Bail and Personal Liberty

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We have laws enough, it is the execution of them that is our life.—Coke

I. Introductory

It was Professor Jenks who made the often-quoted remark that the "writ of habeas corpus was originally intended not to get people out of prison, but to put them in it". Although the same cannot be said of bail, bail is like habeas corpus in that it was not, originally, inspired by any "love of an abstract liberty". It is remarkable that these two institutions, begotten of such origins, should have developed an alliance in which habeas corpus was used to supplement bail for the protection of personal liberty.

In serving simultaneously the end of personal liberty and the ends of justice the institution of bail attempts to achieve a synthesis of two almost conflicting principles: (1) detention guarantees appearance, and (2) liberty is the right of one whose guilt has not yet been proven. Nevertheless, there are some considerations which tend to give the thesis of personal liberty a dominant part in the synthesis achieved. The presumption of innocence, for example, if applied rigorously, would lead to bailing almost every accused. The development of society is accompanied by the development of judicial hierarchies and the appearance of stricter and more refined rules of procedure and evidence. Duration of detention and of trial, and consequently bail, acquire greater importance. Considerable time may elapse before the accused is brought to trial or before a final judgment is delivered by the highest court with jurisdiction. The delay occasioned, for example, by the infrequent visits of itinerant justices was an important factor in establishing bail.

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1 (1902), 18 L.Q. Rev. 65; Select Essays in Anglo-American Legal History, Vol II (1908) p. 552.


It would seem that bail might find its way into a legal system without the necessary presence of any doctrine of personal liberty. This view is further supported by the existing evidence as to the origin of bail in English law. When bail acquired its distinctive rôle in criminal procedure about the 12th century,\(^4\) prisons were not numerous and, where they existed, they were places “made to be broken”.\(^5\) Escapes were frequent,\(^6\) and sheriffs were heavily fined when they occurred.\(^7\) It was not unnatural for the sheriff to try to relieve himself of the responsibility for producing the prisoner by entrusting him to his friends.\(^8\)

The sheriff, who had the powers of arrest and bail, found another advantage in releasing prisoners on bail. The absence of any effective control, except from the Exchequer, allowed the sheriff a latitude which made abuses almost inevitable.\(^9\) Release on bail proved to be a very lucrative business for the sheriff.\(^10\) To his interest to avoid the penalties for escapes was thus added his interest in the perquisites following release on bail.

These, by themselves, would make release on bail quite common. The existence of a fluid society encouraged the appearance of other tendencies. A statute of 1299 condemned corrupt methods of procuring bail, such as the use of “threats and friends jurors of the country”, and imposed penalties.\(^11\)

It is thus clear that, for a variety of reasons, bail was available to any accused prepared to meet the sheriff’s demands or to use less orthodox methods. Such practices raise two fundamental issues, upon which the efficacy of bail to safeguard personal liberty may ultimately depend. The first issue is the extent of bail, that is, the availability of bail. The second is the kind of power that should be entrusted to the bailing authority. In other words, should the power be discretionary or obligatory? A corollary of the second issue is this: if discretion is allowed, what are the considerations that should guide its exercise? It is proposed to deal with these issues in order.

**II. Availability**

It is possible for a legal system to eliminate bail completely if it is prepared to try every accused directly after his arrest, or to

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\(^4\) De Haas, Antiquities of Bail (1940) p. 39.
\(^6\) Loc. cit.
\(^7\) Morris, The Mediaeval Sheriff to 1300 (1927) p. 88.
\(^8\) Pollock and Maitland, *op. cit.*, p. 584.
\(^9\) Morris, *op. cit.*, chap. 4, for a general discussion.
\(^11\) 27 Ed. 1, stat. 1, c. 8.
supply adequate accommodation for the many accused, regardless of the gravity of the offence or the probability of their guilt. A less efficient and less ambitious system would accept the necessity of bail, and may adopt one of three criteria to decide whether to bail or not. Reference may be made to: (1) the nature of the offence; (2) the probability of guilt; or (3) the authority that ordered detention. These three points fall now for consideration, with special reference to the development of the law in England.

In common law countries bail, like other legal doctrines, develops in such a haphazard manner that even the attempt to discover guiding principles must be made with great caution. Statutes may act like buoys and, in the English law of bail, the Statute of Westminster I (1275), chapter 15, is such a buoy. A close reading of the Statute reveals the existence of the rudiments of two schools of thought on bail among the framers of the Statute. Some offences must have been thought so heinous that a person accused of them should not be released on bail at all. The Statute specifically declared that imprisonment for the death of a man, for breach of the laws of the forest, arson or treason, were to be irreplevisable. On the other hand, all misdemeanours were made replevisable. Under these provisions the nature of the offence was made the deciding factor. The sheriff was deprived of all discretion except in deciding the sufficiency of the bail.

