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In the

Supreme Court of the United States

THIRD NATIONAL BANK IN NASHVILLE,

PETITIONER,

V

IMPAC LIMITED, INC., ET AL.

No. 76-674

Washington, D. C.
April 26, 1977

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v. No. 76-674

IMPAC LIMITED, INC., ET AL

Washington, D. C.

Tuesday, April 26, 1977

The above-entitled matter came on for argument at 11:41 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

THOMAS P. KANADAY, JR., ESQ., Farris, Evans and Warfield, 18th Floor, Third National Bank Building, Nashville, Tennessee 37219 For Petitioner

MRS. GAIL P. PIGG, Home Federal Tower, 230 Fourth Avenue, North, Nashville, Tennessee 37219 For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-674, Third National Bank in Nashville versus Impac Limited.

Mr. Kanaday, I think you may proceed now.

ORAL ARGUMENT OF THOMAS P. KANADAY, JR. ESQ.,

ON BEHALF OF PETITIONER

MR. KANADAY: Mr. Chief Justice and may it please the court:

This case arises out of a $700,000 loan which was made by Third National Bank to certain borrowers to finance the construction of a commercial office building. The payment of the loan was secured by a deed of trust under the terms of which certain real property was conveyed to a trustee who was granted the power to sell the property in the event of default.

The loan was originally made in May of 1973 and originally matured in May of 1974.

However, at the borrower's request, three different extensions of the maturity date were granted, the last of which expired in July, 1975.

In August of 1975, the bank determined that the loan was in default and in September, 1975, the bank gave the requisite notice of foreclosure.

The process of foreclosure in Tennessee is an exercise of private contractual right and is not accomplished

through judicial means.

After the notice of foreclosure was given, the Respondents filed this action in the Tennessee Chancery Court seeking to enjoin the foreclosure. The Chancellor granted a temporary injunction restraining the bank from foreclosure.

The bank then moved to dissolve the temporary injunction relying on the provisions of 12 United States Code Section 91. The Chancellor granted that motion, holding that Section 91 of the Banking Act forbids a Tennessee Court from enjoining a national bank prior to foreclosure.

Respondents filed an interlocutory appeal to the Tennessee Supreme Court which, in its decision, judicially created an exception to the anti-injunction proviso of Section 91.

The Tennessee Supreme Court held that the anti-injunction proviso does not apply where a bank's debtor is seeking to restrain a foreclosure.

The structure of my argument will be, first, to examine the grammatical and historical meaning of the anti-injunction proviso in Section 91, then the decisions of this Court and the State Court decisions and having done that, to explore whether, under the circumstances present in this case, there is any constitutional impediment to its historic and natural construction.

QUESTION: Will you somewhere along the line answer

this question and that is, whether Respondent Impac, instead of being a mortgagee, had simply owned a piece of land and your client sent out a bulldozer and started excavating on the land and the Respondent objected and your client said, "We are starting our new branch office here," and the Respondent said, "Well, gee, I never sold it to you," and it turned out to be simply a mistake in identity on the part of your client.

Would the Tennessee courts be disabled by the section you rely on from issuing an injunction in that situation?

MR. KANADAY: Well, clearly, under the decision of the Supreme Court in this case, they would not be disabled.

QUESTION: Well, under your theory, would they be?

MR. KANADAY: Under our theory I do not know because in the instance that you posit to me, the bank is acting on its own initiative without reliance on any contractual rights.

In this instance we are relying on our rights in the contract in the deed of trust so I do not know. It might be stretched that far.

QUESTION: You say, then, it is simply literally no injunction in whatever circumstances are conceivable? At least, you say it could be pressed that way.

MR. KANADAY: Yes, sir. This Court in 1888, when it decided the case of Pacific National Bank versus Mixter, said that it was an absolute prohibition and that the remedy -- and that was an attachment case and not an injunction case but I

don't think that is important.

QUESTION: Well, but it could be quite important, couldn't it? Because if you read the section of the statute you are relying on as a ustem generous type of thing, attachment and execution are both remedies prior to judgment initiated by a plaintiff and certainly you could read the word injunction as being so limited.

MR. KANADAY: I don't understand the limitation that is implied by reference to the attachment. The bank is relying on the latter part of Section 91 which provides, "No attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court."

QUESTION: Do you have to go as far as was suggested in the case of the bulldozer mistakenly on the wrong property?

Do you have to say this statute would go that far in order to support your position?

MR. KANADAY: No, sir, we do not. We do not.

QUESTION: You have business relationships and business transactions and documents from which you are proceeding as distinguished from the other which is a trespass, I would take it.

MR. KANADAY: Precisely. That is what I have tried to respond, that we were relying on private contractual rights

between the lender and the borrower that define the nature of the relationship and the rights on the happening of certain events rather than a unilateral action on the part of the bank.

