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Criminal Law—Violation of Advertising Regulation—Sufficiency of Proof

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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.

103.0 of the Administrative Code of the City of New York prohibiting the maintenance at gas stations of signs larger than twelve inches by twelve inches "referring directly or indirectly to the price of gasoline."[102] Therefore it was improper for the Court of Special Sessions to dismiss the complaint upon appeal from a conviction in the Magistrate's Court. Since the reversal by Special Sessions was upon the facts as well as the law, however, a new trial was ordered.[103]

Statutory Construction — "Knowingly Authorize or Permit Operation of Auto by Unlicensed Driver"

In *People v. Shapiro*[104] the defendant was convicted of a violation of Section 20(4-a) of the Vehicle and Traffic Law, which provides in part: "Nor shall any person knowingly authorize or permit the operation or driving of a motor vehicle owned by him or in his charge upon a public highway of the state by any person who is not duly licensed." At the trial, a police officer testified that he had stopped an automobile and found that the operator was unlicensed and that defendant, who was seated in the front seat, was admittedly the owner. Upon this factual basis, defendant was convicted. The Appellate Division reversed this conviction on the ground that there was no proof that defendant authorized or permitted the operation of his automobile by a person whom he knew to be an unlicensed driver. On appeal, the People argued that the prosecution was not required to so prove, since the statute should be construed as imposing a duty upon the automobile owner to inquire whether a person is licensed to operate a motor vehicle before permitting him to drive. Rejecting this argument, however, the Court of Appeals affirmed the order of the Appellate Division for a new trial.

Since violation of section 20(4-a) of the Vehicle and Traffic Law is not merely a traffic infraction, but a misdemeanor,[105] the Court construed the statute strictly against the party seeking its enforcement.[106] Thus the Court concluded that the word "knowingly" as used in the statute imposes upon the prosecution the burden of proving knowledge on the part of the accused of facts sufficient to constitute the crime.[107] Knowledge that the operator was not licensed is an

102. People v. 25 Stations, Inc., 3 N.Y.2d 488, 168 N.Y.S.2d 962 (1957).
103. In *People v. Bellows*, 281 N.Y. 67, 22 N.E.2d 238 (1939), which was followed in the present case, it was held, "It is a question of law whether from any view of the testimony, there was a question of fact regarding the defendants' guilt which should have been submitted to the trial judge or to the jury and not disposed of by dismissal in the appellate court." Thus review by the Court of Appeals did not constitute a review of the facts as prohibited by Article VI §7 of the Constitution of the State of New York. But since reversal by the apellate court below was on the facts as well as well as the law a new trial was required.
104. 4 N.Y.2d 597, 176 N.Y.S.2d 632 (1958).
105. N. Y. VEHICLE AND TRAFFIC LAW, §70.
106. See MCKINNEY'S CONSOLIDATED LAWS, STATUTES, §271.
107. N. Y. PENAL LAW, §3.