

MORTGAGES AND MORTGAGE FORECLOSURES IN OHIO

I. Creation of Security Interest in Real Property By Mortgage

A. Definition of Mortgage -an estate created by a conveyance, absolute in form but intended to secure the performance of an act, usually the repayment of a monetary debt by the grantor, and which estate would become void if the act is performed according to the terms agreed upon at the making of the conveyance.

1. Conveyance of Interest in Real Property
2. Secures performance of an obligation.
3. Condition to become void upon performance, i.e., "the condition of defeasance",
4. Absolute in form but treated as a lien.

B. Present View in Ohio -the legal and equitable title remain with the grantor until breach of the condition of defeasance. After breach, legal title passes to the grantee, subject to the equity of redemption, but until grantee enforces legal title through foreclosure and sale, the actual fee and right to possession remain with the grantor.

C. The Equity of Redemption -the right to redeem after condition broken is the right which the grantor has, upon payment of the mortgage debt and/or performance of the mortgage condition, to regain the legal title to the real estate which has passed to the grantee as a result of the grantor's failure to comply with the condition of defeasance.

D. Recording Acts -Must be in writing, executed and acknowledged in conformity with the statutory requirements for executing a deed. (R.C. 5301.01)

1. Acknowledged before Notary Public or other officer empowered to certify such acknowledgments.

2. Must contain description of real property or refer to deed or map by which property may be identified. Hurd vs. Robinson (1860), 11 Ohio St. 232.

See *In re Bunn* : "It is instructive to compare this case with those in which Ohio courts have set aside mortgages as inadequate to give constructive notice. Ohio courts have refused to allow a recorded mortgage to give constructive notice when the mortgage had been executed in violation of a statute. See *In re Nowak*, 820 N.E.2d 335, 338 (Ohio 2004). Prior to statutory modification, Ohio law explicitly required two witnesses to attest a mortgage, and courts refused to allow recorded mortgages that had been attested by only one witness to give constructive notice to subsequent purchasers. *Id.* Unlike the formal attestation requirements discussed in *Nowak*, substantive Ohio mortgage law does not appear to require a precise legal description of the mortgaged property. O.R.C. § 5302.12 provides that a mortgage in substance following the form set forth in this section, when duly executed in accordance with Chapter 5301. of the Revised Code, has the force and effect of a mortgage" The statute then gives a brief form mortgage. The form requires only a description of land or interest in land and encumbrances, reservations, and exceptions, if any." *Id.* On the other hand, a land installment contract must contain a "legal description of the property conveyed." O.R.C. § 5313.02(A)(3). The legislature's choice to require land installment contracts to contain "legal descriptions" while only requiring mortgages to contain a "description" can be assumed to have significance. See *O'Toole v. Denihan*, 889 N.E.2d 505, 514 (Ohio 2008). In any event, Chapter 5301 does not appear otherwise to require a precise legal description of the property subject to the mortgage, and the trustee points to no case in which an Ohio court has invalidated a mortgage that has an accurate informal description but lacks a formal description."

3. Must identify the obligation secured thereby -need not show the amount of the indebtedness as long as it references a note or other evidence of the indebtedness from which the amount may be ascertained. Hurd vs. Robinson (1860), 11 Ohio St.232.

E. Statutory Form (R.C. 5302.12)

F. Statutory Condition of Defeasance (R.C. 5302.14) - Upon performance of condition, mortgage is void.

G. Statutory Covenants (R.C. 5302.13)

1. Covenant of Title -fee simple
2. Covenant of Seizin -right to convey.
3. Covenant that property free from encumbrances.

H. Effective Date of Mortgages/Priority

1. Recording of Mortgage is not necessary to validity of the instrument between its parties, but it is necessary to put unrelated third parties on notice of the existence of the mortgage.
2. R.C. 5301.23 provides that all properly executed mortgages shall take effect at the time they are delivered to the recorder for record.- Priority is determined by time of delivery for record.
3. R.C. 5301.231 provides that mortgage modification agreements shall take effect at the time they are delivered to the recorder for record.
4. Unrecorded mortgage is effective/enforceable against the grantor but has no priority as a lien against third parties. Coshocton National Bank vs. Hagans (1931), 40 O App 190, Amick vs. Woodworth (1898), 58 Ohio St. 86.
5. Bankruptcy Consideration and Consequences of Defectively Executed Mortgage
 - (a) Trustee can avoid and sell free of lien.
 - (b) Mortgagee treated as general unsecured creditor.

I. Effect of Mortgage on After-Acquired Property

1. If property intended to be subject to mortgage.
2. Enforceable as an equitable contract between the parties to mortgage.
3. Mortgagor is estopped to deny based on mortgage covenants.
4. Not enforceable against bona fide vendee or mortgagee who relied on title.

