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Title 10. Commerce and Trade

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10-7-20

SURETYSHIP

10-7-21

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, 59 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”’ 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.)


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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.

General Consideration (Cont’d)


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. 512 (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).


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. XR 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 and 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. Whitney Co. v. Sheffield, 51 Ga. App. 623, 181 S.E. 119 (1935).


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. 494, 609 S.E.2d 755 (2004).

One who consents to a novation is not discharged as a surety. If notes are accepted by a creditor the surety, his consent of this section. Inc., 146 G. (1978).

If a party manner as is a right to other, and that particular ap contractual made without is thereby 48 Ga. App.
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. Love'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 (1944).

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 guarantee 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 guarantee to the bank. Frelsburg Dev. Co. v. Colony Bank, 290 Ga. App. 847, 650 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 insured 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 Purn. Co. v. Jones & Co., 13 Ga. App. 302, 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 85, aff’d, 241 Ga. 460, 246 S.E.2d 316 (1978); Fairmount 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 85, 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. Paul 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 change, regardless of how the change affected the surety, and even if the change injured 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. 453, 260 S.E.2d 483 (1979).

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

Change in terms of payment to creditor discharges surety. — A change by the obligee and principal in the terms of payments to
Novation (Cont’d)


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. 512 (1867).

Under former Civil Code 1885, §§ 2908 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’Neill, 101 Ga. 852, 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 288 (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. Blldr. Mats of Am., Inc. v. Gilbert, 257 Ga. App. 763, 572 S.E.2d 88 (2002).


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 intention, is immaterial, and will not discharge one signing as surety. Watkins Medical Co. v. Harrison, 33 Ga. App. 383, 126 S.E. 905 (1925).


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. 287, 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. Ramires v. Golden, 225 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

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

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

Consent

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

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

Taking of a promissory note for an antecedent liability does not constitute a payment of the debt in the absence of an agreement to that effect, or evidence that such was the intention of the parties. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798, 183 S.E. 694 (1935).

Mutual intention to treat former contract as no longer binding must be shown. — To do away with the stipulations in a contract, the circumstances must show a mutual intention of the parties to treat the stipulations as no longer binding and must be such as, in law, to make practically a new agreement. Pittsburgh Plate Glass Co. v. Jarrett, 42 F. Supp. 725 (M.D. Ga. 1942), modified, 131 F.2d 674 (5th Cir. 1942).

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

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

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

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

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

New note given for old with different terms is novation. — When a note was given by principal and security during the Civil War which, at the close of the war, was scaled to a gold standard, a new note given by a principal alone for the amount thus scaled, and accepted by the payee in the discharge of the first note, was a novation of the original contract under former Code 1868, §§ 2125, 2898. Hamilton v. Willingham, 45 Ga. 800 (1872).

Substituting absolute deed for mortgage. — An absolute deed conveying land as secu-
Application (Cont'd)

Rity for a debt is a security of a higher nature than a mortgage for the same debt on the same premises, and when the mortgage is entered satisfied and surrendered up because of the execution of such deed, the transaction operates as a novation and amounts to a merger. Bostwick v. Felder, 73 Ga. App. 118, 85 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. Faulk v. Williams, 28 Ga. App. 183, 110 S.E. 652 (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 (1894).

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, 158 S.E. 783 (1930).

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

Surety will not be released by fraudulent renewal note disaffirmed by creditor. — While under former Civil Code 1910, §§ 3543 and 3544 a surety will be discharged by a novation changing the nature or terms of the surety's contract without the surety's consent, and therefore the acceptance by a payee bank, without the agreement or consent of the surety, of a new note in renewal or payment of the original note signed by the surety will discharge the note therefrom, 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. 866 (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 588 (1984).

Contract simply giving creditor additional security. — Where a second contract simply gave the seller payment of the first, the risk of the first was not a new meaning of risk and did not introduce provisions of Code 1933, § 75-1 (1930).

Grantee who binds creditor assenting the mortgagee, cipal to B, d grantee, assumes and C, the latter principal debts changed to a m for C's assumption property conve, position would if B did not ass Anderson, 177 I conform to t. (1935).

New obligator recognition of grantee in a sal consideration to pay an outstanding property convey, the grantee by the deed, and grantor, the grantor, the latter in the debt. While deed is not be unless the holder knowledge of all enters into an all holder's ow wherein the hot running directly that thegra then, in the abs
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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, § 103-205. W.T. Raleigh Co. v. Overstreet, 71 Ga. App. 873, 32 S.E.2d 574 (1944).

