

**ANTONIO MA. BARRETO ET AL., PLAINTIFFS AND APPELLANTS, VS.
AUGUSTO H. TUASON ET AL., DEFENDANTS AND APPELLANTS.***G. R. No. 23923. March 23, 1926*

Ponente: ROMUALDEZ, J.

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More than a century and a quarter ago, in the ancient town of Binondo, now one of the districts of the City of Manila, Don Antonio Tuason founded a mayorazgo of strict agnation upon the third and the remainder of the fifth of all his properties, by an instrument executed to that end, duly approved by the King of Spain in a cedula issued for that purpose.

It was therein provided, among other things, that the revenue of the properties so entailed, and all such others as might be annexed thereto, should be distributed in the proportion of four-fifths for the first born, and his successors, and one-fifth for the other eight children and other descendants of the founder, mentioned in the instrument.

The plaintiffs allege that this disposition constituted a family trust (*fideicomiso familiar*) which thereafter became subject to the provisions of article 4 of the Statute of Disentailment of October 11, 1820; that the defendants, and their predecessors, all of whom descend from the lines of the first born, have so considered it and have been paying, up to the year 1921, sums of money on account of the fifth of the revenue of the mayorazgo; that the defendants purchased in 1905 and 1915 the rights of some of the beneficiaries of the said trust; that in the payments of the fifth of the revenue mentioned, fraud was committed; that the plaintiffs, who are part of the descendants of four of the eight children who were the beneficiaries of the fifth of the revenue, were without a copy of the instrument of foundation, the protocol of the notary before whom it was acknowledged having disappeared, and that for this reason they were unaware of their rights and were unable to discover the fraud until the year 1922 in which the original of the said Royal Cedula was discovered in the archives of Seville, Spain; that the defendants fraudulently obtained a Torrens title in their favor upon the entailed real estate; that there are now no surviving descendants of four of the eight children of the founder who are beneficiaries of the fifth of the revenue. Plaintiffs conclude by praying that defendants be required to pay them, as damages, P500,000, that is, one-half of the family trust administered by the latter, and that this liability be enforced against the properties described in paragraph 31 of the complaint; that defendants render an account of the receipts, expenses and profits of the said properties from February 4, 1874, when they took possession of them, until December 31, 1921, and from January 1, 1922, until judgment is rendered; that the defendants, jointly and severally, pay them their share of the liquidation of the product of said properties, after deducting the amounts received on account by plaintiffs; that the defendants pay legal interest upon such sums as may be adjudicated, computed from the filing of the complaint until the complete payment of the amounts therein demanded.

The defendants interposed several defenses, in the first of which they alleged that the Royal Cedula upon which the foundation rests and the Statutes of Disentailment are contrary to plaintiffs' contentions. In their second defense they allege possession of a Torrens title to the property in question, free from charges or encumbrances.

The

third defense is that of the prescription of the action here brought. As a fourth defense the defendants Dona Paz Tuason de Gonzalez, Dona Consuelo Tuason de Quimson, Don Juan Tuason and Dona Albina Tuason contend that they inherited the share of their father Don Jose Maria Tuason in the properties constituting the endowment of the mayorazgo; that proceedings were had for the administration of the testate estate of the said deceased and a committee on claims appointed which performed its duty, but that no claim whatever was presented by any of the plaintiffs; that the partition of the hereditary properties was decreed and the proceedings in the estate declared to be finally concluded. By way of counterclaim the defendants ask that plaintiffs return the pensions received after the year 1917 on account of the revenue of the properties which constitute the mayorazgo, as the payments of such pensions were improper.

The judgment of the Court of First Instance of Manila before which the case was tried dismisses the complaint and the counterclaim, without costs.

Both parties appealed. The plaintiffs contend that the trial court erred—

(1) In holding that before the disentailment the possessors of entails were not mere usufructuaries of the inalienable properties which constituted the entail. (2) In weighing the evidence and in deciding that the provision made by the founder, Don Antonio Tuason, in favor of his second-born children and their successors is not a family trust. (3) In confusing the charges and encumbrances referred to in article 7 of the Statute of Disentailment with the allowances for support and pensions mentioned in article 10 of the same statute. (4) In failing to give effect to the allegations and evidence of fraud adduced by plaintiffs with respect to the performance of the trust by defendants. (5) In holding that the defendants were entitled to obtain, as they did obtain, a Torrens title upon the real estate in question, and that the allegation of plaintiffs that they obtained it by fraud is not supported by the evidence. (6) In holding that even admitting that the plaintiffs are within the general denomination of descendants of the founder of the mayorazgo they are not entitled to receive any part of the revenue, it not having been demonstrated that they are poor. (7) In denying the new trial prayed for by plaintiffs. The defendants assign as error the action of the court in dismissing their counterclaim.

The principal undisputed facts which must be stated as a basis for disposing of the questions presented are as follows:

The mayorazgo now under consideration was created February 25, 1794.

On the 4th of June of the same year, 1794, the founder, Don Antonio Tuason, died in Manila.

On August 20, 1795, the mayorazgo was approved by Royal Cedula.

On October 11, 1820, the Statute of Civil Disentailments was promulgated in Spain.

On October 31, 1863, a Royal Decree was issued extending to the overseas provinces the statutes concerning civil disentailments and declaring them to be in force in such provinces from March 1, 1864.

On February 1, 1874, Don Jose Severo Tuason, at that time the possessor of the entail, executed a will, respecting the mayorazgo and transmitting it as such to his first-born son, Don Jose Victoriano Tuason, and died the third day of the same month and year.

On February 4, 1874, an inventory was prepared of the properties left by Don Jose Severo Tuason, among which the mayorazgo was mentioned.

On January 31, 1875, a liquidation and partition of the said properties was made, and the properties of the mayorazgo were preserved and respected as entailed.

On January 25, 1878, Don Jose Victoriano Tuason, the first-born son of the testator, who was at that time thirteen years of age, died in Metz (formerly Germany, now France).

On August 7, 1896, the liquidation and partition of the property was registered.

On October 9, 1905, Don Jose Rocha y Ruiz sold, to the heirs of Don Jose Severo Tuason his share of the fifth of the revenue of the properties of the mayorazgo.

On November 16, 1916, Dona Remedios Aragon y Rocha also sold to the heirs of Don Jose Severo Tuason her share of the fifth of the said revenues.

The books of the defendants show the receipts and dis-bursements relating to the real estate of the mayorazgo (Exhibit 2) from January, 1904, until December, 1922. In each year items appear under the heading, "Participations in one-fifth of the products." In the year 1905 an entry appears "Purchase of rights as to one-fifth of the products;" in the year 1906, "Purchases of rights, to one-fifth of the products;" in the year 1910, "Purchase of rights to one-fifth of the products," and in the year 1911 " Notary's fees for deed of assignment with respect to one-fifth of the products;" in the year 1912, "Notary's fees for deeds of assignment as to one-fifth of the product"

In the course of the trial the parties agreed upon certain facts by means of the following stipulation:

"The parties to the above entitled cause appear before this court and agree that the court may consider as admitted, without the necessity of evidence, the following facts:

"I. The facts alleged in paragraphs I, II, III, IV, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI and XXXII of the amended complaint, dated November 7, 1923.

"II. The facts alleged in paragraphs 3 and 4 of the first special defense in the answer to the amended complaint, dated April 16, 1924.

"III. That when Don Jose Severo Tuason died on February 3, 1874, all the properties which constituted the mayorazgo passed to his first-born son, Don Jose Victoriano Tuason, in accordance with his will, a certified copy of which is attached, marked as Exhibit 1.

"IV. The facts alleged in paragraphs 6, 7, 8, 9, 10 and 11, with the exception of the allegation contained in paragraphs 9 and 10 that the properties which constituted the mayorazgo passed freely to Don Jose Victoriano Tuason, which is not accepted by counsel for plaintiffs, as this is the question of law raised by the complaint.

"V. That none of the plaintiffs received any pensions whatever as a charge against the revenue or products of the properties which constituted the mayorazgo at the time when the same passed into the hands of Don Jose Victoriano Tuason; and with the exception of those who are mentioned in paragraph 2 of the counterclaim, none of them, nor their ancestors, received any pensions whatever as a charge upon the revenues or products of the properties which constituted the mayorazgo during the ten years prior to the date of the filing of the original complaint.

"VI. The facts alleged in paragraph 2 of the second special defense of said answer to the amended complaint.

"VII. The facts alleged in paragraphs 1, 2, 3, and 4 of the fourth special defense of the defendants Paz Tuason de Gonzalez, Consuelo Tuason de Quimson, Don Juan Tuason and Albina Tuason, contained in said answer to the amended complaint.

"VIII. All the facts alleged in paragraph 2 of the counterclaim contained in the said answer to the amended complaint.

"IX. That the present assessed value of the Hacienda Santa Mesa-Diliman is three million five hundred fifty thousand six hundred forty-six pesos (P3,550,646); that of the Hacienda de Mariquina one million five hundred

seven thousand one hundred forty pesos (P1,507,140) ; that of the lots and buildings on Calle Rosario five hundred forty two thousand three hundred eighty-two pesos (P542,382); and solely for the purpose of the decision in this case it is agreed that their real value as between a purchaser desiring to buy and a vendor willing to sell said properties is the same as their assessed value.

"X. That the revenue and expenses of the properties on Calle Rosario are those shown in the statement attached, marked as Exhibit 2, and that said statement is taken from the books of the defendants.

"XI. That the receipts and expenditures of the Haciendas Santa Mesa-Diliman and Mariquina are also those which appear in the statement attached, marked as Exhibit 3, which was also taken from the books of the defendants.

"XII. That the stipulation contained in the preceding paragraphs shall not prevent the plaintiffs from impugning, as improperly charged, any of the items appearing in said two statements.

"XIII. That in the record of the testamentary estate of the late Don Juan Jose Tuason, case No. 16031, above-mentioned, a document appears, a copy of which is annexed, marked as Exhibit 4.

"XIV. A copy of the deed of partition of the property of Don Jose Severo Tuason is "attached and marked Exhibit 5.

"XV. That the plaintiffs, who, as admitted in paragraph 2 of the cross-complaint, collected from the defendants the sums mentioned in said paragraph, did so upon receipts prepared by Don Augusto Tuason, acting for himself and his brothers, and worded as follows:

" 'Received from Don Augusto Tuason the sum of * * * the part corresponding to me of the fifth of the products of the properties of the Tuason mayorazgo corresponding to the current year.'

"XVI. That Don Jose Rocha y Ruiz Delgado, as the first party, and the brothers and sister, Doña Teresa, Don Juan, Don Mariano, Don Demetrio and Don Augusto Tuason, as the second parties, executed a contract of assignment of rights marked Exhibit 6; and likewise Dona Remedios Aragon y Rocha and the said brothers and sister entered into the contract of assignment of rights marked Exhibit 7.

"Manila, P. I., August 30, 1924.

"ANTONIO SANZ and JOSE GALAN BLANCO

"By (Sgd.) ANTONIO SANZ

"Attorneys for Plaintiffs

"ARANETA & ZARAGOZA

"By (Sgd.) GREGORIO ARANETA

"Attorneys for Defendants"

The various questions raised by the parties turn upon these fundamental points, namely, (a) the nature of the mayorazgo; (b) the Statute of Disentailment and the conduct of the interested parties and their effects; (c) defenses to this action alleged by defendants; and (d) the persons entitled to the relief prayed for.

THE NATURE OF THIS "MAYORAZGO"

Its literal text, together with that of the Royal Cedula by which it was approved and confirmed, is as follows:

"Don Carlos, by the grace of God King of Castile, etc., whereas on behalf of you, Don Vicente Dolores Tuason, Captain of Infantry of the Royal Armies, Lieutenant-Colonel of the Regiment of the Prince Royal, of the City of Manila, a resident of the said city, Testamentary Executor of your deceased father, Don Antonio

Tuason, Lieutenant-Colonel of the said Royal Armies and Colonel attached to the above-mentioned regiment, it was made known to me, on the 13th of April of the present year, that your said deceased father, on the 25th of February of last year, founded a mayorazgo (estate tail) of strict agnation, upon one third and the remainder of the fifth part of all his property, estate and effects which at that time were of the value of one hundred and thirty-five thousand pesos, appointing you in the first place to enjoy the same as his first-born, and after you to take your place your eldest son and at his death to succeed him his eldest son and so on, adding that although the wishes of Don Antonio Tuason in regard to the accomplishment of said entail in all its parts were very keen, he could not effectuate them on account of his death, but that the duty of carrying them into effect had been imposed upon you not only on account of your appointment as Executor of his Estate, but also as being the first one selected to possess the mayorazgo, with which object, you and your seven brothers received during the lifetime of your father your respective paternal legitimes; that your said father made explicit designation of the real estate that was to be entailed with the advertence that if any amount should be lacking to complete the full value of the third and the remainder of the fifth, it should be delivered in cash to be invested in real estate specially in lands; that nothing more remained to be done, according to the attached verified copy of the instrument establishing the said entail which copied literally is as follows:

" 'I, Don Antonio Tuason, a resident of this Pueblo of Binondo, beyond the walls of the City of Manila, in the Philippine Islands, Lieutenant-Colonel of Infantry of the Royal Armies of H. M. the King, and Colonel attached to the Regiment of Militia of the Prince Royal; being in good health according to my understanding and in the full use of my senses and mental faculties, desiring on the one hand to recompense the good services rendered to my person and my house by my eldest living son Don Vicente Dolores Tuason, Captain of the Royal Armies, and Lieutenant-Colonel of the above-mentioned Regiment, and desiring on the other hand to insure in part the permanence of my estate, without diminishing the legitimes of my other children, so that they may fully enjoy them, and taking into consideration the evanescence of the great family fortunes which have existed in these Islands on account of their not having been entailed, I have determined to establish an entail or mayorazgo of the third part and the remnant of the fifth part of all my property, as I have stated in my last will and testament and in my codicils, and with this object in view, making use of the right that has been by law conferred upon me, I execute this deed with the following clauses and conditions subject in everything to whatever the Royal Audiencia may determine and H. M. may decide, to all of which I now and forever assent.

" 'First. Having taken stock and inventory of all the property of which I am now possessed, in cash, real estate, jewelry and other things, I found myself to be the possessor of an estate of the value of one hundred and thirty-five thousand pesos, which after having deducted the third and the fifth, left me a remainder of seventy-two thousand pesos, which I divided amongst my eight children, there corresponding to each one of them the sum of nine thousand pesos, which sum was actually delivered to each and every one of them, as shown by documents which I have in my possession; and the third and the remnant of the fifth, I hereby devote to the aforesaid entail, and if by accidents of time the total value of my property should increase or diminish, so also shall the said capital of this entail, which never must be allowed to exceed the total value of the said third and remainder of the fifth.

" 'Item.

" 'That the possessor of this entail or mayorazgo or betterment must take an oath before the Court of Justice of the territory, to observe and perform all the clauses and conditions contained herein, and if he should fail to observe and perform any of them, either totally or in part, he shall lose his right to the mayorazgo, which shall pass to the next successor.

" 'Item.

" 'That he must keep in his possession the original parchment Royal Patent of Nobility of my house, and in case that it should be lost, he must immediately request a certified copy thereof, from the Royal Audiencia, the Noble City, or the Court of Justice of Tondo in whose offices it has been recorded and so likewise he must do with the certificate of the coat of arms and insignia of my house, which have been registered in the said Noble

City.

