AMICUS EXHIBIT 2

OFFICIAL CODE OF GEORGIA

ANNOTATED

VOLUME 8

Title 10. Commerce and Trade

2009 Edition

§ 2970; Civil Code 1910,

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mpson Co. v. Williams, 10 Ga.
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y liable guarantors not — Nonsettling guarantors of otes who were individually, not were not cosureties under 0-7-20; thus, they were not dis- laintiff's acceptance from other f less than the total sum owed otes. Any novation by virtue of it agreement would not operate e nonsettling guarantors from ual limited liabilities. Marret v. Ga. App. 427, 441 S.E.2d 902

defense by terms of guaranty — Even if a corporation presi- eased from the president's per- antee of a corporate loan, 10-7-20 did not apply to release s from liability where, by virtue of their guarantee documents, ors had expressly waived any guarantors might have which to the guarantors claim under Baby Days, Inc. v. Bank of 218 Ga. App. 752, 463 S.E.2d 171

Benson v. Henning, 50 Ga. App. 406 (1935); Hurt v. Hartford ., 122 Ga. App. 675, 178 S.E.2d Howell Mill/Collier Assocs. v. 36 Ga. App. 909, 368 S.E.2d 831

a part of the consideration for a asing a surety, 7 ALR 1605.
of principal to contract as af- ility of guarantor or surety, 24 3 ALR 589.

Endorsing payment upon note before maturity as releasing surety or endorser, 37 ALR 477.

Construction and effect of provision in bond purporting to protect contractee in building contract against release of surety, 77 ALR 229.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 ALR 85.

Right to join principal debtor and guarantor as parties defendant, 53 ALR2d 522.

10-7-21. "Novation" defined; effect on surety's liability.

Any change in the nature or terms of a contract is called a "novation"; such novation, without the consent of the surety, discharges him. (Orig. Code 1863, § 2130; Code 1868, § 2125; Code 1873, § 2153; Code 1882, § 2153; Civil Code 1895, § 2971; Civil Code 1910, § 3543; Code 1933, § 103-202.)

Editor's notes. — It was held in some cases, prior to 1981, that this section did not apply to compensated sureties, as they were treated as guarantors under O.C.G.A. § 10-7-1 as it then read. See, for example, Travelers Indem. Co. v. Sasser & Co., 138 Ga. App. 361, 226 S.E.2d 121 (1976); Brock Constr. Co. v. Houston Gen. Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978), overruling Little Rock Furn. Co. v. Jones & Co., 13 Ga. App. 502, 79 S.E. 375 (1913), and Fairmont Creamery Co. v. Collier, 21 Ga. App. 87, 94 S.E. 56 (1917). Other cases stated that this section did apply to contracts of guaranty. See, for example, Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651 (1975); Gilbert v. Cobb Exch. Bank, 140 Ga. App. 514, 231 S.E.2d 508 (1976); Ricks v. United States, 434 F. Supp. 1262 (S.D. Ga. 1976). Then in 1981, Ga. L. 1981, p. 870, § 1, amended O.C.G.A. § 10-7-1 to abolish the distinction between contracts of suretyship and guaranty. See the Editor's note to O.C.G.A. § 10-7-1.

JUDICIAL DECISIONS

Analysis

General Consideration
Novation
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General Consideration

Section strictly construed. — Georgia courts have given this section strict enforcement. Oellerich v. First Fed. Sav. & Loan Ass'n, 552 F.2d 1109 (5th Cir. 1977).

Liability of a surety cannot be extended beyond the actual terms of surety's engagement and will be extinguished by any act or omission which alters the terms of the contract, unless it is done with the surety's consent. Washington Loan & Banking Co. v. Holliday, 26 Ga. App. 792, 107 S.E. 370, cert. denied, 26 Ga. App. 801 (1921). See § 10-7-3.

Cited in Richardson v. Allen, 74 Ga. 719 (1885); McMillan v. Benfield, 159 Ga. 457, 126 S.E. 246 (1924); Payne v. Fourth Nat'l Bank, 38 Ga. App. 41, 142 S.E. 310 (1928); Bank of Norman Park v. Colquitt County, 172 Ga. 109, 157 S.E. 469 (1931); Smith v. Georgia Battery Co., 46 Ga. App. 840, 169 S.E. 381 (1933); Burgess v. Ohio Nat'l Life Ins. Co., 48 Ga. App. 260, 172 S.E. 676 (1934); American Sur. Co. v. Garber, 114 Ga. App. 532, 151 S.E.2d 887 (1966); Overcash v. First Nat'l Bank, 115 Ga. App. 499, 155 S.E.2d 32 (1967); Palmes v. Southern Mechanical Co., 117 Ga. App. 672, 161 S.E.2d 413 (1968); Overcash v. First Nat'l Bank, 117

General Consideration (Cont'd)

Ga. App. 818, 162 S.E.2d 210 (1968); Hurt v. Hartford Fire Ins. Co., 122 Ga. App. 675, 178 S.E.2d 342 (1970); Farmer v. Peoples Am. Bank, 132 Ga. App. 751, 209 S.E.2d 80 (1974); Travelers Indem. Co. v. Sasser & Co., 138 Ga. App. 361, 226 S.E.2d 121 (1976); Jackson v. College Park Supply Co., 140 Ga. App. 134, 230 S.E.2d 329 (1976); Gilbert v. Cobb Exch. Bank, 140 Ga. App. 514, 231 S.E.2d 508 (1976); Ricks v. United States, 434 F. Supp. 1262 (S.D. Ga. 1976); Browning v. National Bank, 143 Ga. App. 278, 238 S.E.2d 275 (1977); Brock Constr. Co. v. Houston Gen. Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978); Walter E. Heller & Co. v. Aetna Bus. Credit, Inc., 158 Ga. App. 249, 280 S.E.2d 144 (1981); White v. Phillips, 679 F.2d 373 (5th Cir. 1982); Rice v. Georgia R.R. Bank & Trust Co., 183 Ga. App. 302, 358 S.E.2d 882 (1987); Howell Mill/Collier Assocs. v. Gonzales, 186 Ga. App. 909, 368 S.E.2d 831 (1988); South Atlanta Assocs. v. Strelzik, 192 Ga. App. 574, 385 S.E.2d 439 (1989); Regan v. United States Small Bus. Admin., 729 F. Supp. 1339 (S.D. Ga. 1990); First Union Nat'l Bank v. Boykin, 216 Ga. App. 732, 455 S.E.2d 406 (1995).

Novation

Novation discharges surety. — Contract of suretyship was one of strict law under former Code 1863, § 2127, and any change of the nature or terms of the contract, without the consent of the surety, discharges the surety. Camp v. Howell, 37 Ga. 312 (1867).

A change in the nature or terms of the contract is a novation, and such a novation, without the consent of the surety discharges the surety from liability. Smith v. Georgia Battery Co., 46 Ga. App. 840, 169 S.E. 381 (1933) (change in terms of bond after surety signed).

Any change in the terms of the contract is considered a novation and discharges the surety in the absence of the latter's consent. The surety is also discharged by any act of the creditor which injures the surety or increases the surety's risk. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297 (S.D. Ga. 1970).

Any novation without the consent of the surety, or increase in risk, discharges the surety. Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651 (1975).

Tenant and landlord changed the terms of lease without the consent of the guarantor on the lease, therefore the guarantor was discharged from its obligations; the amendments, which removed the landlord's obligation to provide additional access to the property and waived the landlord's liability for leasing portions of the property to competing businesses, were material changes to the lease. SuperValu, Inc. v. KR Douglasville, LLC, 272 Ga. App. 710, 613 S.E.2d 154 (2005).

In a suit to recover on a note, the trial court properly denied a creditor's motion for summary judgment, and granted summary judgment to the guarantor of the note, releasing the guarantor from the guaranty the guarantor entered into with the creditor's debtor, as the execution of an escrow agreement between the creditor and the debtor, which materially changed the debtor's obligations thereunder without the guarantor's consent, amounted to a novation, releasing the guarantor from any obligation under the note. Thomas-Sears v. Morris, 278 Ga. App. 152, 628 S.E.2d 241 (2006).

Change must be material. — Any material alteration in the original contract, without the knowledge or consent of the guarantor thereof, will relieve the guarantor from the guaranty. H.C. Whitmer Co. v. Sheffield, 51 Ga. App. 623, 181 S.E. 119 (1935).

A surety will not be discharged from the contract unless the change or alteration in the contract is material. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297 (S.D. Ga. 1970).

Changes in lease agreed on in advance by guarantor. — Increased holdover rent was reserved in a commercial lease, and since there was no change in the terms of the lease, the landlord's act of allowing the corporation to remain as a tenant holding over was not a novation; in any event, the guaranty gave the landlord the authority to change the amount, time, or manner of payment of rent and to amend, modify, change or supplement the lease, and thus, the guarantor consented in advance to changes in the lease. Hood v. Peck, 269 Ga. App. 249, 603 S.E.2d 756 (2004).

One who consents to a novation is not discharged as a surety. If notes are accepted

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by a creditor as security and are signed by the surety, the notes are not "without the consent of the surety" as contemplated by this section. Mauldin v. Lowe's of Macon, Inc., 146 Ga. App. 539, 246 S.E.2d 726 (1978).

If a party makes a contract in such a manner as is authorized by law, the party has a right to object to being bound by any other, and this elementary general rule has particular application to material changes in contractual obligations of sureties when made without their consent, and their liability is thereby extinguished. Hamby v. Crisp, 48 Ga. App. 418, 172 S.E. 842 (1934).

Individually liable guarantors not released by novation. — Nonsettling guarantors of promissory notes who were individually, not jointly, liable were not cosureties under O.C.G.A. § 10-7-21; thus, they were not discharged by plaintiff's acceptance from other guarantors of less than the total sum owed under the notes. Any novation by virtue of the settlement agreement would not operate to release the nonsettling guarantors from their individual limited liabilities. Marret v. Scott, 212 Ga. App. 427, 441 S.E.2d 902 (1994).

No evidence of novation to discharge surety. — Given that the broad language of a guaranty obligated the guarantor to the bank, absolutely and unconditionally guaranteeing the payment and performance of each and every debt that the debtor would owe, and because no issue of fact existed as to whether the guarantor was discharged by any increased risk or any purported novation, the guarantor remained obligated under the guaranty to the bank. Fielbon Dev. Co. v. Colony Bank, 290 Ga. App. 847, 660 S.E.2d 801 (2008).

Change which benefits surety. — The rule enunciated in this section will not be altered by the fact that the change in the contract, which was made without the knowledge or consent of the surety, nevertheless inured to the benefit of the principal and the surety. If the change is made without the knowledge or consent of the surety, the surety's complete reply is non haec in foedera veni. Little Rock Furn. Co. v. Jones & Co., 13 Ga. App. 502, 79 S.E. 375 (1913), overruled on another point, Brock Constr. Co. v. Houston Gen. Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978); Fairmont Creamery Co. v. Collier, 21 Ga. App. 87, 94 S.E. 56 (1917), overruled on another point, Brock Constr. Co. v. Houston Gen. Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978).

Any change in the terms of a contract by which a new and materially different contract is created constitutes a novation and, when made without the consent of the surety, operates to discharge the latter; this is true even though such newly created contract is more favorable to the surety than the contract as originally executed. Paulk v. Williams, 28 Ga. App. 183, 110 S.E. 632 (1922).

A surety who has not consented to a change in a bond is entitled to claim a discharge, regardless of how the change affected the surety, and even if the change inured to the surety's benefit. Smith v. Georgia Battery Co., 46 Ga. App. 840, 169 S.E. 381 (1933).

Change which does not injure surety. — A surety is discharged from the terms of the contract, even though the surety is not injured by the contract change. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297 (S.D. Ga. 1970).

If there is a change in the nature of the contract and it is made without the knowledge or consent of the surety, a release will result, regardless of injury. Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352 (1936).

Any change, whether to the surety's benefit or detriment, is a novation which discharges the surety. Upshaw v. First State Bank, 244 Ga. 433, 260 S.E.2d 483 (1979).

Release of parties to instrument secured discharges surety. — By virtue of this section, when a surety or accommodation endorser signs a note, the consideration of which is that the note shall be held by the bank where it is negotiated as collateral security for another note or draft due the bank, and the bank, without the knowledge and consent of the surety, changes the contract by releasing the acceptor and endorser of that other note or draft, the security or accommodation endorser of the collateral note is discharged. Stallings v. Bank of Americus, 59 Ga. 701 (1877).

Change in terms of payment to creditor discharges surety. — A change by the obligee and principal in the terms of payments to

Novation (Cont'd)

the contractor from that provided in the building contract operates to discharge the surety. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297 (S.D. Ga. 1970).

Claim for interest not novation. — Creditor's claim for interest in an action against the debtor and personal guarantor on an open account agreement did not result in a novation of the agreement. Charles S. Martin Distrib. Co. v. Berhardt Furn. Co., 213 Ga. App. 481, 445 S.E.2d 297 (1994).

Increase in rate of interest. — The giving of a new note for a usurious increase in interest, and part payment thereof, in consideration of 12 months delay to sue, discharges the surety on the original note. Camp v. Howell, 37 Ga. 312 (1867).

Under former Civil Code 1885, §§ 2968 and 2971, if, after a promissory note payable to a named payee or bearer has been signed by one as surety, the principal, before it comes into the hands of one who thereafter receives it as bearer in the course of negotiation before due, so alters it as to increase the rate of interest agreed to be paid from 8 to 12 percent, such note is by such alteration rendered void as to such surety; and this is true even though, at the time it comes into the hands of such bearer, one has no notice of the alteration by the principal. Hill v. O'Niell, 101 Ga. 832, 28 S.E. 996 (1897).

Comaker of the third series of renewal notes was discharged following subsequent renewals at an increased rate of interest since the provisions of the note did not cover subsequent modifications of the interest rate and the comaker had not signed the subsequent notes. Bank of Terrell v. Webb, 177 Ga. App. 715, 341 S.E.2d 258 (1986).

