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Article 19

Evidence--Prosecution for Receiving, Concealing and Withholding Stolen Property Under Section 1308 of the Penal Law (People of the State of New York v. Sam Marino, 271 N.Y. 317 (1936))

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those intended at the time of condemnation.[14] Land may be condemned for future use.[15] Its use at any time must not constitute an alienation, nor an unlawful use of public property.[16] Its temporary use, until that future time, as a parking space is not an alienation of city property in violation of Section 71 of the Greater New York Charter.[17] The definition of public use must be kept elastic in order to keep pace with changing conditions;[18] "resort must be had to cases rather than definitions."[19] *Matter of Flushing Meadow Park* stands as an additional case construing what is a public use.

L. J.

EVIDENCE—PROSECUTION FOR RECEIVING, CONCEALING AND WITHHOLDING STOLEN PROPERTY UNDER SECTION 1308 OF THE PENAL LAW.—Defendant, a dealer in second-hand automobiles, was charged with violating the Penal Law [1] in having received, concealed

[14] Matter of Boston Road, 142 App. Div. 726, 127 N. Y. Supp. 637 (1st Dept. 1911).

[15] Matter of S. I. Rapid Transit Co., 103 N. Y. 251, 8 N. E. 548 (1886).

[16] Kahabka v. Schab, *et al.*, 205 App. Div. 368, 371, 199 N. Y. Supp. 551 (4th Dept. 1923), *aff'd*, 236 N. Y. 595, 142 N. E. 298 (1923); People *ex rel.* Hoffeller v. Buck, 193 App. Div. 262, 184 N. Y. Supp. 210 (4th Dept. 1920), *aff'd*, 230 N. Y. 608, 130 N. E. 913 (1920); Callanan v. Gillman, 107 N. Y. 360, 14 N. E. 264 (1887); Cohen v. Mayor, 113 N. Y. 532, 21 N. E. 700 (1889).

[17] Gushee v. City of New York, 42 App. Div. 37, 58 N. Y. Supp. 967 (1st Dept. 1899). At page 41, the court said, "It is proper to furnish * * * opportunities * * * for rest for themselves and their animals as may be required." This Doctrine was later extended to include the advent of automobiles in Matter of McCoy v. Apgar, 241 N. Y. 71, 150 N. E. 546 (1925); Blank v. Browne, 217 App. Div. 624, 216 N. Y. Supp. 664 (2d Dept. 1926).

[18] 54 A. L. R. 7; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376 (1891); Tanner v. Treasury Tunnel Min. & Reduction Co., 35 Colo. 593, 83 Pac. 464 (1906). In answering the question as to what is a public use Judge Cooley says, "That can only be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to public necessity which on account of their peculiar character, and the difficulty, perhaps impossibility of making provision for them otherwise, it is alike proper, useful and needful for the public to provide." This Definition was cited with approval in Matter of Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429 (1888).

[19] Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376 (1891).

[1] N. Y. PENAL LAW § 1308: "A person who buys or receives any property knowing the same to have been stolen * * * or who conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, * * * is guilty of a felony * * *. A person who being a dealer in or collector of any merchandise or property, * * * fails to make reasonable inquiry that the person selling or delivering any stolen or misappropriated property to him has the legal right to do so, shall be presumed to have bought or received such property knowing it to have been stolen or misappropriated." It is proved in this case that the defendant made no inquiries whatever as to the 'legal right to do so' of the person from whom he received the car. Under this section he was, therefore, presumed to have received the Buick, knowing it to have been stolen.

and withheld a Buick automobile of the value of more than $500.00, knowing it to have been stolen. The People, in order to prove the criminal knowledge of the defendant, introduced into evidence testimony that the defendant had possessed, sold and disposed of stolen cars to others at or near the time of this sale and under similar circumstances. The prosecution, however, was not able to show that the thief who delivered this Buick to the defendant was the same thief who delivered the others. The defendant seeks a reversal of his conviction on the ground that the admission of prior crimes in regard to receiving stolen property without evidence that it came from the same thief is error. *Held,* such evidence is admissible in a prosecution, under Section 1308 of the Penal Law, when the defendant is charged with knowingly concealing and withholding stolen property from its true owner. O'Brien, Hubbs and Crouch, JJ., dissented. *People of the State of New York* v. *Sam Marino,* 271 N. Y. 317, 3 N. E. (2d) 439 (1936).

