

[Cite as *Wells Fargo Bank, N.A. v. Young*, 2011-Ohio-122.]

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

WELLS FARGO BANK, N.A.	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2009 CA 12
v.	:	T.C. NO. 09CV00301
LEROY E. YOUNG, et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellees	:	

OPINION

Rendered on the 14th day of January, 2011.

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LEROY E. and MARTA YOUNG, 514 Washington Avenue, Greenville, Ohio 45331
Defendant-Appellee

FROELICH, J.

{¶ 1} Wells Fargo appeals from a judgment of the Darke County Court of Common Pleas, which entered a default judgment in favor of Wells Fargo on a mortgage note

executed by Leroy Young and ordered that the mortgaged property owned by Young and his wife be conveyed to Wells Fargo by Commissioner's deed. For the following reasons, the trial court's judgment will be reversed and the case remanded for further proceedings.

I

{¶ 2} In December 2004, Leroy E. Young obtained a 30-year loan of \$77,000 from Wells Fargo Bank, N.A., to finance the purchase of real property located at 514 Washington Avenue in Greenville, Ohio. Young signed an adjustable rate note, agreeing to repay the loan with an initial annual interest rate of 5.75 percent. The loan was secured by a mortgage executed by Young and his wife, Marta L. Young.

{¶ 3} In November 2008, Young and Wells Fargo executed a loan modification agreement. Under this agreement, Young agreed to repay a principal balance of \$76,042.46 over forty years at an annual interest rate of 3.75 percent. Young's monthly principal and interest payment was \$306.09.

{¶ 4} On June 8, 2009, Wells Fargo filed a Complaint in Foreclosure against the Youngs, claiming that Leroy Young had defaulted on the note and loan modification agreement and that the note was secured by a mortgage on the 514 Washington Avenue property. Wells Fargo sought judgment against Leroy Young in the amount of \$75,740.44, with interest at a rate of 3.75 percent per year from February 1, 2009, and other expenses. Wells Fargo also requested that the mortgage be foreclosed, that the property be ordered sold, and that the bank be paid from the proceeds of the sale. Copies of the original note, the loan modification agreement, and the mortgage were attached to Wells Fargo's complaint.

{¶ 5} The following day, the trial court, sua sponte, filed an “Entry – Briefing Schedule and Notice of Intent to Order Mediation, Short Sale or Deed in Lieu of Foreclosure.” The entry stated that the court “has determined that reducing [foreclosure] litigation costs and delays is in the interest of all parties” and presented three options for the parties: (1) if the owners desire to keep the property, the owners “shall assemble income verification and financial statement information to negotiate a means to re-affirm the debt;” (2) if the owners anticipate a sale of the real property to third parties, the owners should forward “information to the Court and Plaintiff’s counsel regarding the ‘short sale’ such as the purchase contract and appraisal;” and (3) if the owners are unable to keep the real property and have no anticipated third party buyer, “then a ‘deed in lieu of foreclosure’ should be considered to accomplish transfer of the realty.” The trial court indicated that the homeowners should promptly notify the court and plaintiff’s counsel of their intentions. The court concluded:

{¶ 6} “IT IS THEREFORE ORDERED AND DECREED that the parties hereto shall comply with the following schedule: (1) within 28 days after service of this Entry, Defendant owner may file a request for the court to commence loan re-affirmation mediation, or to Order a deed in lieu of foreclosure or for approval of a short sale to a third party, both in satisfaction of mortgage indebtedness; (2) within 45 days after service of this Entry, Plaintiff and other parties may file any response to Defendant owner’s request, or objection to the Court’s Orders herein, or otherwise brief why the Court should not order transfer of the real estate herein by short sale or deed in lieu of foreclosure. Thereafter, unless additional time for responses or replies is granted, this matter shall be submitted for

adjudication on the pleadings unless otherwise notified.

{¶ 7} “The Clerk of Courts shall provide this Entry to all parties and counsel of record with the initial pleadings filed herein.”

{¶ 8} The Youngs were each served with the complaint and summons on June 13, 2009. They did not file an answer or otherwise respond to the complaint or the court’s entry.

