Improper methods of police interrogation are known to every country in the vorld. And everywhere, it is agreed that an accused's confession of guilt which ıas been procured through physical violence, psychological intimidation, or im-ıroper inducements or promises cannot be considered in evidence against him at rial. The primary reason why involuntary confessions are excluded from evidence s that they are unreliable indices of truth; men have been known to admit crimes ıf which they are innocent, simply to escape the pain of torture or to obtain an :resistible benefit.

The exclusionary practice also expresses society's condemnation of police third degree" methods, which not only violate the accused's privilege against elf-incrimination,[1] but, by inflicting harm on one merely suspected, not convict-d, of crime, nullify his constitutional right to the presumption of innocence.[2] 'hus the practice serves purposes other than the mere need to decide cases pon trustworthy evidence: by removing the ultimate incentive it serves to dis-ɔurage the police from using illegal questioning methods.

In light of these considerations it is understandable that Ethiopian law 'owns severely upon the use of coercion against persons being investigated under ıspicion of crime. The Criminal Procedure Code states quite clearly that "No olice officer or person in authority shall offer or use or make or cause to be ffered, made or used any inducement, threat, promise or any other improper ıe:hod to any person examined by the police."[3] Violation of this command sub-:cts the police officer to both civil[4] and penal[5] sanctions. And, of course, the ɔurts do not allow into evidence confessions which have been obtained by ɔrce.[6]

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[1] All references in this article are to the Criminal Procedure Code, 1961, unless otherwise stated.

[2] Recognized in Art. 27(2), Crim. Pro. C.

[3] Art. 53, Rev. Const.

[4] Art. 31.

[5] Arts. 2035 and 2038, Civ. C.

[6] Art. 417, Pen. C.

[7] It is evident that at least our higher appellate courts are operating on the understanding that convictions may not be based upon involuntary confessions. See, e.g., the language used in Teshome Gabre v. Attorney General (Sup. Imp. Ct., 1963), Crim. App. No. 237/56 (unpublished, Library, Faculty of Law, Haile Sellassie I University): Although accused's statement to the police was uncautioned, it "was voluntary and made without fear

But, it must be asked, are the exclusion of coerced confessions and the threat of sanctions having their intended effect? To judge from what one sees and hears, no. In many cases in the High Court, convictions are based wholly or in part upon confessions given by the accused to the police while in their custody. And, in many cases, the accused repudiates his confession at trial, claiming it was the result of coercion, while the police in turn insist it was not. Even granting that many or even most of these claims of beatings and torture are untrue (it is hard to believe that all are), the vital question is: how is the trial court to distinguish between the free confession and the forced one? It seems that cases are rare in which the accused is able to convince[7] the court to exclude the confession, and no wonder: when the police interrogate a suspect there are no witnesses, no friends, no family present. Therefore it inevitably boils down to the word of the accused against that of the police, and how many of us will believe the accused?

Foreign "Solutions" to the Third Degree

This problem of distinguishing voluntary from involuntary confessions is not unique to the Empire. It has been faced in many other countries, and "solutions" worked out. In England, for example, the rule excluding involuntary confessions was not, by itself, felt sufficient to deter the police from coercive methods. Therefore, in the well-known "Judges' Rules," it is laid down that the police must inform a suspect of his privilege against self-incrimination as soon as the police officer decides in his mind to charge him, and, once the suspect is in custody, he may not be questioned at all.[8] Extraction of a confession in violation of the Rules confers upon the trial court a discretion to exclude it from evidence. Thus the English system tries to avoid the possibility of *improper* police interrogation, by forbidding *all* interrogation of the accused while he is in custody — the time when the "third degree' generally takes place.