The reason for the rule under which evidence of other crimes is admissible to prove the particular crime for which a defendant is on trial, is found in the necessity for establishing knowledge or intent in cases where such knowledge or intent may not be inferred from the commission of the single act charged in the indictment.[2] Among the crimes in which criminal intent is an essential ingredient, are the felonious receiving, concealing and withholding of stolen property, the passing of counterfeit money, obtaining money or property under false pretenses, and forgeries.[3] In these classes of cases criminal knowledge or intent cannot always be inferred from, or proved by the act itself, and therefore, resort must be had to other similar offenses to prove the gravamen of the offense.

In *People* v. *Doty,*[4] the court laid down the rule that in order to prove that the defendant had knowingly *received* stolen goods, the prosecution must show that the defendant had *received* the stolen goods *from the same thief* who had delivered the others, otherwise the evidence was inadmissible. To impute knowledge to *A,* that the property he received from *B* was stolen, because *A* knew that the property he received from *C* was stolen, did not seem fair.[5] In the instant case, the district attorney conceded that the evidence did not come within the rule, but asked that the rule be overruled in so far as it was applicable to stolen automobiles.[6]

The Court of Appeals did not think the request to overrule *People* v. *Doty* was necessary. Section 1308 of the Penal Law relates not only to the *receiving* of property, knowing it to be stolen, but also to the *concealing* and the *withholding* of such property with like knowledge. The crime, therefore, is made out when one with-

[2] People v. Doty, 175 N. Y. 164, 67 N. E. 303 (1903).
[3] Note, *Admissibility of Prior Crimes in a Prosecution for Forgery* (1936) 10 ST. JOHN'S L. REV. 263.
[4] People v. Doty, 175 N. Y. 164, 67 N. E. 303 (1903).
[5] Coleman v. People, 55 N. Y. 81 (1873).
[6] People v. Marino, 271 N. Y. 317, 3 N. E. (2d) 439 (1936).

holds property from the true owner knowing the same to have been stolen.[7] To prove that the defendant knew he was concealing and withholding stolen property, evidence may be introduced that at or near the time of the arrest, the defendant concealed and withheld other stolen property, knowing it to be stolen.[8] It is not necessary that he receive it from the same thief or know the thief who stole it. The reasoning of *People* v. *Doty,* which relates solely to *receiving* stolen property, therefore, does not apply to this case.

In cases of forgery and counterfeit money it has always been one of the chief elements of proof, as bearing upon the defendant's guilty knowledge that he possessed, at other times not too remote, other forged or illegal paper.[9] This same principle, the court now holds, can be applied to stolen automobiles, especially since the identity of an automobile can always be ascertained and ownership established through the state registration records.[10]

S. L.

LANDLORD AND TENANT—LICENSE TO ENTER TO MAKE REPAIRS —RIGHT TO MAKE REPAIRS OF A NATURE NOT CONTEMPLATED BY PARTIES WHEN LEASE WAS EXECUTED.—The plaintiff at the time this action was brought, was the owner of two adjoining buildings which were previously in the hands of two different owners. The defendant occupies the entire floor of one of these premises pursuant to a lease obtained from one of the plaintiff's grantors, which lease contains a covenant of quiet enjoyment. The plaintiff desires to consolidate both buildings into one with a common elevator, and this necessitates breaking through the party-wall of defendant's premises. The plaintiff claims the right to make this structural change under the terms of the assigned lease, which reserved to the landlord the right to enter and make repairs and changes in the building. *Held,* a lease which reserves to the landlord the right to enter and make repairs and changes in a building will not be construed to authorize a major change which could not have been contemplated when the lease was executed.

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[7] People v. Wilson, 151 N. Y. 403, 45 N. E. 862 (1897).

[8] People v. Di Pietro, 214 Mich. 507, 183 N. W. 22 (1921); State v. Cohen, 254 Mo. 437, 162 S. W. 216 (1913); State v. Feuerhaken, 96 Iowa 299, 65 N. W. 299 (1895); United States v. Brand, 79 F. (2d) 605 (C. C. A. 2d, 1935); Nakutin v. United States, 8 F. (2d) 491 (C. C. A. 7th, 1925); WHARTON, CRIMINAL EVIDENCE (11th ed. 1935) § 349; WIGMORE, EVIDENCE (2d ed. 1923) § 324.

[9] Note (1936) 10 ST. JOHN'S L. REV. 263.

[10] In People v. Di Pietro, 214 Mich. 507, 183 N. W. 22 (1921), the court said: "* * * that the probabilities of an honest mistake diminish as the number of similar transactions indicating a scheme or system increases." WIGMORE, EVIDENCE (2d ed. 1923) § 324, "the more striking the coincidence, the more difficult to believe that the explanation is an innocent one."