# ABSOLUTE CRIMINAL LIABILITY IMPOSED FOR PRINTING NUMBERS TICKETS

*State v. Lisbon Sales Book Co.*
*200 N.E.2d 587 (Ohio Ct. App. 1963), aff'd,*
*176 Ohio St. 482, 200 N.E.2d 590 (1964)*

A corporation was indicted for violating a statute which prohibits the manufacture or printing of tickets for or representing an interest in the numbers game.[1] The indictment against the corporation described the offense in the language of the statute. Upon demurrer the common pleas court ruled that the statute violated the due process clause of the fourteenth amendment because the statute did not require that the manufacturer or printer have knowledge that the tickets were to be used in the numbers game.[2] The court of appeals reversed and remanded for further proceedings,[3] holding that it was not necessary for the trial court to consider whether the tickets were in fact used or useful in the numbers game. The court of appeals noted that the statutory prohibition was the printing of tickets, not the illegal use of such tickets. The court stated further that the statute is violated only when the material in question is printed if at that time an ordinary man reading or examining the printed matter would conclude that it represented a share or interest in a scheme of chance. After examining a sample of the tickets, which was attached to the bill of particulars, the court stated that "no ordinary person would consider these books as being of such nature as to sound an alarm leading to an inquiry as to whether the substantially blank sheets of paper had a special usefulness which was illicit under the statute." [4] The court concluded, however, that even though the bill of particulars would have been dispositive of the case in favor of the defendants, the bill of particulars could not be considered when ruling on the validity of the indictment. Therefore, the demurrer was overruled.[5]

The Ohio Supreme Court affirmed,[6] holding that the indictment was legally sufficient because it charged the offense in the words of the statute and that the statute's silence on the question of intent indicated that the General Assembly intended to make proof of specific intent unnecessary; therefore, proof of a general intent to do the proscribed act was sufficient. Judge Taft in his dissenting opinion supported the court of appeal's interpretation of the statute, but disagreed with that court's treatment of the bill of particulars, stating that it should have been considered on demurrer

1 Ohio Rev. Code Ann. § 2915.11 (Page Supp. 1964). For the text of this statute, see note 66 *infra*.

2 State v. Lisbon Sales Book Co., 88 Ohio L. Abs. 208, 182 N.E.2d 641 (C.P. 1961).

3 State v. Lisbon Sales Book Co., 200 N.E.2d 587 (Ohio Ct. App. 1963).

4 *Id.* at 589.

5 *Id.* at 590.

6 State v. Lisbon Sales Book Co., 176 Ohio St. 482, 200 N.E.2d 590 (1964).

to the indictment. Therefore, in Judge Taft's opinion, the demurrer should have been sustained, since the bill of particulars showed that the defendants had not been charged with violating the statute.[7] The United States Supreme Court denied review.[8]

The use of the bill of particulars has been a source of confusion in Ohio law. Although the Ohio Constitution provides that accusation of a criminal offense shall be by presentment of an indictment by the grand jury,[9] the constitution does not specify the content or form of the indictment. Until the short-form pleading statutes were enacted in 1929, there was no statutory authority for a bill of particulars;[10] therefore, an indictment had to charge an offense with a high degree of particularity.[11] The defendant's right to particularity in the indictment was not a constitutional right; it was a right judicially declared as part of the public policy of the state as an essential element of the concept of fairness.[12] The purpose of holding the state to a high degree of particularity in the indictment was to enable the defendant and the court to know what particulars the defendant would have to defend. This long-form indictment was a combination of technical averments of law and statements of fact. If the charge in the indictment was so general and vague that the defendant could not prepare an adequate defense, the indictment was struck down and a costly and time-consuming indictment had to be obtained.[13] The disadvantages of long-form pleading were remedied by the present statute which provides that an indictment can be a general charge of the offense.[14] The technical averments and particularity required in the long-form indictment are now provided for the accused in a bill of particulars if seasonably requested.[15] When a bill of particulars is furnished to the accused, it serves to limit the prosecution at trial to proof of its specifications.[16]

The short-form pleading statutes of New York[17] and Massachusetts[18] are similar to those in Ohio. In both New York and Massachusetts, the bill of particulars is considered as part of the indictment when the suffi-

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[7] *Id.* 488-89, 200 N.E.2d at 595-96 (dissenting opinion).

