## CONVICTION AND PROBATION

A note in the CANADIAN BAR REVIEW of December, 1940, gave a very kind welcome to the new Committee on Criminal Science which the Faculty of Law in Cambridge had established. In this note the need was stressed for a scientific approach in developing and improving in Canada as well as in Great Britain the system of the administration of criminal justice. The same need was emphasized by Mr. J. C. McRuer K.C., in his review of 'Penal Reform in England', the first volume of our series, English Studies in Criminal Science. This series will be continued by the publication in England from time to time of other volumes, one of which, on Mental Variations and Criminal Behaviour is now being prepared. There are, however, some problems of criminal science in which immediate interest can usefully be stimulated by concise treatment in pamphlet form. By this method, the salient features of such problems can be brought to view, and their deeper investigation encouraged. We are, therefore, promoting the issue of such a pamphlet series in parallel to the series of books. On hearing of our scheme the Editor of the Canadian Bar Review, Mr. Cecil A. Wright, K.C., on behalf of the Canadian Bar Association, most generously offered to publish in the REVIEW these shorter studies and to reproduce them subsequently as pamphlets.

The present is the first of these studies, and I would like to take this opportunity on behalf of my Committee to express our thanks to the Editor and The Canadian Bar Association for this courteous hospitality. It is, however, more than this, for it manifests the spirit of collaboration on which scientific progress so largely depends. We in Cambridge look forward to the continued development of this interchange between Canada and Great Britain.

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# CONVICTION AND PROBATION

## INTRODUCTORY NOTE

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## I

Statistics[1] show that of the total number of all persons brought before all our courts and found guilty of indictable offences, more than every second one are dealt with under the provisions of the Probation Act, 1907. If we take into account only children and young persons (*i.e.*, all those not yet seventeen years of age), we find that out of every ten of these, eight are dealt with under the Act. And even when we consider only the cases before Quarter Sessions and Assizes, *i.e.* the most serious cases of crime, we find that seven out of every twenty offenders are dealt with under the Act.

These figures alone are sufficient to establish the importance of the Probation Act in our administration of criminal justice. It follows that any measure which is likely to affect the probation, either in its substance or in its operation, should be subjected to the most careful and thorough examination. Such a measure was the Criminal Justice Bill of 1938. The final adoption of this Bill was prevented by the outbreak of hostilities, but it will undoubtedly be taken up again immediately after the war.

The Criminal Justice Bill proposed a change in certain provisions of the probation system as they were laid down by the Probation Act, 1907, a change which immediately evoked so vigorous a controversy as to suggest that a point of major importance was involved.[2] In Great Britain, where public opinion exercises such a deep influence on the shaping and development of the legal system, it is imperative to subject to a most careful examination a proposed legal change which, from the moment it was first suggested, aroused so much feeling.

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[1] The last available statistics are those for 1938, Criminal Statistics, England and Wales, 1938, Cmd. 6167. 1940.

[2] Not only amongst those concerned with the operation of the system. See, for example, "Probation. The Journal of the National Association of Probation Officers", Vol. 2, number 7, January, 1937, pp. 106-107, and Vol. 11, number 8, April, 1939, pp. 117-120 and p. 128; but also in Parliament: see Standing Committee A, Official Report, 21st Feb., 1939, cols. 158 to 192.

## II

Let us first of all consider the position as regulated by the Probation Act, 1907.

The Probation Act, 1907, envisages three main methods of dealing with delinquents:—dismissal, binding over without probation, and binding over with probation.

A court of summary jurisdiction can choose one of these methods when the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation.

A court of quarter sessions or of assize can, under this Act, only choose between binding over without probation and binding over with probation, and even then, only when the offender has been indicted for an offence punishable with imprisonment.

It must be noted that a court of summary jurisdiction must not proceed to a conviction if it makes an order under the Probation Act. Juvenile courts, being courts of summary jurisdiction, are, of course, within this rule.[3] On the other hand, courts of quarter sessions and of assize must convict before they can make an order under the Probation Act.

