would have served no useful purpose to enact laws which would and could not be implemented effectively.

It is, therefore, hoped that the various IP laws of ASEAN countries can be harmonized and that there will be uniformity of, and consistency in, efforts for effective IP rights enforcement in the entire region. The Philippines, cognizant of its role as a member of this community and the economic benefits of such participation, has laid the groundwork to achieve this end. What therefore remains to be seen is a more concrete effort on the structural end in order to attain the goals of greater protection of intellectual property rights in the Philippines, perhaps through the creation of permanent specialized IP courts similar to those of other countries. In this manner, enforcement of such laws and the procedures relating thereto could be given greater attention and specialization in light of the increasing influx of branded goods into the country. A development of the legal measures to protect such additional investments in our country would provide an incentive to future investors and bode well for continued Philippine economic prosperity.

Writ of Possession in Extra-Judicial Foreclosure of Real Estate Mortgage: A Critical Analysis

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I. INTRODUCTION: THE MECHANISM OF EXTRA-JUDICIAL FORECLOSURE AND THE WRIT OF POSSESSION

On 6 March 1924, the Legislative department of the Philippines enacted Act No. 3135,[1] entitled "An Act to Regulate the Sale of Real Property under Special Powers Inserted in or Annexed to Real Estate Mortgages." Prior to its enactment, no law at that time permitted a mortgagee, upon the default of a debtor, to extra-judicially foreclose property used as security in a transaction based on a stipulation in the contract.[2] At best, the Supreme Court supported this notion, albeit with a minority of the Court adhering to the contrary.[3] Later, this Act was amended by Act No. 4118,[4] and the result was an affirmation of the use of stipulations of this nature and the regulation of the method by which such right of extra-judicial foreclosure may be exercised by the mortgagee.[5] To emphasize, "Act 3135, as amended, covers only real estate mortgages and is intended merely to regulate the extrajudicial sale of the property mortgaged if and when the mortgagee is given a special power or express authority to do so in the deed itself or in a document annexed thereto."[6] From this pronouncement, it is clear that the same statute is rendered inapplicable where the mortgage is a chattel mortgage.[7]

In enacting the said law, the procedure by which a mortgagee may foreclose a real estate mortgage was thus established; but it cannot be overemphasized that the law still recognizes that the debtor possessed the right to redeem the subject property in the same means as established in ordinary civil actions.[8] Likewise, the law clearly provides that a creditor-

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1. An Act to Regulate the Sale of Real Property under Special Powers Inserted in or Annexed to Real Estate Mortgages, Act No. 3135 (1924).
2. VICENTE FRANCISCO, 1 THE REVISED RULES OF COURT: SPECIAL CIVIL ACTIONS 672 (1972).
3. El Hogar Filipino v. Paredes, 45 Phil. 178 (1923).
4. An Act to Amend Act Numbered Thirty-One Hundred and Thirty-Five, Entitled "An Act to Regulate the Sale of Property under Special Powers Inserted in or Annexed to Real-Estate Mortgages," Act No. 4118. (1933).
5. FRANCISCO, *supra* note 2.
6. *Id.* at 673 (citing Luna v. Encarnacion, *et al.*, 91 Phil. 531 (1952)).
7. *Id.* at 672.
8. *Id.* at 673.

mortgagee may validly foreclose on a property only if there is a stipulation in the written agreement authorizing him to do so in case the debtor defaults on his obligation. Absent such stipulation, the creditor has no other recourse than that of a judicial foreclosure.[9]

In the exercise of this right to foreclose, the law grants to the purchaser of the foreclosed property the right to resort to filing a Petition for the Writ of Possession in court.[10] By definition, a Writ of Possession is "a writ of execution employed to enforce a judgment to recover the possession of land. It commands the sheriff to enter the land and give possession of it to the person entitled under the judgment."[11] Clearly, it is granted mainly to facilitate the transfer of the property from the previous holder to one now entitled to it.

Under section 7,[12] the purchaser may avail of the Writ in two ways: *first*, within the one year redemption period, provided that a bond is filed, and *second*, after the lapse of such one year redemption period and without the necessity of a bond.[13] If the purchaser chooses to avail of the first manner by

9. *Id.*
10. Act No. 3135, § 7.
11. Philippine National Bank v. Sanao Marketing Corporation, 465 SCRA 287, 299 (2005) (citing BLACK'S LAW DICTIONARY 1611 (6d ed. 1999)).
12. Act No. 3135, § 7.

> In any sale made under the provisions of this Act, the purchaser may petition the Court of First Instance of the province or place where the property or any part thereof is situated, to give him possession thereof during the redemption period, furnishing bond in an amount equivalent to the use of the property for a period of twelve months, to indemnify the debtor in case it be shown that the sale was made without violating the mortgage or without complying with the requirements of this Act. Such petition shall be made under oath and filed in form of an ex parte motion in the registration or cadastral proceedings if the property is registered, or in special proceedings in the case of property registered under the Mortgage Law or under section one hundred and ninety-four of the Administrative Court, or of any other real property, encumbered with a mortgage duly registered in the officer of any register of deeds in accordance with any existing law, and in each case the clerk of court shall, upon filing of such petition, collect the fees specified in paragraph eleven of section one hundred and fourteen of Act Numbered Four Hundred and ninety-six, and the court shall, upon approval of the bond, order that a writ of possession issue, addressed to the sheriff of the province in which the property is situated, who shall execute said order immediately.

13. *Philippine National Bank*, 465 SCRA at 300; Ong v. Court of Appeals, 333 SCRA 189, 195 (2000) (citing Navarra v. CA, 204 SCRA 850, 856 (1991);

which the Writ may be obtained, he must file an *ex parte* motion under oath for that purpose in the corresponding registration or cadastral proceeding in the case of property covered by a Torrens title. Upon the filing of such motion and the approval of the corresponding bond, the law, also in express terms, directs the court to issue the order for the issuance of a writ of possession.[14]

It is in the application of such a provision, however, that the damage is done. In desiring to facilitate the transfer of property, the law, as rendered by the Court, has been seemingly one-sided in favor of the purchaser of the property and against the debtor. True, the law must afford protection to the purchaser in good faith, but in doing so, Supreme Court decisions have resulted in denying certain rights to the debtor and have, thus, in effect, failed to afford him the protection which the law itself clearly provides under section 7, in relation to section 8.[15] Unfortunately, the remedy for the debtor, as stated in the Act itself, is rendered nearly nugatory if the application by the courts — which inevitably deny the debtor rights afforded to him by the law and the Constitution — is allowed to persist.

This article, therefore, seeks to revisit Supreme Court decisions involving pertinent provisions of Act No. 3135, as amended, and the due process clause of the Constitution,[16] and to harmonize such decisions with

UCPB v. Reyes, 193 SCRA 756, 760-61, 764 (1991); Banco Filipino Savings and Mortgage Bank v. Intermediate Appellate Court, 142 SCRA 44 (1986); Marcelo Steel Corp. v. Court of Appeals, 54 SCRA 89, 97 (1973); De Gracia v. San Jose, 94 Phil. 623 (1954)).

14. *Philippine National Bank*, 465 SCRA at 301; Chailease Finance Corporation v. Ma, 409 SCRA 250 (2003); Samson v. Rivera, 428 SCRA 759 (2004); Idolor v. Court of Appeals, 450 SCRA 396 (2005).

15. Act No. 3135, § 8.

> The debtor may, in the proceedings in which possession was requested, but not later that thirty days after the purchaser was given possession, petition that the sale be set aside and the writ of possession cancelled, specifying the damages suffered by him, because the mortgage was not violated or the sale was not made in accordance with the provisions hereof, and the court shall take cognizance of this petition in accordance with the summary procedure provided for in section one hundred and twelve of Act Numbered four hundred and ninety-six, and if it finds complaint of the debtor justified, it shall dispose in his favor of all or part of the bond furnished by the person who obtained possession. Either of the partied may appeal from the order of the judge in accordance with section fourteen of Act Numbered four hundred and ninety-six; but the order of possession shall continue in effect during the pendency of the appeal.

16. PHIL. CONST. art III, § 1.

the sweeping rule that the Writ of Possession be automatically and mechanically issued, without the exercise of discretion by the courts,[17] upon a petition by the purchaser, placing him in possession of the property in question, and the rule that the mortgagor may only dispute such a Writ *after* the purchaser has been given possession.[18] In addition, this article likewise suggests for legal justifications why such a remedy may and should be automatically permitted to the debtor. It also presents suggestions that may help remove the inequities against mortgagors in the sweeping and unqualified applications by the courts that make the issuance of the writ of possession in favor of the purchaser of the mortgaged property automatic, mechanical, and mandatory, in derogation of the substantive and procedural requirements of pertinent laws and the due process clause of the Constitution.

