1914.

Present : Pereira J. and Ennis J.

GOONETILLEKE v. ABEYAGOONESEKERA.

83—D. C. Kandy, 21,892.

Senatus consultum velleianum—*Woman principal debtor—Receiving benefits from transaction—Surety—Waiver of the benefit.*

The *senatus consultum velleianum* and the *authentica si qua mulier* of the Roman-Dutch law have not ceased to be in force in this Colony, but in view of the altered conditions of life with us, the former, at any rate, should be sparingly administered, that is to say, only when a clear and cogent case is made out calling for its application. The benefit of the *consultum* may be waived, but the waiver should be in express terms, and it is not included by implication in a renunciation of the benefits that sureties are usually entitled to. A woman is not entitled to the privilege of the *consultum* where she has bound herself as a principal debtor (or jointly and severally with the principal debtor), or if she has acquired any benefits by reason of the transaction.

ENNIS J.—It has been urged on appeal that the renunciation must expressly refer to the *senatus consultum velleianum*. I am unable to see that for a renunciation of the general privilege there is any virtue in a name. It is different in the case of a special privilege (*beneficium authentica si qua mulier*), for, according to Grotius, this must be separately renounced, and it could probably only be so renounced by naming it.

THE facts are set out in the judgment. The material portions of the bond sued upon are as follows:—

Know all men by these presents that we, (1) Dissanayake as principal and (2) Lama Ettana as surety, are jointly and severally held and firmly bound unto (1) Palaniappa Chetty and (2) Caruppen Chetty in the sum of Rs. 3,500 of lawful money of Ceylon to be paid to the said (1) Palaniappa Chetty and (2) Caruppen Chetty, or to either of them, their heirs, &c., for which payment to be well and truly made we do and each of us doth hereby engage and bind ourselves jointly and severally, our heirs, &c., firmly by these presents. And for further and better securing unto the said (1) Palaniappa Chetty and (2) Caruppen Chetty and their aforesaid the payment of all moneys payable and to become payable under by virtue or in respect of these presents, we do hereby specially mortgage and hypothecate to and with them and their aforesaid as a first or primary mortgage free from any encumbrances whatsoever all and singular the lands and all the estate, right, title of us and each of us in, to, upon, or out of the said several premises and every part or portion thereof. I, the said Lama Ettana, as sub-surety, hereby expressly renouncing all benefits, privileges, and exceptions whatsoever to which sureties are otherwise by law entitled, and we do and each of

us doth hereby also further engage and bind ourselves jointly and severally, our heirs, &c., for the due payment of any balance sum that may become payable under and by virtue of these presents if the proceeds realized by the sale of the premises hereby mortgaged shall be found to be insufficient to cover the whole of the debt under these presents incurred, including all interest and costs.

Whereas the above-bounden (1) Dissanayake and (2) Lama Ettana, widow of the late Dissanayake Muhandiram (hereinafter termed "the obligors"), have requested the said Palaniappa Chetty and Caruppen Chetty (hereinafter termed "the obligees") to lend and advance to them, the obligors, upon promissory notes to be made and signed by him the first-named obligor Dissanayake singly in favour of the obligees or of either of them such sum or sums of money that they the obligors or either of them may from time to time require during the next twelve months from the date thereof, or also thereafter on the condition that all such sums so lent shall be repaid in manner in the said promissory notes stipulated, and shall not in the aggregate exceed the said sum of Rs. 3,500, and shall be secured by these presents in the mortgage hereby effected.

A. St. V. Jayewardene (with him *Canekeratne*), for the plaintiff, appellant.—The *senatus consultum velleianum* is obsolete, and is not in force now. The intestate has waived the benefit of the *senatus consultum*, and it cannot be pleaded as a defence to this claim. See *Van der Linden 209* (*Henry's edition*), *Morice's English and Roman-Dutch Law*, *Brooke v. Natchia*.[1] It is clear from the terms of the bond that the intestate was a principal debtor, and not merely a surety. She was the party who was primarily benefited by the transaction. She is therefore liable. *Grotius 3, 3, 15 and 16.*

Sandrasagra, for the defendants, respondents.—The *senatus consultum velleianum* is not obsolete. See *Gambs v. Krickenbeek*.[2]

The waiver should be express if a woman is to be barred from pleading the *senatus consultum*. In this case the benefits to which the intestate was entitled as a woman were not waived. In this case there is only a general waiver to which women along with other sureties are entitled. See *Grotius 3, 3, 18 and 19.*

The deed itself speaks of the woman as a surety. It could not be said that she was a principal debtor.

Cur. adv. vult.

