

ESTATE OF ANTONIO MA. BARRETTO Y ROCHA, REPRESENTED BY ITS ADMINISTRATORS DOLORES MORATINOS VIUDA DE BARRETTO ET AL., PETITIONERS, VS. EMILIO MAPA, JUDGE OF FIRST INSTANCE OT MA...*G. R. No. 45475. November 16, 1937*

Ponente: CONCEPCION, J.

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This is a petition for a writ of prohibition. In civil case No. 24803 of the Court of First Instance of Manila, known as the case of the Mayorazgo Tuason, the defendants were ordered, on June 17, 1936, to deliver to the judicial receiver appointed in said case the sum of P133,690.67 owing by them as part of the revenues of the mayorazgo, for distribution among the plaintiffs and the intervenors; and upon failure of said defendants to do so within the time granted for the purpose, an order was entered on October 17th of the same year for the issuance of a writ of execution against the defendants, whose names were given in the subsequent order of November 3d of the same year, and among whom the herein respondent Consuelo Legarda Viuda de Prieto is included. This respondent, as soon as "she became aware of the last order, filed through her attorneys, Orense and Belmonte, on the 9th of the same month, a petition praying that she be excluded as well from the order entered on the 3d of said month as from the writ of execution issued in pursuance thereof. The petition alleged that she is not and has never been a party defendant in this case, but that she is an intervenor in her own right, both as a descendant of one of the younger children of the founder of the mayorazgo and as descendant of purchasers of the participations of other descendants. That although she had been receiving a part of the revenues of the properties of this mayorazgo corresponding to the defendant Mariano S. Tuason, it was by virtue of a deed executed by the said Mariano S. Tuason ceding a portion of his undivided share in the aforesaid properties which is not involved in this case and which was and is not affected by the notice of *litis pendens* relating to this case. This cession was evidenced by the deed executed on November 7, 1935 in payment of a mortgage credit of the petitioner against the said Mariano S. Tuason, which deed was filed in the case of the Mayorazgo Tuason, and the court, by reason thereof, on December 2, 1935, ordered the receiver bank to deliver to the petitioner the share pertaining to the said Mariano S. Tuason in the revenues of the aforesaid properties.

In view of the petition above referred to, and notwithstanding the opposition of the plaintiffs who are the petitioners herein, the court, on December 17, 1936, issued the order which gave rise to the present proceedings, modifying the order of November 3, 1936 as well as the writ 'of execution issued by virtue thereof, in the sense that the name of the respondent Consuelo Legarda Viuda de Prieto was excluded therefrom and Mariano S. Tuason was substituted as defendant in her stead.

The plaintiffs and the intervenors filed two motions for the reconsideration of the aforesaid order which were denied by the court, as a consequence of which the present petition for the writ of prohibition was brought.

To dispose of these proceedings, it is necessary to discuss and determine:

- What was the liability or obligation referred to in the deed of cession which, under the aforesaid mayorazgo, could pertain to Mariano S. Tuason and which the grantee Consuelo Legarda Viuda de Prieto has not assumed in accepting the cession made in her favor by the said Tuason of a portion of his share in the properties of the mayorazgo? Was it a simple personal obligation, or was it in any way secured by any real property of the mayorazgo?
- Is the provision contained in the twelfth paragraph of the deed of cession and incorporated in the order complained of, under which it was stipulated that the said grantee would not assume the liability of the grantor, valid or not?

It appears from the decision rendered by this court on March 23, 1926 in the case of the Mayorazgo Tuason (Barretto vs. Tuason, 50 Phil., 888) that, in establishing said mayorazgo, its founder provided in the instrument of foundation, amount other things, that:

"It shall be his (possessor of the mayorazgo) 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, * * *." (Page 903.) And this court has held that:

"A special fideicomiso was instituted in the foundation in question consisting of a mandate to the first-born possessor of the, entailed properties to distribute one-fifth of the net revenue of the properties each year among the eight younger children of the founder and other specified relatives. This special charge, distinct, but a part of the mayorazgo under consideration, is specifically termed a family trust, as an annual distribution of funds among the relatives of the founder is involved." (Id., p. 889.) This court, referring to the effects of the Statute of Disentailment, further stated:

"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; * * *" (Id., p. 937.)

It is not disputed that the family trust consisting of the distribution of one-fifth of the revenues, formerly among the younger children of the founder and, now, among the heirs and descendants of the younger children, or the plaintiffs and the intervenors, was converted by the Disentailing Law into a trust of one-fifth of the properties in full ownership. In other words, it is beyond question that the plaintiffs and the intervenors are now the absolute owners of an undivided one-fifth of the properties of the mayorazgo. What is involved in the present proceedings is the usufruct of the revenues not paid to the petitioners, that is, the fifth of the revenues to the usufruct of which the plaintiffs and the intervenors, were entitled. Does this usufruct constitute a real lien on all the properties of the mayorazgo, as contended by the petitioners, or is it merely a personal obligation of the defendants to the plaintiffs and the intervenors, as claimed by the respondent Consuelo Legarda Viuda de Prieto? Stated differently, does the aforesaid family trust carry with it a real lien to which all the properties of the mayorazgo are subject in order to secure the payment of the fifth of the revenues collected by the defendants and not delivered to the plaintiffs and the intervenors?

