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Criminal Law—Effect of Omission of Essential Element of Burglary First Degree from Long Form Indictment—Per Curiam

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COURT OF APPEALS, 1957 TERM

the possibility that any such question might arise. The Court, however, has shown a general reluctance to dismiss indictments.⁹³

Effect of Omission of Essential Element of Burglary First Degree from Long Form Indictment — Per Curiam

A long form indictment for first degree burglary was insufficient since it did not allege that the crime occurred at night⁹⁴ and could not be amended nor the deficiency provided by a bill of particulars.⁹⁵ However, the indictment did not have to be dismissed since it spelled out essential requirements of fact for burglary second degree and the misnomer was not fatal error.⁹⁶

Unlawful Advertising

Defendant was convicted of violation of section 421 of the Penal Law which makes it a misdemeanor to put before the public with intent to sell merchandise an advertisement containing any assertion which is untrue, deceptive, or misleading. The allegedly misleading advertising consisted of three signs reading "Toys 20% to 40% off. Come in and Browse around," "Largest Selection of standard brand toys, 20% to 40% off," and "Toy Discount, Westchester First Supermarket. 20% to 40%."

Defendant's appeal from affirmance of conviction by the County Court was based mainly upon three contentions: (1) that it was error to admit evidence to prove a standard price for such toys and games; (2) that while the signs referred to toys the evidence concerned the prices of games and not toys; (3) that the People failed to prove beyond a reasonable doubt that the meaning of the signs was that all, rather than a substantial number of the toys, could be purchased at the discount and that evidence which indicated only that three games were sold at or above the standard retail price thus failed to establish guilt.

The Court of Appeals by a 4-3 majority found the conviction to be "not completely unsupportable" and affirmed the courts below.⁹⁷ As to defendant's first contention, the Court held that although defendant was entitled to place its own price upon the toys and then discount that price as it wished, it would not be allowed to give the impression that it was giving 20% to 40% off the ordinary, established, or prevailing price in the community. The existence of such a prevailing price was found properly proven by expert testimony.

93. See *People v. Howell*, 3 N.Y.2d 672, 171 N.Y.S.2d 801 (1958).

94. N. Y. PENAL LAW §402(4).

95. *People v. Ercole*, 308 N.Y. 425, 126 N.E.2d 543 (1955).

96. *People v. Oliver*, 3 N.Y.S.2d 684, 171 N.Y.S.2d 811 (1958).

97. *People v. Minjac Corp.*, 4 N.Y.2d 320, 175 N.Y.S.2d 16 (1958).