" 'Item.

" 'He must uphold all the other rights and privileges conferred upon my house by the aforesaid Royal Letters Patent and redress all wrongs in violation thereof which may be committed or attempted against my legitimate descendants, bearing in mind that one of my objects, in the establishment of this mayorazgo, is to uphold and defend the honors that H. M. has deigned to confer upon me, as a proof of the esteem in which I hold those gracious honors and the deep gratitude I feel on account of them.

" 'Item.

" 'It shall be his duty to bear, as his first surname, my family name of Tuason, and so shall he sign his name in all judicial and extrajudicial matters; he shall also display my coat of arms upon all his crests and buildings and he who shall fail to do any of these things, shall forfeit his right of succession to the mayorazgo, and I hereby declare him excluded therefrom.

" 'Item.

" 'It shall be his duty to set apart one-fifth of the net revenue derived from the entail each year, and that one-fifth part shall be divided into eight parts, giving one to each of my eight children, and in their absence, to my, grandchildren, but upon the understanding that if one or more of my children should die without succession, the part belonging to them shall be distributed among my grand-children and other descendants of mine according to their needs and as prudence may dictate to him, so that, when the time arrives that none of my children or grandchildren are alive, it shall then be always understood that said fifth part shall be applied to all those of my descendants who are poor, the apportionment to be made by him prudently according to their needs and therefore the possessor of the entail is hereby charged to discharge this duty with conscientious scruple.

" 'Item.

" 'That the holder of this mayorazgo, having legitimate sisters who may desire to marry or to enter into some convent, shall assign to the former an appropriate marriage portion, and shall defray, for those who may desire to become nuns, all the expenses that may be necessary up to the moment that they take the veil, it being well understood, nevertheless, that all these expenses shall be taken out of the profits and never out of the capital.

" 'Item.

" 'It shall be his duty to preserve all the entailed properties in good condition and to try to increase them as much as possible, and their increase shall also be incorporated into the mayorazgo as capital.

" 'Item.

" 'Bearing in mind that the entailed houses and other real property belonging to this mayorazgo may be in danger of fire, on account of their proximity to houses built of nipa, bamboo, and other combustible materials, I order the possessor of the mayorazgo to keep always in good condition the fire engine from Europe, which I now have at my home, and which I bought for that purpose, at the cost of P110. Under no excuse whatsoever, even in the case of a public calamity, must that engine be taken out of my home, except for the purpose to which I destined it; and should it ever deteriorate or become useless, he must immediately substitute it with another of the same quality, the cost of which must be taken out of the earnings of the mayorazgo; so that if through his guilty negligence any of the properties of the mayorazgo should be destroyed by fire, as a penalty for his non-performance of this condition, he shall be deprived of the mayorazgo and this shall pass to the next succession but his successor shall be obliged to rebuild the property destroyed, and the cost of this work shall be taken out of the entire earnings of this mayorazgo, if it be necessary, but never out of the capital, so that he shall first apply the earnings of the mayorazgo to whatever expenses may be necessary for the reconstruction

of that property, rather than to his own personal wants.

" 'Item.

" 'He shall also provide another fire engine at the expense of this mayorazgo, to the value of P200, more or less, according to its size, and it shall always be kept in good condition by the holder of this mayorazgo, with the object of rendering assistance to the public with it; and in case of fire the said engine shall be handled by the servants of the possessor, or by any other well known and expert persons; but if by reason of this my desire to help the public in its need bickerings and controversies should arise, or if the strange persons who are to handle the said engine should not do so with all the care that such a delicate and expensive engine requires, or should it become a cause of worry and unpleasantness for the possessor of the same, then this clause shall not stand and have the effect that I intended it to have, but I earnestly caution the holder of the mayorazgo to observe as faithfully as possible this my pious request, and so attract the blessings of heaven, for it is my earnest desire that the public shall never lack an engine so necessary as that fire engine, the cost, repair and replacement of which must be taken out of the earnings of the mayorazgo. I also enjoin the possessor of the mayorazgo to be pious and generous in his expenditures for Divine Worship, the Service of then King, and the Public Welfare (without vanity) so that the Lord may bless all his undertakings. „

""Item.

" 'That the possessor of the mayorazgo must necessarily be a layman, and never a member of any religious order under vow of chastity; and should he enter any religious order while holding the mayorazgo, it shall ipso facto pass to his children.

" 'Item.

" 'That he must be a Roman Catholic Christian and free from the stigma of treason against H. M. and the country, or that of any other infamous crime, and should he be guilty of any of these crimes while holding the mayorazgo, it is my desire that he shall be considered as having been excluded from the same one hour exactly before the time he committed the said crime, and the mayorazgo shall pass to the next in the order of succession which I establish in this document, and in the same way let the mayorazgo be understood as having been lost to him who should dare to mortgage it or in any other way impose or levy upon it any charge that may endanger its existence, and let everything that he may do against the said mayorazgo be considered to be null and void.

" 'Item.

" 'As soon as the establishment of this mayorazgo shall be approved, I shall give and deliver to him the value of the said third and fifth, deducting the amount that I may consider it necessary to expend upon the charges on the fifth, and should this amount deducted be found insufficient for it, the amount that may be lacking shall be taken from the mayorazgo, but should it be found to be in excess of this requirement, the surplus shall be returned to the funds of the mayorazgo.

" 'Item.

" 'The properties upon which I establish this entail are: My private residence, with every thing that is contained within its fence, as well as the dependencies that are built close to the said house and fence on the right hand looking towards the church of this pueblo of Binondo, which are a shed, with a tile roof, having display tables; a stone house and the lot of land that reaches up to the estero towards Calle Nueva of this pueblo, all of it surrounded by a stone wall; the image of Our Lady of Soterrana of Nieva, dressed in a cloth of beaten gold, and contained within its golden tabernacle which is at this date in my private residence; and the organ which is also in the reception room of my said residence. The value of my residence is declared in my inventory taken the twelfth of October, seventeen hundred and seventy-nine, adding to it the sum of P2,200 for the improvements made on it, and which have not yet been completed; and the value of the other properties shall

be their purchase price according to their documents of sale, all of which property is absolutely free from any encumbrance; and if any amount should be lacking to complete the full value of the third and remainder of the fifth, it shall be delivered to the holder of the mayorazgo, in cash, to be invested in real estate, especially in lands, which shall also become capital of the mayorazgo; and if before the Royal approval of the mayorazgo I should find some houses appropriate for this purpose, I shall buy them for this object and I shall declare them to belong to the mayorazgo.

" 'Item.

" 'It shall be the unavoidable annual duty of the holder of this mayorazgo, to order a novena of Our Lady of Soterrana (of my special devotion) to be made at the Parochial Church of this pueblo of Binondo, setting up the corresponding candles in Her altar, and on the last day of that novena to have a public procession of that image through the streets of this pueblo, as I have been accustomed to do up to now, with all possible ceremony, and for this purpose I now have in my hands the sum of P2,000 belonging to this pious object (the establishment of which has been set forth in my aforesaid last will and testament), the earnings of which sum at the rate of five per centum per annum, which are one hundred pesos, have been destined to the preservation and maintenance of this act of devotion; he shall also fulfill another pious trust in favor of the souls in Purgatory, to the same amount of two thousand pesos, left by my deceased wife, in my possession, the interest whereof, which is one hundred pesos, must be delivered to the parish priest of this pueblo to say a collectory of masses in the same church during the aforesaid novenary of our Lady, giving six reales as alms to each of these priests for every mass, and if there be any surplus money after the aforesaid novenary it is my will that it be totally spent for masses in behalf of the souls in purgatory, and in order that from now henceforth the needs of both these pious intentions be duly attended to, as being one of the objects which I have had in mind in establishing this mayorazgo, it is my will that the aforesaid sum of four thousand pesos belonging to the two above-mentioned pious foundations be also entailed. in the said mayorazgo. It is also my will that the jewelry of gold, silver and diamonds belonging to the said image and destined exclusively to Her cult, which I have actually in my possession at this date, and which are described in a separate inventory, be also kept in his possession by the holder of the mayorazgo.

" 'Item.

" 'It is my will that all the property hereby entailed and all that which may be added to it shall not be sold or alienated, in whole or in part, or charged or encumbered or mortgaged with censos, or any other kind of encumbrance or charge; and if the contrary is done it shall be void and he who shall have done it or attempted to do it shall immediately lose the possession of the mayorazgo, and it shall pass to the next in succession, who shall make demand for the annulment of the alienation within thirty days; and if he shall fail to do so, he shall also lose the mayorazgo, and it shall pass to the following possessor; and the same rule shall apply as to all the possessors, and this clause shall be observed although ignorance of it be alleged.

" 'Item.

" 'To the enjoyment and possession of the mayorazgo I hereby call in the first place my aforesaid son, Don Vicente Dolores Tuason, on account of the great service he has rendered me, particularly in my old age, for which reason I consider him to have been bettered upon valuable consideration, and therefore he shall enjoy the possession of the same, upon the terms set forth, for all the days of his life, and after his death his eldest son, if he be alive, shall succeed him, and in default of his eldest son, he shall be succeeded by the eldest son or grandson of this said eldest son, and so on, following the direct line of descent; and in the absence of any direct lineal descendant of his eldest son, let the possession pass to the eldest living son of the aforesaid Don Vicente, and should there be no son left alive, then to the eldest grandson of his eldest son; and should the male line of my first born be completely extinguished I desire that the mayorazgo shall pass unto the eldest son of my deceased son, Don Santos Tuason, and observing in the succession this same order of procedure, the descendants of my others sons shall in their turn be called to the possession of the mayorazgo in the successive

order of the dates of their birth. While there may remain a single male descendant of any of my male children no female descendants of mine shall enter into the possession of the mayorazgo; for it is my will that the said possession shall pass from male to male in strict agnation. But should there be absolutely no male descendant of the male line, let the descendants of the female line enter into possession, observing the same order that has been preserved for the male line, and always giving preference to the male rather than to the female; it being understood that in this order of succession the possession shall be given to that one of my descendants most nearly related to the last lineal descendant of my son Don Vicente who may have held the mayorazgo; and in this aforesaid appointment females shall be qualified to possess the mayorazgo; but the males shall be always preferred to the female even though the latter may be an elder sister; and in the absence of all descendants of the female line of my sons, let the possession pass to the descendants of my daughters in the order of their birth, starting with those of my eldest daughter, Dona Eustaquia, and the order of this succession shall be the same as that already prescribed for the male line.

" 'Item.

" 'And should the line of my descendants of all kinds be absolutely and completely extinguished, then the mayorazgo shall be applied to the maintenance of the Regiment of the Militia of Mestizos Sangleyes, entitled of the "Prince Royal" or any other body of soldiers of the same nationality which may be bearing arms in the service of our King; but if at that time there should be in existence any Monastery for descendants of that nationality, then from that time I deed in favor of it one-half of the aforesaid mayorazgo; and should there not be at that time either of those two things, let the whole mayorazgo revert to the Royal Treasury. And with these clauses, conditions, and charges I hereby make, constitute and establish this mayorazgo, constituting its lawful possessor the owner (señor) thereof upon the terms set forth; and it is my desire that it have all legal effect that other mayorazgos have and that it should be so considered after obtaining the Royal Consent and not before, because in establishing its clauses and conditions it has been my only aim to make them known to the Royal Audiencia and to H. M. so that in view of the same they may alter or modify them according to their will, with the understanding that I, as a faithful vassal and obedient subject, hereby accept the establishment of the mayorazgo under any terms and conditions that may meet with the approval of H. M., in this pueblo of Binondo this 25th of February, 1794. Antonio Tuason.'

"In view of which you concluded by praying that the said document, having been presented to me, I should deign to approve, in each and every one of its terms, the above-mentioned entail of strict agnation, which of the third and the remainder of the fifth of his property the aforesaid Don Antonio Tuason established in favor of yourself as first-born son, and of your own and his other descendants under the terms set forth therein, and requested that the corresponding royal permit be duly issued. And bearing in mind the report of my Council of the Indies, and a letter from my Royal Audiencia of Manila, dated July 22 of last year, declaring that the said Audiencia could find no objection to the establishment of the above-mentioned entail and attaching thereto a certified copy of the document in which the aforesaid entail was established, and in view furthermore of the reports received by me from the Royal Excequer and from my Fiscal, I have deigned to approve your request in consideration of all the circumstances detailed above as well as of the services you rendered me by paying me the sum of 8,800 reales as Half Annata.

"Therefore, of my own volition, with full knowledge of all the facts, and by virtue of my Royal Prerogative, of which I have decided to make use in the present instance, and of which I do make use as King and natural Lord, recognizing no higher authority over me in regard to my temporal power, I hereby do approve the establishment of the mayorazgo founded by your above mentioned father, Don Antonio Tuason, and I hereby declare it to be in effect henceforth forever, and I do ratify and confirm henceforth the validity of the same, in the terms in which it was established, with all the clauses, conditions, penalties and restitutions provided for in the body of the said document and do obviate and overcome any and all obstacles, faults or defects, of fact or of law, of form, order or substance, that it may be necessary for me to validate in order to confirm and ratify the said mayorazgo; and I ordain that all the foregoing be put into effect, fulfilled and observed,

notwithstanding any and all other laws, fueros, rights, usages, customs, pragmatics, and conditions of these Kingdoms and Realms, as well as of the Indies, be they general or special, and whether passed in parliament or otherwise, for should any such exist contrary hereto, I hereby repeal them and declare them to be null and void in whatever may relate to the effect and validity of this Cedula, although leaving them in full force and effect in regard to all other matters.

"And by this my letter or its duly certified copy signed by a notary public I request my beloved son, His Serene Highness the Prince Don Fernando, and I order all the Infantes, Prelates, Dukes, Marquises, Counts, Knights, Ricos Hombres, Priors of the orders, Comendadores, and Sub-Comendadores, Wardens of my Castles, my fortified houses and dwellings; the members of my council, Presidents, Regents and Justices of my Royal Courts of Justice, the Wardens and Sheriffs of my House, Court and Chancelleries, all the Governors and Corregidores, Veinticuatro, Knights, Squires, Officers and gentlemen, all the Majors, Naval Provosts and all of my Judges and Judiciary, as well as all the other inhabitants of all my Cities, Towns and open places of these my Kingdoms and Realms, and of the Indies and Islands of the Ocean Sea, not only those that exist at present, but also those that may come into existence in the future (I order them I say) to observe and obey and to enforce the observance and fulfillment of every thing that may be contained in this, my letter of approval and confirmation, in the exact terms in which it is set forth, and that upon no excuse or cause whatsoever shall they oppose on their own part or allow others to oppose, any obstacles whatever to the fulfillment of this my will; and let this my letter be registered in the 'Contadurias Generales, de valores,' Royal Exchequer and my Council of the Indies. "Dated in San Ildefonso, the 20th of August, 1795.

"I, THE KING

At the beginning and on the left margin there is a note reading as follows:

"Approving and confirming the mayorazgo founded by Don Antonio Tuason, late Lieutenant-Colonel of the Royal Armies, and supernumerary Colonel of the Regiment of the Prince Royal of the City of Manila, in the Philippine Islands, upon the terms and conditions therein set forth.

