partnership now in question. They have not been placed on the record as mere *pro forma* defendants. The prayers in the plaint make no distinction between the fifth and sixth defendants and the other defendants, but ask for relief against whichever defendant may be found liable. As therefore the fifth and sixth defendants cannot properly be made parties, the whole suit must fail. I would therefore dismiss Appeal No. 188 with costs.

Miller, J.—I agree. The appeals are dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.

VENKATRAMA IYER AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

ESUMSA ROWTHEN AND OTHERS (DEFENDANTS, NOS. 1, 10, 11 AND 12), RESPONDENTS.*

1909. November 22, 23. December 7.

Mortgage—Decree, mortgage of—Mortgagee has a charge on amount realised in execution of decree mortgaged—Civil Procedure Code, Act XIV of 1882, *s.* 276—*Attachment and mortgage of decree on same day—Mortgage valid unless attaching creditor shows it to have been effected during the pendency of attachment.*

Where a decree is mortgaged and the amount due under the decree is subsequently realised in execution, the mortgagee has a charge on the amount so realised.

The mortgagee is entitled to a charge on property which through no fault of his has taken the place of the mortgaged property.

Singaravelu Udayan v. *Rama Iyer*, [(1903) 13 *M.L.J.*, 306], dissented from.

The receipt by one Court of a notice of attachment by another Court is not a judicial act to which the principle that judicial acts must be presumed to have been done at the earliest point of time of the date thereof would apply. Where therefore a decree is mortgaged on a certain date, and notice of attachment of such decree is received by the Court on the same day, it lies on the attaching creditor seeking to set aside such mortgage as made during the pendency of attachment under section 276 of the Civil Procedure Code to show that the receipt of such notice was prior to the execution of the mortgage.

When a decree is attached and the attachment is subsequently withdrawn by agreement, the attachment does not continue against the money realised in execution of such decree in the absence of anything to that effect in the agreement.

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* Second Appeal No. 1153 of 1907.

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VENKATRAMA IYER v. ESUMSA ROWTHEN.

SECOND APPEAL against the decree of F. Du P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 513 of 1906, presented against the decree of T. S. Thiagaraja Aiyar, District Munsif of Mannárgudi, in Original Suit No. 349 of 1905.

The facts for the purpose of this case are sufficiently set out in the judgment.

S. Srinivasa Ayyar for appellants.

V. Purushotham Ayyar for the Hon. The Advocate-General and *T. R Venkatrama Sastri* for fourth respondent.

JUDGMENTS (Sir CHARLES ARNOLD WHITE, C.J.).—I have read the judgment which my learned brother is about to deliver and I concur.

With regard to the question whether the plaintiff has a lien on the money in deposit in the Munsif's Court, it seems to me on further consideration, that the view taken in the judgment of this Court to which I was a party namely, *Singaravelu Udayan* v. *Ramayer*(1) was wrong, and that it is not supported by the decision in *Gurney* v. *Seppings*(2) to which reference is made in the judgment.

I think the decree of the Courts below should be modified in the manner indicated in the judgment of my learned brother, and that the respondents should pay the appellant's costs throughout.

KRISHNASWAMI AYYAR, J.—The first defendant mortgaged the decree in Original Suit No. 254 of 1891 against defendants Nos. 2 to 9 on the file of the District Munsif of Mannargudi, to the plaintiff. The mortgage deed is dated the 3rd of November 1904. The tenth defendant who had obtained a Small Cause decree against the first defendant on the file of the Subordinate Judge's Court of Tanjore attached the decree in Original Suit No 254 of 1891 under section 273 of the Civil Procedure Code of 1882. This order of attachment was received by the Mannargudi Munsif on the 3rd of November, *i.e.*, the same day as the date of the mortgage. Defendants Nos. 11 and 12, other decree-holders against the first defendant, attached the said decree—subsequently to the plaintiff's mortgage, in execution of their respective decrees. The tenth defendant having afterwards withdrawn the attachment, the first defendant executed his own decree in Original Suit No. 254 of 1891 and realised the sum of Rs. 801 which was kept in deposit to the credit of that cause in the District Munsif's Court of Mannargudi. The plaintiff's suit is for the recovery of his

(1) (1903) 13 M.L.J., 306. (2) (1845) 15 L.J. Ch., 385.

mortgage amount from the amount in deposit. Both the Courts below have concurred in dismissing the suit, as against the money in deposit. The first question for decision is whether section 244 of the Code of Civil Procedure of 1882 bars the suit. It is contended for the respondent that the plaintiff is the assignee of the decree-holder in Original Suit No. 254 of 1891 and is bound therefore to apply in execution of that decree for the realisation of the amount due under it and cannot institute a separate suit. It is unnecessary to consider for the purposes of this case whether a mortgagee of a decree is an assignee within the meaning of section 232 of the Code of Civil Procedure, 1882. There can be no doubt, however, that as mortgagee, he can sue his mortgagor for sale of the mortgaged property (see appeal against Order Nos. 107 to 109 of 1906) and the purchaser may then proceed to execute the decree which he has purchased. The present suit, it must be remembered, is not for realisation of the amount due by the judgment-debtors of the first defendant but for recovery of the plaintiff's claim from the amount in deposit to the credit of the first defendant in Original Suit No. 254 of 1891. The questions arising between the plaintiff and the first defendant or those arising between the plaintiff and the tenth, eleventh and twelfth defendants are not questions arising between the parties to the suit No. 254 of 1891 or their representatives. Section 244 of the Code of Civil Procedure 1882 cannot therefore bar the present suit.

