

"In the circumstances of this case, however, the subsequent search of the petitioner's home cannot be regarded as incident to his arrest on the street corner more than two blocks away."<sup>10</sup>

Since Mila Aguilar Roque was arrested on the street and her house was not within her immediate control, its search without a valid search warrant cannot be considered as incidental to her arrest. Consequently, the documents seized at her house should have been declared inadmissible in evidence.

Fourthly, it is settled that in order that a search may be considered as incidental to a lawful arrest, it must be contemporaneous with the arrest.<sup>11</sup> The Constabulary Security Group searched the house of Mila Aguilar-Roque thirty minutes after her arrest. Since the search of her house was not contemporaneous with her arrest, it cannot be considered incidental to her arrest.

The ruling in the case of *Nolasco, et al. vs. Paño*, G. R. No. 69803, October 8, 1983 is clearly erroneous. Like old soldiers, the martial law syndrome never dies.

#### FOOTNOTES

<sup>1</sup>*Papani vs. U.S.*, 84 F2d 160, 163. (Italics supplied.)

<sup>2</sup>*State vs. Adams*, 136 SE 703, 704 (Italics supplied.)

<sup>3</sup>79 C.J.S., Searches and Seizures, Sec. 67(d), p. 844. (Italics supplied.)

<sup>4</sup>*State vs. Johnson*, 230 A2d 831, 836.

<sup>5</sup>*Chimel vs. California*, 395 U.S. 752, 762-763. (Italics supplied.)

<sup>6</sup>*Shiplely vs. California*, 395 U.S. 818, 820. (Italics supplied by the United States Supreme Court.)

<sup>7</sup>399 U.S. 30, 35.

<sup>8</sup>*Agnello vs. U.S.*, 260 U.S. 20, 30-31.

<sup>9</sup>*Stoner vs. California*, 376 U.S. 483, 486; *Preston vs. U.S.*, 736 U.S. 364, 367.

<sup>10</sup>382 U.S. 36, 37.

<sup>11</sup>*Preston vs. U.S.*, 376 U.S. 364, 367; *Stoner vs. California*, 376 U.S. 483, 487; *James vs. Louisiana*, 382 U.S. 36, 37; *Duke vs. Taylor Implement Manufacturing Co., Inc.*, 391 U.S. 216, 220; *U.S. vs. Chadwick*, 433 U.S. 1, 15.

## THE SHIP MORTGAGE DECREE OF 1978 AND ITS APPLICATIONS

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The Philippines is a seaboard country. It has 7,000 islands all bounded by a vast body of water which should basically account for giving greater importance to the shipping industry of this country. In spite of our country's geographical location, however, the Philippines' shipping laws have not been responsive to the development of our shipping industry until the advent of the Ship Mortgage Decree. This law took effect on June 11, 1978.

The Preamble of the Ship Mortgage Decree of 1978 provides that it is the declared policy of the state to "accelerate the growth and development of the shipping industry." This type of industry requires substantial investment; and by reason of heavy capital requirement for ship acquisition and operation, the Philippine shipping industry must necessarily turn to financial institutions, both domestic and foreign, for assistance in ship financing. To attain this objective, the Ship Mortgage Decree had to be enacted.<sup>1</sup>

#### Purpose of Ship Financing

The purpose for which a mortgage may be constituted on a vessel and its equipment in favor of any financial institution, domestic or foreign, is enunciated in Section 2 of the Decree.<sup>2</sup> Under this Section, "any citizen of the Philippines, or any association or corporation organized under the laws of the Philippines, of which at least 60% of its capital is owned by citizens of the Philippines may, for the purpose of financing the construction, acquisition, purchase or initial operation of vessels, freely constitute a mortgage on its vessels and its equipment with any bank or other financial institutions, domestic or foreign." By mandate of this law, if the purpose of the ship financing is not for construction, acquisition, purchase, or operation of vessels, the transaction will not fall under the protective provisions of the decree. As a consequence, where for example, the vessel was mortgaged to guarantee payment of a "pre-existing obligation," the mortgage may be taken as a valid ordinary "chattel mortgage" but not as a preferred ship mortgage under this Decree. In this context, the Philippine Ship Mortgage Decree of 1978 differs from the U.S. Ship Mortgage Act of 1920, as amended, in the fact that, while the Philippine law has specified four (4) specific purposes for which a ship financing may be obtained upon guarantee of a ship mortgage, no such requirement is found in the U.S. Ship Mortgage Act of 1920.

