NOTE

Acceleration Clauses in Notes and Mortgages

When equity first came to the aid of the mortgagor who was in default in the payment of principal or interest or both, relief was granted on a fairly liberal basis. Later, an increasing regard for the rights of the mortgagee led to a withholding of such relief unless fraud, mistake or inequitable oppression were clearly proved. This was the doctrine prevalent in chancery by the middle of the last century; it was at this period that acceleration clauses first came into general use in mortgages.¹

But, together with this historical fact, it must be kept in mind that the courts, in their attitude toward problems arising from the use of this new device, have naturally been profoundly influenced by their conceptions of sound economic policy, as well as consideration for the individual economic positions of the parties involved.² It is, in fact, inconceivable that in these decisions, fraught as they are with serious—sometimes disastrous—consequences to one or both of the parties, the courts should ignore such considerations. Therefore, strict application of abstract legalistic propositions has frequently been subordinated to the arithmetic of the dollars and cents involved,³ which eventually has become assimilated into and become a part of the propositions themselves. Apparently contradictory holdings may frequently depend on the varying concepts relating to these factors which are uppermost in the mind of the tribunal deciding the specific issue before it. Obvious as these propositions have become in modern legal analysis, they must nevertheless be continually remembered in attempting to obtain a clear picture of the law on this subject.

It is universally accepted that the failure of a mortgagor to meet installments of principal or interest, or to pay taxes, assessments and insurance will not cause the whole debt to mature at once upon default, absent a provision in the bond or mortgage to that effect.⁴ Such a provision,


². On occasion, the courts have gone so far in this direction that, where the two influences would lead to conflicting results, they have frequently given weight to the latter at the expense of the former. See, in this connection, Petterson v. Weinstock, 106 Conn. 436, 138 Atl. 433 (1927), cited infra note 83.

³. One example of this is the dissent of Cardozo, C. J., in Graf v. Hope Bldg. Corp., 254 N. Y. 1, 7, 171 N. E. 884, 886 (1930). There, through an error in a bookkeeper's arithmetic, payment of what should have been an installment of $6,121.56 was $401.87 short of the correct amount. Enforcement of the acceleration provision (as sustained by the majority) meant that because of the $401.87 deficiency, the mortgagor's interest was foreclosed in a property mortgaged for $355,000. "In this case, the hardship is so flagrant, the oppression so apparent, as to justify a holding that only through an acceptance of the tender will equity be done. . . . The deficiency, though not so small as to be negligible within the doctrine of de minimis, was still slight and unimportant when compared with the payment duly made." 254 N. Y. at 14, 171 N. E. at 889. For further discussion of this case, see infra p. 106.

commonly called an acceleration clause, is a very effective protective device. Actually, acceleration clauses are a result of the superior bargaining power of the mortgagee; this economic factor has always been a motivating force in the tendency of courts to find an equitable loophole for the mortgagor whenever this is at all possible. Although acceleration provisions are a comparatively recent development in mortgage law, they have already gained sufficient prominence to find recognition in the New York statutory form mortgage, which, although only optional, is used very widely in mortgage transactions in that state. A violation of the conditions of such a provision serves to accelerate the time fixed for the payment of the whole debt, allowing the mortgagee to sue upon a note perhaps several years before the date originally set for payment. By this device, the mortgagee may avail himself at once of the security and foreclose for the full amount of the debt, or for the single installment in default, or he may get a personal judgment against the debtor, whichever course of action appears to him most advantageous. As another alternative, he may, if he chooses, maintain an action at once against parties secondarily liable. Oppressive as it may sometimes appear, the right to accelerate has usually been regarded as neither a penalty nor forfeiture.

Most of the litigated problems coming up under acceleration clauses fall into a few broad categories. Attempted exercise of the option by the mortgagee raises the question whether he has elected in time or not, and under what circumstances he must notify the mortgagor that he intends to accelerate the entire debt. Then there are the problems arising out of the possible defenses of the mortgagor—whether the conduct of the mortgagee amounts to a waiver of his right to accelerate; under what circumstances the mortgagor can use tender of payment after default as a defense; other equitable defenses such as fraud, accident, hardship and mistake. There is also the important matter of the time of the running of the statute of limitations, some aspects of which are a steady source of litigation.

A. IN GENERAL

Categorically, acceleration clauses are of two types, although, as will be seen later, many courts, frequently disregarding the intentions of the parties, refuse to distinguish between them. The first is the elective type and provides that the whole of the principal sum shall become due at the option of the mortgagee upon some specified default such as a failure to pay an installment of interest or principal, or upon a delinquency of taxes, assessments or insurance premiums. The clause may contain only one of these obligations or it may contain all, and provision for a grace period, that is, a given number of days after default in which the mortgagor is able to defeat foreclosure by tender, may or may not be present.

The second type of acceleration clause is similar in every way, except that it stipulates that the whole debt shall become due immediately upon default. It is "automatic" in its operation in that it purports to mature.

the entire debt *ipso facto*, without requiring an election. In neither of these two types of acceleration provisions are there definite requirements as to form and wording, although, as stated above, New York has a statutory form mortgage, the purpose of which is to reduce prolixity of language usually employed in mortgage instruments. However, in any instrument in which the statutory form is not used, the language must be free from ambiguity or the courts will hesitate to enforce the clause.\(^{10}\)

It is common knowledge that the ordinary mortgage consists of two instruments, the note or bond and the mortgage instrument itself. Frequently the parties will insert an acceleration clause in the note and omit it entirely in the mortgage, or vice versa.\(^{11}\) For this purpose the two instruments must be construed as a unit,\(^{12}\) and the presence of an acceleration clause in one of the instruments supplies it for the other, although if there is a clause in each instrument, and there is a discrepancy between them, the clause in the bond always prevails.\(^{13}\)

### B. Election

It would seem that a discussion of the mortgagor’s right to elect should, by definition, be directed at the elective type of acceleration clause exclusively. By its very nature an acceleration clause which is intended to operate automatically should confer no right or duty upon the mortgagor to elect. But even under this type of clause many courts require the mortgagor to make an election, especially for the purpose of the running of the statute of limitations on the whole debt.\(^{14}\)

