* damages and this inclines us to leave the award of interest on money payable under an indemnity obligation (insurance or otherwise) to the discretion of the court, at least where the loss is in the form of damages.

73. Even where the obligation is to indemnify another person in respect of loss in the form of non-payment of a debt (as opposed to damages) the indemnifier is not in the same position as the ordinary contract debtor. He needs to be notified of the principal debtor's failure to pay and he needs time to investigate the state of account between the creditor and the principal debtor in order to know the extent of his liability[100]. Some flexibility is needed here because the time that the indemnifier ought reasonably to be allowed, before interest should be recoverable, depends on the size and complexity of the claim. All in all, we are satisfied that an obligation to indemnify a person against his loss (whether by indemnity, indemnity-insurance, guarantee or any other form of indemnity obligation) ought not to carry statutory interest. It should instead be left to the court to decide in its discretion what interest, if any, should be awarded under the 1934 Act (as revised). We recommend accordingly.

The period over which statutory interest should be payable

(a) Commencement where a date for payment has been agreed

74. We now turn to the question of the period over which statutory interest should run. First, we consider when it should start, then we consider when it should stop. As to the commencement it is, in our view, necessary to draw a distinction between cases where the parties have agreed on a date for payment and those where they have not. Where the parties have fixed a date for payment by agreement, then, on the face of it, this should be the date from which the debt should carry interest if unpaid. This principle should apply to insurance money (except in the case of an obligation to indemnify) in the same way as in respect of other contract debts. These were the views that we adopted provisionally in our working paper[101] and they received almost unanimous support. The only alternatives that were suggested were that there should have to be a demand for payment after the due date and that a period of "grace" should be allowed before statutory interest should start to run. We have considered these suggestions but reject them. It seems to us that the debtor who has agreed to pay on a certain date should pay interest if he delays beyond that date. We accordingly recommend that where a date for payment has been agreed the debt should carry statutory interest from that date.

[99] Paras. 137 to 141, below.
[100] *cf. The Rosarino* [1973] 1 Lloyd's Rep. 21, 26 to 27.
[101] Working Paper No. 66, (1976), paras. 78, 82 and 95 (*e*).

75. We should add that although a date for payment may be agreed expressly it may also be agreed impliedly, having regard, for example, to the previous dealings between the parties and to trade usages. Also, the date for payment may be agreed by the use of a formula such as "30 days after invoice" which does not identify any particular date but yet signifies when payment is to be made. In all these cases we recommend that statutory interest should start from the date agreed for payment. We realise that it will not always be easy to determine whether a date for payment has been agreed, but the burden of proof on this issue will be on the creditor; accordingly, the debtor will get the benefit of the doubt in cases where the parties have not made their intentions clear.

(b) Commencement where no date for payment has been agreed

76. One commentator argued that all contract debts should carry interest from the moment that the debt was due whether or not a date for payment had been agreed. Everyone else who sent us comments agreed with the suggestion made in our working paper that where no date for payment had been agreed statutory interest should not start to run until there had been a demand for payment. Most thought that the demand should be followed by a period of "grace". There was, however, a division of opinion as to whether the demand should be in any particular form and as to the period of "grace" that should be allowed. There are a number of different points here and we consider them separately.

(i) *No statutory interest before demand*

77. As we have indicated, the great majority of those who commented on the point said that unless a date for payment had been agreed a debt should not carry interest until a demand for payment had been made. We think that this is sensible. The gist of the scheme for statutory interest is that it should only accrue where a debtor has *withheld* payment[102] and if no date for payment has been agreed it does not seem appropriate to treat a debt as withheld (although it may be legally due) until payment has been demanded. We accordingly recommend that no statutory interest should accrue before demand, where no date for payment has been agreed.

(ii) *Period of "grace" following demand*

78. If, as we believe, a demand for payment should in some situations be required before statutory interest starts to run, it seems to follow that the person of whom payment is demanded should be allowed time after the demand in which to effect the payment before becoming liable to statutory interest. Some commentators argued that no such period should be allowed, not even a day, but they were a small minority. Other suggestions ranged from a period of seven days "grace" to a period of 90 days. There was considerable support for the suggestion in our working paper that a period of one month should be allowed[103]. We are satisfied, from the advice that we have received, that a period of about a month would be generally acceptable. There are, however,

[102] See the *dictum* of Lord Denning M.R., quoted at para. 12, above.
[103] Working Paper No. 66, (1976), para. 86.

administrative reasons for making the period a lunar month (28 days) rather than a calendar month, so that the interval is always the same and statutory interest always starts on the same day of the week as the date on which the demand is received. We accordingly recommend that statutory interest should not start to run until 28 days after the receipt of the demand.

(iii) *Form of demand and provisions as to service*

79. It was generally agreed by those who sent us comments that, if a demand for payment was to have legal significance in determining the date from which statutory interest should run, the demand ought to be made in writing. It was pointed out that this would be consistent with the usual practice on the Continent of Europe. There was, however, a difference of opinion as to whether the demand for payment should have to be in a special form specifying, for example, the consequences of not paying the debt within the statutory period. Some thought that a special form should be prescribed. Others thought that, as long as the demand was in writing, that it identified the debt and indicated that it was due for payment, nothing more was needed. We are impressed by one point made against the requirement of a special form, namely that, in the context of international transactions governed by English law, it would be a trap for persons who were unfamiliar with the detailed provisions of English law, and, in particular, for persons brought up in the rules and traditions of the Continental systems. On the other hand, there is some information which the debtor needs to have before his failure to pay can be fairly regarded as a withholding of the debt. He needs to know to whom to pay the debt, the method of payment (if some particular method is required) and the address (if any) to which payment is to be sent. Also, a bald statement of the overall indebtedness is not always enough: sometimes it is appropriate for the overall claim to be broken down item by item, showing such credits as may be due. It would not be reasonable to require the creditor to include all such information in his demand for payment if it had already been supplied in some other way or if in the particular case it was not necessary. Everything should depend on what is reasonably requisite in the circumstances of each case. Our recommendations are that the written demand should only be valid, for the purpose of starting interest running, if it gives the debtor such information as may be reasonably requisite in the circumstances to enable him to determine where, how and to whom to pay the debt and how, in the case of an unitemised bill, the sum has been calculated.

80. Although we said in our working paper that the demand should take effect from its receipt[104], we did not consider in detail what provisions should be made concerning the service of the demand on the debtor. Few comments were received on this point. Such rules as there are for service of documents generally require that they be served on an individual personally or at his last known address and that, in the case of a limited company, they should be served on the company secretary

[104] Working Paper No. 66, (1976), para. 86.

or sent to the company's registered office[105]. So far as the service of documents on limited companies is concerned, we think that the registered office may well be the appropriate place for the service of court papers and statutory notices[106], but that it would be unreasonable and inconvenient, for both creditor and debtor, to insist that the demand for payment should in all cases be sent to the registered office. The course of dealing between the parties and the documents passing between them usually make it clear to what address the account should be sent for payment. In very many cases this is somewhere other than the registered office. Sometimes there is no previous course of dealing and no exchange of documents but the debtor carries on his business from an address, other than that of the registered office, at which it would be commercially reasonable for the demand to be sent. In relation to business debts, that is to say, debts incurred in the course of a business, we want the provisions as to service to be consistent with commercial practice. Accordingly, we recommend that, where the debtor is a body corporate, service of the demand should be valid if effected at an address from which the debtor carries on business and at which it would be commercially reasonable to serve the demand, having regard to the previous course of dealing between the parties and any communications between them in connection with the transaction in question. These recommendations are intended to provide an alternative to service on the company secretary or at the registered office.

81. Where the debtor is a partnership we recommend that the demand should be treated as having been validly served if delivered at, or posted to, the principal address from which the partnership carries on business, or if served on a partner or person having the control or management of the partnership business. As for ordinary individuals, our recommendations are that service should be effected by delivering the demand to the debtor personally or by leaving it at, or posting it to, his last known address. In the case of a business debt, whether the debtor be a partnership or an individual, we recommend that the option of service at the place of business should be available subject to the same provisions, *mutatis mutandis*, as where the debtor is a body corporate. The creditor should, in all cases, have the benefit of the statutory presumption of delivery in the ordinary course of post[107] but the presumption should be rebuttable. This means that the service will be invalid if for any reason the demand is not delivered at the address to which it is posted.

82. It may be said that the provisions for service which we are recommending are complicated and, in some respects, imprecise, so that the question of good or bad service will often be litigated on grounds of pure technicality. We think that this will only happen very rarely. Admittedly, in cases where the validity of the service was questionable, the debtor might defeat a claim for statutory interest by proving that

[105] R.S.C., O. 65, rr. 1 to 5; C.C.R., O. 8, rr. 8 and 39: Public Health Act 1936, s.285; Misuse of Drugs Act 1971, s.29; Local Government Act 1972, s.233; Consumer Credit Act 1974, s.176; Rent Act 1977, s.41.

[106] Companies Act 1948, ss.107(1) and 437.

[107] Interpretation Act 1889, s.26.

the service of the demand was invalid. However, the courts would still have a discretion to award interest under the 1934 Act in such a case and the discretion would no doubt be exercised in the creditor's favour if the debtor was withholding the money and relying on purely technical grounds for not paying statutory interest. We are, therefore, reasonably confident that the number of such disputes would be small.

(c) Date from which statutory interest should cease to run

83. There was general agreement with the view, expressed in the working paper[108], that statutory interest should cease to run once the debt had been paid (although, of course, the accrued interest would remain payable) or judgment for the debt had been obtained[109]. Since a debt may be discharged, or rendered irrecoverable, by circumstances other than payment, we should, for completeness, add that statutory interest should cease to run from the date when there ceases to be an obligation to pay the debt, otherwise than by reason of the debt having been paid. In other words, statutory interest should cease to run in respect of a debt when the interest would so cease if it was carried under an express contractual provision. We recommend accordingly.

The statutory rate of interest

84. The rate payable under our scheme ought, in our view, to be a realistic one, that is to say, it ought to be related closely to the cost to the ordinary creditor of borrowing money. On the other hand, the cost of borrowing money is not the same for everyone and we want a rate that will serve equally well for commercial and non-commercial transactions. There are three important questions here: whether the rate should be simple or compound, on what principles it should be fixed and who should fix it.

(a) Simple or compound

85. Some commentators argued that statutory interest should be compounded at yearly or half-yearly intervals. This would mean a significant difference between the amount payable immediately before the date for compounding and the amount payable immediately thereafter. Compounding at closer intervals, say monthly, weekly or daily, would mean that the statutory liability increased less jerkily but of course there would be a greater number of calculations to be made. For small debts the cost (to the creditor and the debtor and perhaps the court) of doing the relevant calculations could be out of all proportion to the sums involved and most commentators who favoured compound interest suggested that there should only be compounding of interest where the principal sum was over a certain figure. This, however, would mean a significant difference between the debt that was just below the line and the one that was just above. Whatever attempts are made at streamlining it, a system for compounding statutory interest is bound to be either too crude to be fair in all cases or too intricate to be

[108] Working Paper No. 66, (1976), paras. 87 to 89.
[109] The question of interest *after* judgment is considered in Part V, paras. 178 to 184.

practicable. We think it is better to get away from compounding altogether and to recommend a simple rate. This is what we suggested in our working paper[110] and we were strongly supported by the great majority of those who sent us comments. A simple rate is applied in all the foreign legal systems that we have examined.

(b) Principles to be applied in fixing the rate

86. There was general agreement with our provisional view that the statutory rate of interest payable on contract debts should aim to compensate the creditor for having to borrow money rather than for losing investment income. Almost everyone agreed that the statutory rate ought, accordingly, to be no lower than the Minimum Lending Rate (fixed from time to time by the Bank of England) and indeed something above it. Many commentators suggested a rate that was one or two per cent. above Minimum Lending Rate. Some, however, argued for a penal rate that went beyond merely compensating the creditor; they wanted a rate that would act as a deterrent to the defaulter. They made the point that unless the rate was fixed at much higher than Minimum Lending Rate many debtors would still prefer to pay the interest than to pay their debts on time.

87. Our main objection to a penal rate of statutory interest is that it assumes that all debtors are wilful defaulters who have the means to pay but make a policy of not doing so. This is, of course, untrue. According to the Report of the Payne Committee on the Enforcement of Judgment Debts the largest group of debtors consists of married, male wage-earners who have contracted multiple obligations and lack resources other than their weekly earnings[111]. A penal rate would seem inappropriate here. In any case, the creditor who wishes to exact a higher rate of interest from his defaulting customers than the proposed rate can always stipulate for the payment of the higher rate as a term of the contract[112]. We are satisfied that the guiding principle to be followed when fixing the statutory rate of interest on contract debts should be to compensate the creditor for having to borrow money and that the practice of the Commercial Court of awarding one per cent. over Minimum Lending Rate (or "bank rate" as it used to be) provides a very useful and fair model[113].

(c) Method of fixing the rate

88. Some commentators favoured linking the proposed statutory rate to a rate that is already established and, in particular, the rate payable on the Short Term Investment Account[114]. However, this rate is calculated to give the depositor a fair return on a safe investment rather than to compensate him for having to borrow and tends to be below the Bank of England Minimum Lending Rate[115]. It does not

[110] Working Paper No. 66, (1976), para. 77.
[111] (1969), Cmnd. 3909, para. 68.
[112] We understand that a rate of between 1 and 2 per cent. per month is usually agreed between department stores and customers with monthly accounts.
[113] *F.M.C. (Meat) Ltd.* v. *Fairfield Cold Stores Ltd.* [1971] 2 Lloyd's Rep. 221.
[114] Administration of Justice Act 1965, s.7, and rules made thereunder.
[115] See the graph annexed at the end of Working Paper No. 66.

seem suitable for our purposes. The rate payable on judgments could, in theory, provide an appropriate model but experience has shown that it is changed very seldom and is often out of line with the real cost of borrowing money[116]. Other commentators suggested that statutory interest should be fixed at one per cent. over the Minimum Lending Rate (as declared by the Bank of England). Another idea that was well supported on consultation was that the statutory rate should be fixed from time to time by statutory instrument.

89. Finally, there was the suggestion, again well supported, that the statutory rate should be calculated and declared by the Governor of the Bank of England every three months, basing the calculation on the average Minimum Lending Rate for the quarter last passed and adding between one and two per cent. The advantages of having the rate fixed in this way are that the creditor and, for that matter, the debtor, would have no difficulty in finding out what the rate was on any given date and when it was next due for review. Commentators made the point to us, in relation to rates fixed and refixed by statutory instruments, that it is sometimes difficult for people, and in particular non-lawyers, to find out which statutory instrument is in force at any particular time. Minimum Lending Rate tends to receive more publicity but the many marginal variations that are made in it at unpredictable intervals detract from its utility as an index of the interest due on ordinary debts. We are persuaded that the best method of having the statutory rate of interest fixed would be for the Governor of the Bank of England to calculate and declare it in advance for every quarter, and we recommend accordingly. We believe it would be appropriate for the details concerning the method of calculation, and the form and content of the declaration, to be regulated by statutory instruments made by yourself; as for the calculation, the formula we recommend is one per cent. over the average Minimum Lending Rate for the preceding quarter with the figure being rounded up to the nearest half per cent.

Fluctuations in the statutory rate

90. Some commentators raised the question whether the rate of statutory interest carried by a debt should fluctuate as the statutory rate itself fluctuated. The proposal was made that each debt should bear interest at one rate only, namely the statutory rate in effect at the time that statutory interest started to run. It was argued that an expedient of this kind would be needed if the statutory rate were linked directly to the Minimum Lending Rate. We think that the argument has force. The quantification of the interest due would be very difficult if the statutory rate and the liability of the debtor had to follow every twist and turn of Minimum Lending Rate. On the other hand, adoption of the proposal might result in serious injustice if there were a substantial shift in interest rates between the date when interest started to run and the date of payment. A creditor might recover a high rate of statutory interest over a period when he could borrow money cheaply and conversely he might only recover a low rate of statutory interest over a

[116] This, too, is depicted in the graph at the end of Working Paper No. 66.

period when the cost of borrowing was very high. This would be unsatisfactory. However, the problem at which the proposal is aimed only arises in an acute form if the statutory rate is linked directly to Minimum Lending Rate. Provided that the statutory rate is fixed and refixed at quarterly intervals, as we recommend, we do not think that the fluctuations will cause a serious problem. We are satisfied that it would then be appropriate for the interest on each individual debt to change as the statutory rate changes and we recommend accordingly.

A judicial power to suspend the running of statutory interest

91. The most controversial proposal in our working paper was that the court should have no power to disallow statutory interest in whole or in part[117]. In support of our proposal some commentators said that discretionary awards under the 1934 Act were far from consistent and that although the courts purported to be applying the same principles some were more generous, in matters of rate and period, than others. We were warned that the certainty provided by our scheme and its administrative advantages over the present system of discretionary awards would all be lost if the courts always had a residuary discretion to award interest at less than the prescribed rate or over less than the prescribed period, or, perhaps, to disallow the claim for interest altogether.

