1972

The Bowery Savings Bank v. Lynn A. Jenkins And Linda M. Jenkins : Respondent's Brief

In The Supreme Court of the State of Utah

THE BOWERY SAVINGS BANK,
a corporation,

Plaintiff-Respondent,

-vs-

LYNN A. JENKINS and
LINDA M. JENKINS, his wife,

Defendants-Appellants.

RESPONDENT'S BRIEF

Appeal from the District Court of Salt Lake County
Honorable Stewart M. Hanson, Jr.

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STATUTES

In The Supreme Court of the State of Utah

THE BOWERY SAVINGS BANK, a corporation,

Plaintiff-Respondent,

vs.

LYNN A. JENKINS and LINDA M. JENKINS, his wife,

Defendants-Appellants.

Case No. 12903

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action instituted by plaintiff to foreclose a real estate mortgage because of the defaults of defendants in making the payments required by the note and mortgage.

DISPOSITION IN THE LOWER COURT

Based upon the pleadings, affidavits and the defendants' answers to written interrogatories, the trial court granted plaintiff's motion for summary judgment. The summary judgment determined the amount due and owing on the mortgage and ordered that the mortgage be foreclosed.

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent seeks to have the decision of the lower court affirmed on appeal.

STATEMENT OF FACTS

The following are the facts in the case as set forth in the summary judgment entered by the lower court, and as established by the pleadings, affidavits and defendants' answers to written interrogatories.

On November 7, 1966, Johnson-Anderson Mortgage Co. made a mortgage loan to Thomas L. Hoopiiaina and Carole Hoopiiaina, his wife. The mortgage was recorded on November 9, 1966, and became a first lien against the property in question. The note and mortgage were later sold by Johnson-Anderson Mortgage Co. to plaintiff-respondent, The Bowery Savings Bank, and plaintiff-respondent is now the owner of the note and mortgage. All these facts were admitted in defendants' answer to the complaint. (R. 1, 2, 11).

In November of 1970, the Hoopiiainas sold the property to the defendant-appellants, Lynn A. Jenkins and Linda M. Jenkins, his wife, (hereinafter called the "Jenkins") and a deed was recorded placing record title in the Jenkins' name. Although the Jenkins claim that they sold the property under contract to some people by the name of Andrus, and that they then sold the contract to some people by the name of Peterson, no document was ever recorded indicating that either the

Andruses or the Petersons had any interest in the property. (R. 16, 26, 61) Record title to the property still stands in the name of Lynn A. Jenkins and Linda M. Jenkins, his wife. (R. 2, 11, 59)

The Jenkins failed to make the monthly installment payments which came due on the note and mortgage on June 1st and July 1st, 1971. On July 15th, the Jenkins tendered the sum of $131.56 to plaintiff, but this tender was rejected by plaintiff and was returned by plaintiff to the Jenkins because there was then past due on the note and mortgage the sum of $261.12. On August 5, 1971, the Jenkins tendered the sum of $263.12 to plaintiff, but this tender was also rejected by plaintiff and was returned by plaintiff to the Jenkins because there was then past due on the note and mortgage the sum of $389.12. On about September 15, 1971, the Jenkins tendered the sum of $394.68 to plaintiff, but this tender was rejected by plaintiff and was returned by plaintiff to the Jenkins because there was then past due on the note and mortgage the sum of $526.24. (R. 13, 25, 33, 60)

The plaintiff declared the entire unpaid balance of the note and mortgage in the sum of $14,635.14 to be due and payable, and instituted this action to foreclose the mortgage. (R. 34, 35, 36) Thereafter the Jenkins tendered the sum of $526.24 to plaintiff. This tender was rejected by plaintiff and was returned by plaintiff to the Jenkins because the entire unpaid bal-

ance of the mortgage in the sum of $14,635.64 had already been declared due and payable, because no sums had ever been tendered by certified check as previously required in a written notice to the Jenkins as a condition to reinstating the delinquent account, and because said sum was insufficient to bring the delinquencies current and pay the costs and attorneys' fees already incurred by the plaintiff in the action. (R. 34, 60, 61)

The unpaid principal balance of the note and mortgage is $14,635.64, and said sum bears interest at 6% per annum from May 1, 1971, the last date that any payment was received by plaintiff and applied on the loan. This amount is not disputed by defendant-appellants. (R. 34, 61)

ARGUMENT

POINT I

SUMMARY JUDGMENT WAS PROPERLY GRANTED SINCE THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

In Point I of their brief the appellants argue that summary judgment was improperly granted since genuine issues of material fact existed concerning tenders of delinquent payments.