II. *EX PARTE*: UNFAIRLY TITLED IN FAVOR OF ONE SIDE

In Latin, the term *ex parte* literally means "in part;"[19] however, some legal systems have equated the same term with "without notice" when translated into plain legal English.[20] Such a translation is clearly illustrated in the proceedings for a Writ of Possession under section 7 of Act No. 3135. The Supreme Court has itself recognized that this petition is one that is *ex parte* and is summary in nature — declaring the same to be "a judicial proceeding brought for the benefit of one party only and without need of notice to any person claiming an adverse interest. It is a proceeding wherein relief is granted even without giving the person against whom the relief is sought an opportunity to be heard."[21]

This proclamation, one of so many others of a similar tenor, demonstrates the Supreme Court's tendency to extend greater aid to a purchaser in ensuring his possession of the property subject to such foreclosure in situations where extra-judicial foreclosure is resorted to. As a result, less protection is thus afforded to the debtor, who, though given a

17. *Ong*, 333 SCRA at 197 (citing Suico v. Court of Appeals, 301 SCRA 212, 221 (1999); A.G. Development v. Court of Appeals, 281 SCRA 155, 159 (1997); Navarra v. Court of Appeals, 204 SCRA 805, 858 (1991)).

18. *Ong*, 333 SCRA at 196.

19. CASSELL'S LATIN DICTIONARY 201 (1942).

20. Renata Vystrcilova, Legal English, http://publib.upol.cz/~obd/fulltext/Anglica-2/Anglica-2_07.pdf (last accessed Feb. 23, 2008).

21. Saguan v. Philippine Bank of Communications, G.R. No. 159882, Nov. 23, 2007; Oliveros v. Presiding Judge, RTC, Br. 24, Biñan, Laguna, 532 SCRA 109 (2007); Santiago v. Merchants Rural Bank of Talavera, Inc., 453 SCRA 756 (2005).

right to redeem, is almost left unaided in protecting his rights against illegal and unjustified deprivation of possession over the mortgaged property.

An apt illustration is the case of *Philippine National Bank v. Sanao Marketing Corporation*.[22] Here, Sanao Marketing Corporation obtained a loan from the Philippine National Bank (PNB), which was secured by a real estate mortgage on several parcels of land. When it failed to pay the loan, PNB resorted to an extra-judicial foreclosure of the properties and thus applied for a Writ of Possession based on a Provisional Certificate of Sale over the said properties. Respondents questioned the issuance of the certificate and the application for the Writ of Possession, alleging certain procedural lapses in its issuance. The Regional Trial Court first granted the Writ in favor of PNB and denied the motion for reconsideration filed by Sanao. On appeal, the Court of Appeals reversed the lower court and ruled in favor of the respondent, declaring that the Provisional Receipt was null and void, and, as such, the Writ based on it must likewise be rendered invalidly issued in grave abuse of its discretion. The Supreme Court, on appeal by PNB, ruled in its favor, declaring that the Writ was in fact properly issued in this case. To justify its ruling, the Court first declared that in cases of extra-judicial foreclosure, petitioning for the Writ is proper.[23] It then went on to pronounce that a reading of section 7 of Act No. 3135 shows that:

> The purchaser in a foreclosure sale may apply for a writ of possession during the redemption period by filing an *ex parte* motion under oath for that purpose in the corresponding registration or cadastral proceeding in the case covered by a Torrens title. Upon the filing of such a motion, the law also directs the court to issue the order for a writ of possession.
>
> ...
>
> Any question regarding the regularity and the validity of the sale, as well as the consequent cancellation of the writ, is to be determined in a subsequent proceeding as outlined in section 8 of Act No. 3135, as amended by Act No. 4118. Such a question is not to be raised as a justification for opposing the issuance of the writ of possession, since, under the Act, the proceeding is *ex parte*.[24]

From this pronouncement, the Court proceeded to read section 8 of the said Act which provides for the manner by which the debtor may question the writ should it appear that there was no violation of the mortgage in the first place, or in the case where the procedural requirements for the

22. Philippine National Bank v. Sanao Marketing Corporation, 465 SCRA 287 (2005).

23. *Id.* at 299-300.

24. *Id.* at 301-02.

foreclosure were not followed. It then, however, declares that a reading of the provision indicates that:

> The law is clear that purchaser must first be placed in possession. If the trial court later finds merit in the petition to set aside the writ of possession, it shall dispose the bond furnished by the purchaser in favor of the mortgagor. Thereafter, either party may appeal from the order of the judge. The rationale for the mandate is to allow the purchaser to have possession of the foreclosed property without delay, such possession being founded on his right of ownership.
>
> It has been consistently held that the duty of the trial court to grant a writ of possession is ministerial. Such writ issues as a matter of course upon the filing of the proper motion and the approval of the corresponding bond. The court neither exercises its official discretion nor judgment.[25]

In this ruling, the Supreme Court stated that the Court of Appeals, while recognizing the existence of procedural lapses in the issuance of the Writ by the lower court, was nonetheless erroneous in ruling that the Writ of Possession was invalidly issued. It unequivocally declared that upon the filing of a petition for the issuance of a writ of possession, the court:

> need not look into the validity of the mortgage or the manner of its foreclosure. In the issuance of a writ of possession, no discretion is left to the trial court. Any question regarding the cancellation of the writ or in respect of the validity and regularity of the public sale should be determined in *a subsequent proceeding* as outlined in section 8 of Act No. 3135.[26]

From this ruling, one can see that the Supreme Court's interpretation of sections 7 and 8 is greatly advantageous to the purchaser. Despite the procedural lapses recognized by the Court itself as having occurred in the issuance of the Writ, it nonetheless declared the same to have been validly issued on the premise that its issuance is ministerial upon the court in which the same has been applied for. It in fact directs that a new case be filed should the debtor have valid cause to question the Writ: the validity of the real estate mortgage or the foreclosure proceedings, even as it recognizes the right of the debtor under section 8 of Act No. 3135 to seek cancellation of the Writ after possession, is given to the purchaser.

This ruling is just one of many declarations made by the Court towards this direction. The Supreme Court has, in more than one instance,[27]

25. *Id.* at 303.

26. *Id.* at 305 (emphasis supplied).

27. *Id.* at 303; Philippine National Bank v. Adil, 118 SCRA 116 (1982); Vda. De Zaballero v. Court of Appeals, 229 SCRA 810 (1994); Veloso v. Intermediate Appellate Court, 205 SCRA 227 (1992); David Enterprises v. Insular Bank of

continuously held that the issuance of a Writ of Possession following extra-judicial foreclosure of real estate mortgage is ministerial, mechanical, and automatic, involving absolutely no exercise of discretion on the part of the Regional Trial Court judge handling the special land registration proceeding for issuance of the Writ of Possession. Clearly, these sweeping unqualified rulings of the Supreme Court may cause irreparable damage and injury and deprivation of the property rights of the mortgagor in breach of the substantive and procedural requirements of the pertinent laws and the sacred constitutional right to due process of law.[28]

To add insult to injury, the remedy of the mortgagor — to petition in the same summary land registration proceeding for issuance of a Writ of Possession to set aside the foreclosure sale and the Writ of Possession as provided for in section 8 of Act No. 3135[29] — is emasculated as a remedy against deprivation of property rights without due process of law by the pronouncement of the Court in strictly interpreting the same provision in favor of the debtor. The Court has stated that the petition to set aside the foreclosure sale may be filed only after the possession has been delivered to the highest bidder, within 30 days from such deprivation of possession from the mortgagor. The ruling that the purchaser must first be placed in possession of the property is unjust, unfair, and oppressive in case the Writ of Possession issued is later found to be erroneous. The Court will simply enforce damages on the bond in favor of the mortgagor.[30] The aggrieved party is given the opportunity to question the decision of the judge via an appeal. The Supreme Court based such *dictum* on the purchaser's presumed right to ownership, declaring that the same must be exercised without delay.[31]

The remedy has trampled on possessory rights, consequently resulting in irreparable damage and injury to the procedural right of the mortgagor in violation of the protection of the due process of law before such remedy becomes available. It is a grossly unjust and oppressive policy of the law to allow the highest bidder to shoot first and inflict damage and injury before determining whether the issuance and implementation of the Writ of Possession is justified or not. Even if it should turn out that the Writ of

Asia and America, 191 SCRA 516 (1990); Marcelo Steel Corporation v. Court of Appeals, 54 SCRA 89 (1973).

28. PHIL. CONST. art III, § 1 ("[n]o person shall be deprived of life, liberty or property without due process of law.").

29. Act No. 3135, § 8.

30. Philippine National Bank v. Sanao Marketing Corporation, 465 SCRA 287, 303 (2005).

31. *Id.* at 303; Ong v. Court of Appeals, 333 SCRA 189, 197 (2000).

Possession is unjustified, the damage has been done and the right against deprivation of property without due process of law has been violated.

The *dictum* that the remedy to set aside the auction sale and Writ of Possession may be filed only within 30 days from the time possession is given to the purchaser, and not before,[32] is rendered illusory by the rule on appeal. The appeal must be filed within 15 days from the receipt of the decision or order denying the motion for reconsideration. The mode of appeal is by Notice of Appeal. The appeal is perfected upon filing of the Notice of Appeal and payment of the docketing fee. The special land registration court loses jurisdiction upon perfection of the appeal, making the remedy to petition for the cancellation of the auction sale and Writ of Possession after the purchaser is placed in possession illusory. Even if the period of appeal is counted from the resolution on the petition filed after the possession is given to the purchaser to set aside the auction sale and the writ of possession already issued, there is a great waste of time and resources involved, as well as unnecessary damage or injury to the mortgagor if it turns out that valid grounds exist to set aside the auction sale and the Writ of Possession.