QUESTION: Mr. Kanaday, what in the statute draws a distinction between a breech of contract claim and a tort claim? There is nothing in the statute --

MR. KANADAY: There is nothing in the plain reading of the statute that draws such a distinction. But I don't think that we have to embrace such an egregious position.

QUESTION: No, no, but if you concede that the statute does not apply literally in that situation, are you not saying that in some cases it is read literally and in some cases it is not?

MR. KANADAY: Justice Stevens, I am not saying that I concede how the statute would be read under those extreme cases. I am saying that important distinctions can be made. I don't know how the statute is read.

QUESTION: Well, if one could distinguish between tort and contract, could one also not distinguish, as your opponent does, between cases in which the plaintiff is a creditor and those in which he is a debtor?

MR. KANADAY: Yes. But I am not saying that the statute affords us the liberty to make those distinctions, either between tort, contract, debtor, creditor. I am relying on the facts of this case where there is a private contractual

right that there is an absolute prohibition under the statute from the interference prior to final judgment.

If there is any confusion about the proper construction of anti-injunction proviso, it arises because in its present form, Section 91 is an amalgam of two unrelated statutes. The first portion of the statute voids preferential transfers of property by insolvent national banks.

The second portion of Section 91 prohibits the state court from issuing attachments, injunctions and executions against a national bank prior to final judgment.

The issue in this case of course is whether a state court can issue an injunction against a national bank from foreclosing on collateral prior to final judgment.

Now, because of the holding of the Tennessee Supreme Court, I think another way of stating the issue is whether the preceding language relating to preferential transfers in some manner does restrict the otherwise unqualified meaning and unqualified language of the anti-injunction proviso.

Until 1864, a national bank could not even be sued in the state courts. In that year, a statute was adopted affording jurisdiction in actions against national banks in a state court.

In 1873, the Congress adopted the anti-injunction proviso as a limitation upon the jurisdiction of state courts to grant certain types of remedy at certain stages of the

litigation in the state court proceedings.

Now, in 1973, there was a revision of the banking and the judiciary code and as a result of this revision, there was an inadvertent deletion of the anti-injunction proviso and it was left out of the code for some two years by mere inadvertence.

Then in 1875, there was another revision of the code and the anti-injunction proviso reappeared without explanation at the end of the section which voided preferential transfers by insolvent national banks and it has remained in that position through the present day.

It was in that position when this Court issued its decisions in Mixter, Van Reed and Earle.

The Tennessee Supreme Court reached the result that it did by taking the erroneous view that "We looked to the purpose of the statute, which was to secure the assets of a bank, whether solvent or insolvent, for ratable distribution among its general creditors."

We say that was not the purpose of the statute. The clear purpose was to limit the jurisdiction of the state courts to grant extraordinary remedies at a certain stage in the proceeding. It was a limitation on the jurisdiction grant of the 1864 statute.

The first case that this Court has decided on it was Mixter.

Now, Pacific National Bank of Boston versus Mixter which, in 1888, held that the anti-injunction proviso nullified an attachment which had been obtained by a creditor of a national bank against funds of that bank on deposit in another bank.

The Court clearly rejected the argument that the anti-injunction proviso of Section 91 is somehow limited by its preceding provisions voiding preferential transfers. The Court said, "As it stood originally as part of Section 57 after 1873 and as it stands now in the revised statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state court."

The form of its reenactment in the revised statute does not change its meaning in this particular. All attachment laws of this state must be read as if they contained in express terms that they were not able to apply to suits against the national bank. The remedy is taken away altogether and cannot be used under any circumstances and it was further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions.

That is true. Now, that was this Court's unanimous construction of the statute in 1888.

The Mixter case then was followed by the case of Earle versus State of Pennsylvania. In that case, a creditor of a bank customer sought to reach funds on deposit in the bank.

The bank claimed no interest in the funds and was a mere stakeholder. This Court concluded that this was not an action against a bank or its property rights.

It is interesting to note that the Supreme Court in the Earle decision dissolved the attachment against stocks the bank held as collateral for a loan of that customer. But unhappily, we don't have a statement of the reasoning of the Court in doing this.

Presumably, it was because of the applicability of the anti-injunction proviso.

The present case is clearly not within the ambit of the exception in the Earle case, for in the present case the proceeding is brought by the Respondents against the National Bank as named party defendant and obviously, the injunction which they seek would materially affect the bank's property rights in its collateral.

The final decision was in 1905 in Van Reed versus People's National Bank, which reaffirmed the holding of Mixter, again, an attachment case.

Yes, sir?

QUESTION: What is the procedure for the bank in this case foreclosing on its security?

