CONVICTION AND PROBATION

THE CASE AGAINST CONVICTION

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In passing the Probation of Offenders Act in 1907 Parliament inscribed on the statute book an expression of the community's will to win back an offender from his evil ways rather than to seek satisfaction in his sufferings under legal punishment.

The Act repealed section 16 of the Summary Jurisdiction Act, 1879, which had allowed the magistrates to release on recognizance an offender who had been convicted of a trifling offence, and it repealed the whole of the Probation of First Offenders Act, 1887, which had extended the same principle to persons charged for the first time with certain offences punishable with not more than two years' imprisonment. It extended the principle of release on recognizance to any person punishable by a court of summary jurisdiction, by provisions the general effect of which is to permit the court, in cases where it thinks the charge has been proved but yet considers it inexpedient to inflict punishment, or any other than a nominal punishment, to deal with the offender by any of three methods of treatment "without proceeding to conviction". The three methods are

(a) dismissal of the information or charge;

(b) discharge of the offender on recognizance without a condition as to supervision;

(c) discharge of the offender on recognizance with the condition that he be under the supervision of a probation officer.

In the case of more serious offences tried on indictment in the higher courts, it allows the court, after the offender has been convicted, to discharge him on recognizance either without supervision, or under the supervision of a probation officer.

In permitting the magistrates thus to deal with offenders "without proceeding to conviction", it has placed those so dealt with in a category distinct from others whom the courts decided to punish and who were classified as "convicted offenders". Moreover, it provided, most humanely, for the help and guidance of those offenders whose path was likely to prove

particularly hard, that the courts might appoint a social worker, called probation officer, to act as supervisor for the period of the Probation Order; part of this officer's duty being to guide, admonish and befriend the probationer.

In moving the second reading of the Probation of Offenders Bill in 1907, Mr. Herbert Samuel, M.P. (now Viscount Samuel), at that time Under Secretary of State for the Home Department, said that the Bill was of a non-controversial character and the Government had not heard a whisper of opposition to it from any quarter of the House.[1]

In 1914 the Act was amended by sections 7, 8 and 9 of the Criminal Justice Administration Act;[2] it was amended again in 1925 by Part I of the Criminal Justice Act,[3] and some further amendments were embodied in the Children and Young Persons Act of 1933.[4] In none of the debates on these amending measures was any whisper of opposition heard to the terms by which offenders were dealt with under the Probation of Offenders Act.

In 1939 Sir Samuel Hoare, then Home Secretary, introduced to the House of Commons his long promised Criminal Justice Bill and, to the surprise of penal reformers, it was found to repeal the wise provision in section 1 of the Probation of Offenders Act which placed probationers in a category apart from offenders who carried the burden of a criminal conviction. It was, of course, very well known that the Home Office desired as much as any one to give the best chance of rehabilitation to offenders dealt with by probation, and it was known that only a few years previously the Children and Young Persons Act had been amended to prevent the use of the words "conviction" and "sentence" in the Juvenile Courts. But these facts only served to create still further amazement. Why had the Home Office taken this retrograde step? To be sure the Departmental Committee on the Social Services in Courts of Summary Jurisdiction had recommended in 1936[5] that such an amendment of the law should be made, but two of its members had rendered minority reports differing from that view. Moreover, two other Departmental Committees had made recommendations against records of conviction.

[1] Hansard, 8th May, 1907, col. 294, 4th series, Vol. 174.
[2] 4 & 5 Geo. V, c. 58.
[3] 15 & 16 Geo. V, c. 86.
[4] 23 Geo. V, c. 12.
[5] Reports, 1936, Cmd. 5122.

Thus in 1925 the Departmental Committee on Sexual Offences against Young Persons said:[6]

> If the facts justified it, the offender might be placed on probation under the Probation of Offenders Act, 1907. It may be said that this involves a conviction, on indictment, and to convict a young man may injure his future prospects. We recommend, to meet this point, that the Probation of Offenders Act, 1907, might be altered by amending section I (2) so as to allow the Court after verdict to decline to record a conviction, and to follow, as nearly as may be, the law which by Section 1 (1) of the Act, governs courts of summary jurisdiction.

Again, in 1927 the Departmental Committee on the Treatment of Young Offenders recommended:[7]

> (30) The need for conviction in a court of assize or quarter sessions before an offender is placed on probation should disappear.

The explanation of the Home Office desire to repeal the provision in section 1 (1) of the Act may be found by looking back into some earlier history. The Industrial Schools Act of 1857[8] required that before a child could be sent to an Industrial School he must first be convicted of vagrancy; the Industrial Schools Act, 1861,[9] which repealed and replaced the Act of 1857 omitted this requirement. The Reformatory Schools Act of 1866[10] required, before committal, not only that the child should be convicted, but that he should have been sentenced to imprisonment; and the Children Act of 1908[11] repealed the Reformatory Schools Act, 1866, but continued the old requirement[12] for conviction to precede committal to a certified reformatory.

The first draft of the Children and Young Persons Bill of 1932 put the question of convictions in Juvenile Courts in an equivocal position, for clause 41 provided that all certified schools, hitherto separately classified as Industrial Schools and Reformatory Schools should, in future, be known as Approved Schools, and presumably what was now to apply to the one type was also to apply to the other.