A similar attitude prevailed for some time in the interpretation of section 3 of the Habeas Corpus Act, 1679. It was thought that the section made all misdemeanours bailable on mere application for a writ of habeas corpus. Indeed, the wording of the section, the circumstances which gave birth to the Act and the fact that the Act was one in a series of statutes limiting the authority of the king and the discretion of his judges lend great support to that view. It was so interpreted in Australia and Ireland, and was not definitely rejected in England until 1922.14

15 R. v. Fraser (1892), 13 L.R. (N.S.W.) 150.
14 R. v. Phillips (1922), 86 J.P. 188; 128 L.T. 118; also Re Frost (1888), 4 T.L.R. 757. In R. v. Phillips, Lord Hewart C.J. at p. 189 referred to the Act of 1848 (11 & 12 Vict., c. 42, s. 23) which gave justices of the peace discretionary power to bail, and said he would be very reluctant to accept the view that justices had that discretionary power while the King's Bench Division had not, and he decided that the Habeas Corpus Act, 1679, s. 3, did not deprive the superior courts of their discretion. With respect, the reference cannot be sustained. The Habeas Corpus Act was passed in 1679 at a time when the magistrate's power of bail was still governed by the Statute of Westminster I. In misdemeanours he had no discretion except over sufficiency. The Act of 1848 amended the law in this respect, but no similar amendment was introduced to the Habeas Corpus Act, 1679, and the anomaly remained.
These provisions show that it is quite possible to divide crimes into bailable and non-bailable simply by declaring them to be so. In that case personal liberty becomes primarily the concern of the legislature. It can extend or narrow it by extending or narrowing the field in which bail is allowed. To guard personal liberty, the judges can do no more than offer a favourable interpretation of the law.

This intriguing simplicity becomes more complicated when it is sought to draw the line between the bailable and non-bailable offences. Where is the line to be drawn, and what is the guiding principle? Should it be the gravity of the offence, its anti-social tendencies, the character of the accused, to name only a few of the possible criteria? Is any one of these terms capable of precise definition so as to enable the formulation of a classification? Is it not true to say that rigid classification, unless it is so meticulously detailed that it becomes more of a burden than a help, of necessity involves a predetermination which cannot take into account all the variety and diversity of the degrees of each particular crime?

One further objection to a system of rigid classification is its misplaced equality of treatment. If the law declares that a person accused of the commission of any particular crime, larceny, for example, shall not be bailed, clearly the law accords equality to all sorts of accusations, or, at least, to all sorts of \textit{prima facie} cases. A weak \textit{prima facie} case is considered as strong as the strongest. The same argument could be submitted against a provision which would declare, categorically, any offence to be always bailable.

It seems clear that a system of rigid classification cannot be accepted as suitable for general application. Indeed, the second school of thought among the framers of the Statute of Westminster I adopted a more suitable criterion, namely, the probability of guilt. The Statute, for instance, declared that imprisonments on mere suspicion were bailable, presumably without any regard to the nature of the offence suspected. On the other hand, where a man's acts clearly spoke for his guilt, for example if he is caught with the thing stolen, bail was denied him.

Both theories found their way into the Statute, and it was not until 1826 that the theory of the probability of guilt began to hold the field on its own. Between 1275 and 1826 bail was the subject of many statutes which were mainly concerned with the \textit{enforcement} of the law as it then existed.\footnote{See \textit{infra} p. 382.} The main complaint against the substantive law of bail, as expressed in the Commons,\footnote{Parliamentary Debates, Vol. 15 (new series), p. 286.} was
that on charges of felonies the magistrate could not bail the accused; he must either commit or discharge, while he must bail in all misdemeanours. By the nineteenth century felonies and misdemeanours were shedding many of their distinctive features, and the number of capital felonies had been steadily reduced. Justices of the peace had already, in 1554 and 1555, acquired the power to hold preliminary examinations and, although they acted at times "the part of an exceedingly zealous and by no means scrupulous detective armed with the authority of a magistrate", that power and the experience gained from it must have acquainted them more fully with the ways of crime and with the necessity of a more flexible criterion in bail.

The Criminal Justice Act, 1826, enacted that in felonies or suspicions of felonies, if the evidence raised a strong presumption of guilt, the accused should be committed; if the evidence did not raise a strong presumption of guilt or innocence, bail was grantable by two or more justices; in other cases he should be discharged. By section 3 the same rules applied to misdemeanours, except that one justice was empowered to remand on bail. The Indictable Offences Act, 1848, repealed the Act of 1826 and gave a single justice the power to bail, at his discretion, in felonies and misdemeanours, except in certain specified misdemeanours where he had no discretion, and in cases of treason where he might not bail at all.

Thus the doctrine of the probability of guilt was finally and definitely accepted and the discretion of the magistrate was enthroned. Whether this is more favourable to personal liberty than a more rigid system depends upon the way the discretion is exercised — a question that will fall for later consideration.

