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CRIMINAL PROCEDURE—SOME PROBLEMS IN THE ADMINISTRATION OF BAIL

[T]he bail system failed to accomplish either of its purposes, the assurance of the presence of the bailed accused at the trial or the release from custody of those whose presence could reasonably be depended upon.¹

The purpose of this note is to discuss some of the modern administrative aspects of bail as they relate to the validity of the preceding critical observation concerning the faults of the bail system. Special stress will be placed upon the practical application of the principles of bail to the problems which arise in its administration, and emphasis will also be placed upon suggested solutions to these problems. In approaching this subject matter, one must keep in mind the conflicting policies inherent in the subject: the desire of society to have the accused stand trial must be balanced against the desire that no untried accused be needlessly detained. Many times the practical availability of bail to an accused will depend upon which policy the court desires to place its stress. The scope and difficulty in properly conducting bail procedure is illustrated by the following comment:²

Grave abuses as to bail are reported from almost every part of the land. There is general complaint that admission to bail is a perfunctory routine, that the amount is fixed capriciously or with reference to arbitrary schedules with no real consideration of the circumstances of the particular case, that there is frequent carelessness as to security, that professional sureties flourish in connection with the criminal courts and are often permitted to assume an aggregate of liability which makes their bonds worthless, that forfeitures are not enforced or are feebly and occasionally enforced, and that on the whole there is no effective security for appearance in cases where such security is needed.

These problems of bail procedure can best be discussed, for the purposes of this note, through the following categorization: (1) The right to bail; (2) The proper amount of bail; and (3) Bail forfeiture. However, before examining these categories, it will be worthwhile to inquire into the historical background of the subject as an aid in the better understanding of the many facets involved in the proper administration of bail.

The delivery or bailment of an accused person into the hands of his friends while he is awaiting trial is a process which has its foundation deeply embedded in the traditions of English law. In fact, it has

¹ 1 NAT. COM. ON LAW OBS. AND ENF., REP. ON PROSECUTION 91 (1931).
² 2 NAT. COM. ON LAW OBS. AND ENF., REP. OF CRIM. PROS. 22 (1931).
been said that the concept of bail is as old as English law itself.3 The present notions of bail, however, were first codified in 1275 under the guidance of Edward I in the Statute of Westminster, which listed the types of offenses which were or were not bailable.4 Until this statute the sheriff had complete discretionary power in a poorly defined area such discretion, naturally, led to abuses and laxity in bail procedure. A summary of the policy behind such early bail administration is found in the following analysis of early English bail:5

If a man was arrested he was usually replevied ... that is to say, he was set free so soon as some sureties (plegii) undertook ... or became bound for his appearance in court. It was not common to keep men in prison. This apparent leniency of our law was not due to any love of an abstract liberty. Imprisonment was costly and troublesome. ... The sheriff did not want to keep prisoners; his inclination was to discharge himself of all responsibility by handling them over to their friends.

By 1689 the processes of bail had become so well established that the only reference made to it in the English Bill of Rights was that "excessive baile ought not to be required."6

The present English system of bail has changed little since the Seventeenth Century. The granting of bail in cases of felonies and misdemeanors is still a purely discretionary matter with the English judge because bail is neither granted nor denied as a matter of right —but in the exercise of a sound judicial discretion guided by established principles and precedents.7

The English concept of bail, with some modification,8 has been incorporated into the U.S. Constitution.9 The Federal Judiciary Act of 1789 guaranteed to all citizens the right to bail and this guarantee is now embodied in the Federal Rules of Criminal Procedure.10 Thirty-five states, by the means of constitutional provisions, and one state by statute, have altered the common law and provide that all persons shall be bailable by sufficient sureties except for capital offenses.

4 1 Stephen, supra note 3 at 234.
5 2 Pollock and Maitland, supra note 3 at 584.
6 Taswell-Langmead, English Constitutional History 505 (10th ed. 1946).
7 Orfield, Criminal Procedure From Arrest to Appeal 103, 104, 107 (1927); 41 Yale L.J. 293, 294 (1931).
8 There is some dispute as to whether or not the Eighth Amendment of the Federal Constitution allows bail as a matter of right. See, Orfield, supra note 7 at 111. But cf. Carlson v. Landon, 72 S. Ct. 525, 536 (1952); 27 St. John's L.R. 56, 59 (1952).
9 U.S. Const. Amend. VIII.
10 Fed. R. Crim. P. 46 (a) (1).
where the proof is evident or the presumption great.\textsuperscript{11} As the preceding indicates, there is now little confusion or doubt concerning the law of bail, so far as statement is concerned, but, as the remainder of this note will disclose, there is neither consistency nor certainty, even within a jurisdiction, in the \textit{administration} of this important element of criminal procedure.

