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Evidence—Alleging Prior Convictions In the Indictment

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sequences which might have affected the substantive rights of the parties."[24] With Section 1176 itself and this statement of its purpose in mind, the Court of Appeals in the present case stated, as dictum, that this Section by itself would have required a *nunc pro tunc* order in this case if plaintiff's first husband had not died before it became effective. This dictum, however, is not nearly so apparent from the phrasing of Section 1176, the language being almost identical to that of the superseded Section 1774, as it is from the new interpretation which this Court gives to Section 1774 of the old Code.

EVIDENCE

ALLEGING PRIOR CONVICTION IN THE INDICTMENT

Before 1959, Section 275(b) of the Code of Criminal Procedure provided: "The indictment shall not allege that defendant has previously been convicted of any crime nor shall it set forth any record thereof, unless such prior conviction affects the degree of the crime charged in the indictment."[1]

In *People v. Johnson,*[2] defendants were convicted of the crimes of burglary in the third degree,[3] and possession of burglars' instruments after prior conviction.[4] On appeal they argued that the trial court committed reversible error in allowing evidence of defendants' prior convictions to be read to the jury. They maintained that this violated Section 275(b) of the Code of Criminal Procedure, as quoted above.

The Court of Appeals held that it was not reversible error for the trial court to permit a stipulation as to defendants' prior convictions to be read to the jury. In arriving at this determination, the Court reasoned that as the degree of crime under Section 408 of the Penal Law was clearly affected by a prior conviction,[5] the exception reserved in Section 275(b) ". . . unless such prior conviction affects the degree of the crime charged in the indictment" applies. Consequently, allowing the District Attorney to allege the prior conviction in

24. Johnson v. Johnson, 198 Misc. 691, 694, 98 N.Y.S.2d 336, 340 (Sup. Ct. 1950).

1. This Section was amended in 1959 (L 1959 ch. 221) adding the words "or offense" after "of any crime" and "or is an element of such crime" after "indictment." Such terms were not part of the statute when first brought into question in the Johnson case.
2. 8 N.Y.2d 183, 203 N.Y.S.2d 809 (1960).
3. N.Y. Penal Law § 404:
A person who: 1. With intent to commit a crime therein, breaks and enters a building, or a room or any part of a building or; 2. Being in any building commits a crime therein, and breaks out of the same is guilty of burglary in the third degree.
4. N.Y. Penal Law § 408:
A person who . . . has in his possession in the day or night time any engine, machine, tool . . . or implements adapted, designed or commonly used for the commission of burglary, larceny or other crime under circumstances evincing an intent to employ . . . shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he is guilty of a felony.
5. Ibid.

the indictment and to offer proof of such conviction did not constitute reversible error.

The traditional or common law rule permitted establishing a previous conviction of a defendant by alleging it in the indictment and proving it as an element of the People's case. In 1926, Section 1943 of the Penal Law was enacted.[6] This Section enabled attention to be brought to the prior conviction subsequent to sentence or conviction thus differing from the common law rule to that extent.

The Court, in *People v. DeSantis*,[7] held Section 1943 to be only an alternative procedure and therefore the common law method of alleging the prior conviction in the indictment could still be followed. However, when the Legislature, following a suggestion of the dissent in the *DeSantis* case,[8] enacted Section 275(b), the common law rule was limited to a considerable extent. The prior conviction in the *DeSantis* case affected only the punishment, upon conviction for a subsequent felony. Therefore, Section 275(b) did away with the common law practice of alleging prior convictions in the indictment where such past conviction affected only the punishment.

The Court of Appeals distinguished the present case from the *DeSantis* case. It stated that aside from punishment, there are other serious consequences involved where a prior conviction changes the crime from a misdemeanor to a felony (such as punishing accessories) and concluded that the case clearly fell within the exception of Section 275(b).

It appears that the reason for the exception to Section 275(b) is that where, as here, the prior conviction is an element of the crime or offense, in order to enable a person to properly defend the charge against him, it must be alleged in the indictment.

INDICTMENT DISMISSED WHERE BASED ON EVIDENCE ILLEGALLY SUBMITTED TO GRAND JURY

The evidence which may be presented to the Grand Jury is prescribed by law and is strictly limited to legal evidence.[9] In the case of *People v. Peetz*[10] an indictment was issued by the Kings' County Grand Jury charging defendant with the crime of second degree manslaughter in that while in the "heat of passion" defendant threw his infant son into a baby carriage thereby inflicting fatal injuries. The facts presented to the Grand Jury established that when defendant

6. N.Y. Penal Law § 1943:
If at any time, either after sentence or conviction, it should appear that a person convicted of a felony has previously been convicted of crimes as set forth in sections 1940, 1941 and 1942, it shall be the duty of the District Attorney . . . to file an information accusing the said person of such previous convictions.
7. 305 N.Y. 44, 110 N.E.2d 549 (1953).
8. N.Y. State Legis. Annual (1957) at 51-52. The dissent of Judge Fuld in the DeSantis case indicated that the practice of charging prior felony offenses in the indictment is unfair and prejudicial and should be outlawed.
9. N.Y. Code Crim. Proc. § 249.
10. 7 N.Y.2d 147, 196 N.Y.S.2d 83 (1959).