MR. KANADAY: Under the terms of the deed of trust, the trustee who is appointed in the instrument -- in this case there was a substitute trustee appointed -- the bank gave

notice to the customer of the default, called the loan, then published in a newspaper in Davidson County, Tennessee, in Nashville, once each week --

QUESTION: It takes no official participation? It isn't a judicial foreclosure?

MR. KANADAY: No, sir, the courts are not used at all. The trustee appointed in the instrument does act to enforce the bank's rights under the power of sale granted --

QUESTION: But he is not any kind of a public official?

MR. KANADAY: No, sir. I am the trustee in this sale, as a matter of fact.

QUESTION: Well, what about at the sale?

MR. KANADAY: The other trustee, then, reads the notice of foreclosure, whereas there has been a default and we have called the note due and it has been advertised and now --

QUESTION: Then at no time in the whole foreclosure procedure is there any official participation?

MR. KANADAY: A public official? No, sir, there is not, not at all. We did not get any --

QUESTION: Well, in your capacity you have the same responsibilities, I suppose and constrictions as a public official, do you not?

MR. KANADAY: The trustee --

QUESTION: Are you responsible to a court for --

MR. KANADAY: The sale, after it is held by the trustee, is not reviewed by a court. As I understand it, some states have a confirmation process or something like that. We don't have that. It is entirely a private act.

There is a fiduciary obligation, of course, that the trustee has, but there is no public review, there is not public empowerment --

QUESTION: There is no automatic judicial review.

MR. KANADAY: That is correct.

QUESTION: Was there any constitutional issue presented in the courts below?

MR. KANADAY: Justice White, there was no constitutional issue presented in this case at all until after I filed my brief after this Court had granted certiorari and it was raised in the Respondent's --

QUESTION: Do you say -- what is your position on whether the Respondent is privileged to attempt to sustain the judgment below by making a constitutional argument?

MR. KANADAY: I think that you are addressing this to the timeliness issue.

QUESTION: No, no, I am just -- assume we agreed with you except for the constitutional issue presented here?

MR. KANADAY: Yes.

QUESTION: Do we have to face that or must we --

QUESTION: No, sir, I do not think that it is even

appropriate that you face that.

QUESTION: Why?

MR. KANADAY: Because in the case of Cardinale versus Louisiana, a unanimous decision which you wrote, you wrote this way, "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions."

QUESTION: Do you think that is a jurisdictional matter? The case is properly here, isn't it?

MR. KANADAY: Yes, sir, it is.

QUESTION: Well, the Respondent now wants to sustain the judgment on constitutional grounds.

MR. KANADAY: And your question is what?

QUESTION: Well, is the Respondent privileged to argue that this statute that you rely on is unconstitutional?

MR. KANADAY: No, sir, I do not think so.

One, for the reason that you stated in the Cardinale decision. You noted not only the jurisdictional considerations incident to that rule, but you also noted the policy reasons incident to judicial administration.

You said questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind.

Now, apart from this, relative to appropriateness in this case, I think there is another result of the failure to

raise the question in timely fashion and that is a plain waiver of constitutional rights, which either party can do in any civil or criminal litigation by not having raised it in the trial court, not having raised it in the state supreme court and it is obvious that it was not raised in those proceedings because the state court opinion clearly said -- and I agreed with it at the time on this one point, that there was no jurisdiction in any other forum and they devote a portion of the decision to a holding that the case could not be brought in the federal district court which was true, as we understood the case at that time, thinking it was strictly a federal statutory construction case.

QUESTION: Mr. Kanaday, if the mortgagor wants to challenge the question of default, to what is really in default, how is it normally done if there is a state bank, say, as the mortgagee and in this case, how would he do it? When it is a federal bank under your view?

MR. KANADAY: There are two procedures to be followed that I am familiar with, with the law as it is practiced in Tennessee.

One would be a preforeclosure proceeding to enjoin the sale or to have the sale held but then subject to further orders of the court pending a hearing.

Another approach would be a postforeclosure proceeding to nulify the sale and set it aside or, lacking that,

they might be content to file suit for monetary damages.

QUESTION: What is the normal procedure if you have a state bank as the mortgagee? What is usually done in this kind of controversy? Is it the preforeclosure injunction proceeding?

MR. KANADAY: Your Honor, I have seen both types of actions brought during the real estate crunch in 1974 and 1975. There was plenty of both types of actions. And the reason that so many of the actions are brought after foreclosure is that Tennessee does have a statute barring an application for an injunction unless it is filed within five days preceding foreclosure and many people sort of trip up on that procedural requirement and bring the post --

QUESTION: And that procedure would be available against the National Bank here?

The post-procedure foreclosure would be available?

MR. KANADAY: Oh, yes, sir.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Kanaday.