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In one American case—the *Detroit Trust Co. v. The Thomas Barlum* 3. The court held that under the U.S. Ship Mortgage Act of 1920, “there was no requirement that for the Act to apply, the money obtained should be used for purposes wholly maritime, and not for purposes partly maritime and partly non-maritime.”

#### Requisites for Valid Mortgage

By provision of Sec. 3 of the Ship Mortgage Decree,<sup>4</sup> the ship mortgage constituted for ship financing shall not be valid against third parties other than the mortgagor, his heir or assign, and a person having actual notice of the mortgage, if the “ship mortgage” is not recorded in the office of the Philippine Coast Guard of the port of documentation of the vessel or the vessel’s port of documentation of the vessel or the vessel’s port of registry. Consequently, in respect of third parties, recordation of mortgage is the source of validity. But even assuming that an unrecorded ship mortgage is valid against a mortgagor, his heir or assign and a person having actual notice of the mortgage, will such unrecorded mortgage have a preferred status under the decree? It is submitted that, if the ship mortgage is unrecorded, it cannot attain a “preferred status” as such status is conferred only by Section 17 when the mortgage is recorded as required by Section 3. Thus, in *Morse Dry Dock and Repair Co. v. Northern Star*: 5 the U.S. Supreme Court ruled that “recordation and indorsement are essential to the preferred status of a mortgage.”

#### Effect of Valid Recorded Mortgage

A valid recorded mortgage will create a preferred maritime lien on the vessel pursuant to Sections 4 and 17. The creation of a preferred mortgage lien is conditioned upon the fulfillment of three (3) requisites, namely: (1) that the mortgage is recorded as provided in Section 3 of the Decree; (2) an affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lien of the mortgaged vessel; and (3) that the mortgage does not stipulate that the mortgagee waives the preferred status of the mortgage.

Is there any restriction to recording of the ship mortgage? Section 8 of the Decree<sup>6</sup>, in conjunction with Section 17 thereof<sup>7</sup>, provides that “(a) no mortgage shall be recorded unless it states the interest of the mortgagor in the vessel, and the interest so mortgaged; (b) that the mortgage shall not be recorded unless previously acknowledged under oath before an officer authorized by law to administer oath; and that (c) when there is a change of port of documentation of the mortgaged vessel, the mortgage cannot be recorded at a new port of documentation unless certification has been issued by the Coast Guard or Station Commander of the previous port of documentation authorizing the recording of the mortgage at the new port of documentation.

A preferred mortgage lien commands priority over all claims against the vessel, subject to some exceptions as provided in Section 17 of the law.<sup>8</sup> This means that when a mortgaged vessel is sold as a result of extrajudicial sale or by order of Regional Trial Court in a suit *in rem* in admiralty for the enforcement

of a preferred mortgage lien, all preexisting claims on the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of Section 16<sup>9</sup> of the Decree, shall be held terminated and attached, in accordance with the priorities established by law, to the proceeds of the sale. Accordingly, a preferred mortgage lien acquires priority over all claims against the vessel, except when the following claims exist in the order stated: (a) expenses and fees allowed and costs taxed by the court and taxes due to the government; (b) crew’s wages; (c) general average; (d) salvage, including contract salvage; (e) maritime liens arising prior in time to the recording of the preferred mortgage; (f) damages arising out of tort; and (g) preferred mortgage registered prior in time.

In determining priority of maritime liens, there are two foremost propositions. (a) maritime claims outrank non-maritime claims (with the possible exception of state tax claims), and (b) maritime lien claims outrank claims which are maritime but not liens (with the exception of costs of operating and caring for the ship while she is in *custodia legis*).

