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RECENT CASES

SMITH v. EVANS: THE HANGOVER OF PROXIMATE CAUSE IN PENNSYLVANIA DRAM SHOP CASES

A tavernkeeper is civilly liable for serving intoxicating beverages to a minor, to a visibly intoxicated person, or to a person of known intemperate habits.[1] This Case Note analyzes and evaluates the basis of this liability.

Until its repeal the Dram Shop Act provided a statutory basis for civil liability in dram shop cases: "any person furnishing intoxicating drinks to any other person in violation of any existing law . . . shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and any one aggrieved may recover full damages against such person so furnishing by action on the case . . . ."[2] The final two decisions under this act were rendered in 1957 and 1958, and neither indicated a basis for liability in cases arising under the Act of 1951 after the repeal of the earlier act.[3]

Smith v. Evans[4] illustrates the approach the Pennsylvania courts have taken in dram shop cases since the repeal of the Act of 1854. Not unlike *Schelin v. Goldberg*[5] and *Corcoran v. McNeil*,[6] the *Smith* case gives labels to legal concepts without fully developing the underlying theory of liability. The plaintiff was both a minor and a visibly intoxicated person when he entered the defendants' taverns. He was served intoxicating drinks, and shortly after leaving the last tavern the automobile which he was driving left the highway, the accident resulting in severe injuries for which he was awarded a substantial recovery by the jury. In commenting on the liability of the tavernkeepers under the Act of 1951, which is strictly a criminal statute, the supreme court said:

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1. Smith v. Evans, 411 Pa. 142, 190 A.2d 441 (1963); Corcoran v. McNeil, 400 Pa. 14, 161 A.2d 367 (1960); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958).

2. Act of May 8, 1854, Pa. Laws 663, § 3 (hereinafter referred to as the Act of 1854). Section 1 of this act made it a misdemeanor to serve intoxicating drinks to any person of known intemperate habits, to a minor, or to an insane person. The Act of 1854 was repealed by PA. STAT. ANN. tit. 47, § 9-901 (1951) (hereinafter referred to as the Act of 1951). Section 493 of the Act of 1951 makes it unlawful for any person "to sell, furnish or give any liquor or malt or brewed beverages . . . to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or to persons of known intemperate habits."

3. McKinney v. Foster, 391 Pa. 221, 137 A.2d 502 (1958); Manning v. Yokas, 389 Pa. 136, 132 A.2d 198 (1957).

4. 411 Pa. 142, 190 A.2d 441 (1963). The most recent decision in this area is Jardine v. Upper Darby Lodge No. 1973, Inc., — Pa. —, 198 A.2d 550 (1964).

5. 188 Pa. Super. 341, 146 A.2d 648 (1958).

6. 400 Pa. 14, 161 A.2d 367 (1960).

> The Act of 1951 . . . inter alia, makes it unlawful for any licensee to sell or furnish any liquor or malt or brewed beverages to a minor or to a visibly intoxicated person. . . . If the intoxicating beverages are sold in violation of this statute, this constitutes negligence, and if the unlawful act or acts are the proximate cause of an injury, the violator is responsible in damages for the loss suffered.[7]

In dram shop cases the Pennsylvania courts declare a violation of the criminal statute to be negligence per se and then proceed to determine whether such violation was the proximate cause of the injury to the plaintiff. The labels "negligence per se" and "proximate cause" are semantical façades which cloud the true issue of the basis on which liability can be attributed to tavern-keepers in these cases when there is no longer any statutory imperative for such liability in Pennsylvania.

In the *Schelin* case, the first to be decided under the Act of 1951, the theory upon which the court declared a violation of the Act of 1951 to be negligence per se was found in section 483 of the *Restatement of Torts*, which provides that: "If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute."[8] In explaining the applicability of this section to dram shop cases the court said: "Section 493 of the Liquor Code of 1951 . . . making it unlawful to sell, furnish, or give away liquor to any person visibly intoxicated was enacted to protect society generally, but to protect *specifically* intoxicated persons 'from their inability to exercise self-protective care.' "[9] *Smith v. Evans* purports to follow the *Schelin* case,[10] and it can be assumed that the court considers the principle of section 483 of the *Restatement of Torts* to be a valid foundation upon which to base the premise that a violation of the Act of 1951 is negligence per se. But this contention may not be a sound one. The American Law Institute does not attempt to define what groups make up "classes" within the meaning of section 483 of the *Restatement of Torts*;[11]

7. Smith v. Evans, 411 Pa. at 144, 190 A.2d at 442.

8. RESTATEMENT, TORTS § 483 (1934); Schelin v. Goldberg, 188 Pa. Super. 341, 348, 146 A.2d 648, 652. This principle was found to apply *a fortiori* in Corcoran v. McNeil, 400 Pa. at 21, 161 A.2d at 371. As a preface to its discussion of this section, the court in Schelin v. Goldberg, *supra* at 347, 146 A.2d at 651, adopted RESTATEMENT, TORTS § 286 (1934), saying:

> Under the common law the violation of a legislative enactment by doing a prohibited act, makes the actor liable for an invasion of an interest of another providing, among other things, that the intent of the enactment is exclusively or in part to protect an interest of another as an individual and that the plaintiff has not so conducted himself as to disable himself from maintaining an action.