The Americans have resorted to other means of deterring the police from using improper methods. In addition to the rule excluding involuntary confessions from evidence, the federal courts automatically exclude *any* confession, "voluntary" or "involuntary," which is obtained while the police are unlawfully holding the accused — e.g., during a period of "unnecessary delay" between his arrest and his appearance in court.[9] And for the state courts, a federally-imposed rule is now evolving which probably will exclude any confession made by an accused while in police custody if his right to counsel was denied at that time.[10] Like the English approach, both of these rules attempt to discourage coercive police

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7. Of course, the burden of proof should properly be on the prosecution to prove the confession is voluntary. That is certainly the case in Anglo-American law. See *Halsbury's Laws of England* (3d ed., London, Butterworth & Co., 1955), vol. 10, Criminal Law, para. 860, and *Corpus Juris Secundum* (New York, American Law Book Co., 1961), vol. 23, Criminal Law, para. 835.

8. "Special Issue on Police Questioning," *Crim. L. Rev.*, 1960, pp. 298-356, *passim*.

9. Upshaw v. United States (Sup. Ct, U.S. 1948), *U.S. Rep.*, vol. 335, p. 410, *Lawyers Ed.*, 93, p. 100; Mallory v. United States, (Sup. Ct., U.S., 1957), *U.S. Rep.*, vol. 354, p. 499, *Lawyers Ed. 2d, vol.* 1, p. 1479.

10. Escobedo v. Illinois (Sup. Ct., U.S., 1964), *U.S. Rep.*, vol. 378, p. 478, *Lawyers Ed. 2d*, vol. 12, p. 977; Y. Kamisar, "The Right to Counsel and the Fourteenth Amendement: A Dialogue on 'The Most Pervasive Right' of an Accused," *U. of Chicago L. Rev.*, vol. 30 (1962), p. 1.

methods by denying the police the right to interrogate suspects secretly and at length, for under those conditions the "third degree" flourishes.

Lastly, let us mention the Indian approach. Under the Indian Criminal Procedure Code[11] the police are permitted to question a suspect at length, and need not caution him to remain silent. But generally,[12] no confession the accused makes to the police or while in police custody is admissible against him at trial; to be admissible it must be made before a magistrate, who will ensure that the accused is making it voluntarily and with knowledge of his right to remain silent before recording it. The theory of this rule is, apparently, that the only confessions which are *certain* to be voluntary are those made to a court, and that confessions made to the police are bound to be tainted with the suspicion of coercion. To discourage police coercion, then, the Indians do not recognize as evidence the results of police interrogations.[13]

The Ethiopian Approach: Article 35

In the three legal systems referred to above, the rule excluding involuntary confessions from evidence is not relied upon to discourage improper police interrogation methods. Nor are the usual penal and civil sanctions found effective.[14] Rather, in each country, supplementary rules have been adopted to discourage such methods, and thereby protect the criminal suspect from police abuse of his rights. What, then, of our system? Does Ethiopian law provide the weapons which are needed to fight these problems? I believe that it does, at least in part.

Article 35 of the Criminal Procedure Code provides:

— *Power of court to record statements and confessions.*

(1) Any court may record any statement or confession made to it at any time before the opening of a preliminary inquiry or trial.

(2) No court shall record any such statement or confession unless, upon questioning the person making it, it ascertains that such person voluntarily makes such statement or confession. A note to this effect shall be made on the record.

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11. *Indian Code of Criminal Procedure,* 1898 (Lucknow, Eastern Book Co., 1962).

12. Sections 25 and 26 of the Indian Evidence Act (1872) state the exclusionary rule. But Section 27 provides an exception in that where facts (e.g., physical evidence) are discovered in consequence of a confession made to the police, the relevant part of the confession is admissible at trial.

13. With the exception mentioned in note 12, above. It is questionable whether the rules can have great deterrent effect on the police, so long as the incentive embodied in Section 27 exists. But it is apparently felt that the absolute reliablity of the accused's statement in consequence of which the facts were discovered outweighs other policy considerations which would militate for exclusion.

