STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Kelly, P.J., Cavanagh and O'Connell, J.J.

THE FIRST NATIONAL BANK
OF CHICAGO, AS TRUSTEE FOR
BANKBOSTON HOME EQUITY
LOAN TRUST 1998-1,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,
STATE OF MICHIGAN and
DEPARTMENT OF NATURAL
RESOURCES, STATE OF MICHIGAN,

Defendants-Appellants.
____/

Supreme Court No. 137527

Court of Appeals No. 272431

Court of Claims No. 03-57-MT

BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

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COUNTER QUESTIONS PRESENTED FOR REVIEW

I. Appellee First National Bank of Chicago as Trustee for BankBoston Home Equity Trust 1998-1 has standing by statutory enactment to bring an action on behalf of the BankBoston Home Equity Trust 1998-1?

II. The failure of Appellant to provide Appellee with constitutionally adequate notice invalidated the foreclosure action and as a result Appellant's mortgage continues in force?

III. Compliance with State statutes which violate State and Federal constitutions are no defense to a constitutional invalid foreclosure?

IV. Failure to comply with constitutional due process requirements renders the foreclosure invalid and results in the mortgage being enforceable by mortgagor?

OBJECTIONS TO QUESTIONS PRESENTED FOR REVIEW

The Appellee does not accept the Appellant's Counter Statement of Facts for the following reasons. First of all, the underlying questions in this case are whether or not the notice Appellant's gave Appellee was such to comply with constitutional requirements of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

The question presented in question I does not address that issue but simply deals with statutory compliance. Likewise, the question in paragraph II does not address the constitutional notice but is refuted in the Statement of Facts that in no way did the typographical error in the original mortgage prevent the Appellant from identifying the property properly. In fact, it had actual notice of the correct description. The second question is subject to the same objection and we

believe the same applies to question 3 the actual question as stated there is whether there is standing and we have adequately discussed this issue and presented our views on all three issues not solving the question of constitutional notice and we have demonstrated that the answer in our question I demonstrates that the Appellee had standing under our Judicature Act II BA to bring the action as a real party in interest.

STATEMENT OF PROCEEDINGS AND FACTS

Appellee accepts Appellant's Statement of Proceedings and Facts.

ARGUMENT

Standard of Review

This action was tried on stipulated facts. All issues on appeal are questions of law subject to de novo review[1].

I. Appellee First National Bank of Chicago as Trustee for BankBoston Home Equity Trust 1998-1 has standing by statutory enactment to bring an action on behalf of the BankBoston Home Equity Trust 1998-1.

The Appellee has standing to be a real party in interest to bring this action on behalf of the beneficiaries of the BankBoston Home Equity Loan Trust 1998-1. The pertinent facts disclosed by the pleadings are as follows:

1. Summons and Complaint were filed together with Certificates of Service on April 7, 2003 with subsequent Certificates of Service being received on February 27, 2004. An Answer to the Complaint was filed. In Appellee's Complaint, Appellee alleged that Appellee is the First National Bank of Chicago as Trustee for BankBoston Home Equity Trust 1998-1, the answer which was "no contest" which under MCR 2.111(C)(2)[2] is tantamount to an admission for the purposes of this action. The same response in the Amended Complaint. In the Amended Complaint at Paragraph 9, we the Appellee further alleged that

> "subsequently BankBoston, N.A., f/k/a First National Bank of Boston assigned a mortgage to the First National Bank of Chicago as Trustee for BankBoston Home Equity Loan 1998-1 of 100 Federal Street, Boston, Massachusetts 02111, by assignment recorded on April 25, 2001 in Liber 961 at Page 806.

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[1] *Cardinal Mooney High School v Michigan High School Athletic Assoc*, 437 Mich 75, 80; 467 NW2d 21 (1991).

[2] MCR 2.111(C)(2). See Longhofer, Michigan Court Rules Practice 5th Ed. See 2111.10 at Page 249.

In answer, the Appellant stated "admit an assignment of mortgage as setting forth the facts as alleged in Paragraph 9 was recorded as alleged". Subsequently, on March 24, 2005, an agreed Stipulation of Facts attached to the Appellant's Appendix as Exhibit 9 was entered into by and between the attorneys for the respective parties to this action. It was stipulated that:

> "the following agreed facts for the purpose of entering a judgment under Michigan Court Rule 1.116(A), all exhibits attached to this stipulation of fact are to be considered as evidence in the same manner as if they were formally admitted in the course of trial on the merits".

The jurisdiction of the Court of Claims was stated as a fact in Paragraph 3 of the agreed Stipulated Facts.