[8] Lisbon Sales Book Co. v. Ohio, 33 U.S.L. Week 3250 (Jan. 26, 1965).

[9] Ohio Const. art 1, § 10.

[10] See McCullough, "The Role of the Bill of Particulars in Criminal Cases," 55 Ohio Op. 278 (1955).

[11] See State v. Boyatt, 114 Ohio St. 397, 151 N.E. 468 (1926); Lamberton v. State, 11 Ohio 282 (1842); Anderson v. State, 7 Ohio (part 2) 250 (1836).

[12] McCullough, *supra* note 10, at 279.

[13] DuBrul v. State, 80 Ohio St. 52, 87 N.E. 837 (1909); State v. Trisler, 49 Ohio St. 583, 31 N.E. 881 (1892); Fouts v. State, 8 Ohio St. 98 (1857); Dillingham v. State, 5 Ohio St. 280 (1855).

[14] Ohio Rev. Code Ann. § 2941.05 (Page 1953).

[15] Ohio Rev. Code Ann. § 2941.07 (Page 1953).

[16] State v. DeRighter, 145 Ohio St. 552, 62 N.E.2d 332 (1945); State v. Whitmore, 126 Ohio St. 381, 185 N.E. 547 (1933).

[17] N. Y. Code Crim. Proc. § 295a-1.

[18] Mass. Ann. Laws. ch. 277, § 34 (1956).

ciency of the indictment is questioned by demurrer.[19] The New York Court of Appeals in *People v. Bogdanoff*[20] indicated that the New York Constitution entitles the accused to a bill of particulars. The New York court reasoned that when indictments constituted the sole formulation of an accusation, the defendant's right to know the nature and cause of the accusation was protected by requiring particularity in the indictment. Upon the New York legislature's authorization of short-form indictments, however, the bill of particulars became mandatory and now must be read with the indictment in order to protect the rights of the accused.[21] The Massachusetts Constitution requires the offense to be fully described to the accused.[22] Even though this requirement may be satisfied by the indictment alone, the bill of particulars is still mandatory and must be read along with the indictment.[23] Thus, the accused has no constitutional right to a bill of particulars; but, as in New York, the bill of particulars is essential in determining the sufficiency of the indictment. Therefore, the short-form accusatory procedure as it is used in New York and Massachusetts appears to give better protection to the rights of the accused than did the long-form indictment.[24] Conversely, the Ohio procedure as expressed by the court of appeals in *State v. Lisbon Sales Book Co.*[25] seems to enable the prosecution to withstand demurrer to the indictment at the expense of subjecting the accused to a meaningless trial.

The Ohio law regarding the effect of the bill of particulars on the sufficiency of the indictment is not as well settled as the court of appeals in *Lisbon* indicated it to be. As recently as 1958 one court of appeals recognized that the Ohio Supreme Court had not clarified the law regarding the use of the bill of particulars in situations such as *Lisbon*.[26] In

[19] See People v. Bogdanoff, 254 N.Y. 16, 171 N.E. 890 (1930); Commonwealth v. Diamond, 248 Mass. 511, 143 N.E. 503 (1924); *cf.* Mass. Ann. Laws, ch. 277, § 34 (1956).

[20] 254 N.Y. 16, 171 N.E. 890 (1930).

[21] *Id.* at 24, 171 N.E. at 895.

[22] Mass. Const. § 13.

[23] The bill of particulars is mandatory in the sense that when an indictment is specific enough to charge the accused with a particular crime and thus pass the constitutional test, but is not specific enough to enable the accused to prepare an adequate defense, the accused has a statutory right to a bill of particulars. Commonwealth v. Jordon, 207 Mass. 259, 93 N.E. 809 (1911).

