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ANNOTATED



VOLUME 8

Title 10. Commerce and Trade

2009 Edition

10-7-20

§ 2970; Civil Code 1910,

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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.

SURETYSHIP

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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
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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); *Palmer v. Southern Mechanical Co.*, 117 Ga. App. 672, 161 S.E.2d 413 (1968); *Overcash v. First Nat'l Bank*, 117

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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

by a creditor the surety, t consent of t this section. Inc., 146 G (1978).

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over on a note, the trial denied a creditor's motion judgment, and granted summary judgment to the guarantor of the note, guarantor from the guaranty entered into with the creditor execution of an escrow between the creditor and the guarantor materially changed the debt thereunder without the consent, amounted to a release of the guarantor from any liability on the note. Thomas-Sears v. App. 152, 628 S.E.2d 241

Material. — Any material change in the original contract, without the consent of the guarantor, releases the guarantor from the guaranty. Hittner Co. v. Sheffield, 51 S.E. 119 (1935).

not be discharged from the guaranty by change or alteration in the original contract. Brunswick Nursing Ctr., Inc. v. Great Am. Ins. Co., 297 (S.D. Ga. 1970).

Consent agreed on in advance by creditor. — If the creditor agreed in advance by the leaseholdover rent was commercial lease, and since a change in the terms of the landlord's act of allowing the tenant to remain as a tenant holding the property; in any event, the landlord's authority to lease, time, or manner of payment and to amend, modify, or terminate the lease, and thus, the guarantor consented in advance to the change. Hood v. Peck, 269 Ga. App. 242, 524 S.E.2d 756 (2004).

Consent to a novation is not required. — If notes are accepted

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 by discharge of 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

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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 intentment, 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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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 condi-
tion useless to himself and the condition is
disregarded, the surety may claim the prin-
ciple announced in this section. Central Ga.
Bank v. Cleveland Nat'l Bank, 59 Ga. 667
(1877).

**Unconsented increase in risk is an inde-
pendent 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 dis-
charge 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 execu-
tion of the public printer's performance
bond, the legislature by resolution autho-
rized the treasurer (now director of the
Office of Treasury and Fiscal Services) to
advance to the printer a sum in part pay-
ment 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 ante-
cedent liability does not constitute a pay-
ment 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 inten-
tion 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 ad-
justed 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 in-
tended 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-

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Application (Cont'd)

urity 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), con-

stitute 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

gave the seller payment of the debt with the first, the risk of the debt was not a novation meaning of the provisions of Code 1933, § 3543. *Overstreet*, 71 Ga. App. 118, 35 S.E.2d 783 (1945).

Failure of surety. — Where the debt was not a novation, and the surety, and the plaintiff's title contract was not discharged. *Wright & Lock*, 770 (1930).

Grantor who creditor assents to the mortgage. — Where the mortgage was assigned to B, the grantee, assumed by C, the latter principal debt was changed to a mortgage for C's assumption property conveyed position would be if B did not assume. *Anderson*, 177 Ga. 507, 185 S.E. 783 (1936).

New obligation recognition of grantee in a sale. — Where the consideration for the sale was an outstanding property conveyed by the deed, and the grantor, the grantee and the latter in the debt. While the deed is not binding unless the holder has knowledge of such, the holder enters into an agreement whereby the holder running directly to the grantor, then, in the absence

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

**Not to be released by fraudulent
disaffirmance by creditor.** —
former Civil Code 1910,
§ 4 a surety will be discharged
changing the nature or terms
contract without the surety's
before the acceptance by a
out the agreement or con-
ty, of a new note in renewal
the original note signed by
discharge the surety from
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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,
the 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).

Note for account. — By virtue
guarantor is not released by
mere fact that an account
guaranteed has been
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for goods furnished "in
ie contract of guaranty" and
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ands in lieu of the account.
boro, 11 Ga. App. 547, 75 S.E.
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(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
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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.
v. App. 685, 320 S.E.2d 838

**Simply giving creditor additional
here a second contract simply**

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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 plain-
tiffs 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 prin-
cipal 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 foot-
ing that the grantee becomes the principal,
then, in the absence of special conditions,

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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 knowl-
edge 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 agree-
ment 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 prin-
cipal debtor, would not operate to relieve
the grantor from responsibility on the grant-
or'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

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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

surety will result, but surety by an extension of time to the principal, not only must be for a definite period, but must be for a definite agreement. *Duckett v. Ga. App.*, 151 (1905), 50 Ga. App. 492, 189 S.E. 104, 189 S.E. 644, 192 S.E. 298.