\textbf{The Right to Bail}

The guarantee of bail \textit{as a matter of right} in non-capital offenses by the majority of jurisdictions\textsuperscript{12} in this country has been listed as one of the major causes for defective bail administration in criminal cases.\textsuperscript{13} In most cases there can be no doubt that it is undesirable that an accused person should be held in custody while awaiting trial. However, the concept of bail, as a matter of \textit{right}, has caused its administration to be so inflexible that bail often fails in one of its purposes, \textit{i.e.}, securing the presence of the accused at the time of trial. The absolute right to bail has resulted in hindering the courts in using their sound judicial discretion in denying bail in those cases where it seems likely from the individual's record that he will "jump bail". Further, is often dangerous to allow certain individuals free movement in society, as in the case of sex psychopaths. The notion of bail as a matter of \textit{right} has forced courts to free an accused on presentment of the proper security: where he had previously absconded while on bail and it was likely that he would abscond again;\textsuperscript{14} where the person was accused of an offense committed while on bail previously granted;\textsuperscript{15} and where the accused was a sex offender and was classified as a sex psychopath.\textsuperscript{16} The foregoing instances tend to indicate the consequences of a policy which makes bail a matter of right. Bail, under this concept, is given as readily to the hardened criminal with a long record of offenses as to the first offender with strong family and community ties.

The English practice of allowing a great amount of discretion in the admission of an accused to bail is gaining considerable support

\textsuperscript{11} \textsc{Orfield, supra} note 7 at 107. Only five states have retained the common law. Four states except only murder from the constitutional guarantee. Three states provide that bail is a matter of right only for misdemeanors.

\textsuperscript{12} \textit{Ibid.}

\textsuperscript{13} \textsc{Beeley, The Bail System in Chicago} 166 (1927); \textit{41 Yale L.J.} 293, 294 (1931).

\textsuperscript{14} Rowan v. Randolph, 268 Fed. 527 (1920); Kendrick v. State, 180 Ark. 1160, 24 S.W. 2d 859 (1930).

\textsuperscript{15} \textit{41 Yale L.J.} 293, 294, n. 8 (1931).

within this country. This trend is manifested by one authority who would suspend the bail privilege in cases where: (1) a hardened offender is charged with a felony; (2) the accused is mentally defective or (3) the convicted person is making an appeal. The American Law Institute's Code of Criminal Procedure advocates judicial discretion in granting bail if the indictment involved the commission of murder, treason, arson, robbery, burglary, rape, kidnapping or any other offense against the person likely to result in death and be called murder. It is evident that these authorities believe it necessary to the proper administration of bail that the court be allowed some discretion in permitting release on bail where a dangerous felony is involved or a danger to the public would be constituted by the accused's release. Such a position seems reasonable in light of the fact that such persons are often hardened felons and are likely to fail to appear at the time of trial.

The foregoing innovations in the law of American bail face two possible objections: (1) the constitutions of many jurisdictions guarantee the right to bail; and (2) placing such discretion in the hands of a court would make it possible for the court to be arbitrary and abusive of an accused's rights before trial. Naturally, the constitutional objection is a formidable one because constitutional amendments are always difficult to accomplish. Nevertheless, it is urged that such amendments should be a subject for future consideration if bail administration is to be made more efficient. The contention that such discretion in granting bail would place an arbitrary power in the hands of the court is weakened by the fact that the preceding authorities urge only partial discretion guided by certain standards. This is, in reality, a much more conservative view than the English practice of complete discretion in allowing bail. This compromise approach embodies many of the advantages of the English system while, at the same time, it avoids the valid objections that such discretion could be abused.