This court said:

"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." (Id., p. 937.)

The only inference that can be drawn from the foregoing passage is that the mayorazgo exists in fact, and will continue to exist until the properties are divided among those entitled thereto; but there is absolutely nothing in the abovequoted paragraph or in the entire decision of March 28, 1926 which holds, nor may it in any wise be deduced from the very nature of the family trust, with which we are here concerned, that the same implies any lien or mortgage, taking into account:

- That the founder of this mayorazgo, in enumerating the properties entailed, expressly declared that they "are absolutely free from any encumbrance" {Id., p. 907) and that it was his:

"* * * 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; * * *" (Id., p. 908.)

This shows that it was the will of the founder of the mayorazgo that the properties which he delivered to his first-born free from any encumbrance should always be preserved in that condition, and said intention is entirely incompatible with the theory that those properties are subject to a lien or mortgage.

- Law 27 of the Toro is cited for the purpose of demonstrating that the family trust in question is an encumbrance. The citation does not, however, establish the proposition, because the statement in that law to the effect that when the father or mother gives a betterment from the third part of their properties to any of their legitimate children or descendants, they may impose upon it any encumbrance, whether of restitution or of trust, leaves the issue before us undecided. If any encumbrance could be imposed, the question that arises is whether the founder of the mayorazgo not only could impose but in fact imposed a real lien on the properties of the mayorazgo. It has already been shown that the existence of a lien or encumbrance is contrary to the manifest will of the founder of this mayorazgo.

- A lien under the Civil Law is created by contract or by statute, or is a right in equity. (37 C. J., pp. 307 and 308.) Inasmuch as the family trust under consideration is not the result of a contract or of an express provision of a statute, we shall confine ourselves to finding out what a "lien in equity" is.

"The term 'lien' is used in equity in a broader sense than at law. And although it is difficult to define accurately the term equitable lien, generally speaking, an equitable lien is a right, not recognized at law, and which a court of equity recognizes and enforces as distinct from strictly legal rights, to have a fund or specific property, or the proceeds, applied in full or in part to the payment of a particular debt or demand; a right of a special nature over property which constitutes a charge or encumbrance so that the property itself may be proceeded against in an equitable action, and either sold or sequestered, and its proceeds or its rents and profits applied on the debt or demand of the person in whose favor the lien exists, * * *" (37 C. J., p. 308.)

Does this lien in equity exist in the family trust in question? In other words, does said family trust imply a lien in equity? We will say yes, in so far as the revenues of the properties of the mayorazgo are concerned; but our answer is negative, in so far as the properties are involved. There can be no doubt that such lien on all the revenues of the mayorazgo exists, that is, all the revenues shall respond for the payment of the fifth thereof to the younger children of the founder, now to the plaintiffs and the intervenors. This is plainly deduced from the very words of the founder: "It shall be his (possessor of the mayorazgo) 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, * * *." From this it may logically be concluded that as long as the fifth part of the net revenue shall not have been set apart, all the revenues are encumbered with the obligation to pay the shares of the younger children. The younger children, and now their descendants, have the right to assert their claim, wherever the

revenues may be found, to the fifth thereof, and they may even ask for the attachment or deposit of all the revenues with a view to insuring their right to recover their participations. But the payment of the fifth of the revenues cannot be enforced against the properties of the mayorazgo by attaching and selling any part thereof, because that would be violative of the plain prohibition of the founder of the mayorazgo against the sale of the properties entailed and would destroy the family trust to the prejudice of future successors or descendants. Every time a part of the properties is attached and sold, the subject matter of the mayorazgo would be reduced, the revenues would be less, and, consequently, the day may come when there would no longer be any real property of the mayorazgo from which the payment of the fifth of the revenues may be effected. We should not forget that the defendants are under obligation to pay the fifth of the revenues, not at one time, but every year and as long as the mayorazgo exists.

- Such alleged lien would: furthermore be essentially inconsistent with the continuance of the mayorazgo. The founder has established this entail as a permanent institution in order that the first-born children on the one hand and the younger children on the other, and their respective descendants, may enjoy the properties of the mayorazgo in perpetuity, and his express will and the purpose of the mayorazgo cannot be brought into realization if the younger children or their descendants would have such lien on the properties entailed as to permit them to attach and sell part or all of said properties.