9. Schelin v. Goldberg, 188 Pa. Super. at 348, 146 A.2d at 652; cited with approval in Corcoran v. McNeil, 400 Pa. at 21, 161 A.2d at 371.

10. Smith v. Evans, 411 Pa. at 144-45, 190 A.2d at 442.

11. RESTATEMENT, TORTS § 483, comment *a* (1934).

but as an example of the type of statute to which the section refers, it specifies child labor statutes, which prohibit the employment of children in dangerous occupations until they have reached a certain age.[12] It is difficult to equate the class of "children" as they are protected under child labor laws with the legal protection afforded the class of "intoxicated persons" (if such is a class under section 483 of the *Restatement of Torts*) under the Act of 1951 as the court appears to have done. It is an even more difficult extension of the analogy to hold that because a violation of a child labor law is negligence per se, therefore a violation of the Act of 1951 is negligence per se simply because children and intoxicated persons are two groups unable to protect themselves. One major distinction between these two groups is that intoxicated persons have rendered themselves unable to exercise self-protective care by their own voluntary acts in consuming intoxicating drinks. A further policy consideration with regard to this treatment of intoxicated persons is that it protects a class which is likely to cause harm to others. An intoxicated person who causes injury to another person may find himself conveniently immune from liability if liability can be shifted to the tavernkeeper who served him.

The Act of 1951 itself offers evidence that it was not created to protect a class of persons within the meaning of section 483 of the *Restatement of Torts*. The purpose of the act is to uphold "the protection of the *public* welfare, peace and morals of the *people* of the Commonwealth."[13] In direct contrast to this purpose, the Act of 1854 was created "To protect certain domestic and *private* Rights, and prevent abuses in the Sale and Use of Intoxicating Drinks."[14] This emphasis on the public, criminal aspect of the Act of 1951, as distinguished from the emphasis on private, civil liability in the Act of 1854, further suggests that a violation of the Act of 1951 should not be regarded as negligence per se in a civil action.

A California district court of appeal dealt specifically with this issue in *Hitson v. Dwyer*.[15] In that case the plaintiff was served intoxicating liquor while sitting on a movable stool in the defendant's tavern. He continued to be served after he was "obviously intoxicated," and fell off the stool. He was then dragged across the floor by defendants and suffered injuries for which he attempted to recover against the tavernkeeper. Under one of the allegations in his complaint the plaintiff argued that the defendants were negligent per se by reason of their violation of the "provisions of the Alcoholic Beverage Control Act . . . which prohibits the selling, furnishing or giving of any

12. RESTATEMENT, TORTS § 483, comments *b* and *c* (1934).
13. PA. STAT. ANN. tit. 47, § 1-104 (1951). (Emphasis added.)
14. Act of May 8, 1854, Pa. Laws 663. (Emphasis added.)
15. Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

alcoholic beverage to any obviously intoxicated person."[16] In sustaining a demurrer to the complaint, the court stated that simply because the statute makes it a misdemeanor to serve liquor to an obviously intoxicated person is not to say that the plaintiff

> was one of a class for whom the act was drafted. The primary purpose of the act is declared in Section 1 thereof to involve . . . "in the highest degree the economic, social and moral well-being and safety of the State and all its people." Under such a statement it cannot be said that an obviously intoxicated person is one for whom the act was adopted.[17]

A similar result was reached by a Connecticut superior court in *Noonan v. Galick*.[18] The plaintiff was served liquor by defendant-tavernkeeper and became intoxicated. As a result of her intoxication, she was later run over while lying on the highway. The court refused to extend to the plaintiff a civil liability statute which afforded a remedy to an injured third person against the seller. In dealing with the criminal statute involved, the court said,

> In order to base a recovery upon negligence in violation of a statute, it must appear that the injury suffered was of a nature which the statute was intended to guard against. . . . It is extremely doubtful if these provisions in our Liquor Control Act were intended to guard an intoxicated person from personal injury.[19]

The situations and the statutes confronting the courts in *Hitson v. Dwyer* and in *Noonan v. Galick* were not unlike those which have appeared before Pennsylvania courts. The express purpose of the California statute in the *Hitson* case mirrors that of the Act of 1951, and yet the Pennsylvania courts have declared a violation of that statute to be negligence per se in order to establish a basis for civil liability in dram shop cases when the statutory basis therefor no longer exists.