Change in payment terms, costs and expenses resulted in novation. — New agreement was a novation under O.C.G.A. § 10-7-21 as the agreement changed the payment terms of the original contract by adding the requirement of late charges on unpaid balances, and costs and expenses of collection, including attorney fees; therefore, the novation discharged the guarantor. Bldr. Marts of Am., Inc. v. Gilbert, 257 Ga. App. 763, 572 S.E.2d 88 (2002).

There is no novation if there is no new consideration. Sens v. Decatur Fed. Sav. & Loan Ass'n, 159 Ga. App. 767, 285 S.E.2d 226 (1981).

Consent

Implied consent makes change immaterial. — Any change or alteration made in an instrument after the instrument's execution which is impliedly authorized by the signers thereof, and which merely expresses what would otherwise be supplied by intendment, is immaterial, and will not discharge one signing as surety. Watkins Medical Co. v. Harrison, 33 Ga. App. 585, 126 S.E. 909 (1925).

Surety may consent in advance to a course of conduct which would otherwise result in the surety's discharge. Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651 (1975).

A surety is not discharged by any act of the creditor or obligee to which the surety consents. Consent may be given in advance, as at the time the contract of suretyship is entered into. Union Commerce Leasing Corp. v. Beef 'N Burgundy, Inc., 155 Ga. App. 257, 270 S.E.2d 696 (1980).

A guarantor may consent in advance to conduct which would otherwise result in statutory discharge. Regan v. United States Small Bus. Admin., 926 F.2d 1078 (11th Cir. 1991).

If the language of a guaranty specifically contemplated an increase in the obligor's debt and the creation of new obligations, and included waivers of any "legal or equitable discharge" and of any defense based upon an increase in risk, the protections O.C.G.A. §§ 10-7-21 and 10-7-22 were waived. Underwood v. NationsBanc Real Estate Serv., Inc., 221 Ga. App. 351, 471 S.E.2d 291 (1996).

By assenting in advance to a waiver of all legal and equitable defenses, the guarantor was foreclosed from asserting that the guarantor was discharged under O.C.G.A. § 10-7-21 or O.C.G.A. § 10-7-22. Ramirez v. Golden, 223 Ga. App. 610, 478 S.E.2d 430 (1996).

Alleged guarantor was not discharged from the obligations of a personal guarantee under O.C.G.A. §§ 10-7-21 and 10-7-22 because, although a subsequent agreement changed the terms of the original guaranty by granting an extension of time regarding the terms of purchase from a company and

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Consent

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acted as a novation, the alleged guarantor consented to those changes. Staten v. Beaulieu Group, LLC, 278 Ga. App. 179, 628 S.E.2d 614 (2006).

Disregard of condition of surety's consent makes section apply. — If a surety authorizes the substitution of the new bill on a condition useless to himself and the condition is disregarded, the surety may claim the principle announced in this section. Central Ga. Bank v. Cleveland Nat'l Bank, 59 Ga. 667 (1877).

Unconsented increase in risk is an independent ground for discharge of a surety. Upshaw v. First State Bank, 244 Ga. 433, 260 S.E.2d 483 (1979).

Application

Rules apply to negotiable instruments. — An agreement (novation) which would discharge the surety or guarantor of a simple contract for the payment of money will also discharge one who is a guarantor or surety on a negotiable instrument. Sewell v. Akins, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

Official bonds. — Where, after the execution of the public printer's performance bond, the legislature by resolution authorized the treasurer (now director of the Office of Treasury and Fiscal Services) to advance to the printer a sum in part payment for the public printing of the session then pending, this was such a novation of the contract as discharged the sureties under this section, if done without the surety's consent. Walsh v. Colquitt, 64 Ga. 740 (1880).

Taking of a promissory note for an antecedent liability does not constitute a payment of the debt in the absence of an agreement to that effect, or evidence that such was the intention of the parties. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798, 181 S.E. 694 (1935).

Mutual intention to treat former contract as no longer binding must be shown. — To do away with the stipulations in a contract, the circumstances must show a mutual intention of the parties to treat the stipulations as no longer binding and must be such as, in law, to make practically a new agreement. Pittsburgh Plate Glass Co. v. Jarrett, 42 F. Supp. 723 (M.D. Ga. 1942), modified, 131 F.2d 674 (5th Cir. 1942).

Promissory note evidence of settlement of accounts. — Generally, the execution of a promissory note is prima facie evidence of the full settlement of all accounts up to the date of the note. A compromise, or mutual accord and satisfaction, is binding on both parties. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

Under the facts, the taking of a demand promissory note for a preexisting liability which was covered by the guaranty did not constitute a payment of the debt and thereby release the guarantor. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798, 181 S.E. 694 (1935).

Accord and satisfaction is effected by each party relinquishing claim. — Where each of two persons relinquishes a claim against the other, or each discontinues an action against the other, a mutual accord and satisfaction is effected, regardless of the respective amounts involved; and this bars any further recourse on the part of either as to such claims. Any rights of the parties must now be based upon the new agreement. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

New note for less than old is presumptive evidence of settlement. — A new note for a less sum than the old note, given in renewal thereof, is presumptive evidence that all differences between the parties were adjusted and settled when such new note was given. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

Other agreement must be clearly shown. — It must be upon clear and satisfactory evidence that both parties agreed and intended that the settlement, made when the new note was given, was not final and that any defense which could have been made to the old note might still be made to the new one. Collier v. Casey, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

New note given for old with different terms is novation. — When a note was given by principal and security during the Civil War which, at the close of the war, was scaled to a gold standard, a new note given by a principal alone for the amount thus scaled, and accepted by the payee in the discharge of the first note, was a novation of the original contract under former Code 1868, §§ 2125, 2828. Hamilton v. Willingham, 45 Ga. 500 (1872).

Substituting absolute deed for mortgage. — An absolute deed conveying land as secu-

Application (Cont'd)

rity for a debt is a security of a higher nature than a mortgage for the same debt on the same premises, and when the mortgage is entered satisfied and surrendered up because of the execution of such deed, the transaction operates as a novation and amounts to a merger. Bostwick v. Felder, 73 Ga. App. 118, 35 S.E.2d 783 (1945).

Changing the date from which a promissory note draws interest by erasing the words "from date" and substituting therefor the words "from maturity" is a material alteration creating a new contract and constitutes a novation. Paulk v. Williams, 28 Ga. App. 183, 110 S.E. 632 (1922).

Renewing note at same rate. — By virtue of this section, the mere renewal of a note at the same rate of interest is not a novation. Partridge v. Williams' Sons, 72 Ga. 807 (1884).

New note to ward and security deed conveying same property conveyed to guardian. — If a guardian holding a note secured by a deed received, for the benefit of two minor wards, payment from the debtor of a sum equal to the share of one of the wards, and settled with such ward at majority, and thereafter the debtor executed a new note and security deed to the other ward at majority, the new note representing the ward's share of the original indebtedness and the security deed conveying the same property as the original deed to the guardian, it was held that the new note and security deed did not amount to a novation. Kelley v. Spivey, 182 Ga. 507, 185 S.E. 783 (1936).

Failure to enter into contract not relied upon by surety. — The fact that no contract was ultimately entered into between the grantor and grantee in the security deed executed contemporaneously with notes endorsed by a surety does not constitute a fraud upon the surety so as to relieve the surety of liability on the notes; nor does such fact constitute a novation of the notes so as to relieve the surety of the surety's liability thereon, for if it does not appear that the surety relied upon the existence of such contract as an inducement to sign as surety, there can be no fraud, nor can the failure to enter into the contract, which was cancellable at any time solely by the grantee in the security deed (the payee in the notes), constitute a novation of the notes. Southern Cotton Oil Co. v. Hammond, 92 Ga. App. 11, 87 S.E.2d 426 (1955).

Surety will not be released by fraudulent renewal note disaffirmed by creditor. — While under former Civil Code 1910, §§ 3543 and 3544 a surety will be discharged by a novation changing the nature or terms of the surety's contract without the surety's consent, and therefore the acceptance by a payee bank, without the agreement or consent of the surety, of a new note in renewal or payment of the original note signed by the surety will discharge the surety from liability, such an acceptance by the payee bank, when induced by the actual fraud of the maker in presenting the renewal instrument with the signature of the surety forged thereon, and without knowledge or reasonable ground to suspect, on the part of the bank, that the signature was in fact a forgery, will not release the surety, if it appeared that upon discovery of the fraud of the maker the bank promptly disaffirmed the bank's previous acceptance of the renewal note by regaining possession of the original note and suing thereon. Biddy v. People's Bank, 29 Ga. App. 580, 116 S.E. 222 (1923).

Substituting note for account. — By virtue of this section, a guarantor is not released by reason of the mere fact that an account which the guarantor guaranteed has been reduced to a note, when it appears the account was for goods furnished "in pursuance of the contract of guaranty" and it appears that the note represents the same amount and stands in lieu of the account. Kalmon v. Scarboro, 11 Ga. App. 547, 75 S.E. 846 (1912), later appeal, 13 Ga. App. 28, 78 S.E. 686 (1913) (see O.C.G.A. § 10-7-21).

The substitution of a promissory note for an original account indebtedness, with the inclusion in the note of an extended time for payment, a higher face amount reflecting accrued interest, and a provision authorizing the recovery of attorney fees in the event of collection by an attorney, did not result in either a novation of the contract nor an increased risk and did not discharge the guarantors of the prior guaranty agreement from liability. Columbia Nitrogen Corp. v. Mason, 171 Ga. App. 685, 320 S.E.2d 838 (1984).

Contract simply giving creditor additional security. — Where a second contract simply

on of the notes. Southern Hammond, 92 Ga. App. 11, 955).

t be released by fraudulent isaffirmed by creditor. — former Civil Code 1910, :4 a surety will be discharged anging the nature or terms ontract without the surety's erefore the acceptance by a nout the agreement or con- ty, of a new note in renewal the original note signed by discharge the surety from n acceptance by the payee uced by the actual fraud of esenting the renewal instru- gnature of the surety forged thout knowledge or reason- suspect, on the part of the gnature was in fact a forgery, he surety, if it appeared that of the fraud of the maker the disaffirmed the bank's previ- of the renewal note by re- on of the original note and Biddy v. People's Bank, 29 16 S.E. 222 (1923).

ote for account. — By virtue guarantor is not released by mere fact that an account antor guaranteed has been note, when it appears the for goods furnished "in e contract of guaranty" and he note represents the same nds in lieu of the account. oro, 11 Ga. App. 547, 75 S.E. r appeal, 13 Ga. App. 28, 78 (see O.C.G.A. § 10-7-21).

ion of a promissory note for ount indebtedness, with the note of an extended time for her face amount reflecting st, and a provision authoriz- y of attorney fees in the event an attorney, did not result in ion of the contract nor an and did not discharge the he prior guaranty agreement Columbia Nitrogen Corp. v. . App. 685, 320 S.E.2d 838

ply giving creditor additional ere a second contract simply

gave the seller additional security for the payment of the debt, was not inconsistent with the first contract, and did not increase the risk of the surety, the second contract was not a novation of the first within the meaning of former Code 1933, § 103-202 and did not release the surety under the provisions of either § 103-202 or former Code 1933, § 103-203. W.T. Raleigh Co. v. Overstreet, 71 Ga. App. 873, 32 S.E.2d 574 (1944).

Failure of creditor to record lien. — Where the defendant had signed the note as surety, and this fact was known to the plaintiffs when they accepted the note, the failure of the plaintiffs to record the retention of title contract within the time required by law did not discharge the surety. La Boon v. Wright & Locklin, 42 Ga. App. 275, 155 S.E. 770 (1930).

Grantor whose debt is assumed is surety if creditor assents to assumption. — Where A, the mortgagor, was originally bound as principal to B, the mortgagee, and C, the grantee, assumed the debt to B, as between A and C, the latter assumed the position of principal debtor and the former was changed to a mere surety. The consideration for C's assumption of the debt was the property conveyed by A to C. This change of position would not affect B, the mortgagee, if B did not assent to the change. Stapler v. Anderson, 177 Ga. 434, 170 S.E. 498, answer conformed to, 47 Ga. App. 379, 170 S.E. 501 (1933).

New obligation from grantee to creditor is recognition of suretyship. — When a grantee in a sales agreement, as part of the consideration thereof, assumes and agrees to pay an outstanding indebtedness against the property conveyed, the grantee takes upon the grantee the burden of the debt secured by the deed, and, as between himself and the grantor, the grantee becomes the principal and the latter merely a surety for payment of the debt. While the holder of the security deed is not bound by such an agreement unless the holder consents to it, when, with knowledge of such an agreement, the holder enters into an independent stipulation on the holder's own account with the grantee whereby the holder obtains a new obligation running directly to the holder on the footing that the grantee becomes the principal, then, in the absence of special conditions, the holder is held to have recognized and become bound by the relation of principal and surety existing between the maker of the surety deed and the grantee. Zellner v. Hall, 210 Ga. 504, 80 S.E.2d 787 (1954), later appeal, 211 Ga. 572, 87 S.E.2d 395 (1955).

Extension of mortgage without consent of grantor discharges grantor. — A purchased land subject to a mortgage which A assumed, and later sold the land to B under a like assumption; B sold the land to C, who did not assume; thereafter the mortgagee, at the request of C, extended the maturity of the mortgage and of a portion of the debt, without the knowledge or consent of A. It was held that if the mortgagee had knowledge of the new relationships, the grant of the extension operated to release A from liability. Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352 (1936).

Grant must consent to extension where suretyship was not created by mutual agreement of all parties. — In the absence of a mutual agreement of the grantor, the grantee, and the holder of the encumbrance to that effect, the relation of principal and surety did not exist between the grantee and grantor, and the latter was not discharged from liability by an agreement between the other parties to extend the time of payment. Alsobrook v. Taylor, 181 Ga. 10, 181 S.E. 182 (1935).

Reduction in interest rate does not release grantor who remains principal. — Change in the rate of interest called for by contract from eight to six percent at the time of the sale of the premises to grantees, when grantor remained bound to holder as principal debtor, would not operate to relieve the grantor from responsibility on the grantor's note and deed to secure debt. Zellner v. Hall, 211 Ga. 572, 87 S.E.2d 395 (1955).