- A lien on all the entailed properties does not and cannot exist in favor of the plaintiffs and the intervenors, for the reason that it is contrary to the nature and continuance of the family trust under consideration and of the mayorazgo itself. May there be a mortgage in their faVor? There is of course no express, voluntary or contractual mortgage. If one exists, it would be what is known under the former legislation as an implied or general mortgage. However, apart from the circumstance that any mortgage would also be contrary to the nature of the mayorazgo, the petitioners have lost such implied encumbrance or mortgage, granting that they ever had it. According to the provisions of the second paragraph of article 1875 of the Civil Code, "the persons in whose favor the law creates a mortgage shall have no other right than to demand the execution and registration of the instrument by which the mortgage is to be evidenced; this without prejudice to the provisions of the Mortgage Law in favor of the State, provinces, and towns for the amount of the last year's taxes and in favor of the insurers for the premium of the insurance." The Civil Code was made effective in these Islands in 1889 by the Royal Decree of July 31, 1889, and the first Mortgage Law on the 1st day of October of the same year. According to article 348 of said law, "those who on the day this law becomes effective have any of the legal mortgages excepted in article 355, shall have the right to require, within the period of two years from said date, the person bound by said mortgage to execute in lieu thereof a special mortgage sufficient to answer for the amount of the obligation secured by the first." (Rodriguez Berriz, Mortgage Law and Regulation, p. 93.)

Commenting on article 347 of the Spanish Mortgage Law from which the above-quoted article 348 of the first Mortgage Law of the Philippines was copied, Galindo y Escosura states the following:

"The main thought, the axis on which the project rotates, was to convert implied legal mortgages into special and express mortgages, a period being fixed for the purpose after the lapse of which the hidden encumbrance shall be inefficacious. But inasmuch as the one favored by the encumbrance ought to have the right to ask for the conversion, and the one subject thereto could not oppose it, disturbing effects in themselves of the old contracts and even of the relations of dependence and respect which the parties in some mortgages had, two groups of legal mortgages had to be established; one of those granted by the old legislation to women and to the children for their properties ; these were included in the' general rule of article 347; the first, in the exception of 354 * * *" (Vol. 4, 2d ed., p. 491.) (Underlining ours.)

Manresa (vol. 12, 3d ed., p. 513), commenting on the above-quoted second paragraph of article 1875, states as follows:

"We then likewise state that before the publication of the Mortgage Law, legal mortgages were classified according to their nature into implied, necessary and general mortgages, which, without being evidenced by any document and without referring to determinate or known properties, subjected all that a person owned in favor of another, creating an odious privilege which was highly prejudicial to business transactions in the sense that under said system the purchaser or mortgage creditor was always exposed to the risk that a hidden mortgage would appear, the existence of which there was no means of knowing. But with the promulgation of the aforesaid law, the old ways were abandoned, although special care was taken to preserve the benefit conceded by the old laws to persons in whose favor' said mortgages were constituted, without prejudice, however, to the publicity which the property must have in order to attain the ends of the Mortgage Law.

"Its effect was the continuance of legal mortgages, but of a new nature, for hidden and general encumbrances had to be converted into public and special ones through the exercise of the right granted for the purpose to the holders thereof.

"The second paragraph of the article under consideration therefore provides that the persons in whose favor the law creates a mortgage shall have no other right than to demand the execution and registration of the instrument by which the mortgage is to be evidenced. Thus at the present time, as well as from January 1, 1863, when the original Mortgage Law became effective, to have a legal mortgage is to have, not the real encumbrance or charge on the properties of the debtor whose obligation is secured by it or the mortgage already constituted, but solely the right to compel another to execute the same * * *." (Underlining ours.)

In view of the provisions of article 348 of the first Mortgage Law of the Philippines and the second paragraph of article 1875 of the Civil Code, and of the foregoing commentaries, there can be no doubt that, even supposing that the family trust in favor of the petitioners implies or carries with it a real lien, they have lost their right to that lien or implied mortgage, for the reason that it was not converted into a special and public mortgage through the execution by the possessors of the mayorazgo of the corresponuing instrument and its registration in the registry of property.

It cannot be rationally argued that neither the Civil Code nor the first Mortgage Law and at one stroke destroyed existing rights acquired under the former legislation, such as an implied legal mortgage. Such contention is absolutely devoid of force, as will be seen from the circumstance that the aforesaid laws did not arbitrarily destroy or abolish implied mortgages, and that, on the contrary, they were preserved in improved forms by converting them into special and public mortgages after compliance by the holders of said rights, if they wanted to preserve them, with a certain requisite.

There being no real lien in favor of the petitioners to secure the payment of the fifth of the revenues, Mariano S. Tuason could therefore validly transfer his participation in the properties of the mayorazgo free from all encumbrances, and Consuelo Legarda Viuda da Prieto could acquire the same without assuming any obligation of the grantor. There is nothing which militates against the validity of the stipulation contained in paragraph twelfth of the deed of cession executed by Mariano S. Tuason in favor of the respondent; and none of the various pronouncements made by this court in its decision of March 23, 1926 was violated, set aside or changed, when the respondent judge held in the order of December 17, 1936 that no lien was created in favor of the plaintiffs and the intervenors on the participation of Mariano S. Tuason in the four-fifths of the Hacienda de Mariquina, which is one of the properties of the mayorazgo. Neither did the respondent judge act without his jurisdiction and power in holding in the said order of December 17th that it is not proper to include the respondent Consuelo Legarda Viuda da Prieto as one of the defendants, in substitution for Mariano S. Tuason, as regards the payment of the sum of P133,690.67 owing by the said defendants, and much less to issue a writ of execution against her.