"Done in duplicate, countersigned by the Secretary, Don Antonio Ventura de Franco." Neither the authenticity nor the due execution of the instrument above set forth has been disputed, nor its solemn legalization and confirmation in strict accordance with the laws then in force.

The disagreement of the parties is as to whether the first-born possessor of the entail is or is not a mere usufructuary and if the mayorazgo is or is not a trust (fideicomiso).

At first sight it might appear to be unnecessary to decide these questions, if plaintiffs' action is based, as alleged, upon the right of their ancestors to a participation in the fifth of the revenue. But if, as they affirm, the distribution of the fifth of the revenue is a family trust subject to article 4 of the Disentailing Law of October 11, 1820, such participation in the revenue, by virtue of the provisions of that article, became converted into a participation in a fifth of the properties of the mayorazgo. There would be no occasion for such condition and participation in the property if the first-born possessor had, not only the usufruct, but also the naked ownership, nor if the entail were not a trust.

Both parties agree, nevertheless, that the entail under consideration is a mayorazgo. Now what is a mayorazgo? Let us take the definition given according to Gutierrez by Molina in his "Hispan Primogeniis," accepted by the parties. It is as follows:

"Majoratus est jus succedendi in bonis ea lege relictis ut in familia integra perpetuo conserventur, proximoque cuique primogenito ordine succesivo deferantur." (Gutierrez "Codigos," tomo 2, p. 207.)

(A mayorazgo is the right to succeed to the property left upon the condition that it be preserved perpetually intact

in the family and that it be transmitted in order of succession to each next first-born.)

In the present foundation we find: Succession to the hereditary estate; the condition that the properties be preserved perpetually intact in the family of the founder; the requirement that they shall pass in the established order to each succeeding first-born.

Now let us see if the first-born possessor of the entail is or is not a mere usufructuary.

In the text of the instrument of foundation we see that the founder does not give to the first-born the title of "owner" but only that of possessor, and that he applies this designation to him with frequent insistence. In the seventeenth clause it is declared that it is the enjoyment and possession of the mayorazgo (not the absolute ownership) to which the first-born is called. And when, in the eighteenth clause he calls him "owner" (señor), the founder takes care to do so under express limitation of the concept, for he says: "And with these clauses, conditions and charges I hereby make, constitute and establish this mayorazgo, constituting its lawful possessor the owner (señor) thereof upon the terms set forth * * *." (Italics ours.)

With respect to the extent of the rights of the first-born possessor of the mayorazgo upon the properties thereof, this is what he said upon this subject in clauses 8 and 16, which we again transcribe, as follows:

"Id. It shall be his duty (that of the possessor of this mayorazgo) to preserve all the entailed properties in good condition and to try to increase them as much as possible, and their increase shall also be incorporated into the mayorazgo. * * * (Italics ours.)

"It is my will that all the property hereby entailed and all that which may be added to it shall not be sold or alienated, in whole or in part, or charged or encumbered or mortgaged with censos, or any other kind of encumbrance or charge; and if the contrary is done it shall be void and he who shall have done it or attempted to do it shall immediately lose the possession of the mayorazgo, and it shall pass to the next in succession, who shall make demand for the annulment of the alienation within thirty days; and if he shall fail to do so, he shall also lose the mayorazgo, and it shall pass to the following possessor; and the same rule shall apply as to all the possessors, and this clause shall be observed although ignorance of it be alleged."

Consequently, the first-born, according to the terms of this foundation, has the "enjoyment and possession" of the properties of the mayorazgo, but subject to the strict obligation of preserving them intact, it being absolutely and severely forbidden to sell them, alienate them or encumber them in any manner whatsoever.

If his rights are limited in this manner it is our understanding that the first-born who enters into possession of this mayorazgo does not acquire the dominium directum over the entailed properties, but only their enjoyment, or, in other words, the dominium utile, and this is precisely what constitutes a usufruct, which, as we know, is the right to enjoy the property of another with the obligation of preserving its form and substance. (Jus alienis rebus utendi fruendi salva rerum substantia.)

But, if the first-born possessor is not vested with the ownership of the properties, in whom is it vested?

It is vested perpetually in the descendants of the founder, in all their indefinite succession. This is what is implied in Molina's definition which we have transcribed: " * * * Ut in familia integra perpetuo conserventur * * * "

Therefore it is that Alcubilla (Diccionario de la Administracion Española, vol. 7, p. 1000), in speaking of the mayorazgo, begins by saying: "The mayorazgo was an entail of properties subject to the ownership of a family with the prohibition of alienation." (Italics ours.)

Escriche, in his "Diccionario Razonado de Legislation y Jurisprudencia," (vol. IV, p. 67) gives a similar definition, which is as follows:

"Mayorazgo. The right to succeed to entailed properties, that is, to properties subject to perpetual ownership by some family, with the prohibition of alienation." (*Italics ours.*)

It is to be noted that both Alcubilla and Escriche use the expression "ownership of the family," and not "ownership of the first-born possessor."

That the possessors of mayorazgos were nothing more than usufructuaries, has been so decided by the Supreme Court of Spain in its judgment of June 5, 1872, of which the part pertinent to this case is as follows:

"Up to the time of the publication of the Disentailing Law in 1836 [in the Philippines read March 1, 1864] the possessors of entails and mayorazgos HAD ONLY THE EIGHT OF USUFRUCT of the inalienable properties which constitute them, with the obligation of performing the obligations imposed by the founder, for which reason they could only renounce or transfer that same right and the powers granted them by the foundation." (*Capitals and brackets ours.*)

Let us pass to the second point. Is this mayorazgo a trust or not?

Counsel for defendants allege that the mayorazgo is an institution distinct from the trust (*fideicomiso*), and that the entail here in question is a mayorazgo and not a trust.

It is true that the mayorazgo must be distinguished from the trust. But it is also true that the differences between one and the other do not make the mayorazgo incompatible with the trust. Gutierrez, in his work entitled, "Codigos o Estudios Fundamentales sobre el Derecho Civil Espanol" second volume, pages 191 and 192, second edition, says:

"Mayorazgos have also been compared to trusts (*fideicomisos*), but we cannot believe that the intention, in doing so, was to make no distinction between them. To say that they were introduced in imitation of the *fideicomisos* and of the feuds is not equivalent to the affirmation that they are either one or the other. If it is necessary to seek out the antecedents of this institution, one must go to the source of all of them—the Roman Law and the Germanic Law. The former gives us as our sole model the *fideicomiso*; but knowing what this was, and the causes and effects of this testamentary disposition, it would have been an error, impossible to our authors, to regard the *fideicomiso* as the source from which the mayorazgos were derived. Let us see how Paraladorio explains the matter in his *Diferencias*: 'The nature of the mayorazgo has such affinity with the *fideicomiso* that to some extent Palacios, Rubios, Covarubias, Menchaca, etc., are not without justification for their statement: *Nihil aliud esse majoratum quam fideicommissum quoddam in perpetuum relictum cum primogeniti praerogativa*. Nevertheless they are to be distinguished, first because the *fideicomiso* can be created by will or codicil only whereas the mayorazgo can be created by contract; the *fideicomisario* (beneficiary) cannot take possession of the property by his own authority; the successor to a mayorazgo, as soon as the condition of the instrument of foundation is complied with, acquires the possession thereof. The mayorazgo is an institution *sui generis*, and it cannot be said, simply because it possess similarity to the *fideicomiso*, and at times may be governed by the same rules of law, that they are one and the same thing.' (*Dif. 18.*)"

As may be seen, these differences refer to the origin of the institution, to the form of its constitution and to its enjoyment on the part of the beneficiary. These are details which do not divest the mayorazgo of its nature as a *fideicomiso*, the essence of which, in concise terms, is nothing more than the confiding of a thing to one in order that he may preserve it and deliver it to another (*fidei time committo*). This in substance is what the mayorazgo is—the confiding of the entailed properties to the first-born in order that he may preserve them for the family and deliver them to his successor.

To both institutions is applicable this definition of the *fideicomiso*, taken from Alcubilla (*Diccionario de la*

Administration Espanola vol. 5, p. 635) :

"A form or manner of testamentary substitution by which the testator or trustor charges the heir (trustee) to deliver a certain aliquot portion of the estate, or all thereof, to a third person who receives the name of beneficiary (fideicomisario)."

As every mayorazgo contains the essential elements of a fideicomiso, many writers, among whom are those whom we cite in this decision, when they speak of the fideicomiso in the sustitucion fideicomisaria, cannot avoid directing their attention to the mayorazgo, and they compare the two institutions, seeking in them, not the essential common elements which they recognize in them, and which have led them, by association of ideas, to think of the one when studying the other, but rather reasons of distinction and difference because of their essential generic similarity.

There were and there are still in the Spanish laws various forms of trusts derived from the customary law. Among such trusts, one successive and perpetual one arose, vested with the prerogative of primogeniture, and involving the principle of masculinity. This is the mayorazgo.

Thus it is that Scsevola, in his work on the Civil Code, volume 13, pages 501 and 502, says:

"But up to this point we have been speaking of temporary trusts. Now comes the turn of the perpetual trusts, the most typical of which is the institution known by the name of mayorazgo." (Italics ours.)

And on page 505 of the same volume, speaking of the tendency to perpetuate family lustre and traditions, the same writer makes the following statement;

"From the nobles the tendency passed to the commons and the mayorazgo became general. What did the mayorazgo come to be ? The Roman SUSTITUCION FIDEICOMISARIA as to its form; as to its substance the continuation of this substitution with the right of primogeniture and the principle of masculinity." (Italics ours.)

In the "Enciclopedia Juridica Española," vol. 22, page 105, the distinguished collaborator, Don Jose Buxade, in explaining the mayorazgo, makes the following observation:

"This succession, predetermined by the founder or by the law, has some of the features of the sustitucion fideicomisaria, some of the Germanic principle of masculinity and some of feudal primogeniture, as has been stated by Señor Azcarate." (Italics ours.)

As we have observed in one of the citations which we have inserted, the writer Palacios Rubios, and others mentioned by Parlodorio, did not hesitate to say, as he observes: "Nihil aliud esse majoratum quam fideicomisum quoddam in perpetuum relictum cum primogeniti praerogativa." (That the mayorazgo is. nothing but a certain trust left in perpetuity and with the prerogative of primogeniture.)

And this, in our opinion, is correct. The fideicomiso is the genus and the mayorazgo the species. Not every fideicomiso is a mayorazgo, but every mayorazgo is a fideicomiso.

Analyzing the entail under consideration, we may say that it is a mayorazgo (from major natu, the first-born) in that it is a right granted to each first-born to succeed to the entailed properties in order to preserve them intact and perpetually in the family, and deliver them in the order of succession to the following first-born. And it is a fideicomiso, in that it is a charge of confidence imposed upon the first-born usufructuary possessor to preserve the entailed properties in order to deliver in due time the possession and enjoyment thereof to the succeeding first-born.

Leaving out of consideration for a moment its characteristic of perpetuity, which, as we have seen, does not alter

its nature, this successive appointment, made in the foundation in the case at bar, to the enjoyment of the dominium utile amounts to a call to the usufruct with which the second part of article 787 of the Civil Code deals. We refer to it in order that a better understanding may be had of the following language of Manresa in one of his' commentaries upon that article, which is as follows:

"But notwithstanding such authoritative opinions to the contrary, it is our understanding that if the usufruct, like other rights, may be the subject matter of a substitution because the testator is not bound to dispose jointly of the dominium directum and the dominium utile, or in favor of a single person, it is unquestionable that when he calls successively several instituted heirs to the enjoyment of the dominium utile, the one first called has the character of a trustee who is to deliver that right to the beneficiary when the time specified in the will arrives and that therefore it constitutes a true fideicomiso." (Manresa, Spanish Civil Code, vol. 6, p. 172, edition of 1921.) (Italics ours.)

But counsel for defendants insist that this mayorazgo is not a fideicomiso.

Now let us examine the grounds upon which this conclusion rests.

They refer to the fact that both in the deed of foundation and in the Royal Cedula by which it was conferred, as well as in the complaint in this action, in the stipulation of facts and in plaintiffs' brief, it is not called a fideicomiso but a mayorazgo. But mayorazgo is the specific name, and if, as we have said, the mayorazgo belongs to the genus of fideicomisos, because it is one of them, the mere fact that the name fideicomiso was not given it is not equivalent to a denial that it is such.

Defendants' counsel point out several differences between the fideicomiso and the mayorazgo. We have already stated that such differences do not make them mutually incompatible, and do not deprive the mayorazgo of the trust characteristic inherent in its nature.

The fact that the creation of fideicomisos is not subject to the formalities required for mayorazgos; that the latter might be founded by contract and are irrevocable in certain cases, while fideicomisos must always be established by will and are revocable; that in mayorazgos the trustee is always a relative of the founder, whereas' in the ordinary fideicomiso it is not necessary that he should be; that in the mayorazgo the one who is called to the entail, as soon as his right vests, may take possession of the properties without the necessity of a delivery, which is not the case with respect to the fideicomiso—all these are differences in matters of detail which do not change the legal condition of the property in either case inasmuch as their owner confides them to a person for preservation and delivery to another, which is the characteristic and fundamental aspect of the mayorazgo which we must keep in mind in order to determine whether the plaintiffs are or are not entitled to the relief sought by them in the complaint in this case.

The fact that in the mayorazgo there is a perpetual entail of properties, while in the ordinary fideicomiso it is only temporary, does not support the theory of the defendants. We have already observed that Scsevola refers to the mayorazgo as the typical perpetual fideicomiso. The characteristic of perpetuity in the mayorazgo does not deprive it of its nature as a fideicomiso.

The fact that in the mayorazgos the possessor enjoys the properties, whereas under ordinary fideicomisos he does not, is no reason for concluding that the mayorazgo is not a fideicomiso. This difference as to the rights of the trustee in either case does not destroy the nature of the charge of preserving the properties received in order to deliver them to the beneficiary. We have already noted that in the mayorazgo the possessor of the entail is a mere usufructuary and this only during the period of his tenancy.

It is not correct to state, as is asserted in the reply memorandum of the appellees, pages 2 and 3, that the first-born or successive possessors of the mayorazgo are at one and the same time trustees and beneficiaries. They are not

both at the same time or with respect to the same thing. While he possesses the mayorazgo, the first-born is a trustee, but he is not a beneficiary. If he enjoys the properties he does not do so as either trustee or beneficiary, but as a usufructuary heir. During his possession of the entail he is the trustee and the one called to succeed him in the enjoyment and possession of the entail is the beneficiary or cestui que trust until his tenancy begins, and when it does begin he ceases to be the cestui que trust and becomes the trustee. Consequently, in the mayorazgo, at any given moment the same distinction exists between the functions and rights of the interested parties as that which there is in the fideicomiso.

It is asserted in said memorandum and in the same place that in the mayorazgo the title to the properties is vested in the first-born who possesses them, in view of his double character of trustee and cestui que trust, while in the fideicomiso the title is not vested in the cestui que trust, but in the trustee. This requires some explanation. The firstborn possessor of the trust holds title to the properties as trustee, not as cestui que trust, and enjoys the use of such properties as usufructuary, not as cestui que trust; and this title under which he holds is not definitely vested in him. It is a trust title, that is to say, essentially and inseparably conditioned upon the obligation of preserving the property for the beneficiary. The same thing is true with respect to the title which the trustee holds to the property in his

care. The fact is cited that the Disentailing Law of October 11, 1820, in enumerating the entails which it abolishes, uses the terms, "mayorazgos," "fideicomisos," "patronatos," etc., which, according to counsel for defendants, implies that the mayorazgo and the fideicomiso are entails of different kinds. And so, truly, they are. The mayorazgo and the fideicomiso are different entails, but the mayorazgo does not on that account cease to be a species of fideicomiso. The purpose of the law was to abolish civil entails and therefore, as Gutierrez says in the passage cited in defendants' brief, "it was necessary to enumerate these acts which differ somewhat from one another, although in the principal idea all are alike because they are special forms of entail." (Vol. 2, "Codigos," p. 227.) (Italics ours.)

