1896.
July 2 and 7.

MEERASAIBO *v.* PHILIPPAL.

D. C., Mannár, 8,476.

Action for cancellation of fraudulent conveyance—Fraudulent preference.

Plaintiff, an unsatisfied judgment-creditor of first defendant, sued him and second defendant to have a conveyance of certain lands by first to second defendant cancelled on the ground of fraud. Plaintiff had not seized the lands in execution of his judgment.—

Quære, whether the action was not premature.

Held, that plaintiff could not succeed in having the conveyance cancelled. What he could at the most ask was that the conveyance be declared void, and the land declared executable to his judgment.

Fraudulent preference is the preference by an insolvent debtor of a creditor in fraud of his other creditors, and it is only a trustee who represents all the creditors who can ask a Court to declare a transaction to be a fraudulent preference in order that the professed creditor may be compelled to restore what he has unfairly acquired to the estate for equal distribution amongst all the creditors.

THE facts of the case appear in the judgment.

Wendt, for appellant.

Sampayo, for respondent.

7th July, 1896. WITHERS, J.—

Plaintiff is the unsatisfied judgment-creditor of the first defendant, and he brings this action to have a conveyance of certain lands from his debtor to the second defendant cancelled on the ground that this conveyance was made with intent to defraud him of his just claims and to prevent him from satisfying his demands out of the only property which the first defendant had before the conveyance.

The plaintiff did not attempt to seize these lands in execution of his judgment, and I am inclined to doubt whether his action is not a premature one—whether, in fact, he has a good cause of action. In no case, I imagine, could he succeed in having a conveyance from his debtor to a stranger cancelled; at the most he could ask that the conveyance should be declared void, and that the land should be declared executable to his judgment notwithstanding the conveyance.

The Judge has, however, given judgment for the plaintiff on the ground that the act of sale is a fraudulent preference. Fraudulent preference is the preference by an insolvent debtor of a creditor in fraud of his other creditors, and it is only a trustee who represents all the creditors who can ask a court to declare a transaction to be a fraudulent preference in order that the

professed creditor may be compelled to restore what he has unfairly acquired to the estate for equal distribution amongst all the creditors.

However, the pronouncement of the Judge that this transaction was a fraudulent preference may be regarded as a technical mistake. I do not think, however, that the facts support the Judge's finding that this was a fraudulent transaction, so far as the second defendant is concerned.

It is not proved that the second defendant intended to defraud the plaintiff or knew that his purchase was calculated to defraud the plaintiff. Moreover, it seems to me that there was valuable consideration for the purchase and sale between the first and second defendants.

The second defendant was a creditor of first defendant, and was in possession of the land as an otti holder or usufructuary mortgagee, and he took the fruits of the land in lieu of interest on a principal sum which was owing to him by first defendant. He made further advances to the first defendant. Finding, however, unable to pay the money, the first defendant discharged the debt by selling the land. The amount of money owing to the second defendant was a fair price for the land sold. The District Judge drew up a sort of mortgage debt account between the first and second defendants, which made it appear as if the second defendant was really in debt to the first defendant when he took the impeached conveyance.

That account was framed on the footing of an ordinary English mortgage where the mortgagee is in possession of the property mortgaged. The usufructuary mortgagee is in quite a different position. He has not in the same way to account for his usufruct. The usufruct is in lieu of interest. It may be little or it may be very large. He is allowed to keep it without any surplus being set off against the principal debt. I would set aside the judgment and dismiss plaintiff's action with costs.

LAWRIE, J.—I agree.