{¶ 9} On July 22, 2009, the trial court issued a Notice to Show Cause, stating that the Youngs had been properly served, that they had not “indicated any opposition to the transfer of the realty to the Plaintiff without judicial sale,” and that Wells Fargo had orally moved for a default judgment. (The following day, Wells Fargo moved, in writing, for a default judgment.) The court’s show cause order noted that proceeding without a judicial sale had “numerous advantages to the parties and involved government entitles” and gave notice of the court’s intent to “cause the transfer of the realty by Court-appointed Commissioner, under direction of the Court, in full satisfaction of the mortgage indebtedness of Plaintiff, with partial release of any junior lien-holders, and with forfeiture of the owner’s right of redemption” (although this was not one of the options presented in its June 9, order).

The court ordered any party opposing such transfer to file objections by August 7, 2009; parties in agreement with the proposed transfer were permitted to file a statement indicating such agreement by the same date.

{¶ 10} On August 13, the Clerk of Courts for Darke County submitted an affidavit attesting to the significant amount of time and effort expended by the Clerk, the Sheriff, and the Court to process foreclosure cases, the cost of transferring the property by public sale,

and that in the majority of foreclosure cases, multiple orders of sale are issued. No objections or other responses were timely filed.

{¶ 11} On the same day, the trial court ordered the conveyance of the Youngs' property to Wells Fargo by Commissioner's deed. In its decision and entry, the court found that foreclosure proceedings were equitable proceedings and that the authority to convey by Commissioner's deed was within the court's equitable powers, based on common law and R.C. 2329.34. The court further found that it had provided due process notice to all parties, that Wells Fargo had not "provided any objections which convince the Court that conveyance of title by Commissioner's deed is fundamentally unfair or unlawful," that numerous reasons favor conveyance by Commissioner's deed, that the offer of conveyance by Commissioner's deed "gives the Plaintiff the full value of the asset to be applied to the debt," and that the Commissioner's deed is not a voluntary conveyance like a deed in lieu of foreclosure. The court noted two legal assumptions that it had made: (1) that the statutory sale proceedings in R.C. Chapter 2329 "are not the exclusive remedy for protection of a mortgage lien," and (2) that "there are no violations of Ohio's marketable title standards as a result of the conveyance by Commissioner's deed."

{¶ 12} Following the court's decision, Wells Fargo moved for additional time to object. Wells Fargo's motion was denied. Nevertheless, the court vacated its decision, on its own motion, based on Wells Fargo's opposition to conveyance by Commissioner's deed, and the court scheduled an evidentiary hearing on the issue, at which time the court would hear testimony for this and approximately twenty other similar cases.

{¶ 13} The evidentiary hearing was held on September 15, 2009. Counsel for Wells

Fargo and other lenders presented arguments against the use of a Commissioner's deed to transfer the property and offered the expert testimony of Kenton L. Kuehnle and Samuel Shellhaas. Mr. Kuehnle, an attorney with 39 years of experience in real estate law and titles, discussed foreclosure actions historically, the statutory requirements, and the marketability (or lack thereof) of title as a result of the court's proposed procedure. Mr. Shellhaas also discussed the marketability of title under the court's proposed procedure.

{¶ 14} Ten days later, the trial court entered a default judgment to Wells Fargo on the note in the amount of \$75,740.44 plus accrued interest from February 1, 2009, at 3.75 percent per annum, plus any advancements for taxes and insurance. The court further found that Wells Fargo was entitled to have the equity of redemption foreclosed and that Wells Fargo's mortgage was the first and best lien on the property, except for the interest of the Darke County Treasurer for any unpaid taxes and assessments. The court overruled Wells Fargo's objections to the use of a Commissioner's deed and ordered the property conveyed to Wells Fargo by Commissioner's deed. The court appointed Margaret B. Hayes, Esq., as Commissioner to prepare all documents and to convey title; the court also ordered that she receive fees from Wells Fargo "in the sum of \$450.00, payable within 15 days hereafter." The judgment entry set forth the procedures for the conveyance of the property by the court-appointed Commissioner. The Youngs were granted three days to exercise the equity of redemption.

