

HON. SIR JOHN BOYD, C.:—I disposed of this case at the close of the evidence in favour of the plaintiff, but reserved the legal question as to the effect of the Statute of Limitations.

So far as foreclosure is asked, the action is for the recovery of land, and must be brought within 10 years after the right of action first accrued. *Heath v. Pugh*, 6 Q. B. D. 364.

So far as the recovery of money due on the covenant to pay is concerned, the action must also be within ten years after the cause of action arose. 10 Edw. VII., ch. 34, sec. 49 (k). In mortgages made prior to 1894 the period of limitation was longer, but this mortgage is dated 1901. The statutory form of mortgage is used, and it provides that in default of payment of interest, the principal shall become payable. The principal of \$1,500 was to be paid two years from date of mortgage, which would be on 18th May, 1903; the payment of interest was to be annually, and the first payment was due on 18th May, 1902, and was not paid, nor has anything been paid on the mortgage.

The action was begun on 16th July, 1912, over 10 years from the first default in payment of interest.

The effect of this acceleration clause on the Statute of Limitations has been considered in *McFadden v. Brandon*, 6 O. L. R. 277, and it was held that the cause of action in respect of the whole sum arose on the default respecting payment of the interest, and that the Statute began to run upon that first default. This decision of Mr. Justice Street was affirmed by the Court of Appeal: S. C. 8 O. L. R. 610. The reason of the thing is fully discussed by the Court in *Hemp v. Garland* (1843), 4 Q. B. 519, which has been a leading case ever since.

The inaction of the plaintiff for more than ten years since the first default has therefore (under the Statute) deprived him of all remedy upon this mortgage, and the action must be dismissed.

However, as the defendant raised various defences on the facts which failed, I think he should pay the costs in proportion, and to avoid the trouble of apportionment, I would fix the extent of his success as equivalent to one-fifth of the whole, and direct that the defendant pay four-fifths of the plaintiff's costs.