To interpret the Act of 1951 to establish negligence per se for violations is to impose strict liability upon the tavernkeeper as though the Act of 1854 had never been repealed. Such a harsh imposition of liability may not be warranted in the absence of a specific legislative demand that it exist.[20] Also, the argument has arisen that strict liability in these cases makes the tavernkeeper an insurer of the safety of his patrons. It has further been stated that, in imposing such liability, the courts have exceeded all realistic bounds

16. *Id.* at 806, 143 P.2d at 954.
17. *Id.* at 808, 143 P.2d at 954-55.
18. 19 Conn. Supp. 308, 112 A.2d 892 (1955).
19. *Id.* at 310, 112 A.2d at 894. *Contra*, Schelin v. Goldberg, 188 Pa. Super. at 347, 146 A.2d at 651.
20. For an exemplary statute which imposes strict liability in dram shop cases, see ILL. REV. STAT. ch. 43, §§ 135-136 (1932).

in denying the tavernkeeper the defense of contributory negligence, as well as the defense that the serving of the liquor was not the proximate cause of the injury.[21]

Although the Pennsylvania courts have insisted that the intoxication must be the proximate cause of the plaintiff's injuries, as exemplified by *Smith v. Evans*,[22] the mere labelling of a theory of negligence does not explain it, nor does it mean that it is necessarily the correct theory. One legal writer suggests that: "The only problem of any difficulty involved in this whole line of cases is that of defining the scope of the protection afforded by the statute. The question of causal connection is an incidental one and wherever made decisive constitutes a false issue."[23] This point is exemplified in the Pennsylvania dram shop decisions.

In specifically repealing the civil liability clause of section 3 of the Act of 1854, the Legislative Reference Bureau stated that the section was repealed because it was "obsolete" and "unnecessary."[24] The effect of repealing a legislative enactment which gave a statutory civil cause of action to one injured due to his own intoxication, or due to the intoxication of another, against the one who had served the intoxicating drink, would seem to be to require that such cases be decided upon basic common law principles of negligence. As the court said in the *Schelin* case, "When an act embodying in expressed terms a principle of law is repealed by the legislature, then the principle as it existed at common law is still in force."[25] The question thus should become whether or not the plaintiff in the *Smith* case could recover at common law.

The overwhelming weight of authority holds that, under common law principles of negligence, no remedy exists against a tavernkeeper for injuries and damages resulting from the acts of a person to whom the tavernkeeper has served intoxicating liquor.[26] The basis for the denial of liability in these

21. See 4 VILL. L. REV. 575, 588 (1959); McKinney v. Foster, 391 Pa. at 266, 137 A.2d at 504. In *Smith v. Evans*, counsel for the appellant speaks to this point with regard to his assignment of error in the trial judge's charge to the jury:

> When a jury hears the categorical pronouncements "negligence as a matter of law," and "violation of the law," coupled finally with an instruction that "then you must find both defendants are answerable in damages," this amounts to a direction to find for the plaintiffs.

Brief for Appellant, p. 12.

22. 411 Pa. at 145, 190 A.2d at 442.

23. GREEN, RATIONALE OF PROXIMATE CAUSE 23 (1927).

24. PA. STAT. ANN. tit. 47, § 9-901 (1951).

25. Schelin v. Goldberg, 188 Pa. Super. at 346, 146 A.2d at 651.

26. *E.g.*, Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943); Noonan v. Galick, 19 Conn. Supp. 308, Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943); Noonan v. Galick, 19 Conn. Supp. 112 A.2d 892 (1955); State for Use of Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939); Demege v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936); Annot., 54 A.L.R.2d 1152 (1957). It should be noted

cases is that there is "no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor."[27] This rule rests on the theory that "the proximate cause of the injury is the act of the purchaser in drinking the liquor and not the act of the vendor in selling it . . . ."[28] It is difficult to place the entire emphasis on "proximate cause" in these cases, and to conclude, as do the Pennsylvania cases, that the causal chain begun by the tavernkeeper in furnishing the liquor was in no way superseded or intervened by the intentional, voluntary act of the person who drank the liquor. As pointed out in *Noonan v. Galick*, under basic common law rules of negligence, even if the selling of the liquor were the immediate cause of the injury, a plaintiff could not recover for his own personal injuries because his contributory negligence would be a defense to the action as a matter of law.[29]As the court said in *Seibel v. Leach*, "Courts may in proper instances apply old rules to newly created conditions, but they cannot create new rules for conditions already regulated."[30]

In order to fill the gap left by the common law in dram shop cases, various states have felt that the weight of justice and the need for upholding the public welfare require the enactment of civil damage or dram shop statutes.[31] Pennsylvania had such a statute in the Act of 1854 which was specifically repealed by the Act of 1951. The Court of Appeals of Maryland commented on its analogous situation in this way: "In the face of the flood of civil damage laws enacted, amended and repealed in other states . . . and of the total absence of authority for such liability, apart from statute—the fact that there is now no such law in Maryland expresses the legislative intent as clearly and compellingly as affirmative legislation would."[32] Several courts have held that to allow recovery in these cases, where no such recovery could be had at common law, would be a direct usurpation of the power and function of the legislature.[33]

Still, in spite of these two obstacles—the one being that there could be no recovery in dram shop cases on the basis of proximate cause at common law, and the other being that Pennsylvania no longer has a dram shop act

that although the contributory negligence of an intoxicated patron would not be available as a defense to a tavernkeeper in an action by a third party plaintiff who was injured as a result of the actions of an intoxicated patron, the third party plaintiff would be precluded from recovery by the defense of proximate causation as it existed under common law principles of negligence.