Election is something more than the mere mental act of the mortgagor.\(^{15}\) There must be some manifestation of an intention to exercise the option, and this must be clear and unequivocal.\(^{16}\) According to some courts, election, when it is not by way of suit, must be followed by an affirmative act in the direction of enforcement.\(^{17}\) However, the bringing of an action is universally considered a sufficient manifestation of an intention to elect, and this is true even though the action has not been technically commenced by the service of summons.\(^{18}\) Although cases on the

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13. Brown v. Marion Mortgage Co., 107 Fla. 727, 145 So. 413 (1932). Here the mortgage acceleration clause was automatic, while the acceleration clause in the bond was elective. The court required election, although it stated that the two clauses were "not inconsistent." Cf. Linamv. Anderson, 12 Ga. App. 735, 78 S. E. 424 (1913); Kennedy v. Gibson, 69 Kan. 612, 75 Pac. 1044 (1904). But see Swearingen v. Lahner, 93 Iowa 147, 61 N. W. 433 (1894).


point are few, it has been held that an election once made cannot be withdrawn by the mortgagee, but the inference is that this is only where the mortgagor has changed his position in reliance on the withdrawal.\(^9\)

Where the mortgage has been assigned, the assignee acquires the right to accelerate,\(^9\) and on the assignment of the mortgage as security for a loan, the mortgagee and his assignee are in equity joint owners, and both must join in an election to treat the principal as due.\(^21\) However, the entire debt cannot be accelerated by the owner of only part of an indebtedness evidenced by notes secured by a trust deed.\(^22\) The trustee is generally given the right to sue at the request of the majority of bondholders, and this is always true where there is a stipulation in the trust deed to that effect. But where the deed contains no provision authorizing the trustee to sue, the authorities are divided on the question whether the bondholders can be deprived of the right to bring action.\(^23\)

### C. Notice of Election

Unless the contrary is expressly provided in the terms of the acceleration clause, notice to the mortgagor of the mortgagee’s intention to accelerate is generally not a condition precedent to the bringing of an action.\(^24\) However, the New York statutory form mortgage provides that notice is a prerequisite to bringing a foreclosure action for a default in the payment of taxes, insurance or assessments, and the period of grace runs from the time this notice is given rather than from the date of default.\(^25\) If the default is in the payment of interest or principal, the statutory form mortgage does not require the mortgagee to give notice of his election.\(^26\)

In situations where the default is caused by some act of the mortgagee himself, such as failure to notify the mortgagor of a change of address, the statutory form mortgage provides that notice is generally not a condition precedent to the bringing of an action.\(^27\) Unless the contrary is expressly provided in the terms of the acceleration clause, notice to the mortgagor of the mortgagee’s intention to accelerate is generally not a condition precedent to the bringing of an action.\(^28\) However, the New York statutory form mortgage provides that notice is a prerequisite to bringing a foreclosure action for a default in the payment of taxes, insurance or assessments, and the period of grace runs from the time this notice is given rather than from the date of default.\(^29\) If the default is in the payment of interest or principal, the statutory form mortgage does not require the mortgagee to give notice of his election.\(^30\)

In situations where the default is caused by some act of the mortgagee himself, such as failure to notify the mortgagor of a change of address, or where the mortgagor had been authorized to make payment by mail,

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According to Union Central Life Ins. Co. v. Adams, 169 Okla. 572, 38 P. (2d) 26 (1934), the placing of the bond or mortgage in the hands of an attorney for collection is a sufficient manifestation of election.


**But see** City National Bank v. Pope, 260 S. W. 903 (Tex. Civ. App. 1924). According to the Restatement, Contracts (1932) §280, an election once made may be withdrawn provided that there has been no change of position in reliance.


26. **N. Y. REAL PROP. LAW** § 258, Schedule M; id., § 254, Subd. 2; Albertina Realty Co. v. Rosbro Realty Corp., 258 N. Y. 472, 180 N. E. 170 (1932).
and the check never reached the mortgagee, the mortgagor, under these circumstances, is entitled to notice of his creditor’s intention to elect. In one decision, the mortgagor was in default but the mortgagee promised, without consideration, to refrain from foreclosing, while payments were being made under a plan for liquidating the debt. The court held that the mortgagee could not elect until he had given reasonable notice of his intention to retract his promise.

D. “Waiver” of Right to Elect

In the ordinary situation in which judicial aid is invoked the mortgagee acts quickly after default, and attempts to foreclose immediately. Of course his right to accelerate the debt is permissive, even, it appears, where the acceleration clause is of the elective type, and he has the privilege of “waiving” it if he so desires. Courts use the term “waiver” very loosely, often failing to distinguish between a new promise to forego foreclosure, supported by consideration, and facts constituting an estoppel. In many of the cases in which “waiver” is allowed consideration is not discussed at all, nor are the facts of an estoppel delineated, although they are generally present. However, when the conduct of the mortgagee does not justify an estoppel, courts generally allow him to retract an express “waiver” on the ground of lack of consideration. But generally the mortgagee may not retract without first notifying the mortgagor of his intention to do so.

Difficulty arises when the mortgagee, upon default, does nothing. The question is, must he bring action immediately or will delay constitute a “waiver”? Under the most widely accepted rule, the mortgagee must sue within a reasonable time. In jurisdictions where the statute of limitations begins to run from the date of default rather than from the date of election, this is certainly a barrier to the length of time he may delay.