Creditor's agreement to allow delay in payment is not an additional consideration, as debtor's promise to pay debt already due creates no additional obligation. Sens v. Decatur Fed. Sav. & Loan Ass'n, 159 Ga. App. 767, 285 S.E.2d 226 (1981).

Payment of late charges or reinstatement fees authorized by original contract does not furnish new consideration. Sens v. Decatur Fed. Sav. & Loan Ass'n, 159 Ga. App. 767, 285 S.E.2d 226 (1981).

Promise to pay usury does not discharge surety. — A mere promise to pay usury is

Application (Cont'd)

void, and the surety is not thereby discharged. Lewis, Leonard & Co. v. Brown, 89 Ga. 115, 14 S.E. 881 (1892).

Parol contract does not release surety where statute of frauds applies. — Where a written contract which must, under the statute of frauds, be in writing has been signed by a surety for one of the contracting parties, the surety will not be released from liability by reason of the making of a subsequent parol contract between the principals which does not become binding by reason of complete performance or otherwise. Willis v. Fields, 132 Ga. 242, 63 S.E. 828 (1909).

Parol evidence inadmissible to show novation under statute of frauds. — A contract which by law is required to be in writing cannot be changed by parol evidence so as to substitute therefor, by novation, a contract which is also required by law to be in writing. Evidence of a parol agreement is inadmissible to establish the novation of a contract by law required to be in writing. Ver Nooy v. Pitner, 17 Ga. App. 229, 86 S.E. 456 (1915).

When section should be charged. — Where Civil Code 1895, §§ 2968, 2971, and 2972, defining a contract of suretyship and the rights of a surety, were pertinent to the issues involved, the statutes should have been given in a charge to the jury on timely written request, or even without request. Haigler v. Adams, 5 Ga. App. 637, 63 S.E. 715 (1909).

If the arrangement for the use of a pledged savings account did not deviate from the terms of the subject note as agreed to by plaintiffs, no issue concerning the discharge defenses remained for jury determination, warranting summary judgment. Cohen v. Northside Bank & Trust Co., 207 Ga. App. 536, 428 S.E.2d 354 (1993).

Extension

Extension of time for payment. — If after the maturity of a note the debtor pays to the creditor a sum of money representing advance interest upon the principal at the rate of 8 percent per annum for a definite period of time, in consideration of a promise by the creditor to extend the time of payment of the principal, this agreement, although not in writing, constitutes a valid contract between the parties, and, when made without the consent of the surety upon the note, operates to release and discharge the latter by virtue of this section. Lewis v. Citizens' & S. Bank, 31 Ga. App. 597, 121 S.E. 524 (1924), aff'd, 159 Ga. 551, 126 S.E. 392 (1925).

If a valid and binding extension is granted to the principal debtor without the consent of the surety, the latter is discharged. Alropa Corp. v. Snyder, 182 Ga. 305, 185 S.E. 352 (1936).

A creditor of a partnership who has notice of the dissolution and of the agreement by the continuing partner to assume the debts of the firm is bound to accord to the retiring partner all the rights of a surety. Hence, if, without the latter's knowledge or consent, the creditor, upon a sufficient consideration, extends the time of payment of the firm indebtedness, the retiring partner is released from the indebtedness, and the creditor must thereafter look only to the firm assets and to the individual assets of the continuing partner. Grigg v. Empire State Chem. Co., 17 Ga. App. 385, 87 S.E. 149 (1915).

Where the creditor had, for a consideration, extended the time of payment of the note signed by the surety, and in addition thereto had calculated, and undertook to and did collect, usurious interest from the principal, and by reason of such payment did indulge the principal debtor and extend the payment of the note, all of which, according to the evidence, was without the knowledge or consent of the surety, the surety was discharged by virtue of this section. Pickett v. Brooke, 24 Ga. App. 651, 101 S.E. 814, cert. denied, 24 Ga. App. 817 (1920).

Period of extension must be fixed by agreement. — In order to discharge a surety by an extension of time to the principal, not only must there be an agreement for the extension, but the proof must show that the indulgence was extended for a definite period fixed by the agreement. Bunn v. Commercial Bank, 98 Ga. 647, 26 S.E. 63 (1896); Ver Nooy v. Pitner, 17 Ga. App. 229, 86 S.E. 456 (1915).

If a signer of a note was in fact a surety only and the payee, under a valid agreement with the principal and without the consent of the surety, extends the time of maturity as fixed by the obligation, a release of the

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Taking demand time. — Taking o
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ALR. — Conse
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Liability of sure
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Discharge of a
surety by extensi
collateral, under
Law, 48 ALR 715;
1088; 2 ALR2d 26

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Liability of gra
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r of a partnership who has notice dution and of the agreement by ing partner to assume the debts is bound to accord to the retiring the rights of a surety. Hence, if, latter's knowledge or consent, r, upon a sufficient consideration, e time of payment of the firm ess, the retiring partner is re- the indebtedness, and the cred- thereafter look only to the firm to the individual assets of the partner. Grigg v. Empire State ., 17 Ga. App. 385, 87 S.E. 149

he creditor had, for a consider- nded the time of payment of the d by the surety, and in addition ad calculated, and undertook to ollect, usurious interest from the and by reason of such payment ge the principal debtor and extend ent of the note, all of which, ac- o the evidence, was without the e or consent of the surety, the s discharged by virtue of this sec- ett v. Brooke, 24 Ga. App. 651, 101 cert. denied, 24 Ga. App. 817

of extension must be fixed by nt. — In order to discharge a surety ension of time to the principal, not st there be an agreement for the n, but the proof must show that the ce was extended for a definite pe- d by the agreement. Bunn v. Com- Bank, 98 Ga. 647, 26 S.E. 63 (1896); y v. Pitner, 17 Ga. App. 229, 86 S.E. 5).

gner of a note was in fact a surety l the payee, under a valid agreement principal and without the consent rety, extends the time of maturity as y the obligation, a release of the

surety will result, but in order to discharge a surety by an extension of time granted to the principal, not only must there be an agreement for the extension, but the indulgence must be for a definite period fixed by a valid agreement. Duckett v. Martin, 23 Ga. App. 630, 99 S.E. 151 (1919); Benson v. Henning, 50 Ga. App. 492, 178 S.E. 406 (1935); Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603 (1936), aff'd, 184 Ga. 644, 192 S.E. 298 (1937).

Taking demand note is not extension of time. — Taking of a demand note was not such an extension of time as would release a guarantor because a demand note is instantly due and the moment delivered can be sued upon. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798, 181 S.E. 694 (1935).

Creditor may rescind extension obtained by fraud. — Under former Code 1882, §§ 2153 and 2154, if the maker of a note induced the payee to extend the time of payment, by fraudulent representations, upon the discovery of such fraud, the creditor can rescind the agreement, but if the creditor failed so to do and retained the benefits of the transaction, this will operate to discharge a surety or accommodation endorser. Burnlap v. Robertson, 75 Ga. 689 (1885).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Suretyship, § 35.

C.J.S. — 72 C.J.S., Principal and Surety, § 95 et seq.

ALR. — Consenting to continuance or extension of time in action as releasing surety, 7 ALR 376.

Extension of time or other modification of original contract as releasing indemnitor of surety or guarantor, 43 ALR 1368.

Liability of surety or guarantor for partnership in respect of transactions or defaults subsequent to change in personnel of the partnership, 45 ALR 1426.

Discharge of accommodation maker or surety by extension of time or release of collateral, under Negotiable Instruments Law, 48 ALR 715; 65 ALR 1425; 108 ALR 1088; 2 ALR2d 260.

Taking of demand note in renewal as releasing surety or endorser, 48 ALR 1222.

Acceptance of interest in advance as consideration for, or evidence of, an extension of time which will release a guarantor, surety, or endorser, 59 ALR 988.

Liability of grantee assuming mortgage debt to grantor, 76 ALR 1191; 97 ALR 1076.

Liability of guarantor of or surety for bank deposit as affected by reorganization, merger, or consolidation of bank, 78 ALR 381.

Creditor's knowledge of, or consent to, assumption by third person of debtor's obligation as release of original debtor or extinguishment of original debt essential to novation, 87 ALR 281.

Guaranty of commercial credit of dealer as affected by latter's change of location or field of operation, 89 ALR 651.

Lessee as surety for rent after assignment; and effect of lessor's dealings (other than consent to assignment or mere acceptance of rent from assignee) to release lessee, 99 ALR 1238.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Rule as to discharge of surety by subsequent modification of obligation without his consent as applicable to surety on bond for discharge of lien, 102 ALR 764.

Failure of accommodation maker or endorser to disaffirm transaction, or his continued recognition of note after learning of its use for purpose other than intended, as ratification of, or estoppel to assert, the diversion, 105 ALR 437.

Construction and application of provision of guaranty or surety contract against release or discharge of guarantor by extension of time or alteration of contract, 117 ALR 964.

Remission or waiver of part of principal's obligation as releasing surety or guarantor, 121 ALR 1014.

Necessity of proof of original obligor's consent to, or ratification of, third person's assumption of obligation, in order to effect a novation, 124 ALR 1498.

Payments or advancements to building contractor by obligee as affecting rights as between obligee and surety on contractor's bond, 127 ALR 10.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 ALR 85.

Surety's liability as affected by the addition, without surety's knowledge or consent, of the personal obligation of a third person, 144 ALR 1266.

Creditor's acceptance of obligation of third person as constituting novation, 61 ALR2d 755.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 ALR2d 734.

Liability of lessee's guarantor or surety beyond the original period fixed by lease, 10 ALR3d 582.

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

10-7-22. Discharge of surety by increase of risk.

Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability shall discharge him; a mere failure by the creditor to sue as soon as the law allows or neglect to prosecute with vigor his legal remedies, unless for a consideration, shall not release the surety. (Orig. Code 1863, § 2131; Code 1868, § 2126; Code 1873, § 2154; Code 1882, § 2154; Civil Code 1895, § 2972; Civil Code 1910, § 3544; Code 1933, § 103-203.)

JUDICIAL DECISIONS

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GENERAL CONSIDERATION
ACTS DISCHARGING SURETY
1. IN GENERAL
2. LOSS OF COLLATERAL
3. FORBEARANCE TO SUE AND DISMISSAL OF SUIT

General Consideration

Editor's notes. — In Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460, 246 S.E.2d 316 (1978), this section was held not to apply to compensated sureties. However, Ga. L. 1981, p. 870, § 1, amended § 10-7-1 so as to abolish the distinction between contracts of suretyship and guaranty. Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599 (1981). See the editor's note under § 10-7-1.

Section codifies general rule. — This section is a codification of the general rule. Timmons v. Butler, Stevens & Co., 138 Ga. 69, 74 S.E. 784 (1912); Johnson v. Longley, 142 Ga. 814, 83 S.E. 952 (1914), later appeal, 22 Ga. App. 96, 95 S.E. 315 (1918).

Section is of judicial origin, being merely the adoption and incorporation into the Code by legislative approval of the principles previously asserted in Brown v. Executors of Riggins, 3 Ga. 405 (1847), and Jones v. Whitehead, 4 Ga. 397 (1848). Cloud v. Scarborough, 3 Ga. App. 7, 59 S.E. 202 (1907).

Common law. — The rule stated in this section is a correct statement of the common law applicable to compensated sureties. Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460, 246 S.E.2d 316 (1978); Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599 (1981).

While O.C.G.A. § 10-7-22 does not apply to compensated sureties, the rule stated therein is a correct statement of common law applicable to compensated sureties. West Cash & Carry Bldg. Materials of Savannah, Inc. v. Liberty Mtg. Corp., 160 Ga. App. 323, 287 S.E.2d 320 (1981).

Uniform Commercial Code provides for discharge of parties on instruments. — Former Code 1933, § 103-203 was super-

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Christian v. Atlanta A
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Place, Ltd. v. Green,
S.E.2d 242, aff'd in
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Not applicable to guarantor. — O.C.
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recover against a bond the insurer to a mortgage lender under the Residential Mortgage Act, . § 7-1-1000 et seq., because the it gave rise to the judgment the er obtained against the lender oc- before the bond was in effect, and ler's failure to pay the judgment an act that authorized recovery the bond; the bond did not contain ic covenant extending liability to or to the bond's execution. Hart- Ins. Co. v. iFreedom Direct Corp., App. 262, 718 S.E.2d 103 (2011), nied, No. S12C0408, 2012 Ga. 46 (Ga. 2012).

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OR AND SURETY

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al 'Exculpatory' Clause, or Will ligence Suffice," see 19 Ga. St. b. 2014)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
NOVATION
APPLICATION

General Consideration

Cited in Western Sur. Co. v. APAC-Southeast, Inc., 302 Ga. App. 654, 691 S.E.2d 234 (2010); Hanna v. First Citizens Bank & Trust Co., Inc., 323 Ga. App. 321, 744 S.E.2d 894 (2013).

Novation

No evidence of novation to discharge surety.

Trial court did not err in ruling that a promissory note modification was simply a modification of certain terms of the original note instead of a novation that substantially increased a guarantor's personal liability under the guaranty and, therefore, discharged the guarantor because there was no merit to the guarantor's contention that, at the time the guarantor executed the note modification, such modification contemporaneously increased the guarantor's contractual obligations to the creditors; at the time the guarantor executed the note modification on behalf of the debtor, the guarantor was already personally obligated to pay the creditors, pursuant to the guaranty, the original principal amount plus the accrued interest. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

Novation not found. — Guarantor argued that a bank's settlements with two other guarantors constituted a novation under O.C.G.A. § 10-7-21; however, a novation required a new agreement, and there was no new contract between the bank and the borrower and no new contract between the bank and the borrower. Additionally, the guarantor consented to the settlements in advance in the guaranty agreement. Wooden v. Synovus Bank, 323 Ga. App. 794, 748 S.E.2d 275 (2013).