June 9, 1914. PEREIRA J.—

In this case the question is whether the second defendant, who pleads that his intestate was a woman and therefore not liable under the Roman-Dutch law as surety on the bond sued upon, is entitled to succeed in his contention. It has been said that the *senatus consultum velleianum* is an effete law that may be deemed to be

[1] *2 S. C. C. 66.*

[2] *Ram. (1820) 4.*

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obsolete in this Colony. I see no reason for thinking that either the *senatus consultum velleianum* or the *lex authentica si qua mulier*, which like many other laws from the same source (namely, the Roman law) was incorporated into the Roman-Dutch jurisprudence, has ceased to be in force in this Colony, but in view of the altered conditions of life with us, I think that the *senatus consultum velleianum*, at any rate, should be sparingly administered, unless a clear and cogent case is made out calling for its application. The benefit of the *cosultum* may be waived, and it has been contended that in this case the deceased, Dissanayake Lamaetani, did waive the benefit. What is relied on in support of that contention is the expression in the bond sued upon—"renouncing all benefits and privileges and exceptions to which sureties are otherwise by law entitled." The waiver in the case of the *senatus consultum* in question should be express (see *Grotius 3, 3, 18*), and I do not understand the words that I have cited to mean an express waiver of the *beneficium senatus consulti velleyani*. They rather indicate the waiver of the ordinary privileges that sureties in general are entitled to, namely, the *beneficium ordinis seu excussionis*, the *beneficium divisionis*, the *beneficium cedendarum actionem*, &c. At the same time it is, I think, clear law that a woman is not entitled to the privilege in question if she has allowed herself to be a principal debtor (see *Grotius 3, 3, 15*), or if she has acquired any benefits by reason of the transaction (see *Grotius 3. 3. 16*). It is clear from the terms of the bond that Dissanayake Lamaetani had bound herself thereby jointly and severally with the first defendant. The bond says so in express terms, and further express authority is given thereby to the obligees to sue for and recover from the "obligors or from either of them" the total and aggregate amounts of the notes secured by the bond. True that at the very commencement of the bond the deceased is described as surety, but that description may help in adjusting rights and liabilities of herself and the first defendant *inter se*. It cannot detract from the joint and several liability expressly created by the bond. Moreover, it is clear that the deceased had benefited by the transaction in connection with the bond sued on. It is therein provided that the obligees should lend and advance to both the obligors money on promissory notes to be signed by the first of them only. For these reasons I would set aside the judgment appealed from and allow the appeal, with costs.

ENNIS J.—

This is an action on a bond against two defendants. The second defendant is the administrator of the esatate of a woman who died intestate, and the first defendant is the intestate's son. The second defendant pleaded that the intestate was a surety on the bond, and he claimed the benefit of the *senatus consultum velleianum*

The learned District Judge upheld this contention, and gave judgment against the first defendant and dismissed the action as against the second defendant. The plaintiff appeals from the judgment so far as it dismissed the action against the second defendant.

I think the case *Gambs v. Kriekenbeek*[1] shows, as found by the learned District Judge, that the *senatus consultum velleianum* forms part of the law of Ceylon. That law forbade women to become sureties for others. In administering the law, however, the Roman jurists applied certain principles: that a woman could only obtain the benefit of the *senatus consultum* by pleading it; that a woman who became suety with her eyes open and with a full knowledge of her rights ought not to be allowed to evade her responsibility, and that if she renounced her rights still ought not afterwards be allowed the privilege; that they cannot effectually plead the benefit of the *senatus consultum* if they have attempted to practise a fraud, or if they have benefited by the transaction; and so on (*Bruyn's Opinions of Grotius 47; Nathan's Common Law of South Africa, vol. I., pp. 291 et seq.*).

These principles may receive a different application in Ceylon, so far as they relate to procedure or evidence, by the Ceylon Civil Procedure Code and the Ceylon Evidence Ordinance, and there are certain features in the present case which, in my opinion, are sufficient to throw on the second defendant the onus of proof that his intestate did not receive any benefit from the transaction. The bond binds both the first defendant and his mother "jointly and severally," and their heirs, executors, and administrators. The obligees are to advance "such sums of money as they, the obligors or either of them," may require. The plaint alleges that the money was lent to both the parties, and this is not denied in the answer of the second defendant. These points *primâ facie* show that the woman received some benefit from the transaction. Further, the second defendant's intestate renounced "all benefits, privileges, and exceptions whatsoever to which sureties are otherwise by law entitled." She mortgaged the property mentioned in the schedule, and the bond provided that it should be lawful for the obligees to sue the obligors or either of them to recover the money in case of default. The bond was notarially executed, and it must be presumed that it was read over to her. She must have entered into the transaction with her eyes open, and with a full knowledge that she was liable to be called upon to pay all the sums advanced should there be default in payment within the specified time. It has been urged on appeal that the renunciation must expressly refer to the *senatus consultum velleianum*. *Grotius 3, 3, 18* is the passage relied upon, but I am unable to see that for a renunciation of the general privilege there is any virtue in a name. It is different in the case of the special privilege (*beneficium authentica si qua mulier*), for,

[1] *Ram. (1820) 4.*

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according to Grotius (*3, 3, 19*), this must be separately renounced, and it could probably only be so renounced by naming it. I therefore think that the second defendant's intestate in renouncing the general privileges to which women are entitled renounced the benefit of the *senatus consultum velleianum*, especially as it seems she must have been fully aware of the effect of default.

I would allow the appeal.

Appeal allowed.