The situation is compounded by another pronouncement of the Supreme Court that the filing and pendency of an action for annulment of the foreclosure sale[33] or an action questioning the validity of such issuance[34] cannot be invoked to suspend the proceedings for issuance of the Writ of Possession and its implementation.[35] Indeed, being a court of equal or concurrent jurisdiction, the Regional Trial Court trying the action for annulment of the foreclosure sale cannot enjoin the proceedings for issuance of the Writ of Possession and its implementation. This ruling holds true despite the fact that the grounds to set aside the foreclosure sale and the Writ of Possession in the land registration proceeding for issuance of the Writ of Possession — namely: (1) that the mortgage has not been violated; and (2) that the procedural and substantive requirements of Act No. 3135 have not been complied with — are the same grounds available to annul the foreclosure sale.[36]

32. *Philippine National Bank*, 465 SCRA at 302 (citing Act No. 3135, § 8).

33. *Ong*, 333 SCRA at 199; Kho v. Court of Appeals, 203 SCRA 160 (1991).

34. Vaca v. Court of Appeals, 234 SCRA 146 (1994); Navarra v. Court of Appeals, 204 SCRA 850 (1991); De Jacob v. Court of Appeals, 184 SCRA 294 (1990).

35. *Philippine National Bank*, 465 SCRA at 303 (citing *Chailease*, 409 SCRA at 253).

36. Act No. 3135, § 8.

III. REASONS TO ALLOW THE QUESTIONING OF THE VALIDITY OF THE REAL ESTATE MORTGAGE AND THE EXTRA-JUDICIAL FORECLOSURE PROCEEDINGS IN THE SAME PETITION

Given these interpretations of the law, it is clear that the courts must remedy the obvious and glaring injury that results from these sweeping and unqualified rulings. The arbitrary declarations of both the lower courts and the Supreme Court that the mortgagor may not question the validity of the real estate mortgage and the extra-judicial foreclosure proceedings in the same petition for issuance of the Writ of Possession but must raise the same in a separate action to nullify and set aside the auction sale[37] must be reversed and set aside for the following compelling and indubitable considerations.

A. Act No. 3135 does not prohibit but in fact, permits it

Section 8 of Act No. 3135 governing the petition for the issuance of a Writ of Possession following the extra-judicial foreclosure of a real estate mortgage allows the filing of the petition to set aside the auction sale and the Writ of Possession in the same summary land registration proceedings. Such a petition must be based on the grounds that the mortgage has not been violated and that the requirements under the provisions of Act No. 3135 have not been complied with. In particular, the law, under section 8, provides that:

> The debtors may, in the proceedings in which possession was requested, but not later than thirty days after the purchaser was given possession, petition that the sale be set aside and the writ of possession cancelled, specifying the damages suffered by him, because the mortgage was not violated or the sale was not made in accordance with the provisions hereof.[38]

Of importance in this provision are the words, "but not later than thirty days after the purchaser was given possession."[39] The law states, in clear and unequivocal terms, that the petition to set aside the auction sale and to cancel the Writ of Possession may be filed at any time but not later than 30 days after the property foreclosed has been delivered to the purchaser.[40] A

37. China Banking Corporation v. Ordinario, 399 SCRA 430 (2003); Banco Filipino Savings and Mortgage Bank v. Intermediate Appellate Court, 142 SCRA 44 (1986); A.G. Development Corporation v. Court of Appeals, 281 SCRA 155, (1997); Royal PB Management and Holdings Co. v. Regional Trial Court of Pasig, Civil Case No. 88961 (Court of Appeals, 7th Division, May 23, 2006) (resolution denying the Petition for Certiorari against the Court, May 23, 2006).

38. Act No. 3135, § 8.

39. *Id.*

40. *Id.*

reasonable reading of the provision clearly indicates that it does not prohibit the filing of the petition before the purchaser is given possession. In this instance, the 30 days provided in the law must be viewed as a period of limitation. The provision does not specify that the petition may be filed only within 30 days after the purchaser is given possession. Under the clear and literal context of the law, the petition may be filed anytime "but not later than 30 days after the purchaser was given possession." The mortgagee is clearly not prohibited from filing the petition before the purchaser is given possession of the property.

Furthermore, it must likewise be seen that there is nothing in Act No. 3135, as amended, that prohibits the mortgagor or any interested party from participating in the summary proceedings to oppose the issuance of the Writ of Possession. While it is true that section 7 provides that the petition is *ex-parte*[41] — since the Regional Trial Court acting as a special land registration court is a court of record — the mortgagor must nevertheless be furnished with a copy of the petition and the order setting the case for summary hearing, for purposes of establishing the jurisdictional facts showing compliance with the requirements under Act No. 3135 as the basis for the issuance of the Writ of Possession. Since the mortgagor is permitted to petition that the sale be set aside and the Writ of Possession be cancelled in the same proceedings where the possession was requested, under section 8 of Act No. 3135,[42] it follows that the mortgagor may participate in the proceedings by asking the court to set aside the auction sale, in opposition to the petition for the issuance of the Writ of Possession, or to cancel the Writ of Possession if already issued.

B. To avoid multiplicity of suits

The pronouncement that the validity of the mortgage and the foreclosure sale may be questioned only in a separate civil action encourages and promotes multiplicity of suits. Certainly, the petition for the issuance of a Writ of Possession, if consolidated with the civil action to annul the foreclosure sale, will avoid such multiplicity. Considering the fact that both proceedings involve the same parties and the same subject matter, there is no reason why the same cannot be done. In *Philippine Savings Bank v. Mañalac, Jr.*,[43] the main argument of the petitioner was that:

> [T]he Court of Appeals erred in sustaining the trial court's order consolidating Civil Case No. 53967 with LRC Case No. R-3951, arguing that consolidation is proper only when it involves actions, which means an ordinary suit in a court of justice by which one party prosecutes another

41. *Id.* § 7.

42. *Id.* § 8.

43. Philippine Savings Bank v. Mañalac, Jr., 457 SCRA 203 (2005).

> for the enforcement or protection of a right, or a prevention of a wrong. Citing *A.G. Development Corp. v. Court of Appeals*, petitioner posits that LRC Case No. R-3951, being summary in nature and not being an action within the contemplation of the Rules of Court, should not have been consolidated with Civil Case No. 53967.[44]

In ruling on the contention of the petitioners, the Court declared unequivocally that such was not correct. It stated, to wit:

> We do not agree. In *Active Wood Products Co., Inc. v. Court of Appeals*, this Court also deemed it proper to consolidate Civil Case No. 6518-M, which was an ordinary civil action, with LRC Case No. P-39-84, which was a petition for the issuance of a writ of possession. The Court held that while a petition for a writ of possession is an *ex parte* proceeding, being made on a presumed right of ownership, *when such presumed right of ownership is contested and is made the basis of another action, then the proceedings for writ of possession would also become groundless.* The entire case must be litigated and must be consolidated with a related case so as to thresh out thoroughly all related issues.
>
> In the same case, the Court likewise rejected the contention that under the Rules of Court only actions can be consolidated. The Court held that the technical difference between an action and a proceeding, which involve the same parties and subject matter, becomes insignificant and consolidation becomes a logical conclusion in order to avoid confusion and unnecessary expenses with the multiplicity of suits.
>
> In the instant case, the consolidation of Civil Case No. 53967 with LRC Case No. R-3951 is more in consonance with the rationale behind the consolidation of cases which is *to promote a more expeditious and less expensive resolution of the controversy than if they were heard independently by separate branches of the trial court.* Hence, the technical difference between Civil Case No. 53967 and LRC Case No. R-3951 must be disregarded in order to promote the ends of justice.[45]

From this ruling, it is gleaned that the notion of consolidating a Petition for the Writ of Possession with an ordinary civil action is not a novel consideration for the Court. It has itself recognized the need for ensuring the most expeditious and less expensive means of resolving controversies for the benefit of all those concerned. Such is, in fact, the better recourse, especially when the grounds for the annulment of the foreclosure sale and those for setting aside such sale are the same. It is, therefore, but proper to allow mortgagors to question the validity of a Writ of Possession, asking that the same be set aside in the same proceedings as the petition for the issuance of the Writ itself, so that the burden borne by courts in adjudicating controversies may be alleviated when possible.

44. *Id.* at 213.

45. *Id.* at 213-14 (emphasis supplied).

C. In the interest of the administration of justice and fair play

Since the separate civil action may be consolidated with the petition for issuance of a Writ of Possession, it is more in keeping with the orderly administration of justice to allow the mortgagor to participate in the proceedings for the issuance of the Writ of Possession as oppositor and to move to set aside the foreclosure sale and the Writ of Possession, if already issued, in the same proceeding. Instead of directing the mortgagor to file a separate civil action — which may be decided differently on the same issues if consolidation is not resorted to, and thus yielding results violative of the spirit and objective of the policy against multiplicity of suits — the problem is avoided by a simple consolidation of the actions in the same petition and proceeding. The courts are therefore able to administer justice on related issues with the same frame of thinking and with the same judicial imperatives, thereby ensuring fairness in adjudicating the respective rights of the parties.

