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Criminal Law

M. E.H. Smith

sale was conditioned acquires no right in the property which is valid as against the claims of the initial seller. There are exceptions to the rule which the Court recognized where some muniment of title is by the initial seller placed in the hands of the purchaser on which a subsequent purchaser relies. In such a case the rule that where one of two innocent persons must suffer a loss arising from the culpability of a third person, he whose carelessness or negligence made the loss possible must bear the loss.

This completes a review of the more important and novel cases decided in the past year on the subjects assigned. Needless to say, all of the adjudicated cases are of importance. Only those in which novel or interesting questions have appeared have been noted and the omission of any one case from this discussion should not be regarded as a conclusion of the writer that the omitted case is wanting in importance, but rather that the issues of law presented, discussed and applied do not present the novelty which would make them of interest in this type of paper.

CRIMINAL LAW

M. E. H. SMITH

The Colorado Supreme Court has ruled on approximately twenty cases in the field of criminal law during the past year. The majority of these cases have been the usual run of the mill raising no new points or issues for consideration by our Court. However, there are eight which deserve comment at this time.

I should like to call your attention to the case of *People v. Dolph*.[1] You will recall that this case had considerable publicity, and involved one of the councilmen of the City of Denver. Councilman Dolph was allegedly trafficking in the sale of a liquor license. He was apprehended and arrested when he received $500 in the basement of a drug store. As a result, he was charged with confidence game and attempting to obtain money by false pretenses. The confidence game was disposed of under a common principle and is not noteworthy in the case. The trial court ruled that there is no crime of attempting to obtain money by false pretenses and dismissed the case. The state appealed and the Supreme Court held that while the facts showed violations of all concepts of ethics and decency, still, in the State of Colorado there is no crime of attempted false pretenses since there is no specific statute enacting it and there was no crime such as this known to the common law as of 1607.

Both *Block v People*,[2] and *Kallnback v. People*,[3] were cases of causing death of a person while operating an automobile under the influence of intoxicating liquor. In the Block case the question was raised concerning the obtaining of a sample of blood for an alcohol test while the defendant was unconscious. In the Kallnback case

[1] 239 P. 2d 312, 1951-2 C. B. A. Adv. Sh. (Dec. 17, 1951).
[2] 240 P. 2d 512, 1951-2 C. B. A. Adv. Sh. (Nov. 19, 1951).
[3] 242 P. 2d 222, 1951-2 C. B. A. Adv. Sh. (Feb. 4, 1952).

a sample of blood was obtained from the defendant for an alcohol test without the defendant's objection. In both cases it was contended that this was a violation of the defendant's constitutional privileges against self incrimination under Article 2, Section 18 of the Colorado Constitution.

While these identical questions had not been raised in Colorado before, as far as our Supreme Court is concerned, the general rule throughout the United States has been that such a test was not the defendant's testimony, nor was the test obtained with the use of any process against him as a witness and the test was proven as was any other physical fact in the case. Hence, the defendant was in no way speaking against himself. A few courts have confused the test as testimony. Our Court clearly made the distinction that the constitutional privilege was intended to prevent a defendant from being forced to give testimony against himself. Our Court did not contemplate the exclusions of evidence of physical facts relating to the defendant, and that the result of an analysis of a blood sample was not his testimony. This principle is again reaffirmed by citing the *Block* case in the *Kallnback* case.

In *Rosier v. People*,[4] the defense sought by *subpoena duces tecum* to obtain all the files concerning the defendant from the Police Department and the District Attorney. In this case the defense relied upon *Battalino v. People*,[5] wherein the defendant had demanded written statements of certain witnesses. The Court now adopts a statement directly out of *Wharton's Criminal Evidence* and underlines the same to the effect that, "as to the evidence in possession of the prosecution, the general rule is that the accused has no right to inspection or disclosures of the same." The Court further quotes from the Battalino case and states that the, "granting or refusal of the accused's request for inspection of written statements of a witness for the prosecution has been held to lie in the discretion of the trial court." The Court also quotes from *Silliman v. People*,[6] to the effect that:

> A written confession of the defendant in a criminal case may be retained by the prosecution officers until such time as they desire to make use of it. No right of defendant is violated when his motion to inspect the document before it is offered in evidence is denied, that right being accorded him when it is formally offered.

The Court further states:

> In this jurisdiction there is neither statute nor precedent authorizing defendant's counsel to make an examination or inspection of the People's evidence prior to the time that it is offered on the trial. Under some most unusual circumstances defendant may be entitled to inspect and examine documents in the possession of the law en-

[4] 247 P. 2d 448, C. B. A. Adv. Sh. (July 14, 1952).
[5] 118 Colo. 587 (1948).
[6] 114 Colo. 130 (1945).

forcing officers, but then he first must make a *prima facie* showing of their materiality.