27. State for Use of Joyce v. Hatfield, 197 Md. at 254, 78 A.2d at 756.
28. Noonan v. Galick, 19 Conn. Supp. at 309-10, 112 A.2d at 894.
29. *Ibid.*
30. 233 Wis. at 68, 288 N.W. at 775.
31. See, *e.g.*, Demege v. Feierstein, 222 Wis. at 203, 268 N.W. at 212; Noonan v. Galick, 19 Conn. Supp. at 311, 112 A.2d at 894.
32. State for Use of Joyce v. Hatfield, 197 Md. at 256, 78 A.2d at 757.
33. See *ibid.*; Cole v. Rush, 45 Cal. 2d at 354, 289 P.2d at 455.

to fill this gap in the common law—the Pennsylvania courts have consistently allowed recovery in dram shop cases. In *Corcoran v. McNeil*, the second case to be decided under the Act of 1951, the court cited with approval the 1888 case of *Rommel v. Schambacher*.[34] In that early case the plaintiff entered defendants' tavern and became intoxicated. Another intoxicated patron then attached a piece of burning paper to his clothes, causing injuries to the plaintiff. In holding that the defendant-tavernkeepers were liable for the plaintiff's injuries, Chief Justice Gordon said:

> All this is a plain matter of common law and good sense, and does not depend on the act of 1854, or any other statute. Where one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ, as of the drunken and vicious men whom he may choose to harbor.[35]

However, the fact remains that when this case was decided such a cause of action was explicitly sanctioned by the Act of 1854. In the California case of *Cole v. Rush*[36] the defendant-tavernkeepers knew that the decedent would become belligerent if he had a few drinks. Nevertheless he was served liquor and became intoxicated. He was fatally injured in an ensuing fight in the tavern. In sustaining a demurrer to the complaint in a wrongful death action by the decedent's widow and minor children, the court commented upon *Rommel v. Schambacher* and similar cases:

> [T]he liability of a saloonkeeper in this line of cases appears to be related to that of innkeepers and restauranteurs for injuries to guests or patrons by other guests or persons not connected with the management, and is an exception to the general common law rule of nonliability of the vendor of intoxicating liquor, and furnishes no precedent for imposing liability on the saloonkeepers under the circumstances . . . in this case.[37]

The repeal of the Act of 1854,[38] leaves two alternatives for the Pennsylvania courts to follow in dram shop cases. First, deny recovery in all such cases because at common law there could be no recovery on the principle of proximate cause; or, secondly, extend and amplify basic principles of negligence, so that the law may better fit dram shop situations without torturing the over-emphasized, elusive[39] concept of proximate cause to fit into cases where it has never applied. The latter alternative, if followed, need not be categorized as judicial legislation.

34. 400 Pa. at 20, 161 A.2d at 370-71.
35. Rommel v. Schambacher, 120 Pa. 579, 582, 11 Atl. 779 (1888).
36. 45 Cal. 2d 345, 289 P.2d 450 (1955).
37. *Id.* at 352-53, 289 P.2d at 454.
38. PA. STAT. ANN. tit. 47, § 9-901 (1952).
39. GREEN, *op. cit. supra* note 23, at 39.

The emphasis placed upon proximate cause by the Pennsylvania courts in dram shop cases is not only unacceptable under common law principles of negligence, but is also ineffective to explain the underlying theory of liability. The better approach is exemplified by the New Jersey case of *Rappaport v. Nichols.*[40] In that case an intoxicated minor drove his automobile into the Rappaport automobile, killing Arthur Rappaport. The plaintiff alleged that defendant-tavernkeepers should have known of Nichols' minority because the alcoholic beverages which he consumed that evening were all bought for him by an adult companion. In reversing a judgment for the defendants the court said: "Negligence is tested by whether the reasonably prudent person at the time and place should foresee an unreasonable risk or likelihood of harm or danger to others . . . . And, correspondingly, the standard of care is the conduct of the reasonable person of ordinary prudence under the circumstances."[41] The emphasis is thereby shifted from causation to the duty of the tavernkeeper to use reasonable care in determining whether or not a particular patron, if he were to consume intoxicating liquor, would foreseeably cause harm to himself or to others. A breach of this duty must be established before the question of a causal connection between the breach of duty and any resulting injury arises. As the court said:

> The negligence may consist in the creation of a situation which involves unreasonable risk because of the expectable action of another . . . . Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor.[42]

In answer to the defendants' contention that their actions were not the proximate cause of Rappaport's death, the court held that the injuries which resulted should have been foreseen by the defendants as a natural consequence of their breach of duty to the intoxicated person, and to the public in general.[43] The fact that there were intervening causes which were foreseeable would not relieve the defendants from liability.[44]

An approach such as that employed in the *Rappaport* case does not impose strict liability upon tavernkeepers, as do civil damage acts, and does not present the unsatisfactory results which occur where a violation of a criminal statute is interpreted to be negligence per se, and the issue then becomes one of proximate cause, as in the Pennsylvania cases. Defendant-

40. Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).
41. *Id.* at 201, 156 A.2d at 8.
42. *Ibid.*
43. *Id.* at 202, 156 A.2d at 8-9.
44. *Id.* at 203, 156 A.2d at 9.

tavernkeepers in dram shop cases are placed under no unjustifiable burden because they can always "discharge their civil responsibilities by the exercise of due care."[45]

It is not within the scope of this Case Note to explore the sociological principles which underlie an evaluation of the advantages of allowing recovery against a tavernkeeper who sells liquor to a minor or to a visibly intoxicated person. However, it should be noted that even in cases which have expressly denied recovery in dram shop cases there have been vigorous and able dissents because of the rigidity with which the courts have applied common law principles in denying recovery against the tavernkeepers.[46] It is suggested that such liability may be advantageous if it is founded on sound principles of negligence. The denial of liability in dram shop cases is based on common law principles which were in existence long before the hazards of driving automobiles while under the influence of intoxicating liquor had arisen. A change in attitude is warranted but not upon the reasoning of such cases as *Smith v. Evans*. The *Rappaport* case points out the necessity that the judicial process adapt the law to fit the needs of the times:[47]

> When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or to the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent.