So far we have considered two alternative criteria for deciding the availability of bail. The third criterion suggested at the beginning of this study was to refer to the authority which ordered the detention. The Statute of Westminster I (1275), chapter 15, seems to have recognized such a reference, for it declared that replevy was not available to those imprisoned by special command of the king or any of the judges of the superior courts. The courts have added to this group detention, in certain circum-

17 1 & 2 Phil. & Mary, c. 13.
18 2 & 3 Phil. & Mary, c. 10.
20 7 Geo. IV, c. 64.
21 11 & 12 Vict., c. 42, s. 23.
22 For a neat summary of the legislation on bail see Stephen, op. cit., p. 239.
23 "Replevy or plevy is applied to the sheriff to take pledges, and bail to the highest courts of record", 2 Inst. 186. See, generally, 2 Hale P.C., Chap. xv.
stances, by order of either House of Parliament. In all these cases the order, if properly made, has been thought to be a sufficient answer to a demand for bail.

The propriety of an order, however, requires both formal and substantial validity. Formal validity, which means an outward appearance of validity, is comparatively easy to detect, for it appears on the face of the order. The substantial validity requires going behind the order itself, and it is here that we discern the risk involved in allowing a mere order to prevent bail.

In the case of judicial orders the substantial validity of the order can normally be challenged on appeal and, when a superior court refuses to bail a person detained by order of an inferior court, it does so on being satisfied that the inferior court has acted regularly. Even that would not prevent the court from bailing the prisoner if it thought fit to do so. The danger, however, is that the presumption of regularity might cover the abuse of authority and abuses were not lacking in the law of bail. The Statute of Westminster I itself declared that the sheriff in his practice of bail was moved by "avarice or malice", to use Coke's words, and before the Statute was passed an investigation by a hundred jurors uncovered a great deal of abuse, which persisted even after the strictures and limitations imposed by the Statute. However, judicial independence is a guarantee against the recurrence of abuse.

The provision in the Statute of Westminster I that imprisonments by order of the superior courts were irreplevisable was, undoubtedly, a sound one. No sheriff or any inferior court may be allowed to upset an order of a superior court.

The acceptance of the order of an inferior or superior court as justification for refusing to allow bail rests, firstly, on the supervisory power in the hands of the superior courts and, ultimately, on the independence of the judiciary. The Crown sought at one time to put imprisonment by its order beyond the effective control of the courts. It maintained, in conformity with the Statute of Westminster I, that any person imprisoned by special command of the king was irreplevisable. Nevertheless, many statutes were passed during the reign of Edward III constraining the royal authority to arrest. These opposing claims of the Crown and the legislature raise a somewhat bewildering question: Why was it that no legislative attempts were made to remove the alleged immunity enjoyed by royal imprisonments, and why was it that

24 2 Inst. 186.
25 De Haas, Antiquities of Bail (1940) pp. 87-94.
26 See infra, part III.
statutes on bail were completely silent on a matter of such importance to personal liberty?

The traditional view attempts to show that the clear provisions of the Statute did not really mean what they said. Coke categorically states that commandment of the king meant commandment of the King's Bench, and commandment of his justices meant that of the justices of the Common Pleas. Hale, more guardedly, explains that that provision "is not intended of the personal command of the king, for regularly as the king cannot in person arrest or imprison, so he cannot command another to imprison"; it is intended therefore "of the process of law issuing of the king's courts". Hale follows Coke in thinking that the justices referred to in the Statute were the justices of the Common Pleas. He does not explain why the Common Pleas should have been singled out for special reference. This explanation, with respect, is gravely artificial.

What, then, is the answer? Why was it that no legislative measures were taken to remove the alleged immunity of crown imprisonments from the law of bail? It might be submitted that since Parliament had passed Acts declaring that imprisonment can only be by due process of law, it might have thought it redundant to provide for bail where the king had ordered imprisonment. The prisoner should be discharged if the imprisonment is arbitrary and, should due process be alleged, the imprisonment was again invalid because by law the king could not order imprisonment. It might be submitted, further, that the Statute of Westminster I did not affect the power of higher courts to bail in all cases. The writ of habeas corpus was free from all the shackles that limited other bail writs. It could issue to bail from any imprisonment. This argument was in fact presented to the Court of King's Bench and the House of Lords in the famous Darnel's case, which will be considered presently.

These are possible theoretical explanations. The real reason, however, seems to be that those imprisoned by special command preferred to obtain their release by other than judicial means, or, when there was a resort to the courts, kings normally consented to releases on bail. The issue was thus shelved until Charles I refused to consent to the bail of the famous Five Knights.