The petition is denied with costs against the petitioners, and the injunction issued in this case is ordered lifted. So ordered.

Avancena, C. J., Villa-Real, and Laurel, JJ., concur.

CONCURRING AND DISSENTING

IMPERIAL, J.,

I believe it is not necessary now to decide whether the entailed properties are subject to the payment of the sum of P133,690.67 fixed in the order of June 17, 1936: first, because the principal question to determine; which consequently decides the proceedings, is whether Consuelo Legarda Viuda de Prieto is bound under the terms of the order to pay any part of the aforesaid sum and whether a writ executing the order may be issued against her, and, secondly, because the fundamental question whether the properties of the mayorazgo are answerable for the payment of said sum, under the theory that the fifth of the revenues is an encumbrance imposed thereon by the founder and the laws, has not been directly raised by pleadings filed with the court and, therefore, cannot be put in issue in the instant proceedings.

The only question to decide in this case refers to the mode of executing, and to the persons against whom to execute, the order of June 17, 1936 which requires the defendants to deliver to the judicial receiver the sum of P133,690.67 . for distribution among the plaintiffs and the intervenors. The order is not directed against Consuelo Legarda Viuda de Prieto, nor does it impose upon her any obligation to deliver any amount; consequently, a writ for the execution of said order cannot be issued against her personally. A judgment or order is conclusive and binding only against the parties or their legal representatives who have directly intervened in the case (sec. 306, Code of Civil Procedure).

But the majority decision goes farther and, unnecessarily at this time, holds that the properties of the mayorazgo are not answerable for the payment of the said sum, which is a part of the fifth of the revenues, for the reason that this fifth is not a mortgage lien, or that of another class, on the said entailed properties. The liability of the defendants in respect to the delivery of the fifth of the revenues kept by them should be distinguished from the liability of the entailed properties in relation to said obligation. The first is personal in nature, but the second is an obligation implying lien or encumbrance, not arising from mortgage, in the same way that the right from which it is derived is real, in the sense that it subsists wherever the properties are found and these properties are directly answerable even if they be in the possession of third persons. From the latter point of view the right of the plaintiffs and the intervenors to the fifth of the revenues is real in nature and directly binds the entailed properties. The mayorazgo being a trust and a family trust having been created therein, as held in the principal decision rendered in the case (50 Phil., 888 et seq.), the beneficiaries or cestitis que trust, who are the plaintiffs and the intervenors, may follow the trust properties wherever they are found, with previous identification thereof, with a view to making them answerable for the payment of the fifth of the revenues corresponding to them. "As a general rule, if the property may be distinctly traced and identified, and superior rights of innocent third persons have not intervened, a cestui que trust may, in equity, follow and recover, or impress a trust on, trust funds or property which have been diverted, no matter what the form into which they have been converted nor into whose hands they have come. If it can be traced and identified, this rule applies, although the subject matter of the trust consists of money. The principle of following trust funds, in equity, does not apply as against one who has participated in the breach of trust but has retained none of the property or its proceeds; nor in favor of one who is a stranger to the trust and has no beneficial interest in the trust fund." (65 C. J., sec. 888, pp. 963965; U. S. vs. Dunn, 45 S. Ct., 451; 268 U. S., 121; 69 Law. ed., 876 [mod. 288 F., 158]; Central Nat. Bank vs. Connecticut Mut. L. Ins. Co., 104 U. S., 54; 26; Law. ed., 693; Texas vs. White, 10 Wall., 68; 19 Law. ed., 839; Luster vs. Martin, 58 F. [2d], 537 [cert. den. 55 S. Ct, 86] ; Dixon vs. Hopkins, 56 F. [2d], 783; China Fire Ins. Co. vs.

Davis, 50 F. [2d], 389; 76 A. L. R., 1259 [cert. den. 52 S. Ct., 36; 284 U. S., 658; 76 Law. ed., 558]; Turner vs. Kirkwood, 49 F. [2d], 590 [cert. den. 52 S. Ct. 18; 284 U. S., 635; 76 Law. ed., 540]; Van Allen vs. Dorrough, 15 F. [2d], 940 [rev. 14 F. (2d) 494]; Beaver Boards Co. vs. Imbrie & Co., 282 F., 654 [aff. 288-F., 552] ; In re Larkin & Metcalf, 202 F., 572; American Can Co. vs. Willkms, 178 F., 420; 101 C. C. A., 634 [aff. 176 F., 816]; Cal'well vs. Firih, 91 F., 177; 33 C. C. A., 439; Dow vs. Berry, 18 F.(121; U. S. us. Myers, 27 F. Cas. No. 15,844; 2 Brock., 513; McLarren vs. Brewer, 51 Me., 402; Hanford vs. EuJastel, 93 A., 586; 87 N. J. Law, 205; Schramm-Johnson Drugs vs. Kleeb, 169 Pac, 161;"51 Utah, 159; In re Hallett, 13 Ch. D., 696.)

