

BAIL DECISION-MAKING : LAW AND PRACTICE IN SCOTLAND

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P R E F A C E

The consequences of refusal of pre-trial release were impressed upon me during a study visit to the untried prisoners' wing of Saughton Prison in 1971. This experience sparked off my interest in pre-trial release procedures and led to the bail research project.

I am indebted to my supervisors, Mr. N.H. Avison and Professor F.H. McClintock for their advice and constructive criticism. Mr. Avison left Edinburgh University to take up an appointment in Canada in September 1974 and from that time Professor McClintock acted as supervisor. Dr. R.J. Wilson corrected many of my misconceptions about sociology and research methodology and his encouragement helped me to continue. Professor G.H. Gordon and Mr. O.J. Brown, Clerk of Justiciary, saved me from many mistakes about criminal procedure. Mr. W.D.H. Sellar helped by pointing out non-existent kings to which I had referred in the historical discussion.

The police and court staff with whom I came into contact were always helpful. The information and refreshments which they provided were much appreciated.

Mr. R.N. Mowe deciphered and typed my often confused and sometimes illegible manuscript. Ms. C. White typed the final copies and bore with me through seemingly endless revisions. I am most grateful for their assistance.

Despite the help which I have received, errors no doubt remain. For the errors and views expressed, I must be held responsible.

S U M M A R Y

Bail is an ancient institution and in the first chapter the major theories about the origin of bail and the development of bail in Scotland up to the seventeenth century are considered. This leads on to a description of the formative period of modern law which culminated in the Criminal Procedure (Scotland) Act 1888.

Before embarking on a study of the modern law and practice a perspective in which the Scottish system may be judged is provided. Attention is directed to the attempts made by other countries to deal justly with the untried accused. This survey includes countries which presently operate a system of bail, countries in which the bail system has fallen into disuse and countries in which bail has been abolished. The findings and recommendations of recent bail research projects, the disillusionment with bail and alternatives which have been developed are described.

The common law and statutory provisions regulating the modern bail law are considered in the third chapter. Particular attention is paid to the discretionary powers of the Lord Advocate, the police and the courts and the opportunities to apply for bail which have been provided by the law.

As the law in the case and statute books could provide only limited information about the bail system, a research project was devised to study the operation of the law in practice. For reasons described in the fourth chapter, the research was directed to the bail decision-making of the police and the courts. Both observation and record research were used. Bail decisions are not considered in isolation but an attempt is made to describe bail decision-making at all the different stages in the legal system at which this matter is considered. Thus in subsequent chapters the bail decision-making

situations at the police level, in a burgh court, a sheriff court and in the High Court of Justiciary are described. Issues considered are, for example, the relative importance of officials involved in the decision-making situation, the accuracy, relevance and sufficiency of the information given to the decision-maker and the variables which influence the decision-maker. Some important consequences of the bail decisions are also examined. These include, for example, the money security implied in bail, the time spent in pre-trial custody, the success of the bail decisions and the effect of the bail decision on the outcome of the case.

In the last chapter the findings of the study are drawn together and bearing in mind the experience of other countries, an assessment is made of the Scottish bail system. Reference is made to the different patterns of decision-making and some important consequences of these patterns. The availability of information is critically considered and possible improvements canvassed. Extensions of the right to challenge custody are put forward. Changes in the criteria governing the bail decisions which include the introduction of a right to release and preventive detention are advocated. The dependence on money security as a basis of release is criticised and alternatives are considered. Finally some suggestions for further research are given.

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I
 THE HISTORICAL
 DEVELOPMENT
 OF BAIL

Bail, "some expedient of this sort seems always to have been a part of our customary law".

-- Hume¹

SOME THEORIES ABOUT THE HISTORICAL ORIGIN OF BAIL IN SCOTLAND

The antiquity of bail has often been asserted, notably by Hume, but no consideration appears to have been given to the sort of expedient which anticipated the institution of bail known to modern Scots law.

Although the historical development of bail in Scotland has been neglected a considerable literature exists on the origin of the institution of bail.

In this section we outline the main theories which have been advanced and with these theories in mind describe the results of our research into the early Scottish records.

The Main "Expedients" Identified as the Origin of Bail²

Some scholars have attributed a very ancient history to bail. They have identified in the hostage custom of early Germanic tribes a similar idea to bail, in that a hostage was held as guarantor or surety of the obligation of a third party. An example of a

proponent of this view was Gierke who founded his theory on the results of his research on Germanic tribes. Describing Gierke's theory De Haas wrote:

"The personal responsibility of the surety for his own debt or that of another was tantamount to hostageship of the body. Suretyship is incorporeal hostageship; ideelle Vergeiselung, which is an obvious result of an evolutionary process from hostageship itself - Abspaltung der realen Vergeiselung. The surety does not, in other words, become the debtor; his sole duty is the assumption of liability." 3

Holmes has expressed a similar view. He argued that:

"when hostages are given for a duel which is to determine the truth or falsehood of an accusation, the transaction is very near to the giving of similar security in the trial of a case in court. This was, in fact, the usual course of the Germanic procedure". 4

Talking more specifically about English custom, Holmes referred to the old rule of English procedure which stated that a defendant must either give security or go to prison. According to Holmes "this security was the hostage of earlier days, and later, when the actions for punishment and redress were separated from each other, became the bail of the criminal law".⁵ De Haas has argued that the pledge could not be considered a hostage in the literal sense of the word, as the pledge, in the view of most proponents of the theory, was not liable to the same consequences as the defaulter.⁶ For Gierke, however, the pledge was envisaged as a literal hostage, because he considered the liability of the surety extended even to bodily injury.

Opposing views have also been strongly supported by those who have adhered to some form of the theory, that the origin of bail is to be found in the early form of settlement, which replaced the blood feud, and was based on a system of set payments for injury. Thus a relationship similar to the modern bail relationship has been identified in the ancient practice of giving pledges for the payment of the

wergeld, and in the later development of giving pledges for the defendant's presentation in court.⁷

Among those who identified the pledges for presentation of the defendant in court, as the prototype of bail, disagreement has arisen as to the nature of these pledges. One view supported is that the pledges derived from the frankpledge system.⁸ Supporters of this view have argued that the system of general suretyship, which was evolved on a tithing basis by the Anglo-Saxons and which was developed under the Norman influence into the frankpledge system, incorporated the arrangement of pledges who bore responsibility for holding the defendant to answer accusations at trial. Critics of this view, however, have argued that for this special purpose, separate surety arrangements were made ~~out~~with the system of general suretyship.

Holdsworth proved to be an adherent of the former view when he wrote:

"We can see therefore, the importance of the system of frankpledge from the point of view of the law of procedure. It made certain persons responsible for the production of a defendant. It provided pledges for his appearance. It did the work of the policeman, the bail, and the prison of more civilised times".⁹

De Haas, however, has doubted whether the frankpledge system was ever used to guarantee the defendant's appearance in court for trial. In her book, Antiquities of Bail, she attempted to demonstrate that "frankpledge and bail are probably not immediately connected; neither are they interchangeably associated".¹⁰ Some of the evidence she adduced in support of this view was that, despite the general suretyship arrangement, laws made specific provisions for an individual suretyship arrangement to guarantee the future appearance of the defendant.¹¹ She also pointed out that in the majority of cases which

she had examined in the twelfth and thirteenth century Pipe Rolls the surety was a single individual rather than a number of persons. Only the latter, she said, would be consistent with an organised surety system. In addition, the frankpledge system was limited in its application to parts of England¹² and also suffered a rapid decline in the fourteenth century. The conclusion supported by De Haas was that "frankpledge was called upon to present offenders, rather than to hold the individual for trial, which constitutes the underlying principle of the modern bail surety".¹³

Both the hostage and pledge theories have been criticised by Beyerle who attacked the historical basis and the probability of such theories. According to De Haas, except in a war situation Beyerle could not "envisage a situation so extreme or pressing as to induce anyone to expose himself voluntarily to the possibility of seizure of his body and the loss of his liberty".¹⁴

Beyerle's view was that the surety protected the debtor or wrongdoer from the vengeance of the injured party. In describing the evolution of this relationship he argued that from the early position, where the surety was responsible for the appearance of the debtor, a more complicated system had evolved. Under this the surety guaranteed payment in the event of the default of the debtor and in such a case the surety had power over the debtor's property and body. The final stage in this process was reached when the surety's own property could be attached by the creditor to satisfy the payment owed by the debtor. According to Beyerle, therefore, the evolution was from a trustee relationship to a substitute payer.¹⁵ He argued that the hostage theory implied that the surety or hostage, in the

event of the debtor's default, would become subject to the demands of the creditor, but he did not believe that this described what happened. In his view it was the debtor or his property that came under the control of the surety and it was only ultimately that the property of the surety could be attached.

The question of which early form of suretyship best represents modern bail is further confused by the necessity to consider the emergence in England in the thirteenth century of two distinct forms of suretyship called bail and mainprize. Hale has stated that the terms bail and mainprize "are used promiscuously often times for the same thing, and indeed, the words import much the same thing ... but yet in a proper and legal sense they differ".¹⁶ Bail appears to have been a far stricter form of suretyship than mainprize. In bail, the prisoner released from gaol was released into the custody of the person who had given bail for him and the consequence of his state as a person in custody remained unaltered. In mainprize, however, the mainpenors acted as sureties only and the person so released had the privileges of a free man. Modern bail seems, therefore, to be related to mainprize rather than the concept of thirteenth century bail in its technical sense.

It is obvious even from this outline of the main controversies that the origin of bail has provoked considerable disagreement. The opposing camps of hostage versus pledges for wergeld theorists have themselves contained important internal divisions. In the former, some supporters of the hostage theory considered bail as a metaphorical hostageship, with the surety liable only to a property fine; others envisaged a literal hostageship with the surety liable to

suffer the penalty incurred by the defaulter. In the latter there was no agreement as to the forms of pledge which foreshadowed modern bail. Both main theories have been criticised and the origin of bail has instead been identified in the special relationship said to have existed between the debtor and surety.

Bearing these theories in mind we now consider the various forms of hostageship and pledge, suggestive of bail, which have existed in Scots law.

Considerable obscurity surrounds the nature of Scots law before the fourteenth century due to the loss and destruction of many of the records and documents which were taken from Scotland by Edward I. In view of this the adoption of a somewhat speculative attitude towards the fragments of information which can be obtained about this early law may be justified.

Scots law, must be understood in the light of the various foreign legal systems influential in Scotland at different historical periods.

Speculation about the history of Scottish bail need not detain us however, until after the fifth century. Despite infiltration of Roman forces into Scotland,¹⁷ any Roman law influence dating from this period is not considered to have survived the withdrawal of Roman forces from Britain in the fifth century. Cooper, however, has asserted that the influence of Roman law in later centuries was crucial in shaping the law of pledging in Scotland.

"From the frequent references in Regium Majestatem and other procedural treatises, to the plegius at all stages of civil process, it would appear that the laws of cautionry must have been considerably developed at an early stage. And all the evidence which survives indicates that in both countries that development resembled Roman doctrine which still supplies the common basis in general principles for both the Scottish law of cautionry and the English law of suretyship". 18

This view is we think open to question. Although Roman law is known to have been taught in England as early as the sixth century it has not been suggested that these Roman law ideas spread to Scotland.¹⁹ The view generally accepted is that the Church was the channel, through which the influence of Roman law flowed into Scotland.²⁰ The tradition of the early Church, however, was Celtic in character and Gaelic was the language of the churchmen. Smith has pointed out that it was not until the twelfth century that the Celtic traditions and usages were suppressed when the church refashioned itself on the Roman model.²¹ Nor was it until after the twelfth century that the practice of studying Roman and Canon law at foreign universities was established. Because of this we are of the opinion that if pledging was known in Scotland before the twelfth century it must have been of indigenous growth, or influenced by some law system other than the Roman system.

The period between the fifth and twelfth century has been described by W.F. Skene.²² He outlined the emergence of the four kingdoms, Dalriada, the Picts, the Britons of Strathclyde and Bernicia, from the Celtic and Teutonic races populating the northern part of Britain. Although the next five centuries witnessed an unending struggle for power within the kingdoms and a succession of battles and truces which led to a constant shifting in the respective power positions of the original kingdoms, according to Skene some settled form of government did exist. It seems reasonable, therefore, to assume the existence of some form of law in the kingdoms. Innes has argued that this is confirmed in the most ancient records "where we find references to a still earlier common law, Assize terra - the law of the land - Lex Scotia evidently of definite provisions and received authority".²³

With Gaelic as the common language of this period and contact maintained with Ireland the influence of Celtic custom seems very likely. Such a view has been adopted by Bannerman who has stressed that common customs were shared by the Scots and the Irish²⁴ and has argued that:

"the culture of the Scots of Dalriada, as might be expected, mirrors that of contemporary Ireland. And indeed, Gaelic-speaking Scotland and Ireland constituted a single culture-province down into the seventeenth century".²⁵

The Celtic influence has been described by Innes in the following terms, "whilst under a Celtic sway, Scotland's laws were those which have received a certain shape and definiteness from their longer use and greater cultivation in Ireland".²⁶ Cameron has also supported the existence of a Celtic system of law and has argued that sufficient proof may be found in the Celtic fragments which have survived to show the existence of a Celtic system of law up to the eleventh century.²⁷ As proof he cited the Scots law of succession and marriage and more important for our present interest, the honor price form of criminal law embodied in the Leges inter Brettos et Scotos.²⁸

The existence of the Leges inter Brettos et Scotos indicates that some development from personal retaliation and the concurrent blood feud, had occurred by the twelfth century. The distinction between civil and criminal law was still blurred, however, and the role of a public official to prosecute crime was not defined until the sixteenth century. An honor price form of compensation for wrongs suffered, which detailed compensation or cro according to the wrong and rank of the victim or wrongdoer, was recognised. This type of tariff system was often found in early legal systems and existed for example, not only in Irish law but also in Welsh and Saxon law. Unfortunately the Leges inter Brettos et Scotos give no information as to how the system of fines was implemented. Looking to the Saxon laws, however, the

operation of a similar system can be studied. A law of Edmund I described the Saxon practice:

"The slayer shall give security to his advocate, and the advocate to the kinsman (of the slain man) that he (the slayer) will make the reparation to the kindred. After that it is incumbent upon the kin of the slain man to give security to the slayer's advocate that he (the slayer) may approach under safe conduct and pledge himself, according to forms of law, to pay the wergeld. When he has pledged himself to this, he shall find a surety for the payment of the wergeld".²⁹

That there must have been some arrangement existing in Scotland for the payment of cro is unquestionable but no record remains describing it. It seems plausible that the arrangement adopted in Scotland was also based on pledging. This plausibility is enhanced in two ways. The Leges inter Brettos et Scotos stated, for example, that if the wife of a free man was slain, her husband should have the kelchyn, and her kin should have the cro and the galnes. Galnes according to J. Skene was like cro, a form of compensation for slaughter.³⁰ It may not be without significance that the term "galnes" is connected with the O. Ir. "gell" meaning pledge.³¹ More significant perhaps, is a procedure described in the Leges Marchiarum.³² It was ordained by these laws that where a defender³³ had found pledges and had been convicted on a charge of robbery or theft, his pledges were liable for the sum specified in the charge, but in cases of homicide the pledges were liable for the full manbote. With the difference that pledges became liable when the defender failed to appear, a statute of Robert III provided that pledges were answerable for assythment.³⁴ A similar procedure was also described by Balfour³⁵ and J. Skene.³⁶

In earlier discussion³⁷ we pointed out that some theorists have identified the pledges for wergeld as the origin of bail. A similar theory presents itself as one explanation for the development of bail in Scotland if the plausibility of a pledging system to ensure cro payments is accepted.

Without wishing to suggest that the Irish law of pledging was wholly adopted in Celtic Scotland it seems profitable, if the importance of its influence is accepted, to give some consideration to that law. Such an inquiry leads to a consideration of the ancient laws of Ireland contained mainly in Senachus Mor and Liber Aicill.³⁸

The hostage theory of bail seems at first glance to receive strong support from the Irish laws, where considerable discussion of the law of hostage sureties takes place.³⁹ This hostage surety system, however, appears to have had a special function in Ireland. Ireland at this period consisted of a number of distinct kingdoms and sub-kingdoms and the law of hostage sureties seems specifically designed for the situation where the defendant belonged to one sub-kingdom and the injured party to another. According to these old Irish laws both parties were required to give hostage sureties. An apportionment might extend to the defendant, the hostage surety and the tribe which supplied the hostage surety.

This hostage surety system seems, however, to have existed in conjunction with another pledging system under which either the defendant or hostage sureties themselves could offer pledges for the hostage sureties. Failure to accept such pledges resulted in body-fine being owed to the hostage surety.

"If the defendant gave notice to the hostage surety of the plaintiff that neither pledges nor sureties were accepted from the hostage surety or the defendant, and the hostage surety of the plaintiff did not offer to give pledges himself, body-fine is due from the defendant to his own hostage surety, and body-fine is due from the plaintiff to the hostage surety of the defendant, and body-fine is due from the plaintiff to his own hostage surety".⁴⁰

These pledges appear to have been a form of protection for the hostage surety, hence the body-fine payable to the hostage surety when such pledges were not offered or accepted. This protection seems to have been extended even to bodily seizure, for example, the defendant was

advised by law that, "if pledges or securities have not been accepted from him for his own pledge, to take hostage surety of the plaintiff until what is lawful is given him".⁴¹ It was possible, however, to give hostage sureties without any additional pledges.

In the event of the default of the defendant, Senachus Mor prescribed that five seids, honor price and double compensation were due by the defendant to the plaintiff. If then, the plaintiff gave the hostage surety time to seek the defendant and the defendant absconded from the surety also, five seids and honor price were due to the surety. After this unsuccessful pursuit of the defendant, the law allowed the plaintiff to proceed against the hostage surety and unless "equal forgiveness of debt" could be negotiated, it was provided that "death seizure shall take place".⁴²

There was nothing metaphorical about this form of hostageship but two features make it difficult to use in support of the hostage theory of bail. The first objection is that it applied only to the special situation where disputing parties belonged to different sub-kingdoms and was not part of the procedure where one royal power had jurisdiction. Another difficulty is the fact that the hostage system was itself often hedged with another pledging system not based on hostageship.

The Scottish resemblance to Ireland at this period is striking - the cluster of small kingdoms and the clans aping sub-kingdoms. Although it is known that hostages from different kingdoms were taken, particularly in war, and indeed this practice existed between England and Scotland until as late as the eighteenth century, this is rather different from the situation envisaged by writers concerned with the hostage theory of bail. In Scotland, as in Ireland, there is little

evidence to suggest that hostages were taken to ensure settlements of disputes arising within the jurisdiction of one royal power. In many cases, however, the weakness of royal power and the frequency of inter clan disputes, makes the utilisation of clan hostages seem a solution which was likely to have been adopted.

Where one royal power had jurisdiction the forms of pledge used in Ireland were those described in the Brehon laws. Seven different forms were listed,⁴³ but as a large number of Heptads were used as teaching aids for law, Atkinson has given a justified warning that "the limitation to seven must have been achieved at the cost of a little procrustean violence".⁴⁴ The purpose and result of standing as pledge was described thus, "if ... to prevent the spoliation or arrest one has gone security, and if the person for whom he has gone security does not accept the law, he must pay for him".⁴⁵ Reference was also made to the necessity of suing the pledge, a procedure which would hardly be necessary if the pledge was held in hostageship.

One of the seven forms described, gives added credulity to the thesis that early pledging systems in Scotland were influenced by Celtic law. This is the form of pledge known in Celtic law as cul-raith. "Cul-raith" has been defined as a back security that is a surety which goes to back the first surety.⁴⁶ The form seems to have been well defined with liability emerging only if both the defender and the first surety failed to meet their respective obligations.⁴⁷ The term appeared in Scots law as "culreach" and was defined in much the same sense as back security i.e., "backborgh".⁴⁸ The two terms cannot be identified, however, as easily as Cameron has attempted.⁴⁹ It is not possible to say to what extent the Irish conception of cul-raith influenced the evolution of the culreach in Scotland.

The earliest surviving description of the culreach is contained in the Regiam Maiestatem by which period the culreach was firmly established within a system of repledging which we discuss below. It is only within this context that the Scottish form can be understood.

As a result of the overlapping jurisdictions of the various feudal, justiciary, sheriff and burgh courts, cases could be competently tried in more than one court. The grant of power to hold court usually included, therefore, the powers of replegiation and of finding caution de colreach.⁵⁰ This meant that where a case was brought in one court, the defender could plead that the case should be taken in his master's court. If his master was willing the defender could then be repledged by his master or the master's representative from the first court. It was possible also for a master on his own initiative on finding caution to repledge his man to his own court.⁵¹ The power of replegiation extended only to the master's liege man, men borne or dwelling on his lands, or a member of his family. Abuse of the power provoked legislation in the thirteenth century to prevent the bribery of masters to repledge any malefactor.⁵² The result of unscrupulous repledging by the lords to their own courts, sometimes meant that the disputed issue would never receive a fair hearing as the injured party would find it impossible to compel the defender's appearance in a court where the issue would be tried. The special form of pledge, the culreach appears to have been designed to prevent this. It was therefore required that where the defender was repledged it was necessary for him to leave a culreach in the court from which he was repledged. If thereafter the injured party did not receive justice in the master's court he could return to the first court and continue his action against the defender. Where this occurred the culreach was liable to a fine, and if the defender did not appear, the culreach was answerable to the

injured party.⁵³

In the records we found reference to leaving the pledge behind in the first court and to making the culreach answerable in place of the defender if the defender did not appear, which suggests the applicability of the hostage theory. Nevertheless, doubt is cast on the persuasiveness of this interpretation, in view of our failure to find any provision relating to custody or restrictions on the liberty of the culreach. The culreach is, however, consistent with a watered down version of the hostage theory, in which it is sufficient for a third party to be held responsible for the default of the principal.

It is difficult to say on the basis of available material in what way the culreach was attached to the court. Rather, however, than interpret the culreach as hostage, we put forward another possible interpretation. It seems clear that the law requiring the provision of a culreach was a method of ensuring that the first court could if necessary obtain redress for the injured party. A situation in which it was possible for the court to enforce its judgement against an absent defender was where the defender had property within the jurisdiction of the court. There is evidence that in some circumstances relating to freemen, where such property existed, the court did not require the usual provision of cautioners.⁵⁴ In our opinion therefore the culreach was more likely to have been a cautioner with property within the jurisdiction of the first court, than a hostage.

Some clear examples of hostageship as a method of ensuring the appearance of a defender may be adduced from the sixteenth century but this will be considered below.⁵⁵

The Celtic influence, though we would argue very important in this early period, was not the only foreign influence affecting Scotland. According to Ritchie:

"There can be no question of inviolate Celtdom... in Fife and further up the East Coast there had been English infiltration. Norwegians occupied Orkney, Shetland, Caithness and the 'Southern Land'; they had settlements all around the West Coast, held the Hebrides and controlled the Irish Sea. Thus surrounded, 'Celtic Scotland' was permeated with English feudalism and Norse custom".⁵⁶

Trying to detect any possible Norse influence is problematic. From the system existing in the Orkneys and Shetlands in the early seventeenth century, we are induced to conclude either that a similar system existed in Norse law or that the influence was in the opposite direction ~~that is~~ Scots law influenced the Norse law of pledging. Information which we extracted from the "Court Book of Shetland" illustrated a pledging arrangement of that period.⁵⁷ Thus in a case of manslaughter, dated 1602, of the six persons thought to be responsible, each produced a cautioner from whom security of one hundred pound Scots was taken for their appearance in court. It would be unwise, however, to infer the existence of a similar system in early Norse law if Dobie's caveat is accepted.⁵⁸ Dobie has emphasised the uncertainty which surrounds the early Norse law because of the destruction of early records and the possible taint of Scottish influence in surviving records. For the earlier period, as there is no material from which Norse criminal law can be reconstructed,⁵⁹ it is impossible to say with any authority whether a similar or different system of pledging existed. Even granting the existence of a different system, however, it seems likely that its influence was localised and, in the absence of any evidence to suggest the contrary, it seems reasonable to discount Norse influence in this field.

The feudal influence to which Ritchie referred⁶⁰ did not represent a sharp break in the development of Scots law, as a system akin to feudalism existed in Celtic Scotland as in Anglo-Saxon England. Nevertheless from the eleventh century the Celtic influence was ousted by a new influence which may, with reservation, be termed Anglo-Norman.⁶¹ This new influence in Scotland was one of the repercussions of the Norman conquest of England. Scotland in absorbing many Norman settlers from England also absorbed new ideas and institutions. And with events dictating long sojourns at the English court for some royal heirs and members of the Scottish court, this process was encouraged. The influence became a deliberate policy in 1124 with the accession of David I who while being a descendant of the Scots Kings was also one of the most powerful barons in Norman England. The more developed Anglo-Norman system commended itself naturally and much of this law was absorbed into Scots law. By the end of the thirteenth century, however, the political ambitions of Edward I had aroused considerable concern in Scotland. Resistance culminated in the Wars of Independence and after Scotland succeeded in establishing her independence, direct influence from England ceased.⁶²

It is arguable however that an indirect influence permeated the development of Scots law due to the use of the Regium Maiestatem and other texts. The Regium was a compilation of law and custom drawn up in the thirteenth century and was very much influenced by an Anglo-Norman treatise written by Glanville and other foreign materials notably Roman and Canon law. These source materials were adapted to Scottish needs. Although some doubt surrounds the question, to what extent the surviving texts represent the early law, it is clear that by the fifteenth century the Regium was much used by practitioners and greatly influenced later law.⁶³

While attempting to assess an Anglo-Norman influence on the Scottish law of pledging, we noted that the Scottish term "borch" or "borrowes" (pl.) is derived from the O.E. "borges" meaning pledges or sureties.⁶⁴

The earliest records reveal that considerable similarity must have existed between the Scottish and English system of pledging. Dating from the twelfth century, if not earlier, there grew up between Scotland and England a body of law, the March Laws, which regulated some of the special problems created by the clash of two separate jurisdictions.⁶⁵ These laws, as might be expected, reflected the laws found in Scotland and England at this period. A special feature of the early March Laws was the land tenure held by serving as Inborch or Utborch. This office seems to have been designed to facilitate the enforcement of judgements based on the March Laws. Thus pledges given by either Englishmen or Scotsmen could be distrained in both realms.⁶⁶ Based as it was on mutual assistance, the offices of Inborch and Utborch do not appear to have survived the hostility generated by the Wars of Independence.⁶⁷ Noteworthy also is the procedure which related to cases where a person from either Scotland or England was challenged for injury touching life or limb, robbery or theft. The procedure involved the giving of pledges who were answerable not only for the production of the defender, but also in the case of robbery or theft for the amount appealed, and in the case of slaughter for the full manbote.⁶⁸

One of the earliest descriptions of the use of pledging in criminal matters which we found was contained in the Regiam Maiestatem. Book Four of the Regiam was concerned mainly with criminal matters and owed less to Glanville's Tractatus than the other Books, but the

description of pledging contained therein was clearly based on the Tractatus.⁶⁹ The two pledging systems were not identical, however, and the English frankpledge system was never adopted in Scotland. Nor was borrowing from England always successful, for example, Robert III's attempt to introduce limitations to the types of offences in which pledges might be accepted similar to the limitations contained in the Statute of Westminster 1275.⁷⁰ Some reference, which has not been identified as of English origin, to a pledging system was also contained in the Regiam for example the law in Book Two which stated that a master might lose his serf if he refused to stand as pledge.⁷¹

It is our opinion that pledging must have been known in Scotland in view of the Celtic influence. The taking of borch was therefore unlikely to have been an Anglo-Norman procedural innovation, though the Anglo-Norman influence may have provided a sophistication to Scottish procedure. The fact that the Regiam, with its description of Anglo-Norman pledging, was absorbed into Scots law does not, we think necessarily merit the conclusion that later Scots law was based on the English law of pledging.

Though we found differences, the early similarity between the two systems is striking but developments after the decline of English influence deserve independent consideration.

In the post Independence period of Anglo-Norman influence it becomes much easier because records exist to discern and interpret pledging arrangements. To avoid confusion, the use of the word "pledge" to mean a thing given in security, and "pledge" used as a synonym for "borch" which implied a surety or cautionary relationship between

people, ought to be noted.⁷² It is the latter meaning which must be given to references to pledge in the following pages.

A striking feature of the procedure of the period was the importance of pledging in the operation of the various courts. Thus we find that at various stages of court procedure, a pledge or borch was demanded. For example, the admission of essonzies (excuses for non appearance) pled by suitors was subject to the finding of pledge,⁷³ similarly for frivolous exceptions.⁷⁴ A pledge had to be found for the amount disputed in a court case⁷⁵ and, where applicable, for assythment.⁷⁶ Where the defender elected for trial by battle, again a pledge was demanded, in this case to guarantee the damages claimed by the injured party in case the defender was killed.⁷⁷

One of the most difficult problems in an age which lacked the centralised power and police organisation at the disposal of a modern state, was ensuring the attendance of the disputing parties. The method adopted to ensure such attendance was again pledging. Thus the injured party in most cases had to find a pledge to guarantee his attendance and pursuit of the case,⁷⁸ though some parties, e.g. ecclesiastics, widows, orphans and pupils were exempted.⁷⁹ This pledging requirement might be waived also in capital cases where sometimes a faithful promise was accepted, rather than risk deterring serious accusations.⁸⁰ Generally, however, an injured party without pledges or with pledges but failing to pursue the case, fell into the King's mercy.⁸¹ It was possible, therefore, for an injured party without pledges to be detained in prison until the case was completed.⁸² Such detention was not feasible as a general solution to the problem of ensuring the appearance of reluctant defenders in court. Society had not yet "advanced" sufficiently to produce a prison system.

Goals were few in number and excepting perhaps castle dungeons, were not considered secure.⁸³ Certainly they were not capable of containing the numerous defenders for the months, or in some cases years, they awaited trial. Pledging arrangements were therefore utilised in place of custody. According to the usual practice the defender was freed, provided he found sufficient pledges, and was imprisoned only if he failed to find such pledges.⁸⁴

It may be remembered that some writers have identified in the English context a pledging arrangement for the defendant's appearance in court as the prototype of modern bail.⁸⁵ In view of the use of pledging which we have outlined above a similar claim may be made in the Scottish context. To evaluate the resemblance it is necessary to give further consideration to the Scottish pledging arrangements.

Consideration of the early function of pledging soon reveals a more extensive scope than bail. The question of bail generally arises only when the accused is in custody, or if not technically arrested, at least within the physical confines of the court (e.g. in the case of a person summoned to appear and pleading not guilty). In earlier times however the arrest of a reluctant accused often posed greater problems than pre-trial custody. It appears, that from the eleventh century the crowner⁸⁶ bore much responsibility for accepting pledges from the accused in place of pre-trial custody. The crowner had power to arrest the goods of the accused until a pledge was offered, or if the accused fled, he was obliged to pursue him and the citizens were under a duty to assist. In some cases, however, the crowner did not dare, nor did he have the power, to arrest the accused. In this situation the sheriff either had to send sufficient men to make the arrest, or himself act as pledge for the accused's appearance.⁸⁷ These difficulties were reflected in the early form of prosecution

by criminal letters.⁸⁸ By criminal letters the accused was ordered to come on a certain day, to find caution for his appearance to underlie the law. Failure to find caution as directed, resulted in an automatic sentence of outlawry.⁸⁹ The necessity for this use of pledging seems, however, to have diminished and eventually fallen into disuse as the government grew more effective and the powers of its officers were consolidated. Today the same problem is met by an organised police force. By the time of Hume, prosecution by criminal letters was indistinguishable from prosecution on indictment, except in the form of words, and automatic outlawry no longer followed failure to come and find caution.⁹⁰

Though at first the law allowed pledges to be accepted for almost any offence, by the beginning of the fifteenth century a more restrictive attitude prevailed and many offences which today are considered bailable were excluded. In cases where there had been no arrest pledges were acceptable for every type of offence.⁹¹ Where an arrest had occurred however, it was ordained in the earliest legislation that those accused of manslaughter were not to be allowed their freedom on giving a pledge, though a provision allowed acceptance if permission was granted by King's letter.⁹² Generally pledges were not acceptable for accused who were caught redhanded committing manslaughter, theft or robbery because such persons were to be summarily condemned. If justice was delayed it was possible to accept a pledge unless the offence was a great transgression against the King or lords of the realm. In cases where no pledge was accepted the accused was kept in custody until the trial.⁹³ Although Acts of Robert III in 1397 and 1398 affirmed that pledges were acceptable for theft, robbery, slaughter and burning of the country,⁹⁴ strict limitations were introduced in 1400.⁹⁵ By this legislation it was

forbidden to grant pre-trial liberty to accused arrested for manslaughter by the King's command or that of his justiciaries, breakers of prison, common and notorious thieves, those taken for burning or felony, falsifiers of money or the King's seal, excommunicated persons taken by command of the bishop, men taken for treason, or for wickedness touching the King, or willingly resisting the King's command by word or writ, and bailees making short account to their masters. In Scotland, however, it seems unlikely that the limitations were always heeded in practice even in the case of treason. Only fifty years after Robert III's Act it was necessary to pass another Act, to the effect that those suspected of treason were to be kept in prison.⁹⁶ Later Acts in the sixteenth century provided that a pledge might be accepted in serious cases e.g. fire raising, and ravishing of women, as in manslaughter.⁹⁷ Indeed by the end of the sixteenth century, James VI felt it necessary to increase severely the unlaw (fine for failure to appear after a pledge has been found to underlie the law) for "slaughter and other odious crimes", because the fine was so small that it did not deter non-appearance.⁹⁸ The practical inefficacy of these limitations is supported also by Burnett who wrote:

"Such continued to be the situation of the country and insufficiency of its police that ... caution 'to underlie the law' was received in almost every case, treason alone excepted, sometimes, without even an attempt to arrest the person in the first instance."⁹⁹

Despite the fact that bail is not used, as pledging was sometimes, as a substitute for arrest the similarity of function is still striking. And although the rules for accepting pledges and granting bail are not the same, it is easy to identify the reflection of the former in modern bail.

For those attracted to this theory, it is not sufficient merely to locate the origin of bail in this type of early pledging arrangement, as controversy has surrounded the question of which specific form of pledge anticipated bail. The controversy, as explained above,¹⁰⁰ centred round whether the origin of bail was to be found in the frankpledge system. Or according to the less traditional view whether it was to be found in a suretyship arrangement constituted for the special purpose of guaranteeing the defendant's appearance for trial.

Unless willing to ignore Scottish development and attribute the forms of bail solely to adoption of English ideas, it is not possible to identify the frankpledge system as the origin of bail in Scotland because frankpledge was confined to England and indeed only to parts of England.¹⁰¹ Nevertheless although frankpledge did not exist in Scotland it is very easy to draw a parallel, as a system somewhat similar did exist.

Under the feudal system every person was bound to be under a master and the law ordained that each earl, lord, baron and freeholder should be responsible for entering his own men in court.¹⁰² The law dealt strictly with idle men, beggars and others without means of support who did not have masters. Such men were ordered to find a master and if they failed to do so, they were subject to unlaw and also might be kept in custody until a master was found.¹⁰³ This severity extended to those accused of a crime. Thus where a man was accused of theft and did not have a master the law presumed he was a proven and convicted thief and treated him accordingly.¹⁰⁴ There was then, an extensive surety arrangement resembling and possibly inspired by the frankpledge system.

Despite the existence of this system, there is no doubt that individual pledging arrangements were competent for the purpose of guaranteeing the accused's appearance in court.¹⁰⁵ Thus a law existed covering the situation where the master refused to be a pledge for his man.¹⁰⁶ By later law it was even provided that the master must compensate the pledge, if the pledge had been fined because one of the master's men had fled instead of appearing in court.¹⁰⁷ This obviously illustrates that the master and pledge were not necessarily identical. Other examples of someone other than the master acting as pledge may be found in provisions relating to a person acting as a pledge for a stranger who was staying in his house,¹⁰⁸ an unmarried woman or widow acting as pledge,¹⁰⁹ a freeman acting as pledge for himself in minor matters¹¹⁰ or in some serious cases if he owned heritage.¹¹¹ This obligation of the master to stand as pledge appears to have formed part of the superior's feudal duty to defend his vassal.¹¹² but this duty did not preclude other arrangements.

It would seem reasonable therefore to identify the individual pledging arrangements which more clearly resemble individual bail arrangements as the prototype of bail, especially as similar arrangements seem to have antedated the general pledging system inspired by feudalism.

Those theorists who identified the origin of bail in pledging arrangements were divided about the identity of the person standing as pledge. They did not appear to consider the possibility that the same function, that is, guaranteeing the appearance of the accused in court, might be achieved by more than one type of pledge involving different consequences.

According to early Scots law it was possible for an accused to obtain his pre-trial freedom by offering a person as pledge either as a forthcumand borgh or "to answer as law will" to the pursuer.¹¹³ Standing as a forthcumand borgh the pledge was only liable to enter the accused, if he was fit and well, in court on the day appointed. By entering the accused the pledge fully discharged his obligations.¹¹⁴ If the accused did not appear in court, the pledge was liable for unlaw. He might also become liable to the pursuer for the accused's obligation, though he could relieve himself of this obligation by entering the accused in court, at any time before or after the pronouncement of the decree.¹¹⁵ In cases, however, where the pledge stood "to answer as law will" his obligations went beyond the mere presentation of the accused in court. Such a pledge was responsible until the end of the case, and was answerable to the court and to the pursuer if the accused was of insufficient means or insolvent. If the accused did not appear, the pledge was liable to be fined for the accused's non-appearance and was also liable for the amount claimed by the pursuer.¹¹⁶ The earliest reference to these two types of pledge which we found was in the Quoniam Attachiments but from the information available it is not possible to say whether they evolved separately, or whether one evolved from the other.¹¹⁷

The theory of the origin of hail which we consider to be most persuasive is that which identified the origin in the system of presenting pledges for the appearance of the defendant in court. In our research we found that the obligation undertaken by the forthcumand borgh, unlike hostageship or the various forms of pledging i.e. pledges for wergeld, the "culreach", pledging "to answer as law will",

encompassed only the duty to present the defender in court. This is similar to the modern bail obligation. The obligation of the forthcumend borgh also similar to bail, was extinguished when the defender was brought before the court. We are of the opinion, therefore, that the forthcumend borgh represented a significant stage in the development of pledging. It is this form we would argue which best represents the prototype of modern bail.

To do justice, however, to the opposing view held by supporters of the hostage theory of bail some consideration must be given to the use of hostageship in the sixteenth century.

Throughout Scottish history parts of Scotland, particularly the Highlands and Lowlands, were notoriously lawless. James VI, confronted by this age old problem, renewed efforts to enforce law and order towards the end of the sixteenth century. As part of this policy he instituted a system of precautionary suretyship similar to the feudal system of general suretyship discussed above. Rolls were compiled containing the names of suspected depredators and all landlords and bailees in the Lowlands were charged, under pain of outlawry, to find as surety and caution landed men outwith the Lowlands. Duty was laid upon the landlords to present in court any of their men, tenants, or people dwelling on their land who were accused of any crime, and this duty was extended to satisfying the party harmed if necessary.¹¹⁸ Similar surety had to be found by chieftains and principals of clans.¹¹⁹

James's policy also authorised the taking of hostages. General responsibility for the inhabitants of the border lands devolved upon the wardens.¹²⁰ It was ordained, however, that a warden might relieve himself of some of this responsibility by handing over hostages,

representative of the different clans, to be kept in custody. As a result, the responsibility of a chieftain to present for trial any member of his clan who was accused was confirmed. If the accused did not appear the hostage held in custody was liable to suffer the punishment, even to death. In such a case the chieftain's responsibility to the injured party still remained and he was also obliged to hand over another pledge into hostageship.¹²¹ The person into whose custody the hostage was entrusted was under a considerable burden to prevent escape. The extensive use made of this practice of hostageship led landowners and barons to refuse to accept the responsibility. This provoked retaliatory legislation placing such refusal under the pain of fines up to two thousand pounds Scots.¹²²

This legislation illustrates well a pledging system based on hostageship used as a method of compelling the appearance of the accused in court, with the hostage liable to suffer the punishment designed for the accused. It is also of interest in that it is an example of a prospective general hostageship compared with the more usual form of hostage, taken retrospectively after a particular offence, to guarantee the appearance of a particular accused.

In this attempt to clarify what sort of expedient anticipated bail in Scotland, it is hoped that the early forms have been successfully identified and that the juxtaposition of these forms and the competing theories of bail has been illuminating. The form which in our opinion most closely resembles bail has also been indicated.

The inquiry does not extend beyond the seventeenth century. The term "bail" did not appear in Scots law before this time but reference

was made to various forms of borch, pledge, and caution. Reference to bail occurred in the latter part of the seventeenth century¹²³ and this was the term¹²⁴ used in the important Act of 1701 which according to Hume, organised the law "into a new, clear and a more provident order".¹²⁵

REFORMS DEMANDED DURING THE SEVENTEENTH TO THE NINETEENTH CENTURY

"The matter of bail is one of the most important in the personal liberty of the subject".

-- Alison ¹²⁶

In view of the barbarities prescribed by some of the early criminal laws, it is perhaps surprising to find that the law made provision for pre-trial liberation. Although this may originally have been due to lack of any custodial alternative rather than concern with protecting the individual, by the nineteenth century bail was recognised as one of the most important civil liberties of the subject.

In the following section we describe the ways in which the institution of bail was abused and the liberty of the subject eroded during the seventeenth to the nineteenth centuries.

The main abuses criticised namely, undue delay before trial, high bail money and wrongful imprisonment, are regrettably only too similar to abuses identified by the critics of modern bail systems which we describe in Chapter II.

In the Declaration of Estates of 1689, the Scottish Parliament expressed its disillusionment with Stuart rule and offered the Crown to William and Mary. Two of the abuses libelled in this declaration were delaying trial and exacting extravagant bail.¹²⁷ These criticisms and the demands contained in the Claim of Right successfully provoked reforming legislation.

For those in custody committed in order to trial, the Act of 1701¹²⁸ instituted severe penalties for wrongful imprisonment, provided safeguards for the accused in custody and a time limit within which he had to be brought to trial or released. The inequalities in the granting of bail, whereby murderers and other serious offenders were sometimes released on bail while lesser offenders might be kept in custody or granted bail to a sum which they could not raise, were also attacked by this Act. In this attack the Act delineated those crimes which were to be bailable declaring "that all crimes not inferring capital punishment shall be bailable . This provision, however, did not affect the Lord Advocate's power¹²⁹ to consent to bail in any case, nor the power of the High Court of Justiciary to grant bail even in cases not bailable under the Act.¹³⁰ To prevent demands of exorbitant bail which made the grant of liberty illusory in many cases, the Act laid down maximum bail amounts, the maximum varying with the social status of the accused.¹³¹ Because of fluctuating money values the courts were later given the power to double these maxima.¹³² The maxima were again increased¹³³ after a minor scandal caused by the case of Cameron.¹³⁴ At the same time a law was passed which allowed the High Court of Justiciary, on application to the Lord Advocate, to extend these maxima in cases of sedition.¹³⁵ This latter power was soon repealed,¹³⁶ however, "as savouring too much of arbitrary power".¹³⁷ Application for bail

under the Act, had to be in writing to a magistrate competent to try the offence. The magistrate was subject to severe penalties if he neglected to grant liberation on bail to a person so entitled.¹³⁸

The wording of the grant of bail, that the panel be liberated "to answer at all diets", ensured that bail was extended to the trial diet in cases where the accused had appeared at an earlier pleading diet.¹³⁹ But the protection of the Act only applied to accused who had been committed in order to trial and did not extend to the earlier period where a person was committed for further examination.¹⁴⁰ Nor did it apply to the period after committal in order to trial. It did not cover, therefore, application for bail once the trial had commenced, though the court still had discretion with the consent of the prosecutor to grant bail to any amount.¹⁴¹ Bail was never competent, however, for the period after the verdict but before the pronouncement of sentence.¹⁴² In capital cases bail was clearly incompetent, but the case of suspension or an appeal from a sentence of imprisonment presented special problems, as the sentence was in daily execution before the appeal was heard and perhaps granted. Hume in raising these doubts said:

"the complainer ... is truly denied the benefit of the law if he is not released on finding surety, which may be fixed at the discretion of the court, to return to gaol in case the sentence shall be affirmed"¹⁴³

Apart from some legislation which was applicable in special circumstances, i.e. the taking of bail under warrants endorsed between Scotland and other parts of the United Kingdom,¹⁴⁴ the petition for bail by a peer,¹⁴⁵ the taking of bail by a designated police officer for any offence which might be competently tried before a justice of the peace court,¹⁴⁶ the 1701 Act regulated the law of bail for almost two centuries.

Abuses, however, continued to exist under the Act and it was not unknown for persons who were incarcerated for long periods before trial, to enact themselves for transportation rather than remain in custody awaiting trial.¹⁴⁷ The criterion laid down by the Act, "that all crimes not inferring capital punishment shall be bailable" also led to some serious anomalies, which were highlighted as a more restrictive attitude towards the use of capital punishment evolved. Thus some capital offences were deemed not capital for the purpose of bail and vice versa. For example, legislation was enacted to allow bail to be granted to a revenue officer who killed in the course of his duty, because if the charge was murder, this was a capital offence and not bailable.¹⁴⁸ Similarly, when capital punishment was abolished for forgery,¹⁴⁹ forgery became a bailable crime, but the abuse of forgers absconding while on bail necessitated more legislation declaring, that for the purposes of bail, forgery was to be treated as if still a capital crime.¹⁵⁰ Other anomalies which occurred were for example the perpetrator of serious theft, a capital crime, was not entitled to bail, yet the resetter who might be a serious and persistent offender was so entitled, reset not being capital. A similar situation existed in relation to the crimes of theft and breach of trust and embezzlement.¹⁵¹ In addition, many crimes capital in theory were no longer so in practice.¹⁵²

A Law Commission gave some consideration to bail in 1871 but did not suggest altering the criterion of bailable and non-bailable crimes. The Commission contented itself with the proposal, that applications for bail should always be intimated to the prosecutor and that limitations as to the amount of bail should be abolished, the amount to be in the discretion of the court.¹⁵³ Witnesses before the

Commission, however, had proposed that discretion whether to grant bail should be a matter for the sheriff subject to appeal to the High Court of Justiciary. Reform when it did come in 1888 was along similar lines to this latter proposal.

The 1888 Act, like the 1701 Act, was particularly concerned with bail in cases committed in order to trial. The earlier law, however, marked off certain areas, for example, committal for further examination, after verdict before sentence pending appeal, as being subject to special policy considerations. These lines of division have survived in modern law and partly account for the different considerations which attach to bail decisions at certain stages of procedure.

The 1701 Act attempted reform by limiting the discretion of the court, thus the Act not only restricted the court's ability to grant or refuse bail, it also placed limits on the amount of bail which could be demanded. Indeed the possibility of a court demanding unlimited bail was considered as 'savouring too much of arbitrary power'.¹⁵⁴ By contrast, the reforms of the 1888 Act¹⁵⁵ in the main swept away these limitations. This Act, which forms the basis of modern law testified to the increased confidence placed in the discretion of the court.

The use made by the courts of this discretion will be among the questions examined in following chapters, where we consider whether such confidence is justified or whether a modern demand for reform is necessary.

II

MODERN DEMANDS FOR BAIL REFORM

A COMPARATIVE DESCRIPTION

To provide a perspective in which the Scottish bail system may be judged we consider the attempts made by some other countries to deal justly with the untried accused. By examining different approaches to the problem of pre-trial custody we hope also to provide a fruitful source of ideas for improving the Scottish system.

Our examination was of course limited by the availability of suitable source material. From the information available, however, we have selected some of the more interesting variations and alternatives to bail including examples of some countries which have dispensed with a system of bail. Because of Scottish similarities we pay considerable attention to Anglo-American legal systems in which bail has recently been the subject of a major re-examination.

COUNTRIES WHICH HAVE AN OPERATIVE BAIL SYSTEM

(1) Anglo-American Legal Systems

Although the bail provisions in America and Canada are based on English law, the law and practice in the three countries has diverged.

The modern demand for reform of the bail system originated in America in the nineteen fifties and perhaps grew out of a more general concern about poverty and its discriminatory impact in the administration of justice.¹ Successive studies which resulted

because of this interest, revealed so many iniquities that major changes in the American bail system were implemented. The reverberations of the American demand for reform encouraged other countries, notably Canada, England and to a lesser extent, Scotland, to examine their bail practice.

(a) America

A right² to be granted bail in non-capital cases is given to the defendant in the vast majority of American states, either in the state constitution or by statute.³ For defendants who are to be tried in non-capital cases before a federal court, a right to bail has existed since the Judiciary Act 1789. This right to bail recognised by the law is enjoyed by a defendant in all circumstances, except where there is a risk that he is unlikely to appear for trial. Violation of this right can be remedied by legal process. For example, it has been decided that a judge is not justified in refusing bail on the grounds that a defendant is dangerous to the community⁴ or is likely to commit offences, if at liberty, before the trial.⁵

Demanding "excessive bail" is prohibited by the Eighth Amendment of the United States Constitution and similar provision is made in all but one of the state constitutions.⁶ This provision has been restrictively interpreted. The courts have said that it does not give a right to an indigent defendant to be released on his own recognisance.⁷

The security traditionally demanded by the judges is money deposited with the court and subject to forfeiture if the accused fails to appear. Bail amounts tend to be high, for example, bail set at 5000 dollars or above is not unknown for offences of burglary and assault.⁸ The provision of bail money has, however, become "big

business" due to the growth of the commercial bail bondsman. The bail bondsman provides the bail money, on the payment of a fee, for defendants who do not have the money. The fee paid for this service is in the region of 10 to 15 per cent of the face value of the bond and is not returned to the defendant when he appears for trial. Goldfarb has described the growth of this business and its vulnerability to criminal infiltration and corruption. He pointed out that "in practice the judge's ruling can be defeated by the caprice of the bondsman who can refuse to provide bail for good reasons, bad reasons, or no reasons".⁹

The power to grant and fix the amount of bail is confined to the judiciary and, therefore, the grant of bail on the authority of the police or prosecutor is not competent.

The system of money bail came under attack when the results of empirical studies by, for example, Foote and Ares, Rankin and Sturz were published.¹⁰

The studies highlighted the plight of the poor accused and attacked the existence of this financial discrimination in the system of criminal justice. It was found that in many cases bail was set without reference to the question whether the accused could raise the amount and was related instead to the seriousness of the offence. Another practice criticised was the manipulation by judges of the amount of bail to achieve a result not sanctioned by the law, namely the preventive detention¹¹ of some defendants. Thus some judges who were unwilling to authorise bail because they believed, for example, that the defendant might commit offences before trial, paid lip service to the defendant's right to bail and granted bail. By setting bail at a very high amount, however, these judges attempted to ensure that the defendant would not secure release.¹²

The unsatisfactory conditions and length of pre-trial imprisonment were also revealed by the studies. The defendant was found to be prejudiced by this not only in social terms, for example, by causing him to lose employment and disrupting family life, but also by making it difficult for him to prepare his defence. In addition, evidence was adduced which suggested that the bail decision might influence the plea made, the finding at the trial and the sentence imposed. One of the most important findings of the studies was that only a very small number of defendants did in fact fail to appear in an effort to avoid trial.

Reform efforts followed two main directions. Firstly, efforts were directed at improving the existing system and secondly, an attempt was made to provide an alternative to bail as a method of release.¹³

An example of an attempt to reform the existing system is the Illinois scheme which it was hoped would "put the bail bond man out of business and restore the control of pre-trial detention to the courts."¹⁴ Under this scheme provision was made to allow the accused to post bail by depositing 10 per cent of the bond with the court instead of paying this as a fee to the bondsman. If the defendant appeared the deposit was returned with a small deduction to cover administration costs. This scheme, of course, left unsolved the problem of defendants who are unable to raise even 10 per cent of the bail money set.

In another reform effort, in this case directed by the Vera Institute, the reformers attempted to break away from the traditional reliance upon money bail as the criterion of release and developed a different system. The system developed was based on the hypothesis that the stability of a defendant's position in a town was a better indicator of the likelihood of his appearance than his ability to

raise bail. An attempt was made to measure this stability by developing a scale, reproduced below, based on factors relating to the family ties of the accused, his employment record, length of residence and criminal involvement.¹⁵

EXHIBIT I

To be recommended, a defendant needs:

1. A New York area address where he can be reached, AND
2. A total of five points from the following categories.

<i>Int</i>	<i>Ver</i>	
		<i>PRIOR RECORD</i>
2	2	No convictions
1	1	One misdemeanor conviction
0	0	Two misdemeanor convictions or one felony conviction
-1	-1	Three or more misdemeanor convictions or two or more felony convictions
		<i>FAMILY TIES (In New York area)</i>
3	3	Lives with family AND has contact with other family members
2	2	Lives with family OR has contact with family
1	1	Lives with nonfamily person AND gives this person as reference
		<i>EMPLOYMENT</i>
3	3	Present job one year or more
2	2	Present job 4 months OR present and prior job 6 months
1	1	On and off job in either of above 2 lines
		OR Current job
		OR Unemployed 3 months or less with 9 months or more prior job
		OR Receiving unemployment compensation or welfare
		OR Supported by family
		<i>RESIDENCE (In New York Area: NOT on and off)</i>
3	3	Present residence one year or more
2	2	Present residence 6 months OR Present and prior 1 year
1	1	Present residence 4 months OR Present and prior 6 months
		<i>TIME IN NEW YORK CITY</i>
1	1	Ten years or more
		<i>DISCRETION</i>
+1	+1	Positive
-1	0	Negative
		<i>TOTAL INTERVIEW POINTS</i>
<hr/>	<hr/>	
R	NR	<i>TOTAL VERIFIED POINTS</i>
		<hr/>
		R NR
		Reason(s) for discretionary point.

The first operational scheme organised by the Vera Institute was the Manhattan Bail Project which came into effect in 1961. Under the scheme all arrested defendants, if they gave consent, were interviewed by the Vera staff who were usually university law students. The Vera staff completed a standard information sheet which is reproduced overleaf.¹⁶

The defendant's "community roots" score was derived from this information on the basis shown in the Vera scale. An attempt was then immediately made to verify this information, usually by telephone. It was hoped that if verified information could be presented to the court about the "community roots" of the defendant the court might be induced to release the accused on his own recognisance (R.O.R.). R.O.R., according to American legal theorists, differs from bail in that no obligation is incurred by any third party. Under R.O.R. a defendant may be released without any financial conditions as envisaged in the Vera scheme or the defendant alone may sign a bond with or without cash deposit.¹⁷ If release, after a Vera recommendation, was granted by the court the staff attempted to keep in contact with the defendant in order to remind him of the date and time of his next court appearance.

According to Goldfarb, within three years 65 per cent of those interviewed were being recommended for R.O.R. and about 98.5 per cent of those released appeared in court on the appointed date. This compared with a success rate of about 95 per cent for those released by the traditional method of bail.¹⁸

Despite this apparent success, the scheme was not without its critics who said that the scheme left the bad risks to be released, if at all, through the bondsman service.¹⁹ A related criticism was to the effect that the defendants, who were released with Vera backing, would

1. Name: last _____ first _____ middle _____ Q No. _____

Date _____ Ct of apprehence _____ D. No. _____

Reason for Excl or Int _____

Pvt Atty. Y N P _____ Investigator _____

Co-Def. Y N (Names) _____ Ages _____

2. Age _____ Description H W S / H F Ht _____ Wt _____ English Y N _____

3. Are you on drugs Y N _____ Ever Y N _____ When last _____

4. Presently living at _____ no. _____ street _____ boro _____ opt _____ floor _____

For _____ On and off Y N _____ Phone _____

With (Name and Relation) _____ Address _____ Phone _____

5. Previously lived at _____

6. NYC resident for _____

7. Relatives in NYC that keep in close contact with, _____ How Often See

Name	Relation	Address	Phone

8. How married? L CL N _____ Status T L S S _____ How long? _____

Children _____ Spouse Name _____ Address _____

9. Presently employed by _____ company & address _____

For _____ As a _____

10. If unemployed, how long _____

How supported U I W Sav Spouse Other _____

11. Previously employed by _____

For _____ As a _____

12. If employed, support anyone? _____

13. What is your state of health? _____

Ever hospitalized for physical or mental disorder? Y N When? _____

How long? _____ Where? _____

14. Birthplace: City _____ State or Country _____

15. Where will you go if released today _____ Local _____

16. Belong to a Union Y N _____ Name _____ Convictions _____

17. How many times arrested before _____

What for: _____ Disp _____

_____ Disp _____

_____ Disp _____

Ever on Probation Y N _____ Now Y N _____ Violate Y N _____

Ever on Parole Y N _____ Now Y N _____ Violate Y N _____ Officer _____

Address _____ Phone _____

18. Have you had anyone called Y N _____ Who _____

19. Any papers with you Y N _____ Info _____

20. Is there anyone we can call or speak to as a reference, someone that knows where you live, etc. (Relative, employer, friend, union, landlord, neighbor, religious leader, teacher, credit reference).

Order	In Ct	Name	Address	Phone	Occup	Relat- ion	Yrs. Known

Does the complainant know you Y N _____ Is it OK to speak to him Y N _____

I AGREE TO ALLOW THE VERA FOUNDATION TO CALL THE PEOPLE LISTED IMMEDIATELY ABOVE IN QUESTION 20 IF THE FOUNDATION WISHES TO CHECK MY REFERENCES.

Signature _____

have been released and appeared without the intervention of Vera personnel. The scheme, it was said, did not help a great number of defendants who were poor and less likely to satisfy the essentially middle-class criteria based on "community roots".²⁰ Even some commentators who accepted the success of the project raised a caveat. Wald, for example, pointed out that research had verified the hypothesis that defendants with good community ties would not flee but this did not prove the opposite, namely that defendants without good community ties would flee. Because of this, Wald argued that many of the conditions imposed routinely might be unnecessary, expensive to enforce and provoke resentment.²¹

Such criticisms were, however, outweighed by praise for the Vera scheme which was generally considered as having provided a solution to some of the much criticised faults of the bail system. Other Vera inspired projects soon followed in many of the states. In these projects a wide variety of different people, comprising law students, probation officers, prosecuting attorneys, defence counsel, public defenders and court staff, were given the task in one or more states of fact finding and verification.²²

Another attempt to alleviate the plight of the untried accused was made by the Vera Institute in 1964 when it initiated the Manhattan Summons project.²² In this second project, an attempt was made to circumvent the necessity for bail, by Vera staff recommending to the police in suitable cases that a person after a police interview should not be arrested but summoned to appear for any future trial. This also stimulated states to reconsider their traditional practices.²³

At the federal level, the demand for reform led to the passage of the Bail Reform Act of 1966. This legislation, described by Wald,

created a statutory presumption in favour of R.O.R. before trial without any financial conditions.²⁴ Introducing an innovation, the Act also provided for a 'scale of conditions of release'. These conditions ranged through R.O.R., third party custody, limitation of travel residence or association, cash deposit, a surety bond and release into the community by day with return to custody at night. The Act also gave discretion to the judges to impose other conditions.