J. Reformation

1. Mutual Mistake

(a) Description of land

(b) Designation of Party

(c) Description of Debt

(d) Amount of Debt

(e) Terms of Repayment

2. Not effective as against an intervening bona fide vendee or mortgagee who relied on title.

(a) As against/between parties

(b) Third parties with notice or no reliance on title

3. Complaint to Reform Mortgage - In *Delfino v. Paul Davies Chevrolet, Inc.* (1965), 2 Ohio St.2d 282, the Ohio Supreme Court addressed whether a court may reform an instrument defectively executed in contravention of O.R.C. 5301.01. The court explained that the purpose of reformation is to cause an instrument to express the intent of the parties as to the contents thereof, i.e., to establish the actual agreement of the parties, and is not meant to create an obligation. *Delfino*, 2 Ohio St.2d at 286, citing 47 Ohio Jurisprudence 2d 1120, Reformation of Instruments, Section 2. The court also explained that reformation presupposes the existence of a valid instrument. Thus, the court found that a court of equity under its power of reformation cannot validate or give life to an invalid instrument as to do so would require the court to re-execute an improperly executed instrument and create a new agreement. Accordingly, the court concluded that, where a statute such as O.R.C. 5301.01 requires certain formalities for the execution of an instrument, a court of equity under its powers of reformation cannot supply these formalities to validate a defectively executed instrument.

4. By Operation of Law (R.C. 5301.07)

(a) After 21 years

(b) Only for Defective Attestation or Acknowledgement.

K. Expiration of Mortgage Lien

1. By Operation of Law (R.C. 5301.30)

(a) Twenty-one years after date of mortgage or twenty-one years after stated maturity date, if set forth in the mortgage, whichever is later.

(b) Still enforceable against grantor.

(c) Not enforceable against intervening bona fide vendee or mortgagee who relied on title.

(d) Mortgage can be re-filed with Affidavit of mortgagee that debt not paid.

II. Enforcement of Mortgage -Foreclosure

A. Nature of Proceeding

1. Judicial Action
2. Legal determination of the existence of the mortgage lien, and the ascertainment of its extent.
3. Resulting in a public sale of the premises pledged as security for the debt.
4. Extinguishes the equity of redemption⁶
 1. Quasi-in-rem proceeding
 2. Provides purchaser at sale with marketable title.

B. Jurisdiction

1. Common Pleas Court
2. Cleveland Municipal Court (R.C. 1901.18)
3. Franklin County Municipal Court (R.C. 1901.185) – Exclusive jurisdiction to foreclose blighted parcels under R.C. 3767.50
4. Probate Court -in connection with a land sale proceeding or other proceeding involving the property

5. U.S. District Court -provided federal jurisdictional requirements are fulfilled. See, *In re Foreclosure Cases*, 2007 U.S. Dist. Lexis 84011 (N.D. Ohio Oct. 31, 2007), (Boyko, J.) and *In re Foreclosure Cases*, 2007 U.S. Dist. Lexis 84569 (S.D. Ohio Nov. 15, 2007), 521 F. Supp.2d 650, (Rose, J.)

C. Venue (Civ. R. 3(8))

1. Foreclosure may be brought in a county in which any part of the property is situated (Civ.R. 3(8)(5))
2. Foreclosure of real property securing a consumer loan must be brought in the county where the real property is located. (Fair Debt Collection Practices Act, 15 U.S.C. 1692 (i))
3. If foreclosure is brought in a county other than where all or a part of the real estate is located, or in Federal Court, a certified copy of the Complaint must be filed with the Clerk of the Court of Common Pleas in the county or counties in which the property is located, in order to provide constructive notice of the action. (Civ. R. 3(F))

D. "Chain of Title" and Priority of Liens

1. Interest of Mortgagor determines extent of interest in Mortgagee
 - (a) If a mortgagor has less than fee simple absolute, then mortgage is on less than fee simple absolute and is determinative of the interest that can be foreclosed and sold at sale.
 - (b) Fractional Interests can be sold at foreclosure sale -non-mortgaged interests remain intact.
2. Foreclosure Sale will not extinguish interests acquired prior to mortgage unless expressly subjected thereto
 - (a) Life estates
 - (b) Dower rights

(c) Recorded leasehold interests

3. Title acquired subsequent to mortgage takes subject to the mortgage and the rights of the mortgagee

E. Dower Rights of Spouses (R.C. 2103.02)

1. The right of a surviving spouse to a life estate in one- third of the real property owned by the other spouse during his/her lifetime.