{¶ 15} In its judgment, the court gave its reasons for overruling Wells Fargo's objections. The court found that: (1) foreclosure proceedings were equitable proceedings, and the authority to convey by Commissioner's deed was within the court's equitable

powers; (2) it had provided due process notice to all parties; (3) Wells Fargo had not “provided any objections which convince the Court that conveyance of title by Commissioner’s deed is fundamentally unfair or unlawful,” including that R.C. Chapters 2327 and 2329 did not provide that R.C. Chapter 2329 provided an exclusive remedy; (4) the considerations of third parties who are not joined in the litigation were not ripe for adjudication; (5) there were no violations of the Ohio Marketable Title Act or the Ohio Marketable Title standards; and (6) the Commissioner’s deed was not a voluntary conveyance like a deed in lieu of foreclosure.

{¶ 16} Wells Fargo appeals from the trial court’s judgment, challenging the court’s order to convey the mortgaged property to Wells Fargo by Commissioner’s deed. With Wells Fargo’s consent and this Court’s permission, the Darke County Sheriff, the Darke County Treasurer, and the Darke County Clerk of Courts (collectively, “the County officers”) have filed a joint amicus brief in support of the trial court’s judgment.

II

{¶ 17} Wells Fargo’s assignment of error states:

{¶ 18} “THE TRIAL COURT ERRED IN ORDERING THE SUBJECT PROPERTY BE CONVEYED TO APPELLANT VIA MASTER COMMISSIONER’S DEED RATHER THAN ORDERING JUDICIAL SALE AS REQUESTED BY APPELLANT.”

{¶ 19} In its assignment of error, Wells Fargo argues that the court’s order for conveyance by Commissioner’s deed in lieu of a judicial sale is unlawful for seven reasons, to wit: (1) the order violates Ohio statutes; (2) the order violates the constitutional separation

of powers; (3) the order results in strict foreclosure, which is prohibited in Ohio; (4) the order violates due process; (5) the order creates a cloud on the title to the foreclosed real property; (6) the order abrogates the parties' contractual rights; and (7) the order improperly compels the mortgagee (i.e., Wells Fargo) to accept title to the foreclosed real estate.

{¶ 20} In addressing the specific issues before us, it is beneficial to understand the nature of mortgages and foreclosure proceedings in Ohio, both historically and under current law.

A. *Historical background*

{¶ 21} It is now well-established that a mortgage of real property is merely security for a debt. *Hausman v. Dayton*, 73 Ohio St.3d 671, 679, 1995-Ohio-277. However, historically, mortgages were conditional conveyances of property. If a person borrowed money, the mortgagor (borrower) would give the mortgagee (lender) a deed to the real estate conveying fee simple subject to conditions named in the mortgage. *Levin v. Carney* (1954), 161 Ohio St. 513, 516. If the money were repaid in full, title to the property would revert back to the borrower. However, if the money were not repaid in full as required, the deed would become absolute. The lender's remedy was to take possession of the land and, if necessary, to file an action in ejectment. *Id.*; *Kerr v. Lydecker* (1894), 51 Ohio St. 240, 248.

{¶ 22} "As time went on, chancery courts became more liberal in their pronouncements regarding the rights of a mortgagor, by adopting the theory that a mortgage was a mere security for a debt." *Levin*, 161 Ohio St. at 516-517. Chancery courts created an "equity of redemption," allowing the borrower to pay the balance due and redeem the property. *Id.*; Baldwin's Ohio Practice Ohio Real Estate Law §36:2.

{¶ 23} A mortgagor’s right to redeem the property is “absolute.” *Women’s Federal Savings Bank v. Pappadakes* (1988), 38 Ohio St.3d 143, 146, citing *Insurance Co. v. Sampson* (1883), 38 Ohio St. 672; *Sun Fire Office of London v. Clark* (1895), 53 Ohio St. 414; and *Union Bank Co. v. Brumbaugh* (1982), 69 Ohio St.2d 202. “It is the right which the mortgagor has, upon payment of the mortgage debt, to regain the legal interest which has passed to the mortgagee as a forfeiture for failure to comply with the terms under which the mortgage was granted.” *Id.* “The mortgagor’s ‘equity of redemption’ is typically cut off once a mortgagee seeks and is granted a decree of foreclosure. Generally, a common pleas court grants the mortgagor a three-day grace period to exercise the ‘equity of redemption,’ which consists of paying the debt, interest and court costs, to prevent the sale of the property.” *Hausman*, 73 Ohio St.3d at 676.

