ALFORD & WILLS *vs.* JOHNSON.

Surety.—Composition.—Tender.

The defendant became surety to plaintiffs for goods to be by them supplied to one R., to an amount not exceeding £50. *R. received goods to the amount of* £65 7*s.*, *and this debt by payment on account, she reduced to* £40 7*s.* *Then, wishing to give up business and to leave the Colony, she disposed of her stock to a third party for a* £60 *bill.* *This bill she placed in the hands of one of her creditors for a* pro rata *distribution amongst all, at its maturity.* *A* pro rata *distribution of about* 7*s.* 8*d.* *in the* £ *was accordingly made to plaintiffs among the rest.* *Thereafter the plaintiffs made a demand upon the defendant as surety for the full* £40 7*s.* *balance.* *Defendant in reply tendered* £30 7*s.*, *being the remaining* 12*s.* 4*d.* *in the* £ *on the* £50, *but did not make a formal tender in his plea.* THE COURT, *holding that as surety the defendant was in principle a creditor for the amount of his suretyship, and therefore entitled to share in the benefit of the* 7*s.* 8*d.* *composition on the* £50, *held the tender good; and gave judgment for* £30 7*s.*; *plaintiffs to pay costs.*

1865. Aug. 22.

Alford & Wills *vs.* Johnson.

The plaintiffs, merchants, carrying on business in Cape Town, alleged that on September 11th, 1863, the defendant sent them the following letter:—

"GENTLEMEN,—I hereby undertake to pay you an amount not exceeding £50, at six months' notice in writing, conditionally on your supplying goods to that amount to Mrs. J. J. Roberts, and handing to me your claim upon her. This document only to be put in force in the event of her failing to meet her engagements with you."

That, in accordance with the terms of this, and relying on the promise of the defendant therein contained, they supplied goods to Mrs. Roberts to the value of £65 7*s.* That Mrs. Roberts paid £25 on account. That she then left the Colony without further payment. That on the 30th of May, 1864, plaintiffs gave the required notice to defendant. That defendant repudiated his liability.

Defendant pleaded the general issue and four special pleas. 1st. That in the above letter of guarantee the defen-

1865. Aug. 22

Alford & Wills *vs.* Johnson.

dant had not waived the benefit of excussion; and that Mrs. Roberts had not been excussed. 2nd. That after the supply of the goods, plaintiffs had entered into an arrangement with Mrs. Roberts without giving the defendant notice thereof, whereby it was stipulated that she should assign her estate to trustees for the benefit of creditors. That the estate was accordingly assigned to Puzey & Co., merchants in Cape Town, who realised the same and paid to the several creditors a dividend of 7*s.* 8*d.* in the £; and that by this arrangement the defendant was discharged from all liability. 3rd. That the defendant was entitled to notice of the supply of goods and his consequent liability, but received no such notice till May 30th, 1864, upwards of three months after Mrs. Roberts had left the Colony for England, with intent not to return and without leaving any business or effects behind her on which the defendant could have recourse. 4th. That the plaintiffs having received a dividend of 7*s.* 8*d.* in the £ on their claim, they could demand from defendant no more than 12*s.* 4*d.* in the £ on £50, the amount of his suretyship; and that on November 30th, 1864, the defendant, although of opinion that the plaintiffs could not at law maintain an action against him to any extent or for any amount, yet, to avoid litigation, tendered £30 17*s.* 8*d.*, which tender was refused.

The evidence showed that Mrs. Roberts had obtained the goods on Johnson's guarantee. That, business failing, she had sold her stock for a £60 bill and left the Colony for England. Her creditors, five in number, were informed of her intention to leave. There was no regular assignment, but one of the creditors, Puzey & Co., took over the £60 bill, for the purpose of distributing the proceeds *pro rata* among the creditors. That Puzey & Co. did so distribute the proceeds, paying 7*s.* 8*d.* in the £. That defendant himself was a creditor for £6, and received his dividend; but he now swore that he was not aware of the arrangement with the creditors till after Mrs. Roberts' departure, though he knew of the contemplated departure. No demand for the £40 was made upon him till after the payment of the dividend.

Cole, for the plaintiffs.
Porter, A.G., for defendants.

[WATERMEYER, J. :—On the point of tender, the defendant does not specifically make a tender into court. He says he made a tender some time ago. It may be doubted whether this is a good plea of tender.]

Porter, A.G. The point has been argued and decided that it is good pleading to plead the general issue with a tender. In *Melck* v. *Kotzé* there was the general issue and a plea of tender of £5.* Therefore the position was this—"By the general issue I deny you are entitled to anything. Prove that you are; and if you are, then I tendered you £5." We will make the tender now into court, and avoid difficulty on this head.

