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Criminal Law--Mistake of Law--Reliance upon Advice of Public Official

G. Vernon Owen Jr.

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tionary power of equity to vacate judgments obtained by fraud should not be hampered by a rule of apparently little value, but rather should be exercised freely to obtain substantial justice in each particiular case.

WILLIAM X. HAASE

CRIMINAL LAW — MISTAKE OF LAW — RELIANCE UPON ADVICE OF PUBLIC OFFICIAL

A Maryland statute provided: "It shall be unlawful for any person . . . to construct, erect or maintain . . . signs, or display advertising of any kind whatsover, . . . any one or more of which is intended to aid in the solicitation or performance of marriages."[1] The defendant, a minister who conducted what the court called a "marriage business," consulted the State's Attorney about the legality of erecting in front of his home a sign identifying the defendant as a minister. The State's Attorney advised the defendant that erection of the sign would not constitute a violation of the statute. Relying on this advice, the defendant erected the sign. He was then indicted for a violation of the statute. At the trial he attempted to introduce in evidence the advice of the State's Attorney, but the court refused to allow this evidence. From a conviction, the defendant appealed. Though the judgment was reversed on other grounds, the court took the position that reliance upon the erroneous advice of the public official constituted a mistake of law and could not be shown as a defense in a criminal prosecution.[2]

The principal of the common law that there can be no crime without a criminal mind[3] governs only so far as the public welfare and policy permit or demand.[4] Thus, generally, neither ignorance of the law nor mistake of law is allowed as a legal defense,[5] although if the crime charged involves

(perjured testimony concerning true physical condition of claimant held extrinsic fraud where claimant feigned injury) *with* Phillips Petroleum Co. v. Jenkins 91 F.2d 183 (8th Cir. 1937) (perjured testimony concerning true physical condition of claimant held not to constitute extrinsic fraud where claimant actually sustained minor injuries, the nature and extent of which were in issue in the prior proceeding).

[1] MD. ANN. CODE art. 27, § 444A (Flack Supp. 1947). The constitutionality of this statute was upheld in State v. Clay, 182 Md. 639, 35 A.2d 821 (1944).

[2] Hopkins v. State, 69 A.2d 456 (Md. 1949). Lambert v. State, 69 A.2d (Md. 1949), decided the same day, relied on the authority of the principal case.

[3] "The doctrine of intent, as it prevails in the criminal law, is necessarily one of the foundation principles of public justice. There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal." BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 287 (5th ed. 1872).

[4] HOLMES, THE COMMON LAW 49 (1881).

[5] 4 BL. COMMENTARIES *27. For an exhaustive history of the rule that ignorance of the law is not an excuse, see Keedy, *Ignorance and Mistake in the Criminal Law,* 22 HARV. L. REV. 75 (1908). Another exception to the requirement of the criminal mind is constituted by those statutory crimes which require no intent whatsoever. That this latter exception is also based on grounds of public policy, see Sayre, *Public Welfare Offenses,* 33 COL. L. REV. 56 (1933).

no moral turpitude, both would tend to show the absence of a criminal mind. However, if a specific intent is required to constitute the crime charged, ignorance or mistake of law may be shown to prove the absence of the requisite intent.[6]

It would seem that if the defendant in good faith seeks the advice of a public official empowered by virtue of his office to give such advice, makes a full disclosure of the facts, and acts reasonably and in good faith upon the advice given, he should be protected if the advice proves erroneous.[7] It would seem that this protection should even extend to a defendant who acts upon advice obtained from an official who in fact is not empowered to give the advice which the defendant sought, as long as the official is apparently invested with such power, and as long as his position bears a reasonably close connection with the subject matter of the advice given.[8] The objection applicable to permitting ignorance of the law to operate as a defense — that the ignorance may be proved only subjectively by reference to the accused's state of mind[9] — is not fully applicable here, since the basis for the mistake — the official's advice — may be proved objectively, without reference to the accused's state of mind. The difficulty of proof would be no greater than that involved in proving mistake of fact, which does operate as a defense.[10] The majority of courts, however, have not

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[6] U.S. v. Murdock, 290 U.S. 389, 54 Sup. Ct. 223 (1933); Taylor v. State, 107 Ind. 483 (1886). Ignorance or mistake of law has been held to constitute a defense where the statute is obscure, or is capable of more than one reasonable construction. Cutter v. State, 36 N.J.L. 125 (1873); Burns v. State, 123 Tex. Cr. R. 611, 61 S.W.2d 512 (1933). However, this result seems unsound, for if a criminal statute is truly obscure or indefinite, it should be held unconstitutional. If it is not obscure or indefinite, the square problem is presented whether ignorance or mistake of law should operate as a defense to a prosecution under the statute.

[7] It has been suggested that reliance on the erroneous advice of counsel should also operate as a defense to a criminal prosecution. Perkins, *Ignorance and Mistake in the Criminal Law*, 88 UNIV. OF PA. L. REV. 42 (1939). But the reasons for allowing the defense in the case of advice by a public official are more compelling because confidence in the government is destroyed when citizens are punished for relying on the advice of public officers who are apparently authorized to give such advice. See Perkins, *supra*, at 43.

[8] Hall and Seligman, *Mistake of Law and Mens Rea*, 8 UNIV. OF CHI. L. REV. 641, 675-76 (1941). If the official's position has no connection with the subject matter of the advice it cannot be said that the accused acted reasonably on such advice. State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907) (defendant relied on the advice of a court clerk that defendant had authority to carry a weapon); Jones v. State, 32 Tex. Cr. R. 533, 25 S.W. 124 (1894) (defendant relied on the advice of the mayor that he could sell liquor on election day).