Taking demand time. — Taking of such an extension of time by the guarantor because the debt is constantly due and the

Am. Jur. 2d. — § 35.

C.J.S. — 72 C.J. § 95 et seq.

ALR. — *Consolidation of time of extension of time to the principal, 7 ALR 376.*

Extension of time of payment of the original contract of the surety or guarantor.

Liability of surety in respect of subsequent to the partnership, 45 ALR 1088; 2 ALR2d 260.

Discharge of a surety by extension of time to the principal, 48 ALR 715; 1088; 2 ALR2d 260.

Taking of demand time by the releasing surety or

Acceptance of an extension of time for, or of time which will be paid by the endorser, 59 ALR 1088; 2 ALR2d 260.

Liability of guarantor to grantor, 76 ALR 1088; 2 ALR2d 260.

Liability of guarantor to grantor as affected by merger, or consolidation, 381.

Creditor's knowledge of the assumption by the guarantor as release of the guarantor by novation, 87 ALR 1088; 2 ALR2d 260.

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of the surety upon the note, release and discharge the latter this section. *Lewis v. Citizens' & Ga. App. 597, 121 S.E. 524 d, 159 Ga. 551, 126 S.E. 392*

and binding extension is granted ipal debtor without the consent, the latter is discharged. *Alropa yder, 182 Ga. 305, 185 S.E. 352*

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the creditor had, for a consider- ended the time of payment of the d by the surety, and in addition ad calculated, and undertook to collect, 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

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

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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

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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.

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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

ANALYSIS

GENERAL CONSIDERATION ACT'S 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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seded by former (Former § 14-902 was Ga. L. 1962, p. 15 discharge of sureties instruments is current Uniform Commercial Code Christian v. Atlanta A Union, 151 Ga. App (1979).

Law governing the from liability on inst in present O.C.G.A. Place, Ltd. v. Green, S.E.2d 242, aff'd in other grounds, 246 C (1980).

Not applicable to guarantor. — O.C. 11-3-606 address liab creditor; not the liab debtor's guarantor, a release of a guaranto ity on a note. *Fabian* 792, 449 S.E.2d 305

Holder of collateral. Where a debtor to : more than one piec personal or real, as : entire debt, the am nitely fixed in the co the power of the ho whether the holder or a transferee, to : make it the liability o one, and to be paid i the original amount, shall still retain vigor *Loftis v. Clay*, 164 C (1927).

Contract of guarantments not confirms contract guaranteed which says that "th limit the amount of c party, but my liabili exceed \$2000.00 at a shipments are to be confirmed by me," i tor will not be liable confirmed by the gi than \$2000.00 at any vendor may extend c amounts guaranteed contract was not brot ping some goods to

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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 act gave rise to the judgment the lender obtained against the lender before the bond was in effect, and the lender's failure to pay the judgment was an act that authorized recovery on the bond; the bond did not contain a covenant extending liability to the lender or to the bond's execution. *Hartman Ins. Co. v. iFreedom Direct Corp.*, 307 Ga. App. 262, 718 S.E.2d 103 (2011), *cert. denied*, No. S12C0408, 2012 Ga. 446 (Ga. 2012).

see 15 (No. 2) Ga. St. B.J. 12

OR AND SURETY

see 15 (No. 2) Ga. St. B.J. 12

ing with surety.

VS

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).

surety's liability.

al 'Exculpatory' Clause, or Willing Gross Negligence Suffice," see 19 Ga. St. B.J. 10 (Feb. 2014)

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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 Willing Gross Negligence Suffice," see 19 Ga. St. B.J. 10 (Feb. 2014)

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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).

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

Law reviews. — For article, *Georgia Practitioner's Guide to Construction Law*.

10-7-30. Bad faith refusal to perform contract.

Law reviews. — For article, *Georgia Practitioner's Guide to Construction Law*.

10-7-31. Rights of certain payment bond obligor of work.

JU

Notice to contractor defective. Trial court did not err in granting summary judgment to contractor and its surety in a supplier's action to enforce a payment bond and a charge bond for monies advanced by subcontractor for materials it supplied to a construction project because the contractor's notice to contractor failed to comply with O.C.G.A. §§ 10-7-31(a) and 10-7-31(b) because the notice omitted required information; a

RIGHTS OF SURETY AGAINST THE CONTRACTOR

10-7-41. Action for money by surety or endorser.