The respondent agrees with appellants that summary judgment cannot be granted if material factual

issues concerning tender exist. In fact, however, there was no factual issue whatsoever concerning the alleged tenders in this case. The dates and amounts of each tender as alleged by appellants are identical to the dates and amounts of each tender as set forth in the respondents' affidavit in support of its motion for summary judgment. (Compare the dates and amounts of each such tender as set forth by appellants in their answers to written interrogatories (A. 25-26) with the dates and amounts of each tender as alleged in plaintiff's affidavit.) (R. 33-34) These facts concerning each such tender, as established and agreed upon by appellants' answers to interrogatories and respondents' affidavit, were the exact facts as found by the lower court and set forth by the lower court in the summary judgment. (R. 60-61)

There was no factual dispute concerning the alleged tenders by appellants. The only dispute was as to the legal effect of these alleged tenders. This was a question of law, and, as pointed out in Point II of this brief, the lower court ruled correctly insofar as this legal question was concerned.

POINT II

THE VARIOUS ALLEGED TENDERS OF DELINQUENT PAYMENTS BY APPELLANTS WERE ALL INSUFFICIENT AND INADEQUATE AND DID NOT PREVENT PLAINTIFF

FROM FORECLOSING THE MORTGAGE.

In their answer the appellants admitted the execution of the note and mortgage which are the subject of this action. They admitted that the mortgage was properly recorded and be came a valid first lien against the property in question. They admitted that the note and mortgage are now held and owned by respondent and that appellants are now the record owners of the property. (R. 1, 2, 11) The present unpaid principal balance of the note and mortgage, paying interest to May 1, 1971, was established as being $14,635.64, by appellants' answers to interrogatory No. 2 (R. 16, 26) and by the uncontradicted affidavit attached to respondent's motion for summary judgment. (R. 34).

The appellants also admitted to defaulting in their payments on the note and mortgage. (R. 13, 56) They contend, however, that they tendered the delinquent installments to plaintiff-respondent, and that their tenders prevented plaintiff-respondent from foreclosing the mortgage.

It is respondent's contention that each and every tender was insufficient, was returned immediately to defendant-appellants, and that the defective and insufficient tenders could not prevent foreclosure. The facts concerning the alleged tenders are established by defendant-appellants' answers, and answers to interrogatories, and by the affidavit filed in support of plain-

tiff's motion for summary judgment. (R. 13, 25-26, 33-36) These facts may be summarized as follows:

The Jenkins defaulted in making their June 1, 1971 and July 1, 1971 payments on the note and mortgage. Subsequent to July 15, 1971, plaintiff-respondent received a check from the Jenkins in the sum of $131.56. This check was immediately returned by plaintiff-respondent to the Jenkins, because there was then due and owing on the mortgage the sum of $261.12.

Three weeks passed before plaintiff-respondent heard anything further from the Jenkins. Then, subsequent to August 5, 1971, plaintiff-respondent received checks from the Jenkins in the sum of $263.12. These checks were mailed back to the Jenkins on August 9, 1971, and the Jenkins were notified in writing that the checks were being returned because there was then due and owing on the mortgage, the sum of $389.12. The transmittal letter also notified the Jenkins that notice of default had been filed concerning the loan, and that before plaintiff-respondent would even consider reinstating the loan, the Jenkins would have to personally contact plaintiff's agent. (R. 35)

The Jenkins ignored the letter for six weeks. Then on about September 15, 1971, plaintiff-respondent received checks from the Jenkins in the sum of $394.68. These checks were returned to the Jenkins by letter of September 16, 1971. This letter informed the Jenkins

that there was then due and owing on the mortgage the sum of $526.24. It further stated that notice of default had already been filed concerning the loan, and that no reinstatement would be considered unless all delinquent installments were paid by certified check and unless the Jenkins contacted the collection manager. (R. 36)

On September 23, 1971, Jenkins called the collection manager to discuss reinstatement of the loan and was told by the manager that foreclosure proceedings were underway. Action to foreclose the mortgage was instituted on September 24, 1971, by the filing of the complaint in this action. Thereafter, plaintiff-respondent received checks from the Jenkins in the sum of $526.24. The checks were not certified as required by the notice sent to the Jenkins on September 16th. These checks were immediately returned to the Jenkins.