27. Console v. Torchinsky, 97 Conn. 553, 116 Atl. 613 (1922).
30. Collins v. Nagel, 200 Iowa 562, 203 N. W. 702 (1925); Bartlett Bros. Land & Loan Co. v. Rees, 80 Okla. 225, 195 Pac. 757 (1921). See Johnson v. Guaranty Bank & Trust Co., 172 Ark. 779, 9 S. W. (2d) 3 (1928), to the effect that this is especially true where the instrument provides that the whole debt is to become due at the option of mortgagee.
31. For an elaborate discussion of the ambiguities in the use of the term “waiver”, see 3 Williston, Contracts (Rev. ed. 1936) § 679; Ewart, Waiver Distributed (1917) 1.
34. It was held in Meadows Co. v. Bryan, 195 N. C. 398, 142 S. E. 487 (1928), that in the absence of evidence showing some action by the mortgagee, waiver of the right to foreclose created by acceleration clause will be conclusively presumed. But see Union Cent. Life Ins. Co. v. Schultz, 45 Idaho 185, 261 Pac. 235 (1927).
36. See infra note 103.
But reasonable time does not mean within the statutory period. It usually means within a few months.\(^{37}\)

The less prevalent view rejects the reasonable time rule. These courts contend that the mortgagor’s right to elect is vested so long as the default continues.\(^{38}\) However, by delaying unduly, the mortgagor is exposing himself to the possibility of the development of facts constituting an estoppel,\(^{39}\) and courts are noticeably apt to apply the doctrine where it is at all evident that the mortgagor has been oppressed. Here again, the superior bargaining power of the mortgagor in enabling him to exact an acceleration clause from the mortgagee appears to be the force behind the readiness of courts to relieve the latter from the effects of that clause.

The acceptance by the mortgagor of overdue interest is another method of “waiver”.\(^{40}\) In order to operate as a defense, the interest payment accepted by the mortgagor must be the full amount due.\(^{41}\) Payment of a part of what is owing is not sufficient if there is no consideration for the agreement. Practically, it is difficult to see why payment of the full amount of the interest should completely absolve the mortgagor, whereas payment of, for example, 90 per cent. of the amount due, invokes the “all or none” rule. Perhaps the courts feel that the majority of dilatory mortgagors, who are later able to tender the full amount due, default out of negligence rather than impecuniosity, while mortgagors who can raise only a portion of the interest are hard-pressed to the extent that it would behoove the mortgagor to realize on his security without delay. Therefore, in the latter case the court may feel bound to a greater extent to protect the mortgagor by enforcing the acceleration provision. There is also authority to the effect that there is “waiver” if the mortgagee, knowing that the taxes are in default, accepts an interest payment.\(^{42}\) Other courts feel that while the mortgagee thus waives his right to accelerate the debt for a default in interest, this does not affect his right to foreclosure because of the delin-
quent taxes. One case holds that where the taxes are in default in violation of an acceleration clause, and the mortgagee accepts interest for several years, he waives his right to foreclose.

Next to consider are the situations that do not amount to a relinquishment of the right to accelerate. If the mortgagee accepts a late interest payment not knowing that the previous year’s taxes are in default under the terms of an acceleration clause obviously he cannot be said to have waived his right to foreclose. Here the mortgagee has done nothing on which to base an estoppel. Neither has the mortgagor a defense where the mortgagee has excused prior delays in the payment of interest and taxes, if past conduct does not amount to a general course of dealing. Although most of the cases are silent on the matter, it would seem that in situations where the mortgagee has excused prior delinquencies, although not under circumstances amounting to a general course of dealing to that effect, it would be more equitable to notify the mortgagee of his intention to accelerate the debt, this by analogy to the situation where the mortgagee expressly agrees not to foreclose, and there is no consideration for his promise. In such a case, before the mortgagee can retract he is required by the better decisions to make demand on the debtor.

E. Effect of Tender of Payment Before Election

The overwhelming majority view is that the mortgagor, after defaulting, may subsequently tender the amount due and thus defeat the mortgagee’s right to foreclose: provided, however, that payment is made before the mortgagee has elected to accelerate the debt. Most of the decisions do not answer the question whether payment must be made before election or before the action has been technically commenced by service on the defendant. The older decisions state broadly that the mortgagee’s right to foreclose is lost if the taxes, interest, or installment on the principal, are tendered before the commencement of the action, but the tenor of the more recent cases is to require specifically that payment be made before the mortgagee has elected. Provided, however, that payment is made before the mortgagee has excused prior delays in the payment of interest and taxes, if past conduct does not amount to a general course of dealing. Where the mortgagee has excused prior delinquencies, although not under circumstances amounting to a general course of dealing to that effect, it would be more equitable to notify the mortgagee of his intention to accelerate the debt, this by analogy to the situation where the mortgagee expressly agrees not to foreclose, and there is no consideration for his promise. In such a case, before the mortgagee can retract he is required by the better decisions to make demand on the debtor.

45. Bergman v. Fortesque, 74 N. J. Eq. 266 (1908).
47. But see Dunn v. Barry, 169 Pac. 910 (Cal. 1917), in which the court held that where the mortgagee had waived prior defaults, he is under no obligation to notify the mortgagee that he intends to foreclose. See supra note 33.
48. See supra note 33.
50. In Mueller v. Ober, 172 Minn. 349, 215 N. W. 781 (1927) the court allowed the mortgagee to ward off foreclosure by tender of taxes made after the mortgagee had put the instrument into the hands of an attorney, but before action was commenced.
52. Clark v. Paddock, 24 Idaho 142, 132 Pac. 795 (1913); Albertina Realty Co. v. Rosbro Realty Corp., 258 N. Y. 472, 180 N. E. 176 (1932); see Williams v. Gordon, 205 Cal. 590, 593, 271 Pac. 1070, 1071 (1928).
The policy of courts in allowing the mortgagor to save himself by the payment of taxes before election or action, thus defeating the strict terms of the acceleration clause, is explained in several ways. The most frequent rationale is that inasmuch as the purpose of the tax default provision is to protect the mortgagee’s security, and as payment removes the danger of a municipal lien on the property, the mortgagee has not been put at a disadvantage. However, this does not explain why the payment must be made before election or the commencement of action. It would seem that if payment had been made after election or the commencement of action, but before the city had acquired a tax lien, the mortgagee’s security is no less protected, provided, of course, that the action has not progressed to a final judgment. But the danger of thus broadening the rule is that the mortgagor would take advantage of his creditor by stalling off in the payment of taxes until the mortgagee has gone to the expense of litigating his claim.

Although they are very much in the minority, some courts go so far as to allow the mortgagor to defeat the acceleration after foreclosure action has begun. These courts usually proceed on the ground that it would be inequitable to make the mortgagor suffer if he has been neither negligent nor willful. Courts refusing to allow the mortgagor to ward off foreclosure by payment of taxes after the commencement of action generally make an exception where the mortgagor’s default has been caused by certain types of conduct of the mortgagee; where the mortgagee’s conduct has been irreproachable, the fact that the mortgagor has been neither negligent nor willful will avail him nothing.

