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Criminal Law—Unlawful Advertising

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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 night[94] 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).

The split in the Court was over defendant's last two contentions. The majority disposed of the former of these by pointing out that the artificiality of the attempted distinction between toys and games was shown by defendant's failure to object to the use of the word "toy" by the People's witnesses in referring to the games in question and by similar use of the word during the trial by both the attorney and the president of defendant. The dissent adopted defendant's distinction as the main basis for its opinion.

The majority did not directly consider the third of defendant's contentions. This seems the only serious objection to its opinion. The majority did state rather generally that the conclusions of the courts below were not unsupportable and that the question of guilt, being a question of fact, was not within the Court's appellate jurisdiction. A holding that the signs could properly be found to refer to *all* toys was presumably included within this broad proposition. But, in view of the difficulty of finding the meaning advanced by defendant to have been excluded beyond a reasonable doubt from the range of meanings reasonably attributable to the signs,[98] the case may contain an implicit interpretation of section 421 as proscribing not only definitely misleading but also possibly misleading advertising.

The dissent stated that the signs meant that the discount could be obtained on a substantial number (not all) of the toys. Since the meaning of the signs was a question of fact,[99] however, and thus was not reviewable by the Court of Appeals,[100] the dissent may be assumed to have meant only that, as a matter of law, the evidence did not warrant a finding of fact excluding this meaning of the signs. And by invoking the axiom that criminal statutes are to be strictly construed,[101] the dissent seems to have implied that section 421 may not be construed to cover ambiguous advertising in which one of the possible meanings is innocent.

Violation of Advertising Regulation — Sufficiency of Proof

Defendant maintained at its gas station a sign five feet in length by three and one-half feet in width which read "Owned and Operated by 25 Stations Inc." The numerals "25" were painted in red and measured thirty-six inches in height as contrasted to the other words which were in black and of six inches or less in height. The Court of Appeals held that a question of fact existed as to whether the sign referred to the price of gasoline and thus fell within the terms of §B36

98. In *People* v. *Watson*, 154 Misc. 667, 278 N.Y.Supp. 759 (Sup.Ct. 1935), *aff'd* 245 App.Div. 838, 282 N.Y.Supp. 235 (2d Dep't 1935), a prosecution for false advertising as to securities, N. Y. PENAL LAW §952, it was stated that "when a given statement of fact is relied on to constitute a felony and it is susceptible of two meanings, one innocent, the hypothesis of an interpretation that involves guilt is not sufficient to establish criminality".

99. People v. 25 Stations, 3 N.Y.2d 488, 168 N.Y.S.2d 962 (1957).

100. N. Y. CONST., Art. VI, §7.

101. *But see* N. Y. PENAL LAW §21.