The Pennsylvania dram shop cases since the Act of 1951 have suffered entirely too long from the hangover of proximate cause.

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45. *Id.* at 205, 156 A.2d at 10.
46. See, *e.g.*, Cole v. Rush, 45 Cal. 2d at 357-66, 289 P.2d at 457-62; Fleckner v. Dionne, 94 Cal. App. 2d 246, 251, 210 P.2d 530, 534 (1949).
47. Rappaport v. Nichols, 31 N.J. at 202, 156 A.2d at 8.

COMMONWEALTH v. DUFF: USE OF THE INDEFINITELY SUSPENDED SENTENCE IN PENNSYLVANIA

The Pennsylvania Superior Court held in *Commonwealth v. Duff*[1] that when a man has been found guilty on several criminal charges, the court may indefinitely suspend the imposition of sentence[2] on all but one charge if the defendant is placed on probation for a definite period on the remaining bill.[3] Suspensions of sentence have long been and continue to be used in Pennsylvania, not only in conjunction with probation, but also as an independent device.[4] Due to the doubt which has been cast upon the validity of the indefinitely suspended sentence[5] the superior court's approval of its usage is worthy of consideration. This Case Note will inquire into the legality and propriety of the indefinite suspension of the imposition of sentence in Pennsylvania.

In February, 1959, Doctor Nathaniel Duff, a seventy-four year old physician, pleaded guilty before the Quarter Sessions Court of Philadelphia to six bills charging abortion and to two others charging conspiracy to commit abortion. The doctor was sentenced to twenty-three months probation on one of the abortion charges and was given a suspended sentence on all the other bills.[6] Almost four years after the original sentencing, Duff was found guilty of committing abortion during his twenty-three month probationary period. This time a different judge placed him on three years probation.[7] Fourteen days after the latter sentencing, the first trial judge, after a hearing, vacated the original suspended sentences and imposed prison sentences of eighteen to thirty-six months on three of the indefinitely suspended abortion sentences. The three sentences were to run concurrently. No action was taken on the bill under which the defendant had originally been placed on probation,[8] however, there is judicial authority to the effect that the court could have imposed sentence for violation of the terms of probation[9] and thereby avoided the issue which was presented in this case.

The suspended sentence has played an important and necessary role in the growth of the Anglo-American judicial system. Both in England and

1. 201 Pa. Super. 387, 192 A.2d 258 (1963).
2. "Indefinite suspension of sentence" in the context used in this Note, refers to the suspension of the *imposition* of sentence (as opposed to its execution) for an unspecified period of time.
3. Commonwealth v. Duff, 201 Pa. Super. 387, 192 A.2d 258 (1963). The court was divided four to three on the decision.
4. *Id.* at 390-91, 192 A.2d at 260-61.
5. *Id.* at 398, 192 A.2d at 264.
6. Record, pp. 2a-3a.
7. Ct. [Quarter] Sess. Phila. Co., Bill No. 884, June term (1961).
8. Record, p. 2.
9. *E.g.*, Commonwealth v. Fox, 69 Pa. Super. 456 (1918).

in the United States, courts developed methods to alleviate the harsh penalties of the criminal law.[10] The judicial reprieve, which was the direct forerunner of the suspended sentence, was a suspension of either the imposition or execution of sentence by the English courts and was commonly used when a judge believed the defendant should not have been convicted. Such reprieves were temporary in nature, their purpose being to permit the defendant to appeal to the Crown for a pardon.[11] From this practice of judicial reprieve the American courts developed the indefinite suspension of the imposition of sentence during the good behavior of the defendant.[12] State courts sustained these suspensions either because they had been in use for a long period of time or because there was the mistaken belief that the power to indefinitely suspend sentence existed in the English courts.[13]

The Supreme Court in *Ex parte United States* (*Killits* case),[14] after a thorough historical review, concluded that at common law the courts had authority to *temporarily* suspend sentences,[15] and that occasionally, due to a failure to bring further criminal proceedings against the defendant, punishment was indefinitely escaped. The Court unanimously concluded that neither state nor federal courts had derived authority from the common law to suspend sentences indefinitely and that in the absence of express statutory authority it is unconstitutional for courts to suspend either the imposition or execution of sentences.[16]

In the *Killits* case the defendant pleaded guilty in a federal court to the charge of embezzlement. He had no prior criminal record and appeared to be an ideal subject for probation. The trial court, suspended the execution of sentence for five years.[17] The federal prosecutor then moved that the order be vacated on the grounds that it was beyond the powers of the court. The motion was denied, and a petition for mandamus was filed with the

10. TAPPAN, CRIME, JUSTICE AND CORRECTION 539 (1960). Although "benefit of clergy" is not considered a true precursor of the suspended sentence, it reflected the same motive of mitigating severity of punishment. From the thirteenth century, members of the clergy, and later anyone who could read, were enabled to escape legal punishment in exchange for relatively lenient ecclesiastical jurisdiction. This power of the courts disappeared from use at the beginning of the nineteenth century. *Tappan, op. cit. supra* at 639-40; HALL & GLUECK, CRIMINAL LAW AND ITS ENFORCEMENT 12 n.9 (2d ed. 1958).