JU

Cited in *Progressive Electric, Inc. v. Task Force Construction, Inc.*, 323 Ga. App. 608, 760 S.E.2d 621 (2014).

10-7-56. Subrogation to rights of contractor.

JU

ANALYSIS

GENERAL CONSIDERATION

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West's
Code of Georgia
Annotated

COMMERCE & TRADE

SURETYSHIP

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renewal note by failure of payee to nature of other indorser on original signature was not required on renewal request of surety. *Woolfolk v. Mathews*, 3a.App. 694, 188 S.E. 729. Principal and Surety § 116

ure of payee of note to prove its claim pty proceedings against one of the oes not release his cosurety. *Arm Citizens' & Southern Bank*, 1916, 145 10 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 and Surety § 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 n 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*, 3a. 446, 13 S.E. 578. Principal and Surety § 116

ient against defendant having been e obtained, without the consent of on his supersedeas bond, an injunction further proceedings. Held, that of the surety on the injunction bond e 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 and Surety § 116

ed sureties

wo sureties on note were liable to ureties for \$664.16, and one surety nd 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

§ 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

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

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.

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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, Surety-
ship and Guaranty § 8:1.3 Brown's Ga. Forms 2nd Ed. (1999) Rev.
§ 10-7-21.

Notes of Decisions

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mance 10

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parties 9

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Waiver or estoppel of guarantor 20

1. In general

Rule that a surety's liability will not be ex-
tended by implication or interpretation and that
any novation without consent of surety, or in-
crease in risk, discharges the surety applies to a
guarantor. Code, §§103-202, 103-203. Dun-
lap v. Citizens and Southern DeKalb Bank,
1975, 134 Ga.App. 893, 216 S.E.2d 651. Guar-
anty § 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. Feld-
er, 1945, 73 Ga.App. 118, 35 S.E.2d 783. No-
vation § 1

Conveyance of personalty by judgment debtor
to holder of judgment lien as security for subse-
quent independent loan did not constitute a
"novation" extinguishing a judgment lien as to
personalty thus conveyed as security and subse-
quently 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 thereun-
der. 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 indebted-
ness, time being made the essence of new con-
tract, 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 pay-
ment of sum equal to share of one ward and
settled with such ward at his majority, "nova-
tion" of remainder of debt resulting in loss of
priority of original security deed held not effec-
ted by grantor's execution of new note and secu-
rity 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, rehear-
ing 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 "no-
vation," and, when made without a surety's
consent, discharges him, though the new con-
tract 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.

Bank's failure to procure credit
requested in connection with loan
borrower's son's pledge of certific-
ate and personal guaranty was not
in terms of notes as would have
charging son as surety; bank's li-
ability, violation of its obligations;
Code, §§ 103-203, 109A-3-601,
DeKalb County Bank v. Haldi,
App. 257, 246 S.E.2d 116. Princ-
ipal § 101(1)

Where prime contractors and
lender reached agreement beyond term
stipulated in performance bond,
binding on surety. Code, §§ 103-
203, 109A-3-601, Southern Mechanical Co.
v. Ga.App. 672, 161 S.E.2d 413.
Surety § 100(1)

A departure from terms of con-
tract must be such as to prejudice
before it may be discharged. P.
boro Corp. v. U.S. Cas. Co., 1960
340, 114 S.E.2d 49. Principal a
100(1)

Adding to salesman's bond cover-
age, without surety's knowledge, a
second signed bond, condition absolvi-
ng obligee from responsibility for loss
of goods consigned, and requiring re-
turn of funds, inventories, and
made from consigned stock be for
discharge surety. Civ.Code 1910,
Smith v. Georgia Battery Co., 1931,
184 Ga. 381, 169 S.E. 381. Principal ar
101(2)

In an action on a note, where
authorized the inference that the
contract had been altered after its
execution, changing the date from which it
and that defendants were sureties
not consent to such change, it
direct a verdict for plaintiff. Paulk
v. Williams, 1922, 28 Ga.App. 183, 110 S.E. 63
and Surety § 101(6)

A substitution of another contrac-
ing contract whose performance i-
bond discharges the surety. Haig
v. Adams, 1909, 5 Ga.App. 637, 63 S.E. 71
and Surety § 100(1)

A material change in a building c-
out the consent of the surety releas-
gle v. Adams, 1909, 5 Ga.App. 637,
71 S.E. 71. Principal and Surety § 100(1)

Where, under a building contra-
ct, two persons agreed to erect a house, and
conditioned for the compliance w-
contract, and one of them began th-
thereafter abandoned it, when the
the consent of the owner, and at th-
the surety, undertook to complete i-
but failed so to do, the surety's r-
increased by any act of the owner

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r. Pleading & Practice Forms, Rev. ed., Form 62.