This priority of preferred mortgage lien over all other claims against the mortgaged ship recognizes also the fact that the priority of a preferred mortgage lien is not absolute. It is still subordinate to certain class of seven (7) maritime lien claims against the ship as pointed out above. This is the consequence of our adherence to two (2) criteria in maritime law on the application of priority of liens, which prescribe that: (a) liens are ranked both according to *class* (such as wage liens, salvage liens, collision liens, and service liens: the general rule being that, except for wage and salvage liens, tort liens outrank contract liens); and (b) according to the *time of accrual* (the general rule is that all liens within a class rank in the inverse order of accrual, i.e., last in time is first in right).

The creation of a preferred mortgage status on the vessel under Section 17 of the Decree<sup>10</sup> covers not only a valid mortgage constituted on a vessel of “domestic ownership” but also on any other vessel holding a “Provisional Certificate of Philippine Registry” where the mortgage thereon complied with the conditions imposed on valid mortgages by Section 4<sup>11</sup>. This is so because Section 4(b)<sup>12</sup> of the Decree considers every vessel holding a “Provisional Certificate of Philippine Registry” a vessel of domestic ownership. Moreover, the status of preferred mortgage has been extended to “foreign ship mortgages” pursuant to Section 15<sup>13</sup> of the Decree, for as long as “any mortgage, hypothecation or similar charge on the vessel has been duly and validly executed in accordance with laws of the foreign nation under the laws of which the vessel is documented and has been duly registered in accordance with such laws in a public registry either at the port of registry of the vessel or at a central office of the foreign country”.

It is submitted, however, that in foreign ship mortgages the purpose of the ship mortgage cannot be strictly limited to construction, acquisition, purchase or operation of vessels as required in cases of vessels of “domestic ownership” and those with “Provisional Certificate of Philippine Registry”. The reasons are twofold: To conform with rules of “general maritime laws”, and by reason of “comity” with other maritime nations who have similar rules.

The restriction imposed by our Ship Mortgage law on the enforcement in this jurisdiction of the “Foreign Ship Mortgages” is indeed protectionist. It is

that, "a preferred mortgage lien in the case of a foreign vessel shall be subordinate to maritime railway or other necessities, performed or supplied in the Philippines"<sup>14</sup>. In effect, this means that a preferred foreign ship mortgage can be outranked by any local materialman's claim for services which were supplied in the Philippines. But this restriction will not apply to mortgages on of vessels of "domestic ownership" and vessels with "Provisional Certificate of Philippine Registry" where in both the preferred mortgage status of the lien generally prevails even over domestic necessities and services. The only exception to this rule is when other "preferred maritime liens" arise prior in time to the recording of the preferred mortgage.<sup>15</sup>

There are two distinct restrictions, however, on the enforceability of the preferred mortgage lien under Sections 4(e) and (f) of the law. The first is, under Section 4(e)<sup>16</sup> "a mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness" Thus, if a preferred mortgage provides for the separate discharge of a property other than a vessel, the amount to be paid shall be endorsed upon the documents of the vessel. A typical example of this is when the document of mortgage of a vessel includes a mortgage of non-maritime property like a car". In such a case, the mortgage is not to be considered a preferred ship mortgage under our Ship Mortgage Decree unless the amount necessary to discharge the mortgage on the car is specified in the document.

The second is, when the document of preferred mortgage includes more than one vessel and provides for separate discharge of each vessel by payment of a portion of the mortgage indebtedness, the amount of indebtedness which shall be paid for the discharge of the vessel from the mortgage should be endorsed upon the documents of the vessel.<sup>17</sup> If the mortgage does not provide for separate discharge of a vessel and the vessel is to be sold upon order of court in a suit *in rem* in admiralty<sup>18</sup>, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum which, in the opinion of the court, the approximate value of the vessel bears to the approximate value of all the vessels covered by the mortgage. It is important pointing out that the U.S. Ship Mortgage Act, Section 922(e) thereof<sup>19</sup>, established the same requirement as Section 4(e) of our Ship Mortgage Decree, in that, "a mortgage which includes property other than a vessel shall not be held a preferred mortgage of such property by the payment of a specified portion of the mortgage indebtedness". Accordingly, as a matter of analogy, our concept of ship mortgage is similar with that of the United States, whereby by negative inference the U.S. maritime law experts suggest that a preferred mortgage may include "property other than a vessel, which is taken to mean a non-maritime property." But when this situation occurs, the rule on separate discharge of non-maritime property must be observed in the document of mortgage. This rule, however, does not apply to a mortgage of a "vessel" and her "freight" (the freight being held to be a part of the vessel for this purpose),<sup>20</sup> nor to a mortgage on two or more vessels where there is an adequate provision for the discharge of the vessels as a whole or singly. Consequently, where a mortgage does cover both a vessel and a non-maritime property, the mort-

