A HISTORY OF ENGLISH LAW

IN TWELVE VOLUMES

For List of Volumes and Plan of the History, see pp. ix-x

A HISTORY OF ENGLISH LAW

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To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law. ROGER NORTH

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In this dilemma the Local Authorities resorted to two extra-legal devices. They used the threat of arrest and punishment as a means of frightening the beggars and vagrants away from particular parishes. On the other hand, there grew up a systematic perversion of the Vagrancy Act, under which the destitute wanderer was apprehended, frequently at his own request, not with any idea of punishment, but in order to dispatch him, with a " pass," to his own parish, without cost to the place in which he had been taken up.[1]

In many places this passing of vagrants was contracted for by the justices [2]—a practice which was in effect sanctioned by a statute of 1792.[3]

As with the poor law, so with the closely connected subject of vagrancy, the justices found that they must do a great deal more than merely enforce the criminal law. They found that in this, as in many other branches of their work, they were obliged to adopt some kind of a policy, and to take administrative measures to carry this policy into effect.

Houses of Correction and Prisons.

We have seen that in the Tudor period the house of correction was an integral part of the national system of poor relief. Since that system proposed to relieve the able-bodied poor by the provision of work, some mode of constraint was needed for those who refused to work. That means of constraint was provided by houses of correction which the justices were directed to build in each county.[4] They were regarded as being reformatories, as distinct from gaols, which were places of detention till trial or of punishment.[5] We have seen that in Coke's opinion they were, at the beginning of the seventeenth century, effecting this object.[6] From the first the justices had entire control of these institutions. Their administrative powers over them were as large as their administrative powers in respect of the poor law or of vagrancy. But, after the Great Rebellion, the freedom of the justices from control by the central government tended in this, as in other parts of their duties,[7] to make them take their responsibilities very lightly; and, just as the character of the poor law changed at the end of the seventeenth century,[8] so necessarily did the character of the houses of correction. The idea of providing work for the pauper was generally abandoned,

[1] Webb, The Old Poor Law 376. [2] Ibid 384-387.
[3] 32 George III c. 85 § 6; Webb, op. cit. 385.
[4] Vol. iv 396, 397-398.
[5] " So little at the outset were these places regarded as places of punishment, and so much the means of finding employment for the unemployed poor that it was evidently not unusual, about the middle of the seventeenth century, to give the inmates regular wages in return for their work," Webb, English Prisons under Local Government 13.
[6] Vol. iv 396. [7] Above 133. [8] Vol. vi 353-354.

deserving applicants were generally given out relief; [1] and so the house of correction ceased to be a place where those who refused work could be reformed by being compelled to do it. They came to be gaols, where vagrants and others guilty of minor offences, could be confined.[2]

The Justices no longer concerned themselves with work for the unemployed poor, or of disciplinary employment for sturdy rogues and vagabonds. They merely handed over to the master [of the house of correction] a power to exact from his prisoners whatever labour he chose, partly as a means of relieving the county from the expense of maintaining them, partly as punishment, but in the main as the master's own perquisite by way of supplement to a small salary.[3]

The justices were as negligent in the supervision of the houses of correction as of the gaols.[4] The Legislature gave them enlarged powers to provide these houses, and enlarged powers of management in 1744; [5] and the attempts at prison reform, which marked the third quarter of the eighteenth century,[6] produced Acts which provided for the inspection and structural alteration of these houses, and the making of regulations for the treatment and discipline of the inmates.[7] But this legislation seems to have been ineffective,[8] as ineffective as it was in the case of the gaols.[9]

In the eighteenth century the gaols were perhaps the most mediæval institutions in England. There were county gaols for which the sheriffs were responsible, and there were also gaols which belonged, as franchise jurisdictions belonged, to private persons.[10] In both cases the gaol was regarded not merely as a self-supporting institution, but as an institution out of which a profit could be made.[11] Like other mediæval offices the office of gaoler was a saleable office till 1716.[12]

It was not till the end of the seventeenth century that the justices got control of the gaols. A statute of 1700 gave them power to build and repair gaols.[13] But, as yet, they had little or no power to control their management. The enquiry made by the House of Commons in 1729 into the management of the Fleet and Marshalsea prisons revealed hideous abuses, and, in

[1] Above 175, 176.
[2] See 6 George I c. 19 § 2 which gave justices the power to commit persons charged with small offences either to the gaol or to a house of correction; their powers in this respect were further regulated by 17 George II c. 5 § 32; B. M. Jones, Henry Fielding 211-213.
[3] Webb, English Prisons under Local Government 14-15.
[4] Below 182. [5] 17 George II c. 5 §§ 30 and 31. [6] Below 183.
[7] 22 George III c. 64; § 14 of this Act specified the rules, orders and regulations to be observed in these houses; 24 George III c. 55.
[8] Webb, op. cit. 16-17. [9] Below 183. [10] Below 182 n. 7.
[11] Vol. xi 567. [12] 3 George I c. 15 § 10.
[13] 11, 12 William III c. 19, continued by 10 Anne c. 14 § 2 and made perpetual by 6 George I c. 19 § 1.