2. Inchoate (contingent) during lifetime.

3. Vested upon death

4. Terminated by divorce

5. Sale of dower (R.C. 2103.041)

(a) Calculation of dower valuation (Subchapter A, Chapter 11 of the Internal Revenue Code)

(b) Mortality tables

F Necessary Parties

1. Depending upon Plaintiff's objectives, the only necessary parties within the Civ. R. 19 context are parties with an ownership interest.

(a) Present property owners

(b) Owners' heirs, devisees, grantees, assigns and executor/administrator if owners are deceased.

(c) Owners' spouses

2. Proper parties -Sheriff's Deed will not convey clear title to the real estate unless all parties with a potential interest in the property are joined in the action. Interests of parties not joined will survive the foreclosure and continue to encumber the property after Sheriff's Sale.

(a) Borrowers -whether or not they have a present ownership interest in the property

(b) Guarantors

(c) Condominium Unit Owners' Associations

(d) All liens of record:

(i) Mortgages

(ii) Judgment Liens (R.C. 2329.02)

(iii) State of Ohio Tax Liens

(iv) Personal Property Tax Liens -County Treasurer (R.C. 5719.04)

(v) Worker's Compensation Liens (R.C. 4123.76)

(vi) Unemployment Compensation Liens (R.C. 4143.23)

(vii) Federal Tax Liens

(viii) Corrupt Activities Liens (R.C. 2923.32)

(ix) Condominium Assessment Liens (R.C. 5311.18)

(x) Ohio EPA Liens (R.C. 3734)

(xi) Federal EPA Liens (CERCLA)

(xii) Mechanic's Liens (R.C. 1311)

(xiii) Recognizance Bond Liens (R.C. 2937.25)

(xiv) Vendor's Liens (R.C. 5301.26)

(xv) Ohio Estate Tax Liens (R.C. 5731.02)

- Valid ten years from date of death.

- Automatic -lien not filed.

(xvi) Federal Estate Tax Liens

- Internal Revenue Code Section 6324

- Valid ten years from date of death.

- Automatic -lien not filed.

(xvii) Land Contract Vendees (R.C. 5313.02)

(xviii) U.C.C. Financing Statements (R.C. 1309.21)

(xix) Miscellaneous Court Orders and other filings pursuant to R.C. 5301.252.

(e) Lessees or tenants

(f) County treasurer (R.C. 323.47)

G. Acceleration

1. Notice that entire balance owing under the loan is now due and payable based upon default

(a) Borrower's right to reinstate/de-acceleration

(i) Cure default and avoid or terminate foreclosure proceedings.

(ii) At lender's option if not permitted by loan documents.

2. Condition precedent to foreclosure

(a) Evidenced by filing complaint if no prior demand required

(b) Prior written demand/notice if required

H. Receivership

1. By Statute (R.C. 2735.01 (B))

(a) Mortgaged property is in danger of being lost, removed, or materially injured; or

(b) Default under mortgage; and

(c) Property is probably not sufficient to discharge debt.

2. By Contract

(a) Entitlement to Appointment of Receiver in Mortgage

(b) Borrower consents to Receiver in event of default

(c) Assignment of Rents

3. Receivership vs. Mortgagee-In-Possession

(a) Receiver appointed by Court and under court control and direction

(b) Mortgagee takes possession and control of premises without prior Court intervention

4. Considerations

(a) Profits collected not disbursed until after sale

(b) Deficits taxed as costs of sale

(c) Court Approval of Receiver's Reports

(d) Receiver's fees and compensation -set by Cuyahoga County Local Rule 26

I. Standing and Real Party in Interest

1. Standing- The doctrine of standing operates to ensure actual adversity between a plaintiff and defendant. To satisfy the requirement of "standing," a plaintiff must establish (1) that is has suffered an injury in fact that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. The existence of these three

elements – proof of injury in fact, causation and redressability – is determinative of the issue of whether the plaintiff’s interests are sufficiently adverse to the defendant’s interests in order to create an actual controversy capable of judicial resolutions. Standing is not jurisdictional because “standing challenges the capacity of a party to bring an action, not the subject matter of the court. Although a court may have subject matter jurisdiction over an action, if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter.” State ex rel Tubbs Jones v. Suster (1998), 84 Ohio St.3d 70.

(a) The Assignment of the Mortgage

Just as the mortgage must be recorded to create a valid legal encumbrance on the mortgaged real estate, the assignment must be recorded to invest the assignee with the legal status of the mortgage “holder” with the power to enforce the lien. ORC Section 5301.31 states in relevant part: “**The assignment**, whether it is upon the original mortgage, upon the margin of the record of the original mortgage, or by separate instrument, **shall transfer not only the lien of the mortgage but also all interest in the land described in the mortgage.**”

(b) Right to Enforce the Note

(1) Holder R.C. 1301.01

(T)(1) “Holder” with respect to a negotiable instrument means either of the following:

- (a) If the instrument is payable to bearer, a person who is in possession of the instrument;
- (b) If the instrument is payable to an identified person, the identified person when in possession of the instrument.

