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Acceleration Clauses in Notes

ACCELERATION CLAUSES IN NOTES

By Jesse H. Sherman of the Denver Bar

IN view of the increasing number of foreclosures which are taking place, the decision of our Supreme Court in *Spears vs. Cook*, 85 Colo. 318 furnishes food for thought.

Suit was brought upon a promissory note, secured by a trust deed. There was no acceleration clause in the note, but the trust deed contained a provision that in case of default in the payment of interest, the whole principal sum might be declared due and payable. Default was made in the payment of interest and suit was brought upon the note, before maturity, upon the theory that the note and trust deed together constituted one contract and that the provision in the trust deed also controlled and accelerated the time of payment of the note. The Court held that the action was premature and that the acceleration clause in the trust deed matured the debt for the purpose of foreclosure only and not for the purpose of supporting an action upon the note.

In this decision the Court refers to the case of *Parker vs. McGinty*, 77 Colo. 458. The latter case arose out of a foreclosure of a mortgage and the entry of a deficiency judgment before the maturity of the note. In commenting upon this case, the following language appears in *Spears vs. Cook*: "The mortgage (in the *Parker* case) contained a provision for the acceleration of the due date upon failure to pay interest. Such failure occurred and the principal was declared due and payable. A foreclosure was decreed and a deficiency entered in the foreclosure suit against the defendants personally liable for the debt. This was in accordance with Section 272 of the Code. The Court then added: "If *Parker* and *Wagner* had been sued on the note independently of a foreclosure proceeding, the action would have been premature, so far as the principal debt is concerned. For the purpose of such an action the acceleration provision would not have made the principal due and payable".

From the foregoing it would appear that—

(a) If suit is brought to foreclose under an acceleration clause in a mortgage or trust deed, a deficiency judgment can be entered on a note not due;

(b) If foreclosure takes place through the Public Trustee under an acceleration clause in a trust deed, no suit for deficiency can be brought upon the note before maturity, unless there is also an acceleration clause in the note.

As a matter of fact the note sued on in the Parker vs. McGinty case also contained an acceleration clause, which the Court must have overlooked when it said, in the Spears-Cook case, that "If Parker and Wagner had been sued on the note independently of a foreclosure proceeding, the action would have been premature so far as the principal indebtedness is concerned."

BELIEVE IT OR NOT

State of Colorado	} ss:	Before R. W. Morgan, Esq., Justice of the Peace.
County of Boulder		

The People of the State of Colorado	}	CRIMINAL COMPLAINT
versus		
F. E. Goehring		

The Complaint of Chas. Rotolo made before R. W. Morgan, Esq., a Justice of the Peace in and for said County, on the 6th day of October, A. D. 1930, who, being duly sworn, upon his oath says: That F. E. Goehring on or about the 5th day of October, A. D. 1930, at, to-wit, the said County of Boulder, in the State aforesaid, Did then and there Violate the Motor, Traffic Laws of the State of Colorado. by driving in a reckless and abandon manner thereby injuring the property and damaging the person of one Chas. Rotolo to the extent of breaking the leg of one of his valuable milk cows thereby causing him great financial loss, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the same People of the State of Colorado.

Subscribed and sworn to before me	}	CHAS. ROTOLO.
this 6th day of October, A. D. 19.....		
R. W. Morgan,		
Justice of the Peace.		