That the properties of the mayorazgo are answerable for and subject to the payment of the fifth of the revenues, which after the Disentailing Law was converted into a fifth of the properties, is shown by the following passages of the principal decision, supra:

"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.

* * * * *

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

* * * * *

"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.

* * * * *

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

" '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.'

* * * * *

" '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

* * * * *

"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 RIGHT 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?

* * * * *

"Analyzing the entail under consideration, we may say that it is a mayorazgo (from major natus, 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 fideicomitiso.' (Manresa, Spanish Civil Code, vol. 6, p. 172, edition of 1921.)

* * * * *

"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.

* * * * *

"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.

* * * * *

"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 abovementioned, 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.

* * * * *

"* * * 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.

* * * * *

"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 possessors 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.

* * * * *

"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 of 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 whether any fraud has intervened. No fraud in fact need be shown, and no excuse will be heard from the trustee.' (Italics ours.)

* * * * *

"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).

* * * * *

"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 (4/40) of the whole of the properties of this foundation must be divided into four equal portions, because one portion, or one-fortieth (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 (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 (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 80/100 pesos (P560,016.80), or one hundred forty thousand four and 20/100 pesos (P140,004.20), which is one-fortieth part (1/40) for each stirps.

* * * * *

"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 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 mayorazga, in accordance with the sixth clause of the deed of foundation and article 4 of the Disentailing Law."

It is inferable from the passages quoted from the principal decision: (1) that the founder created a mayorazgo of permanent character; (2) that in order to carry out the purposes of the foundation, the founder absolutely prohibited the alienation and encumbering in any form, of the entailed properties, enjoining that the first-born possessor who violates his will would be removed from his position and the management of the properties would pass to the immediate first-born successor; (3) that the mayorazgo was from the beginning a trust, similar to usufruct which is provided for in the Civil Code, in virtue of which the first-born possessor and his immediate successors had only the beneficial ownership of the entailed properties and the naked ownership belonged to all

the descendants of the founder; (4) that the charge on the fifth of the revenues was likewise a family trust; (5) that in relation to all the entailed properties, the first-born possessor and his immediate successors, who are charged with the duty of carrying out the will of the founder, are the fiduciaries, or trustees as called by the Code of Civil Procedure, and the plaintiffs and the defendants and the relatives of the first-born possessors who are entitled to receive a proportional part of the fifth of the revenues, are the cestuis que trustent; (6) that in relation to the fifth of the revenues, the possessors or administrators of the properties are the fiduciaries, and the intervenors, the defendants, and other relatives of the firstborn possessors are the cestuis que trustent; and (7) the trust nature which the entailed properties have had from the beginning subsists up to the present, notwithstanding the promulgation and enforcement of the Disentailing Law, for the reason that the defendants, as actual[^] possessors, have so recognized by their own acts and they have not proceeded with the liquidation and division of the properties.

It is true that, according to article 2 of the Disentailing Law, the possessor of the properties on the date of its effectivity should acquire half of the four-fifths of the properties and reserve the other half for his immediate successors; but this provision was subject to two conditions imposed by article 3, namely, liquidation and division of all the entailed properties. According to article 3, in order that the first-born could dispose of half of the four-fifths, it was necessary to liquidate the mayorazgo and distribute all the entailed properties among the persons designated in the law. The failure to comply with these conditions is the reason why this court in its principal decision held that the trust subsists and the entailed properties continue to be answerable for all the obligations imposed by the founder and subsequently modified by the Disentailing Law.

All the conclusions of fact and of law made by this court in its principal decision have become final and binding and res judicata as to all parties who have intervened in the case, with the result that any resolution to be issued in the future ought to accord with what has already been resolved and decided.

The majority opinion states:

"5. A lien on all the entailed properties does not and cannot exist in favor of the plaintiffs and the intervenors, for the reason that it is contrary to the nature and continuance of the family trust under consideration and of the mayorazgo itself. May there be a mortgage in their favor? There is of course no express, voluntary or contractual mortgage. If one exists, it would be what is known under the former legislation as an implied or general mortgage. However, apart from the circumstance that any mortgage would also be contrary to the nature of the mayorazgo, the petitioners have lost such implied encumbrance or mortgage, granting that they ever had it. According to the provisions of the second paragraph of article 1875 of the Civil Code, 'the persons in whose favor the law creates a mortgage shall have no other right than to demand the execution and registration of the instrument by which the mortgage is to be evidenced; this without prejudice to the provisions of the Mortgage Law in favor of the State, provinces, and towns for the amount of the last year's taxes and in favor of the insurers for the premium of the insurance.' The Civil Code was made effective in these Islands in 1889 by the Royal Decree of July 31, 1889, and the first Mortgage Law on the 1st day of October of the same year. According to article 348 of said law, 'those who on the day this law becomes effective have any of the legal mortgages excepted in article 355, shall have the right to require, within the period of two years from said date, the person bound by said mortgage to execute in lieu thereof a special mortgage sufficient to answer for the amount of the obligation secured by the first.' (Rodriguez Berriz, Mortgage Law and Regulation, p. 93.)

