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HABEAS CORPUS—RIGHT OF APPEAL.—[Illinois] Relator was arrested on a warrant issued by the Governor of Illinois for his rendition on the requisition of the Governor of Wisconsin, in which state he was wanted for arson. On a petition for a writ of *habeas corpus*, relator merely testified that he was not in Wisconsin on the day when the crime was allegedly committed. Though two witnesses testified to the contrary, the trial court discharged the relator. On appeal, reversed. *Held:* The trial court cannot discharge one arrested under a governor's warrant where the evidence relating to the subject of presence in or absence from the state is contradictory, inasmuch as *habeas corpus* is not a proper proceeding in which to try the question of alibi or the guilt or innocence of the accused. *People ex rel. Sedlack* v. *Toman, Sheriff*, 362 Ill. 516, 200 N. E. 331 (1936).

Strictly speaking, the writ of *habeas corpus* is not an action or a suit, but rather a *summary* remedy open to the person detained. *Orr* v. *Jackson*, 149 Iowa 641, 128 N. W. 958 (1910); *Arnold* v. *Schmidt*, 155 Wis. 55, 143 N. W. 1055 (1913). Its great object is the speedy liberation of those who may be imprisoned without sufficient cause. *Henry* v. *Henkel*, 235 U. S. 219 (1914); *Belch* v. *Manning*, 55 Fla. 229, 46 So. 91 (1908); *People* v. *Windes*, 283 Ill. 251, 119 N. E. 297 (1918); *People* v. *Kuhne*, 107 N. Y. 1020 (1907).

The weight of authority seems to be to the effect that, in the absence of statutory provision, no order or judgment in *habeas corpus* proceedings is reviewable on appeal or writ of error. *People* v. *Siman*, 284 Ill. 28, 119 N. E. 940 (1918); *In re Webers*, 275 Mo. 677, 205 S. W. 620 (1918); *Ex parte Logan*, 33 Okl. 659, 126 Pac. 800 (1912); *Rex* v. *Buxton*, 2 K. B. 1056 (1910). The decisions are based either on the ground that the order or judgment in a *habeas corpus* proceeding does not possess the finality or other attributes necessary to bring it within the scope of the statutes permitting appeals or writs of error, or upon the more substantive ground that the delay incident to appeals would tend to defeat the purpose of *habeas corpus*—a speedy remedy to the person unlawfully imprisoned. See *State* v. *Towery*, 143 Ala. 48, 39 So. 309 (1904); *In re Hughes*, 159 Cal. 360, 113 Pac. 684 (1911); *Martin* v. *District Court*, 37 Colo. 110, 86 Pac. 82 (1906); *In re Williams*, 149 N. C. 436, 63 S. E. 108 (1908). Where the order has refused the release of the prisoner, the ground for not

allowing an appeal on the part of the petitioner is the fact that the order is not final and he may seek his release again, with the earlier order not standing as a bar. Only a few jurisdictions permit review without express statutory authorization, and apparently limit its availability only to the state. *Gillard* v. *Clark*, 105 Neb. 84, 179 N. W. 396 (1920); *People* v. *Kaiser*, 206 N. Y. 46, 99 N. E. 195 (1912); *Garfinkle* v. *Sullivan*, 37 Wash. 650, 80 Pac. 188 (1905); *Harkrader* v. *Wadley*, 172 U. S. 148 (1898).

Statutory provisions have been made in some jurisdictions providing for an appeal on *habeas corpus*, though not all of them give such a right when the petitioner is discharged. There is a conflict of authority as to whether appeals may be taken from a discharge in *habeas corpus* cases under a general statute relating to appeals, or whether such cases must be specifically mentioned. The tendency has been to deny the privilege except when specifically granted. *State* v. *Berkstresser*, 137 Ala. 109, 34 So. 686 (1902); *Notesten* v. *Rogers*, 18 N. M. 462, 138 Pac. 207 (1914); *Wesiner* v. *Burrell*, 28 Okla. 546, 118 Pac. 999 (1911).