Charles I was a devout believer in the divine right of kings

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27 Inst. 186.
28 2 Hale P.C. 131.
29 See 2 Hale P.C., Chap. xv.
30 See cases cited in (1627), 3 St. T. 98-126.
and he did not lack exponents of that theory. Hooker had already given it currency, and Bodin had expounded his all-embracing theory of sovereignty. Former kings provided Charles I with precedents to follow in his exactions, but with one important difference: in his attempts to secure “loans” and “benevolences” he paid less regard to the Commons than his predecessors whose “forced loans never became effectual except through the direct or indirect sanction of Parliament. It was an intentionally tolerated abuse, the motive for which was the avoidance of a grant of subsidy.”

In the eyes of many, forced loans were not only contrary to law but also a betrayal of the object for which people consented to form a civil government. That object, as later fully expounded by Locke, was the protection of property, and the same people who, in the words of Hallam, “would have seen an innocent man led to prison or the scaffold with little attention, twice broke out into dangerous rebellion” when subsidies were granted. The constitutional struggle which culminated in the Petition of Right, 1628, owed its origin to the determination of five knights to protect their property against illegal encroachment.

It is interesting to note that the whole issue was fought and won not on the legality of loans or any other interference with rights of property but on the narrow technical doctrine of bail. For the first time bail entered the constitutional arena to occupy the minds of king and council, judges, lords and commons, and its entry was a recognition of its importance in securing personal liberty against tyrannical authority.

Out of the many gentlemen who were sent to prison for refusing to pay specified loans only five brought their writs of habeas corpus. The returns made to the five writs were similar: they recited the special command as the authority for detaining the prisoners. It was objected that the returns were insufficient in that they did not disclose any specific cause for detention, and that the prisoners should be discharged. Alternatively, it was argued, and this was the main contention, that the prisoners should be

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31 In the conference held between Lords and Commons in 1627 concerning the Petition of Right, Ashley, on behalf of the King, argued in these terms: “Divine Truth informs us, that the kings have their power from God, the Psalmist calling them ‘the children of the Most High’; which is in a more special manner understood than of other men: for all the sons of Adam are by election the Sons of God, and all the sons of Abraham by recreation, or regeneration, the children of the Most High, in respect of the power which is committed unto them” (1627), 3 St. T. 150.
34 Darnel’s case (1627), 3 St. T. 1.
bailed, and the Court of King's Bench could bail, even though the imprisonment was by special command. The court's power to bail, it was argued, was not affected by the Statute of Westminster I. If the prisoners were not bailed they would be imprisoned without any specific charge and without the hope of being released by any judicial process. The court, however, remanded the prisoners. Contrary to what some eminent authorities believe, the court did not intend the remand to be a final disposal of the case. The judges explained to the Commons that they remanded the prisoners to enable the court to make a further consideration of that difficult problem. They did not uphold the Crown's contention.

The House of Commons were greatly incensed at the remand of the Five Knights. A committee was appointed to draft a petition of right and Littleton and Selden, who were counsel for the Five Knights and members of the House, and Coke, now an old man of eighty-one, were appointed to present the petition to the Lords. They argued, in their allotted tasks, that the king could not commit but by due process of law and that the commitment was bailable. The constitutional struggle ended with the Petition of Right, which required, in imprisonments by special command, the return of the cause of detention to enable the court to decide whether to discharge the prisoner, bail or remand him in custody.

It was clear in the proceedings in Parliament that the king was opposed to the Petition, although, in the end, he assented to it, and when it came for judicial consideration it proved helpless to guarantee bail on discharge. In 1629 the great Selden and others were committed by special commandment of the king. Writs of habeas corpus issued on their behalf, and the command was returned. On behalf of the Crown, it was argued, inter alia, that since a return to habeas corpus could not be traversed, and since the Petition of Right merely required a cause to be returned, any cause would be sufficient. When the court was ready to deliver its judgment the prisoners were not produced on instruction from the King. His Majesty held conferences with the judges and, ultimately, agreed to the bail of the prisoners provided they gave sureties for good behaviour — a condition which the prisoners indignantly refused. They were sent to the Tower, and the Petition of Right failed to protect one of its great architects, Selden.

36 (1627), 3 St. T. 161-166.
37 Selden's case (1629), 3 St. T. 235.
38 The Habeas Corpus Act, 1816, s. 3, allowed traversing the return.
This failure illustrates once more the ineffectiveness of laws against the combined indifference of the judiciary and the executive. Parliament could not maintain the authority of its laws for it was dissolved just after the arrests were made. In 1640 the Long Parliament held its first session and passed laws compensating the victims and driving further nails in the coffin of tyranny. The Habeas Corpus Act, 1640, provided that "if any person is committed by the king himself in person, or by his privy council or by any members thereof, he shall have granted unto him, without any delay, upon any pretence whatsoever, a writ of habeas corpus, upon demand or motion made, by the court of King's Bench or Common Pleas, which shall thereby, within three days after the return is made, examine and determine the legality of such commitment, and do what to justice shall pertain in delivering, bailing, or remanding such prisoner". The gaoler should certify in the return the true cause (not merely the fact or any cause) of the committal. The Habeas Corpus Act, 1679, strengthened and elaborated these and other provisions in the law of habeas corpus.