* * * * *

"In view of the provisions of article 348 of the first Mortgage Law of the Philippines and the second paragraph of article 1875 of the Civil Code, and of the foregoing commentaries, there can be no doubt that, even supposing that the family trust in favor of the petitioners implies or carries with it a real lien, they have lost

their right to that lien or implied mortgage, for the reason that it was not converted into a special and public mortgage through the execution by the possessors of the mayorazgo of the corresponding instrument and its registration in the registry of property."

For the purposes of this dissenting opinion it is not out of place to observe that the decision of the majority concedes, though hypothetically, that the lien weighing upon the properties of the mayorazgo is one of those anciently known by the name of "implied legal mortgages". But it concludes that the implied legal mortgage which formerly existed and encumbered the properties of the mayorazgo has disappeared because of the failure of the petitioners, the plaintiffs and the intervenors, to convert it into a public special mortgage through the execution by the possessors of the mayorazgo of the corresponding document with subsequent registration, in accordance with the provisions of article 1875, paragraph 2, of the Civil Code and article 848 of the Mortgage Law made effective in the Philippines on October 1, 1889. With reference to this aspect of the case, I may state, with all due respect for the opinion of the majority, that in laying down such conclusion no account was taken of the provisions of Base 27 of the Law of Bases which preceded the drafting and approval of the Civil Code or of Rules 1, 2, 4 and 8 of the transitory provisions of said Code, according to which the innovations and changes introduced by the Civil Code neither have retroactive effect nor prejudice vested rights which shall be governed by the prior legislation under which they were acquired. Said legal provisions, in so far as pertinent hereto, read as follows:

"Base 27. * * * changes in derogation of vested rights shall have no retroactive effect.

"TRANSITORY PROVISIONS

* * * * *

"1. Rights vested under the legislation prior to this code by virtue of acts which transpired while it was in force, shall be governed by such prior legislation even if the code should otherwise provide with respect thereto, or should not recognize such rights. But if any such right is recognized for the first time by this code, it shall be effective at once, even when the act which gave rise thereto may have taken place under the prior legislation, provided it does not conflict with other vested rights having the same origin.

"2. * * * Therefore, * * * fideicomiso to apply property in accordance with the private instructions of the testator, and any other acts permitted by the old law shall be efficacious; * * *

"4. Actions and rights which accrued before this code became operative, but which have not been enforced, shall continue to subsist with the same force and effect given them by the prior law, but shall be subject, with respect to their exercise, duration, and the procedure for enforcing them, to the provisions of this code.

"If official proceedings for the enforcement of the right or action, commenced under the provisions of the prior law, should be pending and such proceedings should be different from those prescribed by this code, the parties may elect to make use of either procedure.

"8. Guardians and curators appointed under the provisions of the prior law and subject to the same shall retain their offices, but shall be subject with respect to their exercise to the provisions of this code.

"This rule shall also be applicable to the possessors and temporary administrators of the property of other persona, in the cases in which the law authorizes the same."

If it is admitted, though hypothetically, that the lien existing on the properties of the mayorazgo in favor of all the beneficiaries is, according to prior legislation, an implied legal mortgage, it is evident that it was not suppressed by the second paragraph of article 1875 of the Civil Code because this provision is an innovation or change of said Code and, in conformity with Base 27 and Rules 1, 2, 4 and 8 of the transitory provisions, had no retroactive

effect, and the implied legal mortgage should be recognized and given effect in pursuance of the prior legislation under which it gained existence.

Reference is also made to article 348 of the Mortgage Law which took effect in the Philippines on October 1, 1889 and to the commentaries of Galindo and Escosura on article 347 of the Spanish Mortgage Law of 1861, which was not enforced in the Philippines and is the same as article 348, for the purpose of showing the same proposition that, by reason of the failure to register the special public instrument of mortgage which the plaintiffs and the intervenors ought to have demanded from the possessors of the mayorazgo conformably to the second paragraph of article 1875 of the Civil Code, the implied legal mortgage then constituted under the prior legislation in favor of the beneficiaries ceased to exist or became ineffective.

Article 348 and the commentaries cited do not have any persuasive force. In order to comprehend the real meaning and extent of article 348, it should be read and applied in conjunction with article 354 of the same Mortgage Law in force in the Philippines from October 1, 1889. These articles read verbatim as follows:

"ART. 348. Those who at the time this law becomes effective have in their favor any legal mortgage excepted in article 355, may require within the period of two years from said date the person bound by said mortgage to execute in lieu thereof a special mortgage sufficient to answer for the value of the obligation secured by the first mortgage.