The present case, of course, arose in connection with interstate extradition, which is wholly governed by constitution and statutory provisions. Courts have held that on a hearing on a writ of *habeas corpus* in such a case, they may consider only the following: whether the prisoner falls under the conditions of the federal statute; whether he is the person charged; whether the papers are sufficient under the law to justify a warrant of extradition. *People* v. *Hyatt*, 172 N. Y. 176, 64 N. E. 825 (1902); *Work* v. *Corrington*, 34 Ohio St. 64 (1877); *Ex parte Massee*, 95 S. C. 315, 79 S. E. 97 (1913). The judicial inquiry, however, cannot extend to the motive of the extradition proceedings. *Barranger* v. *Baum*, 103 Ga. 465, 30 S. E. 524 (1898). Likewise, the court will not go into the merits of the case or determine the guilt or innocence of the accused. *Drew* v. *Thaw*, 235 U. S. 432 (1914); *State* v. *Justus*, 84 Minn. 237, 87 N. W. 770 (1901); *Commonwealth* v. *Philadelphia County Prison*, 220 Pa. St. 401, 69 Atl. 916 (1908). Finally, courts, as in the instant case, say that a person should not be discharged where there is merely contradictory evidence on the subject of his presence in or absence from the state. *Munsey* v. *Clough*, 196 U. S. 364 (1905); *Dennison* v. *Christian*, 72 Neb. 703, 101 N. W. 1045 (1904).

It would thus seem that, considering the nature of extradition proceedings, perhaps the instant court was correct in reversing the order of discharge. But, however desirable such a result is, the court clearly disregarded the prevailing view as to the writ of *habeas corpus*. The cases cited in the opinion are all cases where the appeal was taken by the petitioner from an order refusing discharge. *People ex rel.* v. *Meyering*, 349 Ill. 198, 181 N. E. 620 (1932); *People ex rel.* v. *Traeger*, 340 Ill. 147, 172 N. E. 168 (1930); *People ex rel.* v. *Meyering*, 345 Ill. 449, 178 N. E. 80 (1931). The court disregarded the case of *People* v. *Siman*, *supra*. There Mr. Justice Duncan said: "It is now the well settled doctrine of this court [Illinois] that no writ of error lies to review the order or judgment of a court or judge in a *habeas corpus* proceeding, for the discharge of a prisoner in a crim-

inal case, as the order or judgment is not a final order or judgment.—No appeal from such an order has been granted by any statute in this State, and consequently no appeal is permissible from such an order or judgment."

The better reasoning seems to be that a writ of error or appeal will not lie in behalf of the state to review an order or judgment of a court of competent jurisdiction, in *habeas corpus* proceedings discharging from custody the petitioner. Keeping in mind the original purpose of the writ, it is indeed difficult to perceive the wisdom or reason upon which statutes and decisions are based which allow an appeal in such cases. The delay which might, and generally would, attend the appeal in many cases would work a denial of the very object of the writ, which is to secure the *present* discharge of the prisoner, and in most cases its value would be so impaired as to lose that distinctive character and office with which it has always been clothed.

LYLE E. PIERCE.

COMMENT ON FAILURE TO TESTIFY —CONSTITUTIONALITY OF STATUTE SO PROVIDING — [South Dakota] During a trial, in accordance with a South Dakota statute (Laws 1927, c. 93), expressly providing that in a criminal case "defendant's failure to testify in his own behalf is hereby declared to be a proper subject of comment by the prosecuting attorney," the prosecutor commented on the defendant's failure to testify. The defendant was convicted. On appeal, reversed. *Held:* Statute is unconstitutional as it violates section 9 of Article 6 of the South Dakota constitution which provides that "no person shall be compelled in any criminal case to give evidence against himself." *State* v. *Wolfe,* 266 N. W. 116 (S. D. 1936).

The Fifth Amendment of the Federal Constitution provides against self-incrimination and all the states have similar constitutional provisions except New Jersey and Iowa, which, nevertheless grant this privilege by virtue of the common law. *State* v. *Zdanowiscz,* 69 N. J. L. 619, 53 Atl. 1047 (1903); *State* v. *Height,* 117 Iowa 650, 91 N. W. 935 (1902). Until recent times, under the common law, the accused was not permitted to testify. In 1864 Maine passed the first competency act "the person so charged shall at his own request but not otherwise be deemed a competent witness," ME. STAT. (1864) c. 280. Maine was followed by all the states save Georgia. GA. ANN. CODE (Park 1914) §1037. Almost all these statutes, while qualifying the defendant to testify, provide that failure to testify shall not create a presumption against the defendant, and this provision is construed to forbid comment. *Commonwealth* v. *Scott,* 123 Mass. 239 (1877); *State* v. *Garrington,* 11 S. D. 178, 76 N. W. 326 (1877); *cf. State* v. *Monohan,* 96 Conn. 289, 114 Atl. 102 (1921) (Statute expressly forbids comment).