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

Grantor whose debt is assumed is surety if creditor asserts to assumption. — Where A, the mortgagor, was originally bound as principal to B, the mortgagee, and C, the grantee, assumed the debt to B, as between A and C, the latter assumed the position of principal debtor and the former was changed to a mere surety. The consideration for C's assumption of the debt was the property conveyed by A to C. This change of position would not affect B, the mortgagee, if B did not assent to the change. Stapler v. Anderson, 177 Ga. 434, 170 S.E. 496, answer conformed to, 47 Ga. App. 379, 170 S.E. 501 (1938).

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

Extension of mortgage without consent of grantor discharges grantor. — A purchased land subject to a mortgage which A assumed, and later sold the land to B under a like assumption; B sold the land to C, who did not assume; thereafter the mortgagee, at the request of C, extended the maturity of the mortgage and of a portion of the debt, without the knowledge or consent of A. It was held that if the mortgagee had knowledge of the new relationships, the grant of the extension operated to release A from liability. Abopra Corp. v. Snyder, 182 Ga. 305, 155 S.E. 336 (1930).

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

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


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

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. 248, 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 §§ 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).


Extension

Extension of time for payment. — If after the maturity of a note the debtor pays to the creditor a sum of money representing an 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, 81 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. 365, 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. 383, 87 S.E. 149 (1918).

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, 25 S.E. 63 (1896); Ver Nooy v. Pitner, 17 Ga. App. 229, 86 S.E. 455 (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 extens principal, not only ment for the extens must be for a defir agreement. Dukce 630, 99 S.E. 151 (1 50 Ga. App. 492, 1 any Mgt. Co. v. Na App. 104, 189 S.E. 644, 192 S.E. 298

Taking demand time. — Taking a such an extension guarantor because stantly due and th

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Extension of tim original contract a surety or guarantor Liability of sure nership in respect subsequent to cha partnership, 45 AI

Discharge of a surety by extens collateral, under Law, 45 ALR 715; 1088; 2 ALR2d 26

Taking of dem releasing surety or Acceptance of i considera tion for, or of time which will u

Liability of gra debt to grantor, 7c

Liability of guar depost as after merger, or consol 381.

Creditor’s know assumption by thi gation as release o gushment of or novation, 87 ALR
of the surety upon the note, and binding extension is granted to such a debtor without the consent of the latter, the latter is discharged. Alropider, 182 Ga. 395, 183 S.E. 552.

r of a partnership who has notice of the agreement by a partner to assume the debt is bound to accord to the retiring the rights of a surety. Hence, if the latter's knowledge or consent, upon a sufficient consideration, time of payment of the firm was, the retiring partner is released from, the indebtedness, and the creditors thereon are made to the firm to the individual assets of the partner. Grigg v. Empire State, 17 Ga. App. 385, 87 S.E. 149.

he creditor had, for a considered the time of payment of the bond by the surety, and in addition calculated, and undertook to collect, usurious interest from the and by reason of such payment the principal debtor and extend out of the note, all of which, according to the evidence, was, and in amount or consent of the surety, the is discharged by virtue of this sect. v. Brooke, 24 Ga. App. 651, 101 cert. denied, 24 Ga. App. 817.

of extension must be fixed by it. In order to discharge a surety's entire time of the principal, not a there be an agreement for the 1, but the proof must show that the ce was extended for a definite pe by the agreement. Bunn v. Com. bank, 98 Ga. 647, 26 S.E. 69 (1896); y v. Pinte, 17 Ga. App. 293, 85 S.E. 5.

gner of a note was in fact a surety the payee, under a valid agreement principal and without the consent surety, extends the time of maturity as the obligation, a release of the surety will result, but in order to discharge a surety by an extension of time granted to the principal, not only must there be an agreement for the extension, but the indulgence must be for a definite period fixed by a valid agreement. Duckett v. Martin, 23 Ga. App. 630, 99 S.E. 151 (1919); Benson v. Henning, 50 Ga. App. 492, 178 S.E. 406 (1935); Guar- anty Mfg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 180 S.E. 603 (1936), aff'd, 184 Ga. 644, 192 S.E. 298 (1937).

Taking demand note is not extension of time. — Taking of a demand note was not such an extension of time as would release a guarantor because a demand note is instantly due and the moment delivered can be sued upon. Sull v. Citizens Bank & Trust Co., 51 Ga. App. 798, 181 S.E. 694 (1936).

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 may 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

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, 45 ALR 1368.
Liability of surety or guarantor for partnerships 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, 46 ALR 715; 65 ALR 1428; 106 ALR 1938; 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 1298.
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 497.
Construction and application of provision of guaranty or surety contract against release or discharge of guarantor by extension of time or alteration of contract, 117 ALR 964.
Remission or waiver of part of principal's obligation as releasing surety or guarantor, 121 ALR 1014.
Necessity of proof of original obligor's consent to, or ratification of, third person's assumption of obligation, in order to effect a novation, 124 ALR 1498.
Payments or advancements to building contractor by obligee as affecting rights as between obligee and surety on contractor's bond, 127 ALR 10.
Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 ALR 85.