Forms, Legal and Business, Surety Guaranty § 8:1.

; Ga. Forms 2nd Ed. (1999 Rev.) 21.

large sureties from liability thereon. Code §§ 103-202. *W. T. Rawleigh Co. v. 1944*, 71 Ga.App. 873, 32 S.E.2d on \approx 1

der canceled note and loan deed al and interest amounted to almost al indebtedness, and accepted in a series of unsecured, noninterest- s for amount of principal indebted- ing made the essence of new con- tract was a "novation" within inition, which the Court of Appeals disturb. Code 1933, § 103-202; sey, 1939, 59 Ga.App. 627, 1 S.E.2d on \approx 1

ardian holding security deed note of two minor wards received pay- equal to share of one ward and such ward at his majority, "nova- remainder of debt resulting in loss of original security deed held not effect- r's execution of new note and secu- conveying same property to other majority (Code 1933, §§ 20-115; Kelley v. Spivey, 1936, 182 Ga. 507; . Novation \approx 1

annot, at law or in equity, be bound by the very terms of his contract; principal and the obligee change the without his consent, the surety is Bethune v. Dozier, 1851, 10 Ga. al and Surety \approx 99

erning

tate rules of decision should have d as federal law governing rights all Business Administration (SBA) guarantors of SBA loans, as there ssity for national rule on liability of antors. O.C.G.A. §§ 10-7-21, -9-504(3). *Regan v. U.S. Small min.*, 1991, 926 F.2d 1078, rehear- Federal Courts \approx 413

in of instrument

.Code 1910, § 3543, any change in f a contract by which a new and ifferent contract is created is a "no- l, when made without a surety's charges him, though the new con- favorable to him than the original. aulk v. Williams, 1922, 28 Ga.App. i. 632; Taylor v. Johnson, 1855, 17

SURETYSHIP

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 \approx 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. *Palmer v. Southern Mechanical Co.*, 1968, 117 Ga.App. 672, 161 S.E.2d 413. Principal and Surety \approx 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 \approx 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 \approx 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 \approx 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 \approx 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 \approx 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.*

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Note 4

Haigler, 1905, 123 Ga. 659, 51 S.E. 638. Principal and Surety \approx 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 & Merriitt*, 1904, 121 Ga. 437, 49 S.E. 292. Principal and Surety \approx 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 \approx 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 \approx 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 \approx 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 \approx 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. *Worthington v. Brewster*, 1860, 30 Ga. 112. Principal and Surety \approx 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,

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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

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\$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. Scarborough*, 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. Scarborough*, 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.*, 1991 App. 351, 471 S.E.2d 291. Guaranty. Mere inclusion in promissory note of amount owed under guaranty at termination of provision authorizing attorney fees in event of collection did not result in any increase in risk so as to discharge them. O.C.G.A. *Columbia Nitrogen Corp. v. Mason* Ga.App. 685, 320 S.E.2d 838. Principal and Surety ⇨ 97

By virtue of "continuing guaranty in agreement for lease of cash registers" lease agreement were not dischargeable of substitution of cash registers by another provision in lease agreement providing that this instrument constituted contract between parties hereto, amendments, oral or written, shall amend hereto unless signed in presence of officer of lessor. *Union Commerce Corp. v. Beef 'N Burgundy, Inc.*, Ga.App. 257, 270 S.E.2d 696. Principal and Surety ⇨ 97

Where lender loaned debtor additional which it then consolidated with amount compensated sureties guaranteed, such consolidation was taken without knowledge of the uncompensated sureties, and the compensated sureties, under the guaranty agreed to be sureties only for original extensions or renewals of that loan on the consolidated indebtedness, \$622,123 greater than loan the surety to guarantee, represented new indebtedness new indebtedness was novated amount owed by the principal discharged uncompensated sureties. Code, §§ 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 note and deed to secure debt, which thereafter asserted as the basis for release where both guarantors did sign a note which renewed earlier note, the former's consent to the later note ratified acts and, therefore, even if there existed a change which amounted to a novation where both guarantors consented to it there was no novation discharging the guarantors. Code, § 103-202. *Mauldin v. Macon, Inc.*, 1978, 146 Ga.App. 539, 226 S.E.2d 61. Guaranty ⇨ 61

