

1906

EMPEROR
v.
BAHAL.

vaccinator. There is nothing in the evidence to show that the vaccinator received any special injury. I must express my surprise that on these facts the Courts below should have held that an offence under section 353 of the Indian Penal Code was committed. The vaccinator was not acting in the execution of his duty. It is no part of a vaccinator's duty to insist on vaccinating a child in opposition to the wishes of its parent or guardian. The vaccinator rendered himself liable to a charge of assaulting the child. The accused do not appear to me to have exceeded their right of private defence. The view which I take is supported by the decision in *Mangobind Muchi v. Empress* (1). It is true that the accused Bahal had no right to break the vaccinator's needle and throw it away, and his actions in so doing might possibly constitute an offence under section 426 of the Indian Penal Code. But as he has been for a month in prison, I do not deem it necessary to consider whether a conviction should be entered under that section. For the above reasons I quash the convictions of the applicants under section 353 of the Indian Penal Code and the sentences passed on them. I am informed that they have been released on bail under the order of this Court, dated the 22nd January, 1906. The result of the order now passed is that the bail is discharged and the applicants need not surrender.

P. C.

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November 28.

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March 21.

PRIVY COUNCIL.

AHMAD WALI KHAN (PLAINTIFF) v. SHAMSH-UL-JAHAN, BEGAM
AND ANOTHER (DEPENDANTS).

[On appeal from the High Court of Judicature, Allahabad.]

Act No. IV of 1882 (Transfer of Property Act), section 95—Joint mortgage bond in ordinary form—Payment by one mortgagor and redemption of whole property mortgaged—Charge on property of co-mortgagors—Failure of plaintiff in suit for money paid on mortgage to prove that he executed bond as surety only—Right to contribution—Pleadings—Relief.

The fact that a plaintiff has claimed too much on one cause of action does not preclude him from recovering what he is actually entitled to on another cause of action, provided the pleadings are wide enough to cover such a claim

Present.—Lord DAYBET, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

The construction of section 95 of the Transfer of Property Act (IV of 1882) should not limit its operation to mortgages under which possession passes, and therefore on redemption properly repasses: the better way is to construe it distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow on redemption.

To raise funds for the defence of a relative the plaintiff and defendants jointly executed a bond in the ordinary form, each pledging immovable property as security.

The plaintiff eventually paid off the amount due on the bond and redeemed all the property mortgaged. In a suit in which he claimed the whole sum paid by him on the ground that he had executed the bond only as a surety, the defendants denied that he was a surety and pleaded that he was only entitled to a rateable amount from each of them. *Held* that the plaintiff's failure to prove that he was merely a surety on the bond did not preclude him from recovering a proportionate share from each of the defendants; and that under section 95 of the Transfer of Property Act, he was entitled also to a charge for such amount on the defendants' interests in the property respectively mortgaged by them.

APPEAL from a decree (24th February, 1903) of the High Court at Allahabad which reversed a decree (19th December, 1900) of the Subordinate Judge of Bareilly.*

The main question in the appeal was whether the appellant executed a bond on the 6th October, 1896, as a principal, or as a surety for the respondents against whom he brought the suit out of which this appeal arose, for payment of the original debt which had been discharged by him.

The respondents were the appellant's half-sisters. Their own brother, Sardar Wali Khan, with whom they resided at a village called Adkhata was, in July, 1896, arrested on a charge of murder: on his arrest his mother and sisters came to live with the appellant at Bareilly and stayed there until Sardar Wali Khan was eventually convicted and executed.

To raise funds for his defence, the bond in suit was executed on 6th October, 1896, in favour of one Banarsi Prasad, a money-lender at Bareilly, and the loan, Rs. 10,000, was made jointly to the appellant and the respondents. As security for repayment both the appellant and respondents mortgaged the shares respectively owned by them in certain villages. On the 2nd November, 1896, the appellant paid the amount due on

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SHAMSH-UL-
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* Cf. I. L. R., 25 All., 337.