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

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

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 ALR2d 754.

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, § 3344; Code 1993, § 103-203.)

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ANALYSIS

GENERAL CONSIDERATION

ACTS DISCHARGING SURETY

1. In General.
2. Loss of Collateral.
3. Forbearance to Sue and Dismissal of Suit.

GENERAL CONSIDERATION


Section codifies general rule. — This section is a codification of the general rule. Timmons v. Butler, Stevens & Co., 158 Ga. 69, 142 Ga. 814, 83 S.E. 982 (1914), later appeal, 22 Ga. App. 96, 96 S.E. 315 (1918).

Section 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).


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

Not applicable to guarantor. — O.C. § 11-9-608 address liab creditor, not the liab debtor's guarantor, a release of a guarantee on a note. Fabian 791, 440 S.E.2d 305.

Holder of collateral. Where a debtor to more than one piec personal or real, as entire debt, the amitly fixed in the 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 Loltis v. Clay, 164 (1927).

Contract of guaranty not confirm contract guaranteed which says that "the limit the amount of parry, but my liabil exceed $2000.00 at a shipments are to be confirmed by me," i to will not be liable confirmed by the at than $2000.00 at any vendor may extend c amounts guaranteed contract was not brolping some goods to
OFFICIAL CODE OF GEORGIA
ANNOTATED

2015 Supplement

Including Acts of the 2015 Regular Session of the General Assembly

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SURETYSHIP

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

NOWATION

APPLICATION

General Consideration


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, 799 S.E.2d 836 (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 'Excipientary' Clause, or Will Gross Negligence Suffice," see 19 Ga. St. B.J. 10 (Feb. 2014)
JUDICIAL DECISIONS

Analysis

General Consideration

Acts Discharging Surety

1. In General

General Consideration

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

Instruction proper. — As there was evidence to support a charge on waiver of a guarantor's right to be discharged by an increase of risk or a novation, and it was not an improper statement of the law, there was no cause to grant the guarantor's motion for a new trial. Fletcher v. C. W. Matthews Constr. 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).


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 330 (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).

RIGHTS OF SURETY AG.

10-7-41. Action for moneys due under contract or guaranty

JUI


10-7-56. Subrogation to rights of creditor

JUI

Analysis

General Consideration
SURETYSHIP

under other funds from the borrower, released
land from lien of execution on indebted-
ext to the amount of $644.16, and from operation of security
by surety to secure the $1,500

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10.7–21

8. Effect of the running of the statute of limi-
tations

The mere failure of payee of a note, who is

135 Ga. 518, 86 S.E. 372. Principal and Surety = 116

116

135 Ga. 518, 86 S.E. 372. Principal and Surety = 116

135 Ga. 518, 86 S.E. 372. Principal and Surety = 116

135 Ga. 518, 86 S.E. 372. Principal and Surety = 116

135 Ga. 518, 86 S.E. 372. Principal and Surety = 116

§ 10–7–21

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

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Library References

Key Numbers

Novation =1.

Principal and Surety =99.

Westlaw Key Number Searches: 278k1; 309k99.

IR Library

Change in name, location, composition, or
structure of obligor commercial enterprise
subsequent to execution of guaranty or

surety agreement as affecting liability of
guarantor or surety to the obligee, 69
A.L.R.3d 567.

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

Encyclopedias

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

C.J.S. Novation §§ 2 to 4, 9 to 10, 14 to 16.
§ 10–7–21

C.J.S. Principal and Surety §§ 102.

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

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Performance of contract 12
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Release or loss of other securities 15
Substitution of new obligation between same parties 9
Sufficiency of pleadings 22
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Waiver or estoppel of guarantor 20

1. In general
Rule that a surety’s liability will not be extended by implication or interpretation and that no
novation without consent of surety, or increase in risk, discharges the surety applies to a
A “novation” under the rules of the civil law is a mode of extinguishing one obligation for
another. Code, §§103–202. Bostwick v. Felder,
1945, 73 Ga.App. 118, 35 S.E.2d 783. Novation
§ 1
Conveyance of personality by judgment debtor to holder of judgment lien as security for subsequent
independent loan did not constitute a “novation” extinguishing a judgment lien as to
personally thus conveyed as security and subsequently levied upon under the judgment. Code,
§ 103–202. Bostwick v. Felder,
1945, 73 Ga. App. 118, 35 S.E.2d 783. Novation
§ 1
A contract of two persons as sureties to pay for goods sold to principal and all indebtedness
of principal to seller under prior contract was not a “novation” of prior contract, and hence
§ 1
Where lender canceled note and loan after principal and interest amounted to a
second original indebtedness, and accepted
liens thereon a series of unsecured, noninterest
bearing notes for amount of principal indebtedness, time being made the essence of new con-
tract, new contract was a “novation” under statutory definition, which the Court of Appeals
§ 1
When guarantor holding security deed not
for benefit of two minor wards received pay-
ment of sum equal to share of one ward and settled with such ward at his majori-
ty, disposition of remainder of debt resulting in
priority of original security deed held notify-
ed by grantor’s execution of new note and sec-
rity deed conveying same property to other
ward at her majority (Code 1933, §§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
released. Bethune v. Dozier,
1851, 103 Ga. 235. Principal and Surety
§ 99