[Whereupon, a recess is taken for luncheon from 12:00 o'clock noon to 1:02 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Counsel, you may continue.

MR. KANADAY: I'll reserve the balance of my time, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Mrs. Pigg.

ORAL ARGUMENT OF MRS. GAIL P. PIGG

ON BEHALF OF RESPONDENTS

MRS. PIGG: Mr. Chief Justice and may it please the Court:

Petitioner propounds the theory that the courts of our land cannot interfere by injunctive relief to protect the citizens of our land from wrongful foreclosure of their property by a National Bank until a final hearing at which time, I submit, the damage is done. The --

QUESTION: What do you think the statute means and what is its purpose?

MRS. PIGG: Your Honor, I think that the statute clearly on its face means that its purpose is to protect creditors for ratable distribution among its creditors.

The statute defines -- it is self-defining in that the heading of it regulates transfers by banks and other acts in contemplation of insolvency. It goes further after that heading and it prohibits transfers, assignments, payments of money committed after an act of insolvency or in contemplation

thereof with a view to prevent the application of the bank's assets in accord with the National Banking Act and with a view to prefer one creditor over another.

Then, your Honor, it has a semicolon and it says, "And no attachment -- no injunction, attachment or garnishment will issue against any bank." In that case, it says "Against any state bank pending a final hearing."

It says also"against the bank or its assets" and I submit that that is an important clause.

But Your Honor, Mr. Chief Justice, I submit that it is free and clear of ambiguity that you cannot pull the last clause of that. That entire statute is one sentence. I submit that you cannot pull the last clause and apply it to wherever it is that you want to apply it.

I submit that this is good law and I would like to say initially that I do not argue with it -- that Respondent does not argue with that law but the Petitioner goes further and says that this Court has ruled three times that the courts cannot interfere with national banks to protect the assets of its debtor pending a final hearing -- always pending a final hearing.

Now, I submit that these cases did not hold that.

I would like to take a very quick look at Mixter. Mixter was decided by Chief Justice White -- or Mixter was an opinion written by Chief Justice White in 1888.

In that particular case, the bank owed Mixter $15,000. Mixter began a suit by attachment.

Now, the bank was not insolvent on the date, apparently, that that attachment issued but just prior thereto, it closed its doors, then it resumed business.

During the resumption of business, the attachment issued.

Now, I would like to say to the Court that in the Mixter case, I felt that there must be a typographical error because the year was one year preceding the period of time that is involved and I think when the Court reads that case it will see what I mean.

Nevertheless, the bank was in severe financial difficulty at that period of time. This would be, I think, the obvious reason why the Court extended or appeared to extend the statute to mean that the bank did not have to be insolvent.

The Earle case decided by the Court and written in the opinion written by Justice Harlan in 1900 did not go that far. This was a case in which one Mr. Long, as I recall, had a judgment against -- had a judgment for some $31,000.

An attachment issued by garnishment and the court in that instance held that this last clause related back to the rest of the section.

Now, it also in that instance went on to say that this was not an asset of the bank but nevertheless it clearly

allowed the attachment by garnishment to stand.

There has been another case which is the Van Reed decision written by Mr. Justice Day in 1905 and this case was another simple attachment by a creditor in which event the court related back to the Mixter case and extended the statute to apply beyond insolvency but I submit to the Court that these banks clearly protect -- or these cases clearly protect the bank against interference of its assets by creditors. They --

QUESTION: In these cases they were creditors of the bank. Is that it?

MRS. PIGG: Yes, sir, they were creditors of the bank, Mr. Justice Stewart.

QUESTION: In all three cases.

MRS. PIGG: And none of these cases, and it is almost frightening to me that the extension -- that they have been extended this far -- none of these cases stands for the proposition, none of these cases had before it the question as to whether the bank could wrongfully take away the assets of the debtor's property or the assets of one of its debtors, not a single one and I submit that neither of these cases stands for that proposition.

I have alluded, I think, to the fact that property held as security under a deed of trust in Tennessee is not owned by the bank and I would like to look to Tennessee law on that point for a moment.

And this is all supported, of course, in my brief, but the mortgagee is clearly a creditor. His only interest in the property is as security. He is not deemed to be a property owner.

The Court has clearly held and this was, I think, in a 1955 Supreme Court case, that legal title vests in the trustee and this has been the holding in that state for the last many, many years, certainly since the turn of the century.

QUESTION: And who is the trustee in this case?

MRS. PIGG: The trustee in this case -- I believe now is Mr. Kanaday.

But the trustee, Your Honor, in a situation like this is always selected by the mortgagee, always. I know of no exception to that rule. The trustee is simply selected by the lender.

QUESTION: Doesn't the mortgagee have an equitable interest in the property?