92. On the other hand, other commentators argued that our scheme would be oppressive if it did not allow the courts a relieving power in the situations in which persons acting honestly and reasonably might be expected to withhold payment, for instance, where the creditor was himself in breach of the contract under which the debt arose.

93. Suppose that a washing machine is sold and installed but it breaks down almost immediately; it is a term of the contract that the sellers will deliver it in working order and maintain it in working order for a specified period; they promise to "send a man round" but in fact the machine is not put into working order for six months. Under the existing law, the seller's breach does not entitle the customer to withhold payment except in respect of losses attributable to the seller's breach. In practice, however, the understanding (both of customer and seller) is that, provided the complaint is serious and is well-founded, the withholding of the price, or the balance that is due, is a commercially acceptable form of self-help. On the facts just posed, we do not wish the seller to be entitled to six months' statutory interest without allowing the court a discretion to remit the statutory interest over the period in question. A discretion would be needed which enabled the court to deal differently with the question of interest depending on the seriousness of the creditor's breach of contract. The court should also have power to order the repayment of statutory interest which has been paid.

94. As a matter of law reform it would, no doubt, be more satisfactory to revise the legal rules as to when the contract price for goods or services may be lawfully withheld. This, however, would involve a

[117] Working Paper No. 66, (1976), paras. 90 and 95(i).

radical reappraisal of the Sale of Goods Act 1893 and lies beyond the scope of the present report. We hope in due course to produce working papers on the whole topic of remedies for breach of contract as part of our work under Item I of our First Programme. For the moment, however, we are only concerned with the availability of statutory interest, and we recommend that the court should have a discretion, on the application of the debtor, to remit statutory interest (or, as the case may be, to order repayment) where the creditor has broken the terms of the agreement and such an order would be reasonable in all the circumstances.

Contracting out

95. As we mentioned earlier[118], we do not intend our scheme for the recovery of statutory interest on unpaid debts to override other contractual arrangements as to interest that the parties may make, but there is a problem on the control of "contracting out" clauses. It is appropriate to consider this problem now.

96. The point was made by a number of commentators that the bargaining position of the supplier of goods or services is not always stronger than that of the person to whom the goods or services are supplied. A large corporation may, it was argued, be able to insist, when placing an order with a supplier in a small way of business, that the contract should exclude the right to statutory interest or that the rate of interest should be well below the statutory rate. The large corporation could then withhold payment of the account without being liable for interest at the statutory rate. To redress the balance it was proposed, by some, that contracting out (by which we mean contracting for the payment of no interest or interest at less than the statutory rate) should be forbidden or, failing that, it should be subject to a "reasonableness" test; that is to say, the clause in question should only be binding if it was reasonable for it to have been included in the contract[119].

97. There are serious practical difficulties with prohibiting or regulating agreements for the payment of interest at rates lower than the statutory rate or for the payment of no interest at all. The cost of borrowing fluctuates from time to time and a rate that the parties may agree on in respect of a loan repayable over several years may at one time be higher than the statutory rate and at another time lower. It would be extremely inconvenient if the creditor could resile from the contract rate and claim the statutory rate instead when interest rates were high, but return to the contract rate when rates were generally low. It may be said, in answer, that the creditor would only be allowed to recover more than the contract rate when it would be fair and reasonable to allow him to do so. However, this raises the question of what would, in the circumstances, be fair and reasonable and would lead to great uncertainty. There is a further point. If the creditor were allowed to challenge an agreed rate of interest as unreasonably low, justice would seem to require that the debtor should be allowed a similar right to

[118] Paras. 46 and 49, above.
[119] See s.11 of the Unfair Contract Terms Act 1977.

challenge an agreed rate as unreasonably high. However, this would mean a major change in the existing law of consumer credit (which lies outside our present terms of reference) whereby interest rates may not be challenged for unreasonableness alone, even by a consumer, but only on the ground that the credit bargain is "extortionate"[120].

98. Where the parties stipulate for the payment of interest at an agreed rate, different from the statutory rate, the terms agreed will no doubt favour the party whose bargaining position is stronger. However, this fact does not, by itself, justify intervention, by the courts or by Parliament, any more than the fact that the terms agreed as to price will tend to favour the party whose bargaining position is stronger. For all these reasons we have concluded that there should be no control over rates of interest agreed on by contract save for those controls that are already provided under the existing law.

99. We have concluded that the parties should be free to provide for contractual interest instead of statutory interest, but this leaves open the question whether a debtor should be allowed to contract out of statutory interest where he is not liable to pay contractual interest either. It may be that some purchasers will be able to insist on the exclusion of a right to statutory interest as one of their trading conditions and that, as a result, the creditor who is in a weak bargaining position vis-à-vis his debtor is likely to be kept out of his money and deprived of a right to statutory interest as well. Nevertheless, we have concluded that an agreement to exclude the right to statutory interest should be no less effective than a provision for the payment of contractual interest, at whatever rate. The creditor should not be entitled to recover statutory interest where the right to it has been excluded by contract. We recommend accordingly.

100. It should be noted that the problems considered in the preceding paragraphs concern *the right to statutory interest*, and its exclusion. We still have to consider *the discretionary award of interest* and whether the parties are or should be able, by contract, to oust the courts' jurisdiction to make such awards. This topic is discussed in Part IV[121].

Transitional provisions

101. Under the existing law, contract debts do not generally carry interest unless the parties have provided for it. The effect of our recommendations is to reverse this general rule and to provide instead that contract debts should generally carry interest at the statutory rate unless the parties have provided to the contrary. It would be unjust to change the rules in relation to contracts that are already in existence when the new law comes into force. We accordingly recommend that the new régime should only apply to contracts (and debts arising thereunder) made after our proposed legislation comes into effect.

[120] Consumer Credit Act 1974, s.137.
[121] Paras. 164 to 170, below.

The deduction of tax

102. There is a difficulty concerning the deduction of tax from payments of interest. We mentioned it in our working paper[122] and received several comments and suggestions on consultation. The general rule is that, where "yearly interest of money" is payable, debtors of a certain class, namely local authorities, companies and partnerships having a company as a member, must deduct tax at the standard rate from the gross amount of interest payable[123]. The tax so deducted must be remitted directly to the tax authorities and the creditor receives the interest less tax. These rules do not affect the creditor's liability to tax in respect of the interest but merely regulate the process of collection; that is to say, the creditor may have to pay more tax than has been deducted or may be entitled to a rebate, depending on his tax position.

103. If the statutory interest payable under our recommendations were regarded as "yearly interest of money" the process of deducting and remitting the tax on small sums and over short intervals could involve the debtor in administrative work and expense out of all proportion to the amount of tax involved. We believe that the amounts of statutory interest recoverable under our recommendations will usually be calculated over periods of less than a year and will often be for small sums, for which the procedure of deduction and remission of tax is inappropriate. We accordingly recommend that the provisions concerning the deduction of tax, as just described[124], should not apply to payments of statutory interest.

PART III — INTEREST ON DAMAGES

Introduction

104. The topic of interest on damages is considered in this Part under three main headings:—

Personal injury litigation and awards of interest;
Awards of interest in Admiralty; and
Awards of interest on damages generally.

Personal injury litigation and awards of interest

105. The 1934 Act has empowered the courts, from the date when it came into force, to award interest in respect of damages for death or personal injury. However, between 1934 and 1969 interest was seldom awarded in such cases; indeed, applications for interest were hardly ever made.

The Winn Report

106. In 1968 the Committee on Personal Injuries Litigation presented a report (the Winn Report[125]) which included a number of recom-

[122] Working Paper No. 66, (1976), para. 34.
[123] Income and Corporation Taxes Act 1970, s.54(1) (*a*) and (*b*).
[124] See the preceding paragraph. Tax must also be deducted in relation to persons whose usual place of abode is outside the United Kingdom: Income and Corporation Taxes Act 1970, s.54(1)(*c*). However, we are not making any recommendations for the relaxation of this particular requirement in relation to payments of statutory interest.
[125] Cmnd. 3691.

mendations aimed at encouraging litigants to bring disputed claims before the courts with greater speed. The Report noted a tendency to allow cases to "go to sleep" to the prejudice, usually, of the plaintiff. With a view to speeding up the litigation and thus making it easier for the courts to arrive at a just result, the Winn Report recommended, amongst other things, that interest should be added to damages in respect of personal injury or death, whether applied for or not. This recommendation was given statutory force by the Administration of Justice Act 1969 which provides[126] that, in every case of personal injury or wrongful death where the damages exceed £200, an award of interest should be made under the 1934 Act unless there are special reasons for refusing it.

Jefford v. **Gee**

107. In *Jefford* v. *Gee*[127] the Court of Appeal considered the practice adopted by the courts in relation to awards of interest generally and declared the principles which should be followed by the courts when considering what, if any, interest should be awarded in respect of damages recovered in personal injury litigation. The principles are conveniently referred to as "the *Jefford* v. *Gee* guide-lines".

108. The Court of Appeal decided that the appropriate rate of interest in personal injury litigation should normally be the rate payable on money paid into court and deposited on the Short Term Investment Account[128]. A higher or lower rate might be ordered where one or other of the parties was guilty of unreasonable delay or in other exceptional circumstances.

109. The Court of Appeal propounded four main guide-lines as follows:—

(*a*) Special damages (that is to say, loss of earnings and out-of-pocket expenses to the date of trial) should carry interest at one-half the appropriate rate as from the date of the accident. The selection of the half-rate basis is designed to provide a rough and ready but fair method of averaging out compensation for losses of earnings and out-of-pocket expenses which range over a period and comprise an aggregate of smaller, and often trifling, individual sums.

(*b*) General damages in respect of future pecuniary losses should carry no interest.

(*c*) General damages for pain and suffering and loss of amenities should carry interest at the appropriate rate from the date of the service of the writ to the date of trial.

(*d*) Damages awarded to a dependant under the Fatal Accidents Acts, where the accident results in death, should carry interest at the appropriate rate from the date of the service of the writ to the date of trial.

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[126] Section 22.

[127] [1970] 2 Q.B. 130.

[128] The rate is regulated by rules made by the Lord Chancellor, with the concurrence of the Treasury, in accordance with s.7 of the Administration of Justice Act 1965.

Our Report on Personal Injury Litigation – Law Com. No. 56

110. Under Item VI of our First Programme we recommended the examination of two aspects of Personal Injury Litigation: Item VI(*a*) Jurisdiction and Procedure, to be examined by an *ad hoc* committee and Item VI(*b*), the Assessment of Damages, to be examined by the Commission. Item VI(*a*) was the subject-matter of the Winn Report. Item VI(*b*) was the subject-matter of our Report on Personal Injury Litigation – Assessment of Damages[129]. In it we considered the *Jefford* v. *Gee* guide-lines and made certain recommendations[130].

111. We did not criticise the new statutory requirement[131] that awards of interest should become the general rule in personal injury litigation. However, we expressed reservations and criticisms in regard to the *Jefford* v. *Gee* guide-lines. One point that we made was that the rule that pecuniary losses should bear interest from the date of the accident at half the appropriate rate was somewhat rough and ready and that it ought not to be applied where, on the facts of the particular case, a more accurate estimate could be made of the loss that the plaintiff had suffered by not being reimbursed at the time the loss was sustained. For example, where all the loss is sustained at the date of the accident and not spread over an extended period, it may be more appropriate to award interest on a full-rate basis from the date of the accident[132].

112. In addition, we recommended two very important changes in the *Jefford* v. *Gee* guide-lines.

113. One recommendation was in relation to general damages for pain and suffering and loss of amenities (non-pecuniary losses). We criticised the award of interest in respect of such heads of damage on the ground that judges assess damages for pain, suffering and loss of amenities by reference to the figure appropriate at the time of trial, not by reference to the figure that would have been appropriate if the award had been made at the time of the accident. We made the point that the plaintiff was compensated for being kept out of his money by being awarded damages at the contemporary rate and that if interest were added to this figure there would be over-compensation. We accordingly recommended that no interest should be awarded in respect of non-pecuniary losses of this kind.

114. The other recommendation was in relation to interest on damages awarded for loss of dependency in actions under the Fatal Accidents Acts. We criticised the *Jefford* v. *Gee* guide-line that provided for interest to be added to the total sum of damages awarded and calculated from the date of service of the writ down to judgment. We pointed out that, by not separating the pre-trial loss of dependency from the future loss in making the award of damages, the court would

[129] (1973), Law Com. No. 56.
[130] *Ibid.*, paras. 263 to 286.
[131] Administration of Justice Act 1969, s.22.
[132] (1973), Law Com. No. 56, para. 281; and see the report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978), Cmnd. 7054, para. 742. Interest on pecuniary losses was awarded on a full-rate basis in *Ichard* v. *Frangoulis* [1977] 1 W.L.R. 556.

be allowing interest not only on past losses but also on the loss to come. We accordingly recommended that interest on awards of damages under the Fatal Accidents Acts should only be calculated on the loss of dependency down to the date of judgment, and should be calculated from the date of death at half the appropriate rate.

115. Shortly before our Report was published, the Royal Commission on Civil Liability and Compensation for Personal Injury was set up and the question of compensation for injury and death has now been studied afresh by them. We appreciate that the recommendations in our Report will not be implemented until the very similar proposals on this topic in paragraphs 739-756 of the report by the Royal Commission have been considered.

116. In our working paper we mentioned the *Jefford* v. *Gee* guide-lines and drew attention to the recommendations that we had made in our Report[133]. The general reaction from commentators was to support our recommendations, although some doubted whether the process of upgrading the scale of awards for general damages for pain and suffering etc. was sufficient to make good the loss to the plaintiff caused by being kept out of his money over the period in question.

Law Com. No. 56 in the light of new developments

117. We are not providing in our present Bill for the revision of the *Jefford* v. *Gee* guide-lines. One reason is that you already have the draft Bill, entitled Law Reform (Personal Injuries etc.) Bill, which was annexed to our Report on Personal Injury Litigation – Assessment of Damages (Law Com. No. 56); this provides for the two important changes mentioned in the preceding paragraphs[134]. Another reason is that the Court of Appeal indicated recently, in *Cookson* v. *Knowles*[135], that the effects of inflation since 1970 (when *Jefford* v. *Gee* was decided) made it necessary to review the guide-lines that they themselves had laid down in that year. Indeed, their decision in *Cookson* v. *Knowles* was that the two important changes recommended in Law Com. No. 56 should be adopted as part of the existing practice of the courts and should be applied in future cases. It may therefore be that the changes that we recommended in Law Com. No. 56 will be effected without legislation being needed, although some doubt must remain until the point raised in *Cookson* v. *Knowles* has been ruled on by the House of Lords.

118. There is a third reason for not proposing a revision of the *Jefford* v. *Gee* guide-lines. The high rate of inflation in recent years has added to the problems faced by the courts where the injured plaintiff has incurred pecuniary losses prior to the date of trial. One problem has been that of determining what interest should be added to the amount awarded in respect of those losses to compensate the plaintiff for having been kept out of his money[136]. But a further problem created by

[133] Working Paper No. 66, (1976), paras. 116 to 118.
[134] Clause 14(3) and Schedule 2.
[135] [1977] 3 W.L.R. 279, 284.
[136] See paras. 109 and 111, above for the *Jefford* v. *Gee* guide-lines as to the calculation of interest on pecuniary losses (para. 109(*a*)) and for our criticism of that guide-line (para. 111).

inflation relates to what the amount of the award itself should be, having regard to any diminution in its purchasing power between the dates on which the losses were incurred and the date of trial. Both questions have been examined by the Royal Commission, whose terms of reference allowed them to take a much broader look at the question of compensation for personal injury than is permitted by our present terms of reference. Their conclusions are similar to ours and they recommend, in paragraphs 748 and 752, that the decision in *Cookson* v. *Knowles* should stand. Accordingly, we have decided against providing in our Bill for the revision of the *Jefford* v. *Gee* guide-lines. Indeed, we have decided to add nothing by way of further recommendation to what we said about *Jefford* v. *Gee* in Law Com. No. 56 save for one point about the rate of interest appropriate to awards of damages in personal injury cases.

119. In *Jefford* v. *Gee* the Court of Appeal chose, as the "appropriate rate" for awards of interest required by the Administration of Justice Act 1969, the rate payable on money paid into court and deposited on the Short Term Investment Account; this seemed the most appropriate of the various possibilities then available[137]. It was thought that it would provide a reasonably fair index of the loss suffered by the plaintiff as a result of being kept out of his money.

120. However, the Short Term Investment Account rate will seem less appropriate if the recommendations which we make, in Part II, for the introduction of statutory interest on contract debts, are implemented. One of our recommendations is that the statutory rate of interest in respect of contract debts should be fixed by the Governor of the Bank of England, quarterly, at a figure at least one per cent. above the average Minimum Lending Rate for the preceding quarter. We give our reasons[138] for saying that the statutory rate, so fixed, would be fairer compensation for the creditor who was kept out of his money than would the Short Term Investment Account rate. These reasons apply with equal force, in our view, to the rate of interest on damages in personal injury litigation wherever an award of interest is appropriate. We accordingly recommend that the appropriate rate for the purposes of the *Jefford* v. *Gee* guide-lines should be the statutory rate that we are recommending in Part II.