2. Law governing
Georgia state rules of decision should have
been adopted as federal law governing
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,
1991, 926 F.2d 1078, quoting 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
materially different contract is created is a
novation, and, when made without a surety’s
consent, discharges him, though the
novation is more favorable to him than the
original contract. Paulk v. Williams,
1929, 78 Ga. 183, 110 S.E. 632; Taylor v. Johnson,
1931, 78 Ga. 521.

SURETSHIP

Bank’s failure to procure credit requested in
connection with borrower’s son’s pledge of certif-
icate and personal guaranty was not in terms of
notes as would have charging son as surety, bank’s
violation of its obligations. Code,
§§ 103–203, 109A–3–601,
DeKalb County Bank v. Haldt,
App. 163, 246 S.E.2d 116. Principal
§ 101(1)

Where prime contractors and
subcontractors agreed to perform in
definite manner, and all
required to be paid. Code,
§§ 103–203, 109A–3–601,
DeKalb County Bank v. Haldt,
App. 163, 246 S.E.2d 116. Principal
§ 101(1)

A departure from terms of con-
tract must be such as to prejudice
before it may be discharged. P
corp. v. U.S. Nails Co.,
1960, 114 S.E.2d 49. Principal
§ 101(1)

Adding to salesmen’s bond cov-
ers, without surety’s knowledge, a
signed bond, condition absolutely
released from responsibility for loss
of consigned, and requiring re-
stitution of funds, inventories, and
made from consigned stock be for
defense against. Civ.Code 1

Smith v. Georgia Battery Co.,
193,
146, 169 S.E. 381. Principal
§ 101(2)

In an action on a note, where
bond was endorsed by the surety
under the bond, and the note in
handwritten by the surety, and
he had not made a written endorse-
ment on the note, the surety was
not discharged. Haigl
1998, 5 Ga.App. 637, 63 S.E. 71,
Surety
§ 100(1)

A material change in a building c
on the consent of the surety requires
for the surety release. Adams,
1999, 5 Ga.App. 115. Principal
§ 100(1)

Where, under a building contrac-
t to erect a house, and conditioned for the compliance w
v, and one of them began tickets in
thereafter abandoned it, when the
surety undertook to complete it
but failed so to do, the surety’s
interest expressed by any act of the owner
COMMERCE & TRADE

SURETYSHIP

Bank’s failure to procure credit life insurance required 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 best, violation of its obligations under notes. Code, §§ 103–202, 109A–3–601, 109A–10–103. DeKalb County Bank v. Haldl, 1978, 146 Ga.App. 257, 246 S.E.2d 116. Principal and Surety ☑ 101(1)

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

A departure from terms of construction contract must be such as to prejudice a paid surety before it may be discharged. Peachtree Roxboro Corp. v. U.S. Cas. Co., 1950, 119 Ga.App. 340, 114 S.E.2d 49. Principal and Surety ☑ 101(1)

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

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

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

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

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

In an action on a note it appeared that after the instrument was signed and conveyed 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 executing the contract and conveying realty to secure the same, even though surety was not injured 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; 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. Principal and Surety ☑ 99

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

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

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

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

If a plaintiff in a fl. 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,
§ 10–7–21
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

5. Change in terms of payment


Defendants sued on agreement to guarantee faithful performance of contract whereby principal was to purchase medicines from plaintiff on credit, and 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 guarantee 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

A supplemental contract, providing for substitution or 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, 143 S.E. 459. error dismissed 36 S.Ca. 451, 241 U.S. 687, 60 L.Ed. 1237. Principal and Surety

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

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

$4,000. 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. Sarabro, 1912, 11 Ga.App. 547, 75 S.E. 846. Guaranty

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 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. Sarabro, 1912, 11 Ga.App. 547, 75 S.E. 846. Guaranty

7. Change in obligation or duty of principal

By virtue of continuing guaranty in agreement for lease of cash register, such agreement were not discharge of substitution of cash register being signed by officer of lessor, by another provision in lease agreement that instrument constituted contract between parties hereto, an oral or written, shall be amended hereto unless signed in officer of lessor. Union Commer. Corp. v. Beef 'N Burgundy, Inc., 1985, 227 S.E.2d 696, Pri