{¶ 24} “‘Strict foreclosure’ is the name of the [historic] procedure by which the borrower’s equity of redemption is cut off and the conveyance of the mortgage becomes absolute. The decree did not order a sale but gave the mortgagor a specified period to make redemption and provided that if he failed to redeem within such period, the mortgagor and all persons claiming under him were barred and foreclosed from exercising their rights and equities of redemption.” Baldwin’s at §36:2; see *Kerr*, 51 Ohio St. at 249. With strict foreclosure, the interests of junior lienholders were defeated, and the mortgagor (borrower) was unable to share in any excess proceeds from the subsequent sale of the property by the mortgagee. *Id.*

{¶ 25} Due to the harsh results caused by strict foreclosure, foreclosure by sale of the mortgaged property developed, which protected the interests of junior lienholders and

allowed the borrower to obtain the benefit of any sale proceeds exceeding the amount of the debt to the mortgagee. *Id.*

{¶ 26} Both strict foreclosure and foreclosure with judicial sale existed in Ohio until 1853, when Ohio adopted Section 374 of the Code of Civil Procedure. *Id.*; *Kerr*, 51 Ohio St. at 250. The provision provided that, “when a mortgage is foreclosed, a sale of the premises shall be ordered.” *Id.* This provision, which eliminated strict foreclosure, was also included in the General Code and currently exists, in a modified form, as R.C. 2323.07. *Id.*

B. *Foreclosure under the Revised Code*

{¶ 27} “Under present statutes a mortgagee, who appeals to the courts to enforce his mortgage after condition broken, must elect between two remedies. He may sue for the foreclosure of his mortgage, followed by a sale of the mortgaged premises, or he may sue to recover possession of the premises in ejectment proceedings.”¹ *Levin*, 161 Ohio St. at 517-18.

{¶ 28} A suit for foreclosure of the mortgage “constitutes a proceeding for the legal determination of the existence of a mortgage lien, the ascertainment of its extent, and the subjection to sale of the property pledged for its satisfaction, and no more.” *Carr v. Home*

¹Where land installment contracts are involved, a vendor may seek to recover possession of his property through an action for forfeiture and restitution or by foreclosure and judicial sale. However, once the vendee has paid in accordance with the contract terms for five years or more or has paid a sum equal to or in excess of twenty percent of the purchase price, the vendor is limited to the foreclosure and judicial sale procedures provided in R.C. 2323.07. R.C. 5313.07.

Owners Loan Corp. (1947), 148 Ohio St. 533, 540. An action to foreclose a mortgage is not a claim for possession of the property, nor is it an action for personal judgment on the note secured by such mortgage, although claims on the note and to foreclose on the mortgage are often brought in the same action. See *id.*; *Levin*, *supra*.

{¶ 29} Foreclosure proceedings are governed by equity and statute. Upon entering a judgment of foreclosure, a court typically identifies the amount due, forecloses (i.e., cuts-off or excludes) the equity of redemption (usually providing the mortgagor with a three day grace period to redeem the property), and orders the property to be sold by sheriff's sale, pursuant to the procedures set forth in R.C. Chapter 2329 (governing execution against property). See R.C. 2323.07.

{¶ 30} The primary purpose and goal of a foreclosure sale is to protect the interests of the mortgagor-debtor² while, at the same time, ensuring that the secured creditors receive payment for unpaid debts. *Ohio Sav. Bank v. Ambrose* (1990), 56 Ohio St.3d 53, 56; *Huntington Natl. Bank v. Burch*, 157 Ohio App.3d 71, 2004-Ohio-2046, ¶36. Consistent with these interests, R.C. Chapter 2329 is designed to obtain the maximum amount of money from the foreclosure sale. *Id.*

{¶ 31} Under R.C. 2329.17, real property must be appraised by “three disinterested freeholders” who reside in the county where the property is located, and the appraisal must be filed with the clerk of court. The party seeking the sale of the land (e.g., the mortgagee) must publicize the date, time, and place of the sale in a newspaper of general circulation in

²In this regard, we accept, without comment, the bank's advocacy for the “plight of the homeowner.” (Appellant's Reply Brief, p.11.)

the county. R.C. 2329.26. Absent certain exceptions, the land must be sold for at least two-thirds of the appraised value. R.C. 2329.20.

