Present : Wood Renton C.J. and De Sampayo J. 1917.

WIJEYEWARDENE *v.* JAYAWARDENE.

187—D. C. Colombo, 45,217.

Surety—Beneficium ordinis—*Effect of general renunciation of privileges of suretyship.*

When the plaintiff, who held a bond from the Ceylonese Union Company, was about to put his bond in suit, the defendant intervened and granted him a bond (No. 5,279) which contained, *inter alia*, the following clauses:—

In consideration of the plaintiff granting the indulgence aforesaid, and forbearing at the request of the defendant to claim and enforce payment of the monies due to him by the company, the defendant doth hereby covenant with the plaintiff as follows:—

(1) That he, the defendant, shall and will, at the expiration of twelve months from date hereof, if there shall be due, owing, and payable to the plaintiff upon the said bond No. 5,112 the whole or any part of the principal . . . . . , well and faithfully pay to the plaintiff the full amount so due.

(2) Upon such payment the plaintiff shall execute an assignment in his (defendant's) favour of the said bond No. 5,112, but with the express provision that the defendant shall have no remedy or recourse against the plaintiff if he, the defendant, from any reason or cause fails to recover the said monies. . . . . .

(3) This guarantee shall be a continuing guarantee, and shall extend to and be applicable to the full amount of the principal due and owing and to become due and owing to the plaintiff as aforesaid.

(4) In order to give full effect to the provisions of this guarantee, the defendant doth hereby expressly waive all suretyship and other rights inconsistent with such provisions, and which he might otherwise be entitled to claim and enforce.

(5) The plaintiff, in consideration of the guarantee and covenant aforesaid, hereby covenants with the defendant that he will not, during the term of twelve months from the date hereof, enforce his claim for the monies due and owing to him.

Held, (*a*) That the bond (No. 5,279) embodies a contract of guarantee or suretyship, and that the defendant had not bound himself as co-principal debtor.

(*b*) That the defendant was not debarred from relying on the *beneficium ordinis*.

"The ordinary privileges of suretyship must be specially renounced. In that case the renunciation by the defendant in deed No. 5,279 of his rights as a surety would clearly be inoperative. But even if we adopt the view of Van der Keessel, the present appeal would still fail. For the efficacy of the general renunciation

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depends on whether the surety, not being *peritus juris*, is proved affirmatively to have understood the nature of the right or rights renounced. . . . . I would hold that the surety's knowledge on that vital point must appear on the face of the deed of suretyship itself."

THE facts are set out in the judgment.

Elliott and *F. J. de Saram*, for the plaintiff, appellant.

Bawa, K.C., and *Drieberg*, for defendant, respondent.

Cur. adv. vult.

July 5, 1917. WOOD RENTON C.J.—

The plaintiff sues in this action for the recovery of a sum of Rs. 58,654.26, alleged to be due to him by the defendant under deed No. 5,279 dated August 3, 1914. The details of the claim are set out in an account of particulars filed with the plaint. The defendant pleaded as matter of law that the action was not maintainable unless and until the plaintiff had sued, and had failed to recover the amount claimed from, the Ceylonese Union Company Limited, and denied his liability in respect of certain items in the account of particulars, with which it is unnecessary to concern ourselves further, as the plaintiff's counsel stated, at the commencement of his argument on the hearing of the appeal, that he would not press his claim in regard to them. The learned District Judge held in favour of the defendant on the issue of law, and ordered the plaintiff's action to stand out of the trial roll till he had sued the Ceylonese Union Company and failed to recover from them the amount of his claim, which is reduced, by the omission of the items above mentioned, to Rs. 46,375.49. The plaintiff appeals.