(2) PETE (Person Entitled to Enforce) R.C. 1303.31

(A) "Person entitled to enforce" an instrument means any of the following persons:

(1) The holder of the instrument;

(2) **A nonholder in possession of the instrument who has the rights of a holder;**

(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 1303.38 or division (D) of section 1303.58 of the Revised Code.

(B) A person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

The fact that an assignment has not been recorded at the time the case is filed, does not mean that the named Plaintiff does not own the mortgage loan or that said Plaintiff does not have standing to commence the action. While ownership of the loan may confer standing, ownership and standing do not insure that the named Plaintiff is the real party in interest. The real party in interest must have the substantive legal rights sought to be enforced through the Complaint. The holder of the note and mortgage will always be the real party in interest, but the real party in interest need not always be a holder of the note. A holder of the mortgage may not be the holder of the note, but may nevertheless be entitled to enforce the note, and as such, be the real party in interest. Because Rule 17 states that "no

action shall be dismissed,” the real party in interest rule, like standing, would by its express language appear to be non-jurisdictional; however, the 1st District Court of Appeals has taken a different view of the operation of Civ. R. 17:

“In the instant case, the evidence clearly demonstrates that Plaintiff had no interest in the subject note and mortgage at the time the complaint was filed, and as such lacked standing to bring this action. Civ. R. 17 only permits two means of curing an action not initially brought in the name of the real party in interest: (1) joinder or substitution of the real party in interest; or (2) ratification of the action’s commencement in the name of the real party in interest. Plaintiff’s subsequent assignment of the interest that was held by the real party in interest at the time the complaint was filed constitutes neither. A bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.” Wells Fargo Bank, N.A. v. Byrd (Sept. 12, 2008) Ohio App. 1 Dist. 2008, 2008 WL 4182439 2008-Ohio-4603.

Likewise, the Eleventh Appellate District has held that “Civ. R. 17 is not applicable when the Plaintiff is not the proper party to bring the case and, thus, does not have standing to do so. A person lacking any right or interest to protect may not invoke the jurisdiction of a court.” Northland Ins. Co. v. Illuminating Co. 11th Dist. Nos.2002-A-0058 and 2002- A-0066, 2004-Ohio-1529, at ¶ 17. The court also noted that “Civ. R. 17(A) was not applicable unless the plaintiff had standing to invoke the jurisdiction of the court in the first place, either in an individual or representative capacity, with some real interest in the subject matter. Civ. R. 17 only applies if the action is commenced by one who is sui juris or the proper party to bring the action.” Travelers Indemn. Co. v. R.L. Smith Co (Apr. 13, 2001), 11th Dist. No. 2000-L-014. See Wells Fargo Bank, N.A. v. Jordan, 2009-Ohio-1092.

III. Procedural Steps in Foreclosure

A. Comprehensive Title Examination - Ohio Courts require title evidence in the form of a Preliminary Judicial Report to be filed with the Court. R.C. 2329.191

- 1 .Search of records of County Recorder's Office and Clerk of Court's Office for all parties with possible interests in the real property I all liens on the property and pending actions affecting the real property.
2. Search of Probate Court records for marriages or deaths of the mortgagor/record title holder.
3. Search of Domestic Relations Court records for pending or past divorce actions of the mortgagor/record title holder.
4. Search of Federal Bankruptcy Court records for pending bankruptcies affecting the real property.

B. Preparation of the Complaint

1. Case Caption -should contain the names and addresses of all parties joined in the case.
 - (a) Proper designation of Plaintiff -fka, nka, successor by merger to, etc.
 - (b) Proper designation of Defendants required to default/clear interest
2. First Claim for Relief -Promissory Note (attached to Complaint as Exhibit)
 - (a) Allegation that Plaintiff is entitled to enforcement of the Note, Contract or other debt instrument.
 - (b) Allegation that Note is in default.
 - (c) Allegation that Note has been accelerated and is now due and payable in full.
 - (d) Amount due and owing on Note.
3. Second Claim for Relief -Mortgage Deed (attached to Complaint as Exhibit)
 - (a) Incorporate by reference the allegations of First Claim

(b) Allegation that Plaintiff is owner and holder of Mortgage given to secure Note

(c) Allegation that the condition of defeasance has been broken

(d) Allegation that the Mortgage is a good and valid lien upon the real estate described therein

(e) If the terms of the Mortgage so provide, allegation that funds advanced by Plaintiff to pay real estate taxes, hazard insurance premiums and property preservation and protection are secured by the Mortgage .-(R.C. 5301.233)

(f) Allegation that the named defendants may have or claim to have an interest in the subject real estate. If the U.S.A. is a named defendant, 28 USC §241 0 provides that the pleading must set forth with particularity the nature and interest of the U.S.A.; and if the U.S.A.'s interest s a federal tax lien, the name and address of the taxpayer, the identity of the IRS office which filed the lien, and the date and place of filing.

