the Court in this case, when it received notice of the attachment of the foreclosure decree, was to stay its hand, and in the words of the section "abstain from executing the decree." Instead, however, of doing so, the Court has thought fit to proceed with the execution of the decree, and in the first instance has passed the order which is objected to, substituting the name of Baji Lal for that of the judgment-debtor, Barhma Din. This proceeding was *ultra vires* and contrary to the express provisions of the section. The appeal must, therefore, be allowed, and the order of the lower Courts set aside with costs in all Courts.

Appeal decreed.

1903
June 24.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

ALI JAN (PLAINTIFF) *v.* MARIAM BIBI (DEFENDANT).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 65 *(e) and* 90—*Prior and subsequent incumbrancers—Implied covenants binding upon the mortgager.*

A puisne mortgagee of property, upon which there existed several prior incumbrances, obtained a decree for sale after redemption of the prior incumbrances. The prior incumbrances were redeemed, and the mortgaged property was put up to sale; but the sum realized by the sale was not sufficient to cover even the amounts due upon the prior incumbrances, not to mention the amount due upon the mortgage in suit.

Held that, having regard to section 65 of the Transfer of Property Act, 1882, the puisne mortgagee decree-holder was entitled to a decree under section 90 of the said Act in respect of the deficit due upon the prior incumbrances as well as in respect of the deficit upon his own mortgage.

THE facts of this case are as follows:—One Malik Ali Jan, a puisne mortgagee, obtained a decree for sale on his mortgage subject to the redemption by him of certain prior mortgages. The amount decreed in respect of the mortgage sued upon was Rs. 1,569-4-6 with future interest and costs. The prior mortgages amounted at that time to Rs. 7,668, but in order to pay them off the decree-holder had to pay over Rs. 9,000. The property, when sold, fetched Rs. 6,200. The decree-holder applied for a decree under section 90 of the Transfer of Property Act for the difference between the price realized by the sale of

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* Second Appeal No. 114 of 1902, from an order of W. Tudball, Esq., District Judge of Gorakhpur, dated the 28th of November 1901, modifying an order of Munshi Anant Prasad, Subordinate Judge of Gorakhpur, dated the 12th of July 1901.

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the property and the total amount due both on the prior mortgages and the mortgage directly in suit. The Court of first instance gave the decree-holder the decree asked for. One of the judgment-debtors appealed, urging, amongst other pleas, that at any rate the deficiency in respect of the amounts due on the prior mortgages could not form the subject of a decree under section 90 of the Act. The lower appellate Court (District Judge of Gorakhpur), on an interpretation of section 90, upheld this contention, and accordingly modified the order of the Court of first instance, and gave the decree-holder a decree under section 90 of the Transfer of Property Act in respect only of the amount still due upon his own mortgage for which a decree had been passed under section 88 of the Act. Against this order the decree-holder appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

STANLEY, C.J., and BURKITT J.—We are of opinion that the view of the law taken by the learned District Judge in this case cannot be supported, and that the appeal must be allowed. Upon the main question with which his judgment deals the answer, as it appears to us, may be found in the provisions of section 65 of the Transfer of Property Act. That section provides, amongst other things, that, in the absence of a contract to the contrary, where a mortgage is a second or a subsequent incumbrance upon property, the mortgagor is to be deemed to contract with the mortgagee, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as it becomes due, and will at the proper time discharge the principal money due on each such prior incumbrance. Then comes the following provision :—"The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested." The attention of the learned District Judge was evidently not called to this section. If it had been, we have no doubt that he would not have come to the conclusion at which he arrived. The latter portion of the section to which we have referred gives a puisne mortgagee the

benefit of the implied contracts mentioned in the section as being annexed to his interest in the mortgaged property; in other words, his mortgage security is a security not merely for the principal sum and interest advanced by the puisne mortgagee, but also a security in respect of any loss which the puisne mortgagee may sustain by reason of the breach of the implied covenants. If this be so, the mortgagor in the present case having failed to pay off on the due dates the prior incumbrances, the puisne mortgagee, the appellant, having been obliged to pay them, is entitled to add to the principal sum due to him on foot of his mortgage the sums which he has been so obliged to pay off. Irrespective of the provisions of this section, we may also add that we think the language of section 90 is quite wide enough to justify the order which was passed in the Court of first instance for payment of not merely the principal money expressed to be secured by the puisne incumbrance, but also the moneys which were paid off by the mortgagee in respect of the prior incumbrances, so far as these moneys were not satisfied out of the proceeds of the sale of the mortgaged property. The use of the term mortgage in the singular cannot be relied upon as restrictive, inasmuch as in the construction of an Act of the Legislature the singular number is held to include the plural. Here the property was directed to be sold, not merely to satisfy the puisne incumbrance, but to satisfy also the amounts due on foot of prior mortgages which had been paid off by the puisne mortgagee. The learned advocate for the respondent, whilst admitting that he could not contend that section 65 of the Transfer of Property Act did not have the effect which we have attributed to it, yet contended that, inasmuch as the respondent Musammat Mariam was not a party to two out of the six mortgages which were redeemed by the appellant, she ought not to be held responsible for the debts secured by those two mortgages. We are of opinion that it is too late now for her to raise this contention. She ought to have done so when the decree for sale was pronounced on the 30th of April, 1898, or at latest when the order absolute was being made on the 17th of December, 1898. For these reasons we are unable to concur in the careful and well-considered judgment of the learned

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District Judge. The appeal must therefore be allowed, the decree of the lower appellate Court set aside, and that of the Court of first instance restored. The plaintiff will have his costs of this appeal, and also his costs in the lower appellate Court.

We desire to draw the attention of the learned District Judge to the form of the decree under section 90 which was passed in the Court of first instance. It is not a decree at all in point of form, but is merely a direction to draw up a decree in a certain form. The learned District Judge should call the attention of all Civil Courts in his district to this matter, as we understand the mistake is frequently made.

Appeal decreed.

1903
June 25.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

W. BUTLER (PLAINTIFF) v. ADAMJI BAHURA (DEFENDANT).*

AND

W. BUTLER (PLAINTIFF) v. ADAMJI BAHURA AND ANOTHER (DEFENDANTS).*

Act No. V. of 1888 *(Inventions and Designs Act), section* 29—*Infringement of patent—Patent consisting of a combination of parts—Infringement as to one or more of such parts.*

Held that a valid patent for an entire combination for a process gives protection to each part thereof which is new and material for that process. *Parkes* v. *Stevens* (1) followed.

THE suits out of which these appeals arose were brought by the assignee of a patent for an improved form of brick kiln, under section 29 of the Inventions and Designs Act 1888, to recover damages for alleged infringements of the patent. The nature and mode of working of the patent kiln are fully described in the judgment of the High Court. The Courts below dismissed the plaintiff's suits in each instance on the ground that the infringement alleged was an infringement of one part only of the patent, and that the part of the patent which had been copied by the defendent was of no practical utility apart from the other portion of the patent which had not been so copied. The plaintiff appealed to the High Court, on the

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* First Appeal No. 257 of 1901, from a decree of H. B. J. Bateman, Esq., District Judge of Bareilly, dated the 7th of June 1901, and First Appeal No. 269 of 1902, from a decree of B. J. Dalal, Esq., District Judge of Moradabad, dated the 31st of May 1902.

(1) (1869) L. R., 8 Eq., 358.