gage is not a preferred mortgage unless it "provides for the separate discharge of such property by the payment of a portion of the mortgage indebtedness". In "*Emma Giles*"<sup>21</sup> it was held that the "discharge provision relating to the non-maritime property must be absolute and not conditional". And, in "*Port Welcome Cruises, Inc. v. S.S. Bay Belle*"<sup>22</sup> it was suggested that "the simple solution is to take separate mortgages on the maritime and non-maritime property and avoid the whole problem". In fact, there seems to be no discernible advantage in the composite mortgage, since there must be separate recordation of the ship and shore property and separate foreclosure actions on default.<sup>23</sup>

In addition to the above requirements of a valid ship mortgage, Section 6 of the Decree requires that the mortgagor,<sup>24</sup> when requested by the mortgagee, must disclose in writing to him prior to the execution of any preferred mortgage, the existence of any maritime lien, prior mortgage, or other obligation or liability upon the vessel to be mortgaged, that is known to the mortgagor. Moreover, without the consent of the mortgagee, the mortgagor should not incur, after the execution of the mortgage and before the mortgagee has had a reasonable time in which to record the mortgage, any contractual obligations creating a lien upon the vessel other than a lien for wages of stevedores when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, or for salvage, including contract salvage, in respect of the vessel, tonnage dues and all other charges of the Philippine Government as regards the vessel but not exceeding P20,000.00.

#### Foreclosure of Preferred Mortgage Lien

Under Section 10 of the Decree,<sup>25</sup> upon violation or default of any term or condition of the mortgage, the preferred mortgage lien may be enforced by the mortgagee by suit *in rem* in admiralty, where the vessel itself is made a party defendant and may be arrested in the manner specified in Section 11 of the law.<sup>26</sup> The enforcement of a preferred mortgage lien through a suit *in rem* in admiralty falls within the original exclusive jurisdiction of the Regional Trial Court of the place where the vessel may be arrested or of the place where the mortgagor or mortgagee resides, at the election of the mortgagee. The law requires that Notice of Commencement of suit *in rem* in admiralty must be given by the mortgagee thru publication and actual notice to the parties which the court may direct. However, failure to give such notice shall not constitute a jurisdictional defect but the mortgagee may be held liable for damages to anyone prejudiced by his action *in rem* in admiralty.

Apart from the suit *in rem* in admiralty under Section 10 of the Decree upon default of any term or condition of the mortgage, the mortgagee may, in addition to the action *in rem* in admiralty bring suit *in personam* in admiralty against the mortgagor of the vessel under Section 18 of the Decree,<sup>27</sup> in respect of the amount representing the outstanding mortgage indebtedness secured by the vessel or any deficiency in the full payment thereof.

Moreover, where the vessel is situated in a foreign country at the time when the terms and conditions of the mortgage had been broken, suit *in rem* in admiralty may be instituted in a foreign country in which the vessel may be found pursuant to the procedure of that country for enforcement of ship mortgages constituting maritime liens on vessels under the laws of the country.

What liens may then be enforced by suit *in rem* in admiralty?

Pursuant to the Ship Mortgage Decree, a suit *in rem* in admiralty may be instituted under Section 10 of the Decree when a preferred mortgage lien is enforced by the mortgagee against the mortgagor, whereby the mortgaged vessel is arrested and treated as the defendant under Section 11 of the Decree.<sup>28</sup> Also, a suit *in rem* may be instituted under Section 21 of the Decree<sup>29</sup> when maritime liens for necessities are enforced against the vessel, for recovery of cost of repairs to the vessel, cost of supplies furnished to the vessel, towage service given to the vessel, use of drydock or maritime railway, or other necessities furnished to any vessel, whether foreign or domestic, upon the order of the owner of the vessel or of a person authorized by the owner.

