

NEGOTIABLE INSTRUMENTS

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During the year under survey, the several decisions rendered involved applications of accepted legal principles. Therefore the purpose of this survey will be fulfilled by a brief mention of the cases, the rules applied, and the status of the rule under the UNIFORM COMMERCIAL CODE which has now been in effect for more than three years, since January 1, 1964.

SURETYSHIP

The courts applied the well accepted rules that a novation¹ or a release of security² without the consent of the surety discharges him.³ *Bayne v. Sun Finance Co. No. 1*⁴ followed previous cases⁵ in holding that the frequently found waiver in promissory notes, whereby all parties waive suretyship defenses based on extension of time to pay, is effective.⁶ In *Deems v. Wilson*⁷ the court of appeals applied GA. CODE ANN. section 109A-3-415 (3) (1962 Rev.) allowing oral proof of the accommodation character of defendant's signature on a note, as against the original holder. The statute allows such oral proof in all cases except against a holder in due course without notice of the accommodation character.

WAIVER: DEFENSES OF DURESS AND PARTIAL FAILURE OF CONSIDERATION⁸

*Williams v. Rentz Banking Co.*⁹ applied the principle of law that a note executed under duress may be ratified by subsequent voluntary payments on the note, thus waiving the defense of duress. There were four dissents which did not question the legal principle, but thought that summary judgment should not have been granted because there was an issue of fact for the jury as to whether or not the payments were in fact made on the note. If the payments had not been on the note, then of course there would not have been a ratification thereof. In *American International Industries,*

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1. *American Sur. Co. of New York v. Garber*, 114 Ga. App. 532, 151 S.E.2d 887 (1966).
2. *Hartsfield Co. No. 3, Inc. v. Williams*, 114 Ga. App. 547, 151 S.E.2d 908 (1966).
3. The defenses of a surety are carried forward under the UNIFORM COMMERCIAL CODE §3-415, comment 1 (official ed. 1963).
4. 114 Ga. App. 27, 150 S.E.2d 311 (1966).
5. *E.g. Mansour v. Fulton Nat'l Bank of Atlanta*, 93 Ga. App. 809, 92 S.E.2d 839 (1956).
6. See UNIFORM COMMERCIAL CODE §3-112, comment 3 (official ed. 1963), which suggests that the validity of such waivers is not affected by the new CODE.
7. 114 Ga. App. 341, 151 S.E.2d 230 (1966).
8. The UNIFORM COMMERCIAL CODE would not seem to affect the prior law as to what constitutes a waiver of such defenses, since GA. CODE ANN. §§109A-3-305, 306 (1962 Rev.) simply make the defenses available.
9. 114 Ga. App. 778, 152 S.E.2d 825 (1966), same case as 112 Ga. App. 384, 145 S.E.2d 256 (1965).

Inc. v. Plumbers Woodwork Co.,¹⁰ the court held that partial payment on a contract, after knowledge of certain defects, does not waive a buyer's defense of partial failure of consideration.¹¹ Judge Eberhardt, in the *Williams* case,¹² suggests one reason why partial payment might waive a defense of duress, but not a defense of partial failure of consideration. Duress goes to the whole contract, and any payment is inconsistent with duress, while partial failure of consideration does not go to the whole contract, and partial payment is not necessarily inconsistent.

PLEADING AND BURDEN OF PROOF

The Court of Appeals of Georgia in *Glaze v. Fulton Nat'l Bank of Atlanta*¹³ held that a general denial is insufficient as a defense against a suit on a promissory note, therefore such denial can be stricken on demurrer. GA. CODE ANN. section 109A-3-307 (1962 Rev.) carries forward this rule, providing in subsection (1) that signatures on notes are admitted unless specially denied in the pleadings, and in subsection (2) that production of the note entitles a holder to recover unless the defendant establishes a defense. The latter subsection was interpreted by the court in *Haygood v. Stevenson Co.*¹⁴ to mean that the defendant not only has the burden of establishing a defense in the first instance, but also by a preponderance of the total evidence.¹⁵

CHECKS

The case of *Lambeth v. Lewis*,¹⁶ arising under the Uniform Commercial Code, involved three rules concerning checks. First, the court cited GA. CODE ANN. section 109A-3-409 (1962 Rev.) in holding that a check does not operate as an assignment of the drawer's funds in drawee bank.¹⁷ Second, the court cited GA. CODE ANN. section 109A-4-405 (1962 Rev.) in holding that a check is an order upon a bank and is revoked by the death of the drawer.¹⁸ Third, the court held that the holder of the check was remitted to his rights on the underlying obligation.¹⁹

10. 114 Ga. App. 490, 151 S.E.2d 822 (1966).