Even if father's risk was increased by his son-in-law as a primary obligor on second note, father was not discharged of contractual obligations under "guaranty" which provided that bank, with or without father, might alter, renew, or extend

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

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

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§§ 10-7-21, 10-7-22. *Underwood v. Nations-Banc 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 daugh-

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Note 7

ter'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 ⇨ 102

Where a sheriff's bond was proper officer "on the additional security," whether the bond is destroyed by such a without the knowledge of the quare. *Taylor v. Johnson*, 18 Principal and Surety ⇨ 102

9. Substitution of new obligor same parties

In order for Georgia statutes 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 agreei §§ 7-4-16, 10-7-21. *Charles S. elling Co., Inc. v. Bernhardt* 1994, 213 Ga.App. 481, 445 S.E. tion ⇨ 4

10. Extension of time for pay performance

Agreement between lender and on payment of delinquencies pl 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 s ligation of allowing lender to cre by borrower against surety's sa Code, § 103-202. *Sens v. Decat & 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 ne he did not know if creditor was co 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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out surety's consent discharges surety
ply in action to recover under pay
performance bond brought against
ed surety. Code, § 103-202. *Travel*
Co. v. Sasser & Co., 1976, 138
51, 226 S.E.2d 121. Principal and
102

re against defunct bank of claim on
of deposit issued by bank did not
tion between bank and depositor re
eties on certificate. *Laws 1919*, p.
§ 13; art. 7, § 15, as amended by
p. 198, § 4; p. 159, art. 7, § 18; as
y *Laws 1925*, p. 128. *Council v.*
931, 42 Ga.App. 632, 157 S.E. 263.
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d labor. Held, that the act of such

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partner in carrying out the work was not a
novation but in pursuance of the original con
tract. *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 addi
tional security," whether the identity of the
bond is destroyed by such addition, if made
without the knowledge of the original security,
quere. *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 nova
tion 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 per
sonal guarantor; claim for interest did not
change terms of account agreement. O.C.G.A.
§§ 7-4-16, 10-7-21. *Charles S. Martin Distrib
uting Co., Inc. v. Bernhardt Furniture Co.*,
1994, 213 Ga.App. 481, 445 S.E.2d 297. Nova
tion ⇨ 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 moratori
um on payment of notes and would amortize
out charges accruing during moratorium over
remaining terms of loans did not create nova
tion which, thereby, discharged surety from ob
ligation 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 agree
ment, 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,

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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 pay
ment to debtor without surety's consent dis
charged 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 peri
od fixed by valid agreement between payee and
principal obligor, without consent of surety, dis
charges 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 demur
rer. *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 indul
gence 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 peri
od, for a valuable consideration, and without
surety's consent. *Turner v. Womack*, 1923, 30
Ga.App. 147, 117 S.E. 104. Principal and Sure
ty ⇨ 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 ex
tension by contractor of the time for payment of
any such indebtedness will not necessarily dis
charge 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, sure
ty's defense based on contractor's extension of
time of payment of indebtedness in suit, evi
denced 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)

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Note 10

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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 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 would be available by the principal, the surety is discharged of all liability on the note. *Wortham v. Smith*, 1860, 30 Ga. 112. Principal and Surety ⇨ 104(1)

11. Negotiable Instruments

Obligation of comaker of three promissory notes was discharged following renewal notes with increased interest provisions of note did not cover modifications of the interest rate did not sign subsequent renewal notes. *Bank of Terrell v. Ga. App.* 715, 341 S.E.2d 25. Notes ⇨ 140

Where officers and stockholders of a corporation guaranteed their corporation's promissory notes, signed the legal obligation of the corporation, which effectuated giving of security of notes and deed to secure without the guarantors' consent result in a novation. Code, § 10:1-307. *Lowe's of Macon, Inc.*, 1978, 539, 246 S.E.2d 726. Novation ⇨

Material change in contract of promissory note, without his express consent, will defeat action against the holder of altered note, although appear by whom alteration was made. Statute governing effect of alteration of promissory note either before or after enactment of negotiable instruments law (Civ.Code 1910, § 3543, 4296; Laws 1924, p. 151, 152). *Hamby v. Crisp*, 1934, 172 S.E. 84, 418. Alteration of Instruments ⇨

Change of note or accommodation promissory note from instrument not under seal, thereby extending limit to twenty years, constitutes material alteration (Civ.Code 1910, § 5, 3541). *Hamby v. Crisp*, 1934, 172 S.E. 84, 418. Alteration of Instruments ⇨