In decisions allowing the mortgagor to save himself by payment of taxes before election, the basis of the rule is that a mere technical default, as it has not yet assumed the gravity of a lawsuit, is not sufficient justification for foreclosure. Although the point is rarely discussed, apparently the mortgagor may be as negligent and willful as he pleases and he will get under the wire by payment before election or action.

Under an ordinary acceleration clause, the time of the vesting of the mortgagee’s right to declare the whole debt due because of default in the payment of taxes, is usually ambiguous. By the better view, however,

52. See infra note 70. Recent legislation in New York has allowed this.
53. Blackman v. Carey, 192 Iowa 548, 185 N. W. 87 (1921). Here the court suspected the mortgagee’s actions. Cf. Hughes v. Kaw Inv. Co., 133 Misc. 48, 97 So. 495 (1923), where under an acceleration clause in a deed of trust, the court held that the mortgagor would be relieved if he paid taxes before the property was actually sold. This apparently is the Missouri rule. Whelan v. Reilly, 61 Mo. 355 (1876); Philips v. Bailey, 82 Mo. 639 (1884). But see Brown v. Kennedy, 309 Mo. 335, 274 S. W. 337 (1925). Note, however, that these Missouri cases concern deeds of trust rather than mortgages.
57. But see Eberich v. Solomon, 112 Conn. 498, 152 Atl. 823 (1931), where the court intimates that if the delay in the payment of assessments had been willful, foreclosure might not be defeated by payment of the delinquent assessments long before commencement of action.
taxes are in default from the date interest begins to run on them. At
that time the mortgagee’s security is diminished in the amount of the accru-
ing interest. In a widely cited New York decision, the acceleration clause
stated that the taxes were to be paid, “as soon as they became due and pay-
able”. The mortgagor did not pay them on the first day they became
payable, and on the following day the mortgagee brought suit to foreclose.
The court held that as the default was a technical one, it would be inequi-
table to allow foreclosure. To call this a default at all seems to be a rig-
orous interpretation of the clause.
In connection with requiring the mortgagee to accept a tender before
election or the commencement of action, many courts draw a distinction
between the payment of taxes and the tender of interest. According to
the dissenting opinion of Mr. Justice (then Ch. J.) Cardozo in Graf v.
Hope Building Corp., a leading New York decision, this distinction is
vital. He points out that the punctual payment of interest has an importance
to the lender as affecting his way of life, perhaps the very means for his
support, whereas the importance of the payment of taxes is merely an
assurance of security. Another distinction which is sometimes brought
out is that in the case of interest the time set for payment and the amount
due are usually evident upon the face of the instrument, whereas the pay-
ment of taxes depends largely upon extrinsic factors. Consequently, de-
default in the former is less excusable than in the latter. This seems to be
more or less a make-weight argument, because taxes generally come with
periodic regularity.
A distinction is also made where the default entails payment of in-
terest upon a prior mortgage rather than the mortgage upon which fore-
closure is sought. Although the reason for so doing seems to be without
sound basis, greater leniency is shown in the former situation. Following
Mr. Justice Cardozo’s argument, the mortgagee might be as dependent
on the interest accruing from a prior mortgage as on the interest from a
present mortgage. Despite this argument, the majority of courts regard
default in payment of interest as an offense of no greater gravity than a
Corresponding default in the payment of taxes, and consequently a tender
before election will forestall the operation of the acceleration clause.
Where the acceleration clause is automatic rather than elective, the
question arises whether tender in such a case before the commencement
of action will cut off the right to foreclose. As discussed above, most
courts require that tender, to be effective, must be made before election.
Where the clause is automatic, however, by definition, no election should
be necessary. The debt becomes due at once upon default. In such a

nard, 71 Md. 601, 18 Atl. 957 (1889), to the effect that taxes are in default when they
are legally demandable. Default occurs on the date when they become over-due and
in arrears, even though the collector must give thirty days notice before he can levy
on the property. Robinson v. Miller, 317 Ill. 501, 148 N. E. 319 (1925); Ertz v. Perl-
man, 103 N. J. Eq. 425, 143 Atl. 548 (1928).
Dep’t 1908).
61. 254 N. Y. 1, 171 N. E. 884 (1930).
(1st Dep’t 1921).
64. Sykes v. Arne, 116 Cal. xvii, 47 Pac. 868 (Sup. Ct. 1897); Cresco Realty Co.
v. Clark, 128 App. Div. 144, 112 N. Y. Supp. 550 (2d Dep’t 1908); Weinberg v.
N. E. 319 (1925) to the effect that a conditional tender before action is brought is in-
effective to bar foreclosure. Likewise, a partial tender of the amount in default will
situation, default takes the place of election. What then happens if tender is made after default? There are comparatively few cases on the subject, but anomalously enough, where it has come up, courts allow effective tender up until action to foreclose is commenced. This is a further manifestation of the tendency of some courts, having a regard for the economic factors involved, to come to the aid of the mortgagor wherever possible.

Although the legislative draft of the New York statutory mortgage form places greater importance on a default in the installment of principal than on a corresponding default in interest, making the principal due immediately on default, the construction generally given is that the debt does not mature ipso facto. The mortgagee must elect to assert this right. Consequently, a tender of the installment of the principal after default but before election will relieve the mortgagor.

This statutory form has been construed differently by a New York County Court in Leakey v. Schwing. The contention of the court in this decision was that no election is necessary; that the acceleration clause in the statutory form reads, "the whole of such principal sum shall become due after the default of any installment of the principal". It does not say that it shall become due at the option of the mortgagee after default. On this basis, inasmuch as the clause in the instant case stipulated that the entire debt was to become due "at the option of the mortgagee", although otherwise it was identical with the statutory form, the court held that this deviation took the case out of the statutory construction.

Although the recent moratory legislation passed in most states is not within the scope of this note, it is pertinent to mention that in New York the mortgagor may now escape foreclosure by tendering payment of interest, taxes or assessments before the action has proceeded to a final judgment. Under this statute the mortgagee may not foreclose for defaults in principal or installments in principal. In view of the fact that legislative construction of the statutory form mortgage places greater importance upon the timely payment of principal than of interest or taxes, this legislation is surprising.