14. Among the reasons why in many countries it is extremely difficult to make effective use of civil and penal remedies against the police are: difficulties of proof; the small amount of money damages which can be recovered; and the reluctance of prosecutorial and judicial authorities to proceed against police officers. This last point may be of particular validity in Ethiopia, where almost all public prosecutors are police officers, unlikely to press vigorously against their fellows. Furthermore, Penal Code Article 417 is *not* a "complaint offence;" therefore there is no possibility for the injured party to bring a private prosecution should the public authorities decline to act. Art. 44, Crim. Pro. C.

(3) Such statement or confession shall be recorded in writing and in full by the court and shall thereafter be read over to the person making the statement or confession, who shall sign and date it. The statement shall then be signed by the president of the court.

(4) A copy of the record shall then be sent to the court before which the case is to be inquired into or tried, and to the public prosecutor.

What is the purpose of this article? In view of its strong similarity to Section 164 of the Indian Code,[15] it is unquestionable that the drafters of Ethiopia's Code were to some extent looking towards the Indian system.[16] And in Indian law, as we have seen, the reason why the magistrate is given power to record confessions is that only confessions so recorded are admissible in evidence at trial. It was the intention of the drafters of our Criminal Procedure Code, I submit, to require all confessions which the police wish to have proved at trial, recorded and certified "voluntary" under Article 35. Confessions not so recorded should be inadmissible against the accused, as they are in India.

Why, then, if the drafters so intended did they not expressly so provide in the Code? The obvious answer is that the appropriate place for rules of admissibility is not the criminal procedure code, but the evidence code. The drafters no doubt intended that the evidence code, when it appeared, would provide the

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15. *Indian Code of Criminal Procedure,* cited at note 11, above.

Art. 164. *Power to record statements and confessions.* —

(1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the State Government may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter or under any other law for the time being in force or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,
Magistrate"

Explanation — It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

16. Many other articles in the Ethiopian Code are strikingly similar to provisions of the Indian Code. For example, note the similarities between Ethiopian Articles 30, 31, and 51 and Indian Code Articles 161, 163, and 54 respectively.

Actually, the *direct* source of Article 35 and of the other cited articles was more likely the Malayan Criminal Procedure Code which, like the codes of many former British dependencies, was closely patterned after Indian law. Compare Ethiopian Articles 30, 31, 35 and 51 with Malayan Code Secs. 112, 114, 115 and 23 respectively. For a comparative view of the Commonwealth "family" of provisions compare the cited sections with the Singapore (Secs. 120, 122, 123 and 31), Sudan (Secs. 117, 118, 119 and 25) and Northern Nigeria (Secs. 123, 124, 125 and 26) criminal procedure codes.

consequences of failure to have a confession recorded by a judge, just as the law of evidence in India and elsewhere[17] covers such matters.

Of course it is unfortunate that the procedure and evidence codes could not have been promulgated at the same time, thereby obviating such problems as we now face. Concededly, it is arguable that the Criminal Procedure Code does *not* envision the Indian-type rule I have suggested. It has been argued,[18] for example, that the wording of Article 27(2)[19] implies that confessions made to the police are admissible in evidence at trial, and that the police need not, therefore, take advantage of the procedure established by Article 35. Granting that ambiguity exists, I submit that the soundest course would be to adopt the Indian rule on admissibility, thus *requiring* judicial screening under Article 35 of all confessions which are to be introduced at trial. The following considerations are, to my mind, persuasive :

1. Under the present system,[20] the issue of voluntariness of the confession is adjudicated during the trial hearing. If Article 35 were used in all cases the issue would be adjudicated prior to trial, thereby eliminating the waste of a full court's[21] time and energy, and the need to interrupt consideration of the main issues of the case.

2. Under the present system the issue of voluntariness is adjudicated at a time remote from the interrogation. Evidence which might prove or disprove coercion has by then grown stale or disappeared. Often, the police claim that the accused's repudiation of his confession is an "afterthought" on advice from his prison-mates, and it is almost impossible for a court to decide where the truth lies. If Article 35 were used in all cases, the confession would be recorded immediately after it was made, before the accused had a chance to change his mind and "invent" stories of torture. Voluntary confessions so certified under Article 35 would then be admissible at trial, and false claims of coercion could not be raised.