[24] In People v. Bogdanoff, *supra* note 20, the court indicated that under the long-form pleading procedure, courts were more interested in technical perfection, and the pleader, if he followed the common law forms, might draft an indictment sufficient to withstand demurrer even though such an indictment might give little information as to the nature or cause of the accusation. The short-form procedure better protects the rights of the accused by doing away with the technicalities and formalism of the old-style pleading and concentrating instead upon giving the accused actual notice of what he will have to defend. See also State v. Engler, 217 Iowa 138, 251 N.W. 88 (1933); Commonwealth v. Peakes, 231 Mass. 449, 121 N.E. 420 (1918); Commonwealth v. Farmer, 218 Mass. 507, 106 N.E. 150 (1914); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

[25] *Supra* note 3.

[26] State v. Carey, 107 Ohio App. 149, 157 N.E.2d 381 (1958).

*Harris v. State*,[27] the Ohio Supreme Court held that the material and essential elements constituting an offense are to be found by presentment by the grand jury, and a court cannot amend an indictment to supply such elements when they have been omitted from the indictment. The court reasoned that to allow such an amendment "would not only violate the constitutional rights of the accused, but would also allow the court to convict him on an indictment essentially different from that found by the grand jury." [28]

The Ohio Supreme Court dealt directly with the question of the effect of the bill of particulars on the indictment in *State v. Whitmore*.[29] In that case, the court stated in dictum that the prosecuting attorney has the right to amend the indictment and the power to furnish the accused with a bill of particulars so long as such action does not prejudice the rights of the accused. The argument usually advanced to deny the use of the bill of particulars when testing the sufficiency of the indictment is that the bill of particulars enables the prosecutor to substitute his whim and caprice for the findings of the grand jury.[30] The court in *Whitmore* answered this argument by stating that:

> Under such circumstances the indictment and the bill of particulars constitute the charge against the accused. If, after the accused has been furnished with a bill of particulars, the charge remains vague, indefinite or uncertain, or fails to state facts sufficient to constitute an offense under the laws of the state, then the accused has a right to resort [to] . . . demurrer.[31]

Since *Whitmore*, the courts of appeals have treated *Whitmore* and *Harris* as conflicting on the question of the effect of the bill of particulars on the indictment.[32] This apparent conflict arises from the holding in *Harris* that an essentially deficient indictment cannot be cured by a bill of particulars and from the dictum in *Whitmore* that the bill of particulars

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[27] 125 Ohio St. 257, 181 N.E. 104 (1932).

[28] *Id.* at 264, 181 N.E. at 106. See also State v. Wozniak, 172 Ohio St. 517, 178 N.E.2d 800 (1961); State v. Cimpritz, 158 Ohio St. 409, 110 N.E.2d 416 (1953); State v. Parker, 150 Ohio St. 22, 80 N.E.2d 490 (1948).

[29] 126 Ohio St. 381, 185 N.E. 547 (1933).

[30] *Id.* at 387, 185 N.E. at 550.

[31] *Id.* at 387-88, 185 N.E. at 550.

[32] In State v. Gossler, 42 Ohio L. Abs. 138, 57 N.E.2d 677 (Ct. App. 1944), the Court of Appeals of Franklin County decided that in determining the sufficiency of an indictment, the indictment and bill of particulars should be considered together. Later that year, however, the same court stated that the obvious conclusion to be drawn from *Whitmore* is that the bill of particulars does not effect the sufficiency of the indictment. State v. Collett, 44 Ohio L. Abs. 225, 58 N.E.2d 417 (Ct. App. 1944). In Campfield v. State, 91 Ohio App. 74, 105 N.E.2d 661 (1950), the Court of Appeals of Franklin County, on facts similar to *Harris* in that an essential element of the offense was omitted in the indictment, found that the indictment before the court did not charge an offense against the state. The court distinguished the language on the bill of particulars in *Whitmore* as being only dictum and, therefore, not controlling.

should be considered when the indictment is too vague, indefinite, or uncertain. However, the conflict between *Harris* and *Whitmore* is merely superficial when it is recognized that the basic consideration of both positions is the protection of the rights of the accused. *Whitmore* merely says that a bill of particulars or an amendment to an indictment will not be considered in testing the sufficiency of an indictment when to give effect to them would prejudice the rights of the accused. On the other hand, *Harris* simply states that it would be prejudicial to the accused's constitutional right of indictment by grand jury to allow an amendment or bill of particulars to supply an essential allegation missing in the indictment.

