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Evidence—Revocation of Operator's License

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his own admission of guilt in a subsequent civil action arising out of the same occurrence? The use of the conviction in the subsequent action is the price he may have to pay for such convenience.

REVOCATION OF OPERATOR'S LICENSE

Under the authority vested in him by the New York Vehicle and Traffic Law Section 71(2)(b),[35] the Commissioner of Motor Vehicles revoked respondent's driver's license following a Massachusetts conviction for driving "under the influence." Since this determination was made without a hearing it was subject to judicial review.[36] This review resulted in the trial court annulling the revocation.[37] After an Appellate Division affirmance,[38] the Court of Appeals, in *Sullivan v. Kelly*,[39] unanimously reversed the lower courts, upholding the Commissioner's determination to revoke.

The respondent felt the Commissioner lacked adequate grounds upon which to revoke the license. The revocation was based upon three documents before the Commissioner: (1) A copy of the notice of suspension addressed to the respondent by the Registrar of Motor Vehicles in Massachusetts which labeled the conviction as one of operating a motor vehicle while under the influence of intoxicating liquor; (2) a letter from the Massachusetts Registrar to the Bureau of Motor Vehicles in New York; and (3) a certified abstract of the Massachusetts court record which identified the respondent as the party involved and stated the offense as "operating under the influence."

None of these documents mentioned the Massachusetts statute under which respondent was convicted. The respondent contended that New York Vehicle and Traffic Law Section 71(2)(b) was not operative without identification of the Massachusetts statute. He also contended that the copy of the court record was the only document which the Commissioner could consider, claiming that the notice of suspension and the letter from the Massachusetts Registrar lacked probative value and were unreliable sources for supplying the essentials required to justify revocation. On the basis of the court record abstract alone, the offense was labeled as "operating under the influence." This document, coupled with the absence of the Massachusetts statute, was, the respondent felt, inconclusive enough to prevent the Commissioner from acting under Section 71.

To substantiate his position the respondent referred to *Moore v. Macduff*,[40] where only the statute under which the driver was convicted was con-

35. Now § 510 of the N.Y. Vehicle and Traffic Law:
. . . licenses must be revoked . . . where the holder is convicted . . . (of) an offense consisting of operating a motor vehicle or motorcycle while under the influence of intoxicating liquor where the conviction was had outside this state; . . . .
36. N.Y. Vehicle and Traffic Law § 510(6).
37. Sullivan v. Kelly, 16 Misc. 2d 699, 184 N.Y.S.2d 310 (Sup. Ct. 1959).
38. 9 A.D.2d 865, 194 N.Y.S.2d 460 (4th Dep't 1959).
39. 7 N.Y.2d 462, 199 N.Y.S.2d 481 (1960).
40. 309 N.Y. 35, 127 N.E.2d 741 (1955).

sidered in refusing to allow revocation of a license because the statute provided alternative grounds for conviction, namely, driving while ability was impaired by "alcohol" or by a "drug." There was no way of determining upon which alternative the conviction rested.

On the other hand, *Bouchard v. Kelly*[41] upheld a license revocation based solely upon consideration of a Delaware certificate of conviction.

On the basis of these two cases the respondent felt the Commissioner was limited to consideration of the court record and the Massachusetts statute in this instance. He felt the revocation was not valid because the statute was not present and the court record was inconclusive in that it merely stated the offense as "operating under the influence."

The Court of Appeals, nevertheless, sustained the Commissioner's license revocation in this case. The *Moore* and *Bouchard* cases were deemed non-determinative because neither case suggested any necessity for excluding all documents other than the court record and the statute from consideration. The *Moore* case was simply an instance where no other sources were present to determine which alternative offense had been committed. In the *Bouchard* case the certificate itself established the essential information enabling the Commissioner to employ Section 71. The Court, therefore, did not feel precluded from allowing the Commissioner to consider the suspension notice and the letter from the Registrar in determining whether there were facts sufficient to warrant a revocation.