In addition, the consolidation of the petitions may ensure that whatever other remedies granted to the mortgagor by law are not left empty and without meaning. As indicated in Act No. 3135, the mortgagor is permitted to appeal from the order granting the issuance of a Writ of Possession.[46] Such an appeal is rendered an empty remedy for the mortgagor if and when he is not permitted to file an opposition and a petition to set aside the auction sale and the Writ of Possession in the same summary proceeding where the Writ of Possession is requested, as is allowed under the statute. The mortgagor cannot raise new issues on appeal which were not raised and taken up during the summary hearing and, therefore, the absence of his participation in the latter proceeding deprives him of his chance to properly question the validity of the issuance of the Writ. Allowing the mortgagor, therefore, to participate in the same proceeding as for the issuance of the Writ, provides him with the opportunity to raise issues that may be taken up, should an appeal become necessary.

The consolidation of the petitions is not contrary to the Rules of Court. In fact, some provisions found therein support the motion for consolidation when read in relation to Act No. 3135. The 1997 Rules of Civil Procedure is said to be applicable in all courts[47] and in special land registration cases "in a suppletory character and whenever practicable and convenient."[48] Since

46. Act No. 3135, § 8.

47. 1997 RULES OF CIVIL PROCEDURE, rule 1, § 2 ("These Rules shall apply in all courts, except as otherwise provided by the Supreme Court.").

48. *Id.* rule 1, § 4 ("These rules shall not apply to election cases, land registration, cadastral, naturalization and insolvency proceedings, and other cases not herein provided for, except by analogy or in a suppletory character and whenever practicable and convenient.").

there is nothing in Act No. 3135 that prohibits the service of pleadings on the mortgagor, the rule under section 4 of rule 13[49] on service of judgments, resolutions, orders, or pleadings subsequent to the complaint (petition), written motions, notices, appearances, demands, offers of judgment, or similar papers, upon the parties affected are followed by all the courts of the land in proceedings for the issuance of a Writ of Possession. All things considered, the concept of allowing an action to be consolidated with the Petition for the Writ of Possession is not one to which the Rules are adverse. In fact, this is one such situation wherein the Rules of Court must be made applicable as it is both "practicable and convenient" to do so, albeit in a suppletory character, as expressly permitted by the Rules of Court.

Accordingly, the purpose of serving notice to the affected parties is to give them an opportunity to be heard. This purpose would be thwarted if the mortgagor is not permitted to participate by opposing the issuance of the Writ of Possession in the summary land registration proceeding. Besides, Act No. 3135 itself expressly allows the mortgagor to move to set aside the auction sale in the same special land registration case where the possession is requested.[50] How can the mortgagor be barred from participating in the summary hearing after he has been served with the order and the other notices for the summary hearing as an affected party? Clearly, therefore, it is only by permitting his participation in the proceedings that all parties concerned are afforded their rights to due process.

IV. JURISDICTION OF THE SPECIAL LAND REGISTRATION COURT IN SUMMARY PROCEEDINGS FOR THE ISSUANCE OF A WRIT OF POSSESSION AND THE INDISPENSABLE REQUISITE OF ADEQUATE NOTICE UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION

A. Jurisdiction of the special land registration court over the person of the mortgagor is acquired by service of notice

The summary proceeding for the issuance of a Writ of Possession under Act No. 3135 is a special land registration case,[51] which cannot bind the

49. *Id.* rule 13, § 4 ("Every judgment, resolution, order, pleading subsequent to the complaint, written motion, notice, appearance, demand, offer of judgment or similar papers shall be filed with court, and served upon parties affected.").

50. Act No. 3135, § 8.

51. *Id.* § 7; De los Angeles v. Court of Appeals, 60 SCRA 116 (1974); De Ramos v. Court of Appeals, 213 SCRA 207 (1992). All Petitions for Writ of Possession are docketed as land registration cases, which are the appellations for land registration proceedings. In *De los Angeles v. Court of Appeals*, the Supreme Court held that petitions mentioned in Act No. 3135 "should be disposed of in accordance with the summary procedure prescribed in section 112 of the Land Registration Act [now section 108 of the Property Registration Decree or Presidential Decree No. 1529]." *De los Angeles*, 60 SCRA at 118; *see,* Amending and Codifying the Laws Relative to Registration of Property and for Other Purposes [PROPERTY REGISTRATION DECREE], Presidential Decree No. 1529, § 108 (1978). This was reiterated in *De Ramos. De Ramos,* 213 SCRA at 216.

Although *De los Angeles*, referred to a petition to set aside the sale and to cancel the Writ of Possession, the same applies to the issuance of the Writs of Possession, which are also "petitions" as can be seen in section 7 of Act No. 3135. *De los Angeles*, 60 SCRA at 118; Act No. 3135, § 7. Besides, section 112 of the Land Registration Act (now section 108 of the Property Registration Decree) is the only rule of summary procedure in the "registration proceedings" mentioned in section 7 of Act No. 3135, as amended. "Grant any other relief," as provided under section 108 of the Property Registration Decree, certainly refers to the issuance for a Writ of Possession.

> Sec. 108. *Amendment and Alteration of Certificates.* — No erasure, alteration, or amendment shall be made upon the registration book after the entry of a certificate of title or of a memorandum thereon and the attestation of the same by the Register of Deeds, except by order of the proper Court of First Instance. A registered owner or other person having an interest in registered property, or, in proper cases, the Register of Deeds with the approval of the Commissioner of Land Registration, may apply by petition to the court upon the ground that the registered interests of any description, whether vested, contingent, expectant or inchoate appearing on the certificate, have terminated and ceased; or that new interest not appearing upon the certificate have arisen or been created; or that an omission or error was made in entering a certificate or any memorandum thereon, or on any duplicate certificate; or that the same or any person on the certificate has been changed; or that the registered owner has married, or, if registered as married, that the marriage has been terminated and no right or interests of heirs or creditors will thereby be affected; or that a corporation which owned registered land and has been dissolved has not conveyed the same within three years after its dissolution; or upon any other reasonable ground; and *the court may hear and determine the petition after notice to all parties in interest*, and may order the entry or cancellation of a new certificate, the entry or cancellation of a memorandum upon a certificate, or *grant any other relief* upon such terms and conditions, requiring security or bond if necessary, as it may consider proper; Provided, however, That this section shall not be construed to give the court authority to reopen the judgment or decree of registration, and that nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith, or his heirs and assigns, without his or their written consent. Where the owner's duplicate certificate is not presented, a similar petition may be filed as provided in the preceding section.
>
> ...

PROPERTY REGISTRATION DECREE, § 108 (emphasis supplied).

Thus, the law is clear that jurisdiction over the persons of the affected parties is acquired by the court in a special land registration proceeding by setting the case for initial hearing giving notice to all affected parties. Mortgagors-

mortgagor without the acquisition of jurisdiction over his person. A proceeding does not bind a person who is not brought within the jurisdiction of the court.[52]

Before the court, acting as a special land registration court, may proceed with the *ex-parte* presentation of evidence in support of the petition, the jurisdictional facts must first be established. Such facts may be established by proof consisting primarily of notice by way of service of the petition[53] on the mortgagor and notice of the initial hearing for establishing the jurisdictional facts, with proof of service of the notice[54] on the mortgagor and the *prima facie* fact of ownership by the purchaser. Said ownership must, in turn, consist of the certificate of title registered in his or her name, or the Sheriff's Certificate of Sale[55] in favor of the purchaser, where there is yet no consolidation of title in the name of the purchaser.

The *ex-parte* presentation of evidence to prove the violation of the mortgage and compliance with procedural and substantive requirements may proceed only after establishing at the initial hearing the above-mentioned jurisdictional facts of notice to the mortgagor and *prima facie* ownership of the mortgaged property of the purchaser. This is the common practice of most courts handling special land registration cases for issuance of a Writ of Possession. However, some courts acting as special land registration courts, proceed with the *ex-parte* reception of evidence without first establishing the aforementioned jurisdictional facts on the mistaken motion that the proceedings are absolutely *ex-parte* and the issuance of the Writ is mandatory, mechanical, and automatic.[56]

Without establishing said jurisdictional facts at the initial hearing, the court acquires no jurisdiction over the person of the mortgagor and the summary proceeding, including the issuance of the Writ of Possession, will not be binding on the mortgagor. It is settled that a party not brought within the jurisdiction of the court is not bound by its judgment for such would be violative of his cardinal right to procedural due process, the minimum requisite of which is notice and opportunity to be heard.

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oppositors are parties-in-interest because they would be adversely affected by the petition for issuance of the Writ of Possession as their properties would be wrested from their possession.

52. Sievert v. Court of Appeals, 168 SCRA 692 (1988).

53. 1997 RULES OF CIVIL PROCEDURE, rule 13, § 4.

54. *Id.* rule 15, §§ 5-6.

55. FRANCISCO, *supra* note 2, at 681.

56. *See generally*, An Act to Provide for the Adjudication and Registration of Titles to Lands in the Philippine Islands [LAND REGISTRATION ACT], Act No. 496 (1924); *see*, 1997 RULES OF CIVIL PROCEDURE, rule 68.