"ART. 354. The existing legal mortgages, the conversion of which into special mortgages may be required according to article 361 (should read art. 348 because art. 361 has no relation to art. 354 and undoubtedly there has been typographical error), shall be those which at the publication of this law are implied:

"First. In favor of the public Treasury, on the properties of those handling the funds thereof or dealing with it, and on properties of taxpayers indebted for taxes for more than one year which encumber the same real properties.

"Second. In favor of women, on properties of a third person who has offered to give them dowries.

"Third. In favor of the husband, on the properties of the woman who has offered to donate a gift, or on the properties of a third person who has made the same offer by her.

"Fourth. In favor of minors or incompetents, on the properties of their guardians or administrators, or the heirs of the latter, if their predecessors have died without the approval of the accounts.

"Fifth. In favor of children, on the properties of their mother and those of their stepfather, if she has been their guardian or administratrix and her accounts have not been approved.

"Sixth. In favor also of minors, on the properties belonging to them which have been sold and have not been fully paid.

"Seventh. In favor of the legatee, on the properties of the testator, if the legacy has not been fully paid.

"Eighth. In favor of refection creditors, on the properties repaired, for the amounts or goods, advanced and not paid for work, construction and repair.

"Ninth. In favor of vendors, on the thing sold, for the price thereof when no extension has been granted for its payment."

It is obvious from these two provisions that the implied legal mortgages referred to in article 348 are solely the mortgages specified in paragraphs 1 to 9 of article 354, with the result that, as the implied legal mortgage which existed on the entailed properties is not included in the enumeration, granting that said encumbrance was in fact a mortgage of that character under the former regime, the conclusion is inevitable that the provisions of article 348

and the commentaries cited are not applicable to the lien which encumbers all the properties of the mayorazgo foundation.

But in the light of legislative history the encumbrance weighing since the beginning on the entailed properties cannot be considered as one of the implied legal mortgages mentioned in article 1875, paragraph 2, of the Civil Code and article 348 of the Mortgage Law, for the reason that before their effectivity the Disentailing Law of October 11, 1820, extended to the Philippines on March 1, 1864, had already provided for the suppression of mayorazgos upon previous compliance by the possessors with certain conditions already referred to above. As the mayorazgos were consiaem disentailed long before the effectivity of the Civil Code and the Mortgage Law of 1889, there was no reason for their articles 1875 and 348, respectively, to deal therewith, unless it be to legislate on a subject already not existing before the same law.

That the implied legal mortgages adverted to in article 347 of the Spanish Mortgage Law of 1861 and article 348 of the Mortgage Law of the Philippines of 1889 do not embrace the encumbrance or entail created by the mayorazgo on the properties of the foundation, is lastly shown by the following passage of the declaration of purposes of the Codification Commission when it presented to the Cortes the project of the Mortgage Law of 1861 (Seix, XVIII Enciclopedia, Jurldiea Espanola, p. 46):

"This transformation of the old legal mortgages into express mortgages must have a peremptory period; otherwise, the better effects of the law would be retarded indefinitely: the Commission has fixed the period of one year, deemed by it to be more than sufficient for all prior rights to be protected; he who allows the term to expire without exercising his right should not be surprised if it elapses; the law seeks to protect and assist those who do not waive expressly or impliedly the protection extended to them.

"Included in this case are the old legal mortgages, constituted in favor of the public Treasury on the properties of its debtors, administrators, auditors, treasurers and other agents and persons liable to it; that which women have on the properties of a third person who has offered to give them dowries; that of the husband on the properties of the woman who has promised to donate, a gift, or on the properties of a third person who by her has made the same promise; that of the minors or incompetents on the properties of their guardians or of the latter's heirs; that of the children on the properties of their mother or on the properties of their stepfather for the negotiation of their guardianship; that of the minors on their properties which have been sold and have not fully paid; that of the legatees, if the legacy has not been fully satisfied; that of the refection creditors on the repaired properties for amounts or goods advanced and not paid for construction and repair; and, lastly, that of the vendors on the properties sold, the payment of the price of which has not been extended."

In view of the foregoing, I concur in the result of the case, but I dissent from so much of the decision of the majority as declares that the properties of the mayorazgo are not answerable for the payment of the fifth of the revenues which the defendants, as heirs of the last possessor and as actual possessors of the properties, are bound to pay to the plaintiffs and the intervenors.

Abad Santos and Diaz, JJ., concur in this opinion.

Petition denied.

RESOLUTION

February 5, 1938

CONCEPCION, J.:

Examining the motion filed by the petitioners on December 16, last, for the reconsideration of the decision rendered herein on November 16 of last year, it is of course to be noted that there is some difference between the theory sustained by said petitioners in the petition for certiorari which gave rise to these proceedings, and that now adopted by them in the motion for reconsideration. In the petition they contended that there exists a lien in their favor on all the properties of the mayorazgo, without giving its designation but specifying that its object was to secure the payment of the fifth of the net revenues of all said properties assigned to the eight younger children of the founder of the mayorazgo of whom the petitioners are descendants or successors in interest. The petition was denied, as this court arrived at the conclusion that the petitioners did not have on said properties any lien of a real nature (mortgage) or any lien in equity. In the motion for reconsideration they now contend that the lien referred to in the petition for certiorari is a usufructuary right over the properties of the mayorazgo, by virtue of the family trust created by the founder of said entail consisting of the duty imposed on his first-born to separate and deliver annually to the eight younger children of said founder and other specified relatives the fifth of the net revenues of the properties of the mayorazgo. They also allege that they have a lien in equity on all the properties of the said mayorazgo by reason of the family trust adverted to.