65. See supra note 14.

66. N. Y. REAL PROP. LAW § 254, Subd. 2. This view finds support in a surprisingly large minority. See Holman v. Holliš, 94 Fla. 614, 114 So. 254 (1927), where the clause was of the automatic type, and the court decided that tender after default but before the mortgagee placed the instruments in the hands of his attorney for enforcement was a defense. Kreiss Potassium Phosphate Co. v. Knight, 98 Fla. 1004, 124 So. 751 (1930).


68. 150 Misc. 150, 270 N. Y. Supp. 69 (Co. Ct. 1934).

69. N. Y. REAL PROP. LAW § 258, Schedule M, cov. 4.


By statute, it is provided that the mortgagee must accept payment curing all defaults other than default in payment of principal, if payment is tendered before foreclosure action has proceeded to final judgment. CIVIL PRACTICE ACT § 1077a, Quenzer v. Morris-Morris Corp., 250 App. Div. 726, 293 N. Y. Supp. 288 (2d Dep't 1937); Schreiner v. Hylest Realty Corp., 254 App. Div. 580, 2 N. Y. S. (2d) 887 (2d Dep't 1938). §§ 1077a and 1077b, respectively, suspended the right to foreclose and sue for the mortgage debt in case of defaults occurring only in the payment of principal, or installments of principal. Tuttle v. Clark, 257 App. Div. 87, 12 N. Y. S. (2d) 141 (4th Dep't 1939).
F. Other Defenses of the Mortgagor

By the opinions of the majority of courts, if the mortgagor has not made payment or tender before the election of the mortgagee, or if the latter has not waived his right to elect, foreclosure proceedings will be allowed unless the mortgagor can show inequitable conduct on the part of the mortgagee.\(^71\) Just what kind of conduct this is is not exactly definite, although it seems to vary according to the economic policies of any particular court.

In *Ferris v. Ferris*,\(^72\) an old New York decision, the court held that if the conduct of the mortgagee amounts to anything less than fraud, he should be allowed to prevail. In *O'Connor v. Meskill*,\(^73\) a leading New Jersey case, it was decided that even where the mortgagee had lulled his mortgagor into a false sense of security by making offhand promises of leniency in the payment of interest, the mortgagee had no defense if the statements of leniency did not amount to fraudulent misrepresentation. Furthermore, it has been held that where the mortgagee, adhering to the letter of the contract, was induced by malicious feelings toward the mortgagor to bring foreclosure proceedings, this was no defense to the action.\(^74\)

\(^71\) In *DeGroot v. McCotter*, 19 N. J. Eq. 531, 533 (1868) the court indicated that where the defendant has been negligent, the contract will be enforced according to its strict terms, implying that the mortgagee may still have defenses, even though the mortgagee's conduct is irreproachable. But in *Joseph M. Rowland Co. v. Sutton*, 99 N. J. Eq. 171, 131 Atl. 617 (Ch. 1925), where absent any unconscionable conduct on the part of the mortgagee, the fact that the mortgagors had by mistake failed to send half the amount due was held to be no defense to a foreclosure action, even though the mortgagor had offered to pay the balance after action was commenced.

See *Garfinkle v. Hickey*, 96 N. J. Eq. 720, 126 Atl. 428 (1924). Here the mortgagee could have acquired actual knowledge of the interest maturity dates by examining the record, and his failure to receive a bill for the interest which was mailed to a different name did not excuse default in payment.

In *Freund v. Weisman*, 101 N. J. Eq. 245, 137 Atl. 885 (1927), 53 A. L. R. 522 (1928), where the defendant's honest mistake was caused by the plaintiff's acts, relief was given.

And in *Johnson v. Guaranty Bank and Trust Co.*, 177 Ark. 770, 9 S. W. (2d) 3 (1928) it was held that where the mortgagors defaulted in the payment of purchase-money installments, confusion not resulting from the mortgagee's inequitable conduct is no defense.

But where, by the terms of the note, interest was due "after Mar. 1", "equity is reluctant to declare a forfeiture when there is such doubt and uncertainty as to lead the obligated party unknowingly into a default." *McKee v. Stewart*, 211 Iowa 1185, 1188, 1190 N. W. 286, 287 (1931).

Also, in *Trowbridge v. Malex Realty Corp.*, 198 App. Div. 656, 191 N. Y. Supp. 97 (1st Dep't 1921), where the mortgagor was confused by different dates fixed in the various mortgages, and there was no willful neglect on his part, the court gave relief.

In *Armstrong v. Rogdon Holding Co.*, 139 Misc. 549, 274 N. Y. Supp. 682 (Sup. Ct. 1930) the conduct of the mortgagee was perfectly conscionable, while the mortgagor's failure to pay taxes was intentional, deliberate and willful. The court stated that mere improvidence, neglect or poverty is not a sufficient basis for relief.


\(^72\) Also in *Trowbridge v. Malex Realty Corp.*, 198 App. Div. 656, 191 N. Y. Supp. 97 (1st Dep't 1921), where the mortgagor was confused by different dates fixed in the various mortgages, and there was no willful neglect on his part, the court gave relief.

\(^73\) In *Armstrong v. Rogdon Holding Co.*, 139 Misc. 549, 274 N. Y. Supp. 682 (Sup. Ct. 1930) the conduct of the mortgagee was perfectly conscionable, while the mortgagor's failure to pay taxes was intentional, deliberate and willful. The court stated that mere improvidence, neglect or poverty is not a sufficient basis for relief.

\(^74\) In *Weiner v. Cullens*, 97 N. J. Eq. 523, 128 Atl. 176 (1925) the court held that there is no merit in the contention that the foreclosure proceeding was prompted by improper motives on the part of the complainant, and that therefore the defendants were entitled to equitable relief.


But in *Harry Kresner, Inc. v. Fuchs*, 238 App. Div. 844, 262 N. Y. Supp. 669 (2d Dep't 1933), where mortgagee had been accustomed to send mortgagee notice of due date of interest payments and this time failed to do so, and as a result mortgagor defaulted, and mortgagee claimed that he had "got" the defendants as had been planned, the court granted relief to the mortgagee, stating that "In times of financial depression..."
Thus it is apparent that some of these older decisions embrace a policy favorable to the creditor.