This question has been before the Supreme Court at a later date with apparently a similar ruling in the case of *Cassinetti v. District Court of El Paso County,* No. 16,762, on which the opinion is not yet available.

In the case of *Tate v. People,*[7] which involved a charge of murder, the Court quoted from *Ryan v. People,*[8] which had set up the rule that if there was an error in the instructions in first degree murder and the jury returned a verdict of second degree murder, the error was harmless and not grounds for reversal, but in view of the case of *Battalino v. People,*[9] holding that the trial court should not instruct on a degree of homicide not sustained by the evidence, the Court now stated in the Tate case:

> We are now inclined to re-evaluate the statement in *Ryan v. People,* 50 Colo. 99, 144 Pac. 306, that it was not prejudicial error to instruct on first degree murder when the verdict returned was a second degree. When this court holds in a majority of cases that a trial court should not instruct on degrees of homicide not sustained by the evidence, then in this case, we must say that by such an instruction here, error obtains. The fact that the trial court gave an instruction on first degree murder when the essential elements are missing in the proof, it must be said that the jury could easily infer by the giving of such an instruction that these elements were present in the case. It presents a fertile field for discussion among jurors not skilled in legal technique, for finding a welcome opportunity to compose differences and agree upon a compromise verdict. We must say that it was prejudicial error under the circumstances of this case to give the instruction on first degree murder in the absence of proof of the necessary elements.

In the case of *Eckhardt v. People,*[10] the court again quoted from the Tate case and cited most of the above as the law. This case, incidentally, held that a manslaughter charge and an assault and battery charge while based on the same facts are not two degrees of the same crime, but initiate crimes of different classes and cannot be combined.

In *Walker v. People,*[11] a murder case, the principle is again affirmed as set out in *Ryan v. People,*[12] by stating:

> This likewise is true where the error relates to first degree murder and defendant is convicted of murder of the second degree as we specifically held in *Ryan v. People,* 50 Colo. 99, 106, 114 Pac. 306. The contention that the

[7] 247 P. 2d 682, 1951-2 C. B. A. Adv. Sh. (May 5, 1952).
[8] 50 Colo. 99 (1911).
[9] 118 Colo. 587 (1948).
[10] 247 P. 2d 673, 1951-2 C. B. A. Adv. Sh. (June 23, 1952).
[11] 1951-2 C. B. A. Adv. Sh. (July 24, 1952).
[12] *Supra,* n. 8.

> objectionable parts of the instructions may have influenced the jury to compromise their verdict 'rests upon conjecture, merely, and cannot be entertained. We must assume that the jury performed their duty intelligently, and with a correct understanding of the charge of the court.'

In reading the case we find that at one point the Court does comment that a verdict of murder in the first degree would have been fully supported by the record so that there apparently were elements to justify the first degree murder charge, where the Tate case did not have the elements to justify such a charge.

From the reading of these cases together, it would appear that we now have a new and modified rule. If all the elements are present in the case justifying a first degree murder charge, regardless of the fact that there may be an error in the first degree instructions and a second degree murder verdict results, such error is harmless. On the other hand, if any elements of the first degree murder charge are lacking such instruction would be reversible error.

In *McBride v. People,* the Supreme Court extended the facts of confidence game as basically shown in *Munsell v. People,*[13] to cover a series of checks given by the defendant wherein he knows that the checks are short and held that it was a part of a scheme to defraud, thus making the checks bogus, and coming within the confidence game statute. The Court held further that the intent of the defendant rather than the means used in obtaining the money is the primary issue of the offense.

EQUITY, WATER, OIL AND GAS

FRANK F. DOLAN

EQUITY

Rand v. Anderson:[1] The plaintiff, mother of the defendant, filed the action to rescind an alleged oral agreement whereby he had agreed to support and maintain her for the remainder of her life, and to set aside a deed of conveyance in joint tenancy to her son and herself. The defendant, among other defenses, denied the existence of the alleged oral agreement and alleged the execution of conveyance in joint tenancy to have been a voluntary gift on the part of the plaintiff and the expenditure of large sums by him in improving the property, and prayed for partition of the premises, or, in the alternative, if decree of rescission be granted, then that plaintiff be required to reimburse him for the monies he advanced and disbursed in reliance on his interest according to the deed. The lower court found generally for the plaintiff, however, it entered judgment for the defendant against the plaintiff for the monies paid out by him for improving the property less an amount charged against him for use and occupancy of a room occupied by him and his wife until the time they had removed from the prop-

[13] 122 Colo. 420, 222 P. 2d 615 (1950).

[1] 1951-2 C. B. A. Adv. Sh. (Jan. 28, 1952).