Where note sued on was executed before enactment of negotiable instruments law, questions presented were determined by old law (Laws 1924, p. 126). *Crisp*, 1934, 172 S.E. 842, 48 (1). Alteration of Instruments ⇨ 20

Where a new note is accepted by the holder of a note in renewal of a note given without the consent of a surety, this amounts to a novation on the part of the surety. *E. Matthews & Son v. Ga. App.* 412, 79 S.E. 22. Principal and Surety ⇨ 105(3)

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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)

lit. Negotiable instruments

Obligation of comaker of third in series of
renewal notes was discharged following subse-
quent 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 person-
ally guaranteed their corporation's account, as
corporate officers, signed the legal documents
which effectuated giving of security, seller's tak-
ing of notes and deed to secure debt was not
without the guarantors' consent and did not
result in a novation. Code, § 103-202. Maul-
din v. Lowe's of Macon, Inc., 1978, 146 Ga.App.
539, 246 S.E.2d 726. Novation ⇨ 7

Material change in contract of accommoda-
tion indorser, without his express or implied
consent, will defeat action against him by payee
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tiable 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 indorse-
ment from instrument not under seal to one
under seal, thereby extending limitations from
six to twenty years, constitutes material altera-
tion (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
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questions presented were determinable by ante-
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Where a new note is accepted by the payee or
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ly given, without the consent of a surety there-
on, 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. Altera-
tion of Instruments ⇨ 5(2)

12. Performance of contract

If the creditor enlarges the time for the per-
formance of a contract, without the consent of
the surety thereon, the latter will be discharged.
Worthan v. Brewster, 1860, 30 Ga. 112. Princi-
pal 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 no-
tice 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 be-
tween principal and creditor, such as extension
of contract, when person who purports to repre-
sent 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 usuri-
ous. 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)

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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

COMMERCE & TRADE**SURETYSHIP****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 of 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 unde rning discharge by novation an increase of risk. O.C.G.A. § 10-7-22. *Ramirez v. Golden*, 1996, 223 Ga.App. 610, 478 S.E.2d 430. Gr

By signing guaranty with una guage allowing creditor to extend ly, 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 circun note could be considered novatic where guarantor participated i leading to execution of second nc ing second note. O.C.G.A. § 10- ion vi Certaineed Corp., 1991, 318, 411 S.E.2d 558. Guaranty ⇌

21. Conditions precedent

The liability of guarantors of a goods sold subsequently reduced i conditioned upon the procuring against the original debtor before 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 y or any other documents associa did not support claim that they leased from guaranty on grounds there was no allegation as to a nature or terms of guaranty agr O.C.G.A. § 10-7-21. *Regan v. U.S. nness 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; Coc Code 1895, § 2972; Civil Code 191

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S.E. 31. Principal and Surety ☞

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Short v. Jordan, 1928, 39 Ga.App.
3. 31. Principal and Surety ☞

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10-7-22. *Cohen v. Northside
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or estoppel of guarantor

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10-7-22. *Ramirez v. Golden*,
u.App. 610, 478 S.E.2d 430. Guar-

Guarantor was liable to holders of promissory
note under unconditional personal guaranty, de-
spite agreement's subsequent modification;
guaranty's terms permitted amendment and
modification without altering guarantor's un-
derlying obligation and, by expressly assenting
in advance to waiver of all legal and equitable
defenses, guarantor was foreclosed from assert-
ing that he was discharged under statutes gov-
erning 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 lan-
guage allowing creditor to extend, renew, modi-
fy, or waive any of the terms of the obligations
of the principal, guarantor consented to execu-
tion 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 sign-
ing second note. O.C.G.A. § 10-7-21. *Anders-
on 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 guaran-
ty, or any other documents associated with loan,
did not support claim that they should be re-
leased 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 Busi-
ness Admin.*, 1990, 729 F.Supp. 1339, affirmed
926 F.2d 1078, rehearing denied. Novation ☞

§ 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.

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 re-
lieving 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 credi-
tor waived or did not enforce certain loan cove-
nants 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 guaran-
ty 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 princi-
pal debtor, resulting in the granting of solicited
indulgence as a gratuity or favor, will not dis-
charge the surety. The court's charge to this
effect, taken with the context, and construed in
the light of the evidence, was relevant and cor-
rect. *Vason v. Beall*, 1877, 58 Ga. 500. Princi-
pal and Surety ☞ 97