1915. *October* 28. MASON, J.

Principal and surety.—Subsequent agreement.—Novation.—Giving time.—Release.

Defendant and another became surety in a sum of £500 for F for performance of a contract whereunder F became liable to pay plaintiff £1,029. The benefits of excussion and division were renounced. By a subsequent agreement between F and plaintiff, F consented to judgment for £1,029 and costs, to be reduced by any moneys received from the sureties, and for the balance F made certain cessions by way of security. *Held,* on exception to a plea of release in an action against defendant as surety, that the second agreement was not a novation of the first, but simply one giving F time to pay what he could not recover from the sureties. *Held,* further, that there was no release of F, that defendant's right of recourse against F was not barred thereby, and that therefore defendant was not released.

Exception to a plea of release in an action on a contract of suretyship.

L. Greenberg, for plaintiff (excipient).

J. Stratford, K.C. (with him *A. Alexander*), for defendant (respondent).

The arguments appear from the judgment.

MASON, J.: Plaintiff in this case sues for the sum of £500, which he claims to be due on a contract of suretyship entered into by defendant on behalf of one Franklin. The declaration alleges that Franklin failed to carry out the contract for the performance of which the defendant with another, Van Hees, became surety, and that he thereunder became indebted to the plaintiff in the sum of £1,029. The agreement of suretyship, which binds the defendant and Van Hees *in solidum* and renounces the benefits of excussion and division, is admitted. But the defendant (§ § 2 and 3 of the plea) pleads that by reason of a subsequent agreement between Franklin and the plaintiff company he is entirely released from liability, or at any rate he is not liable to be sued at the present time. The case comes before the Court now by way of exception to this plea.

Now this subsequent agreement recites that Franklin owes the plaintiff company the sum of £1,029 under the prior contract in accordance with a statement of account (which, however, is not annexed to the plea), and that Franklin has agreed to liquidate and the company to accept liquidation of the amount in the

manner thereafter mentioned. Then the agreement provides that Franklin acknowledges his indebtedness to the company in the sum of £1,029 which with costs is to be paid thus: Franklin is to consent to judgment for this amount and costs; any moneys received from the sureties are to go in reduction of the £1,029 and costs, and for whatever balance may remain Franklin cedes all his rights in a certain contract with the Paarl Municipality and gives also as security cession of his rights to a certain inheritance.

From the reference in clause 6 of this agreement and the terms of the cession of the Paarl Municipality contract it is clear that the Paarl Municipality cession is not by way of payment but by way of security, so that if more than the debt were received under that cession, the company could not retain it. In substance the agreement is that the plaintiff company agrees to sue the sureties first and not to sue Franklin until that has been done and until the money receivable under the Paarl contract has been exhausted or ceases to be paid.

Mr. *Stratford*, for the defendant, contends that this subsequent agreement novates the obligation for which the defendant became surety, and that it has been accepted as a payment by, and operates as a release of, Franklin. Now the agreement does not seem to me intended as a novation of the original contract; what it does practically is to give time to Franklin to pay what he cannot recover from the sureties and to provide further security for that balance to the plaintiff. As was stated in the case of *Du Plessis* v. *Miller and Carlis* (1906, T.S. 150), the giving of time to the principal debtor, even with an agreement for further security, does not operate, as in English law, to release the surety, and the taking of judgment is clearly stated by Voet (46.2.1) not to constitute any release. There was a case the other day in this Court *Webster* v. *Varley* (*supra, p.*), in which a judgment was held to be a novation, but that was because the taking of judgment was an election inconsistent with the other remedy which it was attempted to enforce. What is the meaning of the clause that any moneys received from the sureties are to go in reduction of the debt? Mr. *Stratford* contends that this releases the surety; but that would be to construe the document so as to destroy the very right it was intended to preserve and to have exercised.

The clause certainly implies that the company shall sue the sureties before suing Franklin, and the other clauses imply that so long also as the £20 a month is paid under the Paarl contract, Franklin shall not be sued.

But does that release the surety? The general principle governing the release of sureties in cases of this kind is that the subsequent contract prevents the creditor giving cession of action or prejudices the surety in recovering from the debtor if he pays. But I do not see how Franklin could object if the surety sued him for repayment. Franklin has agreed that the surety may be sued, and that necessarily implies that the surety may recover from him. It does not seem to me that the surety is prejudiced by such an agreement because he has renounced the benefits of division and excussion and the creditor is entitled to sue him first; and the surety is not interested in the balance of the debt for which he is not liable. The case seems to me very much like those referred to by Burge on *Suretyship* (p. 154), where he says that in English law an agreement of composition with a debtor reserving all the creditor's rights against sureties does not operate to release the sureties. It is clear, moreover, from clause 8 of the agreement, and the fact that the cessions were only by way of security, that Franklin himself was not released; he is liable for the full amount which is not recovered from the sureties or the securities.

The objections, therefore, to paragraphs 2 and 3 of the plea seem to me well founded. Mr. *Stratford* contended that the defendant was entitled to plead that the amount claimed to be due by the plaintiff arose under the judgment, but the plaintiff does not claim it to be so due; the company claims the sum to be due in terms of the contract for which defendant was surety and in accordance with a detailed account which is attached to the declaration: they cannot and do not rely on the judgment. The plaintiff company is entitled to the costs except the wasted costs caused by the exception which the defendant is entitled to. Leave is given to amend, the amendment to be made within 14 days unless the defendant appeal. And leave will be given to appeal if that is required.

Plaintiff's (excipient) Attorneys: *Guinsberg & Pencharz*; Respondent's Attorneys: *B. Alexander & Bros.*

[G. H.]