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Statutory Rape--Defense--Reasonable Belief Prosecutrix Had Reached Age of Consent

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of supervisors, board of trustees, *common council, or other body. . . .* "[36] Such inclusive language, with specific mention of "common council,"[37] seems to be indicative of a legislative intent to include the contracts of cities.

In view of the related section of the Code of Civil Procedure and the purpose of the Public Works Act it seems clear that the legislative intent was that the obtaining of labor and material bonds on all public contract projects be a matter of general, statewide concern.

Conclusion

Van Loben Sels and *Williams* can be explained only on the basis that the courts took the narrow view that the geographical confines and the purpose of the municipal improvement are controlling and can exempt the improvement in every way from the operation of State statutes. This view has been specifically overruled in *Department of Water & Power v. Inyo Chem. Co.*[38] where the supreme court held that even though the subject matter of litigation is a municipal affair, if a "state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of statewide concern, then the state law applies even as to 'autonomous' charter cities."[39] The broad public policy to protect laborers and materialmen is a matter of legitimate general, statewide concern. The statute implementing this policy would seem to affect municipal improvement projects only "incidentally in the accomplishment of a proper objective of statewide concern."[40] Therefore, *Van Loben Sels* and *Williams* should be overruled.

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[36] CAL. CODE CIV. PROC. § 1192.1(f). (Emphasis added.)

[37] "Common Council. In American law. The lower or more numerous branch of the legislative assembly of a city." BLACK, LAW DICTIONARY 417 (4th ed. 1951).

[38] 16 Cal. 2d 744, 108 P.2d 410 (1940).

[39] *Id.* at 754. The court cited City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745 (1932) which seems to have posed almost the same question as was decided in *Van Loben Sels*. There were two statutes involved in *Charleville*. The court seems to have used a philosophy differing from that of *Van Loben Sels* in its decision concerning at least one of the statutes.

[40] *Ibid.*

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STATUTORY RAPE—DEFENSE—REASONABLE BELIEF PROSECUTRIX HAD REACHED AGE OF CONSENT

Defendent admittedly had sexual intercourse with the victim who was but seventeen years of age at the time of the act. Defendant was charged with statutory rape in violation of section 261, subsection 1 of the Penal Code.[1] He at-

[1] "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years. . . ." CAL. PEN. CODE § 261.

tempted to defend by showing that he had in good faith a reasonable belief that the prosecutrix was eighteen years of age or over at the time of the act. The trial court refused to admit such testimony, and the district court of appeal affirmed the conviction.[2] On appeal, the California Supreme Court reversed by a unanimous court. Thus, in *People v. Hernandez*,[3] defendant's honest and reasonable belief that the prosecutrix had reached the age of consent was a valid defense to the crime of statutory rape and evidence to this effect was improperly excluded.

With this decision the California court stands alone among the courts which have had this problem before them.[4] The other courts which have ruled on this question take the view, as did California prior to *Hernandez*,[5] that statutory rape statutes exist for the protection of the society, the family, and the young female deemed by the various legislatures incapable of giving legal consent to illicit acts of intercourse. And this being so, the perpetrator of this crime acts at his peril and will not later be heard to assert that he was mistaken as to the age of his victim and thereby guiltless of the crime charged.[6]

In reaching its decision in the principal case, the court relies on sections 20[7] and 26[8] of the Penal Code. Section 20 provides that there must be a union of act and intent in every crime. Section 26 provides that one who acts under ignorance or mistake of fact which disproves any criminal intent is incapable of committing a crime. Construing the above sections together the court concludes that if one commits the act of illicit intercourse under the reasonable belief that the female has reached the age of consent, the essential element of criminal intent is not present. Therefore, since the legislature has made no explicit direction otherwise, "a charge of statutory rape is defensible wherein a criminal intent is lacking."[9]

Although under the particular facts of the principal case[10] one can readily be

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The 1889 amendment increased the age of consent from ten years to fourteen years, Cal. Stat. 1889, ch. 191, § 1, at 223; in 1897 the age was increased to sixteen, Cal. Stat. 1897, ch. 139, § 1, at 201; the age of consent was increased to eighteen in 1913, Cal. Stat. 1913, ch. 122, § 1, at 212.