11. The same principle would probably apply to a note, so that partial payment would not waive a defense of partial failure of consideration. See *Pearson v. Brown*, 105 Ga. 802, 31 S.E. 746 (1898).

12. 114 Ga. App. 778, 780, 781, 152 S.E.2d 825, 827 (1966).

13. 114 Ga. App. 291, 151 S.E.2d 478 (1966).

14. 114 Ga. App. 335, 151 S.E.2d 462 (1966).

15. In so holding the court expressly followed UNIFORM COMMERCIAL CODE §3-307, comment 2 (official ed. 1963).

16. 114 Ga. App. 191, 150 S.E.2d 462 (1966).

17. See prior law to the same effect, GA. CODE ANN. §14-1707 (1936).

18. In this section the UNIFORM COMMERCIAL CODE follows prior law, GA. CODE ANN. §13-2040 (1936), in providing that death revokes a check, and that a bank is authorized to pay a check until it has knowledge of the drawer's death. The new CODE goes beyond prior law in authorizing a bank with knowledge of death to pay checks within ten days after drawer's death. The new CODE also authorizes a bank to pay checks until it has actual knowledge of incompetence, thus rejecting decisions such as *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S.E. 182 (1897).

19. See GA. CODE ANN. §109A-3-802(1) (b) (1962 Rev.), not cited, to this effect.

USURY²⁰

In *Harrison v. Arrendale*²¹ a borrower voluntarily assumed an indebtedness owed the lender by a third person. Defendant-borrower relied on *Bishop v. Exchange Bank*²² which held that a transaction was usurious when a lender required, as a condition of a loan, that a borrower assume a third party's debt. In the *Harrison* case the court rejected the plea of usury, and distinguished the *Bishop* case on two grounds: first the borrower here voluntarily assumed the third party's debt, and second there was consideration for the assumption, namely the release of the third party. The *Harrison* case also reiterated the rule that an honest miscalculation can rebut usury.

MISCELLANEOUS

GA. CODE ANN. section 109A-3-117 (1962 Rev.), providing that either the principal or the agent may enforce an instrument payable to a person as agent of another named person, was cited and followed in *Bennett v. Cannon*.²³ *Duncan v. Georgia Money Corp.*²⁴ involved a verdict and judgment against two defendants who were joint makers of a note. The verdict and judgment was in one amount against one defendant, and in another amount against the other. Each defendant argued that the judgments in different amounts released him, on the theory that a release of one joint obligor releases the other. The court held that the holder of the notes never expressly or impliedly released either defendant, and that the judgment in different amounts, even against joint makers, did not constitute such a release. *Bayne v. Sun Fin. Co. No. 1*²⁵ held that a suit on a note under the Industrial Loan Act²⁶ must allege that lender was licensed at the time the obligation was incurred. Ga. Laws 1967, p. 562 amended the specific repealer section of the UNIFORM COMMERCIAL CODE, GA. CODE ANN. section 109A-10-103 (1962 Rev.), by specifically repealing certain sections of the Code of 1910 relating to negotiable instruments.

20. The UNIFORM COMMERCIAL CODE has not changed the prior law defining usury, nor the rights of a holder in due course as against a plea of usury. See GA. CODE ANN. §109A-3-305(2) (b) (1962 Rev.).

21. 113 Ga. App. 118, 147 S.E.2d 356 (1966).

22. 114 Ga. 962, 41 S.E. 43 (1902).

23. 114 Ga. App. 479, 151 S.E.2d 828 (1966).

24. 222 Ga. 643, 151 S.E.2d 769 (1966).

25. 114 Ga. App. 27, 150 S.E.2d 311 (1966).

26. GA. CODE ANN. §25-301 *et seq.* (1959 Rev.).