HENRY KELLER, Appellant, *v.* **REPUBLIC OF LIBERIA**, Appellee.

Heard: May 2 & 3, 1979. Decided: June 15, 1979.

APPEAL FROM THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

1. Where a defendant's plea in a criminal case is "not guilty" the burden of proof shifts to the State to establish the defendant's guilt conclusively without any rational doubt, otherwise a judgment of conviction will not be sustained by the Supreme Court.
2. An accused in a criminal action is presumed to be innocent until the contrary is proved; and, in case of a reasonable doubt, he is entitled to an acquittal.
3. In criminal cases the burden of proof is upon the State - that is, the prosecution must prove beyond a reasonable doubt the facts laid in the indictment.
4. In trial of a case for embezzlement, which involves monetary transactions, the prosecution is required to conclusively establish that (i) the funds belonged to the private prosecutor; (ii) the funds were under the control or in the custody of the defendant; (iii) that an audit was conducted by authorized persons; and (iv) that a loss in the amount for which the indictment is laid, supported by documentary evidence, was shown to have occurred.
5. Embezzlement is the appropriation to one's own use and benefit property or money entrusted to him by another in the line of his duty whilst employed for that purpose. Hence, a conviction for embezzlement cannot be affirmed where it is shown that the money alleged to have been embezzled is in the form of checks, which are negotiable instruments issued by one other than the accused in settlement of his debt, and which checks are produced by the accused as cash on hand.
6. To convict an accused of the crime of embezzlement, it is not sufficient to show that there is a shortage in his account. The evidence must prove that the accused fraudulently and feloniously converted the goods or the money laid in the indictment to his own use.
7. In the prosecution of a crime involving monetary transactions, documentary evidence in support of the amount of money involved and connecting the defendant to the loss of that money is of primary importance and must be produced at the trial.
8. In trials involving monetary transactions, account books, when regularly kept, are

admissible in evidence but they must be books of original entry; and when the entries are made by a clerk they must be proved by him.

9. Where in the absence of the account books, a summary of accounts is used in a criminal prosecution, that summary should be signed and testified to both as to the entries made therein and how such entries relate to the funds for which the trial is being conducted, how they are connected to the defendant, and how they prove the commission of the crime. The person who made the entries must testify and stand the test of cross examination; but where he is unavailable for good and sufficient legal reason, then someone familiar with his handwriting and the preparation of the summary of accounts must testify.

10. Only the exhaustive description of a document and its connection to the case can be considered as sufficient identification of that document for purposes of admitting it into evidence, otherwise faked and false documents might very well be admitted into evidence in contravention of the rule governing admissibility of documents into evidence.

11. There is no provision of law governing the selection of jury under the 1956 Code which requires that alternate jurors sit separate from the regular jurors; and there is also no provision of law under that Code, which makes substitution of an alternate juror for a regular juror discretional with the judge, to be done at any time.

12. Under the 1956 Code, the causes which necessitate substitution of a juror on the panel are: (i) death of a regular juror during trial; (ii) the absence of a regular juror; or (iii) incapacitation or incompetency of a regular juror during the trial. This is the only time and the causes for which an alternate juror may be substituted for a regular juror.

13. A bill of exceptions must state distinctly the grounds upon which the exception is taken; it is improper to place upon the appellate court the burden of searching the record in order to discover the exception taken and the ground therefor.

14. An exception should be so taken as upon its face to inform the appellate court of the ground upon which it is based so as not to necessitate the appellate court referring to the records in order to discover the ground thereof. The Supreme Court shall not consider any exception in a bill of exception if the ground is not distinctly set forth.

15. Exceptions to any portion of the trial judge's charge to the jury must be stated with particularity so as to enable the Supreme Court to determine whether or not the trial judge committed a reversible error. The exceptions should point out the particular portions of the charge objected to in such manner as to appraise the Supreme Court of the particular error and/or irregularity complained of; and objections to the charge shall be regarded

waived unless each ground of objection is specified.

16. An exception taken during the process of a trial is a protest against the ruling of the court upon a question of law. It is designed as a warning that said point would be submitted to the appellate court for review, so as to give the trial court the opportunity to reconsider its ruling or action, and opposing counsel the opportunity of consenting to a reversal thereof.
17. Where the bill of exceptions or assignment of errors in an appeal fails to show on its face that the exception taken and set forth in said bill of exceptions or assignment of errors conform to, and are supported by the records at the trial, the appellate court will not take cognizance of such exceptions upon an appeal.
18. The only grounds under our statute on which a motion in arrest of judgment may be granted are: (i) failure of the indictment to charge an offense; and (ii) that the court has no jurisdiction of the offense charge.
19. This Court will confine itself to and decide upon the records on appeal before it, and will not do for a party that which he ought to have done to prove his side of the case at the trial.