Awards of interest in Admiralty

121. In our working paper we discussed the jurisdiction of the old Court of Admiralty[139]. We pointed out that, in the matter of interest on damages, it did not follow the common law. Whereas at common law there was, as a general rule, no right to interest when a debt or damages were withheld[140], Admiralty law allowed a person with a claim for damages arising out of a collision to recover interest on the damages, so as to compensate him for the period over which the money payable to him was wrongfully withheld.

[137] [1970] 2 Q.B. 130, 148 to 149. See para. 108, above.
[138] Paras. 86 to 89, above.
[139] Working Paper No. 66, (1976), paras. 29, 98 to 100 and 107.
[140] Para. 8, above.

122. In our working paper we said that interest was recoverable in the Admiralty jurisdiction *as a matter of right*. Certainly in the older cases[141] it seems to have been regarded as the claimant's entitlement whether as part of the damages or as something in addition. We made the comment in our working paper that the distinction between claims arising out of collisions at sea and claims arising out of collisions on land seemed hard to justify. In the former situation the claimant may recover interest under Admiralty law or, as an alternative, under the 1934 Act. In the latter situation the claimant may only apply for interest under the 1934 Act. We suggested that, for the sake of overall consistency, the rules should be the same in Admiralty cases as in non-Admiralty cases, and that awards of interest on damages should in all cases be dealt with under the 1934 Act[142].

123. The case that we were putting forward for abolishing the old Admiralty jurisdiction in the matter of interest was founded on two propositions: (*a*) that the Admiralty rules governing awards of interest were anomalous in that the awards were not a matter of discretion but a matter of entitlement and (*b*) that there were no peculiarities in the nature of Admiralty litigation that would justify different rules on interest. After giving careful consideration to the comments and criticism raised on consultation, we doubt whether either of these propositions can be sustained.

124. So far as the first proposition is concerned, it must be said at once that a large part of the Admiralty jurisdiction concerns claims founded in contract and claims in respect of personal injury[143] and that cases in these categories are tried according to the same rules of law and practice (including the award of interest) as contract cases and personal injury cases outside the Admiralty jurisdiction. A right to interest may be provided by contract or by statute; otherwise it will be awarded, if awarded at all, as a matter of judicial discretion under the 1934 Act. The supposed *entitlement* to interest in Admiralty cases only applies where a claim for damage to property is made in respect of a collision involving a vessel and in a few other cases, such as salvage actions[144].

125. In the limited number of cases in which interest may be awarded as part of the Admiralty jurisdiction, as opposed to the jurisdiction created by the 1934 Act, it may be an oversimplification to describe the recovery of interest as an entitlement. It was pointed out to us on consultation that in cases decided since the last war the courts have treated the award of interest in Admiralty cases as discretionary; indeed, the courts seem to have the same latitude as to the sum on which to award interest, the rate at which to award it and the period over which it should run as if the award were being made under the 1934 Act[145].

[141] *The Dundee* (1827) 2 Hagg. 137; 166 E.R. 194; *The Kong Magnus* [1891] P.223, 235 to 236, *per* Butt P.
[142] Working Paper No. 66, (1976), paras. 98 to 100, 107 and 120(*e*) and (*f*).
[143] Administration of Justice Act 1956, s.1(1).
[144] *The Aldora* [1975] Q.B. 748.
[145] See in particular the judgment of Lord Merriman P. in *The Berwickshire* [1950] P.204, 208 cited with approval in *Jefford* v. *Gee* [1970] 2 Q.B. 130, 144.

There *are* differences between "Admiralty interest" and "1934 Act interest", as we shall call them, which we consider in the next few paragraphs; however, to the extent that both are subject to the exercise of a judicial discretion, they are very much alike.

126. Admiralty interest has three characteristics not shared by 1934 Act interest. It is for consideration whether these characteristics are justified by the nature of Admiralty litigation or whether they are merely anomolies. First, a set of guide-lines has been evolved for determining the period over which Admiralty interest should be calculated; these guide-lines differ from the *Jefford* v. *Gee* guide-lines on special damages[146] in that they have much greater precision. We may mention by way of illustration the rules that interest should run from the date of the collision when an unladen vessel sinks as a result, but from the projected date for the end of the voyage in the case of a vessel carrying a cargo[147].

127. Next, there is the rule that Admiralty interest must be included with the damages when a party makes a payment into court under R.S.C., Ord. 22 with a view to settling the action against him[148]. In practice, payments into court are made less frequently in Admiralty cases arising out of collisions than in non-Admiralty cases. This is because questions of liability are decided by the Judge whereas assessments of damage are dealt with by the Registrar and, in all but minor collisions, the tendency is for the parties to litigate the question of apportionment of liability first and to leave damages over. Once questions of liability have been resolved the assessment of damages is generally disposed of out of court. However, payments into court are sometimes made and the rule is that the party making them must include such Admiralty interest as may be awarded along with a sum in respect of the damages.

128. A different rule applies to 1934 Act interest. In *Jefford* v. *Gee* the Court of Appeal stated it as follows[149]:

> "The defendant should, therefore, in future make his payment into court in the same way as he always has done, namely, an amount which he says is sufficient to satisfy the cause of action apart from interest. If the plaintiff recovers more (apart from interest) he gets his costs. If he recovers no more (apart from interest) he does not get his costs from the date of the payment in and he will have to pay the defendant's costs. The plaintiff will, of course, in either case, get the appropriate award of interest irrespective of the payment into court."

Thus, the plaintiff may not pray in aid the 1934 Act interest in order to "beat the payment into court" whereas Admiralty interest may be so used.

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[146] See para. 109(*a*), above.
[147] *Straker* v. *Hartland* (1864) 2 H. & M. 570; 71 E.R. 584.
[148] *The Norseman* [1957] P.224.
[149] [1970] 2 Q.B. 130, 149 to 150. The rule needs to be qualified in the light of *Butler* v. *Forestry Commission* (1971) 115 Sol. J. 912 discussed in paras. 188 to 191, below.

129. Finally, there is the practice of paying money and interest into court in what is known as a "limitation action". The origin of the limitation action is said to lie in a principle of maritime law that a ship-owner's liability for a collision should be limited to the value of the ship and freight[150]. Today the relevant rules are to be found in the Merchant Shipping Acts 1894-1977 and in rules of court. These Acts allow ship-owners and others to limit their liability for losses incurred "without their actual fault or privity" to an amount calculated by reference to the tonnage of the ship at the rate of so many gold francs a ton. In order to establish his right to limit his liability the ship-owner must bring proceedings (a limitation action) naming the claimants as defendants, and asking for a decree limiting his liability. The amount of the liability is fixed by the court, having regard to the tonnage and the statutory limit per ton of the liability. Provided that the ship-owner establishes his right to relief, a decree is granted to this effect, accompanied by a direction that the ship-owner must pay the appropriate sum into court together with interest calculated from the date of the occurrence. It is sometimes to the ship-owner's advantage to pay the money into court in advance of the order[151], but presumably he must include an appropriate sum for interest in the payment in order to obtain the benefit of limited liability under the Acts.

130. It is convenient to turn now to the second proposition on which we based the proposal in our working paper for the abolition of the Admiralty jurisdiction to award interest, namely, that there are no peculiarities in the nature of Admiralty litigation that would justify different rules on interest.

131. The first point of difference is that the Admiralty rules, or guide-lines, in relation to the period over which interest should be awarded, have greater precision than the *Jefford* v. *Gee* guide-line. The Admiralty rules have been refined over the centuries and in the small area in which they apply they have been found to work with certainty and fairness. The *Jefford* v. *Gee* guide-line, on the other hand, is a recent attempt to provide a single rough and ready rule to deal with a much larger area of litigation. Accordingly, so far as the first point of difference is concerned, we believe that the special rules in Admiralty cases ought to be preserved.

132. The second point concerns payments into court. The Admiralty rule of practice (that payments into court ought normally to include interest) seems a sensible one which should not be changed. Indeed we make recommendations, in Part V[152], that are aimed at bringing the Queen's Bench practice on payments into court into line with the existing Admiralty practice.

[150] For a full discussion of the history, the legislation and the procedure see British Shipping Laws, Vol. 4; *Marsden's Law of Collisions at Sea* (11th ed., 1961), paras. 168 to 225.

[151] Because of a change in the rate of conversion from gold francs into pounds sterling. See *The Mecca* [1968] P.665, 670.

[152] Paras. 185 to 197, below.

133. The third point of difference concerns the limitation action and, in particular, the practice of ordering the plaintiff to pay compensation into court *together with interest*. This feature of the Admiralty jurisdiction was established well before the 1934 Act was passed[153] and it is extremely doubtful whether a limitation action would qualify as "proceedings tried in any court of record for the recovery of any debt or damages" for the purposes of an award of interest under the 1934 Act. We have concluded that the nature of the limitation action requires a different kind of jurisdiction in the matter of interest from that created by the 1934 Act.

134. Lastly, we should mention a consideration of more general importance, namely, the international character of Admiralty litigation. The rules applied in Admiralty cases (and, in particular, the rules pertaining to interest referred to in paragraphs 126 and 127, above) are well-known internationally and generally acceptable; this country is often chosen as the venue for legal proceedings rather than other countries where such proceedings might be brought. We were warned by several persons and organisations who sent comments and who are closely involved with Admiralty litigation that changes in the existing rules and, in particular, changes that replaced the comparative certainty of the existing rules with the different and less well-established guidelines that have been developed under the 1934 Act would make our courts less attractive to litigants from other countries.

135. Our conclusion, taking all these considerations into account, is that the case for abolishing the old Admiralty jurisdiction to award interest is not made out. There are, admittedly, some situations and some respects in which it is appropriate for the courts to apply the same principles with regard to interest in Admiralty as in non-Admiralty cases but this they already do[154]. In other situations and other respects the special rules for Admiralty cases need to be preserved. We accordingly recommend that the non-statutory jurisdiction to award interest in Admiralty cases should be left as it is.

136. There is one final point to be made about awards of interest in Admiralty cases. It concerns the rate at which interest should be calculated when awards are made under the non-statutory jurisdiction. The present tendency is to fix the rate by reference to the rate payable on the Short Term Investment Account for the period in question. We are recommending elsewhere in this report that a statutory rate should be fixed for contract debts[155] and that in personal injury litigation the same rate should be used when awarding interest on pecuniary losses[156]. We should now add that the same rate should, in our view, be applied in Admiralty cases as well. However, we think that this can be left to the courts[157] without the need for statutory intervention.

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[153] *The Northumbria* (1869) L.R.3 A. & E. 6.

[154] *The Funabashi* [1972] 1 W.L.R. 666. In personal injury cases the *Jefford* v. *Gee* guide-lines are followed whether the case is heard as an Admiralty case or a non-Admiralty case.

[155] Paras. 86 to 89, above.

[156] Paras. 119 and 120, above.

[157] The need for a "realistic" rate of interest in Admiralty cases was emphasised in *The Funabashi* [1972] 1 W.L.R. 666, 671, *per* Dunn J.

Awards of interest on damages generally

137. In our working paper we mentioned that although awards of interest on damages under the 1934 Act were discretionary the implementation of certain recommendations in the Winn Report[158] had put a duty on the courts to consider making an award, in certain cases, even if no application for interest was made[159]. In these cases, where the claim arises out of personal injury or death and the damages exceed £200, the court must make an award under the 1934 Act unless there are special reasons for not doing so. We suggested in our working paper that the duty that is imposed on the courts in such cases could be made general, so as to apply to all kinds of claim for damages[160]. We invited comments on this suggestion but indicated that our provisional view was against any such extension. The comments that we received were unanimous in their rejection of the suggestion. The general view on consultation was that, whilst the special rule was justified in relation to personal injury actions, in other actions interest should only be awarded under the 1934 Act if an application for an award was made. We share this view and recommend accordingly.

138. An issue that proved more controversial was whether interest on damages should continue to be a matter for the courts' discretion, under the 1934 Act, or whether the payment of interest should be as much a matter of entitlement as the payment of damages.

139. In our working paper we indicated our preference for leaving awards of interest on damages to the courts' discretion, and gave various reasons[161]. We pointed out that the computation of interest on a claim for damages had in most cases to be done on a rough-and-ready basis, because items of special damage accrue at different times. Also, some losses are covered by first party insurance or mitigated (for the purpose of assessing interest although not necessarily for the purpose of assessing damages) by National Insurance benefits, social security payments and so on. We doubted whether an acceptable universal formula could be devised for determining how interest should be calculated without allowing the court some margin of discretion. In fact, even those who contended that interest on damages should be a matter of entitlement agreed that a judicial discretion should not be excluded entirely. Once it is conceded, as we think it must be, that the calculation of interest cannot be an exact process where damages are concerned but must be left, to a greater or lesser extent, to the discretion of the court, the case for making the award of interest on damages an entitlement is greatly weakened.

140. Indeed, the only point on which an entitlement to interest on damages would seem to have a clear advantage over a discretionary award concerns payments into court. If interest on damages were an entitlement, the defendant who paid money into court in respect of a

[158] (1968), Cmnd. 3691, implemented by the Administration of Justice Act 1969, s.22.
[159] See para. 106, above.
[160] Working Paper No. 66, (1976), paras. 109 to 111.
[161] Working Paper No. 66, (1976), paras. 102 to 105.

claim for damages would be bound to make a payment for interest as well. Much importance was attached to this by those who favoured making interest an entitlement. However, we believe that the regulation of payments into court, and the consequences, in terms of costs, of accepting or rejecting the payment, are primarily questions of procedure rather than of substantive law. We accept that the guide-line in *Jefford* v. *Gee* on payments into court, quoted in paragraph 128, can lead to difficulties. We think, however, that these difficulties can be resolved by minor changes in rules of court, and these we discuss in Part V[162]. Leaving the question of paying interest into court on one side, there are, we think, no advantages to plaintiff or to defendant in making interest on damages an entitlement. The great majority of commentators agreed with our provisional conclusion that interest on damages should, in the main[163], be a matter for the courts' discretion. We recommend accordingly.

141. We favour leaving awards of interest on damages to the discretion of the court. We assume that the discretion will be exercised in accordance with the basic principle that the defendant who keeps the plaintiff out of his money should compensate the plaintiff accordingly[164]. As for the rate of interest to be applied, we hope that the courts will adopt the rate fixed for interest on contract debts as the most convenient and reliable index of the measure of compensation that the plaintiff should receive[165].

PART IV THE 1934 ACT

Introduction

142. The 1934 Act was passed as a result of the recommendations of a short report by the Law Revision Committee[166]. At the time of presenting the report the position was that interest might be recovered as a matter of entitlement in certain cases, for instance where it was payable by agreement or by statute. In addition, the Civil Procedure Act 1833 (Lord Tenterden's Act) allowed interest to be awarded, as a matter of discretion, in certain specified circumstances[167]. In other respects the common law rule against the recovery of interest on debts or damages prevailed.

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[162] Paras. 185 to 197, below.

[163] We exclude, for these purposes, the recovery of interest on damages in an action upon a dishonoured bill of exchange.

[164] See the passage from the *Harbutt's "Plasticine"* case quoted in Part I at para. 12.

[165] c.f. *Cremer* v. *General Carriers S.A.* [1974] 1 W.L.R. 341, 357. Different considerations may apply where the damages are payable in a foreign currency; see Part II, paras. 63 and 64, above.

[166] (1934), Second Interim Report, Cmnd. 4546.

[167] Interest might be awarded under s.28 in respect of an unpaid debt where there was a written instrument which stipulated for the payment of the debt upon a certain day or where the creditor had made a written demand for payment, warning the debtor that interest would be claimed; it might also be awarded under s.29 in respect of damages for trespass to goods or conversion or the delayed payment of insurance monies.

143. The Law Revision Committee was critical of the common law rule and recommended its reform. The report said[168]:

> "The courts, including all appellate tribunals, should have the power to award interest in all cases in their discretion where it is not already provided for by statute, or by contract, or otherwise."

Plainly, the Law Revision Committee wanted the gaps in the existing law on interest to be filled so that wherever proceedings were brought for the recovery of a debt or damages which did not carry a right to interest, an application could be made to the court for a discretionary award.

144. In this report we are differing from the Law Revision Committee in that we are recommending the creation of a new kind of entitlement to interest in respect of contract debts[169], but otherwise our general approach to the question of interest is exactly the same. We believe, as they did, that a judicial discretion to award interest should be generally available, filling the gaps in the law wherever the plaintiff has to take proceedings to recover what he is owed (be it a debt or damages) and the defendant is not otherwise liable to pay interest.

145. Unfortunately, the wording of the 1934 Act has left some of the gaps unfilled. In our working paper we referred to them and made proposals for reform which received widespread support on consultation. The problems are considered in detail in the paragraphs that follow. We have concluded that the best way of resolving them would not be by amending the 1934 Act but by repealing the relevant parts and starting again. This is what our Bill, and in particular clause 10[170], is intended to achieve.

Interest on debts under the 1934 Act

146. We commented in Part II on the difficulty posed by the requirement that interest may only be awarded under the 1934 Act in any proceedings *tried* in any court of record[171]. We also mentioned the other major point of difficulty, namely, that interest may, it seems, only be ordered in respect of the sum for which judgment is given, so that where the whole debt is paid before judgment no interest may be awarded and where part is paid interest may only be awarded in respect of the balance[172].

