

**OPINION NO. 78-015****Syllabus:**

1. Upon receipt of a writ of possession issued pursuant to R.C. 2327.02 (C) as part of a foreclosure action, the county sheriff must deliver actual and exclusive possession to the purchaser at a judicial sale, even where delivery of such possession requires forcible removal of the occupant, provided that the occupant was a party to the foreclosure action.
2. R.C. 1923.01, which vests jurisdiction over actions in forcible entry and detainer in municipal and county courts, does not prevent a county sheriff from forcibly removing an occupant from foreclosed premises under a writ of possession, and delivering possession to a purchaser at a judicial sale.

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To: **Anthony J. Pizza, Lucas County Pros. Atty., Toledo, Ohio**  
By: **William J. Brown, Attorney General, April 14, 1978**

I have before me your request for my opinion on the following questions:

1. Upon receipt of a writ of possession as part of a foreclosure action, must the sheriff deliver actual possession to the purchaser at a judicial sale, even where delivery requires forcible removal of the occupant?
2. Would the answer to question number one be affected by whether or not the occupant was a party to the foreclosure proceedings?
3. What effect does the Forcible Entry and Detainer Statute, particularly as it vests jurisdiction in the Municipal Courts, have upon the authority of the Sheriff to enforce writs of possession?

In a foreclosure proceeding, once the sale has been completed and approved by the court, the purchaser is entitled to both a sheriff's deed and a writ of possession. Poole v. Loan and Bldg. Co., 4 O. Dec. 504 (1896). The sheriff is thereupon authorized and directed to execute the writ pursuant to R.C. 2327.02(C), which specifies that the writ shall contain specific description of the property and a command to the sheriff to deliver it to the person entitled thereto.

One of my predecessors, in 1933 Op. Att'y Gen. No. 1913, p. 1809, addressed the issue posed by your first question. In considering a situation where the occupants of property were defendants in the original action wherein a judicial sale was had, my predecessor concluded that it is the mandatory duty of the sheriff to serve the writ of possession provided for by G.C. 11654, now R.C. 2327.02. Moreover, my predecessor concluded that where the occupants refuse to leave the premises, it is the duty of the sheriff to remove them and their personal property from the premises and to deliver possession to the purchaser.

A similar conclusion was reached in Tetterbach v. Meyer, et al., 10 O. Dec. Rep. 212 (1888), where the court reasoned that if the sheriff were unable to enforce a writ of possession by physically removing an occupant who was a party to the foreclosure suit, the issuance of the writ would be an idle gesture. The court added that where the occupant was a party to the foreclosure, there would be no point in requiring the purchaser to initiate an action in forcible entry and detainer, as had been urged by the defendant, because there were no issues to litigate. It is, therefore, my conclusion also that the provisions of R.C. 2327.02(C) require that a county sheriff enforce a writ of possession upon an occupant of foreclosed premises, where the occupant was a party to the foreclosure proceedings, by physically removing that occupant if he fails to vacate voluntarily.

It should be noted, however, that the foregoing conclusion applies only in those instances in which the party against whom physical removal is sought was also a party to the foreclosure action. If the occupant of the premises was not a party to the foreclosure action, a writ of possession cannot be enforced against him. The Court of Appeals for Summit County held, in Nunn v. Hutchinson, 1 Ohio Law Abs. 282 (1922) that a writ of possession can be used only against the parties to the foreclosure suit, and cannot be used to disturb the possession of a stranger to the suit. The court further held that a writ should be executed only when the right is clear, for it cannot be used to litigate conflicting rights not already adjudicated. The plaintiff in that case took possession under a lease from the mortgagor. When the mortgagee initiated foreclosure, he neglected to join the plaintiff. An injunction was granted to the plaintiff to prevent enforcement of the writ. Under this holding, it is clear that a sheriff may not enforce a writ against an occupant who was not a party to the foreclosure action.

Your final question raises the possibility of a jurisdictional conflict between the provisions of R.C. 2327.02 and those of R.C. 1923.01, *et seq.* and R.C. 1901.18, which grant jurisdiction in actions in forcible entry and detainer to the county and municipal courts. R.C. 1923.01, in pertinent part, provides as follows:

As provided in sections 1923.01 to 1923.14 inclusive, of the Revised Code, any judge of a county court, within his proper area of jurisdiction, may inquire about persons who make unlawful and forcible entry into lands and tenements and detain them, as well as about persons who have a lawful and peaceable entry into lands and tenements and hold them unlawfully and by force. If upon such inquiry it is found that an unlawful and forcible entry has been made, and that the lands or tenements are held by force, or that after a lawful entry they are held unlawfully, then such judge shall cause the party complaining to have restitution thereof.

R.C. 1923.02(C) specifies that proceedings under the provisions of R.C. Chapter 1923 may apply to sales of real estate, on executions, orders, or other judicial

process, provided that the judgment debtor was in possession at the time of the judgment or decree which gave rise to the sale. R.C. 1901.18(A) specifies that a municipal court, within its territory, shall have original jurisdiction in any civil action, of whatever nature or remedy, wherein judges of county courts have jurisdiction. Original jurisdiction over actions in forcible entry and detainer is thus vested in the county and municipal courts.

While the jurisdiction thus vested is original, it is not exclusive. R.C. 1923.03 indicates that such jurisdiction over actions for forcible entry and detainer is concurrent with that of the court of common pleas in the following terms:

Judgments under sections 1923.01 to 1923.14, inclusive, of the Revised Code, either in the county court or in the court of common pleas, are not a bar to a later action brought by either party. (Emphasis added.)

Thus, in Kuhn v. Griffin, 3 Ohio App.2d 195 (1964), the Court of Appeals for Lucas County held that the court of common pleas has original jurisdiction in forcible entry and detainer concurrent with that of the county and municipal courts.

In summary, the purchaser of real property at a judicial sale may obtain actual possession thereof through one of two methods where an occupant of the premises who was a party to the foreclosure proceedings refuses to vacate voluntarily. The purchaser is entitled to both a sheriff's deed and writ of possession, which must be executed by the county sheriff, who has a duty to deliver actual and exclusive possession to the purchaser, even where such delivery requires forcible removal of the occupant. The purchaser may, however, elect to obtain possession against an occupant who was a party to the foreclosure proceedings through an action in forcible entry and detainer. Although the purchaser is not required to initiate an action in forcible entry and detainer, he may do so. Where the occupant of foreclosed premises was not a party to the foreclosure proceedings, the purchaser at a judicial sale must obtain possession through an action in forcible entry and detainer. It is, therefore, my opinion and you are so advised that:

1. Upon receipt of a writ of possession issued pursuant to R.C. 2327.02 (C) as part of a foreclosure action, the county sheriff must deliver actual and exclusive possession to the purchaser at a judicial sale, even where delivery of such possession requires forcible removal of the occupant, provided that the occupant was a party to the foreclosure action.
2. R.C. 1923.01, which vests jurisdiction over actions in forcible entry and detainer in municipal and county courts, does not prevent a county sheriff from forcibly removing an occupant from foreclosed premises under a writ of possession, and delivering possession to a purchaser at a judicial sale.