The early attempts at reform were given much favourable attention in 1964 when a report was made to the National Conference on Bail and Criminal Justice.²⁵ In 1968 the philosophy and many of the provisions of the reform projects were adopted by the American Bar Association and published as recommended minimum standards for pre-trial release.²⁶

Later studies of the results of the reform efforts have not, however, been encouraging. Wald reported that studies from 1968-71 have shown that some 40 per cent of defendants were still being detained and in one study it was found that the number of defendants detained was greater than before the implementation of reforms. In assessment Wald argued that the bail reforms:

"have probably had their greatest impact in releasing good risk defendants who might otherwise have had to pay a bondsman or go to jail. They did not, however, do very much to solve the problem of the defendant who needs supportive help in the community to succeed on release. Nor have they reduced the staggering costs society and the individual still pay for detaining persons not yet convicted of any crime. Finally, the abhorrent conditions under which presumptively innocent men are detained, have on the whole, gotten worse, not better, due to overcrowding, physical deterioration of facilities, and a steadfast refusal to allocate adequate funds to this part of our criminal system".²⁷

She considered that future reforms ought to be concerned with ameliorating the conditions of pre-trial detention for defendants who are not released. In this respect some limitations on the time liable to be spent in custody was considered essential. Agreeing with earlier researchers that money bail was inequitable per se, she also

argued that its continued existence was preventing the concentration of attention and resources necessary to make alternative conditions of release work.

It seems unlikely, however, that the bail system will be abolished until some solution is found to the problem of protecting the community from defendants considered to be dangerous because, for example, they may commit acts of violence or other offences while at liberty.

Preventive detention is not legally sanctioned in America but in some cases the judges have attempted to provide this protection by manipulation of the bail system.²⁸ It has been recognised, however, that this practice not only unfairly discriminates against the poor but is also unreliable in the protection it affords, as the professional criminal who may be the most dangerous to the community is the most likely to have "contacts" able to provide bail. Considerable resistance to the philosophy of preventive detention and, in view of the Eighth Amendment, doubts surrounding its constitutionality at present, however, combine to militate against the legalisation of preventive detention.²⁹

(b) Canada³⁰

There is no right to bail in Canada but the Canadian Bill of Rights has a provision to the effect that the law shall be construed so that no person shall be deprived of "the right to reasonable bail without just cause".³¹ This provision has not, however, been judicially interpreted and it is uncertain what protection it affords the defendant. Although it is accepted that the main purpose of bail is to ensure that the defendant will appear for trial other criteria enjoy a limited acceptance.³² It has been pointed out by Friedland that bail

may be competently refused on the grounds that the accused may interfere with witnesses or the prosecution case or may commit other offences while on bail.³³

The form of bail is described in the Canadian Criminal Code as a recognisance entered into by the accused before a justice, with sureties to the amount directed by the justice. Although this form is similar to that found in English law, which makes provision for the creation of a debt owed by the surety if the accused fails to appear, the practice in Canada resembles American rather than English practice. In Canada the courts demand deposit of security before the release of the accused. Both cash and property bail are accepted.³⁴ The amount of bail demanded may be high, for example, Friedland described the median amount of cash bail set for offences of breaking and entering, auto theft, joyriding and possession of burglar tools, respectively as 1001-2000 dollars, 301-500 dollars and 501-1000 dollars.³⁵

Unlike America, the operations of the professional bondsman are illegal³⁶ though in many cases their activities are ignored. A similar function, with less taint of illegality, is also carried out by professional money lenders.

One of the most important studies inspired by the American research, was Friedland's study of the extent and nature of custody before trial in the Toronto Magistrate's Courts.

Many of Friedland's findings were similar to the conclusions of the American studies. Most importantly, Friedland found that although only about 5 per cent of defendants were refused bail at first court appearance, about 22 per cent of defendants pleading not guilty to a summary offence and about 66 per cent of defendants pleading not guilty to an indictable offence spent some time in custody after the first court appearance.³⁷ Friedland submitted that if the defendant was

deemed to be a good risk by the magistrate he ought to be released and not kept in custody because of his inability to raise bail. If the defendant was not considered a good risk, this ought to be stated and bail refused, instead of attempting to achieve the same result by demanding high bail.³⁸ Attention was also directed to the need for a reassessment of the criteria regulating the refusal of bail.³⁹ Friedland argued that if it was decided, that an estimate of the likelihood of the defendant committing further offences while on bail ought to be included in the criteria, the implications of this form of preventive detention ought to be discussed and safeguards provided for the defendant. Possible safeguards which he approved were the placing of the onus of proof on the Crown and a duty placed on the courts to give reasons for their decision.⁴⁰ The practice of requiring security in advance was also subject to severe criticism and adoption of the English practice was urged.⁴¹ Like the American researchers, Friedland argued that more use ought to be made of R.O.R. To achieve this he advocated the adoption of a scheme, similar to that employed by the Vera Institute, to collect information about the defendant's background and ties in the community and to make recommendations to the court.⁴²

(c) England

A right to bail in misdemeanour cases was established in England in 1275 by the Statue of Westminster, but no provision was made for the release of an arrested person in more serious cases where a felony was charged. This right to bail was abolished by the Indictable Offences Act 1848⁴³ and replaced by provisions which gave a single magistrate the power to grant bail at his discretion in all cases excluding treason cases. A similar provision in the Magistrates Courts Act 1952

forms the basis of the modern law.⁴⁴

The law states that bail may be refused on the ground that the defendant may abscond, and in this respect factors such as the nature of the offence and the likelihood of guilt are considered relevant. Other grounds, particularly the likelihood of the defendant committing offences while on bail or interfering with the administration of justice, have also gained recognition.⁴⁵

The demand of excessive bail was prohibited in the Bill of Rights 1689 but there was no appeal possible on this ground. The only remedy given until 1967⁴⁶ was to apply for a writ of habeas corpus and this was competent only if the amount demanded was so excessive as to amount to a refusal of bail.⁴⁷

To find bail the defendant must enter into a recognisance in which he undertakes an obligation to appear and may also undertake an obligation to pay over a specified sum of money if he fails to appear. If requested the defendant must also provide sufficient and satisfactory sureties. Historically the defendant was handed over into the custody of the surety and the obligation of the surety was to present the defendant for trial.⁴⁸ Although some reference to this still exists in the law, for example, the surety's right to arrest the defendant if the surety believes he intends to abscond, the obligation which is now undertaken is the payment of a specified sum in the event of the non-appearance of the defendant. In no case does money have to be deposited in advance. Due to this practice, and the prohibition against contracts of indemnity between a defendant and his surety, nothing similar to the bondsman system has evolved.⁴⁹

Unlike America and Canada the granting of bail is not limited to judicial officers. The police are also vested with discretion to release a person arrested without warrant, provided the offence does

not appear to the police to be serious.⁵⁰ The decision lies with the police officer in charge of the police station. This officer must consider bail whenever it is not reasonably practical to bring the arrested person before a court within 24 hours, and even if this is reasonably practical he may still consider and grant bail. Another practice which may aid the quick release of a defendant is the acceptance by the police of the bail specified in the arrest warrant. It is an accepted practice that a magistrate in granting a warrant may if he thinks fit make provision for bail, i.e., he may "back the warrant for bail".⁵¹

Public concern about bail and pre-trial imprisonment led to the publication in 1960 of a Home Office report.⁵² This study described the excessive use made of custodial remands and the time spent by defendants awaiting trial.⁵³ It was estimated that custodial remands before final disposal were applied in one year to about 9000 persons who did not subsequently receive any sentence of detention.⁵⁴

A number of research efforts were also directed at the decisions made about bail by the courts and some disturbing results were produced.⁵⁵ These studies were unanimous in their conclusions that the information given to the court was in most cases totally inadequate and could not support a rational bail decision.⁵⁶ In this context the plight of the unrepresented defendant at the bail hearing was particularly criticised. Indeed one writer was moved to conclude that the situation is "not that the unrepresented defendant is not given a fair hearing but in effect he is given no hearing at all".⁵⁷

Considerable interest was shown by the researchers in the American Vera Institute bail experiment. Davis and Bottomley, for example, produced "community roots" scores for the cases in their samples and reported that a much greater number of defendants were eligible for

release on Vera criteria than were in fact released.⁵⁸ A warning note against the over enthusiastic reception of the Vera scheme was, however, sounded by Zander.⁵⁹ He pointed out that "community roots" criteria related more to the likelihood of reappearance than other factors, for example, the commission of offences while on bail, which English courts also consider relevant to the bail decision. Perhaps with this or similar objections in mind, most writers did not advocate the adoption in England of the Vera scoring scheme. The writers did, however, believe that Vera type information ought to be placed before the court and advocated the adoption of standardised information sheets which would be given to the magistrates. Unfortunately no suggestion was made as to who would complete these information sheets, whether the information would be verified, and if so, the manner in which this could be achieved. It was indeed proposed that in practice this task might have to be left to the police.⁶⁰ Some support, however, may still be found for the adoption of a scoring system. The argument put forward by King was that:

"in spite of assertions to the contrary there really appears to be no valid reason why a points score system similar to the Vera method should not be adapted to the English situation. It is true of course that courts in this country may refuse bail for reasons which involve so much uncertainty and guesswork that they defy scientific evaluation. Yet this does not mean that it would be a waste of time to assess objectively those items of information which relate to the defendant's record and community ties. A recommendation for or against bail based on a points score assessment does not necessarily exclude the exercise of magistrate's discretion".⁶¹

Following the American work, English researchers also inquired into the effects of the refusal of or failure to find bail. The tentative results recorded bore out the American findings that custodial remands adversely affected the plea, finding and disposition of the case. Other adverse effects, for example, disruption of family life, loss of employment and difficulty in preparing a defence

were also described.⁶²

Comparatively little attention appears to have been given to the financial aspect of bail, including the provision of sureties. In the sample described in the Home Office report, sureties were found for sums between 25 and 200 pounds by about 42 per cent of defendants committed for trial, and by about 15 per cent of defendants tried summarily.⁶³ Sureties for sums over 200 pounds were found respectively by 1.9 per cent and 0.4 per cent of defendants.⁶⁴ It was concluded that the "sureties demanded ... were not abnormally high".⁶⁵ Failure to find a surety was recorded as the sole reason for refusal of bail in respectively 1 per cent and 7 per cent of the cases.⁶⁶ No statistics were given, however, about the number of defendants refused bail where the inability to provide a satisfactory surety was a contributory reason for the refusal. The delay caused by finding sureties willing to act and satisfactory to the courts or police and the resultant time spent in custody by the defendant, were also not recorded. The criteria employed by the courts or police to reject unsatisfactory sureties have been criticised by King as sometimes arbitrary and unfair.⁶⁷ King also drew attention to the fact that in his sample of courts there was a great disparity ranging from 15 to 70 per cent in the proportion of cases in which sureties were considered necessary.⁶⁸ This suggests that the necessity to provide sureties may impose an inequitable and perhaps unnecessary burden on some defendants.

Legislative action to ameliorate some of the unsatisfactory features of the bail system was taken in the Criminal Justice Act 1967. Interestingly this Act reintroduced a right to bail. Such a right, however, is given only to defendants charged with a summary offence punishable with not more than six months imprisonment.⁶⁹ The scope of this right is further limited by additional qualifications.⁷⁰

It has been suggested that the application of these provisions may not result in an increase in the number of persons released, because the existence of the wide qualifications may suggest to magistrates reasons why bail should be refused.⁷¹ Certainly the provisions guarantee release only to an insignificant minority of defendants, and in view of the attitude expressed by the Lord Chancellor, it seems unlikely that this right will be extended.⁷²

An innovation, perhaps more profitable to the defendant, is the duty placed on magistrates to give an unrepresented defendant written notice of the grounds on which bail was refused. Such notice must also be provided on the request of the defendant's legal representative.⁷³ In research undertaken after the Act, however, the criticism has been made that in practice this notice is not always given to unrepresented defendants.⁷⁴

A provision authorising some experimentation with the conditions of release is also contained in the Act.⁷⁵ This was not in effect an innovation as the practice of imposing conditions, though of dubious legality, was well established before the Act. Conditions attached to bail, such as periodic reporting to a police station or surrendering of a passport, represent a form of restricted liberty which the American researchers advocated to enable some poor risk defendants to be liberated.

In a study completed after the implementation of the 1967 Act, King found that special conditions were imposed in 14.7 per cent of the cases. He also found that despite some exceptions, the evidence did not suggest that the power to impose conditions was being used unreasonably or without restraint.⁷⁶ He was alarmed, however, at the wide powers to impose conditions authorised by the words "in the interests of justice or for the prevention of crime",⁷⁷ and argued,

that this might "lead to a substantial curtailment of freedom for those on bail and even to a system of house arrest which was far removed from anything contemplated by Parliament."⁷⁸ He proposed, therefore, that some restraint should be placed on the type of conditions which may be imposed.⁷⁹

In 1971 the Home Office supported proposals⁸⁰ to open "an establishment, on an experimental basis, of a bail hostel for defendants on remand who would otherwise be refused bail because they had no fixed abode".⁸¹ Such an establishment, providing twelve beds for male defendants, was opened in London in November 1971. It has been argued, however, that the provision of such accommodation even on an extensive scale is not the solution. King has criticised the bail hostels arguing that:

"remarkably little thought seems to have been given either to the nature of 'bail hostels' or to the type of prisoner who will live in them. It is clear enough that the great advantage of hostel accommodation is that it allows a person to carry on working and does not shut him off from the remainder of the community. Yet the man with 'no fixed abode' is unlikely to have a regular job, nor will his commitment to society or his roots in the community be particularly strong. In short it is this type of remand prisoner who is least likely to benefit from temporary hostel accommodation".⁸²

In King's opinion the provision of bail hostels merely detracted attention from the real need, namely complete reform of the conditions under which prisoners are remanded. The success of the bail hostels has been considered in a Home Office survey. This revealed that of those men granted bail with a hostel condition, 70 per cent honoured that and all other conditions, and committed no further offences while on bail. About 89 per cent answered to bail but 19 per cent were in breach of some - though perhaps minor - conditions.⁸³

The major problems of insufficient information, irrational decisions and the adverse effects of pre-disposition custody, though now well documented, have not yet been resolved. The question of bail

is being examined, however, by a working party set up by the Home Secretary in 1972. No doubt some of these problems will be tackled in the working party's recommendations.⁸⁴

(2.) Variations in a Civilian System

France⁸⁵

There is no right to bail in France. According to Vouin there is, however, provision for mandatory release where the offence is a petty offence, or a correctional offence not legally punishable by a term exceeding two months imprisonment. In addition, mandatory release is required, subject to rather wide conditions,⁸⁶ when the maximum penalty prescribed by law is less than two years imprisonment. Where mandatory release is required the defendant must be granted release as of right and such release is not subject to the imposition of any financial conditions.

In all other cases the defendant may be granted release only at the discretion of the competent judicial authority. It is possible for the judge to grant such release on his own initiative, or on the motion of the prosecutor or of the defendant. Application for release may be made at any stage of the proceedings.

Preventive detention is recognised by French law. The judge, in exercising his discretion, is entitled to consider whether the defendant will abuse his liberty if released. The grounds justifying refusal of liberty because of fear of abuse are wide, and include the prevention of the flight of the defendant, prevention of interference with the course of justice (by for example preventing the commission of further offences) and calming the community. To impose preventive detention the judge, in addition to the requirement of fear of abuse of



liberty, must be satisfied that there exists serious indications of the guilt of the defendant. To protect the defendant the Code of Penal Procedure allows appeal from the refusal of release and limits preventive detention to a period not exceeding two months. Release is compulsory if this limit is exceeded without an order being made for the extension of the period. There is, however, no limit to the number of orders of extension which may be made and in effect, therefore, no limit to the time which a defendant may spend in custody under preventive detention.

In comparison to the Anglo-American legal systems, there are some interesting variations in the conditions of release. Under French law release is without exception "subject to the proviso that the defendant undertake to appear again at every stage of the proceedings as soon as he may be required and to keep the examining judge informed of all his movements".³⁷ From this it may be seen that the defendant's recognisance imposes a more onerous obligation than that usually required by Anglo-American systems. A second condition relates to the election of domicile by the defendant to facilitate the service of documents and notices relating to the proceedings. The imposition of a third condition relating to the provision of financial security lies in the discretion of the judge.³⁸

Security in the form of recognisance by a third party, similar to the present English surety system, was competent before 1959 but was so rarely applied that it was abolished. Now, if security is demanded, it must be furnished in "coin, banknotes, certified cheques or bonds issued or guaranteed by the state and must be deposited",³⁹ with an officer of the court. The security recognised by French law is, however, composed of two parts, only one of which bears any resemblance to the Anglo-American form. The first part of the security deposited.

guarantees the defendant's appearance at the different procedural stages and is ultimately refunded by the court of the defendant fulfills this condition. The second part of the security however;

"guarantees according to an order of priorities fixed by law, the costs incurred by the public authorities (the state), then such fines as may be imposed and, finally, the restitution and reparation which the court orders in favour of the victim." 90

It is obvious that in order to cover these guarantees the amount of security required might be very high. Although there is no provision in the Code that the security must be based on the defendant's means, according to Vouin, the judges do take the financial resources of the defendant into account. Although the imposition of security is comparatively rare in practice, Vouin has argued that more use ought to be made of this condition.⁹¹

(3) Variations in a Legal System of the Far East

Japan⁹²

In Japan a right to bail has existed since 1948. This right does not apply, however, to the period of investigation and this restricted application has been subject to some criticism, as the period of detention during investigation may extend to 25 days. The right to bail is further restricted by wide exceptions including an exception for offences punishable by a minimum imprisonment of not less than one year.⁹³

Discretionary release by a judge is also possible, though this is less common. The judge may grant such release without any application from the defendant which is useful, for example, in the case of an unrepresented defendant who may be unaware of the release procedure. In exercising his discretion the judge may take into account,

circumstances justifying preventive detention, for example, suggestions that the defendant may tamper with evidence or commit further offences if released.

Although there is no prohibition against excessive bail, the judge in setting bail is directed by the Code of Criminal Procedure to take the financial ability of the defendant into account.⁹⁴ Both deposit of cash or negotiable sureties, and a written promise to pay the sum undertaken by a third party, are recognised ways of finding bail. It may be appreciated, therefore, that the Japanese system combines features of the English surety system and the American and Canadian deposit system.

The judge has discretion to impose other non-financial conditions but it is laid down by law that some conditions are improper and such conditions are prohibited, for example, a condition that the defendant must be of good behaviour.⁹⁵

In addition to bail Japanese law makes provision for a non-monetary system of release called suspension of the execution of detention. Suspension has been described as a peculiarity of Asian law, called at various times in its history Oazuke and Sekiku. Under this form of release the judge releases the defendant into the protective custody of a person or institution.⁹⁶ This resembles the historical institution of English suretyship but differs from it, not only due to the absence of a financial guarantee, but also because in suspension the entrustee does not have any legal right or duty to apply force to ensure the defendant's appearance. The only sanction applicable to suspension is the rescission of the order, which of course makes the defendant liable again to detention. According to Dando and Taniya suspension is now of little importance, but they have argued that this method of release might increase in importance with the expansion of social welfare agencies.⁹⁷

COUNTRIES WHICH HAVE A BAIL SYSTEM ON PAPER

In some legal systems, although provision is made for bail the institution has fallen into disrepute and disuse. Indeed, in some jurisdictions bail now enjoys little more than a paper existence enshrined in a statute.

(1) Denmark

In Denmark although the law makes provision for bail and other kinds of conditional release, these forms of liberty are never authorised. Persons are either released without any condition or held in custody. According to a report written by Botein and Sturz this failure to use bail stems from the belief that bail "is an instrument oppressive to the poor but convenient for the rich and well connected".⁹⁸

The results of one Danish study quoted by Botein and Sturz⁹⁹ showed that in 1961 only 6600 persons were arrested and of these 5000 were released by the police within 24 hours. In the whole of Denmark detention hearings were instituted in only 3200 cases. As such hearings are confined to the most serious cases, release is rare and was granted in only 200 cases. The Danes prefer to avoid the necessity for conditional release, by avoiding arrest whenever possible, and using instead summons procedure to initiate prosecutions. When compared with recommendations made in other countries that greater use should be made of different forms of conditional release to enable the greatest number of defendants to be released, the Danish experience would appear to suggest that the emphasis ought to be shifted, from the devising and utilisation of new forms of conditional release, to the avoidance of unnecessary arrest.¹⁰⁰

(2) Norway¹⁰¹

The Norwegian experience has resulted in a disillusionment with bail which Bratholm has suggested was due to the refusal of the courts to accept that bail could achieve the legally prescribed purposes of detention, namely the prevention of the flight of the defendant, of interference with witnesses or of repetition of the offence.¹⁰² Although provision is made for bail it is according to Bratholm, "rarely used - probably indeed no more than once or twice a year."¹⁰³

Norwegian law tries to limit the use of detention by providing that arrest and detention are only competent when the offence charged carries a maximum statutory penalty of more than six months and in addition one of the legally prescribed purposes of detention can be shown to exist.

Despite this limitation, a study by Bratholm revealed that the use of detention and length of custody gave cause for concern and compared unfavourably with the practice in Denmark and Sweden.¹⁰⁴

Bratholm argued that in practice other purposes not recognised by the existing law were being achieved by covert manipulation of the law. The solution he advocated was the reconsideration and redefinition of the purposes of detention. If, he argued, it was considered necessary and acceptable that detention be used to aid investigation, or for general preventive purposes, or as a "shock" in certain individual cases, this should be explicitly recognised by the law. This would allow the necessary protection for the defendant, which was lacking in the existing law, to be provided. Much of the manipulations of the law could also be avoided he argued, by requiring judges to give very specific reasons to support a detention order.¹⁰⁵

Bratholm did not make any recommendations to revive the bail system, probably agreeing with the courts that bail was unsuited for

the realisation of the functions expected of it.

(3) The Soviet Union

After the Russian revolution of 1917 the existing bail system was abolished on the principle that the wealthy ought not to be given any opportunity to buy their freedom. The superceding law made provision for release, in suitable cases, either on the defendant's promise to appear, or on the provision of a surety by a third party or social organisation.¹⁰⁶

Release on these terms continues to apply, but a provision authorising bail has been reintroduced to the law. Under Article 89 of the Soviet Code of Criminal Procedure¹⁰⁷ bail may be granted at the discretion of the prosecutor or at the discretion of the court. Article 99 states that the amount of bail should be determined by the official granting bail who must take into account the circumstances of the case. Bail may consist either of money or valuables and must be deposited with the court. The deposit may be supplied by the defendant himself, or by a third party or by a social organisation.

An explanation of this change in policy relating to bail has been given by Ruisis. He stated that the reintroduction of bail was possible because the capitalist elements in Russian society had been eradicated.¹⁰⁸ In view of this the suggestion that the deposit of money might in some cases be an effective way of backing up the obligation undertaken by the defendant had proved acceptable. According to Ruisis, however, the bail provisions have provoked continuing controversy and the use of bail has been confined to very rare cases.¹⁰⁹

COUNTRIES WHICH MAKE NO PROVISION FOR A BAIL SYSTEM

The weaknesses of systems of release dependent on money security have been detailed above at some length. It is perhaps surprising that such forms of release are to be found in so many legal systems representing such a diversity of legal development. Although there is considerable experimentation with a wide variety of alternative forms of release in the countries which we have described, these countries still cling to a system of bail.

In a few countries, however, the bail system has been completely rejected by both law and practice. We turn now to outline the experience of two of these countries.

(1) Sweden 110

Despite the fact that Sweden has no system of bail, the country has a record of length and frequency of pre-trial detention which compares very favourably with the practice of countries, described above, which operate such a system.

The results of a study of arrest in Stockholm in 1962 were reported by Botein and Sturz. It was found that 57 per cent of persons arrested were released within 24 hours. For the remaining 43 per cent the average length of pre-trial custody was 19 days.¹¹¹

Swedish law attempts to safeguard the defendant by defining the circumstances in which a person may be detained and placing strict limitations on the time which the defendant may be liable to spend in custody.

The police may detain a person for investigation for 12 hours after which period the person must either be released or arrested. A person must be released if a minor offence, carrying

only a fine or temporary suspension from office, is charged. After arrest, jurisdiction passes to the prosecutor. The prosecutor also has power to release the arrested person, but if he does not authorize release, he must within 5 days file a detention petition with the court. The circumstances which the court must take into consideration are defined by statute. The court may order detention if "probable cause" exists to suspect a person of committing a crime punishable by imprisonment and "if there is reason to fear that the suspect may flee, dispose of evidence, prevent investigation or continue his criminality".¹¹² In cases where the crime charged carries a minimum penalty of two years imprisonment detention must be ordered "unless it is clear that no reason exists (for this precaution)".¹¹³ The court must give a decision within 4 days.

A safeguard against prolonged and unnecessary detention is to be found in provisions to the effect, that the judge must set a trial date at the detention hearing, and if trial is not held before the expiry of 2 weeks another detention hearing must be held unless waived by the defendant. Failure to comply with these provisions must result in the release of the defendant. According to Botein and Sturz these provisions have ensured that in practice trial is usually held within a 2 week period.¹¹⁴

Although Botein and Sturz reported that most defendants are released unconditionally, it is competent for either the prosecutor or the court to impose a variety of non-financial conditions, for example, periodic reporting to the police.

(2) Hungary ¹¹⁵

Vargha, in describing the treatment of the untried defendant in Hungary pointed out that Hungarian law, although it does not make any provision for bail, does provide for unconditional release.

In no circumstances, however, has a right to unconditional release been created. Release is discretionary, and may be refused if custody is considered necessary "to guarantee the success of criminal procedure or to prevent a further criminal offence from being committed".¹¹⁶

Hungarian law draws a clear distinction between custody before trial and after a sentence of imprisonment, and this is reflected in the treatment of the two types of prisoners. This distinction does not, however, prevent the courts from taking time spent in pre-trial custody into consideration for sentencing purposes and the pre-trial custody period must be calculated as part of the sentence.

Instead of custody or unconditional release Hungarian law, like Swedish law, makes provision for a variety of forms of conditional release. Vargha has explained that these preliminary safety measures, for example, prohibition against the abandonment of domicile, are designed to replace remand when a minor limitation of freedom would be sufficient to ensure the presence of the defendant.¹¹⁷

In the following chapters we describe the provisions of Scots law which regulate the treatment of untried accused and, bearing in mind the defects and problems encountered in other countries, we examine the way these provisions work in practice.

III

MODERN SCOTS LAW

THE LAW RELATING TO BAIL

The discussion of the legal provisions regulating bail assumes a familiarity with Scottish criminal procedure which not all readers may possess. In the following section, therefore, we attempt to provide some background information by giving a brief description of relevant procedure and the criminal court hierarchy.

AN OUTLINE OF SCOTTISH CRIMINAL PROCEDURE¹

In Scotland there is a system of public prosecution headed by the Lord Advocate and staffed by Advocates-Depute in the High Court of Justiciary and procurators-fiscal in the sheriff courts. The justice of the peace stands the burgh prosecutors, who staff the lay courts, also prosecute in the public interest but are not under the control of the Lord Advocate. Private prosecutions are rare, and with a few statutory exceptions, will not be entertained by the courts unless consent to the prosecution has been obtained from the Lord Advocate or the High Court of Justiciary. The police have no power to prosecute and must report the results of any investigation made by them to the appropriate public

prosecutor, who has the duty to oversee or conduct the later preparation of the case. It is the public prosecutor who is vested with discretion to decide whether a prosecution will be brought, what offence will be charged and subject to legal limitation, the type of procedure.

There are two types of procedure, summary and solemn, which may be followed at trial. The type of procedure selected has implications for bail, in that the legal provisions regulating bail vary according to the type of procedure which the prosecutor decides to follow at trial. In summary procedure the trial proceeds upon the charge stated in the complaint which has been served upon the accused before the first diet. Trial is conducted by a judge (or judges)² sitting without a jury. In solemn procedure the arrested person is first brought before a sheriff for judicial examination, though in practice the accused rarely makes any statement in regard to the charge at this stage. It is usually after the accused has been fully committed by the sheriff that the indictment is served on the accused. After the service of the indictment a pleading diet is held at least six days later either in the sheriff court or in the High Court of Justiciary. At least nine days later the trial diet is held at which the judge sits with a jury.

The courts in the criminal court hierarchy do not all exercise both summary and solemn jurisdiction. At the lowest level of the hierarchy, the justice of the peace and burgh (or police) courts which are presided over by lay judges, exercise summary jurisdiction only. The sentencing power of these inferior courts of summary jurisdiction is generally restricted to sixty days imprisonment. The sheriff courts exercise both summary and solemn jurisdiction. In summary procedure the sheriff courts may in some circumstances impose a sentence of up to six months imprisonment. The courts of summary jurisdiction may grant or refuse oral applications for bail made in

open court, at the first appearance of any accused who is charged with offences over which they have jurisdiction. If the accused is not called upon to plead at his first appearance and the case is continued (C.W.P.) an application for bail may also be made at the pleading diet.

Solemn jurisdiction, in addition to summary jurisdiction, is exercised by the sheriff courts, and exercised exclusively by the High Court of Justiciary. When exercising solemn jurisdiction the sheriff court may impose a sentence of up to two years imprisonment, but no time limitation is imposed on the sentencing powers of the High Court of Justiciary. In cases where the public prosecutor contemplates procedure on indictment either in the sheriff court or in the High Court of Justiciary, the accused is charged on petition and brought before the sheriff in private. A petition for bail may be presented to the sheriff at this first appearance unless the charge is murder or treason. The sheriff may either grant or refuse the petition and may either commit the accused for further inquiries (C.F.E.) or "fully commit" the accused, that is, commit the accused "until liberated in due course of law" (F.C.). If the accused has been committed for further inquiries he will be brought before the court again and has another opportunity to apply for bail when he is committed until liberated in due course of law.

The High Court of Justiciary has an overriding power to admit to bail any person charged with any offence, and this includes charges of murder and treason. In practice, however, the High Court of Justiciary, when it considers bail petitions, generally sits as an appellate court.

THE DEFINITION OF BAIL IN SCOTS LAW

Bail is security which is given as a condition of liberation and which is liable to forfeiture if an accused person does not fulfil his promise to appear to answer to the charge on the day appointed. Depending on the circumstances in which bail was granted, the security may take the form of a bail bond, or a deposit of money or an article of value.³ Bail does not necessarily imply the creation of an obligation in a third party, as bail may take the form of a pledge deposited by the accused.⁴

A RIGHT TO BAIL DEFINED AND DISCUSSED

In using the expression "a right to bail" we refer to a positive legal right and not to a natural law or a moral right. When we identify a right to bail we imply, therefore, that violation of the right can be prevented or remedied by some legal procedure.

The use of the term "right" in the law is not, however, free from ambiguity. This ambiguity has been criticised by Hohfeld who drew attention to the fact that although the terms "right", "privilege" and "power" were often used synonymously in the law, the same legal consequences were not always attached.⁵ Hohfeld argued that a right is distinguishable from other legal relations, in that it always implies a correlative duty.⁶ Explaining the difference between a right and a privilege Hohfeld said, "the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's 'no-right' that X shall

not enter".⁷ Right and power are distinguishable, he argued, because a power implies the "ability" to effect a change in legal relations.⁸

In considering whether a right to bail exists in Scots law it is necessary, therefore, to look beyond the terms used in statutes or by the judges, to find out what legal consequences are attached.

We detail below⁹ the circumstances in which an accused has an opportunity to be admitted to bail. Bail may be granted by the Lord Advocate, the police and the courts.

It is quite clear that the accused has no right to be admitted to bail by the Lord Advocate¹⁰ or by the police¹¹ who have never in any circumstances had a duty to grant bail. There is no provision authorising appeal or review of the exercise of the bail powers of these officials. Indeed, in the case of the police, it is specifically provided that refusal of bail shall not found any claim for damages, wrongful imprisonment, or any other claim whatsoever.¹² The question whether the accused has a right to bail by the courts has aroused some controversy.

According to Hume the 1701 Act created a privilege of bail for those accused of crimes not carrying a capital punishment.¹³ This statute, however, in addition to providing for appeals from the refusal of bail laid a duty on the judge to grant bail in non-capital cases. Other duties were placed on the judge, breach of which similarly made him liable to a charge of wrongful imprisonment. The penalty prescribed was a fine of up to 6000 pounds Scots and loss of office and public trust.¹⁴ Hume's terminology led the Crown, in Mackintosh v. McGlinchy, to advance the argument that bail had never "been anything except a privilege obtainable only if the court thought

fit to grant it".¹⁵ The Crown's argument was rejected by the Lord Justice-General who stated that for bailable offences, the 1701 Act "provided certain hard and fast maximum measures of caution ... which if tendered to the Court, entitled those persons as a matter of right to bail".¹⁶ It is submitted, that much of the confusion surrounding the question whether a right to bail exists, stems from a failure to distinguish the two separate rights in relation to bail which were created by the 1701 Act. Firstly the Act granted, under certain conditions, a statutory right to the accused to apply to a judge for bail and laid duties on the judge to hear and decide such bail applications within a specified time. The case of Andrew v. Murdoch¹⁷ in which the sheriff-substitute was sued for failing to give deliverance on a bail petition within the statutory time limit of 24 hours, was an example of a person suing for an alleged breach of this right. The second right created by the Act, was the right to be admitted to bail. Thus the judge was under a duty in non-capital cases to grant bail to an amount within the maxima laid down. The sheriff-substitute was sued in Arbuckle v. Taylor¹⁸ for an alleged failure to admit Arbuckle to bail as was his right.

It is possible to explain the position of bail in modern law in terms of the development of these separate rights. Thus, as we describe below,¹⁹ the first right has gradually been extended by giving the accused the statutory right to apply for bail at the stage of committal for further examination,²⁰ to apply pending an appeal against sentence or conviction,²¹ to apply where sentence is delayed until a report is prepared²² and most recently to apply for review of a court's bail decision.²³ The second right has not enjoyed a similar extension and has in fact been extinguished. The Bail (Scotland) Act 1888 abolished the non-capital criterion of bailable crimes and declared

that "all crimes... except murder and treason, shall be bailable".²⁴

J. Macdonald, in an article written immediately after the Act, declared that the 1838 Act "established the general proposition that all crimes are bailable and that the amount of bail is in the discretion of the Magistrate".²⁵ This interpretation that the Act had extended the right to be admitted to bail by extending the crimes which were bailable has lingered. In 1921 the discretion of the court to grant or refuse bail was attacked in Mackintosh v. McGlinchy.²⁶ In the same year, in H.M. Advocate v. Guinn and Macdonald, Lord Salveson also rejected this interpretation saying:

"... it is obvious that it would be exceedingly detrimental to the public interest if it was supposed that every person who was accused of any crime short of murder or treason was entitled to be set at liberty until the day of the trial upon finding a certain amount of bail. I think this is not the law".²⁷

From the passing of the statute the courts have interpreted the 1838 Act as removing the duty to grant bail in bailable cases and leaving the question of the grant or refusal of bail in the discretion of the court.²⁸ Any attempts to place limitations on this discretion have been rejected.²⁹

The extension of the first right helps counterbalance the effect of the extinction of the second right as it gives to the accused various opportunities to challenge his custody. It would be possible of course to extend this right further by, for example, allowing appeal in solemn procedure by the accused from the judge's decision at the stage of committal for further examination. But in the absence of any right to be admitted to bail, the right to apply for bail can only give limited protection to the accused.

We have argued that the grant of bail is always discretionary. The accused has no right to be admitted to bail, though in some

circumstances he has a right to apply for bail and to have his application considered.

We consider in more detail below, the legal provisions which vest discretion to grant bail in the Lord Advocate, the police and the courts, and we describe the criteria which they have said they use in the exercise of their discretion. The circumstances in which the accused has a right to apply for bail are also fully described.

BAIL BY THE LORD ADVOCATE

The Lord Advocate's discretion to grant bail before trial antedated the 1701 Act. As this Act imposed limitations only on the discretion of the courts, it was still competent for the Lord Advocate to grant bail, even in non-bailable cases, and to demand bail money in excess of the statutory maximum.³⁰ This power of the Lord Advocate was specifically retained by S.8 of the Bail (Scotland) Act 1888. The Lord Advocate, therefore, may grant bail to an unlimited amount to an accused and accept responsibility for liberation, without the intervention of a court. The law does not place any limitations on this discretion.

The criteria which the Lord Advocate considered influential have not been published. For the reasons stated above³¹ we are persuaded that the accused has no right to apply for bail to the Lord Advocate.

BAIL BY THE POLICE

Although the law makes provision to ensure that an arrested person is brought before a court as soon as possible, that is not later than the first lawful day after arrest, a person may still spend up to 24 hours, or if local or public holidays intervene, up to 72 hours in custody before his first appearance before a competent court. As such delay was considered undesirable, especially in the case of minor offences, a statutory innovation gave the police power to grant bail.³²

The present law rest on S.10 of the Summary Jurisdiction (Scotland) Act 1954 which vests discretion to grant bail in a chief constable, or in his absence any other officer in charge of a police station. The designated police officer, however, may only grant bail to accused charged with offences which may competently be tried before a court of summary jurisdiction, other than a sheriff court³³ (i.e., a justice of the peace or a burgh court). A statutory maximum of 20 pounds limits the amount of bail which may be demanded.³⁴

In effect, the seriousness of the offence and the maximum bail amount are limitations imposed on police discretion. The police have not made public the criteria which they consider influential. We have argued that there are no circumstances in which the accused has a right to ask for bail.³⁵

BAIL BY THE COURTS

Although discretion is vested in the Lord Advocate and the police, the grant or refusal of liberty on bail is generally considered a

question of importance which the courts ought to decide.

The discretion of the courts to grant bail is unlimited with two exceptions. The inferior courts of summary jurisdiction may not entertain a bail application if the accused is charged with an offence over which they have no jurisdiction.³⁶ The sheriff courts may not entertain a bail application if the offence charged is murder or treason.³⁷

Unlike the Lord Advocate and police, the courts have indicated in the reported cases the criteria likely to influence the exercise of their discretion. We argued above³⁸ that the protection of the accused's liberty is ultimately dependent on the way in which the courts exercise their discretion. The criteria which the courts acknowledge give an important insight into the interests, including the liberty of the accused, which the courts try to balance, and the weighting given to these interests. These criteria which the courts say they adopt may also be compared with the criteria, which we argue in later chapters, they adopt in practice.

(1) Criteria Described by the Courts as Influencing their Discretion

(a) The attitude of the public prosecutor

The courts admit to placing great reliance on the Crown's attitude to bail. This is understandable in view of the role played by the public prosecutor and the independent discretion to admit to bail which is vested in the Lord Advocate.

It appears that where the prosecutor consents to bail this is considered sufficient to induce the courts to grant bail. According to the Lord Justice-General in H.M. Advocate v. Saunders:

"There may be cases, even where the offence is a very heinous one, where the Crown consents to bail being allowed, and when the Crown does consent the application is always granted". 39

The extent of Crown power is not clear, however, if a situation arose in which a court refused bail despite Crown consent. It is doubtful whether the Crown would interfere with the court's refusal in such circumstances. This view gains some support from the decision in Anderson.⁴⁰ In this case a court set bail at a figure higher than authorised by statute and higher than that desired by the Crown. The Lord Justice-Clerk in lowering the bail recognised, "that Crown counsel did right in declining to interfere with the judgement of the sheriff fixing the amount of bail".⁴¹

The reasons for the courts reliance on the Crown's attitude were explained by the Lord Justice-General in Potter and Ors v. H.M. Advocate:

"... in prosecutions conducted by the public prosecutor the discretion is vested in the first instance at least, in the Lord Advocate; and unless it can be alleged that the Lord Advocate has refused bail, not for the purpose of securing the ends of justice but for some other and therefore illegitimate purpose, I think the court ought not to interfere because such interference would be nothing less than relieving the Lord Advocate of the responsibility attaching to his high office. He is subject to this responsibility and vested with the corresponding discretion because he has means and appliances for obtaining information and forming a judgement which are not within the reach of any other official and are not possessed by this court".⁴²

A statement soon after the 1888 Act indicated that the courts might endorse the Crown's view not only where the Crown consented but also in serious cases, unless there were exceptional circumstances, where the Crown objected. In Wilson v. McGuire the Lord Justice-Clerk, considering a charge of rape, said that bail should not be allowed:

"where the Lord Advocate objects to its being granted and states on his responsibility that his investigation of the case does not disclose any fact tending to show that it should be dealt with as exceptional. If in any such case there were exceptional circumstances the Lord Advocate could himself take these into consideration and consent to bail".⁴³

This identification of the courts' and the Lord Advocate's discretion

did not, however, prevail. Later judges emphasised the independent discretion of the courts though recognising the Crown's attitude as a very important factor influencing their discretion. Thus in Mackintosh v. McGlinchy the Lord Justice-General was of the opinion that, "in considering any appeal to the court's discretion a statement made to the court on the high responsibility of the Lord Advocate is entitled to great weight".⁴⁴ The most recent statement on this question is by Lord Clyde in McLaren v. H.M. Advocate where it was said that the opposition of the Lord Advocate:

"... is a factor of very great importance in any consideration of the matter by this court, for he has means of obtaining information and forming a judgement on the matter which are not possessed by us".⁴⁵

The courts place great weight, therefore, on the prosecutor's attitude to bail. In addition the courts rely heavily on the information advanced by the Crown about the circumstances of the offence.

Great reliance must be placed on such information because of a modern reluctance by the judges to inquire into the merits of a case at this procedural stage. It is likely that this reluctance stems from the courts abandonment of the inquisitorial role which formerly they adopted in relation to pre-trial procedure.⁴⁶ In the eighteenth century, the High Court of Justiciary would in some circumstances inquire into the merits of a case by considering defence and prosecution precognitions.⁴⁷ By the end of the nineteenth century however that court was refusing to undertake such inquiry,⁴⁸ although in the lower courts an inquiry was still generally conducted at the stage of judicial examination. The judge in the lower courts, therefore, having taken precognitions and inquired into the merits of the case was in a very informed position to consider any bail application.⁴⁹

As in modern procedure the High Court of Justiciary does not conduct an inquiry into the merits of the case at the stage of application for bail, and as judicial examination is now a mere formality, the courts have no alternative but to rely on information which the prosecutor selects.

(b) Regard to the public interest and the ends of justice

The judges have described themselves as exercising their discretion with a single regard to the public interest and the ends of justice. In older law this regard was limited to the consideration of whether the accused would appear for trial. Even evidence that the accused had been convicted of subornation of perjury and interference with witnesses and was likely to repeat such conduct, was held in Kerr v. Orr and Fulton⁵⁰ to be an insufficient ground for refusing bail. Similarly, according to Burnett,⁵¹ consideration of the likelihood of the accused committing further crimes was not a matter which would influence the court's discretion. Some support for this narrow interpretation was still voiced after the 1888 Act was passed. The Lord Justice-General in Rennie v. Dickson, for example stated, "if it is thought that (the prisoner absconding) is not likely to happen there is no reason why liberation should not be granted".⁵²

The demands of public interest and the ends of justice have, however, been reinterpreted by the judges. In this reinterpretation a number of factors, other than the likelihood of the accused's appearance at trial, have been described by the judges as likely to influence their discretion.

(i) The nature of the offence

The seriousness of the offence charged has been described as a relevant consideration when the judge is considering the amount of

risk to the public, which would be involved if the accused were to be released on bail.⁵³

(ii) Consideration for the victim

Where the alleged victim of the accused may be at risk if the accused is allowed to return home, the judge may take this into consideration and refuse bail.⁵⁴

(iii) The possibility that the accused might tamper with evidence or intimidate witnesses.

Although in older law the likelihood of the accused interfering with the ends of justice by attempting to falsify evidence was a relevant consideration only in relation to the amount of bail set,⁵⁵ the judges, after the 1888 Act, have now included this consideration in factors affecting their decision to grant or refuse bail.⁵⁶

(iv) Previous convictions of the accused.

In H.M. Advocate v. Quinn and Macdonald Lord Salveson said that:

"in the ordinary case bail ought to be allowed only where the person accused has previously been a law abiding citizen with regard to whom there can be no reasonable doubt that, although he is released on bail, he will attend his trial when it comes on. It does not, in my opinion, apply to persons who have been law breakers in the past, and still less to persons ... who have a record of many previous convictions and have served sentences of penal servitude." 57

In a later case, the legality of the practice of presenting the accused's record to the judge when the matter of bail was in issue was questioned, in view of the statutory prohibition against laying the accused's record before the judge before the prosecutor has moved for sentence. It was decided, however, that the statutory prohibition did not apply to pre-trial bail decisions, and that the accused's criminal record might be a highly relevant and proper factor for consideration.⁵⁸

In McLeod v. Wright criminal record was said to be not merely a highly relevant consideration but:

"in some cases, in itself sufficient to warrant the court refusing bail. That would be particularly so where the list of previous convictions is substantial or the latest conviction is of relatively recent date". 59

Criminal record is considered relevant by the courts, at least in the view of Lord Salveson, as an indication that the accused is unlikely to appear for trial, and in the more popular view, as an indication that the accused may continue his criminal activities while on bail.

(v) The likelihood that the accused will repeat the offence or commit other offences while on bail.⁶⁰

Criminal record is generally used to gauge the likelihood of the commission of further offences but any other information tending to show this will be considered.

(vi) Arrest for an offence alleged to have been committed while the accused was on bail.

Where an accused is admitted to bail and subsequently reappears before the court charged with an offence alleged to have been committed while on bail, the judges have declared their reluctance to grant bail again.⁶¹

(vii) Criminal Association

Another interpretation of defeating the ends of justice which has been made, relates to circumstances:

"where the person accused is not acting alone, but in association with others who may not themselves be the objects of criminal proceedings and where liberation would leave the accused free to continue in association and co-operation with these people for the very same criminal objects participation in which has brought him to justice".⁶²

Apart from the suggestion in MacLeod v. Wright⁶³ that a substantial and recent criminal record may be a sufficient factor to induce a refusal of bail, the judges have not indicated what weight they

attach to the various factors, nor what combination of factors they treat as fatal to the success of a bail application. It has, however, been emphasised that the factors which the judges have described cannot be treated as closed or exhaustive categories. Pointing to the uniqueness of particular cases, the judges have said that relevant considerations must vary, from time to time, with changing conditions.⁶⁴

(c) Information given by the law agent for the accused

Despite the number of judicial dicta emphasising the importance of information laid before the court by the prosecutor, the judges have generally been silent about their attitude to another potential source of information, that is information from the accused's law agent. The exception to this silence concerns information relating to the innocence of the accused.

(i) The presumption of innocence

In Scottish procedure, an accused is presumed innocent until proven guilty and this presumption affects the onus of proof at trial. The presumption of innocence, however, has also provided a raison d'être for bail. In older law, the innocence of an accused was certainly regarded by the judges as a relevant consideration in the granting of bail. The judges, as described above,⁶⁵ might consider precognitions and any defences alleged, and if the accused's innocence was indicated might grant bail even if the crime was prima facie not bailable. This concern with the innocence of the accused outlived the passing of the 1888 Act. The point is well illustrated by the judgement in H.M. Advocate v. Scott where Lord Stormonth Darling said;

"No doubt in one view it seems a little hard to use the confession of the prisoner against him, but at the same time his confession displaces the presumption of innocence on which such an application is largely founded".⁶⁶

As the courts, however, attempted to extend the factors unfavourable to bail to include previous convictions, it was argued that such an extension was incompatible with the presumption of innocence. To avoid what appeared to be an inevitable clash the judges denied that the presumption had any application to bail. In MacLeod v. Wright Lord Justice-General Clyde said:

"The matter of granting bail is not a question which raises issues regarding the presumption of innocence or any other presumption. If it did so bail would always have to be granted for in this country everyone is presumed innocent till the contrary is proved". 67

The abandonment of innocence as a relevant consideration was deemed inevitable in view of the judges' abandonment of their pre-trial inquisitorial attitude, in that a real assessment of evidence tending to show guilt or innocence no longer takes place.

Modern law has also extended bail provisions to situations where the presumption of innocence cannot apply. Thus bail is now competent pending an appeal against conviction or sentence.

The influence of older law in which innocence was a relevant consideration has not yet been totally harmonised with modern law. This is seen, for example, in the incongruous procedure whereby an application for bail accompanied by a letter pleading guilty under the Criminal Procedure (Scotland) Act 1987 S.31 often includes an averment of innocence.⁶⁸

(ii) Types of information advanced in favour of the accused

The law agent for the accused, apart from pointing out circumstances which tend to show that the accused's case does not offend against any of the factors considered inimical to bail, may also give additional information to the court. The value placed by the judges on such information has not, however, been reported.

It was recognised by Alison that factors, other than the

possibility of forfeiture of bail money, might induce an accused to appear for trial.⁶⁹ The same recognition perhaps prompted those law agents who advanced "community root" type factors to persuade the court to agree to grant bail. Information relating to stable family life, employment and long residence in a community, has been advanced.⁷⁰ Other defence information urged in reported cases related to hardships which would be a consequence of a refusal of bail, for example, loss of employment resulting in deprivation of the accused and his family,⁷¹ impediment of the accused's legal defence⁷² and youth of the accused.⁷³

(2.) The Accused's Right to Apply for Bail

(a) Before trial

An arrested person must be brought before a court on the first lawful day after arrest.⁷⁴ If local or public holidays (including Sundays) intervene, a delay of up to 72 hours may occur. The accused has a right when brought before the magistrate or sheriff to apply for bail.

(i) Summary procedure

The Summary Procedure (Scotland) Act 1954 is the principal statute regulating bail in summary cases.

When an accused is brought before a court of summary jurisdiction the court may adjourn the case to a specified date without recording the accused's plea. Such an adjournment may be granted to allow time for further inquiries or for any other necessary cause.⁷⁵ A case may be continued without plea in this way for a total period of 7, or on cause shown 21 days from the date of apprehension.⁷⁶ If the accused is not liberated on bail he has a second opportunity to apply for bail

at the pleading diet.⁷⁷

In the absence of a successful motion for continuation without plea, the accused's plea will be recorded at his first appearance. If a plea of not guilty is recorded the trial may take place immediately. In most cases, however, an adjournment before trial will be granted. It is provided in the 1954 Act that the date of the trial shall be as early "as is consistent with the just interests of both parties",⁷⁸ but no specific time limit is set.

(ii) Solemn procedure

The Bail (Scotland) Act 1888 and the Criminal Procedure (Scotland) Act 1887 are the two principal statutes regulating bail in solemn procedure.

If an arrested person is charged with an offence which is to be tried by the sheriff or by the High Court of Justiciary according to solemn procedure, he is first brought before the sheriff on petition. The sheriff may grant a motion for continuation and commit the accused for further examination. There is no statutory maximum placed on this period of committal but it must be concluded within a reasonable time.⁷⁹ The accused has a right to apply for bail when he is committed for further examination.⁸⁰

In the absence of a successful motion for committal for further examination, the accused will be committed until liberated in due course of law at his first appearance and has a right to apply for bail.⁸¹

The time which the accused is liable to spend in custody after committal until liberated in due course of law and before trial is limited to 110 days.⁸² An extension may be granted if the prosecutor can satisfy the court that he is not responsible for the delay, for example, if the delay is caused by the illness of the accused, the absence or illness of a necessary witness, or the illness of a judge

or juror.⁸³ If the time limit is exceeded the accused must be set at liberty immediately. After such a liberation the accused is forever free from all question or process in respect of the crime for which he was committed.⁸⁴

(b) Appeal

In certain circumstances the accused has the right to appeal against the refusal of bail or against the amount of bail set by the magistrate or sheriff. Appeals may be disposed of in court or chambers, by the High Court of Justiciary or any one Lord Commissioner.⁸⁵

(i) Summary procedure

Under the Summary Jurisdiction (Scotland) Act 1954 S.11, the accused may appeal a bail decision regardless of whether the decision was made when the case was continued without plea or at the pleading diet.⁸⁶ The prosecutor has a co-extensive right of appeal and may appeal the grant of bail or the amount of bail set.⁸⁷ In the event of an appeal by the prosecutor the accused is liable to be detained in custody until the appeal is determined. There is a time limit of 72 hours⁸⁸ placed on the length of such custody but an order for a longer period of detention may be granted by the High Court of Justiciary.⁸⁹ The accused, if he has raised the bail money, must be released if the prosecutor's appeal has not been granted, before the expiry of the time limit.⁹⁰ If the appeal is made by the accused, however, there is no provision limiting the time he may spend in custody before the appeal is determined. If the prosecutor's appeal is refused, it is competent for the court to award expenses to the accused. Similar expenses cannot, however, be awarded against the accused.⁹¹

(ii) Solemn procedure

The accused has no statutory right to appeal a bail decision made when he was committed for further examination.⁹² In view, however, of the inherent jurisdiction of the High Court of Justiciary to admit to bail any person charged with any crime, it is arguable that a petition to the High Court of Justiciary might be considered competent.⁹³ Unlike the accused, the prosecutor is given a statutory right to appeal a bail decision at this procedural stage.⁹⁴

The Bail (Scotland) Act 1888 S.5 gives the accused a right to appeal a bail decision made at the time he was committed until liberated in due course of law. The prosecutor has a co-extensive right of appeal.⁹⁵

Provisions, similar to those described in summary procedure, regulate the time limit for appeals⁹⁶ and the award of expenses.⁹⁷

(c) Review

The Criminal Justice (Scotland) Act 1963 S.37 gives the accused a right to make applications to a court to review its refusal of bail or review the amount of bail set.

The grant of the right to apply for review was not intended to restrict the accused's right to appeal.⁹⁸

The accused may apply for review of an unfavourable bail decision on the fifth day after the original decision and thereafter on the fifteenth day after any subsequent decision. The court may grant an application for review "on cause shown". This has been interpreted by the courts as showing a material change of circumstances.⁹⁹ Discretion to grant an application is vested in the court.¹⁰⁰

Application for review may be made when there is a bail decision at any procedural stage, and the procedural stage may be expected to

affect the criteria adopted by the court. For example, different criteria may be expected to influence the court in an application for review before trial compared with an application made after conviction.¹⁰¹ Although there is no specific provision relating to the right of the prosecutor to be heard by the court in any review application, we are of the opinion that a reasonable interpretation is, that the prosecutor has the same locus standi as he had at the original bail decision.

Clearly the Act gives power to a court to review its own bail decision but a question has arisen concerning jurisdiction when an appeal has been taken from the original bail decision. In the case of H.M. Advocate v. Jones¹⁰² a sheriff court refused bail and an appeal was taken to the High Court of Justiciary where bail was again refused. An application for review, alleging a material change of circumstance was brought in the sheriff court. The sheriff-substitute held that the application was incompetent in view of the appeal. He was of the opinion that to allow such review by the sheriff court would be to offend against the established practice, whereby a judge in an inferior court does not have the power to review the decision of the Supreme Court.

From Ward v. H.M. Advocate¹⁰³ it appears, however, that the incompetence of the inferior court extends only to matters upon which the appeal court has made a decision. In this case there was some confusion about the facts. The facts finally accepted were, that Ward was granted bail by the sheriff-substitute and an appeal against this grant of bail, taken by the prosecutor to the High Court of Justiciary, was refused. Ward, however, was unable to raise the bail money and later appealed to the High Court of Justiciary to reduce the amount of bail. Lord Cameron dismissed the appeal, holding that the

review of the amount of bail was still within the competence of the sheriff court which had originally allowed bail. The intervening appeal to the High Court was held not to have affected the sheriff court's power of review, as the High Court had not made any determination on the point in issue, that is the amount of bail. Taking the view, that Ward's application to the High Court of Justiciary was an application for review under the 1963 Act, such reasoning is sound. Ward's application, however, appears rather to have been an appeal, as envisaged and authorised by the 1888 Act. On this view the decision is questionable in its argument that the relevant statute must be the 1963 Act and that appeal taken to the High Court was "premature". The provisions of the 1963 Act were enacted without prejudice to the accused's right of appeal. We would argue, therefore, that an appeal taken by the accused under the 1888 Act against either the refusal or the amount of bail is still competent, even if the accused has not utilised his right of application for review under the 1963 Act. In Ward's case an appeal had been taken by the prosecutor to the High Court of Justiciary against the grant of bail but there is nothing in the 1888 Act to prevent the accused utilising his right to appeal a different matter, that is to appeal the amount of bail.

(ii) Solemn procedure

The provisions regulating application for review of bail in summary procedure apply also to bail petitions decided by the sheriff exercising solemn jurisdiction.¹⁰⁴

Review of a bail decision of the High Court of Justiciary was, however, competent before 1963 and is still competent. Such review may be obtained by presenting a Note of Appeal,¹⁰⁵ requesting renewal of application for bail after refusal of bail by the sheriff and the High Court of Justiciary on appeal. It is necessary to aver a material

change of circumstances.

It is important to appreciate the distinctions between review and appeal and the two remedies ought not to be confused. The provisions authorising review are designed to bring new information to the consideration of the court which made the original bail decision. Review is no substitute for appeal which gives the accused the opportunity to allege that the court which made the original decision wrongly exercised its discretion.

(d) During trial

It is provided in the bail bond that bail continues through all adjournments or continuations of the diets of court until the final disposal of the charge, or if sooner, until the expiry of ~~6~~ months after the finding of bail.¹⁰⁶ A similar provision applies to bail in summary procedure.¹⁰⁷

Once bail has been granted there is no procedure by which bail can be recalled even if there is evidence that the accused is likely to abuse his freedom by, for example, absconding. In an unreported case a petition for recall of bail presented by the prosecutor was held by the sheriff to be incompetent.¹⁰⁸

A cautioner is, however, entitled to withdraw his bond of caution at any diet of the court at which the accused appears personally.¹⁰⁹

(e) After trial before sentence

Once an accused has presented himself for trial and the trial has been completed, any question of liberation on bail is considered to be subject to different policy considerations, than those attached to

pre-trial bail. Different rules relating to bail have been evolved, therefore, to regulate the grant or refusal of bail at procedural stages after trial.

(i) Where an accused pleads guilty at the first diet but sentence is delayed until a later date.

In solemn procedure where an accused pleads guilty he is liable to be detained in custody under the original warrant of commitment until the sentencing diet, a period which must not involve unreasonable delay. It is provided, however, by the Criminal Procedure (Scotland) Act 1987 S.34 that the prosecutor may consent to the release of the accused until the sentencing diet. Where the prosecutor gives such consent it is within his discretion to fix the bail conditions.

