

Clause 8 was not invoked by either party. At the trial it was held that the determination of the amount under clause 6 was void, because it was not made until after May 10, 1885; and a reference to a Master was ordered to take an account of the net profits under the agreement. The Master reported that \$706.68 and interest was due to the plaintiffs, but upon an appeal the report was sent back, and a new report was afterwards made finding \$501.11 and interest as the amount due.

Held, (1) that a contract to pay interest could not be implied from the dealings of the parties, and, there being no express contract, the case was not one in which interest was payable "by law," and therefore it did not come within the first branch of section 85 of the Ontario Judicature Act, R.S.O., c. 44; nor did it come within the second branch, as a case in which it had been usual for a jury to allow interest, for no debt existed which was payable until it was ascertained, either in the manner provided by the agreement, or, in default of that, by means of the account taken in the action.

Smart v. Niagara and Detroit Rivers R.W. Co., 12 C.P. 404, and *Michie v. Reynolds*, 24 U.R.C. 303, distinguished.

(2) That the mode of computation provided by the contract being departed from, no certainty remained as to the amount payable or the time of payment, which could not be said to arrive until the final decision of the issues raised in the action; nor did all the elements of certainty appear by the contract, so as to require nothing more than an arithmetical computation to ascertain the exact sum or the exact time for payment; and therefore there was no debt or sum certain, payable by virtue of a written instrument at a certain time, within the meaning of section 86, subsection 1.

Merchant Shipping Co. v. Armitage, L.R. 9 Q.B. 99, and *London, Chatham & Dover R.W. Co. v. South-Eastern R.W. Co.*, (1892) 1 Ch. 120 (1893) A.C. 429, followed.

Spartali v. Constantinidi, 20 W.R. 823, considered.

(3) That, having regard to the delay in bringing the action, and the fact that the omission of the accountant to make his award or computation within the time fixed by the sixth clause of the agreement was not attributable to the misconduct, delay, or default of the defendant, the plaintiffs were not equitably entitled to damages in the nature of interest for the delay in payment.

Consideration of the question of costs.

Shepley, Q.C., and *J. Christie* for the plaintiffs.

O'Gara, Q.C., for the defendant.