147. Our main proposal in Part II is that creditors should, as a general rule, have an entitlement to interest at a statutory rate on unpaid contract debts, unless the contract provides otherwise. The implementation of this recommendation will narrow the gaps referred to in the preceding paragraph by reducing the number of cases where a discretionary award will be needed but it will not close the gaps completely. There will still be cases where debts are withheld and where

[168] Cmnd. 4546, para. 8.
[169] This is the subject-matter of recommendations in Part II, para. 45 onwards, above.
[170] Appendix C. The text of clause 10 appears at p.92, below.
[171] Part II, para. 31, above.
[172] *The Medina Princess* [1962] 2 Lloyd's Rep. 17. See Part II, para. 32, above.

interest may not be recovered under our recommendations in Part II or under the general law. A number of examples may be given:—

(*a*) The recommendations in Part II do not apply to debts that consist of rent or other sums payable under a contract of tenancy or payable by way of rentcharge[173].

(*b*) The recommendations in Part II do not apply to debts payable in a foreign currency[174].

(*c*) The recommendations in Part II only apply to "contract debts" and not to other debts, such as those arising in quasi-contract or by statutory provision or by reason of subrogation, rights of salvage and so on [175].

(*d*) The recommendations in Part II do not apply to money recoverable under an obligation to indemnify, even though it may be payable as a contract debt[176].

(*e*) The recommendations in Part II do not apply where the debtor has contracted out of his obligation to pay statutory interest on default[177].

(*f*) The recommendations in Part II do not apply to debts arising under contracts entered into before the Part II recommendations come into force[178].

(*g*) Where the contracting parties have not agreed on a date for payment statutory interest is not recoverable under the recommendations in Part II until 28 days after the service of a written demand for payment of the debt[179]. Statutory interest may not be recovered in respect of contract debts of this kind unless these requirements are fulfilled.

(*h*) Even where the requirements mentioned under the preceding sub-paragraph are fulfilled, there will still be a period prior to demand and a further period between demand and the expiry of the 28 days when statutory interest may not be recovered.

148. We believe that the court should have a discretion to award interest on debts in the various situations described above even though judgment may be obtained without the proceedings being "tried" and even though the debt may be paid, in whole or in part before (or without) a judgment. In our working paper[180] we proposed that the jurisdiction created by the 1934 Act should be widened to fill these gaps in particular but that the jurisdiction should be confined, as at present, to awarding interest on debts that are the subject-matter of "proceedings"[181]. These proposals received unamimous support on consultation and we recommend that they should be given legislative effect.

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[173] Part II, paras. 56 to 61, above.
[174] Part II, paras. 63 to 64, above.
[175] Part II, paras. 65 to 66, above; *The Aldora* [1975] Q.B. 748, 751.
[176] Part II, paras. 68 to 73, above.
[177] Part II, paras. 95 to 100, above.
[178] Part II, para. 101, above.
[179] Part II, paras. 77 and 78, above.
[180] Working Paper No. 66, (1976), paras. 92 and 95(*j*).
[181] See Appendix A for the wording of s.3(1) of the 1934 Act.

Interest on damages under the 1934 Act.

149. Most of what we have just said about interest on debts applies to interest on damages too. It is arguable that the court has no power to award interest on damages where judgment is obtained in default[182], although there is no clear authority on the point. As for the cases where money is paid prior to judgment, it seems to be assumed, at least for the purposes of money paid under an interim award, that the jurisdiction conferred by the 1934 Act allows the court, on making the final award of damages, to award interest on the total damages; however, account must be taken of the fact that the plaintiff has been kept out of some of his money for one period and the rest for a longer period[183]. Almost all the comments that we received supported the proposal in our working paper[184] that the court's jurisdiction to award interest on damages should extend to damages prior to judgment or paid under a judgment obtained without a trial. We think that any doubts that may exist as to the court's jurisdiction in these respects should be removed and we recommend accordingly.

Limits placed by provisos (a), (b) and (c)

(a) Interest upon Interest

150. Proviso (a) states that nothing in section 3 of the 1934 Act is to authorise the giving of interest upon interest[185]. This raises three points for consideration. The first concerns the debt that is itself interest, whether payable by contract or by statute. The effect of the proviso is to limit the creditor to the interest that is payable as of right; although that interest may be withheld, the creditor may not obtain a discretionary award of interest on the unpaid interest by way of additional compensation. The second point is that the proviso might be construed as preventing the court from awarding interest on damages (as opposed to interest on debts) where the damages consisted of interest payments that the plaintiff had been obliged to make by reason of the defendant's wrongful conduct. This construction was rejected by Oliver J. in *Bushwall Properties Ltd.* v. *Vortex Properties Ltd.*[186] but his decision in that case was reversed on appeal on other grounds[187] and the point still awaits the ruling of a higher court. The third point is that the proviso plainly prevents the court from awarding interest on a compound, rather than a simple, basis.

151. The proposals that we made in our working paper were that the courts should be allowed to award simple interest (not compound) on debts and on damages, including damages assessed by reference to the interest for which the plaintiff has incurred a liability[188]. As for the debt that is itself interest, our proposal was that the creditor should not

[182] *Waite* v. *Redpath Dorman Long Ltd.* [1971] 1 Q.B. 294, 299 *per* Fisher J. A counter-argument is that the assessment of damages constitutes a trial of the proceedings for the purposes of s.3(1) of the 1934 Act. See Supreme Court Practice, para. 6/2/7A (1976 ed.).
[183] Supreme Court Practice, para. 29/9-17/17 (1976 ed.).
[184] Working Paper No. 66, (1976), paras. 112 and 113.
[185] The text appears in Appendix A.
[186] [1975] 1 W.L.R. 1649.
[187] [1976] 1 W.L.R. 591.
[188] Working Paper No. 66, (1976), paras. 114 and 120(*c*) (iii).

be entitled to apply to the court for a discretionary award of interest on interest; in this respect we thought that proviso (*a*) was sound. However, we treated the problem as part of the larger problem of whether a creditor should be allowed to seek a *discretionary* award for a period over which he already has an *entitlement* to interest, whether by contract or by statute[189]. We come to the larger problem later in this report, in our discussion of proviso (*b*)[190].

152. Comments received on consultation were unanimous in supporting our proposal that the power to award interest on damages should be available even where the damages were assessed by reference to the interest for which the plaintiff had incurred a liability. We recommend that the jurisdiction of the courts in this respect should be put beyond doubt by legislation.

153. As for the other two points, the majority of commentators favoured our approach, namely, that the interest should be simple not compound and, that the discretion to award it should not be available in respect of debts that consisted of interest. However, some argued that the courts should be given the power, to be exercised in exceptional cases, of awarding interest on debts or damages, on a compound basis, and of awarding interest in respect of (and in addition to) the interest to which the creditor was entitled by contract or by statute.

154. The situations that have been cited to us as illustrating the need for a jurisdiction to give compound interest may be classified under two main heads. First, there is the case in which a person, acting in breach of a fiduciary duty, makes a profit for himself out of the misuse of funds. We agree that an award of interest on a compound basis is sometimes appropriate in such a case. However, the equitable jurisdiction to award compound interest would apply to cases of this kind[191] and we are recommending that the equitable jurisdiction should be preserved[192]. Accordingly, we do not think that a statutory jurisdiction to award interest needs to be created to deal with this particular kind of case.

155. It was argued, further, that the power to award compound interest was needed in another kind of case, namely where the debtor's conduct had been so bad vis-a-vis his creditor that our scheme for statutory interest would not provide adequate redress. It was contended that in such cases the court should be empowered to order more by way of interest than the statutory norm and to order that the interest should be compounded over the period of default, particularly if the sums involved were large. This argument raises the larger question of the proper relationship between the contractual, or statutory, entitlement to interest on the one hand, and the discretionary award on the other, a topic which is discussed at length in our consideration of proviso (*b*), in paragraphs 157 to 163, below.

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[189] *Ibid.*, paras. 91, 93 and 95(*j*).
[190] Paras. 157 to 163, below.
[191] *Wallersteiner* v. *Moir* (*No. 2*) [1975] Q.B. 373.
[192] See paras. 21 and 50, above.

156. There is still the question whether there should be a discretion to award interest on a compound basis in respect of debts that are outside the scheme for statutory interest[193] and in respect of damages. However, it was not contended by any commentators that the case for compound interest was particularly strong in these last-mentioned categories and we do not think that a case for change has been made out. For this reason, and for reasons appearing in the paragraphs immediately following, we have concluded that the provisional views expressed in our working paper[194] were correct, namely, that discretionary awards of interest made under the 1934 Act (as revised) should be on a simple, not a compound, basis, and that the same rule should obtain whether the proceedings are for the recovery of a debt or for damages.

(b) Debts on which interest is payable as of right

157. Proviso (*b*) states that nothing in section 3 of the 1934 Act is to apply "in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise". If our scheme for statutory interest on unpaid contract debts (as recommended in Part II) were given legal effect, proviso (*b*) would, in its present form, exclude many contract debts from the jurisdiction (created by the 1934 Act) to make discretionary awards of interest. This is because under our scheme interest would, in the ordinary way, be "payable as of right" in respect of unpaid contract debts. It is necessary to consider whether proviso (*b*) needs to be revised.

158. One possible conclusion is that no revision is required. Another is that proviso (*b*) should be modified so as to exclude the award of interest, under the 1934 Act, in respect of any debt upon which interest is payable as of right, *but only in respect of the period over which such interest is payable:* this is the conclusion that we favoured, provisionally, in our working paper[195]. A third is that proviso (*b*) should be removed altogether. Finally it is arguable that proviso (*b*) should be revised so as to exclude the possibility of a discretionary award of interest not only where interest is payable as of right, as at present, but also where the recovery of interest has been excluded by the terms of the contract.

159. As between the first and second of the four possible conclusions under consideration, comments received on consultation favoured the second. It was generally acknowledged by commentators that proviso (*b*) would work injustice if allowed to remain in its existing form when our scheme for statutory interest on contracts debts was introduced. Take, for example, the case of a debtor who avoids his creditor for twelve months – perhaps by leaving the country – but who is eventually served with a demand for payment which he ignores and then with court proceedings which result in a judgment being obtained against him. Under the existing law, the creditor has no *right* to interest but

[193] See the examples given in para. 147, above.
[194] Working Paper No. 66, (1976), paras. 93, 95 (*j*), 114 and 120 (*c*)(iii).
[195] *Ibid.*, paras 91 and 95 (*j*).

may obtain a discretionary award of interest covering the whole period since the debt was first payable. Under our scheme for statutory interest, the creditor would have a *right* to statutory interest in respect of the short period between the expiry of 28 days after service of the demand and the obtaining of judgment. However, because some interest would be payable as of right, although only for a short period, proviso (*b*) would make it impossible for the courts to make a discretionary award of interest in respect of the longer period when the debtor was avoiding service and when statutory interest was not running. Commentators agreed with us that our scheme ought to empower the courts to make a discretionary award of interest for the period when interest was *not* running even though there might be another period when interest *was* running. Accordingly, we have concluded that proviso (*b*) should not remain in its present form but ought, at the very least, to be modified.

160. That brings us to the third possible way of treating proviso (*b*), namely deleting it altogether. The view of a number of commentators was that the courts should have a discretion to award something extra by way of interest (perhaps compounding it, with yearly or half-yearly rests) on top of whatever was payable as of right. It was argued that the scheme for the recovery of statutory interest would not bear sufficiently heavily on the debtor whose default was wilful and that the courts ought to have a residuary discretion to award interest at more than the statutory (or indeed contractual) rate to deal with the person who found it cheaper to withhold payment and pay interest than to pay the debt. The simplest way of accommodating this proposal would be by abolishing proviso (*b*) altogether.

161. There are two points to be made in favour of retaining proviso (*b*), albeit in a modified form[196]. One is that our scheme for statutory interest aims to give the creditor a commercial rate in respect of unpaid debts, so the residuary discretion would only be needed where an award of something more than the ordinary commercial rate was appropriate. We think that the courts would be reluctant to exercise such a discretion unless clear guidance was given by statute as to how and when such a residuary discretion should be used. We have discovered no reported case in which the discretion to award interest under the 1934 Act has been used to award interest at more than the ordinary commercial rate. Even if a residuary discretion were made available to award interest at more than the statutory (or contractual) rate, we doubt whether it would be used.

162. The other point is that if the residuary discretion to grant interest at more than the statutory (or contractual) rate were available *and were used*, it would undermine the certainty of the scheme for statutory interest, which is its principal merit. Also the consequences of allowing a discretionary award on top of contractual (as opposed to statutory) interest ought to be considered. Under the existing law, when contracting parties stipulate for interest at a certain rate the courts

[196] See para. 159, above.

have no power to order the payment of interest at a higher rate. If they were given such a power it would make for considerable commercial uncertainty, which would be undesirable.

163. Our conclusion is that the proposal under consideration goes further than is necessary or appropriate. We believe that proviso (*b*) should be modified but not deleted altogether. We accordingly recommend that the courts' discretion to award interest on debts that already carry a right to interest should be available in respect of periods over which no interest is payable as of right, but not otherwise.

164. There is a final point to be considered in connection with proviso (*b*). The statutory jurisdiction to award interest on the unpaid debt may not be exercised where the debt already carries a right to interest, for example, where the parties have provided for interest to be payable on default. On the other hand, the fact that the parties have agreed that interest should *not* be payable on default does not, by itself, exclude the court's jurisdiction to make a discretionary award. Accordingly, the creditor who contracted out of his right to statutory interest under the scheme that we are recommending would still be able to apply for a discretionary award. The fact that he had agreed to forego his right to statutory interest would be a factor for the court to take into consideration but it would not prevent the court from making a discretionary award where justice required.

165. We have considered whether further revision of proviso (*b*) is needed. It might be provided that the jurisdiction to make a discretionary award should not be exercisable where the parties have agreed that the debt in question is not to carry stautory interest. In favour of such a change it may be argued that, in order to be consistent, the rules on "contracting out" should apply to statutory interest and to interest under the 1934 Act (as revised) in the same way.

166. We believe that the argument based on consistency is misconceived. The two kinds of interest under consideration are different. The one which we are recommending as "statutory interest" is only to be payable in respect of contract debts and the entitlement depends on what the parties have agreed in that respect; if the parties have agreed that there should be no entitlement, then their agreement should be given legal effect[197].

167. On the other hand, the discretion to award interest under the 1934 Act does not arise out of a contract and is not an entitlement. An application for a discretionary award is an appeal to the wide powers which the courts have in respect of proceedings for damages as well as debts. Indeed, the discretion to award interest has been likened to the courts' discretion to award costs[198].

168. Accordingly, we see no inconsistency in allowing a creditor to apply for a discretionary award of interest on a debt which he has agreed should not carry statutory interest under our scheme, but which

[197] Paras. 95 to 100, above.

[198] Supreme Court of Judicature (Consolidation) Act 1925, s.50(1). *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447, 452 *per* John Stephenson J.

is withheld for so long that he has to take legal proceedings to recover it. We do not think that it would be just that in such a case the creditor should, by waiving his right to statutory interest, automatically disqualify himself from applying for a discretionary award. Whether the court would grant such an application is another matter; that would depend on all the circumstances.

169. It may be said that this is not a complete answer to the question whether the courts should be prevented from making a discretionary award of interest by the fact that the parties have "contracted out". Let us suppose that the creditor not only waives his right to statutory interest (by a provision in the contract under which the debt is created) but also purports to waive his right to apply for a discretionary award. Would such a waiver be binding on him so that the court would have no jurisdiction to entertain his application, or might the waiver be regarded as void as an "ouster of jurisdiction" that was contrary to public policy?

170. It is not possible to give a general answer to this question on the existing state of the law, nor do we think that it is desirable that a general answer should be provided. "No one has ever attempted a definition of what constitutes an ouster of jurisdiction. Each case must depend on its own circumstances. Each agreement needs to be separately considered"[199]. The legal doubt as to whether and, if so, how parties to a contract may oust the courts' jurisdiction to award interest under the 1934 Act does not seem to have given rise to difficulties in practice. There are, to our knowledge, no reported cases on problems in this particular area and no one who sent us comments on our working paper suggested that this aspect of proviso (*b*) needed amendment or clarification. In the result, we have concluded that the only amendment to proviso (*b*) that is required is in relation to the debt that carries interest over one period but not over another[200].

(c) Bills of exchange

171. For completeness, we mention proviso (*c*) which states that nothing in section 3 of the 1934 Act "shall affect the damages recoverable for the dishonour of a bill of exchange". As we said at the beginning of this report[201], the law and practice relating to the recovery of interest in respect of dishonoured bills of exchange is complicated but well-established and not in need of reform. The decision to leave bills of exchange outside the 1934 Act seems to have been justified. No one we consulted suggested that there was a need for change. Accordingly, we recommend that proviso (*c*) should be retained notwithstanding the revision of other parts of the 1934 Act.