B. Jurisdictional facts that must be established to warrant the issuance of the Writ of Possession

After establishing the jurisdictional facts at the initial hearing, the special land registration court is vested with jurisdiction to proceed with the reception of evidence; the evidence adduced must establish that the mortgage was violated,[57] usually by non-payment of the loan secured by the mortgage. Compliance with the substantive and procedural requirements under Act No. 3135 is likewise required. These requirements include the presence of a power of sale to justify extra-judicial foreclosure,[58] the publication and posting of the notice of auction sale, and the conduct of the auction sale "between the hours of 9:00 o'clock in the morning and 4:00 o'clock in the afternoon,"[59] which means that the bidding must start at nine o'clock in the morning and close not earlier than four o'clock in the afternoon to accommodate as many competitive bidders as possible.

Non-compliance with any of the requirements under Act No. 3135 is a ground to deny the petition for the issuance of a Writ of Possession. For instance, where the auction sale is rescheduled to another date, the subsequent foreclosure sale is null and void if there is no re-publication of the notice because a sale without the corresponding notice is tantamount to a private sale. Similarly, an extra-judicial foreclosure of real estate mortgage without a power of sale incorporated or attached to the deed of real estate mortgage is null and void.

Other instances where the Petition for Writ of Possession has been denied are the following:

(1) In *Vaca v. Court of Appeals*,[60] the Supreme Court recognized the fact that equitable circumstances can merit the denial of the Writ of Possession.[61]

(2) In *Villarico v. Court of Appeals*,[62] the Supreme Court held that an invalid deed of mortgage cannot be a basis for the issuance of a writ of possession. In that case, the Supreme Court upheld the denial of a Writ of Possession because the deed of mortgage was null and void.[63]

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57. *See*, Act No. 3135, §§ 7-8.

58. FRANCISCO, *supra* note 2, at 673 (citing Luna v. Encarnacion, 91 Phil. 531, 534 (1952)).

59. Act No. 3135, § 4.

60. Vaca v. Court of Appeals, 243 SCRA 146 (1994).

61. *Id.* at 149.

62. Villarico v. Court of Appeals, 373 SCRA 23 (2002).

63. *Id.* at 29.

(3) In *Sulit v. Court of Appeals,*[64] the Supreme Court refused to issue the Writ of Possession on the equitable consideration that the mortgagee did not turn over the surplus proceeds of the auction sale.[65]

(4) In *Cometa v. Intermediate Appellate Court,*[66] where the properties in question were found to have been sold at a price unusually lower than their true value — that is, properties worth at least PhP500,000.00 were sold for only PhP57,396.85 — the Supreme Court, taking into consideration the factual milieu obtaining therein as well as the peculiar circumstances attendant thereto, decided to withhold the issuance of the Writ of Possession on the ground that it could work injustice because the petitioner might not be entitled to the same.[67]

C. Lack of notice to the mortgagor, except by publication, of the extra-judicial foreclosure is a ground to deny the petition for issuance of Writ of Possession

The due process clause requires adequate notice to the defendant and an opportunity for him to be heard. Whether jurisdiction is exercised *in personam* or *in rem,* the judgment will be invalid if defendant has not been given adequate notice. The recognized methods of giving notice are personal service[68] or substituted personal service, by leaving the summons and the complaint at defendant's house with "some person of suitable age and discretion then residing therein."[69]

The extra-judicial foreclosure of real estate mortgage is null and void if the mortgagor was not given notice, except by publication of the auction sale. Notice by publication is only proper when made for justifiable causes[70] and becomes adequate compliance of the due process clause of the Constitution only with respect to the mortgagor where his address or his general whereabouts are unknown. For a mortgagor with a known address, the acceptable mode of service is personal service, which is a better way of giving notice to the mortgagor as it is "practicable."[71]

Act No. 3135 originates from the American legal system. Hence, the developments in United States (U.S.) constitutional law, from which a due process clause was transplanted to this country, has a persuasive effect on our

64. Sulit v. Court of Appeals, 268 SCRA 441 (1997).

65. *Id.* at 455-58.

66. Cometa v. Intermediate Appellate Court, 151 SCRA 563 (1987).

67. *Id.* at 568-69.

68. 1997 RULES OF CIVIL PROCEDURE, rule 14, § 6.

69. *Id.* § 7.

70. *Id.* § 14.

71. *Id.* § 6.

legal system. Proceedings under the Land Registration Act are actions *in rem,*[72] which are "against the whole world."

The previous doctrine that publication and posting of notice on the property in an action *in rem* constituted adequate notice to affected parties[73] was explicitly abandoned by the U.S. Supreme Court[74] after *Mullane v. Central Hanover Bank and Trust Co.*[75]

In the leading case of *Mullane,* the U.S. Supreme Court held that notice by publication for defendants whose names and addresses are known is not adequate notice. Notice by publication is adequate only for defendants whose names and addresses are unknown because no other mode is more

72. LAND REGISTRATION ACT, § 2.

73. Pennoyer v. Neff, 95 U.S. 714 (1878).

74. Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICTS OF LAW 22-23 (3d ed. 2002). As noted by Professors William M. Richman of the University of Toledo College of Law and William L. Reynolds of the University of Maryland:

> [d] Notice in *In Rem* actions
>
> The measure of adequate notice does not change when the court exercises power over defendant's property instead of her person. There is language in older cases that indicates that, because property is deemed to be in possession of its owner, seizing the property or posting the notice upon it (especially if accompanied by publication) constitutes adequate notice to its owner. After *Mullane,* however, the Supreme Court explicitly rejected this notion. The measure of adequate notice for in rem as well as in personam actions is the two-part *Mullane* test. Posting property and publication in local newspapers will rarely pass part 1 since they are unlikely to give actual notice to defendant. Nor will such forms of notice satisfy part 2 of the *Mullane* test because typically they are not the best means of notice available. The names and addresses of property owners are usually available from public records, and notice by mail (considerably more reliable than posting or publication) often will be possible. Based on this analysis, the Court has rejected notice by publication and posting in a wide variety of contexts. (*See,* Tulsa Professional Collection Service Inv. v. Pope, 485 U.S. 478 (1988) (published notice of probate proceeding insufficient notice to creditors of the estate); Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) (notice of tax sale by publication and posting of property inadequate as to mortgagee); Green v. Lindsey, 456 U.S. 444 (1982) (posting notice on tenant's apartment door insufficient notice in eviction action)).

75. Mullane v. Central Hanover Bank and Trust Co. 339 U.S. 306 (1950).

likely to give them actual notice. It is only in this situation that notice by publication alone is constitutionally adequate.[76]

The U.S. Supreme Court, in *Mullane*, laid down two tests for adequate notice under the due process clause of the Constitution. The first test is whether the method chosen is reasonably likely to reach those affected; and the second test is if the conditions do not permit notice reasonably likely to reach those affected, whether the method chosen is about as good as the other.[77]

Under the twin standards, notice by publication is not an adequate notice under the first test for known defendants. For known defendants, notice by mail is clearly more likely to inform them than notice by publication.[78]

The same rule must apply to notice by publication in a newspaper of general publications under the 1997 Rules of Civil Procedure. Service of summons and the complaint by publication is allowed for justifiable causes, as when the whereabouts of the defendant is unknown.[79] Personal service or substituted service is required if the address of the defendant is known.[80]

76. *Id.* at 318-19.

77. *Id.* at 314.

78. RICHMAN & REYNOLDS, *supra* note 74, at 22.

> Notice by publication is much more troublesome. It clearly fails part 1 of the *Mullane* test. In the words of the Court:
>
> > It would be idle to pretend that publication alone ... is a reliable means of acquainting interested parties of the fact that their rights are before the courts. ... Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.
>
> If publication is ever to be considered constitutionally adequate notice, it must be because it satisfies part 2 of the *Mullane* test. When the identity, interest, or address of persons affected by legal action are unknown, notice by publication, although not likely to reach them, is no less likely to give actual notice than any other method. It is only in those situations that publication alone is constitutionally adequate.

79. 1997 RULES OF CIVIL PROCEDURE, rule 14, § 14.

80. *Id.* §§ 6-7.

V. RESPONDING TO THE INEQUITY: SUGGESTIONS FOR THE REFORMATION OF THE INEQUITABLE CASE LAW

The decisions[81] of the Supreme Court that adhere to the obsolete and outmoded doctrine that the issuance of a Writ of Possession after foreclosure is a mechanical, automatic, and ministerial duty of the court, disallowing the participation of the mortgagor as an affected party in the summary proceedings under the Land Registration Act, and to the *dictum* that the petition under section 8 to set aside the auction sale may be filed only after the purchaser was given the possession[82] must be qualified and harmonized with the requirements of due process and the paramount ends of justice.

While the investments of banks and other lenders are entitled to legal protection, the borrowers are likewise entitled to protection against groundless and illegal foreclosure. Mortgagors have the right to be heard in the summary land registration proceeding. That is the objective of serving notice to them and setting the petition for summary hearing to establish the jurisdictional facts for the issuance of a Writ of Possession. If the proceeding is really *ex parte*, ministerial, mechanical, and automatic, giving the judge no discretion, what is the use of setting the petition for summary hearing? What is the use of serving notice to the mortgagor as an affected party if he does not have the right to be heard before he is deprived of possession?

