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Evidence—Admission of Evidence of Crime Not Charged in Indictment

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rule that serious doubt remains whether the protection hitherto afforded by the rule still remains.

ADMISSION OF EVIDENCE OF CRIME NOT CHARGED IN INDICTMENT

Upon the trial of one crime evidence of the commission of another crime not charged in the indictment is generally inadmissible.[66] However, exceptions have been made to admit such evidence under certain circumstances.[67] In *People v. Cohen*[68] the defendant was convicted on several counts of insurance fraud and larceny by false representations with respect to two different fires,[69] the first of which occurred in Pennsylvania, the second in New York. The Court of Appeals reversed the Appellate Division,[70] and held that the trial court had not erred in admitting evidence showing that the cause of the first fire was the defendant's incendiarism, even though such evidence tended to prove the crime of arson, which was not charged in the indictment.

The Court held the evidence of arson admissible with respect to the crimes involving the first fire because it was introduced naturally and incidentally to the showing of facts and because it showed the falsity of defendant's statement in his insurance claim (that he did not know the cause of the fire), which showing evidenced his misrepresentations and his intent to defraud. The evidence of arson in the first fire would not have been admissible to prove the charges with respect to the second fire, but the Court held that since that evidence was properly admitted with respect to the first fire and counsel for the defendant had failed to object to its admission with respect to the second fire, the objection could not be raised for the first time on appeal.[71]

People v. Molineux[72] and *People v. Katz*[73] are the leading New York cases dealing with exceptions to the general rule on admission of evidence of an uncharged crime. Among the exceptions set forth in those cases is one concerned with the situation in which proof of the uncharged crime is relevant to the instant crime because it tends to show defendant's intent or a common scheme or plan.[74] This exception has been allowed in trials for uttering counter-

66. People v. Sharp, 107 N.Y. 427, 14 N.E. 319 (1887); Coleman v. People, 55 N.Y. 81 (1873); People v. Shea, 147 N.Y. 78, 41 N.E. 505 (1895).

67. The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. (Wharton on Crim. Ev. [9th ed.] sec. 48) . . .

People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294, 62 L.R.A. 193, 240 (1901).

68. 5 N.Y.2d 282, 184 N.Y.S.2d 340 (1959).

69. N.Y. PEN. LAW, §§ 1202, 1290, 1294.

70. People v. Cohen, 4 A.D.2d 557, 172 N.Y.S.2d 575 (4th Dep't 1957).

71. N.Y. CIV. PRAC. ACT § 446.

72. People v. Molineux, *supra* note 67.

73. People v. Katz, 209 N.Y. 311, 103 N.E. 305 (1913); see also People v. Thau, 219 N.Y. 39, 113 N.E. 556 (1916); People v. Buchar, 289 N.Y. 181, 45 N.E.2d 225 (1942).

74. People v. Molineux, *supra* note 67.

feit money,[75] receiving stolen property,[76] and obtaining goods by false pretenses.[77] In all of these cases the defendant's acts alone do not prove his intent, and evidence of similar and/or related acts is admitted to show intent. The *Cohen* case seems to fall within this exception to the general rule. Proof of arson by the defendant in the Pennsylvania fire indicates the falseness of his representations as to the cause of the fire and, in addition, tends to show his intent to defraud the insurer by obtaining the insurance proceeds by means of false representations.

CIRCUMSTANTIAL EVIDENCE OF OPERATION OF MOTOR VEHICLE

The Westchester County Court reversed a Special Sessions conviction under Section 70(5) of the New York Vehicle and Traffic Law, for operating a motor vehicle while intoxicated.[78] The ground of the County Court's reversal was that the people had failed to establish that the defendant was operating the vehicle within the meaning of the section. In *People v. Blake*[79] the Court of Appeals reversed this determination and ordered a new trial.

Defendant was found by police officers, seated alone, in a drunken condition, in his automobile which was halted against a guardrail on the Bronx River Parkway, with the engine running. On appeal defendant argued that the facts surrounding his apprehension were not sufficient to show that he was operating the auto as charged. On the other hand, the people argued that the defendant was in fact operating when he was taken into custody. The question appears to be on open one in the Court of Appeals, the only New York decision establishing a standard for "operating" being handed down by the County Court of Erie County.[80] It was there indicated that one must be making some effort toward putting the car into operation and motion.

The Court of Appeals avoided the question in the instant case, however, by holding there was sufficient circumstantial evidence to find the defendant "had" operated. Under the tests as established in *People v. Taddio*[81] and *People v. Weiss*,[82] the Court held that the facts adduced at trial supported a clear inference that defendant had operated the vehicle, despite the possibility that someone else may have been operating. In reaching this decision, the Court makes it clear that "had been operating" is included within the "operating" of the Section herein involved, and that that operation may be shown by circumstantial evidence under established principles.

Although the question of what constitutes operating in the sense of "is operating" is left open in the Court of Appeals, the burden in enforcing this

75. People v. Everhardt, 104 N.Y. 591, 11 N.E. 62 (1887).
76. Coleman v. People, 58 N.Y. 555 (1874).
77. Mayer v. People, 80 N.Y. 364 (1880).
78. "Whoever operates a motor vehicle or motor cycle while in an intoxicated condition shall be guilty of a misdemeanor."
79. 5 N.Y.2d 118, 180 N.Y.S.2d 775 (1958).
80. People v. Domagala, 123 Misc. 757, 206 N.Y. Supp. 288 (1924).
81. People v. Taddio, 292 N.Y. 488, 55 N.E.2d 749 (1944).
82. People v. Weiss, 290 N.Y. 160, 48 N.E.2d 306 (1943).