

4-1-1952

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Recommended Citation

Charles S. Desmond, *Bail—Ancient and Modern*, 1 Buff. L. Rev. 245 (1952).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol1/iss3/3>

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BAIL—ANCIENT AND MODERN

CHARLES S. DESMOND*

THE subject of criminal bail, which interests, usually, only those accused of crime, and the lawyers who prosecute and defend them, has unexpectedly produced front-page news throughout America. Accused Communists are held in high bail, furnished by their supporters. Bail is fixed for recalcitrant witnesses before courts and Congressional committees. Convicted defendants are granted or refused bail pending their appeals. Some of their lawyers, charged with contempt, must produce bail for themselves. Bail is fixed, revoked and reinstated in successive legal proceedings bewildering to the newspaper reader who tries to keep himself informed about subversive people and their subversive doings. Some of the convicted Communists, after unsuccessful appeals to the Supreme Court, fail to appear to serve their sentences. Thereupon officers of the Civil Rights Congress Bail Fund, which provided the bail monies, are brought into court, refuse to answer questions as to the sources of that fund, and find themselves under the necessity of putting up still more bail to answer charges of contempt of court. The amounts fixed for bail differ widely from defendant to defendant, and from Judge to Judge. An inquiring citizen finds it all hard to follow.

The basic idea is, of course, simple enough, however obscured by unfamiliar terminology. The central thought that a person detained pursuant to legal procedures is, on the putting up of property as security for his later presence when required by the court, placed in the "friendly custody" of his sureties or bondsmen instead of remaining in prison. Bail is required, too, from convicted defendants on appeal, from witnesses under certain circumstances, and also, on occasion, in civil cases, but the bail we are discussing here is that taken from defendants in criminal prosecutions.

Part of the perplexity which surrounds the whole matter of bail is caused by the use of the word "bail" itself to several meanings. As a noun, it means the security given, or the person giving it, that is, it describes either the property deposited to pledge a person's appearance in court when his presence shall be required, or it can refer to the person who puts up that property for that purpose. As a verb, "to bail" is either to grant liberty to a person under arrest, or to provide the guarantees on which he is liberated. In an attempt at clarity, the word is used in this article to denote the security itself.

Like so many of our legal forms and institutions, the bail system now in general use in the United States comes to us from England, and its origins are in the dim far past of history. After centuries of development in Britain, its practices were first codified into English statute law in 1275, in the reign of the great law-

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giver, Edward I, and the essential features then written out persist to our own day and our own country. But, long before that, there had been customary and traditional methods whereby a man or group gave pledges to make certain the appearance of an accused for trial, or payment by him for his wrongdoing. Indeed, bail is as old as English law itself, and back of that its beginnings are traced by scholars to tribal customs on the Continent. In primitive societies, before there were courts or lawyers or written laws, injuries demanded prompt satisfaction, either in blood or treasure. When a man was killed, his tribe or family wreaked vengeance on the slayer unless the slayer paid a proper price in property, or with his own life. To save his life the killer promised to pay, and his friend or his tribe stood back of his promise till he could redeem it. Perhaps at times the surety gave himself as hostage, that is, physically surrendered himself into the custody of the aggrieved group till payment was made for the wrong. Gradually the "blood feud," and vengeance, ceased to be customary. And so, long before there were courts or judges, compensation came to be measured in money. In seventh century England there was actually a sliding scale of rates for the life or limb of every man, up to and including the king himself. The arrangements for these settlements were for centuries carried on between families or tribes, till the time came when the central authority of the King intervened, and courts and judicial procedures were invented to hear the grievances and deny or compel redress. Thus Anglo-Saxon criminal law was born, with the state itself exacting punishment from the guilty.

At some point in this long, slow historical development, English feudal lords were required by royal decree to stand surety for their whole households. Later on (since there were still no policemen) each man had his own surety, who was ready for duty at all times, or hailed in to serve in a particular case. After the Norman conquest, when the invaders brought with them to England their favorite method of settling disputes by the duel, sureties were still used to guarantee the presence of the parties at those sanguinary exercises.

In the twelfth and thirteenth centuries, when the English kings sent forth their traveling justices for infrequent appearances in the rural counties, it was important that local officials have power to release on bail, otherwise an accused citizen might languish in jail for years, while the leisurely judicial train was on its way to his locality. So the Sheriff was given power to take pledges from sureties in all cases but those of the great crimes of treason and homicide. As to those, release could be had only on the King's command and by the King's own officers. But some of the Sheriffs were venal men too, grasping and greedy even for those corrupt days. The sheriffs demanded and got huge fees for accepting bail, and went so far, says tradition, as to clap citizens into jail on trumped-up charges, in order to make them pay bribes for being released on bail. Even when the king himself sent out his order for release, still the sheriff had to have his "gift." But, in those days, as in these, official corruption brought investigation and reform leg-

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isolation. Thus, out of all this, came the statute of the year 1275, detailing procedures for bail (without sheriff's "gifts") strikingly similar to the bail statutes of present-day America.