The result of this constitutional struggle, so far as it is relevant to the law of bail, was to establish the right of the courts to bail any person detained by special command if they saw fit to do so. Indeed, the principle applies to all detentions in the exercise of the royal prerogative.

Bail then was made available though the detention was by royal command. Unfortunately, a similar rule was not established in connection with detention by order of either House of Parliament. After some doubts, the Sheriff of Middlesex' case decided that where a person is detained by order of either House and a writ of habeas corpus issues in his favour, if the return to the writ is couched in general terms, merely showing that the applicant was detained by order of the House, the court cannot interfere. If, however, the return alleges the breach of a specific privilege and states the facts constituting the breach, the court will proceed to decide, firstly, whether the alleged privilege in fact exists and, secondly, whether the alleged facts constitute a breach of that privilege.

In the first of these two rules the court accepts the order of detention at its face value and, since it cannot discharge the applicant, a fortiori it cannot release him on bail. Bail was refused in the two famous cases, Shaftsbury's case and Danby's case. It

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39 The Triennial Act was passed in this session "for the prevention of inconveniences happening by the long intermission of Parliament".

40 (1840), 11 A. & E. 273.

41 (1677), 1 Mod. 144.

42 (1682), Skinner 56.
is arguable, however, concerning the second rule, that while the court is debating the existence of the alleged privilege and its breach the applicant should be released on bail, in the same way that any person detained on a charge of crime may be bailed pending a final decision whether the crime alleged exists in law and whether the facts alleged make out a *prima facie* case. The law as established by the two cases just cited is against this submission.

The attitude of the courts towards parliamentary privilege is a thorny problem which is still in need of reconsideration. At this point we are only concerned with making one or two remarks. The effect of what the courts have held in habeas corpus cases on detention by order of either House is that, if the return is general the committing House must be considered competent to decide the extent of its privilege as well as what amounts to a breach of that privilege. On the other hand, if the return is specific the House ordering detention must be considered incompetent to decide those two questions, for how else would the court investigate whether the alleged privilege existed in law and whether the acts complained of were a breach of that privilege? In adopting this attitude the courts think that they are championing personal liberty to the extent possible. The protection, however, depends more on chance than design, for the warrant of detention may consistently refrain from divulging the facts which would give the court jurisdiction.

In justification of this policy of limited interference the courts have often stated that Parliament is a High Court whose status is at least equal to that of the royal courts, and the royal courts cannot interfere with a judgment given by a higher or equal court. If that is so, what difference does it make whether the return is general or specified? Is Parliament a High Court when the return is general and does it cease to be so when the return is specified?

A restatement of the law on this point is needed. The court may accept the competence of Parliament to decide on its own privileges, accepting thereby the rule laid down by Wylde J. and other judges in *Shaftsbury's case* 43 that the question is one of jurisdiction and that the court cannot meddle with the transactions of the High Court of Parliament during the session or, alternatively, the court may take upon itself the right to decide the extent and breach of parliamentary privilege, at least in habeas corpus cases. Legislation may be needed to clarify the position.

Availability of bail does not turn merely on the scope of bailable offences. It also depends on the access to bailing authorities. The first representative of the law accessible to the accused is, of

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43 (1677), 1 Mod. 114, at p. 156.
course, the person who makes the arrest. Arrest may be affected by an ordinary person or by an officer of the law, with or without a warrant. It is obvious that an ordinary person or an ordinary officer arresting without a warrant should not be entrusted with the power to bail. Neither should he be entrusted with the exercise of a judicial discretion.

Before 1360 it was the sheriff who had the authority to make arrests and it was proper that he should have bailing powers too. In that year justices of the peace started making their inroads on the powers of the sheriffs and, when by 1483 the justices' powers of arrest became all-embracing, their power of granting bail was considerably extended also, although it remained within the bounds established by the Statute of Westminster I. Prisoners who could not be bailed by the justice had to await the arrival of the assize judge or apply for a writ of habeas corpus to be released on bail.

The Indictable Offences Act, 1848, introduced fundamental changes and innovations in the law of bail. It gave a single justice the power to bail in his discretion in almost all cases, adopting the principle of the 1483 Act, which was the first to give a single justice power to bail generally, and departing from the provisions of the Acts of 1826, 1554 and 1487, which required the presence of at least two justices to bail a felon. This reversion is certainly favourable to personal liberty. The 1848 Act introduced, too, the practice of backing the warrant for bail. By this practice the police officer is authorized on the warrant to accept bail from the accused, who was thus enabled to bail himself without loss of liberty. In 1879 the Summary Jurisdiction Act empowered the inspector of police, or other officer of equal or superior rank, or an officer in charge of a police station, to bail all those arrested without a warrant unless the offence appears to be of a serious nature.