If the lender loaned debtor addid whether it then consolidated with am modified sureties guaranteed, such note was taken without knowledge of the uncompensated sureties, and the self sureties, under the guarantee surety to be sureties only for origin extensions or renewal of that loan consolidated indebtedness, 529,21 greater than loan the surety instrument, represented new indebtedness was novation owed by the principal discharged sureties. Code, §§ 103–202. Upshaw v. First S. 1979, 44 Ga. 433, 260 S.E.2d 483. Surety

If even one guarantor did not sign and deed to secure debt, which thereafter assumed the basis for both guarantors did sign as when renewed earlier note, the form was consent to the later note ratified and, therefore, even if there exist any change which amounted to a novation discharge of all previous obligations under "guaranty" which provided that bank, will father, might alter, renew, or ext
COMMERCE & TRADE

SURETYSHIP

10-7-21, 10-7-22. Underwood v. Nations


mer inclusion in promissory note covering

mortgage owed under guaranty at time of

its termination of provision authorizing recovery of

of attorney fees in event of collection by attorney

not result in any increase in risk to sureties.

was to discharge them. O.C.G.A. § 10-7-22.

Columbia Nitrogen Co., 1984, 171

Ga. App. 685, 320 S.E.2d 838. Principal and

Surety 97

By virtue of “continuing guaranty” provision

agreement for lease of cash register, sureties

lease agreement were not discharged on ac-

tion of substitution of cash registers without

writing signed by officer of lessor, as required

another provision in lease agreement pro-

viding that this instrument constitutes entire

contract between parties hereto, and no rep-

ropeals, oral or written, shall constitute

payment hereof unless signed in writing by

officer of lessee. Union Commerce Leasing

Corp. v. Beech ‘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 uncom-

pensated sureties guaranteed, such consolidation

was taken without knowledge or consent of

the uncompensated sureties, and the uncom-

pensated sureties, under the guaranty agreement,

were to be sureties only for original loan and

any extensions or renewals of that loan, the note

of the consolidated indebtedness, which was

$221.23 greater than loan the sureties agreed

guaranteed, represented new indebtedness and

the new indebtedness was novation to the

amount owed by the principal discharging the

recompensated sureties. Code, § 103-101.01

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 provided that both without notifying

the guarantor’s consent to the later note ratified the

earlier and, therefore, even if there existed a ma-

terial change which amounted to a novation,

where both guarantors consented to the change,

was no novation discharging the guaran-


Atlanta, Inc., 1978, 146 Ga. App. 539, 246 S.E.2d

26. Guaranty 61

Even if father’s risk was increased by reten-

tion of his son-in-law as a primary obligor on

second note, father was not discharged from his

contractual obligations under “guaranty” agree-

ment which provided that without notifying

father, might alter, renew, or extend daugh-

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 De-

Kalb 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 sure-

ties’ risk under, prior suretyship contract, obli-

gating 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. G. 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.


Principal and Surety 105(3)

Acceptance of new note, without consent of

surety, extending time of payment of original

matured note, held to discharge surety, with-

standing parol agreement or understandings to


25, 131 S.E. 916. Principal and Surety 105(3)

Surety discharged where purchase-money

note renewed without his consent. Nunnally v.


119. Principal and Surety 105(3)

Sureties on note were not discharged, under

Civ.Code 1910, §§ 3543, 3544, by payee’s ac-

cceptance of renewal note with forged signatures

of sureties thereon, where payee, on discovery

of the fraud, promptly disaffirmed its accep-

tance of the renewal note by re-taking and suing

on the original note. Biddy v. People’s Bank,


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.

Scarborough 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 sureship, nor the

principal’s liability, but the property was not

affected thereby. Whigham v. W. Hall & Co.,

1911, 8 Ga.App. 509, 70 S.E. 23. Principal and

Surety 97
§ 10–7–21

Note 7

A creditor of a partnership, who has notice of dissolution and of an agreement by the continuing partners 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 partners. 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 charging 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 liquated 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, 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—his 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, 1860, 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. Barrett, 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 discharge the surety or increase his risk, or cause him to greater liability, by which he would be discharged. Sullivan v. Hugely, 1873, 48 S.E. 486. Principal and Surety ⇐ 97

If the obligee blind himself to furnish 100 acres of pine land to furnish stocks for a sawmill, 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. Bethel v. Dodson, 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. National Transfer & Storage Co., Inc. v. Main Const., Inc., 1995, 217 Ga.App. 538, 458 S.E.2d 481, reconsideration denied. Principal and Surety ⇐ 102