It is evident, then, that the function of the bill of particulars is to protect the accused by informing him of the exact nature of the charge. The indictment and the bill of particulars, therefore, are not opposites, one of which must prevail, but are complementary, since the latter supplements the generality of the former. It has also been established that the benefits of the bill of particulars are intended for the defendant, not the state, and that the purpose of the short-form pleading procedure is to speed up criminal justice without depriving the accused of his rights.[33] Had the court of appeals in *Lisbon* given proper consideration to the bill of particulars on demurrer, these purposes and objectives would have been fulfilled. Obviously the rights of the accused would not have been violated since the bill of particulars clearly showed that no offense was charged. To hold, as the court of appeals did in *Lisbon,* that an indictment is sufficient for all purposes once it meets the minimum constitutional requirements is to ignore the very distinction between long- and short-form pleading. Such a holding ignores the General Assembly's obvious realization that the general language of a short-form indictment might be subject to more than one interpretation, a contingency which the legislators provided for by giving the accused a statutory right to a bill of particulars. When, as in *Lisbon,* the general language of an indictment has been given substance by a bill of particulars and, as particularized, the indictment does not charge the accused with committing any criminal offense, it is certainly an anomalous application of the rule of *Harris* to ignore the bill of particulars and force the defendant to proceed through a meaningless trial. The court of appeals in *Lisbon* reasoned that since a defective indictment cannot be cured by a bill of particulars, neither can a bill of particulars create a defect in a valid indictment.[34] This application of the mutuality doctrine is clearly fallacious, because the benefits of the bill of particulars are intended for the accused, not the state.[35]

The Ohio Supreme Court in *Lisbon* avoided questions about the bill of particulars by its interpretation of the statute. In the syllabus of its opinion, the court stated that proof of general intent to do the proscribed act was sufficient; therefore, it was not necessary for the prosecution to prove specific intent.[36] It must be assumed that the court in distinguishing

[33] State v. Whitmore, *supra* note 29, at 386, 185 N.E. at 550.

[34] *Supra* note 3, at 590.

[35] State v. Whitmore, *supra* note 29, at 386, 185 N.E. at 550.

[36] State v. Lisbon Sales Book Co., *supra* note 6.

between general and specific intent meant that the prosecution is not required to prove that the defendant specifically intended to print numbers tickets, but that the prosecution must prove only that the defendant intended to print items which were in fact numbers tickets. Whether the defendants subjectively knew or had reason to know that the printed matter was numbers tickets is irrelevant under the supreme court's interpretation of the statute. However, having expressly eliminated specific intent and guilty knowledge from the prosecution's requirement of proof, it is difficult to understand why the court's opinion dealt so extensively with the presumption of guilty knowledge.[37] The court in *Lisbon* appears to rely upon the presumption of guilty knowledge, not as a substitute for the requirement of specifically alleging and proving guilty knowledge, in which case the presumption would at least be rebuttable,[38] but as support for imposing absolute liability. In effect, the court may be saying that one of the reasons why the General Assembly can impose strict liability by this statute is that knowledge can be presumed from the situation described by the statute. Therefore, it is necessary to examine the authority which allegedly supports this contention.