{¶ 32} After the property has been sold, R.C. 2329.31(A) directs the court to carefully examine the proceedings and, if the court finds that the sale was made in conformity with R.C. 2329.01-2329.61, to “direct the clerk of the court of common pleas to make an entry on the journal that the court is satisfied of the legality of such sale and that the attorney who filed the writ of execution make to the purchaser a deed for the lands and tenements.” The court may stay confirmation of the sale “to permit a property owner time to redeem the property or for any other reason that it determines is appropriate.” R.C. 2329.31(A).

{¶ 33} Although the mortgagor’s equity of redemption was foreclosed at the time judgment was entered in favor of the mortgagee, the General Assembly created a statutory right of redemption, which exists independently of the equitable right. R.C. 2329.33. See *Hausman*, 73 Ohio St.3d at 676 (stating that the mortgagor “failed to exercise its equity of redemption, and this part of the right to redeem was therefore cut off. What still remains, however, is [the mortgagor’s] right to redeem under R.C. 2329.33”). Under this statutory right of redemption, at any time prior to the confirmation of the sale, a mortgagor “may redeem it from sale by depositing in the hands of the clerk of the court of common pleas to which such execution or order is returnable, the amount of the judgment or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the day of sale to the time of such deposit, except where the judgment creditor is the purchaser, the interest at such rate on the

excess above his claim.” R.C. 2329.33. If a mortgagor exercises the statutory right of redemption prior to the confirmation of the sale, the court must set aside the sale, apply the deposit to the judgment, and award the interest to the purchaser. *Id.*

C. 2008 House Bill 138

{¶ 34} In the face of the recent foreclosure crisis, the Ohio General Assembly passed Sub. House Bill 138, effective September 11, 2008. H.B. 138 aimed to encourage mediation, expedite post-judgment transfer of property, and facilitate locating parties who purchase properties at sheriff’s sales.

{¶ 35} With the passage of Sub. House Bill 138, R.C. 2323.07 and other statutes were amended “to require purchasers of real property at a judicial sale to provide certain identifying information, to require purchasers to pay the balance due on the purchase price within thirty days of the confirmation of the sale, to allow municipal corporations to conduct inspections of property subject to a writ of execution, to require judicial sales to be confirmed within thirty days of sale, to require officers who sell real property at a judicial sale to file a deed within fourteen days of payment of the balance due on the purchase price, to authorize courts and county boards of revision to transfer certain tax delinquent lands subject to judicial foreclosure without appraisal or sale, to permit a summary property description to be read at a judicial sale, to allow the courts to perform mediation in an action for the foreclosure of a mortgage, and to offer property that did not sell at a judicial sale to a political subdivision before forfeiture to the state.” Sub. H.B. 138.

{¶ 36} Although many of these changes are not relevant to this appeal, it is notable that H.B. 138 allows for the transfer of property by the court or the county board of revision,

without a sale, in certain circumstances. *Id.* For example, R.C. 323.28(E) provides that if a county treasurer’s complaint alleges that property is delinquent vacant land, abandoned land, or nonproductive land, and “the value of the taxes, assessments, penalties, interest, and all other charges and costs of the action exceed the auditor’s fair market value of the parcel, then the court or board of revision having jurisdiction over the matter on motion of the plaintiff, or on the court’s or board’s own motion, shall, upon any adjudication of foreclosure, order, *without appraisal and without sale, the fee simple title of the property to be transferred to and vested in an electing subdivision ***.*” (Emphasis added.); see, also, R.C. 5721.18 (allowing the county prosecuting attorney to bring a foreclosure for the transfer of certain lands to an “electing subdivision”).

{¶ 37} Significantly, H.B. 138 did not authorize the court to transfer foreclosed property under the circumstances presented in this case or otherwise impact the then – and still – existing general mandate of R.C. 2323.07 requiring that, “[w]hen a mortgage is foreclosed or a specific lien enforced, a sale of the property *** shall be ordered by the court having jurisdiction.”

III

{¶ 38} We turn now to the issues raised by Wells Fargo on appeal.