Application

Guarantor who admitted forging co-guarantor's signature estopped from pleading discharge. — Husband/guarantor was equitably estopped from arguing that a licensor's discharge of his co-guarantor and wife discharged him pursuant to O.C.G.A. §§ 10-7-20 and 10-7-21 because he signed an affidavit that he had forged his wife's signature on the guaranty without her knowledge, and the affidavit resulted in the wife's dismissal from the licensor's suit. Noons v. Holiday Hospitality Franchising, Inc., 307 Ga. App. 351, 705 S.E.2d 166 (2010).

Guarantor bound by contract. — As there was some evidence to support a determination that a guarantor did not intend that contractual guaranty obligations were contingent upon another individual signing the guaranty as a co-surety, the failure of such signature was not a change in the contract terms or a release that discharged the guarantor from liability. Fletcher v. C. W. Matthews Contr. Co., 322 Ga. App. 751, 746 S.E.2d 230 (2013).

Instruction proper. — As there was evidence to support a charge on waiver of a guarantor's right to be discharged by an increase of risk or a novation, and it was not an improper statement of the law, there was no cause to grant the guarantor's motion for a new trial. Fletcher v. C. W. Matthews Contr. Co., 322 Ga. App. 751, 746 S.E.2d 230 (2013).

10-7-22. Discharge of surety by increase of risk.

Law reviews. — For article, "Georgia Law Needs Clarification: Does it Take Willful or Wanton Misconduct to Defeat a Contractual 'Exculpatory' Clause, or Will Gross Negligence Suffice," see 19 Ga. St. B.J. 10 (Feb. 2014)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
ACTS DISCHARGING SURETY
1. IN GENERAL

General Consideration

Risk of guarantor not increased. — Trial court did not err in granting a payee's motion for summary judgment in the payee's action against a maker and a guarantor to collect on a promissory note and to enforce a guaranty because the payee established that there was no issue of material fact as to the defense that its actions in promising to refinance the loan or to extend a line of credit increased the guarantor's risk under the guaranty; a lender's failure to lend additional sums to a principal did not discharge a guarantor from liability for the amount that was actually advanced by the lender. Ga. Invs. Int'l, Inc. v. Branch Banking & Trust Co., 305 Ga. App. 673, 700 S.E.2d 662 (2010).

Instruction proper. — As there was evidence to support a charge on waiver of a guarantor's right to be discharged by an increase of risk or a novation, and it was not an improper statement of the law, there was no cause to grant the guarantor's motion for a new trial. Fletcher v. C. W. Matthews Contr. Co., 322 Ga. App. 751, 746 S.E.2d 230 (2013).

Waiver of defense clear. — Trial court properly held a guarantor liable on a promissory note because the construction of the guaranty was a matter of law for the court and the language employed by the parties in the guaranty was plain, unambiguous, and capable of only one reasonable interpretation and the discharge of the surety by increase of risk under O.C.G.A. § 10-7-22 was a legal defense which the plain language of the guaranty waived. Hanna v. First Citizens Bank & Trust Co., Inc., 323 Ga. App. 321, 744 S.E.2d 894 (2013).

Cited in Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536 (2014).

Acts Discharging Surety

1. In General

Consent by guarantor in advance to changes.

Trial court did not err in ruling that a promissory note modification was simply a modification of certain terms of the original note instead of a novation that substantially increased a guarantor's personal liability under the guaranty and, therefore, discharged the guarantor because there was no merit to the guarantor's contention that, at the time the guarantor executed the note modification, such modification contemporaneously increased the guarantor's contractual obligations to the creditors; given the unambiguous language of the guaranty, no issue of fact existed as to whether the guarantor was discharged by any increased risk or a purported novation because the guarantor voluntarily and explicitly agreed in advance to the modification of the original note. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

No evidence of increased risk meant no discharge of surety.

Guarantor argued that a bank's settlements with two other guarantors increased the guarantor's risk, discharging the guarantor under O.C.G.A. § 10-7-22; however, the language of the guaranty unconditionally obligated the guarantor individually to pay the entire amount of the borrower's indebtedness, and the language permitted the bank to enter into settlements with the others. Wooden v. Synovus Bank, 323 Ga. App. 794, 748 S.E.2d 275 (2013).

10-7-24. Refusal to sue p charge.

Law reviews. — For article, gia Practitioner's Guide to Con

10-7-30. Bad faith refusa tyship contract.

Law reviews. — For article, gia Practitioner's Guide to Con

10-7-31. Rights of certai payment bond o ment of work.

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Notice to contractor defic Trial court did not err in grantin eral contractor and its surety s judgment in a supplier's action t under a payment bond and a charge bond for monies a subco owed it for materials it suppli construction project because the er's notice to contractor failed to with O.C.G.A. §§ 10-7-31(a 44-14-361.5(c) because the notic omitted required information; a

RIGHTS OF SURETY AG T

10-7-41. Action for mone surety or endors

JUI

Cited in Progressive Elec. S Task Force Construction, Inc., App. 608, 760 S.E.2d 621 (2014).

10-7-56. Subrogation to r

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ANALYSIS

GENERAL CONSIDERATION

West's Code of Georgia Annotated

ı renewal note by failure of payee to
nature of other indorser on original
re such other indorser was insolvent
gnature was not required on renewal
uest of surety. Woolfolk v. Mathews,
Ga.App. 694, 188 S.E. 729. Principal
/ ⇦ 116

ure of payee of note to prove its claim
ptcy proceedings against one of the
oes not release his cosurety. Arm-
Citizens' & Southern Bank, 1916, 145
)0 S.E. 44. Principal and Surety ⇦

ument reciting payment by a surety
inistrator's bond of a certain amount
s proportion of any and all liability,
a suit on the bond as to him, and
o look to the principal and other
r the balance that might be recovered
further cost or detriment" to such
s a release of such surety and not a
of indemnity or an agreement not to
urging a cosurety. Wilkinson v. Con-
133 Ga. 518, 66 S.E. 372. Principal
/ ⇦ 116

ction at law on a joint note, all the
cept one appearing on its face as
verdict cannot be rendered against
e sureties for the whole amount of the
against one of them for half that
m the ground that he notified the
he would only be surety for half the
the note; but, in case of such verdict,
ay enter judgment against all the
r the lesser sum. Jones v. Lewis,
Ga. 446, 13 S.E. 578. Principal and
116

ment against defendant having been
ne obtained, without the consent of
on his supersedeas bond, an injunc-
ining further proceedings. Held, that
of the surety on the injunction bond
ie surety on the supersedeas bond, at
: extent of the property owned by the
y. Lewis v. Armstrong, 1888, 80 Ga.
. 114. Principal and Surety ⇦ 116

tion against the sureties of a former
tor by the administrator d. b. n. de-
annot plead a release because plain-
s administrator of one of their co-
aid out the assets of his estate to his
uch act, if a discharge at all as to
, was only so pro tanto. Poullian v.
88, 80 Ga. 27, 5 S.E. 107. Principal
⇦ 116

ed sureties

wo sureties on note were liable to
ureties for $664.16, and one surety
ad worth about $2,700 owed bank
) on his personal note, and bank in
on of receiving $801.75 "together
with other funds from the borrower," released such land from lien of execution on indebtedness of $664.16, and from operation of security deed given by surety to secure the $1,500 indebtedness, and the surety thereafter died owning no property, the cosurety was released from liability as surety. Bulloch Mtg. Loan Co. v. Jones, 1940, 63 Ga.App. 55, 10 S.E.2d 88. Principal and Surety ⇦ 116

That suit on note containing joint and several obligations of principal and sureties was dismissable against deceased surety without prejudice does not discharge other sureties. Barnett v. Ferris, 1929, 39 Ga.App. 206, 146 S.E. 345. Principal and Surety ⇦ 116

Voluntary dismissal of action as to deceased surety does not ipso facto discharge cosurety from liability. Ellis v. Geer, 1927, 36 Ga.App. 519, 137 S.E. 290. Principal and Surety ⇦ 116

7. Substitution of sureties

Provision in contract that "This agreement contains the entire contract and there is no understanding that any person other than the undersigned shall execute this agreement," does not prohibit substitution of new sureties for existing ones, but merely precludes any of parties or signatories to contract from claiming it to be void for lack of any additional allegedly required signatures. Code, §§ 103–201, 103–202. Overcash v. First Nat. Bank of Atlanta, 1967, 115 Ga.App. 499, 155 S.E.2d 32. Principal and Surety ⇦ 116

Alteration in contract resulting in substitution of one of three sureties made without intent to defraud could still be enforced against remaining sureties. Code, §§ 20–802, 103–201, 103–202. Overcash v. First Nat. Bank of Atlanta, 1967, 115 Ga.App. 499, 155 S.E.2d 32. Principal and Surety ⇦ 116

8. Effect of the running of the statute of limitations

The mere failure of payee of a note, who is holder thereof, to institute suit to recover on note against one of sureties thereon, before expiration of period of limitation in which suit must be brought against such surety, does not amount to a release by payee of the obligation to him of a cosurety on note whose obligation is not barred by limitations, although payee's act in refraining from instituting suit was not procured by or consented or agreed to by latter surety. Code 1933, § 103–203. Scott v. Gaulding, 1939, 187 Ga. 751, 2 S.E.2d 69, 122 A.L.R. 200, answer to certified question conformed to 60 Ga.App. 306, 3 S.E.2d 766. Principal and Surety ⇦ 116

A surety cannot accept indulgence of creditor, make no attempt to fulfill his obligation by paying debt when it falls due and is not paid by his principal, and then, after the statute of limitations has barred any action by creditor against his cosurety, obtain a discharge from his obligations. Scott v. Gaulding, 1939, 187 Ga. 751, 2 S.E.2d 69, 122 A.L.R. 200, answer to certified question conformed to 60 Ga.App. 306, 3 S.E.2d 766. Principal and Surety ⇦ 116

Even if an agreement to release a surety on an administrator's bond was not enforceable for want of authority in the attorney to make it, or of the temporary administrator and heirs on whose behalf it was made, yet the transaction, including the dismissal as to such surety of a suit brought, for a consideration paid by him, and not bring any further action against him, constituted such conduct as released the other surety on the bond, especially where the first administrator had removed from the state, and further action against him was barred by limitations. Wilkinson v. Conley, 1909, 133 Ga. 518, 66 S.E. 372. Principal and Surety ⇦ 116

§ 10–7–21. Novation; discharge of surety

Any change in the nature or terms of a contract is called a "novation"; such novation, without the consent of the surety, discharges him.

Formerly Code 1863, § 2130; Code 1868, § 2125; Code 1873, § 2153; Code 1882, § 2153; Civil Code 1895, § 2971; Civil Code 1910, § 3543; Code 1933, § 103–202.

Library References

Key Numbers

Novation ⇦1.

Principal and Surety ⇦99.

Westlaw Key Number Searches: 278k1; 309k99.

ALR Library

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 A.L.R.3d 567.

Creditor's acceptance of obligation of third person as constituting novation, 61 A.L.R.2d 755.

Encyclopedias

74 Am. Jur. 2d, Suretyship §§ 21, 41–47.

C.J.S. Novation §§ 2 to 4, 9 to 10, 14 to 16.

C.J.S. Principal and Surety § 102.

7 Ga. Jur., Contracts § 6:33.

Forms

17 Am. Jur. Legal Forms 2d, Suretyship § 244:105.

23 Am. Jur. Pleading & Practice Forms, Rev., Suretyship, Form 62.

Georgia Forms, Legal and Business, Suretyship and Guaranty § 8:1.

3 Brown's Ga. Forms 2nd Ed. (1999 Rev.) § 10–7–21.

Notes of Decisions

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1. In general

Rule that a surety's liability will not be extended by implication or interpretation and that any novation without consent of surety, or increase in risk, discharges the surety applies to a guarantor. Code, §§103–202, 103–203. Dunlap v. Citizens and Southern DeKalb Bank, 1975, 134 Ga.App. 893, 216 S.E.2d 651. Guaranty ⇦ 36(1)

A "novation" under the rules of the civil law is a mode of extinguishing one obligation for another. Code, § 103–202. Bostwick v. Felder, 1945, 73 Ga.App. 118, 35 S.E.2d 783. Novation ⇦ 1

Conveyance of personalty by judgment debtor to holder of judgment lien as security for subsequent independent loan did not constitute a "novation" extinguishing a judgment lien as to personalty thus conveyed as security and subsequently levied upon under the judgment. Code, § 103–202. Bostwick v. Felder, 1945, 73 Ga. App. 118, 35 S.E.2d 783. Novation ⇦ 1

A contract of two persons as sureties to pay for goods sold to principal and all indebtedness of principal to seller under prior contract was not a "novation" of prior contract, and hence did not discharge sureties from liability thereunder. Code, § 103–202. W. T. Rawleigh Co. v. Overstreet, 1944, 71 Ga.App. 873, 32 S.E.2d 574. Novation ⇦ 1

Where lender canceled note and loan deed after principal and interest amounted to almost twice original indebtedness, and accepted in lieu thereof a series of unsecured, noninterest-bearing notes for amount of principal indebtedness, time being made the essence of new contract, new contract was a "novation" within statutory definition, which the Court of Appeals would not disturb. Code 1933, § 103–202. Collier v. Casey, 1939, 59 Ga.App. 627, 1 S.E.2d 776. Novation ⇦ 1

Where guardian holding security deed note for benefit of two minor wards received payment of sum equal to share of one ward and settled with such ward at his majority, "novation" of remainder of debt resulting in loss of priority of original security deed held not effected by grantor's execution of new note and security deed conveying same property to other ward at her majority (Code 1933, §§ 20–115, 103–202). Kelley v. Spivey, 1936, 182 Ga. 507, 185 S.E. 783. Novation ⇦ 1

A surety cannot, at law or in equity, be bound further than by the very terms of his contract, and, if the principal and the obligee change the terms of it without his consent, the surety is discharged. Bethune v. Dozier, 1851, 10 Ga. 235. Principal and Surety ⇦ 99

2. Law governing

Georgia state rules of decision should have been adopted as federal law governing rights between Small Business Administration (SBA) and Georgia guarantors of SBA loans, as there was no necessity for national rule on liability of SBA guarantors. O.C.G.A. §§ 10–7–21, 10–7–22, 11–9–504(3). Regan v. U.S. Small Business Admin., 1991, 926 F.2d 1078, rehearing denied. Federal Courts ⇦ 413

3. Alteration of instrument

Under Civ.Code 1910, § 3543, any change in the terms of a contract by which a new and materially different contract is created is a "novation," and, when made without a surety's consent, discharges him, though the new contract is more favorable to him than the original contract. Paulk v. Williams, 1922, 28 Ga.App. 183, 110 S.E. 632; Taylor v. Johnson, 1855, 17 Ga. 521.