> "The exclusive jurisdiction of this court as founded upon Section 6431 of the Revised Judicial Act of 1961, as amended, MCL 600.6431 and MCL 211.781(l)."

Stipulation of Facts 21 and 22 state:

> 21. That on July 1, 1998, BankBoston, N.A., assigned the first mortgage to The First National Bank of Chicago, BankBoston Equity Loan Trust 1998-1, as Trustee (see Exhibit 9), which was duly recorded in the office of the Register of Deeds for Clinton County, Michigan, on April 25, 2001, in Liber 961, Pages 804. The assignment was dated and notarized on July 1, 1998, and makes specific reference to the April 3, 2000, recording of the assignment to BankBoston, N.A. The assignment listed the address of The First National Bank of Chicago as Trustee for BankBoston Home Equity Loan Trust 1998-1 as 100 Federal Street, Boston, Massachusetts 02111.
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> 22. The assignment to The First National Bank of Chicago, BankBoston Home Equity Loan Trust 1998-1, as Trustee described the property as Lot 66 and contained the street address as 604 East Oak Street, and the permanent parcel identification number of 300-431-000-066-01.

Stipulated Fact 58 states:

> "That on February 24, 2003, Notice of Intention to File Claim on behalf of the First National Bank of Chicago as Trustee for BankBoston Home Equity Loan Trust 1998-1 was filed with the Court of Claims for the State of Michigan, Case No. 03-57-MT. (See Exhibit 24).

That further stipulated Exhibit 6 attached to the Stipulation of Facts states:

> "such assignment of mortgage conveyed Lot 66 of Prince Estates 2, etc., to First National Bank of Chicago as Trustee of BankBoston Home Equity Loan Trust 1998-1 addressed to the same at 100 Federal Street, Boston, Massachusetts 02111".
> (The mortgage in this matter is attached as stipulated Exhibit 3.)

Paragraph 12 of such mortgage provides that the covenants and agreements of this security instrument shall bind and benefit the successors and assigns of lender. That the Trial Court upon deciding the Motion for Summary Judgment clearly recognized the applicability of Section 2.116(A)[3] of the Michigan Court Rules and stated as follows in his first paragraph of his opinion:

> "This matter is before the Court on an agreed Stipulation of Facts, Trial Briefs and oral argument together with a view of entering a judgment on the stipulated facts pursuant to MCR 2.116(A). Plaintiff seeks money damages for the denial of due process and the State's deprivation of property by tax forfeiture and foreclosures. It invokes Section MCL 211.781 which provides a cause of action in the matter in the Court of Claims for an interest holder who did not receive notice as required by the General Property Act. This Court finds for the Plaintiff."

At no time was any objection raised to the standing of the Trustee Appellee to bring an action as one of its duties as Trustee. This is clearly recognized by statute. Section 2041 of the Revised Judicial Act of 1961[4], MCL 600.2041[5] provides as follows:

> "Every action shall be prosecuted in the name of the real party in interest; *but an executor, administrator, guardian, trustee of an express trust, a party with whom or in who's name a contract has been made for the benefit of another or a party authorized by statute may sue in his own right without joining him as a party for whose benefit the action is being brought and further brought, ...*" (Emphasis supplied)

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[3] MCR 2.116(A).

[4] Section 2041 of the Revised Judicial Act of 1961

[5] MCL 600.2041

As Trustee, the Appellee had a duty to protect the legal integrity of the mortgage which was an asset of the Trust in excess of $100,000.00 at the time of sale, this asset was substantial and qualified as a legally protected interest.

A review of principal cases cited by the Appellant and clearly they are inapplicable[6] not only for the statutory exemption or recognition of the rights of a Trustee as a real party in interest but also on the basis of the facts. These cases involve statutory litigation brought on by third party associations on behalf of their trade membership and other interest organizations and related cases. We are not unmindful that there is a dispute in this Court over the right of such parties to bring actions but very frankly does not apply to a Trustee whenever the trust holds title to securities for the benefit of others such as we have in this case.

Appellee does not disagree with the definition of standing as quoted from the *Lee, supra* case at Page 24 of Appellant's Brief:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not .. . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision."[7]

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[6] *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992); *Meacham v Blaess*, 141 Mich 258; 104 NW 579 (1905); and *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363; 716 NW2d 561 (2006).

[7] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich at 739 (quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (citations omitted)).

Clearly, this definition of the irreducible constitutional minimal of standing is met as it clearly has met the test stated above under the Court Rule 2.116(C)[8].