The foregoing facts establish that the alleged "tenders" of the Jenkins were at all times insufficient and inadequate and constituted no defense to the action. It is a basic rule of law that a tender in order to have any legal effect must be sufficient to cover all sums which are then due to the creditor. As stated in 86 C.J.S. § 7 Tender:

> "In order to constitute a valid tender, the tenderer must offer a specific amount. While such amount need not be beyond reasonable dispute, nothing short of an offer of everything

> that the creditor is entitled to receive is sufficient, and a debtor must at his peril tender the entire sum due, including all necessary expenses incurred or damages suffered by the creditor by reason of the default of the debtor, and a mistake in tendering an amount less than the sum due is the misfortune of the tenderer, the tender having no legal significance if refused, and the position of the parties remains the same as though no tender had been made."

The defendants' first tender of $131.56 was made at a time when there was $261.12 owed on the note and mortgage. This tender was insufficient in amount and had no legal effect.

The defendants' second tender of $263.12 was made at a time when there was $389.12 owed on the note and mortgage. This tender was insufficient in amount and had no legal effect.

The defendants' third tender of $394.68 was made at a time when there was $522.24 owed on the note and mortgage and was made after the defendants had been informed in writing that notice of default had been filed concerning the loan and that reinstatement of the loan would not be considered unless certain conditions were fulfilled.

The defendants' fourth tender of $526.24 was not

made until after defendants had received a second written notice that notice of default had been filed concerning the loan and that reinstatement would not be considered unless certain conditions were fulfilled. The $526.24 was not received by plaintiff-respondent until after suit had been instituted and until after plaintiff-respondent had incurred costs and attorneys' fees in the institution of the action.

The defendant-appellants assert in Point II of their brief that they had a right to bring all delinquent installments current and have the loan reinstated at any time prior to service of summons upon them. This is not the law.

The general rule is that a mortgagee need only take some affirmative act which clearly evidences its intention to accelerate the mortgage. After such act has been taken the debtor no longer has the right to tender delinquent payments and thereby prevent foreclosure. As stated in 55 Am Jur 2d, Mortgages § 390:

> "The exercise of an option to declare due the entire debt secured by a mortgage is generally regarded as terminating the right of the mortgagor to compel the acceptance by the mortgagee of the defaulted obligation merely. Under this rule it is held that the exercise of an option to accelerate a mortgage is not affected by a subsequent tender of arrears even

> if such tender is made before foreclosure of the mortgage."

The rule is stated as follows in 59 C.J.S., Mortgages § 495(6)(b) at page 797:

> "A tender before the commencement of foreclosure action but after election to accelerate does not bar acceleration, nor does a tender after foreclosure action is commenced. A tender of less than the full amount due is likewise insufficient. . . ."

Various acts have been held sufficient as evidencing a creditor's election to have the entire debt paid, thereby cutting off the debtor's right to have the loan reinstated by the tender of delinquent installments. Such acts have included the creditor listing the entire indebtedness as immediately due and payable on his books (*Wolfley v. Wooten,* 220 Mo. App. 668, 293 S.W. 73); presentment of a claim to the debtor's administrator as a mature debt (*Burk v. Guilford Mortgage Co.,* Tex. Civ. App. 161 S.W.2d 574); the filing of a suit by the creditor (*Stewart v. Thomas,* Tex. Civ. App. 179 S.W. 886) the sending of a demand letter to the debtor by the creditor's attorney which included a statement of the total sum due (*Thompson v. Willson,* 183 Misc. 949, 51 N.Y.S.2d 665). Plaintiff-respondent is aware of no case which has held that a debtor has a right to reinstate a delinquent loan until after he has been served with summons.

The law in Utah, as in most other jurisdictions, is that a defaulting debtor need not even be given notice of the creditor's election. As stated by the Utah Supreme Court in *Thomas v. Foulger,* 71 Utah 274, 264 Pac. 975, 978:

> "According to the great weight of authority, when a note contains a provision accelerating the date of maturity if the interest is not paid when due, the holder of such note is not required to give notice of an election to declare the note due as a condition precedent to bringing an action for its collection."

