is struck off and the suit dismissed against him under Order IX, Rule 5, does not discharge the surety, provided the suit be still in time against the principal. That being so, and confining our decision to that ground alone, we think that the order of the learned Judge below dismissing the suit was wrong.

Even were that not so, it would still be a question whether, in view of the form of the suit, the Judge ought to have taken it for granted, as he appears to have done, that the plaintiff was suing the second defendant merely as a surety. If, in fact, he was suing him as a principal, none of these considerations upon which the dismissal of the suit has been based would apply at all.

We must, therefore, reverse the decree of the learned Judge below and remand the case to him for trial upon the merits.

Costs will be costs in the cause.

Rule made absolute.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

VENKAJI NARAYAN KULKARNI AND OTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GOPAL RAMCHANDRA DESHPANDE (ORIGINAL PLAINTIFF), RESPONDENT.*

1914. *August* 19.

Mortgage—Equity of Redemption—Extinguishment—Mortgagor passing a rajinama *to mortgagee for the land—Mortgagee executing* kabulayat *to pay Government assessment.*

In 1876, the plaintiff mortgaged the land in dispute to the defendants; and in 1879 passed a *rajinama* relinquishing all his occupancy rights in the said land in favour of the defendants. The latter at the same time gave a comple-

* Second Appeal No. 368 of 1913.

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mentary *kabulayat* agreeing to pay Government assessment on the land. The plaintiff having sued to redeem the mortgage,

Held, dismissing the suit, that the *rajinama* and *kabulayat* effectually extinguished the plaintiff's equity of redemption.

SECOND appeal from the decision of L. C. Crump, District Judge of Belgaum, reversing the decree passed by K. R. Natu, Subordinate Judge at Athni.

Suit to redeem a mortgage.

The mortgage in question was passed in 1876 by the plaintiff's father to the defendants. Under its terms the mortgagees were to enjoy profits in lieu of interest and the mortgagor was to pay Government assessment of the land.

In 1879, the plaintiff executed a *rajinama* to the defendants making over to them the right of occupancy in the land. At the same time, the defendants executed to the plaintiff a *kabulayat* agreeing to pay Government assessment in respect of the land.

The plaintiff sued in 1909 to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act.

The Subordinate Judge dismissed the suit, holding that the transaction of 1879 effectually transferred the equity of redemption to the defendants.

On appeal the District Judge held that the transaction of 1879 did not operate as a transfer of the equity of redemption. He, therefore, reversed the decree and ordered the appeal to be set down for hearing on merits.

The defendants appealed to the High Court.

Coyaji, with *G. K. Parekh*, for the appellants.

G. S. Rao, for the respondents.

BEAMAN, J. :—The plaintiff in this suit mortgaged the land to the defendants in 1876, and in 1879 he passed

a *rajinama* relinquishing all his occupancy rights in the said land in favour of the defendants. The defendants at the same time gave the complementary *kabulayat*. The trial Judge held that this transaction amounted to a relinquishment of the equity of redemption by the mortgagor in favour of the mortgagees. The learned Judge of first appeal has held that it did not. In his opinion the only effect of the *rajinama* and *kabulayat* under the Act of 1865 was to confer upon the mortgagees the privilege, as the learned Judge calls it, of paying the Government assessment. We find it a little difficult to understand in what light this could have appeared to the learned Judge a privilege for which any person would be anxious to pay good consideration. However that may be, on the facts found by the learned Judge of first appeal, the case is clearly covered by authority. The judgment of this appeal Court in *Dagadu* v. *Sakharam*[1], following *Vishnu Sakharam Phatak* v. *Kashinath Bapu Shankar*[2] and *Tarachand Pirchand* v. *Lakshman Bhavani*[3], appears to us to have settled the law beyond controversy upon the only question we are asked to answer. In our

(1) The following judgment was delivered by Scott, C. J., and Batchelor, J., on the 25th February 1914 in appeal No. 12 of 1912 from order :—

SCOTT, C. J. :—In this case we have no doubt that the *rajinama* and the *kabulayat* (assuming that we cannot look at the document Exhibit 37 which was contemporaneous with them) operate to transfer the equity of redemption to the mortgagee in whose favour the Court had found that a sum of money was payable by the mortgagor. The case is not distinguishable from *Tarachand Pirchand* v. *Lakshman Bhavani*[3] and *Vishnu Sakharam Phatak* v. *Kashinath Bapu Shankar*[2]. The words are apt to declare the relinquishment of all the right of the mortgagor in favour of the mortgagee, and the transaction was such as was contemplated by the terms of the old section 74 of the Land Revenue Code. We reverse the order of the lower appellate Court and restore the decree of the Original Court with costs throughout upon the plaintiffs.

(2) (1886) 11 Bom. 174. (3) (1875) 1 Bom. 91.

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opinion the *rajinama* and the *kabulayat* of the year 1879 effectually extinguish the plaintiff's equity of redemption. We must, therefore, now reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with all costs upon the respondent throughout.

Decree reversed.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Heaton and Mr. Justice Shah.

1914.

March 9.

EMPEROR *v.* HANMARADDI BIN RAMARADDI.*

Criminal Procedure Code (Act V of 1898), section 162—Statements made to police during investigation—Proof of the statement by oral deposition of the police officer to whom it is made—Indian Evidence Act (I of 1872), section 157.

During an investigation a witness stated to the police that she had seen a boy at the scene of murder soon after the offence was committed. When examined before the committing Magistrate, she denied the presence of the boy at the scene of the offence. At the trial before the Court of Session, she admitted the presence of the boy. The statement that the witness had made in the investigation was sought to be proved at the trial by the oral deposition of the police officer to whom it was made. The defence objected to this deposition on the ground that it offended against the provisions of section 162 of the Criminal Procedure Code. The Sessions Judge overruled the objection and let in the evidence. The accused having appealed,

Held, that the police officer could be allowed to depose to what the witness had stated to him in the investigation, for the purpose of corroborating what she had said at the trial.

APPEAL from conviction and sentence recorded by E. H. Leggatt, Sessions Judge of Dharwar.

The facts were that, on the 20th August 1913, one Rama Valikar and his wife Honnava started from Makrabi to Haveri. They were later on joined by the accused, who was intimate with Honnava. The party rested for

*Confirmation Case No. 3 of 1914: Criminal Appeal No. 42 of 1914.