The plaintiff was a director of the Ceylonese Union Company, who are the proprietors and publishers of the "Ceylonese" newspaper, from 1913 to some time in 1914, and up to October 28, 1913, he had financed the company to the extent of Rs. 10,200. On October 28 he took a bond from the company—No. 5,112—to secure the payment of that amount and all such further and other sums of money as might be advanced to the company by him. In 1914 the debt due by the Ceylonese Union Company to the plaintiff was Rs. 46,375.49. The plaintiff was about to put the bond in suit, when the defendant, who was himself a director of the company, intervened, and the deed on which the present action is brought—No. 5,279, dated August 3, 1914—was entered into by the plaintiff and the defendant. After reciting the indebtedness of the company to the plaintiff, the deed proceeds as follows:—

And whereas the said (defendant), who is the managing director of the company, hath requested the said (plaintiff) to forbear from enforcing his said claim against the company, and to give one year's time for the payment of the monies so due and to become due to him, the said

(defendant) undertaking and making himself answerable and responsible to the said (plaintiff) for the payment to him of the amount of the said monies, with interest thereon:

And whereas the (plaintiff) has consented so to do upon the said (defendant) entering into these presents and the covenants and agreements herein contained on his part:

Now this indenture witnesseth that in consideration of the said (plaintiff) granting the indulgence aforesaid, and forbearing at the special request of the said (defendant) to claim and enforce payment of the monies due to him by the company, he, the said (defendant), doth hereby, for himself, his heirs, executors, and administrators, covenant with the said (plaintiff), his heirs, executors, administrators, and assigns, as follows, that is to say:—

1. That he, the said (defendant), shall and will, at the expiration of twelve months from the date hereof, if there shall be due, owing, and payable to the said (plaintiff), or to his heirs, executors, administrators, or assigns, upon, under, and in respect of the said in part recited bond and mortgage No. 5,112 of the 28th day of October, 1913, the whole or any part of the principal monies and interest secured thereby and payable thereunder, well and faithfully pay to the said (plaintiff), or to his aforewritten, the full amount so due and owing at the said date.

2. Upon such payment the said (plaintiff) shall, at the cost of the said (defendant), execute an assignment in his favour of the said bond No. 5,112 of the 28th day of October, 1913, but with the express provision that the said (defendant) shall have no remedy or recourse against him, the said (plaintiff), and his property and estate, if he the said, (defendant), from any reason or cause whatsoever, fails to recover the said monies or any part or parts thereof.

3. This guarantee shall be a continuing guarantee, and shall extend to and be applicable to the full amount of the principal due and owing and to become due and owing to the said (plaintiff) as aforesaid.

4. In order to give full effect to the provisions of this guarantee, the said (defendant) doth hereby expressly waive all suretyship and other rights inconsistent with such provisions, and which he might otherwise be entitled to claim and enforce.

And this indenture further witnesseth that the said (plaintiff), in consideration of the guarantee and covenant aforesaid, hereby covenants with the said (defendant) that he will not during the term of twelve months from the date hereof enforce his claim for the monies due and owing to him as aforesaid.

On the day on which this deed was executed, the defendant took from the company a bond of indemnity—No. 5,280—in respect of any payments that he might be obliged to make to the plaintiff under deed No. 5,279. The first question that has to be decided is whether deed No. 5,279 is one of guarantee. I agree with the learned District Judge that it is. The test on which the answer to that question depends is whether or not the primary liability of the original debtors—the company—remains.[1] The fact that the deed under consideration describes itself throughout as a "guarantee"

[1] *Forth v. Stanton, 1 Wms. Saunders, 211; Harburg India Rubber Comb Co. v. Martin, (1902) 1 K. B. 778; Davys v. Beuswell, (1913) 2 K. B. 47.*

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is, of course, not conclusive evdidence of its character. But the statements that the plaintiff at the request of the defendant forbears from enforcing his claim against the company, on the undertaking of the defendant to be " answerable " for " the payment of the monies due and to become due to him " by the company, that the guarantee is to be a " continuing " one, and—a provision to which I shall shortly have to revert in another connection—that the defendant expressly waives all " suretyship and other rights inconsistent with " the terms of the deed, indicate, in my opinion, that the primary obligation of the company was regarded as still subsisting, and that the defendant neither intended to bind himself *tanquam principalem*, within the meaning of the Roman-Dutch law,[1] nor has in fact done so. The insertion in the deed of a clause entitling the defendant, on discharging the company's indebtedness to the plaintiff, to an assignment of the bond—No. 5,112—taken by the latter from the company on October 28, 1913, does not militate against the interpretation that I have put on deed No. 5,279. No doubt a surety has a right to a cession of actions against the principal debtor without any express stipulation. But that right may well be made the subject of such a stipulation *ex abundanti cautela*.