Cole: refused the tender and argued :—As to the defendant's first plea, Mrs. Roberts' departure from the Colony, out of the jurisdiction of this Court, leaving nothing behind her, is, in law, a complete excussion. As to the second plea, no assignment was proved by the evidence, nor any arrangement on the plaintiffs' part beyond the receipt of their share of the proceeds. As to the third plea, if notice of the supply of goods was necessary at all, Johnson must be taken to have had notice on the very day of their supply, for the evidence shows delivery was declined without the prior production of the letter of suretyship which was accordingly written. As to the fourth plea, if a regular assignment to trustees had been proved, and the consent of plaintiffs thereto, the composition received by plaintiffs must be, in law, taken to go in *pro rata* payment of the whole amount for which defendant was surety. But here there is no assignment proved.

[WATERMEYER, J. :—What possible difference is there in the principle to be applied?]

If there had been an assignment, it would have been a clear release of the debtor.

[WATERMEYER, J. :—And what greater release can there be than the debtor giving up everything, and going out of the jurisdiction?]

One of the creditors has sent his claim to England, and others may do the same. I admit that if this were an assignment, the principle in the plea would apply; but submit there has not been one.

[* But see *Jones* vs. *Borradaile, Thompson, Hall & Co.*, Buch. 1875, p. 38.]

1865.
Aug, 22.

Alford & Wills *vs.* Johnson.

[WATERMEYER, J.:—Suppose before the distribution of the note the defendant had paid the £50, and taken cession of action. He would have been entitled to his dividend as a creditor for such sum. And how can his legal position now be different?]

If he had taken cession of action, he would have made his position better, certainly; but he did not do so.

Porter, A.G.: It is scarcely necessary to go beyond the plea of tender, which is very strong in our favour. But as to the fourth plea, there cannot be, either in law or in common-sense, the slightest difference in principle between the arrangement made in this case for a *pro rata* distribution by one creditor in whose hands all the assets are vested, and the case in which that arrangement, having been reduced to writing became a written assignment; and if so the position of the plea is correct on the strength of *Gee and Others* v. *Pack* (33 L. J., Q. B. 49).

CLOETE, J.:—The conduct of Mrs. Roberts herself towards the creditors has been thoroughly *bonâ fide* and proper; and Puzey must in this case be considered the stake-holder for the subsequent division of what she left behind in his hands. The defendant should have come in as creditor for his suretyship, and received a dividend on that; and it is the fault of the plaintiffs that this was not done, since no notice was given to the defendant at the time of winding up. The amount of the tender in effect restored the defendant to the position he was entitled to occupy; and that tender was in itself quite sufficient to carry the case, and being a legal and satisfactory tender, also to carry the costs.

WATERMEYER, J., concurred and said:—The plaintiffs themselves, when they took the £60 note, handed it over to Puzey & Co. for a *pro rata* distribution; and if they intended to enforce this letter of guarantee against the defendant, then he, in contemplation of law, was entitled to be ranked as a creditor, and to have the benefit of distribution on that amount. There was no distinction in principle in his legal position whether he paid the £50 before the distribution, and, taking cession of action became a creditor for the whole of that money, or, not doing so, became entitled to the composition, and its consequent reduction of

his liability to £30. The fact is, this is rather an ingenious attempt to get the advantage of a preference beyond the amount the defendant engaged for as surety. The plaintiffs gave credit for £65 instead of £50, and now wish to have the advantage of the suretyship for £50, and to get the £15 also, as if under that suretyship. But to this they are not entitled. . . . . My only doubt is whether there is a good plea of tender. I do not mean to overrule the decision which says that tender may be pleaded with the general issue; but this plea is not, in form, a plea of tender now. It says the defendant was prepared, but it does not specially say he is now.

CLOETE, J.:—In my mind, satisfactory tender made at any time before action brought would operate as a bar.

Judgment for the amount of the tender, plaintiffs to pay the costs.

[Plaintiffs' Attorneys, HOFMEYR, TREDGOLD, & WATERMEYER.
Defendant's Attorney, R. J. POWRIE.]

TRUSTEES OF BRINK *vs.* VAN REENEN AND OTHERS.

Tacit hypothec.—Minors.—Fidei Commissum.—Preference in Insolvency.—Act 5, 1861, §§ 3 *and* 8.—*Pro-tutors.—Confirmation of Account.*—Res Judicata.

Where a proof of debt had been made upon an insolvent estate and had been admitted as correct by the trustees, in so far as it appeared upon the first account filed by the trustees, and this account had been confirmed by the Court but nothing was awarded therein in respect of the said proof and the final account had not been filed: Held, *that an exception* rei judicatæ *could not be pleaded to an action by the trustees to have the proof of debt expunged.*

A. and B. made a mutual will whereby they bequeathed to C., their only child, certain slaves, the said slaves not to be sold after C.'s death but to devolve upon her descendants, and these failing, to their (testators') then living father and mother, and, in case of their predecease, to their next collateral relations, the survivor to remain in possession of the slaves during life, without power of alienation and should the