[2] People v. Hernandez, 213 A.C.A. 794, 29 Cal. Rptr. 253 (1963).

[3] 61 A.C. 584, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).

[4] That mistake as to age is not a valid defense see: Manship v. People, 99 Colo. 1, 58 P.2d 1215 (1936); Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (1942); State v. Wade, 224 N.C. 760, 32 S.E.2d 314 (1944); Reid v. State — Okla. Crim. —, 290 P.2d 775 (1955); Law v. State, 92 Okla. Crim. 444, 224 P.2d 278 (1950); Farrell v. State, 152 Tex. Crim. 488, 215 S.W.2d 625 (1948).

[5] People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896). See also People v. Griffin, 117 Cal. 583, 49 Pac. 711 (1897).

[6] See note 4 *supra*.

[7] "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." CAL. PEN. CODE § 20.

[8] "All persons are capable of committing crimes except those belonging to the following classes . . . Four. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." CAL. PEN. CODE § 26.

[9] 61 A.C. at 591, 393 P.2d at 677, 39 Cal. Rptr. at 365.

[10] At the time the act of intercourse took place the prosecutrix was seventeen years, nine months of age. Evidence was offered to show that, prior to the act, in the presence of defendant, prosecutrix had made statements to a police officer to the effect that she was eighteen years of age. Evidence of a similar instance, but in a different town, was offered and rejected as was a question concerning the age she gave to her employer.

sympathetic with the court's decision, the reasoning employed in reaching it is not too convincing. The court points out that "the issue raised by the rejected offer of proof in the instant case goes to the culpability of the young man who acts *without* knowledge that an essential factual element exists and has, on the other hand, a positive reasonable belief that it does not exist."[11] It points out further that the court has moved away from the "imposition of criminal sanctions in the absence of culpability."[12] But is there really an absence of culpability?[13] And was the defendant's mistake of fact innocent, or guilty?

It is not within the scope of this note to extensively comment on the moral atmosphere prevailing in today's society. However, one must question the underlying notion developed throughout the opinion in the principal case, *i.e.*, that the defendant's conduct would not have been blameworthy or "culpable" if the facts were as he reasonably supposed them to be. Although fornication is not designated as a crime in California[14] (it is punishable by statute in a number of states[15]), it is submitted that in light of prevailing moral standards such illicit sexual intercourse is not considered proper and may even be thought of as being "culpable."

The primary question to be examined, however, is the court's contention that defendant's reasonable belief that the prosecutrix had reached the age of consent is a valid defense to the charge of statutory rape. In maintaining this position the court relies heavily upon *People v. Vogel*,[16] where this same court held that a good faith belief that a previous marriage had been terminated, when in fact it had not, was a valid defense to the charge of bigamy. In *Vogel*, as in the principal case, the court concludes that proper construction of section 20 and 26 of the Penal Code requires such a result.[17] But this rationale, while leading to a reasonable and just result in the former case, is not as acceptable when applied to the charge of statutory rape. By examining the language used in support of the present decision, the disparity between the two is readily observed. In the principal case the court quotes from *Vogel:* " 'Since it is often difficult for laymen to know when a judgment is not that of a competent court, we cannot reasonably expect them always to have such knowledge and make them criminals if their bona fide belief proves to be erroneous.' "[18] Commenting on this proposition, the court states: "Certainly it cannot be a greater wrong to entertain a bona fide but erroneous belief that a valid consent to an act of sexual intercourse has been obtained."[19] Obviously questionable due to moral considerations,[20] this position

[11] 61 A.C. at 587, 393 P.2d at 675, 39 Cal. Rptr. at 363.