11. PIGEON, PROBATION AND PAROLE IN THEORY AND PRACTICE 84-85 (1942); TAPPAN, *op. cit. supra* note 10, at 540.

12. *Ibid.*

13. Warner, *Some Legal Problems Raised by Probation*, in PROBATION AND CRIMINAL JUSTICE 25 (Glueck ed. 1933).

14. 242 U.S. 26 (1916).

15. *Id.* at 51-52.

16. *Id.* at 43-52; see Warner, *supra* note 13, at 26; TAPPAN, *op. cit. supra* note 10, at 541.

17. CHUTE & BELL, CRIME, COURTS AND PROBATION 95 (1956).

Supreme Court of the United States.[18] Judge Killits, of the trial court, *in propria persona*, filed a brief for the defendant,[19] which is summed up by Professor Chute as follows:

> [T]he power [to suspend sentences] in one form or another had been continuously exercised by the federal judges "from time out of mind"; . . . the Department of Justice and the President had acquiesced in it for nearly a century, . . . it was necessary for the proper administration of justice, and . . . it was the only amelioration possible as there was no federal probation system. The power to suspend . . . is "consonant with the best interests of society, in cases where either the arbitrary minimum penalty is disproportionate to the actual criminality involved in the particular offense, or when . . . vindication of the law may be associated with the saving of the individual as a responsible unit of society.[20]

Although the facts of *Killits* applied particularly to a suspension of the execution of sentence for a fixed time by a federal court, the Supreme Court applied its reasoning and decision to all suspensions of sentence by both federal and state courts. As a result of the holding in *Killits*, Congress and many state legislatures passed probation laws.[21] By 1956 all states had adopted adult probation laws.[22]

In 1909,[23] seven years before the *Killits* case, Pennsylvania courts were authorized to suspend the imposition of sentence of "any person"[24] and were given "the power to suspend the imposing of sentence, and place the defendant on probation, *on such terms and conditions as it may deem right and proper* . . . ." except for certain enumerated crimes and for persons previously imprisoned.[25] Thus, the Pennsylvania Legislature clearly provided for the suspended sentence as an integral part of the probationary power and as an adjunct to it. In so doing the Legislature recognized that correction could often be more successfully and economically obtained through the use

18. *Ibid.*

19. *Ex parte* United States, 242 U.S. 26, 61 L.Ed. 129, 137 (1916) (petition reprinted only in Lawyer's Edition, United States Supreme Court Reports).

20. CHUTE & BELL, *op. cit. supra* note 17, at 95-96.

21. 18 U.S.C. §§ 3651-56 (Supp. IV, 1946); see generally CHUTE & BELL, *op. cit. supra* note 17, at 67-111 where the statutory development of state and federal probation laws is traced.

22. CHUTE & BELL, *op. cit. supra* note 17, at 84; *e.g.*, MISS. CODE ANN. tit. 3A, §§ 4004-23 (1942).

23. Prior to 1909 the Pennsylvania courts exercised the power to suspend sentence under the assumption of a common law power. Commonwealth v. Mayloy, 57 Pa. 291 (1868); Commonwealth v. Dunleavy, 16 Pa. Super. 380 (1901); Commonwealth *ex rel.* Nuber v. Keeper of the Workhouse, 6 Pa. Super. 420 (1898).

24. Juvenile probation acts were in force before this time. Pa. Laws 1901, act 279, held unconstitutional, substantially re-enacted Pa. Laws 1903, act 274, repealed, 11 PA. STAT. ANN. § 243 (1939).