Although the plaintiff-respondent was not required to give notice to the Jenkins, it did, in fact, give two written notices to them. Both of these notices were given prior to the time the Jenkins made any pretext at tendering all of the delinquent installments then due under the mortgage.

The first notice was given on August 9, 1971, after the Jenkins had tendered the sum of $263.12 to plaintiff-respondent. This notice stated that the $263.12 was being returned to the Jenkins because there was then due and owing on the mortgage the sum of $389.12. It notified them that notice of default had already been filed concerning the loan and that reinstatement of the loan would not even be considered until after the Jenkins had contacted the office.

The second notice was given on September 16, 1971, after the Jenkins had again made an insufficient tender, this time in the sum of $394.68. This notice stated that the $394.68 was being returned to the Jenkins and that the amount due and owing was $526.24. It again informed the Jenkins that notice of default had been filed concerning the loan and that reinstatement of the loan would not even be considered until after the Jenkins had contacted the collection manager and had submitted all delinquent amounts by certified check. As previously mentioned, no certified check was ever tendered to plaintiff-respondent.

The instant case is very similar to the recent Utah case of *American Savings & Loan Association v. Blomquist*, 21 U.2d 289, 445 P.2d 1 (1968). In that case, the defendants executed and delivered to plaintiff a promissory note and mortgage, which were apparently identical in all material respects with the note and mortgage involved in the case now before this Court. In that case, as in the instant case, the defendants were consistently late in making their payments. On December 14, 1964, the plaintiff sent a letter to defendants which demanded the payment of $149.00 for the November 15, 1964 installment; delinquencies in prior payments of $22.00; and 14 unpaid late charges totalling $83.16. The letter stated that plaintiff would not accept any partial payment of the sums then due and that if payment were remitted after December 25th, it should also include the December 15th installment payment.

In that case, as in the instant case, the defendants sent a check which was insufficient to pay the amount then due. In that case, as in the instant case, the check was returned to defendants and defendants were referred to plaintiff's letter of December 14th.

On January 6th, another check was sent to plaintiff by defendants, which check was also insufficient to pay the amount then due. As in the instant case this check was returned by plaintiff to defendants. The transmittal letter stated that defendants must immediately pay the sums referred to in the letter of December 14th, plus the December installment payment. When the defendants resubmitted this same check to plaintiff, the plaintiff returned it with a letter which stated that plaintiff was going to accelerate the debt and which gave defendants 30 days within which to pay off the loan.

The trial court in that case gave summary judgment for the plaintiff, as did the trial court in the instant case. On appeal the decision was affirmed. The Supreme Court rejected the defendants' contention that the notice to defendants was inadequate. The Court held:

> "By the letters of December 14 and 28 and January 6, the respondent unequivocally demanded strict performance and rejected appellants' response thereto with a check of $147 as an inadequate tender. From all the surrounding facts and circumstances there is no

evidentiary basis to hold that the trial court erred in its determination that appellants were given adequate notice and a reasonable time to comply."

In the instant case the plaintiff-respondent at all times demanded strict performance and rejected each and every inadequate tender by immediately returning each such tender to defendants. The defendants were given two written notices that notice of default had been filed concerning the loan and that plaintiff-respondent would not even consider reinstating the loan unless certain conditions were complied with. The trial court did not err in its determination that plaintiff was entitled to summary judgment.

POINT III

THE PLAINTIFF WAS NOT REQUIRED TO JOIN AS A DEFENDANT ANY PERSON WHOSE INTEREST IN THE PROPERTY DID NOT APPEAR OF RECORD AT THE TIME THE SUIT WAS INSTITUTED.

In Point III of their brief, the Jenkins urge that plaintiff's complaint should be dismissed for failure to join certain "indispensable parties" as defendants to the action. The Jenkins claim that these "indispensable parties" are the "Andruses", who are allegedly purchasing

the property from the Jenkins under an unrecorded real estate contract and the "Petersons", who are allegedly the owners of the property under some type of unrecorded conveyance from the Jenkins. The Jenkins admitted in their answers to interrogatories that neither the alleged contract, nor the alleged deed, nor any other instrument referring to the conrtact or the deed nor any instrument of any type referring to the Andruses or the Petersons has ever been recorded with the Salt Lake County Recorder. (R. 16, 26).