(ii) Where sentence is delayed to enable a report to be prepared

A court may adjourn a case, in both summary and solemn procedure, for a maximum of 3 weeks to facilitate the preparation of a report designed to help the judge determine the most suitable method of dealing with an accused.¹¹⁰

If a medical or psychiatric report is required the court, in both summary and solemn procedure, may remand the accused for a maximum period of 3 weeks.¹¹¹ Discretion to liberate the accused on bail is vested in the court. Compulsory conditions are attached to the bail bond. These conditions require that the accused undertakes to undergo the required medical examination and undertakes to attend or reside at a specified place to enable the examination to be made.

(f) After trial pending appeal against conviction or sentence

The different criteria adopted by the courts in deciding bail applications made on behalf of convicted rather than untried prisoners, were explained by Lord Justice-Clerk Cooper in H.M. Advocate v. Young. He said:

"... once the prisoner has been convicted the presumption of innocence is displaced and the onus demonstrandi is on the applicant thereafter to show cause why, pending any appeal which he may take, he should be released from the prison confinement to which he has been sentenced following upon the conviction". 112

The powers and duties of the Crown are also changed once an accused has been convicted. The Crown's position was clarified in 1932 by the Lord Advocate, when he replied in Parliament to criticisms which had been raised concerning a bail application pending appeal after conviction. The Lord Advocate, emphasising that at this stage discretion was vested wholly in the court, pointed out that, "strictly speaking the Crown has no locus standi at all in this matter, but out of courtesy to the court a representative of the Crown attends...." 113

(i) Summary procedure

The two most common methods of obtaining a review of a conviction or sentence in summary cases are suspension and appeal to the High Court of Justiciary by stated case.

Suspension is a common law remedy. After the final determination of a case an accused in custody may present a bill of suspension and liberation to the High Court of Justiciary. If the accused finds caution and is liberated he must, under pain of abandonment of his appeal, attend personally in court on the day appointed for the hearing of the appeal. 114

An appeal by stated case is competent under the Summary Jurisdiction (Scotland) Act 1954 S.62.

If an appeal is taken the summary court may require the appellant to consign a sum or find caution to cover any fine or expenses which may be incurred.¹¹⁵ Where an appellant is in custody he is entitled to make application to the summary court for caution for interim liberation pending the determination of the appeal.¹¹⁶ Despite the terminology, caution for interim liberation is essentially the same as bail.¹¹⁷ The court, in its discretion, may refuse such application or if it decides to grant interim liberation may dispense with further consignment or caution, or may impose additional conditions as to caution or other conditions.¹¹⁸ Any such application must be determined by the court within twenty-four hours.¹¹⁹ If the court refuses interim liberation or asks for caution to an amount which the accused cannot raise, the accused may within twenty-four hours appeal to the High Court of Justiciary or any judge thereof. That court may refuse the appeal or grant interim liberation on such conditions as it thinks fit.¹²⁰ No right of appeal, from a summary court's grant of interim liberation or the amount of caution, is given to the prosecutor.

If the appellant is liberated but fails to appear in court when required a sanction, additional to the forfeiture of caution exists, in that the court may hold the appeal to be abandoned.¹²¹ On the abandonment of an appeal the court may grant warrant to apprehend the appellant and time spent at liberty is not counted in computing any unexpired period of imprisonment.¹²² If the appeal is dismissed warrant to apprehend may be granted by the High Court of Justiciary and again any time spent at liberty is excluded from the computation of the period of imprisonment. In dismissing an appeal, however, the High Court of Justiciary does not have the power to impose

a term of imprisonment longer than the unexpired term.¹²³

(ii) Solemn procedure

Where a person convicted on indictment lodges an appeal against conviction or sentence, under the Criminal Appeal (Scotland) Act 1926, he may petition the High Court of Justiciary to grant bail until the appeal is determined.¹²⁴ Such a petition may competently be determined by a single judge of the High Court of Justiciary who may in his discretion grant or refuse bail. If bail is refused, however, the appellant has a right to have his petition considered again by a quorum of the High Court of Justiciary. Consistent with the Crown's lack of locus standi in this matter the Act gives no similar right to the Crown.

If the Court grants bail and the appellant is liberated but fails to appear in court when required, a sanction additional to the forfeiture of bail, exists in that the Court may summarily dismiss the appeal.¹²⁵

If the appeal is dismissed or if the sentence of imprisonment is increased by the High Court the appellant must serve the unexpired period of imprisonment. In computing this unexpired period, any period after the date of admission to bail is not counted.¹²⁶

BAIL: APPLICATION, FORM, FORFEITURE, RECALL

(1) Application

(a) Mode of application for bail

The law does not lay down specific requirements relating to the mode of application for bail and methods appear to be dictated by the

practice and convenience of the courts. Under the 1701 Act, both verbal and written applications were considered, and despite dicta in Arbuckle v. Taylor¹²⁷ that applications must be in writing, verbal applications continued to be heard by the courts.

Application for bail in summary cases is, in modern practice, usually verbal. Refusal of such application is recorded on the minutes and record of successful application is made on the warrant of committal.

In solemn procedure the favoured mode of application is by written petition, because this method is considered to have procedural advantages especially in the event of an appeal. Verbal applications, nevertheless, were still considered by some sheriff courts until 1972. In a recent practice direction¹²⁸ from the High Court of Justiciary it was pointed out that the judges of that Court were reluctant to consider verbal applications and the advantages of written applications were commended. This will possibly ensure that only written petitions are presented.

(b) Legal aid and application for bail

In certain circumstances an accused may be granted legal aid. If legal aid is made available, the accused may receive legal advice and legal representation free.¹²⁹

(i) Legal aid in summary procedure

In summary proceedings prosecuted in a justice of the peace court or a burgh court, the accused is eligible only for legal advice.¹³⁰

Where a summary prosecution is to be taken before the sheriff and the accused is in custody, the accused is entitled to legal aid until the conclusion of the pleading diet and this includes legal aid in connection with any application for bail up to and including this time.¹³¹

Legal aid is also available to cover any application for review or

appeal of a bail decision.¹³² Where a plea of guilty is tendered legal aid continues until the last diet fixed for disposal of the case.¹³³ The accused, while legal aid continues, is entitled to legal advice about bail and to have any application for bail made by a legal representative.

Apart from these circumstances, to obtain legal aid the accused must satisfy the court that the grant of legal aid is in the interests of justice and that he is financially incapable, without hardship, of paying for his own defence.¹³⁴

(ii) Legal aid in solemn procedure

In solemn procedure the accused is entitled to legal aid until he is admitted to bail or committed until liberated in due course of law.¹³⁵ The accused, therefore, always has access to legal advice about bail and may if he wishes be represented by a solicitor, who if necessary will petition the court for liberation on bail. Legal aid is also available to cover any application for review or appeal of a bail decision.¹³⁶ Apart from these circumstances, to obtain legal aid the accused must satisfy not the conditions relating to the interests of justice but only financial eligibility. Once the accused appears before the High Court of Justiciary, he is always entitled to legal aid if he satisfies the financial conditions.¹³⁷

(iii) Legal aid in appeals after conviction or sentence

Legal aid is not available to an accused appealing against conviction or sentence, either in summary or solemn procedure, unless it appears to the Supreme Court Committee that the accused has substantial grounds for taking the appeal and that in the particular circumstances of the case it is reasonable that he should receive legal aid.¹³⁸ If legal aid has been granted in earlier proceedings, the financial condition is considered satisfied. If legal aid has not previously

been granted, the financial conditions must also be satisfied.¹³⁹

(2) Form

(a) Forms in which bail may be found

(i) Police bail

Bail granted by the police may be found by the deposit of money or an article of value to cover the amount of bail. The deposit may be made by a surety¹⁴⁰ or by the arrested person. It is arguable that bail may also be found, by the creation of an obligation to pay over the amount of bail if the accused fails to appear on the appointed day.¹⁴¹ The form of bail to be accepted in a particular case lies in the discretion of the police.¹⁴²

(ii) Bail in summary procedure

It is provided that in summary procedure bail is to be interpreted as including any pledge lodged by or on behalf of the accused as security for his attendance in court.¹⁴³

Bail may be found by consignment of money, equal to the amount of bail, with the clerk of the court. This money may be consigned by the accused or by a third party.¹⁴⁴

Alternatively bail may be found by a third party signing a bail bond as cautioner and surety.¹⁴⁵ A bail bond "is not a mere private instrument, it is a bond of judicial description".¹⁴⁶ The standard form of a bail bond is reproduced in Appendix I. The only reason for which a person may be rejected as cautioner and surety is if the clerk of the court is not satisfied that the person has sufficient financial means to cover the sum specified in the bond.¹⁴⁷

(iii) Bail in solemn procedure

The only way in which bail may be found in solemn procedure is by a third party signing a bail bond as cautioner and surety.

(b) Conditions which may be attached to bail

In general the only condition which is attached to bail is a condition requiring the accused's appearance in court. Despite the old precedent of Symons¹⁴⁸ in which bail was granted in conjunction with a residential condition and a condition relating to the provision of a guard for the accused, the courts have not used their discretion to impose additional conditions to bail. Even where legislation appears to grant a limited power to impose conditions¹⁴⁹ the courts have not taken advantage of such power. Compulsory conditions are, however, attached to bail by the Criminal Justice (Scotland) Act 1949 S.27. Under this section, where a person remanded for an inquiry into his physical or mental condition is granted bail, conditions relating to willingness to undergo examination, and attendance for examination are imposed in the bail bond.¹⁵⁰

(3) Forfeiture

The penalty attached to breach of a bail condition or failure to appear in court is forfeiture of bail.¹⁵¹ The court may in addition, however, grant a warrant to apprehend the accused.¹⁵²

When bail becomes liable to forfeiture, the usual practice is for the court, on application of the Crown, to forfeit the bail. In Morrison v. Monro¹⁵³ it was held competent for a sheriff to forfeit bail after the prosecutor had deserted the diet pro loco et tempore and it was remarked that this was a common procedure in the High Court.

The High Court of Justiciary may also forfeit bail at a diet fixed for a hearing on the relevancy.¹⁵⁴

In forfeiting the bail the court, if necessary, may also grant a warrant of recovery of bail from the cautioner.¹⁵⁵ The cautioner may apply to the court for time to pay but may become liable to imprisonment if he fails to pay within the time granted. The court, however, instead of ordering imprisonment for failure to pay may allow recovery by civil diligence.¹⁵⁶

Objections to forfeiture may be made, but the only ground of objection entertained by the courts, is the improper citation of the accused.¹⁵⁷

A sanction, additional to forfeiture and rearrest, exists in relation to bail granted pending appeal against conviction or sentence. As we described above,¹⁵⁸ the court may dismiss the appeal if the accused fails to appear.

The question whether an accused who fails to appear may also be held liable for contempt of court was raised in Pirie v. Hawthorn.¹⁵⁹ In this case the accused, a youth of seventeen, was charged on a summary complaint and was cited to appear in the sheriff court. He failed to appear but appeared after notification at the adjourned diet. He explained that he had failed to appear because he had not read the citation and his father had forgotten to remind him of the date. Although it was held that the conduct of the accused did not disclose a wilful defiance of the court and did not amount to contempt of court, Lord Justice-General Clyde was of the opinion that in other circumstances the accused's failure to appear might amount to contempt. It was argued before the court that although the Summary Jurisdiction (Scotland) Act S.33 provided that the failure of a witness to appear could be treated as contempt, no similar provision was made in regard

to the accused. In the case of the accused it was provided that a warrant for his apprehension could be issued. The Lord Justice-General took the view that the failure of the court to issue a warrant did not prevent the court from considering the charge of contempt. He stated, however, that the issue of a warrant of apprehension was an extreme measure which was not always appropriate.¹⁶⁰ It is arguable, therefore, that if a court has taken the step of issuing a warrant, a prosecution for contempt might be considered incompetent.

Some countries have created a separate offence of failure to appear on the appointed day.¹⁶¹ This has the advantage of clearly proscribing the conduct which the law wishes to deter. The use of contempt of court as a deterrent against the accused's failure to appear has other disadvantages, not least the technicalities surrounding the law of contempt. Another difficulty is that the essence of contempt is not the failure to appear but the failure to obey an order of the court, that is the citation.¹⁶² Citation of the accused for trial, however, may not occur until after the release of the accused on bail.¹⁶³ Presumably, therefore, if the accused absconded before lawful citation he could not be held liable for contempt.

(4) Recall of Forfeiture

Prior to the Criminal Justice (Scotland) Act 1949, the courts had no power to refund bail which had been forfeited, though it was possible for the accused to apply for a suspension of the sentence of forfeiture.¹⁶⁴

It was provided, however, by the 1949 Act S.44 that any court, if satisfied that it is reasonable in all the circumstances, might recall its own order of forfeiture and direct that bail money be

refunded. This decision of the court is final and is not subject to review.

BAIL REFUSED: PRE-TRIAL CUSTODY AND COMPENSATION

(1) Compensation for Illegal Custody

Under the statute of 1701 a right to be admitted to bail existed in certain circumstances and it was competent under this statute for an accused to sue a magistrate for damages in respect of an alleged breach of this right.¹⁶⁵ Under the 1888 Act, however, admission to bail is discretionary and such an action is no longer competent.

Under the Crown Proceedings Act 1947 S. 2(5), no liability attaches to the Crown in respect of judicial acts and this includes any wrongful detention. A judge is also protected from personal liability for acts done in exercise of his judicial duty.

In summary procedure a judge, other than a sheriff, might be found liable in damages in some circumstances. To be successful the person suing must prove that he has suffered imprisonment as a result of some proceeding, act, judgement, decree or sentence and that the proceeding etc., has been quashed. He must also prove that the proceeding etc., was taken maliciously and without probable cause. Some defences are specified.¹⁶⁶

Refusal of bail by the police does not ground any action for damages for wrongful imprisonment or any other claim arising from a refusal to liberate.¹⁶⁷

(2) Compensation for Legal Custody

(a) Monetary compensation

Some legal systems have thought it equitable to provide monetary compensation, in some circumstances, for loss suffered by a person who was imprisoned before trial but acquitted of the charge.¹⁶⁸ No such provision exists in Scotland.

(b) Reduction of sentence

For those accused who are convicted, time spent in custody before trial, may be taken into account by the court when considering sentence. The Criminal Justice Act 1967, S.68 of which applies to Scotland, obliges a court in passing sentence of imprisonment or detention in a Young Offender's Institution, to have regard to any time spent in custody by the accused awaiting trial or sentence. Unlike the equivalent English provision, however, time spent in custody is not automatically subtracted from a sentence but may be subtracted at the discretion of the court.

LIBERATION WITHOUT BAIL

Release on bail is not the only way in which an accused may be released pending disposal of his case.

It is provided by statute¹⁶⁹ that where the police have power to bail an arrested person they also have the power to liberate that person without requiring bail in any form.

With possibly a few statutory exceptions,¹⁷⁰ the courts have the

power to release an accused without bail and merely cite him to appear on the appointed day.

Release without bail, however, presents some procedural difficulties in solemn procedure which do not complicate release in summary procedure. The complexities referred to arise because of the potential difficulty of serving the indictment on an accused. The preparation of the indictment generally takes some time and it is not usually prepared before the accused is committed until liberated in due course of law which is the procedural stage at which many accused are liberated. To facilitate the service of the indictment, which is vital to the success of the prosecution, the accused is required to elect a domicile of citation before he is released on bail. Service of the indictment is competent at the domicile of citation,¹⁷¹ and this avoids the difficulties of serving the indictment when the accused has changed his address or has absconded. In summary procedure, if the accused is in custody, the complaint must be served on him before he is asked to plead. In most cases,¹⁷² therefore, the complaint will have been served before the court considers bail and possibly liberates the accused.

Another alternative to bail is liberation under a fixed penalty but this method of release is competent only in summary procedure.¹⁷³ Under this form of liberation there is no requirement to find a cautioner or to consign any sum of money. In addition the court's discretion is restricted in that the maximum penalty is limited to the sum of 10 pounds.

PROVISIONS REGULATING THE PRE-DISPOSITION RELEASE OF CHILDREN

Since the implementation in 1970 of part III of the Social Work (Scotland) Act 1968, children who commit offences are not generally brought before a criminal court. The 1968 Act introduced new machinery for dealing with children ¹⁷⁴ in need of compulsory measures of care. According to the philosophy behind this Act, the commission of an offence by a child is merely one indication that the child is experiencing difficulties and is in need of help. The Act provided that each local authority must recruit lay persons to form a children's panel. The new system of children's hearings which was set up is staffed by three persons drawn from the panel. Provision was also made for the appointment by each local authority of an officer to be known as the reporter. This officer has very wide powers including the power to decide whether a child should be referred to a children's hearing. The children's hearing is intended to consider all the problems of the child and to recommend a disposal in the best interests of the child.

(1) Children Arrested by the Police

When a child is arrested, with or without warrant, a report must be made by the police to both the appropriate prosecutor and reporter.¹⁷⁵ An authorised police officer has the power to release such a child unless the charge is homicide or other grave crime; or it is in the child's interest to remove him from association with any reputed criminal or prostitute; or the officer has reason to believe that liberation would defeat the ends of justice. Liberation may be granted on the child, or his parent or guardian, entering into an obligation

promising the child's attendance at the hearing of the charge. Alternatively liberation may be granted on the child, or his parent or guardian, finding bail to an amount that the officer believes will secure the child's attendance at the hearing.¹⁷⁶ Police powers to liberate children are wider, therefore, than their powers to liberate adult offenders conferred by S.10 of the Summary Jurisdiction (Scotland) Act 1954.

In cases, however, where a decision is taken not to proceed with a charge, the child is not automatically entitled to his liberation. The detention of the child may be continued to enable the reporter to decide whether the child should be referred to a hearing on some other ground. If the reporter believes custody to be necessary, the child's detention will continue until the hearing. No provision is made for consideration of an application for release but a limitation of 7 days is placed on the period of detention.¹⁷⁷

(2) Children Brought Before a Hearing

When a reporter considers that a child who is in custody is in need of compulsory measures of care, he must whenever practicable, arrange a hearing to sit on the first lawful day after custody. If, however, the hearing is unable to dispose of the case detention may be continued for a period not exceeding 21 days if the hearing is satisfied that detention is necessary in the interests of the child, or if the hearing has reason to believe that the child will abscond during investigation of the case.¹⁷⁸ On cause shown a further period not exceeding 21 days detention may be authorised on application by the reporter.¹⁷⁹

If a child not in custody fails to appear before a hearing, the hearing may issue a warrant of detention for a maximum of 7 days and this is authority for bringing the child before the hearing.¹⁸⁰ If the hearing is unable to dispose of the case and has reason to believe that the child will not appear when required, detention may be authorised for a period not exceeding 21 days.¹⁸¹ On cause shown, this period may be extended for a further period not exceeding 21 days.¹⁸² The hearing, in order to obtain further information, may require a child to attend or reside at a clinic, hospital or other establishment for a period not exceeding 21 days and a warrant of detention may be issued for this purpose.¹⁸³

An appeal against any of these detention decisions may be taken to the sheriff.¹⁸⁴ In limited circumstances, an appeal by stated case to the Court of Session is also possible.¹⁸⁵ No further appeal is competent.

(3) Children Brought Before a Sheriff

Where a child and his parents do not accept the grounds of referral to the hearing, the case must be brought before a sheriff for a finding as to whether any ground of referral is established.¹⁸⁶ This is a civil not a criminal procedure. If the child fails to attend he may be arrested and detained until the case is determined. No provision is made for consideration of any application for release but the case must be determined within 7 days.¹⁸⁷

An appeal may also be taken to a sheriff against any decision of a hearing.¹⁸⁸ If the appeal is taken against a warrant of detention there is no provision for interim liberation of the child. The appeal, however, must be determined within 3 days or the warrant ceases to have effect.¹⁸⁹

(4) Children Prosecuted in the Criminal Courts

It is still competent, on the instructions or at the instance of the Lord Advocate, to prosecute a child criminally¹⁹⁰ but such prosecution is comparatively rare. In the event of a criminal prosecution the general provisions which were described above, regulate bail. One difference in procedure, however, is that a child not liberated on bail cannot be committed to prison but must be committed to a place of safety¹⁹¹ chosen by the local authority.¹⁹²

(5) Legal Aid Provisions under the 1968 Act

There is no provision for legal aid or representation at the hearing.¹⁹³

Legal aid may be granted in respect of any proceedings before the sheriff, if the sheriff is satisfied that the grant of legal aid is in the interests of the child and if financial conditions are satisfied.¹⁹⁴ Where an appeal is taken to a sheriff against a child's detention before disposition by the hearing, legal aid is available without inquiry into financial resources.¹⁹⁵

With the additional condition that substantial grounds for appeal must exist, legal aid is available in respect of any appeal to the Court of Session.¹⁹⁶

Although the amount of work involved forced us to exclude from our research the operation of the provisions which regulate the release of children, we consider this a subject worthy of research. We have included a description of the release provisions, not only to give a comprehensive account of this area of Scots law, but also because they

represent an unheralded example of the abolition of bail. It is true that bail may still competently be given by the police if the child is arrested, but bail has in effect been abolished for children who are detained but who are not to be prosecuted in the criminal courts. In place of bail the Social Work (Scotland) Act attempts to safeguard the child against pre-disposition custody by imposing strict time limits on the length of custody and by providing machinery to facilitate a speedy appeal to the sheriff against detention. As the availability of legal aid is limited, however, there is no guarantee that the child or his parents will be aware of or understand the appeal provisions.

"Thus the problem of official formulations of rules and rights becomes complex. First, as to formulations already present, already existent: the accepted doctrine. There, I repeat, one lifts an eye canny and skeptical as to whether judicial behaviour is in fact what the paper rule purports (implicitly) to state. One seeks the real practice on the subject, by study of how the cases do in fact eventuate. One seeks to determine how far the paper rule is real, how far merely paper. One seeks an understanding of actual judicial behaviour, in that comparison of paper rule with practice; one follows also the use made of the paper rule in argument by judges and by counsel, and the apparent influence of its official presence on decisions. One seeks to determine when it is stated, but ignored; when it is stated and followed; when and why it is expressly narrowed or extended or modified, so that a new paper rule is created."

-- Llewellyn ¹

IV

BAIL IN PRACTICE

THE RESEARCH PROJECT

The legal provisions regulating bail were described in the previous chapter where we pointed out that the law does not give a person in custody any right to be released on bail pending court appearance. The only right conferred is the right to ask for bail and to have this request considered. Statutes define in detail the circumstances in which this latter right applies but gives unfettered discretion to the police and the courts to grant or refuse bail in any case where they are authorized to consider this request.

THE SUBJECT OF THE RESEARCH

Every year the exercise of the legal discretion of the police and the courts results in the detention in custody of thousands of persons until the date set for their appearance in court. It is possible to ascertain the number of persons detained in prison before trial from published criminal statistics² but the figure for police custody is not publicly available. Nothing was known about the exercise of this legal discretion except that in certain reported cases³ the judges had indicated various circumstances which they said might persuade them to grant or refuse bail. To remedy

this we resolved to study the bail decision-making of the police and the courts.

Decision-making may be studied at several different levels. It is important to draw a clear distinction between prescriptive and descriptive studies. In the former the aim of the researcher is to create an optimal theory or model of some aspect of decision-making, for example, how decisions ought to be made in an organisation given certain defined goals. In the latter the researcher attempts to describe some aspect of decision-making, for example, how decisions are reached in an organisation. These different approaches are, however, apparently confused by some theorists. Thus we would categorise the philosophical models of judicial decision-making called by Schubert⁴ the legal-norm,⁵ the legal-fact⁶ and the legal-discretion⁷ models as prescriptive models despite the fact that the theorists might consider that they have described how judicial decisions are made. The models are properly categorised as prescriptive if as Schubert said:

"When the observed decision fails to correspond to the predicted decision (the researcher)⁸ usually castigates the court for having (in this particular case) failed to follow the rules of logic in reaching its decision. No attempt is made to discover whether judges actually do make decisions in the manner prescribed by the model." ⁹

It is our impression that although organisational decision-making theorists have tended to concentrate on the development of prescriptive theories or models,¹⁰ the emphasis has been different among those concerned with decision-making by law officials. Theorists interested in this area have been more concerned with producing descriptive theories and models and have been particularly interested in their predictive potential.¹¹

There has been a great volume of research work related to the general area of organisational decision-making. After surveying the studies Rubenstein¹² identified three main foci, the decision, the decision-maker and the decision process. We believe that this classification may also be applied to research studies concerned with decision-making by law officials.¹³

Much of the bail research has been concerned with aspects of decision-making and because of this we think the studies can be profitably be considered in the wider context of organisational or more specifically legal decision-making.

There have been few attempts in the bail studies at developing prescriptive theories or models. The Vera "community roots" scale may, however, be considered as the first step towards a prescriptive model which attempts to identify the good risks when securing the appearance of the accused is the sole aim of the bail system. The only other attempt, of which we are aware, to produce a prescriptive model was made by Landes.¹⁴ Landes using mathematical logic has attempted to evolve an economic model of an optimal bail system.

The great bulk of bail research has been descriptive in character. The revelations of these studies have generated many reforms and have possibly inspired the development of prescriptive models.

In reviewing the bail studies in Chapter II we noted that a great deal of research was concerned with ascertaining the factors which influenced the bail decision and the success and consequences of that decision. This appears to have been the main focus of the research. We are not familiar with any research which concentrates on the bail decision-maker but attention has been drawn to the fact that the person who controls the bail decision may not be the judge but may be the

bondsman¹⁵ or the prosecutor.¹⁶ Studies of the decision process have been undertaken though perhaps incidentally to consideration of the bail decision. Suffet has certainly criticised the neglect of this aspect and emphasised its importance when he studied bail decision-making as a product of courtroom interaction.¹⁷

Like researchers concerned with other legal systems, we thought a descriptive study was essential as in Scotland the only information about bail was restricted to the content of the legal norms.

In choosing the focus of the study we were influenced by Schur who has argued that:

"No examination of substance and procedure in the field of criminal law can be completely satisfactory, unless it takes into account the emergence (largely through the informal interaction between individuals occupying the related roles that constitute the system of criminal justice) of working patterns of accommodation to situational imperatives and of routinized modes of everyday operation. Such developing patterns reflect or even generate a significant amount of strain between ideal and actual legal norms." 18

This induced us to devote considerable attention to the decision process. We considered bail not as the isolated decision of one type of official in one type of court but tried to describe bail decision-making at all the different stages in the legal system at which this matter was considered. We hoped that this approach would give some insights into decision-making in general and bail decision-making in particular, which other bail studies had not attempted. Areas of interest opened up were, for example, the attention given to legal norms at different levels of decision-making, the extent of agreement about the importance of variables between different officials, the similarity of decision-making situations and the relative importance of officials involved in the decision-making situation. The different decision-making situations are described separately and in considering these we were, like Suffet, interested in the patterns of interaction

between the various officials, who were involved in the decision-making situation. We were interested, for example, not only in what information was available to the decision-maker but in who supplied the information and on whose information the decision-maker relied.

Following the general trend in bail research, we decided that the bail decision itself would be another important subject for investigation. This involved a consideration of what variables were likely to produce a bail granted or refused decision. In this assessment we made the assumption, that the decision could be explained by reference to what occurred in the decision-making situation particularly the information made available to the decision-maker. In examining some of the consequences of the bail decisions, attention was paid to such issues as whether accused were able to raise the money for bail, how long persons spent in custody, whether released persons appeared in court when requested, and the final disposal of the case.

Although we accepted that the bail decision must to some extent be influenced by the personal attitudes and beliefs of the individual decision-maker, we made no attempt to explore this in the present study. We considered the decision-makers and other persons involved in the decision-making situation, therefore, not as individuals but as role actors.¹⁹

SETTING UP THE RESEARCH PROJECT

When we designed the research we thought that it might be more revealing to cut across the main demarcation lines drawn by the law namely, bail in summary procedure, bail in solemn procedure and bail after conviction, to study separately the different bodies vested with discretion. These bodies we identified as the court prosecutors, the police, the burgh and justice of the peace courts, the sheriff courts and the High Court of Justiciary.

We were able to study only one example of each body exercising discretion as the amount of work involved and the time available prohibited a comparative study of similar bodies in different districts. It was possible to study each body in Edinburgh which was a convenient research base and we, therefore, sought permission to carry out the research in that city.²⁰

(1) Obtaining Permission for the Research Project

University colleagues introduced us to various officials who were in a position to consent to the research. The research could not have been undertaken without official consent as bail petitions in the sheriff court and in the High Court of Justiciary are heard in private with members of the press and the public excluded. In addition we required access to a wide variety of confidential papers and records. Permission was readily granted to allow us access to all papers and records that we desired, and to attend the bail petition hearings in the sheriff court. We were, however, refused entry to the hearings of the High Court of Justiciary on the ground "that so long as the

matter of bail is dealt with in Chambers, it appears essential to exclude third parties who have an academic or statistical interest in the matter".²¹ Despite this refusal, we decided to continue with the project though we considered the exclusion from the High Court of Justiciary as a considerable loss to the research. In 1972 on the appointment of a new Lord Justice-General, permission was again sought. On this occasion the request was granted and fortunately it was not too late to include bail appeals to the High Court of Justiciary in the research.

(2) Preliminary Fieldwork

Little orientation was required before beginning fieldwork because of our legal training. We found that our familiarity with legal procedure and jargon was helpful not only in understanding the practice but also in facilitating our acceptance by various officials.

Initially we spent a number of weeks observing decisions in the burgh and sheriff courts and examining all the records and official papers which were relevant to bail.

Because of our interest in the decision-making situation, observation was the obvious method of collecting the data we wanted. Indeed, as the decision-maker was to a great extent dependent on the presentation of verbal information and as no record was made of this, observation was the only way of finding out much relevant information. Although much of our data was collected by observation we were able to avoid or minimise the most common sources of distortion caused by this method. Firstly, we had no difficulty in observing the decision-making because, unlike many decisions, judicial bail decisions

are made in a formal setting. Secondly, it is extremely unlikely that the decisions were affected in any way by our presence as observers. Not only were we silent and uninvolved in the decision-making, but in many cases the decision-maker was unaware of our research interest. A third possible source of distortion was minimised because we did not attempt to select information from the total amount of information available. Our intention was to record all information made available to the decision-maker, though we found it impossible to record systematically the subtleties conveyed by tone of voice or gesture.²²

It became apparent during this preliminary work that we could not observe the prosecutor or police making bail decisions in the same way that we could observe the judge. We decided to exclude the exercise of the prosecutor's discretion to grant bail from the research because of the difficulties of monitoring his decision in the absence of any formal decision-making situation. We were persuaded towards this exclusion, when it appeared from the records, that the prosecutor by-passed the police and the courts in only a very few cases. Noting, however, the apparent influence of the prosecutor's representations on the decision of the judge, we paid particular attention to this in the research. Although it was possible to observe the bail decisions made by the police, certain difficulties lead us to the conclusion that there were advantages in relying on record research rather than observation. As we explain in Chapter V, there was no forum for the consideration of police bail because the decision was made informally after consideration of a written report. In the absence of any forum, there was a real possibility that we might influence the decision or practice if we attempted to attach ourselves

to the police decision-maker. In view of this danger²³ and the fact that we had access to the written report on which the decision was based we did not attempt to observe the decisions in the sample, though we did observe other bail decisions which were made while we were examining the police records.

To ensure consistency in the recording of data we prepared information sheets. These sheets, reproduced in Appendix II, were designed to enable us to record what happened in the decision-making situation and included oral and written information given to the decision-maker.

Although we placed emphasis on observation a great deal of information, for example, the time spent in custody and the delay in raising bail could be obtained only from official records or papers. A considerable amount of time, therefore, was also devoted to collecting this data.

As observers we had the advantage of being able to mix with court and police personnel. Although most of our questioning was informal we did request a number of interviews which were granted. This unstructured observation and discussion was a source of much valuable information and many ideas. To allow us to make comparisons and to use statistical techniques, however, the observation of the decision-making situation and the collection of data from the available records was appropriately structured.

In the following chapters we describe in more detail the way in which the research was structured to examine the different decision-making situations, the questions examined and the results of the study.

V

LIBERATION BY THE POLICE
BEFORE FIRST COURT APPEARANCE

"Some of the harmful
consequences of an arrest
can be mitigated if the
accused has the opportunity
of being quickly released
from police custody"

-- Friedland ¹

The recent upsurge of research in various countries concerning bail and other pre-trial release procedures has focussed on court practices. An arrested person, however, may be liable to spend a substantial period in police custody before his case is considered by a court. In Scotland an arrested person must be brought before a court within 24 hours but at the weekend this period increases to 48 hours or, if a court holiday intervenes, 72 hours.

In this chapter we examine the partial solution to the problem of police custody which has been adopted in Scotland, that is, police bail. The legal provisions regulating bail were described above.² It may be recalled that the police have the power to grant bail only to persons who are to be tried before the inferior courts of summary jurisdiction.³ Although the police may not ask for bail in excess of 20 pounds, their discretion is otherwise unlimited by statute or common law.

Before describing the results of the study of police bail decision-making we attempt to place the subject of the research in its procedural context by describing the practice adopted by the police after they have arrested an accused up to the time they consider bail.

A DESCRIPTION OF POLICE PROCEDURE AFTER AN ARREST

The usual procedure followed by the police after making an arrest was to take the person to the appropriate divisional station.⁴ Persons arrested within a defined area around the central police station and women arrested alone were, however, taken direct to the central police station. At the divisional station the report of the arresting officer was heard by the divisional sergeant who decided whether to proceed with a charge. Details of identity and property were then recorded. Any address given by the arrested person was verified, usually by a police officer asking confirmation from the occupants of the house at the address given. A charge sheet was prepared by the divisional sergeant on the basis of the facts given by the arresting officer. As soon as possible after the relevant information had been recorded the arrested person was transferred to the central police station.

As a matter of police practice the question of bail or other form of liberation was determined only by the officer in charge of the central police station. Bail was generally determined at that station by the duty sergeant "with the cognisance" of the inspector.

On arrival at the central police station the prisoner's property was checked and identification details were entered in the book recording arrests. Thereafter the prisoner was locked up in one of the cells. There was a possibility of delay before the divisional sergeant was appraised of the facts surrounding the offence because verification of address and completion of the charge sheet by the divisional force could take some time, especially when there were a number of arrests. Until the duty sergeant knew these facts he was

not of course able to make any determination about bail. Very occasionally to avoid delay, a sergeant would telephone for details and might arrange for bail before the reports arrived.

When an arrested person was taken directly to the central police station the procedure was the same as followed at the divisional station. Delay, however, was avoided and when verifying an address a police officer might, if so instructed, inform the occupants that bail of a specified amount would be acceptable. The police said that considerably effort was also made, on behalf of divisional prisoners with insufficient money, by telephoning and house visits to contact relatives or friends who might provide money for bail.

THE SUBJECT OF THE RESEARCH

The research covered all arrests made in the year 1972 by Edinburgh City Police.⁵ The number of arrests in which a charge was made totalled 7328. This figure included cases destined for the sheriff and burgh courts, children's hearings and warrant arrests destined for courts in England and other parts of Scotland. Of these cases, 3726 persons appeared in custody in the Edinburgh Burgh Court and these cases were prima facie eligible for police bail.⁶ Bail was granted by the police in 824, that is 22 per cent, of the eligible cases.

The research was designed to examine the way in which the police exercised their statutory discretion by constructing a model of the operative variables in bail decision-making and to consider the results of the police decisions.

THE RESEARCH METHODOLOGY(1) Record Research Versus Observation of Decision-Making

In the course of preliminary fieldwork we found that the sources of information available to the police differed from those available to the courts. The courts, in addition to some basic recorded information, relied essentially on verbal information presented by the prosecutor, the accused's law agent and the accused. Most of the information available to the police, however, was contained in the charge sheet. This record drawn up by the police was, as far as the police were concerned, a correct representation of the facts and it was on the basis of these facts that the police made the decision about bail. Information which could be obtained from the charge sheet was as follows:- date and time of arrest; name of arresting officer; date and time of appearance in central charge office; name and address of arrested person; police verification of name and address; sex, date of birth and occupation of arrested person; name of officer accepting charge; brief account of the circumstances of the offence; names and addresses of witnesses.

One obvious source of information, that is, the criminal record has not been mentioned. This is because the criminal record files were not kept in the charge room and were not as a matter of practice consulted by the authorised police officer when he was considering bail.

Although the charge sheet was the basic source of information, two other sources of information were available to the police. Information from these sources, however, was not readily revealed in the records.

The first source was information advanced by the police themselves. The chief constable had given certain directions relating to the amount of bail required and the circumstances in which bail ought to be refused. These directions were made available to us and were taken into account in the research. It was more difficult, however, to determine when an objection to bail by an individual officer had been made. Such an objection was recorded in only 2 cases, but although the police admitted that this information was not fully recorded, it was still regarded as a rarity. The objection, when it occurred, generally related to some special circumstance surrounding the offence which was considered to make bail undesirable. We decided that as these special circumstances were in any event taken into consideration by the officer deciding bail, the omission from the records of a few specific police objections to bail would not have any appreciable effect on the research results. Additional information might also be requested by the officer making the bail decision from the arresting officer, but this occurred generally only where the information on the charge sheet was considered to be obscure. Lastly, it was possible that the officer making the bail decision might have additional information from his own personal knowledge of the arrested person or circumstances of the offence. Although we were aware that personal knowledge, like the prejudices of the individual decision-maker, might be important factors in a particular decision it was not feasible in the context of our study to attempt to collect and assess this information.

The second source of information concealed by the records was information from the arrested person. Where information from the arrested person differed from the information on the charge sheet the

police information, as one might expect, was accepted by the officer considering bail. But if information given by the accused, for example, about his address was later verified then the charge sheet information was changed. For our purposes, however, some problems were raised by the common situation where the accused who lacked sufficient money for bail was asked whether relatives or friends would provide the money. As no record was kept of this, failure to have bail money raised was open to more than one interpretation. The correct interpretation might be that the person named by the arrested person was asked but failed to provide the money, or that the arrested person did not name anyone or that the police did not consider granting bail. In interpreting the data which related to persons granted bail this ambiguity did not arise because it was possible to obtain the information about the provision of money from the bail receipts.

We have described some of the difficulties involved in basing the study of police bail on record research. We had reservations about observation also, partly because we doubted whether observation would significantly increase our knowledge of the information available, and partly because of practical difficulties, not least the problem of ensuring that our presence did not influence the bail procedure and decision.⁷ Unlike the bail decision in court, there was no public forum where information was exchanged when the police considered bail. From mere observation, therefore, we could not have obtained information conveyed by telephone or from conversations outwith our presence. In addition the bail decisions might be made at any time, day or night. This and the problem of ensuring that our attempts, to witness any police questioning and information gathering, did not influence police practice, persuaded us not to rely on observation. We favoured record research which seemed to give an almost equivalent information yield and involved the fewest practical difficulties.

The relevant records were located in the charge office of the central police station and because of this we spent a considerable period of time working there. This helped familiarise us with police procedure as prisoners were locked up and bailed while we were in the charge office. Some time was spent discussing bail in general terms with the different police officers and this influenced our ideas about which variables to include in the model of police bail. It was also possible, as the study was retrospective, to ask specific questions about individual cases without affecting the result of these cases.

(2) The Construction of a Model of the Operative Variables in Police Bail Decision-Making

A clustering of bail granted decisions occurred in those cases destined for Monday and Saturday sittings of the burgh court. In order to reflect the annual percentage⁸ of bail granted to bail refused decisions, we collected a sample from all the arrested persons destined to appear before Edinburgh burgh court on two Mondays, two Saturdays and three other weekdays. The sample included 92 cases in 23 of which bail was granted. The sample represented 2.5 per cent of the cases eligible for police bail in 1972.

For the purpose of the research the assumption was made that the police did not make arbitrary bail decisions but granted or refused bail utilising in some way the available information. The first step taken, therefore, was to break down the information available to the police into a number of information items. Fourteen information items were categorised as follows:- number of hours after arrest before the next court (CTHRS); information relating to the circumstances of the

arrested person, that is sobriety (SOBRIETY), sex (SEX), age (AGE), address (ADDRESS), employed (EMP), occupation (OCC); the offence charged (OFFENCE) and special circumstances surrounding the offence (SPCIRCS); chief constable's bail decision (CCOBJ); police objections to bail (POLOBJ); information about the availability of bail money, that is, the arrested person had sufficient money to cover the standard bail amount (MONAVS), had sufficient money to cover the bail amount asked (MONAVA), contacted someone who provided bail money (MONVAVP).

Our aim was to construct a model to illustrate the way in which all or any of the variables, that is, the information items were utilised. Drawing on our experience of police practice we conceived a model of police decision-making as a certain flow of variables which must be satisfied before bail would be granted.

We considered, and rejected as inappropriate, various methods of constructing our model, for example, multiple regression and factor analysis. A methodology which suggested to us some attractive possibilities was Guttman's scalogram analysis.⁹

The Guttman technique has been developed and applied mainly in the construction and development of attitude scales. The distinguishing characteristics of a Guttman scale are that the scale must satisfy the tests of cumulateness and unidimensionality. A simple example may illustrate the logic behind the Guttman technique. An example of a unidimensional cumulative scale is a ruler. A ruler measures length, a single dimension, and grades the units of length cumulatively that is, six inches is greater than four inches and both are greater than one inch.

An attempt to measure the attitude of a group of persons towards

convicted persons provides a more sophisticated example. In attempting to construct a Guttman scale the first task of the researcher is to generate, on the basis of experience and intuition, a number of statements which he thinks reflect different positions on the attitude continuum. Such statements might range for example through (1) I would work beside a person with a criminal record (2) I would employ a person with a criminal record in an unskilled job (3) I would employ a person with a criminal record in a responsible position (4) I would invite a person as a friend to my house even if the person had a criminal record (5) I would marry a person even if the person had a criminal record. If the researcher is successful in constructing a Guttman scale with the properties of unidimensionality and cumulativeness then the pattern of responses from the group tested will fall into a certain characteristic pattern. This pattern is such that all respondents (or a sufficient number to satisfy the tests specified by Guttman) if they agree, for example, with statement (5) will also answer that they agree with statements (1), (2), (3) and (4). Similarly respondents answering that they agree with statement (2) will agree with statement (1) and if they disagree with statement (3) they will disagree with statements (4) and (5). Translating this into the terms of our first example this means that if a piece of string passes the 2 inch mark on a ruler but does not pass the 3 inch mark then we can predict that it passes the 1 inch mark but fails to pass the 4 and 5 inch marks. One important difference, however, ought to be noted. The ruler is also an ordinal scale which means that 4 inches is twice as long as 2 inches. This does not apply to the Guttman scale, thus the conclusion cannot be drawn that a person who agrees only with statements (1) and (2) is twice as prejudiced as a person who agrees with statements (1) to (4).

Although we were not attempting to measure the police attitude to bail, Guttman scalogram analysis utilises two procedures which we thought might be adapted to construct a model of police decision-making. Firstly, Guttman scalogram analysis arranges variables in an order of importance according to the number of cases which fail or pass each individual variable. Secondly, it fits in different variables to arrive at the pattern of variables which forms the best scale. This seemed basically what we were attempting to illustrate in the model, that is, we were attempting to identify the variables which influenced the bail decision and show their respective importance. We decided, therefore, to use the Guttman technique to find the best fit pattern when bail decision was the most important or highest ordered variable.

Data cards were prepared for each case in the sample. Details of identification, the fourteen information items and the bail decision were coded and punched on each card. The Guttman scalogram analysis used, was the subprogram Guttman Scale, taken from the system of computer programs called Statistical Package for the Social Sciences (SPSS).¹⁰ The program cards directed the creation of a number of different scales each with the bail decision as the highest ordered variable. Cutting points were chosen for the different variables to test various theories about the relationship of the variables. For example, theorising that to achieve a bail granted decision the arrested person had to be sober, had to have a fixed address and have regular employment, cutting points for the variables sobriety (SOBRIETY), address (ADDRESS) and employed (EMP) were chosen to construct such a scale.

Results with the different scales tested were unimpressive and all fell below the minimum 0.6 coefficient of scalability from which

we concluded that no valid Guttman scale had been produced. To take into account a possible interactive effect in some variables we recoded sobriety to take into account the effect of passage of time.¹¹ A new variable, money available for bail (MONAV) was also created.¹² A number of new scales were then programmed but the coefficients of scalability were still below 0.6.

On reflection we decided that our preoccupation with the coefficient of scalability was misconceived because the variables based on the information items were not essentially cumulative in character. What confirmation, therefore, was required? It may be recalled that the model we conceived was a certain flow of variables all of which must be satisfied to realise a positive bail decision. We were of the opinion that to confirm the model, it was necessary to create a scale which showed all the cases passing the bail granted variable as also passing all the other variables in the scale, and no case failing to pass one or more variables passing the bail granted variable. Bearing this in mind we re-examined the scales which had been generated. In one scale consisting of the following variables:- bail decision (BAILDEC), money available for bail (MONAV), sobriety (recoded) (SOBRIETY), address (ADDRESS), special circumstances surrounding the offence (SPCIRCS), chief constable's bail direction (CCOBJ) and police objections to bail (POLOBJ), all the cases passing the bail granted variable also passed all the other variables, and no case which failed to pass one or more variables passed the bail granted variable. In view, however, of the possibly unreliable coding of (POLOBJ) we decided that it was not justifiable to include this as a separate variable. The reason for this was that the police objection to bail in individual cases was almost never recorded, and

to overcome this we had coded this variable on our estimation of when such objection was likely to have occurred. As our estimation reflected the variable special circumstances we considered that the cases were more aptly coded under that variable. This recoding did not cause any significant change in the ordering of the data.

The final scale, called Scale A, from which (PCLOBU) was omitted is reproduced and explained in Appendix III.¹³ We have extracted the crucial pass/fail pattern from Scale A and this is illustrated in Table I. We submit that Scale A confirms our model of police bail decision-making. It identifies the information items which were utilized by the police in deciding bail and illustrates the way in which the information items were utilized.

If this confirmation is accepted, it follows that the police in deciding bail did not consciously or subconsciously add or subtract metaphorical or even real points, but rather regarded the presence of certain variables as a prerequisite for, and justification of, the granting of bail. Failure to find one or more of the variables resulted in a refusal of bail. Equal importance was apparently accorded to each variable. Extraneous variables were disregarded, though it was always possible for a new variable to be incorporated to form a new decision pattern.

We are of the opinion that this form of decision pattern must be found in many other decision-making contexts as it leads to uniformity and quick decisions, relying as it does on almost mechanical application of settled criteria, rather than the balancing and weighting of circumstances for each individual case.¹⁴ We suggest that the Guttman technique can usefully be adapted in the manner which we have described to verify such decision-making patterns. The Guttman technique can

TABLE I

SELECTION OF PASS/FAIL PATTERNS FROM SCALES A, B AND C

	BAIL GRANTED		HAD MONEY AVAILABLE		SOBER		FIXED ADDRESS		NO SPECIAL CIRCUMSTANCES		NO C.C. OBJECTION TO BAIL		OFFENCE	
	FAIL	PASS	FAIL	PASS	FAIL	PASS	FAIL	PASS	FAIL	PASS	FAIL	PASS	FAIL	PASS
PATTERN FROM SCALE A	0	23	0	23	0	23	0	23	0	23	0	23	0	23
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PATTERN FROM SCALE B	0	17	0	17	0	17	0	17	0	17	0	17	0	17
	0	6	0	6	0	6	0	6	0	6	0	6	0	6
PATTERN FROM SCALE C	0	23			0	23	0	23	0	23	0	23	0	23
	11	0			0	11	0	11	0	11	0	11	0	11

also be used to identify the operative variables in this particular form of decision-making pattern. It may be seen in Scale A and Table I, that all and only those cases which passed the bail granted decision passed the other variables. The variables in that scale must be accepted as the operative variables because, when other variables were added or removed, the cases which passed the bail granted variable no longer passed all the other variables. This is illustrated in Scales B and C which are reproduced and explained in Appendix III.¹⁵

To summarise: one type of decision-making pattern may be represented by a flow of variables leading to a positive decision. A positive decision is dependent on the presence of all of these variables and a negative decision is the result of the absence of any one or more of these variables. The Guttman technique may be adapted to identify the existence of such a pattern and the operative variables. Police bail decision-making was examined and we found that it fell into the pattern described. The operative variables were identified. A bail granted decision was found to occur only when money was available, the prisoner was sober, the prisoner had a fixed address, there were no special circumstances surrounding the offence, and there was no objection by the chief constable to bail.¹⁶ All these variables must be considered of equal importance.

(2) Testing the Model

Because of the subjectivity of the original selection process and our consequent inability to characterise the cases on which the model was built as representative of the whole population, we decided that the model

must be subjected to testing by a random sample of cases.¹⁷

The cases in the random sample were examined to see if they conformed to the model, that is, to see if in all cases in which bail was not granted at least one of the variables in the model was not satisfied and in all cases in which bail was granted all the variables were satisfied.

The results of this examination are set out in Table II. Table II includes all the cases in which bail was not granted and illustrates the variable or variables which the case failed to satisfy to obtain bail.

The cases in which bail was granted were also examined. It was found that 11 cases satisfied all the variables in the model but in 2 cases bail was granted contrary to the model. Both cases failed to pass on the recoded sobriety variable. A new coding of sobriety was evolved to take account of these cases. The new coding specified that where the sobriety (SOBRIETY) variable was coded drunk and the money available (MONAV) variable was positive and the hours before the next court (CTHRS) variable was coded twelve or more, then the sobriety coding equalled sober. The effect of this second revised coding was to reduce the time span of more than twenty-four hours to more than twelve hours where a person was drunk but had the money available for bail. The results in Table II were not affected by the introduction of this new coding.¹⁸

The final model in the form of a diagram is represented in Figure I.

TABLE II

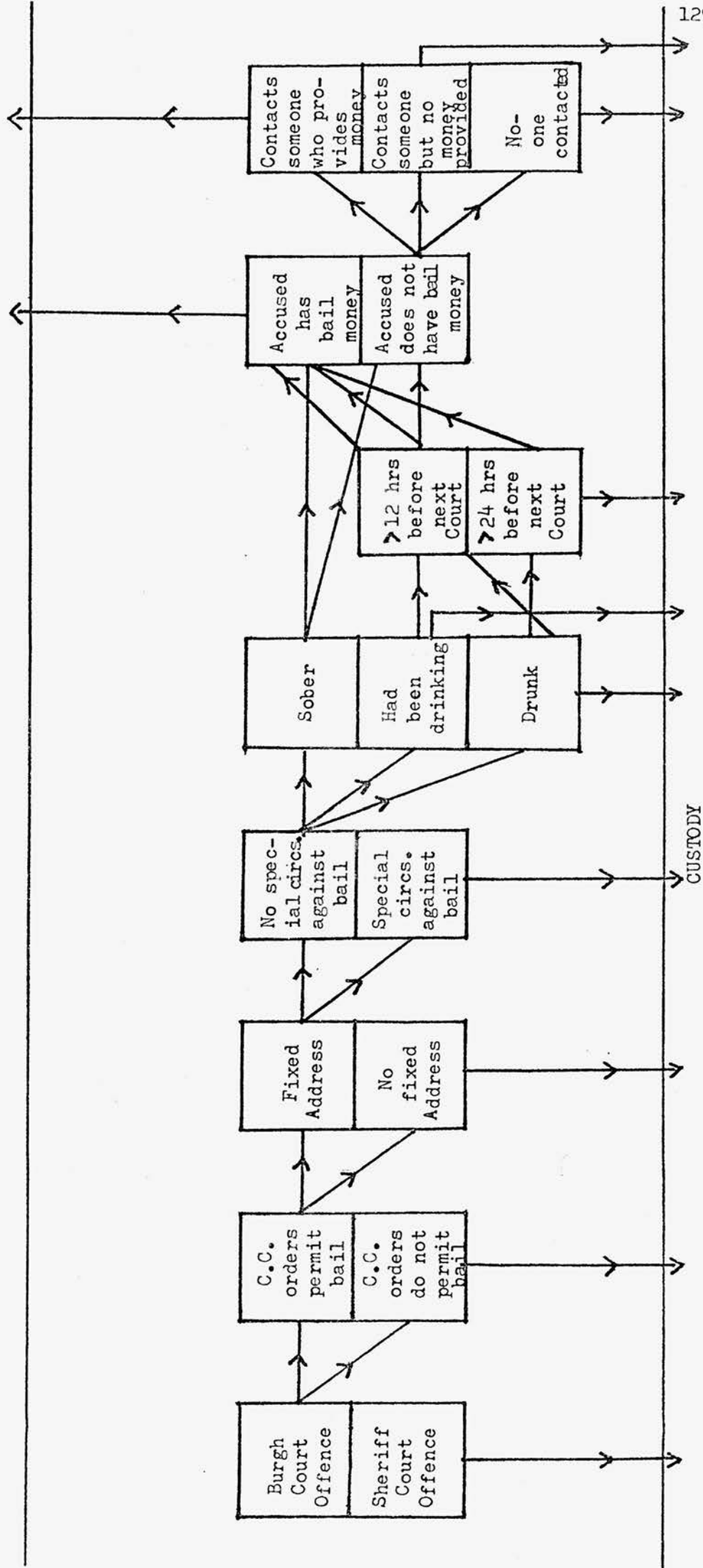
CASES NOT RELEASED ON BAIL : VARIABLE(S) NOT SATISFIED

Ref. No.	SOBRIETY			Fixed Address	C.C. Allows Bail	No special Circumstances	Money Avail.	Ref. No.	SOBRIETY			Fixed Address	C.C. Allows Bail	No special Circumstances	Money Avail.
	HBD +12	Hrs	D +24						HBD +12	Hrs	D +24				
87		13	x				x	3627		17	x	x			x
147						x	x	4407		13	x				x
207		22	x	x			x	4527							x
327		10	x				x	4587						x	x
637		10	x				x	4767		15	x			x	x
1047		5	x			x	x	4827		10	x		x		
1107		21	x		x			4947							x
1167	x	11						5067							x
1467				x			x	5127		11	x				x
1587		11	x				x	5247		11	x	x			x
1647		17	x	x			x	5367		14	x	x			x
2007		11	x		x		x	5427		10	x	x			
2127		10	x				x	5487		6	x			x	x
2137		13	x				x	5967		13	x	x			x
2367		11	x				x	6087		10	x	x			x
2427		13	x				x	6267		11	x			x	x
2507		17	x	x				6387					x		x
2727						x	x	6627		10	x				x
2967		17	x	x				6747		10	x				
3027					x		x	6867		13	x	x			
3207				x		x	x	7107		12	x				x
3267	x	10		x			x	7167				x			x
3337		14	x	x			x	7227		16	x				x

FIGURE I

Bail Decision-Making at the Police Level

LIBERTY



CUSTODY

AN EXAMINATION OF SOME CONTROVERSIAL ASPECTS OF POLICE BAIL

In this section four aspects of police bail are examined. Firstly, we consider the time spent by bailed and non-bailed persons in custody and the conditions of that custody secondly, bail money thirdly, the success of bail and lastly, the practice of withdrawing bail.

(1) Police Custody

(a) Time spent in police custody before first court appearance

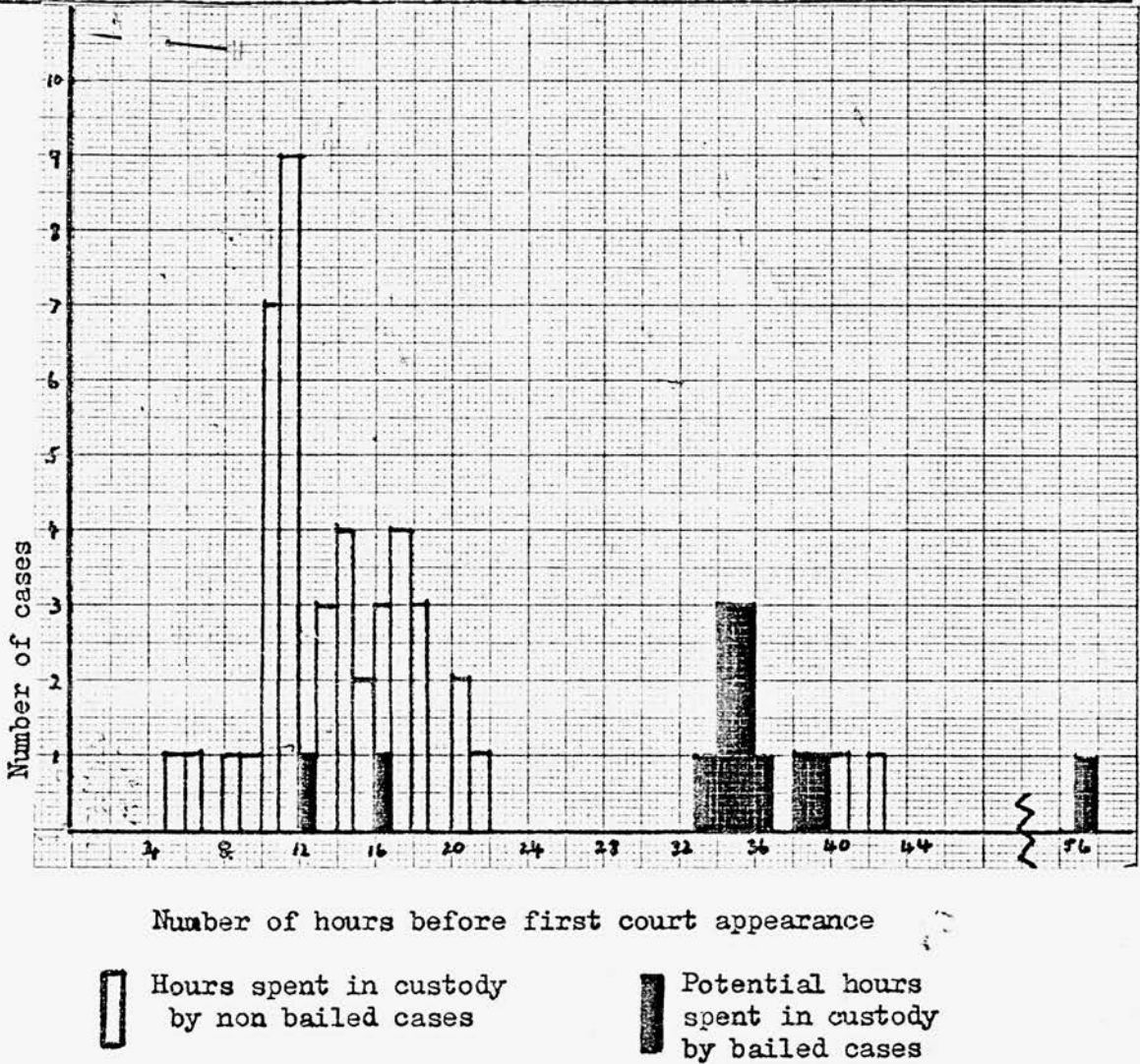
This description of time spent in custody was based on the second, that is, the random sample because the original sample was weighted in favour of weekend arrests and accordingly could be expected to give an unrepresentative picture.