It is said in the brief of the defendants that it may be admitted that the mayorazgo is a sustitucion fideicomisaria but not that the mayorazgo is a fideicomiso.

It cannot, however, be denied that the substitution fideicomisaria is nothing more than the combination of the substitution and the fideicomiso. This is so stated by the distinguished author Sanchez Roman in the passage which defendants cite in their brief (pages 35-40), and which is as follows:

"It was later, when, from the combination of these two institutions—the substitution and the fideicomiso—the sustitucion fideicomisaria arose as a form completely distinct from the other classes of substitutions known to the law—the vulgar, the pupilar, and the ejemplar—as a means of consolidating the fortunes of families by preventing their dissolution and ruin. From the fideicomiso was taken the designation of various persons through whose hands the estate was to pass applying the doctrine of the substitution in that the one called in the first place was entitled to the use and enjoyment of the hereditary properties with the obligation of preserving them in order to transmit them at his death to the one called in the second place as the substitute of the first. The second tenant occupied the same position as the first tenant with respect to the person designated in the third place, and so on successively. The inalienability of the hereditary properties and a pre-established order of succession, which were the logical consequence and development of those principles, constituted the elements of the entail and it was sufficient to add to them, in the most advanced period of their history, the Germanic principle of masculinity and the feudal principle of primogeniture, in order to establish the mayorazgos—true outgrowths of the sustitucion fideicomisaria." (Vol. 6 [1st vol.], pp. 689, 690.) (Italics ours.)

The quoted paragraph contains a statement made by other writers, which is that the mayorazgo is an outgrowth of the sustitucion fideicomisaria. If the latter, according to the cited passage, is in turn a combination of the sustitucion and of the fideicomiso, it follows that there is a fideicomiso in the sustitucion fideicomisaria, just as

there is in the outgrowth of the latter, which is the mayorazgo, unless the fideicomiso disappeared when it was combined with the sustitucion and converted into the sustitucion fideicomisaria, and also disappeared when the mayorazgo was developed from the latter institution. But such is not the case, and we have already seen that the mayorazgo is in itself a fideicomiso, that it is one of its species.

We are unable to find any sufficient reason for the abandonment of the conclusion that the mayorazgo in question is in its essence a fideicomiso.

Now, within this foundation a special trust was established, consisting of the charge laid upon the first-born possessor to set apart the fifth part of the net revenue of the properties each year, and to distribute it among the eight younger children of the founder and other specified relatives.

This special trust is not an essential part of the mayorazgo—that is to say, the mayorazgo could have existed just as well without it. It constitutes one of the provisions, one of the conditions imposed upon the first-born possessor of a kind which is frequent in such cases and not prohibited by the law. Gutierrez in the cited volume of his work, page 203, says:

"The mayorazgo permits fair conditions; it would be difficult to determine, among the vast number which have been invented by the capricious will of the founders, which are those which merit this consideration and what are their effects."

Its legality and fairness cannot be doubted, inasmuch as this mayorazgo, including the provision under consideration with respect to the fifth of the revenue, was solemnly approved and confirmed by the King of Spain, who, in his Cedula issued for that purpose, inserted together with the foundation instrument at the beginning of this decision, says in part:

" * * * I do approve the establishment of the mayorazgo founded by your above-mentioned father, Don Antonio Tuason, and I hereby declare it to be in effect from this moment henceforth forever, and I do ratify and confirm henceforth the validity of the same in the terms in which it was established with all the clauses, conditions, penalties and restitutions provided for in the body of the said document * * *." (Italics ours.)

This special charge upon the fifth of the revenue constitutes the family trust to which Scaevola refers in his cited work on the Civil Code, volume 13, pages 697, 698, wherein he says:

"Family trusts.—The Act of 1820 distinguishes between mayorazgos and fideicomisos. In the former there is a successive succession of certain persons, a transmission from one to another; in the fideicomiso on the contrary there is only a corpus of properties, the revenues from which are distributed annually, or at longer or shorter periods among groups of persons. When this group is composed of relatives of the founder, the trust is called a family trust." (Italics ours.)

It is true that the special charge which constitutes the family trust established in the entail now under consideration, is different from the mayorazgo upon which it is based, and as Scaevola well says, the Act of 1820 distinguishes one from the other by different precepts, applicable to each, as we shall see hereafter. And they are different from one another even though in the essence both are trusts. Applying to our case what is said by Scaevola in the citation we have just transcribed, it follows that in the mayorazgo, properly so called, the usufructuaries, who are the firstborn possessors, succeed one another in the usufruct of the properties, and transmit them from one to the other; that is to say, as Scaevola says, "there is a successive succession of certain persons, a transmission from one to another;" and in the family trust there is the corpus of the property of the entail, a fifth of the revenue of which is distributed annually among the relatives of the founder, which is what Scaevola says in the cited passage. But in the passage he says: "In the trust (fideicomiso) on the contrary there is only a corpus of properties," etc. He says "there is only" in contradistinction to what there is in the mayorazgo,

namely a succession of usufructuaries and the transmission of the usufruct from one to the other; while in the family trust there is no such succession of usufructuaries or such transmission of the usufruct, but only a corpus of properties, a fifth of the revenue of which is distributed each year among the relatives of the founder.

It is true that in this family trust there is a succession of beneficiaries who are the first-born sons; but this succession is inevitable in every perpetual family trust, because man's life is limited. And certainly the existence of such an indefinite succession is to be anticipated in a perpetual family trust, such as the one under consideration, as other-wise it would not have been one of the entails abolished by the Act of October 11, 1820.

But counsel for defendants observes that the mayorazgo having been established upon all the entailed properties, there cannot be a distinct and separate trust with respect to a part of the revenue. He adds that there would have been such a separate trust if the founder had designated certain properties which would constitute a fourth part (he probably meant to say four-fifths) and the mayorazgo had been established upon this and that the family trust had been established upon the remaining fifth.

We find no force in this suggestion. If the founder had designated certain properties constituting a fifth of the entailed estate, in order that the revenue of that fifth might be distributed among his eight younger children and other relatives, he could not have been sure whether the revenues of the fifth of the entailed properties would constitute a fifth of the revenue of all such properties. His clearly expressed intention, as shown by the deed of foundation, is that there shall be distributed not the revenue from one-fifth of the properties, but a fifth of the revenue of all the properties mentioned.

It is our opinion that such a charge with respect to the distribution of the fifth of the revenue constitutes a family trust such as that described by the learned writer Scsevola in the citation above set forth.

Therefore, with respect to the question raised by the parties concerning the nature of the foundation which is the subject-matter of this action, our conclusions are as follows:

The first-born possessor of this mayorazgo is a mere usufructuary of the entailed properties.

This mayorazgo is, in its essence, a trust.

Annexed to this trust there is a special institution which constitutes a family trust. With respect to the parties interested in these institutions so constituted by the present foundation, we hold that in the mayorazgo as such, from the point of view of its nature as a trust, the trustor is the founder, the trustee is successively each first-born possessor of the entail, from the time he possesses and while he possesses it; the beneficiary or cestui que trust, is the first-born successor called to possess the entail, and prior to the commencement of his possession; for as soon as his possession commences, he becomes the trustee and the following first-born becomes the beneficiary.

In the family trust instituted within this mayorazgo, and upon the fifth of the revenue, the trustor is the founder himself; the trustee is also successively each first-born possessor of the entail from the time he possesses it and while he possesses it; and the beneficiaries, or 'cestuis que trustent, are the eight younger children of the founder and other relatives designated in the deed of foundation.

We deem it to be advisable to state, for the purpose of avoiding confusion, that we have adopted here the nomenclature of the Civil Code in force (arts. 783, 784) in which the "fideicomisario" is the beneficiary (cestui que trust), as distinguished from the meaning with which this word "fideicomisario" has been used in the Spanish translation of sections 582-593, and 778 of the Code of Civil Procedure, in which the idea is conveyed that the "fideicomisario" is the person charged with the trust—that is, the "trustee" whom we designate as the "fiduciario."

DISENTAILING LAW; CONDUCT OF THE PARTIES; ITS EFFECTS

We have stated that on October 11, 1820, the Civil Dis-entailing Law was published in Spain, and that this Act was extended to the Philippines as of the 1st of March, 1864, by Royal Decree dated October 31, 1863.

Articles 1, 2, 3, 4, 7 and 10 of the Statute of October 11, 1820, which contain the precepts pertinent to the matters here in controversy, read as follows:

"ARTICLE 1. All mayorazgos, fideicomisos, patronatos, and every other species of entail of property, real, personal, mixed or semoviente, censos, juro of any other nature, are hereby abolished, and the properties entailed are henceforth restored to the class of absolutely free properties.

"ART. 2. The present possessors of the entails abolished by the preceding article may at once freely dispose of one-half of the properties of which they are composed; and after their death the other half shall pass to the persons who would have been entitled to succeed immediately to the mayorazgo if it had subsisted, so that he may also freely dispose of it as the owner. This one-half reserved to the immediate successor shall never be liable for debts contracted or which may be contracted by the present possessor.

"ART. 3. For the purpose of carrying into effect the provisions of the preceding article, whenever the present possessor may desire to alienate all or part of his one-half of the properties heretofore entailed, a formal appraisal and division of all of them shall be made with strict equality and with the intervention of the immediate successor; and if the latter should be unknown, or should be subject to the patria potestas of the present possessor, the Syndic Procurator of the town where the possessor resides shall intervene in his name, without requiring for this any fees or emoluments whatever. If these requisites are not complied with, the contract of alienation made shall be void.

"ART. 4. As to family trust, the revenues of which are distributed among the relatives of the founder, although they be of different lines, the appraisal and distribution of the properties of the trust shall be made at once among the present recipients of the revenues in proportion to that which they are receiving, and with the intervention of all of them; and each, as to the part of the properties which is allotted to him, may freely dispose of one-half, reserving the other half to the immediate successor in order that he may do likewise, in strict accordance with the provisions of article 3.

"ART. 5. With respect to elective mayorazgos, trusts or patronatos, when the election is absolutely free, the present possessors may dispose as owners of all the properties; but if the election must necessarily fall upon a member of some particular family, or community, the possessors shall dispose of only one-half and shall reserve the other one-half to the end that the successor who may be elected may do the same; the appraisal and division prescribed by article 3 shall be made with the intervention of the Syndic Procurator.

* * * * *

"ART. 7. The temporary, as well as the perpetual, charges to which all the properties of the entail are subject in general, without special mortgage, shall be allotted with proportionate equality to the properties distributed and partitioned, as herein provided, unless the interested parties by common agreement, shall prefer some other method.

* * * * *

"ART. 10. Be it likewise understood that the foregoing provisions shall be without prejudice to the allowances for support (alimentos) or annuities (pensiones) which the present possessors are required to pay to their mothers, widows, brothers, the immediate successor, or other persons, in accordance with the foundations or private agreements, or judicial decision. The properties heretofore entailed, although they may pass as free to other owners, shall remain subject to the payment of such allowances for support (alimentos) or annuities (pensiones) during the lifetime of those who are now receiving them, or while they retain the right to receive them, unless the recipients of such allowances for support are immediate successors, in which case they shall cease to enjoy them as soon as the present possessors die. Thereafter the obligations now existing to pay such annuities (pensiones) and allowances for support (alimentos) shall cease, but it is declared that if the present

possessors do not invest in such allowances for support (alimentos) and annuities (pensiones), a net sixth part of the revenues of the mayorazgo, they shall be obliged to contribute up to this extent for the purpose of endowing their sisters and aiding their brothers in proportion to their number and needs; and a like obligation shall rest upon the immediate successors in respect to the one-half of the properties reserved to them.

* * * * *

"ART. 14. No one hereafter, even though it be by way of betterment or upon any other title or pretext, shall found any mayorazgo, fideicomiso, patronato capellania, obra pia, or any entail whatsoever upon any kind of properties or rights, nor prohibit, directly or indirectly, their alienation. Neither shall any one entail bank stock or other foreign funds." (Vol. 6, "Legislation Ultramarina," by Rodriguez San Pedro, page 72.)

Under the provisions of article 2 above set forth the possessors of mayorazgos from the time the Act took effect were authorized to dispose freely of one-half of the entailed properties, the other one-half being reserved in absolute ownership to the successor to the entail.

And in accordance with the provisions of article 4 of the same statute, the properties of the family trust were required to be distributed among the recipients of revenues in proportion to their respective participations.

Applying these articles to the foundation which is the object of the present case, and considering as we do; that the charge relating to the distribution of one-fifth of the revenue constitutes a family trust, it follows that for the purpose of carrying out the provisions contained in the entail under consideration, without a breach of any of its conditions, it must be kept in mind that the participation in the fifth of the revenues, by virtue of article 4 above-mentioned, and proportionately among the recipients, became converted into a participation in the ownership of one-fifth of the properties; and inasmuch as this fifth must be taken from the properties of the mayorazgo, it is evident that the provisions contained in article 2 of the law with respect to the power of the first-born possessor to freely dispose of one-half and to reserve the other one-half to his successor, must become operative in our case, not upon all the properties of the entail, because one-fifth is assigned by article 4 above-mentioned to the recipients of the fifth of the revenue, and their successors, but upon the remainder, namely the four-fifths part of said properties.

Counsel for defendants, insisting in their opinion that this charge concerning the distribution of the fifth of the revenues among the relatives of the founder is not a family trust, denies the applicability of article 4 of the Disentailing Law, and affirms that such distribution of the fifth of the revenues relates to the charges, allowances for support (alimentos) and annuities (pensiones) to which articles 7 and 10 of that statute apply.

Having arrived at the conclusion that this distribution of the fifth of the revenue is a family trust, it appears to us that the application of article 4 of the Disentailing Law is inevitable as this article expressly and unequivocally refers to "family trusts, the revenues of which are distributed among the relatives of the founder."

With respect to the charges to which article 7 refers, counsel for defendants insist that these are included in the pensions mentioned in article 10 and, for the purpose of supporting this assertion, cite Gutierrez' Commentary upon article 7. To this counsel for plaintiffs reply with an observation which, in our judgment, successfully refutes defendants' proposition. This is what the plaintiffs say in their additional brief, pages 5 and 6:

"In his commentary on article 7 Gutierrez says, as stated in the brief of our opponents, that 'this provision was lacking in the draft, for article 5, with which it is most naturally connected, speaks of allowances for support and pensiones alimenticias, which, in the existing law, are covered by a special article.' From this citation we draw the conclusion that article 7 did not exist in the original draft of the law; but on the other hand, the provisions of article 10 did exist in the original draft, and it became necessary to increase it, in the bill article 10, and this does not include what is included in article 7."