MRS. PIGG: Your Honor, certainly the mortgagee has an interest from the standpoint of his security interest. He has, and we get into a situation here where it becomes shaded. Once the property is sold to a bona fide purchaser -- I'll get back to your, to answer your question in just a moment -- but once the property is sold to a bona fide purchaser, contrary to what Petitioner says, that property under Tennessee law is gone. It is beyond the reach of that mortgagor.

Now, that is assuming that it is a bona fide purchaser, of course. But the trustee has only such power as he is granted in that deed of trust.

Now, the serious question becomes -- the serious question throughout this entire matter becomes who determines default?

In the event there is no default, the trustee has no power and it is a dry trust. There are cases, again, throughout our state that state just exactly that and I would like to point out that the Jones case that is cited in my brief on page 14 states that the property cannot be recovered and in that instance there was a fradulent sale, an actual sale whereby the mortgagee fraudulently took the property back and then sold it to a bona fide purchaser and the court held that the Petitioner could only recover -- or the Plaintiff in that case could only recover damages.

QUESTION: What did the deed of trust say in this case?

MRS. PIGG: Your Honor, the deed of trust in this instance was used or was a very standard form.

QUESTION: Well, whatever it was, however standard it was, what did it say about the mortgagee's privileges to declare a default?

MRS. PIGG: In the event of default, he can advertise for 20 or 21 consecutive days -- three consecutive weeks and

this is stated but there is nothing in the deed of trust that tells how one determines default. There is no waiver in the deed of trust by that mortgagor.

QUESTION: Well, doesn't a person declaring a default do so at his own peril if he is mistaken?

MRS. PIGG: Your Honor, he does so at his own peril -- and forgive me, Mr. Chief Justice --

QUESTION: In any situation where the power to declare a default is vested in one person.

MRS. PIGG: That is not the question before this Court, with the permission of the Court. The question is --

QUESTION: Well, tell me the answer to my question and then we will see if it fits in.

MRS. PIGG: Yes, I would have to agree that he does so at his peril but then I would have to parry with the question, what is his peril? What is the remedy of the property owner? The remedy of the property owner -- first of all, Tennessee does have the right of equity of redemption but it is waived in this deed of trust as it is waived in virtually all deeds of trust in the State of Tennessee. I know of none that would be different so what is his remedy?

He has waived it in the papers and the terms that are decided or controlled by the lender. He has waived demand, notice and protest. He has waived the equity of redemption.

What can he do? There is only one thing that he

could do if the theory of Petitioner were accepted.

He could -- Petitioner says that he can recover the property. This is error. He can recover the property if the mortgagee is the successful bidder and retains the property. Then he could, I am confident, recover the property under Tennessee law but if the mortgagee is not the successful bidder he cannot recover the property as previously stated.

All right, his next remedy then, and Petitioner would delegate him to the second-best remedy. He has only one other, and that is to recover damages.

And I submit to the Court that to recover damages in this instance is not sufficient. Damages are simply inadequate and I would turn the attention of the Court to the fact that the Chancellor in the first hearing of the matter, before this question arose, before the question of jurisdiction, did find that irreparable damages would occur if foreclosure were permitted to be had prior to a final hearing.

And then, of course, when this question arose, he dissolved the injunction, only for it to be reinstated by the Tennessee Supreme Court.

I submit to the Court that beyond the inadequacy of the damages, that the legal fees that would be involved in seeking that final redress would be impossible, absolutely impossible for most people.

We are not dealing here only with business, hard core

commercially-oriented people. We are dealing here with literally hundreds of thousands of home loans, home improvement loans, of automobile loans, office loans -- every kind of loan and in each one of those instances, Petitioner stands before the court and says that you cannot interfere if they wrongfully foreclose.

QUESTION: We are only concerned in this case with the statute involving national banks, as I understand it.

MRS. PIGG: This is true, Your Honor. And I am referring always, throughout my argument, only to national banks. When I state that we are concerned, they have mortgage loans and we are concerned with these type loans.

QUESTION: I think you made the statement, if I understood you correctly, that nothing in the deed of trust had indicated what constituted an event of default.

MRS. PIGG: No, sir, this was not -- I'm sorry, Your Honor, if I misled. There are certain things that obviously constitute default.

QUESTION: It sets forth a long list of things that constitute default.

MRS. PIGG: Certainly, one of them being nonpayment, one of them being a question of whether the property has been damaged or taxes have been paid or insurance kept in force and effect. Those are just some of those. But I am talking about, when I responded to the question earlier, I am talking about

who will make that determination?

Let me take the example of a case that I have simply followed throughout my brief and refer to now. Take the situation of a man who pays the account and it gets wrongfully credited to someone else's account. No demand, no notice, no protest. He does not have to be given this.