In any event, Appellant has waived its rights to object. This matter clearly was decided as the Trial Court stated in its opinion under Section subsection (A) of Court Rule 2.116[9]. It is clear that any objection to standing under this Court Rule must be that the Court lacks jurisdiction of the subject matter under subsection 2.116(C)(5)[10]. Subsection 2.116(D)(2)[11], provides that grounds listed in subrule (C)(5), (6) and (7)[12], must be raised in a party's responsive pleadings unless the grounds are stated in a motion filed under this rule prior to the parties first responsive pleading. At no time did the Appellant file any responsive pleading alleging the grounds of section 2.116(C)[13]. In fact, the matter did not come up until the Court asked for briefing on this matter. In fact, its answer to both the original Complaint and the Amended Complaint were "does not contest the allegation that the Appellee was the Trustee".

Due process was accorded and that the only interest which was left outstanding was that of the Appellee. Failure to provide constitutionally adequate notice to a party with an interest in the property has been held to invalidate the sale and make the same void as to that party and by

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[8] MCR 2.116(C).

[9] MCR 2.116(A).

[10] MCR 2.116(C)(5).

[11] MCR 2.116(D)(2).

[12] MCR 2.116(C)(6) and (7).

[13] MCR 2.116(C).

emphasis supply *Wayne County Treasurer v Perfecting Church*[14] and *Sidun v Wayne County Treasurer*[15].

Therefore, Appellee as Trustee has an existing valid interest in the property which by failure upon closing on the property the Appellant retained liability for that interest. It is clear that under the statute 411.78(k)[16], that the sale of the property was free and clear of the interest of any recorded or unrecorded instruments and it follows therefore that the foreclosing governmental units stepped into the shoes of the interest not so foreclosed against and because of the sale retained the contract position of the mortgagor title holder. MCL 211.78(l)[17] seems to be recognized as a foreseeable consequence of an unperfected right to sue. It is obvious that the State has sold the property, the purchaser has given consideration to the Appellant for the purpose of that property. Appellant therefore retained the contract interest and the liability thereon under the mortgage contracts and therefore the decision of this Court should recognize the Appellant's liability to perform the contract entered into by its predecessor in title. It is not an unfair as the Appellant has in fact been unjustly enriched by its action. It obtained upon the sale of the property as admitted in the Statements of Facts nearly fifty times what was the value of its claim against the Appellant. That at the time Stipulation of Fact 52, clearly shows that "the taxes due on the property together with interest and fees total $2,316.24." And that it realized gross proceeds of $109,000.00 on its sale of the property which is not reflective of the value of the property at that time but is a auction bid price but

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[14] *Wayne County Treasurer v Perfecting Church*, 474 Mich 1059; 711 NW2d 297 (2006).

[15] *Sidun v Wayne County Treasurer*, 481 Mich 503; 751 NW2d 453 (2008).

[16] MCL 411.78(k).

[17] MCL 211.78(l).

nevertheless, it is fifty times what it is. In short, since the date of sale September 23, 2002, the Appellant has had the full use of the Appellee's funds which were at interest in this property and therefore Appellee should be entitled to recover the expectations that it was to receive on the mortgage to this date. The Trial Court and the Court of Appeals errored in its findings that the judgment rate of interest applied. That upon remand, that the Court of Claims be entitled to assess damages on the basis of the terms of the contract obligation which was assumed by the Appellee as the result of its failure to provide due process.

It is clear that the Appellant does not stand alone in liability for the failure to provide constitutionally mandated due process notice.

II. The failure of Appellant to provide Appellee with constitutionally adequate notice invalidated the foreclosure action and as a result Appellant's mortgage continues in force.

Stipulation of Fact 37, clearly shows that all interested parties with the exception of Appellee were accorded due process notice. That further, Stipulations 45 through 48 clearly show that with respect to the interest of the aforementioned parties.

While this matter was pending in the Court of Appeals, two important cases were decided, *Wayne County Treasurer v Perfecting Church, supra* and *Sidun v Wayne County Treasurer, supra*. These were cases of first impression by the Michigan Supreme Court and they arose over the question of whether or not the Trial Court retained jurisdiction after it was determined that due process requirements under the foreclosure statute had not been met. This Court held that the effect of failure to comply with due process requirements made the forfeiture and foreclosure proceedings were void and that the Circuit Court retained jurisdiction. This interpretation is generally accepted

by the Appellant and is considered to be rule of law.[18] The controlling opinion of the majority in the Court of Appeals from which Appellant appealed accurately reflects the law as previously decided by the Court and its application to the Stipulated Facts. It is carefully done and the conclusions are fully supported by findings by the Stipulated Facts in the matter.