The general effect of all this legislation is that, whether arrested with or without a warrant, the accused is provided with an early opportunity to demand his discharge on bail. If his application is refused, his final resort is a writ of habeas corpus. There is a tendency among writers to advocate the abolition of the practice of successive applications for the writ. It is advisable to be cautious in this matter. It will be remembered that there is no appeal

44 1 Rich. III, c. 3.
45 7 Geo. IV, c. 64.
46 1 & 2 Phil. & Mary, c. 13.
47 3 Hen. VII, c. 3.
48 42 & 43 Vict., c. 49.
against refusal of the writ in "a criminal cause or matter". The only opportunity left to the accused to have his case considered by more than one court is by successive application. By all means, abolish the right to successive application, but give the accused, in return, a general right to appeal against refusal.

III. Discretion

We have seen that probability of guilt has come to be the main guiding test in bail. With this development was bound up the question of the extent of the discretion that should be allowed to the magistrate in granting or refusing bail. The existence of discretion became imperative, and the time is now ripe for a consideration of the problems connected with that development. These problems are mainly two: (1) the bailability of the accused; and (2) the conditions required for and imposed on bail.

It has been observed that English law in its infancy and maturity had, for different reasons, allowed discretion in both these matters. It has been seen, too, that some offences were put outside the discretion of the magistrate completely, except in so far as the amount of bail was concerned, where bail was made obligatory. On the other hand, nothing has been said so far of the second of the two problems just mentioned. Surely, it might be argued, it should be possible to specify the conditions subject to which bail may be granted, at least where the amount of bail is in issue. A minimum and a maximum for each offence may be determined by statute. In that way excessive and easy bail may both be avoided and the bail may be made to fit the crime. French law, at one time, specified the minimum and maximum of bail for certain crimes. Modern Egyptian law limits the amount of bail to be forfeited on non-appearance to not more than five Egyptian pounds. France, however, abolished both minimum and maximum by the law of March 25th, 1848, and the law of July 14th, 1865, successively. The modern practice in France and, despite the letter of the law, in Egypt is to allow the judge to exercise his discretion.

It is not difficult to see why a system specifying conditions is not really practicable. It requires, for every offence, a scale which must take innumerable factors into consideration, the most obvious of which is the value of the property in crimes connected with property. It cannot devise one maximum for a set of not too dis-

50 See my article, Habeas Corpus Appeals (1952), 15 Mod. L. Rev. 55.
similar crimes, or even for one particular crime, for example, larceny. To avoid being excessive the maximum must be within the reach of many. If it is, forfeiture of the recognizance will not be a great hindrance to the rich.

English law avoided making any detailed provisions to govern the amount of bail. The Statute of Westminster I and subsequent statutes could do no more than require reasonable sureties of sufficient persons having sufficient within the countries where such persons be so let on bail or mainprise. The Petition of Right, 1628, and the Habeas Corpus Act, 1640, made no reference to the problem, and the Habeas Corpus Act, 1679, merely enacted in section I that security is to be given in any sum according to the judge's discretion, having regard to the quality of the accused and the nature of the offence. It is perhaps surprising that the Act is not more precise. Three days before it was passed Pepys was required to provide sureties for £30,000 to secure his release on bail. The wide unlimited discretion contained in the Act did not escape the notice of the judges. After James II had failed in his attempts to repeal the Act, they did their best to evade its provisions by requiring prisoners entitled to bail to find security in such excessive sums that they could not furnish them. "Excessive baile", the Commons complained in their Bill of Rights, 1688, "hath beene required of persons committed in criminal cases to elude the benefitt of the lawes made for the liberty of the subjects". The Bill enacted that bail may not be excessive.

Thus, even the Bill of Rights refrained from enacting anything like strict rules to govern the exercise of an admittedly necessary discretion, and it might have become liable to abuse had it not been for the Act of Settlement, which rescued the judges from dependence on the Crown, and rescued the law of bail from abuse. This is not to suggest that the independence of the judges was the only factor which imposed respect and impartiality in the practice of bail, for there was another of no less importance, namely, the emergence of a more settled political society.

Personal liberty can never be secure unless it is possible for an independent body to control all sources of abuse. At the time of the Statute of Westminster I, and for some time afterwards, the sheriff was almost outside the effective control of any judicial authority. He was, of course, in matters of bail subject to the writs de homine replegiando, de manuceptione, de odio et atia, and habeas

52 (1444), 23 Hen. VI, c. 9.
53 A. Amos, English Constitution (1857) p. 198.
corpus issuing from higher courts. To reach these courts, however, required money and time. True, too, there were the justices in eyre who were empowered to “detect and punish frauds on the part of the sheriffs and other fiscal officers”. These justices, however, were little concerned with the administration of justice, and the crown division of the eyre existed “to fill the king’s coffers and not to maintain his peace”. They became as unpopular as the sheriffs. To this must be added the fact that the sheriff was frequently in the centre of politics. Even judges were sometimes political partisans. Tresilian C.J. was executed during the reign of Richard II for his political activities. Justices of the peace and jurors were not infrequently intimidated.

