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Evidence—Circumstantial Evidence of Operation of Motor Vehicle

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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 an 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).

section of the Vehicle and Traffic Law appears to be eased by the instant decision. The officers may now charge defendant directly on information, relying upon facts within their knowledge to show "operation" circumstantially, without having to procure another affiant to support a charge upon information and belief.

EVIDENCE OF SPEEDING PROVIDED BY UNTESTED RADAR EQUIPMENT SUFFICIENT IF CORROBORATED BY QUALIFIED OBSERVERS

Defendant's conviction in the City Court of Buffalo for speeding was based on a radar meter reading, supported by the observations of two policemen. One officer, looking through the rear view mirror of the radar car, observed defendant's car for about 150 feet as it approached the field of the radar beam. The other officer was stationed about one-tenth of a mile further down the street. He watched defendant's vehicle as it passed the radar car and approached him head on, until it stopped just short of his position.

The grounds of defendant's appeal were that (1) the evidence of the radar meter reading was insufficient because there was no evidence to show that the speedometer, against which the radar set had been tested, was itself accurate and (2) the testimony of the policemen was insufficient because neither of them had an adequate opportunity to observe the speed of the defendant's car. On appeal the Supreme Court, Erie County, rejected both the policemen's testimony and the radar reading as insufficient and reversed the conviction without specifying whether its decision was on the law or on the facts.

The Court of Appeals, considering the Supreme Court reversal as one on the law alone,⁸³ held that evidence of speeding provided by untested measuring devices was admissible but insufficient, without more, to sustain a conviction, and that testimony of qualified observers could supply the deficiency in proof. The testimony of the police officers was also held to be admissible and sufficient to raise a question of fact as to defendant's speed. The case was remitted to the appellate court for determination of that question.⁸⁴

The Court declared this holding to be based squarely upon its recent decisions in a radar meter case, *People v. Magri*,⁸⁵ and two speedometer cases, *People v. Heyser*⁸⁶ and *People v. Marsellus*.⁸⁷ In all three cases convictions based on police officers' estimates of defendant's speed which corroborated the readings of untested devices were upheld. In *Magri*⁸⁸ one officer located at the radar car and another about 800 to 1000 feet further down the road observed defendant as he approached the radar car, passed through the radar beam and continued down the road to the second officer's position. In

83. N.Y. CODE CRIM. PROC. § 543-a(4).

84. *People v. Dusing*, 5 N.Y.2d 126, 181 N.Y.S.2d 493 (1959).

85. 3 N.Y.2d 562, 170 N.Y.S.2d 335 (1958).

86. 2 N.Y.2d 390, 161 N.Y.S.2d 36 (1957).

87. 2 N.Y.2d 653, 163 N.Y.S.2d 1 (1957).

88. *People v. Magri*, *supra* note 85.