In practice, as the vast majority of indictable offences (89% in the statistics of 1938, the last available) are dealt with by courts of summary jurisdiction, the result is that out of the total number of persons dealt with under the Probation Act an insignificant minority are convicted (on the basis of the same statistics, only 7%).

A change in this position was proposed in the Criminal Justice Bill, 1938. This Bill, as first introduced, envisaged the repeal of the Probation of Offenders Act, 1907 (except as it applies to Scotland), adopting, however, from that Act, the three measures of dismissal, binding over without probation, and binding over with probation. But in clauses 17 and 20 the Bill contained modifications of provisions of the Act of 1907 one major effect of which, if they become law, will be

[3] Under the Children and Young Persons Act, 1933, sec. 59, a court of summary jurisdiction, even if it does not make use of the Probation Act, can no longer employ the words "conviction" and "sentence" in respect of offenders not yet seventeen years of age.

that, except in the case of persons under seventeen years of age,[4] a conviction will always have to precede any of the aforesaid three measures.[5] The Bill gives[6] continuing effect to section 59 of the Children and Young Persons Act, 1933,[7] and therefore offenders under seventeen will continue not to have any conviction at all registered against them in a court of summary jurisdiction.

III

It was thus proposed to abolish a principle which had been applied in the administration of the probation system for more than 30 years; those who had found this principle satisfactory in practice had indeed expressed their expectation that if a change were to be made, the movement would be in the reverse direction, *i.e.*, that it would extend the procedure hitherto applied in the courts of summary jurisdiction to the higher courts, whenever the Probation Act was being applied. That is to say, they expected that the procedure now applied to 93% of all cases dealt with under the Probation Act would be adopted also for the remaining 7% (*i.e.* those before the Assizes or Quarter Sessions). The Criminal Justice Bill plans the opposite, *i.e.*, the extension of the procedure applied in the 7% of cases so as to cover the 93% of cases. Thus the Criminal Justice Bill suggests a measure the effect of which would be to increase the number of offenders *convicted* by well over 80,000 a year.

What reasons have been put forward in order to justify such a change? It has been urged that when an alteration of a system in operation for more than a quarter of a century is advocated, the *onus probandi* should rest on the shoulders of those who ask for such an alteration. The fact that the probation system is not perfect and exhibits certain defects would be a reason in favour of recording convictions only when it is proved that these defects are wholly or partially the result of not recording convictions. Those who oppose the change do not deny the shortcomings of the present probation system, but argue that the reasons for these are different and that the change proposed would make the probation system less efficient.

[4] See note 3, *supra*.

[5] The Children and Young Persons Act, 1933, sec. 59, does not apply to courts of record and therefore, in the very rare cases in which a child is brought before a court of quarter sessions or of assize, conviction must precede an order.

[6] In the 4th Schedule.

[7] For the Bill does not reproduce from the Probation Act the words "without proceeding to conviction", but speaks of "in lieu of sentencing him" (clause 17) and "where a person is convicted of an offence" (clause 20).

It must be noted that in this respect the Criminal Justice Bill embodies a recommendation made a few years before by a Departmental Committee,[8] although this recommendation was not unanimously adopted by the Committee: two of its members expressed their disagreement in unequivocal terms.[9] Miss Madeleine J. Symons (now Mrs. Robinson), among others, stated that no evidence was collected by the Committee justifying the recommendation adopted by the majority, and this point seems to us to be of such importance that we quote below Miss Symons' statement.[10]

## IV

Those who support the proposed change refer freely to the case of *Oaten* v. *Auty*.[11] There is so much confusion of thought about this case, that we feel justified in discussing it at some length. *Oaten* v. *Auty* is concerned with a purely legal point as to right of appeal, *i.e.* as to whether a decision under the Probation Act can be appealed against; and the conclusion to which the Judges came was that appeals can be made. It seems to us that it is a case which is not relevant to the question whether or not the recording of a conviction ought to precede dismissal or binding over under the Act.

As to the merits, or demerits, of the Probation Act in giving to the justices the discretion and powers which it does give, this case in itself has really nothing to say. The question whether the legislature was wise in wording the Probation Act as it did is not a point which was in issue in the case before the Judges.