Even in the absence of a statute providing against comment or the raising of a presumption, Virginia, South Carolina and Georgia deny such comment on the grounds that it violates the constitutional privilege against self-incrimination and deprives accused of the presumption of innocence to which he is entitled. *Price* v. *Commonwealth,* 77 Va. 393 (1883); *State* v. *Howard,* 35 S. C. 197 (1891); *Coleman* v.

State, 93 S. E. 154, 15 Ga. A. 338 (1914). The United States Supreme Court, however, has decided that there is nothing in the Federal Constitution to prevent the states from permitting comment on a failure to testify. See *Twining* v. *New Jersey,* 211 U. S. 78 (1908).

Very few states permit comment on a failure to testify. *Parker* v. *State,* 61 N. J. L. 308, 39 A. 651 (1898); *Patterson* v. *State,* 122 Ohio 96, 171 N. E. 26 (1930); *State* v. *Stennett,* 260 N. W. 732 (Iowa, 1935); *State* v. *Cleaves,* 59 Me. 298 (1871). It must be remembered, however, that New Jersey and Iowa have no constitutional provision against self-incrimination, nor any statute forbidding comment. (IOWA CODE (1927) §13891 repealed at 43rd Gen. Ass. c. 269.) Ohio by constitutional amendment provides for comment on failure to testify. OHIO CONST. Art. I,, §10. Four years later, however, the Ohio court felt obliged to say that the aforesaid amendment was not intended to aid the prosecution or to lessen the proof required on behalf of the prosecution. See *Parker* v. *Village of Dover,* 98 Ohio N. P. (N. S.) 465, 472 (1916). Maine, in *State* v. *Cleaves, supra,* held that there may be comment on the defendant's silence; however, the legislature later enacted that the defendant on cross-examination should not be compelled to testify to facts that would tend to convict him of any crime, other than that for which he was on trial. Act of Feb. 14, 1879, c. 92, p. 112.

South Dakota is the only state with the normal constitutional privilege against self-incrimination which has attempted by statute to permit comment. In decisions prior to the statute of 1927 the court ruled that comment by the prosecutor was reversible error. *State* v. *Garrington,* 11 S. D. 178, 76 N. W. 326 (1898); *State* v. *Sonnenschein,* 373 S. D. 585, 159 N. W. 101 (1916); *State* v. *Lindec,* 51 S. D. 516, 215 N. W. 495 (1927).

The function of the constitutional provision against self-incrimination, so far as the individual is concerned, is to guarantee to the accused that he will not be forced by positive present act or word to furnish, produce, or make evidence to be used against himself. See Dills, *Comment on Failure to Testify* (1928) 3 Wash. L. Rev. 161, 164. The ultimate ground of policy as regards the state is to prevent the prosecution from relying for proof of its case upon evidence obtained from the accused. See 4 *Wigmore,* EVIDENCE (2nd ed. 1923) §2272.

The reasoning of the majority of the court in the instant case is that the effect of the statute permitting comment is to deprive the defendant of the option of testifying. If he does take the stand he is subjected to gruelling cross-examination which detracts largely from the weight of his testimony as evidence. See *State* v. *Garrington, supra* at 188. If he exercises his supposed privilege of not testifying, the prosecution draws an inference of guilt from his silence, which inference, at least to the extent of the weight given to it by the jury, is an incrimination of himself by the accused. See *People* v. *Tyler,* 36 Cal. 523, 530 (1869). To choose between two evils is certainly not the true option intended by the constitutional provision.