It is again urged for the respondent that on the date of the mortgage to the plaintiff execution of the decree in Original Suit No. 254 of 1891 had become barred under section 230 of the Code of Civil Procedure, 1882, and that therefore no interest passed to the plaintiff under his mortgage. This contention is clearly untenable. In the first place the decree in Original Suit No. 254 of 1891 was then under execution, an application for execution being pending which had been preferred within twelve years from the date of the decree. The plaintiff as mortgagee of the decree was certainly entitled to the benefit of the execution. In the second place assuming that a fresh application by the plaintiff would become barred, the plaintiff is not seeking to execute any decree more than twelve years old but only proceeding to recover by suit the amount due to him from moneys realised by the first defendant. It is difficult to see how section 230 of the Civil Procedure Code of 1882 can affect the plaintiff's right.

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It is next contended that the plaintiff's mortgage is subsequent to the tenth defendant's attachment and that the plaintiff is postponed to the tenth defendant and also to the eleventh and twelfth defendants who, though their own attachments were later than the plaintiff's mortgage have, it is said, valid claims enforceable under the tenth defendant's attachment. The attachment of the tenth defendant was, as already stated, on the same date as that of the plaintiff's mortgage. Under section 273 of the Civil Procedure Code, 1882, it only takes effect from the date of the receipt of the notice by the Court whose decree is attached. At all events a private alienation by the holder of the decree attached is void under section 276 of the Civil Procedure Code, 1882 only if made during the continuance of the attachment, "duly intimated and made known" in the manner provided by section 273. It is plain that a transaction which is *primâ facie* valid, can only be invalidated by the attaching decree-holder showing to the satisfaction of the Court that the alienation was made during the pendency of the attachment (*Satya Charan Mukerei* v. *Madhub Chunder Karmakar*(1)). The tenth defendant has clearly failed to show it. It is argued that the receipt of the notice by the Mannargudi Munsif was a judicial act, and must be presumed to have been done at the earliest point of time on the 3rd of November, while the alienation in favour of the plaintiff being a private transaction he is bound to show the actual time at which the transaction was concluded. Reliance is placed upon the decisions in *Wright* v. *Mills*(2) and *Clarke* v. *Bradlaugh*(3). These decisions do not support the respondent's contention. In the latter case a writ of summons was held not to be a judicial act and the legal fiction, assuming it was applicable to judicial acts without qualification, as to which doubts were expressed, was held inapplicable to a writ of summons. It is impossible to suppose that the receipt by the Mannargudi Munsif of the notice of attachment issued by the Subordinate Judge of Tanjore was a judicial act to which such a fiction could be applied. It follows, therefore, that the defendant has not shown that the alienation in favour of the plaintiff was during the pendency of an attachment.

(1) (1903) 9 C.W.N., 693. (2) (1859) 4 H. & N., 488
(3) (1881) 8 Q.B.D., 63.

Section 276 of the Civil Procedure Code, 1882, cannot then, in my opinion, invalidate the mortgage. But assuming the above view to be erroneous, the attachment of the tenth defendant was withdrawn by exhibit J. It was strenuously argued by the learned vakil for the respondents that exhibit J was not an absolute withdrawal of the attachment but conditional on the money realised by the first defendant in execution of his decree being kept in deposit. But the condition having been fulfilled the withdrawal of the attachment must take effect according to the terms of exhibit J. No attachment of the money in deposit was substituted in place of the attachment of the decree. It is difficult to hold that notwithstanding the terms of exhibit J the attachment continued as before so as to invalidate the alienation in the plaintiff's favour under the terms of section 276 of the Civil Procedure Code, 1882. Defendants Nos. 11 and 12, however, stand in a distinctly worse position. Their attachments were later than the mortgage. They are *primâ facie* postponed to the mortgagee. The money realised was not realised in execution of the decrees of any of the attaching decree holders. The first defendant executed the decree in Original Suit No. 254 of 1891. Defendants Nos. 11 and 12 would not therefore be entitled to any rateable distribution under section 295, Civil Procedure Code, 1882, out of moneys realised by the first defendant in execution of his decree, after the tenth defendant had withdrawn his attachment. It is essential to a valid claim for rateable distribution that the assets should have been realised by the tenth defendant executing the first defendant's decree by way of executing his own decree. If we are to assume that under exhibit J the tenth defendant entered into a special arrangement with the first defendant for making the money realised by the first defendant in execution, available to the tenth defendant to the extent of his claim, such an arrangement cannot avail the eleventh and twelfth defendants who can only put forward claims enforceable under the tenth defendant's attachment as entitled to priority against the plaintiff's mortgage. In the view here expressed it is unnecessary to consider the conflicting views propounded by the Bombay High Court in *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia and another*(1), and by the Allahabad High Court in *Manohar Das*

(1) (1892) I.L.R., 16 Bom., 91.