4. Prayer for Relief

(a) For a finding of the amount due to Plaintiff on the Note and for judgment (if desired) against those defendants personally obligated thereon.

(b) For a finding that Plaintiff is entitled to recover amounts advanced to pay taxes, insurance and protection for the property.

(c) For a finding that the Mortgage is a first and best (or good and valid) lien on the subject premises for the amount due on the Note, plus interest and advances for taxes, insurance and property protection.

(d) That the defendants' equity of redemption be foreclosed.

(e) That all of the parties be required to answer as to their respective interests in the property or be forever barred from asserting any interest therein.

- (f) That all liens on the property be marshalled and priorities determined.
- (g) That the subject property be sold as upon execution.
- (h) That the proceeds of sale be applied in payment of the liens in order of their priority.
- (i) For such other relief as the Court deems just and equitable.
- (j) For costs of the action, including the cost of the Preliminary Judicial Report.

C. Service of Summons

1. Unless valid service is perfected on a party, its interest cannot be extinguished by the foreclosure action.
2. With respect to the titleholders, a judgment is a nullity and void ab initio unless they have been validly served with a summons, entered an appearance in the case, or affirmatively waived service. Maryhew vs. Yova (1984), 11 Ohio St. 3d 154; O.B. Corp. vs. Cordell (Franklin Co., 1988), 47 Ohio App. 3d 170.
3. Methods of Service -All methods of service other than by certified mail must be requested in writing to the Clerk.
 - (a) Residence Service (Civ. R. 4.1(3)) –By process server to a person of suitable age and discretion residing at the premises.
 - (b) Certified Mail Service (Civ. R. 4.1(1)) -Easiest, cheapest and most common method of service. As long as it is sent to a proper address, certified mail is effective even if the receipt is signed by someone other than the addressee. Akron-Canton Regional Airrrport Authority vs. Swinehart (1980), 62 Ohio St. 2d 403; Mitchell vs. Mitchell (1980), 64 Ohio St. 2d 49. However, certified mail must be sent to an address reasonably calculated to reach the defendant. Title Examination Standard 9.1 of the Ohio State Bar Association provides that if the certified mail receipt is not signed by the addressee, it is not necessary to

inquire further concerning the identity of the recipient unless there are other factors which would be sufficient to create reasonable doubt in the mind of the title examiner concerning the propriety of delivery. Caveat -Judgment is voidable by defendant who did not sign certified mail receipt and who can show he was not living at the address at the time of service. .-Therefore, if receipt is signed by someone other than the named defendant, although service is presumed valid, it should only be accepted if there is good reason to believe the defendant was living at the mailing address at the time of service.

(c) Ordinary Mail Service (Civ. R. 4.6) -Can be used when certified mail is returned either "refused" or "unclaimed" and is deemed completed upon mailing by the Clerk unless subsequently returned as undeliverable. If not returned to the Clerk as undeliverable, ordinary mail creates a rebuttable presumption that service was proper. The presumption may, however, be rebutted by evidence that the defendant did not reside at the mailing address, even if the address could reasonably be anticipated to be one at which the defendant would receive the summons. Nationwide Insurance Co. vs. Mahn (1987), 36 Ohio App. 3d 251.

(d) Personal Service (Civ. R. 4.1(2)) -Primary benefit is that the process server is directed to find and serve only the person named, so that there can be no question as to the fact and validity of service. However, personal service is more expensive and if named defendant cannot be located and personally served within 28 days, even if it does not appear that he has moved, ordinary mail service cannot be utilized. Ordinary mail, may, however, be issued if the person named refuses to accept service.

(e) Service by Publication (Civ. R. 4.4)

(i) Quasi-in-rem proceeding

(ii) Allows Court to acquire jurisdiction over the person for purposes of rendering judgment affecting real estate only.

(iii) No jurisdiction to render personal judgment against defendant

(iv) Plaintiffs attorney required to file Affidavit alleging that the residence of the defendant is unknown and cannot with reasonable diligence be ascertained. Affidavit must also set forth efforts to ascertain.

(v) Both the Affidavit and the published notice must contain the last known address of the defendant. Brown vs. Gonzalez (Erie Co. 1975), 50 Ohio App. 2d 254.