Figure II illustrates the real time spent in custody, from the time of arrest to the first court appearance, by accused who were not released on bail. Also represented in this figure is the potential time which the bailed accused would have spent in custody if bail had not been granted. The average real time spent in custody by the non-bailed cases was 14.6 hours and the average potential time spent in custody by bailed cases was 33.7 hours. The average real time spent in custody by the bailed cases was 10.7 hours. This comparatively long time may be explained by the fact that a large number of accused had been drinking or were drunk when arrested. The police were reluctant to release on bail someone who was still under the influence of drink. In addition delay sometimes occurred while the police contacted relatives or friends of the arrested person to inform them that money was required. Some time may also have elapsed before

relatives or friends, who were willing to supply the money, were able to bring it to the police station.

FIGURE II

Time Spent in Police Custody Before First Court Appearance



From this it appears that a bailed person did not on average enjoy any great advantage over a non-bailed person in relation to the real time spent in custody, as the bailed person spent only 4 hours

less in custody than the non-bailed person. But as the potential time to be spent in custody by the bailed group greatly exceeded the potential time to be spent in custody by the non-bailed group, the grant of bail saved the bailed person from a period of custody much longer than 4 hours.

(b) A description of conditions in the police cells¹⁹

Before being locked up in a police cell an arrested person was required to hand over all his property to the police. The police also removed belts, ties and any other article which they considered might be used for self injury or as a weapon.

The three-storey cell block was adjacent to the charge office and consisted of 24 cells which were able to contain up to 60 prisoners. Some attempt was made to segregate the prisoners. Although children ought to be detained in a place other than a cell, lack of alternative accommodation usually meant that children, though separated from the rest of the prisoners, were locked up in one of the smaller cells. For female prisoners there existed a special cell which could be opened by one key only and this key was always held by a woman. This cell was small with a slightly raised wooden floor and, apart from toilet facilities, was completely bare. On the same level there were two communal cells. These cells had fitted benches round the walls, heaters which were supplemented by hot air vents and a toilet open to public view. One cell was used to contain burgh court prisoners and the other C.I.D. prisoners, destined for the sheriff court. The basement cells had concrete floors, no heating and felt damp and very cold. The police admitted that obstreperous prisoners sometimes had their jackets, jumpers and shoes removed and were locked up there, literally

to "cool off". The cells on the top storey were provided with beds and bedding. These cells were generally used for overnight prisoners but were sometimes used during the day. Only sober and non-verminous prisoners were allocated these cells. The drunk and vagrant prisoners were given instead a rubber pallise on the floor of the appropriate communal cell. A cell was reserved for persons arrested for driving offences involving drink or drugs and these prisoners were allowed to sleep there until they regained their sobriety. Another cell known as the "hospital" cell was larger than the other cells to allow, where necessary, the presence of two escorts to guard the prisoner.²⁰

The police showed us a printed notice which described the rights of the prisoner. The notice stated that writing paper must be supplied to the prisoner on request and that he was entitled to send a message by letter or telephone to a relative or friend, or in appropriate circumstances, to a foreign consul. It also stated that the prisoner, subject to police consent, might be allowed a supervised visit by a relative or friend. Information about bail was also given and the notice stated that:

"If you wish to be released on bail you should notify the officer on duty. If your case is one in which bail can be granted, he will, if necessary, send a message to your friends for the amount of bail. When bail is lodged you will be liberated and will be advised of the time and place fixed for your appearance in court."

We were informed by the police that this notice was displayed in the cells. While inspecting the cells, however, we commented on the absence of the notice. The police then stated that the prisoners usually tore down or defaced the notices.

To encourage good order the police allowed smoking and were usually willing to purchase cigarettes or newspapers for the prisoner out of money from his property. The prisoner did not, however, have to buy his own food, as meals from a commercial caterer were brought in

three times a day.

Photographs and fingerprints were taken of those prisoners who were to appear in the sheriff court but not usually of prisoners destined to appear in the burgh court.

On the mornings when the courts were sitting, the prisoners awaiting appearance in the burgh court were brought directly from the police cells into the burgh court. The prisoners who were to appear in the sheriff court were taken under escort to the cells below the sheriff court.

(2) The Price of Freedom: Current Police Rates

Until about ten years ago it was not uncommon for the police to grant liberation on the deposit of some article, for example, a watch or a ring equivalent in value to the amount of bail set. Although still legally competent, in practice such articles are no longer accepted. Liberation on bail is now granted only on the deposit of a sum of money.

The amount of money requested is in the discretion of the officer granting bail but his discretion is bounded by a statutory maximum of 20 pounds. In examining all the cases in 1972 in which bail was granted only one case was found which violated the statutory maximum. In this case 25 pounds was deposited as bail for an accused charged with four offences of breach of the peace. There was some suggestion that each offence had been assessed separately although it is not within the statutory regulations to exceed the maximum in this way. Foreign currency may sometimes be acceptable to the police and in one case French francs to the value of 15 pounds were accepted. Cheques, however, were not accepted. In addition to the statutory maximum, the chief constable had

fixed the amounts of deposit which he considered appropriate for the various offences. Although these amounts were not absolutely binding, few cases were found where bail was fixed outwith the suggested amount. The scale laid down by the chief constable is shown in Table III.

TABLE III

Bail Amounts Recommended by Chief Constable

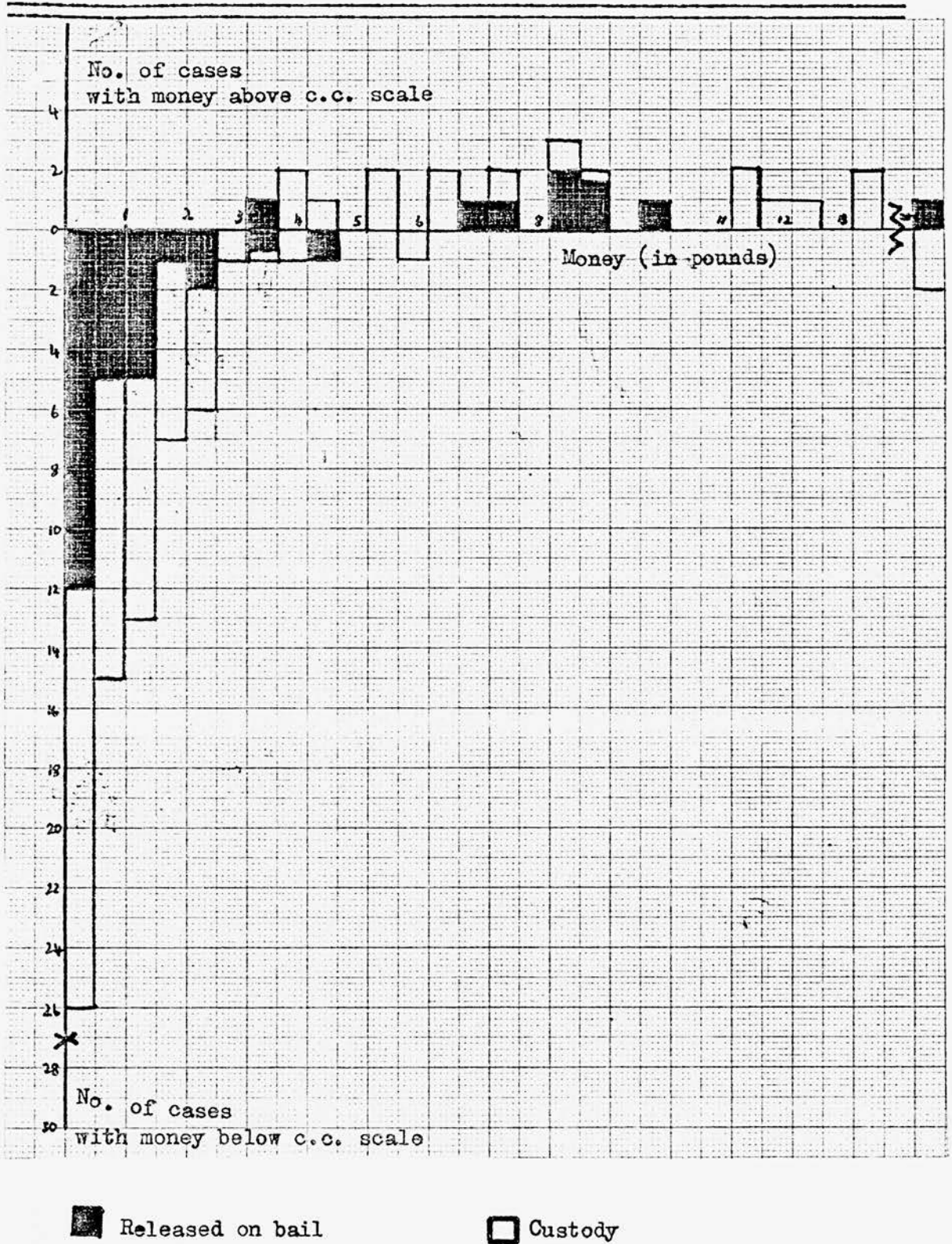
Offence	Bail amount (in pounds)	Offence	Bail amount (in pounds)
Assault		Games of hazard	
Trifling	3	1st offence	5
More serious to injury	5	2nd offence	10
Serious	10	Malicious damage according	
Breach of the Peace	5-10	to damage max.	20
Within football/rugby ground	10	Indecent conduct/exposure	
Nuisance	5	1st offence	5
Drunk and incapable	3	2nd offence	10
Drunk and disorderly	5	Prostitution	
Drunk in charge of child	5	1st offence	10
Drunk in charge of pedal cycle	5	2nd offence	20
		Public Park Byelaws	1
		Trespass (S) Act	2

Considering the cases in both samples, we found that in all but 2 cases in which bail was granted the deposit fell within the recommended scale. The average amount deposited was 5 pounds and 78 pence. Despite the low amounts requested for release on bail, only 25 per cent of those cases released on bail were able to pay the money out of their property. In 75 per cent of the cases the money was provided by relatives or friends. Figure III illustrates that of those arrested, 18 per cent had no money at all and another 40 per cent had under one pound. A mere 18 per cent had the money to pay bail at the recommended amount.

Three main questions are raised by these figures. Firstly, whether the requirement that money be pledged prevented the release of

FIGURE III

Amount of Money in Possession of Arrested Persons



impecunious persons. Secondly, whether the sums of money required were too high or too low and thirdly, whether the money requirement was an effective inducement to prompt released persons to appear in court.

(a) A consideration of whether the money requirement prevented release.

It is apparent from the decision-making model constructed with the help of Guttman scalogram analysis that the non-availability of money prevented a considerable number of persons from obtaining bail. Scale C shows that when the availability of money variable was removed from the scale an additional 11 (12 per cent) of the cases passed all the remaining variables.²¹ When the new coding of sobriety was incorporated into the model the number of additional cases passing, as Scale D shows, increased to 15 (16 per cent).²² In the second sample no cases failed on the availability of money variable alone. But using the new sobriety coding 6 (7 per cent) of the cases failed because of the non-availability of money. From this we estimate that by abolishing the requirement that money be pledged, the number of cases released would be increased by about 50 per cent which would increase the release rate from 22 per cent to about 40 per cent. The number of cases detained in custody would be decreased by about 16 per cent.

In addition, the abolition of the money requirement would reduce police work by relieving the police of duties connected with bail receipts and more importantly by rendering unnecessary the police efforts to obtain money from the relatives and friends of the arrested person.

(b) A Consideration of the amount of bail required.

The police, in following the amounts of bail suggested by the chief

constable, appeared to base the amount on the seriousness of the offence rather than the financial means of the individual accused. The police estimation of seriousness, however, in 31 per cent of the cases in the two samples exceeded the penalty imposed by the burgh court. In 27 per cent of the cases the money required by the police and the court penalty were identical. In only 23 per cent of the cases was the sum requested by the police less than the court penalty. (The remaining 19 per cent of the cases were not included because final disposal did not occur at the first court appearance.)

The amounts of deposit requested by the police seemed very low in comparison with bail amounts in other countries. Nevertheless in many cases the amounts exceeded or equalled the disposition of the burgh court. The amounts appeared even more incongruous when they were compared with the bail amounts set in the sheriff court. We found that the amounts of bail requested by the sheriff were linked to a rough tariff of seriousness of offence but were also linked to the individual means of the accused. The police tariff, however, did not reflect the sheriff court practice. This led to some strange results; for example, the sheriff in one case asked for bail of 20 pounds from an accused charged with attempted murder, and 5 pounds or less was asked in many cases where theft by housebreaking was charged. In the police tariff recommended by the chief constable, however, 20 pounds was the sum laid down for a second charge of prostitution and a refusal of bail was recommended if the offence charged involved dishonesty.

(c) A consideration of the effectiveness of the money requirement as an inducement to appear

In view of the poverty of many of the arrested persons appearing in the burgh court, it is arguable that the threat of forfeiture of

even very small amounts of money may be an inducement to some accused to appear. Such an argument also gains some support from our finding that in a great number of cases the forfeiture of bail was likely to be more severe a penalty than the court disposition. We do not, however, even at the police level, support the view that money bail is an inducement to appear. We are of the opinion that for those persons who have no intention of appearing in court, the fear of forfeiture of a small sum of money will not deter them, if they are not deterred by the fear of rearrest and punishment for the original offence. Any objection based on the fact that the disposition of the court may be less severe than the forfeiture of bail may be countered by the argument that although this was a finding of our research it is unlikely that the accused could be aware of this possibility.²³

There was also some evidence to suggest that because the amounts of police bail were high in comparison to the court dispositions, this acted as a disincentive to officials to follow up cases in which the accused did not appear in court. Indeed the police admitted that occasionally in circumstances where the offence of being drunk and incapable was charged, they informed the arrested person that if he paid the money for bail but did not appear in court, the money would be forfeited and that would probably be the end of the matter. We found that of the 40 bailed accused failing to appear in court in 1972, a warrant of arrest was issued in only 14 cases. In the remaining cases no action was taken other than forfeiting the money deposited as police bail.

The money requirement in police bail is in no way comparable to the form of compulsion built into the English surety system. The money for the deposit was accepted from any person including a co-

accused, without regard to the reliability of the person advancing the money or his relationship to the arrested person. Indeed the money advanced by relatives or friends was in some cases taken by the arrested person who signed the bail receipt in his own name. Even in cases where the receipt was signed in the name of a person other than the arrested person, that person has no legal duties or powers to compel the arrested person's attendance in court.

There is very little evidence to indicate whether a high appearance rate would be maintained even in the absence of a money requirement. Although police have the statutory power to release persons without a money deposit, this power was very rarely exercised. In only 9 (less than 0.003 per cent) of the cases where bail was competent was a person released on his own word. The number is too small to base any prediction about the success of an extension of this form of release but in all cases the individuals did appear when required in court. Successful release without money in other cases, for example, those appearing before the sheriff court cannot easily be used to gauge police success, because so many of the burgh court cases were petty offenders charged with offences committed while under the influence of alcohol.

(3) The Success of Bail

The criteria of success of bail is not limited in Scotland to the appearance of the bailed person in court. Success also depends on the released person not committing another offence while on bail.

When measured by the number of bailed persons appearing as directed in court, police bail was successful in that only 40 (4.3 per

cent) of those released failed to appear. Table IV illustrates the types of offence for which bailed persons failed to appear and the amount of bail forfeited.

TABLE IV²⁴

Bail Forfeiture : Types of Offences and Amount of Bail			
Offence	No. of cases	Total forfeited (in pounds)	Average forfeited (in pounds)
Drunk and incapable	22	66	3
Breach of the peace	14	70	5
Theft	2	10	5
Licensing (S) Act	1	5	5
Assault	1	15	15

TABLE V

Bail Forfeiture : Signatories of the Bail Receipts	
	Number of cases
Bail receipt signed by arrested person	22
Bail receipt signed by relative	9
Bail receipt signed by other person	6
Bail receipt signed by co-accused or relative of co-accused	3

Table V shows that over 50 per cent of the individuals who failed to appear were bailed in their own name, and yet individuals paying their own deposit money formed only 24 per cent of the samples. It would be misleading, however, to conclude that those cases, in which bail was made possible by relatives or friends advancing money for the deposit, were a better risk. The fact that a person has relatives or friends

in the community may well be an indicator of a good bail risk but an individual able to pay his own bail may also have relatives or friends in the community and it would be wrong to conclude from the fact that they do not pay his bail that he was a greater bail risk.

It is difficult to evaluate success based on the second criteria of failure to commit another offence while on bail. It was not possible to gather information about whether a charge for an offence committed while on bail arose after the first offence had been dealt with. But no cases of individuals rearrested for another offence while still on bail were found in the samples. In view of this, the shortness of the period of liberty and the fact that the police refused release where they thought another offence might be committed, it seems safe to conclude that the second criteria of success was also fulfilled.

Considering success from a different angle, however, the question may be asked, whether the police refused release in cases where the individuals would have appeared in court and would not have committed another offence if released. In our submission the answer is in the affirmative.

Firstly, we are of the opinion that the availability of money is not a variable which is relevant in the assessment of a good bail risk. The arrested person's ability or lack of ability to raise a very small sum of money gives no indication about whether he will fail to appear in court or commit offences or in other ways abuse his release on bail. It does not even give a reliable indication about whether the accused is a vagrant or passing through the city. We argued above²⁵ that fear of forfeiture of small amounts of money was not a successful inducement to appear. In view of this we favour the abandonment of availability of

money as a criterion of release. When we interpreted Scale D we argued there would be a 50 per cent increase in the number of persons released if the availability of money was not considered relevant by the police.²⁶ The police with justification refused to release, except in to the care of a fit person, persons who were not sober. It appears, however, from the data in the second sample that a person with money was considered to sober up more quickly than a person without money in his property.²⁷ We estimate, therefore, that the removal of the money criterion would also lead to an increase in the number of sobered drunks released.

The chief constable's directions prohibited release in cases where theft or some other offence involving dishonesty was charged. The sheriff court, however, taking a much greater risk in view of the longer period of freedom and the more serious offence charged, successfully released many accused charged with offences of dishonesty. There is no good reason for automatically excluding persons charged with such offences from police bail.

The criteria on which the police granted and refused bail must be considered justified, in as much as the police obtained a very high rate of appearance in court which was not marred by the commission of offences by the accused in the period of liberty. We are of the opinion, however, that it is not sufficient for the criteria to ensure only that the persons bailed are successful releases, the criteria must also ensure that all potential successful releases are bailed. We found that the criteria failed in this second objective by failing to maximise the number of probable successful releases. We believe that the abandonment of the money requirement and an extension of the types of offence in

which release is considered would go a long way towards realising the second objective.

(4) Cancellation of Bail

23

One police practice which is without statutory authority and contrary to the practice of the courts is the cancellation of a grant of bail.²⁹ In checking the issued bail receipts for the year 1972 we found that in 5 cases bail had been granted then cancelled. In 2 of the cases the cancellation was unobjectionable in that the bail for procedural reasons had been re-entered in the bail book kept by the police for accused, who were to appear in the sheriff court. In the other 3 cases a bail receipt had been issued and signed by the appropriate third party, who had supplied the money for the deposit. The grant of bail was also noted in the usual manner in the book kept for this purpose. Despite this, bail was cancelled. No reason was recorded, and the arrested person was brought as a custody prisoner to the burgh court. The police explained that such cancellation might occur if the arrested person turned obstreperous in the police station, perhaps because the effect of drink had not completely worn off.

METHODS OTHER THAN BAIL BY WHICH RELEASE FROM CUSTODY MAY BE OBTAINED

(1) Release on Own Word

As an alternative to bail, the police have the power to liberate

a person on his own word that he will appear when requested in court. The police claimed to regard the use of this power as appropriate only when extenuating circumstances existed. Extenuating circumstances, however, do not seem to have occurred often because in 1972 only 9 such cases were recorded.

Three of the cases concerned women arrested on charges of breach of the peace. In each case the woman was the only person available to look after children at home. In another case a man on a similar charge was released on the recommendation of a doctor. Medical attention was also required for three persons, two of whom were over seventy, who were charged with being drunk and incapable. A respectable civil servant and a woman of almost fifty who were arrested on similar charges were also released. None of these persons had sufficient money to give bail at the rate recommended by the chief constable.

(2) Release on Word of Parent

In the case of children the law provides that unless the offence charged is homicide or other grave crime, or the child is in association with a criminal or prostitute, or his liberation is likely to defeat the ends of justice, the police must liberate the child with or without bail.³⁰ Although bail is competent it was not used by the police in these circumstances.³¹ The usual practice was to liberate the child on his parent or guardian entering into a verbal obligation to present the child at the hearing of the charge. The parent was directed to telephone on the morning of the next court to find out whether the child was to be presented at the sheriff court or more usually at a children's hearing.

No separate statistics were kept of the number of children taken

into police custody. Data about the release of children into the custody of a social worker or transfer to an assessment centre was recorded, but not systematically. Although we consider that the criteria and results of police release in this area are worthy of research the amount of work involved prohibited its inclusion in the present research.

(3) Release on the Authority of the City Prosecutor

When the police considered that release was outwith their competence they sometimes consulted the city prosecutor about whether a particular persons ought to be released. Only 7 cases were recorded in 1972 as being released on the authority of the city prosecutor. The police admitted, however, that such consultation was not fully recorded.

Of the cases recorded, bail was granted in 2 cases. In one case the charge was theft of good from a shop. The other case was a warrant arrest for a parking offence. In the remaining cases release was authorised in one case where theft was charged and another case in which a warrant arrest had been made. Release was also granted to an accused who was charged with being drunk and incapable and required hospital treatment. Proceedings were dropped and the release authorised of one accused charged with being drunk and incapable and another charged with breach of the peace and wife assault.

Consultation with the city prosecutor was not automatic but it appears from the cases that to prompt consultation it was helpful to be a foreign national or to be in need of medical attention or to be very old.

(4) Release on the Authority of the Procurator-Fiscal

A consultation which was considerably standardised took place between the police and the procurator-fiscal in relation to certain traffic offences which fell within the jurisdiction of the sheriff court.

The most usual example of this concerns vehicle drivers who were arrested and taken to the central police station after providing a positive breath test. Under the relevant legislation³² the driver is required to provide a sample of blood or urine for analysis. If the driver provided the requisite sample and it was possible to get him home safely, he was usually liberated by the police on the authority of the procurator-fiscal.

The police said, however, that as a matter of general practice they would not, even if requested, contact the procurator-fiscal to authorise release for arrested persons who were not eligible for police bail.

For those persons not released by the police, the court appearance was their next, or for those appearing in the sheriff court, their first opportunity to obtain release.

VI

THE BAIL DECISIONSOF A LAY MAGISTRATE'S COURT

There exists "widespread criticism of the lay magistrates system in Scotland, with bailies sitting as magistrates in their own locality, dispensing their particular brand of justice"

-- The Scotsman¹

"The lay judge brings to the court a practical everyday knowledge of the way of life and social conditions in the local community to which those who appear before him belong, and such knowledge is not less valuable ... than the foundations of legal training possessed by the professional judge".

-- White Paper²

The hierarchy of the Scottish criminal court structure was outlined above³ and we described at the base of this hierarchy, the burgh or police courts and the justice of the peace courts.

Four main features differentiate these courts from other Scottish courts exercising criminal jurisdiction. Firstly, their administration is not the responsibility of the central government and the court prosecutors are not answerable to the Lord Advocate. Secondly, the judges are not legally qualified and are given little or no training. The clerk appointed to the court may be legally qualified but whether legally qualified or not he is an ex officio legal assessor to the court and has a duty to advise the magistrates about law and procedure.

Thirdly, the jurisdiction and sentencing powers of these courts are very restricted. With a few exceptions the power of sentence is limited to the imposition of a fine not exceeding 50 pounds and/or the imposition of a sentence of imprisonment not exceeding 60 days. The fourth distinguishing feature results because the legal aid and advise scheme has not been fully extended to these courts. As legal aid is not available for representation, the vast majority of accused are unrepresented by a law agent.

THE SUBJECT OF THE RESEARCH

Although burgh and justice of the peace courts deal with very minor offences, their procedure was of considerable interest to us because we estimated that these courts dealt with 40 to 50 per cent⁴ of all arrested persons who were brought before a court in 1972. This interest was increased when we discovered the low status given to these courts by the lawyers to whom we talked and heard criticisms of alleged breaches of legal procedure and disregard of the precepts of natural justice.⁵

As we described above⁶ the general aim of the research was to describe the decision-making situation and to consider what information influenced the decision-maker to grant or refuse bail. In investigating some of the consequences of the bail decisions we hoped to highlight any problems specific to the burgh court.

In our study of the Edinburgh burgh court we looked at the

information made available to the bailie and attempted to assess what information influenced his bail decision. In addition we considered the availability of legal advice and representation in relation to bail. In considering the consequences of the bail decisions we concentrated on the following issues:- the time spent in prison because bail was refused or while attempting to raise bail, the disparity between bail and sentence, the effect of the bail decision on the outcome of the case, the review process and forfeiture of bail due to the non-appearance of the accused.

THE RESEARCH METHODOLOGY

(1) The Preliminary Study

In the course of our preliminary study in the burgh court various officials to whom we talked voiced some surprise that we were studying bail. We were assured by them that there was nothing problematic about bail in the burgh court, as bail decisions were few and completed in a few seconds. Our own observation confirmed their description but we considered that both this scarcity and haste of decision warranted some investigation.

On the basis of information gained during this period, we drew up information sheets which we used during our period of observation to ensure that we did not omit any information about a particular case. These information sheets are reproduced in Appendix III. ⁷

It was not feasible to observe the cases chosen at random or

even observe cases over a period chosen at random. The observation period was dictated by the availability of time and an estimate of time which would be sufficient to give an accurate and hopefully representative sample of bail decisions in the burgh court. We decided to study the cases in a four week period in May 1972 and arranged to have access for this period to the prosecutor's papers and the criminal records.

(2) The Period of Observation

Applications for bail in the burgh court were always heard in open court.⁸ The court convened every day except Sundays and each day we sat in court, in a seat generally reserved for social workers, to observe all the custody cases brought before the court. These custody cases included all the persons arrested by the police on the morning of the court or during the previous afternoon or weekend, and persons who had been in custody since a prior court appearance, at which time their case had been continued without plea. For all persons pleading not guilty or not pleading because their case was continued without plea, we completed a court information sheet adding any extra information made available to the court. Later we noted from the prosecutor's papers and police records, the information available to the prosecutor which included the criminal record of the accused.

(3) Record Research

When we came to look at the consequences of the bail decision we found that the number in the sample was insufficient to allow us to draw any conclusions about many of the questions in which we were

interested. We decided, therefore, to base this record research on the year 1972.

Unfortunately due to the organisation of the records we found much of the information we wanted, difficult and sometimes impossible, to obtain. Where it was impossible to obtain the information from the records we made estimates based on the sample cases, although we were unable to demonstrate that all the proportions of the sample were necessarily numerically representative of the proportions of the annual population.

The main records analysed were the bail receipts of the burgh court, the court lists, the police charge files and arrest book.

THE RESEARCH RESULTS

(1) Description of the Sample

During our period of observation in May 1972, 288 arrested persons were brought before the burgh court. Of these cases, 257 pled guilty and were sentenced immediately. No cases were continued to allow a report to be prepared before sentence. Bail was a relevant consideration in only 27 cases.⁹ Of these cases 25 pled not guilty and 2 were continued without plea. Table VI shows the bail decision which was made in these cases.

TABLE VI¹⁰

The Bail Decisions (Sample)

	Bail granted	Bail not granted	Ordnained to appear	Total
Police bail continued by court	3	0	0	3
Burgh court bail	13	6	2	21
Change of plea to guilty	2	1	0	3
Bail granted after review	2	0	0	2

(2) Information and Bail Discretion(a) The magistrate

The basic information available to the magistrate, who was generally called the bailie, was the information on the complaint which covered the name, age and address of the accused and the name of the offence charged. The bailie was also in a position to know whether the accused had been released on police bail, because in these cases the accused was not brought before the court from the cells.

In 21 of the cases the bailie made his decision without any additional information except the request of the prosecutor.

In 1 case one additional item of information was given by the prosecutor. This information was that the accused was of no fixed address.

In 5 cases the accused attempted to advance some information. In one of these cases the bailie, immediately after the prosecutor's request for bail at a certain amount, had confirmed the bail. The accused said he could not raise the money as he had commitments to meet.

The clerk silenced this accused, however, and told him that bail had been set and could not be reduced. Thus the accused was precluded from making out a case for bail at an amount he could afford. It ought to be noted that there was no legal justification for the clerk's statement, the mere pronouncement of an amount of bail does not preclude a judge from taking into account representations of the accused for a lower amount. The second accused protesting against the amount of bail informed the bailie that he had been unemployed for seven weeks. In this case also the bailie confirmed the bail requested by the prosecutor without any further inquiry.

Two other accused protested when the prosecutor alleged they had no fixed address. The first accused gave an office address to the court but this was rejected by the clerk. The rejection or acceptance of an address is, however, a matter for the judge and in other courts we have seen an office address accepted. A second address was then given by the accused and he said that he had lived there for twenty years. The other accused said she had four sons and daughters who would give her a home. In neither of these cases did the bailie attempt to make further enquiries or to have this information checked.

The fifth accused who attempted to give information was no more successful. She tried to object to custody when the prosecutor asked for custody to enable him to take out a warrant of an unspecified nature. The bailie refused to listen to the accused and told her that she would be allowed to speak at her trial. We discovered later from the prosecutor's papers that this woman was once professionally employed and was now married and residing with her husband who was regularly employed. She had no previous convictions. She had a fixed address, though the police alleged that she and her husband were

due to leave that address in a few days. The charge was committing a fraud by presenting a cheque for three pounds with insufficient funds to cover the amount. On the basis of these facts the woman, had she been allowed to speak, might have made out a good case for retaining her liberty. The charge was later deserted by the prosecutor.

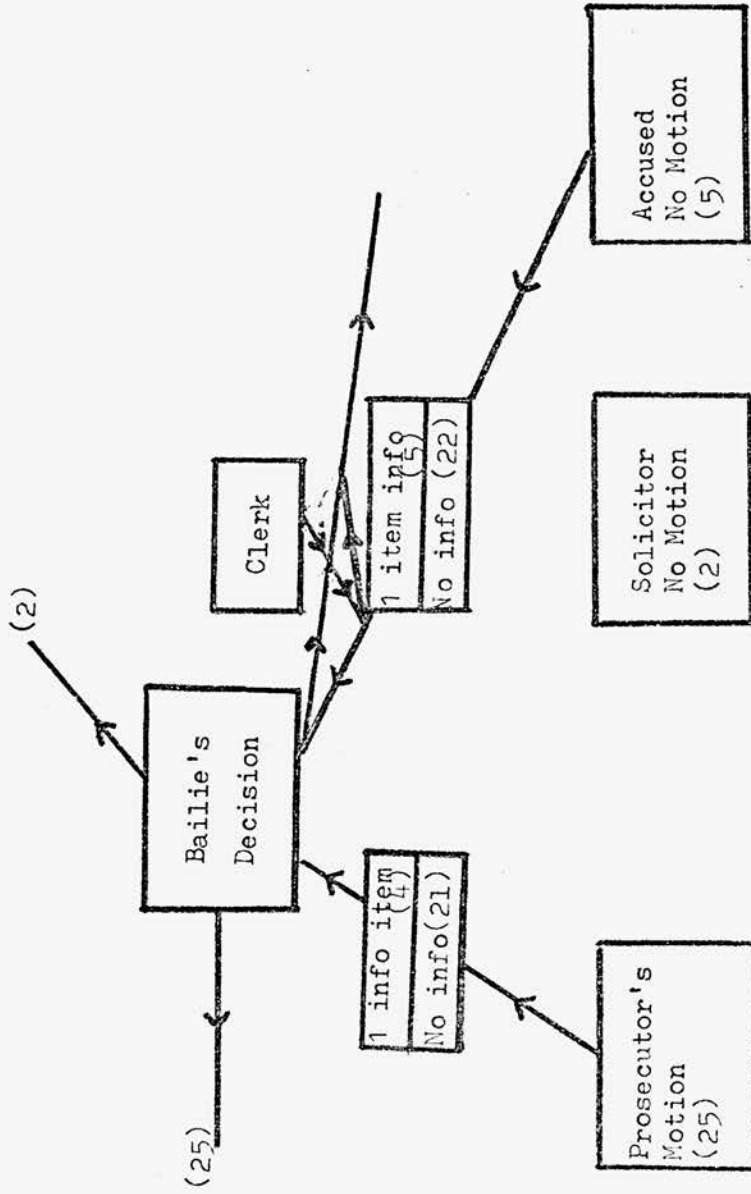
To summarise: we found that in 21 (78 per cent) of the cases the bailie had no information on which to make a decision except the information on the complaint and the bare request of the prosecutor.¹¹ The accused attempted to give additional information in 5 (19 per cent) of the cases but the giving of such information was not encouraged and no attempt was made by the bailie to clarify or increase this information. In no case was any attempt made by the bailie to obtain additional information from the accused or the prosecutor.

Having ascertained what information was available, we attempted to assess what information influenced the decision of the bailie. We found that in all but two cases he granted the prosecutor's request for custody or liberty and also assented to the amount of bail asked by the prosecutor. Having regard to this assent to the prosecutor's request and the fact that the bailie had little or no information to found his own decision, we had no hesitation in concluding that only one operative variable, namely the request of the prosecutor influenced the bail decision of the bailie. We represent bail decision-making in the burgh court in Figure IV.

The findings relating to the bail decision-making of the bailie are disquieting. In a court where there is no lawyer to protect the interests of the accused, an inquiry by the magistrate into the merits of bail or custody is a necessity. It is accepted, and indeed it has

FIGURE IV

Bail Decision-Making in a Burgh Court



often been said by the High Court of Justiciary, that the attitude of the prosecutor is a relevant consideration for the court. The view that the court should exercise its bail discretion merely by rubber stamping the request of the prosecutor has, however, never been adopted.

To improve the bail decision-making of the magistrates, the quantity and quality of the information made available to them must obviously be improved. We give further consideration to this question below.¹² Any improvement, however, would also be contingent on the extent to which the lay magistrates free themselves from their complete dependence on the prosecutor.

(b) The city prosecutor

The city prosecutor by virtue of his office has discretion to consent to the release of a person on bail pending court appearance. In the previous chapter we saw the prosecutor exercise this discretion by consenting on a few occasions to the release of persons for whom the police were unwilling to accept the responsibility of liberating on police bail.¹³

When an accused is brought before a court the prosecutor may make representations to the court about bail.¹⁴ It is the court, however, which is vested with the discretion to grant or refuse bail.

When we examined the exercise of the prosecutor's discretion in opposing bail or asking bail of a certain amount, we found that the prosecutor, in contrast to the magistrate, did have before him a great deal of information on which to base his decision. This information consisted firstly, of information from the police charge sheet,

and in the last chapter we broke down this information into the following categories:- date and time of arrest; name of arresting officer; date and time of appearance in central charge office; name and address of arrested person; money in possession of arrested person; sex, date of birth and occupation of arrested person; name of officer accepting charge; charge; brief account of circumstances of the offence; names and addresses of witnesses. Secondly, the prosecutor had access to the full criminal record of the accused and from this he labelled the offences which he might want to bring to the attention of the court. Thirdly the prosecutor knew whether the accused was released on police bail and how much money was paid. Lastly the prosecutor had the opportunity to obtain additional information if the accused gave information in court.

In examining the sample cases we discovered that, although the basic information available to the prosecutor was the information obtained by and available to the police, the prosecutor in opposing or asking for bail did not use the same criteria as the police. The police, as we described,¹⁵ required sobriety as a pre-requisite of release. Assessment of the sobriety of the accused was not, however, a problem for the prosecutor because probably without exception, if the accused was sober enough to be brought before a court he would be sober enough to be released. We found that the prosecutor did not follow the chief constable's directions about bail. In a number of cases we witnessed the prosecutor ask for bail which did not correspond to the recommended scale and ask for bail when a property offence was charged. The special circumstances which we described as influencing the police decision were not considered fatal to bail by the prosecutor. For example, we found that the prosecutor in some

cases asked for bail even when the address of the accused was the locus of the offence charged or where the accused lived with the victim of the offence.

Because only a small number of bail decisions were made in the sample cases, it was impossible to attempt any sophisticated analysis to discover what variables did influence the prosecutor. We were able, however, to make some distinctions between the cases. We found that a clear cut division existed between those cases in which bail was requested and those in which custody was requested. In the latter cases, unlike the former, the prosecutor had information that the accused had no fixed address, or that the police wanted custody to allow them to make further inquiries. We examined all the other information items available to the prosecutor but we did not find any which produced such a clear distinction.

When we examined the amount of bail asked by the prosecutor we did not find any clear cut distinctions. It is possible, however, as may be seen in Table VII, to distinguish a rough tariff based on the seriousness of the offence as perceived by the prosecutor. We found that for drunk and incapable offences the prosecutor tended to ask bail between 3 to 5 pounds, for assault between 5 and 15 pounds depending on criminal record and for breach of the peace between 5 to 10 pounds depending on criminal record. The highest bail of between 15 to 20 pounds was usually asked if the charge specified that the accused was a known thief loitering with intent, or in possession of goods or tools without a satisfactory explanation.

Although the prosecutor always asked for a specific amount of bail, we discovered that he was not in a position to know whether the accused could afford the bail asked. In 7 cases in the sample, the

TABLE VII

A Comparison of the Means of the Accused, Bail Amount and Sentence

Dependents	Employed	Money available	Bail amt. (pounds)	Sentence	Offence	Record
Yes	Yes	Yes	3	D/S Ad	Ass/B of P	S
NR	No	No	5	£5 TTP	B of P	None
NR	Yes	Yes	5	£5 TTP	B of P	S
NR	Yes	Yes	5	£5 TTP/Ad	Ass/B of P	S
No	No	No	8	Ad	FP	L/C
NR	No	No	8	Ad	FP	None
Yes	Yes	Yes	8	£2/53 TTP	Ass/B of P	S
Yes	Yes	Yes	10	£5 TTP	Indecent Exposure	S
NR	No	No	10	£10 TTP	B of P	S/C
NR	No	No	10	£10 TTP	B of P	L/C
Yes	Yes	Yes	10	Ad /Ad.	B of P/Ass	S
No	No	No	10	£8 TTP	B of P	None
Yes	No	No	12	£8 TTP	Known Thief	L/C
Yes	Yes	No	12	£8 TTP	Known Thief	L/C
Yes	No	No	15	£15 NTP	Known Thief	L/C
Yes	Yes	Yes	15	Ad /£5 TTP	Mal Den/ B of P	S
Yes	No	No	15	Ad /Ad.	B of P/Ass	L
NR	No	No	20	£15 NTP	Known Thief	L/C

NR = Not recorded

D/S = Desert simpliciter i.e. charges dropped

Ad = Admonished

TTP = Time allowed to pay fine

NTP = No time allowed to pay fine, accused goes to prison for a fixed number of days. The prisoner may be released if the fine is paid, or released from part of the sentence if part of the fine is paid.

Ass = Assault

B of P = Breach of the peace

FP = Found in area for unlawful purpose

S = Short record, no custody sentence

L = Long record, no custody sentence

C = Custody sentences in previous record

prosecutor knew that the money asked was available, either because the accused had sufficient money in his possession, or because the accused had paid police bail. Information about dependents, however, was often not recorded nor was there any information about the financial commitments of the accused. The prosecutor did have information about the employment status of the accused but in only 5 cases was the income of the accused recorded. This may be seen in Table VII and it ought to be noted that bail money of 10, 15 and 20 pounds was asked, although the accused did not have the money available and was recorded as being unemployed with dependents. We reached the conclusion that the money asked by the prosecutor depended on a rough tariff of seriousness of offence as perceived by the prosecutor, rather than the financial ability of the accused to raise the money. We do not know if financial hardship was caused to families who raised the bail but in 4 (22 per cent) of the cases in which bail was granted, the amount set caused the accused to plead guilty or spend the whole time in prison unable to raise the money. The amount of bail asked also exceeded in 11 (60 per cent) of the cases in which bail was granted the sentence imposed, and equalled the sentence in 5 (28 per cent) of the cases.

(2) Legal Representation and Legal Aid

Of the 288 arrested persons appearing in the burgh court during our period of observation only one accused was represented by a lawyer in court. The accused who was charged with breach of the peace was released on police bail but did not appear in court and his solicitor lodged a plea of not guilty on his behalf. Although an accused on

bail cannot avoid his obligation to appear in court by instructing a solicitor to represent him, the absence of this accused evoked no comment from the court. Indeed without any request from the solicitor and without any information being given, the bailie, on the question of the clerk, ordained the accused to appear. A co-accused who pled not guilty was also ordained. These two accused were the only custody cases ordained to appear in our period of observation.

All the provisions of the legal aid scheme have not been extended to burgh or justice of the peace courts. Accused appearing in these courts cannot obtain legal representation under the legal aid scheme, though they are eligible under the scheme for legal advice.¹⁶ No provision is made for solicitors to attend regularly at the burgh court or police station for the purpose of giving such advice. The accused can expect no help from the clerk of court who may be legally qualified, as it has been decided that the clerk has no duty or authority to protect the interests of the accused.¹⁷ The accused must, therefore, defend himself as best he can against a legally qualified prosecutor before a lay magistrate.

In Edinburgh, however, an attempt has been made to fill this gap in the legal aid scheme by the provision and payment of a part-time public defender. This provision was instigated and financed by Edinburgh Corporation who annually have given a honarium "for the services of a solicitor being available in the burgh court on behalf of poor persons".¹⁸ In January 1974 the Corporation agreed to extend this scheme by voting to appoint a full time solicitor to give legal advice and assistance to persons appearing in the burgh court.¹⁹ This

proposal did not unfortunately meet with approval from the Scottish Home and Health Department, who objected on the grounds that some legal aid facilities existed and that the current Government proposed to abolish the burgh and justice of the peace courts.²⁰

Despite the provision of a public defender we found that none of the accused in the sample had benefitted from this scheme. We accordingly requested an interview with the solicitor, who was appointed to act as public defender, to discuss the practical extent of the scheme. The solicitor explained that his appointment obliged him to attend at the burgh court to give legal aid and advice when he was notified by burgh court officials of a request by an accused for this aid. He did not consider that his duties extended to visiting the accused after arrest and before his first court appearance to advise him about his plea and, if necessary, about bail. When asked how often he gave legal advice and aid under this scheme he estimated between six and twelve occasions in a year. He also expressed the opinion that he would not be able to continue as public defender if there was any appreciable increase in the demand for his time and services.

We doubt, however, whether the "unmet need" for legal aid in the burgh court was represented by less than a dozen cases a year. It appears that in practice the effectiveness of the public defender scheme was severely limited. The scheme helped only a very small number of accused. It was not readily available, since it was probably unknown and certainly unpublicised, and depended on court officials to give notification of a request.

We are convinced that all the provisions of the criminal legal aid scheme ought to be extended to lay magistrates courts. Apart from general benefits, we think that such an extension would have two

important consequences in relation to bail. Firstly, access to legal advice before first court appearance would lead to an increase in the number of not guilty pleas and therefore the number of cases in which bail would be a relevant consideration. Secondly, the attendance of a duty solicitor would ensure that a request for bail was made on behalf of the accused. In addition, on the basis of our experience in the sheriff court, we believe that the duty solicitor would also ensure that if necessary a case would be made out for the release of the accused on bail, and the financial ability of the accused to raise bail would be made known to the court. When faced with possible opposition, the prosecutor would be likely to give more details about his grounds of opposition or his grounds for requesting a comparatively high amount of bail. The provision of legal advice and representation is, as we argue below,²¹ one method of overcoming the lack of information available to the court.

(3) Some Consequences of the Bail Decisions

(a) Annual number of persons granted bail and remanded in custody

Using the bail receipts issued by the burgh court in 1972 we counted that bail was granted and raised in 172 cases.²² In addition, we estimated that the court continued police bail in 39 cases.²³ In 16 cases bail was granted by the court but not raised. This figure does not include a number of accused, who were granted bail, but who changed their plea to guilty because they could not raise the amount set. We estimated that if these cases were included the number of cases in which bail was granted but not raised would rise to 42 cases.²⁴ The total number of cases in which bail was granted equalled 178 plus

39 (estimated) plus 42 (estimated), that is, 259 cases. The number of accused who appeared in custody for trial we counted as 34. This figure also is misleading, because the records concealed cases in which bail was refused but later granted after review, cases in which the charge was dropped, cases in which a plea of guilty was made at a later diet and cases in which a plea of not guilty was changed to guilty when bail was refused. Our estimate of the number of accused refused bail was 99.

To summarise: during the year 1972, 9 per cent of the 3726 custody cases appearing in the burgh court pled not guilty. Of these, 60 per cent raised bail, 12 per cent were unable to raise bail and 25 per cent were refused bail.²⁵

(b) Time spent in custody because bail was refused or not raised.

TABLE VIII

Average Time Spent in Custody because Bail was Not Granted or Not Raised

	No. of cases	Time (days)
Bail not granted	34	22
Bail granted	235	—
Bail not raised	18	30
Bail raised	98	same day
Police bail continued	39	no delay
Bail raised at prison	25	same day
Bail raised at prison	55	7

In Table VIII we illustrate that persons who were granted bail but who were unable to raise the money spent on average a longer period in custody than persons refused bail. Inability to raise the money resulted in 42 per cent of the persons granted bail being admitted to prison. Of these 26 per cent were released from prison the same day when a relative or friend brought the bail money to the prison. About 56 per cent of the persons admitted to prison spent an average of 7 days in prison before their bail money was raised and 20 per cent remained in prison until their trial. These figures illustrate that people were admitted to prison and spent a considerable time in custody for the sole reason that they lacked money. Apart from the distress to the accused and his relatives, it must also be borne in mind that these admissions and short term custody cases were expensive and no doubt caused considerable strain on the overburdened facilities and manpower of the prison system.

When we examined the sentences given to persons refused bail and persons unable to raise the bail money, we found that in every case the pre-trial custody was more severe than the eventual sentence imposed. From Tables IX and X it may be seen that in all but one case a fine was imposed by way of sentence. In the one case where a sentence of 30 days imprisonment was given, the pre-trial custody still exceeded the sentence.

It may be recalled that the burgh court with few exceptions does not have the power to impose a sentence of imprisonment in excess of 60 days. Specific provision is made to prevent the court from imposing a combination of fine and imprisonment which would exceed this maximum.²⁶ Tables IX and X illustrate, however, that in many cases the court imposed a fine without allowing any time to pay. This meant that if the

TABLE IX²⁷

Comparison of Time Spent in Custody Due to Refusal of Bail and Sentence

Time (days) spent in custody due to refusal of bail	Sentence	Time (days) spent in custody due to refusal of bail	Sentence
4	£5/7 dys N.T.P.	22	£5/7 dys N.T.P.
26	£10/7 dys N.T.P.	23	£10/30 dys NTP
13	£10/14 dys N.T.P.	45	£5/7 dys N.T.P.
26	Admonished	8	Admonished
3	£2/8 dys N.T.P.	8	Admonished
43	30 days prison	30	Admonished
32	£30/50 dys T.T.P.	25	£20/30 dys NTP
12	Admonished	32	£10/30 dys NTP
37	Deserted Simpliciter	32	£10/30 dys NTP
15	Not guilty	31	Not proven
17	£15/30 dys N.T.P.	20	£5/7 dys N.T.P.
31	£15/30 dys N.T.P.	7	£5/7 dys N.T.P.
22	Admonished	7	£5/7 dys N.T.P.

TABLE X²⁸

Comparison of Time Spent in Custody Because Bail Was Not Raised and Sentence

Time (days) spent in custody because bail was not raised	Sentence	The Amount of Bail Set (pounds)
35	Not guilty	15
35	£5/7 dys N.T.P.	15
21	Admonished	8
22	£5/7 dys N.T.P.	15
11	£10/30 dys T.T.P.	12
44	£20/30 dys N.T.P.	15
23	Deserted Simpliciter	10
31	£30/60 dys N.T.P.	15
46	£20/30 dys N.T.P.	12
46	£10/30 dys N.T.P.	12
21	Admonished	8

convicted person could not immediately raise the money for the fine he was imprisoned for the period fixed as an alternative to the fine.²⁹ We found that in some cases the combination of pre-trial custody and sentence exceeded 60 days imprisonment. These cases are underlined in the Tables. Conceptually pre-trial custody is different from sentence but the subtleties of this distinction are unlikely to be appreciated by the man deprived of his liberty. Because of this we were disturbed by the fact that a person refused or unable to raise bail granted by the burgh court might be liable to spend a total period in custody which exceeded the sentencing powers of the court.

Table X also illustrates that in most of the cases in which bail money was set but not raised the amount of bail asked exceeded the fine imposed as sentence.³⁰

To summarise: we found that the majority of persons refused or unable to raise bail in the burgh court spent a period in custody awaiting trial greater than any period of imprisonment imposed as sentence. The combination of pre-trial custody and sentence in some cases was greater than the maximum sentence within the competence of the court.

(c) The effect of the bail decision on the outcome of the case.

In many bail research projects it has been suggested that release on bail and pre-trial detention have some relationship with the outcome of the case. It has been argued that the bail decision may affect firstly, the determination of guilt or innocence and secondly, the sentence imposed.³¹

We looked at the outcome of the bail refused and bail granted but

not raised cases set out in Tables IX and X. We were unable³² to look at the results of all the cases released on bail for the year and instead we used the results of the cases released on bail in the sample. We did not find that release on bail increased the likelihood of a not guilty finding. No cases released on bail in the sample were found not guilty. Of the cases appearing in custody 3 were found not guilty or not proven. In relation to sentence, we found that no case released on bail was given a custodial sentence but only 1 case appearing in custody was given such a sentence.

We did find, however, a marked difference between the bail and custody cases in relation to the imposition of fines. In 210 out of the 23 custody cases in which a fine was imposed, a prison alternative was fixed and the court did not allow the convicted person any time to pay the fine. In contrast in all (10) the bailed cases in which a fine was imposed after conviction, the accused were allowed time to pay the fine.

In some cases, therefore, a double penalty was imposed on those persons who lacked money. They were kept in custody because they could not raise the money for bail, and as they had no opportunity to raise money to pay a fine, their detention was likely to continue after sentence. Accuseds released on bail not only had the opportunity of raising money for a possible fine while on bail but were given additional time by the court to pay the fine.

(d) Review of the bail decisions

Our attempt to investigate reviews of bail by the burgh court was unsuccessful. We were informed that no records were kept of applications for review or their outcome. Officials informed us that very

few such applications were made.

The procedure was described as informal, the clerk bringing the written application to the notice of the bailie before court and the prosecutor attending to give his views.

(e) Forfeiture of bail

In the year 12 persons (5 per cent of those released on bail by the burgh court) failed to appear and had their bail forfeited. Two of these cases related to the same man who was charged on two separate occasions with being drunk and incapable. Although this accused was described as having no fixed address, he had on the first occasion seven pounds and on the second occasion twenty-two pounds in his possession. Bail was set at three and five pounds respectively and when the accused failed to appear, the bail was forfeited but no warrant for arrest was issued. As we suggested in Chapter V³³ the forfeiture of bail appears sometimes to be considered a sufficient penalty. In another two cases bail was forfeited but the warrants for arrest were withdrawn, presumably because the accused did appear for trial though after their case had been called. Of the remaining cases, four involved youths charged with breach of the peace, one a housewife aged forty, charged with a similar offence, one a man who was charged with being drunk in charge of a child and one known thief. The last case is interesting as it typified the modern prototype of a good bail risk. The accused in this case was a professional man employed and supporting his family with whom he lived. He had no previous convictions. Ironically this was the only case in which the warrant of arrest was still outstanding four months after the end of 1972.

As the accused's non-appearance for trial resulted in the issue of

a warrant of arrest in only 8 cases in the year, and as the accused was rearrested in all but 1 case, failure of accused to appear when on bail cannot be considered a problem in the burgh court.

IMPLICATIONS OF THE PROPOSED REORGANISATION OF LAY MAGISTRATES COURTS

The reorganisation of local government in Scotland is due to come into effect in 1975. With this in mind the Conservatives published a White Paper which advocated the replacement of the burgh and justice of the peace courts by a system of justices courts.³⁴ Major changes proposed in the White Paper were that the central government should adopt the responsibility for the administration of the new courts and that the prosecutors should be answerable to the Lord Advocate. Although it was envisaged that many of the new courts should be staffed by legally qualified stipendary magistrates, the present system of lay persons sitting as magistrates was specifically retained. To overcome deficiencies in the present system due to the lack of legal expertise and prejudices of lay persons, it was proposed to introduce a training scheme for magistrates and to require three magistrates to sit together. Under the scheme the new courts are to be given wider jurisdiction in summary offences and their sentencing power is to be increased to allow the imposition of a fine not exceeding 100 pounds. Their power of imprisonment, however, is to remain at the present maximum of 60 days.

This proposed reorganisation will affect the court in many ways but below we consider only the implications for the system of bail.

Firstly, we anticipate that the proposed extension of jurisdiction

would lead to an increase in the number of arrested persons brought before the lay magistrates courts. This would particularly affect persons charged with theft or housebreaking up to the value of 100 pounds, regardless of previous convictions. These persons are at present always brought before the sheriff court but in future might be brought before a justices court. Secondly, the view was expressed in the White Paper that decisions are best taken by at least three magistrates but propose that a bail decision may be taken by one magistrate. If the view about the quality of majority decisions is correct we must assume that some bail decisions would be inferior.

The proposed reorganisation does present an opportunity of educating magistrates to make their bail decisions on the basis of some adequate information, but we doubt whether a short course of lectures and a suggested 24 appearances on the bench in one year will have the far reaching improvements claimed in the White Paper. The possibility of extending legal aid to the new courts was not considered in the White Paper but we believe that if a new and wider role is envisaged for these courts, such an extension is vital. The extension of the duty solicitor scheme would not only safeguard the interests of the increased numbers of arrested persons brought before the court but would also ensure the publication of information to the court. If the scheme is not extended, persons who would previously have benefitted from legal representation in a sheriff court will be denied this advantage if brought before a justices court.³⁵

VII

DECISIONS MADE ABOUT
PRE-DISPOSITION RELEASE
IN A SHERIFF COURT

Considerable attention ought to be devoted to the sheriff courts in a study of bail because of the large number of bail decisions made and the gravity of the cases considered by these courts. We estimated that the sheriff courts were responsible for over 80 per cent of the bail decisions made by a court in 1972.¹ These courts were responsible for the vast majority of bail decisions because although the lay courts of summary jurisdiction dealt with approximately the same number of custody cases,² a much smaller percentage of accused pled not guilty³ thus reducing the number of cases in which bail was a relevant consideration. The High Court of Justiciary dealt mainly with bail appeals. We found, however, that appeals were comparatively rare and accounted for an estimated 2 per cent of the annual decisions.⁴ The sheriff court has jurisdiction to consider and grant bail in any case unless murder or treason is charged. Thus a decision about bail may be made in the sheriff court even if the crime charged may or must be tried in the High Court of Justiciary.⁵

THE SUBJECT OF THE RESEARCH

Our study of the Edinburgh sheriff court opened up some areas of interest which were different from those considered in the burgh court. One differentiating feature was that for the overwhelming majority of accused appearing in custody before the sheriff court, the court appearance was their first opportunity of obtaining release on bail.⁶ In contrast, arrested persons appearing before the burgh court were eligible for police bail and might be released prior to court appearance. Accused appearing in custody before the sheriff court did, however, have the opportunity of obtaining free legal advice about their plea and about bail. In addition, free legal representation in court was available to them and if they accepted this, responsibility for making representations about bail fell on their solicitor. As legal representation at this stage was virtually unknown in the burgh court, we were interested to see what effect this had on the conduct and result of bail applications. In the sheriff court not all bail applications were heard in open court and we were given an opportunity to consider bail applications which were held in private and from which the public and press were excluded. Other applications which we considered were applications for release after a plea of guilty and pending the completion of a report before sentence. We intended considering these applications in the burgh court but found that in no case did the bailie ask for a report. Conceptually this question of liberation pending a report before sentence differs from the question of pre-trial liberty. The presumption of innocence, however, has been accorded little substantive relationship to the issue of bail⁷ and, as many similar considerations affect both forms of release, we

thought it important to include liberation before sentence within the ambit of the study.

In accordance with the general aims of the study, we considered what information was made available to the decision-maker and attempted to assess the effect of this information on the decision to release or detain in custody. We identified the decision-maker as the sheriff and the procurator-fiscal. It may be remembered, from the discussion in Chapter III⁸, that in Scotland the procurator-fiscal has, by virtue of his office, certain powers to authorise or refuse release.

In the context of the information study, we attempted to assess the possible effects and implications of a bail experiment in Scotland, similar to experiments in America inspired by the Vera Institute. These experiments have received some attention in England and the suggestion has been made that Vera type information sheets should be introduced into English courts.⁹ In Scotland also the experiments have received some favourable attention from the organisers of a government bail study.¹⁰ Other aspects with which we dealt were the use made by the procurator-fiscal of the information available to him, the attitude of the sheriff towards receiving information and the contribution made by the accused's solicitor.

In considering the consequences of the decisions, we concentrated on the following issues: bail money, time spent in prison, a comparison of bail decisions and the final dispositions, the success of bail and the effect of the bail decision on the outcome of the case.

THE RESEARCH METHODOLOGY

(1) The Preliminary Study

Before starting to collect data we spent a period of two weeks in the sheriff court and in the court offices familiarising ourselves with procedure, finding out what records were available and what information could be obtained from them. On the basis of information gained during this period we compiled information sheets for use in the recording of data relating to the sample cases. These information sheets are reproduced in Appendix II.

It was not feasible to observe cases chosen at random. The observation period was dictated by the availability of time and with this limitation we estimated that a four week period would be sufficient to produce a useful and hopefully representative sample. The study in the sheriff court covered a four week period in March 1972 and we were given access to all the papers relating to the cases observed during this period.

(2) The Period of Observation

In the sheriff court bail applications in summary procedure were heard in open court, as were deliberations about custody or liberty when an accused pled guilty and sentence was delayed pending the completion of a report. As a matter of court practice, however, bail applications in solemn procedure were made by petition and these were heard in private. It was the practice to clear the court of the public and press and hear the petitions in court in the

presence of court officials and the accused's solicitor. The accused was also present except in review cases when he was not usually brought from prison to court.

We sought and obtained permission to attend these private hearings through the offices of the clerk of court and the procurator-fiscal. On a few occasions court officials challenged our presence but the objection was withdrawn when we referred to the permission obtained and this was confirmed by the clerk of the court.

Edinburgh sheriff court sat daily except Sundays and heard cases arising within the sheriffdom which encompassed, in addition to the city of Edinburgh, an area in Midlothian and Peebles.

Our research was mainly concerned with the custody cases, that is, persons arrested within the sheriffdom and brought before the sheriff court at the earliest opportunity after arrest.¹¹ Other persons included in the custody lists were persons who had previously appeared in court at which time they had been remanded in custody.