As just stated, discretion in granting bail is greatly limited by constitutional provisions for those cases less than capital, but judicial option in the admission of an accused to bail is still of consequence in those instances involving capital offenses. The usual constitutional rule is that bail shall be allowed, even in capital offenses, except where

17 Beeley, Bail System in Chicago 165 (1927); A.L.I. sec. 70 (1930); 41 Yale L.J. 293 (1931).
18 Beeley, Bail System in Chicago 166 (1922).
20 Supra note 7.
21 Supra notes 18 and 19.
the proof is evident or the presumption is great. The administration of this rule of law, however, is subject to a wide range of judicial interpretation by those who determine whether bail is to be allowed in particular cases. Two distinct views in applying this constitutional test as to the burden of proof for the allowance of bail in capital cases are evident from an analysis of cases in several jurisdictions. These views, all essentially dealing with the burden of proof of guilt for the purposes of determining if bail is possible, are: (1) The court may place the burden on the applicant for bail to show that the proof of criminal responsibility is not evident nor the presumption great; (2) The court may place the burden on the prosecution to show that the proof is evident or the presumption is great.

The jurisdictions differ as to the weight to be given to the indictment in weighing the evidence of guilt in order to determine if the admission to bail is proper. One view would allow the indictment to be conclusive proof that guilt is evident; a second view would create a rebuttable presumption of guilt from the mere existence of the indictment. Still another approach, which is the rule in Kentucky, would give no weight to the indictment in determining evidence of guilt for the purpose of granting bail. The divergence of the preceding rules of interpretation concerning the admission to bail in capital offenses tends to show the true scope of judicial discretion in this area of bail administration. It can be seen that the courts are free to adopt the policy which they believe will most likely serve the purpose of bail procedure in their jurisdiction.

**Amount of Bail**

The universally recognized purpose of requiring bail after arrest is to secure the presence of the accused whenever it shall be lawfully required, without his continued incarceration. It is obvious that if this purpose is to be effectuated, it must be accomplished through the proper determination by the court of a reasonable amount of bail under the circumstances. The only absolute guide which is used to
determine whether a reasonable bail sum has been set by the court is the constitutional test that the bail must not be excessive. The accepted standard for excessiveness is that bail may be no greater in amount than is needed to secure the presence of the defendant at the trial, giving consideration to the gravity of the offense.

The foregoing discussion of the standard used to fix bail indicates that the trial court has a wide discretion in setting the amount of bail in each case. This discretion in determining the amount of bail is a factor which a court can use to counteract the undesirable results in administering bail caused by the lack of judicial discretion in refusing bail in certain instances. In fact, many authorities believe that effective administration of bail must depend upon the wise exercise of judicial discretion in fixing the amount of bail. Unfortunately, bail is often administered in routine fashion with no particular regard to the circumstances of the case; nor is careful thought given to what a reasonable and proper amount of bail would be. The bail system derives most of its flexibility from the wide discretion which is allowed in fixing bail; but, if the judge fails to take advantage of this allowable flexibility the administration of bail is thereby greatly weakened. Effective exercise of this important discretion in determining the amount of bail presupposes the consideration and evaluation of several elements which are inherent in each application for bail, i.e., the nature of the offense, the penalty involved upon conviction, the pecuniary and social position of the accused, the general reputation and character of the defendant, the applicant's previous criminal record and the weight of the evidence held by the prosecution. Each of these factors, if carefully evaluated, is an indicium of the probability that the accused may or may not abscond. A study of these factors, by the court, will give it the insight necessary to fix bail in a reasonable amount which can be met by those not likely to "jump bond" but which can not be met by those with a "tendency" to leave the jurisdiction.

In glibly advocating the above standard as criteria for fixing bail

29 U.S. Const. Amend. VIII; Ky. Const. Sec. 17.
31 Ex parte Malley, 50 Nev. 248, 256 P. 512 (1927); Ex parte Spoon., 18 Okla. Cr. 708, 192 P. 698 (1920); 41 Yale L.J. 293, 296 (1931).
32 Beeley, Bail System in Chicago 155 (1927); 41 Yale L.J. 293 (1931).
33 Supra note 7; 41 Yale L.J. 293, 294 (1931).
34 People v. Searles, 229 App. Div. 603, 243 N.Y.S. 15 (1930); Beeley, Bail System in Chicago 155 (1927); Fed. R. Crim. P. 46(c); 27 St. John's L.R. 56, 64 (1952); 41 Yale 293, 297 (1931). One element the court may not use in setting the amount is the fact that the accused has used the Fifth Amendment. Noto v. U.S., 76 S. Ct. 255 (1955).
amounts, the writer realizes the difficulties in administering such tests and the time which would be involved in the effective investigation of each element. As has been suggested:

... in more pioneer and rural days, the court or court’s advisors were sufficiently acquainted with the few persons brought into court to know, with a fair degree of accuracy, whether they would be dependable or whether they need be detained or put on bail... this personal knowledge is no longer possible.\[36\]

Because these rural conditions no longer exist, special administrative machinery is needed for the sole purpose of determining an accused's background for the object of fixing an amount of bail.\[38\] Unfortunately, no such machinery is readily available for the use of present courts, hence they are not able to use the preceding criteria for setting the amount of bail with maximum effect. Until such administrative machinery can be established, the courts can greatly increase the efficiency of bail administration by adhering as closely to these standards as the present composition of courts will allow.\[37\]

**Forfeiture**

The basic concept of bail is founded upon the proposition that one of the greatest deterrents to “jumping bail” is the knowledge that the security pledged to insure the accused’s appearance will be forfeited upon such action.\[38\] Yet, in many jurisdictions the processes of forfeiture of bail are no longer effective means in assuring the court that the accused will be present at the appointed time.\[39\] Several factors can be listed in this apparent breakdown in the administration of bail forfeiture.

*First.* A factor which bears a direct relation to the number of absconders is the carelessness of the courts in the type and value of security allowed for bail.\[40\] The usual types of security are: deposits of cash; pledges of specified property; mere promises of financially responsible sureties that a sum will be paid in case of the accused’s non-appearance; and personal recognizances by the accused.\[41\] Clearly, the more valuable and secure bond will be the one less likely to be

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35 Supra note 1.
36 Id. at 92.
37 It would be of no value to the purpose of this paper to discuss bail in terms of specific amounts. For a list of cases involving instances of sum certain, See 8 C.J.S. 109, n. 69.
38 Supra note 7 at 120.
39 Willoughby, PRINCIPLES OF JUDICIAL ADMINISTRATION 561, 562 (1929); 15 A.B.A.J. 71, 73 (1929); 102 Penn. L.R. 1031, 1067 (1954).
41 Supra note 7 at 118.
forfeited, and an actual deposit of cash would perfectly fit this standard but the possibility of raising cash may be so limited that a reliable accused could not, under this standard, obtain bail. Perhaps the most desirable of the securities is a pledge of specified property since such a pledge would more readily allow an accused his freedom while still furnishing an incentive to appear at his trial.

Second. The next factor which causes difficulty in the administration of bail is the court's carelessness in determining the adequacy of the property which is offered as security for the admission of an accused to bail. Of often the surety, a professional bondsman, is allowed to assume an aggregate of liability far beyond the value of the pledged property which could well render the bail bond worthless. One instance of worthless security is cited where a bondsman was accepted for $100,000 worth of bonds when his security was a one-half interest in property valued a $25,000 but covered by a $11,500 mortgage. It is evident that where the security is extremely inadequate (as above), the bondsman will feel little fear of ultimate forfeiture and will give no aid to the court in its effort to find the accused. Such laxity on the part of the court in scrutinizing the financial ability of the surety can only achieve the ultimate defeat of the purpose of bail administration.

Third. One of the most important factors in the high rate of bail forfeiture is due to the existence of the professional bondsman. Historically a bailed person was placed in the hands of his friends or relatives. There was little likelihood that an accused would abscond when such persons were the sureties and would suffer loss if he failed to appear at the proper time. However, there is no such reason for the defendant to properly appear when professional bondsman is acting as surety. The accused has little reason to care about the possible loss of the professional surety, especially since the bail fee was probably exorbitant in the opinion of the accused. Hence, it is seen that the use of the professional surety gives the accused no real incentive to return for trial.

Fourth. The most important element in the defective administration of forfeited bail is the carelessness shown by the courts in the