Five judgments were delivered in the *Oaten* v. *Auty* appeal and in so far as these five Judges took occasion to declare their

[8] See: "Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction", 1936, Cmd. 5122. Paragraph 103 (IV), pp. 73–74.

[9] *Ibid.*, "Reservations on Paragraph 102", pp. 146-147.

[10] "I am strengthened in my view by the fact that in the course of our evidence we have received no representations that the practice since 1907, of not 'proceeding to conviction' has held any unfortunate results on the Probation System, nor have we been told of any inconvenience caused to the Courts in administering this section of the Statute during thirty years, other than the solitary criticism already referred to. Although this occurred in 1919, apparently it was not thought necessary to deal with the matter in Part 1 of the Criminal Justice Act, 1935, which otherwise made far-reaching changes in the organization of the probation system." *ibid.*, p. 146.

We may add that this observation strengthens the impression we first received when the Report was issued, that in view of its great importance for the administration of criminal justice in this country it is to be regretted that the collected evidence was never published.

[11] *Oaten* v. *Auty*, [1919] 2 K.B. 278.

opinions about points which were not in issue their remarks are of interest in our present enquiry; but although they may be received with respect, they carry no more weight than the opinions expressed by other persons who have had perhaps more experience of the working of the Probation Act and have been in a position to observe the advantages and disadvantages created by the avoidance of the use of the word 'conviction'.

Of the five judgments, that of Darling J. is most commonly quoted. In the course of this his Lordship said:—

> The words of s. 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. . . . The Probation of Offenders Act, 1907 has allowed the Justices to find all the facts that make a person guilty, but to enter in their record that he is not guilty.[12]

On this dictum the following observations may be made.

(a) His Lordship did not show why the words of the Act must be regarded as "unscientific", and it is therefore not clear what he meant by this word.

(b) It would doubtless be illogical to find a person guilty and also to declare him not guilty, but it must be pointed out that the Probation Act does not authorize any such course of action: there is no provision that the court should declare the offender not guilty, and there is no evidence that the courts have ever made any such pronouncement.

(c) The reference to "the modern passion for calling things what they are not . . ." is not in accordance with the facts, which are as follows. The conception that justices might find on the evidence that an offence has been committed and yet not proceed to conviction was adopted by the legislature as far back as 1879 in section 16 of the Summary Jurisdiction Act of that year, so that this policy was by no means modern in 1907.[13] But even this was not the first occasion on which this principle of procedure was approved by the legislature, for in

[12] *Ibid.*, pp. 282-283, 284.

[13] 42 and 43 Vict. c. 49. s. 10. "If upon the hearing of a charge for an offence . . . the court of summary jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment,—(1) The court, without proceeding to conviction, may dismiss the information, and, if the court think fit, may order the person charged to pay such damages, not exceeding forty shillings . . . as the court thinks reasonable."

1863 "An Act to amend the Law in certain Cases of Misappropriation by Servants of the Property of their Masters" was passed, which, in section 1, provided

> that if upon the Hearing of the Charge the said Justices shall be of opinion that the same is too trifling, or that there are circumstances in the Case which render it inexpedient to inflict any Punishment, they shall have Power to dismiss the Charge, without proceeding to a Conviction.[14]

The principle adopted by the Probation Act, 1907, is therefore not open to attack on the argument that it was invented under the influence of a modern passion, in view of the fact that it had existed without public question for over fifty years at the time when Lord Darling was speaking.[15] It would seem, therefore, that the principle was, from the first, a measure of social utility. Of course, it may be that to-day other reasons of social utility demand its reversal. But one fact is beyond any doubt: the problem can be elucidated only by an objective and thorough investigation.

## V

Of the controversy which the proposed change has aroused not only in the House of Commons during the discussions of the Bill, but also amongst those professionally interested in the administration of law and the working of the probation system, it may be said, speaking broadly, that the outstanding feature so far is the radical divergence of approach to the problem. The field seems to be divided between those who desire that in all cases where offenders are dismissed or bound over without or with probation, there should be no conviction at all recorded (whether in courts of summary jurisdiction or in courts of quarter sessions or of assize), and those, on the other hand, who take the diametrically opposed view and hold that conviction should always precede, thus bringing the courts of summary jurisdiction into line with the courts of quarter sessions and of assize.