The Opinion of the Court of Appeals recognizes very clearly that the question of notices on a national and multi-national bank need specific instructions as to where notice shall be sent. I think this Court as the Court of Appeals can take judicial notice of the fact that its incumbent upon a large institution such as a bank or service company to designate spots where notice may be sent. In this case, the Legislature with respect to real estate documents, mortgages, etc., has required that all instruments relating to mortgages should contain the address of the person who is acquiring the interest which was clearly done in this case. The address given was 100 Federal Street, Boston, Massachusetts, which was the address of both the Servicer and the Trustee as pointed out in the Opinion of the Court of Appeals.

> "In light of our Supreme Court's decision in *Sidun, supra*, and after reviewing the evidence presented below, we conclude that the notices sent to BankBoston were not reasonably calculated to apprise it of the forfeiture hearings. BankBoston recorded its assignment from Investaid, and this assignment provided its Boston address, at which it continued to maintain an office after its merger with Fleet. Fleet is a large international bank with offices all over the country. Given the sheer size of Fleet and the offices it undoubtedly assumed as a result of the merger, Fleet determined the address where notices should be sent. Even after the merger, plaintiff still maintained the BankBoston address with the Registar of Deeds as the proper place to receive notice regarding the property."

> "However, Title Check disregarded this address and instead chose to send notices to two Fleet addresses in Providence. It is unknown what relationship, if any, these

[18] Smith, *An Update on Foreclosure of Real Property Tax Liens Under Michigan's New Tax Foreclosure Process*, Michigan Real Property Review, Vol. 36, No. 1, Page 30 (Spring 2009).

> Providence addresses had to either the property or the pending foreclosure. The notices sent were not reasonably calculated to apprise BankBoston of notice. Without any statutory authority, a foreclosing governmental unit lacks the power or discretion to determine the best business practices of private entities. Based on its own policies and procedures, BankBoston made the decision to provide its Boston address in the mortgage assignment. Plaintiff also listed the Boston address on the assignment recorded with the Registar of Deeds and Fleet maintained that office at all times relevant to these proceedings. Defendants may not simply substitute their judgment as to where parties should receive notice. Through Title Check, defendants were aware of BankBoston's Boston address and failed to send noticed to that address."

As earlier pointed out in the Opinion, this provides a bright line address that is available to any party having an interest in serving notices and this was recognized by Title Check from its party tracing work sheet (Stipulated Exhibit 7, Appendix 69a, Stipulation of Facts 36). Had notice been sent to 100 Federal Street, either to the Trustee or to BankBoston, we would not be here today and certainly as the Court points out in the Opinion, without any statutory authority appointed, a foregoing governmental unit lacks the power or discretion to determine the best business practice of the private entities. It was clearly the holding of the *Republic Bank*[19]*, supra* case that the address on the mortgage was held to be sufficient. For this Court to adopt a different position and without a bright line test such as the address on the instrument evidencing the ownership interest in the party, this Court and all the Courts will be flooded with questions of validity of service statute in force MCL 565.201[20] gives clear direction where these notices should be sent. If the recipient wants to give a different place for receipt of notice, he can so provide at his peril. As a matter of fact, with respect to taxing notices, there is a provision in the General Property Tax Act ("GPTA")[21] that

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[19] *Republic Bank v Genesee County Treasurer,* 471 Mich 732; 690 NW2d 917 (2005).

[20] MCL 565.201.

[21] General Property Tax Act ("GPTA")

allows banks to notify taxing authorities of where they want their taxing notices to be sent otherwise they will be sent to the County Treasurer by the taxpayer.

III. Compliance with State statutes which violate State and Federal constitutions are no defense to a constitutional invalid foreclosure.

MCL 211.78(2)[22] states:

> "It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States but that those provisions not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States. The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated."

Appellant discusses the fact that the GPTA puts an impossible burden on the County Officials. If the procedure is not followed even though it may offend due process, the quick answer is that due process trumps statutory requirements. This Court is not the governmental agency which can bring conformity between the provisions of the GPTA and fundamental constitutional requirements. It is the Legislature's function and the Act clearly contemplates that. As a matter of fact, the statute since its enactment ten years ago has undergone three or more major amendments and revisions.[23] And two or three simple amendments of the statute could remove any question of

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[22] MCL 211.78(2).