No statutory guide-lines

172. The 1934 Act provides no guide-lines as to the way in which the discretion to award interest should be exercised. We have considered whether statutory guide-lines are needed.

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[199] *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478, 485, *per* Bankes L.J.
[200] Paras. 158 and 159, above.
[201] Part I, paras. 23 and 24.

173. The intention of the Law Revision Committee was that the discretion to be conferred on the courts should be a wide one. They said: "It is not a discretion which Judges would feel any difficulty about exercising"[202]. The fact that the 1934 Act contains no guide-lines does not seem to have given rise to difficulty. Certain principles have been enunciated by the courts and followed by them, the main one being that the plaintiff should be compensated by an award of interest where the defendant has kept him out of his money[203]. We doubt whether a case for the introduction of statutory guide-lines can be made out, except perhaps in relation to awards required in personal injury litigation by the Administration of Justice Act 1969[204].

174. In general, it seems to us that guide-lines are not needed so far as discretionary awards of interest on debts are concerned. In our working paper we suggested that the rate at which discretionary awards of interest should be calculated should be the statutory rate payable on contract debts[205]. We received comments on consultation to the effect that, although the statutory rate should and, no doubt, would be treated by the courts as the norm, the discretion as to rate, allowed by the 1934 Act, should be retained for cases, such as where debts are payable in a foreign currency, where a different rate might be more appropriate. We accept the force of this. Our conclusion is that, so far as the discretionary award of interest on debts is concerned, there should be no statutory guide-lines or requirements as to the rate to be applied or as to the manner in which the discretion should be exercised.

Powers of arbitrators in the matter of interest

175. Several commentators raised the question whether arbitrators have the power to make discretionary awards of interest by virtue of the 1934 Act. On the face of it they would seem to have no such powers since the discretion is only allowed, by the 1934 Act, to "courts of record". However, it was held, in *Chandris* v. *Isbrandtsen-Moller*[206] that the submission of a dispute to an arbitrator, in accordance with an arbitration agreement, confers on the arbitrator the same powers and discretions in the matter of interest as if the tribunal were a court of record. This means that the powers conferred by the 1934 Act to make awards of interest may be exercised by arbitrators as if they were courts of record[207]. The revision of the 1934 Act that is recommended in this Part would not affect this principle. Accordingly, there is no need to make special provision for arbitrators in our Bill and no such provision has in fact been made.

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[202] (1934), Cmnd. 4546, para. 10.

[203] See the passage from the *Harbutt's "Plasticine"* case, quoted in Part I, at para. 12, above. See too *Kemp* v. *Tolland* [1956] 2 Lloyd's Rep. 681, 691 *per*, Devlin J.; *The Rosarino* [1973] 1 Lloyd's Rep. 21, 27 *per* Mocatta J.; *Business Computers Ltd.* v. *Anglo-African Leasing Ltd.* [1977] 1 W.L.R. 578, 587 to 588 *per* Templeman J.

[204] Guide-lines for awards of interest in personal injury litigation are considered at paras 107 to 120, above.

[205] Working Paper No. 66, (1976), para. 93.

[206] [1951] 1 K.B. 240.

[207] *The Finix* [1978] 1 Lloyd's Rep. 16.

Summary

176. The 1934 Act needs revision in a number of respects but its general purpose—enabling the courts (and arbitrators) to make discretionary awards of interest where interest is not otherwise payable —is sound. We accordingly recommend the introduction of a new statutory discretion, in the matter of interest, to replace that created by the 1934 Act. It should be, in effect, a revised version of section 3 of the 1934 Act which serves the same general purpose as that Act but which also provides for the various points of difficulty discussed in this Part.

PART V OTHER PROBLEMS

Introduction

177. We have, in Parts I to IV, covered the existing law relating to interest on contract debts and on damages and have made a number of recommendations for changes in the law. The Bill which is annexed as Appendix C puts these changes in legislative form. There are, however, other problems relating to the recovery of interest on which we received comments on consultation. Some of the problems lie outside our terms of reference and it would not be appropriate for us to make recommendations for legislative change without further consultation. As for the others, although, in some cases, the existing law and practice appears unsatisfactory, the primary responsibility for making proposals for reform lies with some body or department other than ourselves. In the result, we make a number of suggestions for your consideration but no recommendations for legislative change.

Interest after judgment in the High Court

178. In our working paper we said that there would be no discussion of interest on judgment debts and that we would only be concerned with interest accruing or awarded prior to judgment. Nevertheless, many comments were sent to us on the topic of interest on judgment debts. The history of interest on judgment debts is that interest at 4 per cent. per annum was made payable on judgment debts by section 17 of the Judgments Act 1838. This provision remained in force until 1971 when your predecessor, in the exercise of powers granted by the Administration of Justice Act 1970[208], substituted a new rate of 7½ per cent. per annum[209]. The rate was recently changed by yourself to 10 per cent. per annum[210]. We should perhaps mention that there are other statutory provisions concerning interest that are related directly to the rate payable on judgment debts: one is the interest recoverable on an award made by an arbitrator[211]; another is the rate recoverable by solicitors from their clients on their bills for non-contentious business[212]; a third is the interest allowed on debts of a deceased person that do not otherwise carry a right to interest where the High Court has directed the taking of an account[213].

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[208] Section 44.
[209] Judgment Debts (Rate of Interest) Order 1971, S.I. 1971 No. 491.
[210] Judgment Debts (Rate of Interest) Order 1977, S.I. 1977 No. 141.
[211] Arbitration Act 1950, s.20.
[212] Solicitors' Remuneration Order 1972, S.I. 1972, No. 1139, r.5(1).
[213] R.S.C., 0.44, r.18(1)(*b*). The rule in respect of county court proceedings provides merely for interest at 4 per cent. per annum: C.C.R., 0.29, r.14.

179. When the rate of interest on judgment debts was moved from 4 to 7½ per cent. per annum in 1971, there was a general expectation that it would be adjusted frequently thereafter as the cost of borrowing money rose and fell and that it would give the judgment creditor a commercial rate of interest slightly above the Minimum Lending Rate fixed by the Bank of England[214]. Some disappointment has been expressed in comments sent to us and also in the courts[215], that the rate remained at 7½ per cent. per annum long after this had ceased to be a reasonable index of the cost of borrowing money.

180. The point was made by many who sent us comments that if contract debts were to carry statutory interest the rate before judgment and the rate after judgment should be the same. This is an argument which the Court of Appeal found attractive in *Jefford* v. *Gee;* however they rejected it because at that time the rate payable on judgment debts was still 4 per cent. per annum[216]. We think that it would make for consistency and would be generally acceptable. Accordingly, if our recommendations in regard to statutory interest on contract debts are acceptable, we hope that consideration will be given to bringing the rate of interest payable on judgment debts into line with the rate of interest payable on contract debts so that the two move together.

Interest after judgment in the county court

181. In 1887 it was decided that judgments obtained in the county court are not judgments to which the Judgments Act 1838 applies and, accordingly, that county court judgments do not carry interest under that Act[217]. Some doubt has been cast on this decision recently[218] and comments have been made by members of the Court of Appeal to the effect that, if the decision is indeed correct, then the law should be changed[219].

182. The question whether county court judgments should carry interest was considered by the Payne Committee on the Enforcement of Judgment Debts. At the time their Report was published, the county court jurisdiction in contract and tort was limited to £500 and the Committee recommended that creditors should recover interest on county court judgments exceeding, say, £100[220]. This Report continues: "Very difficult questions arise, however, with regard to the calculation and collection of interest on small judgments, especially when paid by instalments, and we think that this problem requires detailed examination. It should, however, be deferred until after changes in the substantive law relating to interest on contracts has been studied and revised to bring it up to date with current thought."

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[214] *Cremer* v. *General Carriers S.A.* [1974] 1 W.L.R. 341, 357 *per* Kerr J.
[215] *Dalmia Dairies Industries* v. *National Bank of Pakistan* (Q.B.D.) Kerr J. 14 April 1976, unreported.
[216] [1970] 2 Q.B. 130, 148.
[217] *R.* v. *County Court Judge of Essex* (1887) 18 Q.B.D. 704.
[218] *K.* v. *K.* [1977] Fam. 39, 49, *per* Lord Denning M.R.
[219] *Ibid., per* Stephenson L. J. at p. 57 and Orr L. J. at pp. 57 and 58; *Sewing Machine Rentals Ltd.* v. *Wilson* [1976] 1 W.L.R. 37, 43, *per* Megaw L. J.
[220] (1969), Cmnd. 3909, para. 1170.

183. Since the publication of the Payne Committee's Report in 1969, the jurisdiction of the county courts in contract and tort has been raised from £500 to £2,000 and interest rates have risen steeply. (Recently they have fallen but this does not detract from the point we are making here.) Some commentators argued strongly that it was unjust that the creditor with a county court judgment should receive nothing by way of interest for the time that he was kept out of his money after judgment.

184. With regard to the passage just quoted from the Report of the Payne Committee, we are now putting before you our recommendations for changes in the substantive law relating to interest on contract debts. The question whether interest in the county court should be regulated by the same principles and by similar rules as in the High Court was not raised in our working paper but the general view of those who sent us comments was that it should. Not having conducted fuller consultation on the points raised in the Report of the Payne Committee we do not feel that there is much that we can usefully add to the Committee's recommendations, but it is quite clear from our consultation that the difference between judgments in the High Court and in the county court, in the matter of interest, causes serious anomalies and widespread dissatisfaction.

Payment into court

185. We come now to the problems surrounding payments into court. We are concerned, in particular, with the defence tactic, approved and indeed encouraged in *Jefford* v. *Gee*[221], of paying money into court in respect of damages but not in respect of the interest that may be awarded under the 1934 Act. Since the plaintiff has no entitlement to interest in respect of his damages, there is no obligation on the defendant to make a payment into court in respect of the interest element; this is so even in personal injury litigation, although here an award of interest follows judgment almost automatically[222].

186. Where the money paid into court is sufficient to satisfy the claim for damages but makes no allowance for the interest that may be awarded under the 1934 Act the plaintiff is placed in a dilemma. If he takes the money out of court that is an end of the case; he cannot later apply for an award of interest as his claim has already been disposed of without his obtaining a judgment in his favour[223]. If, on the other hand, he leaves the money in court and proceeds to trial, he runs the risk of losing the case and recovering nothing at all. More important, he runs the risk, even if successful in his action, of recovering less than was paid into court. The normal consequence of recovering judgment for less than the money in court is that the plaintiff has not only to bear his own costs from the date of the payment in but has to pay the defendant's costs from that date as well. Thus a payment into court may be regarded in a sense as insurance by the defendant. He insures in respect of his costs by making a payment into court which is in fact an offer, and if

[221] [1970] 2 Q.B. 130, 149 and 150. See Part III, para 128, above.
[222] Part III, para. 106, above.
[223] *Newall* v. *Tunstall* [1971] 1 W.L.R. 105; *Waite* v. *Redpath Dorman Long Ltd.* [1971] 1 Q.B. 294, 299.

the plaintiff declines it and the action goes on, the defendant has insured against the costs which he might otherwise have to pay on the plaintiff obtaining judgment[224].

187. If the damages and interest awarded by the court are less, even when added together, than the money paid into court, then it seems just that the plaintiff should suffer the usual consequences, in costs, of rejecting a reasonable payment into court and attempting to obtain a judgment for more. The difficult and apparently unjust case is where the amount paid into court is more than the damages awarded but less than the damages and interest taken together. In *Jefford* v. *Gee* the Court of Appeal said that in such a case the plaintiff would have to pay both sides' costs from the date of the payment into court[225]. The Court of Appeal were, we think, not laying down an inflexible rule, but merely indicating what would happen in a normal case. Nevertheless, it means that, in such a situation, the plaintiff may not normally obtain interest to compensate him for being kept out of his damages except at the price of paying both sides' costs. This has been criticised as unjust by several commentators.

188. A way out of the difficulty was suggested in *Butler* v. *Forestry Commission*[226] and we welcomed it in our Report on Personal Injury Litigation—Assessment of Damages[227]. We referred to it once more in our working paper[228]. Many of those we consulted expressed views on the problem and on the *Butler* v. *Forestry Commission* solution to it and we think that both merit further examination.

189. In *Butler* v. *Forestry Commission* the plaintiff claimed damages. He maintained that in 1961 the defendants had wrongfully removed a boundary fence and that his cows had, as a result, wandered from the plaintiff's field into the defendants' wood where they ate rhododendrons and became ill. He started proceedings in 1967 and although liability was admitted the case was not tried until March 1971. The only matter in dispute was damages and in September 1970 the defendants paid £200 into court. In the result, the plaintiff was awarded damages of £132 and a discretionary award of interest was made under the 1934 Act in the sum of £85; the interest was no doubt intended to compensate the plaintiff for the ten years that he had been kept out of his damages. The official referee, who tried the case, ordered the defendants to pay the plaintiff the costs of the whole action; the Court of Appeal reversed his decision as to costs and limited the defendants' liability to the costs incurred by the plaintiff prior to the payment into court.

190. The importance of the case, in the present context, lies not so much in the decision as in the advice given by the Court of Appeal as to what a plaintiff should do when faced with a payment into court that is enough to cover the damages but not to cover the interest. The advice

[224] *Newall* v. *Tunstall* [1971] 1 W.L.R. 105, 109, *per* Ashworth J.
[225] [1970] 2 Q.B. 130, 149, 150.
[226] (1971) 115 Sol. J. 912. The facts appearing in the text have been taken from a transcript of the judgments given by the Court of Appeal.
[227] (1973), Law Com. No. 56, para. 285.
[228] Working Paper No. 66, (1976), para. 106.

was that the plaintiff should write an open latter to the defendant stating that he was satisfied with the money paid in as sufficient to satisfy his claim, then point out that the defendant had kept him out of the money and that he would take the money out if the defendant would pay the appropriate interest. The plaintiff could also say that if the defendant refused to pay interest he would leave the money in, go on and draw the judge's attention to the letter and refusal when the judge considered costs. That letter would be a significant contemporary document and, no doubt, the judge would exercise his discretion under R.S.C., Ord. 62, r.5, by giving the plaintiff all his costs.

191. A case in which the advice given by the Court of Appeal was followed, although *Butler* v. *Forestry Commission* appears not to have been cited to the judge, is *Vehicle and General Insurance Co. Ltd. (in liquidation)* v. *H. & W. Christie Ltd.*[229] The plaintiffs were claiming a sum from the defendants which they, the defendants, were alleged to have received as insurance premiums in their capacity as agents for the plaintiffs. Eventually, after the proceedings had been started and the defendants had disputed liability, it emerged from an inspection of the defendants' records that £314.30 was due. The defendants offered to pay this but nothing in respect of interest or costs. The plaintiffs rejected this proposal but indicated in a letter that if the interest and costs were paid they would be satisfied, as they were not pursuing their claim for premiums in excess of the £314.30. The defendants paid £314.30 into court and nothing more. The plaintiffs did not take the money out but proceeded to trial and obtained judgment for £314.30. The trial judge, after considering the plaintiffs' letter and the circumstances in which the payment into court was made and rejected, made an award of interest under the 1934 Act and ordered the defendants to pay the plaintiffs their costs throughout.

192. The two cases just cited show that the dilemma of the plaintiff, described in paragraph 186 above, is capable of resolution. It is not true to say that he must lose either the interest or the costs if money is paid into court that covers the damages (as in the *Butler* case) or the debt (as in the *Vehicle and General* case) but not the interest. He can, by means of an open letter, protect himself against losing his costs and having to pay the defendant's by stating why the payment into court is not acceptable. Then, as long as the interest that is eventually awarded is enough, when added to the damages, to "beat the payment into court", the plaintiff ought usually to be awarded the interest and his costs as well. We say "usually" because there is another factor to be taken into account. It is that the longer the case takes in coming to trial the larger the award of interest will be. If, for example, the *Butler* case had been heard in 1962, one year after the events complained of, the interest would probably have been less than £10. By March 1971 the interest had grown to £85. In deciding which side should bear the costs incurred after the payment into court the court should, and no doubt would, have regard not only to the amount paid into court but also the date of payment, as the plaintiff's rejection of the money in court would not be

[229] [1976] 1 All E.R. 747.

reasonable if the money was sufficient to cover the interest down to the date of the payment, although not sufficient to cover the interest accruing thereafter.

193. After commending the *Butler* v. *Forestry Commission* solution in our Report on Personal Injury Litigation—Assessment of Damages we added[230] that there might be a case for an enquiry into the question of interest on money in court in every sort of action but that we would not advise legislation in the limited context with which we were then concerned.

194. Having reconsidered the problems surrounding awards of interest and payments into court and the comments made on them by those we consulted, we have reached the conclusion that most, if not all, of the difficulties would be solved by a new rule of practice that a payment into court was to be construed as including interest unless the defendant indicated otherwise.

195. We were told by those representing insurance interests that when money is paid into court it is usually calculated to include interest and (interest apart) to exceed what it is anticipated that the court will award by way of damages. It therefore appears that the advice given in *Jefford* v. *Gee*[231] to pay only that which the defendant says is sufficient for the damages but not for the interest, may not always be followed.