{¶ 39} First, Wells Fargo claims that the trial court’s conveyance of the Youngs’ property by Commissioner’s deed is contrary to the Revised Code. In response, the County officers assert that the existence of R.C. 2323.07 “begs the question of whether foreclosures are legal proceedings or equitable proceedings.” They state: “If a foreclosure is an equitable proceeding, then statutory requirements are not the exclusive remedy.” The County officers argue that, because

foreclosure proceedings are equitable in nature, the trial court was permitted to fashion an equitable remedy, including conveyance by a commissioner, provided that the court gave notice and opportunity to be heard in accordance with due process. In support of their argument, the County officers rely upon *Union Trust Co. v Lessovitz* (1930), 122 Ohio St. 406; *Chemical Bank of New York v. Neman* (1990), 43 Ohio St.3d 204; and *Feinstein v. Rogers* (1981), 2 Ohio App.3d 96.

{¶ 40} It is well-recognized that actions in foreclosure arise in equity. See *Kerr*, supra; *Lessovitz*, supra (concluding that the right of subrogation and priority of liens were chancery issues for purposes of Section 6, Article IV, of the Ohio Constitution of 1912). Moreover, civil actions that were recognized as equitable actions before the adoption of the Code of Civil Procedure remained equitable in nature after the General Assembly enacted statutes providing an equitable remedy. See *Wagner v. Armstrong* (1916), 93 Ohio St. 443 (holding that statutory claim for partition was appealable as chancery case).

{¶ 41} Of critical importance is whether the Ohio legislature, in enacting statutes governing foreclosure, intended the statutes to provide an exclusive procedure for foreclosure or, instead, meant the statutes to be merely cumulative of common law equitable remedies.

{¶ 42} “Whether a particular statutory remedy is exclusive or merely cumulative, is a question of construction and interpretation, depending upon the intent of the Legislature as manifested in the terms and provisions of the statute.

{¶ 43} “In some cases, a remedy prescribed by statute is regarded as exclusive. Indeed, in particular cases, it may appear, either expressly or by

necessary implication, that the remedy provided therein is intended to be exclusive.

This is true where a new remedy or mode of procedure is authorized by a new statute, and the new procedure is inconsistent with the former one. In such cases, the person injured must confine himself to the statutory remedy. However, an existing remedy is not necessarily taken away by a statute which simply provides an additional remedy. It may appear that the remedy afforded by a particular statute is not intended to be exclusive, but cumulative with respect to other remedies of the party. Indeed, an existing remedy, particularly one which is long established, is not regarded as taken away by statute, except by direct or express enactment, or necessary implication from language showing, in a clear manner, that the statutory remedy was intended to be exclusive. Hence, where a new remedy is provided by statute for an existing right, and it neither denies an existing remedy nor is incompatible with its continued existence, the new remedy is regarded as cumulative, and the person seeking redress may adopt and pursue either remedy at his option.' 50 American Jurisprudence, page 590, Section 595." *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 242-43.

{¶ 44} We agree with the County officers that the enactment of R.C. 2323.07 and its predecessors did not create an exclusive statutory remedy for breach of a mortgage condition. For example, the Ohio Supreme Court has repeatedly recognized that the enactment of statutory foreclosure procedures did not eliminate the common law remedy of ejectment. *Kerr*, 51 Ohio St. at 250; *Levin*, 161 Ohio St. at 517. Under this remedy, the mortgagee may assert title under the mortgage and seek to recover possession of the mortgaged premises. *Bradfield v. Hale*

(1902), 67 Ohio St. 316, 323. This action is grounded in the fact that, as between the mortgagor and mortgagee, after a condition has been broken, the legal title to the property is in the mortgagee (lender). *Id.*; *Levin*, 161 Ohio St. at 520; *Hausman*, 73 Ohio St.3d 671, paragraph one of the syllabus (following *Levin*). Until the mortgagee obtains possession, however, the mortgagee “is not in any proper sense the owner and is not entitled to exercise control over [the premises].” *Levin*, 161 Ohio St. at 521, quoting 59 C.J.S., *Mortgages*, § 310, page 404. Ejectment “does not cut off the right of redemption, and the mortgagor has time to redeem by action, wherein the rights and equities of the parties, including the debt secured by the mortgage, the rents and profits, etc., may all be adjusted by a court of equity.”³ *Id.* at 520.