In support of the presumption of knowledge in *Lisbon,* the court referred to two situations in which knowledge is presumed: (1) where knowledge is of language, men, and things which commonly prevails, and (2) where the nature of an offense is such that when it is charged specifically the charge will contain within its terms an averment of knowledge.[39] An example of the first situation is a common pleas decision which held that a fair is something so public in nature that it can be presumed that anyone within a two-mile radius would know of it.[40] As an example of the second situation described by the court, the charge of keeping a disorderly house has been held to contain a sufficient allegation of guilty knowledge, since a person could not keep a disorderly house without knowledge thereof.[41] It is difficult to appreciate how either of these situations described and relied upon by the court is analogous to the facts of *Lisbon.*

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[37] On the other hand, if guilty knowledge is presumed it need not be averred, and it has been said that all men are presumed to have that knowledge of language, men, and things which commonly prevails. So too, as a general rule, where a statute or ordinance is silent as to the defendant's knowledge, the indictment or other accusation need not allege guilty knowledge. . . . The nature of an offense may be such that when it is charged specifically, the charge will contain within its terms an averment of knowledge. For instance, charges of concealing stolen goods and keeping a disorderly house have been held sufficient allegation of scienter, since a person could not have "stolen" goods or "keep a disorderly house;" without knowledge thereof. . . . The language of the indictment in the case at bar in its terms descriptive of the offense, in substance, alleges knowledge.

176 Ohio St. at 485-86, 200 N.E.2d at 593-94.

[38] Irrebuttable presumptions can only be justified by the clearest expediency and soundest policy. United States v. Provident Trust Co., 291 U.S. 272, 282 (1934).

[39] See note 37 *supra.*

[40] State v. Fromer, 7 Ohio N.P. 172 (C.P. 1897).

[41] Brown v. Toledo, 7 Ohio N.P. 435 (C.P. 1900).

In order for these situations to support a presumption of knowledge in *Lisbon,* the identity of a numbers ticket must be something so common that all men can be presumed to recognize one on sight. The court of appeals, however, found that the tickets printed by the defendant were such that not even an ordinary man would suspect that they were numbers tickets.[42] The inevitable conclusion is that either the identity of numbers tickets is not common knowledge or that the tickets which the defendant was charged with printing were not numbers tickets. If either conclusion is correct, it points up the fallacy of the court's argument of presumption of knowledge in *Lisbon.* If the identity of numbers tickets is not common knowledge, there is no basis for holding that a charge of printing numbers tickets presumes guilty knowledge; and if the identity of numbers tickets is common knowledge, then the bill of particulars clearly shows that the defendants did not print numbers tickets. Since the court could not validly presume guilty knowledge for any purpose in *Lisbon,* the presence of that doctrine in the opinion is confusing and serves to obscure the apparent holding of the court that the statute imposes liability regardless of any intent or knowledge. In light of this holding, it is profitable to examine briefly the concept of absolute criminal liability.

In 1846 an English court found a retail tobacco dealer guilty of having in his possession adulterated tobacco, despite the fact that he did not know nor have reason to suspect that it was adulterated.[43] In 1864 a Massachusetts court reached the same result as the English decision, upholding a conviction for selling adulterated milk although the defendant was ignorant of the adulteration.[44] The relevant factors considered by the Massachusetts court in holding the defendant absolutely liable were the lightness of the penalty, the language of the statute, the impracticability of requiring proof of knowledge, the importance of protecting the community against the common adulteration of food, and the reasonableness of imposing the risk upon the dealer and thus holding him absolutely liable. Since that decision, the arguments in support of absolute criminal liability have continued to be precisely the same.[45]

The United States Supreme Court in *Shevlin-Carpenter Co. v. Minnesota*[46] held that the absolute criminal liability doctrine does not necessarily violate the due process provision of the fourteenth amendment, but the Court in a later decision cautioned that "neither this court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not."[47] In *United States v. Balint*[48] the Supreme Court followed the rationale of *Shevlin-Carpenter* in finding that it was not necessary to show that the defendant knowingly sold nar-

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42 200 N.E.2d 587 (Ohio Ct. App. 1963).

43 Regina v. Woodrow, 15 M. & W. 404, 153 Eng. Rep. 907 (Ex. 1846).

44 Commonwealth v. Farren, 91 Mass. ( 9 Allen) 489 (1864).

45 Hall, General Principles of Criminal Law 328 (2d ed. 1960).

46 218 U.S. 57 (1910).