The question then arises whether, assuming that deed No. 5,279 is only a contract of guarantee, and that the defendant has not bound himself as co-principal debtor, he is debarred from relying on the *beneficium ordinis* by the stipulation in the deed that he expressly waives all suretyship and other rights which are inconsistent with its terms, and which he might otherwise be entitled to enforce. The learned District Judge has held that, as there is in the stipulation just mentioned no express renunciation of the *beneficium ordinis*, the defendant has not effectually renounced that privilege, and, therefore, that the plaintiff cannot proceed with his action against the defendant till he has discussed the Ceylonese Union Company. The District Judge has accordingly directed that the present action shall stand out of the trial roll until the plaintiff has sued the principal debtors and has failed to recover from them the amount of his claim. I may say at once that, if the view taken by the District Judge of the law applicable to this part of the case is correct, I see no objection to the present action being allowed to stand over till the plaintiff's action against the company has been determined.

There is little, if any, local authority upon the question of the form in which in this Colony the special privileges accorded by the law to sureties must be renounced, and it may be convenient, therefore, to consider the subject on general lines. The three main privileges which a surety, who is not also a co-principal debtor, enjoys are the *beneficium ordinis*, or *excussionis*, by which he is entitled to claim that, as his liability is of an accessory character,

[1] *Voet 46, 1, 16.*

it shall not be enforced against him until the creditor has unsuccessfully endeavoured to obtain satisfaction from the principal debtor; the *beneficium divisionis*, which provides for the apportionment of liability among the co-sureties; and the *beneficium cedendarum actionum*, which secures the right of a surety who has discharged his principal's indebtedness to a cession of any rights of action against the principal debtor that the creditor may possess. The *beneficium ordinis*, restoring, as he alleged, the older law on the subject, which had fallen into disuse, was conceded by Justinian.[1] The *beneficium divisionis* was introduced by Hadrian.[2] The *beneficium cedendarum actionum* is recognized both in the Digest [3] and in the Code.[4] There is a conflict of opinion among jurists as to the mode in which these privileges, which were duly incorporated into Roman-Dutch law, should be renounced. According to Voet,[5] an express and special renunciation was necessary: "*Generalis omnium exceptionum renunciatio neque hanc (exceptionem*, i.e., *beneficium ordinis) neque alias tollat.*"

It was not sufficient that the surety should renounce one of the *beneficia* by name—"*Reliquisque omnibus exceptionibus fidejussori datis.*" Voet proceeds to give the reason for this rule:[6] "*Non enim sequitur, eum, qui cogitavit de beneficio divisionis, dum apertam ejus fecit renunciationem, etiam propterea simul de ordinis aut cedendarum actionum remedio cogitasse, etsi omnium beneficiorum fidejussori competentium mentionem subjecerit; ne aliquin eo deveniatur, etiam eum, qui nulla præmissa beneficii specialis mentione generaliter tantum renunciavit beneficiis omnibus fidejussori indultis, omnibus exceptionibus cariturum esse : cum utique de eo, qui uni specifice renunciavit beneficio, ac reliquis generaliter, æque obtendi possit quod de cæteris specifice non cogitaverit.*" The same view is taken by Grotius,[7] by Van Leeuwen,[8] and by Perezius.[9] In *Censura Forensis* Van Leeuwen deals with the matter thus: "But ought these renunciations to be made expressly and specifically? Although some think that they are sufficiently renounced by a general clause, including all the privileges, or the individual privileges, which accrue to sureties, and can accrue to them; in practice, nevertheless, it has been accepted that a general renunciation of all privileges is not sufficient, but that they must be expressly and specifically given up, since they are of the nature and substance of the act itself; and inasmuch as general clauses of renunciation of this kind are generally, according to the custom of unskilled notaries, inserted where they do not belong in their documents, without the knowledge of, and notice to, the parties.

