CONVICTION AND PROBATION

The Case for Amending the Law

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Every criminal trial which does not result in an acquittal goes through two stages. The first is concerned with whether the defendant has committed a crime, the second with the consequences of the decision that he has. So before a court can consider placing a defendant on probation it must have been satisfied that he is guilty of an offence. A finding of guilt is commonly known as a conviction, for, to use Webster's definition, to convict is "to find or prove guilty of an offence or crime charged."

In a criminal trial there are a number of formalities which include arraignment, plea and judgment, but there is no formality known as "the conviction." Mr. Justice Humphreys has put it thus: "There is no distinction in law between a conviction by the verdict of a jury, or the finding of a court, and a conviction on a prisoner's own confession."[1] Conviction results automatically when guilt is established.

Section 1 (1) of the Probation of Offenders Act, 1907, presents lawyers with a puzzle because it apparently permits a court to place an offender on probation "without proceeding to conviction". Fortunately it is no longer necessary for us to try and solve the puzzle of what these words mean, for that was done in the well-known case of *Oaten* v. *Auty*[2] by the late Mr. Justice Avory. In the course of his judgment the learned Judge said that "section 1 (1) of the Act of 1907 may be made sensible by reading the words 'without proceeding to conviction' as meaning 'without proceeding to record the conviction'," and, in so doing, he adopted a secondary and technical meaning of the word "conviction" which is defined in Webster's Dictionary as "a judgment of condemnation entered by a court having jurisdiction." It may be said by the opponents of an amendment of the law that this judicial interpretation of the section should satisfy the lawyers and that things should be left as they are. That is not a valid argument for two reasons.

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[1] *James Grant* (1936), 26 Cr. App. R. 8.
[2] [1919] 2 K.B. 278.

The first reason is that, while Mr. Justice Avory's explanation makes the law theoretically intelligible, it produces in practice a situation which is little short of comic. A summary court, which is the only court with which we are now concerned, never records convictions in a formal manner—to do so would be to exercise the functions of a court of record—and all that is done is to make a note of the plea and adjudication in the court register. Therefore, if the direction that the court is not to record the conviction is to be construed narrowly, it has no effect and, if it means that no note of any kind is to be kept of the court proceedings, it cuts at the root of the probation system and of common sense. It is a cardinal principle with social reformers that no court should sentence an offender before learning as much as possible of his environment and history. The aim should be less to make the punishment fit the crime than to make it fit the criminal. If no record is to be kept of proceedings in court which result in the making of a probation order, courts which may subsequently have to deal with the offender will be deprived of material essential to them if they are to come to sensible decisions. Fortunately, practice often proves wiser than theory and it has been so in this case for, when police and probation officers speak in court of an offender's previous convictions, they always include any previous "binding-over" under the Probation Act. That, however, is no reason why a misleading provision should remain on the statute book when an opportunity of amendment is presented.

The second reason for reform is more practical than theoretical. The aim of all progressive social reformers is to develop the constructive methods of dealing with offenders instead of merely depriving them of their liberty. In the forefront of the constructive methods of treatment stands probation, but unfortunately its use and development are hindered by the poor regard in which it is so often held by the general public. Most people who are qualified to express an opinion on the working of the probation system, including all the members of the recent Social Services Committee,[3] are agreed that probation is commonly regarded as tantamount to a "let-off" and that the wording of section 1 of the Probation of Offenders Act of 1907 is, at any rate partially, responsible. Disagreement only arises over the question whether the phrase "without proceeding to conviction" shares responsibility with the rest of the section. It is, therefore, necessary to consider the section as a whole.

[3] Departmental Committee on Social Services in Courts of Summary Jurisdiction which reported in 1936.

First, its scope includes dismissal of the charge and binding over without supervision, and so gives currency to the notion that these methods of dealing with a case are closely related to probation, properly so-called. Secondly, these methods of treatment become available if the court "thinks" the charge is proved, thereby suggesting that a degree of proof less than certainty is sufficient and encouraging the idea that probation is for those not found guilty. Thirdly, the court must take into account the "character, antecedents, age, health and mental condition of the person charged", the "trivial" nature of the offence and the undesirability of inflicting anything more than a "nominal" punishment. Add to all this the direction not to proceed to conviction and it ceases to be a wonder that the idea has gained currency that probation is a treatment reserved for the young, the infirm and the mentally afflicted who have committed minor delinquencies undeserving of serious punishment. To those who have seen probation successfully applied to grown men and women who have been guilty of serious offences and who believe the system capable of greater application in such cases, it is saddening to see the efforts of trained and efficient probation officers hampered by the popular misconception which exists and which sometimes affects the minds of magistrates, court officials and social workers, as well as those of the probationers themselves.