196. It seems to us more convenient that payments into court should, as a rule, be inclusive of interest rather than exclusive. When a defendant makes a payment into court he does it with a view to disposing of the claim. He wants the plaintiff either to accept the money or to reject it, not to accept it and then to ask for more; and it does not matter whether the "more" is in respect of damages or interest[232].

197. We think that it would be helpful to plaintiffs and to defendants and indeed to the court of trial if the present ambiguous position were clarified by rules of court to the effect that payments into court should be presumed to include interest. This is not to say that a defendant should not be allowed to pay in money in respect of a debt or damages only (without interest) but that if he wished his payment to be so construed he should make this plain on the relevant court form. Then the plaintiff would know what was intended, and he would know whether he needed to write a letter as advised in *Butler* v. *Forestry Commission*. We would imagine that payments would usually be made inclusive of interest and that the need for such letters would hardly ever arise. We recommend that the problem and our comments on it be brought to the attention of the Rules Committees.

Particular statutory provisions

(a) Insolvency

198. The creditor of an insolvent person or company may prove in the bankruptcy or liquidation, not only for the debt that he is owed but,

[230] (1973), Law Com. No. 56, para. 285.
[231] [1970] 2 Q.B. 130, 149 and 150.
[232] See the observations of Ashworth J. in *Newall* v. *Tunstall* [1971] 1 W.L.R. 105, 109.

subject to certain qualifications, for the interest as well. One important qualification is that the provable interest may only be calculated down to the date of the receiving order or, as the case may be, the presentation of the winding-up petition[233]. Another is that it is to be calculated at a rate not exceeding 5 per cent. per annum[234]. However, the excess over 5 per cent. may be paid out of the estate once the provable debts have been paid in full[235].

199. In respect of a debt "whereon interest is not reserved or agreed for", the creditor may prove in the estate of the bankrupt for interest at a rate not exceeding 4 per cent. per annum to the date of the receiving order. Such interest runs from the time when the debt was payable, if payable by virtue of a written instrument at a certain time; otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment[236]. The same rule applies to proof for interest on the winding-up of a company[237].

200. If, after all the proving creditors have been paid in full (including interest down to the date of the receiving order in excess of 5 per cent.), the bankrupt's estate still has a surplus over, it is to be applied first in paying interest from *after* the date of the receiving order at the rate of 4 per cent. per annum on all debts proved in the bankruptcy[238]. Any balance then belongs to the bankrupt[239]. With the winding-up of a company the rule is different. Provided that there is a surplus after the proving creditors have been paid in full, the company is to be treated as no longer insolvent[240]. This means that the creditor who is entitled to interest on the debt for which he has proved may recover the interest accruing after the presentation of the winding-up petition as if there had been no winding-up at all. On the other hand, the creditor who is not entitled to interest at the time of the presentation of the petition has no means of recovering interest at a later stage even though the company may be in a position to pay it[241].

201. So far as contract debts are concerned, our intention is that a creditor should be entitled to prove for statutory interest (as recommended in Part II) in the same way and subject to the same limitations as for contractual interest.

202. We make no recommendations in this report for changes in the Bankruptcy Act 1914 nor in the Companies (Winding-up) Rules 1949. This branch of the law is now being considered by the Insolvency Law Review Committee and we do not wish to say anything that may seem to prejudge the outcome of their deliberations. However, it does seem

[233] *In re Humber Ironworks & Shipbuilding Co.* (1869) 4 Ch. App. 643.
[234] Bankruptcy Act 1914, s.66(1); Companies Act 1948, s.317, as interpreted in *In re Theo. Garvin* [1969] 1 Ch. 624.
[235] *In re a Debtor. Ex parte Official Receiver* v. *United Auto & Finance Corporation* [1947] Ch. 313.
[236] Bankruptcy Act 1914, Sch. 2, r.21.
[237] Companies (Winding-up) Rules 1949, S.I. 1949, No. 330.
[238] Bankruptcy Act 1914, s.33(8).
[239] *Ibid.*, s.69.
[240] *In re Fine Industrial Commodities Ltd.* [1956] Ch. 256.
[241] *In re Rolls-Royce Ltd.* [1974] 1 W.L.R. 1584.

to us that the rate of 4 per cent. per annum for interest on debts "whereon interest is not reserved or agreed for" can, in times of high interest rates, be so low as to be unjust, as can the 5 per cent. per annum above which no interest is payable out of the estate until all the provable debts have been paid; likewise, the 4 per cent. per annum payable out of the surplus in the case of a bankruptcy. In all these respects it seems to us that the statutory rate of interest that we are recommending for contract debts[242] would be more appropriate than the existing fixed rates of 4 or 5 per cent. per annum. We should also mention the rate of rebate required by the rules where a creditor proves for a debt payable at a future date. The rate is fixed under the existing law at 5 per cent.[243] and it seems to us that, in times of very high interest rates, this could give the "future" creditor an unfair advantage over the creditor whose debt is already due. Here again, the statutory rate of interest which we are recommending for contract debts would seem to be more appropriate.

(b) Partnership Act 1890

203. The Partnership Act 1890 contains two provisions for the recovery of interest as a statutory entitlement at a statutory rate. Section 24 sets out certain rules that are to apply to the partners' interests in the partnership property and their rights and duties in relation to the partnership, subject, however, to any agreement express or implied between the partners. The third of these rules is that any partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of 5 per cent. per annum from the date of the payment or advance.

204. The other relevant provision is section 42. It states that where one partner ceases to be a partner and the others carry on without any final statement of accounts as between the firm and the outgoing partner then, in the absence of any agreement to the contrary, the outgoing partner is given a choice: he may either claim such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets.

205. The option of interest under section 42, at the rate of 5 per cent., has been criticised[244], rightly in our view, as being too low to be just in times when interest rates generally are high. The provision for interest at 5 per cent. in section 24 is open to the same criticism. We have examined both with a view to reform.

206. The recovery of interest on advances is considered first. Before the passing of the Partnership Act 1890 the general rule at common law was as follows: partners were not entitled to interest on the capital

[242] Part II, paras. 86 to 89.
[243] Bankruptcy Act 1914, Sch. 2, r.22; Companies (Winding-up) Rules 1949, S.I. 1949, No. 330, r. 101.
[244] *Sobell* v. *Boston* [1975] 1 W.L.R. 1587, 1593, *per* Goff J.; *Lindley on Partnership* (13th ed., 1971), p.8.

provided (unless it was provided for by agreement) but an advance by a partner in excess of his capital contribution was treated as a loan on which, by usage, interest was payable[245]. The rate usually allowed was 5 per cent.[246], presumably because this was regarded as a reasonable commercial rate for the risk of capital in the kind of partnership ventures that came before the courts.

207. The common law rule was adopted in section 24 of the Partnership Act 1890 and the interest rate on advances was fixed at 5 per cent. The cost of borrowing has recently been well in excess of 5 per cent. So this section has been a potential source of injustice. A provision that is more closely related to current rates of interest is needed. Although the rate that we are recommending in Part II is intended to provide a "default" rate rather than an "investment" rate[247], we think that it would serve the purposes of section 24 of the Partnership Act 1890 reasonably well. We suggest that it be adopted in place of the present rate of 5 per cent. per annum.

208. As for the recovery of interest in respect of assets left in the business by the outgoing partner, the position prior to the passing of the Partnership Act 1890 was complicated. The remedies were equitable rather than legal. If the outgoing partner (or the representative of his estate) could show that the remaining partners were making a profit from wrongful use or investment of his share of the business assets, he was entitled to hold them to account not only for his share of the assets but also for compound interest, on the ground that they were acting in breach of trust[248]. Even if there was no breach of trust, the remaining partners had to account for his share of the assets and the court usually gave the outgoing partner the choice between claiming whatever part of the profits could be attributed to the use made of his share of the assets or simple interest at 5 per cent. However, this was not the invariable rule. A claim for a share of the profits or for interest might be refused if justice so required[249].

209. Section 42 of the Partnership Act 1890 gives the outgoing partner a right to insist on a share of the profits or interest at 5 per cent. No doubt it was considered desirable to minimise the uncertainty provided by the old equitable rules. We are not absolutely convinced that this was justified. A case could be made for leaving the awarding of interest and the fixing of the rate to the courts' discretion, as it was before 1890. If, however, a rate is to be fixed it should be something that is, in commercial terms, realistic. The outgoing partner is being deprived of the use of his money and we accordingly suggest that the rate of interest which he should receive should be the same as the rate which we suggest in the case of unpaid contract debts, that is to say,

[245] *Lindley on Partnership* (5th ed., 1888) p.390.

[246] *Hart* v. *Clarke* (1854) 6 De G. M. & G. 232; 43 E.R. 1222; *In re the Norwich Yarn Co. Ex parte Bignold* (1856) 22 Beav. 143; 52 E.R. 1062; *Troup's case* (1860) 29 Beav. 353; 54 E.R. 664.

[247] See paras. 86 to 88, above.

[248] *Macdonald* v. *Richardson* (1858) 1 Giff. 81; 65 E.R. 833; *Townend* v. *Townend* (1859) 1 Giff. 201; 65 E.R. 885.

[249] *Clements* v. *Hall* (1857) 2 De G. & J. 173, 186; 44 E.R. 954, 959, *per* Lord Cranworth L.C.

a statutory rate fixed quarterly, at least one per cent. over Minimum Lending Rate for the preceding quarter[250].

210. We accordingly make the suggestion that sections 24 and 42 of the Partnership Act 1890 should each be reformed and that in each case the rate of 5 per cent. should be replaced by the statutory rate payable in respect of contract debts. However, we have decided against incorporating these two suggestions in our Bill as amending legislation. We received no comments on consultation that were directed specifically at the reform of partnership law and we do not know how our suggestions will be received by persons carrying on business in partnership or by government departments with special responsibilities in this branch of the law, in particular, the Department of Trade. Also, there are other statutory provisions for interest which may merit amending legislation which we mention in the paragraphs that follow. We have thought it better to make no provision in our Bill for the amendment of particular statutory rights to interest, but only to deal in our Bill with what may be described as the "general" law.

Miscellaneous statutory rights to interest

211. There are various statutory rights to interest on debts and on damages that do not fit conveniently into any of the earlier Parts of this report. For instance, there are provisions in the Housing Act 1961[251] and in the Local Authorities (Land) Act 1963[252] concerning the right to charge interest, at a rate prescribed by statutory instrument, in respect of certain kinds of loan. There are also provisions for the recovery of interest in respect of improvement grants that have to be repaid[253] and in respect of compensation payable on the compulsory acquisition of land[254]. Mention may also be made of the statutory right to interest on compensation payable on breach of certain contracts of carriage[255] and of the Inland Revenue's right to recover interest in respect of overdue taxes[256]. None of these provisions have been the subject of comment or criticism and we are not making positive recommendations for change. However, we do make the general observation that overall consistency is desirable and we suggest that the departments with responsibility for the provisions in question (and others like them) should consider whether the rate currently in force should be changed having regard, in particular, to our recommendations in Part II for the introduction of statutory interest at a prescribed rate in respect of unpaid contract debts.

Rules of court, administration and apportionment

212. There are rules concerning the interest that may be awarded by the courts in certain kinds of case. Many of them concern the administration of estates and the apportionment of income and capital be-

[250] Paras. 86 to 89, above.
[251] Section 7(2)(*a*).
[252] Section 3(4).
[253] Housing Act 1969, s.6(4).
[254] Lands Clauses Consolidation Act 1845, s.85, as amended by the Land Compensation Act 1961, s.32. See too the Opencast Coal Act 1958, ss.35(7) and (8).
[255] Carriage of Goods by Road Act 1965, Sch., Art. 27.
[256] Taxes Management Act 1970, ss.86 to 92.

tween tenants for life and remaindermen. However, we should mention first two other rules that may need revision. One is the rule concerning the interest recoverable between the issue of proceedings in the High Court and a default judgment being obtained, where there is a right to interest but no rate has been specified. The current rule[257], that interest should be added to the sum for which judgment may be given, at the rate of 5 per cent., is out of line with our recommendations on the "default" rate for interest on contract debts[258]. It would be more appropriate to link the rate to the proposed statutory rate of interest on unpaid contract debts. The other rule that merits special mention is one which was brought specifically to our attention on consultation. It concerns informal contracts for the sale of land where no provision is made for the rate of interest on unpaid purchase money. If the contract is made by correspondence interest is payable at 5 per cent. per annum by virtue of the Statutory Form of Conditions of Sale[259]. However, there is no provision as to the rate payable where the contract is made otherwise than by correspondence and, in any event, 5 per cent. seems a little low. We suggest that the interest rate for unpaid purchase money should be the same as the rate that we recommend for interest on unpaid debts, except, of course, where the parties have agreed otherwise.

213. As for the administration of estates pursuant to a court order, there are various rules for the recovery of interest. Debts payable to the estate (which do not carry interest already) carry interest at the rate applicable to judgment debts where the estate is being administered in the High Court[260] but at 4 per cent. per annum in the county court[261]. Pecuniary legacies carry interest from one year after the testator's death at 5 per cent. per annum in the case of High Court administrations[262] and at 4 per cent. in the county court[263]. In the case of an intestacy the widow's so-called "statutory legacy" used to carry interest at 4 per cent. per annum under the provisions of the Administration of Estates Act 1925 (as amended)[264]. The rate may now be changed by yourself by statutory instrument[265] and you have in fact raised it recently to 7 per cent. per annum[266]. This is a convenient point at which to mention a rule about the maintenance of minors, namely that provision for the maintenance of a minor may be made at the rate of 5 per cent. per annum out of the income from a contingent legacy left to him (or her) by a parent[267]. The various rules considered in this and the preceding paragraph are, for the most part, outside our present terms of reference and we did not consult in our working paper on the question whether

[257] R.S.C., 0.13 r.1(2), 0.19, r.2(2).
[258] Paras. 86 to 89, above.
[259] S.R. & O. 1925, No. 779 condition 4, made by the Lord Chancellor under s.46 of the Law of Property Act 1925.
[260] R.S.C., 0.44, r.18.
[261] C.C.R., 0.29, r.14.
[262] R.S.C., 0.44, r.19.
[263] C.C.R., 0.29, r.15.
[264] Section 46(1) (i).
[265] Administration of Justice Act 1977, s.28.
[266] Intestate Succession (Interest and Capitalisation) Order 1977, S.I. 1977, No. 1491, clause 2.
[267] Trustee Act 1925, s.31(3).

reform was needed. However, we make the general observation that there is a lack of consistency in the matter of rate and that greater consistency would be desirable.

214. As for apportionment, interest rates are used by the courts as a means of striking a fair balance between the portion that should go to the tenant for life (income) and the portion that should go to the remainderman (capital) in cases where the money has been invested in a way that is unduly favourable to one at the expense of the other. It is necessary, in fixing the rate, to take a much longer view of investment return than is appropriate in the case of debt-collecting, so we do not suggest that the rate should be linked to the statutory rate of interest that we are recommending, in Part II, in relation to unpaid contract debts. However, the rate which has been applied by the courts for many years, namely 4 per cent. per annum, ought to be reviewed. The rate was settled on by the courts and, accordingly, may be revised by the courts. A suggestion was once made[268] that the Chancery Judges ought to meet from time to time to consider whether the rates applied by courts in the exercise of their equitable jurisdiction, and, in particular, in the matter of apportionment, should be changed. No doubt the Law Reform Committee, who are studying this branch of the law[269], will take this suggestion into consideration.

PART VI SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

215. The purpose of this Part of the report is simply to draw together all the conclusions arrived at in the other Parts and to summarise our recommendations for reform; we identify, where appropriate, the clauses in the Bill which are aimed at putting each of the recommended reforms into effect.

Aspects of the present law that are not in need of reform

216. We have concluded that no reforms are needed in –

(*a*) the equitable jurisdiction to award interest (Part I, para. 21)

(*b*) the matrimonial jurisdiction (Part I, para. 22)

(*c*) the law governing the recovery of interest upon the dishonour of a bill of exchange (Part I, paras. 23-24 and clauses 2(8) and 12(2) of the Bill).

Interest on debts

217. We have concluded that the existing law does not provide adequate means of redress for the creditor who is kept out of his money by his debtor. The general rule at common law is that the creditor has no right to interest unless it is provided by the terms of the contract. Interest may sometimes be awarded under the 1934 Act as a matter of discretion but the circumstances in which such an award may be made are limited (Part II, paras. 28-34).

[268] *Re Goodenough* [1895] 2 Ch. 537, 539 *per* Kekewich J.

[269] On 26 October 1977 the Law Reform Committee were asked to consider the existing statutory and other powers, rights and obligations of trustees and personal representatives in the light of existing conditions.

218. Whilst it would be an improvement in the law to make discretionary awards of interest under the 1934 Act more widely available, this is not all that is needed. In addition, it should be made a general rule that contract debts should carry the right to interest at a statutory rate (statutory interest) save where the parties have agreed otherwise (Part II, paras. 35-44 and clause 1 of the Bill).