Internal stability, too, is essential for the protection of personal liberty, though it need not guarantee it. Stability may result from the presence of a strong central authority or from the presence of internal social cohesion. Both factors were of infrequent recurrence, and many of the numerous legislative measures were of no avail. In 1299 and 1330 the sheriff was made punishable by justices of assize on the suit of any person who was entitled to, but was refused bail. Justices of the peace from 1360 shared the sheriff’s power of arrest, and bail passed to them in part in 1360 and generally in 1483. To deal with the magnates the Star Chamber was created as a separate court in the same year, and laws were passed to check corruption among juries and intimidation by men of local influence.

The change in the *dramatis personae*, however, proved insufficient. The justices followed the road already trod by the sheriffs. In 1487 and 1554 statutes were passed condemning the jus-

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56 Taswell-Langmead, p. 112.
61 A lively example of this could be found in the proceedings against Hugh and Hugh Le Despenser (1320), 1 St. T. 25, at col. 28, in which the magnates in their march, “took and seized upon castles, towns, manors, lands, tenements, goods and chattels of the king’s liege subjects; and others of them they took and imprisoned, others they ransomed, and some they killed, and did many other things... in England, Wales and the Marches”. See also Stubbs, pp. 287 et seq. (vol. III).
62 3 Hen. VII, c. 3.
64 1 & 2 Phil. & Mary, c. 13.
tices because they had "oftentimes by sinister labour and means, set at large the greatest and notablest offenders". They were made punishable by justices of gaol-delivery and were reminded that the law of bail was still governed by the Statute of Westminster. They were required to certify the bail they would grant to the next gaol-delivery. But, despite the abuse, the justice was never deprived of his power to bail.

Once, however, the judiciary secured its independence the vigour and effectiveness of the law became more noticeable and, since machinery had already been provided for the effective control, on the suit of the individual, of the activities of sheriffs and justices by superior courts, abuse of the law of bail became something to be wondered at rather than expected.

There is another point connected with the exercise of judicial discretion to which reference should be made. What is the essential qualification for being a surety? Obviously if the court may refuse bail on the ground of the insufficiency of the surety for other considerations than his ability to produce the accused or forfeit the recognizance, the prisoner could be put to considerable inconvenience. This question was decided in Regina v. Badger. In that case Arthur George O'Neil was apprehended for seditious language said to have been used at an unlawful assembly. The magistrates refused to accept bail from two gentlemen "though perfectly solvent and in respectable circumstances", on the alleged ground that they attended chartist meetings. That great judge, Lord Denman C.J., held that the magistrate could not reject bail at his discretion, when bail was offered, to enter into an investigation as to the character or opinion of the bail, provided he was satisfied of their sufficiency to answer for the appearance of the party in the amount reasonably required for that purpose. If he refused bail he would commit an indictable offence.

IV. Conclusion

It has been assumed throughout that a person released on bail is restored to his freedom. Is a person released on bail free? The attempt to answer this question may serve as a conclusion. The freedom we mean is a freedom of movement characterized, in the negative, by the absence of external physical restraint, and, in the positive, by the presence of a mental freedom of choice, which finds its expression in the physical ability of the chooser to fulfil his choice. It will not be possible at present to elaborate on this.

67 (1843), 4 Q.B. 468.
Another opportunity will be sought to give a definition of the concept of personal liberty.

What is the position of the person released on bail? The traditional view is that he is in the custody of his bail—all that happens is a transfer of custody. Before the authorities for and against this view are considered, it must be remarked that this theory cannot apply where the accused acts as his own surety. In this case the only restraints on the accused are the fear of pecuniary loss and the consequent danger of being arrested at any time. These are weighty considerations and they lie heavily on one's freedom of choice. Nevertheless, during the bail period he is master of his own movements. The force of the restrictions comes into play only when the accused commits a breach of the law, that is, only when he refuses to honour his recognizance by appearing on the specified date.

The second class, where there are sureties, is on a different level. Without attempting to abscond or evade the course of justice in any way the bailed could always be arrested by his bail and he commits an offence if he attempts to resist. He need not even consent to his bail or have any knowledge of their existence; nevertheless, they may arrest him at any time, regardless of any privilege he might enjoy. This is indeed a stringent rule, which probably arises from the fact that the bailswereoriginally bound corpus pro corpore and were thus exposed to great risks, including, according to Hale, a fine beyond the sum mentioned in the recognisance.

From this it might be argued that a person released on bail with sureties is not free, especially since he may be required to remain within a certain locality or in a certain place. Nevertheless, there is a difference between being threatened with loss of liberty and its actual loss.

