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CRIMINAL PROCEDURE Bonds and Recognizances: Amend Forfeiture Provisions

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CRIMINAL PROCEDURE

Bonds and Recognizances: Amend Forfeiture Provisions

CODE SECTIONS:	O.C.G.A. §§ 17-6-71 to -72 (amended)
BILL NUMBER:	HB 187
ACT NUMBER:	463
SUMMARY:	The Act amends the Code sections relating to time frames for the holding of execution hearings for forfeiture of bail bonds, should the principal not appear. Changes are also made in the circumstances under which forfeiture will not be entered.
EFFECTIVE DATE:	July 1, 1989

History

Provisions for bail bonding in Georgia date back to 1851.[1] Failure of the accused to appear for trial, or of the state to prosecute, or of a witness to appear and testify have historically resulted in forfeiture of a bail bond.[2] In each of these cases, the court clerk issued a writ of *scire facias* upon the bond, and service of process by personal service or publication upon the surety was allowed.[3] The surety of the bond was given until the next term of court to show just cause why the bond should not be forfeited.[4] If neither the surety nor the principal showed cause, judgment would be entered against the principal and the surety.[5]

By 1873, the statute provided for minimum notice of a hearing to the surety, by personal service, twenty days prior to the beginning of the

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1. Act of 1784, Cobb's Digest 862 (1851).
2. Code of Ga. § 4605 (1867).
3. Code of Ga. § 4606 (1867). A writ of *scire facias*, when issued, "requir[es] the party against whom it has been issued to show just cause why the party bringing it should not have advantage of such record.... Under current rules in most states, this writ has been abolished." BLACK'S LAW DICTIONARY 1208 (5th ed. 1979). *But see* State v. Slaughter, 246 Ga. 174, 176—77, 269 S.E.2d 446, 448—49 (1980) (upholding the writ procedure over the surety's claim that forfeiture of an appeal bond was a separate civil action to which the surety had a right to trial by jury. The court held that when a surety enters a bond, it impliedly agrees to the statutory forfeiture scheme).
4. Code of Ga. § 4606 (1867).
5. *Id.*

next term.[6] Service by publication was reserved for those out of the county in which bail had been set.[7] The surety could avoid liability if the defendant was delivered to the court up to the first day of the next term of court.[8] After that day, and after forfeiture had been formally entered, all costs would be assessed against the surety of the bond.[9]

The statutory forfeiture provisions have remained substantially the same, only the technical service of process requirements have changed.[10] One of the last changes in the statute did allow the surety two terms of the court prior to an entry of forfeiture.[11] The 1981 section allows the same twenty days before return notice to the surety provided in the 1873 version of the statute.[12] Additionally, the 1981 Code provides for certain situations in which a finding of forfeiture of the bond will be set aside.[13]

The 1988 amendment to this section added provisions to prevent forfeiture of a bond if the principal were shown to be in the custody of a sheriff or other law enforcement officer,[14] or if the accused were on active military duty.[15] If the surety produced the defendant within ninety days of a forfeiture judgment, ninety-five percent of the bond

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6. Code of Ga. § 4703 (1873). The "term" of the court is "the space of time prescribed by law during which a court holds session. The court's session may actually extend beyond the term." BLACK'S LAW DICTIONARY 1318 (5th ed. 1979).

7. Code of Ga. § 4703 (1873).

8. Code of Ga. § 935 (1896).

9. *Id.*

10. *Compare* Code of Ga. § 4605 (1867) *with* 1943 Ga. Laws 282 *and* 1953 Ga. Laws 452. *See* JAM Bonding Co. v. State, 182 Ga. App. 608, 356 S.E.2d 551 (1987) (holding that although the statutory notice procedures were regularly not followed by the clerk of the court, so long as the surety had actual notice of the date of the accused's arraignment, forfeiture for his failure to appear at trial was appropriate). *See also* Osborne Bonding Co. v. Harris, 183 Ga. App. 764, 360 S.E.2d 32 (1987) (holding that the surety is entitled to notice of arraignment only, not the date of trial. Further, the court held that should the surety appear, any requirement of notice is waived).

11. 1953 Ga. Laws 452. The procedures for forfeiture were challenged in State v. Slaughter, 246 Ga. 174, 176, 269 S.E.2d 446, 448 (1980) (court upheld summary procedure for entry of judgment against a surety if the principal fails to appear for a hearing or for final adjudication of the case).

12. *Compare* O.C.G.A. § 17-6-71 (1982) *with* Code of Ga. § 4703 (1873).

13. O.C.G.A. § 17-6-72 (1982). Forfeiture will not be found when the defendant is found to have suffered from a physical disability which prevented his appearance, or to have been incarcerated. O.C.G.A. § 17-6-72(a), (b) (1982).