{¶ 45} Nevertheless, the enactment of Section 374 of the Code of Civil Procedure in 1853 and the subsequent enactment of R.C. 2323.07 reflect the General Assembly’s intent that only limited foreclosure procedures be permissible in Ohio. Section 374 eliminated the process of strict foreclosure, which had previously existed in Ohio. In addition, the statute codified the remedy recognized in equity, which allowed the mortgagee to foreclose upon the mortgage, have the equity of redemption cut off, and then have the land sold by the order of the court

³ Generally, a mortgagee in possession of mortgaged real estate, by sufferance or consent, during the period that the right to redeem exists, is a trustee for the mortgagor and those claiming under him. *Levin*, 161 Ohio St. at 519. The mortgagee “is required to handle the mortgaged property in a provident manner and to handle the income therefrom and apply the proceeds to the debts in the order of their priority. When his own debt is paid he is required to restore the property to the mortgagor.” *Id.*

and apply the proceeds to the payment of the debt. See *Levin*, 161 Ohio St. at 517. The result of the legislative action was to recognize one foreclosure method under equity and statute – foreclosure with judicial sale of the mortgaged property.

{¶ 46} As stated above, foreclosure procedures are now based on statute and equity. For example, the equitable right of redemption exists concurrently with and independent of the statutory right of redemption. However, we find no authority – in Supreme Court precedent or statute – that would permit a trial court to employ a foreclosure procedure that excludes a judicial sale from its order.

{¶ 47} The County officers cite to *Chemical Bank* and *Feinstein* in support of their assertion that conveyance by sheriff's sale is not the exclusive remedy upon foreclosure of the mortgage and termination of the equitable right of redemption. With respect to *Chemical Bank*, the County officers rely on the following statement by Supreme Court of Ohio:

{¶ 48} “Neman’s argument also requires us to assume that Chemical Bank [as majority shareholder of the corporation in default] could only have disposed of the property through a forced sale. This is not necessarily true. *Once the liens on the property were discharged*, Chemical Bank might have arranged for an orderly, non-distress sale of Eastgate Shopping Center. Alternatively, the bank might have decided to keep the shopping center.” *Id.* (emphasis added.)

{¶ 49} The County officers misconstrue *Chemical Bank*. In that case, the Supreme Court noted that, at any time before the final decree in the foreclosure actions against the defaulting corporation, the corporation or Chemical Bank (as the corporation’s new majority shareholder) could have redeemed the property by

paying off and thus discharging the liens. The Supreme Court's subsequent reference to an "orderly, non-distress sale" or keeping the shopping center, quoted above, simply meant that, after Chemical Bank had exercised its right of redemption, it could have then decided to sell or keep the shopping center. *Chemical Bank* does not support the proposition that the trial court in a foreclosure action can fashion a remedy other than the sheriff's sale.⁴

{¶ 50} *Feinstein* is also inapposite. *Feinstein* discusses whether a judgment creditor may foreclose on the debtor's real property without first executing upon the debtor's personal property. The case does not address whether a party bringing a foreclosure action may seek a remedy other than an order of sale or whether the trial court in a foreclosure action may order a remedy without judicial sale.

{¶ 51} As an alternative argument, the County officers claim that conveyance by Commissioner's deed is permitted under R.C. 2329.34. R.C. 2329.34 allows for conveyance by a master commissioner or special master in two situations:

⁴The facts in *Chemical Bank* are convoluted and unique. Chemical Bank was a judgment creditor of the principal shareholder of a corporation that owned a shopping center; Neman was the shareholder's attorney, who allegedly had the shareholder's stock in his possession. The case arose out of Neman's failure to provide the stock certificates to the county sheriff when served with a writ of execution. After the shopping center defaulted on mortgages to other lenders and those lenders sued for foreclosure, Chemical Bank sued Neman for the value of the stock as of the date of the writ of execution. A jury found in favor of Chemical Bank. In discussing Chemical Bank's right to redeem in the foreclosure actions and its options after redeeming the property (had it obtained the stock and become the majority shareholder), the Supreme Court was rejecting Neman's argument on appeal that Chemical Bank's attachment of the stock would have been futile and the stocks would have had minimal value, considering that other creditors had sued for foreclosure on the shopping center's mortgages.

{¶ 52} “(A) When, by an order or a judgment in an action or proceeding, a party is required to convey such property to another, and he neglects or refuses to do so, and the master is directed to convey on his failure; [or]

{¶ 53} “(B) When specific real property is sold by a master under an order or judgment of the court appointing him. No court shall make or issue an order to a master for the sale of real estate, unless there exists some special reason why the sale should not be made by the sheriff of the county where the decree or order was made, which reason, if the court finds any to exist, shall be embodied in and made part of the judgment, order, or decree for such sale.”