The former group assert, for example, that to associate conviction with probation is discordant, on the ground that the basic idea of binding over is to give the transgressor the

[14] 26 and 27 Vict. c. 103.

[15] In all the proceedings which took place before the passing of the Probation Act, and again in the Report of the Departmental Committee on the Probation Act which was presented in 1909 after two years' experience of the working of the Act (1909, Cmd. 5001, and 5002), there is not to be found any criticism of the principle in question.

fullest possible opportunity of reform without the handicap of being stamped as a criminal which a recorded conviction inevitably involves. They argue that a conviction not only tends to hinder his own improvement, but also to dislocate his adjustment in society and thus introduces a danger of collapse into chronic criminality.

Their opponents say, amongst other arguments, that dismissal and binding over under the Act is not in any case possible unless the charge against the offender has first been proved: that in a large number of cases the offender has been previously convicted, and very often has broken a previous probation order; that it is an anomalous situation when a person is proved to have committed an offence and yet is not convicted of it, and that law ought not to be framed so as to allow the development of an idea that crime can be committed with relative impunity; and finally that because of the wide use which is made of the Probation Act the dangers of the present system are accentuated.

Although these two extreme points of view are so prominent, there are other possible modifications of the present rules which perhaps should be considered. For example, a rule could be adopted that a conviction should only be recorded against a person who has previously been found guilty of one offence, or, perhaps, of more than one; another possibility would be to require conviction only in the case of an offender who has previously been dealt with for another offence by dismissal or binding over without or with probation; or again, to convict before binding over, but not to convict before dismissing a charge; another plan would be to dismiss without conviction, but to convict before binding over, with proviso, however, that if and when the offender shall satisfactorily have fulfilled the conditions of the order, the conviction shall be expunged.

Perhaps the most important reason why it is so difficult to decide on one of these solutions is that we know so little of the psychological effect of a recorded conviction on the person convicted, and of the social reaction of the community (and of certain of its groups) to a man with a criminal record. Facts are needed, rather than impressions, and unfortunately there have so far not been adequate scientific investigations into the question. Material on this subject ought, indeed, to be accumulated, for it would not only help in the solution of the present problem of conviction, but would be of great value in appraising other measures of criminal policy.

## VI

It is manifest that the position in which the matter has been left in the Criminal Justice Bill, as it stands in the last stage which it has reached, is most unsatisfactory. In the House and in Committee the Government resisted the attack of those who opposed the new proposals as to conviction; but although the attack narrowly failed when directed against the provisions of clause 17, the same attack narrowly succeeded when subsequently directed against clause 18. Therefore, if the Bill as it now stands becomes law, the somewhat absurd result will be reached that conviction will be required in every case before dismissal or binding over without probation, but will not be recorded when the offender is bound over with probation.[16] It is, therefore, difficult to suppose that the Bill will be allowed to pass into law as it stands, and it seems inevitable that the whole question will have to be re-opened.

A subject at once so important and so controversial as this needs consideration in the light of the best arguments that can be advanced for and against any particular solution, and it seems advisable that the problem should be investigated in this way before the time arrives for the final decision in England.[17] Moreover, as the probation system, in one form or another, has been adopted in most of the countries of the world and its use is likely to be extended in the future, the present discussion covers an interesting question of criminal policy which calls for study on comparative lines. We have been fortunate in obtaining the collaboration of men whose opinion should be taken into account when, after the war, the legislature has to make its decision on this matter. We are also extremely obliged to Professor Edwin Sutherland who has very kindly contributed a most instructive note on the position regarding this matter in the United States of America.

[16] Parliamentary Debates, House of Commons, Standing Committee A, 21 February, 23 February, 7 March, 1939.

[17] See, *e.g.*, Times Educational Supplement, 28 Dec. 1940, p. 518, col. 2.