3. There is no justifiable reason why the police should *not* use Article 35 in all cases. The Code now requires the police to bring all persons in custody before the "nearest court within forty-eight hours of his arrest or so soon thereafter as local circumstances and communications permit."[22] If an accused has confessed prior to his first appearance in court, it is no inconvenience to ask the judge to record it at that time. So long as the judge is satisfied of the accused's voluntary

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17. See note 16, above.

18. By some of my students, whose creative discussions inspired many of the ideas in this article.

19. Particularly, the phrase "and that any statement he may make may be used in evidence." It has been further argued that Article 97, which refers to "statements" taken under Article 27, shows the drafters' intent that *confessions* recorded under Article 27 be admissible at trial. But there is an important difference between a "statement" and a "confession" in that the latter is necessarily incriminating whereas the former is not. The failure of Articles 27 and 97 to mention confessions can be taken as demonstrating an intent that only non-confessional statements are covered by them.

20. Apparently the police do not presently make use of Article 35, nor do the courts require them to do so.

21. Article 35 seemingly enables a single judge sitting alone to record a confession, whereas at present, in most criminal trials, three-judge benches deal with the question.

22. Art. 29, Crim. Pro. C.

wish to make a statement, he can record it in a brief time. The only conceivable reason why the police might wish to avoid this procedure is that the confession is not truly voluntary; in such cases of course it does not deserve to be admitted in evidence.

Where the accused confesses subsequent to his initial presentation in court but before trial, the inconvenience to the police in bringing the accused before the nearest court is slight, and certainly outweighed by the advantages gained by having the confession immediately certified as voluntary by a judicial officer.

What Can be Done?

If these reasons are persuasive, what can be done? The following steps might be considered:

1. *The forthcoming code of evidence* could provide that no confession shall be admissible in any criminal trial if it has not been recorded by a judge under Article 35, provided there was opportunity for the police to take advantage of that procedure.

But there is no need to wait for the code of evidence. In order to enforce the Criminal Procedure Code, and the constitutional guarantees of due process and presumption of innocence, the courts could take action immediately:

2. *The Supreme Imperial and High Courts, in cooperation with the Ministry of Justice,* could exercise their rulemaking power[23] to provide, explicitly, that after a certain date no trial court will admit into evidence any confession made to a police officer, etc. which was not recorded under Article 35 despite the opportunity for such recording. It could also advise all members of the judiciary on the importance and meaning of Article 35, and provide them with clear instructions on how to carry out their duties thereunder.

3. *The police* could adopt the strict policy of making use of the procedure which Article 35 provides in all cases where confessions are made.

It is submitted that if these above reforms were carried out, all parties would benefit thereby. The *accused* would not so likely experience (or, what is just as bad, fear) coercive police techniques of interrogation; the innocent suspect would not experience unjust harm. The *courts* would not be faced as often as they are today with difficult disputes at trial as to the voluntariness of confessions offered in evidence, and could with clearer conscience convict accused persons indicted by their own confessions. The *police* would have a clear opportunity to prove their innocence of the frequently-made charges of brutality, and thus to ensure the public's trust and cooperation.

Possible Objections: Repudiation of Recorded Confessions at Trial

Two possible objections to this proposal are foreseeable. The first is that Article 35 recording will accomplish nothing, because defendants will still be free to raise the issue of coercion at trial, at which time it will have to be considered over again. This would mean the Article 35 court would have wasted its time.

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23. Under the Administration of Justice Proclamation, 1942, Sec. 20(a), (h), Proc. No. 2, *Neg. Gaz.*, year 1, no. 1, the Afe Negus and the President of the High Court may, with the Minister's approval, make rules for the Supreme Court and for the High and lower courts respectively. The writer does not believe that this power has been abrogated by any provision of the Criminal Procedure Code or otherwise, with respect to the conduct of criminal cases.