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v. *Ram Autar Pande*(1), as to the meaning of the phrase "claims enforceable under the attachment" in section 276 of the Civil Procedure Code, 1882.

There is yet another argument advanced by the respondents which remains to be noticed. It is contended by Mr. Venkatarama Sastry that the decree in Original Suit No. 254 of 1891 being no longer in existence by reason of the decree amount having been realised in execution, the plaintiff's mortgage is at an end and the plaintiff has no lien on the moneys in deposit in the Munsif's Court of Mannargudi but only a personal claim against the first defendant. The decision in *Singaravelu Udayan* v. *Ramayer*(2) is cited in support of this view. With great respect to the learned Judges who decided this case I am unable to follow this decision. *Gurney* v. *Seppings*(3) cited therein does not appear to support the view expressed in that case. The Lord Chancellor allowed the mortgagee to proceed with his action against the mortgagor on condition of his depositing the money realised into Court as security for the sub-mortgagee. Relying on this case, Coote observes at page 850, Vol. II (seventh edition) of his 'Law of Mortgages' "If the debt is got in by the original mortgagee he is bound to apply it in discharge of the sub-mortgage." See also Fisher on 'Mortgages,' page 854. No reference is made in *Singaravelu Udayan* v. *Ramayer*(2) to section 73 of the Transfer of Property Act and to the principle underlying that section. There are numerous authorities in support of the position that the mortgagee is entitled to a charge upon the property which through no fault of the mortgagee has taken the place of the mortgaged property. It is well known that the money or the property given by Government in substitution for the lands taken up under the Land Acquisition Act is charged in favour of the mortgagee who had his claim upon the property so taken. See *Vira Rayava* v. *Krishnasami*(4), *Jotoni Chowdhurani* v. *Amor Krishna Saha*(5). The charge upon the proceeds of a sale of mortgaged property for arrears of revenue or of rent declared by section 73 of the Transfer of Property Act is recognised in *Gosto Behary Pyne* v. *Shib Nath Dut*(6) in *Beni Prosad Sinha* v. *Rewat Lall*(7) and *Kamalakant*

(1) (1903) I.L.R., 25 All., 431.
(2) (1903) 13 M.L.J., 306.
(3) (1845) 15 L.J. Ch., 385.
(4) (1883) I.L.R., 6 Mad., 344 at p. 347.
(5) (1908-1909) 13 C.W.N., 351.
(6) (1893) I.L.R., 20 Calc., 241.
(7) (1897) I.L.R., 24 Calc., 746.

Sen v. *Abul Barkat*(1). Where an undivided share in property is mortgaged and the mortgagor gets specific property in lieu of the share on partition, it has been held that the mortgage is a valid encumbrance on the substituted property. *Bijnath Lall* v. *Ramoodeen Chowdry*(2), *Hem Chunder Ghose* v. *Thako Moni Debi*(3), *Joy Sankari Gupta* v. *Bharat Chandra Bardhan*(4), *Lakshman* v. *Gopal*(5), *Amolak Ram* v. *Chandan Singh*(6), and section 44 of the Transfer of Property Act. The puisne mortgagee is on the same principle entitled to a charge on the surplus sale-proceeds on a sale under the first mortgage (*Berhamdeo Pershad* v. *Tara Chand*(7)). It would be difficult indeed to hold that so far as the first defendant (the mortgagor) is concerned he would be at liberty to realise his decree and deal with the proceeds to the prejudice of his mortgagee, the plaintiff. As regards defendants Nos. 10, 11 and 12 if there be any force in their contention it affects them quite as much as the plaintiff for they merely attached the decree of the first defendant and not the amount realised in execution of it and they not having therefore any lien upon the amount in deposit, are not entitled to raise any objection to the plaintiff obtaining a decree against the first defendant and the amount which stands to his credit. As already observed, however, I am inclined to hold that the plaintiffs have a valid charge on the amount in deposit in the Munsif's Court at Mannargudi. I would modify the decrees of the Courts below and declare that the plaintiffs are entitled to a lien for the amount decreed, on the amount in deposit in the District Munsif's Court at Mannargudi to the credit of the first defendant in the Original Suit No. 254 of 1891 and that the plaintiffs are entitled to draw that sum from that Court in execution of this decree. The respondents will pay the appellants' costs throughout on the amount decreed by the Courts below.

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(1) (1900) I.L.R., 27 Calc., 180.
(2) (1873) L.R. 1 I.A., 106.
(3) (1893) I.L.R., 20 Calc., 533.
(4) (1899) I.L.R., 26 Calc., 434.
(5) (1899) I.L.R., 23 Bom., 385.
(6) (1902) I.L.R., 24 All., 483.
(7) (1906) I.L.R., 33 Calc., 92.