[1] *Novell, 4, c. 1.*
[2] *Inst. de Fidejuss s. 4.*
[3] *Dig. 46, 17.*
[4] *Cod. viii., 41, 2.*
[5] *46, tit. 1, s. 16.*
[6] *46, tit. 1, s. 17.*
[7] *Introd. iii., s. 29.*
[8] *Kotze's edit. ii., p. 45, iv., s. 12; Cens. For. iv., c. 17, ss. 20, 21.*
[9] *Prael. in Cod. viii., 41, nn. 23 et seq.*

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"And therefore these renunciations, although they have been expressly and specifically made, do not hold good unless the sureties (because they are looked upon as of difficult and recondite law, and as easily escaping the notice of any one) have been informed of them, and had them explained. This is so much the case that the omission to give the information vitiates the renunciation. Especially is this so with us, with whom these privileges are almost useless and of no effect, owing to the customary form used by our notaries, who scarcely ever omit to say that the surety has renounced the *beneficium ordinis, divisionis, et excussionis.*"

A different view of the law, however, commended itself to Van der Keessel[1]: "*Beneficiis fidejussorum non mode specialiter, sed et generaliter renunciari posse, juris ratio docet, sive juris peritus simpliciter renunciaverit, sive imperitus ea sibi cognita fuisse generaliter declaraverit.*"

Burge, in his treatise on Suretyship,[2] associates himself with this statement: "In the writings of many jurists, and amongst them J. Voet,[3] it is said that a general renunciation of all privileges is not sufficient; but the better opinion seems to be that, where the renunciation is expressed to be of all privileges competent to sureties, it extends to this as well as the other privileges on which the surety would be otherwise entitled to insist."

In spite, however, of the opinion of Van der Keessel and Burge, Kotze, C.J., in his note on the relevant passage in Van Leeuwen's *Commentaries*,[4] says that the weight of authority is on the other side, and that view appears to have been adopted in the South African Courts.[5] In the local case of *Goonetilleke v. Abeyagoonesekera*,[6] a question arose as to whether a renunciation by a woman of "all benefits, privileges, and exceptions whatsoever to which sureties were otherwise by law entitled" was an adequate legal renunciation of her right to rely on the *Senatus consultum Velleianum*, which has been held[7] to be still in force in this Colony. Perera J. said that the stipulation just cited rather indicated a waiver "of the ordinary privileges that sureties in general are entitled to, namely, the *beneficium ordinis seu excussionis*, the *beneficium divisionis*, the *beneficium cedendarum actionum, et cetera*," than the special privilege created by the *Senatus consultum Velleianum*. But he held on the facts that the surety had bound herself as co-principal debtor. Ennis J. said that the clause of renunciation was capable of excluding the general privilege created in favour of women sureties by the *Senatus consultum*, though it might not have been strong enough to deprive them of the right to rely on a special law such as the *Authentica si qua mulier*, which defines the position of a married

[1] *Thes. 502.*
[2] *Page 334.*
[3] *Voet, lib. 46, tit. 1, 16.*
[4] *Kotze's edit. ii., p. 45, iv., s. 12; Cens. For. iv., c. 17, ss. 20, 21.*
[5] *Maas. iii., 364.*
[6] *(1914) 17 N. L. R. 368.*
[7] *Cambs v. Krickenbeek, (1820) Ram. 4.*

woman who becomes surety for her husband. I do not think that there is anything in *Goonetilleke v. Abeyagoonesekera* (*ubi supra*) to constrain us to hold that the clause of renunciation with which we are here concerned is in law a sufficient renunciation of the *beneficium ordinis*. The remarks of Pereira J. on the subject were *obiter dicta*. He disposed of the appeal on the ground that the surety had bound herself *tanquam principalem*. I doubt whether in cases of this kind any distinction can be drawn between the *Senatus consultum Velleianum* and the *Authentica si qua mulier*, or, for that matter, between these special privileges and the privileges of sureties in general. In the case of *Mackellar v. Bond*,[1] the Privy Council had to deal with the following facts. A married woman executed, in favour of her husband, a general power of attorney. The terms of this instrument are not stated in the official report of the case. But it clearly contained no special reference either to the *Senatus consultum Velleianum* and *Authentica si qua mulier* or to the privileges of sureties in general. The husband, in alleged pursuance of this power of attorney, professed to bind his wife personally as surety under a mortgage bond in favour of the Natal Bank, which contained the following provision: "The appearer (*i.e.*, the husband) renounces the benefit of the legal exceptions *non numeratæ pecuniæ non causa debiti*, and, if need be, the benefit of his constituent's ante-nuptial contract and the *beneficia Senatus consulti Velleiani, de authenticæ si qua mulier, ordinis seu excussionis, et novæ constitutionis duobus vel pluribus reis debendi*, with the force and effect of which he acknowledges himself to be perfectly acquainted."