Building contractors agreed to erect building according to certain plans by a named date and gave a bond conditioned for the compilation with the contract, or that the surety would do and perform as designed and needed by the contractor, with the consent of the owner, and at the instance of the surety, undertook complete the building, but failed to furnish materials and labor. Held, that the act of the partner in carrying out the agreement but in pursuance of contract. Adams v. Haigler, 1905 S.E. 638. Principal and Surety

Where a sheriff’s officer, acting in the additional of local security, whether the bond is destroyed by such a sheriff’s knowledge of the surety. Taylor v. Johnson, 1865, 1 Ga. 262. Principal and Surety ⇐ 102

4. Substitution of new obbligees or parties.

In order for Georgia statutes to apply, circumstances are in law imply a mutual agreement whereby new, distinct and dependent in lieu of those who provide for. Code Ga. Secs. 24, 27, 7, 25 Pittsburg Plate Glass Co. v. J. P. Simpson, 1917, 136 Ga.App. 441, 445 S.E. 4

Creditor’s claim for interest balance on open account was not a warranty that debtor was in interest, so as to discharge personal guarantor. Claim for change in terms of account agreement. § 7–4–10, 7–10–21. Charles S. Alling Co., Inc. v. Bernhardt, 1934, 38 Ga.App. 481, 445 S.E. 4

10. Extention of time for performance.

Agreement between lender and borrower that acceleration of delinquencies and reinstatement fees authorize by lender, lender would grant 90 days in payment of notes and vouch for charges accruing during maturities of loans did not, as charged, authorize of allowing lender to create a borrower against sureties’s security. Code, § 103–202. Sens v. Decan, 1974, 159 Ga. 526, 226. Principal and Surety

Although promissory note contained instead and exemption right to his debt or any renewal or extension thereof not falling into the same or consented to extend to any creditor that was not given, despite or authorized modification to the did not know if creditor was authorized to do anything with submod creditors failed to show that preclearance note was made knowledge or consent as requiring, terms of modification. Code, §
or the omission of some act not specially
by law, nor the commission of necessity authorized by law, by the creditor, tends to increase the risk of the surety as a discharge. Stewart v. Barre,
Ga. 664. Principal and Surety 97.

A proposition is made by the principal that the judgment to pay less than actual action thereof, to which the plaintiff, provided the payment should be made thirty days, this, without more, did not increase his risk, or exhibit greater liability, by which he would be ed. Sullivan v. Hughe, 1872, 48
Principal and Surety 97.

obligee bind himself to furnish goods or labor and furnish stocks for a surety, and then, principal accept 860 in dis- of the contract, without the consent of, it is such an alteration of the original contract which will discharge the surety. Beha
1851, 10 Ga. 235. Principal and
Surety 97.

ges in parties to obligation secured.

n of party as joint general contractor of material change entitling surety to dis-charge obligation under performance bond, as a separate matter, was in fact only agent of principal contractor, and there was no actual relationship of principal and surety. Am. Transfer & Storage Co. Inc. v. Masson,
1995, 217 Ga.App. 538, 458 S.E.2d
consideration denied. Principal and Surety 102.

providing that novation in contract discharged surety and discharged charges, as a performance bond brought against
ed surety. Code, § 103–202. Travel
Co. v. Sasser & Co., 1976, 131,
522 S.E.2d 121. Principal and Surety 102.

g. against defunct bank of claim of deposit issued by bank did not
ion between bank and depositor entitle
931, 42 Ga.App. 632, 157 S.E. 2d
Surety 102.

contractors agreed to erect a house certain plans by a named date, and condition for the compliance, direct, or that the surety would do.

One of the contractors alone began it, abandoned it, whereupon the other, with the consent of the owner, instance of the surety, undertook the building, but failed in all labor. Held, that the act of such

SURETYSHIP

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Note 10

Creditors’ grant of extension of time for payment to debtor without surety’s consent discharged surety from his obligation as surety under promissory note. Code, §§ 109A–3–606,

Extension of maturity of note for definite period fixed by valid agreement between payee and principal obligor, without consent of surety, discharges surety. Civ. Code 1910, §§ 3542–3544,


App. 247, 129 S.E. 119. Principal and Surety 104(1).

That a surety may be discharged because of increasing his risk by extension of time to the principal without his consent, three things are necessary. First, at the time the indulgence is granted the owner and holder must know that the surety was such; second, there must be a sufficient consideration, and, third, the indulgence must be for a definite period. Hays v. Edwards, 1924, 31 Ga.App. 725, 121 S.E. 838. Principal and Surety 104(1).

