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RECENT CRIMINAL CASES

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[Ed. Note. Through the courtesy of the Daily Legal News of Cleveland, Ohio, we are able to print the recent opinion of Judge David Ralph Hertz of the Court of Common Pleas of Cuyahoga County, Ohio, in the case of *Ohio* v. *Hubert Emonds*. The case is a graphic presentation of the question, "When Should Probation Be Granted?" Judge Hertz gives his answer in the opinion printed below.]

This matter is before the Court after a plea of guilty of manslaughter on an application to suspend the imposition of sentence and to place the defendant on probation in the manner provided by law.

Careful search for a discussion by the courts in this State or elsewhere of when probation is to be granted or denied has revealed none. An inquiry, however, into the theory and rationale of probation is impelled both by the character of this defendant and the circumstances of his offense. These considerations together with widespread misconceptions of what probation is and what it seeks to accomplish, prompt a formal statement by the Court.

The defendant was charged with having brought about the death of one James Beebe by stabbing him early in the morning of June 29, 1937, in a bar room known as Loyda's Cafe in the city of Cleveland.

The information generally found in the police reports, in this case is sketchy and vague. The Court consequently was compelled to resort to the provisions of General Code, section 13451-2, to learn what happened. Accordingly the witnesses were summoned and examined in open court and in the manner provided by law.

Of the eighteen persons known to the police to have been on the scene, only the defendant and six others are able to tell us anything of what preceded the incident. They are Walter J. Ralph, companion of the defendant, Rudolph Loyda, proprietor of the cafe, John Helwig a bartender and Beebe's three Companions, Edward Higgins, Charles Hesseman and Bernis Jalovec. Of these all were examined except Jalovec, who failed to respond to subpoena.

With the exception of the defendant and Ralph all appeared to be unwilling witnesses. Each had significant lapses of memory. Each told things favorable to the defendant only after considerable prodding; and for being unwilling to

say anything reflecting on Beebe. Nevertheless certain facts stand out clearly.

For at least three years Emonds and Ralph had been in the habit of coming to Loyda's Cafe each evening after work (Emonds worked until about midnight as a motion picture operator) and there partaking of a light lunch. Infrequently Emonds would drink whisky but never more than two glasses. Emonds and Ralph always seated themselves at a certain table in the cafe with Emonds in the furthermost corner, his back to the wall and facing the bar and Ralph at Emond's left. Both Loyda and Helwig corroborate the statements of Emonds and Ralph that after having their lunch they would leave, Emonds invariably stopping at the bar on the way out to purchase six or seven cigars. This had been a nightly habit.

On the night in question Emonds and Ralph entered and seated themselves as usual. They had their lunch, Emonds having a glass of whisky, several cups of coffee, and a sandwich. Clearly, he was not intoxicated. After a while they were joined by Loyda, the proprietor, who sat at the table at Emond's right. Seated at the bar were Beebe, his three companions and others.

Emonds first noticed Beebe when he observed the four companions who, though seated in chairs facing the bar, had turned about in their seats and were staring steadfastly at him. Loyda also observed the four acting in the same manner. After a while Emonds protested to Beebe. Whereupon Hesseman and Jalovec turned, but Higgins and Beebe continued to stare as before. According to Loyda this continued for some fifteen or twenty minutes. According to Hesseman it was occasioned by a remark previously made by Beebe who had asked his friends to "watch me outstare that fellow."

The staring annoyed Emonds but Loyda and Ralph both told him to pay no attention to it. After exchanging words with Beebe, Emonds told Ralph that he was afraid that the four were trying to make trouble and that it would be best for Ralph and him to leave. He thereupon rose from the table as usual and proceeded toward the bar taking the course he usually took in purchasing his cigars. Both Loyda and Ralph thought when he rose that he was about to follow his usual procedure although Loyda seems to believe that Emonds at that time was "riled."

Unless we believe what Emonds tells us, we are unable to learn what followed. Ralph can tell very little becuse he sat or stood with his back to the bar. Loyda, probably because he is unwilling to offend neighborhood customers and is eager to portray his establishment as a peaceable and orderly place, claims to know equally little.

Beebe's two companions who testified, also claim to have seen little and give highly improbable explanations therefor. Higgins testifies that as he saw Emonds approaching he purposely turned away because he did not want to see what happened; Hesseman says merely that he wasn't watching. The bartender claims to have been busy serving a customer. All agree that they saw no knife in Emond's hands as he approached Beebe and that whatever happened, took place quickly and without noisy turmoil.

Emonds relates that as he passed Beebe the latter, who was still staring at him, kicked him, strik-

ing him in the right leg about three or four inches below the knee.