Advertisement is held for three consecutive weeks and if he is fortunate enough and finds that in the newspaper, which is a legal publication, from that point he immediately tries to stop that sale.

Tennessee law, as Mr. Kanaday stated to the Court earlier, has a five-day notice requirement. You must give the mortgagee five days' notice before an injunction can be had. Or where it can be had, actually.

So the oppressed party -- and I will call him the oppressed party at this point because I feel that he is -- he attempts to stop the sale and applies to the court of injunctive relief and the court says to that citizen, "We cannot help you. The courts do not have power over the banks to stop your property from being sold. We can help you only after the act is done and we will try to help you recover damages."

I submit to the Court that this is at the point of taking. This is -- it becomes questionable as to whether there is a violation of due process of the Fifth Amendment of that individual.

Now, I want to quickly respond to a question that was asked of Petitioner earlier and that is that I do not attack the statute as unconstitutional because not for one moment do I conceive that either Congress or this Honorable Court ever would allow any bank anywhere to stand in the shoes of the Court and make a determination as to whether a man, in fact, is in default or not.

So I certainly do not attack it as constitutional. I say only that if the construction were accepted which Petitioner propounds, that it would render it unconstitutional and that is the only way that I enter that argument.

QUESTION: Well, in that sense, if you are right and we agree with Petitioner in his suggested construction of the statute, we affirm that we reverse the judgment of the Supreme Court of Tennessee because they were wrong on the statute and the constitutionality of the statute was never challenged.

MRS. PIGG: Your Honor, there was, I would have to say to the Court -- to Mr. Justice Rehnquist -- that there has been no challenge of the constitutionality here. Now, perhaps I misunderstood what you were saying.

QUESTION: Well, I think you have to fish or cut bait on the thing. Either, you know, you do assert a constitutional challenge and then you have to demonstrate that you have a right to do so on the state of the record, or you say,

as I understood you to say, that you are simply using the constitutional argument as a guidance to statutory construction which we are free to consider along with all the other statutory guidelines.

MRS. PIGG: Your Honor, this is correct. This is precisely what I am doing.

QUESTION: Which? Which is precisely what you are doing?

MRS. PIGG: Submitting it as the construction, as a part of determining the statute. I do not attack the statute as unconstitutional and I never have.

QUESTION: So if we disagree with you on the construction of the statute, you do not expect us, then, to reach any constitutional argument?

MRS. PIGG: Well, obviously not. I mean, this an argument from my standpoint.

QUESTION: That is all I needed to know.

MRS. PIGG: And -- well, I'll proceed from there but I would submit to the Court that there is an additional situation here. Whereas the man who has the example that I proposed of the man who has lost his house goes back into the same courtroom with the man next door who did not his loan with a national bank and the court says, he can grant an injunction insofar as a savings and loan or an insurance company, but not as to a national bank.

What is the feeling of the individual at that point as to who makes the determination of default? What is his feeling as to due process? Has he had a hearing?

I submit to the Court that he has not had a hearing. He has simply lost the property prior to the time of taking.

I would also go back and cite Mr. Justice Stewart in the Fuentes case because the language is far better than I could say it, in that if the right to notice and a hearing is to serve its full purpose, it must be granted at a time when the deprivation can still be prevented, that this Court does not embrace the proposition that the wrong can be done if it can be undone.

I submit, first of all, that the wrong cannot be undone but if it could, that that does not relieve the fact that the oppressed citizen has still lost his property.

The wrong was done at that period of time.

There are three major points that I state here. First of all, that the statute on its face is free of ambiguity. Second, that the property is not an asset of the bank. It is still an asset of the citizen. Third, that the construction they seek would render it in violation of the Fifth Amendment.

I submit to the Court somewhere in Petitioner's brief they have stated that the wheels of business must continue to run.

I state that the wheels of business must give way and let the courts determine if there is default.

First of all, now, there is nothing here which would interfere with the bank's rights, ultimately. If there is a hearing under the foreclosure injunction statutes which we have, if there is a hearing, then it will be determined at that time whether there is possible or possibly irreparable damages.

From that point there will be a hearing.

If the court finds at that time that there are no irreparable damages in the picture and no showing of irreparable damages, then there will not be an injunction granted. There is only a determination to be made as to whether there are irreparable damages and whether the bank, in fact, has a right to foreclose.

QUESTION: Mrs. Pigg, did you argue in the Supreme Court of Tennessee that to construe this statute against you would be to impinge upon your constitutional right of due process of law?

MRS. PIGG: Mr. Justice Stewart, I did not.

QUESTION: You did not make that argument?

MRS. PIGG: No, sir, I did not. I would state to the Court that I do follow Rule 40 of the Supreme Court rules in that the statement of a question presented will be deemed to include every subsidiary question fairly presented therein

and I do feel that this is a question fairly presented under the issue.