The minority, however, points out, as the late Judge Andrew Bruce observed, that the constitutional provision against self-in-

crimination was aimed only against direct compulsion, and does not go to the extent of prohibiting comment. See *Bruce, The Right to Comment on the Failure of the Defendant to Testify,* 31 Mich. L. Rev. 226, 233 (1932), which is a reply to *Reeder, Comment on Failure of Accused to Testify,* 31 Mich. L. Rev. 40 (1932) (two excellent discussions of this problem). Secondly, the minority contends that nothing the prosecution can say will either add or detract very much from the impression the jury already has of the defendant's failure to take the stand on his own behalf. The jury's reaction "is natural and irresistible. It will be drawn by honest jurymen and no instruction will prevent it." *Parker* v. *State,* 61 N. J. L. 308, 39 Atl. 651 (1898). Thirdly, as a matter of serving the best ends of justice, a jury should be permitted to consider as one evidentiary fact in the determination of the guilt or innocence of the accused his failure to testify—the probative effect of which will vary according to varying circumstances in different trials. This does not appear to be unfair to the accused. "If innocent, he has every inducement to state the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance. Being guilty, . . . a statement of the truth would lead to his conviction, and justice would ensue." *State* v. *Cleaves,* 59 Me. 298 (1871).

The logic of the dissent appears to undermine the position of the majority, and in the light of adoption of resolutions by both the American Law Institute (9 Proc. Am. L. Inst. 202-218 (1931) and the American Bar Association (56 A. B. A. Rep. 137-152 (1931) recommending that comment be permitted on the failure of the accused to testify, the majority holding seems questionable and retrogressive.

GERTRUDE SIEBER.

USE OF SYMBOL "AND/OR" IN INDICTMENT AS REVERSIBLE ERROR.—[Texas] Accused was found guilty under an indictment charging him with keeping a place to bet and wager and to "gamble cards, dice and/or dominoes" and as a place where people resorted to "gamble, bet and wager on games played with cards, dice and/or dominoes." On appeal, reversed. *Held:* Indictment quashable for use of symbol "and/or" and for omission of the word "with" before the words "cards, dice and/or dominoes." *Compton* v. *State,* 91 S. W. (2d) 732 (Tex. Cr. App. 1936).

The objection to the indictment having been properly raised by a motion to quash, *Cohn* v. *United States,* 258 Fed. 355 (C. C. A. 2d, 1919), the court reversed on finding grounds for the motion. It is a well settled rule that no one count in an indictment may charge a person with more than one offense, and if done the indictment is bad for duplicity. 2 Moore (1932) Illinois Criminal Law and Procedure 812. It is also an elementary principle that an indictment must not charge offenses in the alternative, since the defendant cannot then know precisely with what he is charged or convicted so as to preclude a second prosecution for the same offense. *Tyompies Publishing Co.* v. *United States,* 211 Fed. 385 (C. C. A. 6th, 1914). However, it is not always easy to decide what is "one offense" within the mean-

ing of the rule concerning duplicity. It would appear that where the crime charged relates to one act, or series of acts pertaining to one transaction, it would not under the rule be duplicitous for mentioning the several acts, things or persons connected therewith. For example, a count charging the theft of a horse at one time and the buggy at another has been held bad for duplicity. But a count charging theft of a horse and buggy at the same time is not duplicitous. *People* v. *Waters,* 104 Ill. 544 (1882). On the other hand, if *alternate* forms of words describe offenses whose ingredients are not the same, and more than one offense is used, the indictment must be amended or the conviction quashed, and that whether the link between the formulae be "or" or "and." Neither uncertainty nor duplicity is removed by the use of "and" if more than one offense is charged. 75 Sol. J. 788. Hence the determining question, and the one on which the principal case turns, is one of "certainty."