Most courts, however, excuse the mortgagor for defaults caused by conduct of the mortgagee, whether intentional or inadvertent, when such conduct makes it impossible or unreasonably difficult for the mortgagor to pay on time. Thus, if the mortgage has been assigned, and no notice has been given to the mortgagor, the latter is not required to tender timely payment to the assignee.

Furthermore, when the mortgagee has changed his residence and has not informed the mortgagor of such change, most courts allow the latter to pay late with impunity. A desirable rule might be to require the mortgagor, on or before the due date, to put the money on deposit in a bank either in his own town or in the mortgagee's town. This would curb a mortgagor who might be tempted in this situation to take advantage of the mortgagee. This, however, may be an unjust burden to impose on the mortgagor.

Where the mortgagee has been guilty of no offense greater than to enforce the acceleration clause according to its strict terms, no matter how harsh the foreclosure is on the mortgagor, some courts allow him to prevail.

such as those existing at present, courts do not favor oppressive acts on the part of mortgagees, though claimed to be founded on strict legal rights. Malice here was evidence of oppression.


In Tibbetts v. Bush & Lane Piano Co., 111 Wash. 165, 189 Pac. 996 (1920), where the mortgagee made diligent inquiry as to the date and amount of interest payments, but agent of mortgagee refused to give him this information, and foreclosure suit was started before mortgagee could ascertain correct amount and make tender, he was given relief. Cf. Pattent v. Pepper Hotel Co., 153 Cal. 450, 96 Pac. 296 (1908); Van Ness v. Robbins, 47 N. J. Eq. 329, 21 Atl. 954 (1890).

76. Although where mortgageor knew nothing of the assignment and did not go to his mortgagee to pay interest installment, he cannot be relieved. Scharff v. Annattce Realty Co., 96 N. J. Eq. 222, 124 Atl. 702 (Ch. 1924).

In Strange v. Rosenberg, 101 Misc. 618, 167 N. Y. Supp. 838 (Sup. Ct. 1917), the mortgage was assigned without notice and mortgagee was able and willing to pay, and attempted to pay the mortgagee.

In Farmers' Savings Bank v. Roe, 195 Iowa 137, 191 N. W. 810 (1923), where mortgageor did not know that the mortgage had been assigned, the court held that timely tender to the bank where interest was made payable, was sufficient defense.


77. Schieck v. Donohue, 62 App. Div. 330, 87 N. Y. Supp. 206 (1st Dep't 1904); Adams v. Rutherford, 13 Ore. 78, 8 Pac. 896 (1885). In Atkinson v. Walton, 162 Pa. 219, 29 Atl. 98 (1894), the mortgagee was willing to pay interest at all times but did not know mortgagee's address. Court said it was up to mortgagee to seek him out. Here mortgagee was not at fault in any way. Cf. Foerst v. Masonic Hall Ass'n, 3 Cal. Unrep. 720, 31 Pac. 903 (1893).


79. Lotterer v. Leon, 138 Md. 318, 113 Atl. 887 (1921): Election to foreclose cannot be objected to on the grounds that it is oppressive or inequitable. While "the exercise of the right of acceleration often carries hardship to mortgagor ... usually no relief can be granted unless mortgagee or his representative has acted unfairly toward mortgagor." Beck v. Williams, 116 Misc. 80, 82, 190 N. Y. Supp. 256, 258 (Sup. Ct. 1921). However, in Stern v. Rainier, 193 Iowa 665, 187 N. W. 442 (1922) the court stated that peculiar hardship would justify equitable relief. See Busch v. Grossmith, 159 Pa. 623, 28 Atl. 438 (1894). The court held that where default is made in the payment of interest on a mortgage, a writ of fieri facias on the bond will not be set aside upon the allegation that the debtor was prevented from making the payment of the interest in time by the action of the plaintiff's clerk in promising to inform the debtor of the amount due on interest.
In *Graf v. Hope Building Corp.*, the New York Court of Appeals refused to stay a foreclosure action predicated on the default in payment of a small fraction of an interest installment. The defendant had made an arithmetical mistake in the computation of the interest payment, and after sending what he thought was the correct amount to the mortgagee, he sailed for Europe. In the meantime the mortgagee discovered the mistake and notified the defendant's secretary of the fact. The secretary had no authority himself to make up the deficit, but upon the return of the mortgagor, he negligently failed to inform his employer of the mistake. After the due date and grace period had passed, the mortgagee immediately brought foreclosure proceedings. As soon as the mortgagor learned of this he tendered the amount due and the tender was refused. Despite the fact that the value of the property was greatly in excess of the debt, and although the integrity of the mortgagor was very apparent, the court held in favor of the mortgagor. Because of the fact that the mortgagee took advantage of the default with suspicious speed, and inasmuch as the mortgagor's negligence was very slight, the decision seems unduly harsh.

Other courts, perhaps a majority of them, have given relief regardless of the guilt of the mortgagee, in situations where default was caused by accident, mistake, or circumstances beyond the control of the mortgagor. In *Schieck v. Donohue*, decided by the New York Appellate Division, the court summed up the rule: "In equity forfeitures will not be enforced where the debtor was ready, willing and able to pay and made every effort to find the creditor to make a tender or where the tender was prevented or excused by any act of the creditor and the debtor avers a willingness and ability to pay." 82

In respect to leniency to the mortgagor, the Connecticut Court of Errors has gone far. In *Petterson v. Weinstock* 83 the court made statements to the effect that while mistake is ground for intercepting the mortgagor's right to foreclose under an acceleration clause, not all mistakes of every nature constitute such grounds without reference to the circumstances. Although equity will not relieve against wilful or gross negligence, where the mortgagor is guilty merely of the plain brand of negligence, equity will champion him. In the *Petterson* case, the mortgagor, believing that the debt was due on a certain day, refrained from making an interest payment. Actually, he was mistaken in the day, and he had inadvertently defaulted. Even though the mortgagor was negligent in not learning the exact due date either from an examination of the papers or by inquiry from the mortgagee, the court thought that his fault was not sufficiently great to justify foreclosure. The most weighty factor in influencing the court was the fact that foreclosure for such a venial lapse would work undue hardship on the mortgagor. On the whole, a position midway between those of the *Hope* case and the *Petterson* case would seem to be the most desirable.

