A HISTORY OF ENGLISH LAW

IN TWELVE VOLUMES

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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.

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spectators, it went far to deprive the punishment of many of its terrors. He said : [1]

> No hero sees death as the alternative which may attend his undertaking with less terror, nor meets it in the field with more imaginary glory. The day appointed by law for the thief's shame is the day of glory in his own opinion. His procession to Tyburn, and his last moments there, are all triumphant; attended with the compassion of the meek and tender hearted, and with the applause admiration and envy of all the bold and hardened. His behaviour in his present condition, not the crimes, how atrocious so ever, which brought him to it, are the subject of contemplation. And if he hath sense enough to temper his boldness with any degree of decency, his death is spoke of by many with honour, by most with pity, and by all with approbation. How far such an example is from being an object of terror, especially to those for whose use it is principally intended, I leave to the consideration of every rational man. . . . The great cause of this evil is the frequency of executions: the knowledge of human nature will prove this from reason; and the different effects which executions produce in the minds of the spectators in the country where they are rare, and in London where they are common, will convince us by experience. The thief who is hanged to-day hath learnt his intrepidity from the example of his hanged predecessors, as others are now taught to despise death, and to bear it hereafter with boldness from what they see today.

In fact a condemned criminal was in some cases an object of popular interest between the time of his sentence and his execution.[2] Fielding gave good reasons for thinking that the punishment of death would have a far greater deterrent effect if it were carried out in private.

> If the executions were so contrived that few could be present at them, they would be much more shocking and terrible to the crowd without doors than at present, as well as much more dreadful to the criminals themselves, who would thus die in the presence only of their enemies; and when the boldest of them would find no cordial to keep up his spirits, nor any breath to flatter his ambition.[3]

Fielding wrote his tract in 1751, but this salutary reform was not made till 1868.[4]

[1] An Enquiry into the Causes of the late Increase of Robbers (1751) 121-122; cp. Lecky, History of England ii 134-135; as Dickens says in A Tale of Two Cities, Bk. ii chap. ii, "the Old Bailey was famous as a kind of deadly inn-yard, from which pale travellers set out continually, in carts and coaches, on a violent passage into the other world."

[2] Thus Horace Walpole tells us that one M'Lean, a highwayman, excited much interest—"the first Sunday after his condemnation, three thousand people went to see him; he fainted away twice with the heat of his cell. You can't conceive the ridiculous rage there is of going to Newgate; and the prints that are published of the malefactors, and the memoirs of their lives and deaths set forth with as much parade as—Marshal Turenne's—we have no generals worth making a parallel," Letters (ed. Toynbee) iii 21.

[3] Op. cit. 124.

[4] 31 Victoria c. 24.

(ii) *Imprisonment.*—"The use of imprisonment as a punishment," says Maitland,[1] "more especially if it be imprisonment for a definite period fixed by the sentence, is a sign of advancing civilization." In the twelfth and early thirteenth centuries prisons were used for detention rather than for punishment.[2] Edward I's statutes set the fashion of using imprisonment as a punishment.[3] But "even in these cases the imprisonment was as a general rule but preparatory to a fine. After a year or two years the wrong-doer might make fine; if he had no money, he was detained for a while longer." [4] In fact, in the thirteenth century, fines were not imposed. The imposition of a fine would have been an evasion of Magna Carta, "for an amercement should be affeered, not by royal justices, but by neighbours of the wrong-doer." Fines were not imposed, they were set as the result of a bargain between the Crown and the wrong-doer, on payment of which he was set at liberty.[5] In later law fines, and imprisonments for a definite term, or fines, or imprisonments, were freely imposed by statutes. But just as Magna Carta had provided that amercements should be *salvo contenemento*,[6] so the Bill of Rights provided that fines imposed as a punishment should not be excessive.[7]

From Edward I's reign onwards imprisonment was a usual punishment. But the state of the gaols, right down to the middle of the nineteenth century, made it a peculiarly demoralizing punishment. We have seen that the gaols were self-supporting institutions out of which the gaoler expected to make a profit. No care was taken of the inmates. The sexes were not separated, and the most elementary sanitary precautions were neglected.[8] Gaol fever was rampant, and was sometimes fatal to the judges, barristers, and officers of the courts. At Oxford, in 1577, the chief baron, the sheriff, and about three hundred others died within forty hours, and in 1750 it was so rampant in Newgate that it killed two judges of Assize, the lord mayor, an alderman, and many others.[9] Coke said that "few or none are committed to the common gaol, but

[1] P. and M. (1st ed.) ii 514.

[2] Ibid 514-515.

[3] Ibid 515 and n. 8.

[4] Ibid 515; vol. iii 391.

[5] P. and M. ii 516; Griesley's Case (1588) 8 Co. Rep. at p. 41a; in later law the difference between a fine and an amercement was said to be that "a fine is always imposed and assessed by the Court, but an amercement . . . is assessed by the country," ibid at p. 39a; this case shows that the question when a man should be fined and when amerced, and, if amerced, whether the amercement should be assessed by the court or by his peers, had become the centre of a mass of complex rules.

[6] (1215) § 20; vol. ii 214 n. 6.

[7] "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted," 1 William and Mary, Stat. 2 §§ 1, 10.

[8] Vol. x 181-182; Lecky, History of England ii 127-129; vii 327-330.