particular, the cruelties practised on the prisoners by the gaolers Huggins and Banbridge and their underlings.[1] Criminal proceedings were taken against them and other officers of their prisons by order of the House of Commons.[2] Though they managed to secure acquittal, the result of these enquiries was legislation which gave the justices larger powers of control over the gaolers and gaols. They were given powers to control the fees charged by gaolers in 1729,[3] and powers of control and management were given in 1759.[4] In 1773 they were empowered to provide chaplains for gaols;[5] and, in the following year, the mortality caused by gaol fever, not only to the prisoners but also to the bar and the bench, produced an Act empowering the justices to take measures for cleansing the gaols and the prisoners.[6] But the account which Fielding gives of the gaols in *Amelia* shows that the justices failed to make use of their powers.[7] The campaign of Howard, and his revelations as to the state of the gaols,[8] produced the Act of 1779, which Blackstone was instrumental in getting passed, for the establishment of penitentiaries.[9] The Act made elaborate arrangements for the treatment of the prisoners and for the work which they were to do;[10] and the reasons assigned for this new departure show that more rational and more humane ideas as to the treatment of criminals were beginning to make their influence felt.[11] Later Acts of 1784 and 1791[12] provided for the rebuilding of gaols, for the appointment by the justices of governors and other officers, for the making of

[1] Parlt. Hist. viii 710-711, 731, 737, 740, 803; Lecky, History of England ii 128-129; Webb, op. cit. 25-27; that there were similar abuses in the seventeenth century appears from the complaints made in 1621 of the way in which the Warden of the Fleet prison treated his prisoners, Notestein, Commons Debates 1621 ii 102, 105, 158, 374-375; iv 277-278, 355-356.

[2] 17 S.T. 298, 310, 383, 398, 462, 511, 526, 546, 582.

[3] 2 George II c. 22 § 4.

[4] 32 George II c. 28 § 6.

[5] 13 George III c. 58.

[6] 14 George III c. 59; Webb, op. cit. 35; Lecky, History of England ii 130; vol. xi 567; vol xii 455-456.

[7] B. M. Jones, Henry Fielding 208-211, 213-215; in 1746 the Archbishop of York said of the gaol at York, "the prisoners die and the Recorder told me yesterday, when the turnkey opens the cells in the morning, the steam and stench is intolerable and scarce credible. The very walls are covered with lice in the room over which the Grand Jury sit," P. C. Yorke, Life of Hardwicke i 501; the Gate-House prison, which belonged to the Dean and Chapter of Westminster, was said by Sir John Fielding in 1770 to be hopelessly inadequate, Parlt. Hist. xvi. 935-936.

[8] Webb, op. cit. chap. iii.

[9] 19 George III c. 74 §§ 5-14; Lecky, History of England vii 335.

[10] §§ 31-59.

[11] "Whereas, if many offenders convicted of crimes for which transportation hath been usually inflicted were ordered to solitary imprisonment, accompanied by well-regulated labour and religious instruction, it might be the means under providence, not only of deterring others from the commission of the like crimes, but also of reforming the individuals, and inuring them to habits of industry, § 5; cp. Bl. Comm. iv 371.

[12] 24 George III c. 54; 31 George III c. 46.

rules for the inmates, for the classification of prisoners, and for the visitation of gaols by the justices.

Blackstone was sanguine as to the good results which might be expected from the Act of 1779. He said:[1]

> If the whole of this plan be properly executed, and its defects be timely supplied, there is reason to hope that such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of capital punishment, except for very atrocious crimes.

Unfortunately this Act was no better enforced than the earlier Acts. Though the Legislature had given large powers to the justices, and also to committees appointed by the central government,[2] except in a few counties when some justice took the trouble to enforce these statutes,[3] little was done till the legislation of the nineteenth century.[4] It would probably be true to say that no part of the administrative duties of the justices was more neglected than these duties of supervising the gaols.[5] This was the inevitable result of casting upon an already overburdened set of officials a large number of new duties, and of providing no means of securing that these duties were fulfilled by these officials.

Liquor Licensing.

Statutes of 1552 and 1627 gave the justices power to license ale-houses, and to take recognizances of their keepers for the prevention of drunkenness and the maintenance of order.[6] Though there were some doubts as to whether these statutes applied to inns for the entertainment of travellers, the better opinion seems to have been that they did apply to inns which sold ale.[7] After the Restoration these statutes were laxly applied,[8] and, till a statute of 1729,[9] no licence was

[1] Comm. iv 371.

[2] Webb, op. cit. 54-62.

[3] 19 George III c. 74 § 15.

[4] Ibid 50-54, 63-65.

[5] Lecky, History of England vii 327; vol. xi 567-568.

[6] 5, 6 Edward VI c. 25; 3 Charles I c. 4. In vol. iv 515 I have misstated the effect of this legislation. The statute 5, 6 Edward VI c. 25 required ale-houses to be licensed by the justices, and the statute 3 Charles I c. 4 was simply an amending act. The resolutions concerning inns (Hutton's Rep. 99-100) applied, not to ale-houses, but to inns for the entertainment of travellers; and it seems to be clear that an inn was used as an ale-house it required a license, Dalton, Justice of the Peace 97, at pp. 24-25, and c. 56, but in Coke's opinion if it was merely an inn it did not; Notestein, Commons Debates 1621 ii 174; until the downfall of prerogative government in 1640 these duties of the justices (like many of their other duties) were strictly enforced by the Council and the judges of Assize; on the whole subject see Webb, The History of Liquor Licensing in England chap. i.

[7] Last note.

[8] Webb, op. cit. 15-24.

[9] 2 George II c. 28 § 10; a statute of 12, 13 William III c. 11 § 18 which required a licence was repealed by 1 Anne St. 2 c. 14 § 1 because it hindered the consumption of English brandy, see Webb, op. cit. 21-22.