[12] *Ibid.*

[13] "Culpable. Blamable; censurable; involving the breach of a legal duty or the commission of a fault. The term is not necessarily equivalent to 'criminal,' for, in present use, and notwithstanding its derivation, it implies that the act or conduct spoken of is reprehensible or wrong but not that it involves malice or a guilty purpose." BLACK, LAW DICTIONARY 454 (4th ed. 1951).

[14] People v. Hopwood, 130 Cal. App. 168, 19 P.2d 824 (1933).

[15] See, *e.g.*, CONN. GEN. STAT. REV. § 53-219 (1958); GA. CODE ANN. § 26-5801 (1953); IDAHO CODE ANN. § 18-6603 (1947); WIS. STAT. ANN. § 944.15 (1957).

[16] 46 Cal. 2d 798, 299 P.2d 850 (1956).

[17] *Id.* at 801, 299 P.2d at 853.

[18] 61 A.C. at 590, 393 P.2d at 677, 39 Cal. Rptr. at 365.

[19] *Ibid.*

[20] Does the court actually mean what it says? Is it no greater wrong to believe that consent has been obtained to partake in illicit intercourse than it is to have a bona fide belief that one is free to remarry?

does not present an acceptable analysis of the problem. It is true that a reasonable mistake of fact, honestly entertained, is generally a valid defense to a criminal charge where, had the facts been as supposed, there would have been no offense.[21] But the same is not true when the mistake of fact only extends to the gravity of the wrong.[22] Defendant's mistake in the principal case was of the type which should properly be labeled a *guilty mistake of fact*,[23] *i.e.*, what was done would reasonably be considered as objectionable even if the facts had been as he supposed. What the defendant intended to do was wrongful even though the legislature in this State has not provided punishment for the particular wrong he had in mind. It is in this state of mind where the *mens rea* element (or criminal intent), which the court held was lacking, is found. However, this guilty state of mind which provides the *mens rea* element in the principal case was non-existent in the *Vogel* case. There the defendant was acting under an *innocent mistake of fact*, *i.e.*, what was done (defendant remarried under the mistake of fact that his first wife had obtained a divorce) would have been neither a crime nor objectionable had the facts been as he reasonably supposed them to be.[24]

Under this analysis, the proposition advanced by the court that the mistakes of fact in the two cases were equally exculpating does not stand up. It is certainly "a greater wrong" to entertain the belief that valid consent to having illicit intercourse has been obtained than it is for a layman to entertain a bona fide belief that he has obtained a valid divorce decree from a competent court, when, in fact, the court lacked proper jurisdiction.

While the full effect of the *Hernandez* decision remains to be seen, it seems clear that the mistake of fact defense will be extended to similar criminal charges unless the legislature directs otherwise. The court in the principal case expressly overruled *People v. Griffin*,[25] where the victim of the rape was beyond the age of consent, but was incapable of giving legal consent because she was of unsound mind.[26] The court in *Griffin* held that it was no defense that the perpetrator of the rape was not aware of his victim's mental incapacity.[27] It is certainly conceivable that the mistake of fact defense may be succesfully instituted against charges of violating similar statutes (*e.g.*, the abduction statute[28]) which have

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[21] People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1956); People v. Brown, 74 Cal. 306, 16 Pac. 1 (1887); see PERKINS, CRIMINAL LAW 826 (1957).

[22] See PERKINS, CRIMINAL LAW 832 (1957).

[23] See Perkins, *Alignment of Sanction with Culpable Conduct*, 49 IOWA L. REV. 325, 375 (1964).

[24] See PERKINS, CRIMINAL LAW 826 (1957).

[25] 117 Cal. 583, 49 Pac. 711 (1897).

[26] "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances. . . . 2. Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent." CAL. PEN. CODE § 261.

[27] The argument against the mistake of fact defense is even stronger in this situation than in the case where the female is under the age of consent. Certainly if the victim was only ten years of age it is inconceivable that a defense that defendant believed her to be over eighteen would be accepted. But it is not so clear as to what would result if the victim was over eighteen years of age but only had the mentality of a ten year old.

[28] "Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution is punishable by imprisonment