[9] Lecky, History of England ii 130.

they come out worse than they went in." [1] He added that "few are committed to the house of correction but they come out better." [2] But he could not have added this if he had lived in the eighteenth century. In that century the houses of correction were as bad as the gaols. Fielding said that of the prisoners which came before him "the most impudent and flagitious have always been such as have been before acquainted with the discipline of Bridewell"; and that a commitment to Bridewell "tho' it often causes great horror and lamentation in the novice, is usually treated with ridicule and contempt by those who have already been there." [3] In fact magistrates would often not commit to Bridewell because of the evil effects upon those who were sent there.[4] Goldsmith did not exaggerate when he said that the prisons were places which "inclose wretches for the commission of one crime, and return them, if alive, fitted for the perpetration of thousands"; [5] nor did Fielding exaggerate when he said that the houses of correction were "schools of vice, seminars of idleness, and common stores of nastiness and disease." [6] Johnson agreed with these views. "The misery of gaols," he said, "is not half their evil: they are filled with every corruption which poverty and wickedness can generate between them." [7] We have seen that in the last quarter of the century the public conscience was aroused, largely by the magnificent work of Howard.[8] Blackstone and others attempted to reform the prisons; and Acts were passed for this purpose.[9] But we have seen that these Acts did not produce all the effects which their supporters expected.[10] The state of the prisons when Dickens wrote had in some respects been improved; but it was still very bad.[11] It was not till the reform of the administrative system of the central government in the nineteenth century, that the state got the necessary machinery for seeing that the legislation which it passed was carried out. We shall now see that it was partly the appalling state of the prisons, and partly the need to provide a suitable punishment for persons whose death sentences it was thought desirable to commute, which were the principal causes for the introduction in the eighteenth century of the punishment of transportation overseas.

(iii) *Transportation.*—Transportation as a punishment for crime has had a curious history. In the latter part of the seventeenth and in the course of the eighteenth centuries it became

[1] Second Instit. 754. [2] Ibid.
[3] An Enquiry into the Causes of the late Increase of Robbers (1751) 62.
[4] Ibid. [5] The Vicar of Wakefield, chap. xxvii.
[6] Op. cit. 63. [7] The Idler no. 38.
[8] Vol. x 182. [9] Ibid 182-183. [10] Ibid 183.
[11] See Holdsworth, Charles Dickens as a Legal Historian 138-140; Bowen, Administration of Justice during the Victorian Period, Essays A.A.L.H. i 544-545.

a very common form of punishment. It continued to be a form of punishment till, in consequence of the objection of the colonies to receive criminals, it was abolished by Acts passed in 1853 and 1857, and penal servitude or imprisonment with hard labour was substituted for it.[1]

In the twelfth and early thirteenth centuries persons could be forced to abjure the realm; [2] and Magna Carta recognized exile as a possible punishment after a regular trial and conviction.[3] But at the end of the thirteenth century exile had ceased to be a definite punishment for crime.[4] It survived only in the case of those criminals who, having taken sanctuary, were forced to abjure the realm; [5] and we have seen that the institution of sanctuary, and its appendant abjuration, were abolished in 1623-1624.[6] The result was that it came to be recognized that a subject could not be compelled to leave the realm except by virtue of an Act of Parliament.[7] On the other hand, it was always possible for the Crown to pardon a criminal, and to attach conditions to its pardon.[8] Thus the Crown might pardon a criminal on condition that he transported himself over the seas,[9] or on condition that he submitted to be transported and imprisoned overseas.[10] It is true that a man cannot make a valid contract to submit to be imprisoned; [11] but it was held in 1839 that this rule did not prevent a criminal from accepting a pardon by virtue of which "his life is spared, but he binds himself to undergo a less severe punishment." [12] It is on these two bases —direct legislation and conditional pardons—that transportation as a punishment for crime rested.

Legislation began in Elizabeth's reign. Two Acts of 1593 provided that in certain cases persons who did not conform to the established church should abjure the realm, and that if they

[1] Stephen, H.C.L. i 482; below 573. [2] Vol. iii 303-304.
[3] (1215) § 39, cited vol. ii 214 n; 10. [4] Vol. iii 304.
[5] Ibid 304-306.
[6] Ibid 307; 21 James I c. 28 § 7.
[7] Probably the law was so settled in the course of the seventeenth century, Stephen, H.C.L. i 480, L.Q.R. vi 396; but in 1621 James I added banishment to Mompesson's sentence, Notestein, Commons' Debates 1621 iv 205, vi 384; Hallam C.H. i 358.
[8] Coke, Third Instit. 233; Craies, Compulsion of Subjects to Leave the Realm, L.Q.R. vi 404-405; Forsyth, Leading Cases 76-77, 460 n. 1.
[9] See R. v. Miller (1772) 2 W. Bl. 797; R. v. Aickles (1785) Leach 390; cp. L.Q.R. vi 406.
[10] Below 570-571; similarly pardons were sometimes granted on condition of service in the navy—"this practice went on throughout the eighteenth century, but in 1771 it was objected to by the Lords of the Admiralty as demoralizing to the ships' crews and as discouraging the voluntary enlistment of better men," L.Q.R. vi 391-392.
[11] "The body of a freeman cannot be made subject to distress or imprisonment by contract but only by judgment," Foster v. Jackson (1616) Hob. at p. 61.
[12] Leonard Watson's Case, 9 Ad. and E. at p. 783.