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80. 254 N. Y. 1, 171 N. E. 884 (1930). For discussion of the dissent, see supra note 3.


83. 106 Conn. 436, 138 Atl. 433 (1927); cf. Pizer v. Herzig, 120 App. Div. 102, 105 N. Y. Supp. 38 (1st Dep't 1907). In Provident Savings Life Assurance Society v. Georgia Industrial Co., 124 Ga. 399, 52 S. E. 289 (1905) it was held that good faith requires that the mortgagee, before undertaking to enforce the provisions of the deed accelerating the debt, he should give the mortgagor a reasonable opportunity to meet his obligations.
In conjunction with the defenses of the mortgagor, an interesting point is raised when the mortgagor refuses to pay his taxes on the ground that they are illegal or unconstitutional. In *Farmers' Security Bank v. Martin*, the mortgagor refused to pay the tax, claiming that it was illegal because of defective descriptions of the land in the assessment roll. The mortgagee paid the tax, and then brought foreclosure action under an acceleration clause. The court held that the mortgagor could not thus collaterally attack the validity of the tax. Offhand, this rule seems to be unjust, but the mortgagor could have protected himself by paying the tax under protest, and then contesting its validity.

G. Statute of Limitations

Ordinarily, the statute of limitations begins to run when a cause of action accrues. An acceleration clause by its very nature gives the mortgagee a right of action against the mortgagor immediately upon default unless there is a period of grace, and if there is such a period, the mortgagee acquires a right of action immediately upon the expiration of that period. This is true whether the acceleration clause is of the type which purports to become operative *ipso facto* upon default without the necessity of the mortgagee's exercising an option, or whether the clause is of the elective type.

It might be argued that under an acceleration clause calling for election by the mortgagee, that a cause of action does not inure to the latter until after he has elected. However, as the usual form of election consists of bringing a lawsuit, to say that a cause of action does not arise until election is to invoke a metaphysical distinction. Nevertheless, it is the overwhelming view in the United States that where the acceleration clause is of the elective kind, the statute of limitations does not begin to run on the whole debt unless the mortgagee elects to accelerate, and the statute begins to run from the date of election rather than from the date of default. If the mortgagee refuses to elect, he may refrain from asserting his right until the statutory period after maturity has expired.

84. 29 N. D. 269, 150 N. W. 572 (1915).
85. Accord: Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254 (1898); Bates v. People's Saving & Loan Association, 42 Ohio St. 655 (1885); cf. Leavitt v. Bell, 55 Neb. 57, 75 N. W. 544 (1898); Hartsuff v. Hall, 58 Neb. 417, 78 N. W. 716 (1899).
88. 89. Westcott v. Whiteside, 63 Kan. 49, 64 Pac. 1032 (1901); Miller v. Uvalde Co., 20 S. W. (2d) 403 (Tex. Civ. App. 1920). But see City Nat. Bank v. Pope, 260 S. W. 903 (Tex. Civ. App. 1924), where the court required the election of the mortgagee to be followed by some affirmative action in order to make the statute run. Here the mortgagee had notified the mortgagor by letter of his election, and later accepted partial payments of interest and principal, refraining entirely from following up his election by a suit. Although it was held in *H. J. McMullen & Co. v. Hamann*, 34 S. W. (2d) 909 (Tex. Civ. App. 1931), that all installments in default for more than four years before election was finally exercised are barred by the statute.
89. Union Cent. Life Ins. Co. v. Adams, 169 Okla. 572, 38 P. (2d) 26 (1934). In *McCarty v. Goodsman*, 39 N. D. 389, 167 N. W. 593 (1918), the court held that where the entire debt consists of installment notes, and mortgagee does not exercise his option to accelerate on the first default, the statute does not begin to run until the maturity of the last note.
However, many courts hold that if the default is upon an installment, the statute will begin to run at once in respect to that particular installment.90

Obviously, to refuse to allow the statute to run unless the mortgagee elects is a violation of the policy of the statute, a policy which is directed at clearing up claims before the years succeed in dimming the evidence.91 This difficulty is mitigated if the date set for the maturity of the debt lies within the statutory period, but it becomes a real objection if the debt, by the terms of the instrument, is to mature in twenty years, or on some such remote date.

If on the other hand the mortgagee elects, the statute of limitations begins to run from that time.92 Theoretically, this type of situation affords an opportunity for the statute to run against the mortgagee, but in actual practice it seems that this rarely occurs. As discussed above, election may be made in other ways than by bringing a lawsuit,93 but many courts require such an election to be followed closely by an action;94 if it is not, the statute of limitations does not begin to run. When election is made by bringing suit, as it generally is, the action is sometimes abandoned, and in that case the statute will generally run on the note as well as on the mortgage. They must be construed as an entity.95 This is true whether or not the note itself has an acceleration provision,96 but where the clause in the mortgage authorizes foreclosure exclusively, making no reference to the maturing of the debt itself, it has been held that the statute runs only on the mortgage.97

When the acceleration clause is the type which makes the whole debt due ipso facto upon default, without any mention of the necessity of an option or election, courts are in sharp dispute on the question of the running of the statute,98 although the majority of the recent decisions seem to favor the view that the statute does not begin to run until the mort-

92. Hatch v. Ely, 121 Neb. 882, 270 N. W. 450 (1930); Union Cent. Life Ins. Co. v. Adams, 169 Okla. 572, 38 P. (2d) 26 (1934). The election must be clearcut. In Industrial Inv. Co. v. Vondersmith, 104 S. W. (2d) 553 (Tex. Civ. App. 1937), the defendants contended that the institution of bankruptcy proceedings against the maker of a note with an acceleration clause of the elective type, where the creditor claimed for the full amount of the note, was in effect an election by the creditor to regard the full amount due at once as to start the statute of limitations running in favor of the accommodation indorsers. The court held that the filing of this claim did not constitute an election.
93. See supra note 17.
95. See supra note 12.
96. Westcott v. Whiteside, 63 Kan. 49, 64 Pac. 1032 (1901).
97. Hall v. Jameson, 151 Cal. 606, 91 Pac. 518 (1907), 12 L. R. A. (n. s.) 1190 (1908). In this case the mortgagee was allowed a power of sale on default. It was held that exercise of this power did not mature the whole debt so as to start the statute running on it. Here no judicial action was necessary; by the terms of the clause, no suit for foreclosure was required. The court assumed that in order to bring foreclosure action in the ordinary manner, the whole debt must be declared due.
gagee has taken affirmative measures to assert his claim. This is even a clearer example of violation of the policy of the statute than is the situation in which the operation of the clause is elective. Although in the latter case it may be contended by technical argument that a right of action does not accrue until the mortgagee has made an election, it must be conceded by all that when the acceleration clause is automatic, a right of action arises at once, or at least after the period of grace has expired.