Under these circumstances, the Jenkins were the only necessary parties defendant to the action since they were the only persons shown by the records of the County Recorder to have any interest in the property. Section 78-37-3, Utah Code Annotated 1953, dealing with necessary parties in mortgage foreclosure proceedings, states, as follows:

> "78-37-3. *Necessary parties—Unrecorded rights barred.*—No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action."

In construing this section, the Utah Supreme Court held in the case of *Gigliotti v. Albergo,* 115 P.2d 791, 100 Utah 392 (1941), that where deeds were given by the mortgagors covering the real property, the grantee in the deeds acquired no interest in the property which would be superior to the mortgage, or which would require the grantee to be made a party to the mortgage foreclosure action, where the deed to the grantee was unrecorded at the time the mortgage foreclosure action was instituted.

The *Gigliotti* case is identical to the case now before this court. The Jenkins could not create any interest in the Petersons or the Andruses which would have any priority over the plaintiff's mortgage. Since no document was ever recorded granting any interest to the Petersons or the Andruses, Section 78-37-3 controlled and they were not necessary parties to the action.

The exclusive test as to whether a person need be made a party to a foreclosure action is whether a conveyance to that person appears of record in the office of the proper county recorder at the time the foreclosure action is commenced. (See *Redondo Improvement Co. v. O'Shaughnessy,* 168 Cal. 323, 143 Pac. 538). It is completely immaterial whether the mortgagee had actual knowledge of the existence of an unrecorded conveyance. He need only join those persons who have a recorded interest. In the case of *Hager v. Astorg,* 145 Cal. 548, 79 Pac. 68, the California Supreme Court

construed a provision of the California Code of Civ
Procedure which is identical to Section 78-37-3 of th
Utah Code. The Court stated:

> ". . . . When the foreclosure proceedings were commenced, the conveyance from M. Astorg to A. Astorg had not been recorded, and was not recorded until after the decree of foreclosure had been entered. Appellant set up these facts in his answer, and further averred that plaintiff, at the time she commenced her action of foreclosure, knew that the conveyance of the premises had been made by M. Astorg to him, and that he was then sole owner, but that she failed to make him a party defendant in the foreclosure proceedings. Upon the trial appellant sought to make proof of this knowledge of plaintiff of the existence of the conveyance to him when she filed her complaint to foreclose, but on objection of the respondent the court decided that this evidence was inadmissible, and whether the ruling of the court was correct or not is the important question to be now determined.
>
> The lower court was undoubtedly of the opinion that, as the conveyance to the appellant was not recorded when the foreclosure proceedings were commenced, it was immaterial whether plaintiff had actual knowledge of its existence

or not; that she was required to make those persons defendants only whose conveyances appeared of record at the time she instituted her foreclosure suit. We are satisfied that this view was correct under the Code and the authorities. It is provided by section 726 of the Code of Civil Procedure that: "No person holding a conveyance from or under the mortgagor of the property mortgaged, . . . which conveyance . . . does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance . . . as if he had been made a party to the action." The language of this section is not open to construction. It plainly declares that it is unnecessary to make any person a party to an action of foreclosure, whose conveyance from the mortgagor, subsequent to the mortgage, is unrecorded at the time the action is commenced, while at the same time it binds such person by the decree in the action as conclusively as though he had in fact been made a party to the suit. The element of actual knowledge of the existence of such conveyance, in the absence of its recordation, is not within the terms of the section. The presence or absence of the subsequent conveyance upon the record

> in the proper office when the action is commenced is the exclusive test as to whether the holder thereof need or need not be made a party defendant, so as to bind him by the foreclosure decree. This is the only test in foreclosure proceedings which the law furnishes, and under the section above quoted it is not necessary to make such holder of an unrecorded conveyance a party defendant, even though the mortgagor may have actual knowledge of the existence of such conveyance when the foreclosure suit is commenced. He need only look to the appropriate records, and make parties to the action those alone whose subsequent conveyances appear thereon.

In Point III of their brief the defendant-appellants cite five cases which they claim support their argument that the Petersons and Andruses are necessary parties to this action. A cursory reading of those cases shows that none of them support defendant-appellants' position or in any manner alters the clear and unambiguous directive of Section 78-37-3.