Appellant was a cashier in the employ of the LAMCO J.V. Operating Company. During the period, 1963-1969, the amount of $14,123,606.77 came into his possession and under his control for his employer. When an audit was conducted, it was alleged that appellant could not account for $82,771.67. For that reason, he was charged with the crime of embezzlement. Appellant having been indicted, tried and convicted, he appealed to the Supreme Court.

On appeal, the Supreme Court found that several procedural irregularities had taken place. The Supreme Court also found that even though appellant did not present any evidence in his defense at the trial, the evidence presented by the prosecution did not prove the guilt of appellant beyond all reasonable doubts, in that none of the witnesses testified to the amounts laid down in the indictment and connected the loss of said amounts to appellant. More than that, the Court said, the evidence appeared to prove that in the course of appellant's employment as cashier, he received as payment for amounts owed to his employer, certain worthless checks, no evidence was adduced at the trial to show that appellant had any connection to said worthless checks by way of benefitting from the alleged fraud or by way of exchanging good checks in the depository for the worthless checks.

The Supreme Court also ruled that the conviction of appellant for embezzlement cannot be affirmed where it is shown that the money alleged to have been embezzled was in the

form of checks, which are negotiable instruments issued by his employer in settlement of debts owed to the employer, and which checks were produced by appellant as cash on hand during a cash count by auditors.

For these and other reasons, the Supreme Court *reversed* the conviction and judgment.

Joseph Findley appeared for appellant. The Solicitor General of Liberia and *M. Fulton W. Yancy* appeared for appellee.

MR. AD HOC JUSTICE SMITH delivered the opinion of the Court.

The records certified to this Court reveal that during the November 1969 Term of the Second Judicial Circuit Court, Grand Bassa County, the grand jurors selected, sworn and empaneled to inquire for and on behalf of the people of that County, and in the name of the Republic of Liberia, returned a true bill charging the appellant, Henry Keller, with the commission of the crime of embezzlement. During the May, A. D. 1970 Term of that court presided over by His Honour, the late Roderick N. Lewis, the case came up for trial before a jury selected, sworn and empaneled upon appellant's plea of "not guilty." For the benefit of this opinion, we quote the part of the indictment found against the appellant which specifically laid out the charge:

> "That on the 17th day of July, A.D. 1963, that is to say, between the 17th day of July, A.D. 1963, and the 19th day of June, A.D. 1969, in the city of Lower Buchanan, County of Grand Bassa, Republic of Liberia, Henry Keller, defendant aforesaid, then and there being employed by the LAMCO Joint Venture Operating Company, organized and operating under the laws of Liberia, as cashier in their Buchanan office and that by virtue of and in the line of his employment, he, Henry Keller, defendant, did collect, receive and take into his custody, possession and control sundry amounts to the total of $14,193,606.77, the said total representing cash revenues, the property of the said LAMCO Joint Venture Operating Company, his principal. But that defendant aforesaid, becoming unmindful of the trust and confidence reposed in him by his principal aforesaid, did unlawfully, wilfully, wrongfully, intentional-ly, feloniously, and fraudulently then and there embezzle, appropriate and convert to his (defendant's) own use and benefit the sum of $82,771.67 (Eighty-Two Thousand, Seven Hundred Seventy-One Dollars and Sixty-Seven Cents) without the knowledge, will and consent of the said LAMCO Joint Venture Operating Company, his principal, the rightful

owner thereof, as appears fully by the attached summary of account annexed and made part of his indictment as is herein set out word for word, then and there the crime of embezzlement, defendant aforesaid did do and commit, contrary to the form, force and effect of the statute laws of Liberia in such cases made and provided and against the peace and dignity of this Republic."

On arraignment, appellant pleaded not guilty to this indictment. Under the law, where a defendant's plea in a criminal case is "not guilty," the burden of proof shifts to the State to establish the defendant's guilt conclusively without any rational doubt, otherwise a judgment of conviction will not be sustained by this Court. *Dunn et al. v. Republic*, 1 LLR 401, 405 (1903); *Capps v. Republic*, 2 LLR 313, 315(1919). Thus in this case where the appellant had pleaded not guilty to the indictment charging him with embezzling the sum of $82,771.67, it was incumbent upon the prosecution to prove at the trial that: (1) the sum of $14,193,606.77 as laid in the indictment belonged to LAMCO Joint Venture Operating Company and that said amount was entrusted to the custody, possession and control of appel-lant in his capacity as cashier of the said LAMCO Joint Venture Operating Company at the cashier's branch in Buchanan; (2) that out of the $14,193,606.77, the amount of $82,771.67 was embezzled by appellant; and (3) that an audit was made of the appellant's account by an authorized person or persons, who must have testified and corroborated in their testimonies, identi-fying and confirming an unquestionable audit report with suffi-ciently supportive relevant documentary evidence to establish the existence of such an amount in support of the prosecution's case, since indeed the case grows out of monetary transactions which give the documentary evidence prime importance.