\[42 \text{Id. at 119; Warner and Cabot, Judges and Law Reforms 27 (1936); 15 A.B.A.J. 71, 73 (1929).}
\[43 \text{102 Penn. L.R. 1031, 1063 (1954).}
\[44 \text{11 J. Crim. Law and Criminology 86 (1920).}
\[45 \text{2 Pollock and Maitland, History of English Law 584 (2d ed. 1905).}
\[46 \text{This is still the practice in England.}
\[47 \text{For a discussion of the bondsman, see, 102 Penn. L.R. 1031, 1046, 1063 (1954).}
enforcement of forfeited bonds. Many courts are extremely lax in the prosecution of forfeited bonds with the natural result that the individual surety makes no effort to aid the court in securing the presence of the accused. Several instances of this gross neglect in collection procedure are evidenced by the practice of courts in widely spread jurisdictions. A survey made in one Georgia county for a period of one year related the fact that only $5,929 was ultimately collected out of a total of $101,750 of forfeited bail bonds. In the city of Atlanta, for the same period, only $15,462 was actually obtained from a sum of $100,100 of forfeited bonds. Even worse examples can be found in other parts of the nation. Chicago for instance, had a $5,000 collection from a total of $1,000,000 bail bonds, and a Cleveland survey indicated that only 2% of the forfeited bonds were collected in that city. In 1950 only 20% of forfeitures were collected in Philadelphia—a higher rate of collection than the previous examples, but clearly inadequate to serve the purposes of the bail system. These statistics indicate that courts, in the past and present, have completely failed in their duty to make effective the collection of bail. There is some indication that a few courts are awakening to their responsibility in collection matters, but it is believed that until many more courts assume their duty in enforcing bail forfeiture, the administration of bail can never be effective.

Conclusion

The foregoing analysis of bail administration and its defects indicates the difficulties which face a conscientious court in properly administering bail. An effective bail system which accomplishes its purposes, i.e., the release of an untried accused with the assurance that he will be present at the trial, is not likely to exist until many of the defects in bail administration are corrected. Many administrative deficiencies regarding bail can be corrected by the following suggested reforms:

1. "Bail jumping" should be made a separate crime.

47 Supra note 7 at 119; WARNER AND CABOT, JUDGES AND LAW REFORM 27 (1938).
48 16 J. CRIM. L. AND CRIMINOLOGY, Table 42 (1925-26).
49 Ibid.
50 WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION, 561, 562 (1929).
51 Ibid.
52 102 PENN. L.R. 1031, 1061 (1954).
53 Ibid. Detroit had a record collection of 100% of forfeited bonds.
54 MINN. STAT. ANN. sec. 613.36 (1947); N.Y. PENAL CODE sec. 1694 (a) (1943).
(2) The judge should be made criminally liable in cases of gross negligence in determining the adequacy of security.\(^5\)

(3) Since it is evident that the security for bail is often extremely inadequate, an initial, separate deposit, which would be available if the security failed to satisfy all claims against it, should be required of the professional bondsman when he applies for a license.\(^5\)

(4) All forfeited bonds should be carefully collected.\(^7\)

(5) A lien should be placed on the property which is pledged for security.\(^5\)

(6) Amounts of bail should be less when given by a friend or relative than if offered by a professional bondsman.

These suggested reforms are not intended to be all-inclusive but adoption of them would greatly aid the proper administration of bail. Until such reforms as these are adopted, the bail system as a process of the criminal courts will continue to be inadequate.

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DOMESTIC RELATIONS—LEGITIMACY SAVING STATUTES—CHILDREN OF COMMON LAW MARRIAGES

The question arises whether the children of an attempted common law marriage,\(^1\) which is void in Kentucky, have been made legitimate by the statutes. This question, uncomplicated by other issues, has never been decided in Kentucky since the abolition of common law marriages in 1852.\(^2\)

Three statutes are applicable. First, Section 391.100 of the Kentucky Revised Statutes seemingly legitimates the issue of common law marriages, together with most other void marriages, by the following language:

\(^{55}\) Supra note 7 at 119; A.L.I. Code of Crim. P. sec. 112 (1930). This would also be analogous to the liability of the common law. See, 2 Pollock and Maitland, History of English Law 584 (2d Ed. 1905).

\(^{56}\) 102 Penn. L.R. 1031, 1063 (1954).

\(^{57}\) See U.S. v. Field, 190 F. 2d 554 (1951), where the court jailed a surety for refusing to give aid to the court in obtaining custody of an accused who had absconded.

\(^{58}\) Supra note 56.

\(^1\) As used in this note, a common law marriage is defined as a marriage based upon mutual consent of the parties to become husband and wife, \textit{per verba de presente}, then and there, without any formal ceremony. An attempted common law marriage refers to a factual situation which would raise a valid common law marriage in a state recognizing common law marriage.

\(^2\) Ky. Acts 1850, c. 617, p. 212, secs. 2 and 8, effective July 1, 1852.