Emonds continues:

"I said, 'Why don't you mind your own business? There is nobody bothering you.' He then said 'I will sock you one,'—as much as I could understand of it at the time. I said 'Oh yeah?' With that he got off his chair and struck me in the upper part of my chest—my right shoulder. I grabbed the arm with which he struck me and pushed him away from me. He came toward me a second time. First I held him at arm's length and then retreated a foot or so, when I noticed that Higgins had jumped up behind me so that Beebe stood between me and one door and Higgins between me and the other door. I heard Higgins say 'You ———. Come outside.' I had been fishing shortly before and was still wearing my fishing jacket in which I usually carry a fish knife. When I saw Beebe acting in this way and thought that Higgins was behind me and Beebe's other two friends at my side I was frightened and lost my head. I pulled out the fishing knife from my pocket because it was the only thing I had handy and opened it. I had to use both hands to open it. Beebe then yelled to Higgins, 'Look out, he's got a knife!' and advanced toward me again. I swung my hand moving it no more than three or four inches. Beebe ran into it as much as I swung it. I was so excited I wanted to get away. I went to the rear of the place, Higgins and Beebe following me. Beebe stopped short of the door and returned, but Higgins followed me outside calling me vile and abusive names. I got my car and drove away. I explain it all by my desire to avoid trouble. If Beebe hadn't kicked me I would have walked past him. It would not have occurred if Higgins had not gotten behind me."

The other witnesses, except Ralph who speaks vaguely of having seen Emonds holding Beebe's arm, say they saw nothing of the stabbing. Higgins denies standing behind Emonds and the physical arrangement of the seats argues that Higgins is probably more accurate in this respect than Emonds. All witnesses are in agreement, however, that Higgins without knowing that Beebe had been stabbed, in great anger pursued Emonds beyond the door and abused him vilely for carrying a knife.

Emonds' story because it is the defendant's own, naturally invites skepticism. Nevertheless several considerations singly and taken together argue in its favor. It is contradicted by neither witness or circumstances. It is consistent and harmonious with what he has claimed from the very beginning. It is not unreasonable or implausible. Beyond question Beebe had sought to provoke the quarrel and it is not difficult to believe that one disposed as he was, may have kicked and struck Emonds. At the same time Higgins' conduct, his angry and abusive pursuit of the defendant, can be understood only if Higgins had participated in Beebe's aggressions. Furthermore Emonds' plea of guilty, at least in measure, increases our respect for his credibility, especially since without it, we should have no direct evidence whatsoever that it was he who stabbed Beebe. Finally, his account offers the only explanation afforded by the evidence

of why Emonds acted as he did, which is that in a frightened effort to save himself from a peril which he overestimated, he resorted to unjustifiable methods of escape. Were there other evidence before us, we might then choose what to believe. In the absence of such, we are in duty bound to moderate our doubts and to accept the defendant's account at least in cardinal measure.

See *Houston* v. *State,* 117 Miss. 311, 78 So. 182;

Martin v. *State,* Miss., 106 So. 270;

State v. *Hurst,* 99 W. Va. 222, 116 S. E. 248;

Cf. Ickes v. *State,* 42 Oh. App. 446, 182 N. E. 49.

Emonds was indicted for second degree murder. He was permitted, however, with the concurrence of the prosecuting attorney to plead guilty to the included charge of manslaughter. That the killing was suddenly precipitated and was motivated without either malice or specifically formulated intention to kill seem clear. The acceptance of a plea to the crime of manslaughter was amply justified under the law as it is doubtful if the facts ever justified an indictment for murder in the second degree.

Erwin v. *State,* 29 O. S. 186, approved in *Beard* v. *United States,* 158 U. S. 550, 39 L. Ed. 1086, 15 Sup. Ct. 962;

Bennett v. *State,* 10 O. C. C. 84, 4 C. D. 129;

Bailus v. *State,* 16 O. C. C. 226, 8 C. D. 526;

Turk v. *State,* 48 O. App. 489, 2 Oh. Ap. 96, 194 N. E. 425; affirmed 129 O. S. 245, 194 N. E. 453.

The plea was entered on December 6, 1937. Sentence, however, was passed pending report by the Probation Department and by Dr. Royal S. Grossman, Director of the Psychiatric Clinic of this Court. The defendant was ordered held in the County Jail where he has been detained ever since that date.