The Supreme Court, in the exercise of judicial statesmanship, may establish rules in an appropriate case allowing the mortgagor, in the same special proceeding where the possession is requested, to oppose the issuance of the Writ of Possession at any time after the filing of the petition, not later than 30 days after the purchaser was given possession. In this way, the mortgagor as an affected party is given the opportunity to be heard before possession is taken from him and the court shall make the necessary adjudication, which either party may appeal, "but the order of possession shall continue in effect during the pendency of the appeal," as provided by section 8 of Act No. 3135.

Such judicial statesmanship of the Supreme Court has in fact leaned towards this direction in the recent case of *Saguan v. Philippine Bank of*

81. Philippine National Bank v. Sanao Marketing Corporation, 465 SCRA 287 (2005); Ong v. Court of Appeals, 333 SCRA 189 (2000); Philippine National Bank v. Adil, 118 SCRA 116 (1982); Vda. De Zaballero v. Court of Appeals, 229 SCRA 810 (1994); Veloso v. Intermediate Appellate Court, 205 SCRA 227, 229 (1992); David Enterprises v. Insular Bank of Asia and America, 191 SCRA 516 (1990); Marcelo Steel Corporation v. Court of Appeals, 54 SCRA 89 (1973).

82. *Philippine National Bank*, 465 SCRA at 303; *Ong*, 333 SCRA at 197.

Communications.[83] In that case, spouses Ruben and Violeta Saguan obtained a loan from the said bank secured by a mortgage over five parcels of land in Davao City. Having failed to pay the loan on time, the bank foreclosed the properties extra-judicially. An auction sale was conducted wherein the bank was declared the highest bidder. As expected, the bank petitioned for a Writ of Possession but the same was opposed by the spouses. While the Supreme Court ultimately ruled in favor of the bank, it nonetheless recognized that Act No. 3135 recognizes the right of the mortgagor to question the propriety of the Writ, in the same proceeding where the Petition for the Writ of Possession was filed by the purchaser. To note, the Court stated that, while such a petition is in fact *ex parte* and thus non-litigious, "the debtor or mortgagor is not without recourse ... [he] may file a petition to set aside the foreclosure sale and to cancel the writ of possession in the *same proceedings* where the writ of possession was requested."[84] This ruling, hopefully the first of many, recognizes the rights to which a mortgagor, though indebted, is nonetheless entitled. Clearly, one very concrete remedy to the dilemma is the perpetuation of rulings and decisions by the Supreme Court in this direction and with this tenor, thus equally aiding the debtor and granting him protection against the illegal and unwarranted issuance of a Writ of Possession.

Furthermore, another solution is for the Supreme Court, in the exercise of its rule-making power under the Constitution,[85] to issue a memorandum circular making the above clarificatory rule. Such would be similar to the circular issued by the Supreme Court which rectified the situation involving the stray decision in *China Bank v. Court of Appeals*,[86] allowing the non-payment of the docketing fee for the petition for extra-judicial foreclosure filed with the notary public. The Court issued an amendatory circular

83. Saguan v. Philippine Bank of Communications, G.R. No. 159882, Nov. 13, 2007.

84. *Id.* (emphasis supplied).

85. PHIL. CONST. art VII, § 5 (5).

> The Supreme Court shall have the following powers:
>
> ...
>
> (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

86. China Bank v. Court of Appeals, 265 SCRA 327 (1999).

mandating that all petitions for extra-judicial foreclosure of real estate mortgage, whether to be conducted by the sheriff or before a notary public, be filed with the Office of the Clerk of Court, with payment of the filing fee, be assigned a case number, and be examined by the Clerk of Court, under the supervision of the Presiding Judge, following the suggestion in an article earlier published in the *Ateneo Law Journal*.[87] In this way, the Court will allow for the adjudication of the petition and the opposition to the same in the same summary proceeding even before the possession is given to the purchaser. This will result in a balanced administration of justice and will ultimately benefit society.

Apart from actions on the part of the Judiciary, the other solution is for the Legislature to introduce amendments to Act No. 3135: by deleting "*ex parte*" before "motion" at the *ninth* line and the last clause of section 7, and amending section 8 by inserting between "requested" and "but" the phrase "at anytime after the filing of the Petition." Should these suggestions be considered, the law shall read as follows:

> Sec. 7. In any sale made under the provisions of this Act, the purchaser may petition the Court of First Instance of the province or place where the property or any part thereof is situated, to give him possession thereof during the redemption period, furnishing bond in an amount equivalent to the use of the property for a period of twelve months, to indemnify the debtor in case it be shown that the sale was made without violating the mortgage or without complying with the requirements of this Act. Such petition shall be made under oath and filed in form of a motion in the registration or cadastral proceedings if the property is registered, or in special proceedings in the case of property registered under the Mortgage law or under section one hundred and ninety-four of the Administrative Code, or of any other real property encumbered with a mortgage duly registered in the office of any register of deeds in accordance with any existing law, and in each case the clerk of the court shall, upon the filing of such petition, collect the fees specified in paragraph eleven of section one hundred and fourteen of Act Numbered Four hundred and ninety-six, as amended by Act Numbered Twenty-eight hundred and sixty-six.
>
> Sec. 8. The debtors may, in the proceedings in which possession was requested *at anytime after the filing of the Petition*, but not later than thirty days after the purchaser was given possession, petition that the sale be set aside and the writ of possession cancelled, specifying the damages suffered by him, because the mortgage was not violated or the sale was not made in accordance with the provisions hereof, and the court shall take cognizance of this petition in accordance with the summary procedure provided for in

87. *See*, Arturo M. de Castro, *Extra-Judicial Foreclosure of Real Estate Mortgage Before A Notary Public: A Case for the Re-Examination and Reversal of China Banking Corporation v. Court of Appeals*, 44 ATENEO L.J. 485 (2000).

> section one hundred and twelve of Act Numbered Four hundred and ninety-six; and if it finds the complaint of the debtor justified, it shall dispose in his favor of all or part of the bond furnished by the person who obtained possession. Either of the parties may appeal from the order of the judge in accordance with section fourteen of Act Numbered Four hundred and ninety-six; but the order of possession shall continue in effect during the pendency of the appeal.

These suggested amendments are designed to clarify the right which the mortgagor may avail of to protect himself and his interests before possession is taken from him. In addition, to remove the slight ambiguities that are currently plaguing the terms of the law will be removed and will thereby allow legal practitioners the chance of applying the same with the certainty that is assured when the law is clear upon its face.

VI. CONCLUSION

It is not denied that default on their obligations by debtors must be deemed reprehensible to the very tenets of agreements and contracts and serve only to curtail the development of relationships worthy of trust, especially when such relationships are crucial to the economic functioning of society as a whole. Obviously, the law has seen fit to protect the lenders in order to ensure the sanctity of agreements securing their loan investments against mortgagors who have availed of the same and have unfortunately reneged on their agreements; they must not, after all, be allowed to walk away from them with impunity. Nevertheless, in ensuring the protection of these transactions, the law must not lose sight of the fact that, ultimately, it is both parties to the controversy and their interests which it must protect with even hands.

Act No. 3135 has provided both parties mechanisms by which their respective rights may be exercised; however, its application has often been one-sided and detrimental to the debtor. This has been illustrated in the numerous Supreme Court decisions that declare that possession must first be given to the purchaser before the propriety of the issuance of the Writ may be questioned. The same decisions have likewise declared that although the Writ may be set aside, it must be done in an action separate from the forum in which the Writ is being petitioned. Not only does this foment the multiplicity of suits, which the Philippine legal system abhors, it does not serve the best interests of justice and fair play and even denies the mortgagor his constitutional right to be given notice and the opportunity to be heard.

The Bench and the Bar, and even the Legislature, must respond to this urgent need, which calls for the revisiting of either the case law or the statute that has long been referred to but rarely critically examined. While the Judiciary may be credited for the numerous pronouncements that have applied the provisions of Act No. 3135 greatly favoring the creditor, they are not entirely to blame for the lack of protection to the debtor. The law may be, and should have long been, challenged as unconstitutional for being violative of due process. The Legislature is thus called upon to amend the provisions that require such action. At the same time, the Judiciary must revisit case law and, from here on, apply the same in a manner that will ensure that all parties are equally protected in accordance with the cardinal requirement of notice and the opportunity to be heard before the deprivation of possession under the due process clause of the Constitution. A reasonable reading of Act No. 3135 will show that possession need not first be resorted to before the debtor be allowed to question the Writ petitioned for and that the legal entitlement to the right of possession may be made in the same proceedings where the petition for the Writ is being heard.

To ensure that all the competing interests and rights of parties to the transaction are equally respected, the changes in the law of an oft-overlooked area of day-to-day transactions must be revisited to balance the scale of justice under a legal system that is no longer deemed as favoring one side, but is in fact in equipoise between the parties — the creditor and the mortgagor, in expeditiously adjudicating their respective rights and obligations in the same summary land registration proceedings.