219. Our recommendations are intended to provide a right to interest at a realistic rate in respect of unpaid contract debts for the period that they have been withheld as if the right had been provided by contract. However, the parties should be free to make other arrangements for the payment of interest if they prefer; the right to statutory interest should not be in substitution for or prejudicial to the parties' other rights and remedies (legal or equitable); the recovery of statutory interest should be a right but not a duty (Part II, para. 45-52 and clauses 2(2), 2(3) and 3(1) of the Bill).

220. Statutory interest should be recoverable in respect of contract debts, including money payable as an agreed pre-estimate of damages for breach of contract; the statutory interest should be recoverable by and from persons other than the original creditor and debtor where the right to be paid the debt (or part of it) or the duty to pay it (or part of it) has passed or been assigned (Part II, paras. 53-55 and clause 1, clause 2(1) and clause 9 of the Bill).

221. Statutory interest should not be recoverable in respect of non-contractual debts, such as debts due in quasi-contract (Part II, paras. 65-66), nor should it be recoverable if the debt falls into one of the following categories:

(*a*) a debt that consists of rent or other sums payable under a contract of tenancy or sums payable by way of rentcharge (Part II, paras. 56-61, and clause 2(6) of the Bill);

(*b*) a debt payable under a contract that is governed by foreign law or that may be paid in a foreign currency (Part II, paras. 62-64 and clause 2, subsections (1) and (5) of the Bill);

(*c*) a debt that constitutes interest (Part II, para. 67, clause 2(7) of the Bill);

(*d*) a debt payable under an obligation to indemnify, including obligations of guarantee and all kinds of indemnity insurance (Part II, paras. 68-73 and clause 2(4) of the Bill).

222. The date from which statutory interest on a contract debt should start to run should be the date for payment where such a date has been agreed (Part II, paras. 74-75, clause 4, subsections (1), (2)(*a*) and (3) of the Bill).

223. Where no date for payment has been agreed, statutory interest should start to run 28 days after the service of a demand for payment (Part II, paras. 76-78 and clause 4(1) (*b*) of the Bill).

224. To be effective to start statutory interest running, the demand should be in writing and should give the debtor such particulars as may be reasonably requisite to enable the debtor to determine where, how and to whom to pay the debt and how, in the case of an unitemised bill, the sum has been calculated (Part II, para. 79 and clause 4(4) and clause 5 subsections (1), (2) and (3) of the Bill).

225. As for service of the demand on the debtor, the rules should be as follows:

(*a*) in the case of a limited company, service should be at the registered office or at any place from which the debtor carries on business and at which it would be commercially reasonable to serve the demand;

(*b*) in the case of a partnership, service should be at the principal address from which the partnership carries on business or on a partner or person having management or control of the partnership business;

(*c*) otherwise, service should be on the debtor personally or at his last known address (Part II, paras. 80-82 and clause 5, subsections (4)-(7) of the Bill).

226. Statutory interest should cease to run in respect of a debt when the interest would so cease if it were carried under an express contractual provision (Part II, para. 83 and clause 6 of the Bill).

227. The statutory rate of interest should be simple, not compound, and should be calculated and declared quarterly by the Bank of England in advance for every quarter; the details concerning the method of calculation and the form and content of the declaration should be regulated by statutory instruments made by yourself; we recommend that the rate should be calculated at 1 per cent. above the average rate for Minimum Lending Rate for the quarter last passed, rounding it up to the nearest half per cent. (Part II, paras. 84-90 and clause 8 of the Bill).

228. The court should have a discretion, on the application of the debtor, to remit statutory interest (or order repayment) where the creditor has broken the terms of the relevant contract and such an order would be reasonable in all the circumstances (Part II, paras. 91-94 and clause 7 of the Bill).

229. There should be no restrictions, by virtue of our recommendations, on the right of the parties to contract out of their liability to pay statutory interest (Part II, paras. 95-100 and clause 2(3) of the Bill).

230. Our recommendations, as above, should only apply to contract debts arising under contracts entered into after our recommendations are given the force of law (Part II, para. 101 and clauses 2(1) and 16(2) of the Bill).

231. Statutory interest on contract debts should not be regarded as "yearly interest of money" for the purposes of sections 54(1) (a) and (b)

of the Income and Corporation Taxes Act 1970 (deduction and remission of tax by debtors) (Part II, paras. 102-103 and clause 3(2) of the Bill).

Interest on damages

(a) Personal injury litigation

232. So far as the *Jefford* v. *Gee* guide-lines are concerned, we have no recommendations to add to those that we made in our Report on Personal Injury Litigation – Assessment of Damages, (1973), Law Com. No. 56, at paras. 263-286 (Part III, paras. 105-118).

233. We hope that the rate at which interest will, in future, be awarded by the courts in respect of damages in personal injury litigation will be the same as the rate that we are recommending for statutory interest on contract debts, but we make no recommendations for legislative changes in this regard (Part III, paras. 119-120).

(b) Awards of interest in Admiralty

234. We have concluded that no changes are needed in the existing law relating to awards of interest in Admiralty cases (Part III, paras. 121-136).

(c) Awards of interest on damages generally

235. We have concluded that there should be no general entitlement to interest on damages but that the award of interest on damages should be left to the courts' discretion (Part III, paras. 137-141).

The 1934 Act

236. We have concluded that the courts should have the power to award interest whenever proceedings are brought for the recovery of a debt or damages, except where a right to interest is already provided by statute, by agreement or otherwise (Part IV, paras. 142-144).

237. The jurisdiction created by the 1934 Act is not wide enough to satisfy all the needs mentioned in the preceding paragraph. In particular, there are situations in which a person may bring proceedings to recover a debt or damages and may be unable to obtain compensation in the form of a discretionary award of interest for the period during which the debt or the damages are withheld. Provision should be made for these situations by repealing the 1934 Act and replacing it with a wider jurisdiction (Part IV, para. 145 and clauses 10 and 13 of the Bill).

238. The jurisdiction created by the 1934 Act should be widened to ensure that the courts have the power, in proceedings for debt or damages, to award interest where the proceedings themselves are not "tried", to award interest in respect of sums paid prior to judgment and to award interest for any period when a debt does not otherwise carry interest, even though there may be other periods during which the debt *does* carry interest (Part IV, paras. 146-149 and clause 10, subsections (1)-(4), (6) and (7) of the Bill).

239. In the re-shaping of the jurisdiction created by the 1934 Act the following features of the old jurisdiction should be retained:—

(*a*) interest should not be awarded on a *debt* that is itself interest although interest should be available in respect of *damages* that contain an interest element (Part IV, paras. 150-152 and clause 12(1) of the Bill);

(*b*) awards of interest should be on a simple, not compound, basis (Part IV, paras. 153-156 and clause 10, subsections (2)-(4) of the Bill);

(*c*) there should be no power to award interest on a debt in respect of a period during which interest is already payable by contract, statute or otherwise (Part IV, paras. 157-170 and clause 10(5) of the Bill);

(*d*) nothing should affect the damages recoverable for the dishonour of a bill of exchange (Part IV, para. 171 and clause 12(2) of the Bill);

(*e*) statutory guide-lines for the exercise of the discretion in the matter of interest should not be provided (Part IV, paras. 172-174).

240. Arbitrators should have the same powers to award interest as courts of record but since this is the existing law no statutory provision is required (Part IV, para. 175).

Other problems

241. So far as High Court judgment debts are concerned, we hope that consideration will be given to bringing the rate of interest into line with the rate for statutory interest on contract debts (Part V, paras. 178-180).

242. So far as county court judgment debts are concerned, we hope that further consideration will be given to the recommendations made by the Payne Committee on the Enforcement of Judgment Debts at paragraphs 1155 to 1170 of their Report (1969), Cmnd. 3909 in the light of our recommendations in Part II for statutory interest on contract debts prior to judgment (Part V, paras. 181-184).

243. So far as payments into court are concerned, we believe that difficulties can arise from uncertainty as to whether payments should be construed as inclusive or exclusive of interest, especially where the interest is not recoverable as of right but may be awarded under the 1934 Act. We suggest that the Rules Committees be invited to consider introducing a rule that a payment into court should be presumed to be inclusive of interest unless the party making the payment indicates otherwise (Part V, paras. 185-197).

244. As for statutory interest and statutory rates of interest created by the Bankruptcy Act 1914 in respect of debts provable in the bankruptcy, we suggest that the Insolvency Law Review Committee consider making the rates the same as for statutory interest on contract debts;

we make the same suggestion in relation to debts provable in a company liquidation (Part V, paras. 198-202).

245. As for the statutory rate of interest on partnership money fixed by sections 24 and 42 of the Partnership Act 1890, we believe that the existing fixed rate of 5 per cent. per annum needs to be revised. The statutory rate that we recommend for contract debts (Part II) seems more appropriate and we hope that consideration will be given to amending legislation (Part V, paras. 203-210).

246. Many miscellaneous rights to interest are provided by statute, some in relation to debts, some in relation to damages, some in relation to other civil obligations such as taxes. There are also various rules of court which regulate the interest recoverable in certain proceedings, in particular, proceedings for the recovery of debts in default of appearance or defence and administration actions. We hope that these statutory provisions and rules of court (and the rates of interest thereby prescribed) will be reviewed in the light of our recommendations, in Part II, for statutory interest on contract debts (Part V, paras. 211-213).

247. As for the rates used by the courts in making apportionments between income and capital, we think that a general review would be appropriate (Part V, para. 214).

(*Signed*) SAMUEL COOKE, *Chairman*
STEPHEN EDELL
W. A. B. FORBES
NORMAN S. MARSH
PETER M. NORTH

J. M. CARTWRIGHT SHARP, *Secretary*
7 *April* 1978

APPENDIX A

THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1934

Section 3, including the provisions introduced by the Administration of Justice Act 1969, s.22.

Power of courts of record to award interest on debts and damages

3.(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section –

(*a*) shall authorise the giving of interest upon interest; or

(*b*) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(*c*) shall affect the damages recoverable for the dishonour of a bill of exchange.

(1A)* Where in any such proceedings as are mentioned in subsection (1) of this section judgment is given for a sum which (apart from interest on damages) exceeds £200 and represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, then (without prejudice to the exercise of the power conferred by that subsection in relation to any part of that sum which does not represent such damages) the court shall exercise that power so as to include in that sum interest on those damages or on such part of them as the court considers appropriate, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(1B)* Any order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is given, whether that period is the whole or part of the period mentioned in subsection (1) of this section.

(1C)* For the avoidance of doubt it is hereby declared that in determining, for the purposes of any enactment contained in the County Courts Act 1959, whether an amount exceeds, or is less than, a sum specified in that enactment, no account shall be taken of any power exercisable by virtue of this section or of any order made in the exercise of such a power.

(1D)* In this section "personal injuries" includes any disease and any impairment of a person's physical or mental condition, and any reference to the County Courts Act 1959 is a reference to that Act as (whether by virtue of the Administration of Justice Act 1969 or otherwise) that Act has effect for the time being.

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*Introduced by the Administration of Justice Act 1969, s.22.

APPENDIX B

Working Paper No. 66

List of persons and organisations who sent comments

Master R. E. Ball, C.B., M.B.E., Chief Chancery Master
Mr. Geoffrey Brice
British Constructional Steelwork Association Ltd.
British Insurance Association
British Insurance Law Association
British Printing Industries Federation
British Rubber Manufacturers' Association Ltd.
City of London Solicitors Company
C.L.C. Outfitters Ltd.
Confederation of British Road Passenger Transport
Consumers' Association
Mr. M. J. Cook
Co-operative Wholesale Society Ltd.
Mr. A. A. Darg
Mr. N. J. Douthwaite-Hodges
Mr. H. Edwards
Finance Houses Association
Grays, Solicitors
His Honour Judge Francis
The Hon. Mr. Justice Goulding
Hire Purchase Trade Association
Institute of Credit Management
Johnson, Pearce & Co. Ltd. (debt only)
The Hon. Mr. Justice Kerr
Mr. Robert M. Justice
Kalamazoo Ltd. (debt only)
Mr. M. A. Lassman
The Law Society
Mr. Wm. A. Leitch, C.B.
Life Offices' Association
Lloyd's
London Boroughs Association
London Maritime Arbitrators Association
National Coal Board
National Farmers' Union
National Federation of Building Trades Employers
Mr. A. A. Preece
Mr. Registrar Rochford, Admiralty Registrar
Royal Institute of British Architects
The Senate of the Inns of Court and the Bar
H.M. Treasury (on behalf of Purchasing Departments)
United Kingdom Provision Trade Federation

APPENDIX C

Interest (Debts and Damages) Bill

ARRANGEMENT OF CLAUSES

Statutory interest on certain contract debts

DRAFT

OF A

B I L L

TO

A.D. 1978

Amend the law by making provision for certain debts to carry interest, and further provision about the power of courts of record to award interest on debts and damages; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Statutory interest on certain contract debts

Certain contract debts to carry interest.

1.—(1) A relevant contract debt shall carry simple interest by virtue of this section and in accordance with sections 2 to 9 below.

(2) In this Act "statutory interest" means interest carried by virtue of this section.

EXPLANATORY NOTES

Clause 1

1. This clause implements the recommendation in paragraph 218 of the report.

2. The effect of the clause is to alter the old common law rule that a creditor has no right to interest on an unpaid contract debt unless a right to interest is provided under the contract. The intention of the clause is that a debt which qualifies as a "relevant contract debt" will automatically carry interest; such interest is referred to in this clause and elsewhere in the Bill as "statutory interest".

Relevant contract debts, etc.

2.—(1) Subject to the following provisions of this section, in this Act "relevant contract debt" means an ascertained or ascertainable sum payable, whether expressly or impliedly, under a contract which is governed by English law, which is entered into on or after the appointed day and by virtue of which the debt is created (as distinct from assigned).

(2) A debt is not a relevant contract debt if, at the time the contract creating the debt is entered into, there is a right to interest or to charge interest on the debt, whether immediately or in the future and whether by virtue of any contract, any statutory provision or otherwise; but in applying this subsection any possibility of the debt carrying interest by virtue of section 1 above is to be ignored.

(3) A debt is not a relevant contract debt if, at the time the contract creating the debt is entered into, interest on the debt is excluded (as distinct from not provided for), whether by virtue of any contract, any statutory provision or otherwise.

(4) A debt is not a relevant contract debt if the debt is payable by one person under an obligation which constitutes or includes a duty wholly or partly to indemnify another in respect of his loss, whether the obligation takes the form of an indemnity, indemnity insurance or guarantee or takes some other form.

(5) A debt is not a relevant contract debt if the debt is payable in a currency other than sterling, or in either such a currency or sterling.

(6) A debt is not a relevant contract debt to the extent that the debt consists of—

(*a*) a sum payable by a tenant under a lease, under-lease or other tenancy of land (whether or not the sum is or includes rent), or

(*b*) a sum payable by way of rentcharge.

(7) A debt is not a relevant contract debt to the extent that the debt consists of interest.

Clause 2

1. This clause implements the recommendations in paragraphs 219, 220, 221, 229 and 230 of the report.

2. The purpose of clause 2 is to draw a line between debts which qualify as "relevant contract debts" and accordingly carry "statutory interest" and those which do not. Only contract debts are eligible; accordingly debts arising otherwise, for example, by statute or quasi-contract, are excluded.

3. Subsection (1) identifies the essential elements in a "relevant contract debt" namely that the debt is an ascertained or ascertainable sum, that it is payable under a contract governed by English law and that the contract creating the debt is entered into on or after the day when the Act comes into force (as to which see clause 16).

4. Subsection (2) excludes from the category of "relevant contract debts" those contract debts in respect of which the creditor has a right to interest or to charge interest otherwise than under clause 1. The subsection is so worded as to exclude contract debts that carry interest by statute (for an example see Housing Act 1961, s. 7(2) (*a*)), or that carry interest by statute, unless the parties agree otherwise (for examples see Partnership Act 1890, ss. 24 and 42), or that give the creditor a statutory right to charge interest (for example, bills affected by rule 5(1) of the Solicitors' Remuneration Order 1972, S.I. 1972 No. 1139). On the other hand, the fact that a creditor may at some stage become entitled by statute to prove for interest (under rule 21 of Schedule 2 of the Bankruptcy Act 1914) on a debt provable in bankruptcy does not prevent the debt from being a "relevant contract debt" for the purposes of clause 1.

5. Subsections (2) and (3) give effect to the recommendations in paragraph 219 of the report by excluding a right to statutory interest where interest is payable under a contract or otherwise or where the parties have agreed that no interest, statutory, contractual or otherwise should be payable. No restrictions are placed in clause 2 or elsewhere on the freedom of the parties to exclude statutory interest by agreement; the report recommends, at paragraph 229, that there should be no such restrictions.

6. Subsections (4), (5), (6) and (7) give effect to recommendations in paragraph 221 of the report.

7. Subsections (1) and (5) together implement the recommendations concerning foreign money liabilities made in paragraph 221(*b*) of the report.

(8) The fact that a court has or may have a discretion to award interest on a debt does not prevent it being a relevant contract debt (whether the discretion arises or may arise under section 10 below or a rule of equity or otherwise).

(9) Nothing in section 1 above affects the damages recoverable for the dishonour of a bill of exchange.