Following the recommendations of the Social Services Committee, the Criminal Justice Bill of 1938 proposed to amend the law by separating probation from binding over and dismissal and by enacting: "When a Court by or before which a person is convicted of an offence for which the Court has power to pass a sentence of imprisonment or to impose a fine is of opinion that, having regard to the circumstances, including the nature of the offence and the character and home surroundings of the offender, it is expedient to place him under supervision, the Court may, in lieu of sentencing him, make a probation order." It is to be hoped that when, after the war, the question of penal reform is taken up again, this or a similar clause will find acceptance and reach the statute book. But, as the debates on the Bill of 1938 clearly showed, there will be controversy before it does so, and that controversy will centre on the admission that a conviction has occurred before a probation order can be considered.

There can be no doubt that the opposition to reform in this matter is sentimental in origin and, in consequence, it is

much more difficult to overcome than if it were logical. Many sincere friends of probation are genuinely alarmed lest an acknowledgment of the conviction should prejudice a probationer because of association of conviction with the word "convict". This fear is so strong that those who are obsessed by it are led to defend a logically untenable position. It would certainly be most unfortunate if in the public eye a probationer was compared with a convict undergoing a long term of penal servitude, but what a flight of fancy is required to imagine it! A lady shopper who is found guilty of obstructing the highway by leaving her car outside the stores is a convicted person, even though the penalty is only 2/6d, but who in his senses thinks of her as a convict? Why should a probationer be less fortunate?

Then it is said that stigma attaches to the idea of conviction and that the path of reform will be made more difficult if a probationer is known to have been convicted. Surely this is muddled thinking! Stigma may attach to the commission of an offence but not to the accident of being found out and punished. A thief is a thief whether convicted or not and no matter how he may be punished. The ethics of the matter are not affected by word jugglery.

There is one more argument against changing the law which, in spite of its moral weakness, requires an answer because it is so frequently uttered. It is said that as the law stands a boy who has robbed one till and has been dealt with under section 1 of the 1907 Act can properly tell his next prospective employer that he has never been convicted of an offence and that this is an advantage which ought not to be taken from him. The perfectly respectable people who put forward this argument would be horrified if it were suggested that they are guilty of undermining the moral basis of probation by encouraging deceit, but that is what in fact they are doing. The prospective employer cares nothing about the legal technicality according to which conviction in section 1 means a finding of guilt, plus the judgment upon it. What he wants to know is whether he can safely put the applicant for a job in a position of trust. It is most desirable that employers should be encouraged to give second chances to those who have transgressed the law, but it is neither reasonable nor honest to get them to do so by juggling with words. There are already many employers who assist the work of probation by giving second and even third chances with their eyes open, and more will be encouraged to do so when they realize that they can

have absolute trust in the probation officer and when they learn to understand and value the result of a system founded on complete honesty of thought and action.

One further misconception must be cleared up. The provision in the Children and Young Persons Act, 1933 (section 59) that the word "conviction" shall not be used in regard to children and young persons is sometimes quoted to reinforce the argument against amendment of the Act of 1907. A moment's examination will show that it cannot be used for this purpose. There is no pretence in the Children and Young Persons Act that there has not been a finding of guilt. All that the Act does is to provide that the expression "finding of guilt" shall be substituted for the word "conviction". This, of course, raises the old question whether a rose by any other name would smell as sweet, but that has nothing to do with the present argument. While the advantages of indulging in what Lord Darling has described as "the modern passion for calling things what they are not"[4] may not be as great as the claims sometimes made for them, it can be said at once that no special virtue is claimed for the word "conviction". "Finding of guilt" means exactly the same thing but it is clumsier and, for that reason, less desirable. But if it can be shown that substitution of "finding of guilt" for "conviction" would materially improve the prospects of a probationer let us, by all means, make that change, provided it is universal and applies to all offences irrespective of the punishment which follows. The name on the label is a matter of indifference provided it does not mislead as to the contents of the bottle. On the other hand no amendment which allowed the present excuses for misrepresentation would satisfy those who want to emphasize the constructive side of probation and who wish to see its use extended to the more serious crimes and the more difficult offenders. Above all, the present opportunity for, if not encouragement of, deceit must be taken away and the ethical basis of probation established beyond question.

[4] See *Oaten* v. *Auty*, *supra*, note 2.