In holding that the primary requisite of criminal pleading is definiteness and certainty, so that nothing is left to inference or intendment, the court places great weight on the case of *Tarjan* v. *National Surety Co.,* 268 Ill. App. 232 (1932), a non-criminal case, and in doing so has garnered the support of a court that has vigorously opposed the use of such symbols as "and/or" and "was/were." The Illinois appellate court in an opinion subsequent to the one cited in the principal case (*City National Bank and Trust Co.* v. *Davis Hotel Corp.,* 280 Ill. App. 247 (1935)), cites at length the cases in which they have condemned what they call "the pollution of our language through the use of such symbols." (See also the very recent case of *Albers* v. *Indemnity Ins. Co.,* 283 Ill. App. 260 (1935).) The use of these symbols has been condemned by the courts of several states: by Alabama in *Clay County Abstract Co.* v. *McKay,* 226 Ala. 394, 147 So. 407 (1933); by Louisiana in *State* v. *Dudley,* 159 La. 872, 106 So. 364 (1925); by Utah in *Putnam* v. *Industrial Commission,* 80 Utah 187, 14 P. (2d) 973 (1932); by Nevada in Ex Parte *Iratacable,* 55 Nev. 263, 30 Pac. (2d) 284 (1934); by the Federal courts in *Irving Trust Co.* v. *Rose,* 67 Fed. (2d) 89 (C. C. A. 4th, 1933), and by the American Bar Association in its Journal of July, August, September, and October, 1932. The reason for this condemnation is rather well stated in an Oregon case, *Kronbrodt* v. *Equitable Trust Co.,* 137 Ore. 368, 2 P. (2d) 236, 3 P. (2d) 127 (1931), wherein the court said: "The words 'and' and 'or' are not interchangeable terms, nor are they convertable. It often happens to preserve the sense it is necessary to construe 'and' as 'or' and 'or' as 'and,' but this is done only when it is necessary to do so in order to carry out an obvious intent as shown by the context and to avoid an absurdity. They never mean the same thing." It is also held that "and" and "or" when combined ought never be used in a pleading. *Macurda* v. *Lewistown Journal Co.,* 104 Me. 554, 72 Atl. 490 (1908); STEVENS, PLEADING (3d Am. Ed. 1882) 340.

Though the decisions have been strong in their condemnation of the use of the symbols, apparently but one case of those cited, the *Putnam* case, *supra,* was reversed *only* because the use of the symbol rendered the offense uncertain. All

the rest have expressed their objections merely by *obiter dicta* while passing to decide the case on its merits, or have reversed where there was also another ground on which to do so.

The indictment in the principal case was apparently framed under Section 625 of the Texas Criminal Statutes, entitled "Keeping." The statute reads, "If any person shall keep or be in any manner interested in keeping any premises, building, room or place for the purpose of being used as a place to bet or wager, or to gamble with cards, dice or dominoes, or to keep — etc." Since the crime charged is for *keeping* a place to gamble one may well inquire: Did the use of the symbol in the indictment or the omission of the word "with" cause uncertainty as to what crime was charged? It seems not—and under the rules of surplusage, the indictment if not otherwise vitiated is good regardless of the surplus part (*Bailey* v. *United States,* 269 U. S. 551 (1925)), which may be stricken. *People* v. *Osborne,* 278 Ill. 104, 147 N. E. 124 (1925). The instant decision may perhaps be sustained as a valiant defense of the proper usage of the English language, but it is open to serious question whether a grammatical impropriety, however egregious, should alone be the basis of a reversal. Though the court was uncertain whether or not the place was used for betting at one or the other games mentioned in the indictment, a sounder result would have been reached by poising the case for judgment on the issue of duplicity—does the indictment use a form of words which discloses more than one offense—or by following the federal rule, which holds an indictment sufficient if it states the essential elements of an offense with such reasonable particularity as will advise the defendant with reasonable certainty of the nature of the accusation, and thus enable him to prepare his defense. *United States* v. *Goldman,* 220 Fed. 57 (C. C. A. 6th, 1915); see also, *United States* v. *Aviles,* 222 Fed. 474 (D. C. Cal. 1915); *People* v. *Ellis,* 185 Ill. App. 417, 420 (1914); *Simpson* v. *United States,* 289 Fed. 188 (C. C. A. 9th, 1923), *cert. denied,* 263 U. S. 707 (1923). Since the crime charged is for *"keeping"* a gambling house, it would seem that confusion as to exactly what forms of gambling were therein carried out would be no ground upon which to raise the objection if it is clear that any one game included under the statute is sufficiently set forth so as to verify that the house was "kept" for gambling purposes.

ROBERT R. NEAL.