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

A contractor’s bond, conditioned for prompt payment of all indebtedness to those furnishing labor or material, is an obligation to pay any indebtedness of contractor so arising, and, extension by contractor of the time for payment of any such indebtedness will not necessarily discharge his surety. National Sur. Co. v. Walker

In suit against contractor and surety on his bond by one who had supplied material, surety’s defense based on contractor’s extension of time of payment of indebtedness in suit, evidenced by his note, accepted by plaintiff and falling due within period provided by statute within which suit on original indebtedness may be brought, and within the time such lien may be asserted, was properly stricken on demurrer. National Sur. Co. v. Walker County, 1926, 25 Ga.App. 643, 104 S.E. 18. Principal and Surety 104(1).

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§ 10–7–21
Note 10


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 inducement extended for a definite period fixed by the agreement. Ver Nooy v. Pitzer, 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 by the principal debtor must be fixed and definite in order to discharge the surety. Bunn v. Commercial Bank of Caddo, 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. 669. 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 sent in the military service, returned, after rendition of judgment, and entered an appeal within the time allowed by the Ordinance of the Convention of 1865, and set up the defense 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 defendant in advance on the debt, the later enters into an agreement of forbearance during the time for which such interest is paid, if there be no agreement to the contrary. Scott v. Safford, 1867, 37 Ga. 384. Principal and Surety ⇒ 104(1).

Where the holder of a promissory note was out 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 of payment was accordingly held, 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 property of a principal in judgment, and no notice given by the surety to protest against the property of his principal, the rules of regard forbearance are the same, after judgment as before. Crawford v. Gaulden, 1867, 37 Ga. 173. Principal and Surety ⇒ 104(1).

The promise to forbear for a definite time will not discharge surety, unless it be a promise binding in law upon the creditor: "Until he tie his hands." Crawford v. Gaulden, 1867, 37 Ga. 173. Principal and Surety ⇒ 104(1).

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COMMERCE & TRADE

SURETYSHIP

Whenever the holder of a note signed by a principal and surety, holds to the principal, or receives from the surety, or is given notice of the surety's dishonor, or for any reason for which a demand is to be made upon the surety, the surety is discharged by any act or omission of the principal which the surety is not made either by any act or omission of the principal or the surety himself; the surety is then released from all liability on the note. Wortham v. 30 Ga. 112. Principal and Surety ⇒ 104(1).

11. Negotiable Instruments

The obligation of a maker of a promissory note to pay the note on demand is subject to the rules of negotiable instruments. Civ Code 1910, §§ 3545, 3426; Laws 1924, p. 126. Principal and Surety ⇒ 105(1).

Where notes were signed on execution before maturity of the instrument, the making of the note, the signature of the instrument to the note, and the amount of the note shall be held to be a part and parcel of the instrument. Civ Code 1910, §§ 4, 5, 5341, 3426, 172 S.E. 842, 48. (Alteration of Instruments ⇒ 20).

Where a note is accepted by a person in renewal of a note without the consent of a novation an instrument, unless such a note is made a part and parcel of the instrument. Civ Code 1910, §§ 4, 5, 5341, 3426, 172 S.E. 842, 48. (Alteration of Instruments ⇒ 20).
COMMERCIAL LAW

SURETYSHIP

Whenever the holder of a promissory note, signed by a principal and surety, extends the time of payment to the principal, without the consent 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)

14. Negotiable instruments

Obligation of co-maker of third in series of renewals was discharged following subsequent renewals at increased interest rate where provisions of note did not cover subsequent modifications of the interest rate and co-maker did not sign subsequent renewals. D.C.G.A. §§ 10-7-21, 10-7-22, 11-2-145(3), 31-3-601(2). Bank of Terrell v. Webb, 1986, 77 Ga.App. 715, 341 S.E.2d 258. Bills and Notes \(=\) 140

Where officers and stockholders who personally guaranteed their corporation's account, as corporate officers, signed the legal documents which effectuated giving of security, seller's taking of notes and demand to secure debt was not without the guarantors' consent and did not result in a novation. Code, § 103-202. Mauldin v. Lowe's of Macon, Inc., 1978, 146 Ga.App. 293, 245 S.E.2d 726. Novation \(=\) 7

Material change in contract of accommodation indorsement, without his express or implied consent, will defeat action against him by payee or holder of altered note, although it does not appear by whom alteration was made, general statute governing effect of alteration being ineffective either before or after enactment of negotiable instruments law (Code 1910, §§ 3541, 3542, 4295; Laws 1924, p. 151, §§ 124, 125). Hamby v. Crisp, 1934, 172 S.E. 842, 48 Ga.App. 418. Alteration of Instruments \(=\) 20

Change of note or accommodation indorsement from instrument not under seal to one under seal, thereby extending limitations from six to twenty years, constitutes material alteration (Code 1910, §§ 5, 3541, 4239, 4361). Hamby v. Crisp, 1934, 172 S.E. 842, 48 Ga.App. 418. Alteration of Instruments \(=\) 5(2)