This fifth of the revenue, the distribution of which is required with respect to the family trust, cannot be the same as the allowances for support or pensiones alimenticias, to which article 10 relates, for, as observed by counsel for plaintiffs, the younger children, among whom in the first place this fifth of the revenue was to be distributed, had already received their respective legitimes before the mayorazgo was founded. At the beginning of the deed of foundation and in its first clause we find that the founder says, among other things:

" * * * and desiring, on the other hand, to secure in part the permanence of my estate, without diminishing the legitimes of my other children * * *.

* * * * *

"Having taken stock and inventory of all the property of which I am now possessed, in cash, real estate, jewelry and other things, I found myself to be the possessor of an estate of the value of one hundred and thirty-five thousand pesos, which after having deducted the third and the fifth, left me a remainder of seventy-two thousand pesos which I divided among my eight children, there corresponding to each of them the sum of nine thousand pesos, which sum was actually delivered to each and very one of them, as is shown by documents which I have in my possession; and the third and the remainder of the fifth I hereby devote to the aforesaid entail. * * *" (Parenthesis and Italics ours.)

At all events article 10 refers to allowances for support or pensions in general; and even assuming for the moment that the fifth of the revenues to be distributed among the younger children of the founder and his other relatives should also be considered as an allowance for support or a pension, this article would not be applicable because there is a special provision in article 4 which relates specifically to family trust, the revenues of which are distributed among the relatives of the founder. The legal maxim is: *specialia generalibus derogant*.

The same thing may be said with respect to article 7 which refers to "the temporary, as well as the perpetual, charges to which all the properties of the entail are subject in general." Considering this distribution of the fifth of the revenue as a charge in the broadest meaning of this word, we should not apply article 7, which deals with charges in general, because there is another provision in article 4 which relates specifically to the distribution of revenues among the relatives of the founder.

Now, in accordance with the allegations contained in paragraph 5 of the first special defense (bill of exceptions, p. 45), it was Don Jose Severo Tuason who possessed the mayorazgo on the 1st day of March, 1864, on which date the Disentailing Law, to which reference has been made, became operative in the Philippine Islands.

By virtue of the provisions of article 2 of that law, Don Jose Severo Tuason, the then possessor of the entail, might on that date have freely disposed of one-half of the four-fifths of the properties of the mayorazgo.

An in accordance with the provisions of article 4, he should have made an appraisal and distribution of the fifth of the properties among the recipients of the revenues in proportion to their respective participations, and each might have freely disposed of one-half of his participation, reserving the other one-half for his immediate successor.

Nothing of this kind was done, however. Don Jose Severo Tuason continued to regard the mayorazgo as subsisting and the properties as entailed. Thus it was that in his will, executed February 1, 1874, he says, among other things:

"Item. I declare that when I married my said wife my estate consisted of the sum of \$144,974.28, deducting the value of the entail I possess." (Clause 3, folio 2, Exhibit 1.)

"Item, I declare that among my properties is included the entail which I have been enjoying and which I inherited from my father, whom I trust is in glory on high, and which will pass in the same order of its institution to my first born son, Don Jose Victoriano, subject to the provisions of law now in force in the

matter." (Clause 6, ditto, folio 3.) (Italics ours.)

This testator, as we have stated in the beginning, died on February 3, 1874. His heirs and successors continued to respect the mayorazgo, as may be seen in the deed of partition in the proceedings connected with the inventory, liquidation, accounts and distribution of the estate (Exhibit 3), judicially approved January 12, 1876, wherein it is said:

"The \$48,949.11 which is the value of the entailed properties which are to pass intact to the immediate successor of the mayorazgo."

(Folio 2, Exhibit 5.)

The first-born successor, Don Jose Victoriano Tuason, as stated above, died January 23, 1878, at the age of 13 years. (Paragraph 6, first special defense.)

More than eighteen years afterward, on the 7th day of August, 1896, the record of the partition above-mentioned was registered.

It is also a proven fact, as stated at the beginning, that in the books of the defendants corresponding to the time which has transpired since the year 1904, and up to the year 1922, entries appear relating to expenses and receipts of the mayorazgo, participations in the fifth of the products, purchases of rights to said fifth of the products, and fees for preparing deeds of assignment of the said fifth of the products. That is to say, the parties interested in this foundation kept it in force in its entirety from March 1, 1864, on which date the Disentailing Law of October 11, 1820, came into effect in these Islands at least up to the end of the year 1922, one year, seven months and some days before the commencement of the present action.

We consider it opportune to cite at this point an opinion of the Supreme Court of Spain concerning the status of properties which formerly belonged to a mayorazgo but which are allowed to remain undivided, in which it is said:

"2. That the properties which belonged to a mayorazgo preserve their character as entailed for the purposes of the partition, up to the time of delivery to the heir of the possessor and to the immediate successor of the half which is due them respectively." (Judgment of the Supreme Court of Spain, Oct. 29, 1857.)

Although this doctrine does not refer expressly to family trusts, we regard it as applicable to the family trust annexed to the mayorazgo under consideration, as the same reason exists therefor. *Ubi eadem ratio ibi eadem juris dispositio*.

Counsel for defendants allege that the properties of this foundation passed into the hands of the heir, Jose Victoriano Tuason, completely free, one-half by testamentary inheritance and the other half by virtue of article 2 of the Disentailing Law. This, however, was not the will of the testator, Don Jose Severo Tuason, nor the will of his successors, all of whom respected the mayorazgo and held it as subsisting *de facto*. In no event could the properties pass into the hands of the heir Jose Victoriano Tuason completely free. It was necessary to preserve them intact until they were appraised and the fifth part thereof had been segregated for distribution among the recipients of the revenues and their immediate successors, in accordance with the provisions of article 4 of the statute.

It is a fact that the trust subsisted and still subsists. The successive possessors of the entail have preserved and preserve the properties of the mayorazgo respecting and distributing the fifth of the revenue among the descendants of the younger children of the founder.

But the entail could not and cannot continue perpetually. Its abolition was decreed by the statute as of the 1st day

of March, 1864. Its perpetual survival would be contrary, not only to the Disentailing Law of October 11, 1820, but also the Civil Code in force which, under articles 781 and 785, paragraph 2, positively prohibits perpetual entails.

If up to the present time the entail in question subsists, this has been because the interested parties have been maintaining it without proceeding to the appraisal and distribution of the entailed properties, as required by articles 2 and 4 of the Disentailing Law; and in accordance with the doctrine announced by the Supreme Court of Spain on October 29, 1857, above cited, the properties of this mayorazgo, preserved de facto by the interested parties as entailed, legally retain this character for the purposes of their partition, which must be effected in accordance with the statute of October 11, 1820.

From what has been said it follows that since March 1, 1864, the date upon which the said Disentailing Law came into force in the Philippine Islands, the successive pos-sessors of the properties of this mayorazgo constituted themselves trustees, charged with the administration and preservation of the said properties and the distribution of the fifth of the revenue among the descendants of the younger children of the founder. Consequently, after the entail was abolished, one-half of the four-fifths of the properties of the mayorazgo continued subject to the trust in favor of its beneficiaries, the heirs of Jose Victoriano Tuason, who was the one called to succeed immediately to the mayorazgo on the date of its disentailment (article 2, Statute), and the fifth of the said properties in favor of the beneficiaries, the recipients of the fifth of the revenue in accordance with the foundation.

Summing up the effects produced with respect to this mayorazgo by the Disentailing Law on the one hand, and the conduct of the interested parties on the other, we may say first, that the trust of the naked ownership instituted in favor of the descendants of the founder indefinitely was abolished, in consequence of the disentailment; and second, that the trust of the usufruct of the properties became converted into a trust of the properties themselves, the beneficiaries being the same, but as owners; that is to say, the first-born successor as to one-half of four-fifths of the said properties, and the descendants of the younger children of the founder with respect to the remaining fifth.

In this case we are only concerned with the fifth of the properties which plaintiffs claim as descendants of four of the eight younger children of the founder.

Hereinafter we shall determine the persons entitled to participate in the fifth of the properties of this foundation and to what extent.

LEGAL OBSTACLES ALLEGED

In addition to the arguments mentioned heretofore, counsel for defendants interpose as obstacles to the action of plaintiffs the registration of the title to the properties of the mayorazgo in favor of the defendants, mentioned in paragraph 11 of the first special defense, under Act No. 496, and the prescription of this action. The defendants, Doña Paz Tuason de Gonzalez, Doña Consuelo Tuason de Quimson, Don Juan Tuason and Dona Albina Tuason interpose as a defense to this action the contention that the plaintiffs filed no claim whatever in the proceedings had upon the testamentary estate of Don Juan Jose Tuason de la Paz, the father of the said defendants, which testamentary proceedings were finally disposed of and filed June 25, 1920.

If, as we have found and decided, the successive possessors of the properties of this mayorazgo were and have been mere trustees of the said properties, holding them in trust for the benefit of the beneficiaries, part of whom are the recipients of the fifth of the revenues, and their descendants, the registration of the title to said properties under Act No. 496 in favor of the said defendants must be deemed to have been effected for the benefit of the beneficiaries of said properties, part of whom are the present plaintiffs. The doctrine established by this court in the case of Severino vs. Severino (44 Phil., 343), is applicable to this feature of the case.

Although the plaintiffs endeavored to demonstrate that the said defendants registered the title by fraud, it is our opinion that the alleged fraud has not been proven in this action. Nevertheless, the existence of fraud is unnecessary to warrant the declaration that registration of the title under Act No. 496 is not a legal obstacle to this action brought by plaintiffs, and the adjudication in favor of those among them who are entitled thereto of the portion pertaining to them of the properties so registered. It was said in the case of *Gilbert vs. Hewetson* (79 Minn., 326), cited with approval in the case of *Severino vs. Severino*, supra;

" 'A receiver, trustee attorney, agent, or any other person occupying fiduciary relations respecting property or persons, is utterly disabled from acquiring for his own benefit the property committed to his custody for management. This rule is entirely independent of the fact ivhether any fraud has intervened. No fraud in fact need be shown, and no excuse will be heard from the trustee.' " (Italics ours.)

With respect to the plea of prescription, counsel for defendants contend that inasmuch as plaintiffs, prior to the filing of the present complaint, had made no effort to enforce their rights since the 1st day of March, 1864, their action is barred. But from the records it appears that up to the year 1922 the defendants have been recognizing in the entries in their books, and in deeds, such as Exhibits 6 and 7, signed by Don Augusto Tuason de la Paz, as grantee, the rights of the descendants of the younger children of the founder to the fifth of the revenue, and therefore the trust which this charge implies; furthermore, said defendants made payments on account of the fifth of the revenue. These acts of recognition and payments, made during the said period of time, prevent the operation of prescription. (Section 50, CoSe of Civil Procedure.)

Furthermore, this being a case which deals with a trust which subsisted from the time of its foundation and by virtue thereof up to March 1, 1864, and thereafter down to the present time by the express will of the present parties, the defense of prescription cannot be entertained. By virtue of the said trust the possession of the said defendants could not be regarded as a basis for an acquisitive prescription in their favor against the plaintiffs because such possession has not been nor is it under claim of ownership, but a title held in the name and on behalf of the beneficiaries, some of whom are the plaintiffs in general. For this reason the defense of prescription cannot be enforced between the trustee and the beneficiaries while the trust relations continue, as was impliedly held in the case of the *Government of the Philippine Islands vs. Abadilla* (46 Phil, 642).

It is alleged by counsel for the defendants that in accordance with the stipulation of facts none of the plaintiffs, nor their predecessors, with the exception of those mentioned in paragraph 2 of the counterclaim, received any pensions whatever as a charge against the revenues of the property of the entail for the ten years prior to the commencement of this action, and that for this reason the action has prescribed. We have already stated that with respect to trusts, such as the one here in question, the de-fense of prescription cannot be maintained. From the 1st of March, 1864, the right of the recipients of the fifth of the revenue, and their descendants, was not and is not limited to the receipt of the fifth of the revenue, but, as we have said, includes a participation in the ownership of one-fifth of the properties of the mayorazgo, and this right, by reason of the subsisting trust, has not prescribed and is imprescriptible.

It is finally contended by the defendant heirs of the late Don Jose Tuason y de la Paz that the plaintiffs did not file any claim whatever in the proceedings had upon the testamentary estate of the said deceased, which said proceedings have been now finally ended. As the properties here in question constitute a trust estate, such proceedings cannot affect them, at least as to a fifth part, because such properties were not and could not be the property of the said testator, who therefore could not legally transmit them to his heirs. If the latter have already entered upon the enjoyment of their various respective portions and have acquired a possession adverse to the rights of the plaintiffs, this adverse possession cannot have legally commenced before the 19th of July, 1919, when the court approved the partition of the properties of the said testamentary estate (paragraph 4, fourth special

defense). And even with respect to prescription, the time which has transpired between the 19th of July, 1919, and the 22d of August, 1923, when this action was commenced, is merely a little over four years, an insufficient time for the acquisitive prescription of real property.

Consequently, the contention of the defendants in their special defenses are not sufficient to destroy plaintiffs' action or to prevent the exercise thereof.

PERSONS ENTITLED TO THE REMEDY

The recipients of the fifth of the revenues are indicated in the sixth clause of the instrument of foundation, the text of which we again transcribe:

"It shall be his duty to set apart one-fifth of the net revenue derived from the entail each year, and that one-fifth part shall be divided into eight parts, giving one to each of my eight children, and in their absence, to my grandchildren, but upon the understanding that if one or more of my children should die without succession, the part belonging to them shall be distributed among my grandchildren and other descendants of mine according to their needs and as prudence may dictate to him, so that, when the time arrives that none of my children or grandchildren are alive, it shall then be always understood that said fifth part shall be applied to all those of my descendants who are poor, the apportionment to be made by him prudently according to their needs and therefore the possessor of the entail is hereby charged to discharge this duty with conscientious scruple."

One of the issues between the parties is whether plain-tiffs are or are not included in the word "grandchildren" (nietos) employed in the clause which has just been transcribed.

The precedent of the word "grandchildren" (nietos) is the Latin word nepos, which is defined in the Latin-Spanish Etymological Dictionary, by Raimundo de Miguel, as follows:

"Nepos, otis * * * Cic, Nieto; * * * Nepos ex filia, Cic, nieto (son of the daughter), * * * Nepotes (plural) Virgil, posterity, descendants."

As we have observed in this explanation, in order to give the word "nepos" the meaning of "the son of the daughter," Cicero added to it the explanatory phrase "ex filia."

The technical meaning of the word in the Roman Law coincides with this literal acceptance, as may be observed in Title 19, Book 2 of the Institutions of Justiniani (D. Justiniani Institutionum, by Gomez de la Serna, vol. 1, p. 595, 6th edition), where it is said: "Sui anten et necessarii haeredes sunt, veluti filius filiave, NEPOS NEPTISVE EX FILIO," etc.

Thus we see that in order to express the idea that the word "nieto" or "nieta" ("nepos neptisve") refers to a "son or a daughter of a son," it was necessary to add the ex-planatory phrase "ex filio" (of the son). Consequently, without this explanatory phrase the meaning of the word "nepos" (grandchild) would be, in the broad acceptance, that which was given it by Virgil, namely; posterity, descendants.