The Prejudice of the Prejudicial Question: Examining and Re-Examining the Doctrine of the Prejudicial Question

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I. INTRODUCTION

The 2000 Revised Rules of Criminal Procedure[1] defines a prejudicial question by enumerating its elements: (1) that there is an issue (in a previously instituted civil action) similar or intimately related to the issue (in a subsequent criminal action); and (2) the resolution of the issue determines whether or not the criminal action may proceed.[2] This remains faithful to the definition stated in the Civil Code of the Philippines, which was drafted approximately 50 years before the 2000 Revised Rules of Criminal Procedure. The Civil Code states that a prejudicial question *must be decided before any criminal prosecution may be instituted or may proceed* and shall be governed by the rules which the Supreme Court shall promulgate.[3]

Jurisprudence, on the other hand, has been using the doctrine as early as 26 February 1920, in the case of *Berbari v. Concepcion*,[4] and defines it as that which is "[u]nderstood in law to be that which *must precede the criminal action*, that which requires a decision before a final judgment is rendered in the principal action with which said question is closely connected."[5]

It appears from the definition provided in the 2000 Revised Rules of Criminal Procedure that there is a very technical description to the doctrine — there has to be a civil case that is filed previous to the criminal case. Nevertheless, while the Rules are defined this way, there are various instances in jurisprudence where the doctrine has been used in situations not involving civil-criminal cases. This can also be gleaned from the definition in *Berbari*, which only states that there is a *question posed before the criminal case may be decided*. It does not state that this question should only be posed in a civil case. Instead, it only requires that the question must first be answered in another case before the criminal case may be decided. The previous question does *not necessarily concern a civil case*. This implication can

1. 2000 REVISED RULES OF CRIMINAL PROCEDURE.
2. *Id.* rule 111, § 7.
3. An Act to Ordain and Institute the Civil Code of the Philippines [NEW CIVIL CODE], Republic Act No. 386 (1950). Article 36 provides:

   > Prejudicial questions, *which must be decided before any criminal prosecution may be instituted or may proceed*, shall be governed by the rules of court which the Supreme Court shall promulgate and which shall not be in conflict with the provisions of this Code (emphasis supplied).

4. Berbari v. Concepcion, 40 Phil. 837 (1920).
5. *Id.* at 839 (emphasis supplied).

also be found in the Civil Code, which states that such prejudicial question is *a question which must be decided before a criminal case may proceed.*[6]

It is thus quite obvious that the Rules have a very stringent definition, and yet, the strict wordings have only been used in one case — *Torres v. Garchitorena.*[7] On the other hand, we have jurisprudence, comprised of some 250 to 260 cases, which touch upon and use the doctrine. It is worth noting that these cases do not concern themselves with civil and criminal cases alone. They also involve other combinations of cases, such as civil-civil, criminal-criminal, civil-administrative, criminal-administrative, labor, and election cases.

The doctrine has been used in our jurisdiction since the 1920s. It was only during the 1960s, however, in the 1964 Rules of Court, when such doctrine was codified. While it has already been codified, the codified version of the doctrine of the prejudicial question fails to provide an exhaustive guideline and framework under which the same may be used. Also, as there are no clear-cut guidelines under which the Supreme Court applies the doctrine, the present status of the doctrine of the prejudicial question simply breeds and breathes in confusion. On one hand, we have the very strict guidelines in the Rules of Court and, on the other, the very flexible application of the doctrine in cases decided by the Supreme Court: how can these then be reconciled?

Thus, the aim of this article is to bring together all the cases wherein the Court[8] used the doctrine or where the parties raised the doctrine as a defense, in order to deduce from them a framework or guideline, if such a framework exists, under which the doctrine of the prejudicial question operates. In addition, the title of this article refers to the *examination* and *re-examination* of the doctrine of the prejudicial question as it seeks to examine the doctrine through jurisprudence, and to re-examine the same, in order to be able to deduce a framework by which it is to be applied.

As the Rules of Court provide for very strict yet non-exhaustive guidelines in applying the doctrine and as jurisprudence provide for very flexible examples, how then do we apply the doctrine? When then, do we apply the doctrine?

6. NEW CIVIL CODE, art. 36.

7. Torres v. Garchitorena, 394 SCRA 494 (2002).

8. Note that in the succeeding discussions, "court" shall refer to lower courts while "Court" shall refer to the Supreme Court.

The questions then that seek to be answered are as follows:

1. As there are other possible combinations of cases that may use the doctrine, other than civil-criminal, such as civil-civil, criminal-criminal, civil-administrative, criminal-administrative, labor, and election cases, can the doctrine be used successfully in these instances?

2. In the civil-criminal combination, does the civil case strictly have to be filed before the criminal case to warrant the suspension of the latter? This is in consonance with the wordings of the 2000 Revised Rules of Criminal Procedure.[9] Do we follow the wording strictly or are there exceptions?

3. Ultimately, is there a framework that can be deduced from jurisprudence as to the use of the doctrine of the prejudicial question?

4. What purpose does the doctrine serve in this jurisdiction? What essential and salient features does it have that makes it indispensable? Or if it does not have any such essential and salient features, can it ultimately be dispensed with in our jurisdiction?

II. THE DOCTRINE OF THE PREJUDICIAL QUESTION: GENERAL IDEA AND HISTORY

Jurisprudence guides us as to the concept and history of the prejudicial question.

Berbari v. Concepcion was decided in 26 February 1920. This was the first decided case in our jurisdiction to have used the doctrine of the prejudicial question. This case defined a prejudicial question as a concept understood in law to be "that which *must precede the criminal action* that which requires a decision before a final judgment is rendered in the principal action with which said question is closely connected."[10] Despite this, *Berbari* provides caution that "Not *all previous questions are prejudicial, although all prejudicial questions are necessarily previous.*"[11]

It has also been defined as the question arising from a case the resolution of which is a logical antecedent to the issue involved in said case and the cognizance of which pertains to another tribunal.[12] It is also a question based

9. 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 111, § 7.

10. Berbari v. Concepcion, 40 Phil. 837, 839 (1920) (emphasis supplied); *see also,* Brito-Sy v. Malate Taxicab & Garage, Inc., 102 Phil. 482 (1957).

11. *Berbari,* 40 Phil. at 839 (emphasis supplied).

12. People v. Aragon, 94 Phil. 357 (1954).

on a fact distinct and separate from the crime but so intimately connected with it that it determines the guilt or innocence of the accused.[13]

Berbari explained that the doctrine was carried over to our jurisdiction from Spain, through the Spanish Law of Procedure of 1882, when the need for the application of said doctrine arose. The Court stated that:

> The compilation of the laws of criminal procedure of Spain as amended in 1880 did not have any provision concerning questions requiring judicial decision before the institution of criminal prosecution. *Wherefore, in order to decide said questions in case they are raised before the courts of these Islands, it would be necessary to look for the Law of Criminal Procedure of 1882, which has repealed the former procedural laws and is the only law in force in Spain in 1884 when the Penal Code was made applicable to these Islands.* Said law of 1882 is clothed, therefore, of the character of supplementary law containing respectable doctrine, inasmuch as there is no law in this country on said *prejudicial* questions.[14]

The case of *Merced v. Hon. Diez, et al.*[15] further explained that the requirement of an issue *cognizable by another court* is necessary to the existence of a prejudicial question, as Spanish jurisprudence, from which the doctrine of the prejudicial question was derived, requires such. This is because Spanish courts are divided according to their jurisdictions, some being exclusively of civil jurisdiction, others of criminal jurisdiction.[16] This is not the case, however, with Philippine courts. Philippine courts have both civil and criminal jurisdiction. Thus, as applied to Philippine courts, when two cases are pending before the same court, the court may be exercising

13. Benitez v. Concepcion, 2 SCRA 178 (1961).

14. *Berbari*, 40 Phil. at 841 (emphasis supplied).

15. Merced v. Hon. Diez, *et al.*, 109 Phil. 155 (1960).

16. *Id.* at 160-61.

> Spanish jurisprudence, from which the principle of prejudicial question has been taken, requires that the essential element determinative of the criminal action must be cognizable by another court. This requirement of a different court is demanded in Spanish jurisprudence because Spanish courts are divided according to their jurisdictions, some courts being exclusively of civil jurisdiction, others of criminal jurisdiction. *In the Philippines where our courts are vested with both civil and criminal jurisdiction, the principle of prejudicial question is to be applied even if there is only one court before which the civil action and the criminal action are to be litigated. But in this case the court when exercising its jurisdiction over the civil action for the annulment of marriage is considered as a court distinct and different from itself when trying the criminal action for bigamy* (emphasis supplied).

different jurisdictions over these cases, for instance, jurisdiction over a civil case for annulment of marriage on the one hand and criminal jurisdiction over a complaint for bigamy on the other. Hence, the doctrine is applicable.[17]

This definition later on evolved to state the elements constitutive of a prejudicial question: (a) the civil action involves an issue similar or intimately related to the issue raised in the criminal action; and (b) the resolution of such issue determines whether or not the criminal action may proceed. This enumeration is now *codified* and *modified* in the 2000 Revised Rules of Criminal Procedure, which provides that:

> (a) the previously instituted civil action involves an issue similar or intimately related to the issue raised in the subsequent criminal action, and (b) the resolution of such issue determines whether or not the criminal action may proceed.[18]

This is as much as can be found in the history of the prejudicial question. It is a Spanish doctrine brought to our territory by reason of our being a colony of Spain. It was insinuated in the Spanish Rules of Court of 1882.[19] In addition, *Berbari* was the first documented case to have used the doctrine in deciding the issues of the case.