25. PA. STAT. ANN. tit. 19, § 1081 (1930). (Emphasis added.)

of probationary measures rather than by imprisonment.[26] In 1911 the Pennsylvania Probation Act[27] superseded the act of 1909 and introduced an important change. The courts were given the power "to suspend the imposing of sentence and place the defendant on probation *for a definite period . . . .*"[28] From this new wording the basic issue in the *Duff* case arises. The conjunctive phrasing in both acts would seem to indicate that the suspended sentence can only be used in conjunction with probation. It appears, from the use of this phrasing and the words "for a definite period," that in the act of 1911 the Legislature intended to prohibit any indefinite suspensions of sentence. It would seem illogical to interpret the statute as authorizing the courts to place the defendant on probation only for a definite period and to use a suspended sentence if they wished to retain control of the defendant indefinitely. If this were the intention, the Legislature could have omitted the requirement of definiteness, as was done in the Act of 1909, and left it to the courts' discretion whether to limit the suspension to a definite term. The Pennsylvania courts, in following *Commonwealth ex rel. Wilhelm v. Morgan*,[29] have continued to ignore the plain meaning of the statute. In *Wilhelm* the defendant was convicted of assault and battery which carried a maximum term of imprisonment of one year; however, the sentence was "deferred" without any specific probationary period set forth. Over four years later the defendant was brought before the court and sentenced to a term of imprisonment of one year commencing from that date. The supreme court interpreted the Act of 1911 as impliedly requiring the suspended sentence to be co-extensive with the probationary period.[30] Since there was no definite probationary period set forth by the trial court and since the act provided that the probationary period cannot exceed the maximum period for which the defendant could have been imprisoned, the court held that action on the suspended sentence must be taken within the maximum period that the defendant *could have been* placed on probation.[31] Thus, the Pennsylvania supreme court held that the statutory requirement for a "definite" period of probation means the maximum period which could have been imposed if there is no period set forth by the trial court. Of course, it must be remembered that the *Wilhelm* case involved a suspended sentence on *one* charge where there was *no probationary period set forth.* The *Duff* case poses a quite different problem. Here there is a twenty-three-month probationary period in connection with the first bill and the suspended sentence in

26. Pa. House Probation Program Comm., *Some Facts About Probation* 1-2 (1935).
27. PA. STAT. ANN. tit. 19, § 1051 (1930).
28. PA. STAT. ANN. tit. 19, § 1051 (1930). (Emphasis added.)
29. 278 Pa. 395, 123 Atl. 337 (1924).
30. *Id.* at 399, 123 Atl. at 338.
31. See *id.* at 398-99, 123 Atl. at 338.

connection with the remaining seven bills. Also, when Duff was sentenced, the probationary period on the first bill had expired. The court does suggest that the power of the courts to act on the bills on which sentence is suspended *may* be limited to violations within the fixed probationary period;[32] however, it points out that the violation in *Duff* actually took place within the probationary period.[33] The real holding of the case, however, with which this Note is concerned, is that for a violation occurring within the fixed probationary period, "the probation may be revoked within a reasonable time after the expiration of that period, if it is done before the expiration of the maximum for which the defendant might have been sentenced" and then sentence imposed on the bills on which sentence had been suspended without fixing a probationary term.[34]

A possible argument against this result can be drawn from another probation law enacted in 1941:

> [T]he court shall have the power, in its discretion, if it believes the character of the person and the circumstances of the case to be such that he is not likely again to engage in a course of criminal conduct and that the public good does not demand or require the imposition of a sentence to imprisonment, instead of imposing such sentence, to place the person on probation for such definite period as the court shall direct, not exceeding the maximum period of imprisonment allowed by the law for the offense for which such sentence might have been imposed.[35]

The Legislature did not expressly state that this act was intended to repeal the act of 1911, but since it accomplished exactly the same purpose as the earlier act, at least there is a possible conflict. The courts, however, in line with their favor for the suspended sentence have held that the act simply deleted the requirement that the trial judge use the words "suspending the imposition of sentence" before placing a defendant on probation.[36] Significantly, the title of the act of 1941 is "An Act to create a uniform and exclusive system of parole in this Commonwealth . . . ." Since probation regulations are included in the act, it would seem that the act is also intended to cover the system of probation. Suspension of sentence is not expressly mentioned, but the liberal probation regulations[37] make the use of a suspended

32. 201 Pa. Super. at 393, 192 A.2d at 262.
33. 201 Pa. Super. at 394 & n.5, 192 A.2d at 262 & n.5.
34. 201 Pa. Super. at 392-96, 192 A.2d at 261-62.
35. PA. STAT. ANN. tit. 61, § 331.25 (1930).
36. Commonwealth *ex rel.* Champion v. Claudy, 171 Pa. Super. 143, 146, 90 A.2d 638, 639 (1952).
37. *Compare* the 1941 statute which leaves the choosing of suitable individuals entirely to the judge's discretion, *with* PA. STAT. ANN. tit. 19, § 1051 (1930). Compare also the restrictions imposed by other probation statutes. See, *e.g.*, 18 U.S.C. §§ 3651-56 (Supp. IV, 1946); N.Y. CONSOL. LAWS §§ 927-39 (McKinney 1949); N.J. STAT.

sentence purposeless and obsolete because anyone whom the court deems worthy is qualified for probation. Previously, not only did the defendant have to be considered worthy by the court, but he also had to qualify for probation by having no prior criminal record and by not having been adjudged guilty of the felonies listed in the 1911 act. Where a defendant did not qualify for probation under the act of 1911, yet the court felt he did not deserve imprisonment, a suspended sentence could be used to accomplish the same purpose as probation without violating the act. The opinion in the *Duff* case indicates that the use of the suspended sentence independently of probation is a "very common practice" in Pennsylvania.[38]

The maximum probationary period in the 1941 act is not to exceed the maximum prison term which could have been imposed; the act of 1911 contains an identical provision with regard to suspended sentences. The act of 1941, however, says nothing of suspended sentences. However, since the courts can now apply probation in every instance where they might formerly have had to use suspended sentences and since the effects of the two techniques are identical—to let the defendant serve his sentence outside of prison—the reason for the suspended sentence has been eliminated. It is also noteworthy that the maximum probationary period under the 1941 act is not to exceed the maximum prison term which could have been imposed; the act of 1911 contains an identical provision with regard to suspended sentences. It does not seem that the legislature would expressly authorize probation for a definite period and impliedly allow indefinitely suspended sentences where they fulfill exactly the same purposes, are qualified in the same manner, and can extend for the same maximum duration. Under this construction, the only difference between the two techniques is that with probation a defendant knows how long he is to remain under the surveillance of the court, whereas under an indefinitely suspended sentence his status must remain in doubt for an unspecified period of time.