If it please the Court, I think the issue is obvious and I think that it really is quite a simple issue. The Tennessee Supreme Court did not accept Petitioner's theory that the Tennessee courts could not protect citizens' properties from wrongful foreclosure.

I submit that that Court gave that decision, contrary to Petitioner's statement in his brief, a very thorough examination and very thorough consideration and that it is certainly in the interest of public policy alone, if not simply to misconstrue a statute, that the State of Tennessee, the Supreme Court of Tennessee, be upheld in its decision.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kanaday?

MR. KANADAY: Yes, Your Honor, I do.

REBUTTAL ARGUMENT OF THOMAS P. KANADAY, JR., ESQ.

MR. KANADAY: If, as the Tennessee Supreme Court held, and if, as the Respondent urges on this Court, the prohibition against the issuing of injunctions is somehow constricted by the preceding language in Section 91 relating to preferential transfers to conditions of insolvent banks, to the securing of banks' assets for ratable distributions among the creditors, then this Court will find it necessary to

ignore the statutory context in which the anti-injunction proviso was adopted and that was, as an amendment to the statute conferring jurisdiction on state courts to hear actions against national banks.

It will not only be necessary to ignore the context of its enactment, it will be necessary to ignore the decision of this Court in the Van Reed case.

While in the Mixter case, as Mrs. Pigg stated, there was no insolvency in the bank at the time that the attachment arose, it did become insolvent.

But the Van Reed decision dispelled any notion that the application of the anti-injunction proviso is in any wise limited by the state of the solvency of the bank in question or the securing of assets for ratable distribution to its creditors and they make that quite explicit in the Van Reed opinion. There is no intimation that the bank in Van Reed was insolvent or was having financial difficulties or had committed preferential transfers.

QUESTION: Mr. Kanaday, in the jurisdiction where I practiced for 16 years, the statutes provide there could be no foreclosure of a mortgage without judicial action and in a judicial action such as was provided by the laws of Arizona, a mortgagor or debtor could raise any of the issues which your opponent has tried to raise here and the court simply would not grant foreclosure until it had had a hearing on those

issues.

Now, I take it there is nothing in that statutory procedure that would violate what you refer to as the anti-injunction provisions?

MR. KANADAY: I don't believe so, Your Honor, although I am not intimately acquainted with that process.

QUESTION: Well, then, wouldn't it make some sense to construe the injunction language, as I suggested earlier, as being the same sort of injunction or the kind of injunction that you would think of in connection with attachments and executions -- that is, what a plaintiff-creditor could get against a bank?

MR. KANADAY: No, sir, I don't think so.

One, because it is an absolute, unconditional, unqualified prohibition in its express terms. The type of foreclosure that Tennessee has under its deeds of trust is the type that it has had since 1796 when it became a state. This was known to the Congress.

I think that what you are suggesting is an important policy consideration, were we determining what is the appropriate legislative policy. But I do not think it is of any assistance in the construction of the statute as we find it now.

QUESTION: You agreed with Mr. Justice Stevens that the statute could not be read literally out to the very length

and breadth of its literal language, that no -- repeat, no injunction shall ever be issued by a state court against a national banking association, didn't you?

MR. KANADAY: I don't recall unqualifiedly going along with that.

QUESTION: Well, what is your position? What is your -- your answer to my bulldozer example was that you really did not have to express an opinion on it, wasn't it?

MR. KANADAY: That is correct. We can always conjure up a parade of horribles that carry the case beyond --

QUESTION: What distinction would you draw in order that my bulldozer example could be governed by an -- you could get an injunction in that case and you can't get one in this?

MR. KANADAY: The distinction that I would draw would be limited to the facts of this case. I am not prepared to tell this Court what would or would not happen in the bulldozer case because we do not have a bulldozer case.

I am prepared to say that there is a basis for a logical distinction where the bank is acting pursuant to a private contract which defines events of default and consequences of those events of default as opposed to when the bank acts unilaterally on its own notion.

QUESTION: I don't suppose you would say an injunction was barred if the bank was engaged in some activities unrelated to its banking business.

For example, if they started to drill for oil on the land, do you think a court of equity might allow an injunction then if you could show all the usual requirements?

MR. KANADAY: It may well be that when a national banking association has acted beyond its powers, it is not entitled as in those activities to the protection of the National Banking Act. In the present situation, it is the most usual type of national banking power that it is exercising and that is to realize upon collateral.

QUESTION: Mr. Kanaday, what happens if, as a matter of fact, the bank violated the contract and the mortgagor did not? What remedy would the mortgagor have under the laws of Tennessee?