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Code, §§ 103–203, 109A–3–601,
DeKalb County Bank v. Haldi,
App. 257, 246 S.E.2d 116. Princ
ty ⇦ 101(1)

Where prime contractors and
reached agreement beyond ter
stipulated in performance bond,
binding on surety. Code, §§ 103–
Palmes v. Southern Mechanical (
Ga.App. 672, 161 S.E.2d 413.
Surety ⇦ 100(1)

A departure from terms of con
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ty signed bond, condition absolvi
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dise consigned, and requiring re
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discharge surety. Civ.Code 1
Smith v. Georgia Battery Co., 193
840, 169 S.E. 381. Principal ar
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In an action on a note, where
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and Surety ⇦ 101(6)

A substitution of another contrac
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and Surety ⇦ 100(1)

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715. Principal and Surety ⇦ 100(
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r. Pleading & Practice Forms, Rev.
ıip, Form 62.
orms, Legal and Business, Surety
Guaranty § 8:1.
ı Ga. Forms 2nd Ed. (1999 Rev.)
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aulk v. Williams, 1922, 28 Ga.App.
ɛ. 632; Taylor v. Johnson, 1855, 17

Bank's failure to procure credit life insurance requested in connection with loans secured by borrower's son's pledge of certificates of deposit and personal guaranty was not such alteration in terms of notes as would have effect of discharging son as surety; bank's failure was, at most, violation of its obligations under notes. Code, §§ 103–203, 109A–3–601, 109A–10–103. DeKalb County Bank v. Haldi, 1978, 146 Ga. App. 257, 246 S.E.2d 116. Principal and Surety ⇦ 101(1)

Where prime contractors and subcontractor reached agreement beyond terms previously stipulated in performance bond, this was not binding on surety. Code, §§ 103–202, 103–203. Palmes v. Southern Mechanical Co., 1968, 117 Ga.App. 672, 161 S.E.2d 413. Principal and Surety ⇦ 100(1)

A departure from terms of construction contract must be such as to prejudice a paid surety before it may be discharged. Peachtree Roxboro Corp. v. U.S. Cas. Co., 1960, 101 Ga.App. 340, 114 S.E.2d 49. Principal and Surety ⇦ 100(1)

Adding to salesman's bond covering merchandise, without surety's knowledge, and after surety signed bond, condition absolving employer-obligee from responsibility for loss of merchandise consigned, and requiring reports, weekly return of funds, inventories, and that all sales made from consigned stock be for cash, would discharge surety. Civ.Code 1910, § 3543. Smith v. Georgia Battery Co., 1933, 46 Ga.App. 840, 169 S.E. 381. Principal and Surety ⇦ 101(2)

In an action on a note, where the evidence authorized the inference that the original contract had been altered after its execution by changing the date from which it bore interest, and that defendants were sureties only, and did not consent to such change, it was error to direct a verdict for plaintiff. Paulk v. Williams, 1922, 28 Ga.App. 183, 110 S.E. 632. Principal and Surety ⇦ 101(6)

A substitution of another contract for a building contract whose performance is secured by bond discharges the surety. Haigler v. Adams, 1909, 5 Ga.App. 637, 63 S.E. 715. Principal and Surety ⇦ 100(1)

A material change in a building contract without the consent of the surety releases him. Haigler v. Adams, 1909, 5 Ga.App. 637, 63 S.E. 715. Principal and Surety ⇦ 100(1)

Where, under a building contract, two persons agreed to erect a house, and gave a bond conditioned for the compliance with the contract, and one of them began the work and thereafter abandoned it, when the other, with the consent of the owner, and at the instance of the surety, undertook to complete the building, but failed so to do, the surety's risk was not increased by any act of the owner. Adams v. Haigler, 1905, 123 Ga. 659, 51 S.E. 638. Principal and Surety ⇦ 100(1)

In an action on a note it appeared that after the instrument, including a note and a conveyance of realty to secure the same, had been signed by defendant as surety and the principal, the latter procured, without the consent of the surety, the signatures of two persons as attesting witnesses to the signature of the principal. Held, that affixing such names was not a material alteration, releasing the surety, unless procured by the payee to defraud the surety. Heard v. Tappan & Merritt, 1904, 121 Ga. 437, 49 S.E. 292. Principal and Surety ⇦ 101(2)

4. Change in provisions of contracts

Any change in terms of contract is novation that will discharge surety who has not consented to change. O.C.G.A. § 10–7–21. Rice v. Georgia R.R. Bank & Trust Co., 1987, 183 Ga. App. 302, 358 S.E.2d 882; Brunswick Nursing & Convalescent Center, Inc. v. Great Am. Ins. Co., 1970, 308 F.Supp. 297; American Sur. Co. of New York v. Garber, 1966, 114 Ga.App. 532, 151 S.E.2d 887; Fairmont Creamery Co. v. Collier, 1917, 21 Ga.App. 87, 94 S.E. 56.

Surety is discharged by contract change, even though surety was not injured by contract change. Code Ga. §§ 103–202, 103–203. Brunswick Nursing & Convalescent Center, Inc. v. Great Am. Ins. Co., 1970, 308 F.Supp. 297. Principal and Surety ⇦ 99

That sureties procured principal to sign an account stated was not a material alteration of contract of suretyship that released sureties. J. R. Watkins Co. v. Brewer, 1945, 36 S.E.2d 442, 73 Ga.App. 331. Principal and Surety ⇦ 99

Where the written contract, of a character required to be in writing, was signed by a surety for contracting party he was not released by parol agreement by the principal, and it did not become binding by complete performance or otherwise. Willis v. Fields, 1909, 132 Ga. 242, 63 S.E. 828. Principal and Surety ⇦ 99

A memorandum at the bottom of a promissory note by the maker, agreeing to pay the note in gold, will release the surety, unless the surety signed the note with the knowledge and understanding that the debt was to be paid in specie. Hanson v. Crawley, 1870, 41 Ga. 303. Principal and Surety ⇦ 99

If a creditor, by an agreement with his principal debtor, for a valuable consideration, without the knowledge or consent of the surety, materially changes the terms of the contract of indebtedness, he thereby releases the surety. Worthan v. Brewster, 1860, 30 Ga. 112. Principal and Surety ⇦ 99

If a plaintiff in a fi. fa. take a new note for his judgment debt, with security, undertaking to deliver the original execution to the securities for their indemnity, and fail to do it, and who,

Note 4

in consequence thereof, lose the money, they are entitled to their discharge. Jones v. Keer & Hope, 1860, 30 Ga. 93. Principal and Surety ⇐ 99

5. Change in terms of payment

Change by obligee and principal in terms of payments to contractor from that provided in building contract operates to discharge surety, but change or alteration in contract must be material. Code Ga. §§ 103–202, 103–203. Brunswick Nursing & Convalescent Center, Inc. v. Great Am. Ins. Co., 1970, 308 F.Supp. 297. Principal and Surety ⇐ 100(2)

Diversion of over $68,000 of construction funds into pocket of third parties was a material change in payment schedule provisions of construction contract which might discharge surety on payment and performance bond. Code Ga. §§ 103–202, 103–203. Brunswick Nursing & Convalescent Center, Inc. v. Great Am. Ins. Co., 1970, 308 F.Supp. 297. Principal and Surety ⇐ 100(2)

Defendants sued on agreement to guarantee faithful performance of contract whereby principal was to purchase medicines from plaintiff on credit for resale held discharged from liability, regardless of whether defendants were sureties or guarantors, where plaintiff agreed, without defendants' consent, to allow principal to sell medicines sold principal on defendants' credit under partial and conditional guaranty to customers by principal and to allow principal to put out medicines on approval, since such alteration of original contract constituted a "novation". Code 1933, § 103–202. H. C. Whitmer Co. v. Sheffield, 1935, 51 Ga.App. 623, 181 S.E. 119. Guaranty ⇐ 53(1)

A supplemental contract, providing for submission to arbitration of any disputed question as to what constituted extras, did not discharge the surety on the contractor's bond, though the original contract provided that payments for extras should be made monthly. Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 1914, 83 S.E. 210, 142 Ga. 499, error dismissed 36 S.Ct. 451, 241 U.S. 687, 60 L.Ed. 1237. Principal and Surety ⇐ 100(6)

That a building contract provided for changes in the structure to be erected did not authorize a change as to the method and amount of the payments without consent of the sureties on the contractor's bond. Blackburn v. Morel, 1913, 13 Ga.App. 516, 79 S.E. 492. Principal and Surety ⇐ 100(4)

6. Change in quantity or price

Sureties on a note for $5,000, which the principal in discounting it with a bank reduced to $2,000, held not relieved from liability on the theory that they were willing to become sureties in the sum of $5,000, but not for the amount of $2,000. Paulk v. Williams, 1922, 28 Ga.App. 183, 110 S.E. 632. Principal and Surety ⇐ 101(4)

A guarantor of an account for goods purchased is not as matter of law released from liability by the mere fact that the account has been reduced to a note for the same amount and standing in lieu thereof. Kalmon v. Scarboro, 1912, 11 Ga.App. 547, 75 S.E. 846. Guaranty ⇐ 53(3)

Where it does not appear from the petition that the risk of guarantors of an account was increased on reduction of the debt to a note, though the note contained a stipulation for attorney's fees and for interest at 8 per cent. instead of 7 per cent., which the account would have drawn, where the petition does not ask for attorney's fees, nor for interest at the higher rate, the guarantors are liable. Kalmon v. Scarboro, 1912, 11 Ga.App. 547, 75 S.E. 846. Guaranty ⇐ 53(3)

7. Change in obligation or duty of principal

Surety can be discharged from its obligation under bond if its risk is increased by any act of insured. Armstrong Transfer & Storage Co., Inc. v. Mann Const., Inc., 1995, 217 Ga.App. 538, 458 S.E.2d 481, reconsideration denied. Oellerich v. First Federal Sav. and Loan Ass'n of Augusta, 1977, 552 F.2d 1109; Brunswick Nursing & Convalescent Center, Inc. v. Great Am. Ins. Co., 1970, 308 F.Supp. 297; Sens v. Decatur Federal Sav. & Loan Ass'n, 1981, 159 Ga.App. 767, 285 S.E.2d 226; Parker v. Fidelity Bank, 1979, 151 Ga.App. 733, 261 S.E.2d 465; Palmes v. Southern Mechanical Co., 1968, 117 Ga.App. 672, 161 S.E.2d 413; Evans v. American Nat. Bank & Trust Co. of Chattanooga, Tennessee, 1967, 116 Ga.App. 468, 157 S.E.2d 816; Seaboard Loan Corp. v. McCall, 1940, 61 Ga.App. 752, 7 S.E.2d 318; Brock Candy Co. v. Craton, 1925, 33 Ga.App. 690, 127 S.E. 619; Washington Loan & Banking Co. v. Holliday, 1921, 26 Ga.App. 792, 107 S.E. 370; Fisher v. Shands, 1920, 24 Ga.App. 743, 102 S.E. 190; Dunlop Milling Co. v. Collier, 1917, 19 Ga.App. 725, 92 S.E. 296; Little Rock Furniture Co. v. Jones & Co., 1913, 13 Ga.App. 502, 79 S.E. 375.

For compensated surety to establish defense on ground of novation, he must demonstrate material change yielding actual harm. White v. Phillips, 1982, 679 F.2d 373. Principal and Surety ⇐ 97

Even if language of guaranty allowed additional note to be considered novation or increase in risk, guarantors waived any defenses based on novation or additional risk; language of guaranty specifically contemplated increase in obligor's debt and creation of new obligations, and guaranty included waivers of any legal or equitable discharge and of any defense based upon increase in risk. O.C.G.A. §§ 10–7–21, 10–7–22. Underwood Banc Real Estate Service, Inc., 19[illegible] App. 351, 471 S.E.2d 291. Guar[illegible]

Mere inclusion in promissory no[illegible] amount owed under guaranty at[illegible] termination of provision authorizing[illegible] attorney fees in event of collection[illegible] did not result in any increase in risk[illegible] so as to discharge them. O.C.G.A.[illegible] Columbia Nitrogen Corp. v. Mason[illegible] Ga.App. 685, 320 S.E.2d 838. Pr[illegible] Surety ⇐ 97

By virtue of "continuing guaranty[illegible] in agreement for lease of cash regis[illegible] to lease agreement were not discha[illegible] count of substitution of cash regist[illegible] writing signed by officer of lessor,[illegible] by another provision in lease agre[illegible] viding that this instrument consti[illegible] contract between parties hereto, an[illegible] sentations, oral or written, shall[illegible] amendment hereto unless signed in[illegible] officer of lessor. Union Commer[illegible] Corp. v. Beef 'N Burgundy, Inc.,[illegible] Ga.App. 257, 270 S.E.2d 696. Pri[illegible] Surety ⇐ 97

Where lender loaned debtor addi[illegible] which it then consolidated with amo[illegible] pensated sureties guaranteed, such[illegible] tion was taken without knowledge o[illegible] the uncompensated sureties, and the[illegible] sated sureties, under the guaranty[illegible] agreed to be sureties only for origin[illegible] any extensions or renewals of that lo[illegible] on the consolidated indebtedness,[illegible] 56,221.23 greater than loan the surc[illegible] to guarantee, represented new indebt[illegible] the new indebtedness was novati[illegible] amount owed by the principal discl[illegible] uncompensated sureties. Code, §§[illegible] seq., 103–202. Upshaw v. First S[illegible] 1979, 244 Ga. 433, 260 S.E.2d 483.[illegible] and Surety ⇐ 97