CONSTITUTIONAL LAW—DIVESTING PRISON-MADE GOODS OF THEIR INTERSTATE CHARACTER — ORIGINAL PACKAGE DOCTRINE.—[Federal] The defendant was convicted under an Ohio statute (OHIO GEN. CODE (1933) §2228-1) prohibiting the resale of prison-made goods on the open market. On appeal, affirmed. *Held:* The Hawes-Cooper Act (45 STAT. 1084 (1929), 49 U. S. C. A. §60 (1935)), providing that "All goods . . . produced by convicts . . . transported into any State . . . shall upon arrival and delivery . . . be subject to the operation and effect of the laws of such States . . . and shall not be exempt therefrom by reason of being introduced in the original package or otherwise," divests prison-made

goods of their interstate character and removes constitutional restrictions on the power of a state to regulate the resale of such interstate shipments though still in the original package. *Whitfield* v. *Ohio*, 56 S. Ct. 532 (1936).

The federal power to prohibit the shipment of goods in interstate commerce has been held to be validly exercised only when the subject matter is "illicit," such as adulterated drugs and foods (*Hipolite Egg Co.* v. *United States*, 220 U. S. 45 (1911)), liquor (*Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311 (1917)), white slaves (*Hoke* v. *United States*, 227 U. S. 308 (1913)), and lottery tickets (*Champion* v. *Ames*, 188 U. S. 321 (1903)), or where a misuse of interstate commerce will result in the spread of harm from the state of origin to people of other states. *Brooks* v. *United States*, 267 U. S. 432 (1925). On the other hand, goods made by child labor, which in themselves are harmless, may not be prohibited from interstate commerce, since their manufacture, not being commerce, is beyond the control of Congress. *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918). The term "illicit" being relative, there is room to criticize the narrow definition given it by the Court, since in the case of admittedly "illicit" goods, Congress attempted, as also in the Child Labor Law, to destroy the source of production as well as to prevent any harmful effect in other states from the goods themselves. The result has been to allow goods manufactured under socially undesirable conditions to circulate in interstate commerce free from federal restraint, and to be sold within a state, immune from local regulation because goods still in the original package were considered to be in the flow of interstate commerce and did not become part of the general stock of goods within the state until after the original package was broken or one resale had occurred. *Leisy* v. *Hardin*, 135 U. S. 100 (1889). See Snider, *Growth of State Power under Federal Constitution to Regulate Traffic in Intoxicating Liquors* (1918) 25 W. Va. L. Q. 42.

The Hawes-Cooper Act, rather than prohibiting interstate shipments, merely removes whatever immunity an original package heretofore gave to interstate goods, and permits state regulation to attach effectively. See Dowling and Hubbard, *Divesting an Article of Its Interstate Character* (1921) 5 Minn. L. Rev. 100. Heretofore, such technique has been applied only to liquor (*In re Rahrer*, 140 U. S. 545 (1891), which upheld the Wilson Act, 25 STAT. 313 (1890), 27 U. S. C. A. §121 (1935)), the interstate shipment of which Congress might well have *prohibited* since it was "illicit" (*Clark Distilling Co.* v. *Western Md. Ry. Co.*, *supra*), so that till now the question was undecided as to whether Congress could apply this technique to nondeleterious goods, such as those made by prison labor, without exceeding its powers. The way now seems open for similar federal statutes relating to things other than prison-made goods. See Chambliss, *Constitutional Code Control* (1936) 30 Ill. L. Rev. 829; Black, *The Significance of the Divesting Theory in the Regulation of Milk* (1935) 23 Ky. L. J. 589. For example, Congress, by enacting a law subjecting goods made by child labor to state laws might thus induce states to pass complementary laws relating thereto, though the

desirability of using such a legal method in lieu of the long considered child labor amendment is debatable.

This decision will, in all probability, result in a further contraction of prison manufacturing, with increased problems of prison administration because of convict idleness, since it paves the way for other state statutes prohibiting the resale of such goods. Under appropriate statutes in pursuance of the later Ashurst-Sumners Act, 49 STAT. 494, 49 U. S. C. A. §61 (1935), prohibiting the interstate shipment of goods in contravention of local law, states could also prohibit the *entry* of prison-made goods. With a consequent narrowing of the market, the ultimate effect will probably be to limit production to the state-use system. See Note (1936) 26 J. Crim. L. 764.