#### How Suit in Rem is Enforced

Upon filing of the petition for judicial foreclosure of a preferred ship mortgage, the applicant may apply *ex-parte* for an order of arrest of the vessel which the court may immediately issue, provided it is made to appear by affidavit of the applicant or of the person who knows the facts that a default in the mortgage has occurred and a bond is filed executed to the adverse party in an amount fixed by the court, not exceeding the applicant's claim, conditioned that the applicant shall pay all the costs which may be adjudged to the adverse party and all damages which he may sustain by reason of the arrest, if the court shall finally find that the applicant was not entitled to the arrest. Once the mortgaged vessel has been arrested, such order of arrest may be discharged by the judge through an Order of Discharge under Section 12<sup>30</sup>, "if a cash deposit is made or counterbond executed by the mortgagor to the creditor and filed with the clerk or judge for an amount double the value of the claim to secure the payment of any judgment that the creditor may recover in the action". Upon discharge of the Order of Arrest, the ship arrested shall be delivered to the party making the deposit or giving the counterbond, or the person appearing in his behalf, on the condition that the deposit or counterbond posted shall stand in place of the vessel released. Under Section 12 of the law, therefore, the cash deposit or the counterbond realistically takes the place of the vessel that is released or discharged; and if such cash deposit or counterbond may, for any reason, be found later to be insufficient, unless the party offering the bond files an additional deposit or counterbond, the mortgagee or creditor may again apply with the court for a new order of arrest. Finally, should the court find the Order of Arrest to have been irregularly or improperly issued, upon application with the court after reasonable notice to the creditor, the court may grant an order for discharge of the Order of Arrest.

In a nutshell, the foregoing is a brief analysis of the application of the 1978 Ship Mortgage Decree.

#### FOOTNOTES:

<sup>1</sup>The Ship Mortgage Decree of 1978, otherwise known as PD No. 1521.

<sup>2</sup>Section 2, Ship Mortgage Decree.

<sup>3</sup>293 US 21, 55 S. CT. 31, 19834 A.M.C. 1417, 1934.

<sup>4</sup>Section 3, Ship Mortgage Decree.

<sup>5</sup>271, U.S. 552, 46 S. CT. 589, 1926 A.M.C. 977, 1926.

<sup>6</sup>Section 8, Ship Mortgage Decree.

<sup>7</sup>Section 7, Ship Mortgage Decree.

<sup>8</sup>Section 17, Ship Mortgage Decree.

<sup>9</sup>Section 16, Ship Mortgage Decree.

<sup>10</sup>Section 17, Ship Mortgage Decree.

<sup>11</sup>Section 4, Ship Mortgage Decree.

<sup>12</sup>Section 4(b), Ship Mortgage Decree.

<sup>13</sup>Section 15, Ship Mortgage Decree.

<sup>14</sup>Section 15, Ship Mortgage Decree.

<sup>15</sup>Section 17(a), Ship Mortgage Decree.

<sup>16</sup>Section 4(e), Ship Mortgage Decree.

<sup>17</sup>Section 4(f), Ship Mortgage Decree.

<sup>18</sup>In admiralty proceeding in *rem*, a person is not made a party defendant, but a vessel or other thing is seized and treated as the defendant, and a decision is sought against the *res* rather than its owner.

<sup>19</sup>Section 922(e), U.S. Ship Mortgage Act.

<sup>20</sup>The R. Lenahan, 10 F. Supp. 497, 1935 A.M.C. 513, E.D.P.A., 1935.

<sup>21</sup>5 F. Supp. 502, 1936 A.M.C. 1146, D.M.D. 1936.

<sup>22</sup>324 F. Supp. 72, 1964 A.M.C. 2674.

<sup>23</sup>Sec. 921, 954(b), The Law of Admiralty, Second Edition, Gilmore and Black, p. 709.

<sup>24</sup>Section 6, Ship Mortgage Decree.

<sup>25</sup>Section 10, Ship Mortgage Decree.

<sup>26</sup>Section 11, Ship Mortgage Decree.

<sup>27</sup>Section 18, Ship Mortgage Decree.

<sup>28</sup>Section 11, Ship Mortgage Decree.

<sup>29</sup>Section 21, Ship Mortgage Decree.

<sup>30</sup>Section 12, Ship Mortgage Decree.