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Criminal Law—Immunity of Prospective Defendant from Grand Jury Indictment

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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.

before a grand jury, even though he did not claim the privilege. Section 2447 of the New York Penal Law is constitutional insofar as it applies to "witnesses," but it cannot be applied to a defendant insofar as it provides that he must assert his privilege at the outset of the proceedings. The protection from indictment and from use of any incriminating testimony elicited results automatically from a violation of the constitutional privilege.

The dissent found Section 2447 to be a mere procedural change in that the witness must now assert the privilege before the immunity is granted. The Section was not offensive if it did not impair any of the constitutional rights of a witness or prospective defendant. Here the immunity is as broad as the privilege, since no testimony given under the immunity may in any way be used against the witness.[59] When a witness or prospective defendant is subpoenaed before a Grand Jury, is apprised of his rights, and voluntarily testifies, he is deemed to have waived his privilege.[60]

In order to properly analyze Section 2447, it is essential to distinguish the rights of an accused from those of an ordinary witness. The privilege of any witness to refrain from giving incriminating answers must not be confused with the right of an accused not to take the stand in a criminal prosecution against him. Both come within the protection of the privilege.[61] The latter applies to the defendant in every criminal case and he may not be called as a witness or be interrogated by government counsel unless he voluntarily takes the stand in his own behalf, thereby waiving the privilege.[62] A defendant before a Grand Jury under compulsion of a subpoena has been held to be immune from indictment.[63] The calling of the accused as a witness virtually compels him to be a witness against himself.[64] However, in respect to persons not actually defendants it must appear at the time of the inquest that the person is a prospective defendant or he may be placed upon the stand as an ordinary witness.[65] Therefore, Section 2447 is not a mere procedural change if applied to a defendant or prospective defendant since it requires him to take the stand in contravention of his Constitutional right. The statute speaks in terms of a "person" who is already in the position of giving testimony upon the witness stand. It does not, by implication or otherwise, purport to affect any rights of any person before the issuance of the subpoena. Upon the serving of the subpoena the immunity formerly provided by Section 2443 is removed, and procedurally postponed until the person thus subpoenaed claims his privilege

59. The dissent points out that 18 U.S.C. § 3486, substantially the same as § 2447, was held to be constitutional in Ullman v. United States, 350 U.S. 422 (1956).

60. People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901); Teachout v. People, 41 N.Y. 7 (1869).

61. United States v. Housing Foundation of America, Inc., 176 F.2d 665 (3d Cir. 1949).

62. United States v. Nesmith, 121 F. Supp. 758 (D.C. 1954); Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953), *cert. denied* 346 U.S. 821.

63. United States v. Monia, 317 U.S. 424 (1943).

64. People v. Molineux, *supra* note 60.

65. People v. Molineux, *supra* note 60.

and is directed to answer. Therefore, since a defendant or prospective defendant cannot constitutionally be subpoenaed, the statute does not appear to apply to such person, for his privilege attaches prior to the issuance of the subpoena.

REQUIREMENTS FOR A PERJURY CONVICTION

The defendant in *People v. Carman*[66] gave false answers under oath concerning her communist affiliation before the Commissioner of Investigation for the City of New York. The investigation was made pursuant to the obligation placed on the City by the New York Security Risk Law to investigate subversives working in security positions in the Department of Welfare.[67] The defendant's subsequent conviction of second degree perjury was affirmed by both the Appellate Division and the Court of Appeals.[68]

Defendant argued that the information did not satisfy Section 291 of the Code of Criminal Procedure,[69] in that it did not set forth the subject matter of the investigation in question.[70] Because it was defective in this matter she claimed that she did not have adequate notice to enable her to prepare a defense of lack of jurisdiction. The Court held that Section 291 was satisfied by the information stating that the "perjury was committed in a hearing and Inquiry being conducted under the New York State Security Risk Law by the City Department of investigation at its office by its authorized Examining Inspector, etc."[71] Defendant relied on *People v. Gillette*,[72] in which case it was held that the subject matter must be set forth so that the defendant may adequately prepare a defense to show that the false testimony was not materially related to the subject under investigation. The Court rejected her argument because at the time of the *Gillette*[73] case there existed only one degree of perjury and materiality was a necessary element. At the time the present defendant perjured herself there were two degrees of perjury and she was charged only with second degree, which crime did not require that the false testimony relate materially to the subject of the investigation.[74]

Defendant's second contention, that the State did not prove the Commission's jurisdiction, was also decided against her. The crux of this contention was that the prosecution must prove that her testimony was relevant and necessary to an investigation which was within the purview of the Commission to

66. 6 N.Y.2d 241, 189 N.Y.S.2d 188 (1959).
67. N.Y. UNCONSOL. LAWS §§ 1101 *et seq.*
68. 7 A.D.2d 633, 180 N.Y.S.2d 246 (1st Dep't 1958).
69. N.Y. CODE CRIM. PROC. § 291. "In an indictment for perjury or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed. . . ."
70. The investigation might have been conducted under §§ 1104, 1105, 1106, 1108 of the New York Security Risk Law.
71. People v. Carman, *supra* note 66 at 191, 241.
72. 126 A.D. 665, 111 N.Y. Supp. 133 (1st Dep't 1908).
73. *Ibid.*
74. People v. Samuel, 259 A.D. 167, 18 N.Y.S.2d 532 (2d Dep't 1940), *reversed on other grounds*, 284 N.Y. 410, 31 N.E.2d 752 (1940).