Even if one guarantor did not si[illegible] note and deed to secure debt, which[illegible] thereafter asserted as the basis for[illegible] where both guarantors did sign s[illegible] which renewed earlier note, the form[illegible] tor's consent to the later note ratified[illegible] acts and, therefore, even if there exis[illegible] rial change which amounted to a[illegible] where both guarantors consented to[illegible] there was no novation discharging t[illegible] tors. Code, § 103–202. Mauldin v.[illegible] Macon, Inc., 1978, 146 Ga.App. 539,[illegible] 726. Guaranty ⇐ 61

Even if father's risk was increase[illegible] tion of his son-in-law as a primary[illegible] second note, father was not discharg[illegible] contractual obligations under "guara[illegible] ment which provided that bank, witl[illegible] ing father, might alter, renew, or ext[illegible]

k v. Williams, 1922, 28 Ga.App. . 632. Principal and Surety ⇐

r of an account for goods pur- as matter of law released from e mere fact that the account has to a note for the same amount in lieu thereof. Kalmon v. Scar- Ga.App. 547, 75 S.E. 846. Guar-

oes not appear from the petition of guarantors of an account was reduction of the debt to a note, ote contained a stipulation for at and for interest at 8 per cent., er cent., which the account would where the petition does not ask for s, nor for interest at the higher untors are liable. Kalmon v. Scar- Ga.App. 547, 75 S.E. 846. Guar-

obligation or duty of principal

be discharged from its obligation its risk is increased by any act of strong Transfer & Storage Co., Const., Inc., 1995, 217 Ga.App. .2d 481, reconsideration denied; irst Federal Sav. and Loan Ass'n 977, 552 F.2d 1109; Brunswick onvalescent Center, Inc. v. Great 1970, 308 F.Supp. 297; Sens v. al Sav. & Loan Ass'n, 1981, 159 285 S.E.2d 226; Parker v. Fidelity 51 Ga.App. 733, 261 S.E.2d 465; thern Mechanical Co., 1968, 117 161 S.E.2d 413; Evans v. Ameri- k & Trust Co. of Chattanooga, 67, 116 Ga.App. 468, 157 S.E.2d d Loan Corp. v. McCall, 1940, 61 7 S.E.2d 318; Brock Candy Co. v. 33 Ga.App. 690, 127 S.E. 619; oan & Banking Co. v. Holliday, pp. 792, 107 S.E. 370; Fisher v. , 24 Ga.App. 743, 102 S.E. 190; g Co. v. Collier, 1917, 19 Ga.App. 296; Little Rock Furniture Co. v. 913, 13 Ga.App. 502, 79 S.E. 375. sated surety to establish defense novation, he must demonstrate ge yielding actual harm. White v. , 679 F.2d 373. Principal and

guage of guaranty allowed addi- be considered novation or in- , guarantors waived any defenses ation or additional risk; language pecifically contemplated increase debt and creation of new obli- guaranty included waivers of any ible discharge and of any defense increase in risk. O.C.G.A.

§§ 10–7–21, 10–7–22. Underwood v. NationsBanc Real Estate Service, Inc., 1996, 221 Ga. App. 351, 471 S.E.2d 291. Guaranty ⇐ 72

Mere inclusion in promissory note covering amount owed under guaranty at time of its termination of provision authorizing recovery of attorney fees in event of collection by attorney did not result in any increase in risk to sureties so as to discharge them. O.C.G.A. § 10–7–22. Columbia Nitrogen Corp. v. Mason, 1984, 171 Ga.App. 685, 320 S.E.2d 838. Principal and Surety ⇐ 97

By virtue of "continuing guaranty" provision in agreement for lease of cash register, sureties to lease agreement were not discharged on account of substitution of cash registers without writing signed by officer of lessor, as required by another provision in lease agreement providing that this instrument constitutes entire contract between parties hereto, and no representations, oral or written, shall constitute amendment hereto unless signed in writing by officer of lessor. Union Commerce Leasing Corp. v. Beef 'N Burgundy, Inc., 1980, 155 Ga.App. 257, 270 S.E.2d 696. Principal and Surety ⇐ 97

Where lender loaned debtor additional sums which it then consolidated with amount uncompensated sureties guaranteed, such consolidation was taken without knowledge or consent of the uncompensated sureties, and the uncompensated sureties, under the guaranty agreement, agreed to be sureties only for original loan and any extensions or renewals of that loan, the note on the consolidated indebtedness, which was $6,221.23 greater than loan the sureties agreed to guarantee, represented new indebtedness and the new indebtedness was novation in the amount owed by the principal discharging the uncompensated sureties. Code, §§ 103–101 et seq., 103–202. Upshaw v. First State Bank, 1979, 244 Ga. 433, 260 S.E.2d 483. Principal and Surety ⇐ 97

Even if one guarantor did not sign original note and deed to secure debt, which guarantors thereafter asserted as the basis for a novation, where both guarantors did sign second note which renewed earlier note, the former guarantor's consent to the later note ratified the earlier acts and, therefore, even if there existed a material change which amounted to a novation, where both guarantors consented to the change, there was no novation discharging the guarantors. Code, § 103–202. Mauldin v. Lowe's of Macon, Inc., 1978, 146 Ga.App. 539, 246 S.E.2d 726. Guaranty ⇐ 61

Even if father's risk was increased by retention of his son-in-law as a primary obligor on second note, father was not discharged from his contractual obligations under "guaranty" agreement which provided that bank, without notifying father, might alter, renew, or extend daughter's present or future liabilities and obtain the primary liability of a third party with regard to those liabilities. Code, §§ 103–101, 103–202, 103–203. Dunlap v. Citizens and Southern DeKalb Bank, 1975, 134 Ga.App. 893, 216 S.E.2d 651. Guaranty ⇐ 53(1)

A contract of two persons as sureties to pay for goods sold to principal and all indebtedness of principal to seller under prior contract was not inconsistent with, and did not increase sureties' risk under, prior suretyship contract, obligating one of such sureties and two others to pay for all products sold to principal under first contract, as second contract simply gave seller additional security for payment of debt. Code, § 103–203. W. T. Rawleigh Co. v. Overstreet, 1944, 71 Ga.App. 873, 32 S.E.2d 574. Principal and Surety ⇐ 109

Payee's acceptance of renewal note with forged signatures of sureties, disaffirmed by suit on original note, held not to discharge sureties. Civ.Code 1910, §§ 3543, 3544. Payne v. Fourth Nat. Bank, 1928, 38 Ga.App. 41, 142 S.E. 310. Principal and Surety ⇐ 105(3)

Acceptance of new note, without consent of surety, extending time of payment of original matured note, held to release surety, notwithstanding parol agreement or understandings to contrary. Civ.Code 1910, § 3544. Atlanta & Lowry Nat. Bank v. Maughon, 1926, 35 Ga.App. 25, 131 S.E. 916. Principal and Surety ⇐ 105(3)

Surety discharged where purchase-money note renewed without his consent. Nunnally v. J.B. Colt Co., 1925, 34 Ga.App. 247, 129 S.E. 119. Principal and Surety ⇐ 105(3)

Sureties on note were not discharged, under Civ.Code 1910, §§ 3543, 3544, by payee's acceptance of renewal note with forged signatures of sureties thereon, where payee, on discovery of the fraud, promptly disaffirmed its acceptance of the renewal note by retaking and suing on the original note. Biddy v. People's Bank, 1923, 29 Ga.App. 580, 116 S.E. 222. Principal and Surety ⇐ 105(3)

The guarantor of a debt is not discharged by the act of the creditor in taking a note from the debtor without the consent of the guarantor. Scarboro v. Kalmon, 1913, 13 Ga.App. 28, 78 S.E. 686. Guaranty ⇐ 61

If a note given for the price of two mules was signed by one of the makers as surety, the return of one of the mules by the buyer to the seller without the surety's knowledge and its acceptance by the seller at the same value for which it had been sold, a credit for such amount being entered on the note, did not change the contract of suretyship, nor injure the surety, and its liability was not affected thereby. Whigham v. W. Hall & Co., 1911, 8 Ga.App. 509, 70 S.E. 23. Principal and Surety ⇐ 97

Note 7

A creditor of a partnership, who has notice of dissolution and of an agreement by the continuing partner to assume the debts, is bound thereafter to accord to the retiring partner all the rights of a surety, and if, without his knowledge or consent, the creditor takes from the continuing partner a renewal of the firm indebtedness, and extends the time of payment thereof, the retiring partner is released from the indebtedness, and the creditor must thereafter look only to the firm assets and to the individual assets of the continuing partner. Preston v. Garrard, 1904, 120 Ga. 689, 48 S.E. 118, 102 Am.St.Rep. 124. Principal and Surety ⇐ 105(3).

That a surety is released from liability because of a change in the contract between the principals whereby the risk of the surety is increased, is a plea which the surety has the privilege of making, or not at his option. It is not a plea of which the principal can take advantage. Simmons v. Goodrich, 1882, 68 Ga. 750. Principal and Surety ⇐ 97

The bond in this case provided for changing so as to meet the varying business of the company. Simmons v. Goodrich, 1882, 68 Ga. 750. Principal and Surety ⇐ 98

Alston, the public printer, was insolvent; he had misappropriated $5,000.00 of the public funds advanced to him, and had become liable for liquidated damages amounting to $3,000.00 in addition. The governor, as agent of the state, received $198,028.58 from a claim of the state against the United States. He did not deposit all of it in the state treasury; but, out of the sum so collected, paid to the use of Alston $15,000 as a fee in connection with said claim. The indebtedness of Alston to the state was not reserved out of this amount. Held, that such action increased the liability of the sureties on Alston's bond, and thereby discharged them. If the governor had paid the money received by him into the state treasury, and Alston had presented his claim and it had been found due, the state, as a creditor, would have been bound to have retained enough out of what was due him to satisfy his liability, for the protection of its own interest as well as that of the securities—he being insolvent. It can make no difference, so far as this principle is concerned, that the governor as the agent of the state, paid the money directly to the use of Alston instead of first paying it into the treasury. Walsh v. Colquitt, 1880, 64 Ga. 740. Principal and Surety ⇐ 117

Deviations from the terms of a bond for the collection and payment of money by an agent, in order to discharge a surety on the bond, must be authorized by the employer without the surety's consent. Charlotte, Columbia and Augusta R. Co. v. Gow, 1877, 59 Ga. 685. Principal and Surety ⇐ 97

Neither the omission of some act not specially enjoined by law, nor the commission of some act expressly authorized by law, by the creditor, which tends to increase the risk of the surety, will operate as a discharge. Stewart v. Barrow, 1876, 55 Ga. 664. Principal and Surety ⇐ 97

Where a proposition is made by the principal debtor in the judgment to pay less than one-half in satisfaction thereof, to which the plaintiff assented provided the payment should be made within thirty days, this, without more, did not injure the surety or increase his risk, or expose him to greater liability, by which he would be discharged. Sullivan v. Hugely, 1873, 48 Ga. 486. Principal and Surety ⇐ 97

If the obligee bind himself to furnish 800 acres of pine land to furnish stocks for a saw mill, and the principal accept 680 acres in fulfillment of the contract, without the consent of the surety, it is such an alteration of the original bargain as will discharge the surety. Bethune v. Dozier, 1851, 10 Ga. 235. Principal and Surety ⇐ 97

8. Change in parties to obligation secured

Addition of party as joint general contractor was not material change entitling surety to discharge its obligation under performance bond; additional party was in fact only agent of original general contractor, and there was no change in actual relationship of parties. Armstrong Transfer & Storage Co., Inc. v. Mann Const., Inc., 1995, 217 Ga.App. 538, 458 S.E.2d 481, reconsideration denied. Principal and Surety ⇐ 102

Statute providing that novation in contract made without surety's consent discharges surety did not apply in action to recover under payment and performance bond brought against compensated surety. Code, § 103–202. Travelers Indem. Co. v. Sasser & Co., 1976, 138 Ga.App. 361, 226 S.E.2d 121. Principal and Surety ⇐ 102

Allowance against defunct bank of claim on certificate of deposit issued by bank did not work novation between bank and depositor releasing sureties on certificate. Laws 1919, p. 158, art. 7, § 13; art. 7, § 15, as amended by Laws 1927, p. 198, § 4; p. 159, art. 7, § 18, as amended by Laws 1925, p. 128. Council v. Freeman, 1931, 42 Ga.App. 632, 157 S.E. 263. Principal and Surety ⇐ 102

Building contractors agreed to erect a house according to certain plans by a named date, and gave a bond conditioned for the compliance with the contract, or that the surety would do so for them. One of the contractors alone began the work, but abandoned it, whereupon the other contractor, with the consent of the owner, and at the instance of the surety, undertook to complete the building, but failed to furnish all materials and labor. Held, that the act of such

partner in carrying out the novation but in pursuance of tract. Adams v. Haigler, 1905 S.E. 638. Principal and Surety

Where a sheriff's bond was proper officer "on the additic tional security," whether the bond is destroyed by such a without the knowledge of the quære. Taylor v. Johnson, 1E Principal and Surety ⇐ 102

9. Substitution of new obl same parties

In order for Georgia statutes tion to apply, circumstances will in law imply a mutual whereby new, distinct and de supplied in lieu of those provide contract. Code Ga. Secs. 2 Pittsburgh Plate Glass Co. v. J F.Supp. 723, modified 131 F.2d ⇐ 4

Creditor's claim for interest balance on open account was n oral agreement that debtor was pay interest, so as to discharge sonal guarantor; claim for i change terms of account agree §§ 7–4–16, 10–7–21. Charles S. uling Co., Inc. v. Bernhardt 1994, 213 Ga.App. 481, 445 S.E tion ⇐ 4

