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Criminal Law—Dismissal of Indictment for Lack of Prosecution

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the "waiver" rule in the federal system.[48]

DISMISSAL OF INDICTMENT FOR LACK OF PROSECUTION

After a delay of twenty-one months, (through no fault of their own) the defendants made a motion pursuant to Section 668 of the New York Code of Criminal Procedure to have the indictments against them dismissed for failure to prosecute. In granting the motion the trial judge stated, "The facts are such as to bring the matter squarely within the holding of the Court of Appeals in *People v. Prosser*." The Appellate Division affirmed,[49] but on appeal the order was reversed by the Court of Appeals in a four-three decision.[50]

Section 668 of the Code of Criminal Procedure provides:

> If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.

The words of the statute make it evident that Section 668 confers a purely discretionary power upon the court. It is because the power granted is one of discretion that the problem in the case of *People v. Alfonso* arises.[51]

As stated earlier, the County Court based its decision on *People v. Prosser*.[52] In that case the Grand Jury returned five indictments in 1946 against the defendant. Soon after the defendant pleaded guilty to two of the indictments, and was sentenced as a fourth felony offender, to imprisonment for an indeterminate term of 15 years to life. In 1952 the defendant was released from prison, since he had been improperly sentenced as a fourth felony offender. The District Attorney then re-arraigned the defendant on one of the three indictments to which, six years before, he had pleaded not guilty. On that re-arraignment he moved under Section 668 to dismiss for failure to prosecute and because he had been denied his right to a speedy trial. The County Judge denied the motion and the defendant was convicted. The Appellate Division affirmed the conviction. On appeal the Court of Appeals reversed, holding that, as a matter of law, the defendant's motion to dismiss should have been granted. A delay of six years was so great that the denial amounted to an abuse of discretion by the County Judge. Since there was an untoward delay of six years, without a waiver by defendant of his right to a speedy

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non-included crime would place him twice in jeopardy, because he had been impliedly acquitted of that crime.

The doctrine of "waiver" is concededly fictional. The *Green* case explores opposing considerations concerning the waiver doctrine, and has been noted in over a dozen law reviews.

48. Note the impact of the *Green* decision upon a state court, in People v. Gomez, 50 Cal. 2d 640, 328 P.2d 976 (1958).

49. A.D.2d 892, 177 N.Y.S.2d 1018 (2d Dep't 1958).

50. 6 N.Y.2d 225, 189 N.Y.S.2d 175 (1959).

51. *Ibid.*

52. 309 N.Y. 353, 130 N.E.2d 891 (1955).

trial, the trial judge should have granted defendant's motion and dismissed the indictment.

When the Court in the case at bar proclaimed that it based its order of dismissal on *People v. Prosser*,[53] it was, in effect, granting the motion as a matter of law and not as an exercise of discretion. The Court of Appeals felt that since the difference in the time element between the case at bar and the *Prosser* case was so great, the former did not fit within the rule of *Prosser*.[54] Rather, this was a situation in which the judge was to exercise his power as a matter of discretion and not of law. Therefore, the decision of the lower court and the Appellate Division was erroneous.

It is true that the Court appears, in form at least, to be making a highly technical distinction. It can be said, as the dissent felt, that any order granted under Section 668 is an exercise of discretion, because of the very nature of the statute. As a result, the granting of the motion, regardless of the basis for the grant, is an exercise of discretion and should be considered as such.

In substance the opinion of the Court results in the same conclusion as reached by Judge Desmond in his dissent. It is now settled by this decision that Section 668 is purely discretionary. The effect of *Prosser* is limited to drawing a line which if reached, represents an abuse of discretion.[55]

IMMUNITY OF PROSPECTIVE DEFENDANT FROM GRAND JURY INDICTMENT

In *People v. Steuding*[56] the People appealed to the Court of Appeals from an order of the Supreme Court, Appellate Division, dismissing the indictment of respondent by the Extraordinary Grand Jury investigating official corruption in Ulster County. Respondent, a public official appearing pursuant to a subpoena, was initially sworn and apprised of the fact that the Grand Jury was not conferring any immunity upon him.[57] He was also advised that his testimony might be used against him and that he had the right to refuse to answer any question that would tend to incriminate him.[58] After being sworn respondent executed a written waiver of any immunity or privilege concerning questions asked relating to his official conduct, but refused to sign a general waiver of immunity. The Grand Jury, ordered to disregard the testimony then given by respondent, indicted him for conspiracy to bribe public officers and of committing bribery.

The Court held that no statute conferring immunity could supersede the constitutional right of a defendant or prospective defendant not to bear witness against himself. His privilege was violated when he was called and examined

53. *Ibid.*
54. *Supra* note 52.
55. *Supra* note 52.
56. 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959).
57. N.Y. PEN. LAW § 2447 purports to confer immunity upon a person only after he invokes his privilege against self-incrimination, and is then directed to answer the questions asked. Section 2447 was enacted to replace § 2443, which provided complete immunity at the outset of any proceeding.
58. N.Y. CONST., Art. I § 6; U.S. CONST., amend. V.