During the period of observation we sat at a table in the well of the court with the clerk of court, the procurator-fiscal and the accused's solicitor. From this position we were able to hear submissions made to the sheriff which in many cases must have been inaudible to the public. We were also able to witness any bargaining made by the solicitor and the prosecutor at the table before the case was called.

As the custody cases were not heard at any specific time we were forced to spend many hours listening to a volume of road traffic offences, livened occasionally by offences of failure to possess a television or dog licence.

While sitting in court, we completed an information sheet for the

following types of cases:- cases in which a plea of not guilty was made, cases which were continued until a later date, cases in which sentence was delayed after a plea of guilty to allow a report to be prepared and applications for review of a previous bail decision. Later we examined the papers of the procurator-fiscal and completed a second information sheet.¹²

(3) Record Research

In the sheriff court study, unlike the burgh court study, we did not attempt to compile the annual statistics from the records. This was partly because the sheriff court yielded a greater number of cases and partly because sheriff courts were included in a government study which we believed would produce this information. We did use some records compiled by the procurator-fiscal's office to ascertain the final disposition of the cases in the sample. We also spent some time gathering information from bail bonds and the records of bail receipts in view of our special interest in the financial aspect of bail.

(4) Preparation for the Use of the SPSS Programs

Variables were constructed to cover the information on the information sheets. All the information obtained by observation and record research about the sample cases was then coded on computer cards. In Appendix V¹³ we include a list of the variables created. Considerable use was made of the SPSS programs to provide descriptive statistics, to test some relationships between the variables and to carry out a Vera type experiment.

THE RESEARCH RESULTS(1) Description of the Sample

During our period of observation 238 custody cases were brought before the sheriff court for a first court appearance or for appearance after a continuation had been granted at an earlier date. A description of the plea made and procedural stage of these cases is given in Table XI.

TABLE XI

Custody Cases : Plea Made and Procedural Stage			
Plea made and procedural stage	No. of Cases	% of observed cases	% in which pre-disposition release possible
Continuations without plea (CWP)	20	7	11
Continuation for further examination (CFE)	15	5	7
Not guilty plea (NGS)	85	29	46
Full committal (FC)	25	9	13
Continuation (report) C(R)	10	4	5
Guilty plea (report) G(R)	30	10	16
Review (R)	4	1	2
	<hr/>	<hr/>	<hr/>
	189	65	100
Guilty plea sentence passed	96	33	-
Missing cases	7	2	-
	<hr/>	<hr/>	<hr/>
Total number of cases observed	292	100	-

From Table XI it can be seen that bail, or release without bail with the accused ordained to appear, was a relevant consideration in 189 (65 per cent) of the observed cases. The dispositions of release or custody for the sample cases, that is, the cases in which predisposition release was possible are set out in Tables XII and XIII.

TABLE XII

Cases Granted Liberty at the Different Procedural Stages						
	CWP	NG(S)	FC	G(R)	Review	Total
Bail granted	0	47	15	0	3	65
Ordained	1	16	0	0	0	17
Ordained (social enquiry report)	0	0	0	9	0	9
Ordained (medical report)	0	0	0	1	0	1
Total number of cases released						92
Number of cases with missing values						7

TABLE XIII

Cases Not Granted Liberty at the Different Procedural Stages								
	CWP	CPE	NG(S)	FC	C(R)	G(R)	Review	Total
Bail refused	0	0	15	10	0	0	1	26
Continuation	19	15	0	0	0	0	0	34
Continuation (social enquiry report)	0	0	0	0	0	11	0	11
Continuation (medical report)	0	0	0	0	9	2	0	11
Continuation (other report)	0	0	0	0	1	7	0	8
Total number of cases continued in custody								90

(2) Information and Discretion to Release or Detain in Custody

Pending the Final Disposition of a Case

(a) The procurator-fiscal

Our examination begins with the procurator-fiscal because he has discretion to agree to liberty before the accused is brought before the sheriff.

While examining the police records we noted that in some cases the procurator-fiscal was recorded as having consented to the release of a person before a first court appearance. This method of release was usually applied to persons arrested on suspicion of contravention of the Road Traffic Act 1972 S.5 to whom a blood or urine test was administered. The procurator-fiscal had also delegated to the police his authority to release accused charged with breach of the peace within a sports ground. Due to a direction from the Lord Advocate this offence must be heard before a sheriff court and the police have no power, therefore, to consent to release on police bail. In the vast majority of cases, however, there was no practice of police consultation with the procurator-fiscal and the police said that, even if requested, they would not contact the procurator-fiscal about bail. It was suggested that an unusually persistent solicitor or the existence of special mitigating circumstances, for example, illness might prompt such consultation. These circumstances, however, must be uncommon as we found only 2 recorded examples of such release in the annual figures.

The procurator-fiscal has a legal right to make representations to the sheriff about the question of liberty or custody of the accused. Below we consider what use the procurator-fiscal made of this right and the apparent effect of his representations on the decision of the sheriff.¹⁴ At this point, however, we consider the extent of the information available to the procurator-fiscal and whether he made this information available to the sheriff.

(i) Information available to the procurator-fiscal

We described in Chapter III the traditional criteria used to assess a bail risk. These criteria concentrate on considerations

which derive mainly from the circumstances and seriousness of the offence and various aspects of the criminal record of the accused.

We found that in every case the procurator-fiscal had the information on which to base a judgement utilising any of these criteria. This information was made available in the police report and a copy of the criminal record of the accused. The information was of a similar nature to the information available to the prosecutor in the burgh court which was described more fully above.¹⁵

In discussing the Vera Institute bail experiments, we pointed out¹⁶ that bail predictions have had some success based on non-traditional criteria which are concerned with "community roots". Considerable interest has been shown in these experiments, and in the context of the English bail system, criticisms have been voiced because in many cases "community roots" information was not available to the court.¹⁷ In view of this we were interested to discover to what extent this type of information was available to the Scottish decision-makers.

In the case of the accused for whom a report was prepared "community roots" information was included in the detailed description of the social background of the accused. In other cases, although additional information about the family and background of the accused was often added to the general information in the police report, this information was not always available. We considered whether information was available to the procurator-fiscal about eight variables. These variables were fixed address, persons with whom accused lives, time spent at the address given, employed, type of job, marital status, dependents, and source of income. Table XIV illustrates the extent and type of information which was not available to the procurator-fiscal.

The procurator-fiscal always had information about the address of the accused and lacked information about the employment status of the accused, in only 3 cases. Information was available about all eight variables in only 19 cases but in over 76 per cent of the cases the procurator-fiscal had information about at least six variables. Missing information most frequently concerned the identity of the co-residents at the accused's address and the time the accused had lived at the given address. Lack of information was never total though in 3 cases information was lacking about as many as five variables.

TABLE XIV

"Community Roots" Information Not Available to the P.F.

1 = person with whom accused lives
2 = time spent at address given
3 = employed
4 = type of job
5 = marital status
6 = dependents
7 = source of income
8 = address

Information not available

No. of cases

1	2	4	7
3	69	4	12

Information not available

No. of cases

1/2	2/4	2/5	5/6	2/7	4/7
17	3	1	5	10	1

Information not available

No. of cases

2/5/6	1/2/7	2/4/7	5/6/7
3	3	2	4

Information not available

No. of cases

1/2/5/6	2/4/5/6	2/3/5/7	2/5/6/7	4/5/6/7
16	1	1	10	1

Information not available

No. of cases

2/3/5/6/7	2/4/5/6/7	3/4/5/6/7
1	1	1

(ii) A comparison of the information available to the procurator-fiscal and the information given to the sheriff

We found that although the procurator-fiscal had full information relating to traditionally accepted bail criteria and considerable information about the "community roots" of the accused, he gave very little of this information to the sheriff. The procurator-fiscal generally indicated whether he agreed to or opposed bail but in 64 per cent of the cases no information was given to support this attitude. In 19 per cent of the cases information about one variable, for example, the number of previous convictions or the circumstances of the offence was given. Information about two variables and about three variables was given in 10 per cent and 5 per cent of the cases respectively. The most information given extended to five variables.

The type of information given merits some attention because it must represent either information which the procurator-fiscal himself considered important or information which he thought the sheriff would consider important. Table XV illustrates the type and frequency of the information given by the procurator-fiscal. From this it may be seen that the procurator-fiscal was preoccupied with criminal record and, with the exception of information about the address of the accused, displayed little interest in information relating to "community roots".

We noted with interest that even in those cases where the procurator-fiscal gave information he did not use all the information which might have advanced his cases. Further consideration and a possible explanation of this is given below.¹⁸

TABLE XV

Type and Frequency of Information Given by P.F. to the Sheriff

Type of information given	Number of cases
Seriousness of offence	5
Circumstances of offence	11
Length of criminal record	29
Recent convictions	13
Seriousness of past sentences	13
Non appearance warrant	5
On bail for another offence	16
Further inquiries necessary	7
	75%
Unsatisfactory address	14
Unemployed	2
Medical history	9
Other information	8
	25%

(b) The sheriff

The sheriff has a duty to consider any application for bail made by an accused when he appears in court for the first time in connection with the offence charged. A trial date is not always fixed at first appearance and if a case is continued the accused may make further applications for bail when he is brought again before the court. In Scotland, unlike England, the judge's decision to commit for trial is now merely a formal stamp to the procurator-fiscal's request. The bail decision of the sheriff, therefore, does not take place in the context of examining whether there is a case to answer.

(1) Information made available to the sheriff

The basic information available to the sheriff in cases where no plea of guilty was registered was the information on the complaint or petition which amounted to the name, age and address of the accused and the offence charged. For additional information the sheriff had to rely on information put forward by the procurator-fiscal, the

solicitor or the accused. In cases where a guilty plea was made and a report ordered, the sheriff also had available the criminal record of the accused.

In considering what information the sheriff had on which to base his decision, we found that in 47 per cent (86) of the cases the only additional type of information made available to the sheriff was the attitude of the procurator-fiscal or solicitor to the liberty of the accused.

This percentage included almost all (32) of the cases which were continued for further enquiries. The prosecutor asked for a continuation in custody in 60 per cent of these cases, but it appears that a request for custody was implicit in the continuation motion in the remaining cases, as this was granted by the sheriff. In the majority of cases¹⁹ the solicitor was silent and did not increase the information available to the sheriff. On a few occasions the solicitor agreed to the procurator-fiscal's motion for continuation in custody perhaps under the misapprehension that he could not oppose custody at this stage. This reluctance of the solicitor to argue for the liberty of the accused stems, we think, from the fact that the procurator-fiscal, but not the accused, has the right to appeal a bail decision at this stage. It may have been overlooked by the solicitor that this limitation does not apply to summary cases. This interpretation gains some confirmation from the fact that in 3 cases¹⁹ the solicitor did not oppose custody and argue for liberation, but instead tried to circumvent the stage of continuation by making a motion for full committal and bail.

Although it may be to the advantage of the prosecutor to have an accused in custody if he wishes to pursue further inquiries, the

accused does have the right to ask for liberation at this stage. The solicitor by his silence is, therefore, failing in his duty to the accused. The solicitor may find it difficult to persuade the sheriff to grant liberation if the prosecutor wishes custody but, by his objections, he could at least force the prosecutor to show cause why the accused should be kept in custody. It is noteworthy that 44 per cent of the accused going to trial were at a later stage released with or without a bail requirement. The solicitor, therefore, cannot be considered to be dealing in this context with a lost cause.

Very limited information was also available to the sheriff in 45 cases in which a not guilty plea was made and in 9 petition cases which were committed for trial. In the majority (44) of these cases, however, agreement was reached by the procurator-fiscal and solicitor and the sheriff merely endorsed this agreement. In this situation we do not believe that the paucity of information need cause concern if the public interest and the interest of the accused are both protected by persons who are fully informed about their respective interests. In the remaining minority of the cases (10) there is cause for concern, as the sheriff reached his decision on what must be considered inadequate information, in view of the disagreement between the procurator-fiscal and the solicitor.

To summarise: we found lack of information to be a cause for concern in cases continued before the trial diet was set, representing 18 per cent of the sample cases and in 5 per cent of the sample cases in which the sheriff made his decision when he was inadequately informed about the merits of the disagreement between the procurator-fiscal and the accused's solicitor.

In the remaining 54 per cent of the sample cases some additional information was given to the sheriff. We now consider the type and extent of the information which was given.

We described in Table XV the type and frequency of the information given to the sheriff by the procurator-fiscal. In Table XVI we give a similar description of the information given by the solicitor to the sheriff.

From a comparison of Tables XV and XVI it may be seen that the procurator-fiscal, unlike the solicitor, concentrated on information about aspects of the accused's criminal record and the offence charged rather than details of the accused's background or "community roots".

TABLE XVI

Type and Frequency of Information Given by Solicitor to Sheriff

Type of information	Number of cases
Seriousness of offence	6
Circumstances of offence	2
Length of criminal record	13
Recent convictions	2
Seriousness of past sentences	7
Non-appearance warrant	2
On bail for another offence	4
Further inquiries necessary	4
	28%
Address	18
Time spent at address	2
Co-residents	7
Marital status	9
Dependents	9
Needed at home by family	10
Employment status	15
Type of job	3
Income	7
Youth	3
Innocent of charge	2
Medical history	9
Other	19
	72%

The solicitor gave more information than the procurator-fiscal covering a greater number of cases. Information was given in 52 per cent of the cases. One type of information was given in 15 per cent of the cases, two types in 10 per cent, three types in 2 per cent and four types in 6 per cent. The most information given was nine types.

When the information from the procurator-fiscal and the solicitor was combined it became apparent that in many cases the increase in the sheriff's information was limited to only one or two information items. In assessing whether the information made available to the sheriff was sufficient we considered that the participation of the legal aid solicitor was of great importance.

The participation of the legal aid solicitor completed the accusatorial contest. In an accusatorial system the judge is not given all the information bearing on the solution of a case but only that information which opposing counsel select in support of their cases. The underlying assumption of such a system is that in the contest between the parties all the relevant information necessary for a decision will be brought before the court.

We examined the information made available to the sheriff to see if the disagreements between the procurator-fiscal and the solicitor did in fact result in an increase in the information made available. The results of this examination are shown in Table XVII.

Table XVII shows that more information was given when the procurator-fiscal and the solicitor disagreed. Where there was agreement more than one item of information was given in only 7 per cent (4) of the cases. Where there was disagreement, however, such information was given in 75 per cent (58) of the cases. No information was given in 74 per cent (42) of the cases in which there was agreement,

compared with 13 per cent where there was disagreement.

TABLE XVII²⁰

Amt. of Information Made Available When P.F. and Solicitor Agreed and Disagreed

Number of information items	0	1	2	3	4	5	6	7	8	9	10
Number of cases when P.F. and solicitor agreed.	42	11	3	0	1	0	0	0	0	0	0
Number of cases when P.F. and solicitor disagreed.	10	8	14	15	13	6	4	3	1	0	1

We also found some evidence which indicated that the amount of information increased with the extent of the disagreement between the procurator-fiscal and the solicitor. Where the disagreement concerned the question of the custody or liberty of the accused we found that an average of 4 information items was given. Where, however, the disagreement concerned the terms of liberty of the accused, that is, whether the accused should be bailed or ordained, or the amount of bail required, an average of 2.5 information items was given.

The sufficiency of the information produced by the clash of interests between the procurator-fiscal and the solicitor depends on two further factors. It is necessary firstly that both parties were fully informed. We found²¹ that the procurator-fiscal was fully informed about traditional factors considered influential in a bail decision but less well informed about "community roots" factors. We discuss the briefing of the solicitor below.²² The second essential is that both parties appreciated what persuasive value was attached by the sheriff to the information which they presented and withheld. Consideration is given below to this²³ where we describe our reservations about the solicitor's interpretation of the important factors.

(11) Additional information requested by the sheriff

We found that the sheriff was not only more receptive than his counterpart in the burgh court to information bearing on the question of pre-disposition custody or liberty, but also took an active part in seeking additional information.

In 27 per cent (50) of the sample cases the sheriff requested additional information before making his decision. These requests were in 42 cases addressed to the procurator-fiscal. Table XVIII shows the information for which the sheriff asked.

TABLE XVIII

Additional Information Requested By the Sheriff from the P.F.

<u>Type of information</u>	<u>Number of cases</u>
Does P.F. agree to terms of liberty suggested by solicitor	25
Severity of accused's criminal record	6
Any recent convictions	3
Acceptability of accused's address	3
Circumstances of offence	2
Is accused on bail for another offence	2
Does record show issue of a non-appearance warrant	1

In 7 cases the sheriff sought additional information from the accused's solicitor and in 1 case directly from the accused. Four of these requests were concerned to clarify the motion of the solicitor, three questioned the acceptability of the accused's address and the last was a plea of despair for anything that could be said in favour of the accused.

The content of the requests are interesting because they illustrate the sheriff's interest in the traditional bail indicators

of attitude of the procurator-fiscal, criminal record and acceptable address of the accused.

(iii) The influence of the information variables on the decision of the sheriff

The information requested by the decision-maker is one indication of the factors which he considers influential but perhaps even more revealing are the reasons given by the decision-maker. Although it cannot be assumed that the reasons given represent the crucial factors in the decision, they do at least indicate what factors the decision-maker regards as acceptable to the public or that section of the public with whom he is concerned. We found, however, that the sheriff gave reasons for his decision in only 3 cases and, therefore, abandoned this line of inquiry.

We then attempted by using statistical correlations to ascertain what information variables were related to the sheriff's decision.²⁴ In doing this we made the assumption that the sheriff's decision was not irrational but was based on the information made available to him in the decision-making situation. We tested some null hypotheses that different variables were not related to the sheriff's decision, in other words, that the two variables were independent.²⁵

We found that using Yates' corrected chi square we could reject the hypothesis of independence with four information variables. We concluded that the sheriff's decision to grant or refuse liberty was dependent on the attitude of the procurator-fiscal,²⁶ and information given by the procurator-fiscal about recent convictions,²⁷ non-appearance on a previous occasion²⁸ and on bail for another offence.²⁹ It was not possible to reject the null hypothesis using any of the information variables advanced by the solicitor. We were also unable to reject the null hypothesis with any of the variables

based on the information which was given in the papers made available to the sheriff.

(c) An evaluation of the information made available to the sheriff

30

We have described above in some detail what may be termed the information input of bail decisions, a process which is of fundamental importance in all decision-making. To be satisfactory we believe that the information made available must satisfy the tests of accuracy, relevance and sufficiency.³¹

The accuracy of the information given in the bail decision-making situation was to some extent guaranteed by the fact that an important part of the information was based on the criminal record files. Information from this source may be considered accurate barring clerical error or deliberate falsification, and the accused might be expected to object in the face of these. We argued that the solicitor was hampered because he did not have access to this source of information and instead had to rely on the memory of the accused. To some extent the accuracy of information not based on criminal record was also protected in that there were two possible sources of such information, the police and the accused. Agreement about information may be considered a good guarantee of accuracy. A disagreement about information considered important by the decision-maker could be resolved by the decision-maker seeking further information.

The information given may be considered relevant in as far as it related to the criterion adopted by the decision-maker. We found that the sheriff placed the greatest emphasis on factors relating to criminal record and fixed address and these were the factors

emphasised by the procurator-fiscal but not the solicitor. The solicitor concentrated on giving information about the background of the accused and about his address although there is little evidence to suggest that the former type of information was considered important by the sheriff. It is interesting to note in this context that unlike "community roots" information, the background information advanced by the solicitor could not in the majority of cases have been given with the aim of showing that the accused had roots in the community and was therefore likely to appear, as this was not disputed by the prosecutor. The information given by the solicitor appears rather to have been given like a plea in mitigation of sentence to persuade the sheriff not to order custody because of the family circumstances of the accused.

In considering the sufficiency of the information given to the decision-maker, it is quite clear that in the great majority of cases the sheriff did not have the information to enable him to assess by reference to the accepted criteria whether the accused ought to be released. Indeed, as we pointed out, in 47 per cent of the sample cases the sheriff had available a minimum of written information and was given no information by the prosecutor or solicitor except that they wanted liberty or custody.

Nevertheless the underlying assumptions of the accusatorial system on which legal decision-making in Scotland is grounded must be borne in mind. As we argued above³² in an accusatorial system the lack of information need not in itself be objectionable. We did point out, however, that the contest between the prosecutor and solicitor was not always joined particularly in continuation cases. Some concern is necessary also because the solicitor did not appear

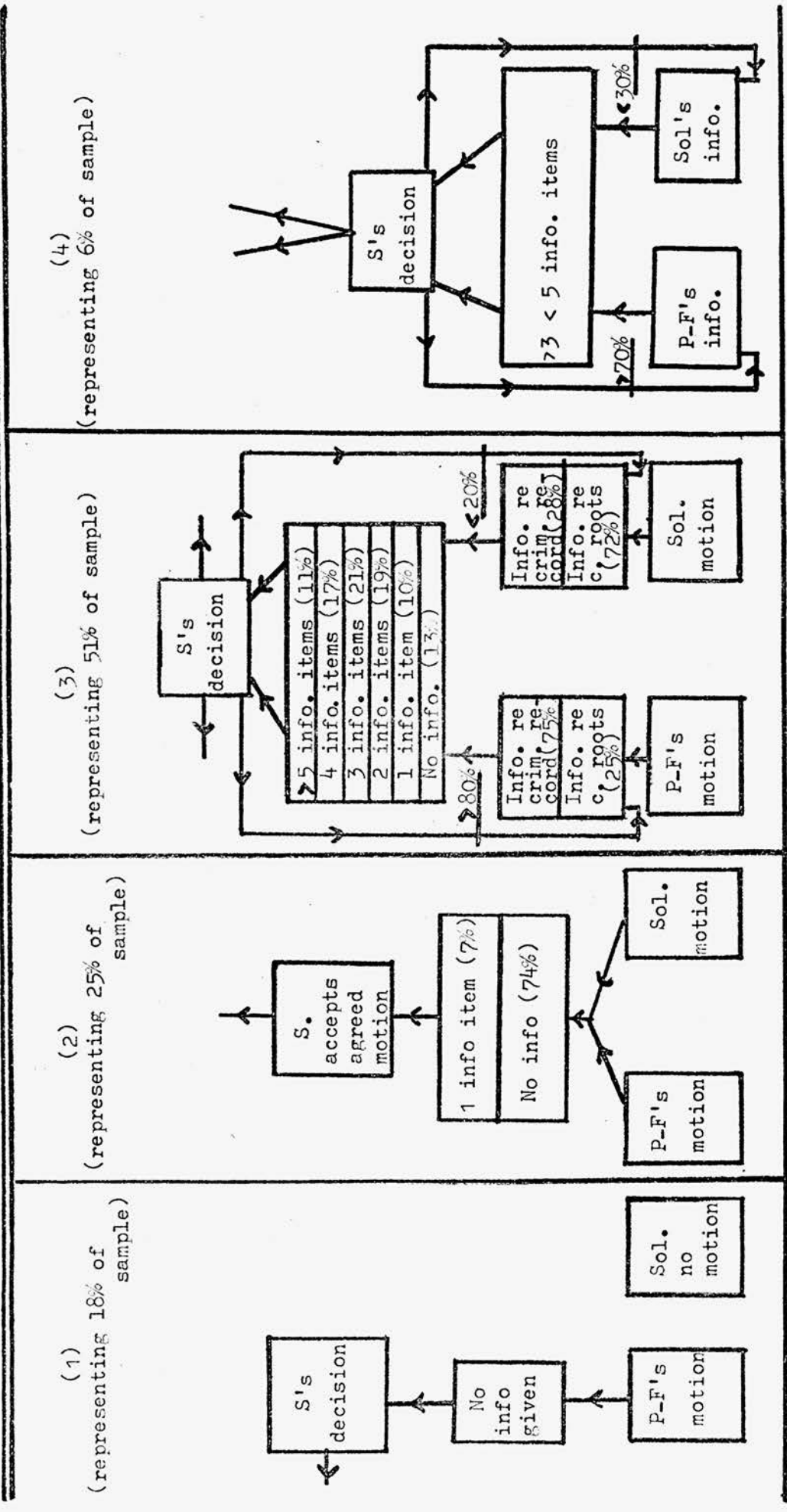
to appreciate that, in view of the importance attached by the sheriff to the criminal record of the accused, it was not adequate to avoid a contest with the prosecutor about the interpretation to be attached to the accused's criminal record and to concentrate instead on describing background circumstances.

(d) Comments on the decision-making models

In Figure V we show four main patterns of decision-making identified at the sheriff court level. The first model describes the situation in which the procurator-fiscal took the initiative in seeking the custody of the accused and the solicitor made no attempt to obtain liberty. This model closely resembles a model which we said represented the pattern of decision-making in the burgh court.³³ In the second model neither the procurator-fiscal nor the solicitor individually controlled the decision but the terms of their agreement were automatically accepted by the sheriff. The model shows that in the great majority of these cases the sheriff was given no information and was not, therefore, able to make an independent assessment of the merits of liberty or custody. The third model represents the situation where the procurator-fiscal and solicitor disagreed about liberty or about the terms of liberty. The model shows that a much greater amount of information was made available to the sheriff who had to choose between the competing suggestions. The sheriff's reliance on the information given by the procurator-fiscal is also illustrated. Perhaps surprisingly the review cases did not always follow this pattern. We found that in 2 of the 4 cases the solicitor and procurator-fiscal had reached an agreement and, as in the second model, this agreement was merely endorsed by the sheriff. The last

FIGURE V

Bail Decision-Making in the Sheriff Court



model represents the situation where the sheriff was given information but neither the procurator-fiscal nor the solicitor made representations for liberty or custody. In this situation the suggestion about liberty or custody came initially from the sheriff. We found that this applied only to some of those decisions made about liberty or custody pending a report after a guilty plea. One explanation for the sheriff's initiative in those cases is that the sentence which the judge was considering to some extent determined whether the report would be compiled while the accused was in custody or at liberty.³⁴

It is interesting to note that the major decision-making patterns which we identified differed considerably from those described by Suffet³⁵ in his study of 1,473 bail settings in New York. Suffet found that the modal pattern of bail decision-making, which represented 49 per cent of the cases, was one in which the judge fixed bail without discussing the matter with either the prosecution or defence attorney. Suffet's suggestion - decision pattern, representing 38 per cent of the cases, resembled the pattern which we found occurred most frequently. Even in this pattern, however, Suffet found that the judge departed from the suggestion agreed by the attorneys in about 33 per cent of the cases.³⁶ It is obvious from this that the judge in Suffet's study played a much more active role in decision-making than his equivalent in the sheriff court. This difference may perhaps be accounted for by the fact that the procurator-fiscal, unlike his American counterpart, is vested with discretion to grant bail. It is not surprising, therefore, that if the procurator-fiscal and solicitor have reached agreement that this agreement should be endorsed by the sheriff. Suffet suggested that the greater success of the prosecution attorney may be because he has more prestige in the

court room.³⁷ We would explain this success, however, by arguing that the prosecutor appreciated, more than the solicitor, the factors likely to influence the decision-maker and was more fully briefed about these factors.

(3) Legal Representation and Legal Aid

In the sheriff court a duty solicitor attended before court to advise and represent all arrested persons who were in custody. This service was made available under the legal aid scheme without any charge to the accused.³⁸

All the accused in the sample, except 2, were represented in court. One of the accused who refused representation pled his case for bail more passionately than any lawyer but with the unfortunate result that he insulted the judge and assaulted the police when they tried to remove him from the dock. Bail was refused. The other accused had a history of mental illness and was kept in custody to allow the preparation of a medical report.

Excluding the continuation cases, the solicitor sought liberty for the accused in almost all cases.³⁹ In 8 cases the solicitor acquiesced in custody. These cases mainly concerned accused for whom a medical report was sought. One case concerned an accused charged with assault and ravishment of a young girl. It was not clear whether the solicitor thought an application would be hopeless in this case or deliberately refrained from seeking bail for tactical reasons.

There was evidence that in some cases the solicitor and the procurator-fiscal had negotiated the terms of release before the court hearing. Reference was made to such agreement in 8 cases and we also

witnessed discussion in 5 cases. The solicitor and the procurator-fiscal agreed the terms of liberty in 51 cases.

In addition to safeguarding the interests of the accused and agreeing favourable terms of liberty with the procurator-fiscal,⁴⁰ we argued that the solicitor played an important role by regulating the amount of information which was made available to the court. We described⁴¹ a model in which the solicitor's acceptance of the procurator-fiscal's motion for bail or custody resulted in little additional information. Where the solicitor opposed and advanced favourable information, however, the procurator-fiscal was forced, if he wanted a result in his favour, to produce information sufficient to induce the sheriff to accept his motion. If the solicitor was tenacious the procurator-fiscal was forced to produce all the unfavourable information available to him.

The continuation cases illustrate the consequences when the solicitor failed to actively pursue the liberty of the accused, namely automatic custody without any information being made available to the sheriff.

The success of the system requires that the solicitor, like the procurator-fiscal, has full information. The solicitor must, therefore, have the time and the opportunity to ascertain the relevant information from the accused.

From the criticisms of delay voiced by the court staff and the flexible court time table which allowed the custody cases to be heard when the solicitor had finished interviewing, it did appear that the solicitor took the time he required.

The question whether the solicitor obtained all the relevant information is difficult to answer. From the information given to the

court by the solicitor,⁴² it may be seen that the solicitor in many cases had elicited, and appeared to regard as relevant, information about the home and background of the accused. We are unable to say, however, to what extent the solicitor failed to elicit such information. It was obvious that the solicitor also regarded the criminal record of the accused as relevant. We noted, however, that in a number of cases the solicitor was either misinformed or lacked full information. In these cases, the solicitor either admitted his lack of information, or his account of the accused's record differed from the account given by the procurator-fiscal who had available a copy of the police record. For details of criminal record the solicitor had to rely on the memory of the accused and the list of previous convictions labelled. But the offences labelled by the procurator-fiscal did not necessarily represent the full criminal record of the accused,⁴³ nor did they show, for example, whether the accused was on bail for another offence or had failed to appear on a previous occasion. We have illustrated above⁴⁴ that various aspects of the criminal record of the accused are considered relevant by both the procurator-fiscal and the sheriff. Because of this it is important that the solicitor has full and accurate information about previous convictions.

We suggest that a simple and effective way to ensure that the solicitor is fully informed would be to make available to him a copy of the accused's criminal record. There can be no sustainable objection to this on the basis of privacy of police records because it concerns only information which the accused could relate given the time and an exceptional memory.⁴⁵ A copy of the police record is at present made for the use of the procurator-fiscal and the provision of a duplicate to the solicitor would be unlikely to overburden the court administration.

(4) Some Implications and Consequences of the Bail Decisions

(a) The money for bail

In Chapter III we outlined the different methods by which bail may be found. Briefly, the legislation provides that in summary cases bail may be found by a deposit of money, equal to the amount of bail, by the accused or a third party. As an alternative, bail may be found by the subscription of a bail bond by a cautioner. This latter method is the only method competent in solemn procedure. The terms of the bail bond provide that the cautioner is bound to pay the amount of bail if the accused does not appear on the appointed date. Provision is made for the issue of a warrant to recover the money if this is necessary and also to imprison the cautioner if he fails to pay the money within a specified time.⁴⁶ It is obvious from this that the legal provisions do not always require that money be deposited. Superficially it appears, therefore, that the Scottish bail bond system resembles the English system of recognisance which has been characterised "as an acknowledgement of an unsecured debt to the State payable upon the non appearance of the accused."⁴⁷

In our examination of the methods used to find bail we discovered some divergence between legal theory and practice. We found that in summary cases the invariable method of finding bail was by the deposit of money rather than the subscription of a bond. In solemn procedure where bonds were subscribed, the money payable by the cautioner in the event of the non-appearance of the accused was in fact deposited at the time the bond was signed. Indeed in some cases, despite the bond's cautionary form, no third party undertook the cautionary obligation and the bond was signed by the accused who deposited the money.

Our research into the explanation of this, revealed an interesting example of official practice distorting and overriding legal norms.

The widespread practice of requiring the deposit of money appears to be due to the practice and insistence of the clerks of the court. Dating back to the seventeenth century, responsibility for accepting cautioners with sufficient means has been placed on the appropriate clerks. Failure has in some cases resulted in an action of damages against the clerk.⁴⁸ To avoid such action the clerk was advised⁴⁹ to require the production of some evidence of sufficiency, for example, a certificate of sufficiency signed by a justice of the peace. Today the only evidence of sufficiency which the clerks of court generally accept is the deposit of a sum of money, equal to the amount guaranteed in the bond. Although it is debatable⁵⁰ whether the clerks of court could be held liable if they accepted a person of insufficient means as a cautioner of a bail bond, they justify their practice by referring to the necessity to protect themselves.

In some unpublished records of the Scottish Home and Health Department⁵¹ we found that the legality of this practice of the sheriff clerks had been attacked in 1931. At that time it was accepted that bail could legally be found either by deposit or by bond without deposit. The Secretary of State, however, declared himself unable and the Convenor of the Sheriffs proved unwilling to take steps to have the practice altered. The practice still flourishes.

Whether the clerks are to be held responsible or not, it is obviously in the public interest that cautioners who are unable to meet the sum specified in the bond, are not accepted. After examining the amount of bail, however, we reached the conclusion that the sufficiency of potential cautioners cannot in most cases be a question

in issue. We found that the bail money was in 67 per cent of the cases 5 pounds or less and in 16 per cent of the cases between 6 and 10 pounds. In only 11 per cent of the cases was bail set at 20 pounds or more and the highest bail was 50 pounds. Excluding a few persons who are habitually of no fixed address, there can be few persons today from whose income or assets the court could not, if necessary, raise 20 pounds or less to cover a forfeited bail. For persons raising comparatively high amounts of bail, evidence of a bank account, ownership of a house or car, or similar evidence could be used as evidence of sufficiency. The current practice is more likely due to bureaucratic convenience than the problem of insufficient cautioners.

The consequences attributable to this practice are open to serious criticism. We found that this practice caused 47 per cent of the sample to whom bail had been granted, to spend some time in prison because they or their families were unable to provide the cash immediately. Table XIX sets out the time taken to raise the bail by these persons. In addition we found that for 8 per cent of the bail cases, this period of imprisonment after a grant of bail, represented a first custodial experience and for 16 per cent this period represented a harsher penalty than the final disposition imposed by the court.

TABLE XIX

Time taken to Raise the Money for Bail

	No. of cases	Average time (in days)
Bail granted	65	-
Bail raised at court	34	same day
Bail raised at prison	6	same day
	24	12
Bail not raised	1	61

TABLE XX

Cases in which Bail was Granted : Amount Required for Bail

Ant. required for bail	£	1	2	3	5	10	15	20	25	50
No. of cases		1	6	1	35	10	5	5	1	1

TABLE XXI 52

Cases in which Bail was Granted : Types of Offence Charged

Crimes against the person	Att. Murder	Assault	Rape	Lewdness
No. of cases	2	9	1	1
Crimes ag. property with violence	Theft HB	HB w.i.	Theft OLP	Robbery
No. of cases	11	8	5	1
Crimes against property	Theft	Fraud	Uttering	
No. of cases	18	1	1	
Miscellaneous crimes	Breach of Peace	Mal. Mischief	Others	
No. of cases	5	2	9	
Road Traffic	Drunk Driving	Dis-qualified	No Insurance	
No. of cases	1	2	2	

TABLE XXII

Cases in which Bail was Granted : Types of Sentence

Non custodial		Custodial	
Case deserted	2	Borstal	8
Admonished	8	Prison < 3 mths	6
Fine	20	Prison > 3 mths < 1 year	5
Probation	7	Prison > 1 year	2

No. of cases with missing values = 7

The case history of one of the accused in the sample illustrates the "hard cases" which may result because of this practice. A young

woman of twenty-one was charged with theft of clothing valued at thirty-five pounds and theft of two pounds from a television meter. Both thefts were from the house of a friend. She had over a period of five years, five previous convictions for theft for which she had been admonished, sentenced to borstal training and put on probation. When charged at the beginning of February with the thefts, she was single, seven months pregnant and receiving unemployment benefit of five pounds per week. She pled not guilty and bail of ten pounds was granted. Almost two months later, at the end of March, her case was put down on the court list for review after she had sent a letter to the procurator-fiscal explaining her inability to raise the money. When the case was called no appearance was entered on her behalf.⁵³ She appeared before the court at the end of the first week in May and pled guilty. She was admonished on both charges.

Other consequences of this practice which must also be borne in mind, are possible financial hardship caused to the family of the accused and the strain of additional short term admissions on an overburdened prison service.

Also important is the fact that the practice has caused or at least contributes to the necessity for setting bail money at such low amounts that the threat of forfeiture cannot be considered a realistic inducement to the accused to appear, or a realistic punishment for failure to appear. We mentioned the low bail amounts in connection with the sufficiency of cautioners. Tables XX, XXI and XXII set out this information in greater detail by illustrating the types of offence for which bail was set and the types of sentence imposed.

It is ludicrous to suppose that an accused faced with a charge, for example, of attempted murder or assault and robbery and liable to a

long prison sentence, will be induced to appear by handing over a few pounds for bail. Nor can the forfeiture of small sums of money compensate for the expense of legal preparation including perhaps the summoning of jurors, the waste of court time and the extra work for the police who have to look for an accused who fails to appear. The same may be said about accused charged with lesser offences even if the potential sentence is not custodial.

The implementation of the legal norms, to allow the subscription of bail bonds in summary and indictable cases without the necessity of producing the cash, would relieve some of these problems. We are of the opinion, however, that a more fundamental change involving the abolition of the money requirement is necessary. This proposed reform receives further consideration below.⁵⁴

In view of our recommendations it is of interest to note that release without any financial condition is already part of court practice. The extent of this practice is recorded in Table XII. This form of release was invariably used for persons who pled guilty and whom the sheriff was willing to release pending a report before sentence. Such release was granted where both property and personal injury offences had been charged. The cases do not appear to be atypical in respect of either the amount or type of information available. In no case was it suggested that release should be conditional on a money requirement.

In contrast, where a not guilty plea was made, there was a noticeable reluctance in the attitudes of the procurator-fiscal, the solicitor and the sheriff to consider release without a financial condition. Thus as we described above the officials offered or accepted bail at token

amounts of one or two pounds.

In one case, where a father and son had both pled not guilty to a charge of breach of the peace, the solicitor gave information that neither accused had any money and that there was nobody at home to raise it. The solicitor offered 10 pounds as "double" bail for one accused and asked, in view of this offer, that the other accused be ordained to appear. Opposing the motion the procurator-fiscal asked that 5 pounds bail be given for each accused. The sheriff granted the solicitor's request. This was 1 of only 3 cases where the non-availability of money was a factor in the decision to ordain the accused. These cases were similar to the extent that the accused had no or only minor previous convictions and the procurator-fiscal had no objection in principle to release. In view of the fact that after conviction release without bail is not restricted in this way, it is rather difficult to justify such a limitation in pre-trial practice.

If the sheriff exercised his power to ordain accused who would have difficulty in raising the money, then some of the objections to the present bail system would be removed. That this does not happen, however, is clear from the facts that only 3 of the accused who had insufficient money were ordained and 48% (31) of those granted bail spent some time in prison before the money was raised.

This does not take into account possible financial hardship to relatives or friends who provided the money for the accused who were immediately released.

(b) Time spent in custody before sentence

We found that 50 per cent of the cases in the sample suffered custody at some time after their first court appearance. Of these 37 per cent were continued without plea or for further inquiry and 33 per cent were continued in custody for a report. In the former the modal period of custody was 7 days and in the latter 14 days. Table XXIII shows the time spent in custody by the remaining cases.

TABLE XXIII⁵⁵

Time Spent in Custody Due to the Bail Decision

	No. of cases	Average time (in days)
Refused bail	18	64
Refused bail and changed plea to guilty	5	same day
Granted bail but not raised	6	same day
	24	12
	1	until trial

It ought to be noted that 5 of the accused refused bail intimated to the court after refusal that they wished to change their plea to guilty. These accused were charged on summary procedure and 4 were given custodial sentences of 6 months or less. One of the accused, however, was merely fined 25 pounds and allowed time to pay. It is disquieting to realise that persistence in a plea of not guilty may make a person liable to spend a longer period in custody. This was certainly the position of one accused and the other accused, if they had persisted in their plea of not guilty, might have spent an average of 64 days in custody awaiting trial with no guarantee that this period would be subtracted from any sentence ultimately imposed.

The periods of pre-trial custody compare favourably with the much longer periods which often occur in other countries.⁵⁶ In Scotland of course, the period is limited to a maximum of 110 days⁵⁷ and this constitutes a valuable safeguard against protracted pre-trial custody. Although the limitation does not apply to summary cases, we found that the pre-trial custody of the sample cases fell within this maximum. The longest period in summary cases was 101 days.

Another safeguard against protracted pre-trial custody is the provision for accelerating the diet of trial when the accused intimates to the procurator-fiscal that he is changing his plea to guilty.⁵⁸ We found 2 accused who had been refused bail who intimated such a plea and their cases were disposed of within 7 days.

Although the times spent in pre-sentence custody are comparatively short, the frequency of resort to such custody compares unfavourably with the frequency of resort to custodial sentences.

We found that although 50 per cent of the sample suffered pre-sentence custody, in only 32 per cent of the sample were custodial sentences imposed. Of those refused bail 37 per cent, and of those kept in custody while a report was being prepared 55 per cent, were not given custodial sentences.

These results suggest that the criteria governing pre-sentence release decisions are more likely to produce a custody decision than the criteria governing the sentencing decision. We give further consideration to this in the last chapter when we discuss the assumptions and justifications of bail.⁵⁹

Legal provisions authorise the judge to take into account time

spent in pre-sentence custody by back-dating a custodial sentence.⁶⁰

This deduction is not automatic, however, and we found only 3 cases in which the sentence was recorded as back-dated. This relief does not of course benefit accused who are found not guilty or given a non-custodial sentence.⁶¹ Using our research design it was impossible to identify cases in which the judge refrained from imposing a custodial sentence because of the time spent in pre-sentence custody. We did note, however, that this point was sometimes made by the solicitor in his plea in mitigation of sentence.⁶²

Subtracting the time spent in pre-sentence custody from the custodial sentence imposed involves some conceptual confusion because the reasons and justification for both types of custody are very different.⁶³ This is reflected in the differences in prison regime which apply to tried and untried prisoners. The legislation, however, appears to recognise that the accused who is deprived of his liberty is unlikely to appreciate the conceptual subtleties.

(c) The success of the bail decisions

Measured by the non-appearance rate, the decisions about pre-disposition release were very successful. In only 4 cases, representing less than 4 per cent of the accused released, was a non-appearance warrant for failure to appear issued.⁶⁴ The accused who failed to appear are described in Table XXIV. None of the accused avoided rearrest and sentence.

The appearance of the accused, however, is only one factor by which the success of bail release is judged in Scotland. The Scottish courts not only attempt to ensure the appearance of the accused but are also concerned that the interim liberty is not abused, for example,

by the accused committing other offences or interfering with witnesses.

TABLE XXIV

A Description of Accused who Failed to Appear

Charge	Record	Past Sentences	Sentence	P.F.'s attitude	Sheriff's Dec.
(S) Theft (£12)	<u>similar</u> < 5 convs	No custodial	Fine £20	Asked for O.T.A. bail	
(P) Ass to serious injury	<u>similar</u> > 10 convs	Fines/3 mths YOI	14 mths prison	Accepted bail	Bail £20
(S) Theft (£3)	<u>similar</u> > 20 convs	Borstal/3 mths prison	Found N.G.	Accepted bail	Bail £5
(S) Theft HB (£33)	<u>similar</u> > 10 convs	Borstal/3 mths YOI	Admonished	Asked for O.T.A. bail	

Although difficult to estimate it does appear that the judge was less successful predicting abuse of liberty than non-appearance. The only method by which we could calculate this success was to base it on the number of cases in which the procurator-fiscal had information that the accused at the time of arrest was on bail for another offence. This is an underrepresentation because it did not take into account offences which were unreported or with which the accused had not at that time been charged. We found that in 13 per cent (23) of the cases the procurator-fiscal had information that the accused at the time of arrest was on bail.

The attribution of success demands not only that accused who could not be successfully released be kept in custody but also that accused who could be successfully released be so liberated. It is not possible to say with assurance to what extent the accused who were kept in custody might have been successfully released. When it is realised, however, that many of the accused were not considered a

sufficient danger to the public to be sentenced to custody,⁶⁵ it seems reasonable to argue that the risk of liberty might have been justified. In regard to the continuation cases, successful appearance and non-abuse of liberty, was guaranteed by automatic custody. A week later, however, 44 per cent of these cases were successfully released. It may be, that all these accused posed a threat to the investigation in the first 7 days which then disappeared. This we doubt and believe that the solicitor should not have silently acquiesced in custody at this stage but should have forced the procurator-fiscal to show cause why custody should be granted.

This discussion is continued below⁶⁶ where we consider in general terms the justifiability of the present criteria of success and make suggestions about ways in which the success rate might be improved.

(d) An attempt to assess the effect of the bail decision on the outcome of the case.

Some researchers have argued that an unfavourable bail decision may have a demonstrably adverse effect on the plea, finding and sentence.⁶⁷ Using Yates' corrected chi square, however, we were unable, in both summary and indictable cases, to obtain significant correlations using the variables bail decision and plea or finding or sentence. Nevertheless we agree with researchers who have pointed out that custody before trial may adversely effect the preparation for trial and the accused's morale, family life and employment prospects.

THE VERA INSTITUTE BAIL EXPERIMENT: THE MERITS OF ATTEMPTING
A SIMILAR EXPERIMENT IN SCOTLAND

The Vera Institute in their bail experiments attempted, with some reported success, to devise a new bail indicator. The bail indicator devised was based, as we described above,⁶⁸ on a score indicating the "community roots" of the accused. In England although it was considered that the courts would be hostile to decision-making based on a scoring system, considerable support has been voiced for the introduction of Vera type information sheets. It has been argued that the use of information sheets would solve a major problem affecting bail decisions, that is, the scarcity of information on which to base a decision about bail.⁶⁹

In the Scottish context we gave some attention to both these issues. Firstly, we considered to what extent the introduction of Vera type information sheets would increase the information available to the sheriff. Secondly, we considered whether a "community roots" indicator could be used in Scotland, instead of traditional criteria, to identify good bail risks.

(1) Increasing the Information Made Available to the Sheriff

When we considered whether information about "community roots" was made available to the sheriff under the present system we noted that the sheriff always had information about the accused's address available in his papers. The procurator-fiscal and solicitor were able

to supplement this information but in 84 per cent of the cases we found that no information about "community roots" was made available by them.

Table XXV shows the information spread in the 16 per cent (30) of the cases in which some of this information was available. Only 1 case was found in which all the information was revealed.

TABLE XXV

"Community Roots" Information Available to the Sheriff

-
- 1 = person with whom accused lives
 - 2 = time spent at address given
 - 3 = employed
 - 4 = marital status
 - 5 = dependents
 - 6 = source of income
-

Information not available	1	2	3	4
Number of cases	3	1	9	2

Information not available	1/3	2/3	3/5	4/5	3/6	5/6
Number of cases	1	1	1	3	1	1

Information not available	1/3/5	3/4/6	3/5/6	4/5/6
Number of cases	1	1	1	1

Information not available	1/3/4/6	3/4/5/6
Number of cases	1	1

Information not available	1/2/3/4/5/6
Number of cases	1

Despite this great lack of information about the "community roots" of the accused, the sheriff did not appear to be conscious of any

deprivation as he sought further information of this kind in only 6 cases. These inquiries all related to the acceptability of the accused's address.⁷⁰

Increasing the availability of this type of information only makes sense if the sheriff is to be persuaded to place less reliance on, or even abandon, traditional criteria. Accepting that this is possible for the purposes of argument, we doubt whether the preparation of information sheets covering this or any other type of information would be necessary or helpful.

It may be remembered that although information about "community roots" was not given to the sheriff, it was available in many cases to the procurator-fiscal.⁷¹ In addition, the accused had the opportunity in all cases to give this information to his solicitor.

The preparation of an information sheet to be given to the sheriff involves many administrative problems not least the decision about who is to prepare the information. Various bodies have been suggested, for example, social workers, court officials and the police. In Scotland the collection of this information would involve unnecessary duplication of the work of the duty solicitor. To counter the argument that the strength of the information sheets lies in the fact that it contains verified information,⁷² it may be said that the procurator-fiscal has some of this information verified by the police and the sheriff, if he doubts the word of the accused, may ask for confirmation.⁷³ Nor is there anything to prevent the solicitor, except perhaps lack of time, from obtaining confirmation by telephone in cases where this is possible.

Expense, unnecessary duplication of work, possible delay in bringing the accused before the court and judicial inability to digest

more paper information within a very short period are some objections to information sheets. In addition we believe that if the procurator-fiscal and the solicitor are both adequately informed, if the judge is receptive and willing to seek further information, information sheets are superfluous.

To summarise: we found information about "community roots" was not generally available to the sheriff. We are of the opinion, however, that in the event of partial or complete acceptance of "community roots" as a bail indicator, the information could be presented to the sheriff without the introduction of information sheets. We considered information sheets to be an inappropriate method of presenting information to the judge in view of the duties and role played by the procurator-fiscal and solicitor in the existing accusatorial system.

(2) The Consideration of "Community Roots" as a Bail Indicator

The underlying assumptions of the Vera scheme were explained in Chapter II⁷⁴ and the point system was reproduced in Exhibit I.

To assess the utility and merits of the Vera scheme in the Scottish situation we computed scores, based on the Vera scoring system, for the cases in the sample. We wished to discover firstly, whether the scheme would achieve its objective of increasing the number of persons released. Secondly, to discover to what extent the scheme would recommend the release of persons who were released under the traditionally accepted criteria and thirdly, whether the recommended persons and the non-recommended persons appeared or did not appear, if they

were in fact released.

We amended the scoring to take into account Scottish differences, for example, Scots law does not distinguish between felonies and misdemeanours. We also simplified some of the scoring because detailed information about, for example, unemployment record was not available for the sample cases. We excluded the discretionary point to avoid introducing bias into the sample scores. We consider that the scoring system which we constructed was marginally more favourable to the accused. This scoring system is set out in Table XXVI.

TABLE XXVI

Adaptation of the Vera Institute "Community Roots" Scoring System

PRIOR RECORD

- 2 No convictions
- 1 1 - 5 convictions
- 1 More than 5 convictions

FAMILY TIES

- 3 lives with family
- 3 lives in military service quarters
- 2 lives with friends who are not co-accused

EMPLOYMENT

- 3 Regular employment
- 2 Employed
- 1 Receiving unemployment benefit
or social security benefit

RESIDENCE

- 2 Has a fixed address
 - 1 Address for less than 6 months
-

The results based on this scoring system are set out in Table XXVII. We found that there was only a 3 per cent increase in the number of cases who qualified on the basis of the point system for a release

recommendation. Indeed when we excluded the continuation report and review cases, to which some specialities attach, only 55 per cent (59) of the cases qualified for a release recommendation in comparison with 71 per cent (78) who were granted release under the present system.

TABLE XXVII

A Comparison of the Scoring Recommendations and the Decisions Made

	Released in sample			Not released in sample			Total
	NG(S)/FC	CWP/CFE	G(R)	NG(S)/FC	CWP/CFE	G(R)	
Score 5 or >5	50	1	6	8	16	12	93
Score 5	28	0	4	17	18	8	75
Total	78	1	10	25	34	20	168

A concordance was found between the results of the Vera recommendations and the present criteria in the cases for which a trial date was set. Of the cases whose scores merited a release recommendation, 50 were in fact released. This means, however, that only 8 custody cases benefited from a recommendation and that 28 cases which were released did not qualify for a recommendation. The scoring favoured 49 per cent of the continuation cases. A special problem affects continuation cases because custody is almost automatic at this stage. We criticised this above⁷⁵ and it is this problem which must be tackled. Of the continuation cases in the sample for which a trial date was set 44 per cent were released on their second court appearance. Cases in which the accused pled guilty and a report was ordered fared better on the scoring system but again we found that the scoring denied a recommendation to 4 (44 per cent) of the report cases released.

The success rate which would have been achieved on the basis of the "community roots" recommendations compared unfavourably with the success of the cases released in the sample.⁷⁶ We found that on the basis of scoring, 31 cases did not qualify for a release recommendation although they were in fact successfully released. In addition, 3 of the accused who failed to appear, achieved a score on the "community roots" scale which qualified for a recommendation.

In our experiment with the sample cases the "community roots" indicator achieved little success in increasing the number of persons eligible for release. The lack of success may be explained by the difficulty of transplanting the indicator, which was designed and its success confined, to legal systems with problems⁷⁷ and legal provisions differing from those of Scotland. We are of the opinion that these differences are sufficiently fundamental to prevent a successful transplantation even with substantial modifications to the "community roots" scoring.

In America a right to bail is given and the problem which inspired the Vera scheme was not the refusal of bail but the inability of many accused to raise bail money set at a prohibitively high figure. This led to the various iniquities of the bail bondsman system. Vera personnel highlighted the injustice of release being dependent on the possession of wealth and tried to construct a new indicator. Scotland, however, has two major problems which probably demand different solutions. The first problem is that some accused are refused bail and this decision is entirely discretionary. Secondly, although bail amounts are comparatively very low some accused cannot even raise very small amounts of money and thus remain in custody. Unlike the

American situation there is no need in Scotland to manipulate the bail system, by demanding high bail money to prevent accused from obtaining release, as the judge can easily refuse bail.

Not only are the problems different but the American criterion of success of bail has only limited application in Scotland. In America the success of bail is judged by the appearance rate of the accused. Other factors, however, affect the question of success in Scotland notably whether the accused has committed other offences while on bail or whether the accused has attempted to interfere with witnesses or in other ways pervert the course of justice. The "community roots" scale was designed to predict merely the likelihood of appearance of the accused and this has also been the measure of its success. There is no evidence to suggest that any reliance can be placed on "community roots" when the success criteria include additional factors. But even if success in Scotland were to be judged by reference only to the appearance of the accused, the scores of the sample cases suggest that fewer persons would be released without any improvement in the identification of persons likely to abscond.

The results we obtained indicate that the Vera scale could not be used successfully in Scotland as it has been in many different states of America. It would, of course, be possible to attempt to create a new scale. To be of practical value such a scale ought to take into account all the success criteria. Many studies, however, have illustrated the difficulties involved in attempting to predict whether an accused is likely to commit other offences.⁷⁸ This would be only one of the factors which the bail scale would have to take into account. We are very doubtful whether a scale could be developed which would give a better prediction than a decision based on the decision-maker's assessment of

the individual circumstances of the case. The inevitable complexity of such a scale would in any event probably prevent its use in the daily routine of bail setting.

VIII

BAIL DECISIONS

IN THE HIGH COURT OF JUSTICIARY

The High Court of Justiciary, with few exceptions,¹ considers the question of bail only when an appeal is taken from the bail decision of an inferior court. Although the sheriff courts are responsible for a much greater number of bail decisions, the decisions of the High Court of Justiciary are significant as the appellate jurisdiction of this court provides an opportunity to develop and standardise the grounds on which bail is granted or refused.

In contrast, however, the grant of bail pending appeal against conviction or sentence is decided at first instance by the High Court of Justiciary. This is true also of interim liberation in summary procedure, where appeal against conviction or sentence is by suspension but not if the appeal is by stated case.²

THE SUBJECT OF THE RESEARCH

The decisions of the High Court of Justiciary were of interest for a number of reasons, not least because of the secrecy surrounding the deliberations which were heard in the privacy of chambers. In the vast majority of cases³ the conduct, procedure and rationale of the

decisions were unknown. In addition as appeals could originate from any of the Scottish sheriffdoms, we were able to examine for the first time bail decisions from parts of Scotland outwith the Lothians and Peebles area.

Many of the issues which we examined in the lower courts again engaged our attention. Thus in studying the decision-making situation, we considered what information was made available to the decision-maker and attempted to assess the effect of this information on the decision to grant or refuse custody. In bail appeals and bail applications pending appeal against conviction or sentence we identified the judge as sole decision-maker, in contrast to the inferior courts where we also identified the prosecutor as a decision-maker.⁴ In the appeal situation, however, the Crown representative does not have the freedom of his counterpart in the inferior courts to agree the terms of liberty or decide whether to oppose a motion of bail. In bail applications after conviction the exclusion was obviously required because, unlike the pre-trial bail provisions, the law does not vest any discretion in the Crown representative nor does it confer any right to make representations. In considering the judge as decision-maker we examined his attitude towards receiving and seeking further information and the reasons or lack of reasons given for his decision. The information given by opposing counsel was also evaluated. In examining some of the consequences of the appeal decisions we concentrated on the following issues:- bail money, time taken to have an appeal considered and the success of the appeal decisions. Lastly some attention was given to the justification and consequences of the secrecy surrounding the proceedings.

THE RESEARCH METHODOLOGY(1) The Period of Observation

No preliminary study was carried out in the High Court of Justiciary because permission for this study was granted almost a year after the beginning of the research by which time we had become very familiar with the bail practice.

The study covered bail appeals and bail applications after conviction heard in the winter session of 1972.⁵

Bail appeals may be heard in court or in chambers before a single judge or a quorum of the court. As a matter of practice the appeals were always heard in chambers before a single judge. The hearings in chambers did not take place every day but were set as required on any day except Sunday.

Before the hearings the various people with an interest in the petitions congregated outside the judges' chambers. Attendance at the hearing of the petitions was strictly limited to the parties contesting the petition. Present at a hearing, therefore, were the accused's counsel and sometimes a representative of the instructing solicitors, a Crown assistant⁶ and an advocate, usually one of the Advocates-Depute,⁷ representing the Crown. The Clerk of Justiciary or a depute was also in attendance. The judge was made aware by the clerk of our research interest in bail. On no occasion was the accused or any other interested party present.

We did not use information sheets to record the debate in chambers but attempted to note fully the verbal interaction in the sequence in which it occurred. After the hearing of the petitions we

completed an information sheet, reproduced in Appendix II, based on information contained in papers held by the Clerk of Justiciary and the Crown assistant.

(2) Record Research

Although we had full access to the court records there was unfortunately no record kept in the High Court of Justiciary about much necessary information concerning, for example, the raising of the bail money, the success of bail and the final outcome of the case. This information could be obtained from the clerk of the sheriffdom in which the accused had made his first appearance. We wrote with some success to request this information.

(3) Preparation for the Use of the SPSS Programs

In Appendix V we list the variables created and coded on computer cards to cover the information obtained by observation and record research. We used the SPSS programs to provide descriptive statistics and to test some relationships between the variables.

THE RESEARCH RESULTS

(1) Description of the Sample

During our period of observation 65 petitions were heard in chambers. The results of the petitions are described in Table XXVIII. The low success rate of 17 per cent for appeals against the refusal of bail should be noted.