Where note sued on was executed and altered before enactment of negotiable instruments law, questions presented were determinable by antecedent law (Laws 1924, p. 126). Hamby v. Crisp, 1934, 172 S.E. 842, 48 Ga.App. 418. Alteration of Instruments \(=\) 3 (2)

Where a new note is accepted by the payee or indorser of a note in renewal of a note previously given, without the consent of a surety thereon, this amounts to a novation and discharges the surety. E. Matthews & Son v. Richards, 1915, 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, as the same as to increase the rate of interest to be paid from 8 to 12 per cent., such note is by such alteration rendered void as to such surety; and this is true even though, at the time it came into the hands of such bearer, he had no notice of the alteration by the principal. Hill v. O'Neill, 1897, 101 Ga. 832, 28 S.E. 996. Alteration of Instruments \(=\) 5(2)

12. Performance of contract

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

13. Notice to creditor of relation of parties

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

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

14. Validity of agreements

Surety is not discharged by agreement between principal and creditor, such as extension of contract, when person who purports to represent obligor 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 without consideration. 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 part of the creditor, 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)
§ 10–7–21
Note 14

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 Americas, 1877, 59 Ga. 701. Principal and Surety ≡ 115(1)

16. Release of cosureties
Plaintiffs' acceptance of less than total sum owed under promissory note did not discharge nonsettling guarantors as cosureties on notes; since guarantors were individually liable, and not jointly liable, they were not "cosureties" 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 portion 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 guarantor; settling guarantor was dismissed from action before trial; 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


17. Extension after maturity of obligation
Where, after maturity of a note, the debtor pays to the creditor a sum representing advanced 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 released him, in view of Civ. Code 1910, § 3543. Be- is v. Citizens & Southern Bank, 1924, 31 Ga.App. 597, 121 S.E. 524, affirmed 159 Ga. 55, 126 S.E. 392; Smith v. First Natl. Bank, 1908, 93 Ga.App. 139, 62 S.E. 826.


Payment of interest at maturity of note creating 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 joint 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 from grantee under such contract should be applied toward payment of notes, did not constitute fraud on any 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, 1953, 92 Ga.App. 11, 7 S.E.2d 426. Bills and Notes, § 222, Secured Credit, § 226, Period Statute of Limitations

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 requirement principal to be repaid on specific date and monthly interest payments to begin one month later, and, thus, arrangement did not expose checkminder to increased risk, was no novation, and did not discharge them. O.C.G.A. §§ 10–7–21, 10–7–22. Cohen v. Bank & Trust Co., 1993, 207 Ga.App. 337, 427 S.E.2d 354, certiorari denied. Bills and Notes ≡ 52

20. Waiver or estoppel of guarantor

Guarantor was liable to holder under unconditioned personal surety's subsequent guaranty's terms permitted modification without altering such obligation and, by express, in advance of waiver of all legal defenses, guarantor was foreclosed to any other discharge, all guaranty was discharged under common law by novation, 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 438. Guaranty ≡ 72

By signing guaranty with unconditioned provision any of the terms of the principal, guarantor consecration of second note, and thus, no discharge as surety by creditors even if under other circumstances could be considered novative where guaranty participated in other execution of second note. O.C.G.A. § 10–7–21. Certainteed Corp., 1991, 511 S.E.2d 558. Guaranty ≡ 72

1. Conditions precedent
The liability of guarantors of a note held subsequently reduced in agreement upon the procuring and giving the original debtor before guarantor. Kalmon v. Scarbrough, 1970, 547, 75 S.E. 456.

2. Sufficiency of pleadings
Bailment by guarantors of property held in trust (SBA) loan, that opportunity to read or under any other documents aslaws did not support claim that they were released from guaranty on ground that there was no allegation as to a bailment or terms of guaranty agreement. O.C.G.A. § 10–7–21. Regen v. United States, 1990, 729 F Supp. 1072, 1078, rehearing denied.

§ 10–7–22. Discharge of any act of the creditor, either injures the surety or will discharge him; a mere allows or neglect to prosecute consideration, shall not relieve the creditor.
SURETYSHIP

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

Sign guaranty with unambiguous language allowing creditor to extend, renew, modify or waive any of the terms of the obligations, and principal, guarantor consented to execution of second note, and thus, guarantor was discharged as surety by execution of the note even if under other circumstances such note could be considered novation, particularly where guarantor participated in negotiations leading to execution of second note before signing second note. O.C.G.A. § 10-7-21. Anderson v. Certainteed Corp., 1991, 201 Ga. App. 31, 411 S.E.2d 558. Guaranty ≡ 73.

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. Kalmow v. Scarboro, 1912, 11 Ga. App. 547, 75 S.E. 846. Guaranty ≡ 77(2)

22. Sufficiency of pleadings

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

§ 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.