Judge Woodside's statement in his dissent, that "The legislature, although not recognizing the legality or propriety of a 'suspended sentence' adopted an alternate procedure to that previously allowed. . . ."[39] certainly

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ANN. § 2A:168-1 to -13 (1953); MODEL PENAL CODE §§ 301.1-.6, 401.1-.3, 405.1-.4; see also CHUTE & BELL, *op. cit. supra* note 17, at 86-87.

38. 201 Pa. Super. at 392, 192 A.2d at 261. See Commonwealth v. Wentz, 52 D.&C. 690 (1946); see also Commonwealth *ex rel.* Paige v. Smith, 198 A.2d 812, 130 Pa. Super. 536 (1938); Commonwealth v. Carelli, 90 Pa. Super. 416 (1927). There is difficulty in finding reported cases which use a suspended sentence where probation could not have been imposed but the above cases indicate that they do exist. The difficulty arises from the fact that a defendant in such a situation is not likely to complain, and the prosecutor, having obtained a conviction, is unlikely to demand further proceedings.

39. 201 Pa. Super. at 399, 192 A.2d at 256.

seems to be the intention manifested by the changed wording of the 1941 statute. The minority of the superior court believes that Pennsylvania courts may no longer use the indefinitely suspended sentence in any form. Instead, they must use the probation system.

The majority opinion, however, does seem to recognize the "alternate method" approach.[40] The court concedes that the Act of 1911 bound the courts to impose a definite probationary period when suspending sentence and admits that "the *Wilhelm* case in 1924 indicated that the sentencing judge should never suspend sentence without imposing probation for a definite period and under definite conditions."[41] However, "the Pennsylvania Legislature has not seen fit to ban the practice in the intervening fifty-two years, nor has the Supreme Court or [the superior court] ever treated such suspensions as nullities . . . ."[42] The majority refused to cast off what had become the traditional construction of the statutory language.[43]

The basic premise of the majority in the *Duff* case was that the courts have carried on a practice for fifty years and there is no reason to stop now. This "longevity" argument was presented in the *Killits* case,[44] and the United States Supreme Court denied its validity.[45] The Court reasoned that an illegality does not become legal simply through the passage of time.[46] The reasons for denying the argument of long usage are even stronger in light of the existence of liberal probation regulations which do away with the need for the suspended sentence as an independent device. The Pennsylvania superior court recognized in *Duff* that the 1941 act contains no authority to use the suspended sentence;[47] therefore, the courts' reasoning that the legislature has acquiesced in the practice for fifty-two years[48] seems to be somewhat contradicted, making the basis of its long usage argument very questionable.

There appears to be ample justification, both in law and in reason, for considering carefully Judge Woodside's admonition:

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40. See *id.* at 391, 192 A.2d at 261.

41. *Ibid.*

42. *Ibid.*

43. 201 Pa. Super. at 392, 192 A.2d at 261. See cases cited *supra* note 38 and accompanying text.

44. *Ex parte* United States, 242 U.S. 26, 61 L.Ed. 129, 137 (1916) (petition reprinted only in Lawyer's Edition, United States Supreme Court Reports).

45. *Ex parte* United States, 242 U.S. 26, 51 (1916). The Supreme Court unanimously held that suspensions of sentence are violations of the courts' Constitutional duties.

46. *Ibid.* The Court stated that, notwithstanding the fact that the technique had long been in use and that there were very good reasons for judges to use indefinitely suspended sentences where there were no probation statutes, "[W]e can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution."

47. 201 Pa. Super. at 392-93, 192 A.2d at 261.

48. *Ibid.*

> There are few areas of jurisprudence in which a high degree of certainty is more desirable than that relating to sentencing, and there are few areas where the law of this Commonwealth is in greater confusion. The majority now adds to the confusion by putting its stamp of approval upon a practice which the legislature has tried for over fifty years to abolish, and which the courts should have long since abandoned without legislative prodding.
>
> I think that the appellate courts should require the sentencing courts to comply with the statutory law and to discontinue the imposition of "suspended sentences" without placing the defendant on probation for a definite period.[49]

Unless this view prevails in the Supreme Court of Pennsylvania, it appears doubtful after the *Duff* case that the courts will abandon the usage of their modified form of the indefinitely suspended sentence until the Pennsylvania Legislature *clearly* makes its intent known.

GEORGE V. COHEN

49. *Id.* at 398-400, 192 A.2d at 264-65.