

public law," and "required by permanent considerations of equity and justice," this demand can be demonstrated, without difficulty, to be just the reverse. The proofs, however, of this proposition will be better understood if, in the first instance, we ascertain the rules of civil jurisprudence, applicable to the subject of interest.

4. Putting aside those cases, in which the liability of an individual to pay interest rests upon an express or implied contract, or upon positive legislation, it may be stated generally, that interest, in the proper sense of that word, can only be allowed where there is a principal debt, of liquidated and ascertained amount, detained and withheld by the debtor from the creditor after the time when it was absolutely due, and ought to have been paid, the fault of the delay in payment resting with the debtor; or where the debtor has wrongfully taken possession of, and exercised dominion over, the property of the creditor.

In the former case, from the time when the debt ought to have been paid, the debtor has had the use of the creditor's money, and may justly be presumed to have employed it for his own profit and advantage. He has thus made a gain, corresponding with the loss which the creditor has sustained by being deprived during the same period of time of the use of his money; and it is evidently just that he should account to the creditor for the interest, which the law takes as the measure of this reciprocal gain and loss. In the latter case the principle is exactly the same; it is, ordinarily, to be presumed that the person, who has wrongfully taken possession of the property of another, has enjoyed the fruits of it; and if, instead of this, he has destroyed it, or kept it unproductive, it is still just to hold him responsible for interest on its value, because his own acts, after the time when he assumed control over it, are the causes why it has remained unfruitful.

In all these cases it is the actual or virtual possession of the money or property belonging to another, which is the foundation of the liability to interest. The person liable is either *lucratu*s by the detention of what is not his own, or is justly accountable, as if he were so.

5. The rules of the Roman law, as to interest for non-payment of a debt due upon contract, are in strict accordance with the above statement: In *bonæ fidei contractibus usuræ ex morâ debentur*" (Digest, lib. 32, § 2; lib. 17, § 3). "Interest," says Domat (lib. 3, tit. 5, § 1), "is the name applied to the compensation which the law gives to the creditor, who is entitled to recover a sum of money *from his debtor in default*:" (cited in Sedgwick on Damages, page 234).

The Code Civil of France in like manner (lib. 3, tit. 3, "Contrats et Obligations," Art. 1146) provides that "les dommages et intérêts" (which, in the absence of a stipulated amount between the parties, are limited, by Art. 1153, to the rate of interest fixed by law), "ne sont dûs que lorsque le débiteur est en demeure de remplir une obligation:" and Art. 1139 defines the meaning of this expression: "Le débiteur est constitué en demeure, soit par une sommation, ou par autre acte équivalent, soit par l'effet de la convention, lorsqu'elle porte que, sans qu'il soit besoin d'acte, et par la seule échéance du terme, le débiteur sera en demeure." The laws of Great Britain and America recognize the same principles.

6. Mr. Sedgwick, an American author, whose work "On the Measure of Damages" is highly esteemed, and of frequent reference in the courts of Great Britain, as well as in those of the United States, has a chapter (XV) on "*Interest with reference to Damages*." At page 373 he says:—

"The allowance or infliction of interest often presents itself entirely disconnected from any question of contract; and, in this aspect, the subject cannot be omitted in any work which treats of compensation, for it is to be observed generally, to use the language of Lord Kenyon, that where interest is intended to be given, it forms part of the damages assessed by the jury, or by those who are substituted in their place by the parties.

"The subject of interest is susceptible of very clearly defined division; *first*, where it can be claimed as a right, either because there is an express contract to pay it, or because it is recoverable as damages which the party is legally bound to pay for the detention of money or property improperly withheld; *second*, where it is imposed to punish negligent, tortious, or fraudulent conduct. In the first case it is recoverable as matter of law. In the second case it rests entirely in the pleasure of the jury."

He then states the rules of the English law, that "all contracts to pay undoubtedly give a right to interest *from the time when the principal ought to be paid*;" and that "where money is due, *without any definite time of payment*, and there is no contract, express or implied, that interest shall be paid, the English rule, independent of statute, is, that it cannot be claimed."*

* "On the Measure of Damages," p. 376.