Buffalo Law Review

Volume 4 | Number 3 Article 13

4-1-1955

Criminal Law—Obscene Telephone Call Held Common Law Crime

Howard L. Meyer II

Although the instant Indiana case involves a tax which has not previously been brought to issue, the court treats it identically with other license taxes. The court bases its analysis on the purpose of the statute, which is the preservation of wild life, which is accomplished with the funds obtained from those licenses. The court asserts that exempting veterans will deplete the funds available for this purpose, and thereby defeat the purpose of the legislature in passing this license fee.

If this reasoning were to be adopted universally, it would seem that almost all of the veteran benefits will fall. With the exception of the statutes attempting to restore pre-war status, no statute will be furthered by granting exceptions or exemptions. This would be especially apparent with regulatory taxes, but will also apply to other taxes with equal force. Although the Indiana court mentioned that a large number of licenses are obtained by veterans, they do not require that the impairment of the statutory purpose be great, but only that the exception "tend to produce this result." This decision would seem to sound the death knell for veterans benefits in Indiana, as perhaps in other states as well.

Raymond S. Ettlinger

CRIMINAL LAW — OBSCENE TELEPHONE CALL HELD COMMON LAW CRIME

Defendant was convicted of telephoning a married woman on a four-party line, and using lewd and salacious language in soliciting her to commit sodomy and adultery with him. *Held:* Although the act violated no statutory provision, the common law is still in effect in Pennsylvania and is broad enough to punish acts which injuriously affect public morality. A dissent argued that the judiciary had arrogated legislative functions to itself. *Commonwealth v. Mochan,* ___ Pa. Super. ___, 110 A. 2d 788 (1955).

The decision cites cases in which killing a horse, *Respublica v. Teisher,* 1 Dall. 335 (U. S. 1788), showing a lewd picture in a private home, *Commonwealth v. Sharpless,* 2 S. & R. 91 (Pa. 1830), and even mildly vilifying the Christian religion, *Updegraph v. Commonwealth,* 11 S. & R. 394 (Pa. 1824), were held to constitute indictable offenses at common law.

New York abolished all common law crimes in 1881, PENAL CODE § 2, L. 1881, c. 676, now PENAL LAW § 22, and all crimes must now be statutory offenses. *People v. Beintner,* 168 N. Y. Supp. 945 (Sup. Ct. 1918); *People v. Knapp,* 206 N. Y. 373 (1912). But

New York has also adopted PENAL LAW §§ 43, 720, 722, which in application cover the same ground as Pennsylvania's recognition of common law crimes.

Under Section 43 a defendant was convicted of openly outraging public decency in asking two little girls to commit sodomy with him. *People v. Casey,* 188 Misc. 352, 67 N. Y. S. 2d 9 (City Ct. Utica 1946).

Under Section 720, the shouting of obscenities in defendant's own backyard, but loud enough to be heard in the street, was held to be disorderly conduct. *People v. Whitman,* 157 N. Y. Supp. 1107 (County Ct. 1916).

A case that clearly points up the propinquity of New York's statutory provisions to Pennsylvania common law is *People v. Daly,* 154 Misc. 149, 276 N. Y. Supp. 583 (Sp. Sess. 1935), where defendant was convicted of disorderly conduct for threatening bodily harm and using abusive language over the telephone.

An appraisal of the decisions under Pennsylvania common law auspices and those dealing with the purview of the New York "dragnet" provisions indicates that these states, among others, although they endorse the principle of legality and the doctrine of *nulle poena sine lege,* do not wish to be precluded from dealing with grossly anti-social behavior that cannot be subsumed under any specific positive sanction.

Howard L. Meyer, II

DOMESTIC RELATIONS — RIGHT OF STRANGERS TO ATTACK FOREIGN DIVORCE DECREE

Petition by collateral heirs to remove decedent's purported wife as administratrix of his estate on the ground that their marriage was void, because the divorce decree obtained in Idaho by the purported wife from her former husband was invalid for lack of jurisdiction. *Held* (5-4): Collateral heirs have no standing to attack the decree in this instance. *Estate of Englund,* ___ Wash. ___, 277 P. 2d 717 (1954).

A decree of divorce in one state is subject to collateral impeachment in another by proof of lack of jurisdiction. *Williams v. North Carolina,* 325 U. S. 226 (1944). No case has been found that precludes a stranger, as such, from maintaining a collateral attack on a divorce decree on grounds, which if proven, would