This broad legal acceptance was carried into the Spanish language when the words "nepos" and "nepotis" were hispanicized by being transformed into the word "nieto." Therefore, Alcubilla, in defining this word in his work, "Diccionario de la Legislation Española," (vol. 8, p. 373) says:

"Nieto (grandson). The son of the son. Used with respect to the grandfather. The term is also used by extension to include the word descendant in a given line to the third, fourth and successive generations'

It is true that in the clause of the instrument which we have been considering, the word "descendants" is also employed. But this word, taking into consideration the provisions of the deed of foundation must be understood as

referring to the descendants of the first-born son who was the possessor of the mayorazgo.

As may be inferred from the provisions of this foundation, considered as a whole, the intention of the founder was to give to his descendants the usufruct of the properties of the mayorazgo, four-fifths to the first-born possessor and his successors, and one-fifth to the eight younger children and their successors.

We can see no sufficient reason for restricting here the meaning of the word "nietos" (grandchildren) to sons of sons alone. From the instrument of foundation as a whole it does not appear that such was the intention of the founder. We can see no reason why he should have limited the enjoyment of the fifth of the revenue to his eight children and to the children of the latter without extending it to their subsequent descendants, when, in dealing with the four-fifths of the revenue he extended the enjoyment thereof not only to his first-born son, or to his grandson, the son and successor of the former, but also to subsequent first-born children.

We do not find in the instrument of foundation, or elsewhere, any reason whatever for believing that in addition to the striking inequality with respect to the apportionment of the usufruct (four-fifths for one child and one-fifth for eight children) it was the purpose of the founder to still further limit the grant to his eight children to their children as to the receipt of the fifth of the revenue, when in the instrument itself (seventeenth clause) the founder provided that in case the male line of the descendants of his first-born son, Don Vicente Dolores Tuason, should become extinct, the mayorazgo should then revert to the eldest son of his deceased son, Don Santos Tuason (who is one of the younger children), and that following the same order the descendants of his other male children (the other younger children) should take by priority of birth, and that in the event of the absence of male heirs of the male line, the heirs of the female line should succeed, and failing these, the possession of the mayorazgo by order of birth should devolve upon the descendants of his children (his younger children).

If the descendants of the younger children, subsequent to the grandchildren of the founder, are granted under certain circumstances the right to possess the mayorazgo itself, with all its properties, we do not see how it can be said that these descendants, subsequent to grandchildren, the sons of sons, were prohibited from receiving a fifth of the revenues of said properties.

It is our understanding that the intention of the founder was not to restrict the grant of the usufruct of the fifth of the revenue by limiting it to a certain number of generations of the younger children, but that he intended to extend it to all of the descendants of the latter. If this is so we should apply to the case the rule of law of the Partidas (Rule 28, Title 34, 7th Partida), which says: "Privilegia recipiunt largum interpretationem voluntati consonan concedentis." (Privileges are to be interpreted with liberality in accordance with the will of him who grants them.)

Furthermore, that the present plaintiffs are entitled to receive the fifth of the revenues has been repeatedly recognized by the defendants when they purchased, in 1905, from Don Jose Rocha y Ruiz, and in 1916 from Dona Remedios Aragon y Rocha their respective participations in the fifth of the revenue, according to paragraph 16 of the stipulation of facts, and when in the years 1917 to 1921 the said defendants delivered to Don Antonio Maria Barretto y Rocha, and to Don Santiago, Don Julio and Don Andres Rocha y Ruiz Delgado, and their sister, Dona Rosario; and in the years 1917 to 1922, to Dona Isabel, Dona Enriqueta, Dona Carmen, Don Antonio, Don Alfredo and Don Clodoaldo Rocha y Pereyra, Don Francisco Beech y Rojo, Don Ciriaco, Don Cayetano, Don Pablo Leon and Don Tonia Tuason, and to the minors Dona Consuelo, Don Juan, Dona Rosario and Doña Carmen Tuason, and to Doña Victoria Rufina, Dona Ana Consolacion Tuason and Dona Asuncion Romana Tuason widow of Caballero, their respective participations in the fifth of the revenue, as appears from the cross-complaint of the defendants, admitted in paragraph 8 of the stipulation of facts.

And it appears that the said Don Jose Rocha y Ruiz was the son of Don Lorenzo Rocha, a grandson, in turn, of

Dona Gregoria N. Tuason (Exhibit 6 and paragraphs 2 and 16 of the stipulation of facts); that Dona Remedios Aragon y Rocha is a relative of the founder (Exhibit 7, admitted in paragraph 16 of the stipulation of facts); and that the said recipients of the fifth of the revenue from the year 1917 to 1921 and from the year 1917 to 1922, are all descendants of grandchildren of the younger children of the founder. (Paragraphs 2 to 30, admitted in paragraph 1 of the stipulation of facts.)

But even supposing for a moment that the word "nietos" (grandchildren) used in the instrument of foundation now before us, did not include these plaintiffs, we must keep in mind that the Disentailing Law of October 11, 1820, when it became operative in the Philippines, on March 1, 1864, created and adjudicated in favor of the then recipients of the fifth of the revenue of this mayorazgo the right of ownership of one-half of the fifth of these properties under article 4 of the said Disentailing Law, and vested the ownership of the other one-half in their immediate successors.

Consequently, even supposing that the receipt of such fifth of the revenue were limited to grandsons, the sons of sons of the younger children of the founder, and supposing also that the recipients of the said fifth of the revenues on March 1, 1864, were grandchildren, sons of sons of the younger children of the founder, that is, the last recipients according to the restrictive hypothesis, notwithstanding all this, the law, when giving to these recipients of the revenue a fifth of the property, reserved one-half thereof for the immediate successors, who are the subsequent descendants of said grandchildren, sons of sons of the younger children of the founder.

And such recipients of the fifth, whoever they may have been on March 1, 1864—for they have not been identified in the record—did not dispose of the participations which the law granted them in and to the fifth of the properties of this mayorazgo, and at their death their said participations in the property passed by operation of law to their heirs. On the other hand, their immediate successors—the record does not show who they were—in whose favor the ownership of the other one-half of the fifth of the properties was reserved, did not dispose of their participation, which, when said immediate successors died, also passed to their heirs by operation of law.

And according to the facts admitted in this proceeding, the plaintiffs must be and are such heirs, both of the then recipients and of their immediate successors, for they are the descendants in direct line of both of them because they are descendants of the younger children of the founder.

The plaintiffs consequently are entitled to participate in the fifth of the properties of this mayorazgo, whether they be considered or not as included in the word "grand-children" employed in the instrument of foundation. In the first case, because they are descendants in direct line of four of the younger children, and in the second place because they are the descendants of the recipients of the fifth of the revenue on March 1, 1864, and the immediate successors of the latter.

Passing to the amount of the participation which is due them respectively, for the purpose of determining this point

we must have regard to the intention of the founder, as it is expressed in the instrument creating the mayorazgo. It was his will that the fifth of the revenue should be divided into eight parts, and that to each of his children, other than his first-born, one part should be given. Upon the death of each of these children, by virtue of the provisions of the instrument of foundation, and by operation of law, their right to an eight part of the revenue which they received during their lifetime was transmitted to their heirs. That is, each of these eight portions of the fifth of the revenue was transmitted from succession to succession, within the stirps of each of the eight younger children who died leaving succession. The heirs of a younger son or daughter could not legally participate in the eight part corresponding to another stirps, as long as heirs in the direct line of this stirps survived; that is to say, each of the eight portions of the fifth, except those corresponding to younger children born without succession. The heirs of a

younger child could not legally participate in the eight corresponding to another stirps, while heirs of this stirps in the direct line survive. That is to say, each one of the said eighth parts of the fifth, except those corresponding to the younger children dying without succession, was preserved and transmitted from generation to generation within each respective stirps.

This plan of division of participation, based upon the will of the founder and the precepts of the law, is that which in our judgment must continue to prevail, and is that which we shall follow in determining the proportion which corresponds to the plaintiff's in the half of the fifth of the properties of this foundation.

Of the eight younger children four died without succession and the other four are the descendants of the plaintiffs in this cause. Hence, four of the eight portions, that is, one-half of the fifth of the properties of this foundation, belong to the plaintiffs herein under the plan of division which has just been indicated. The other four portions, that is, the remaining one-half of the said fifth, which would have corresponded to the stirps of the other four younger children, if they had died leaving succession, accrue, so to speak, both to the descendants of the younger children leaving succession and to the other descendants of the founder.

The distribution of this accretion is made in obedience to a plan distinct from that above indicated, because the founder, foreseeing the contingency, did not prescribe a quota for each stirps of his younger children, but ordered that it be delivered to descendants of both classes, without distinction of lines or stirps. Consequently, this one-half in accretion should be distributed among the descendants of the founder in general, who are the plaintiffs and some of the defendants, but bearing in mind the different rights with which each heir participates, by reason of the greater or lesser proximity of his relationship to the founder, for the purpose of determining if he is to inherit per capita or per stirpes. We say some of the defendants, because with the exception of the ten mentioned in paragraph 5 of the complaint, the other defendants are either persons whose relationship has not been determined (paragraph 6 of the complaint) or have refused to become parties to this action (paragraph 30, of the complaint).

From what has been said it follows that one-half of the fifth of the properties corresponding to the younger sons leaving succession, four-fortieth parts ($\frac{4}{40}$) of the whole of the properties of this foundation must be divided into four equal portions, because one portion, or one-fortieth part ($\frac{1}{40}$) corresponds to each stirps of the said four younger children. The other one-half of the said fifth, that is to say, the other four-fortieth parts ($\frac{4}{40}$) of the whole of the properties of this foundation must be distributed in general among the plaintiffs and some of the defendants, taking into consideration the circumstances of their respective heirships.

These properties may be considered as having been appraised in accordance with provisions of article 4 of the Disentailing Law, inasmuch as the parties, in paragraph 9 of the stipulation of facts, have agreed that for all purposes relating to the decision of this case, the total value of the properties of this foundation is five million six hundred thousand one hundred sixty-eight pesos (P5,600,168).

The one-half of the fifth, or the four-fortieth parts ($\frac{4}{40}$) which are to be distributed equally between the stirps of the four younger sons leaving descendants, is equivalent, according to that valuation of the properties, to five hundred sixty thousand sixteen and $\frac{80}{100}$ pesos (P560,016.80), or one hundred forty thousand four and $\frac{20}{100}$ pesos (P140,004.20), which is one-fortieth part ($\frac{1}{40}$) for each stirps.

Of said four stirpes that of the younger son, Don Felix Bolois Tuason is represented among the plaintiffs by Don Francisco Beech y Rojo, together with his aunts (cousins of his mother Doña Pilar Rojo y Tuason, a great granddaughter of the said younger son), and therefore he inherits in representation of his said mother; by Doña Teodora Benitez Tuason de Reyes; by Dona Romana Fuentes de Salgado, and by Doña Urbana Francisco de Guevara. These three are great granddaughters of the said younger son, Don Felix Bolois Tuason (paragraphs 12,

16, 23, 25 of the complaint, admitted in paragraph 1 of the stipulation of facts). To each one of these four heirs corresponds a fourth part of the fortieth part above mentioned, of the assessed value of thirty-five thousand one and 05/100 pesos (P35,001.05).

The stirps of Doña Gregoria M. Tuason is represented among the plaintiffs by Don Antonio Maria Barretto y Rocha; by Doña Guadalupe Angelica Barretto, widow of Balbas; by Doña Isabel Rocha Pereyra; by Doña Enriqueta Rocha Pereyra; by Don Alfredo Rocha Pereyra; by Don Clodoaldo Rocha Pereyra; by Doña Carmen Rocha Pereyra de Beech; by Don Antonio Rocha Pereyra; by Don Santiago Rocha y Ruiz Delgado; by Doña Rosario Rocha y Ruiz Delgado de Larroquete; by Don Julio Rocha y Ruiz Delgado; by Don Andres Rocha y Ruiz Delgado; by Don Alfonso Rocha Uceda; by Don Angel Rocha Rivera; by Dona Araceli Rocha Rivera; and by Dona Sara Rocha Rivera (paragraphs 7 to 11 of the complaint, admitted by paragraph 1 of the stipulation of facts.) All these said heirs of the stirps of Doña Gregoria M. Tuason, sixteen in number, are great grandchildren of the said younger daughter, Dona Gregoria. To each one of them corresponds a sixteenth part of a fortieth part of the whole of the properties, or one six-hundred-fortieth part ($1/640$) of the properties, or eight thousand seven hundred fifty pesos and twenty-seven and one-fourth centavos (P8,750.27 and $1/4$ centavo) of the total assessed value.

The stirps of Don Pablo Tuason is represented among the plaintiffs by heirs who participate in their own right and by heirs who claim by representation because they inherit with relatives of the generation of the same degree as their proximate ascendants. Among the former are Doña Ciriaca Tuason; Don Cayetano Tuason; Don Pablo Leon Tuason; Don Tomas Mercado; Doña Victoria Rufina Tuason; Dona Ana Consolacion Tuason; and Doña Asuncion Romana Tuason, widow of Caballero. Among the heirs who take by representation are Don Gaston O'Farrell, who represents his deceased father, Don Jose O'Farrell, Doña Remedios Ayala de Reyes and Doña Concepcion Ayala, widow of Beltran, who represent their deceased mother, Doña Maria O'Farrell de Ayala; the minors Doña Consuelo, Don Juan, Doña Rosario and Doña Carmen Tuason y Rosello, who inherit in representation of their deceased father, Don Juan Tuason; and Don Vicente L. Legarda who represents his deceased father Don Miguel Legarda Lerma (paragraphs 13 to 15, 20 to 22, and 24 of the complaint, admitted in paragraph 1 of the stipulation of facts). These heirs who inherit in their own right; together with the persons represented by those who inherit by representation, make a total of eleven great grandchildren of the said younger son Don Pablo Tuason. To each of said heirs claiming in their own right and the persons represented by the others, corresponds an eleventh part of a fortieth part of the total of the properties, namely, one four-hundred-and-fortieth part ($1/440$) of the properties, or twelve thousand seven hundred twenty-seven pesos and sixty-five centavos and five elevenths of a centavo (P12,727.65 and $5/11$ ths of a centavo) of the total assessed value.

The stirps of Don Santos Luciano Tuason is represented among the plaintiffs by Doña Cirila Tuason, widow of Calvo; by Doña Mariana Aurelia Tuason; and by Don Santiago Alvarez. These three are all of the same degree of relationship to the said younger son, whose great great grandchildren they are (paragraphs 17 to 19 of the complaint, admitted in paragraph 1 of the stipulation of facts). To each one of these three heirs corresponds one-third of the fortieth part of the total of the properties, or one one-hundred and twentieth part ($1/120$) of the properties, or forty-six thousand six hundred sixty-eight pesos and six centavos and two-thirds of a centavo (P46,668.06 and $2/3$ of a centavo) of the total appraised value.