47 Morissette v. United States, 342 U.S. 246, 260 (1952).

48 258 U.S. 250 (1922).

cotics. The Court there observed that Congress had weighed the possible injustice of subjecting an innocent seller to a penalty against the greater evil of exposing innocent purchasers to the danger of the drugs and that Congress chose to avoid the latter result. An important consideration to the Court was the fact that there was an opportunity for the seller to discover that he possessed and was selling narcotics.[49] In *United States v. Dotterweich,* [50] the Supreme Court classified statutes which impose absolute criminal liability as legislation whereby penalties serve as effective means of regulation. This classification implied that such legislation should not impose imprisonment as a sanction, and this was followed in *Morissette v. United States,*[51] where the Court said, "penalties commonly are relatively small, and conviction does no grave danger to an offender's reputation." [52] Another statement of *Dotterweich,* affirmed in *Morissette,* was that absolute criminal liability is only imposed upon an innocent person when that person stands in some responsible relation to a public danger. [53]

*State v. Kelly,*[54] the first Ohio case upholding absolute liability, was decided fourteen years before the Supreme Court upheld the constitutionality of absolute liability statutes in *Shevlin-Carpenter.*[55] The penalty imposed in *Kelly* was a one hundred dollar fine [56] and the offense was the sale of adulterated food, which is one of the typical offenses included in the category of public welfare offenses. Although there is a line of cases following the *Kelly* rationale,[57] there has also developed a line of cases holding that even where the legislative definition of an offense indicates that no intent is required, scienter is an element of the offense.[58] In the

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[49] *Id.* at 254.

[50] 320 U.S. 277 (1943).

[51] 342 U.S. 246 (1952).

[52] *Id.* at 256.

[53] *Ibid.* The Court said: "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."

[54] 54 Ohio St. 166, 43 N.E. 163 (1896).

[55] *Supra* note 46.

[56] State v. Kelly, *supra* note 54.

[57] State v. Morello, 169 Ohio St. 213, 158 N.E.2d 525 (1959); Taugher v. Ling, 127 Ohio St. 142, 187 N.E. 19 (1933); Kendall v. State, 113 Ohio St. 111, 148 N.E. 367 (1925); Portage Markets Co. v. George, 111 Ohio St. 775, 146 N.E. 283 (1924); State v. Rippeth, 71 Ohio St. 85, 72 N.E. 298 (1904); Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N.E. 634 (1896); Meyer v. State, 54 Ohio St. 242, 43 N.E. 164 (1896); State v. Kominis, 73 Ohio App. 204, 55 N.E.2d 344 (1943); White v. State, 44 Ohio App. 331, 185 N.E. 64 (1933).

[58] Holt v. State, 107 Ohio St. 307, 140 N.E. 349 (1923); State v. Cameron, 91 Ohio St. 50, 109 N.E. 584 (1914); Kilbourne v. State, 84 Ohio St. 247, 95 N.E. 824 (1911); Farrel v. State, 32 Ohio St. 456 (1877); Crabtree v. State, 30 Ohio St. 382 (1876); Miller v. State, 3 Ohio St. 475 (1854); Birney v. State, 8 Ohio 230 (1837); Anderson v. State, 7 Ohio (part 2) 250 (1836); State v. Williams, 94 Ohio App. 249, 115 N.E.2d 36 (1952).

leading case, *Kilbourne v. State*,[59] the court asked, "To break up the market for [stolen] gas and water pipe, should the legislature make an innocent buyer a criminal?" [60] The statute held unconstitutional in *Kilbourne* provided that whoever bought, received, or unlawfully had in his possession certain articles removed from railroad cars, regardless of knowledge, should upon conviction be imprisoned. In *State v. Williams*,[61] a recent court of appeals case which reviewed the *Kelly* and *Kilbourne* lines of decisions, the court interpreted a statute [62] imposing liability for the possession of undersized fish to apply only to those who at least had an opportunity to inspect the fish. During the course of its opinion, the court was unsuccessful in its attempt to reconcile the cases following *Kelly* and those following *Kilbourne*. From *Williams*, it is evident that the constitutionality of strict liability depends primarily upon the facts of each case.[63]

In determining the constitutionality of section 2915.11 of the Ohio Revised Code, the statute under consideration in *Lisbon*, the Ohio Supreme Court should have considered whether the accused had an opportunity to learn those facts which, if known, would have imparted guilty knowledge, whether the defendants stood in a responsible relation to a public danger, and whether the sanctions of the statute are of a regulatory or punitive nature.