The Anglo-Saxon system has provided two remedies for loss of liberty: an action for false imprisonment, and a petition for a writ of habeas corpus. It will be instructive, therefore, to refer to cases decided on these two remedies to discover whether, in the eyes of

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68 This was made possible by the Bail Act, 1898, s. 1.
69 Anon. (1704), 6 Mod 231; R. v. Butcher (1792), Peake 266, N.P.
70 French's case (1704), 6 Mod 247.
71 Ex p. Lyne (1822), 3 Stark 132, N.P.
73 E.g. (1444), 23 Hen. VI, c. 9.
the law, a person released on bail is considered free or not. If it were true that a person released on bail suffers a continuation of a loss of a personal liberty those two remedies should be available to him. Authorities do not support such a conclusion.

In a case before the Supreme Court of Canada, *Re Isbell*, application for a writ of habeas corpus was made by a person released on bail. Rinfret J. (as he then was) in chambers, refused the application, holding that "a person at large on bail is not so restrained of his liberty as to entitle him to the writ. . . . In fact, bail is one of the alternative remedies which may be granted upon application for habeas corpus." Counsel for the applicant relied on the English case of *Foxall v. Barnett*, which, he thought, had decided that a person on bail may bring an action of false imprisonment for the period during which he was on bail. The facts of *Foxall v. Barnett* were these. Defendant, by a warrant of commitment on a coroner's inquisition held without jurisdiction, caused plaintiff to be imprisoned. Plaintiff was bailed and afterwards, while on bail, procured the inquisition to be quashed. Held, plaintiff could succeed in an action for false imprisonment. Counsel in *Re Isbell* argued that the plaintiff in *Foxall v. Barnett*, though released on bail, was falsely imprisoned during the period of bail because of the illegality of the initial imprisonment. He was to be treated as a prisoner until the inquisition was quashed. If the prisoner can succeed in an action for false imprisonment while he is on bail, surely (it was contended) he must be able to obtain his writ of habeas corpus too.

The learned judge refused to accept this and, with respect, correctly so. The false imprisonment referred to by the court in *Foxall v. Barnett* was the actual imprisonment before the plaintiff was released on bail. The court, as is very clearly expressed in the judgment of Wightman J., did not decide that the plaintiff was falsely or otherwise imprisoned while on bail.

American law, in this respect, is the same as English and Canadian law.

Another argument leading to the same result is this. The period of limitation in an action for false imprisonment starts to run from the moment when imprisonment ends. It has been held in *Syed Mohammed Yusuf Ud-Din v. Secretary of State for India in Council* that where a prisoner had been arrested under a warrant

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76 [1930] 1 D.L.R. 393.
77 Ibid., at pp. 395-6.
78 (1853), 2 El. & Bl. 928.
79 29 C. J. 22; 39 C. J. S. 441, and the cases cited there.
80 (1903), 19 T.L.R. 496.
on a criminal charge, and the warrant is subsequently set aside, the time for bringing an action for false imprisonment runs from the date of the release on bail and not from the date when the warrant was put aside. The former imprisonment ended with the release on bail.

These authorities, however, do not establish that a new imprisonment has not begun in the hands of the sureties. Nevertheless, they show that the initial imprisonment ends with bail and, by holding that a writ of habeas corpus may not issue to discharge a person released on bail, they are holding that the applicant is not detained or deprived of his liberty while on bail.

A historian is often tempted to draw conclusions after making a general survey. Perhaps the moral of our story is this. In days of internal instability the danger to personal liberty may come from the executive, who would be greatly helped by a judiciary too sensitive of other than legal considerations. In some recent cases the judges have shown themselves to be "more executively-minded than the executive". This is a dangerous attitude and its effect on the law of bail has shown itself in an American case where bail was demanded and sureties refused because of their political views. It is difficult for a magistrate to divorce himself from political controversy when the whole world is engaged in it, but the courts have succeeded in weathering many a storm in the past.

The Standing of Lawyers

In no country in the world today has the lawyer a standing remotely comparable with his place in American politics. The respect in which the federal courts and, above all, the Supreme Court are held is hardly surpassed by the influence they exert on the life of the United States. If it is excessive to say that American history could be written in terms of its federal decisions, it is not excessive to say that American history would be incomplete without a careful consideration of them. The presidency apart, no position is more eagerly canvassed than that of a justice of the Supreme Court of the United States. And while it is true that there have been judges of poor quality in each of the three tiers of the federal courts, it is also true that they have been able to attract into their service men whose ability, taken as a whole, rivals that of the men who have sought to win the ultimate prize of the presidency. Cabinet officers and senators have gladly exchanged their places for a position on the Supreme Court; and from Marshall, in the first generation of its history, to Chief Justice Vinson in the present age, it is not an exaggeration to say that the influence of the Court has been second to that of no other American institution. (Harold J. Laski, The American Democracy: A Commentary and an Interpretation. 1948)