The doctrine has been used in this jurisdiction so as to avoid conflicting court decisions, to avoid unnecessary litigation, and to address different rights that are at stake in different proceedings. For instance, in civil cases, what is involved is money or property, whereas in criminal cases, it is life, liberty, as well as money or property.[20] Hence, when a prejudicial question exists in a

17. *See, Merced,* 109 Phil. at 160-61. The distinction between prejudicial question in Spanish jurisprudence and Philippine jurisprudence is that:

> Spanish jurisprudence, from which the principle of prejudicial question has been taken, requires that the essential element determinative of the criminal action must be cognizable by another court. This requirement of a different court is demanded in Spanish jurisprudence because Spanish courts are divided according to their jurisdiction, some courts being exclusively of civil jurisdiction, other of criminal jurisdiction. In the Philippines, where courts are in both civil and criminal jurisdiction, the principle of prejudicial question is to be applied even if there is only one court before which the civil action and the criminal action are to be litigated.

18. 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 111, § 7.

19. *See,* Antonio Bautista, *Procedure and Pre-emption in Adjudication: The Doctrine of Prejudicial Questions,* 78 PHIL. L.J. 1 (2003) [hereinafter Bautista].

20. *See generally, id.*

civil case, it is important to resolve such issue, as it may be determinative of the guilt of the accused in the criminal case and may result in avoiding the subjection of the accused to a restraint on his life and liberty, a punishment more difficult and graver.

III. THROUGH THE YEARS — THE RULES OF COURT AND THE PREJUDICIAL QUESTION

The rules on criminal procedure were originally governed by:

1. The Spanish Law of Criminal Procedure (*Ley de Enjuiciamento Criminal).*
2. General Orders No. 58, dated 23 April 1900.
3. Amendatory Acts passed by the Philippine Commission (Act No. 194).
4. Philippine Bill of 1902, Jones Law of 1916, Tydings-McDuffie Law and the Constitution of the Philippines.[21]

These were all incorporated in the 1940 Rules of Court. Thereafter, the Rules were amended in 1964, 1985, 1988, and 2000.

Relative to the doctrine of the prejudicial question, the Rules of Court have been amended in 1964, 1988, and 2000:

The 1964 Rules provide:

> A petition for the suspension of the criminal action based upon the pendency of a prejudicial question in a civil case may only be presented by any party during the trial of the criminal action.[22]

The 1985 and 1988 Rules state, respectively:

> A petition for suspension of the criminal action based upon the pendency of a prejudicial question in a civil action may be filed in the office of the fiscal or the court conducting the preliminary investigation. When the criminal action has been filed in court for trial, the petition to suspend shall be filed in the same criminal action at any time before the prosecution rests.[23]

21. OSCAR M. HERRERA, TREATISE ON HISTORICAL DEVELOPMENTS AND HIGHLIGHTS OF AMENDMENTS OF RULES ON CRIMINAL PROCEDURE 1-2 (2001) [hereinafter HERRERA].
22. 1964 RULES OF CRIMINAL PROCEDURE, rule 111, § 5 (superseded 1985).
23. 1985 RULES OF CRIMINAL PROCEDURE, rule 111, § 6 (superseded 1988).

> The two (2) essential elements of a prejudicial question are: (a) the civil action involves an issue similar or intimately related to the issue raised in the criminal action; and (b) the resolution of such issue determines whether or not the criminal action may proceed.[24]

The 2000 Rules now provide:

> A petition for suspension of the criminal action based upon the pendency of a prejudicial question in a civil action may be filed in the office of the prosecutor or the court conducting the preliminary investigation. When the criminal action has been filed in court for trial, the petition to suspend shall be filed in the same criminal action at any time before the prosecution rests.[25]
>
> The elements of a prejudicial question are (a) the previously instituted civil action involves an issue similar or intimately related to the issue raised in the subsequent criminal action, and (b) the resolution of such issue determines whether or not the criminal action may proceed.[26]

A significant revision in the 1964 Rules by the 1988 and 2000 Rules is that the petition for suspension may be filed with the fiscal, even when the case is still in the preliminary investigation stage or in court, before the prosecution rests its case. In the 1964 Rules, the petition for suspension may only be filed in court during the trial of the criminal case.

Section 7 of the 2000 Revised Rules of Criminal Procedure is Amendment 8 in the revision of the Rules in 2000. There was a clamor to delineate the use of the doctrine and the doctrine itself as it was much prone to abuse.

Solicitor General Galvez sought a clearer definition of a prejudicial question. He said that the determination of its existence should be based on whether the issue on the civil case can be decided by the criminal court.[27]

Justice Tuquero suggested the removal of the power of the fiscals to determine the existence of the prejudicial question that would suspend the criminal proceedings. He noted that this has been abused in the past by the prosecutors. The courts should only be the one to determine the existence of a prejudicial question. Justice Feria said that this proposal will not only

24. 1988 RULES OF CRIMINAL PROCEDURE, rule 111, § 5 (superseded 2000).
25. 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 111, § 6.
26. *Id.* § 7.
27. Revised Rules of Court of the Philippines, Minutes of the Meeting of the Committee on the Revision of the Rules of Court (May 17, 1999) [hereinafter Minutes of the Meeting].

reverse Francisco but would also affect the institution of a criminal case with the Fiscal provided in rule 110.[28]

Hence, the present changes. These changes now limited a prejudicial question to a "*previously* instituted civil action."[29] This means that before the provision on the prejudicial question comes into play, the civil action must have already been previously instituted or filed prior to the filing of the criminal case.[30]

It was opined that the strict wording has been suggested and incorporated into the Rules to avoid perceived abuse by litigants who may file a case only to prevent the criminal case from proceeding.[31] This is supported by the statement made by Solicitor General Galvez during the meeting of the Committee on the Revision of the Rules of Court, in which case Justice Feria made the suggestion of adding the words "previously instituted" before "civil action" and "subsequent" before "criminal action."

Solicitor General Galvez explicated that his proposal of delineating the nature of a prejudicial question will discourage the willful filing by the accused of a civil case in order to delay or suspend the criminal case. Justice Feria noted that the criterion of the Solicitor General is too restrictive. He opined that the prior filing of the civil case should be taken as good faith on the part of the accused. As a safeguard against abuses, he then suggested to amend section 5 by adding "PREVIOUSLY INSTITUTED" before "civil action" and "SUBSEQUENT" before "criminal action." This modification, Justice Feria declared, would also achieve the purpose of the Solicitor General. The Committee approved Justice Feria's suggestion. The amendments were ordered inserted into the Approved Draft.[32]

IV. CASE SURVEY (1920-2006)

This part will concern itself with cases from 1920-2006, from 26 February 1920 up to 17 March 2006 to be exact, which made use of and discussed the doctrine of the prejudicial question,.

The cases shall be grouped into smaller subdivisions depending on the combinations of the types of cases that are involved. These subdivisions or

28. *Id.*

29. *See*, HERRERA, *supra* note 21, at 50 (emphasis supplied).

30. *See*, FORTUNATO GUPIT, SIGNIFICANT REVISIONS IN CRIMINAL PROCEDURE 27 (2003).

31. *Id.* at 27-28.

32. Minutes of the Meeting, *supra* note 26 (Oct. 25, 1999).

combinations are: (a) civil-criminal, which shall be subdivided further as to which case precedes the other, hence (1) civil-criminal and (2) criminal-civil, and a special subdivision dealing with bigamy cases is provided under (3); (b) civil-civil; (c) criminal-criminal; (d) civil-administrative; (e) criminal-administrative; (f) labor cases; and (g) election cases.

A. Civil-Criminal Cases Combination

This subdivision is further subdivided into civil-criminal and criminal-civil combination, if only to test the strict wordings of the 2000 Revised Rules of Criminal Procedure.[33] The latter states that the civil case must precede the criminal case before the latter may be suspended. Where the civil case is filed belatedly, however, are there instances that warrant the suspension of the criminal case, serving as an exception to the strict wordings of the Rules?

1. Civil-Criminal Cases Combination

Under this subsection, the civil case is filed previous to the criminal case. The earliest case under this category is the earliest case that delved into the doctrine of the prejudicial question — *Berbari v. Concepcion.*[34]

This involved a civil and criminal case. Berbari entered into an agreement with Chicote to establish a corporation. Chicote should have, soon after, given the former half of the capital.

Berbari thereafter, instituted a civil case against Chicote for recovery of a certain sum of money that the latter owes to him personally. Chicote refused to comply with this. Instead, he filed a case of *estafa* against Berbari for allegedly embezzling money that, pursuant to their agreement, should have been used as part of the capital of the business. Berbari defended himself in the *estafa* case alleging that he used said money in compensation for the amount Chicote owed him.

Berbari then requested the Court hearing the criminal case to suspend the criminal proceedings as the issue in the civil case constituted a prejudicial question necessary for the determination of guilt in the criminal case.

The Supreme Court believed otherwise saying that the issue and decision in the civil case was not prejudicial to the decision in the criminal case, if at all, it was "the criminal case which [wa]s prejudicial to the civil case."[35] The Court stated, in addition, that it was not even a question which

33. 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 111, § 7.

34. Berbari v. Concepcion, 40 Phil. 837 (1920).

35. *Id.* at 840.