Applying these standards to *Lisbon*, it can be seen that there was no opportunity for the defendant to discover that the printed items were numbers tickets. Unlike adulterated food, narcotics, or alcohol, objects commonly dealt with by welfare statutes and situations in which the object itself might serve to warn anyone dealing with it of its potential dangers, the tickets in *Lisbon* by admission of the court of appeals were innocent in appearance and not dangerous in any way.[64] Also it is un-

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[59] 84 Ohio St. 247, 95 N.E. 824 (1911).

[60] *Id.* at 256, 95 N.E. at 826.

[61] *Supra* note 58.

[62] Ohio Rev. Code. Ann. § 1533.63 (Page 1964).

[63] In effect the court concludes that a statute which is silent upon the question of knowledge may be interpreted to impose absolute liability upon those (1) who have the means of knowledge and (2) who, regardless of the means of knowledge, must be held liable in the interest of the public weal. State v. Williams, *supra* note 58, at 255, 115 N.E.2d at 38. This conclusion does not reconcile the different lines of decision, but merely restates the proposition that in certain instances public policy demands that someone be held liable. Therefore, the determination of which instances must depend upon the relevant factors of each case.

[64] Judge Taft, who wrote the dissenting opinion in *Lisbon* because he felt that the statute only required that a reasonable man be able to ascertain that the printed matter was numbers tickets, wrote a concurring opinion in State v. Morello, 169 Ohio St. 213, 158 N.E.2d 525 (1959), stating that the arbitrariness of a statute imposing absolute liability may make such a statute unconstitutional. He suggested that the statute involved there was constitutional because a reasonable amount of diligence would have enabled the accused to discover the fact which would have given him scienter. Thus, to Judge Taft it seems that a minimum constitutional requirement of a criminal statute is that it punish only those who have at least an opportunity to know of the facts which make their action illegal.

deniable that the real legislative objective of the statute is to prevent gambling in the numbers racket. This factor, coupled with the requirement that the defendant stand in some responsible relation to the public danger in order to be subjected to absolute liability, further illustrates the fallibility of *Lisbon*. It is clear that where one is in a position to reduce public danger by cautious conduct, a statute requiring him so to act is not unreasonable. In *Lisbon*, however, there is nothing that the printer could do to prevent gambling in the numbers racket because there was no way for him to discover the danger by examining the items he had innocently printed. The real danger would have attached to the printed tickets only after they were out of the defendants' control. The defendants' activity in printing the tickets, therefore, was too far removed from the public danger of gambling for the General Assembly reasonably to hold these defendants absolutely liable.

In considering the sanctions of section 2915.11 of the Ohio Revised Code and their effect on the defendants' reputations if they are convicted, it is worth noting that this statute as originally enacted did not include a prohibition against the printing or manufacturing of numbers tickets and that a violation of the statute was only a misdemeanor.[65] In 1961 the statute was amended to include printers and manufacturers of numbers tickets, and the penalty for violating the statute was increased, making such violation a felony.[66] One of the considerations of the United States Supreme Court in refusing to impose absolute liability in *Morissette v. United States* was the fact that the offense charged was historically a felony.[67] The felony-misdemeanor distinction, based primarily upon the difference in severity of penalties, is pertinent to the question of the reasonableness of any statute which imposes liability without fault. Since a major concern is the reasonableness of damaging the reputation of a

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[65] Ohio Rev. Code Ann. § 2915.11 (Page 1953):

> No person shall vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import . . .
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> Whoever violates this section shall be fined not more than five hundred dollars or imprisoned not more than six months, or both for a first offense. . . .