[23] Smith, *An Update on Foreclosure of Real Property Tax Liens Under Michigan's New Tax Foreclosure Process*, Michigan Real Property Review, Vol. 36, No. 1, Page 30 (Spring 2009).

whether or not due process concerns are met. First of all, I point out that the Appellant makes a great concern over a purported mistake in the address. In a review of the factual data in the Stipulated Facts shows that none of the people involved had any difficulty in determining that the property involved was Lot 66 and not Lot 86 both before and after the amended copies were filed. The record is devoid of any attempt to use the Lot 88 at any time. As a matter of fact, the tax records clearly show that Lot 66 was what was being taxed and this completely repudiates this contention. There was no problem or misunderstanding by any of the personnel involved that they were not dealing with Lot 66. The problem came when for unstated reasons the Title Check people decided rather than to follow their own records that this address to send it was 100 Federal Street, decided that they were to go elsewhere with their notice. There are several things that could aid this. First of all, a clear instruction that one of the addresses to which the notices are sent will be the address on the records in the offices of the Register of Deeds. Secondly, that as is the case with the mortgage foreclosure statute, any funds received in excess of the taxes due and the cost of the action be paid into the Circuit Court for distribution in a manner subsequent which is provided for with respect to sales by foreclosure of mortgages. And last but not least, that upon receipt of notice of a sale of foreclosure, that the period to file objections to this be greatly increased. While it has not been discussed, there is a serious question that may be met some day with respect to the notice that needs to be given under this provision. This would probably alleviate most of the litigation that is bound to transpire over due process notice.

IV. Failure to comply with constitutional due process requirements renders the foreclosure invalid and results in the mortgage being enforceable by mortgagor.

In both *Perfecting Church, supra* and *Sidun, supra* this Court found that an owner's interest in the property remained untouched. That the interest of an owner as mortgagee is neither an extinguished recorded or unrecorded interest. It is clear that the Appellee in this case stepped into the shoes of the mortgagor with respect to the mortgage and failure to make monthly payments put the contract in default as the mortgagee interest remains the same and in force to the extent that it was prior to the unconstitutional forfeiture action. The mortgagee still has full rights to foreclose his mortgage and because of a failure of security to take a money judgment. It is clear that because the Appellant is a agency of the state government, the jurisdiction of the Court of Claims is the proper tribunal for handling this action under the general grant of jurisdiction to the Court of Claims under MCL 600.6431[24].

Therefore, Appellee's damages consist of the unpaid balance due on the contract principal as of the date that it became delinquent to which would be added interest accrued at the rate provided in the mortgage from that date forward.

It is submitted that this is entirely reasonable and fair. First of all, on the date the mortgage was defaulted, the Appellee had a reasonable expectation to receive at any time the mortgage was satisfied the balance due on Appellee's principal plus any unpaid interest. The foreclosing governmental unit came along and took the property, did not compensate Appellee for the balance due on the mortgage at that time and sold the property, put the money in its treasury and presumably used it or drew interest on it. In the meantime, the Appellee has been deprived of the proper use of

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[24] MCL 600.6431.

Appellee's money within the expectation of the mortgage. Therefore, this Court should affirm under the holdings in its prior cases of *Wayne County Treasurer, supra* and *Sidun, supra* that the Trial Court or the Court of Claims based on this compute the balance due to the State. I should point out that the foreclosing governmental unit, in this case the State Department of Treasury, is not left high and dry. It also has a right of indemnity under its contract with Title Check.[25]

[25] Stipulated Statement of Facts, Ex. 13 at Page 3, Section I-J.

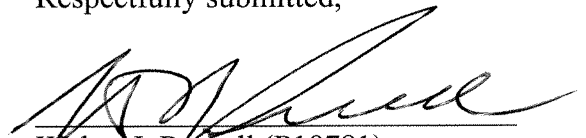
CONCLUSION

In short, the decision of this Court, which follows the decision of *Sidun v Wayne County Treasurer*, supra, which was decided after this matter was appealed, correctly interprets the adequacy of notice and the holding in that case is conclusive upon the plaintiff-appellee in this case. However, the Court erred in following the *Sidun*, supra and *Perfecting Church, supra* cases with respect to effect of improper notice. The court neglected to analyze the further holdings in *Sidun, supra* and *Perfecting Church, supra* in that where the notice was not sufficient for constitutional purposes such notice had not effect on the validity of the interested parties interest in the subject matter or in the property itself. Therefore, the FGU took subject to the mortgage of the plaintiff-appellee and is bound to recognize the existence of that contractual claim and therefore, the finding of the court that the act was a constitutional tort does not comport with the determination in *Sidun, supra* and *Perfecting Church, supra*. Therefore, the contract claim remains valid and the plaintiff-appellee should be entitled to enforce the payment of the sums due under the contract from the FGU.

RELIEF SOUGHT

Appellee respectfully requests this Court to affirm the decision of the Court of Appeals that the Appellee's mortgage interest has not been foreclosed and that the same is in default and return the same to the Court of Claims for determination of the balance due on the contract in accordance with the fact that such contract is in existence and in default.

Respectfully submitted,



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