The first of the cases cited by defendant-appellants in *Johnson v. Home Owners Loan Corporation*, 46 Cal. App.2d 546, 116 P.2d 167. In that case a deed to the appellant *was* recorded prior to the time foreclosure proceedings were instituted, and appellant was consequently held to be a necessary party to the foreclosure

action. Rather than supporting defendant-appellants' argument, this case supports the proposition that only those who have an interest of record need be made parties to a mortgage foreclosure action. This case reaffirmed all of the prior California decisions on this point, including the *Hager v. Astorg* and the *Redondo Improvement Co. v. O'Shaughnessy* cases, *supra.* In the course of its opinion the Court stated at page 169:

> "As pointed out by appellant, we are not here dealing with a person holding a conveyance *from* or *under* the mortgagor which conveyance is *not* of record. The grant deed in the instant case was duly recorded." (Emphasis is that of the California Court.)

The second case cited by defendant-appellants is *Federal Land Bank of Berkley v. Pace,* 87 Utah 156, 48 P.2d 480 (1935). This was not a mortgage foreclosure action, but was an action brought to quiet title to a strip of land which a mortgagee had negilgently failed to include in the mortgage. Had it been a mortgage foreclosure action, only those who had a recorded interest in the property would have had to have been made parties to the action. This distinction was pointed out by the Utah Supreme Court at page 483 as follows:

> ". . . . The plaintiff proceeds on the assumption that section 104-55-3 R. S. Utah 1933 (78-37-3) does not compel him to join as defendants in a suit to reform a mortgage or for

specific performance those parties who have not their conveyance of record. In this he is in error. That section provides that no person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office, need be made a party, but it does not go to the extent of saying that, where one is required to resort to the courts in order to have a mortgage made, all parties interested in the land, in order to be bound by a decree in such case, must not be made parties. Section 104-55-3 has nothing to do with a situation where parties must resort to the courts in order to obtain the mortgage.

The case now before this Court is not one to create a mortgage. It is an action to foreclose a mortgage, and, as stated in the *Federal Land Bank of Berkley* case, section 78-37-3 applies.

The next case cited by defendant-appellants is *Mickelson v. Anderson*, 81 Utah 444, 19 P.2d 1033 (1932). This case has no application to the instant case. In the *Mickelson* case, the defendant Anderson who was the record title owner of the property and whose deed had been properly recorded prior to the institution of the action, was inadvertently omitted as a defendant in the foreclosure proceedings. Her interest *was* recorded and Section 78-37-3 would require her to be made a

party. These facts were set forth by the Utah Supreme Court at page 1034, as follows:

> ". . . on March 20, 1927, Ida Burge conveyed to Vivian Anderson; that the mortgage and all these conveyances were duly recorded; that prior to bringing the foreclosure suit plaintiff had caused an abstract of title to be prepared, but the abstractor had omitted therefrom the record of the conveyance from Ida Burge to Vivian Anderson, and by reason thereof Vivian Anderson, the then owner of the mortgaged property, was not included as a defendant in the foreclosure action; . . ."

The *Mickelson* case did not involve the question of whether one whose interest was not of record should be made a party to a mortgage foreclosure action and this question was not even mentioned by the Court.

Very little need be said about the next case cited by defendant-appellants, *Hoyt v. Upper Marion Ditch Co.*, 94 Utah 134, 76 P.2d 234 (1938). This case did not even involve a real estate mortgage. Accordingly section 78-37-3 was not involved and was not even mentioned by the Court. The *Hoyt* case involved a pledge of stock, and there is not Utah statute involving pledges which in any manner corresponds to Section 78-37-3. It is impossible to see even the remotest connection between the *Hoyt* case and the instant action.

The last case cited by defendant-appellants is

Reader v. District Court of the Fourth Judicial Distric 98 Utah 1, 94 P.2d 858 (1933). In this case service o summons was attempted on a corporate mortgagor whi was the record title owner of the property in questio Service of summons on the corporation was defecti and the court therefore held that it had never been mad a party to the action. Since the party having *record* title was not made a party to the action, the foreclosur judgment was void. This case is in full conformity wit the literal wording of Section 78-37-3. It holds that on having a recorded interest in the mortgaged property i a necessary party to a mortgage foreclosure action. Th case does not state that someone having an *unrecorde* interest in the property should also be made a party t the action. That proposition was not even mentioned i the case.