TABLE XXVIII

Type and Results of Petitions

	Petition Granted	Petition Dismissed	Total
Appeal against refusal of bail (summary)	3	4	7
(solemn)	6	39	45
Crown appeal against grant of bail	2	1	3
Bail after conviction	7	0	7
No appearance entered	-	-	1
Petition abandoned	-	-	1
Missing case	-	-	1
Total	18	44	65

(2) Information and the Exercise of Discretion(a) Bail petitions(i) The decision-makers

We found that the role of the judge as decision-maker in bail appeals in the High Court of Justiciary assumed a greater importance than comparative roles in the inferior courts. We attributed this increase in importance not only to the higher status and appellate powers of the judge but also to the effect of the role played by the Crown representative in bringing or opposing appeals.

The Advocate-Depute when representing the Crown in bail appeals did not enjoy the extensive discretion of the prosecutor in the inferior courts. The decision to appeal did not lie with the Advocate-Depute but with the procurator-fiscal in the inferior court, or the accused. The Advocate-Depute merely received notification of the appeal and was given a summary of what was thought to be relevant information by the appropriate procurator-fiscal. This summary was generally the only

information available to the Advocate-Depute. Because of this the Advocate-Depute appeared to adopt the view that, until further information was available, he would support the procurator-fiscal who was familiar with the circumstances of the case including the police report and who had perhaps precognosed witnesses. In addition at the appeal stage the opportunity of reaching agreement between the Crown and the accused's representatives had usually passed.

In contrast, therefore, to the burgh court where in many cases only the prosecutor made representations about bail, and to the sheriff court where in many cases both parties reached an agreement which was merely endorsed by the sheriff, the judge hearing bail appeals was confronted with two disagreeing parties who were briefed to present their respective cases.

(ii) Information made available to the judge

The petition presented to the judge contained information about the name and age of the accused⁸ and the offence charged. Additional information was given to the judge by the Advocate-Depute and the accused's counsel. Table XXIX shows the information available to the judge when he made his decision.

The judge was informed in all cases about the nature of the accused's record and in 21 (38 per cent) of the cases a copy of the criminal record was given to the judge. A comparison of Tables XXIX and XXXIII shows that with few exceptions the Advocate-Depute emphasised the same characteristics of the accused's record as the procurator-fiscal, and gave the same information to the judge which the procurator-fiscal had given to him. Some of the omissions were, however, interesting. Thus in 2 cases the Advocate-Depute did not repeat to the judge the procurator-fiscal's allegation that there was a risk the

TABLE XXIX

Type of Information Made Available to Judge by A.D. and Counsel

Type of information	Advocate- Depute	Counsel	Total
	No. of cases	No. of cases	No. of cases
Criminal record given to judge	21	0	21
Length of record	30	16	46
Seriousness of previous sentences	2	5	7
Recently released from prison	5	0	5
Recent convictions	5	4	9
Possibility of repetition of offences	6	1	7
On bail	6	1	7
On licence/parole	5	0	5
Seriousness of charge	5	9	14
Circumstances of offence	11	0	11
Appearance of accused for trial	4	18	22
Interference with witnesses	5	4	9
	67%	31%	-
Date of trial	12	0	12
Further charges pending	3	0	3
Recovery of property	7	0	7
Review refused	3	0	3
Strong evidence	2	0	2
Admission by accused	4	0	4
Accused pleading not guilty	0	18	18
Other	0	14	14
Address	4	27	31
Marital status	6	24	30
Dependents	5	12	17
Employment status	5	24	29
Family commitments	0	19	19
Third party will supervise	0	4	4
	13%	59%	-

TABLE XXX

Information Sought by Judge from Advocate-Depute

Type of information	No. of cases
Asks to see record	3
Description of record	3
Any recent record	2
Any similar convictions	1
Date of release from prison	1
Any admission from accused	3
Value of property	1
Reasons for sheriff's refusal of bail	5
Type of trial procedure	4
Trial date	8
Address of accused	1
Family circumstances	1
Acceptability of bail amount	2
Other	4

TABLE XXXI

Information Sought by Judge from Accused's Counsel

Type of information	No. of cases
Address of the accused	4
Appearance of accused for trial	2
Trial plea	2
Anything in favour of the accused	2
Amount earned	5
Amount of bail offered	1
Acceptability of bail amount	1

accused might not appear. Recovery of property and the strength of evidence against the accused were also not brought to the attention of the court.

Some information about "community roots" was given by the accused's counsel in 80 per cent of the cases. A comparison of Tables XXIX and XXXIII shows that although the Advocate-Depute was not fully informed about this type of information, he did have some information in 36 per cent of the cases though he rarely gave such information to the judge. Bearing in mind that in some cases information from defence counsel and the Advocate-Depute referred to the same cases, it may be appreciated that the judge was far from fully informed about "community roots" factors. The judge was given no information about the accused's address, marital status, dependents, employment and family commitments in 47 per cent, 48 per cent, 72 per cent, 53 per cent and 67 per cent of the cases respectively.

Other information which was notable by its absence was the length of time the accused was likely to spend in prison before trial, missing in 60 per cent of the cases and the reasons for refusal or grant of bail in the sheriff court, missing in 65 per cent of the cases.⁹

(iii) Additional information sought by the judge

The judge took an active part in seeking information from both counsel and continued the hearing in 2 cases to allow the parties to obtain further information about a disputed point. A continuation was granted in the first case to enable information requested by the judge about the trial date to be supplied, and in the second case to allow verification of information about the accused's family circumstances.

The judge sought information from the Advocate-Depute in 29 cases and in 17 cases from counsel for the accused. The type and frequency

of the information requested is set out in Tables XXX and XXXI.

The information requested by the judge is interesting because it is likely that it illustrates the type of information which the judge considered important. It may be noted that despite the judge's lack of knowledge about "community roots" factors only 10 per cent of his questions were designed to elicit such information.

(iv) The influence of the information variables on the decision of the judge

Unlike the sheriff and bailie, the judge in the appeal cases gave reasons for his decisions in 76 per cent of the cases. Although the reasons given cannot be considered as necessarily representative of the crucial factors in the decision, they give an important insight into the factors which the decision-maker regards as acceptable to the public or that part of the public, the court personnel, with whom he is concerned.

In Table XXXII we describe the type and frequency of the reasons given. Despite the fact that 30 per cent of the reasons referred to the exercise of the sheriff's discretion, we discovered that in 65 per cent of the cases¹⁰ the judge was not informed of the grounds on which the sheriff based his decision. If our research in the Edinburgh sheriff court is to some extent representative, this lack of information may be explained by the fact that reasons were given by the sheriff in less than 2 per cent of the sample cases. This is one of the considerations which influenced our recommendation made below¹¹ that both judges of first instance and appellate judges should always give reasons for their bail decisions. The criminal record of the accused was particularly prominent and reference was made to this in 40 per cent of the cases in which reasons were given. From the context of the refused petitions it appeared that a lengthy criminal record has per se become a ground

TABLE XXXII

Type and Frequency of the Reasons Given by the Judge for his Decision

	Petition Dismissed	Petition granted
Insufficient grounds to interfere with sheriff's discretion	12	0
Sheriff wrongly exercised discretion	0	2
No change of circumstances since refusal by sheriff	1	0
Persistent criminal record	6	0
Very long record	2	0
Refused on basis of record	8	0
Previous convictions for similar offences	1	0
Not very serious record	0	1
Abuse of liberty	2	0
On bail	2	0
Recently released from prison	3	0
Nature of charge	3	0
Circumstances of offence	1	0
Number of charges	2	0
Not very serious results	0	3
Danger of perversion of justice	3	0
Perversion of justice unlikely	0	1
Early trial	3	0
Late trial	0	1
Section 31 guilty plea	1	0
Admission of offence	1	0
Likely to be custodial sentence	1	0
Conviction unlikely	0	1
Not affected by background circumstances	2	0
Address now satisfactory	0	1

for refusal and was not considered merely an indicator of the likelihood of the accused committing further offences while on bail. It is notable that the judge made reference to "community roots" factors in only 3 (6 per cent) of the cases and in 2 of the cases only to say that his decision had not been influenced by such factors.

The emphasis on factors relating to criminal record rather than "community roots" was borne out by the statistical correlations which we obtained using Yates' corrected chi square.

When we tested a number of null hypotheses, that is, that different information variables were not related to the judge's decision, we were able to reject the null hypothesis with three information variables. We concluded, therefore, that the judge's decision to allow or refuse the accused's bail appeal was dependent on firstly, the number of previous convictions.¹² Secondly, the decision was dependent on whether the accused had ever been given a custodial sentence¹³ and lastly, on whether the accused's record showed that he had on another occasion abused his freedom on bail by committing offences, by absconding or by tampering with evidence.¹⁴

(b) Bail applications pending appeal

In bail applications pending appeal the judge was again prominent as the decision-maker but for reasons different from those applicable to bail appeals.

In solemn procedure discretion to grant bail to a person

appealing against conviction or sentence is vested by statute exclusively in the High Court of Justiciary.¹⁵ Although a practice has grown up whereby a representative of the Crown always attends, this is considered to be purely for the convenience of the court which may wish to request some information.

The information available to the judge from the petition was the name and age of the accused and the grounds of appeal. Additional information was given to the judge by the accused's counsel.

We found a change in emphasis in the information given with counsel stressing that the petitioner would serve a substantial period of his sentence before the hearing of the appeal, that the petitioner had been successfully released before the trial and the grounds of appeal. Reference was also made to the following types of information, marital status, employment status, dependents and fixed address. In only 1 case was information given about the accused's previous convictions or lack of convictions.

Additional information sought by the judge was limited to the date of the appeal hearing requested from the clerk of court and the ability of the petitioner to raise the bail money, requested from his counsel. The Advocate-Depute, representing the Crown, did not contribute information until requested by the judge. Such requests occurred in 6 cases and related to the grounds of appeal specified in the petition. In 2 of these cases the Crown representative, referring to his lack of locus standi, declined to comment.

In the 3 cases in which the judge gave a reason for his decision it was based on the prima facie merits of the appeal or the length of time which the accused was liable to spend in custody before the appeal hearing.

In addition to the non-accusatorial role of the Crown we identified two striking differences between the attitude of the participants in the bail application cases compared with the bail appeal cases. Firstly, the preoccupation with criminal record and fear of repetition of offences which we described in the section covering bail appeals was absent in the applications for bail made on behalf of convicted persons.¹⁶ This may be because of the great difference between the criminal records of the two types of petitioner. The convicted petitioners had no or only minor previous convictions unlike the majority of the bail appeal petitioners who had records of some length including serious convictions. An explanation for this difference in the criminal background of the petitioners is put forward below.¹⁷ Secondly, more prominence was given to the merits of the convicted petitioner's grounds of appeal than was given to the merits of the accused's defence to the charge in bail appeals. This may be one consequence of the application of the presumption of innocence. The presumption does not apply after conviction and the onus demonstrandi therefore lies on the petitioner to show cause why he should be released.

(c) An evaluation of the information made available to the decision-maker

We argued above¹⁸ that to be satisfactory the information made available to the decision-maker must satisfy the tests of accuracy, relevance and sufficiency.

We formed the opinion that the debate in the appeal situation did not guarantee, to the same extent as the sheriff court procedure, the accuracy of the information given to the judge. This was due entirely to the fact that the Advocate-Depute and the counsel for the petitioner

were not as fully informed nor did they have the same opportunity of acquiring first hand knowledge as their sheriff court counterparts. In the case of the Advocate-Depute we have pointed out¹⁹ that in many cases he had little or no information about the family and background of the accused and had to rely on the procurator-fiscal's assessment of what was relevant information. His briefing, however, compared favourably with that of the petitioner's counsel whose instruction by the accused's solicitor was in many cases, as we show below,²⁰ very inadequate. Counsel, of course, had no opportunity to supplement his information by questioning the accused and he was also denied access to the criminal record of the accused compiled by the police.

The remoteness of both counsel from the primary information sources is perhaps inevitable as long as appeals are heard by the High Court of Justiciary. . . An improvement in the briefing of counsel would, however, substantially increase the likelihood that accurate information was given to the judge, as information about the same facts would be available from two different sources.

Information is relevant, we believe, if it relates to the criterion adopted by the decision-maker. Great emphasis was placed by the judge on certain factors relating to criminal record, and we found that this type of information was well supplied by the Advocate-Depute. In many cases, however, counsel for the accused was unable to give or interpret such information.

In the appeal situation we found that the Advocate-Depute and the accused's counsel always adopted an accusatorial role. It may be recalled²¹ that in many cases in the sheriff court there was no contest, but where a contest was joined the information made available to the

sheriff increased. This was true also of the High Court of Justiciary where we noted that in the characteristic conflict situation of the appeal the judge was given a much greater amount of information in comparison to the sheriff.²² In theory this contest ought to have resulted in sufficient information being made available to the judge but as the opposing counsel themselves were not fully informed the information made available was liable to be insufficient. To some extent the judge coped with this by adjourning cases to enable counsel to obtain further information considered necessary by the judge. We did not note any cases, like the continuation cases in the sheriff court, where one party failed completely to contest the case, although on a few occasions counsel for the accused did not press the appeal with any enthusiasm. Indeed in 2 cases counsel admitted to the judge that he considered the appeal to be hopeless. Not surprisingly the judge did not grant these petitions.

The presentation of and source of information about applications for bail after conviction differed considerably from the pre-trial bail appeals. Although the Advocate-Depute attended, he was not legally entitled to contribute to the discussions unless asked some question by the judge. Because of this there was no double check of the accuracy of the information. The Advocate-Depute did receive some information about the petitioner and the circumstances of the case and in the sample cases this information was not contradictory to the information given to the judge. Even if the Advocate-Depute had possessed conflicting information we believe that he would not on his own initiative have pointed out the discrepancy.

Because there were so few of these cases in the

sample (7) we were unable to draw any reliable conclusions about the relevance or sufficiency of the information given to the judge.

(d) Comments on the decision-making model

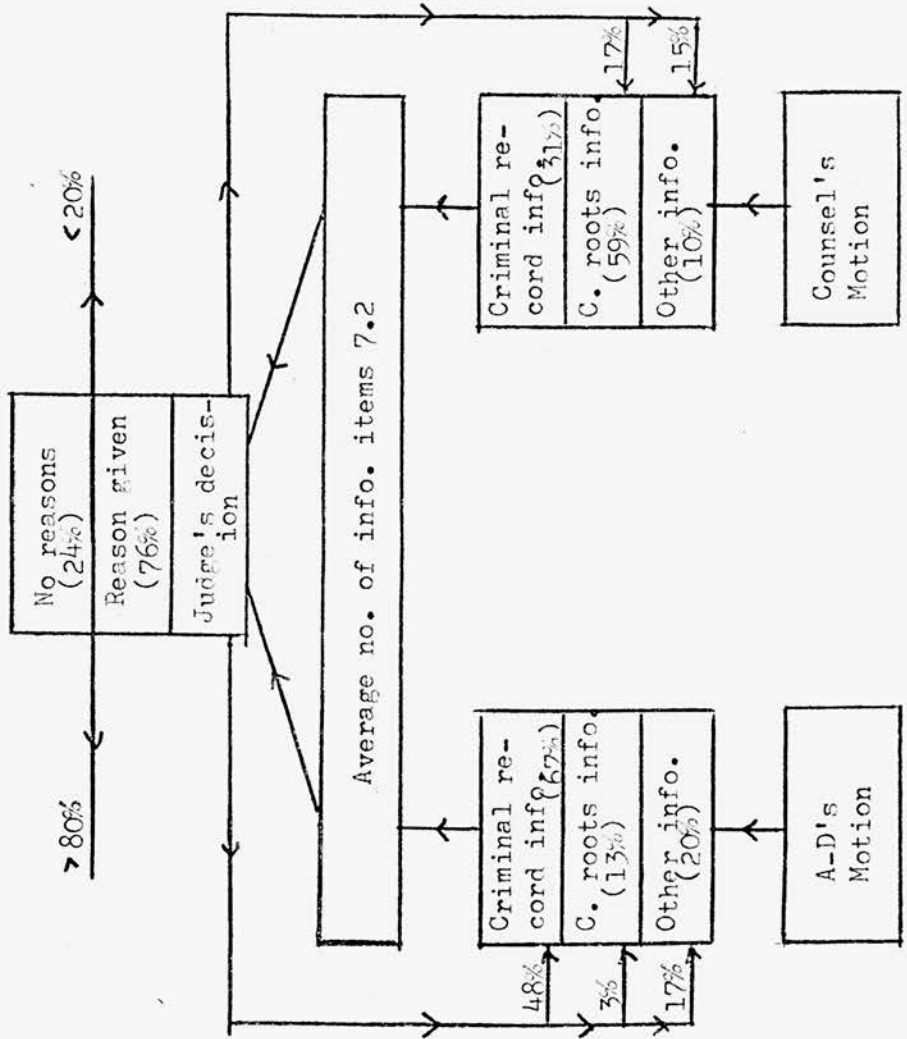
The model of bail decision-making in the High Court of Justiciary differed considerably from those described as applicable to other procedural stages. In Figure VI we represent the judge as arbiter between the competing suggestions but illustrate his frequent acceptance of the submissions made by the Advocate-Depute.

This pattern, as when it occurred at the sheriff court level,²³ may to some extent be due to the fact that the Advocate-Depute in comparison to the accused's counsel selected information which was more likely to influence the decision-maker. The contribution of another factor is, however, perhaps even more important. In the appeal situation, the judge is not making an original bail decision but has to decide whether the judge of an inferior court has wrongly exercised his discretion. The appellate judge is unlikely to conclude that the discretion has been wrongly exercised where the sheriff has refused or granted bail according to the accepted criteria. It is arguable that the Crown were more realistic than the accused, who raised 95 per cent of the bail appeals, and the dominant position of the Crown in the appeal pattern merely reflects this. We are of the opinion that if the Crown appealed a much greater number of bail decisions this dominant position would be reduced and would possibly disappear.

Counsel for the accused was necessarily in a dominant position when presenting applications for bail after conviction because the participation of the Crown representative was legally limited. This,

FIGURE VI

Bail Appeals in the High Court of Justiciary



however, does not in our view explain the high success rate of petitions raised on behalf of convicted persons. The success, as we argue below, is best explained in terms of the non-availability of legal aid for cases considered to have a poor chance of success.

(3) The Briefing of the Advocate-Depute

The Advocate-Depute, unlike the procurator-fiscal, had no first hand knowledge of the case but had to rely on information made available to him by the procurator-fiscal of the sheriffdom from which the appeal originated. The procurator-fiscal was required to make a report to the Crown office and it was this report, together with a copy of the petitioner's criminal record, which was given to the Advocate-Depute by one of the Crown assistants.

We found that with the exception of information obtainable from the criminal records, the Advocate-Depute did not always have full information on which to base a decision using traditionally accepted bail criteria.

From Table XXXIII it may be seen that the Advocate-Depute was informed of the circumstances of the case in only 5 cases. Due to this he was not able to make an independent assessment of, for example, the risk to the public or victim. Similarly he had to rely on the procurator-fiscal's assessment of the risk of non-appearance or interference with witnesses. In the majority, though not all of the cases in which the procurator-fiscal based an objection on these grounds, he also specified the information on which his objection was based. But the assumption cannot be made that this represented full information about the facts, as different evaluations of the relevance of the

available information may have been made by the various procurators-fiscal. Regarding information about the family and background of the accused which bears some relevance to the "community roots" criteria, we found that such information was available only to a limited extent. In 4 of the cases in which the Advocate-Depute did have this information he challenged the submissions of the accused's counsel. The challenge revealed serious discrepancies in information ranging, for example, from counsel's submission that the accused was aged fifty and married with three children whom she looked after while her husband was at work to the Advocate-Depute's reply that the woman was aged twenty-two, divorced with no dependents.²⁴ The Advocate-Depute was handicapped, however, because in 70 per cent of the cases he had no information about two or more variables relating to the family and background of the accused.²⁵ He was thus often unable to contest effectively or verify information given by the accused's counsel.

TABLE XXXIII

Information Made Available to the Advocate-Depute by the P.F.

Type of information	No. of cases
Circumstances of offence	5
Risk of non-appearance	6
Risk of interference with witnesses	2
Recently released from prison	5
On bail	6
On licence/parole	5
Further charges pending	4
Admission of charges by accused	4
Recovery of property	11
Review refused	4
Address	38
Marital status	41
Dependents	22
Employment status	37
Family commitments	1
Strong evidence	10
Trial diet	10
Other	5

(4) Legal Representation and Legal Aid

(a) Legal representation and the briefing of counsel

All the petitioners in the sample were represented by counsel at the hearing of the petition. Solicitors have no right of audience before the High Court of Justiciary and must therefore instruct counsel to present the petition. This, of course, involves additional expense. Provision is made, however, in the Legal Aid (Scotland) Act 1967 to meet in certain circumstances the expense of both the solicitor's and counsel's fees out of the legal aid fund.²⁶ The accused as a matter of practice was not brought from prison to attend. We raised the question with court officials of the procedure adopted if the petitioner wished to represent himself. This we were informed was a situation which had never arisen but it was considered competent with the consent of the court.

In bail appeals counsel instructed to appear for an accused must rely for his information on the instructing solicitors. Counsel does not interview the accused and only in rare circumstances would he have any knowledge of a case before receiving instructions.

While waiting outside chambers before the hearings we noted that counsel on occasion consulted the Advocate-Depute or the Crown assistant to discover the nature of the accused's criminal record. The clerk of court was also consulted, in some cases about the most basic information that is the charge against the accused. This pre-hearing experience made us suspect that counsel might be inadequately briefed. We decided, however, that because of the number of different people involved and the fact that they often formed separate groups engaged in private consultation, it would be impossible to attempt to record

consistently these requests for information. Another practice which we noted but were unable to record with any degree of accuracy was the handing over of instructions by counsel who left to attend other business. Counsel who received the instructions often made his first acquaintance with the case, therefore, only a few minutes before presenting the petition.

Attendance at the hearings confirmed our suspicion that some counsel were inadequately briefed. In 38 per cent of the cases counsel prefaced their pleadings with remarks indicating that little information was available to them or admitted their lack of information in the face of judicial questioning or representations by the Advocate-Depute. This percentage is we would argue an underrepresentation. Some counsel no doubt managed to supplement their information outside chambers and others may have been poorly informed but able to avoid drawing attention to this at the hearing.

The 38 per cent comprised 4 cases in which counsel in his pleadings said he had little information available, 5 cases in which the family circumstances of the accused were left in question and 8 cases in which ignorance of the accused's record was admitted. In one of these cases the Lord Justice-Clerk was very critical about the ignorance of counsel and the instructing agent who had failed to supply this information.²⁷ In the remaining 4 cases counsel admitted ignorance of the charge libelled, the existence of a S.31 plea of guilty, the sentenced imposed on a co-accused and threatening letters to a witness.

In only 3 cases where counsel admitted his inadequate information was the petition of the accused granted. This is a very low success rate (14 per cent) but the success rate for the sample was also very low (17 per cent). It cannot, however, be concluded that the admitted

inadequacy of the information was irrelevant to the outcome of the case.

Of the 3 successful cases, the Advocate-Depute withdrew his objection to bail in one, and in another he was able to supply the information requested by the judge about the family circumstances and address of the accused. In the third case, counsel for the accused was unable to supply the information about the income of the accused. The judge who had requested this information set an amount for bail without this information and without, therefore, any knowledge of whether the accused would be able to raise bail. We concluded that in these cases bail was granted in spite of inadequately informed counsel. Indeed we would argue that one reason for the high dismissal rate of the petitions may be the fact that counsel were inadequately briefed. Another possible contributory reason is considered below.²⁸

Despite a lack of information in some cases, counsel for the accused did give much information to the judge. The frequency and type of information given was described in Table XXIX. We noted that counsel, like the solicitor in the sheriff court, emphasised "community roots" factors rather than factors tending to show that the accused, despite any criminal record, was a good bail risk and unlikely to abuse his liberty. Thus 59 per cent of the information given by counsel related to "community roots" and 31 per cent related to criminal record. In contrast 13 per cent of the information given by the Advocate-Depute related to "community roots" and 67 per cent related to criminal record.²⁹ "Community roots" factors were not disregarded by the judge but it is clear from the information requested and the reasons given by the judge that greater importance was placed on other criteria. It is also clear that the Advocate-Depute, unlike counsel for the accused, concentrated on the information which was given priority by the judge.

(b) The availability of legal aid

Where an appeal is taken against a bail decision in a case which is to be tried by solemn procedure, legal aid is not available to the accused automatically as it is when the accused is in custody until committed until liberation in due course of law.³⁰ Legal aid is made available for bail appeals, however, if the court is satisfied that the petitioner is unable without undue financial hardship to himself or his dependents to meet the expense.³¹ The only criteria to be satisfied is this financial one and the petitioner does not need to show that it is in the interests of justice that legal aid should be made available.

In cases to be tried by summary procedure legal aid is also automatically available to an accused in the early procedural stages until the conclusion of the pleading diet.³² For a bail appeal, however, legal aid is made available only if the accused satisfies the court that it is in the interests of justice that legal aid should be made available.³³

Legal aid is never automatically available for applications for bail pending appeal against conviction or sentence. To receive legal aid for such petitions the petitioner must satisfy the financial criteria and satisfy the Supreme Court Committee firstly, that he has substantial grounds of appeal against conviction or sentence and secondly, that it is reasonable that he should receive legal aid in the particular circumstances of the case.³⁴

For the legally aided cases the success rate for bail appeals relating to petition cases was 15 per cent compared with a 75 per cent success rate for summary cases and 100 per cent success rate for bail applications after conviction. It would appear, therefore, that in the latter categories only those with a strong case were enabled by legal

aid to present their petitions. Although this prevents the presentation of petitions which even counsel admit are hopeless, which happened in two of the bail appeals in solemn procedure, it means that many of the bail decisions are effectively decided outwith the High Court of Justiciary. It also means that persons who are to be dealt with under summary procedure, who in most cases pose less of a threat to the safety of the public, are given less opportunity to petition for bail. The question must be considered whether accused in summary cases should, assisted by legal aid, be given more opportunity to obtain bail, or whether some discretion should be given to the court to refuse legal aid for "hopeless" bail appeals relating to cases to be tried by solemn procedure.

In Table XXXIV we show the number of cases in which legal aid was granted in respect of the petition and the result of the petition. Unfortunately some uncertainty attaches to these legal aid figures because it is not clear to what extent officials from different sheriffdoms followed a consistent practice in recording this data. Any misrepresentation is we think likely to have resulted in an inflated number of legal aid cases recorded. The difference in the number and success rate of the various types of petitions, we would argue, may be accounted for to some extent by differences in the availability of legal aid.

(c) Cost of legal representation

Where legal aid was refused on the ground that it was not necessary in the interests of justice, the cost to the accused of financing the appeal himself may in most cases have been dissuasive if

not prohibitive. It may be recalled that we found that some accused experienced difficulty in raising very low amounts of money for bail.³⁵ It is also relevant to point out that 54 per cent of the accused in the sample were unemployed at the time of their arrest.

For the purposes of legal aid, the fees for the instructing solicitor's work in relation to an interim liberation petition are set at a sum not exceeding 16 pounds.³⁶ There is not set sum for the work involved in bail appeals as this will usually form part of the solicitor's work in preparing the defence. Counsel's fees are said to be "such sum as appears to the Law Society to represent fair remuneration for the work actually and reasonably done."³⁷ Correspondence with the Law Society revealed that the sums paid were in the region of 4 pounds to counsel and 5 to 10 pounds to the instructing solicitor for each appeal.

TABLE XXXIV

Type and Result of Petitions for which Legal Aid was Granted or Refused

Type of petition	Petition Granted		Petition Refused
	Legal aid	No legal aid	
Bail appeal (summary)	Legal aid	3	1
	No legal aid	0	3
Bail appeal (solemn)	Legal aid	6	33
	No legal aid	0	6
Crown bail appeal	Legal aid	2	1
	No legal aid	0	0
Bail after conviction	Legal aid	7	0
	No legal aid	0	0

(5) Some Implications and Consequences of the Decisions of the High Court of Justiciary

(a) The money requirement for bail

(i) The amount of money required

It may be remembered that for reasons discussed in Chapter III the High Court of Justiciary may not release a person merely on his promise to appear but must fix a sum of money as the amount of bail or caution. In Table XXXV we show the amount of money required and the offence charged.

TABLE XXXV

Amount of Money Required and Offence Charged			
Bail Appeal		Bail after Conviction	
Amt. (pounds)	Offence	No. of cases	No. of cases
5	Housebreaking	1	
10	Housebreaking: Theft: Assault & Robbery	3	1
20	Embezzlement	1	
25	Assault and Robbery: Perjury	2	6
30	Att. murder: Perjury	2	

Although the average amount of bail set was higher than that set by the sheriff court,³⁸ it may be appreciated that the bail amounts were still low in comparison to the gravity of the charges for which other legal systems set much higher bail figures.

In setting the amount of bail the judge tended to set the amount himself rather than fix an amount suggested by the accused's counsel.

In view of this there was no guarantee that the petitioner would be able to raise the amount set. Some inconsistency in judicial approach was apparent in this matter as in one case counsel, who said he left the amount of bail to the discretion of the judge, was told that it was counsel's responsibility to suggest an amount. The judge, like his counterpart in the sheriff court, also consulted with the Advocate-Depute as to the acceptability of the bail amount. Such consultations occurred in 3 of the cases. This led to agreement between counsel in the first case and to the setting of the amount suggested by the Advocate-Depute in the second case. In the third case the Advocate-Depute made we would argue the realistic comment that if the accused was being released the amount did not matter.

It appears, therefore, that the High Court of Justiciary applied a rough tariff linked to the seriousness of the offence. This had the double disadvantage that the bail amounts if they were to be found could not reflect the gravity of the crime, and yet low as the amounts were, there was no guarantee that the accused would be able to raise the money. In at least one case³⁹ where bail was granted on appeal the accused was unable to raise the money and remained in custody until his trial.

In the case of bail applications after conviction the amount fixed was similar to the bail amounts fixed for comparable offences. There was no evidence to suggest that as the petitioner had been convicted and no longer enjoyed the presumption of innocence higher amounts of money were required.

In 6 of the 7 cases the judge suggested and fixed the amount of bail, although in 3 cases he inquired whether the petitioner would be able to raise the money. The Advocate-Depute was not consulted about this matter in any of the cases.

(ii) Finding bail

The amount of money set as bail was not accepted by an official of the High Court of Justiciary but had to be found to the satisfaction of the sheriff clerk of the sheriffdom from which the appeal originated. The discussion in Chapter VII is, therefore, applicable also to bail granted by the High Court of Justiciary. Officials stated that the sheriff clerk generally waited until he had received a copy of the successful petition before he accepted the bail money but, if delay was foreseen, it was considered that informal communication of the result by the Justiciary Office would persuade the sheriff clerk to proceed.

(b) Time spent in custody before sentence

After the refusal of bail there was often a considerable time lag before any bail appeal was decided. The longest delays occurred prior to the raising of the appeal particularly where the bail decision was reviewed under the 1963 Act. From Table XXXVI it may be seen that the average or mean time taken to hear a bail appeal after it was raised was 6.8 days and in bail application cases 8.7 days. This compares unfavourably with the maximum of 3 days⁴⁰ within which Crown appeals against the grant or the amount of bail must be heard. There is no maximum time within which an accused's bail appeal or bail application after conviction must be decided. For those refused bail after an appeal the average total time spent in custody was 77 days. For those granted bail after an appeal the average time spent in custody was 35 days. The accused who were eventually released on bail would have been liable to spend on average another 24 days in custody if bail had not been granted and raised.

TABLE XXXVI

Time Spent in Custody Until Appeal was Decided

Bail Appeals			Bail after Conviction	
	Average time (days)	No. of cases	Average time (days)	No. of cases
Time taken to raise petition	8	40	6.7	7
Time taken when bail decision reviewed	24	15	-	-
Time taken to hear petition	6.8	40	8.7	7
Time taken when bail decision reviewed	6.7	15	-	-

(c) The success of the bail decisions

All the accused who were granted and raised bail appeared to answer the charge. We were unable to obtain information about whether they had abused their liberty in any way, for example, by committing offences while on bail.

Only a small number (17 per cent) of the bail appeals made by accused, however, were granted and this raises the question whether more bail appeals could have been granted successfully. It is true that the appeal was refused in no case where a non-custodial sentence was imposed.⁴¹ Nevertheless about 52 per cent of those refused bail on appeal were sentenced to 6 months or less in custody and 17 per cent were acquitted.⁴² We argue below⁴³ that where the act for which the accused was brought before the court is not likely to be considered serious enough to warrant a long term of imprisonment then the risk to the public of the accused abusing his period of freedom is not sufficient to justify depriving the accused of his pre-trial liberty. In view of this we would argue that bail might have been granted successfully in a greater number of cases.

ON LIFTING THE VEIL FROM THE CHAMBERS HEARINGS(1) A Discussion of the Merits of the Private Hearing

The private nature of the bail appeals and applications for bail after conviction stems from considerations similar to those which affect committal proceedings in serious cases,⁴⁴ that is, the desire to prevent possible prejudice to the case of the prosecution or defence.

Prejudice may arise because representations about bail are not governed by the rules of evidence which apply at trial and therefore statements may be made which might not be proved or might be excluded in formal trial proceedings. Counsel at the hearing of the bail appeal may also reveal some factor which might prejudice the outcome of the case if it was published or even if heard by potential witnesses present at the hearing.

We found in practice, that in only 9 per cent of the cases could the publication of the information voiced in chambers be construed as in any way potentially prejudicial to the prosecution case. Potentially prejudicial information we interpreted, for example, as information given by the Advocate-Depute about the finding of incriminating letters in the possession of the accused and details of further charges which were being prepared against the accused. In 25 per cent of the cases we construed the information as potentially prejudicial to the accused. In these cases the information ranged from the unsubstantiated allegations about the accused's involvement in I.R.A. activities, to arguments about a statement made to the procurator-fiscal by the accused and which his counsel submitted would be inadmissible at the trial. In many cases, however, there was some discussion about the criminal record of the

accused and this might also be construed as potentially prejudicial to the accused.

Although the private hearings did effectively prevent potential prejudice they also had some less desirable consequences.

For example, the inevitable secrecy which has developed surrounding the deliberations in chambers which is broken only by an occasional reported case. This may cause a situation to develop in which the sheriff court personnel are unaware of the factors considered influential by the High Court of Justiciary. We did find some evidence which we discuss below, that in some respects the practice of the High Court of Justiciary differed from that expected by the personnel of the inferior courts and differed also from the law as outlined in the reported cases.⁴⁵ This problem, however, could be alleviated and might possibly be overcome by effective feed-back through formal or informal lines of communication in the courts.

A different line of objection may be based on the argument that the chambers hearings offend against the legal ideal "that justice should not only be done, but should manifestly and undoubtedly be seen to be done".⁴⁶ The chambers hearing takes place in the absence of the accused.⁴⁷ With accused imprisoned in different parts of Scotland attendance is arguably impractical on the grounds of expense and inconvenience. Unless, however, counsel takes special pains to acquaint the instructing solicitors of the deliberations at the hearing and the solicitors convey this to the accused, the accused will merely be informed that his petition has been dismissed or granted. Interested friends and relatives of the accused are also excluded from attendance. To allow justice to be seen to be done we favour an innovation which would give the accused the right to request that his appeal be heard in

open court and the choice of lifting or implementing reporting restrictions.⁴⁸ This choice would allow the accused to decide whether his case was best served by publicity or privacy. To safeguard the Crown's position we would support a right of objection on the basis of prejudice to the Crown case.

In view of the fact that bail applications in summary cases are heard in open court without any undesirable consequences it would appear that private hearings are not a pre-requisite to promote the free exchange of information. It must be remembered also that in the case of appeals relating to summary bail applications the question of bail has previously been considered in open court.

(2) Some Interesting Judicial Dicta and the Presumption of Innocence

On a number of occasions we heard the sheriff state the view that in some serious cases the bail decision should be left to the High Court of Justiciary before which court the case would come for trial. This was stated also by a sheriff in a case in which a bail appeal petition was later lodged. At the hearing of the appeal, counsel for the accused referred to this statement. The statement was criticised by the judge who emphasised that the sheriff should not abdicate his responsibility but make his own decision. Without a reported decision or a practice directive, however, it is unlikely that sheriffs will become aware of the attitude of the High Court of Justiciary on this matter. This is particularly unfortunate as, according to the views given expression to by the appeal judge, it may be more difficult to succeed on appeal than on application to the sheriff. This follows from the position adopted by the High Court of Justiciary that in an appeal the onus of proof is reversed and the petitioner

must show that the sheriff wrongly exercised his discretion.

Some other expressions of opinion were also of interest. Reference was made above to judicial displeasure with the practice whereby full details of the accused's criminal record were not given to the accused's counsel and in some cases no details at all were given.⁴⁹ There was also some indication that the judge would perhaps not be adverse to some fuller inquiry into the merits of a case. Indeed, in one case dissatisfaction with the information available was expressed, as it was thought that the matter could be dealt with properly only by judicial consideration of the full precognitions.

(b) The presumption of innocence

In the reported case of MacLeod v. Wright it was stated that "the matter of granting bail was not a question which raises issues regarding the presumption of innocence."⁵⁰ This view reappears again in the reported cases and in academic writings.⁵¹ We found, however, that in the privacy of the chambers bail hearings the presumption of innocence was treated as a relevant consideration by both the judge and opposing counsel. Specific reference was made to the presumption in 5 cases and the context made it clear that the presumption was not regarded as merely a meaningless formula. In one case the judge, in rejecting the argument of the Advocate-Depute that appeals were never allowed when the offence charged was committed while on bail, pointed out that such a submission was contrary to the presumption of innocence. In another two cases the judge said that in view of the presumption of innocence he was reluctant to refuse liberty and he inquired of the Advocate-Depute whether any statements had been made by the petitioners. In reply the information was given that statements admitting guilt had

been made. Counsel for the petitioners said that objections would be taken to the admission of these statements at the trial because they were obtained under duress and submitted that he was entitled to rest on the presumption of innocence. Counsel for the accused in another case similarly rested on the presumption of innocence. In the last case the judge, on receiving information from the Advocate-Depute that a Section 31 letter⁵² had been tendered, pointed out that this was rather awkward for the accused's case and based his dismissal of the bail appeal partly on this ground.

The application of the presumption of innocence does not necessarily lead as some judges and writers have thought to the conclusion that all persons must be allowed the liberty of the innocent. Because they have found such a conclusion unacceptable they have argued that the presumption does not apply to the question of bail.⁵³ We have demonstrated, however, that this is not borne out in practice. It is possible we would argue to recognise the applicability of this presumption to the question of bail without reaching the conclusion which has been found unacceptable.

The effect of the presumption is we think to make bail available to an accused even if any evidence adduced tends to indicate that he is guilty of the offence charged. A full inquiry into the merits of a case is not now accepted practice but the presumption ensures that a person pleading not guilty will not be treated as guilty on incomplete evidence without a full trial. The benefit of the presumption may be lost, however, if the accused indicates officially that he is pleading guilty, for example, by tendering a S. 31 letter. Although presumed innocent and therefore prima facie entitled to bail there are considerations of public interest, for example, whether the accused is likely

to interfere with the process of justice which may outweigh the interest of the accused in his liberty.

"Although ideally the ... system of law is based on equal justice for all men, in reality this is not always so. There are times when the scales of justice are weighted or tipped in favour of the rich and the "connected", and even at times in favour of the guilty, while the poor, the friendless, and sometimes the innocent are punished."

-- Goldfarb.¹

"... the system of bail was never intended as a denial of justice, as a sentence before trial. It was intended as a device to make sure that a person charged with a crime would be available for trial."

-- Goldfarb.²

IX

CONCLUSIONS

AND

RECOMMENDATIONS

Most of the reforms which we recommend were prompted by defects which we identified in the practical operation of the law rather than by defects in the common law and statutory provisions regulating bail. This was in some measure due to the fact that the letter of the law was sometimes distorted in practice. Also important, however, was the fact that in many circumstances the operation of the law resulted in undesirable consequences which could not be deduced merely from an examination of the legal framework.

In this final chapter we attempt to draw together the discussion and findings of previous chapters in order to present our major recommendations.

(1) Bail Decision-Making

Because we considered it important that the bail decision should be based on accurate, relevant and sufficient information³ and that the interests of both the accused and the public should be fully protected, we were concerned to identify any defects in bail decision-making. We looked at bail decisions, therefore, not in isolation but in their organisational setting.

There is no evidence to suggest that the patterns of decision-making which we identified were peculiar to bail decisions, or even

peculiar to decisions made by official responsible for the administration of criminal justice. The decision-making patterns and their functional or dysfunctional effects, therefore, may be of some interest to those more generally concerned with organisational decision-making.

At the police level the general pass pattern,⁴ which we identified using Guttman scalogram analysis, effectively reduced the opportunity for the exercise of discretion. This was due to the fact that the police decision-maker had merely to assess whether certain criteria, settled in advance, were satisfied. He did not have to evaluate the weight to be attached to the different variables. In the general pass pattern, failure to satisfy any of the criteria was sufficient to prompt a negative decision. In addition, the criteria were specific rather than vague and open-ended and this reduced further the discretionary area.

The police decision-maker did not suffer from lack of information. A great deal of information was available to the police, and in all the sample cases the decision-maker had information concerning the variables which were considered relevant. Indeed, because of the nature of the decision pattern, it would be impossible to reach a decision without such information.⁵

The general pass pattern is, in our opinion, well suited to any organisation in which it is desired to encourage uniformity of decisions, or to minimise the decision-maker's discretion and hence minimise the possibility of abuse of such discretion. There are, however, limits on the extent to which narrow criteria, laid down in advance, can deal satisfactorily with future cases and adherence to the criteria may result in "hard cases". There is also the danger that when the criteria become outdated the decision-maker will have little or no experience of the effect of applying new solutions.

At the police level, these dangers were minimised because the police had the power to release only persons charged with minor offences, and they appeared to form a fairly homogenous group. We were in favour of the general pass pattern in view of the restrictions it placed on police discretion. If, however, the categories of person eligible for bail were widened to any great extent we are doubtful whether the same decision-making pattern could be successfully retained. The danger of "hard cases" would increase while the necessary widening of criteria would erode the restrictions on discretion.

The non-consensual suggestion-acceptance pattern which was typical of the burgh court⁶ was one in which the official decision-maker, the magistrate, rubber stamped the decision of another official. This may be functional in some organisations, in that it protects the official who effectively make the decision from undue influence and criticism, or because it preserves the formal hierarchy while reducing the workload of the more important officials. The existence of such a pattern in the burgh court and in some cases, notably the continuation cases in the sheriff court,⁷ is however, open to serious criticism. In these cases the effective decision-maker was the prosecutor and the interests of the accused were not sufficiently protected. In the burgh court, the lack of protection was due to the fact that almost all accused lacked legal representation for which legal aid was not available. In the sheriff court the duty solicitor made no attempt to obtain release for the accused. This regrettable failure on the part of the solicitor may, as we argued above,⁸ be due to the solicitor's experience of judicial sympathy to the prosecutor's motion at this procedural stage, and the absence of any right of appeal.

The official decision-maker had no information on which to base a decision on the merits of a particular case, nor generally did the prosecutor give any information from which the decision-maker could assess the merits of his motion. We consider below some possible improvements.⁹

The same objections do not apply to a similar pattern, the consensual suggestion-decision pattern which often occurred in the sheriff court.¹⁰ In this pattern also the sheriff rubber-stamped a suggestion when he had little or no information available. There was, however, an important difference in that the suggestion represented an agreement between officials, the procurator-fiscal and the solicitor who were appointed to protect the different interests involved. Where the interests of the effective decision-makers are together congruous with the interests of the official decision-maker, as they are in bail, we have argued¹¹ that it is not a defect if the official decision-maker does not have sufficient information about the relevant variables, provided the effective decision-makers are so informed.

It is open to question, however, whether in the bail situation the rubber-stamping of the agreement serves any justifiable function. It does assure that responsibility for the release or imprisonment of the accused is vested in the sheriff, which is we think appropriate when the representatives of the different interests cannot agree. Where agreement has been reached, however, waiting for the automatic acceptance by the sheriff could cause avoidable delay in the release of the accused, without any countervailing benefits. It is doubtful if much delay was caused in the sample cases, because the solicitor generally interviewed the accused only a short time before the accused's appearance in court. If there was any agreement reached between the

solicitor and procurator-fiscal, it was reached after this interview and in many cases agreement was reached in court. But if the solicitor and procurator-fiscal had, as we recommend below,¹² an earlier opportunity to discuss a case, then the practice of waiting for the sheriff's approval would cause delay. In such circumstances we would advocate dispensing with the sheriff's consent. We do not think that this would require any change in the law because although discretion to grant bail is vested in the sheriff, the Crown also has wide powers of release.¹³

The last major pattern which we identified was typical of the bail appeals in the High Court of Justiciary¹⁴ and also occurred to a more limited extent in the sheriff court.¹⁵ This pattern was distinguished by the fact that the officials representing the different interests adopted their traditional adversary positions, and gave information to the decision-makers to support their opposing motions. The official decision-maker for the first time took an active part. He decided between the competing suggestions and in some cases sought further information on which to base a decision. Lawyers of the common law tradition have long proclaimed the merits of the adversary system. They believe that if the strongest possible case is argued in support of the different interests, then the judge is in the best possible position to make his decision.¹⁶ Obviously such a pattern can only be successful where the decision-maker does not have to assess any interests which are not represented. Success also depends on the representatives of the different interests being fairly equally matched in proficiency and on their being fully briefed. Although the bail representations in the sheriff and High Court of Justiciary were made by qualified lawyers, their briefing was in some cases far from adequate. We criticised in particular the briefing of counsel at the

appeal stage.¹⁷

As in this study, inadequate information has been highlighted as a serious problem in many bail research projects in other jurisdictions.¹⁸

The remedy which has been applied with considerable success in America, and by which we are very impressed, is the Vera "community roots" scheme which involved the use of information sheets.¹⁹ This scheme was designed to give information to the judges which was independently verified, and which was proved by experiment to be relevant to the criterion binding the courts, namely whether the defendant would appear for trial.

In England, there has been considerable support for the introduction of similar information sheets to overcome the problem of inadequately briefed magistrates. Most recently this has been advocated in a Home Office report, although it is suggested that the forms would only provide information which:

"would in the great majority of cases be no more than could be elicited from the defendant himself in court, but it would take up a great deal of scarce court time to obtain the information by questioning an often inarticulate defendant in court ... The information on the form would be confined to the defendant's community ties. It would not cover details of his previous convictions; we consider that it would be preferable for this information to continue to be provided by the police who are in the best position to obtain it quickly and accurately".²⁰

Any improvements to be gained by the implementation of such a proposal would we think be illusory. The police, who may both investigate and prosecute in England, cannot be considered independent. The accused would be much better served by free legal representation. In addition, granted that the magistrates are inadequately informed, there has been no attempt to find out what missing information is considered relevant by the magistrates. There would be little gained by supplying information about the defendant's community ties if this information

is considered irrelevant, or of minor importance, by the magistrates. There may be a case for arguing that the existing criteria used by the English courts should be changed to the criteria of community ties, but such a far reaching reform has not been put forward.

The lack of independent verification and inadequate concern about the type of information which is considered relevant by the magistrates are we insist major defects of the English proposals. We also have reservations about whether the use of information sheets is the best method of putting information before the court. In both America and England, free legal representation is often not available to the defendant at the bail hearings. This is not true of Scotland as, in the overwhelming majority of cases in which a decision about bail is made, the accused has free legal representation. The provision of information sheets by some third party does not fit easily into the traditional accusatorial system. This system, as we have discussed, should provide a check on the accuracy and sufficiency of the information given to the judge. It is true that reports such as social background, borstal and medical reports are regularly given within the context of this system but these reports are distinguishable, in that they are prepared by persons, who have specialised training and knowledge not possessed by the prosecutor or solicitor. We are unable to see any advantages in introducing information sheets to the Scottish bail hearing, even if the information was relevant and independently compiled. Indeed, it is difficult to conceive what status they could be given. If, as might well happen, information given by the solicitor or procurator-fiscal differed from the information on the information sheet, it is unlikely that preference could be given to the information sheet rather than the representations of the prosecutor or solicitor, as this would make a mockery of such representations. In our opinion the best method

of protecting the accused and ensuring that informed bail decisions are made is to improve the system of legal representation at bail hearings. This would not always result in the judge being fully informed where the solicitor and procurator-fiscal agreed.²² But where the different interests are protected and the effective decision-makers are fully informed, the official decision-maker's lack of information is not in our opinion a defect.

Where there is disagreement, however, the operation of the adversary system should ensure that relevant information is made available to the judge. We found that, with some exceptions, this happened in practice.²³ The system of legal representation in Scotland is, nevertheless, open to improvement. Major defects which we pointed out were firstly, the lack of legal representation in the burgh court, and we emphasised the great need for legal representation in this court.²⁴ Secondly, we criticised the passive role played by the solicitor at some bail hearings, especially the continuation cases, which we thought might be improved if the accused was given a right of appeal at that procedural stage.²⁵ Thirdly, we argued that the briefing of the prosecution and defence representatives was inadequate.²⁶ Generally the procurator-fiscal and Advocate-Depute were very well informed. They did have less information about the family and background of the accused than other matters but this information, and indeed any other information, could easily be provided by giving appropriate instructions to the police in the case of the procurator-fiscal, and instructions to the various procurators-fiscal in the case of the Advocate-Depute. The briefing of the solicitor appeared to be reasonable. One improvement which we suggested was that the solicitor should have a right to receive a copy of the police record, identical to the one made available to the procurator-fiscal.²⁷ We were however very critical, as was one of the judges, of the briefing of

counsel at the appeal stage.²⁸ In many cases the advocate appeared to have received little or no information from the instructing solicitor and this was not improved by the practice of handing over instructions to another advocate a few minutes before the bail appeal. It is difficult to see how this could be improved as judicial criticism did not produce any noticeable improvement. Presumably, however, if judicial criticism was sufficiently frequent and severe, counsel would ensure that they were adequately briefed. The provision of a copy of the accused's criminal record to the solicitor might help as this would probably be forwarded to counsel. The final criticism referred to the lack of emphasis which the accused's solicitor and counsel placed on factors relating to criminal record which the judge obviously considered relevant and which the prosecutor emphasised.²⁹ This might have been due partly to inadequate briefing, and partly to a lack of appreciation on the part of the accused's representative about the importance attached by the judge to the different criteria. The improvement in briefing which we recommended above,³⁰ and the provision by the judge of reasons for his bail decisions³¹ would probably produce a marked improvement.

(2) The Right to Challenge Custody and Apply for Bail

The right given to a person in custody to challenge his custody at various procedural stages is, we have argued,³² the main source of protection afforded in Scotland, as Scots law no longer gives an arrested person any right to be released before trial.

We have described above³³ the fairly numerous opportunities which the accused has been given extending from application to the police, through

application on court appearance and including review and appeal. Nevertheless, during our study we identified some areas in which changes would give the accused additional protection without jeopardising the public interest.

Making available opportunities to challenge custody is of little help to an accused if he is unaware of or does not understand the provisions. This is not a problem for accused who are legally advised and represented but it is a problem at the police and burgh court level. It is possible for accused to be unaware of the police power to grant bail. The notices which informed the accused about bail and other rights were we reported missing from the police cells.³⁴ A simple change in procedure would overcome the alleged destructiveness of accused in the cells. The details of the notice could be incorporated into the form which the accused signs when he hands over his property. Signing such a form and receiving a duplicate copy would ensure that the arrested person knew about bail.

The magistrate in the burgh court is under no duty to consider bail where the issue is not raised. An accused uninformed about bail or overawed by court procedure may find himself remanded in custody without any consideration given to the need for custody. One way of overcoming this would be to place a duty on the magistrate to consider bail even if it was not requested. The lay magistrate, however, showed no enthusiasm for inquiring into the question of bail and we would, therefore, suggest that this is yet another reason to support legal representation in the lay magistrates courts.

There is also a need to extend the opportunities to challenge custody which are presently available.

One extension which we believe to be necessary is the extension of release provisions at the police level. The existing law limits the possibility of release before first court appearance to arrested persons charged with very minor offences. The effect of this was that any person who was to be brought before the sheriff, even on a summary charge, had no opportunity to obtain release until he appeared in court. Many of these accused were later released by the sheriff and could, we are convinced, have been equally safely released before appearance in court. Although, under English law the police have wider powers of release,³⁵ we do not favour such an extension in Scotland. Extending the police powers would involve an unacceptable increase in police discretion and provide greater opportunities for the abuse of such discretion. Also important is the fact that this extension of police power would conflict with the wide discretion of the prosecutor who is always in Scotland, though not in England, an official independent of the police. Instead we favour some extension of the existing practice whereby police consult the appropriate procurator-fiscal to discuss release.³⁶ Such an extension is particularly desirable to cover the weekend and holiday periods. Ideally, a procurator-fiscal should be on hand to discuss all cases but even directions from the procurator-fiscal's office to consult in the case of accused who are likely to be tried on summary procedure and who have a fixed address, would represent an improvement.

Another way in which release before court appearance could be extended would be to introduce the English procedure of "backing a warrant for bail".³⁷ By this procedure the magistrate, when granting a warrant to arrest, also directs the police to liberate the accused on finding a certain bail. With one reservation we favour introducing such a practice in Scotland. The reservation concerns a matter which we

discuss more fully below,³⁸ that is, whether the person ought to be cited to appear rather than arrested. If there are, however, circumstances justifying arrest on warrant rather than citation, then backing a warrant for bail is compatible with Scottish procedure. This practice, which we think requires statutory authorisation, would ensure an early release from police custody without extending police discretion.

Under the existing law the accused has no right to appeal a bail decision in solemn procedure at the stage of continuation for further examination. This may be due to the influence of older ideas about further examination. It was not thought necessary to give the accused a right to apply for bail at this stage because further examination was considered to be for the protection of the accused.³⁹

Now, however, no effective judicial examination takes place and we suggested that the lack of this right of appeal perhaps inhibited solicitors from asking for bail at this stage.⁴⁰ In view of this, and the fact that a right to appeal has been given to the prosecutor and to the accused in summary procedure, we recommend that in solemn procedure the accused should be given a similar right.

The review and appeal provisions were in general adequate. Two improvements, however, could be made.

The first which we strongly urge, is that the judge should always give a reason for his decision to refuse or grant liberty. These reasons should be specific to the case and not merely a standard phrase like, "not in the interests of justice". To be successful on appeal it is necessary to show that the sheriff or magistrate wrongly exercised his discretion. If specific reasons were given, both the decision to appeal by the procurator-fiscal or the accused, and the determination of that appeal by the judge would be greatly facilitated.

A second improvement which might be made would be to make public the chambers hearings, particularly in appeal cases where the accused is not generally present. Subject to safeguards which we discussed above⁴¹ this would allow the accused, if he desired, to have publicity for his bail application and enable his friends and relatives to attend.

(3) The Criteria Governing Release

Although the conferral on the accused of extensive rights to apply for bail does provide some protection to accused from pre-trial custody, the protection is essentially a formal one. If the criteria adopted by the decision-makers result in the refusal of all or most applications for release, the accused's right to re-apply will afford little relief from custody.

In our study we found that, at all levels, the release rates which resulted using the existing criteria were not high.

The police granted bail to only 22 per cent of those arrested persons whom they had the power to release.⁴² This low release rate was partly explained by the fact that many persons were arrested less than 12 hours before the morning court session and many were under the influence of alcohol. We criticised the police criteria, however, as unnecessarily restrictive in two major respects. Thus we pointed out that the chief constable's directions prohibited release where certain types of offences, notably property offences were charged.⁴³ Secondly we criticised the police insistence on money as a requirement of release.⁴⁴ The amount of money demanded was closely related to a scale of seriousness of offence as perceived by the chief constable. We argued that by abandoning these criteria the number of persons released could be increased

without undermining the existing police success rate.⁴⁵

The decision-maker in the burgh court relied entirely on the recommendation of the prosecutor. We consider this to be an abuse. Our reasons and criticisms have been given above in some detail.⁴⁶

Very few accused, only 17 per cent of the sample, were granted liberty on appeal after refusal of a bail decision. This must to some extent be explained by the fact that the judge considered whether the sheriff had wrongly exercised his discretion using the accepted criteria. Most of the decisions could be easily justified in the light of these criteria.

The great majority of the pre-trial release decisions made in court were made by the sheriff. The criteria adopted by the sheriff were described above⁴⁷ where we noted the importance attached to the accused's criminal record. Fixed address was also considered as an indicator of appearance for trial. In the majority of cases, however, the question at issue was not whether the accused would appear but whether he would commit offences during the pre-trial period. We are of the opinion that the bail decision has in effect turned into a decision about whether preventive detention is merited in view of the accused's past record of criminal involvement.

The sheriff's refusal of bail resulted in 50 per cent of the sample cases spending sometime in custody.⁴⁸ We did not find any significant relationship between the bail decision and the plea, finding or sentence.⁴⁹ We did comment unfavourably, however, on the cases in which the pre-trial custody represented a more severe penalty than the final disposal.⁵⁰

Using the criteria which we described, the sheriff was tolerably successful in predicting non-appearance which occurred in less than 4 per cent of the cases, but he was much less successful predicting the commission of further offences which occurred in at least 13 per cent

of the cases.⁵¹ There was no clear answer to the question whether some of the accused refused bail could have been successfully released though we did note in some cases that the offender's conduct was not considered serious enough to merit a custodial sentence.⁵²

The operation in effect, if not in name, of a system of preventive detention before trial has attracted little interest or criticism. This is difficult to understand in view of the controversy aroused by and resistance to preventive detention as a form of sentence after conviction.⁵³

The system of criminal justice in Scotland is influenced by the ideas of reformation and deterrence but we think that retribution is still generally accepted as a limiting principle. Thus the extent of the deprivation of liberty which is imposed as punishment is limited by the seriousness of the offence committed. Preventive detention has attracted criticism because it offended against this principle and authorised the imposition of long custodial sentences on 'persistent criminals, even though the offence charged was not itself serious. It is true that the public must be protected but the law provides protection by attaching sanctions to certain types of behaviour and not by rounding up and detaining in advance persons thought likely to commit offences. The system of criminal procedure has been developed to deal with the difficulties of ascribing criminal guilt and numerous protections have been incorporated to prevent the conviction of an innocent accused. Ascribing guilt is a hazardous task which pales to insignificance in comparison with the problems of predicting future criminal activity.

Sophisticated attempts to predict the commission of criminal offences have not been particularly successful.⁵⁴ It is not surprising, therefore, that the sheriff's simple attempts based on limited inform-

ation and unverified criteria were not successful. What is surprising, is that the justification of his attempt to prevent hypothesised criminal conduct has not been seriously questioned. If the principle, that society must bear the risk of certain types of conduct for the greater good of individual freedom, is accepted then pre-trial preventive detention cannot be justified in cases where, even if the accused is convicted of the offence charged, he is unlikely to be removed from society for any length of time. If society can stand the potential harm of freeing, after the completion of their sentence, convicted prisoners, many of whom are likely to commit further offences, then it can also bear the lesser potential harm of harbouring a person who is merely suspected of an offence.