14. 1985 Ga. Laws 982. *See* Sunrise Bonding Co. v. Busbee, 165 Ga. App. 83, 299 S.E.2d 153 (1983), where, although the surety and the State both had notice that the defendant was in jail in another county, the court upheld forfeiture of the bond. While recognizing that the statute provided for relief in the event of the defendant's incarceration, the court upheld the forfeiture because the surety did not rely on the statute, but simply asked that the judgment be set aside. *Id.* at 85, 299 S.E.2d at 155.

15. 1986 Ga. Laws 1588.

would be remitted.[16] If the principal were produced within two years of a forfeiture judgment, fifty percent of the bond amount would be remitted.[17]

HB 187

The Act strikes former section 17-6-71(a) and replaces it with an amended version.[18] The Act changes the time frames for the holding of an execution hearing from a minimum of sixty to seventy-five days and the former maximum ninety days to one hundred days after the principal's failure to appear in court.[19] The Act now mandates service of process upon the surety by certified mail, rather than first class mail.[20] The bill as introduced would have set time frames for the execution hearing between 90 and 120 days.[21]

The Act now provides that if the defendant is involuntarily confined pursuant to a court order, in a mental institution of this state or another jurisdiction, the bond shall not be forfeited.[22] The Act further reduces the time allowed for the court to place a detainer upon the defendant in custody from 180 to 30 days.[23] If the detainer is not placed within that time, the surety is relieved from liability.[24]

The Act shortens the time allowed the State for failure to prosecute from three years to two years with respect to felony charges, and from two years to one year for misdemeanors.[25] If the State does not prosecute within these times, the surety is not liable for the bond.[26] Similarly, the Act no longer allows a "reasonable time" for placement of a detainer[27] if the defendant is shown to be incarcerated in a penal

16. 1987 Ga. Laws 1342. A surety has the right to use as much force as would be legal if used by a police officer to "arrest" his principal. Bennett v. State, 169 Ga. App. 85, 86, 311 S.E.2d 513, 515 (1983).

17. *Id.*

18. O.C.G.A. § 17-6-71(a) (Supp. 1989).

19. *Id.*

20. *Id.*

21. HB 187, as introduced, 1989 Ga. Gen. Assem.

22. O.C.G.A. § 17-6-72(b) (Supp. 1989). *Voluntary* commitment of a criminal defendant to a mental institution would have served to prevent forfeiture of the bond under earlier versions of the bill. HB 187 (HCS), 1989 Ga. Gen. Assem.

23. O.C.G.A. § 17-6-72(b) (Supp. 1989).

24. *Id.* The House committee substitute to HB 187 limited the time period to 10 rather than 30 days. The original bill shortened this period to 72 hours. HB 187, as introduced, 1989 Ga. Gen. Assem.

25. O.C.G.A. § 17-6-72(c) (Supp. 1989).

26. *Id.*

27. "Detainer" is defined as "the act ... of withholding from a person lawfully entitled the possession of lands or goods ...." BLACK'S LAW DICTIONARY 404 (5th ed. 1979).

facility.[28] The new law allows a thirty day period before detainer must be entered.[29]

The Act continues to excuse a principal on active military duty who does not appear in court.[30] An earlier version of HB 187 would have removed this provision altogether.[31]

If the surety has paid the bond upon the principal's failure to appear, the surety now has ninety days, rather than sixty, to produce the principal and to apply for remission.[32] Additionally, if the surety applies for remission of the bond for this reason, notice to the prosecutor is no longer required.[33] The surety is, however, still responsible for all court costs of the hearing, as well as costs of transporting the principal to the court.[34]

The effect of the Act is to put bond sureties under a lesser risk of forfeiting their capital, especially where the failure of the principal to appear is beyond the surety's control. The Act relaxes time limitations on the bonding company to produce the defendant, and the amounts which can be recouped are increased when the principal is ultimately produced.

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28. O.C.G.A. § 17-6-72(d) (Supp. 1989).

29. *Id.* The House committee substitute would have allowed only 10 days for the detainer. HB 187 (HCS), 1989 Ga. Gen. Assem.

30. O.C.G.A. § 17-6-72(e) (Supp. 1989).

31. HB 187, as introduced, 1989 Ga. Gen. Assem.

32. O.C.G.A. § 17-6-72(f) (Supp. 1989). The original bill allowed 120 days for such application. HB 187, as introduced, 1989 Ga. Gen. Assem.

33. O.C.G.A. § 17-6-72(f)(2) (Supp. 1989). The previous section required that the surety notify the prosecutor 20 days prior to the hearing of the application for remission. 1987 Ga. Laws 1342.

34. O.C.G.A. § 17-6-72(f)(2) (Supp. 1989). The original version of the bill deleted this subsection. HB 187, as introduced, 1989 Ga. Gen. Assem.