Tulsa Law Review

Volume 2 | Number 1

1965

Criminal Law: Fashion or Felony

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one and in setting out a criteria for determining this issue, the court in *General Electric* said:

> It appears in the evidence that since 1915, although there is no specific agreement to this effect, the company has assumed all risks of fire, flood, obsolescence, and price decline, and carries whatever insurance is carried on the stocks of lamps in the hands of its agents, and pays whatever taxes are assessed. This is relevant as a circumstance to confirm the view that the so-called relation of agent to the company is the real one.[15]

The court went on to say that:

> The question is whether, in view of the arrangements, made by the company with those who ordinarily and usually would be merchants buying from the manufacturer and selling to the public, —such persons are to be treated as agents, or as owners of the lamps consigned to them under such contracts. If they are to be regarded really as purchasers, then the restriction as to the prices at which the sales are to be made is a restraint of trade and a violation of the Anti-Trust law.[16]

Possibly the *Union Oil* case could have been decided upon the basis of whether a true agency relationship existed. Mr. Justice Stewart put it very well in his dissent (of the *Union Oil* case) saying:

> After a trial on the merits it may be determined that the scheme here involved, although on its face a bona fide lease-and-consignment agreement, was in actual operation and effect a system of resale price maintenance. Or the District Court after a trial might find that despite the formal provisions of the lease-and-consignment agreement, there actually existed here some coercive arrangement otherwise violative of the antitrust laws.[17]

Had the present case been decided on the basis of whether a true agency relationship existed or turned on the word "coercive," the *General Electric* case would have remained clear and concise, and the voluminous consignment agreements, which have been entered into in good faith and substantiated by forty years of decisions handed down by our courts, would have remained unaffected. Businessmen would still have a basis for determining whether they have a right to set prices for articles to which they presumably hold title. As it now appears, there is no longer a criteria for determining which agreements will be upheld and which will be determined to be in violation of our "new" antitrust policy.

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CRIMINAL LAW: FASHION OR FELONY

In the past year, nothing has brought about a greater furor in women's clothing than topless fashions, notably bathing suits. Advocates have viewed the style change as a further emancipation of women's

[15] 272 U.S., at 483.
[16] *Ibid.*
[17] 377 U.S. at 31.

fashions and have compared it with other styles which, when introduced, were also revolutionary. Critics of the fashion have denounced it as ridiculous, immoral, or illegal. The ultimate problem is whether a woman who chooses to wear this type apparel will be criminally liable for this act.

Indecent exposure was an early common law offense which is still recognized in a number of jurisdictions.[1] Blackstone stated:

> The last offense which I shall mention, more immediately against religion and morality . . . is that of open and notorious *lewdness;* . . . or by some grossly scandalous and public indecency. . . ."[2]

The earliest case[3] dates back to 1663 when Lord Sidley was convicted for exposing his body before a number of people.

The exposure of the naked body, or its parts, must be shocking to society's sense of propriety to fall within the common law offense. In *Rex v. Gallard*[4] a woman was charged with indecent exposure for "running in the common way naked down to the waist." In quashing the indictment the Court said: "nothing appears immodest or unlawful." The Court based its decision on community standards of modesty and morality, clearly indicating that an exposure of a woman's breasts was repugnant to neither. Other cases[5] have utilized much the same test as found in *Gallard;* the standards of the community regarding modesty and morality.

The *Gallard* case is the sole authority on an exposure of a woman's breasts and it indicates that in 1773 a woman could not be convicted for wearing topless fashions. If a similar mental attitude in society exists today, there could also be no conviction in jurisdictions which adhere to this common law rule.

Throughout history there have been periods of time when an exposure of women's breasts was considered highly fashionable and completely accepted by society. If we are re-entering another such era, and it appears that we may be, there can be no conviction under the common law for wearing topless gowns or bathing suits.

Many states have modified the common law by statute.[6] Oklahoma[7] requires a willful and lewd exposure of the person or his private parts. In *Davison v. State*[8] the court said: ". . . the gist of the offense is a willful, intentional, lewd exposure of one's private parts. . . ."[9] The principal difficulty with this statute is the use of terms of art, such as "lewd" and "private parts," which are not subject to constant meanings.