10. Extension of time for pay performance

Agreement between lender an on payment of delinquencies plu and reinstatement fees authorize by lender, lender would grant 9(um on payment of notes and v out charges accruing during m remaining terms of loans did n tion which, thereby, discharged ligation of allowing lender to cre by borrower against surety's sa Code, § 103–202. Sens v. Decatu & Loan Ass'n, 1981, 159 Ga. S.E.2d 226. Principal and Sur

Although promissory note conta homestead and exemption righ this debt or any renewal or exte where nothing tended to establi had in fact consented to extensi payment and where one creditor that he was given distinct impress had authorized modification to n he did not know if creditor was c or had anything to do with subs ment, creditors failed to show tha of promissory note was made knowledge or consent as require to terms of modification. Code, §

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partner in carrying out the work was not a novation but in pursuance of the original contract. Adams v. Haigler, 1905, 123 Ga. 659, 51 S.E. 638. Principal and Surety ⇦ 102

Where a sheriff's bond was approved by the proper officer "on the addition of A. as additional security," whether the identity of the bond is destroyed by such addition, if made without the knowledge of the original security, quære. Taylor v. Johnson, 1855, 17 Ga. 521. Principal and Surety ⇦ 102

9. Substitution of new obligation between same parties

In order for Georgia statutes relating to novation to apply, circumstances must be such as will in law imply a mutual new agreement, whereby new, distinct and definite terms are supplied in lieu of those provided in the original contract. Code Ga. Secs. 20-115, 103-202. Pittsburgh Plate Glass Co. v. Jarrett, 1942, 42 F.Supp. 723, modified 131 F.2d 674. Novation ⇦ 4

Creditor's claim for interest on outstanding balance on open account was not a novation of oral agreement that debtor was not required to pay interest, so as to discharge liability of personal guarantor; claim for interest did not change terms of account agreement. O.C.G.A. §§ 7–4–16, 10–7–21. Charles S. Martin Distributing Co., Inc. v. Bernhardt Furniture Co., 1994, 213 Ga.App. 481, 445 S.E.2d 297. Novation ⇦ 4

10. Extension of time for payment or other performance

Agreement between lender and borrower that on payment of delinquencies plus late payment and reinstatement fees authorized by notes held by lender, lender would grant 90-day moratorium on payment of notes and would amortize out charges accruing during moratorium over remaining terms of loans did not create novation which, thereby, discharged surety from obligation of allowing lender to credit balance due by borrower against surety's savings account. Code, § 103–202. Sens v. Decatur Federal Sav. & Loan Ass'n, 1981, 159 Ga.App. 767, 285 S.E.2d 226. Principal and Surety ⇦ 104(1)

Although promissory note contained waiver of homestead and exemption rights "as against this debt or any renewal or extension thereof," where nothing tended to establish that surety had in fact consented to extension of time for payment and where one creditor, who averred that he was given distinct impression that surety had authorized modification to note, stated that he did not know if creditor was consulted about or had anything to do with subsequent agreement, creditors failed to show that modification of promissory note was made with surety's knowledge or consent as required to bind him to terms of modification. Code, §§ 109A–3–606, 109A–3–606(1)(a). Kellett v. Stanley, 1980, 153 Ga.App. 854, 267 S.E.2d 282. Principal and Surety ⇦ 104(1)

Creditors' grant of extension of time for payment to debtor without surety's consent discharged surety from his obligation as surety under promissory note. Code, §§ 109A–3–606, 109A–3–606(1)(a). Kellett v. Stanley, 1980, 153 Ga.App. 854, 267 S.E.2d 282. Principal and Surety ⇦ 104(1)

Extension of maturity of note for definite period fixed by valid agreement between payee and principal obligor, without consent of surety, discharges surety. Civ.Code 1910, §§ 3542–3544, 3547. Benson v. Henning, 1935, 50 Ga.App. 492, 178 S.E. 406. Principal and Surety ⇦ 104(1)

Payment of interest included in note does not extend maturity thereof as regards surety. First Nat. Bank v. Chipstead, 1932, 45 Ga.App. 113, 163 S.E. 306. Principal and Surety ⇦ 104(1)

Plea of surety improperly stricken on demurrer. Nunnally v. J.B. Colt Co., 1925, 34 Ga. App. 247, 129 S.E. 119. Principal and Surety ⇦ 104(1)

That a surety may be discharged because of increasing his risk by extension of time to the principal without his consent, three things are necessary: First, at the time the indulgence is granted the owner and holder must know that the surety was such; second, there must be a sufficient consideration, and, third, the indulgence must be for a definite period. Hays v. Edwards, 1924, 31 Ga.App. 725, 121 S.E. 858. Principal and Surety ⇦ 104(1)

Extension of time of payment of note will discharge surety only when for a definite period, for a valuable consideration, and without surety's consent. Turner v. Womack, 1923, 30 Ga.App. 147, 117 S.E. 104. Principal and Surety ⇦ 104(1)

A contractor's bond, conditioned for prompt payment of all indebtedness to those furnishing labor or material, is an obligation to pay any indebtedness of contractor so arising, and extension by contractor of the time for payment of any such indebtedness will not necessarily discharge his surety. National Sur. Co. v. Walker County, 1920, 25 Ga.App. 643, 104 S.E. 18. Principal and Surety ⇦ 104(1)

In suit against contractor and surety on his bond by one who had supplied material, surety's defense based on contractor's extension of time of payment of indebtedness in suit, evidenced by his note, accepted by plaintiff and falling due within period provided by statute within which suit on original indebtedness may be brought, and within the time such liens may be asserted, was properly stricken on demurrer. National Sur. Co. v. Walker County, 1920, 25 Ga.App. 643, 104 S.E. 18. Principal and Surety ⇦ 104(1)

Note 10

Under Civ.Code 1910, § 3544, extension of time, by the creditor on payment of usurious interest by the principal, without the surety's knowledge or consent, discharges the surety. Pickett v. Brooke, 1920, 24 Ga.App. 651, 101 S.E. 814. Principal and Surety ⇐ 108(4)

If payee under a valid agreement with principal and without consent of surety extends time of maturity, the surety will be released. Duckett v. Martin, 1919, 23 Ga.App. 630, 99 S.E. 151. Principal and Surety ⇐ 104(1)

An extension of time will not discharge a surety unless there be not only an agreement for the extension, but an indulgence extended for a definite period fixed by the agreement. Ver Nooy v. Pitner, 1915, 17 Ga.App. 229, 86 S.E. 456. Principal and Surety ⇐ 104(1)

The withholding of money until the adjustment of a controversy between the architect and the contractor as to the proper performance of the contract held not to release the surety on the contractor's bond, though the original contract provided that payments should be made monthly on approval of the architect. Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 1914, 83 S.E. 210, 142 Ga. 499, error dismissed 36 S.Ct. 451, 241 U.S. 687, 60 L.Ed. 1237. Principal and Surety ⇐ 104(1)

The period of extension of payment given the principal debtor must be fixed and definite in order to discharge the surety. Bunn v. Commercial Bank of Cedartown, 1896, 98 Ga. 647, 26 S.E. 63. Principal and Surety ⇐ 106

The mere ex parte making of a writing by a debtor, in which he conveyed to his creditor certain property, whether as payment or security, is not sufficient to effect a discharge of his surety, it not appearing that the writing was delivered to the creditor, or that he ever received the property. Haywood v. Lewis, 1880, 65 Ga. 221. Principal and Surety ⇐ 104(1)

For the guardian to reject a tender of payment in Confederate money, made by the principal in 1864, after the note matured, and for him also to discourage the pressing of the tender by a naked promise not to call for payment until after the close of the war, were not wrongful to the surety. Bonner v. Nelson, 1876, 57 Ga. 433. Principal and Surety ⇐ 104(1)

Such promise, made and kept without the surety's knowledge or consent, did not discharge him, notwithstanding the principal was solvent when the promise was made, and afterwards became insolvent. It created no binding contract; and the whole transaction amounted to mere indulgence, without any act or omission contrary to the creditor's duty to the surety, who so far as appears, gave no notice to sue or to coerce payment. Bonner v. Nelson, 1876, 57 Ga. 433. Principal and Surety ⇐ 104(1)

Indulgence by a creditor to a principal debtor, for a valuable consideration, whether with or without the knowledge of the security, discharges the latter. To make this principle applicable, the creditor must have known, at the time of the indulgence, that the defendant setting up such discharge, signed the note as security. Stewart v. Parker, 1876, 55 Ga. 656. Principal and Surety ⇐ 104(1)

A and B made and delivered to C their joint and several promissory note, due twelve months after date. C afterwards, for a valuable consideration, agreed with A, without the consent of B, to extend the time of payment twelve months longer. C endorsed and delivered the note to D after it was due, with notice of the extension of the time of payment. D, after said time expired, sued A and B, as makers, and C as endorser, and obtained judgment. B, who was then absent in the military service, returned, after the rendition of judgment, and entered an appeal within the time allowed by the Ordinance of the Convention of 1865, and set up the defence that he was only a surety for A, and had no interest in the consideration of the note. A, who had entered no appeal, died before the trial, and was not a party to the "issue on trial": Held, the evidence that B was only a surety, and that C knew that A was to pay the debt, was sufficient to sustain the finding of the jury, and the extension of time of payment given by C to A, without the consent of B., the surety, released him. Perry v. Hodnett, 1868, 38 Ga. 103. Principal and Surety ⇐ 104(1)

Where a creditor receives from the debtor interest in advance on the debt, the latter implies an agreement of forbearance during the time for which such interest is paid, if there is no agreement to the contrary. Scott v. Saffold, 1867, 37 Ga. 384. Principal and Surety ⇐ 104(1)

Where the holder of a promissory note, without the assent of the surety, agreed with the principal to wait twelve months, in consideration of the promise of sixteen per cent. interest; and for the nine per cent. usurious interest took a new note with security, a portion of which usurious note was subsequently paid, and the time was given accordingly; Held, that the surety to the original note was discharged. Camp v. Howell, 1867, 37 Ga. 312. Principal and Surety ⇐ 104(1)

Where there has been no levy made upon the property of a principal in judgment, and no notice given by the surety to proceed against the property of his principal, the rules of law regarding forbearance are the same after judgment as before. Crawford v. Gaulden, 1862, 33 Ga. 173. Principal and Surety ⇐ 104(1)

A promise to forbear, for a definite time, will not discharge surety, unless it be a promise binding in law upon the creditor, "such as will tie his hands." Crawford v. Gaulden, 1862, 33 Ga. 173. Principal and Surety ⇐ 104(1)

Whenever the holder of a pr signed by a principal and surety time of payment to the principa concurrence of the surety, for t avoiding a defense to the note wh by the principal, the surety is di all liability on the note. Worthan 1860, 30 Ga. 112. Principal a 104(1)

11. Negotiable instruments

Obligation of comaker of thir renewal notes was discharged fol quent renewals at increased inter provisions of note did not cov modifications of the interest rate did not sign subsequent renew §§ 10-7-1, 10-7-21, 10-7-22, 11-3-601(2). Bank of Terrell v. 177 Ga.App. 715, 341 S.E.2d 2 Notes ⇐ 140

Where officers and stockholders ally guaranteed their corporation corporate officers, signed the leg which effectuated giving of securit ing of notes and deed to secure without the guarantors' consent result in a novation. Code, § 10 din v. Lowe's of Macon, Inc., 1978 539, 246 S.E.2d 726. Novation ⇐

Material change in contract of tion indorser, without his expres consent, will defeat action against or holder of altered note, althoug appear by whom alteration was r statute governing effect of alterati fective either before or after enacti tiable instruments law (Civ.Code 1 3543, 4296; Laws 1924, p. 151, Hamby v. Crisp, 1934, 172 S.E. 84 418. Alteration of Instruments ⇐

Change of note or accommoda ment from instrument not under under seal, thereby extending lim six to twenty years, constitutes m tion (Civ.Code 1910, §§ 5, 3541, Hamby v. Crisp, 1934, 172 S.E. 84 418. Alteration of Instruments ⇐

Where note sued on was execute before enactment of negotiable inst questions presented were determin cedent law (Laws 1924, p. 126). Crisp, 1934, 172 S.E. 842, 48 (Alteration of Instruments ⇐ 20

Where a new note is accepted by indorsee of a note in renewal of a n ly given, without the consent of a on, this amounts to a novation an the surety. E. Matthews & Son 1913, 13 Ga.App. 412, 79 S.E. 22 and Surety ⇐ 105(3)

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judgment, and entered an appeal
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re. Crawford v. Gaulden, 1862, 33
incipal and Surety ⇐ 104(1)

to forbear, for a definite time, will
ge surety, unless it be a promise
aw upon the creditor, "such as will
s." Crawford v. Gaulden, 1862, 33
incipal and Surety ⇐ 104(1)

Whenever the holder of a promissory note, signed by a principal and surety, extends the time of payment to the principal, without the concurrence of the surety, for the purpose of avoiding a defense to the note which is claimed by the principal, the surety is discharged from all liability on the note. Worthan v. Brewster, 1860, 30 Ga. 112. Principal and Surety ⇐ 104(1)

11. Negotiable instruments

Obligation of comaker of third in series of renewal notes was discharged following subsequent renewals at increased interest rate where provisions of note did not cover subsequent modifications of the interest rate and comaker did not sign subsequent renewals. O.C.G.A. §§ 10–7–1, 10–7–21, 10–7–22, 11–3–415(3), 11–3–601(2). Bank of Terrell v. Webb, 1986, 177 Ga.App. 715, 341 S.E.2d 258. Bills and Notes ⇐ 140

Where officers and stockholders who personally guaranteed their corporation's account, as corporate officers, signed the legal documents which effectuated giving of security, seller's taking of notes and deed to secure debt was not without the guarantors' consent and did not result in a novation. Code, § 103–202. Mauldin v. Lowe's of Macon, Inc., 1978, 146 Ga.App. 539, 246 S.E.2d 726. Novation ⇐ 7

Material change in contract of accommodation indorser, without his express or implied consent, will defeat action against him by payee or holder of altered note, although it does not appear by whom alteration was made, general statute governing effect of alteration being ineffective either before or after enactment of negotiable instruments law (Civ.Code 1910, §§ 3541, 3543, 4296; Laws 1924, p. 151, §§ 124, 125). Hamby v. Crisp, 1934, 172 S.E. 842, 48 Ga.App. 418. Alteration of Instruments ⇐ 20