MR. KANADAY: Well, Mrs. Pigg and I seem to have a difference of opinion as to whether or not the sale could be nullified and set aside. She says that under Tennessee law, this could not happen if it came into the hands of a bona fide purchaser.

As I understand the law in the State of Tennessee, there is no notion of the good faith purchaser for value in real property. The transfer really takes no better title than the transferor conveys and so I think that it could be set aside as a matter of conveyancing law.

In addition, the bank acts at its extreme peril

because there could be a remedy of damages which, albeit, leaves some room for dissatisfaction, but it is a conventional remedy for wrongful taking.

QUESTION: Unless you have changed the law, I always thought that property could not be compensated adequately, on damages. But that aside, assuming that the computer made a mistake --

MR. KANADAY: Yes.

QUESTION: -- and the payment had been made twice what it should have been made --

MR. KANADAY: Yes, sir.

QUESTION: And it came out that it had been made and the property sold to a bona fide person, what remedy does the mortgagor have?

MR. KANADAY: In my opinion, they have the remedy to set the sale aside and should that not be granted --

QUESTION: Well, is that by statutory law?

MR. KANADAY: No, sir, it is not.

QUESTION: Is it by case law? And if so, what is the case?

MR. KANADAY: I do not think that there is any case that I can call to your attention today on that point but in the conveyancing law, in the State of Tennessee, the transferee takes no better title to the transferor and in the facts that you posit, the transferor would not have the legal power to

conduct the sale. It would be an absence of capacity as though it were a minor or an incompetent.

QUESTION: The trust agreement waived the right to do that.

MR. KANADAY: It waived the equity of redemption which is different from the equitable power to void a transaction.

QUESTION: So you are saying that a court of equity could order a recission?

MR. KANADAY: That is correct.

QUESTION: Of that sale on the showing that was postulated by Justice Marshall?

MR. KANADAY: That is correct. Although I admit that Mrs. Pigg and I differ on our construction of Tennessee legal principles.

QUESTION: Mr. Kanaday, I want to be sure of one thing. I take it your posture here is that you are relying on the strict language of the statute?

MR. KANADAY: Yes, sir, I am.

QUESTION: And I also take it that, in effect, you have conceded that there might well be a legislative policy that would apply where the bank is there on the one hand and in a situation of this kind it might be a very different legislative policy.

MR. KANADAY: If I made a concession that there is

a different legislative policy implemented in the anti-injunction proviso depending on whether the bank is a debtor or a creditor, it was an inadvertent admission.

I think that the policy that is expressed in this act is a concern incident to the federal regulations of national banks for the liquidity of the banks for the ability to immediately realize on important types of assets that are within the banks' control. That asset may be a bank account, as it was in Mixter.

The asset may be -- or the property right which is important to the solvency and the continuing management of the bank may be its collateral, backing up a loan. I think it is the same policy that underlies the statute, whether the bank is a debtor or a creditor.

QUESTION: Then I run right smack into Mr. Justice Rehnquist's inquiry about his bulldozer case. You can say the same thing about that.

MR. KANADAY: Well, I don't know whether that is an appropriate exercise of the banking powers to do that type of an act, and I admit that that is a real egregious, horrible thing that has been applied. We can be equally disheartened about the widow whose life's savings is in her home and she only owes $1,000 and the bank wrongfully forecloses. We can postulate horribles but I don't think that we are dealing with anything here but a foreclosure on a $700,000 commercial office

building and I think that we make a mistake when we --

QUESTION: Which, I take it, was worth more than that.

MR. KANADAY: I couldn't tell you whether you could make a deal on the building or not, Your Honor. The bank might be tempted.

QUESTION: They hope it is worth more than that, don't they, if the are going to get their money back.

MR. KANADAY: We hope so.

QUESTION: Mr. Kanaday, am I correct, though, that your argument based on the history of the statute, that this is in the nature of a condition on the consent to be sued in state courts would apply equally to the tort case of the bulldozer?

MR. KANADAY: Justice Stevens, I must admit that because I view the anti-injunction proviso as a limitation on the congressional grant of jurisdiction to state courts, that you have got me into that corner and if I am going to be faithful to that position, I suppose, viewed as a jurisdictional limitation that it might well do that. Yes, sir.

The factors that we have heard mentioned today, adequacy of other remedies, legal fees, effects on home loans, the possibility of error in bank judgment, these are all important considerations. These are the types of things that Congress, in its wisdom, should balance in its mind and in its will in formulating the extent to which it will consent for the

national bank to be sued in state court forums.

MR. CHIEF JUSTICE BURGER: Mr. Kanaday, your time has expired.

MR. KANADAY: Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Pigg and Mr. Kanaday.

The case is submitted.

[Whereupon, at 1:39 o'clock p.m., the case was submitted.]