We are clearly of the opinion that usufruct is not a lien of a real nature in the sense alleged by the petitioners in the petition for certiorari, nor are they usufructuaries of all the properties of the mayorazgo.

As usufruct is the right to enjoy another's properties without altering their form or substance (Derecho Civil by Laserna and Montalban, vol. 1, p. 634; Derecho Civil by Sanchez Roman, vol 3, p. 489; Leyes, from 20 to 27 inclusive, Title XXXI, Partida 3; art. 467, Civil Code), possession of the properties subject to usufruct is inherent in said right, for the reason that, without possession, the usufructuary cannot enjoy the properties. The right of usufruct is therefore not a lien of a real nature for the performance of any obligation, but the enjoyment itself of the properties subject to usufruct.

Neither are the petitioners usufructuaries of all or any part of the properties of the mayorazgo, and this is shown:

(A) By the deed founding the mayorazgo:

1. Because the desire of the founder was to give to his first-born Vicente Dolores Tuason a betterment in the third and fifth of his properties, he established the entail for and in favor of said first-born and his successors (Barretto vs. Tuason, 50 Phil., 888, 902, 909). The mayorazgo was not founded for the eight younger children of the founder, of whom the petitioners are descendants. Therefore, the true and sole usufructuary of the properties is the first-born (mayorazguista).
2. To the eight younger children and other specified relatives, the founder granted only the fifth of the net revenues of the properties entailed.
3. One of the obligations of the usufructuary is to preserve the properties subject to usufruct. This obligation never pertained to the younger children of the founder or their descendants, because the founder imposed on the first-born (mayorazguista), and not on the younger children, the obligation "to preserve all the entailed properties in good condition * * *." (Barretto vs. Tuason, 50 Phil., 888, 904).

(B) Because according to the decision of this court in the same case dated March 23, 1926, published in the volume already cited (50 Phil., 888-971):

1. The first-born (mayorazguista) is the sole possessor of this entail (pp. 914, 915, 916, 922, 937, etc.). The first-born (mayomzguista) having, therefore, the right to possess the properties and being in possession thereof, the eight younger children of the founder and other specified relatives cannot be usufructuaries of said properties for lack of possession.

2. Because the said decision of this court has held that by virtue of the mayorazga established, the first-born (mayorazguista) had the dominium utile of all the properties and was the usufructuary thereof (pp. 914, 920, 922, 926, etc.).

3. The eight younger children of the founder and other specified relatives were merely recipients of a fifth of the revenues. It is stated in the decision but once that they have the usufruct—not of all the properties of the mayorazgo—but of one-fifth thereof; but this happened because this court was considering whether the term "nietos" (grandchildren) used in the deed founding the mayorazgo should be understood as limited to the children of the eight younger children, or on the contrary should be understood in a broad sense as including all the descendants of a line in the third, fourth and successive generations; and in order to give a general perspective of the situation, this court said that 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" (p. 943); but except in this passage, the court, in considering the nature and extent of the rights of the eight younger children and other specified relatives, has repeatedly and invariably held that they are merely recipients of the fifth of the net revenues of the properties (pp. 937, 943, 944, 945, etc.).

In view of the foregoing, we reach the conclusion that the petitioners, as descendants and successors of the eight younger children of the founder of the mayorazgo, are not usufructuaries of the properties of the mayorazgo, nor is usufruct in any case a lien which secures the payment of the fifth of the revenues of the properties.

We shall not discuss whether the mayorazgo is in itself a lien; it is not material to the question under advisement, since we are called upon to show whether or not the petitioners have a lien real in nature independent from the mayorazgo, which serves as security for the family trust consisting of the fifth of the net revenues of the properties to which they are entitled.

As regards the point whether they have a lien in equity on the properties of the mayorazgo, it is believed that the decision sufficiently refutes this contention of the petitioners.

It seems that the trouble of the petitioners lies in their wrong belief that, if they have no lien of a real nature on the properties of the mayorazgo, they would be without any remedy to guarantee the collection of the revenues owing by the respondent defendants. Fortunately this is not true, because there are various adequate ordinary and special remedies provided by the Code of Civil Procedure for the attainment of the same result sought in these proceedings.

Reconsideration is denied, record being made of the fact that Justices Imperial, Abad Santos and Diaz concur and dissent in part on the grounds already set forth in their former concurring and dissenting opinion. So ordered,

Avancena, C. J., Villa-Real, and Laurel, JJ., concur.

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