(vi) Notice must be published at least once a week for three (3) consecutive weeks in a newspaper of general circulation published in the county in which the Complaint is filed or in an adjoining county if no such newspaper exists in the county in which the Complaint was filed.

(vii) Service is deemed completed as of the date of the last publication. Answer date is 28 days after date of last publication.

(f) Service on out-of-state defendants

(i) Civ. R. 4.3(B)(1)

(ii) Affidavit only-service complete upon filing

(iii) No publication needed

(iv) Not insurable under Ohio State Bar Association's Title Examination standards

4. Service of Summons on the U.S.A. -The U.S.A. must be served by serving the U.S. Attorney in the district in which the action is brought, and also by serving the Attorney General of the United States, Washington D.C. 20530. 28 USC §2410 also provides that the U.S.A. has sixty (60) days within which to move or plead to the Complaint after service is complete.

5. Service on particular parties (Civ. R. 4.2)

(a) Children under sixteen

(b) Incompetents confined/unconfined

- (i) Appointment of Guardian Ad Litem for minors and incompetents
- (ii) Minors and incompetents cannot be found in default
- (c) Incarcerated persons
- (d) Corporations, Partnerships, Associations, etc.

D. Lis Pendens In General

1. R.C. 2703.26 states that:

"When the Complaint is filed, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the Plaintiffs title."

The Supreme Court in Cook vs. Mozer (1993), 108 Ohio St. 3D, 37, identified the criteria which must be met in order to involve the doctrine of lis pendens:

- (a) the property must be of a character to be subject to the rule.
- (b) the Court must have jurisdiction over the person and the res.
- (c) the property or res involved must be sufficiently described in the pleadings.
- (d) the litigation must be about some specific thing that must be necessarily affected by the termination of the suit.

Lis Pendens is a procedural device subject to equitable principles to --protect the status quo of the interest in the property and is not a substantive right; it does not of itself give Plaintiffs rights superior to

those who acquire an interest in the property during the pendency of the suit. Katz vs. Banning (1992), 84 Ohio App. 3d 543.

2. Lis Pendens As Applied To Foreclosures

Intervening interests and liens filed prior to lis pendens date must be joined in the foreclosure. Liens filed subsequent to lis pendens need not be joined in order to extinguish such interests and liens through the Sheriff's Sale. Parties acquiring interests or liens subsequent to lis pendens date may intervene in the action, and defendants/owners cannot object to joinder. Kral Builders vs. Gerl (1986), 27 Ohio App. 3d 353.

The rule of lis pendens does not apply to a Mechanic's lien claimant whose lien rights arose or accrued before an action involving the real property which is the subject of that lien became pending pursuant to R.C. 2703.26, and whose lien is filed within the statutory period but subsequent to the date the action becomes pending pursuant to R.C. 2703.26. (R.C. 1311.21) Mechanic's lien rights relate back to commencement of construction.

E. Supplemental Title Examination -Final Judicial Report updating title from date of Preliminary Judicial Report to demonstrate that all parties have been named, that proper service has been perfected, and that no new interests or liens have been acquired in the property between the date of the initial examination and lis pendens date.

F. Obtaining Judgment

1. Default Judgment (Civ. R. 55)

(a) Procedure governed by local rules of Court.

(b) If defendant is in the military service, the statutory procedure required by Soldiers and Sailors Relief Act of 1940 must be followed. (50 USC 501-590)

2. Summary Judgment (Civ. R. 56)

(a) Motion, Memorandum of Law, Affidavit in Support with loan history attached/incorporated

(b) No genuine issue of fact and Plaintiff is entitled to foreclosure as a matter of law

3. Trial on the Merits -Issues

G. The Foreclosure Decree/Order of Sale

1. Recital of pleadings filed -Complaint, Amended Complaint, Answers, Cross-Claims, Counterclaims and Third-Party Complaints.

2. Finding that service of summons upon all defendants was proper and that the Court has jurisdiction over all of the defendants.

3. Finding that certain defendants, if any, are in default for failure to answer, and that such defendants are barred from asserting any claims against the real estate.

4. Finding that the County Treasurer has the first and best lien on the property for real estate taxes due and payable. (R.C. 323.47)

5. Finding as to the amount due to Plaintiff on the Note, and an order rendering judgment therefor in favor of Plaintiff and against those defendants personally obligated thereon, if prayed for in the Complaint and if such obligation has not been discharged in bankruptcy.

6. Finding that Plaintiffs mortgage is first and best (or good and valid) lien on the property after taxes.

7. Finding that the conditions of the mortgage have been broken and that as a result Plaintiff is entitled to foreclosure.

8. Finding as to the amount, validity and priority of all subordinate liens or an order that such findings are reserved for further determination by the Court.