It will be observed that in this bond no distinction is drawn between the privileges of a woman surety and those of sureties in general, still less between the privileges conferred by the *Senatus consultus Velleianum* and that arising under the *Authentica si qua mulier*. The Privy Council held that the husband's deed was void. "By the law, said Lord Watson, who delivered the judgment of the Board, "which prevails in Natal a lady cannot be effectually bound as a surety, even where she executes the deed by her own hand, unless she specially renounces the benefits of the *Senatus consultum Velleianum*, and also the benefits of another rule, *de authentica*. The effect of these privileges is to render her deed altogether void, unless she has expressly renounced her right to plead them." The South African Courts have held, without any divergence of opinion, so far as I am aware, that the *Senatus consultum Velleianum* and *Authentica si qua mulier* stand on the same basis, and that each must be specially renounced. The only controversy has been whether renunciation must be embodied in a notarial instrument, or can be effectuated by a private document.[2]

[1] *(1884) 9 A. C. 715.*

[2] *See Burge, second edition, vol. III., pp. 288, 289, 296, 298; Van Leeuwen (Kotze's edition) II., p. 600, Appx.*

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Speaking for myself, I think that we should follow in this Colony the general rule affirmed by Voet, Grotius, Van Leeuwen, and Perezius, and sanctioned by South African practice, that the ordinary privileges of suretyship must be specially renounced. In that case the renunciation by the defendant in deed No. 5,279 of his rights as a surety would clearly be inoperative. But even if we adopt the view of Vand der Keessel,[1] the present appeal would still fail. For the efficacy of the general renunciation depends on whether the surety, not being *peritus juris*, is proved affirmatively to have understood the nature of the right or rights renounced, and, in view of the term "*declaraverit*" in the original text of Van der Keessel's treatise, as well as of the analogy presented by the practice in regard to the *Senatus consultum Velleianum* and the *Authentica si qua mulier*, I would hold that the surety's knowledge on that vital point must appear on the face of the deed of suretyship itself. This case has caused me considerable anxiety. But I am relieved to find that I have independently arrived at the same conclusion as my brother De Sampayo.

I would dismiss the appeal, with costs.

DE SAMPAYO J.—

This appeal involves the construction of a surety bond granted by the defendant to the plaintiff, and raises an interesting point in the Roman-Dutch law of suretyship. The plaintiff from time to time advanced monies to a company called "The Ceylonese Union Company," and by bond No. 5,112, dated October 28, 1913, the company, after reciting that they were then indebted to the plaintiff in the sum of Rs. 10,200, and that the plaintiff had agreed to advance further sums of money, bound themselves to pay to the plaintiff, on demand, the said sum of Rs. 10,200, and such further sums as might be advanced by the plaintiff; and for securing such payment they hypothecated certain machinery, presses, and other plant of a newspaper business which the company was carrying on. It appears that the plaintiff, in pursuance of his agreement, advanced further moneys, and on August 3, 1914, the company's indebtedness to the plaintiff amounted to Rs. 46,375.49. At this time the defendant, who apparently was interested in the newspaper enterprise, was appointed managing director of the company, and the plaintiff, having begun to press the company for payment of the monies due to him, the defendant, on August 3, 1914, granted to him the bond No. 5,279 now in question. The first recital in the bond set out the particulars of the indebtedness of the company to the plaintiff, and the second recital was as follows: "And whereas the said Theodore Godfred Jayawardene, who is the managing director of the company, hath requested the said Don Philip

[1] *Thes. 502.*

Alexander Wijeyewardene to forbear from enforcing his said claim against the company, and to give one year's time for the payment of the monies so due and to become due to him, he, the said Theodore Godfred Jayawardene, undertaking and making himself answerable and responsible to the said Don Philip Alexander Wijeyewardene for the payment to him of the amount of the said monies, with interest thereon." Then, the defendant, in consideration of the plaintiff granting the indulgence aforesaid, and forbearing at the special request of the defendant to claim and enforce payment of the monies due to him by the company for a period of twelve months, covenanted as follows:—

1. That he, the said Theodore Godfred Jayawardene, shall and will, at the expiration of twelve months from the date hereof, if there shall be due, owing, and payable to the said Don Philip Alexander Wijeyewardene, or to his heirs, executors, administrators, or assigns, upon, under, and in respect of the said in part recited bond and mortgage No. 5,112 of the 28th day of October. 1913, the whole or any part of the principal monies and interest secured thereby and payable thereunder, well and faithfully pay to the said Don Philip Alexander Wijeyewardene, or to his aforewritten, the full amount so due and owing at the said date.