That the Court may place a defendant on probation after conviction for manslaughter is generally accepted since 1931, Opinions of the Attorney General, No. 3336. In this County alone in 1936, fourteen cases and in 1935, sixteen cases were referred to the Probation Department following conviction for manslaughter. Cursory examination of the Department's records reveals at least six instances of voluntary manslaughter where probation was granted with success. During the current term of court in this County a defendant who had killed his wife was placed on probation.

General Code Section 13452-1 reads as follows:

> "In prosecutions for crime, except as mentioned in G. C. 6212-17, and as hereinafter provided, where the defendant has pleaded, or been found guilty and it appears to the satisfaction of the judge or magistrate that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and the public good does not demand or require that he be immediately sentenced, such judge or magistrate may suspend the imposition of the sentence and place the defendant on probation in the manner provided by law, and upon such terms and conditions as such judge or magistrate may determine; provided that juvenile de-

linquents shall not be included within this provision."

By virtue of this provision, the Court is granted discretionary powers which he may exercise only in constant mindfulness of the public good. How that good may be served most effectually was pointed out by our Supreme Court speaking through Chief Justice Thos. W. Bartley as early as 1857 when he said:

"The *leading*, if not the *sole object*, in the administration of criminal justice, is the *safety* and *protection* of the community and its several members. Criminal punishment is not inflicted as an *atonement* or *expiation* for crime; *that* must be left to the wisdom of an overruling Providence. And the experience of the past ages has taught that crime is more effectually prevented by the certainty than by an unreasonable *severity* of punishment disproportionate to the turpitude and danger of the offense. Touch this subject, Blackstone in his Commentaries, uses the following language:

'It is absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (beside the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect, either in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium* to every case of difficulty.'"

Robbins v. *State*, 7 O. S. 131, at p. 170, 171.

Chief Justice Bartley continues in the same opinion at page 174:

"The legitimate *purpose* of criminal punishment being the *safety* of the community and its individual members by preventing the commission of crime, it is the duty of the government to endeavor to reform rather than exterminate offenders. And experience has taught, that the objects of the criminal law are better attained by *moderate* but *certain* than by *severe* and excessive penalties.'

Despite the tremendous contributions made by the social sciences since the day the foregoing was written, it is doubtful if a more scientific and statesmanlike formulation of policy could be written today. Modern penology would be content to adopt it as its creed.

The requirements of the public good as thus defined demand, first that we deny ourselves the luxury of moral wrath in dealing with offenders but comfort ourselves, if we must, with the recollection that vengeance belongs to the Lord. Second, that we remember that certainty of punishment may accomplish a deterrent purpose, but severity defeats that purpose by making conviction more difficult and by making men worse, not better. And third, that in the performance of our duty to society, we remember that because felons must leave prison as well as enter them, we give society only ephemeral protection unless our correctional methods leave them better than they were when we took them.

The Court must choose in his desire to protect the community, between two courses. He may commit the defendant to the penitentiary or he may suspend sentence

and place the defendant on probation.

The first course has one conceded and two alleged but doubtful virtues. Unquestionably while the defendant is confined his opportunities for injuring others are restricted. It is also claimed, however, that imprisonment "teaches him a lesson," "gives him a chance to think it over" and "makes a man of him." Of that there is no substantiating evidence. Whatever data we have, prove to the contrary. And similarly as to the second virtue claimed for imprisonment, that it deters others. As early as in Blackstone's days, the value of severity as a deterrent was challenged. In speaking of the one hundred and sixty offenses then punishable by death under the laws of England, he said:

> "So dreadful a list, instead of diminishing, increases the numbers of offenders. The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty, or mitigate the nature of the offense; and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt to relieve his wants or supply his vices; and if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate in falling at last a sacrifice to those laws which long impunity has taught him to contemn."

The facts are so irresistible that the National Commission on Law Observance and Enforcement (the so-called Wickersham Commission) over the signatures of such eminent jurists and scholars as Geo. W. Wickersham, Newton D. Baker, Roscoe Pound and others, reported as follows:

> "1. We conclude that the present prison system is antiquated and inefficient. It does not reform the criminal. It fails to protect society. There is reason to believe that it contributes to the increase of crime by hardening the prisoner. We are convinced that a new type of penal institution must be developed, one that is new in spirit, in method and in objective."
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> *Vol. III Reports—Nat'l Comm. on Law Observance and Enforcement,* p. 170.

Discussing the other alternative before the Court, the same Commission over the same signatures in the same report, at page 173, says:

> "16. Probation must be considered as the most important step we have taken in the individualization of treatment of the offender . . .
>
> "18. No man should be sent to a penal institution until it is definitely determined that he is not a fit subject for probation. To this end it is urged that every effort be made to broaden probation and provide more and better probation supervision . . . It is clear that probation where it is applicable, is much less expensive and, from the social point of view, much more satisfactory than imprisonment."