Under the New York Civil Practice Act Section 344-a, the Court found justification in taking judicial notice of Section 24 of Chapter 90 of the General Laws of Massachusetts which provides: "Whoever . . . operates a motor vehicle while under the influence of intoxicating liquor shall be punished. . . .". The Commissioner submitted a copy of the information filed in the Massachusetts court for the first time at trial. The information clearly charges the motorist with driving while under the influence of intoxicating liquor in violation of the General Laws of Massachusetts.

The three documents which were before the Commissioner, plus the Massachusetts statute which was judicially noticed, undeniably demonstrate that the respondent deserved to have his license revoked under Section 71. The result in this particular instance, therefore, was the correct one but the Court reached it without clearly stating the grounds. Was the revocation justifiable without consideration of the Massachusetts statute and, if not, how could the Commissioner's revocation of the license be upheld when he made it without the statute before him?

Apparently, a non-capricious, non-arbitrary revocation followed by judicial notice of the foreign statute when the determination is appealed is sufficient to entitle the State to deprive a person of a vested property right, namely the possession of his driver's license under Section 71 of the Vehicle and Traffic

41. 7 A.D.2d 774, 27 N.Y.S.2d 963 (3d Dep't 1958).

Law.[42] In this area, however, where the likelihood of frequent occurrence is present, it would appear that a more definite statement of the Commissioner's power to revoke under Section 71 would be beneficial to the public.

EXCEPTION TO RULE MAKING EVIDENCE OF WITNESS'S INVOCATION OF RIGHT AGAINST SELF-INCRIMINATION INADMISSIBLE

The credibility of a witness may be impeached by proof of prior statements under oath inconsistent with his testimony.[43] Can evidence that the witness has previously invoked his privilege against self-incrimination be used to impeach his subsequent non-incriminating testimony on the same matters?[44]

In *People v. Ashby*,[45] the prosecution was permitted during cross-examination of a key defense witness to show that in his appearance before the Grand Jury, testifying as to the same matters to which he testified freely and without incriminating himself at the trial, he had invoked the privilege fifty or sixty times.[46] The Appellate Division,[47] holding this to be a reversible error of law,[48] ordered a new trial. The Court of Appeals, while affirming the principle that a citizen's assertion of his constitutional right to refuse to incriminate himself cannot subsequently be used to his discredit,[49] held that under the special circumstances of this case the evidence was properly admitted. The defense had attempted to show that the witness in question had always been ready to testify fully and completely but that the prosecutor, to thwart a full investigation, had refrained from calling this key witness. The Court held that in thus raising the issue of the witness's alleged willingness to testify, the defense had opened the door to full inquiry into the witness's prior refusal to testify in reliance on his privilege against self-incrimination.

The only New York authority on this point is *People v. Luckman*,[50] a memorandum decision stating that it was reversible error to permit the prosecution, in cross-examining the witness, to show that she had asserted her privilege against self-incrimination in testifying before the Grand Jury. The distinction between this and the present case is both fine and clear. While such evidence might bear improperly on the credibility of the witness, it is admissible when directed to the question of the willingness with which he testified when the issue has been raised by opposing counsel.

The question has been considered more fully by the federal courts. In *Halperin v. United States*,[51] the Supreme Court recognized that there is nothing inconsistent with innocence in an assertion of the constitutional privilege

42. See dissenting opinion, supra note 38.
43. N.Y. Civ. Prac. Act § 343-a.
44. U.S. Const. Amend. V; N.Y. Const. Art. I, § 6.
45. 8 N.Y.2d 238, 203 N.Y.S.2d 854 (1960).
46. 17 Misc. 2d 413, 184 N.Y.S.2d 284 (Sup. Ct. 1959).
47. 9 A.D.2d 464, 195 N.Y.S.2d 301 (3d Dep't 1959).
48. Citing Halperin v. United States, 353 U.S. 391 (1957).
49. Ibid.
50. 254 App. Div. 694, 3 N.Y.S.2d 864 (2d Dep't 1938).
51. Supra note 48.