2. Upon such payment the said Don Philip Alexander Wijeyewardene shall, at the cost of the said Theodore Godfred Jayawardene, execute an assignment in his favour of the said bond No. 5,112 of the 28th day of October, 1913, but with express provision that the said Theodore Godfred Jayawardene shall have no remedy or recourse against him, the said Don Philip Alexander Wijeyewardene, and his property and estate, if he, the said Theodore Godfred Jayawardene, for any reason or cause whatsoever, fails to recover the said monies or any part or parts thereof.

3. This guarantee shall be a continuing guarantee, and shall extend to and be applicable to the full amount of the principal due and owing and to become due and owing to the said Don Philip Alexander Wijeyewardene as aforesaid.

4. In order to give full effect to the provisions of this guarantee, the said Theodore Godfred Jayawardene doth hereby expressly waive all suretyship and other rights inconsistent with such provisions, and which he might otherwise be entitled to claim or enforce.

In this action the plaintiff has sued the defendant on the above bond for the sum of Rs. 58,654.26, but at the appeal has restricted the claim to the said sum of Rs. 46,375.49, with certain interest. The defendant has taken the legal exception that the plaintiff cannot sue him unless and until the plaintiff has sued and failed to recover the sum claimed from the company. This in effect is the plea of *beneficium ordinis seu excussionis* available to a surety under the Roman-Dutch law. In my opinion the above bond embodies a contract of guarantee or suretyship, and the argument on behalf of the plaintiff that it is an entirely independent contract cannot

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prevail. But two other questions have to be considered, namely, (1) whether, in view of the nature of the objection undertaken by the defendant, it was necessary, in order to sue the defendant without first suing the principal, the company, that he should have renounced the benefits competent to sureties; and (2) whether, if so, there is a sufficient renunciation of them in the bond.

A renunciation being *stricti juris* will not be presumed, but must be express. This is a proposition universally accepted. But all the Roman-Dutch jurists draw a distinction between a tacit and an express renunciation. The principal example of tacit renunciation is the case where the surety binds himself *tanquam principalem*. The first question in this case, then, is whether the defendant though surety has bound himself to the plaintiff as principal co-debtor. Having carefully read the whole instrument, I have come to the conclusion that he has *not done so*. The *governing recital in the bond is the* second, which sets out that the defendant makes himself "answerable and responsible to (the plaintiff) for the payment to him of the amount of the said mones with interest thereon." The "payment" here referred to is clearly the payment by the company to the plaintiff. Any liability undertaken by a surety must be construed strictly and in a sense least burdensome to the surety, and when the defendant *in the first clause agrees that, if there shall be the whole* or any part of the said monies due and payable at the expiration of twlve months, he shall and will pay the same to the plaintiff, the only conclusion is that he undertakes to pay if the company shall not have paid within the period mentioned, and that thus he makes himself liable no more and no less than as surety. This is further borne out by the provision in the fourth clause, by which the defendant *waives the rights to which a surety is otherwise* entitled. The company, in their turn, have given a bond of indemnity to the defendant, but this is quite consistent with thie defendant's position as surety for the company. Some reliance has been placed on the second clause of the surety bond, by which the plaintiff, on payment to him by the defendant, undertakes to assign to the defendant the company's bond in his favour without any recourse to him; and it is contended that if the plaintiff has to excuss and completely exhaust the company's property before he can come against the defendant, there is no object in providing for the assignment of the company's bond. In my opinion, however, this provision involves a wise precaution. A surety on paying is entitled to the benefit of cession, and it does not follow, because the plaintiff may exhaust the company's present property, that the company may not have other property in the future, or that there may not be something available to the defendant from contributories in the event of any winding up. Moreover, a creditor is not required to exhaust all the property of the principal debtor. He need only show that there is no available property within the jurisdiction.