Probation is a form of correctional treatment, in which sense, it is punishment fully as much as imprisonment. It is not leniency. It is not a sentimental concession

which gives "the defendant another chance." It is not a comfortable device for escaping the performance of an uncomfortable judicial duty.

Its defects are two. It is occasionally granted unwisely and sometimes without the necessary supervision. Its shortcomings are those of administration, not of principle.

Where, however, the cases are chosen wisely and the supervision is effective, it offers many advantages. It is economical for its cost is only a fraction of the cost of imprisonment. It conserves the earning power of the defendant for the benefit of his dependents and saves them from the charity rolls, and the public from the burden of supporting them. It permits the defendant to make restitution to those he has wronged. Finally in the effort to rehabilitate the defendant, it utilizes what is good in his environment and character and aims either to eliminate or cure what is bad.

But most significant, is its relative success in protecting society. While sixty per cent of the former inmates of our penal institutions, get into trouble again, about eighty per cent of those placed on probation serve their terms successfully and according to the figures available, only four per cent of these ever get into difficulty later.

Sanford Bates, formerly head of the U. S. Department of Prisons, President of the American Prison Association, and one of the world's renowned penologists, writing in *I, Laws and Contemporary Problems,* at page 485, summarizes probation:

> "as an alternative to letting a man go free without restraint, without guidance, and without hope of reconstruction"

and not as it is so often emphasized:

> "as an avoidance of prison or as an expression of leniency. Properly administered, probation is a deterrent, it is a restraint, and it is a compulsion upon a man to do what he can to re-establish himself."

In short, the case for probation may be summarized in the words of the late President Calvin Coolidge:

> "Justice requires as strongly the saving of that which is good, as it does the destruction of that which is evil. The work that the probation officers are doing is saving of that which is good in the individual, along with the correction of that which is evil. Probation is the right hand in the administration of Justice."
>
> Quoted as Foreword to *"Probation and Delinquency"* by Edwin J. Cooley, Thos. Nelson & Sons, N. Y., 1927.

Unless therefore there exists some specific reason to doubt the safety and propriety of placing this defendant on probation, it would appear that the good of society demands and requires not his incarceration, but having him placed on probation. We therefore consider whether it is safe to release him.

Addressing ourselves first to the character of the defendant, we learn that he is forty-seven years old and one of eight sons and daughters of respected parentage. Although all his brothers and sisters have reached middle age he is the only member of the family ever to run afoul of the law. He, however, has had considerable difficulty. Beginning in Juvenile Court, his involvements reached a climax in 1921 when he was sentenced to the Ohio State Peniten-

tiary for burglary and larceny. Since his release in 1924 he had led a lawabiding and abstemious existence earning his livelihood as a motion picture projectionist at a salary of from $72 to $82 per week. He has held his present job for the last six years and his employer, as well as previous employers, have manifested unusual concern for his welfare. His various acquaintances, friends, employers, and without exception, all who have had occasion to learn anything about him, speak of him as quiet, earnest, industrious and dependable. Not even a slight question has been raised as to his conduct for the last seventeen years.

Generally a record of previous misconduct raises a presumption that the offensive conduct will be repeated in the future and therefore makes probation unjustifiable. That presumption is not tenable here. Neither the background of his youth nor the character of his earlier offenses is related to the matter before us. The Emonds of 1921 and prior thereto, and the Emonds of 1924 and since, have little in common and the offenses of those days are totally dissimilar to the offense now under consideration. Seventeen years of successful self-adaptation to the requirements of society, moreover, argue convincingly that his past history has only collateral significance for us.

His first wife, to whom he was married in 1914, died in 1921. He was married again in 1926 and divorced from his second wife in 1936. Since then he has been paying her for the support of their eleven year old daughter and herself the sum of $90 per month. These payments were made regularly and conscientiously. Careful investigation of the background of the divorce, to ascertain whether it might throw any light upon our problem, reveals nothing reflecting upon this defendant and nothing of any significance here.

Except for an impairment of hearing, his physical examination revealed nothing noteworthy, while the preponderance of the evidence indicates that his intelligence is normal. The psychiatric study, however, raised considerations which required careful investigation and thought.

The defendant was examined clinically and studied not only by Dr. Grossman of this Court but also by Dr. S. Baumoel a highly regarded neurologist and psychiatrist of this city, who was invited into the case at the instance of the defendant's present employer. In addition the defendant was given certain of the newer tests which though offering great promise of future usefulness, as yet lack validation and complete scientific acceptance.