[1] Delaware, Rhode Island and Vermont are states where the common law prevails; their statutes being silent on the subject.

[2] 4 Blackstone, Commentaries 64*.

[3] LeRoy v. Sidley, 1 Sid. 168, 82 Eng. Reprint 1036, (1663).

[4] W. Kelynze* 162, 25 Eng. Reprint 547, (1773).

[5] State v. Bauguess, 106 Iowa 107, 76 N.W. 508, (1898); People v. Kratz, 230 Mich. 334, 203 N.W. 114, (1925).

[6] Code of Ala., TIT. 14 § 326(1); CAL. PENAL 311.1; MINN. STAT. § 617.23; N.Y. PENAL LAW § 1140; OHIO REV. CODE 2905.30; 21 OKLA. STAT. § 1021. These statutes are similar in their requirement of a willful and lewd exposure of the private parts of the body.

[7] 21 OKLA. STAT. § 1021, (1961).

[8] 281 P.2d 196 (Okla. Cr. 1955).

[9] *Id.* at 198. *Ex Parte* Correa; 36 Cal.App. 512, 172 P. 615 (1918). Lewd exposure must be alleged and proved as an element of the crime.

"Lewdness" has been judicially defined to mean anything from lasciviousness and sexual indulgence to obscenity. The Oklahoma Court in *McKinley v. State*[10] said that the term "lewd," when used in a statute to define an offense, usually means "an unlawful indulgence in lust; eager for sexual indulgence."[11] Wearing a topless gown or bathing suit in public may suggest gross exhibitionism, but hardly the sufficient desire for lust or sexual indulgence required in *McKinley.*

In *Francis v. State*[12] the question was whether wearing apparel alone would indicate that the wearer was a lewd person in order to sustain a conviction for keeping a "disorderly house." The court in requiring something more to show lewdness said:

> The fact that girls were seen in said house wearing at night thin, low-necked, short dresses certainly is not, in this age in which such apparel is commonly worn in the highest circles of society, equivalent to a 'scarlet letter,' and stamps its wearers as persons of lewd and lascivious characters.[13]

When lewdness is equated with obscenity further problems arise as courts have often made the terms dependent on each other. This is shown in *Hearn v. District of Columbia*[14] where lewdness was required for a conviction, the term previously being defined as obscene behavior. The Court ruled that "nudity is not *per se* 'obscene'."[15] Although stated somewhat differently the same result is reached; a woman wearing a topless fashion cannot be convicted for her apparel alone.

Exposure of "private parts" is the most often used term in definitions and tests of the statutory offense. "Private parts" are normally said to be the genital areas of the body. There has been some liberality in the use of the term,[16] but it cannot be said to include breasts. In *State v. Moore*,[17] the question was whether the defendant had been rightfully convicted of lewd fondling of private parts where the evidence showed a fondling of the breasts. The Court held that the reference is to the genital area, not to the breasts. Even if the exposure could be considered lewd, it would not encompass the parts of the body required by this decision.

This interpretation of the statute points to the fact that legislatures never intended the statute to regulate topless fashions, as they most likely never even contemplated the fashions. It would be wrong for a court to apply these statutes to acts which in no way fit within the terms of the law.

This survey shows that a woman is not criminally liable for wearing topless fashions in jurisdictions adhering to the common law rule and in most of the jurisdictions that have modified the common law with statutes. Legislatures and municipalities may pass laws which could

[10] 33 Okla. Cr. 434, 244 P. 208, (1926).
[11] *Id.* at 436, 244 P. at 208.
[12] 16 Okla. Cr. 543, 185 P. 126, (1919).
[13] *Id.* at 548, 185 P. at 128.
[14] 178 A.2d 434, (Munic. Ct. App. D.C., 1962).
[15] *Id.* at 437.
[16] State v. Nash, 83 N.H. 536, 145 Atl. 262, (1929) included those parts of the body immediately surrounding the genital area.
[17] 241 P.2d 455, (Ore. 1952).