The United States has fifty different legal systems (those of the forty-eight states, the Federal government and the District of Columbia) so it is impossible to set forth any law of bail as generally applicable throughout the country. However, most states make release on bail, before trial and conviction, a matter of right in misdemeanor cases, and a matter of judicial discretion in cases of felony, including homicides. That idea of "judicial discretion" has its own difficulties. It means that there are no set rules as to whether or not persons charged with felony are to be at large pending trial, and if so, how much money or property must be put up for security. The judge uses his common sense and experience. He must look into the defendant's past record, find out something about the nature and seriousness of the charge and the probability of guilt, then make an informed guess as to the likelihood that the accused will or will not show up for trial. In other words it is the judge's job to figure out how much security is, in reason and common sense, sufficient to insure that the defendant will appear for trial. This judicial task is at times a most difficult one. The judge's duty to the public is to see that the defendant be kept locked up if necessary, but, on the other hand, the defendant is presumed to be innocent and keeping him in jail while awaiting trial may be undeserved punishment. The law generally favors bail and the judge tries to follow that trend. But he knows that, while in theory a bailed-out defendant stays "in the friendly custody" of individual sureties, actually he is under no restraint, and the surety may be a corporation authorized by law to write bail bonds for fees.

These judicial difficulties in determining bail questions are no new thing. When Lord Baltimore was haled into an English court in 1768 on a charge of rape, the court took into consideration his voluntary surrender as showing he had no intention to flee, and, noting that the defendant's large properties would be forfeited if he absconded, named the amount of eight thousand pounds.¹ Jefferson Davis, president of the Confederacy, indicted for treason, was, after long imprisonment in Fortress Monroe, allowed at large on bail of \$100,000, put up by ten well-known Americans including Horace Greeley and Cornelius Vanderbilt, who were relieved from responsibility when a general amnesty was ordered, and the indictment was dismissed.² "Boss" Tweed, despoiler of New York's public treasuries, was (in a civil fraud case brought by the City of New York to collect \$6,000,000 of the great plunderer's graft) held in bail of \$3,000,000, a truly enormous sum in 1875.³ In 1947, in New York's highest court, \$250,000 bail was held to be excessive for

1. *Rex v. Lord Baltimore*, 4 Burrows (K.B.) 2179 (1768).

2. *Case of Davis*, Fed. Cases No. 3621a, 7 Fed. Cas. 63.

3. *People v. Tweed*, 5 Hun 382; *appl. dismsd.* 63 N. Y. 202 (1875).

one Lobell, accused (and later convicted) of stealing several hundred thousand dollars, but who, like Lord Baltimore, had voluntarily surrendered himself and as to whom there was no showing of any intention to flee.⁴ Later the same year but under vastly different circumstances, the same court refused to interfere with the fixation of bail at the same amount, \$250,000 each, for Joseph Rao and Michael Coppola, held as "material witnesses" in connection with the unsolved slaying of an election worker named Scotoriggio.⁵ A year earlier, a New York City General Sessions justice ordered that the admission to bail of an accused seller of heroin required security of \$150,000.⁶ An Illinois court some years ago reduced from \$50,000 to \$5,000 the bail of a defendant charged only with vagrancy,⁷ and a Louisiana court thought that \$40,000 was too high, and \$7,500 about right for bail for a lawyer charged with the improbable crime of bombing a building.⁸ A Federal Circuit Court sitting in New York City, overruled the fixation of \$500,000 bail in the case of Serge Rubenstein, the court indicating that it thought \$50,000 more nearly right.⁹ Rubenstein was accused of making false statements to his Draft Board in World War II. In 1942, New York State's appellate courts refused to set aside a lower court order denying bail to one Jacob Shapiro, an alleged extortionist who had offered to post \$50,000 as security.¹⁰ One of the quirks of bail law is that, although the Federal Constitution and the constitutions of most states forbid "excessive bail," courts may, at least in felony cases, constitutionally refuse to set any bail at all. The anomaly, however, is more apparent than real, since there are two separate problems involved in every discretionary bail application: is the defendant to be released at all, and if so, for what amount of bail? It is only when the judge in his discretion answers "yes" to the first question that he comes to, and is constitutionally limited as to, the amount of bail.

So, like most law questions, when stripped of procedural niceties, the matter of bail is not so complicated after all, and, like most of our legal rules and systems, it works pretty well. The facts of criminal cases are as various as the characters and circumstances of the people who come to trial, and no mathematical formulae can be devised to deal scientifically with all of them. In the end, bail or no bail and if so, how much, is a question for the common sense of the judge who sits in the particular case. Perhaps it might be wise to require, as an extra precaution against fixation of excessive bail, the concurrence of two out of a panel of three judges, in order to impose any bail over, say, \$25,000.

4. *People ex rel Lobell v. McDonnell* 296 N. Y. 109, 71 N. E. 2d 423 (1947).

5. *People ex rel Rao v. Adams* 296 N. Y. 231, 72 N. E. 2d. 170 (1947).

6. *People ex rel Gagliano v. Warden* 188 Misc. 800, 67 N. Y. S. 2d. 220 (Sup Ct., 1947).

7. *People ex rel Sammons v. Snow* 340 Ill. 464, 173 N. E. 8 (1930).

8. *State v. Wertheimer* 183 La. 388, 163 So. 545 (1935).

9. *U. S. ex rel Rubenstein v. Mulcahy* 155 F. 2d. 1002 (2 Cir., 1946).

10. *People ex rel Shapiro v. Keeper of City Prison* 290 N. Y. 393, 49 N. E. 2d. 498 (1943).