9. Junior Lienholder Statute (R.C. 2329.20)

(a) A senior lienholder may demand in its pleading that the property be sold subject to its lien.

(b) Decree must recite the amount due to the senior lienholder; that such lien is a senior lien as defined in R.C. 2329.20; and that the property is to be sold subject to such lien.

(c) Minimum bid is two-thirds of the difference between the value of the property as appraised and the amount due on the obligation owed to the senior lienholder.

10. Finding of "no just reason for delay" pursuant to Civ. R. 54(8), if not all issues in the case are determined in the Decree, so that it will be a final, appealable order.

11. An Order that unless the sums found due in the Decree are paid in full within 3 days from the date the Decree is entered by the Court, the defendants' equity of redemption will be foreclosed and an Order of Sale will issue to the Sheriff to appraise, advertise and sell the property at public sale.

12. Order of Distribution of Proceeds

13. Order to Clerk to release liens and mortgages of record from the property.

H. The Sheriffs Sale (R.C. 2329.151)

1. Praecipe -Request to the Clerk to issue the Order of Sale to the Sheriff

2. Appraisal (R.C. 2329.17) -three disinterested freeholders of the county appointed by Sheriff

3. Advertisement (R.C. 2329.18, 2329.23, 2329.24, 2329.26, 2329.27)

(a) Must contain legal description and street address

(b) Time and place

(c) Terms of Sale

(d) Published once a week for three (3) consecutive weeks in a newspaper of general circulation in the county in which the property is located, commencing at least thirty (30) days before the date of sale.

4. Notice of Sheriff's Sale

(a) Central Trust Company, N.A. vs. Spencer (1987), 41 Ohio App. 3d 237 - "Where a party to a foreclosure action has a judicial lien upon the debtor's property, notice to the lienholder by mail or other means as certain to ensure actual notice is constitutionally required prior to Sale of the debtor's property. Publication notice in a newspaper under O.R.C. 2329.36 and 2329.27 is not sufficient to inform the lienholder of the Sale."

(b) In re Foreclosure of Liens For Delinquent Taxes, (1992), 79 Ohio App. 3d 766 -A mortgagee is required to receive actual notice of tax sale unless the mortgagee's address is not reasonably identifiable. "A mortgagee has a legally protected property interest and is entitled, under the Due Process Clause of the Fourteenth Amendment, to actual notice reasonably calculated to apprise him of a pending tax sale and to afford him the opportunity to take appropriate action to protect his interests."

(c) Central Trust Company, N.A. vs. Jensen (1993), 67 Ohio St. 3d 140 - "Notice only by publication to a party to a foreclosure sale or to a person having an interest therein is insufficient to satisfy due process when the address of that party or interested person is known or easily ascertainable."

(d) Cuyahoga County Revised local Rule 27 became effective September 19, 1994 and provides that:

"The Court will not confirm any Sheriffs Sale until such time as the party ordering the Sale has filed a Certificate of Service of Notice of the Sale stating that said Notice of Sale has been sent to all parties

who have appeared in the action, by ordinary mail, to their last known address or their attorney of record." (Emphasis Added)

5. Minimum Bid (R.C. 2329.20) -Not less than two-thirds of appraised value

6. Multiple Parcels (R.C. 2323.07) -May be sold separately or as a unit

7. Lack of Bidders at Sale (R.C. 2329.52)

(a) Alias and Pluries Orders of Sale -with/or without reappraisals

(b) Alias/Pluries Sale with set minimum bid if offered twice for sale and unsold for want of bidders. (R.C. 2329.51)

(c) Sale on Credit

8. Contempt

(a) For violation of terms of sale

(b) R.C. 2329.30

(c) R.C. 2327.04

(d) Penalties typically include forfeiture of deposit plus costs of new sale

11. Sheriffs Return of Order of Sale (R.C. 2329.53)

(a) Within 60 days from issuance to Sheriff

(b) With or without execution

I. Confirmation of Sale (R.C. 2329.31)

1. Court to confirm sale if held in accordance with law
2. Separate appealable order
3. Order should confirm sale, order distribution of sale proceeds, order Sheriff to prepare Deed, order the Clerk to release liens and mortgages of record and authorize a Writ of Possession to the purchaser.
4. Purchasers have no vested interest prior to confirmation/no standing to object to denial of confirmation -Ohio Savings Bank vs. Ambrose (1990), 56 Ohio St. 3d 53.

J. Sheriffs Deed (R.C. 2329.36, 2329.37)

1. Must be properly executed, witnessed, acknowledged and recorded.
2. No warranty of title. Bidders should examine title before bidding as "caveat emptor" applies. Brickell vs. Miles, 2 ONP NS 153, 14 OD NP 463.
3. Purchaser's title vests upon confirmation and relates back to date of sale. Parker vs. Storts (1864), 15 Ohio St. 351.

