MARIKAR *v.* MARIKAR.

1893.
October 12

D. C., Chilaw, 1,493.

Joint debtors—Payment of debt by one of them—His rights against land mortgaged to the paid off creditor by the other debtor—Effect of such debtor alienating such land—Claim by alienee.

Defendant and her mother, A, were co-debtors on a bond whereby A had mortgaged a parcel of land belonging to her. Defendant paid the debt out of his own funds, and sued A for her moiety. She made no defence, and a decree was entered for the money so due with a declaration that the land was bound and executable for it. Defendant caused the land to be seized in execution, but, before sale, A died, having donated the land to another of her sons, the plaintiff, reserving to herself a life interest. Plaintiff was appointed legal representative of A's estate under section 341 of the Civil Procedure Code. Defendant thereupon caused the land to be re-seized, and plaintiff claimed it under section 247 of the Procedure Code—*Held*, that the land was liable to be sold under the decree in defendant's favour.

THE facts of the case sufficiently appear in the judgment of LAWRIE, A.C.J.

W. Pereira, for appellant.

Dornhorst, for respondent.

LAWRIE, A.C.J.—

The mother of these parties borrowed money and gave a mortgage over her lands; her son, the defendant, was a co-debtor on the bond.

In 1889 the defendant paid the debt out of his own funds. Afterwards (I think in 1894) he brought an action against his mother for her part of the debt which he had paid. She made no defence to the action. Two decrees were entered: one a money decree, the other declaring the land bound and executable as under the mortgage.

The judgment-creditor caused the land mortgaged to be seized in execution. The mother died before a sale was effected. Up to her death she remained in possession. After her death her other son (the present plaintiff) registered a deed of donation to him from his mother, dated 1893.

As the decree had not been executed before the judgment-debtor's death, the plaintiff was appointed legal representative under section 341 of the Code.

Then the judgment-creditor caused the land to be again seized. The plaintiff, relying on his deed of donation, claimed the land. His claim was not upheld. Hence this action under section 247, for declaration that the land is his and is not liable to be sold under the decree obtained against his mother.

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It was a donation to take effect after the donor's death. It was a donation without other consideration than affection by a mother to her son. She was at the time indebted to another of her children. Did she by the donation put the land beyond the reach of him to whom she was then indebted? In a judgment of the Full Court in 1872 delivered by Sir EDWARD CREASY (*Ram. 1892, p. 69*) our law on the subject was stated to be: "An alienation by "gift may be set aside when a man gives away the whole or a "considerable portion of his estate knowing that he is insolvent, "and that he is diminishing the substance out of which his debts "might be paid. He who acts thus will be considered to have "intended the natural results of his acts, which is the defrauding "of his creditors."

In connection with this we should read the dictum of another Chief Justice, that "fraud in a legal sense is an act unwarrantable "in law to the prejudice of a third party, and not that crafty "villainy or grossness of deceit which it is applied in common "language" (*Ram. 1875, p. 182*). It may be that at the date of the donation the lady did not remember that she owed a debt to her younger son; it may be that he did not then mean to insist on payment.

If she had not given all her property to her son, the plaintiff, her other son, might not have insisted on his right as a creditor; but finding that his mother by a *quasi* testamentary donation had excluded him from the succession altogether, he was within his rights on insisting on payment; and his mother, by allowing judgment to go against her, acknowledged that she had been in debt at the date of the donation. On the principle that debt must first be paid I would affirm this judgment, which holds the lands to be liable on an unsatisfied decree obtained against the donor in her lifetime.

BROWNE, A.J.—

I would prefer to affirm this decision for the reason that the plaintiff is not shown to have been under any legal obligation whatever, as by his having taken administration to his mother's estate, to have assented to have been made defendant in the action against his mother, his donor, under the provisions of section 341 of the Civil Procedure Code. Rightly or wrongly, a mortgage decree was entered against his mother, and it still stands against her and those who claim under her. She might have claimed that the payment of the original mortgage by her son and co-mortgagor, the defendant, without his obtaining cession of action was a payment intended to enure to her hereafter as well as his,

especially when by his subsequent deed on which plaintiff relies, she intended a benefit to come to defendant as well as to plaintiff out of this land.

But she did not so claim expressly or by implication. On the contrary, she suffered defendant to obtain a mortgage decree against her and did not resist the seizure in her lifetime. Could she thereafter have been heard to prefer a claim so long as she allowed that decree to stand? And can plaintiff, as her voluntary legal representative for a special purpose, be allowed to do so for his own benefit? I think not.

Moreover, plaintiff, by his conduct in so accepting the *status quo* at her death, has not indicated to the defendant any necessity for showing she had no other lands and that her alienation was truly in fraud of his claim. Had he preserved his own independence by not undertaking her position as a judgment-debtor, defendant might have by necessary averments and proof in his answer have had the deed of gift set aside when relied on against him.