There are two ways in which the issue of coercion might be raised at trial with regard to a confession recorded by a judge under Article 35. A defendant might admit that the judge had given him every opportunity to reveal any coercive circumstances, but claim that because he was intimidated by the police he did not dare refuse to make a "voluntary" statement in court. Such a claim, it is suggested, should be rejected out of hand by the trial court. Once a confession is shown to have been recorded in strict accordance with the requirements of Article 35, the defendant should be foreclosed from re-opening the question of voluntariness at trial. Rather, the trial court ought to treat the Article 35 court's recording (which implies a certification of voluntariness) in the way an appellate tribunal treats a lower court's finding of fact — that is, as binding unless there has been some serious fault in the fact-finding method, or an obviously incorrect legal conclusion drawn from the accepted facts.

That brings us to the second way in which a recorded confession could be attacked at trial — if the recording court did not conduct itself properly under Article 35. In order to ensure that lower courts do not fail to uncover and recognize coercion when it exists, they should be given detailed guidance in the purpose and operation of Article 35. Furthermore, that article ought to be broadly interpreted by the Supreme Imperial and High Courts to *require* the recording court to say and do certain prescribed things in order to ensure that recorded statements are truly voluntary. For example, lower courts should be instructed to:

1. ask the accused if he was cautioned by the police under Article 27; if he claims he was not, such fact should be noted on the record, and should alert the recording court to probe deeper on the voluntariness question. In any case the court should, before recording anything, remind him of his right to remain silent and the possible use in evidence of any statement he may make;

2. tell the accused very specifically that whether or not he makes a statement he will *not* be returned to the custody of the police, but will either be released on bail or else detained in the prison (Arts. 59-60);

3. ask the accused whether he has been subjected to any threat, promise or inducement by the police;

4. ascertain from the accused and the attending police officer how long the accused has been in police custody. If the forty-eight hour limit of Article 29[24] has been violated the court ought to exercise particular caution in accepting the statement as voluntary,[25] and should note on the record the reason for the delay, and what took place during the accused's custody;

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24. Guaranteed by Article 51, Rev. Const.

25. The courts might even consider adopting the American approach (see text accompanying note 9, above), by refusing to admit into evidence any confession, no matter how "voluntary," which was made immediately following a period of post-arrest police questioning in excess of the forty-eight hour limit.

It might be appropriate here to mention that it is by no means clear that the police have the right, under Article 27, to interrogate an accused for the mentioned forty-eight hour period (even assuming normal rest and food intervals). Article 27, despite its title, is reasonably open to the interpretation that it embodies the English rule — i.e., that it permits the police after having established the identity and address of an accused in custody, to *invite* him to make a cautioned statement in answer to the accusation or complaint, but not to question him should he decline. However, until such time as Ethiopia's police are equipped with adequate laboratories, equipment and trained manpower to enable them to rely heavily on scientific detection methods, it would seem unwise to interpret Article 27 to prohibit investigation by non-coercive questioning of the accused.

5. question the accused, in suspicious cases, in chambers with only a clerk present, or in open court but with police officers excluded. (Of course, such questions may relate only to the issue of voluntariness; the court may not interrogate the accused in order to obtain a confession.)

If lower court judges are required to follow some such procedure, and to certify the steps taken in writing, the existence of their affidavits would operate as a serious deterrent to any accused who, prior to trial, had "second thoughts" about his confession. In some cases, of course, the issue will be raised dishonestly at trial by the accused; in others, the accused will justifiably point to errors by or intimidation on the part of the recording judge. In all such cases[26] the trial court cannot escape ruling on the questions raised. But, it is submitted, such disputes will be many fewer, and less difficult to adjudicate, than those faced at the present time. Assuming minimum trust in the judicial personnel of lower courts in Ethiopia, and adequate guidance and supervision from above, there is no reason why Article 35 cannot be administered successfully according to its intended purpose.