K. Statutory Right of Redemption (R.C. 2329.33)

"In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor 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 8% 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. The court of common pleas thereupon shall make an order setting aside such sale, and apply the deposit to the payment of such

judgment or decree and costs, and award such interest to the purchaser, who shall receive from the officer making the sale the purchase money paid by him, and the interest from the clerk."

1. Posting bond in lieu of cash is not an acceptable substitute and does not satisfy statute. Women's Federal Savings Bank vs. Pappadakas (1988), 38 Ohio St. 3d 143.
2. Only the mortgagor can be the "debtor" within the meaning of the statute, and no other party can exercise the debtor's right of redemption. Wayne Savings and Loan Co. vs. Young (1976), 49 Ohio App. 2d 35.
3. The bankruptcy law provisions relating to the debtor's power to cure default and modify the rights of secured creditors is not applicable after a foreclosure sale has been confirmed Johnson vs. First National Bank of Montevideo, 719 F.2d 270.

L. U.S.A.'s Right of Redemption (28 USC 2410(c))

1. 120 days from date of sale for IRS lien
2. One year from date of sale for other liens
3. U.S.A. need only pay amount of foreclosure sale price, not entire amount of debt owed on the mortgage. Delta Savings Loan Association vs. I.R.S. (1988), 847 F.2d 248.

M. Deficiency Judgment

1. If amount owed on debt not satisfied in full from proceeds of sale
2. If personal judgment request in Complaint and rendered in Decree
3. If personal obligation not discharged in bankruptcy
4. Should be included in Confirmation Entry or subsequent order after sale

5. The deficiency judgment amount is established upon confirmation of sale, and the debtor is not entitled to a credit on the deficiency judgment even if the mortgagee makes a profit on the resale after purchasing the property at the Sheriff's Sale. Women's Federal Savings Bank vs. Akram, 515 N.E.2d 939.

6. Limitation on Collection of Deficiency Judgment (R.C. 2329.08) - When a deficiency judgment is obtained in a mortgage foreclosure action upon property used as a dwelling for not more than two families and which has been used in whole or part as a home or farm by the person who executed the mortgage and against whom the deficiency judgment was taken, such judgment is unenforceable after two years from the date of confirmation of sale.

N. Reversal of Judgment (R.C. 2329.45)

1. If a judgment, in satisfaction of which lands or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case, restitution must be made by the judgment creditor of the money for which such lands or tenements were sold with interest from the date of sale.

2. Stay of Execution of Sale while Counterclaim pending -Where mortgagor's damages ultimately exceed those of the mortgagee, the mortgagee's right to foreclosure sale is defeated. Marion Production Credit Assn. vs. Cochran (1988), 40 Ohio St. 3d 265.

IV. Judgment Lien Foreclosures

A. Certificate of Judgment for Lien (R.C. 2329.02)

1. Attaches to debtor's legal interest in all real estate located in County of lien filing.

2. May be renewed/re-filed every five (5) years

B. Homestead Exemption (R.C. 2329.66)

1. \$20,200.00 per owner in residence.

2. Priority over Judgment Liens

3. Does not apply to mortgages (R.C. 2329.661)

C. Fractional Interests In Real Estate

1. Judgment Lien against only one of multiple owners can be enforced as against the fee interest of the judgment debtor; i.e. one-half, one-third, one-fourth, etc. interest in real estate can be foreclosed and sold.

2. Generally not practicable; fractional interests not marketable.

3. Purchaser at Sale may file Partition action to divest/acquire non-foreclosed fee interests.

D. Estate by the Entireties (R.C. 5302.17) -lien does not attach to interest of only one spouse.

1. Estate terminated by death or divorce

2. No new Entireties Estates after April 15, 1985.

E. After-acquired Interests In Real Estate -lien does not attach to after acquired interest; must refile lien.

V. Possessory Actions Post Foreclosure

A. Writ of Possession

1. Executed by Sheriff

2. Person(s) to be removed from premises must have been named and served in the foreclosure action

3. May be filed upon confirmation of sale

4. Confirmation grants purchaser the right of possession against all other parties to the action

B. Eviction (Forcible Entry and Detainer)

1. R.C. Chapter 1923

2. Municipal Court Jurisdiction

3. Tenants, lessees, occupant of premises

4. Unrecorded leasehold interests terminate with foreclosure sale. Hembree vs. Mid-America Federal Savings Loan Association (1989), 64 Ohio App. 3d 144.

5. Purchaser at foreclosure sale must have title through Sheriffs Deed prior to commencement.