MARVIN M. FINDER.

ASSIGNED ERROR AND GENERAL EXCEPTION.—[Florida] Defendants were convicted of larceny of three cows. Upon appeal defendants assigned as error the charge given by the trial court, to which only general exception had been taken below. *Held:* that objection cannot be considered by the Supreme Court unless the subject matter of the objection has been properly excepted to at the trial. And the rule applies even when the error, as here, consists of an obviously incorrect charge as to the law of the case. *Ward* v. *State.* 166 So. 563 (Fla. 1936).

The erroneous charge, which the trial court gave of its own motion, was as follows: "The law is that where one is found in the possession of such property, it is *prima facie* evidence of his guilt of the larceny of that property." The statement is obviously incorrect: it denies the presumption of innocence (see *Linden et al.* v. *United States* (C. C. A. 3rd, 1924), 296 Fed. 104), the rule as to burden of proof, and in the event that the defendants did not take the stand is a judicial comment on that fact. Nevertheless, the affirmance of the judgment was based upon a well-established rule, that objection will not be heard unless the ruling of the trial court has been the ground of a specific exception, advising the trial court of the objection so that it had an opportunity to modify or revise if such action should be deemed necessary. (Cases so holding are collected in 16 C. J. §2647 and in the Current Digests for the last ten years under the heading of "Criminal Law," §1056-1 and §1064-7. The cases are numerous and are from almost all jurisdictions.) The general rule, with several exceptions or reservations to be mentioned later, is well expressed in a recent Illinois case: "The defendant is in no position to urge that the giving of the instruction was erroneous, as an examination of the record fails to disclose any objection made or an exception taken to the giving of the instruction." *People* v. *Reeves,* 360 Ill. 55, 195 N. E. 443 (1935). See also *People* v. *Peck,* 358 Ill. 642, 193 N. E. 609 (1934). Similarly, a specific refusal to charge must be excepted to and assigned as error. *White* v. *State,* 121 Fla. 128, 163 So. 403 (1935); *Jindra* v. *United States,* 69 F. (2d) 429 (1934).

The exceptions to the general rule are: the Texas rule that appeal will be allowed for "fundamental error" in the court's instructions even though no proper exception was taken, *Clayton* v.

State, 78 Tex. Cr. 78, 180 S. W. 1089 (1915); *Holmes* v. *State,* 70 Tex. Cr. 214, 156 S. W. 1172 (1913); and the New Brunswick rule allowing appeal for misdirection on a material point, although proper exception be lacking. In *Rex.* v. *Daley,* 39 N. B. 411, at 416, the court said: "I know of no rule which deprives a person who is convicted under a misdirection of the trial judge of his right to a new trial merely because he did not complain of the misdirection at the time." Some few States have provisions in their statutes that appeal is to be allowed in the absence of proper exception, but this provision is usually limited to major convictions. New York State has such a statutory provision. (Code of Criminal Procedure, Gilbert, §527-528.)

Some courts, however, will not affirm a judgment merely because the proper exception was not taken at the proper time if they are convinced that justice demands a reversal. In this regard judicial reasoning becomes extremely practical and rules of procedure are no obstacle to an end which is decided upon before the application of the rules is worked out. 23 J. Crim. L. 28. Consequently, it is no surprise to find Florida cases which do not agree with the principal case. In 1923 indictments for murder were brought against three related defendants, and convictions were had for lesser offenses. Apparently basing its action on a belief that the convictions were unreasonable or unjust, the Supreme Court of Florida reversed without paying more than cursory attention to the fact that the defendants had not properly excepted to the charge of the trial court, as to which error was claimed in the appeal. *Ellis* v. *State,* 86 Fla. 165, 97 So. 285, 86 Fla. 257, 97 So. 520. But, instead of being an occasional exception to the general practice, appeal should always be permitted—regardless of technical rules—where the trial court has misdirected the jury as to the law of the case. Judicial incompetency should not be excused, or checkmated, by the incompetency of defendant's counsel. The defendant is likely enough to suffer from both and, in the interests of justice—that he shall not suffer too much—the appellate courts should not leave him helpless.

JAMES C. HALLAHAN.