Ohio Rev. Code Ann. § 1.06 (Page 1953) provides that "offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors. . . ." Ohio Rev. Code Ann. § 1.05 (Page 1953) defines "imprisoned":

> "imprisoned" means imprisoned in the county jail if the maximum term prescribed for the offense is one year or less, and imprisoned in the penitentiary if the maximum term prescribed for the offense is longer than one year.

[66] Ohio Rev. Code Ann. § 2915.11 (Page Supp. 1964):

> No person shall manufacture, print . . . [a] device for or representing a number of shares or an interest in a scheme of chance known as "policy," "numbers game,". . . . Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years.

[67] *Supra* note 47.

presumably morally innocent person who happens to violate the statute, the amount of such damage that will be reasonable will vary with the relative social good that will be accomplished by enforcing the statute. Since it has already been established that the defendants in *Lisbon* were not in a position to reduce the danger of gambling, no amount of damage to their reputation can be justified and the misdemeanor-felony distinction is irrelevant. But even assuming that the defendants in *Lisbon* were in a responsible relation to the public danger, there is no justification for making the violation of the statute in question a felony instead of a misdemeanor. The objective of public welfare statutes is to regulate, not punish;[68] yet imprisonment in the state penitentiary for one to three years certainly is more aptly characterized as punitive than regulatory. Implicit in such imprisonment is the idea that the defendants were guilty of some moral or social misconduct. The damage to the defendants' reputation, as compared to the damage to reputation resulting from a fine or confinement in the county jail, would seem to be much greater than any gain in regulatory value under the facts in *Lisbon*. Therefore, the attempt by the General Assembly to attach damaging penal sanctions to such possibly innocent behavior is unreasonable—it stretches the welfare legislation doctrine beyond any redeeming social justification.

Even though it appears that the Ohio Supreme Court interpreted section 2915.11 of the Code as imposing absolute liability, it is quite probable that the defendants' in *Lisbon* will raise the defense of mistake of fact or "no knowledge" at trial. This defense usually has not been available to one who violates a public welfare statute, even if the mistake is reasonable.[69] However, there are instances where exceptions have been made to the rule, such as when the mistake is due to infancy, insanity, coverture, or necessity.[70]

In two recent decisions the California Supreme Court accepted mistake as a valid defense to prosecutions for violations of welfare statutes.[71] That court did not base its ruling on any exceptions to the rule that mistake is no defense, but disregarded the rule itself, holding in both cases that a reasonable, mistaken belief in certain facts is a valid defense.[72] In both of those decisions the California court utilized a statute which provides that "In every crime of public offense there must exist a union, or joint operation of act and intent, or criminal negligence." [73]

Considering that there is no Ohio statutory provision similar to section 20 of the California Penal Code and that the opinion in *Lisbon* gave no

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[68] United States v. Dotterweich, 320 U.S. 277, 280, 281 (1943).

[69] Hall, General Principles of Criminal Law 373 (2d ed. 1960).

[70] State v. O'Neil, 147 Iowa 513, 522, 126 N.W. 454, 457 (1910).

[71] People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673 (1964); People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956).

[72] In People v. Hernandez, *supra* note 71, the court held that the defendant's reasonable belief that a girl was old enough to give consent would be a valid defense to a statutory rape charge. In People v. Vogel, *supra* note 71, good faith belief that the defendant's former wife had obtained a divorce was a valid defense to a bigamy charge.

[73] Cal. Pen. Code § 20.

indication that lack of knowledge is now to be a valid defense in prosecutions under a public welfare statute, it must be assumed that the rule has not been changed in Ohio and that mistake of fact will not prove a valid defense in *Lisbon*.

In summary, the court of appeals' holding that the statute imposes criminal liability only if a reasonable man would recognize the printed matter as a numbers ticket is a just interpretation of section 2915.11. That court's improper exclusion of the bill of particulars, however, diminished the reasonableness of its statutory interpretation. The supreme court did not have to consider the effect of the bill of particulars on the indictment since, under its holding of absolute criminal liability, an accused's mistake of fact or lack of knowledge is immaterial. However, the supreme court's interpretation of the statute, far from falling within the category of acceptable interpretation of public welfare statutes, is clearly unreasonable.