Whether the property of the principal debtor has been sufficiently excussed is a question of fact, on the determination of which the Court may over-rule the plea taken by the surety. In *Rogerson v. Meyer*,[1] where the debtor had become insolvent, the plea was over-ruled, even though there were assets in the insolvent estate still to be recovered and distributed, to which when recovered the credeitor would have a preferent claim. (See *Maasdorp's Institutes, vol. III., p. 363.*) In any case this provision as to cession does not, in my opinion, alter the real nature of the transaction.

The remaining question is whether the privileges allowed by law to sureties have been sufficiently renounced by the defendant. It will be noticed that none of them are specified in the surety bond, and that there is only a general renunciation, as the fourth clause puts it, of "all suretyship and other rights." There appears to be some difference of opinion among Roman-Dutch jurists as to the effect of a general renunciation. The general principle appears to be that, when a surety makes a renunciation, he must do so deliberately and with full knowledge of his rights, and so *Voet 46, 1, 16, Van Leeuwen's Comm, 4, 4, 12*, and other jurists lay down an inflexible rule that the privileges must be renounced specifically and by name. *Kotze's Note to Van Leeuwen, 11., p. 45*, of his translation, *Nathan's Common Law of South Africa, vol. 11., p. 903*, and *Maasdorp's Institutes, vol. III,, p. 364*, show that in South Africa this rule has been adopted as expressing the weightier opinion among jurists. On the other hand, *Burge on Suretyship 333*, citing *Herengius de Fidej 17, 45, 27*, says that the better opinion is that, where the renunciation is expressed to be of all privileges competent to sureties as distinguished from privileges *simpliciter*, the privilege of excussion and the other privileges of sureties are sufficiently renounced. But I am not aware of any local decision or established practice contrary to the rule laid down by the authorities above referred to, and I think that we should follow the law accepted in modern times by so many eminent Roman-Dutch lawyers and commentators. *Van der Keessel's Thes. 502*, to which also Burge refers, does not seem to me to go so far as Burge himself, for the words there are "*Beneficia fidejussorum non modo specialiter sed et generaliter renunciari posse juris ratio docet, sive juris peritus simpliciter renunciavert sive imperitus ea sibi cognita fuisse generaliter declaraverit.*" Vand der Keesssel appears to me to allow the validity of a general renunciation, provided that the surety who makes it is himself a lawyer, or declares that he has full knowledge of the rights he is so renouncing. Van der Keessel undoubtedly is one of the greatest exponents of the Roman-Dutch law, and his opinion is of special value to us, as his *Theses* were published at the very time when Ceylon passed into British hands. But, in order to give effect to

[1] *2 Menzies 88.*

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his view, the condition on which he insists should at least be fulfilled. The defendant in this case is not a lawyer, nor has he made any declaration that he knew the privileges which he waived. It was said at the argument that he must be presumed to have known them, inasmuch as the notary who drew up and attested the bond must be taken to have explained these things. This, even if it happened, would not satisfy the condition which seems to require that the surety should actually understand the matter and make a declaration to that effect. I find some indication that Van der Keessel's rule has not been wholly overlooked by Ceylon notaries. For instance, *Brooks v. Natchia*[1] dealt with a surety bond in which, though the privileges were specially renounced, the sureties proceeded to declare " with the force and effect, of which we, the said sureties, acknowlege ourselves perfectly acquainted." In view of the absence of any such acknowledgment in the present bond, or of any evidence *aliunde*, if such were admissible, I do not think that the plaintiff is able to rely upon the authority of Van der Keessel.

The benefit of excussion furnishes only a dilatory plea, and is lost if it be not pleaded before the *litis contestatio*, which with us may be for this regarded as taking place on the filing of the answer. The creditor is not wrong in bringing the action against the surety in the first instance, since he is not supposed to know whether the plea will be taken or not, and consequently the result of a successful plea will be only to suspend further proceedings until the principal debtor is sued and his property discussed. In this case the District Judge's order that the case should stand out of the trial roll, I think is right, and I would affirm it, with costs.

Appeal dismissed.

[1] *(1879) 2 S. C. C. 66.*