Trust in Our Judges

That brings us to the second foreseeable objection to this proposal — that the lower court judges are not capable or sufficiently "qualified" to administer Article 35 correctly. One frequently hears this rationalization used to explain rules of procedure which deny needed powers of discretion to the lower courts. For example, it has been said that lower court judges are not "qualified" enough to be entrusted with the power to discharge from custody persons accused of serious crimes, even if their innocence is apparent.[27] In fact, of course, the real effect of this "mistrust" of lower court judges is great injustice to the innocent accused. Under a code framed, apparently, on the theory that only public prosecutors and trial courts are "qualified" to recognize the innocence of suspects, an accused, once in custody, may stay there for long periods despite his apparent innocence, simply because no one has the authority to release him. Neither the police[28] nor the court

26. A further precaution which might be taken by the recording court to avoid later disputes would be to conduct the proceeding in the presence of respected elders of the community, who could also be asked to sign as witnesses to the cautions administered by the court.

27. "The preliminary inquiry takes place before the district courts, whose judges are not all qualified, and it was decided not to entrust those judges with the power to release persons suspected by the police of aggravated murder or aggravated robbery, persons who would then easily be able to 'vanish into thin air.'" P. Graven, "La nouvelle procédure pénal éthiopienne," *Rev. pénale suisse,* 79e année, 1963, n. 21 (Translation Semereab Mikael, 1965.).

M. Graven makes it clear in his article that this philosophy was generally instrumental in the drafting of the Code:

"In effect, rather than give the courts leeway that they could not be trusted to use with the necessary discretion, the drafters chose to forego the advantages to be had from general clauses and chose to enumerate the conditions that govern the acts and decisions of the judicial . . . authorities before, during and after trial." *Id.* at p. 74.

28. Article 28 allows the police the alternatives of conditional release on bail, or else presentation of the accused to the "nearest court;" unconditional discharge is apparently not permitted, even if "it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence complained of . . . ."

before which the arrestee is immediately brought[29] nor the preliminary inquiry court[30] has been granted the power to release such a person unconditionally[31] or, if the charge is a serious one, even on bond.[32] Yet one wonders how it can be true that Ethiopian lower courts are not "qualified" to determine such matters — when for hundreds of years, before the new codes and new procedures, they were satisfactorily exercising just such responsibilities.[33] Surely the simple fact question of voluntariness of a confession is within the competence of any alert and conscientious judge to determine, and demands no special "qualifications". In fact, the recording court under Article 35 is certain, by virtue of its proximity in place and time to the circumstances surrounding the confession, to be in a far better position to ascertain its voluntariness than the "higher" trial court will be, months later.

Summary

The administration of criminal justice in Ethiopia is marred by the frequent claims that convictions are based upon coerced confessions. The present system for adjudicating such claims and for deterring the practices which generate them is inadequate, with the result that suspicion and mistrust abound. Article 35 of the Criminal Procedure Code was intended to provide the sole means of taking admissible confessions, but it is being ignored. It will be to the benefit of the police, the courts, and the public if the forthcoming code of evidence reinforces Article 35 in the way suggested. Meanwhile, the courts should exercise their present power to admit into evidence only those confessions which have been judicially recorded and certified to be voluntary under Article 35.

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29. Article 59 offers the court only the alternatives of continued custody or release on bail; it does not, apparently, authorize unconditional discharge on the grounds of obvious innocence.

30. Article 89 requires the court to commit the accused for trial; there is no authority to release him even though the evidence of guilt presented at the inquiry appeared inadequate to support a conviction. But the original draft of the Code provided otherwise. See Graven, cited above at note 27, p. 78.

31. This is not unimportant. It should not be assumed that the offer of *conditional* release on bond is one that every accused is able to take advantage of. Ethiopian prisons hold numbers of accused persons who cannot obtain the required guarantors.

32. Art. 63.

33. For example, it appears that under traditional practices conditional release on guarantee was frequently granted even for the most serious offences, so long as the accused was known in the community and could find a respectable person to vouch for his appearance. And although "unqualified" rural officials made the decision as to who could and who could not be relied upon, surely it was rare for a bonded accused to "vanish into thin air."