These courts seem to be motivated by a policy stronger than that of the statute of limitations. They contend that the acceleration clause is for the benefit of the creditor—it is another arrow in his quiver. The debtor has done wrong. He has defaulted. Consequently, he should not be allowed to take advantage of a legal loophole made possible by the insertion of a clause directed at making him toe the line. This is the usual justification for refusing to allow the statute to run. To rule otherwise would seem to penalize a mortgagee who has been lenient.

A different line of argument for refusing to allow the statute of limitations to run from the time of default in the case of an automatic acceleration clause was advanced in Andrews v. Zook, a recent California decision. The court contended that the perfectly solvent borrower could sign a long term note and by this means get a reduced rate of interest; then he could refuse to pay the first installment of interest, or default in some other way, thereby making the whole debt due at once. With the statute running automatically from the time of default, the creditor would have to bring an action to collect the entire amount within the four year's statutory period, or else be forever barred. In this way, the debtor could compel the creditor to take payment long before it is due, and at the same time take advantage of the lower rate of interest.

The more conservative view, upholding the policy of the statute of limitations and thereby requiring that the statute run from the date of default, is shared by about one-half of the states. These courts proceed under the theory that if the mortgagee is not willing to take advantage of the acceleration clause, there is no reason why the mortgagor should not be allowed to do so. Also, that if an election had been contemplated by the parties there is no reason why they should not have made provision for it. Under ordinary circumstances this position would seem to be the stronger of the two; if the creditor has a right of action for the duration of the statutory period, how does the fact that such right of action arises by the operation of an acceleration clause, rather than the passage of the maturity date fixed in the note, affect the policy of the stat-


100. Core v. Smith, 23 Okla. 990, 102 Pac. 114 (1909); Grafton Bank v. Doe, 19 Vt. 463 (1847). Cf. Lowenstein v. Phelan, 17 Neb. 429, 22 N. W. 501 (1885), where the court said that the acceleration clause was permissive and there is no reason why the statute should make it mandatory.


102. Id. at 22, 13 P. (2d) at 520.


104. In First Nat. Bank v. Peck, 8 Kan. 660, 663 (1871), the court stated that “this clause is inserted in mortgages usually for the benefit of the mortgagee; but being a valid stipulation, the mortgagor has equal right to insist upon it and receive whatever advantage he can from its enforcement.”

105. See the excellent opinion of Burch, J., in Snyder v. Miller, 71 Kan. 410, 80 Pac. 970, 69 A. L. R. 250 (1905). Cf. Noell v. Gaines, 68 Mo. 649 (1878), where the court thought it inconsistent that the debt should fall due for one purpose and not for another.
ute of limitations? However, under certain circumstances, such as where the mortgagor has defaulted in the payment of some small assessment which has not come to the attention of the mortgagee, perhaps because the mortgagor has been silent on the matter, it would hardly be equitable to allow the mortgagor to plead the statute.

Although there does not seem to be any authority on the subject, it is interesting to speculate what the result would be, if, in those states which do not allow the statute to run upon default where the acceleration clause is automatic unless there has been an election, the mortgagor should tender the late payment in the interval between default and election. For this purpose would these same courts say that no election is necessary and therefore a tender after default would be futile? If this were the case, the whole debt would mature at once for the purpose of allowing the mortgagee to refuse a tender after default, but for the purpose of allowing the statute of limitations to run against the mortgagee, the whole debt would not become due until there has been some affirmative conduct on the part of the mortgagee.

CONCLUSION

During the depression wholesale moratory legislation has temporarily disturbed well-settled principles of mortgage law; this legislation has found a judicial equivalent in the recent tendency to relieve the mortgagor from the strict terms of an acceleration provision, the courts grasping at any equitable straw whatever in order to defeat foreclosure. In the earlier cases, courts were extremely reluctant to rescue the mortgagor on any ground short of actual fraud. It was flatly stated that the parties had made their own contract, which must be enforced without any deviation from the original intentions.

The more recent tendency, and this has been particularly marked since the depression, is to regard the right to accelerate as something akin to a penalty. Consequently, relief is often given in cases where the only equity in favor of the mortgagor is that he has acted in good faith, a distinct departure from the former policy.

A few courts, realizing that the depression has affected the mortgagee perhaps no less than his debtor, have tightened equitable seams previously open to the mortgagor. This tendency is perhaps justifiable as an attempt to neutralize legislation which has all too often overlooked the rights of the mortgagee. However, it must not be forgotten that blanket legislation at best is unwieldy; for this reason equitable rules should remain sufficiently flexible to reach the individual case.

J. K. G.

106. Generally, mere ignorance of facts constituting cause of action does not prevent the running of the statute of limitations. Arnold v. Rogers, 43 Ga. App. 390, 159 S. E. 136 (1931); Astle v. Card, 52 R. I. 337, 161 Atl. 126 (1932). Defendant's silence will not toll the statute but if he has used some trick or contrivance tending to exclude suspicion and prevent inquiry, the plaintiff must use reasonable diligence in order to toll the statute. Arkansas Natural Gas Co. v. Sartor, 78 F. (2d) 924 (C. C. A. 5th, 1935). However, the statute will not run if the defendant is guilty of fraud. Kenyon v. United Electric Rys., 51 R. I. 90, 151 Atl. 5 (1930).