Of the other one-half of the fifth of these properties, and which is to be distributed in general, as we have already said, between plaintiffs, and some of the defendants, and which represents four-fortieth parts ($4/40$), or P560,016.80, according to the appraised value, the heirs are the said plaintiffs, who are thirty-three in number altogether, including those who inherit in their own right and those who are to inherit by representation, plus ten

defendants whose relationship to the founder is shown by the records and who are parties to this action, their names being: Don Augusto Huberto Tuason y de la Paz, Doña Maria Soterranea Tuason y de la Paz, Don Demeterio Asuncion Tuason y de la Paz, Don Mariano Severo Tuason y de la Paz, Doña Teresa Eriberta Tuason y de la Paz, Don Angel Ordonez (alias Angel M. Tuason), Don Antonio M. Tuason, Doña Paz Tuason de Gonzalez, Doña Consuelo Tuason de Quimson and Doña Rosario Gonzalez, "widow of Tuason. (Paragraphs 5 and 26 of the complaint, admitted in paragraph 1 of the stipulation of facts.) That is to say, this one-half of the fifth is to be divided into one hundred forty-three equal parts, each portion being four one- thousand-sevenhundred and twentieth parts ($\frac{4}{1720}$) or one four-hundred-and-thirtieth part ($\frac{1}{430}$) of the whole of the properties, or thirteen thousand twenty-three pesos and sixty-four centavos and twenty-eighth forty-three of a centavo (P13,023.64 and $\frac{28}{43}$ of a centavo) of the appraised value for each heir inheriting in his own right, and for each person represented by the heirs who inherit by representation.

The plaintiffs who participate with the defendants in the half of the fifth of the properties are four grandsons who share with their uncles who are great great grandsons. These four grandsons who inherit by representation are the following: Don Gaston O'Farrell, Don Vicente L. Legarda and Don Santiago Alvarez, who represent respectively their deceased fathers, for which reason their participations are entire units; the sisters Dona Remedios and Dona Concepcion Ayala, who participate jointly in one unit; so also the minors Doña Consuelo, Don Juan, Doña Rosario and Doña Carmen Tuason y Rosello, who also receive jointly a single participation; and in like manner the sisters Doña Cirila and Doña Martina Aurelia Tuason also participate jointly in one unit.

With respect to these three descendants of the younger son, Don Santos Luciano, the peculiarity exists that within their stirps the three heirs receives equally, as all are of equal degree of relationship with their common ancestor, the said younger son. But when they concur with the other codescendants of the founder, their shares change because they inherit by representation, as they concur with uncles, cousins of their fathers, the result being that in such case the participation of Don Santiago Alvarez is entire, he being the sole representative of his father, while that of the two sisters Doila Cirila and Dona Martina is one-half for each, because both of them represent their father.

Don Jose Rocha y Ruiz and Doña Remedios Aragon y Rocha, also descendants of younger sons, do not participate in the fifth of the properties because in 1905 and 1916 they respectively sold their participations to the defendants. For this reason their names were not taken into consideration in the distribution of the fifth of the properties in the preceding paragraphs.

Among the petitions of the complaint in this case is one to the effect that the defendants, Augusto, Demetrio, Mariano, Maria Soterranea and Teresa Tuason y de la Paz, and Messrs. Antonio Ma. Tuason, Angel Ordonez (alias Angel M. Tuason) be required to render an account of the receipts, expenditures and profits of this entail from February 4, 1874, to January 1, 1922, and deliver to the plaintiffs the part corresponding to the latter in the net revenue produced by the said properties, deducting that which each of the plaintiffs may have received prior to the commencement of this action.

With regard to these accounts the following agreement was made in the stipulation of facts:

* * * * *

"10. That the receipts and expenses of the properties on Calle Rosario are those which appear in the statement hereunto attached, marked Exhibit 2, and that said statement is taken from the books of the defendants.

"11. That the receipts and expenditures of the Haciendas Santa Mesa-Diliman and Mariquina are also those which appear in the annexed statement, marked Exhibit 3, which is also taken from the books of the defendants.

"12. That the stipulation contained in the two preceding paragraphs shall not prevent the parties plaintiffs from impugning, as incorrectly charged, any of the items which appear in the said two statements."

The accounts mentioned include those of all the properties of this foundation, for the properties mentioned in the paragraphs which have been transcribed above are those which constitute the properties entailed by the founder, Don Antonio Tuason, as alleged in paragraph 31 of the complaint, admitted in paragraph 1 of said stipulation of facts; and the said accounts, Exhibits 2 and 3, correspond to the period comprised between the 1st day of January, 1904, and the 31st of December, 1922.

None of the items contained in these accounts having been successfully impugned, they must be considered, and we shall consider them, as correct by virtue of the stipulation above inserted.

These accounts beginning January 1, 1904, and which are presumed to be the consequence and continuation of those of previous years, having been admitted, it is our understanding that plaintiffs cannot now legally claim an accounting for the time prior to the 1st of January, 1904.

They are, however, entitled to a liquidation of the accounts as to the expenses and revenues of said properties, and to receive the corresponding revenue from the 1st of January, 1923, until the defendants shall deliver to them their respective participations in the properties of this foundation.

Consequently, the plaintiffs are entitled to receive their respective participations in the fifth of the revenue corresponding to the period Which begins from the 1st of January, 1904, until the 31st of December, 1922, in accordance with the accounts which appear in Exhibits 2 and 3.

Plaintiffs are also entitled to the rendition of an account of the income and products of the said properties from the 1st of January, 1923, until such time as their participations in the properties of this foundation are delivered to them, as also to receive that which pertains to them of the fifth of the revenues of said properties during said period beginning with the 1st of January, 1923.

JUDGMENT

By virtue of the foregoing considerations and conclusions it is hereby ordered and decreed that the decision of the Court of First Instance of Manila rendered herein be and it is reversed, and it is declared that the plaintiffs are entitled to participate in a fifth of the properties of this foundation and its revenues in the proportions and amounts hereinafter stated, and that the registration of the title to the said properties under Act No. 496 is not an impediment to its division and the transfer to the plaintiffs, as beneficiaries, of the portions which we shall determine; wherefore it is ordered:

First, That the defendants, Bon Augusto, Don Demetrio, Don Mariano, Doña Maria Soterranea and Doña Teresa Tuason y de la Paz and Don Antonio Ma. Tuason, Don Angel Ordonez (alias Angel M. Tuason), with the intervention of the plaintiffs, partition the properties of the foundation which is the subject-matter of the present cause, and deliver the respective participations, or their value, to the persons and in accordance with the amounts to be specified hereafter, to wit:

(a) To each of the four plaintiffs, Don Francisco Beech y Rojo, Doña Teodora Benitez Tuason de Reyes, Doña Romana Fuentes de Salgado and Doña Urbana Francisco de Guevara, a fourth of a fortieth part of all the properties of this foundation, or its respective appraised value of thirty-five thousand one pesos and five centavos (P35,001.05) as their participation in the one-half of the fifth of the properties in conjunction with their codescendants of the younger sons; and one-forty-third part of the other one-half of the fifth or four-fortieth parts of the said properties, or its appraised value of thirteen thousand twenty- three pesos and sixty four centavos and twenty-eight forty-thirds of a centavo (P13,023.64 and 28/43 of a centavo) as their participation in the other one-half of the fifth of the properties in conjunction with the other descendants of the founder.

(b) To each of the sixteen plaintiffs, Don Antonio Maria Barretto y Rocha, Doña Guadalupe Angelica Barretto, widow of Balbas, Doña Isabel Rocha Pereyra, Doña Enriqueta Rocha Pereyra, Don Alfredo Rocha Pereyra, Don Clodoaldo Rocha Pereyra, Doña Carmen Rocha Pereyra de Beech, Don Antonio Rocha Pereyra, Don Santiago Rocha y Ruiz Delgado, Doña Rosario Rocha y Ruiz Delgado de Larroquete, Don Julio Rocha y Ruiz Delgado, Don Andres Rocha y Ruiz Delgado, Don Alfonso Rocha Uceda, Don Angel Rocha Rivera, Doña Araceli Rocha Rivera and Doña Sara-Rocha Rivera, one-sixteenth of a fortieth part of all the properties of this foundation, or its appraised value of eight thousand seven hundred fifty pesos and twenty-six centavos and one-fourth of a centavo (P8,750.26 and 1/4 of a centavo); and furthermore a forty-third part of the other half of the fifth of said properties, or its appraised value, of thirteen thousand twenty three pesos and sixty four centavos and twenty-eight forty-thirds of a centavo (P13,023.64 and 28/43 of a centavo), the adjudication being made upon the same grounds as the adjudications in the preceding paragraph.

(c) To each of the nine plaintiffs Doña Ciriaca Tuason, Don Cayetano Tuason, Don Pablo Tuason, Don Tomas Mercado, Doña Victoria Rufina Tuason, Doña Ana Consolacion Tuason, Doña Asuncion Romana Tuason, widow of Caballero, Don Gaston O'Farrell and Don Vicente L. Legarda one-tenth of a fortieth part of all the properties of this foundation, or its appraised value of twelve thousand seven hundred twenty-seven pesos and sixty-five centavos and five elevenths of a centavo (P12,727.65 and 5/11 of a centavo); and furthermore a forty-third part of the other half of the fifth of said properties, or its appraised value of thirteen thousand twenty-three pesos and sixty-four centavos and twenty-eight forty-thirds of a centavo (P13,023.64 and 28/43 of a centavo), upon the same two grounds as those which constitute the basis of the adjudications made in paragraph A of this judgment.

(d) Jointly to the two plaintiffs, Doña Remedios Ayala de Reyes and Doña Concepcion Ayala, widow of Beltran, in equal parts, also one-tenth (for the two, not one for each one) of a fortieth part of all the properties of this foundation, or its appraised value of twelve thousand seven hundred twenty-seven pesos and sixty-seven centavos and three elevenths of a centavo (P12,727.67 and 3/11 of a centavo) ; and also a forty-third part (for the said two plaintiffs) of the other half of the fifth of said properties, or its appraised value of thirteen thousand twenty-three pesos and sixty-four centavos and twenty-eight forty-thirds of a centavo (P13,023.64 and 28/43 of a centavo) upon the same two grounds as those which constitute the basis of the adjudications made in paragraph A of the present judgment.

(e) Jointly to the four minors, Doña Consuelo, Don Juan, Doña Rosario and Doña Carmen Tuason y Rosello, in equal parts, one-tenth (for the four, not for each) of a fortieth part of all the properties of this foundation, or its appraised value of twelve thousand seven hundred twenty-seven pesos and sixty-five centavos and five elevenths of a centavo (P12,727.65 and 28/43 of a centavo); and also a forty-third part (for the said four plaintiffs) of the other half of the fifth of said properties, or its appraised value of thirteen thousand twenty-three pesos and sixty-four centavos and twenty-eight forty-thirds of a centavo (P13,023.64 and 28/43 of a centavo), upon the same two grounds as those which constitute the basis of the adjudications made in paragraph A of this judgment.

(f) To each of the three plaintiffs, Doña Cirila Tuason, widow of Calvo, Doña Martina Aurelia Tuason and Don Santiago Alvarez, one-third of a fortieth part of the whole of the properties of this foundation, or its appraised value of forty-six thousand six hundred sixty-eight pesos and six centavos and two thirds of a centavo (P46,668.08 and 1/3 of a centavo); and furthermore to the two sisters Dona Cirila Tuason, widow of Calvo, and Dona Martina Aurelia Tuason, jointly, a forty-third part of the other half of the fifth of said properties, or its appraised value of thirteen thousand twenty-three pesos and sixty-four centavos and twenty-eight forty-thirds of a centavo (P13,023.64 and 2/3 of a centavo) ; and to Don Santiago Alvarez a forty-third of the said other half of the fifth of said properties, or its appraised value of thirteen thousand twenty-three pesos and sixty-four centavos and twenty-eight forty-thirds of a centavo (P13,023.64 and 28/43 of a centavo), all on the same two grounds as those which constitute the basis of the adjudications made in paragraph A of the present judgment.

Second. That the defendants deliver to the plaintiffs named in paragraphs A, B, C, D, E and F of the present judgment and in the same proportion established for the distribution made in said paragraphs A, B, C, D, E and in the first part of paragraph F, the portions which respectively pertain to the said plaintiffs of the fifth of the revenues of this mayorazgo, as shown by Exhibits 2 and 3, from the 1st of January, 1904, to the 31st of December, 1922: Provided, That the plaintiffs mentioned in paragraph 2 of the cross-complaint of the defendants have already received their share of the revenue, and shall not receive it again for the years specified in said counter-claim.

Third. That the defendants render an account of the revenues of the properties of this entail from January 1, 1923, until they deliver to plaintiffs their respective participations in said properties, in accordance with paragraphs A, B, C, D, E and F of the present dispositive part, and that they deliver to the plaintiffs named in said paragraphs, in the proportion therein specified, their participations in the fifth of the revenues of said properties corresponding to the said period of time following January 1, 1923.

Fourth. That the partition of the real estate herein decreed shall be carried out in accordance with the provisions of section 184 of the Code of Civil Procedure, and section 84 of Act No. 496 by causing a technical description to be made of the portions partitioned, and by the execution by the defendants of the proper deeds of conveyance and the delivery to the registrar of the corresponding certificates of title for the issuance of new certificates of title in favor of the defendants.

Fifth. That in case the parties should not agree as to the manner in which such partition is to be effected, the court below, in this proceeding, shall appoint commissioners to that effect, all in accordance with the provisions of section 184 of the Code of Civil Procedure, and other applicable provisions of the Code of Civil Procedure.

No judgment will be entered as to costs. So ordered.

Avanceña, C. J., Street, Malcolm, Villamor, Ostrand, Johns, and Villa- Real, JJ., concur.

RESOLUTION ON MOTION OF RECONSIDERATION

October 5, 1926

ROMUALDEZ, J.:

Upon examination of the motion for reconsideration of our decision, the printed briefs of the defendants, the petitions of the intervenors presented by various persons and the pleadings pro and con, this court finds the following:

MOTION FOR RECONSIDERATION

Counsel for defendants insist upon their contentions maintained from the beginning and disposed of in our decision. They raise some points in their briefs, however, which require a few brief-remarks.

The word "lord" does not necessarily mean "owner" or "proprietor." The word "lordship," derived from "lord," has its own definition in the law, according to which, among other things, it means "usufruct." (Law 1, Title 28, partida 3.)

In the case of *Natividad vs. Gabino* (36 Phil., 663), the meaning of the words "possessor" and "lord," and whether or not they are equivalent to "owner" and "proprietor," are not discussed it simply declares the ordinary meaning of the words "property" and "dominion" which are not questioned here as they are not used in the deed of foundation.

The case of *Edroso vs. Sablan*, (25 Phil., 295) deals with reservable property which cannot be compared with entailed property. The ownership of reservable property passes to the reservor, subject only to a resolutive condition, namely, that there be reservees; the ownership of entailed property does not pass to the first-born, but only its usufruct. The reservor may, under certain conditions alienate the reservable property (arts. 974-976, Civil Code); the first-born possessor cannot dispose of the entailed property and, in the case under consideration, he is expressly and strictly prohibited from alienating or even encumbering it.

The passage from Gutierrez on page 23 of the brief is a part of the commentaries by said author in the course of his exposition of the various opinions on Law 6, Title 17, Book 10 of the *Novisima Recopilacion* (a compilation of laws promulgated subsequent to the creation of this *mayorazgo*) in regard to improvements made on entailed property. The fact is that this author calls possessors of *mayorazgos* "usufructuaries" in commenting on article 10 of the Disentailing Law in his "*Codigos Espanoles*," vol. 2, p. 343, 1868 ed.