We take the view that the criteria which are presently used by the courts are neither justified nor successful. Minor changes in the criteria would be unlikely to produce any noticeable improvement. Reform, if it is to be successful, must be far reaching. There are two major directions such reform could take.

Firstly, the attempt to use bail as a method of preventive detention could be abandoned and the likelihood of appearance for trial could be made the only relevant consideration. In America, likelihood of appearance is the only legal ground and release programmes based on "community roots" have had considerable success. We have raised some doubts, however, about the appropriateness of "community roots" in the Scottish situation.⁵⁵ In addition, as the American experience has also shown, there is a need felt in some circumstances to protect the community from the defendant during the pre-trial period.⁵⁶

The second possibility which we support is to recognise that factors, other than the prevention of flight, are important considerations and to make the preventive detention decisions explicit, incorporating safeguards for the protection of the accused. This involves abolishing the traditional bail hearings and introducing preventive detention hearings. Such a system may be more or less restrictive than the present bail hearings, depending on the grounds of detention which are adopted. We take the view that detention before trial can only be justified where there is a serious risk to the public. Such a risk does not, in our view, exist where the accused is to be tried by summary procedure and is liable to a sentence of imprisonment of six months or less.⁵⁷ Preventive detention hearings should be restricted to solemn procedure. This means that in summary procedure there would in effect be automatic release before trial.⁵⁸ There may be circumstances, even in summary procedure, where the prosecutor considers that there is a serious risk to the public, or a risk that the accused will abscond. To take account of this we suggest the introduction of another new procedure. The prosecutor should be given the right to apply to the judge both for custody and an accelerated diet of trial to be fixed not later than the third lawful day after the accused's appearance in court. If granted, the accused would be kept in custody but only for a very short period. The accused should have the right to delay trial if the period was too short to allow him to prepare his defence. The prosecutor would be unlikely to abuse this procedure because the pressure of work created would be considerable. One difficulty of this proposal is the fact that the prosecutor has discretion whether to follow summary or solemn procedure. Although the prosecutor might be tempted to avoid the release provisions by charging accused on solemn procedure, the additional work of preparing for jury

trials would probably be an effective deterrent.

As regards solemn procedure, it is necessary to determine the circumstances which would justify the issue of a detention order. Using the present criteria adopted by the courts, it is possible to justify refusal of liberty for any fear, no matter how remote, that the accused might commit any type of criminal offence. We recommend that the type of circumstances justifying preventive detention should be much more closely defined. We support limitations along the lines of those put forward by the American Bar Association.⁵⁹ Thus, we suggest that the prosecutor should have the right to apply for a detention order only in the following circumstances: where the accused is charged with an offence involving the infliction of, or a threat to inflict serious bodily harm on another, and there is a risk that, if released, he will threaten or inflict such harm; where the accused is charged with any offence and there is evidence from his criminal record, or other evidence, that there is a risk that he will threaten or inflict anybody with serious bodily harm; where the accused is charged with any offence which he is alleged to have committed while at liberty pending trial; where the accused is charged with an offence and there is reasonable cause to believe that, if released, he would leave Scotland for the purposes of avoiding prosecution or hiding or disposing of the fruits of the alleged offence. Generally, the fear of repetition of offences not involving violence, would not justify detention. There is always the power to arrest accused if they do in fact commit such offences.

The detention hearing should replace the present bail hearing, and the existing rights of legal representation, review and appeal, should be retained, subject to the improvements suggested above.⁶⁰

Where the prosecutor does not seek a detention order, the accused

should be released subject to any security which is authorised by the law.

It may be appropriate at this point to voice some doubts about the underlying philosophy of the existing system which makes decisions about pre-trial release necessary.

Arresting persons reasonably suspected of an offence who pose a serious continuing danger to a particular individual or public order is obviously justified. Less justifiable, however, is the use of arrest, whether with or without warrant, merely as a method of bringing persons before a court. Doubtless arrest may be the only way of compelling attendance in some cases. Many accused, however, as both bail and citation experience show, will attend in response to a court order, where necessary arrest for non-appearance is always possible. Perhaps the main obstacle to extending the use of citation is that arrest has considerable attractions for the police when they are investigating an offence. The major attractions are the opportunities which arrest gives to search and question the accused. In many cases, however, search will be irrelevant where the offence was not committed about the time of arrest and statements in response to police questions obtained from the accused after arrest will not be admitted as evidence by the court. Nor does the police investigation necessarily depend on arrest. The police have the power to ask questions and may search a person if they have obtained the person's consent or have successfully applied for a warrant.⁶¹ Resort to arrest should be reserved, we submit, for situations where it is the only reasonable alternative.

(4) The Security Demanded For Release

The criteria of release adopted by the decision-maker did not necessarily determine whether the person would in fact be released. We found that the release rate was also affected by the form of security which was demanded. Whatever provisions are adopted to govern release, therefore, attention must be given to the security aspect.

At all levels we were very critical of the Scottish system in which money had to be deposited as security for release.

With the possible exception of some cases in the burgh court, we did not find that the deliberate demand of bail money in excess of the means of the accused was used, instead of refusal of bail, to ensure that the person remained in custody.

The amounts of money required as security were in fact very low. Bail amounts of 10 pounds or less were common, even where serious offences were charged. Fear of forfeiture of such small sums cannot be considered an effective inducement to appear especially as many accused were liable, if found guilty, to receive substantial sentences of imprisonment. Indeed in some of the more trivial cases the security was a positive disincentive, as the accused might become aware that if he failed to appear, the bail money might be forfeited and that might be the end of the matter.⁶²

Despite the low bail amounts, many people spent a period in prison because they were not immediately able, and in some cases were never able, to raise the money. This was aggravated by the fact that many of these persons did not eventually receive a custodial sentence.⁶³

In view of the difficulties which many accused have in raising the

present low amounts of bail, it is obviously impossible to raise bail money to a level where fear of forfeiture might be an effective inducement to appear. We are of the opinion that deposit of money is at present irrelevant as a form of security. It is also distinctly harmful in the way it discriminates against the poorer accused who are condemned by lack of money to remain in custody, despite the fact that a judge has decided that in principle they can be safely released.

One method by which money security could be increased would be to operate in practice the bail bond system authorised by the law. We described above⁶⁴ how this legal form was converted into a deposit system due to the practice of the clerks of court. The clerks of court have for long demanded that, in order to prove that he has sufficient funds, a cautioner must deposit the money guaranteed in the bail bond. After this deposit, the clerk allows the cautioner to sign a bond promising that the money will be paid over in the event of the non-appearance of the accused. If the bail amounts were raised, however, some accused would inevitably find it difficult to find cautioners able to guarantee the larger amounts. For example, under the present system a woman receiving state benefits will be permitted to sign a bond as cautioner, provided she is able to deposit the small sum required. Such a woman, however, would probably be unable to persuade the clerk of court that she was a cautioner of sufficient means to guarantee a bond for a much larger amount. The bond system we think suffers from the same defect that characterises a system based on the deposit of money in that it favours those accused who have associates of some wealth and property. Neither the middle class accused nor the professional criminal are likely to experience difficulty in providing cautioners, but the same cannot be said about the unemployed unskilled labourers who form

the majority of custody cases.

The abolition of bail, based as it is on the provision of financial security, would relieve police and court officials of work,⁶⁵ would reduce the strain on prison facilities⁶⁶ and would remove one of the more blatant examples of legal discrimination against the poor.

Liberating persons without financial security is not a novel method of release. The sheriff, as we described,⁶⁷ sometimes released accused before trial merely on an order to appear and this was the standard method of release for those accused who pled guilty and sentence was deferred to allow a report to be prepared. Non-appearance in these cases was no greater than for those released on bail.

We have argued that amounts of money set as bail cannot be considered an effective deterrent of non-appearance and yet non-appearance was rare. We are of the opinion that the majority of accused are unlikely to abscond because of the practical difficulties involved in disappearing in modern society and because of a reluctance to leave family and friends to live under the threat of re-arrest. Although we do not believe that the number of potential absconders is high, we think that the judges might be more willing to take a risk and release an accused if a more effective deterrent existed. For this reason, therefore, we recommend that a new offence should be created to replace financial security.

We suggest that wilful failure to appear after release from custody and in defiance of an order of a judge or designated police officer to appear in court at a specified time and date should be made an offence. The offence should be prosecuted on summary or solemn procedure at the discretion of the procurator-fiscal and should carry a maximum sentence of 12 months imprisonment. In order to impress upon the accused the importance of his attendance and the penalty attached to

failure to appear, we suggest that before release the accused should be required to sign and should receive a copy of a document, which sets out the date and time of appearance and the penalty for non-appearance.

Many countries have experimented with other methods of ensuring a person's appearance. These methods range through a wide variety of forms of conditional release to forms of supportive release.⁶⁸

In general we do not favour a system of release to which conditions may be attached for the purpose of discouraging non-appearance. We are not convinced that there is any need to restrict the liberty of persons to prevent them absconding. Secondly, we suspect that if a person intends to disappear only custody will prevent him. Attaching conditions such as confinement to the city boundaries, or weekly or even daily reporting to the police will not prevent a person from absconding. Conditions, we fear, may be unnecessarily restrictive and involve considerable problems of enforcement. For example, how are the police to ensure that an accused complies with the reasonable restrictions placed on his activities, movements, associations and residences. This is a form of conditional release recommended by the American Bar Association.⁶⁹ It is also possible that the accused might break a condition such as residence at a specified address, without any intention to abscond. If, for example, an accused is thrown out by his family, is he to be brought before the court for breaking a condition, even if he has found alternative accommodation?

Non-appearance in any event is not the most frequent issue before the courts, they are more often concerned with the question of whether the accused will abuse his liberty by, for example, committing offences. Conditions are not appropriate in this context. There would obviously be no point in making the non-commission of offences a condition of

bail, as commission of an offence per se makes a person liable to arrest and revocation of release.

We are more sympathetic towards attempts to develop forms of supportive release. Such attempts include the Vera employees who attempt to keep in touch with released defendants;⁷⁰ modified surety systems where the surety does not incur any financial liability but a responsible friend or official arranges to supervise the released person and help him, for example, to find work or accommodation during the pre-trial period;⁷¹ the Japanese form of suspension called Oazuke;⁷² and the provision of accommodation such as bail hostels.⁷³ There is we believe a need for some form of supportive release in Scotland.

Assistance during the pre-trial period should be generally available but especially to those accused who have difficulty in coping with life in society and end up without any fixed address. The Social Work Department should be given responsibility for the provision of such help which would include arranging accommodation. This would mean that the accused or his solicitor when applying for liberty would also have the opportunity to ask for pre-trial assistance. The judge would then have some alternative to prison to consider. An interview with a social worker could easily be arranged, as at present a social worker always attends court in case the judge orders a social background report. The contact with a social worker, at the request of the accused before trial, might possibly have more effect than the imposition of his services after conviction. In addition this service would probably be less expensive than keeping the accused in prison.

(5) The Conditions of Pre-Trial Custody

Where imprisonment is considered to be necessary the consequences of pre-trial custody should be mitigated as far as possible. Pre-trial custody is not in theory a punishment and the period and conditions of custody should be as favourable as is consistent with security.

Such a principle has been accorded some recognition by the law which imposes a maximum period of pre-trial custody and by the privileges, for example, of not being obliged to wear prison clothes or do work which have been given to untried prisoners.

The strict limitation of 110 days imposed in solemn procedure on the pre-trial period is a very important safeguard.⁷⁴ In this respect the Scottish system compares very favourably with many other legal systems. There is, however, no limit imposed in summary procedure and in a few cases the period of pre-trial custody approached 110 days. In view of the tendency of increasing delay in summary procedure due to a backlog of cases, we think it important to fix a maximum period. The preparation of cases in summary procedure generally involves much less work than the preparation of a case for jury trial. The maximum sentence in summary procedure is limited to imprisonment of 60 days in the lay magistrates court and 3 or 6 months in the sheriff court. If our recommendations limiting the imposition of custody at the pre-trial stage⁷⁵ are not accepted, we would recommend that the maximum period of pre-trial custody in summary procedure should be fixed by law at 28 days.

Another time limit which we recommend is a limit of 72 hours after notification to the High Court of Justiciary, as the period within which appeals against refusal of liberty raised by an accused must be heard. It may be recalled that this limit presently applies only to bail appeals raised by the prosecutor.⁷⁶

Although there are theoretical differences between pre-trial imprisonment and imprisonment after sentence, the accused is unlikely to appreciate the conceptual subtleties. Because of this, we recommend that the deduction from the period of sentence of time spent in pre-trial custody should be automatic, and not left as at present to the discretion of the judge.⁷⁷

(6) Suggestions for Further Research

Due to limitations of time and resources we were unable to explore some practices which seemed to merit further research. Some of these were directly relevant to bail. These included the circumstances in which arrest was used instead of citation, the exercise of police discretion to release arrested persons when no charge was made, the Lord Advocate's discretion to grant bail, the conditions of unconvicted accused in prison and the release of children after arrest.

The research also raised many other issues which attracted us as research subjects. For example, our finding that some bail decisions were based on inadequate information made us question the adequacy of information made available for other decisions. The inability of the unrepresented accused to cope with the bail hearing raised doubts about his ability to cope with more complicated procedures especially the trial. Bail money, like the non-provision of legal representation, are examples of financial discrimination in the criminal justice system and we became interested to discover if any other discrimination existed. The question whether the prosecutor dominated procedural stages other than bail also seemed worthy of further consideration.

The administration of criminal justice has not yet attracted much research in Scotland. It is hoped that this study will help compensate for this neglect not only by providing valuable information about release pending sentence but also by provoking further research about the issues to which we were attracted or other issues identified by the reader.

REFERENCES

CHAPTER I

1. Hume, Commentaries on the Law of Scotland Respecting Trial for Crimes (Edinburgh : 1800), vol. I, 139.
2. This section pp. 2 - 6 is based mainly on information and discussion in E. De Haas, Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275 (New York : Columbia University Press, 1940).
3. Ibid, 5 . De Haas discussing O. von Gierke Deutsches Privatrecht (Leipzig, 1895 - 1917), vol. III, 17.
4. O.W. Holmes Jr., The Common Law, ed., M. Howe, (London : MacMillan and Co. Ltd., 1968), 196.
5. Ibid., 249.
6. De Haas, op. cit., 129.
7. This system of pledges for payment of wergeld antedated the system of recourse to court. When a more organised system of administering justice emerged, the problem of compelling attendance in court was tackled in a similar way to the problem of ensuring payment of the wergeld, namely by requiring pledges.
8. Frankpledge was a system of general suretyship dating in England from the eleventh century. Under this system everyone over the age of twelve years was obliged to have a surety to "bring him to the performance of every legal duty". II Cnut 20, quoted De Haas, op. cit., 19.
9. W.S. Holdsworth, A History of English Law (London Methuen & Co. Ltd., Sweet and Maxwell, 1936), vol. II, 104.
10. De Haas, op. cit., 30.
11. Ibid.
12. Northumberland, Wales and Scotland did not have a frankpledge system. Ibid., 50.
13. Ibid., 49.
14. Ibid., 7.
15. Ibid., 7 - 10.
16. Hale, quoted by Holdsworth, op. cit., vol. IX, 106.
17. O.G.S. Crawford, Topography of Roman Scotland North of the Antonine Wall (Cambridge : University Press, 1949). Crawford at 133 argued that the Roman armies may have penetrated as far as the Moray Firth.
18. Lord Cooper, ed., Regiam Majestatem and Quonian Attachamenta (Edinburgh : Stair Society, 1947), vol. 11, 192.

19. D.B. Smith, 'Roman Law', in An Introductory Survey of the Sources and Literature of Scots Law (Edinburgh : Stair Society, 1936), vol. 1, 171.
20. D.B. Smith, 'Canon Law', in An Introductory Survey of the Sources and Literature of Scots Law (Edinburgh : Stair Society, 1936), vol. 1, 183.
21. Ibid., 184.
22. W.F. Skene, Celtic Scotland : A History of Ancient Alban (Edinburgh : David Douglas, 1886).
23. C. Innes, Scotland in the Middle Ages : Sketches of Early Scotch History and Social Progress (Edinburgh : Edmonston and Douglas, 1860), 175.
24. Who are the Scots? (London : British Broadcasting Corporation, 1971).
25. Ibid., 72.
26. Innes, op. cit., 176.
27. J. Cameron, 'Celtic Law', in An Introductory Survey of the Sources and Literature of Scots Law (Edinburgh : Stair Society, 1936), vol. 1, 338.
28. This is a compilation of a pre-existing tariff of fines said to have been made in the reign of David I.
29. Quoted by De Haas, op. cit., 12.
30. J. Skene, De Verborum Significatione (1681) bound in R. Bell, A Dictionary of the Law of Scotland (Edinburgh, 1826).
31. Cameron, op. cit., 348.
32. Text of the March Laws discussed by G. Neilson, 'The March Laws', in Miscellany One (Edinburgh : Stair Society, 1971), 21, item 9.
33. The term "defender" is more appropriate than "defendant" to Scottish procedure. We have used it in the context of both civil and criminal procedure as the boundaries in early law were not clearly drawn. We have used the term "accused" when discussing the developed criminal law.
34. J. Skene, Regiam Maiestatum : The Auld Lawes and Constitutions of Scotland (Edinburgh, 1774), 415, Rob. III c. 44.
35. P.G.B. McNeill, ed., The Practicks of Sir James Balfour of Pittendreich (Edinburgh : Stair Society, 1962), vols 21 and 22. See 22, 500.
36. J. Skene, op. cit., 301.
37. Supra, 2.
38. Senachus Mor is based on laws promulgated perhaps as early as 100 B.C. but it was greatly modified in the fifth century. Tradition attributes this modification to the influence of St. Patrick. Liber Aicill professes to be a compilation of the opinions of Cormac and Cennfaeladh. Cormac's reign is traditionally dated 227 - 266 A.D.

39. Senachus Mor in Ancient Laws and Institutions of Ireland (Dublin : Commissioners for Publishing the Ancient Laws and Institutes of Ireland, 1869), vol. II, 133 - 145.
40. Ibid., 145.
41. Ibid., 139.
42. Ibid., 145.
43. The seven sureties listed are :- (1) a surety of recovery (2) a surety for a pauper (3) a surety who binds (4) a surety whom his tribe commands (5) a surety who is freed from contracts (6) a surety at the back (7) a surety who sues his tribe. These sureties are distinguishable according to bescna, that is, according to their entitlement to safety, time and after addition. Brehon Law Tracts in Ancient Laws and Institutions of Ireland (Dublin : Commissioners for Publishing the Ancient Laws and Institutes of Ireland, 1901), vol. V, 343.
44. G. Atkinson in introduction, *ibid.*, x.
45. Ibid., 227.
46. Ibid., 343.
47. Ibid., 227.
48. Skene, De Verborum Significatione, *op. cit.*
49. Cameron, *op. cit.*, 349.
50. W.C. Dickinson, ed., The Sheriff Court Book of Fife 1515 - 1522 (Edinburgh : University Press, 1928), 344 - 46.
51. Cooper, ed., *op. cit.*, 289. Regiam Majestatem, supplement No. 12, : Cooper ed., *op. cit.*, 317, Quoniam Attachamenta c.8.
52. J. Skene, *op. cit.*, 329, Alex. II. c.4. : David c.37, Alex. c.4., quoted by Balfour, McNeill, ed., *op. cit.*, 340.
53. Cooper, ed., *op. cit.*, 289, Regiam Majestatem, Supplement No. 12, : Cooper ed., *op. cit.*, 317, Quoniam Attachamenta, ch. 8, : McNeill, ed., *op. cit.*, 339.
54. J. Skene, *op. cit.*, 394, Rob. III. c.10.
55. *Infra*, 26.
56. R.L.G. Ritchie, The Normans in Scotland (Edinburgh : Edinburgh University Publications, 1954), xxxi.
57. Information from G. Goudie, The Celtic and Scandinavian Antiquities of Scotland (Edinburgh : William Blackwood & Sons, 1904).
58. W.J. Dobie, 'Udal Law' in An Introductory Survey of the Sources and Literature of Scots Law (Edinburgh : Stair Society, 1936), vol. 1, 451.

59. Ibid., 454. The "law book" containing Norse law is thought to have been lost or destroyed in the early part of the seventeenth century, *ibid.*, 451.
60. *Supra*, 15.
61. It is premature to characterise the influence as Anglo Norman as early as the eleventh century because the assimilation of English and Norman customs and ideas was not so advanced. Such a characterisation seems, however, to be accepted by historians as appropriate beginning at the reign of David I.
62. The Wars of Independence began in 1296. The Scottish success in the battle of Bannockburn (1314) is often said to represent the successful rejection of English influence.
63. J.J. Robertson, ed., 'De Compositione Cartarum' in Miscellany One (Edinburgh : Stair Society, 1971), vol. 26, 78.
64. W. A. Craigie, ed., A Dictionary of the Older Scottish Tongue from the Twelfth Century to the End of the Seventeenth (Chicago : University of Chicago Press, 1937).
65. G. Neilson, *op. cit.*, vol. 26, 1.
66. *Ibid.*, 22, no. 13.
67. *Ibid.*, 35.
68. *Ibid.*, 21, no. 9.
69. Cooper, ed., *op. cit.*, 251, Regiam Majestatum.
70. J. Skene, *op. cit.*, 404, Rob. III c. XIV. This act does not appear in The Acts of the Parliaments of Scotland (A.P.S.) and doubts therefore attach to its authenticity.
71. Cooper, ed., *op. cit.*, 116, Regiam Majestatum reference to s.9.
72. F. Pollock and F.W. Maitland, The History of English Law Before the Time of Edward I (Cambridge : The University Press, 1952), 2 vols.
"In modern times we use the word 'pledge' when a thing is given by way of security. But throughout the middle ages such a thing is a gage, a vadium. On the other hand the word 'pledge', which answered to the A.-S. borh, was reserved for cases in which there was what we now call suretyship; the plegius was a surety". vol. 2, 185.
73. J. Skene, *op. cit.*, 157, Quoniam Attachiamenta, c. 33.
74. *Ibid.*, Quoniam Attachiamenta, c. 34.
75. McNeill, ed., *op. cit.*, Mod. ten. cur. c. 5., quoted by Balfour, 389.
76. *Supra*, 9.
77. J. Skene, *op. cit.*, 149, Quoniam Attachiamenta c. 12.
78. *Ibid.*, Regiam Majestatum IV c.1(6).
79. McNeill, ed., *op. cit.*, Rob. III c. 6., noted by Balfour, 291
80. J. Skene, *op. cit.*, 332, Regiam Majestatum IV c. 1(7).

81. Ibid., Alex. II. c.10.
82. Ibid., Alex. II. c.10(5).
83. Escapes caused by the insufficiency of gaol accommodation provoked legislation, 1487 c.6, A.P.S. II, 177., which made the sheriff responsible for the custody of the prisoners. Where the sheriff refused such responsibility he became liable as surety if the accused did not appear in court.
84. J. Skene, op. cit., 125, Regiam Majestatem IV c.1.
85. Supra, 3.
86. For a description of the crowner's duties see J. Skene, op. cit., 96 et seq.
87. 1486 c.4, A.P.S. II, 176.
88. This form of prosecution is described by Hume, op. cit., vol. I, 244.
89. 1487 c.5, A.P.S. II, 177.
90. Hume op. cit., vol. I, 449.
91. 1487 c.5, A.P.S. II, 177 makes provision for accepting surety where the offender has not been arrested even if the crime resulted in the death of the victim. The Acts of the Parliament of Scotland (A.P.S.) in 11 vols.
92. J. Skene, op. cit., 124, Regiam Majestatem, IV, c.1(10): IV. c.5(2) at 127.
93. Ibid., 159, Quoniam Attachiamenta c. 39.
94. 1397 c.1, A.P.S. I, 570 : 1398 c.14, A.P.S. I, 573.
95. Supra, reference 70.
96. 1466 c.3, A.P.S. II, 44.
97. 1525 c.10, A.P.S. II, 298 : 1540 c.38, A.P.S. II, 377.
98. 1593 c.13, A.P.S. IV, 18.
99. J. Burnett, A Treatise on Various Branches of the Criminal Law of Scotland (London, 1811), 333.
100. Supra, 3.
101. De Haas, op. cit., 50.
102. J. Skene, op. cit., 62, 103.
103. Ibid., 57.
104. Ibid., 131, Regiam Majestatem, IV. c.14.
105. Compare also the systems outlined in the Leges Quattuor Burgorum. These laws appear to have made provision for a system of general suretyship e.g. it was ordained that burgesses had a duty to be pledge for each other until loss was suffered. After this the duty ceased and acting as pledge was optional. (J. Skene, op. cit., 260, Burrow Lawes c.129). But it seems that burgesses were not automatically given a pledge but had to make their own arrangements. Thus provision was made e.g. for the

situation where a burgess had not found a pledge (Leg. burg. c. 61 quoted by Balfour, McNeill, ed., op. cit., 58) and for the situation where the mansnamed would not stand as pledge (Leg. burg. c. 77 quoted by Balfour, McNeill, ed., op. cit., 58).

106. J. Skene, op. cit., 43, Regiam Maiestatem, II, 12 (9).
107. Johns Carrutheris v. John Maxwell 1506, quoted by Balfour McNeill, ed., op. cit., 571.
108. J. Skene, op. cit., 176, Quoniam Attachiamenta, c. 53 : Quoniam Attachiamenta, c. 47 and Leg. burg. c. 88 quoted by Balfour, McNeill, ed., op. cit., 532.
109. McNeil, ed., op. cit., 93 quoted by Balfour.
110. J. Skene, op. cit., 159, Quoniam Attachiamenta c. 37.
111. Ibid., 394, Rob. II. c. 10(6).
112. T. Craig The Jus Feudale (Edinburgh : Hodge and Co. Ltd., 1934), 1033 et seq. In discussing the delicts which may be committed by a superior against his vassal Craig does not include the failure of the superior to stand as pledge.
113. J. Skene, op. cit., 151, Quoniam Attachiamenta c. 17(1).
114. Ibid., Quoniam Attachiamenta c. 17(2).
115. Alexander Kay and John Methven v. John Methven 1554, quoted by Balfour, McNeill, ed., op. cit., 191.
116. Ibid., 191 : J. Skene, op. cit., 151, Quoniam Attachiamenta c. 17(3).
117. Beyerle's evolutionary thesis discussed supra 4, does not appear to take into account that the two forms of pledge might co-exist.
118. 1587 c.59 s.2, A.P.S. III, 462 : 1593, A.P.S. IV, 39.
119. 1593, A.P.S. IV, 40.
120. For a discussion of the origin and development of the office of warden see Neilson op. cit., 26.
121. 1587 c. 59 s.4, A.P.S. III, 463 : McNeil ed., op. cit., 599 quoted by Balfour.
122. 1598 A.P.S. IV, 179.
123. The term "bail" does not appear in W.A. Craigie, ed., A Dictionary of the Older Scottish Tongue from the Twelfth Century to the End of the Seventeenth (Chicago : University of Chicago Press, 1937). The term, however, does appear in A. Warrack, ed., A Scots Dialect Dictionary (Edinburgh : Chambers Ltd., 1911). The latter seems to be correct as we found references to bail e.g., "... justices, if they find cause shall commit the offender to prison or take sufficient bail ..." 1661 c. 338, A.P.S. VII, 311. "... exacting extravagant baile ..." 1689 c. 28, A.P.S. IX, 38.

124. The terms "pledge" and "caution" are still in use.
125. Hume, op. cit., 141.
126. A. Alison, Practice of the Criminal Law of Scotland (Edinburgh : William Blackwood, 1833), 161.
127. The Declaration of the Estates of the Kingdom of Scotland, 1689, (A.P.S. IX, 38).
128. Act for preventing wrongeous imprisonment and against undue delay in trial, 1701, (A.P.S. X, 272).
129. Lord J.-G. in Potter and Ora v. H.M. Adv. (1878) 4 Couper 146.
130. Hume, op. cit., vol. I, 145.
131. The 1701 Act specified the following maxima:- 6000 merks for a nobleman, 3000 merks for a landed gentleman, 1000 merks for any other gentleman or burges, 300 merks for any inferior person. As a guide to the value of a merk see e.g. J.D. Mackie, ed., Thomas Thomsons' Memorial on Old Extent (Edinburgh : Stair Society, 1946), 107. In this text 20 merks are said to be equivalent to about £13.
132. An Act for more effectual disarming the Highlands in that part of Great Britain called Scotland : and for the better securing the peace and quiet of that part of the Kingdom, 1724 (11 Geo. 1, c. 25).
133. An Act to extend the bail to be given in cases of criminal information in that part of Great Britain called Scotland, 1799 (39 Geo. 3, c. 49). This Act laid down the following maxima:- £1200 for a nobleman, £600 for a landed proprietor, £300 for any other gentleman, burges or householder, £60 for any inferior person.
134. Cameron 1798, quoted by Burnett, op. cit., 339. Cameron who was indicted for mobbing and rioting was freed on bail raised by contributions from his supporters and was thus enabled to abscond and evade trial.
135. (39 Geo. 3, c. 49), supra.
136. An Act for restricting the punishment of Leasing-making, Sedition and Blasphemy in Scotland, 1825 (6 Geo. 4, c.47).
137. Alison, op. cit., 167.
138. Hume, op. cit., 154.
139. Ibid., 157. "Ordains the petitioner to be put to liberty ... upon her enacting herself to appear before them, whenever she shall be called upon a lawful citation ..."
140. Fyffe and McLaren 1762 quoted by Burnett, op. cit., 350 : Andrew v. Murdoch (1814) 2 Dow's App. 401 : Arbuckle v Taylor (1815) 3 Dow's App. 160.
141. Burnett, op. cit., 339.
142. Ibid., 339. Bell 1800, Waddell 1808, quoted by Burnett, ibid., 340.
143. Hume op. cit., vol. II, 497. The point was debated but not determined in Flight 1767.

144. An Act for the more effectual execution of the criminal laws ... 1805 (45 Geo. 3, c.92).
145. An Act ... for trying peers for offences committed in Scotland ... 1825 (6 Geo. 4 c.66).
146. An Act to render more effectual the police in counties and burghs in Scotland, 1857 (20 & 21 Vict. c. 72).
147. Margaret Sinclair, Book of Ajournal, 1st Aug. 1740.
148. An Act ... for punishing such persons as pretend to exercise or use any kind of witchcraft, sorcery, incantment or conjuration, 1736 (9 Geo. 2, c. 5).
149. An Act for abolishing the punishment of death in certain cases of forgery, 1832 (2 & 3 Will. 4, c. 123).
150. An Act to provide that persons accused of forgery in Scotland shall not be entitled to bail, unless in certain cases, 1835 (5 & 6 Will. 4, c. 73).
151. Untitled 'Anomalies in the Law of Bail', Journal of Jurisprudence (1882), 249.
152. Ibid.
153. 'Fifth Report of the Commissioners Appointed to Inquire into the Courts of Law in Scotland' in Reports from Commissioners vol. VII, 275.
154. Supra, 29.
155. Bail (Scotland) Act 1888 (51 & 52 Vict. c.36).

CHAPTER II

1. C. Foote, ed., Studies on Bail (Philadelphia : Pennsylvania Univ. Law School Inst. of Legal Research Law Review, 1966),
2. The concept of a right is discussed infra, 64.
3. There is no right to bail in Arizona, Maryland, New York, Texas, Virginia : P.M. Wald, 'The Right to Bail Revisited : A Decade of Promise Without Fulfillment' in S.S. Nagel, ed., The Rights of the Accused in Law and Action (Beverly Hills : Sage Publications, Inc., 1972), 179.
4. Stack v. Boyle, 342 U.S. 4 (1951)
5. U.S. v. Foster, 79 Fed. Supp. 422
6. The exception is Illinois, Wald, op. cit., 179.
7. Reeves v. State 1966 411 P. 2d, 212. Discussed F.E. Inbau et. al. Cases and Comments on Criminal Justice (Mineola : Foundation Press, inc., 1968), vol. 2, 883.
8. Unfortunately it was not possible to select bail amounts to enable a strict comparison to be made of the amounts required in different countries.
9. R. Goldfarb, Ransom : A Critique of the American Bail System (New York : Harper and Row, 1965), 115.
10. C. Foote, 'A Study of the Administration of Bail in New York City' (1958) 106 U. Pa. L. Rev. 693 : A. Rankin, 'The Effect of Pre-Trial Detentions' 39 N.Y.U.L. Rev., 641.
11. Wald, op. cit., 189.
12. Goldfarb, op. cit., 64 et seq.
13. Wald, op. cit., 181.
14. C.H. Bowman, quoted by Goldfarb, op. cit., 199.
15. This reproduction is a copy of the scale exhibited in Goldfarb, op. cit., 177.
16. This reproduction is a copy of the information sheet exhibited in Goldfarb, op. cit., 174-5.
17. For further information, *ibid.*, 186.
18. *Ibid.*, 156.
19. A bondsman quoted, *ibid.*, 160.
20. D. Lang, 'Beyond the Bail System', 57 Cal. L. Rev. 1112 at 1120.
21. Wald, op. cit., 199.
22. Goldfarb, op. cit., ch. 5.
23. Goldfarb, op. cit., 166 et seq.
24. Wald, op. cit., 182.

25. Wald, op. cit., 182.
26. Wald, op. cit., 183.
27. Ibid., 184.
28. Supra, 35.
29. In 1969 a preventive detention law was passed in the District of Columbia but according to Wald, op. cit., 193, the law has rarely been applied because of problems of interpretation and doubts surrounding its constitutional status.
30. The information on which this section was based was drawn mainly from M.L. Friedland, Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts (Toronto: University of Toronto Press, 1965).
31. Stat. Can. 1960 (c. 44) S. 2(f) : Ibid., 180.
32. Infra 44.
33. Friedland op. cit., 83.
34. Ibid., 179.
35. Ibid., Table XIX, 132.
36. Ibid., 153 : S.119 (2) (e) of the Canadian Criminal Code.
37. Ibid., 93.
38. Ibid., 177.
39. Ibid., 185.
40. Ibid., 188.
41. Ibid., 178.
42. Ibid., 190
43. Indictable Offences Act 1848 (11 & 12 Vict. c. 42).
44. (15 & 16 Geo. 6 & 1 Eliz. 2. c. 55) S.7 (3).
45. For further discussion see A. Samuel's, 'Bail Principles', 1966 N.L.J., 1269.
46. Criminal Justice Act 1967 (c. 80), S.22 (1).
47. Ex. p. Thomas (1956) Crim. L. R. 119.
48. For a discussion of the historical development of bail in England, De Haas, Antiquities of Bail (New York: Columbia University Press, 1940).
49. R.v. Porter [1910] 1 K.B. 369.
50. Magistrates' Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55) S.38 (1).
51. J.B. Egan, 'Bail in Criminal Law', (1959) Crim. L. R. 705.
52. E. Gibson, Time Spent Awaiting Trial (London: H.M.S.O., 1960).

53. *Ibid.*, Pars. 91,92. It was found that 90% of persons committed for trial were previously remanded and that approximately 42% of these remands were custodial. The average time spent on custodial remand was calculated as 2 weeks. About 4% of committals were also in custody and the average time spent in custody was approximately 50 days.
54. *Ibid.*, par. 113.
55. A.K. Bottomley, Prison Before Trial : A Study of Remand Decisions in Magistrates' Courts (London : G. Bell and Sons 1970) : M. King, Bail or Custody (London : Cobden Trust, 1972) : M. Zander, 'Discovering Bail Applicants' Backgrounds, 1967 N.L.J., 921.
56. Bottomley, *op. cit.*, 54, found that in only 26 of his 171 cases was comprehensive information given to the court. King, *op. cit.*, 17, found that in over 500 of the 1,001 cases studied no objective information was given to the court and that in 87 cases there was no discussion at all. Zander, *op. cit.*, 922, reported that in 19 of the 73 cases in his study no information was given about the personal background of the defendant.
57. S. Dell, Silent in Court : The Legal Representation of Women Who Went to Court (London : G. Bell, 1971).
58. C. Davis, Imprisonment Before Sentence, 1968 M.A. thesis, Liverpool University.
Davis described in ch. 5, that 85.7% of those detained in the sample were qualified by their "community roots" score for R.O.R. The median score was 7 points and on this basis he concluded that the persons detained were not only good risks but were very good risks. Bottomley, *op. cit.*, 95, found that 33% of those in custody qualified for a release recommendation and 7% of those released were not so qualified.
59. M. Zander, 'Bail : A Re-Appraisal', (1967) *Crim. L.R.*, 140.
60. Bottomley, *op. cit.*, 96.
61. King, *op. cit.*, 44.
62. Bottomley, *op. cit.*, ch.III : King, *op. cit.*, 71 et seq : Davis, *op. cit.*, ch. VI : C. Davis, 'Pre-trial Imprisonment : A Liverpool Study', 1971 *Br. J. Crim.*, 44 et seq.
63. Gibson, *op. cit.*, 34, Table 36.
64. *Ibid.*
65. *Ibid.*, par. 89.
66. *Ibid.*, par. 103.
67. King, *op. cit.*, 51.
68. King, *op. cit.*, 53 - 60.
69. (c.80) hereinafter referred to as the 1967 Act, S.18(1).
70. *Ibid.*, S.18 (4), (5), (6).
71. *Parliamentary Debates : House of Commons Standing Committees' Official Reports*, 1966 - 67 vol. 2, 428.

72. "I doubt whether the answer would be to restrict further the freedom of magistrates to grant or refuse bail further than has been done already by for example S.18 of the Criminal Justice Act 1967. I believe that this would lead to greater evil than it would solve". Lord Chancellor, reported in 'The Magistrate', 2nd Feb. 1972, at p. 24.
73. 1967 Act S.18 (8).
74. King, op. cit., 46.
75. 1967 Act S.21.
76. King, op. cit., 26.
77. 1967 Act S. 21.
78. King, op. cit., 24.
79. Ibid., 26. King suggested that the restrictions should prohibit interference with the defendant's right to work or his political rights and, unless necessary to prevent the commission of criminal acts, his domestic life, freedom of action and freedom of movement.
80. Ibid., 85. The proposals were put forward by the Howard League for Penal Reform and in Parliament by Norman Fowler.
81. 819 H.C. Deb. col. 925, 18th June 1971 quoted by King, op. cit., 85.
82. King, op. cit., 85.
83. Relevant statistics explained by a Home Office spokesman in Law. Soc. Gaz. 12th Dec. 1973.
84. The report was published but this was too late for us to consider the recommendations in this chapter. We do, however, refer to the report in our conclusions in ch. IX.
85. The information on which this section is based was drawn mainly from R. Vouin, 'Provisional Release in French Penal Law' in C. Foote, ed., (1966) op. cit., 167 et seq.
86. Ibid., 167. The conditions which must be satisfied are (1) that the offence is a correctional offence (2) the inculpé has a domicile or de facto permanent residence in France (3) the inculpé has never previously been convicted of a crime or sentenced to imprisonment for a term exceeding 3 months for a correctional offence.
87. Ibid., 173. Code of Criminal Procedure arts. 140 par. 1, 141 par. 1.
88. Ibid., 169. This does not apply to mandatory release.
89. Ibid., 174.
90. Ibid.
91. Ibid.
92. The information on which this section is based is drawn mainly from S. Dando and H. Tamiya, 'Conditional Release of an Accused in Japan' in C. Foote, ed., (1966) op. cit., 135.

93. Ibid., 325.
94. Ibid., 328.
95. Ibid., 330.
96. Ibid.
97. Ibid., 331.
98. Botein and Sturz quoted by Goldfarb, op. cit., 220.
99. Ibid.
100. This shift in emphasis may be seen in America also, Goldfarb, op. cit., 168, Friedman op. cit., 9 et. seq. also stresses the desirability of using summons procedure rather than arrest.
101. The information on which this action is based is drawn mainly from A. Bratholm, 'Arrest and Detention in Norway' in Foote, ed., (1966) op. cit., 336.
102. Ibid., 348.
103. Ibid.
104. Ibid., 340.
105. Ibid., 353.
106. Goldfarb, op. cit., 222.
107. H.J. Berman, Soviet Criminal Law and Procedure : The R.S.F.S.R. Codes (Cambridge : Harvard University Press, 1972).
108. Goldfarb, op. cit., 223.
109. Ibid.
110. The information on which this section is based is drawn mainly from Goldfarb, op. cit., 218 et. seq.
111. Ibid., 221.
112. Ibid.
113. Ibid.
114. Ibid.
115. The information on which this section is based is drawn mainly from Vargha, 'Remand or Commitment in Custody for Trial or Sentence' in G. Peteri, ed., Hungarian Law : Proceedings to the International Congress of Comparative Law. (New York : Int. Pubns. Serv., 1970).
116. Ibid., 339.
117. Ibid., 342.

CHAPTER III

1. For a detailed discussion Renton and Brown, Criminal Procedure 4th ed., G.H. Gordon (Edinburgh : Green and Son Ltd., 1972).
2. The judge usually sits alone in courts of summary jurisdiction. In the justice of the peace court, however, three lay judges sit together.
3. *Infra*, 91.
4. Summary Jurisdiction (Scotland) Act 1954 (2 & 3 Eliz. 2, c. 48) hereinafter referred to as the 1954 Act, S.10 (1).
5. W.N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, ed., W.W. Cooke (New Haven : Yale, 1966).
6. *Ibid.*, 38.
7. *Ibid.*, 39.
8. *Ibid.*, 51.
9. *Infra*, 73 et. seq.
10. *Infra*, 69.
11. *Infra*, 68.
12. 1954 Act, S.10 (3), discussed *infra*, 95.
13. Hume, Commentaries on the Law of Scotland Respecting Trial for Crimes (Edinburgh : 1800) vol. I, 141.
14. Criminal Procedure Act 1701 (1700, c. 6, A.P.S. X, 272).
15. 1921 J.C. 75 at 76.
16. *Ibid.*, L.J.-G Clyde at 79. See also Potter and Ors v. H.M. Adv. (1878) 4 Coup. 135, Lord Young at 147.
17. (1814) 2 Dow's App. 401.
18. (1815) 3 Dow's App. 160.
19. *Infra*, 73 et. seq.
20. Criminal Procedure (Scotland) Act 1887 (50 & 51 Vict. c.35) hereinafter referred to as the 1887 Act, S.18.
21. 1954 Act, S.65 : Criminal Appeal (Scotland) Act 1926 (16 & 17 Geo. 5, c.15) hereinafter referred to as the 1926 Act, S.9.
22. Criminal Justice (Scotland) Act 1949 (12,13 & 14 Geo. 6, c.94) hereinafter referred to as the 1949 Act, S.27.
23. Criminal Justice (Scotland) Act 1963 (c.39), hereinafter referred to as the 1963 Act, S.37.
24. Bail (Scotland) Act 1888 (51 & 52 Vict. c.36) hereinafter referred to as the 1888 Act, S.1.
25. J.C. Macdonald, 'Bail', 4 J.R. 341 at 343.
26. 1921 J.C. 75, L.J.-G. at 79.

27. 1921 J.C. 61.
28. Rennie v. Dickson (1907) 5 Adam 372, Lord McLaren at 375.
29. Mackintosh v. McGlinchy 1921 J.C. 75, L.J.-G. at 81.
30. J. Burnett, A Treatise on Various Branches of the Criminal Law of Scotland (Edinburgh, 1811).
31. Supra, 65.
32. Police (Scotland) Act (13 & 14 Vict. c.27) S.352.
33. 1954 Act, S.10 (1).
34. Ibid.
35. Supra, 64 et. seq.
36. 1954 Act, S.10 (1).
37. 1888 Act, SS. 2 and 9.
38. Supra, 67.
39. (1913) 7 Adam 76 at 77.
40. Anderson v. H.M. Adv. (1879) 4 Couper 310.
41. Ibid., 312
42. (1878) 4 Couper 135 at 146.
43. (1889) 16 R. (J) 89 at 90.
44. 1921 J.C. 75 at 80.
45. McLaren v. H.M. Adv., 1967 S.L.T. (Notes) 43.
46. Lord Kilbrandon, 'Scotland : Pre-Trial Procedure' in J.A. Coutts, ed., The Accused : A Comparative Study (London : Stevens & Sons, 1966) 62 to 64, et. seq.
47. James and Andrew Johnston, Book of Adjournal, 19th Feb. 1736 : John Fulton, Book of Adjournal 20th June 1740 : Sir Robert Munroe of Culcairn, Book of Adjournal, 1st Aug. 1740 : William, Book of Adjournal, 1st July 1752 : Burnett, op.cit. 336.
48. Potter and Ors v. H.M. Adv. (1878) 4 Couper, L.J. -G. at 146 : Wormald v. H.M. Adv. (1875) 3 Couper, L.J. -C. at 195 : o/f Guinn and Macdonald v. H.M. Adv., 1921 J.C. 61. In this case Lord Salveson referring to Lord Dunedin in Rennie v. Dickson (1907) 5 Adam 372 said Lord Dunedin reached his conclusion "after a careful study of the Crown precognitions, which satisfied him that although the charge against the accused was a very serious one, the accused himself had previously been a law abiding citizen, and that the jury who had to try the case might reasonably come to the conclusion that he was an innocent man." If Lord Salveson is correct, this suggests that the inquisitorial attitude of the courts outlived the nineteenth century.

49. See eg. Mackintosh, Book of Adjournal, 12th July 1751. This case was referred from the High Court of Justiciary to a sheriff court with directions to the sheriff to take precognitions then to consider the question of bail.
50. (1744) Mor. 7419.
51. Burnett, op. cit., 338.
52. (1907) 5 Adam 372 at 375, author's insertion in parenthesis.
53. H.M. Adv. v. Saunders, (1913) 7 Adam 76.
54. Mackintosh v. McGlinchy, 1921 J.C. 75 at 82.
55. Kerr v. Orr and Fulton (1744) Mor. 7419.
56. Mackintosh v. McGlinchy, 1921 J.C. 75 at 82.
57. Ibid., 61-62.
58. Macdonald v. Clifford, 1952 J.C. 22.
59. MacLeod v. Wright, 1959 J.C. 12, L.J.-G. at 14.
60. Mackintosh v. McGlinchy, 1921 J.C. 75 at 82.
61. This ground formed the basis of the prosecution bail appeal which was successful in Macdonald v. Clifford, 1952 J.C. 22.
62. Mackintosh v. McGlinchy, 1921 J.C. 75 at 82.
63. 1959 J.C. 12, L.J.-G. at 14.
64. Ibid : Mackintosh v. McGlinchy, 1921 J.C. 75 at 81.
65. Supra, 76.
66. 18 R.15.
67. 1959 J.C. 12 at 14 : c/f Mackintosh v. McGlinchy, 1921 J.C. 75 at 82.
68. Scottish Home and Health Department, The Sheriff Court, 1967, Cmnd. 3248.
69. Alison, Practice of the Criminal Law of Scotland (Edinburgh : William Blackwood, 1833), 168. The release programme of the Vera foundation is based on a similar recognition that factors other than bail may induce the accused to appear, supra, 36 et. seq.
70. Rennie v. Dickson (1907) 5 Adam 372 at 373 : H.M. Adv. v. Saunders (1913) 7 Adam 76 at 77.
71. Henry, Book of Adjournal, 23rd Oct. 1746. : Murdoch, Book of Adjournal, 15th June 1752.
72. H.M. Adv. v. Thomson (1871) 2 Couper 103 : Potter and Ors. v. H.M. Adv. (1878) 4 Couper 135 at 142.
73. McLaren v. H.M. Adv. 1967 S.L.T. (notes) 43.
74. 1954 Act, S.20 (3) : Renton and Brown op. cit., 34.
75. Ibid., S.21.
76. Ibid., S.21 as amended by 1963 Act S.46.

77. Ibid.
78. Ibid., S.29 (10).
79. Arbuckle v. Taylor (1815) 3 Dow's App. 160, Lord Eldon at 184.
80. 1887 Act S. 18.
81. 1888 Act S.2.
82. 1887 Act S.43.
83. Ibid.
84. Ibid.
85. 1954 Act S.11 (3) : 1888 Act S.5.
86. 1954 Act S.11 (1).
87. Ibid., S.11 (4).
88. Where the place of application is in any island in the Outer Hebrides, or in the Orkney and Shetland Isles the time limit is 96 hours. In computing the time limit, Sundays, public holidays and public feasts are excluded.
89. 1954 Act S.11 (4).
90. Ibid.
91. Ibid., S.11 (6).
92. 1888 Act S.5. This was the interpretation given to S.5. in H.M. Adv. v. Lawson (1909) 6 Adam 118.
93. In H.M. Adv. v. Lawson, supra, it was accepted that the High Court of Justiciary has an inherent and fundamental jurisdiction to prevent oppression and injustice and that the 1888 Act S.8. reserved the right of that court to admit to bail any person charged with any crime. Such a petition, however, must be presented to a quorum of three judges of the High Court of Justiciary, Milne v. McNeill, 1944 J.C. 151.
94. 1888 Act S.5.
95. Ibid.
96. 1888 Act S.7. Supra, 80.
97. 1888 Act S.6. Supra, 80.
98. 1963 Act S.37 (4).
99. H.M. Adv. v. Jones, 1964 S.L.T. (Sh. Ct.) 50.
100. 1963 Act S. 37 (2).
101. Infra, 84 et. seq.
102. 1964 S.L.T. (Sh. Ct.) 50.
103. Ward v. H.M. Adv., 1972 S.L.T. (Notes) 22.
104. 1963 Act S. 37.
105. For form of procedure, see Kenton and Brown, op. cit., 481.

106. Ibid., 482, the six month period is standard in bail bonds.
107. The form of bail bond is reproduced infra., 328.
108. A procurator-fiscal petitioned Glasgow sheriff court for recall of bail because a ship's captain had said that two crew, Americans on bail, were likely to leave the ship. The petition was found to be incompetent. The case was described, unnamed, undated in official information supplied to Scottish section of Home and Health Department.
109. 1954 Act S. 51(2).
110. 1949 Act S.26. It is competent for the court to order more than one period of adjournment therefore it is possible for an accused to be in custody for a period greater than 3 weeks.
111. 1949 Act S.27 (1). Ibid.
112. 1946 J.C.5.
113. H. of C. Deb. 9th May 1932, 1685.
114. 1954 Act S.71 (5).
115. Ibid., S.64.
116. Ibid., S.65 (1).
117. This is implied eg. in the 1963 Act S.37 (5) which states that any reference to bail includes a reference to caution for interim liberation.
118. 1954 Act S.65 (1).
119. Ibid., S.65 (2).
120. Ibid.
121. Ibid., S.71 (5).
122. Ibid., S.65 (3).
123. Ibid., S.71 (6).
124. 1926 Act S. 9 (1).
125. Ibid., S.9 (2).
126. Ibid., S. 9 (4), as substituted by 1949 Act S. 30 (1), and amended by Social Work (Scotland) Act 1968 (c. 49) hereinafter referred to as the 1968 Act, Sched. 3.
127. (1815) 3 Dow's App. 160 at 173.
128. Sheriff court internal circular, Feb. 1972 R.N. 8506 BL (1).
129. Legal Aid (Scotland) Act 1967 (c.43) hereinafter referred to as the 1967 Act, S. 1(7)(a) and S. 2(2). Special provisions relate to accused appearing in the Edinburgh burgh court, infra, 162.
130. Legal Advice and Assistance Act 1972 (c. 50). An accused may receive advice and assistance under S.2. of this Act up to a financial limit of 25 pounds (S. 3(2)). This does not, however, extend to legal representation of an accused before a justice of the peace or burgh court (S.2(3)). The accused must be financially eligible i.e. his disposable income must not exceed 20 pounds a week or he must be in

receipt of supplementary benefits or of family income supplement. (S. 1).

131. 1967 Act S. 2(5) (b). Legal aid includes advice and representation. At this procedural stage the accused does not have to satisfy any financial conditions.
132. Ibid.
133. Ibid.
134. 1967 Act S. 1(7) (a) and S. 2 (2) (a).
135. Ibid, S. 2 (5) (a).
136. Ibid.
137. Ibid., S.2 (4) (b).
138. Ibid., S.1 (7) (b).
139. Ibid., S. 2(4) (a).
140. The term "surety" is used in Acts regulating police bail but the term "cautioner" is used in reference to bail granted by a court. In bail forms both terms appear. The term "cautioner" is used in the text unless "surety" alone appears in an Act.
141. It is not clear from the use of the terms "bail" and "deposit" in the 1954 Act whether "deposit" is used synonymously to mean "bail" (see eg. S.77) or whether bail and deposit are regarded as different alternatives. The latter interpretation gains some support from the fact that although both terms appear in S.10 (1) (3) and (5), in S.10 (2) the term "deposit" alone is used and in S.10 (4) the term "bail" alone is used.
142. 1954 Act S.10 (1).
143. Ibid., S.77.
144. Ibid., S.51 (1) (a).
145. Ibid. It is clear from S.51 (2) that the cautioner is regarded as a person different from the accused.
146. H.M. Adv. v. Crocket and Cautioner, (1864) 4 Irv. 556, Lord Neaves at 558.
147. *Infra*, 202.
148. Hume, Commentaries on the Law of Scotland, Respecting Crimes supplement by B.R. Bell (Edinburgh : 1844) Supplement 175 : Kennedy 1677 quoted in Hume (1800) op. cit. 182.
149. 1949 Act S.27 (2).
150. Ibid.
151. 1954 Act S.30 (d).
152. Ibid., S.30 (c).
153. (1854) 1 Irv. 599, L.J.-C. at 600.

154. H.M. Adv. v. Hannah (1883) 5 Couper 346.
155. 1954 Act S. 51 (1) (b).
156. *Ibid.* S. 51 (1) (c).
157. H.M. Adv. v. Smith and Cautioner (1836) 1 Sw. 301 ;
H.M. Adv. v. Laird and Cautioner (1838) 2 Sw. 26 and 173.
158. *Supra.* 86-7.
159. 1962 J.C. 69.
160. *Ibid.* 73.
161. E.g. Illinois, New York.
162. G.H. Gordon, The Criminal Law of Scotland (Edinburgh : Green and Son Ltd., 1967) 1018.
163. Renton and Brown, *op cit.*, 74. *Infra*, 97.
164. Morrison v. Monro (1854) 1 Irv. 599. The ground of suspension argued was not, however, accepted by the High Court of Justiciary.
165. Arbuckle v. Taylor (1815) 3 Dow's App. 160
166. 1954 Act S.75.
167. 1954 Act S.10 (3).
168. E.g., France. See M. King, Bail or Custody (London: Cobden Trust, 1972).
169. 1954 Act S.10 (1).
170. 1887 Act S. 34 : 1949 Act S. 27 (2).
171. Bryson v. H.M. Adv., 1961 J.C. 57.
172. In the majority of cases there is no continuation at this procedural stage and where there is a continuation, bail is rarely granted; *supra*, chs. VI and VII.
173. 1954 Act S. 29 (e). Despite the maximum this form of release appears to be the closest Scottish equivalent to the English form of release where the accused promises to pay a sum and no sureties are required. In Scotland where the accused is released on his own bail as a matter of practice he is required to pay over the money in advance.
174. A child for the purposes of the 1963 Act is (a) any person under 16 (b) any person under 18 in respect of whom a supervision order by a children's hearing exists (1963 Act S. 30) (c) a child who becomes 16 after the date on which a children's hearing first sit to consider his case (Social Work (Scotland) Act 1972 (c. 24) S.1.)
175. 1968 Act S. 38 (2).
176. Children and Young Persons (Scotland) Act 1937 (1 Edw. 8 & 1 Geo. 6 c. 37) as amended by the 1963 Act Sched. 2, part 2.
177. 1937 Act S.40 (3) and (4), inserted by 1968 Act Sched. 2., part 2.

178. 1968 Act S. 37 (4).
179. Ibid., S. 37 (5).
180. Ibid., S. 40 (4).
181. Ibid., S. 40 (7).
182. Ibid., S. 40 (8).
183. Ibid., S. 43 (4).
184. Ibid., S. 49.
185. Ibid., S. 50 (1).
186. Ibid., S. 42 (2) (c).
187. Ibid., S. 42 (3).
188. Ibid., S. 49 (1).
189. Ibid., S. 49 (7).
190. Ibid., S. 31(1).
191. A place of safety is defined by the 1968 Act S. 94 (1)
 "as any residential or other establishment provided by a
 local authority, a police station, or any hospital, surgery,
 or other suitable place, the occupier of which is willing
 temporarily to receive a child."
192. 1937 Act S.40 (1) as amended by 1968 Act Sched. 2, part 2.
193. 1967 Act S.1. (6A) inserted by 1968 Act, Sched. 4.
194. 1967 Act S.1. (6A) (b), inserted by 1968 Act, Sched. 4.
195. 1967 Act S.5. (5A), inserted by 1968 Act, Sched. 4.
196. 1967 Act S. 1 (6A) (c), inserted by 1968 Act, Sched. 4.

CHAPTER IV

1. K.N. Llewellyn, Jurisprudence: Realism in Theory and Practice (Chicago : University of Chicago Press, 1962).
2. In 1972 9,504 persons representing about 28% of total receptions. Scottish Home and Health Department, Prisons in Scotland 1972, Cmnd. 4349., App. 3.
3. *Supra*, 70 et seq.
4. G. Schubert, Judicial Behaviour : A Reader in Theory and Research (Chicago : Rand McNally & Company, 1964).
5. *Ibid.*, 443. The legal norm model ignores the personal and social characteristics of the judges and defines the law in normative terms. Decisions are deemed to be made by applying the rules of deduction and inference of traditional logic.
6. *Ibid.*, 444. The legal fact model is a modification of the legal norm model and emphasis is placed on the interrelationships of norms, facts and decisions. Decisions are said to be dependent on what facts the judge selects as relevant. The facts selected are considered to determine which norms will be applied.
7. *Ibid.*, 445. The legal-discretion model denies that full knowledge of the facts and norms is sufficient to predict decisions. This model recognises that the decision depends also on psychological, social, political and other variables which influence the judge.
8. The writer's insertion.
9. Schubert, *op. cit.*, 444.
10. For further reading see A.H. Rubenstein, Some Theories of Organisation (Illinois : Homewood, 1961). H.A. Simon, Administrative Behaviour : A Study of Decision-Making Process in Administrative Organisations (New York : The Macmillan Company 1957) : H. Alexis and C.Z. Wilson, Organisational Decision Making (New Jersey : Prentice-Hall Inc., 1967) : C.W. Churchman, Prediction and Optimal Decisions (New Jersey : Englewood Cliffs, 1961).
11. For further reading see Schubert, *op. cit.*: J.B. Grossman and J. Tanenhaus, Frontiers of Judicial Research (New York : John Wiley and Sons, inc., 1969) : S.S. Ulmer, 'Mathematical Models for Predicting Judicial Behaviour' in Berné ed., Mathematical Applications in Political Science (Charlottesville : University of Virginia Press, 1967).
We found few attempts to create prescriptive theories or models but see e.g. R.W. Burnham, A Theoretical Basis for a Rational Case Decision System in Corrections, 1969 Ph. D. thesis for school of criminology, the University of California.
12. Rubenstein, *op. cit.*, 579.