(10) In subsections (2) and (3) above "statutory provision" means a provision made by or under an enactment (including an enactment in a local and personal Act or a private Act), whether the provision came into force before or on or after the appointed day; and in subsection (6) above "rentcharge" has the same meaning as in the Rentcharges Act 1977.

8. According to subsection (8) the fact that interest on an unpaid debt may be recovered, not as the creditor's entitlement (as to which see subsection (2)), but at the discretion of the court (under clause 10), does not prevent the debt from carrying statutory interest under clause 1.

9. Subsection (9) preserves the existing law concerning the damages recoverable for the dishonour of a bill of exchange; this accords with the conclusion, in paragraph 216 of the report, that the law is not in these respects in need of reform.

Nature of statutory interest.

3.—(1) Subject to the provisions of this Act, statutory interest shall for all purposes be treated as being carried under an express provision of the contract creating the debt, and any right or duty arising by virtue of section 1 above shall for all purposes be treated as arising under such an express provision.

(2) Subsection (1) of section 54 of the Income and Corporation Taxes Act 1970 (duty to deduct income tax from certain payments of yearly interest) shall not apply to statutory interest paid as mentioned in paragraph (*a*) or (*b*) of that subsection (payments by companies, etc.), unless the interest is also paid as mentioned in paragraph (*c*) of that subsection (payments to persons abiding abroad).

Clause 3

1. Subsection (1) implements the recommendation in paragraph 219 of the report that the creditor's right to statutory interest (and the debtor's duty to pay it) should be the same as if the right (and duty) had been provided by contract.

2. Subsection (2) implements the recommendation in paragraph 231 of the report.

Commencement of running of statutory interest.

4.—(1) Subject to section 7 below, statutory interest shall start to run on the day after the relevant date.

(2) In subsection (1) above "the relevant date" means—

(*a*) where the creditor and debtor agree a date for payment of the debt concerned, or such a date is established by the course of dealing between them or by such usage as binds them, that date;

(*b*) in any other case, the date of the expiry of the period of 28 days commencing with the day on which the debtor is served with a written demand of the creditor for payment of the debt, being a demand complying with section 5 below.

(3) The date referred to in subsection (2)(*a*) above may be a fixed one or may depend on the happening of an event or the failure of an event to happen.

(4) A demand referred to in subsection (2)(*b*) above is in section 5 below called a statutory demand.

Clause 4

This clause implements the recommendations in paragraphs 222 and 223 of the report.

Statutory demands.

5.—(1) A statutory demand—

(*a*) must identify the debt and give the debtor such information as may be reasonably requisite in the circumstances to enable him to determine where, how and to whom to pay the debt, and

(*b*) must state the amount of the debt and if appropriate must break down the statement into items in such a manner as is reasonable in the circumstances.

(2) A statutory demand served by one joint creditor shall be treated as served by both or all the creditors; and a statutory demand served on one joint debtor shall be treated as served on both or all the debtors.

(3) A demand purporting to be a statutory demand is ineffective if served earlier than the date on which the debt falls to be paid.

(4) A statutory demand may be served on a person by delivering it to him or by leaving it at his proper address or by sending it by post to him at that address.

(5) A statutory demand may—

(*a*) in the case of a body corporate, be served on the secretary or clerk of the body;

(*b*) in the case of a partnership, be served on a partner or a person having the control or management of the partnership business.

(6) For the purposes of this section and section 26 of the Interpretation Act 1889 (service of documents by post) in its application to this section, a person's proper address is—

(*a*) in the case of a body corporate or its secretary or clerk, the address of the registered or principal office of the body;

(*b*) in the case of a partnership or a person having the control or management of the partnership business, the address of the principal office of the partnership;

(*c*) in any other case, the last address of the person to be served which is known to the person serving the notice.

(7) Without prejudice to the preceding provisions of this section, where a debtor (whether a body corporate or unincorporate or a natural person) carries on a business and the debt concerned was incurred by him in the course of the business, a statutory demand may be served on him by leaving it at or sending it by post to any place—

(*a*) from which he carries on the business, and

(*b*) at or to which the demand would be reasonably expected to be left or sent, having regard in particular to previous communications or dealings (if any) between the debtor and the creditor.

EXPLANATORY NOTES

Clause 5

1. Clause 5 implements the recommendations in paragraphs 224 and 225 of the report.

2. Subsection (1) explains what the demand must contain in order to be effective to start interest running.

3. Subsection (2) explains, in case doubt should otherwise arise, that service by one joint creditor counts as service by all and that service on one joint debtor counts as service on all.

4. Subsection (3) states the earliest date on which a valid statutory demand may be served.

5. Subsections (4), (5), (6) and (7) provide rules for the service of the demand, in accordance with paragraph 225 of the report.

Termination of statutory interest.

6.—(1) Subject to section 7 below, statutory interest shall cease to run in respect of a debt when the interest would so cease if it were carried under an express contractual provision.

(2) Subsection (1) above does not prejudice the generality of section 3(1) above.

Clause 6

This clause implements the recommendations in paragraph 226 of the report.

Court's power with regard to statutory interest.

7.—(1) Where statutory interest has run in respect of a debt, and the condition mentioned in subsection (2) below is fulfilled, the court may on the debtor's application order that statutory interest shall be taken not to have run for such period as the court thinks fit.

(2) The condition is that the creditor is or has been in breach of the contract creating the debt and it would be reasonable in the circumstances for an order to be made under this section.

(3) A court may make such further order as it thinks necessary or desirable to give effect to any order made by it under this section; it may, for example, order that statutory interest paid is to be repaid, in whole or in part.

(4) In subsection (1) above "the court" means any court with jurisdiction to entertain proceedings for the recovery of the debt concerned.

Clause 7

This clause implements the recommendations in paragraph 228 of the report.

Rate of statutory interest.

8.—(1) The rate of statutory interest for any period during which it runs shall be such as is declared for that period by the Bank of England in accordance with this section.

(2) The Bank shall declare the rate in advance for each succeeding period of 3 months, starting with that which commences when section 1 above comes into force.

(3) The Bank shall calculate and declare the rate in such manner as is for the time being prescribed by an order made by the Lord Chancellor.

(4) The Lord Chancellor may by an order made under this section prescribe the manner in which evidence of a declaration under this section may be given in legal proceedings.

(5) Where the Bank declares a rate in accordance with this section, it is to be conclusively presumed that the Bank's calculation of the rate was made in accordance with this section.

Clause 8

1. This clause implements in part the recommendations in paragraph 221 of the report.

2. Clause 8 does not prescribe the manner in which the rate of statutory interest is to be calculated and the manner in which it is to be declared; these matters are to be regulated under subsection (3) by an order or orders made by the Lord Chancellor.

3. Subsection (4) enables the Lord Chancellor by order to prescribe rules, if they are required, as to how the making of a declaration by the Bank of England is to be proved in court.

4. Subsection (5) raises a conclusive presumption that when the Bank of England declares a rate of statutory interest, it has calculated the rate in accordance with this clause.

5. Orders under this clause are to be made by statutory instrument in accordance with clause 14.

Assignments, etc.

9.—(1) A debt remains a relevant contract debt if the right to be paid it or the duty to pay it passes, in whole or in part, to a person other than the person who is, under the contract creating the debt, the original creditor or (as the case may be) the original debtor.

(2) In sections 4, 5 and 7 above "creditor", in relation to a debt, means a person entitled (whether immediately or in the future) to be paid the debt, either under the contract creating the debt or because of the right to payment having passed to him, and a reference to anything being done by a creditor includes a reference to it being done by a predecessor (that is, any person who at the time was a creditor within the meaning of this subsection).

(3) In those sections "debtor", in relation to a debt, means a person bound (whether immediately or in the future) to pay the debt, either under the contract creating the debt or because of the duty to pay having passed to him, and a reference to anything being done by or to a debtor includes a reference to it being done by or to a predecessor (that is, any person who at the time was a debtor within the meaning of this subsection).

(4) Where the right to be paid part of a debt passes from the original creditor, then—

(*a*) subject to paragraph (*b*) below, a reference to a debt in sections 4, 5 and 7 above shall include (where appropriate) a reference to part of a debt;

(*b*) sections 6 and 7(4) above shall have effect as if the references in them to a debt were to part of a debt; and

(*c*) subsections (2) and (3) above shall have effect as if the first two references in each to a debt were to part of a debt.

(5) A reference in this section to a right or duty passing is to it passing by assignment, operation of law or otherwise.

Clause 9

This clause implements the recommendation in paragraph 220 of the report that statutory interest should be recoverable by and from persons other than the original creditor and debtor where the right to be paid the debt (or part of it) or the duty to pay it (or part of it) has passed or been assigned.

Court's power to award interest on debts and damages.

10.—(1) This section applies where there are proceedings (whenever instituted) before a court of record for the recovery of a debt or damages, and on or after the appointed day—

(*a*) judgment is given for a sum, whether or not the proceedings have been (or begun to be) tried, or

(*b*) the defendant pays to the plaintiff (whether in pursuance of an order of the court or otherwise) a sum representing or including part of the debt or damages before judgment is given in the proceedings and judgment is given for a further sum, whether or not the proceedings have been (or begun to be) tried, or

(*c*) in the case of proceedings for the recovery of a debt, the defendant pays the whole debt to the plaintiff otherwise than in pursuance of a judgment in the proceedings and otherwise than by paying the debt into court.

(2) Where subsection (1)(*a*) above applies, the court may order that there shall be included in the sum for which judgment is given simple interest at such rate as it thinks fit on all or any part of the debt or damages represented by or included in the sum for all or any part of the period between the date when the cause of action arose and the date of the judgment.

(3) Where subsection (1)(*b*) above applies, the court may, on giving judgment, order that there shall be included in the sum for which judgment is given simple interest at such rate as it thinks fit on all or any part of the debt or damages represented by or included in the sums concerned for all or any part of the period between the date when the cause of action arose and—

(*a*) in the case of the sum paid before judgment, the date of the payment;

(*b*) in the case of the sum for which judgment is given, the date of the judgment.

(4) Where subsection (1)(*c*) above applies, the court may, on the plaintiff's application, order the defendant to pay to the plaintiff simple interest at such rate as it thinks fit on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.

(5) No order may be made under this section in respect of a debt for a period during which, for whatever reason, interest on the debt already runs.

(6) An order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is awarded.

(7) In this section "plaintiff" means the person seeking the debt or damages concerned in the proceedings concerned and "defendant" means the person from whom it is or they are sought.

Clause 10

1. Clause 10 implements the recommendations in paragraphs 236 to 239 of the report.

2. Subsection (1)(*a*) is not restricted to situations where the proceedings have been "tried"; it is in this respect wider than section 3(1) of the 1934 Act.

3. Subsection (1)(*b*) deals with a situation in which, according to *The Medina Princess* [1962] 2 Lloyd's Rep. 17, interest may only be awarded under section 3(1) of the 1934 Act in respect of the sum for which judgment is given.

4. Subsection (1)(*c*) deals with a situation in which interest may not be awarded under section 3(1) of the 1934 Act because the debt that is the subject of the proceedings is paid without a judgment being obtained.

5. Subsections (2), (3) and (4) empower the courts to award interest in the circumstances described above, where interest may not be awarded under section 3(1) of the 1934 Act.

6. Subsection (5) is similar to proviso (*b*) to section 3(1) of the 1934 Act. However, where interest has been running on a debt for one period but not for another the court is given the power, which it did not have under the 1934 Act, to make a discretionary award of interest in respect of the period when interest was not running.

7. Subsection (6) reproduces matter formerly in section 3(1B) of the 1934 Act.

8. Subsection (7) explains how the words "plaintiff" and "defendant" are used in this clause.

Court's duty to award interest on certain damages for injury or death.

11.—(1) Subsection (2) below applies where—

(*a*) the sum mentioned in section 10(1)(*a*) above is one which (apart from interest on damages) exceeds £200 and represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death; or

(*b*) the sums mentioned in section 10(1)(*b*) above together exceed £200 (apart from interest on damages) and one or each of them represents or includes such damages as are mentioned in paragraph (*a*) above.

(2) In such a case, the court shall exercise the power conferred by section 10 above so as to include, in the sum for which judgment is given, interest on such damages as are mentioned in subsection (1) above or on such part of them as the court considers appropriate, unless it is satisfied that there are special reasons why no interest should be awarded in respect of those damages.

(3) Subsection (2) above does not prejudice the exercise of the power conferred by section 10 above in relation to any part of any sum which does not represent such damages as are mentioned in subsection (1) above.

(4) In this section "personal injuries" includes any disease and any impairment of a person's physical or mental condition.

Clause 11

1. This clause reproduces matter formerly contained in sections 3(1A), (1C) and (1D) of the 1934 Act, which were added to the 1934 Act by section 22 of the Administration of Justice Act 1969.

2. Subsections (1)(*a*) and (*b*) cover a situation which appears not to be covered by section 3(1A) of the 1934 Act, namely the case where an interim award of damages is made in respect of personal injuries or death and the additional sum that is finally awarded is less than £200 although the total (taking the interim and the final award together) is in excess of £200. The change is needed because of the reform of section 3(1) of the 1934 Act.

Supplementary.

12.—(1) Nothing in section 10 above authorises the award of interest on a debt or part of a debt if the debt or part consists of interest.

(2) Nothing in section 10 above affects the damages recoverable for the dishonour of a bill of exchange.

(3) It is hereby declared that in determining, for the purposes of an enactment contained in the County Courts Act 1959, whether an amount exceeds or is less than a sum specified in the enactment, no account shall be taken of the power conferred by section 10 above or of an order made in exercising the power.

(4) In subsection (3) above the reference to the County Courts Act 1959 is a reference to it as it has effect for the time being (whether by virtue of the Administration of Justice Act 1969 or otherwise).

Clause 12

1. Subsection (1) replaces proviso (*a*) to section 3(1) of the 1934 Act. It makes it clear, as recommended in paragraph 239 (*a*) of the report, that interest should not be awarded on a *debt* that is itself interest, although nothing should prevent the award of interest on *damages* that contain an interest element.

2. Subsection (2) implements the recommendations in paragraphs 216(*c*) and 239(*d*) of the report and reproduces matter formerly in proviso (*c*) to section 3(1) of the 1934 Act.

3. Subsections (3) and (4) reproduce matter formerly in sections 3(1C) and (1D) of the 1934 Act, which were added to the 1934 Act by section 22 of the Administration of Justice Act 1969.

Repeals and consequential amendment.

13.—(1) The provisions mentioned in subsection (2) below (which are superseded by sections 10 to 12 above and 15 below) shall cease to have effect on the appointed day; but nothing in this subsection affects those provisions in relation to a judgment of a court of record given before that day.

(2) The provisions are:—

(*a*) section 3 of the Law Reform (Miscellaneous Provisions) Act 1934;

(*b*) section 24(3) of the Crown Proceedings Act 1947; and

(*c*) section 22 of the Administration of Justice Act 1969 and, in section 34(3) of that Act, the words from "and section 22" onwards.

(3) In section 375A(1)(*a*) of the Income and Corporation Taxes Act 1970 (discretionary interest on damages for personal injuries or death not income for income tax purposes) after "section 3 of the Law Reform (Miscellaneous Provisions) Act 1934" there shall be inserted on the appointed day "or section 10 of the Interest (debts and damages) Act 1978".

Clause 13

1. Subsections (1) and (2) repeal section 3(1) of the 1934 Act (and related provisions) in accordance with the recommendation in paragraph 237 of the report.

2. Subsection (3) provides for an amendment to a provision in the Income and Corporation Taxes Act 1970, consequential upon the repeal of section 3(1) of the 1934 Act and its replacement by clauses 10 to 12 of the present Bill.

Orders.

14.—(1) The power to make an order under section 8 above or 16(2) below shall be exercisable by statutory instrument.

(2) An order under any of those provisions may be varied or revoked by a subsequent order under the provision concerned.

(3) A statutory instrument made under section 8 above shall be subject to annulment in pursuance of a resolution of either House of Parliament.

The Crown.

15.—(1) This Act binds the Crown, but nothing in this section authorises proceedings to be brought against Her Majesty in her private capacity.

(2) The reference in subsection (1) above to Her Majesty in her private capacity includes a reference to Her Majesty in right of her Duchy of Lancaster and to the Duke of Cornwall.

Clause 15

The Bill is intended to bind the Crown to the same extent that the Crown is bound by the general law of contract. However, this clause ensures that nothing in the Bill, and in particular nothing in clauses 7 and 10, shall authorise proceedings to be brought against Her Majesty in her private capacity.

Citation, commencement, interpretation and extent.

16.—(1) This Act may be cited as the Interest (debts and damages) Act 1978.

(2) This Act (except this subsection) shall come into force on such day as may be appointed by the Lord Chancellor by order, and different days may be so appointed for different provisions or for different purposes.

(3) A reference in a provision of this Act to the appointed day is to the day appointed under subsection (2) above for the coming into force of the provision.

(4) This Act does not extend to Scotland or Northern Ireland.

EXPLANATORY NOTES

Printed in England for Her Majesty's Stationery Office by Harrison & Sons (London) Ltd.
25074 Dd 293928 K22 6/78

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ISBN 0 10 172290 7