[9] People v. O'Brien, 96 Cal. 171, 176, 31 Pac. 45, 47 (1892).

[10] "As a general rule it is stated that a mistake of fact will disprove a criminal charge if the mistaken belief is (a) honestly entertained, (b) of such a nature that the conduct would have been lawful had the facts been as they were reasonably supposed to be." Perkins, *supra* note 7, at 54. Gordon v. State, 52 Ala. 308 (1875). But where intent is not a necessary element of the crime charged, the defense of ignorance

recognized mistake of law induced by a public official's advice as a defense.[11] The result has been sharply criticized[12] and some courts have permitted the defense.[13]

Measures sometimes recommended or resorted to by courts for the protection of defendants denied the defense[14] — executive clemency or the imposing of a nominal fine only — are not equivalent to exoneration.[15] Nor does the possibility of a declaratory judgment afford sufficient protection, for the remedy is not always available,[16] and even if available, the time and

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or mistake of fact will not be available. Haynes v. State, 118 Tenn. 709, 105 S.W. 251 (1907). *Contra*: Farrell v. State, 32 Ohio St. 456 (1877).

[11] The Joseph, 8 Cranch 451 (U.S. 1874) (ambassador); Hoover v. State, 59 Ala. 57 (1877) (probate judge); Broadfoot v. State, 28 Ala. App. 261, 182 So. 411 (1938) (opinions of attorney general); Lindquist v. State, 213 Ark. 903, 213 S.W.2d 895 (1948) (opinions of attorney general); State v. Huff, 89 Me. 521, 36 Atl. 1000 (1897) (fish commissioner); State v. Goodenow, 65 Me. 30 (1876) (magistrate); Staley v. State, 89 Neb. 701, 131 N.W. 1028 (1911) (county attorney); Pisar v. State, 56 Neb. 455, 76 N.W. 869 (1898) (license board); Hamilton v. People, 57 Barbour 625 (N.Y. 1870) (governor); State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907) (court clerk); State v. Foster, 22 R. I. 163, 46 Atl. 833 (1900) (state treasurer); Jones v. State, 32 Tex. Cr. R. 533, 25 S.W. 124 (1894) (mayor). The same result has been reached where the reliance was on the advice of counsel. People v. McCalla, 63 Cal. App. 783, 220 Pac. 436 (1923); Needham v. State, 55 Okla. Cr. R. 430, 32 P.2d 92 (1934); State v. Whitaker, 118 Ore. 656, 247 Pac. 1077 (1926); Commonwealth v. Hargreaves, 50 Pa. D. & C. 641 (1944); Hunter v. State, 158 Tenn. 63, 128 S.W. 361 (1928). For an excellent decision to the effect that good faith reliance on the advice of counsel is a defense, see Long v. State, 65 A.2d 489 (Del. 1949).

[12] Hall and Seligman, *supra* note 8, at 675. See also Von Hentig, *The Doctrine of Mistake, A Study in Comparative Criminal Law*, 16 UNIV. OF KAN. CITY L. REV. 17, 31 (1949).

[13] People v. Ferguson, 134 Cal. App. 41, 24 P.2d 695 (1933) (corporation commission); State v. White, 237 Mo. 208, 140 S.W. 896 (1911) (election judges); State v. Pearson, 97 N.C. 434, 1 S.E. 914 (1887) (election commission). Reliance on the decision of the state supreme court, either construing or determining the validity of a statute, has been held to constitute a good defense. State v. O'Neil, 147 Iowa 513, 126 N.W. 454 (1910); State v. Longino, 109 Miss. 125, 67 So. 902 (1915); *accord*, Wilson v. Goodlin, 291 Ky. 144, 163 S.W.2d 309 (1942) (reliance on decision of circuit court, where superior court had not rendered a decision).

[14] Hoover v. State, 59 Ala. 57, 60 (1877) (court denied defense but suggested that the case was one for executive clemency); Lindquist v. State, 213 Ark. 903, 904, 213 S.W.2d 895 (1948) (appellate court approved of trial court's action in denying defense but imposing only nominal fine).

[15] "The circumstances should entitle a defendant to a full exoneration as a matter of right, rather than to something less, as a matter of grace." Long v. State, 65 A.2d 489, 498 (Del. 1949).

[16] The failure to obtain the state's consent in an action against it for a declaratory judgment may prevent such a proceeding. Purity Oats Co. v. State, 125 Kan. 558, 264 Pac. 740 (1928). Or, the court may find an absence of a justiciable controversy. Adam v. Walla Walla, 196 Wash. 268, 82 P.2d 584 (1938). *But see* Dill v. Hamilton, 137 Neb. 723, 726, 291 N.W. 62, 64 (1940): "Plaintiffs seeking a declaratory judgment, are not required in advance to violate a penal statute

expense involved in obtaining a determination may in many cases render the remedy impractical.

In the principal case, had the court allowed evidence of the advice of the State's Attorney to be admitted, it could have been found that the defendant acted reasonably in relying on the official's advice, for the official was at least apparently empowered to give such advice and the statute did not expressly prohibit the erection of a sign which simply identified the defendant as being a minister. Therefore, the court should have submitted to the jury the questions of whether the defendant made a full disclosure of facts to the official, acted in good faith, and in fact did rely reasonably on the official's advice.

G. VERNON OWEN, JR.

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as a condition of having it construed or its validity determined." See generally BORCHARD, DECLARATORY JUDGMENTS 1020 *et seq.* (2d ed. 1941).