{¶ 54} Neither situation exists in this case, nor do we see it arising in a typical foreclosure action. The Youngs were not required to convey the property to Wells Fargo by court order and, contrary to the order, failed to do so. In contrast, such a circumstance might arise in a divorce action when a party has been ordered to convey his or her interest in real property as part of the court’s division of marital property, yet the party subject to the order refuses to do so.

{¶ 55} R.C. 2329.34(B) permits a master commissioner to sell property in lieu of a sheriff, but the statute specifically requires the commissioner to conduct a sale only when “special reasons” exist that make the sheriff unable or unsuitable to conduct the sale. In short, R.C. 2329.34(B) does not eliminate the need for a sale; rather, it merely authorizes an individual other than the sheriff to conduct the sale in exceptional circumstances. The trial court cannot use R.C. 2329.34(B) to circumvent a sale of the foreclosed property.

{¶ 56} Wells Fargo further argues that conveyance by Commissioner’s deed

in lieu of a sale creates a cloud upon the title to the foreclosed real property and is akin to strict foreclosure. We agree.

{¶ 57} Although the trial court ordered that the Youngs' equitable right of redemption be foreclosed and granted them three days to exercise their equitable right of redemption, the trial court's order of conveyance did not foreclose upon the Youngs' statutory right of redemption, which continues to exist until the sale of the foreclosed property is confirmed. R.C. 2329.33. In the absence of a sale of the foreclosed property or some action that otherwise extinguishes the right of redemption, see, e.g., *Hausman*, 73 Ohio St.3d at 677 (noting that "a mortgagor may waive the right of redemption after the mortgage agreement is entered into, provided the agreement is equitable and supported by adequate consideration"), the statutory right of redemption would not be foreclosed and that unextinguished right would create a cloud on the title upon conveyance of the property to the mortgagee by Commissioner's deed.

{¶ 58} In addition, although the court expressed that it would order conveyance by Commissioner's deed only in limited circumstances, such as where the homeowners were not attempting to keep the property and the property was subject to only one lienholder (see Hearing Tr., p.48), other than the taxing authority, conveyance by Commissioner's deed does not account for the interests of junior lienholders, any excess proceeds upon the sale of the property, or deficiency judgments if subsequent sale proceeds are insufficient to satisfy the debt. In this sense, again, conveyance by Commissioner's deed is akin to strict foreclosure, in which the mortgagee obtained the property and there was no

accounting to the mortgagor when the sale resulted in excess proceeds.

{¶ 59} For all of these reasons, we conclude that the trial court's order of conveyance by Commissioner's deed in lieu of a judicial sale of the foreclosed property is contrary to Ohio law. Wells Fargo presented additional arguments to support this conclusion, but we see no reason to address Wells Fargo's other rationale for reversing the trial court's judgment.

{¶ 60} Wells Fargo's assignment of error is sustained.

III

{¶ 61} Although we sustain the assignment of error, we are not unsympathetic to the concerns that the trial court was trying to address in an attempt to provide a quicker and less costly approach to the foreclosure issues faced in Darke County and throughout the country. The trial court sought input, encouraged debate on the issue, and showed imagination and concern for the burdens imposed on the county by a large number of foreclosure actions.

{¶ 62} However, the only issue before us is whether the remedy attempted by the court was authorized by existing law. It is this rule of law "that creates, protects, and guarantees the continued existence of a civilized society." *Kindig v. Kindig*, Allen App. No. 1-10-13, 2010-Ohio-4805, ¶27. When established law is "contorted to *fix* individual situations, rather than being applied firmly and consistently, *** [w]hat then remains is the will of an autocrat which changes from day to day and place to place ***." *Id.* (emphasis in original).

{¶ 63} "In equitable matters, the court has considerable discretion in attempting to fashion a fair and just remedy." *Winchell v. Burch* (1996), 116 Ohio

App.3d 555, 561. But this discretion cannot flout or override specific statutory mandates. The wisdom and efficacy of existing constitutional laws is a matter for the legislature.

{¶ 64} The trial court's judgment will be reversed and the matter will be remanded for further proceedings.

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DONOVAN, J. and GRADY, J., concur.

Copies mailed to:

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