The Rorschach Test revealed emotional difficulties in the structure of his personality such as internal conflicts, anxieties and fears. We are unable, however, to conclude from such findings that his conduct was unconsciously motivated. We have no assurance that the test did not reflect merely his prevailing mood in his present plight when adjusted individuals might reasonably succumb to similar emotional disturbances. Furthermore such a conclusion was negatived by the findings in the Bell Inventory Adjustment and the Minnesota Scale for the Survey of Opinions which showed superior emotional and social adjustments. Although the latter tests are based

merely on verbalized attitudes, they are consistent with the clinical findings which not only specifically eliminate gross pathological factors, but find him a well-adjusted individual whose history revealed no vicious or violent temper reactions or tendencies.

Both psychiatrists conclude that the defendant is not likely to seek or to create another experience of like nature and that he can be counted upon to try to avoid any similar situation. Dr. Grossman, however, believes that if the defendant "were unavoidably forced into it we might in the future see a repetition." Such an unavoidable situation, however, would require a singular combination of circumstances which by the law of chance is so unlikely to occur that we may with safety minimize it. Certainly possibility must be distinguished from likelihood and the likelihood is too small to justify incarceration merely on that account. On the other hand, careful supervision and psychiatric treatment might even further minimize this risk which is already minimal.

On the whole we are of the opinion that the character of the defendant, as revealed by his life history and the psychiatric studies which have been made, while not eliminating all possibility of trouble in the future, justifies us nevertheless in saying "that he is not likely again to engage in an offensive course of conduct."

We address ourselves now to the circumstances of the case. Clearly this defendant must be distinguished from one who without provocation and of his own spontaneous conduct engages in a crime of violence. Had Beebe and his companions let him alone, Beebe would still be living and Emonds still winning his struggle to make good. There is nothing in the facts to indicate that Emonds in this crime ever intended to defy society or to hold human life cheaply. On the contrary there is much to make us believe that his conduct was motivated largely by fear and partly by desire to avoid trouble. There is no reason in the facts as we have heard them to believe that Emonds' conduct in this offense reveals an anti-social attitude or habit.

It should be noted that Emonds has been incarcerated for approximately three and one-half months in the County Jail. Unavoidably that incarceration was accompanied by uncertainty which in itself was punishment. During that period of time he has not known whether his detention would be brief or long, whether he would be placed on probation or sent to the penitentiary. It would seem that the incarceration under such circumstances, accompanied by the mental torture that uncertainty must have brought in its trail, should go far toward accomplishing whatever good may be realized from incarceration.

Furthermore placing the defendant on probation does not permit him to escape punishment. To impress both the defendant and others with the seriousness of this offense and in this sense to accomplish punishment as rigorous and effective as imprisonment, the conditions of probation may exact pecuniary restitution and impose onerous restraints upon liberty.

Finally neither the defendant nor his crime is such as to shock the conscience of the community if he is placed on probation. He occupies no position of wealth or influence; he is in humble circum-

stances, and while his friends are loyal, they share his position in life. His crime affects directly only a small number of persons and it is fully as attributable to unfortunate coincidence as to choice on his part. Placing him on probation therefore in no wise endangers the prestige of our law-enforcing institutions.

The Court therefore concludes that this case is one in which "the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and the public good does not demand or require" that Emonds be sent to the penitentiary. We therefore, in accordance with usual practice sentence him to the Ohio State Penitentiary but suspend execution of the sentence and place him upon probation for five years, the maximum term.

The conditions and terms of such probation shall, however, be as follows:

1. That Emonds abide by the usual rules, regulations and requirements of the Probation Department;

2. That, in accordance with arrangements between the mother of the deceased James Beebe and this defendant, the defendant pay to her the sum of Fifty Dollars per month for five years for the purpose of contributing toward her upport in lieu of that support which her son might have given her.

3. That the defendant continue as heretofore to comply with the order of the Court in his divorce proceedings and pay to his former wife for the support of herself and their daughter, the sum of Ninety Dollars ($90.00) per month, in accordance therewith;

4. That the defendant refrain from visiting in any way any public place where alcoholic beverages of any nature or kind are consumed upon the premises;

5. That the defendant make himself the patient of a psychiatrist of his own choosing but subject to the approval of the Psychiatric Clinic of this Court, that he abide by the course of treatment to be prescribed by such psychiatrist, and submit to said Psychiatric Clinic quarter annual reports by his psychiatrist describing his progress and condition and providing such information as said Clinic may require.

In the event of any wilful breach of these conditions, the probation shall be terminated and the sentence to the penitentiary ordered into execution forthwith.