The quotation from Molina on page 29 of the brief is the opinion of said author upon the examination of a hypothetical case propounded by him, to wit: *Relinquo talem rem Titio ad alimenta* (I bequeath such and such a thing to Titus for support). But this same writer, in comparing the possession of a *mayorazgo* with a usufructuary in his work "*De Primogeniorum Origine ac Natura*," Book 1, p. 59, 2d column, 1757 ed., says *Ex quo infertur, majoratus possessores usufructuario esse adacquatus, non autem e converso* (from which it follows that the possessor of a *mayorazgo* is the same as a usufructuary although not vice versa).

The decision of the Supreme Court of Spain of October 29, 1859, invoked in support of the reconsideration, had reference to the scope of the Disentailing Law when the possessor of disentailed property, by virtue of said law, had no successor to whom to deliver the ownership of half of said property. The power which in said case is recognized by the courts in said possessor to dispose of the half that might belong to the successor, if there be any, does not arise from his status as possessor and mere usufructuary of the *mayorazgo*, but from the disentanglement itself of the properties which, by virtue of the law, passed in full ownership to their possessors and successors and recipients of their fruits.

The fact that a *mayorazgo* might be created by contract as well as by will does not, as already stated in our decision, deprive it of its nature of a *fideicomiso*. Furthermore, it must be noted that this *mayorazgo*, rather than a donation *inter vivos*, is an act *mortis causa* by virtue of which the founder disposed of the remainder of all of his property. He had already delivered to his eight children their legitimes, reserving only the third of free disposal and the remainder of the fifth of the portion destined to betterment, in order to create this *mayorazgo* upon such remainder, thus definitely disposing of all of his property. Such remainder is what the founder himself calls "betterment" (clauses 2 and 16 of the foundation), whereby he indicates that this *mayorazgo* is the last complement of the testamentary dispositions alluded to by him in the deed of foundation, this document thus constituting a testamentary memorial, for the validity and efficacy of which, as an act *mortis causa*, the laws in force at that time required no special form provided the same was duly identified. With respect to the form of this testamentary act there is, besides, the circumstance that the founder was a military man and as such had the power to dispose of his property *mortis causa*, without being subjected to the forms provided for in the *Ordenanzas del Ejercito* of 1768, confirmed by the Royal Cedula of October 24, 1778 and Law 8, Title 18, Book 10, *Novisima Recopilacion* (5 *Manresa Civil Code*, pp. 218, 219, 1905 ed.)

The person entitled to possess entailed property had the right to bring an action for the recovery thereof upon his legitimate right to possess such property and not in his capacity as a mere usufructuary. This is called a vincular action established by the Law 45 of Toro, which became Law 1, Title 24, Book 11, *Novisima Recopilacion*. Its exercise does not imply nor prove the title to the properties sought to be recovered; it was a right correlative to the right to possess similar to that of an administrator who has the right of action to recover the possession of property

under his administration.

The doctrine enunciated in the decision of the Supreme Court of Spain of June 5, 1872, cited in our opinion, to the effect that possessors of mayorazgos are mere usufructuaries, is not obiter dictum. Such declaration was necessary in that decision because whether or not the possessors of the entailed properties were the owners or merely usufructuaries, was one of the fundamental points discussed there, as appears in the first *resultando* (finding of fact) and in the second *considerando* (conclusion of law).

It is incorrect to say that the Spanish authorities maintain that a mayorazgo is not a fideicomiso. We have cited various authorities in our decision who compare a mayorazgo with a fideicomiso. Molina, himself, in the same passage cited by counsel for the defendants on page 29 of their brief, cannot help calling the possessor of a mayorazgo a fideicomisario (trustee). (Molina "De Primogeniorum Origine ac Natura," Book 1, p. 151).

Naturally, Spanish writers and decisions do not con-fuse—cannot confuse—a fideicomiso with a mayorazgo, just as the concept of a human being cannot be confused with that of a man, inasmuch as every man is a human being, but every human being is not a man. Every mayorazgo is a fideicomiso, but every fideicomiso is not a mayorazgo.

We are of the opinion that our decision answers and sufficiently disposes of the other questions raised in said brief as to whether or not the charge to distribute the fifth of the revenues of the entailed properties constitutes a family trust; whether or not article 4 of the Disentailing Law is applicable to this mayorazgo; whether or not the right of action which the plaintiffs might have had has pre-scribed, and the effects of the registration of the entailed properties under Act No. 496.

Resolving", therefore, said motion for reconsideration, we reiterate the following conclusions, declaring finally:

- (1) That the first-born possessor of this mayorazgo was a mere usufructuary of the entailed properties.
- (2) That this mayorazgo was a fideicomiso.
- (3) That the charge to distribute the fifth of the revenues from said properties was a family trust.
- (4) That article 4 of the Disentailing Law of October 11, 1820 is applicable to the present case.
- (5) That the fifth of the properties into which, by virtue of said law, the fifth of the revenue was converted on March 1, 1864, when the Disentailing Law became effective in the Philippines, has remained and subsists as a fideicomiso up to the present date.
- (6) That the plaintiffs' right of action has not prescribed.
- (7) That the registration of the entailed properties under Act No. 496 must, with respect to the fifth of the said properties conserved up to the present time as a fideicomiso, be held to have been made in favor of the beneficiaries of said fifth part.
- (8) That the plaintiffs, as well as any other descendants of the founder, are entitled to participate in the fifth of the properties of this mayorazgo in accordance with the sixth clause of the deed of foundation and article 4 of the Disentailing Law.
- (9) The pronouncements made in our decision with respect as to the amount of the participation of each claimant shall be set aside in view of the motions of the intervenors which we are about to examine.

RE PLEADINGS OP INTERVENTION

After the promulgation of our decision sworn petitions of intervention were presented by Estanislao Arenas Tuason, widow of Julian La O et al., another by Benito Legarda et al., and another by Emilia Tuason et al.

The first two claim to be descendants of the younger children of the founder and who, if their allegations are proven, belong to the same class as the original plaintiffs.

In view of the fact that said petitions do not rebut the fundamental conclusions of our decision and are limited to the allegation of the right to participate in the fifth of the properties, it is our opinion, in accordance with the

provisions of section 121 and similar provisions of the Code of Civil Procedure, it is but just to grant said petitioners the opportunity to duly establish their alleged rights.

The third petition was presented by Emilia Tuason et al., who claim to be descendants of some of the brothers of the deceased Jose Severo Tuason, possessor of the mayorazgo up to February 3, 1874, and the others of the firstborn possessor Vicente Tuason. Of these petitioners, Emilia Tuason, widow of Rocha, Maria Rocha de Despujolis, Marquis of Oliver, Jose Ma. Rato, Eloisa O'Farrell y Patino, Sofia O'Farrell y Patino, Maria de la Concepcion, Luis Vidal y Tuason, Pedro Baños and the now deceased Juan O'Farrell y Patino, father and grandfather, respectively (according to the petition of intervention) of the intervenors surnamed O'Farrell y Codero and O'Farrell y Montesinos, the deceased Antonio Vidal, father, according to said petition, of the intervenor Maria Vidal y Delgado had been included as defendants in this case and were summoned by publication and declared in default in view of not having appeared nor answered the complaint.

It is alleged in the petition, however, that their failure to intervene in the case was due to the fact that the plaintiffs in paragraph 41 of their complaint only claimed a half of the fifth of the properties and that they believed the other half belong to the descendants of the younger children of the founder's first-born, by which allegation the right of the intervenors to receive their pensions from one-half of the said fifth remained tact.

While the limitation of the plaintiffs' claim in said paragraph 41 of the amended complaint does not appear sufficient for us to deviate from the result of the evidence, nor the provisions of the law applicable to this case, nor to disregard their prayer at the end of said complaint that they be granted any other just and equitable remedy, and for such reasons we have had to adjudicate to them not only a half of the fifth of the property, but also, the other half in common with the defendants; yet, in view of the fact that these intervenors, who have been declared in default on account of said paragraph 41 of the complaint, were justified in believing that only a half of the fifth of the properties were in litigation in this cause, it is our opinion, in view of these considerations and the petitions of intervention referred to above, that it is but just to set aside the distribution made in our decision, thereby granting these petitioners the opportunity to intervene in this cause and to establish and defend their rights, and permitting the original plaintiffs, in justice to their rights, to amend the allegations of their complaint.

Finally, in justice to the defendants, the plaintiffs and the intervenors must take the necessary steps to include as parties to this cause, all of the persons who may have the right to participate in the said fifth of the properties of this foundation.

ORDER

In view of the foregoing, it is ordered:

- (a) That the motion for reconsideration filed by counsel for the defendants is denied in so far as it is incompatible with the fundamental conclusions we have arrived at in the present cause and enumerated in the preceding resolution.
- (b) That the dispositive part of our decision in this cause be set aside.
- (c) That the record in the present case, together with the petitions of intervention mentioned, be returned to the Court of First Instance of Manila in order that the new parties may intervene in this cause and prove their alleged rights, and that the original plaintiffs may, if they so desire, amend their complaint.
- (d) That the plaintiffs take the necessary steps to include as parties to this cause all such known and unknown persons who may have the right to participate in the said fifth part of the properties of this foundation, requiring them to appear and prove their rights.
- (e) That said Court of First Instance proceed to try this cause and render judgment as to the amount to which the original parties and those who may intervene may be entitled as their participation in the fifth of the properties of this mayorazgo.
- (f) That the stipulation of facts subscribed on August 30, 1924 by Attorneys Sanz and Blanco on behalf of the

plaintiffs and Araneta & Zaragoza on behalf of the defendants, for all intents and purposes and with respect to the parties affected, is held as subsisting, as well as the oral and documentary evidence presented by the parties during the original trial of the cause, the original parties as well as those who hereafter may intervene, being entitled to introduce such additional evidence as they may desire upon the subject-matter of the trial herein ordered.

No express pronouncement as to costs. So ordered.

Avanceña, C. J., Street, Ostrand, and Johns, JJ., concur.

JOHNSON, J., with whom concur VILLAMOR and VILLA-REAL, JJ., concurring:

I concur in the granting of a new trial. In my opinion, however, in as much as new parties have been admitted and a new trial has been ordered, the doors should be opened wide for the trial of every issue presented within the four corners of the case, except that the evidence already adduced should stand as a part of the new record. I do not believe that the parties in a new trial should be shambled by doctrines which might be rendered useless by the new facts which might be brought into the case. The intervention having been allowed, the intervenors should be given a full and free opportunity to defend their rights unhampered by jurisprudence announced upon facts, the effect and operation of which may have been entirely changed by facts adduced during the new trial.

STREET, J., concurring:

While in the main I fully endorse the conclusions reached in the admirable exposition of this case contained in the original opinion written by Mr. Justice Romualdez, and while I concur in the return of the case to the court of origin, in conformity with the present resolution, I wish to take advantage of this occasion to refer to a minor feature of the case which is, under this resolution, designedly left open for further consideration in the court below. The point is one in which an antagonism will be presented between the interests of two classes of claimants, and as to which those defendants who are holders of the legal title to the trust property can have no real concern, supposing the capital issue arising between them and the different classes of claimants to have been finally decided contrary to their contentions. I refer of course to the antagonism of interest between those descendants of the original founder who are younger offshoots from the preferred line, and those descendants of the founder who have sprung from four of the younger children of the founder, this latter being the class in whose behalf the original action was instituted. Heretofore no issue has been made between the two classes of claimants here referred to, but unless their conflicting interests are composed by mutual agreement, the lower court will be called upon to settle the matter; and although said court is left free, under the present resolution, to determine the conflicting interests of said two classes of persons as a question of first impression, it will nevertheless be confronted with certain observations in the original opinion which in my opinion will bear further investigation.

The question arises upon the interpretation of the item of the royal cedula creating the entail in which is defined the duty of the holder of the entail with respect to the disposition of one-fifth of the net revenue derived from the entail. This item may be here quoted as follows:

"Item.

"It shall be his duty to set apart one-fifth of the net revenue derived from the entail each year, and that one-fifth part shall be divided into eight parts, giving one to each of my eight children, and upon failure of such, to my grandchildren, but upon the understanding that if one or more of my children should die without succession, the part belonging to them shall be distributed among my grand-children and other descendants of mine according to their needs and as prudence may dictate to him, so that, when the time arrives that none of my children or grandchildren are alive, it shall then be always understood that said fifth part shall be applied to all those of my descendants who are poor, the apportionment to be made by him prudently according to their

needs and therefore the possessor of the entail is hereby charged to discharge this duty with

To understand the application of this provision to the facts of the case before us, it is necessary to bear in mind that the founder had nine children, and that four of the younger eight have no living descendants. On the other hand, four of the younger children have living descendants, being represented in the present litigation by the original plaintiffs. There are also now in existence some persons representing the younger offshoots (segundones) of the preferred line. Some of these latter were named as defendants in the original complaint, but they allowed judgment to be taken by default. The case will now be opened as to these in the Court of First Instance and they, as well as other new claimants, will be at liberty there to present whatever contentions they may see fit to make.

As may be gathered from the petition of intervention filed in behalf of the younger offshoots (segundones) of the preferred line, they claim to be entitled to an undivided one-tenth interest in the income of the entailed property, this being that half of the fifth which formerly pertained to the four younger children of the founder whose lines have become extinct. On the other hand, the original plaintiffs, consisting of the descendants of the four younger children of the founder whose lines are represented by living descendants, will probably insist that they are entitled to all that was conceded to them in the original decision of this court, that is, one-tenth, or four-fortieths, as pertaining to the plaintiffs' four ancestors, per stirpes, and one-tenth, or four-fortieths, as pertaining to the plaintiffs in common with all other descendants of the founder other than the holders of the legal title.

Now I submit that something can be said in favor of a simpler solution of the problem, which would establish the conclusion that the entire fifth now under discussion pertains to all the descendants of the founder other than the holders of the legal title, including of course the younger offshoots of the preferred line, and due allowance being of course made for transfers and surrenders. The point here suggested depends upon the interpretation of the word *nietos* in the Spanish original of the Item of the foundation quoted above, and which is there translated "grandchildren." In the original decision this court sustains the view that *nietos*, as first used in the quoted Item, means descendants. It is my personal opinion that *nietos* ought to be here taken in the strict sense of grandchildren, and not in the secondary sense of descendants.

If this be true, it follows that all of the descendants of the founder other than the present holders of the legal title to the trust property together constitute a single constituency of beneficiaries, and all of these descendants are on precisely the same footing, their rights being derived from the closing words of the paragraph above quoted, which are these: "when the time arrives that none of my children or grandchildren are alive, it shall then be always understood that said fifth part shall be applied to all those of my descendants who are poor, the apportionment to be made by him prudently according to their needs and therefore the possessor of the entail is hereby charged to discharge this duty with conscientious scruple."

It will be noted that the trust thus established was intended for the relief of those of the founder's descendants who should be poor; and as long as the trust subsisted only those who were deemed by the possessor of the entail to be needy could share in the benefits of the trust. But "when the trust is terminated, the distribution must be made among all members of the constituency, and not exclusively among the needy, for every member of the constituency of beneficiaries, even including the wealthy, had an interest in the maintenance of the trust while it subsisted and is entitled to share in the distribution of the trust fund when the trust is ended.

As the entire dispositive part of our former decision is abrogated by the present resolution, the different classes of beneficiaries will in fact be entirely free in presenting their conflicting claims before the lower court and the latter will be entirely unhampered in passing upon those claims. As I understand the present resolution the court wishes to be understood as adhering to the doctrine expressed in the original decision so far as affects the title of the defendants only, without prejudice to the conflicting rights of the different claimants as among themselves.

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