The National Association of Probation Officers, through its President, the Earl of Feversham, brought these facts to the

[6] Reports, 1924/5. Cmd. 2561, p. 26, s. 40.
[7] 1927. Cmd. 2831, p. 123.
[8] 20 & 21 Vict., c. 48, s. 6.
[9] 24 & 25 Vict., c. 113.
[10] 29 & 30 Vict., c. 117, s. 14.
[11] 8 Ed. VII, c. 67.
[12] In section 57.

notice of the Lord Chancellor in anticipation of the opportunity that would occur for amendment when the Children and Young Persons Bill of 1932 went to the House of Lords. In the meantime, however, some members of the House of Commons had raised in committee stage a recommendation of the Committee on the Treatment of Young Offenders that the terms 'conviction' and 'sentence' should not be used in the juvenile court.[13] In response, Major Oliver Stanley, Under Secretary of State, had replied :

> I considered very carefully putting a clause forbidding the use of these words into the Bill, but I decided that such a clause in an operative Statute was not the place for what is really an expression of opinion. I propose to recommend to the Lord Chancellor, when the time comes to frame regulations, that he should recommend that the words 'conviction' and 'sentence' shall not be used in the juvenile courts and that some other form of words, such as 'the offence was proved' and 'the court ordered' shall be used in their place.

But a legal opinion obtained by Lord Feversham suggested that the Under Secretary's proposal to legislate by regulation might prove to be *ultra vires*. Section 59 of the Children and Young Persons Act, 1933, resulted.

It would seem that while the Home Office in spirit is with the reformers, in the flesh it is very much enmeshed in the legal entanglements of the lawyers. Some years previously a judgment in the case of *Oaten* v. *Auty*, [1919] 2 K.B. 278, had been noted for guidance in amendment of the law when the opportunity presented itself, as it did in Sir Samuel Hoare's Criminal Justice Bill. In the course of his judgment in that case Lord Darling said:[14]

> The words of section 1 of the Probation of Offenders Act, 1907, are unscientific, thoroughly illogical, and are merely a concession to the modern passion for calling things what they are not: for finding people guilty and at the same time trying to declare them not guilty.

But Mr. Justice Avory in his judgment in the same case said:[15]

> The words, if taken literally, may be illogical, but the word 'conviction' has different meanings. Sometimes it means an adjudication that a person has committed the offence charged against him; sometimes it means that, plus the judgment of the Court upon it. In section 1, sub-section 1, I have no doubt the word is used in the second of these senses, namely, an adjudication that an offence has been committed plus the judgment. The subsection therefore means to enact that although the offence is proved the justices, without proceeding to record any punishment or judgment upon it, may dismiss the information.

[13] Report, 1927, Cmd. 2831, p. 122, s. 13.
[14] At p. 282.
[15] At p. 289.

In the debate during committee stage on the Criminal Justice Bill the Attorney-General[16] maintained that the words "without proceeding to conviction" were "literally meaningless". Nearly all the other members of Parliament who followed him urged that the offending words, or words meaning what the Act intended, should remain in the statute. "The value of words", said one member,[17] "is contained in the meaning that we put upon them as they apply to us. There has been no argument, except the argument of logic, why we should retain the term 'conviction' . . . no reasons have been advanced to show that either the course of justice would be improved and that a greater deterrent would exist against possible offenders, or that there would be any improvement in the condition of offenders. . . ." Another member[18] said :

> The meaning which the general public ascribe to words in not always the same as is ascribed to the same words by the legal profession. . . . This Bill is designed to make it possible for an offender to recover his position in the social world and to be able to rise again. . . . We are agreed that you have to tighten up the law . . . at the same time we want to prevent the fact of conviction dogging a man or boy for the rest of his life. We do not want to punish him twice for the same offence. I know it is difficult to get over the legal argument, but in the mind of the ordinary man or woman, there is a feeling that if a person has been convicted and if people know it, it does go against him.

Still another member of the House summed up the question thus: "Whenever possible, a crime which has been expiated should be forgotten".[19]

Sir Samuel Hoare, in his speech on the second reading of his Criminal Justice Bill, said :

> I believe that it will help to save some from falling and will help others to rise when they have slipped.[20]

To give effect to these aims when a new Probation Act is contemplated, the first step must be to define the object which it is hoped to achieve, then to consider the available means, and finally to ask the legal draughtsman to frame the best possible clause. There is, however, a tendency in every professional occupation for the specialist to look at a problem solely from the point of view of his own subject, and it must

[16] Official Report, 21st February 1939, col. 165.
[17] Mr. Messer: Official Report, 21st Feb., 1939, cols. 174, 175.
[18] Commander Sir Archibald Southby: Official Report, 21st Feb., 1939, col. 171.
[19] Mr. Petherick: Official Report, 21st Feb., 1939, col. 162.
[20] Official Report, 29th Nov., 1938; col. 286, vol. 342.

be remembered that a purely legalistic attitude cannot satisfy the aims indicated by Sir Samuel Hoare.

For over thirty years the Probation of Offenders Act has served its purpose remarkably well. Defects, where they exist in the probation system, are almost all connected with failure of the courts to use the Act as the law and statutory regulations permit, and to give serious heed to the organization of a proper service of probation officers.

The probation officer's work is difficult, intangible, sometimes almost spiritual. He is a disciplinary officer of the Court, yet he must always maintain his authority by friendship and example. A great deal of his work of rehabilitation is achieved through finding employment for his probationers and keeping them in employment, for no one can reach a state of social health except through employment. In the quest for employment a criminal record acts as a permanent partial disability. And the stigma of that disability can blight a life because of the sense of failure it carries with it. Much of the most successful work of a probation officer is built upon the simple statement he has made over and over again to prospective employers :

"This lad was found guilty of an offence, he was not punished or convicted, but placed in my care after the Court had sifted all the facts of the case. I have been specially instructed to help him and I am to keep the Court informed of his progress."