Change of note or accommodation indorsement from instrument not under seal to one under seal, thereby extending limitations from six to twenty years, constitutes material alteration (Civ.Code 1910, §§ 5, 3541, 4359, 4361). Hamby v. Crisp, 1934, 172 S.E. 842, 48 Ga.App. 418. Alteration of Instruments ⇐ 5(2)

Where note sued on was executed and altered before enactment of negotiable instruments law, questions presented were determinable by antecedent law (Laws 1924, p. 126). Hamby v. Crisp, 1934, 172 S.E. 842, 48 Ga.App. 418. Alteration of Instruments ⇐ 20

Where a new note is accepted by the payee or indorsee of a note in renewal of a note previously given, without the consent of a surety thereon, this amounts to a novation and discharges the surety. E. Matthews & Son v. Richards, 1913, 13 Ga.App. 412, 79 S.E. 227. Principal and Surety ⇐ 105(3)

If, after a promissory note payable to a named payee or bearer is signed by one as surety, the principal, before it came into the hands of one who thereafter received it as bearer in the course of negotiation, before due, so alters the same as to increase the rate of interest agreed to be paid from 8 to 12 per cent., such note is by such alteration rendered void as to such surety; and this is true even though, at the time it came into the hands of such bearer, he had no notice of the alteration by the principal. Hill v. O'Neill, 1897, 101 Ga. 832, 28 S.E. 996. Alteration of Instruments ⇐ 5(2)

12. Performance of contract

If the creditor enlarges the time for the performance of a contract, without the consent of the surety thereon, the latter will be discharged. Worthan v. Brewster, 1860, 30 Ga. 112. Principal and Surety ⇐ 104(3)

13. Notice to creditor of relation of parties

Where the holder of a note extends time for payment, the sureties thereon, who had no notice of such extension, will not be released from liability if, on the face of such note, they appear to be principals, and the holder, at the time he extended payment, had no actual notice that they were sureties. Stewart v. Parker, 1876, 55 Ga. 656. Principal and Surety ⇐ 104(5)

Where it does not appear on the face of a note, and is not known to the payee, that a joint maker is surety for the other, an extension of time granted to the principal will not release the surety. Howell v. Lawrenceville Mfg. Co., 1860, 31 Ga. 663. Principal and Surety ⇐ 104(5)

14. Validity of agreements

Surety is not discharged by agreement between principal and creditor, such as extension of contract, when person who purports to represent obligee lacks authority to do so. Code Ga. §§ 103–202, 103–203. Brunswick Nursing & Convalescent Center, Inc. v. Great Am. Ins. Co., 1970, 308 F.Supp. 297. Principal and Surety ⇐ 105(2)

An agreement by a creditor with the debtor to postpone the day of payment discharges the sureties, even though such agreement is usurious. Knight v. Hawkins, 1894, 93 Ga. 709, 20 S.E. 266. Principal and Surety ⇐ 105(1)

A stipulation between the creditor and the principal debtor, at the time certain property was received in part payment of a debt, that the latter might redeem it within a given time by payment of the whole debt, is no contract for indulgence on the debt, but a mere agreement for the privilege of redemption, and is therefore no discharge of the surety. Marshall v. Dixon, 1889, 82 Ga. 435, 9 S.E. 167. Principal and Surety ⇐ 105(1)

When, by fraud, the payee of a note is induced to extend the time for payment, if, on discovering the fraud, he acquiesces, instead of acting, and the position of a surety on the note is thus altered to his disadvantage, the surety is discharged. Burnap v. Robertson, 1885, 75 Ga. 689. Principal and Surety ⇦ 105(1)

15. Release or loss of other securities

When a surety, or accommodation indorser, signs a note, the consideration of which is that it shall be held by the bank where it is negotiated, as collateral security for another note or draft due said bank, and the bank, without the knowledge and consent of the surety, changes the contract by releasing the acceptor and indorser of that other note or draft, the surety or accommodation indorser of the collateral note is discharged. Stallings v. Bank of Americus, 1877, 59 Ga. 701. Principal and Surety ⇦ 115(1)

16. Release of cosureties

Plaintiffs' acceptance of less than total sum owed under promissory notes did not discharge nonsettling guarantors as cosureties on notes; since guarantors were individually liable, and not jointly liable, they were not "co-sureties" within meaning of statute providing that release of one surety shall discharge a cosurety. O.C.G.A. § 10–7–20. Marret v. Scott, 1994, 212 Ga.App. 427, 441 S.E.2d 902. Guaranty ⇦ 63

Settlement agreement between plaintiffs and several guarantors, entered into without knowledge and consent of nonsettling guarantors, did not amount to novation releasing nonsettling guarantors as sureties; because nonsettling guarantors were not jointly liable for same portions of total debt to plaintiffs, any novation by virtue of settlement agreement would not operate to release them from their own individual liabilities. Marret v. Scott, 1994, 212 Ga.App. 427, 441 S.E.2d 902. Guaranty ⇦ 63

Settlement agreement between plaintiffs and several guarantors did not preclude plaintiffs from enforcing judgment entered against nonsettling guarantors; settling guarantors were dismissed from action before retrial, and final judgment was not entered against them and, accordingly, no existing judgment, pursuant to which both nonsettling guarantors and settling guarantors were joint debtors, had been extinguished by settlement agreement, regardless of its ultimate characterization as mere covenant not to sue or as promise never to enforce judgment. Marret v. Scott, 1994, 212 Ga.App. 427, 441 S.E.2d 902. Guaranty ⇦ 63

Creditor's release of cosurety without surety's consent also discharged surety. O.C.G.A. §§ 10–7–20, 10–7–21. Hendricks v. Davis, 1990, 196 Ga.App. 286, 395 S.E.2d 632, certiorari denied. Principal and Surety ⇦ 116

17. Extension after maturity of obligation

Where, after maturity of a note, the debtor pays to the creditor a sum representing advance interest at the rate of 8 per cent. for a definite period of time, in consideration of an extension of time of payment of the principal, such agreement, although not in writing, was valid; and when made without the surety's consent releases him, in view of Civ.Code 1910, § 3543. Lewis v. Citizens' & Southern Bank, 1924, 31 Ga. App. 597, 121 S.E. 524, affirmed 159 Ga. 551, 126 S.E. 392; Smith v. First Nat. Bank, 1908, 5 Ga.App. 139, 62 S.E. 826.

Acceptance of interest in advance after maturity extends time for paying note and discharges surety not consenting to extension. Civ.Code 1910, § 3544. Short v. Jordan, 1928, 39 Ga. App. 45, 146 S.E. 31. Principal and Surety ⇦ 105(4)

Payment of interest at maturity of note bearing interest only after maturity held to extend note to date interest was paid as regards surety's liability. Short v. Jordan, 1928, 39 Ga.App. 45, 146 S.E. 31. Principal and Surety ⇦ 105(4)

18. Discharge of endorsers

The fact that grantor and grantee in deed securing grantor's notes payable to grantee did not actually make contract for grantor's purchase of seeds from grantee, as recited in deed, which provided that all credits due grantor from grantee under such contract should be applied toward payment of notes, did not constitute fraud on one endorsing notes as surety or novation of notes so as to relieve such surety of liability thereon. Code, § 103–202. Southern Cotton Oil Co. v. Hammond, 1955, 92 Ga.App. 11, 87 S.E.2d 426. Bills and Notes ⇦ 256

19. Discharge of makers

Permitting maker to borrow funds and deposit them in pledged savings account for monthly interest payments after scheduled repayment of principal was missed did not deviate from note requiring principal to be repaid on specified date and monthly interest payments to begin one month later, and, thus, arrangement did not expose comakers to increased risk, was not novation, and did not discharge them. O.C.G.A. §§ 10–7–21, 10–7–22. Cohen v. Northside Bank & Trust Co., 1993, 207 Ga.App. 536, 428 S.E.2d 354, certiorari denied. Bills and Notes ⇦ 52

20. Waiver or estoppel of guarantor

Protection afforded guarantors by statutes governing discharge by novation and discharge by increase of risk can be waived in advance at time guarantor signs guaranty. O.C.G.A. §§ 10–7–21, 10–7–22. Ramirez v. Golden, 1996, 223 Ga.App. 610, 478 S.E.2d 430. Guaranty ⇦ 72

Guarantor was liable to holder note under unconditional person spite agreement's subsequent guaranty's terms permitted ar modification without altering g derlying obligation and, by expr in advance to waiver of all lega defenses, guarantor was foreclos ing that he was discharged und erning discharge by novation an increase of risk. O.C.G.A. 10-7-22. Ramirez v. Golden, App. 610, 478 S.E.2d 430. G

By signing guaranty with una guage allowing creditor to extend fy, or waive any of the terms of of the principal, guarantor conse tion of second note, and thus, not discharged as surety by ex note, even if under other circu note could be considered novatic where guarantor participated i leading to execution of second no ing second note. O.C.G.A. § 10- ion v. Certainteed Corp., 1991, 518, 411 S.E.2d 558. Guaranty ⇦

21. Conditions precedent

The liability of guarantors of a goods sold subsequently reduced t conditioned upon the procuring against the original debtor befor the guarantor. Kalmon v. Scarb Ga.App. 547, 75 S.E. 846. Guar

22. Sufficiency of pleadings

Allegation by guarantors of S Administration (SBA) loan, that have opportunity to read or under ty or any other documents associa did not support claim that they leased from guaranty on ground there was no allegation as to a nature or terms of guaranty agr O.C.G.A. § 10–7–21. Regan v. U.S ness Admin., 1990, 729 F.Supp. 1 926 F.2d 1078, rehearing denied.

§ 10–7–22. Discharge of

Any act of the creditor, ei which injures the surety or shall discharge him; a mer allows or neglect to prose consideration, shall not rele

Formerly Code 1863, § 2131; Cod Code 1895, § 2972; Civil Code 191

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Guarantor was liable to holders of promissory note under unconditional personal guaranty, despite agreement's subsequent modification; guaranty's terms permitted amendment and modification without altering guarantor's underlying obligation and, by expressly assenting in advance to waiver of all legal and equitable defenses, guarantor was foreclosed from asserting that he was discharged under statutes governing discharge by novation and discharge by increase of risk. O.C.G.A. §§ 10–7–21, 10–7–22. Ramirez v. Golden, 1996, 223 Ga. App. 610, 478 S.E.2d 430. Guaranty ⇦ 72

By signing guaranty with unambiguous language allowing creditor to extend, renew, modify, or waive any of the terms of the obligations of the principal, guarantor consented to execution of second note, and thus, guarantor was not discharged as surety by execution of the note, even if under other circumstances such note could be considered novation, particularly where guarantor participated in negotiations leading to execution of second note before signing second note. O.C.G.A. § 10–7–21. Anderton v. Certainteed Corp., 1991, 201 Ga.App. 538, 411 S.E.2d 558. Guaranty ⇦ 72

21. Conditions precedent

The liability of guarantors of an account for goods sold subsequently reduced to a note is not conditioned upon the procuring of a judgment against the original debtor before suit against the guarantor. Kalmon v. Scarboro, 1912, 11 Ga.App. 547, 75 S.E. 846. Guaranty ⇦ 77(2)

22. Sufficiency of pleadings

Allegation by guarantors of Small Business Administration (SBA) loan, that they did not have opportunity to read or understand guaranty or any other documents associated with loan, did not support claim that they should be released from guaranty on grounds of novation; there was no allegation as to any change in nature or terms of guaranty agreement itself. O.C.G.A. § 10–7–21. Regan v. U.S. Small Business Admin., 1990, 729 F.Supp. 1339, affirmed 926 F.2d 1078, rehearing denied. Novation ⇦ 4.

A petition in an action against guarantors and principal held sufficient to withstand a general demurrer. Kalmon v. Scarboro, 1912, 11 Ga. App. 547, 75 S.E. 846. Guaranty ⇦ 85(1)

In an action against sureties on a note, a plea averring that, the principal being a tenant of one of the sureties, and in need of money to run the farm, the note was given to plaintiff, to be paid out of the cotton crop, which was, as plaintiff knew, the principal's only means of paying either the note or the rent, and averring that plaintiff afterwards, without the knowledge of the sureties, to secure a second debt, secretly took a mortgage from the principal on the same crop, thus depriving said surety of the crop, on which he had a landlord's lien, but not averring insolvency of plaintiff, does not state facts relieving the sureties. Stokes v. Gillis, 1888, 81 Ga. 187, 6 S.E. 841. Principal and Surety ⇦ 97

23. Jury instructions

It was not reversible error for trial court to allow guarantors to present evidence that creditor waived or did not enforce certain loan covenants against principal debtor, for court to give charge on law of novation, and for court to refuse to give creditor's written request to charge on when notice of revocation of guaranty agreement is effective; jury's verdict in favor of creditor indicated rejection of claims that guarantors were discharged under guarantees via waiver of any term under principal's loan agreement that materially altered guarantors' liability under guarantees. O.C.G.A. § 10–7–21. First Union Nat. Bank v. Boykin, 1995, 216 Ga.App. 732, 455 S.E.2d 406, certiorari denied. Appeal and Error ⇦ 1052(5)

A conversation by the creditor with the principal debtor, resulting in the granting of solicited indulgence as a gratuity or favor, will not discharge the surety. The court's charge to this effect, taken with the context, and construed in the light of the evidence, was relevant and correct. Vason v. Beall, 1877, 58 Ga. 500. Principal and Surety ⇦ 97

§ 10–7–22. Discharge of surety by increase of risk

Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability shall discharge him; a mere failure by the creditor to sue as soon as the law allows or neglect to prosecute with vigor his legal remedies, unless for a consideration, shall not release the surety.

Formerly Code 1863, § 2131; Code 1868, § 2126; Code 1873, § 2154; Code 1882, § 2154; Civil Code 1895, § 2972; Civil Code 1910, § 3544; Code 1933, § 103–203.