13. Below we give some examples of research dealing with these different aspects.
- (a) The decision: D.A. Thomas, Principles of Sentencing (London : Heinemann, 1970);
R.O. Dawson, Sentencing : The Decision as to Type, Length and Conditions of Sentence (Boston : Little, Brown and Co., 1969).
- (b) The decision-maker :
Schubert, op. cit., chs 3,4 : G. Schubert, The Judicial Mind : The Attitudes and Ideologies of Supreme Court Justices 1946-63 (U.S.A. : Northwestern University Press 1965).
S.S. Nagel, 'Judicial Backgrounds and Criminal Cases' 1962 J. Crim. L., 333.
- (c) The decision process :
W.R. LaFave, Arrest : The Decision to Take a Suspect into Custody (U.S.A. : Little, Brown and Company, 1965) :
D.J. Newman, Conviction : The Determination of Guilt or Innocence Without Trial (Boston : Little, Brown and Company, 1966) :
B.A. Grossman, The Prosecutor : An Inquiry into the Exercise of Discretion (Toronto : University of Toronto Press, 1969) : L. Radzinowicz and M.E. Wolfgang, Crime and Justice (London : Basic Books, Inc., Publishers, 1971), Vol. 2.
14. W.M. Landes, 'The Bail System : An Economic Approach' Journal of Legal Studies, vol. 2, 79.
15. R. Goldfarb, Ransom : A Critique of the American Bail System (New York : Harper & Row, 1965), 109.
16. F. Suffet, 'Bail Setting : A Study of Courtroom Interaction' Crime & Delin., 1966, 318.
17. Ibid. 319.
18. E.M. Schur, Law and Society : A Sociological View (New York : Random House, 1968), 161.
19. Our pre-survey experience of the bail decisions encouraged us in this approach as we noted that there was a marked similarity in the way different individuals acted as prosecutor solicitor or judge in a particular decision-making situation.
20. Although a justice of the peace court sits occasionally in Edinburgh and deals with offenders from the county area, the burgh court deals with the great majority of offences and our study was confined to this latter court.
21. Letter from the Clerk of Justiciary written after consultation with the judges.

22. For example, it was sometimes obvious that the accused from his bearing or actions in the dock was being disrespectful to the judge. Recording this consistently was difficult, as we were not able to observe all the participants and record what was said at the same time. Our interpretation was of course subjective and we had no means of ascertaining whether the judge had made a similar interpretation. Although we would accept that in some cases these subtleties might be factors influencing the judge, we considered it to be less distorting to exclude this type of information than to include it, subject to the dangers of incompleteness and subjectivity.

CHAPTER V

1. M.L. Friedland, Detention Before Trial : A Study of Criminal Cases Tried in the Toronto Magistrates' Courts (Toronto : University of Toronto Press, 1965), 45. This was the only literature we found which dealt in any detail with the problem of custody before first court appearance.
2. *Supra*, ch. III.
3. It is possible for police bail to be granted for cases which in practice are heard by the sheriff court provided the burgh or justice of the peace court have jurisdiction to try the offence. This may arise (a) where the procurator-fiscal or Lord Advocate gives a direction that offenders charged with an offence committed in certain circumstances must be brought before the sheriff court. In Edinburgh such a direction was applied to persons charged with breach of the peace committed within a football or rugby ground. After the completion of our research a similar direction was applied in August 1974 to breach of the peace committed on buses or involving the drivers or conductors. (b) Where there are co-accused and the offence libelled against one must be heard by the sheriff, it is competent for the police to grant bail to another co-accused provided the offence libelled against him may be tried in the burgh or justice of the peace court.
The police for administrative reasons kept a separate record of the cases in which bail was granted and the accused was brought before the sheriff. In 1972 bail was granted in 38 cases.
4. In February 1973 a police spokesman suggested that all arrested persons ought to be taken directly to the central police station but this proposal did not attract much support and was not adopted.
5. For details of police apprehensions in Scotland in 1972, Scottish Home and Health Department, Criminal Statistics Scotland Cmnd. 5464.
6. No statistics were available about the number of cases falling into the different categories. We based the total of the burgh court custody cases on our count of the number of custody cases entered on the burgh court daily disposal sheets. We excluded accused who made a formal appearance in the burgh court when the sheriff court was closed on holiday. We were unable to exclude from the total, accused arrested on a warrant issued by a court outside Edinburgh. These accused were not eligible for police bail. We estimated, however, that the number of these accused was less than 100.

8. In 1972 police bail was granted in 824 cases out of 3726 eligible cases, i.e. 22% of the cases.
9. For further discussion see W.S. Torgerson, Theory and Methods of Scaling (New York : Wiley, 1958) ; L. Festinger, 'The Treatment of Quantitative Data By Scale Analysis', Psychological Bulletin, vol. 44, 149.
10. N.H. Nie, D.H. Bent, C. Hadlaihull, Statistical Package for the Social Sciences (U.S.A. : McGraw-Hill Book Company, 1970).
11. Where the SOBRIETY coding was "drunk" and the CTHRS coding was "greater than 24 hours" the SOBRIETY coding was changed to "sober". Where the SOBRIETY coding was "had been drinking" and the CTHRS coding was "greater than 12 hours" the SOBRIETY coding was changed to "sober".
This change does not mean that no person arrested in a drunken condition was released before the expiry of 24 hours. It means that if e.g. a person was drunk and the time to the next court was 17 hours then that person was not considered for release. If, however, a person was drunk but the time before the next court was 35 hours, that person was considered eligible for release and might be released when the police considered him sober and able to go home safely, perhaps after 13 hours and usually before 24 hours had elapsed.
12. This variable combined the variables MONAVS, MONAVA, MONAVP.
13. Infra. 331.
14. This is similar to practice described by H.A.Simon, Administrative Behaviour : A Study of Decision-making Process in Administrative Organisation (New York : The Macmillan Company, 1970), 88.
"Habit ... has an artificial counterpart, which has been termed by Stene 'organisation routine'. In so far as methods of handling recurring questions become matters of organisation practice, perhaps embodied in manuals of procedure, they cease to be objects of reconsideration when these questions arise. it might be said that a matter has become part of the organisation routine when it is settled by reference to accepted or approved practices rather than by consideration of the alternatives on their merits."
15. Infra, 334, 336.
16. Ibid. This is discussed fully in the explanations given about Scale A.
17. The police list of custody cases for 1972 was numbered sequentially but burgh court cases were interspersed with sheriff court and other cases. As the list did not have any particular order it was considered sufficiently rigorous to use a systematic sample based on a random selection of the first case. The sampling figure chosen was 1 : 60. All cases not destined for the burgh court which were included in the sample were disregarded as they were not eligible for police bail.
18. Although 4 of the cases i.e. 1107, 2607, 2967 and 6867 would have passed the second revised sobriety coding they failed to

pass other variables and still, therefore, fitted into the refusal of bail pattern.

19. In May 1974 Edinburgh police moved to a new headquarters which is to be H.Q. for the new South-east Scotland Regional Force. The cell accommodation at the old H.Q. in Parliament Square where we carried out our study will, however, still be fully used in the future. It was reported that 215,000 pounds is to be spent to upgrade this accommodation. The Scotsman 25th June 1974.
20. An Edinburgh councillor was reported as saying, "conditions in the cells are absolutely deplorable - not even fit for animals to be put in." Evening News 18th January 1974.
21. *Infra*, 336.
22. *Supra*, reference 11.
23. Our finding was not common knowledge. But as some of the accused had over 40 previous convictions it is not inconceivable that they may have become aware of this.
24. Persons charged with theft were not usually considered by the police as eligible for bail. The 2 cases in Table IV were exceptional as both referred to foreign nationals who were visiting Scotland. The city prosecutor may have been consulted about bail (*infra* 146,157) though this was not recorded. We may also speculate that these were cases where the officials were willing to accept a forfeited bail instead of court appearance.
25. *Supra*, 138 et. seq.
26. *Supra*, 137.
27. *Supra*, 127.
28. No such power is given by the authorising statute, the Summary Jurisdiction (Scotland) Act 1954 (2 & 3 Eliz. 2, c.48).
29. *Supra*, 84.
30. Children and Young Persons (Scotland) Act 1937 (1 Edw.8 & 1 Geo. 6, c. 37), S.40.
31. For this purpose the police appear to take 16 as the age at which bail will be required.
32. Road Safety Act 1967 (c. 30), S. (1).

CHAPTER VI

1. The Scotsman 31st March 1973.
2. Scottish Office, Justices of the Peace and Justices' Courts, Cmnd. 5241
3. Supra, 62 et. seq.
4. Published criminal statistics do not reveal the number of cases each court considered. The statistics do reveal, however, that in 1972 about 40% of all summary cases were proceeded against in the lay courts. Scottish Home and Health Department Criminal Statistics Scotland 1972 Cmnd. 5464, Table 2. We found that in Edinburgh the burgh court dealt with more than 50% of all arrested persons brought before a court in 1972.
5. These criticisms are not confined to members of the legal profession. A journalist, George Saunders, has said that the exploits of the lay magistrates have become part of Scottish folklore. He relates the tale of the bailie who told an accused who was being difficult about his plea, "But you must have done it, or the police widna' have brought you here", The Scotsman 31st March 1973.
6. Supra, 107.
7. Infra, 329.
8. Applications for review were an exception and these were considered by the bailie in private.
9. The 4 remaining cases were accused who had been arrested on a warrant issued by a court outwith Edinburgh. These cases were not considered by the Edinburgh burgh court.
10. In 2 cases bail was refused during our period of observation but we discovered that the accused appeared for trial on bail. We concluded, therefore, that the accused had applied successfully for review of the bail decision.
11. A case which attracted considerable criticism in the Scottish press concerned a woman who was remanded in custody for 7 days by a Glasgow bailie on a charge of failing to wash a tenement stair. After spending 7 days in custody she was brought again before the court and on this occasion was represented by a lawyer. The lawyer told the court that the woman had no previous convictions and was the mother of ten children whom she looked after at home. The bailie who remanded her was later reported as saying "If I had even the slightest idea she had one child, never mind ten, this would never have happened." Scottish Daily Express 30th March 1972.
This case illustrates that 'blind' decision-making is not confined to the lay magistrates in Edinburgh.

12. *Infra*, 213 et. seq.
13. *Supra*, 146.
14. Unlike solemn procedure no specific right to make representations is given.
15. *Supra*, 126
16. Legal Advice and Assistance Act 1972 (c. 50).
This Act extends legal aid in England to cover representation in magistrates court but in its application to Scotland for the words 'magistrates courts' the Act substituted the words 'a sheriff'. S. 2 (5)(b). The effect of this Act in Scotland was to make legal advice available, subject to financial limits, up to the cost of twenty-five pounds. The provision for representation in the sheriff court was unnecessary because a duty solicitor scheme had operated in these courts before the Act was passed. Thus although an accused may be eligible for legal advice under this Act, he is not eligible for legal representation.
17. Johannessen v. Robertson 1945 J.C. 146 at 150. "It is not the duty of the assessor (clerk) to aid by his counsel and advice or by putting questions, either of the parties". The position in England appears to be different, B. Harris, 'Justices Clerks', 123 *New. L.J.* states, "Already the High Court have accepted that there are some matters concerning evidence which should be dealt with by the clerk inviting his bench to adjourn and advising an unrepresented party in that absence".
18. Edinburgh Corporation Confirmation Act 1967 (c.v.) par. 440. The honorarium specified is a sum not exceeding five hundred pounds in any financial year but the Secretary of State may approve a higher sum.
19. Reported in The Scotsman 19th January 1974.
20. Reported in Evening News 27th February 1974.
21. *Infra*, 189 et. seq.
22. In our 4 week sample, a burgh court bail receipt was issued in 13 cases which gives an estimate for the year of 169 cases. This gives some indication that numerically the sample was representative of the proportions in the annual population.
23. Because of the difficulties of collection we had to estimate this figure from the sample (3 x 13). We are aware that we cannot estimate to what extent the sample was representative in this respect.
24. *Ibid.* Estimate (5 x 13 + 34).
25. Percentages based on estimated figures.
26. Summary Jurisdiction Scotland Act 1954 (2 & 3 Eliz. 2, c.48) as amended by the Criminal Justice (Scotland) Act 1963 (c.39) S.23, S.3(d).

27. The table is based on 26 cases (instead of 34) because in 8 cases we were unable to ascertain either the time or the sentence. The work involved in basing this table on the annual figures was too great.
28. The table is based on 11 cases (instead of 16) because in 5 cases we were unable to ascertain either the time or the sentence. The work involved in basing this table on the annual figures was too great.
29. This sentencing policy of the burgh court is worthy of investigation. In many cases the burgh court unlike the sheriff court fixed a prison alternative to the fine and refused time to allow the convicted person to pay the fine. The result of this is unfair discrimination against persons with little or no available money to pay a fine. The policy also contributes to the overloading of the prison service with persons imprisoned for very short periods. See also A.D. Smith and J. Gordon 'The Collection of Fines in Scotland' 1972 S.L.T. (news) 181.
30. In the sample we found the same result in cases in which the bail money was not raised. *Supra*, Table VI.
31. See e.g. M.L. Friedland, Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts (Toronto: University of Toronto Press, 1965), 110; E. Gibson, Time Spent Awaiting Trial (London: H.M.S.O., 1960)
32. The organisation of the records made it impossible to obtain this information.
33. *Supra*, 139.
34. The burgh and justice of the peace courts are to be replaced because of local government reform. In 1973 the Conservatives proposed setting up justices' courts staffed by three lay magistrates. The proposal was severely criticised especially by members of the legal profession. The Conservatives eventually agreed to abolish the lay magistrates system and extend the sheriff court system. When the Labour government was elected, however, in 1974 they were persuaded by representations by bailies and others to retain the lay magistrates. The District Courts (Scotland) Bill proposes a mixture of lay and stipendiary magistrates. Training is suggested for the lay magistrates. One proposal which we welcome is an extension of the availability of legal aid.

CHAPTER VII

1. Estimate based on the samples collected in the course of the research project.
2. Supra, 149.
3. This may have been due to the comparatively minor nature of the offences charged and the fact that the accused did not generally have access to a solicitor to advise him about his plea.
4. Estimate based on the samples collected in the course of the research project.
5. The most serious crimes are generally tried before the High Court of Justiciary. This court has exclusive jurisdiction to try crimes of treason, murder, rape, incest, deforcement of messengers and breach of duty by magistrates.
6. A few categories of accused e.g. those charged with breach of the peace within a sports ground might have been considered for an earlier release. Supra, ch. V., ref. 3.
7. Supra, 76 et. seq.
8. Supra, 68.
9. Supra, 46 et. seq.
10. The Scottish section of the Home Office Research Unit have instituted a research project which deals with bail in the sheriff courts. No results have yet been published but we have had some discussion with the organisers of the project P. Didcott and M. Melvin.
11. Supra, 69.
12. Infra, Appendix II, 330.
13. Infra, 340.
14. Infra, 184 et. seq.
15. Supra, 158.
16. Supra, 36 et. seq.
17. Supra, 46 et. seq.
18. Infra, 189 et. seq.
19. In only 3 cases did the solicitor attempt to obtain the release of the accused for the continuation period. In the first and second case the procurator-fiscal objected because valuable property was missing. The value of the property was about 160 pounds. In the third case when the solicitor informed the sheriff that the accused was a married woman with children and a husband who worked the procurator-fiscal raised no objection to release.

20. Table XVI does not include continuation cases (CWP and CFE) because at this stage little or no information was given. The table also excludes one case because of missing values.
21. Supra, 182 et. seq.
22. Infra, 200.
23. Infra, 198.
24. The continuation and report cases (CWP, CFE, C(R)) were not included. The former were excluded because no information was given and the latter because the accused had pled guilty and this might be considered to place them in a different category from the other cases.
25. To do this we divided the information made available by both the procurator-fiscal and the solicitor into information favourable to liberty and information unfavourable to liberty. Generally the information given by the solicitor was classified as favourable to liberty and the information given by the procurator-fiscal was classified as unfavourable to liberty. We had to make some exceptions, however, to take into account e.g., the circumstance where the procurator-fiscal giving information about criminal record said the accused had no previous convictions. This was classified as favourable. Similarly where the solicitor said the accused had no fixed address, this was classified as unfavourable.
26. $x_2^2 = 70.9 \text{ p } 0.0001.$
27. $x_2^2 = 16.6 \text{ p } 0.0001.$
28. $x_2^2 = 8.01 \text{ p } 0.005.$
29. $x_2^2 = 36.93 \text{ p } 0.0001.$
30. Supra., 185 et. seq.
31. In this we differ from J. Hogarth, 'Towards the Improvement of sentencing in Canada' 1967, Canadian Journal of Corrections, 124.
Hogarth evaluated information contained in pre sentence reports according to the criteria of reliability, validity, relevance and efficiency. The main difference lies in our omission of validity as a criterion. According to Hogarth at 130 information is valid if it accurately represents what it purports to represent that is if e.g., it makes genuine distinctions between offenders and non offenders. We do not think the distinctions between validity and relevance is acceptable in this context. We are of the opinion that validity may properly be used as a test of the criterion adopted by the decision-makers but not to evaluate the information itself. Thus it is possible to conclude that a decision-maker has satisfactory information on which to base a decision using the factors he considers crucial. The question whether these factors distinguish what he wants to distinguish, however, raises a different question. Hogarth's criterion of

efficiency is designed to assess whether the least number of information items have been given without sacrificing predictive potential. He appears to assume that sufficient information will have been given to enable the decision-maker to make his decision if he assessed the accepted crucial factors. This is not an assumption which can be made with any confidence in many decision-making situations. In adopting sufficiency as a criterion we again differ from Hogarth.

32. Supra, 189 et. seq.
33. Supra, 155.
34. Suggested by a sheriff in an interview.
35. F. Suffet, 'Bail Setting' : A Study of Courtroom Interaction' Crime & Delin., 1966, 318.
36. Ibid., 323.
37. Ibid., 328.
38. Supra, 89 et. seq.
39. In 11 G(R) cases the solicitor did not specifically ask for liberty though he did give some information in favour of the accused.
40. Supra, 195.
41. Supra, 189 et. seq.
42. Supra, 188 et. seq.
43. We noted that in 3 cases the procurator-fiscal referred to convictions which were not libelled.
44. Supra, Tables XV and XVI.
45. The procurator-fiscal sometimes obliged the solicitor by showing him a copy of the police record of previous convictions against the accused but the solicitor does not have any right to see this.
46. Summary Jurisdiction (Scotland) Act 1954 (2 & 3 Eliz. 2, c. 48) S. 51(b)(c).
47. T.C. Daintith and A.B. Wilkinson, 'Bail and the Convention : British Reflections on the Wemhoff and Neumeister Cases' Am. J. Comp. L. vol. 18, 337.
48. Sibbald v. Ingles, 1785, Mor. 13139.
49. J. McGlashen, Practical Notes on the Jurisdiction and Forms of Process in Civil Causes of the Sheriff Courts of Scotland (Edinburgh, 1868), par. 565.
50. In correspondence contained in some unpublished material of the Scottish Home and Health Department, HM 60/172, some of the writers doubted whether the clerks of court could be held liable and denied any knowledge of this ground of liability.
51. Ibid.
52. Table XXI shows the different offences charged where more than one offence was libelled. Only one offence is shown, however,

where there are multiple charges, for example, three charges of theft.

53. We were unable to find out why no appearance was entered.
54. *Infra*, 278, et. seq.
55. Table XXIII does not include review (R) cases.
56. Italy introduced a "4 year limit" law in 1970 after an obviously innocent man had been held in gaol for more than 4 years without trial. It has been reported, however, that this limitation has now been increased to 9 years.
The Sunday Telegraph 7th April 1974.
57. Criminal Procedure (Scotland) Act 1887 (50 & 51 Vict. c.35) S. 43.
58. *Ibid.*, S.31.
59. *Infra*, 271, et. seq.
60. Criminal Justice Act 1967 (c.80) S.68.
61. The fact that the accused has spent time in pre trial custody may, however, persuade the judge to impose a non custodial rather than a custodial sentence.
62. This was noted in connection with accused who pled guilty and who were sentenced at that first court appearance.
63. Discussed *infra*, 284.
64. This does not necessarily mean that 4 accused had absconded as the failure to appear may have been due to illness or mistake about the date or some similar reason. The rate of wilful failure to appear may, therefore, be less than 4%.
65. *Supra*, 209.
66. *Infra*, 271 et. seq.
67. *Supra*, 47.
68. *Supra*, 36 et. seq.
69. *Supra*, 47.
70. *Supra*, 191.
71. *Supra*, 183.
72. In England the Working Party on Bail Procedures in Magistrates' Courts (London : H.M.S.O., 1974) were so attached to the idea of information forms that they recommended their use even though they were forced to conclude that verification would not be feasible. par. 137.
73. In 1 case where the procurator-fiscal and solicitor gave different information about the address of the accused, the sheriff said he would grant bail if the solicitor's account was confirmed.
74. *Supra*, 36 et. seq.
75. *Supra*, 186.

76. Supra, Tables XII and XIII.
77. In America a major problem was considered to be the comparative ease with which a person could disappear in the densely populated cities which had high rates of population movement. The Scottish situation is in no way comparable.
78. Two classic examples of attempts to predict future criminal behaviour are E.W. Burgess, 'Factors Determining Success or Failure on Parole' in the Workings of the Indeterminate-Sentence Law and Parole System in Illinois (Springfield, 1928) and S. and E. Glueck, Predicting Delinquency and Crime (Cambridge, Mass : Harvard University Press, 1959). See also references and discussion in L. Radzinowicz and M.E. Wolfgang ed., Crime and Justice (London : Basic Books, Inc., 1971) vol. III, part 3.

CHAPTER VIII

1. Where the crime charged is murder of treason the High Court of Justiciary is the only court which can competently consider bail.
2. *Supra*, 86.
3. The most important reported cases were discussed *supra*, 70 et seq.
4. *Supra*, chs. VI and VII.
5. Petitions were heard from 31st Oct 1972 to 20th Dec 1972 inclusive.
6. Although appointment as a Crown assistant requires a legal qualification, a Crown assistant does not have any right of audience before the High Court of Justiciary. A Crown assistant is a member of the Crown Office. This body supervises the system of criminal prosecution in Scotland with the exception of prosecution in the lay magistrates courts.
7. An Advocate-Depute is appointed by the Lord Advocate from members of the Bar to represent the Crown in criminal cases. Although the appointment is a political one, current practice has tended to favour appointments which are not determined by political allegiance.
8. The address of the accused was given as the prison or other institution in which he was held in custody.
9. In the sheriff court study, we found that the sheriff gave reasons for his decision in less than 2% of the bail cases, *supra*, 192. We suspect, therefore, that of the 35% appeal cases in which counsel related the grounds of refusal in the sheriff court, some may have been ex post facto rationalisations on the part of the solicitor.
10. *Ibid*.
11. *Infra*, 270.
12. *Supra*, 192 : $x_1^2 = 6.49$ p 0.01. This was the result when 10 was used as the cut-off point for number of previous convictions.
13. $x_2^2 = 8.09$ p 0.017
14. $x_1^2 = 3.99$ p 0.045
15. Criminal Appeal (Scotland) Act 1926. (16 & 17 Geo. 5, c. 15) S.9.
16. *Supra*, 231 et seq.
17. *Infra*, 244 et seq.
18. *Supra*, 193.
19. *Supra*, 227.
20. *Infra*, 241 et seq.

21. *Supra*, 187 et seq.
22. An average of 2.6 information variables was given to the sheriff in applications for bail in summary and indictable cases after the continuation stage. (110 cases). This average was based on information contained in Tables XV and XVI. In the bail appeals, however, an average of 7.2 information variables was given to the judge. This average was based on Table XXIX. The criminal record of the accused contained a great deal of information and we estimated that this might be counted as 4 variables. This estimate took into account the fact that in some cases all the variables were not relevant, and that some variables were repeated later in Table XXIX.
23. *Supra*, 195.
24. When faced with this conflicting information, the judge said that in this case he did not consider the family circumstances relevant to his decision. In cases where the judge considered the conflicting information to be relevant, he adjourned the case until the next day to allow the information to be verified.
25. The variables considered were fixed address, marital status, dependents, employed, source of income.
26. *Supra*, 90.
27. The judge was surprised and critical about the procedure of consultation which the Advocate-Depute described. The Advocate-Depute said there was no official procedure by which the solicitor or counsel could obtain a copy of or access to police information about the accused's criminal record. The accused's representatives had to rely on informal co-operation with the Advocate-Depute or procurator-fiscal.
It should be noted, however, that the accused will generally have received notice of the convictions which may be libelled against him. Although this does not necessarily describe fully the accused's criminal involvement, it does provide useful information which the solicitor ought to convey to counsel.
28. *Infra*, 244.
29. *Supra*, Table XXIX.
30. Legal Aid Scotland Act 1967 (c. 43), hereinafter referred to as the 1967 Act, S. 5 (a).
31. *Ibid.*, S. 2 (2) (a).
32. *Ibid.*, S. 5 (b).
33. *Ibid.*, S. 1 (7) (a) (ii).
34. *Ibid.*, S. 1 (7) (b).
35. *Supra*, 167, 203.
36. Act of Adjournal dated May 27, 1971.
37. Act of Adjournal dated Aug. 31, 1964.

38. An average of £17 compared with £3 in the sheriff court.
39. This information was supplied by the sheriff clerks of the various sheriffdoms and was incomplete.
40. Supra, 81.
41. This compares favourably with our results in the sheriff court, supra, 209.
42. Ibid.
43. Infra,
44. E.M. Clive and G.A. Watt, Scots Law for Journalists (London : National Council for the Training of Journalists, 1965), 84 et seq.
45. Supra, 70 et seq.
46. R. v. Sussex [1924] 1 K.B. 256, Lord Hewart at 259.
47. In the sheriff court, although the petitions were heard in private, the accused was present except in review cases.
48. An alternative would be to provide that all bail appeals be heard in open court with opposing counsel having the right to apply for reporting restrictions or a chambers hearing. Although this might result in more public hearings, it might cause some delay, if many such applications had to be decided by the court.
49. Supra, 242.
50. 1959 J.C. 12.
51. T.B. Smith, 'Scotland : Bail Before Trial' 108 U. PA. L. Rev., 305.
52. This refers to the procedure authorised by the Criminal Procedure (Scotland) Act 1987 (50 & 51 Vict. c. 58) S.31. An accused may indicate that he intends to plead guilty and desires to have his case disposed of immediately.
53. Smith, op. cit., 322.

CHAPTER IX

1. R. Goldfarb, Ransom : A Critique of the American Bail System (New York: Harper & Row, 1965), 1.
2. Ibid., 3.
3. Supra, 193 et. seq.
4. Supra, 121 et. seq.
5. Although the decision-maker could not keep to the pattern without this information he could of course depart from the pattern.
6. Supra, 155 et. seq.
7. Supra, 186 et. seq.
8. Supra, 186.
9. Infra, 264 et. seq.
10. Supra, 187, 198.
11. Supra, 187.
12. Infra, 269.
13. Supra, 68.
14. Supra, 238.
15. Supra, 188 et. seq.
16. For an attempt to assess the claims of supporters of the adversary system, J. Thibaut, L. Walker, E.A. Lind, 'Adversary Presentation and Bias in Legal Decision-making' 86 Harv. L. Rev. 386 (1972).
17. Supra, 242 et. seq.
18. Supra, 46.
19. Supra, 36 et. seq.
20. Home Office, Bail Procedures in Magistrates' Courts (London : H.M.S.O., 1974), par. 136.
21. Supra, 193 et. seq.
22. Supra, 187.
23. Supra, 189 et. seq.
24. Supra, 161 et. seq.
25. Supra, 186 et. seq.
26. Supra, 181-183 : 199-200 : 240-244.
27. Supra, 200.
28. Supra, 243.
29. Supra, 200, 244.
30. Supra, 266-7.

31. *Infra*, 270.
32. *Supra*, 67.
33. *Supra*, 69, 78-88.
34. *Supra*, 133.
35. Magistrates' Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c.55.), S.38.
36. *Supra*, 146-147.
37. Magistrates' Courts Act 1952, S.93.
38. *Infra*, 277.
39. Arbuckle v. Taylor (1815) 3 Dow's App, Lord Eldon at 183-4. Commitment for examination "was a proceeding with a view to protect him (the accused) against a commitment for trial. ... And if ... where a party is committed for further examination bail shall be required before that further examination takes place, you put him to this inconvenience, that he must give security to stand a trial which he may never have to stand."
40. *Supra*, 186.
41. *Supra*, 252-53.
42. *Supra*, 115.
43. *Supra*, 143.
44. *Supra*, 142.
45. *Supra*, 143.
46. *Supra*, 155 et. seq.
47. *Supra*, 192 et. seq.
48. *Supra*, 209.
49. *Supra*, 212.
50. *Supra*, 209.
51. *Supra*, 210 et. seq.
52. *Supra*, 209.
53. N. Walker, Crime and Punishment in Britain (Edinburgh : Edinburgh University Press, 1970), 317-324. The Criminal Justice (Scotland) Act 1949 (12,13 & 14, Geo.6, c.94), S.21 authorises preventive detention as a sentence subject to fairly strict limitations. The sentence has, however, fallen into disuse. See Renton and Brown, Criminal Procedure 4th ed., G.H. Gordon (Edinburgh : Green and Son Ltd.), 327.
54. A. Sampson, 'Post-Prison Success Prediction', *Criminology* (1974), 155. Sampson at 171 claimed that his complex improvements provided only a "moderately effective predictive measure". *Supra*, 220.
55. *Supra*, 218 et. seq.
56. *Supra*, 35.

57. If the accused is a danger because of some mental disorder appropriate action may be taken under the Mental Health (Scotland) Act 1960 (8 & 9 Eliz. 2, c.61).
58. The attempt to introduce a right to bail in England has given only a limited protection to the defendant because of the extent to which the right was qualified. *Supra*, 49.
59. American Bar Association, *op. cit.*, 85 par. 1.4. We have made some changes in the recommendations.
60. *Supra*, 78 et. seq.
61. Renton and Brown, *op. cit.*, 36.
62. *Supra*, 139.
63. *Supra*, 165 et. seq. : 203 et. seq.
64. *Supra*, 202.
65. The handling of bail money involves a considerable amount of work. A receipt has to be given for the money, the money recorded, deposited in a bank (except in the case of the police who return the identical notes) and when the money is repaid the clerk of court has to check with the bank to find out if any interest is to be paid.
66. In 1972 untried male prisoners accounted for 27.4% of the total prison receptions. Untried female prisoners accounted for 28.55% of the total prison receptions. Untried prisoners were 12.17% and 17.26% respectively of the average daily populations. H.M.S.O. Prisons in Scotland 1972 Cmnd. 4349.
67. *Supra*, 206, 144.
68. *Supra*, 41, 49, 52, 54.
69. American Bar Association, Standards Relating to Pre-trial Release (New York : American Bar Association, 1968), par. 5.2. (iii).
70. *Supra*, 38.
71. American Bar Association, *op. cit.*, par. 5.2. (i).
72. *Supra*, 54.
73. *Supra*, 50.
74. *Supra*, 79.
75. *Supra*, 274 et. seq.
76. *Supra*, 80.
77. *Supra*, 96.

APPENDICES

APPENDIX I

SHERIFF COURT OF THE LOTHIANS AND PEEBLES *at* EDINBURGH

ond.

I, Alexander Brown, bricklayer of 19 Greentrees Avenue, Edinburgh

Do hereby judicially, ENACT, and BIND and OBLIGE myself, my Heirs, Executors, and Successors whomsoever, as Cautioners and Sureties acted in the SHERIFF COURT BOOKS OF Midlothian for Charles Doe, labourer of 19 Brownbark Avenue, Edinburgh

hereinafter called "the accused", that the accused shall appear and answer, or that I shall present the accused at all Diets of Court in, and until the final issue of, any action, process, criminal charge, or prosecution already brought, or which may, at any time within six months from this date, be brought, against the accused, at the instance of a proper Prosecutor, before a competent Court, for the alleged Crime of theft

all as more fully set forth in a Petition or Complaint presented to the Sheriff of THE LOTHIANS AND PEEBLES *at* EDINBURGH at the instance of the Procurator Fiscal of Court for the Public Interest, against the accused, whereon did proceed the Warrant of Commitment against the accused, of date 1st May 19 72 and that under the penalty of ten Pounds sterling, to be paid by me or my foresaids in case of failure. And I, the accused, with consent of me the said Cautioner, do hereby consent and declare that all Citations or other intimations in reference to the said action, process, criminal charge, or prosecution, or to this Bond, which may be left for me, the accused, within the (Sheriff Clerk's Office, Edinburgh or other address specified by the accused)

shall be sufficiently and equally binding on me, the accused, and on me the said Cautioner, as if delivered to me, the accused, personally, which place I, the accused, with consent and concurrence foresaid, do hereby sist as my domicile. And we consent to the Registration hereof in the said Sheriff Court Books, or others competent, for preservation and execution. In WITNESS WHEREOF, these presents.

(Signed) E.F. Witness. Eliza Fraser, typist, 1 Black Road
(Signed) F.G. Witness Francis Gill, typist, 1 Brown Road

APPENDIX IIInformation Sheet Used in Court

Date of Observation	Character of proceedings
Prosecutor's attitude	
Information given to judge by prosecutor	
Legal representation of accused	yes/no
Information given to judge by solicitor	
Does judge seek additional information	yes/no
From whom is information requested	prosecutor/solicitor/accused
What information is requested	
What information is given	
Sheriff's decision	bail granted/bail refused/O.T.A./continuation in custody
Amount of bail	£
Reasons given for decision	
Application for legal aid	yes/no
Result of application	granted/refused
Reasons given	
Other information	

Information Sheet Used in Prosecutor's Office

Name of accused

Sex

Age

Offence charged

No. of offences

Circumstances of offence

Copy of criminal record

Address of accused

Co-residents

Length of residence

Employment record

Occupation

Income

Family circumstances

Other information

APPENDIX III

SCALE A

GUTTMAN SCALE

(GUTPOL10) USING

BAILDEC
 MONAV
 SOBRIETY
 ADDRESS
 SPCIRCS
 CCOBJ

DIVISION POINT = 3.00
 DIVISION POINT = 7.00
 DIVISION POINT = 5.00
 DIVISION POINT = 3.00
 DIVISION POINT = 2.00
 DIVISION POINT = 2.00

RESP = 1 FOR VALUES EQUAL TO DIVISION POINT AND ABOVE.

ITEM.	BAILDEC	MONAV	SOBRIETY	ADDRESS	SPCIRCS	CCOBJ
RESP.	0 1	0 1	0 1	0 1	0 1	0 1
G	ERR	ERR	ERR	ERR	ERR	ERR
U	6	23	23	23	23	23
T	ERR	ERR	ERR	ERR	ERR	ERR
P	5	0	0	0	0	0
L	ERR	ERR	ERR	ERR	ERR	ERR
i	4	18	11	7	12	18
0	ERR	ERR	ERR	ERR	ERR	ERR
3	40	39	13	27	16	24
2	10	10	9	11	1	9
1	1	1	1	1	1	1
0	0	0	0	0	0	0
SUMS	69	23	61	31	29	63
PCTS	75	25	66	34	32	68
ERRORS	0	0	0	8	6	28

92 CASES WERE PROCESSED
 0 (OR 0.0 PCT) WERE MISSING

Explanation of Division Points

The division points shown were chosen to produce the following scale:- bail granted: had money available: sober: fixed address: no special circumstances surrounding the offence: no chief constable's objection to bail.

Explanation of Coding

Had money available means that the arrested person had sufficient money in his property to cover the standard amount of bail for the offence charged or his relatives or friends had been contacted and had provided the money.

Sober means that the arrested person was sober when arrested or if he had been drinking it was more than 12 hours before the next court or if he was drunk it was more than 24 hours before the next court.

Fixed address means that the arrested person was not described as having no fixed address, or an address outside Edinburgh and district, or an address indicating temporary lodgings within a common lodging house.

No special circumstances surrounding the offence means that the following circumstances were absent:- (a) The victim or complainant expressed fear that another offence might occur; (b) The arrested person lived with or in close proximity to the victim or complainant; (c) The arrested person lived in the house where the offence took place; (d) The arrested person injured a policeman (this did not always form the basis of a separate charge) or committed an offence in the police station; (e) The arrested person was wanted for further inquiries in relation to the offence charged or some other offence.

No chief constable's objection to bail means that the following circumstances were absent:- (a) The offence charged involved dishonesty;

(b) The person was arrested on warrant; (c) The offence charged involved serious injury to person; (d) A wife was assaulted and she did not consent to the release of her husband.

Explanation of Scale A

Line 6 of the scale shows that when the variables shown were included in Scale A all the cases which passed the bail decision, that is, all those cases in which bail was granted, also passed all the other variables.

Line 5 illustrates that no case in which bail was refused passed all the variables.

SCALE B

GUTTMAN SCALE

(GUTPOL12) USING

BAILDEC
 MONAV
 SOBRIETY
 ADDRESS
 SPCIRCS
 CCOBJ
 OFFENCE

DIVISION POINT = 3.00
 DIVISION POINT = 7.00
 DIVISION POINT = 5.00
 DIVISION POINT = 3.00
 DIVISION POINT = 2.00
 DIVISION POINT = 2.00
 DIVISION POINT = 2.00

RESP = 1 FOR VALUES EQUAL TO DIVISION POINT AND ABOVE

	BAILDEC		MONAV		SOBRIETY		ADDRESS		SPCIRCS		CCOBJ		OFFENCE	
	0	1	0	1	0	1	0	1	0	1	0	1	0	1
I	ERR		ERR		ERR		ERR		ERR		ERR		ERR	
I														
I	0	17	0	17	0	17	0	17	0	17	0	17	0	17
I	ERR		ERR		ERR		ERR		ERR		ERR		ERR	
I														
I	0	6	0	6	0	6	0	6	0	6	0	6	6	0
I	ERR		ERR		ERR		ERR		ERR		ERR		ERR	
I														
I	13	0	10	3	2	11	0	13	1	12	0	13	0	13
I	ERR		ERR		ERR		ERR		ERR		ERR		ERR	
I														
I	28	0	24	4	13	15	4	24	5	23	5	23	5	23
I	ERR		ERR		ERR		ERR		ERR		ERR		ERR	
I														
I	27	0	26	1	13	14	13	14	9	18	3	24	17	10
I	ERR		ERR		ERR		ERR		ERR		ERR		ERR	
I														
I	1	0	1	0	1	0	1	0	1	0	0	1	0	1
I	ERR		ERR		ERR		ERR		ERR		ERR		ERR	
I														
I	0	0	0	0	0	0	0	0	0	0	0	0	0	0
I	ERR		ERR		ERR		ERR		ERR		ERR		ERR	
I														
I	0	0	0	0	0	0	0	0	0	0	0	0	0	0
I	ERR		ERR		ERR		ERR		ERR		ERR		ERR	
I														
I	69	23	61	31	29	63	18	74	16	76	8	84	28	64
I	75	25	66	34	32	68	20	80	17	83	9	91	33	70
RS	0	6	0	8	2	29	4	14	15	0	8	0	26	0

02 CASES WERE PROCESSED
 0 (OR 0,0 PCT) WERE MISSING

Explanation of Scale B

Scale B illustrates in line 7 that when an additional variable offence (OFFENCE) was added to Scale A all the cases which passed the bail granted variable no longer passed all the other variables in the scale.

SCALE C

GUTTMAN SCALE (GUTPOL15) USING

BAILDEC	DIVISION POINT = 3.00
SOBRIETY	DIVISION POINT = 5.00
SPCIRCS	DIVISION POINT = 2.00
ADDRESS	DIVISION POINT = 3.00
CCOBJ	DIVISION POINT = 2.00

RESP = 1 FOR VALUES EQUAL TO DIVISION POINT AND ABOVE

ITEM,,	BAILDEC		SOBRIETY		SPCIRCS		ADDRESS		CCOBJ		TOTAL
RESP.,	0	1	0	1	0	1	0	1	0	1	
	I-ERR		I-ERR		I-ERR		I-ERR		I-ERR		
G	I	I	I	I	I	I	I	I	I	I	I
U	5	0	23	0	23	0	23	0	23	0	23
T	I-ERR		I-ERR		I-ERR		I-ERR		I-ERR		
P	I	I	I	I	I	I	I	I	I	I	I
O	4	11	0	0	11	0	11	0	11	0	11
L	I-ERR		I-ERR		I-ERR		I-ERR		I-ERR		
1	I	I	I	I	I	I	I	I	I	I	I
5	3	46	0	18	28	6	40	15	31	7	39
	I-ERR		I-ERR		I-ERR		I-ERR		I-ERR		
	I	I	I	I	I	I	I	I	I	I	I
	2	11	0	10	11	9	2	2	9	1	10
	I-ERR		I-ERR		I-ERR		I-ERR		I-ERR		
	I	I	I	I	I	I	I	I	I	I	I
	1	1	0	1	0	1	0	1	0	0	1
	I-ERR		I-ERR		I-ERR		I-ERR		I-ERR		
	I	I	I	I	I	I	I	I	I	I	I
	0	0	0	0	0	0	0	0	0	0	0
	I-ERR		I-ERR		I-ERR		I-ERR		I-ERR		
SUMS	69	23	29	63	16	76	18	74	8	84	92
PCTS	75	25	32	68	17	83	20	80	9	91	
ERRORS	0	0	0	29	6	2	17	0	8	0	62

{ 92 CASES WERE PROCESSED
0 (OR 0.0 PCT) WERE MISSING

Explanation of Scale C

Scale C illustrates in line 4 that when the variable had money available (MONAV) was dropped from Scale A, 23 plus 11 cases successfully passed all the variables except the bail granted variable. Only 23 cases passed the bail granted variable. This suggests that if the police had not used the availability of money for bail (MONAV) as a decision criterion, bail would have been granted in another 11 cases.

SCALE D

GUTTMAN SCALE

(GUTPOL17) USING

BAILDEC
SOBRIETY
ADDRESS
SPCIRCS
CCOBJ

DIVISION POINT = 3.00
DIVISION POINT = 5.00
DIVISION POINT = 3.00
DIVISION POINT = 2.00
DIVISION POINT = 2.00

RESP = 1 FOR VALUES EQUAL TO DIVISION POINT AND ABOVE

ITEM.,	BAILDEC	SOBRIETY	ADDRESS	SPCIRCS	CCOBJ	TOTAL
RESP.,	0 1 I	0 1 I	0 1 I	0 1 I	0 1 I	
G	0 1 I	0 1 I	0 1 I	0 1 I	0 1 I	
U	5 I 0 23I	0 23I	0 23I	0 23I	0 23I	23
Y	0 23I	0 23I	0 23I	0 23I	0 23I	
P	0 15 0I	0 15I	0 15I	0 15I	0 15I	15
O	4 I 15 0I	0 15I	0 15I	0 15I	0 15I	
L	0 15 0I	0 15I	0 15I	0 15I	0 15I	
i	0 43 0I	14 29I	16 27I	6 37I	7 36I	43
7	3 I 43 0I	14 29I	16 27I	6 37I	7 36I	
	0 10 0I	9 11I	1 9I	9 11I	1 9I	10
2	I 10 0I	9 11I	1 9I	9 11I	1 9I	
	0 1 0I	1 0I	1 0I	1 0I	0 1I	1
1	I 1 0I	1 0I	1 0I	1 0I	0 1I	
	0 0 0I	0 0I	0 0I	0 0I	0 0I	0
0	I 0 0I	0 0I	0 0I	0 0I	0 0I	
SUMS	69 23	24 68	18 74	16 76	8 84	92
PCTS	75 25	26 74	20 80	17 83	9 91	
ERRORS	0 0	0 30	16 9	15 0	8 0	78

92 CASES WERE PROCESSED
0 (OR 0.0 PCT) WERE MISSING

Explanation of Scale D

In Scale D the had money available (MONAV) variable was removed (c/f Scale C). The sobriety (SOBRIETY) variable was given a new coding for sober. Thus sober was coded when the (SOBRIETY) coding was sober or the (SOBRIETY) coding was had been drinking and the (CTHRS) coding

was greater than 12 hours or the (SOBRIETY) coding was drunk and the (CTHS) coding was greater than 24 hours or the (SOBRIETY) coding was drunk and the (CTHS) coding was greater than 12 hours and (MONAV) coding was positive. Line 4 of Scale D illustrates that when the effect of the had money available (MONAV) variable on the sobriety (SOBRIETY) variable was taken into account, the number of cases which failed due to the non-availability of money ~~rose~~ from 11 to 15.

APPENDIX IVVariables Used in Study of Police Bail

For some variables no coding is given below, the coding is fully described supra, page 332.

Offence charged: assault; malicious damage; theft; breach of the peace; drunk and incapable; nuisance; prostitution; other.

Circumstances of offence

Police objection to release: yes; no.

Chief constable's directions about release

Address

Age: coded in 10 year periods.

Sex: male; female.

Employed: yes; no.

Sobriety

Has money to cover standard bail amount: yes; no.

Has money to cover bail amount asked: yes; no.

Contacts someone who provides bail money: yes; no.

Bail decision: granted; not granted.

Court disposition: admonished; fine, time to pay; fine, no time to pay; prison.

APPENDIX VVariables Used in Sheriff Court Study

The codings "not specified", "not available" and "other" were reserved for all variables. Where relevant, "not specified" indicated that reference was made to a variable but no further details were given in a particular case. Where relevant, "not available" indicated that no information about a variable was available in a particular case. Where relevant, "other" indicated that the information could not be coded under the classifications described.

(1) Information Made Available to Sheriff(a) Information given by procurator-fiscal

Procurator-fiscal's attitude to release: asks for O.T.A.; agrees to O.T.A.; asks bail; accepts bail offered; asks high bail; asks for custody; opposes O.T.A.; opposes bail; opposes but drops opposition.

Seriousness of offence: serious injury; drugs.

Circumstances of offence: domestic, accused may return; victim still at risk; risk to public; circumstances indicate medical examination needed.

Length of criminal record: long list of analogous offences; long list of offences; long list, number of convictions given.

Recent conviction: less than 3 months; more than once in past year; recently released from prison; on licence from borstal or approved school; on probation; within period of deferred sentence.

Seriousness of previous sentences: served number of prison sentences; served long sentence; custodial sentence for similar offence; record includes approved school and/or borstal.

Non-appearance warrant issued in connection with previous offence: on one occasion; on more than one occasion; history of absconding.

On bail for another offence: charge to be heard in High Court; sheriff and jury trial; for similar offence; on high bail; bail set for two different appearances.

Further inquiries to be made: to trace co-accused; to trace property; release would hinder inquiries; further charges pending.

Address: accused sleeping rough; common lodging house; lost address because of charge; no address in Edinburgh. No fixed address (unspecified) : fixed address (unspecified).

Employment: unemployed; unemployed therefore no job to lose.

Medical history: history of mental or nervous disease; previously in hospital because of mental or nervous disease; drink problem; drugs problem; bad health; pregnant.

Other information: rejected by family; has money for bail.

(b) Information given by solicitor

Legal representation: yes; no.

Solicitor's attitude to release: asks O.T.A.; asks bail; offers bail; offers higher bail; accepts procurator-fiscal's motion; asks full committal; asks report.

Seriousness of offence: minor offence; motoring offence; small amount of property involved.

Circumstances of offence: not returning to address where offence committed; no risk to victim; no risk to public.

Length of criminal record: first offence; no convictions for analogous offence; only a few convictions; only a few convictions for analogous offence; long record but petty offences; no convictions for serious offence; offence referred to not libelled.

Recent convictions: no convictions for over a year; no convictions for analogous offence for over a year; long periods between convictions; unfavourable circumstances when recently released from custody; supervised by social worker.

Seriousness of previous sentences: admonished; fine; probation; no custodial sentence; no custodial sentence for similar offence; short custodial sentence.

Appearance of accused in view of non-appearance warrant issued in past: forgot date; prevented by family circumstances; reasonable excuse.

Likelihood of abuse of bail in view of fact that accused presently released on bail for another offence: first charge dropped; different type of offence; offence now charged occurred prior in time to other offence; innocent of charge.

Address: fixed address; described as no fixed address but has fixed address; suggest alternative to outweigh no fixed address; wishes to return to family; changed address from locus of offence; changed address from victim of offence.

Length of residence: all his life; many years; short but no reason to believe that accused will leave.

Co-residents: parents; other relative; spouse; children; friend.

Employment record: regular employment; employed; lost job recently; start job soon; may lose job if custody; unemployed.

Occupation: profession; trade; services; labourer; school; housewife.

Marital status: single; married; cohabiting; widowed; divorced; separated.

Dependents: spouse; children; other family; none.

Income: from employment; unemployment benefit; social security; supported by parents or spouse; pension; none.

Medical history: history of mental or nervous disease; drink problem; drugs problem; bad health; pregnant.

Other information: bail agreed with procurator-fiscal; O.T.A. agreed with procurator-fiscal; innocent of charge; has already spent some time in custody; youth of accused; needed at home by family; new responsibility because of marriage or child; no person to raise money; no money for bail.

(c) Information given after specific inquiry by sheriff

Sheriff seeks additional information from procurator-fiscal: yes; no.

Information sought: see variables procurator-fiscal's attitude to release to medical history inclusive.

Information given: see variables and coding procurator-fiscal's attitude to release to medical history inclusive.

Sheriff seeks additional information from defence: yes solicitor; no solicitor; yes accused; no accused.

Information sought: see variables solicitor's attitude to release to medical history inclusive.

Information given: see variables and coding solicitor's attitude to release to medical history inclusive.

(d) Information in papers made available to sheriff

Address: address specified; no fixed address.

Age: coded in 10 year periods.

Occupation: professional; trade; services; labouring; school; housewife.

Type of offence: crimes against person (murder, attempted murder, assault, incest, rape, attempted rape, lewd and libidinous practices); crimes against property with violence (theft by housebreaking, house-breaking, theft by opening lockfast places, robbery); crimes against property without violence (theft, reset, fraud, uttering); motor vehicle offences (driving under influence of drink or drugs, driving while disqualified, driving without insurance); miscellaneous offences (breach of the peace, malicious mischief, resisting arrest, prevention of crimes act).

Number of charges: actual number of charges for each offence.

Procedural stage: continued without plea(\$); continued for further examination ; guilty plea(\$); not guilty plea(\$); full committal ; guilty plea report(\$); continuation report; review application.

Report information available: yes; no.

(e) Bail money

Amount of bail offered by solicitor: actual amount in pounds.

Amount of bail acceptable to procurator-fiscal: actual amount in pounds.

(2) Result and Later History of Case

Sheriff's decision: bail granted; O.T.A.; O.T.A. social background report; O.T.A. medical report; bail refused; continuation in custody; custody for social background report; custody for medical report; custody for borstal report.

Bail set by sheriff: amount offered by solicitor; amount acceptable to procurator-fiscal ; amount agreed by solicitor and procurator-fiscal.

Amount of bail set: actual amount in pounds.

Time before trial: coded in periods of 28 days.

Legal aid granted: yes; no.

Appearance by accused at trial: yes; no.

Bail forfeited: yes; no.

Non-appearance warrant issued: yes; no.

Procedure at trial: summary; solemn (sheriff court); solemn (High Court of Justiciary).

Plea: guilty; guilty as amended; accelerated plea of guilty; not guilty; changes plea to guilty; no plea.

Finding: guilty; guilty as amended; guilty to some charges only; plea not guilty accepted; not guilty; not proven.

Sentence: case deserted; admonished; fine; borstal; probation; custody.

Amount of fine: coded in amounts of 10 pounds.

Length of custody: 3 months or less; >3 months <1 year; >1 year <5 years; >5 years.

Sentence back-dated: yes; no.

(3) Information Available to Procurator-Fiscal

Where no coding is given below, the coding follows that of the appropriate variable in 1(a).

Type of offence: based on official classification of criminal offences.

Victim: spouse; family member; acquaintance; stranger; policeman.

Severity of injury: death; serious injury; medical treatment required; minor.

Amount of property: bands of 50 pounds up to 200 pounds; >200 <1000; >1000.

Amount recovered: bands of 20 up to 100 per cent.

Locus of offence: accused's family home; other house; shop; pub; police station; street.

Length of criminal record

Recent convictions

Seriousness of previous sentences

Date of release from custody: < week; < month; < 3 months; < year.

Non-appearance warrant issued in connection with past offence

On bail for another offence

Risk of interference with witnesses: threats to witnesses; domestic crime; conviction for interference with course of justice.

Further inquiries to be made

Co-accused: yes; no.

Address of accused: fixed address; common lodging house; outside Edinburgh; no fixed address.

Co-residents: spouse; children; parent; other relative; armed forces personnel; friend; co-accused; none.

Time spent at address: life; > 5 years; < 5 years > 1 year; < 1 year > 3 months; < 3 months.

Employed: yes; no.

Employment record: regular employment; temporary employment; unemployed.

Occupation: profession; trade; clerical; unskilled; school; housewife.

Income: bands of £10.

Marital status: married; cohabiting; divorced; single.

Dependents: spouse; children; parent.

Family circumstances: separated from spouse; parent rejects accused because of offence; only person available to look after children.

Medical history: history of mental disturbance; alcoholic problem; drug problem; bad health.

APPENDIX VIVariables Used in High Court of Judiciary Study

The codings "not specified", "not available" and "other" were reserved for all variables. Where relevant, "not specified" indicated that reference was made to a variable but no further details were given in a particular case. Where relevant, "not available" indicated that no information about a variable was available in a particular case. Where relevant, "other" indicated that the information could not be coded under the classifications described.

(1) Information Made Available to Judge(a) Information given by advocate-depute

Advocate-depute's attitude: opposes release in principle; wants higher bail money; agrees to bail.

Seriousness of offence: serious offence charged.

Circumstances of offence: violence used; risk to victim; risk to public.

Length of criminal record: number of previous convictions in bands of 10.

Typicality of criminal record: actual number of previous offences, the same as offence charged.

Recent conviction: < 3 months; > 3 months < 1 year; > 1 year.

Recently released from custody: < 3 months; > 3 months < 1 year; > 1 year.

Seriousness of previous sentences: prison; borstal; approved school; probation; fine; admonished.

Longest custodial sentence: approved school/borstal; < 3 months; > 3 months < 1 year; > 1 year < 5 years; > 5 years.

Record shows abuse of liberty: on bail for another offence; on parole; on probation.

Record shows risk of defeating ends of justice: non-appearance warrant issued in past; previously charged with perjury; previously charged with attempting to defeat ends of justice.

Further charges pending: yes.

Ample evidence: yes.

S. 31 letter: yes.

Delay before trial: bands of 28 days.

Address: fixed address; no fixed address.

Dependents: wife; children; other relative.

Employment status: employed; unemployed.

Other information: known to police as successful criminal; involved in I.R.A. activity; drug addict.

(b) Information given by petitioner's counsel

Counsel's attitude to release: asks bail; asks interim liberation.

Seriousness of offence: minor; no serious consequences; summary complaint.

Length of criminal record: no convictions; few convictions; no convictions for violence; no similar convictions.

Recent convictions: no recent convictions; no recent serious convictions.

Seriousness of previous sentences: no custody; only short custodial sentences; many but short.

Appearance of accused: explanation of circumstances which suggest non-appearance; never failed to appear in past; third party promises to ensure appearance; gives assurance that accused will appear.

Likelihood of abusing bail: released on bail without incident on more serious charge; no likelihood of abuse of bail; no likelihood of interference with witnesses; no likelihood that further offences will be committed.

Grounds of refusal of bail in lower court: lengthy criminal record; risk to public.

Presumption of innocence: pleading not guilty; outlines defence; will contest admission; relies on presumption of innocence.

Address: fixed address; contests description of no fixed address.

Employment status: employed; unemployed; has been offered job.

Marital status: married; divorced; single.

Family commitments: recently married; hopes for reconciliation with family; needed by family; wife ill.

Other information: in pre-trial custody for a long time.

(c) Information given after specific inquiry by judge

Judge seeks additional information from advocate-depute: yes; no.

Information sought: copy of criminal record; recent convictions; similar convictions; recently released from prison; description of record; trial date; type of procedure; admission by accused; family circumstances; age; address; value of stolen property; reason for refusal of bail; acceptability of bail amount.

Information given: coded as in (a).

Judge seeks additional information from defence counsel: yes; no.

Information sought: plea; criminal record; family circumstances; employed; income; address; likelihood of appearance; amount of bail offered; can accused raise bail set.

Information given: coded as in (b).

(d) Information available in judge's papers

Type of offence: based on official classification of criminal offences.

Number of charges: actual number.

Procedural stage: bail appeal (summary); bail appeal (solemn); bail appeal after conviction; crown bail appeal.

Copy of criminal record shown to judge: yes; no.

Other information: social background report.

(e) Bail money

Amount of money offered by defence counsel: actual amount.

Amount of money acceptable to advocate-depute: actual amount.

(2) Judge's Decision

Judge's decision: petition granted; petition refused.

Reason given by judge: none; one; two; three.

Sheriff's discretion: insufficient grounds to interfere with sheriff's discretion; agent must show discretion wrongly exercised; discretion wrongly exercised.

Criminal record: persistent criminal; bad record; record shows serious risk of further offences; record of similar offences; not very serious record.

Presumption of innocence: section 31 letter; admission of guilt; conviction unlikely.

Offence charged: nature of offence; circumstances of offence; number of charges; not very serious results.

Trial date: early trial date; late trial date.

Perverting course of justice: likely in view of past conviction; unlikely in circumstances.

Community roots: decision not affected by accused's background; release not necessary because of family circumstances; address now satisfactory.

Sentence: likely to be custodial sentence; recently released from custody.

Abuse of liberty: on bail for another offence; on licence; recently released from custody.

(3) Later History of Case

Legal aid granted: yes; no.

Appearance by accused at trial: yes; no.

Bail forfeited: yes; no.

Non-appearance warrant issued: yes; no.

Plea: not guilty; guilty; guilty to reduced charge.

Finding: not guilty; not proven; guilty; case deserted.

Sentence: non-custodial; <3 months; >3 months <1 year; >1 year <5 years;
>5 years.

(4) Information Available to Advocate-Depute

Where no coding is given below, the coding follows that of the appropriate variable in 1(a).

Procurator-fiscal's reasons for opposition to bail: seriousness of offence to other information inclusive.

Sheriff's reasons for bail decision: risk of non-appearance; risk to public; long criminal record; further offences.

Circumstances of offence to other information inclusive.