

It is contended by the plaintiff that there having been default in payment, interest runs from the date of the mortgage notwithstanding the words, "all without interest, if paid when due to the above parties." It was urged that if nothing had been said about interest in the mortgage the several instalments would have borne interest from the date of mortgage, and that the stipulation "all without interest, if paid when due to the above parties," only exonerates the mortgagor from his *prima facie* liability to pay interest, provided he pays at the days appointed. Two cases are referred to in support of this proposition: *Farquhar v. Morris*, 7 T. R. 144, and *Carey v. Doyné*, 5 Ir. Chy. R. 104.

As it appears to me, neither of the cases do in fact establish that where the proviso is for payment of a sum certain at a future day without any mention of interest, that the law annexes to that proviso an obligation to pay interest also from the date of the instrument. Interest was allowed in both the cases referred to, because the debt for which the security was given was *presently payable*, and the security in no way postponed the payment. They are authorities for saying that after the debt secured becomes payable according to the instrument, interest may be recovered from that date.

No other case that I have been able to find supports the plaintiff's contention. In *Thompson v. Drew*, 20 Bev. 49, where the mortgagee agreed to reconvey on payment of principal, no interest was allowed, and I think that governs this case. Since the case of *Cook v. Fowler*, 7 E. & I. App. 27, it must be held to be settled that interest can only be recovered after the time fixed by a contract for payment of money with interest (in the absence of an express agreement to the contrary) by way of *damages*, and not upon any implied contract to continue paying the stipulated rate of interest, or any interest at all, after the day appointed by the contract for payment. If there is no implied contract to pay interest *after* the day fixed for payment, I do not see how there can be any implied contract to pay interest *before* the time appointed for payment when the contract of the parties is silent on the point.

It appears to me where the parties to a mortgage stipulate for the payment of a sum certain at a future time, and no mention is made of interest, no interest can be recovered until after

that time has elapsed, (see *McDonell v. West* 14 Gr. 492).

The question remains whether the words, "without interest if paid when due" can alter the case. I do not think they can. What penalty, if any, the parties intended should be imposed if the money were not paid "when due" does not appear from the mortgage. The plaintiff says the intention of the mortgage is to oblige the mortgagor to pay interest on the amount in default from the date of the mortgage, (a period of ten years), but I think I might as reasonably hold that he is to pay \$1,000 penalty for his default as that he is liable to pay the ten years' interest claimed. I therefore disallow the plaintiff's claim to the extra interest claimed by him.

CHAMBERS.

BURRITT V. MURDOCH.

Motion for judgment in default of appearance,—Service of notice of motion—Rules 406, 131.

[Dec. 21, 1881.—Jan. 16, 1881.—Proudfoot, J.]

Walter Read, for plaintiff, moved for judgment in default of appearance. The action was against a trustee for an account. The defendant did not appear and judgment was awarded in accordance with the prayer of the statement of claim. On coming to draw up the judgment, it appeared that the notice of the motion for judgment had not been posted up or served on the defendant, and the question was submitted to the learned judge whether, under the circumstances, the judgment should be entered. *Gillot v. Ker*, W. N. (1876) 116; *Dymond v. Croft*, 3 Ch. D. 512; *Parsons v. Harris*, 6 Ch. D. 694; *Rules 406 and 131* were referred to.

PROUDFOOT, J.—After consultation with the other members of the Chancery Division, held that the practice as laid down in *Dymond v. Croft*, and *Parsons v. Harris* must be followed, and that although the defendant had not appeared to the writ of summons, notice of motion for judgment must be served. Such service might be effected by posting up a copy in the office under Rule 131, and as notice had not been served in the present case the judgment ought not to be entered.