None of the cases cited by defendant-appellant intimate, even by way of dicta, that a holder of an un recorded interest in real property should be made a party to a mortgage foreclosure action. The clear and un ambiguous language of Section 78-37-3 is that "N person holding a conveyance . . . which conveyance . . . does not appear of record . . . need be made a party to such action . . ."

The reason the Utah legislature enacted Section 78-37-3 is obvious when one considers the statutory scheme developed in this state to assure uncomplicated alienability of real property and to give assurance to

purchasers of real property concerning their titles. Under this statutory scheme a prospective purchaser is on notice of the claim of any person whose interest in real property is recorded in the office of the proper County Recorder. He knows that he must obtain releases or conveyances from all such persons in order to obtain free and unencumbered title. If he obtains such releases and conveyances from all persons having such recorded interests, he can be assured that his title to the property is clear. No person who holds an unrecorded interest in the property of whom the purchaser had no actual knowledge can later appear and claim superior title to the property in question.

The purpose of Section 78-37-3 is to give similar assurance to the prospective purchasers at mortgage foreclosure sales, and to give similar stability to land titles derived from sheriff's deed emanating from such sales. A prospective purchaser may be willing to bid a substantial amount for a parcel of real property at a mortgage foreclosure sale where he has checked the records of the appropriate county recorder and determined that all persons who had an interest of record in the property were made parties to the foreclosure action and are thereby bound by the foreclosure decree. Section 78-37-3 gives him the assurance that no one unknown to him, who holds an interest in the property under an unrecorded deed or contract of sale, can later assert a claim to the property on the grounds that the existence

of such unrecorded deed or contract was known to the mortgagor or mortgagee.

Without the assurance provided by Section 78-37-3, a prospective purchaser at a sheriff's sale would be willing to bid very little for the property in question. Construction of Section 78-37-3 in the manner urged by defendant-appellants would be disastrous for mortgagees since they would be able to receive only a fraction of the value of their security on foreclosure sale of the property. It would be disastrous for mortgagors since the resulting low bid for the property at a sheriff's sale would correspondingly increase the amount of the deficiency judgment entered against them. It would be disastrous for any person now owning real property where title was derived from a sheriff's deed, since title to his property would be forever questioned.

The plain and unambiguous language of Section 78-37-3 must not be twisted and tortured in the manner urged by defendant-appellants. To do so would result in the consequences envisioned by Justice Wolfe in the *Hoyt* case:

> "The security holder cannot reasonably exhaust the security if at the foreclosure sale no one would buy it because no one could get a title which would be worth paying 10 cents for . . ." p. 240

CONCLUSION

All of the material facts in this case were established by defendant-appellants themselves in their answer to the complaint and their answers to written interrogatories. These documents established that defendant-appellants were continually delinquent in their payments under the note and mortgage. They made several insufficient tenders to plaintiff-respondent, one of $131.56 when there was $261.12 due and owing; one of $263.12 when there was $389.12 due and owing; and one of $394.68 when there was $526.24 due and owing. All tenders were rejected and immediately returned by plaintiff-respondent to defendant-appellants.

It is further established that on two occasions prior to the time defendant-respondents made any attempt at tendering the full delinquency, the plaintiff-respondent notified defendant-appellants, in writing, that notice of default had been filed concerning the loan and that reinstatement would not be considered unless certain conditions were complied with. Defendant-appellants ignored these two notices the same way they had continuously ignored their payment obligations under the note and mortgage. The facts as established led inexorably to the legal conclusion that all of the alleged tenders were at all times insufficient and inadequate and did not prevent foreclosure of the mortgage.

The answers of defendant-appellants to plaintiff's complaint admitted that defendant appellants were the

owners of the property as shown by the records of the County Recorder. Their answers to written interrogatories admitted that no document was ever recorded showing any interest in the property in either the "Andruses" or the "Petersons". Section 78-37-3, Utah Code Annotated declares without equivocation that under these circumstances the defendant-appellants were the only necessary defendants to the action and that neither the "Andruses" nor the "Petersons" were necessary parties.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submittted,

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