In order to establish the allegations of the indictment and prove appellant guilty of the crime of embezzlement, the State produced three (3) witnesses at the trial. The State's first witness was Samuel Derek Darges who identified himself as chief internal auditor of the LAMCO J.V. Operating Company. He testified that he conducted the cash count of appellant's office in June 1969. The State's second witness was Maurice Reginal Everton, who identified himself as budget chief of the LAMCO J.V. Operating Company at the time of the trial, and who in January 1969 made the cash count of appellant's office when he, the said Maurice Reginal Everton, served as assistant internal auditor. The State's third and last witness was Olive Akinsanya, who identified herself as supervision general accountant of the LAMCO J. V. Operating Company.

These three witnesses, who testified for the State, were examined and cross examined; and the State rested evidence and offered for admission into evidence certain documents.

Appellant's counsel objected to the admission of some of the documents, but the trial court overruled the objections and admitted all the documents into evidence. Counsel for appellant then excepted to the ruling.

When appellant was called upon to present his defense, being confident that the State had not proven anything against him to warrant the production of evidence in his defense, appellant waived his right to do so and submitted the case to argument. Counsel for the parties thereupon argued and the court instructed the jury.

After deliberation, the jury returned a verdict of guilty against the appellant. To this verdict, appellant excepted and filed motion of new trial. The motion for new trial was heard and denied by the trial court. Subsequently, appellant, in compliance with law, filed a motion in arrest of judgment, which was heard and denied by the trial court. On the 23rd day of June, 1970, the trial judge rendered final judgment confirming the verdict and sentencing appellant to two (2) years imprisonment, imposing a fine of $500.00, and ordering restitution of the amount of $82,771.67.

Appellant excepted to the trial court's final judgment and announced an appeal to this Honourable Court on a sixteen-count bill of exceptions for review. This Court will consider only those counts of the bill of exceptions which in its opinion are relevant to the fair determination of the case.

Counts one (1) to seven (7) of the bill of exceptions relate to exceptions taken to various rulings of the trial judge on objec-tions interposed to questions. This Court does not however consider these rulings and the exceptions thereto to be important to the determination of this case. Hence, the Court shall not pass on those exceptions.

Count eight (8) of the bill of exceptions relates to the trial judge's order replacing regular jurors on the panel with alternate jurors. This count reads as follows:

> "8. And also because on the 11th day of June, 1970, at sheets 4, 5, & 6 of the minutes for that day, prosecution observed that the seating of the jurors did not show who was an alternate or regular juror, referring to jurymen, Annie Preston and Wellington Kiah, in particular. The defense submitted that the observation was in fact immaterial and that on the day of empaneling the jury, Joseph Roberts, Seekey Yhonon and Betty Jallah were alternates instead of Annie Preston and Wellington Kiah. Your Honour still recognizing prosecution's petition changed these alternates and had them substituted by Annie Preston and Wellington Kiah, retaining Seekey Yhonon to the prejudice of the defense. And to which the defense duly excepted".

Recourse to the trial records reveals that on the 3rd day of June 1970, following the

selection of fifteen (15) jurors to try the case, the trial court made the following record:

> "The Court: Wellington Kiah and Mrs. Annie Preston are serving this panel as talesmen; Joseph Roberts, Seekey Yhonon, and Betty Jallah as alternates."

From this record of the court it is quite clear that Joseph Roberts, Seekey Yhonon and Betty Jallah were the alternate jurors named by the trial court and not Annie Preston and Wellington Kiah. These facts support appellant's version of what transpired in respect of the jurors.

The contention here is that in the midst of the trial, the trial judge, on the suggestion of the prosecution and over the objec-tion of appellant's counsel, made record replacing the two regular jurors Annie Preston and Wellington Kiah by alternate jurors Joseph Roberts and Betty Jallah, who were originally named as alternate jurors. Here is the observation of the prose-cution and the judge's ruling thereon:

> "...The county attorney would like to make his observation for certain irregularity. He observes that the practice of having alternates sit together for the panel is somewhat not followed at this trial, which could be by inadvertence. By that I refer to Annie Preston and Wellington Kiah, who supposed to be alternates on the present panel, are sitting each apart from the other. This position of Wellington Kiah, instead of giving an impression of him being an alternate, looks to me as a regular juror. Hence the prosecution thought to bring this to the court's attention for an immediate investigation and proper adjustment. And submit".

It is not known what legal principle the prosecutor relied on when he made the observation. However, the trial judge, who understood him well, made the following ruling, to which appellant' counsel excepted:

> "It is provided by statute that whenever the regular petty jury has been exhausted in selecting a panel to try any given case, the court shall order the sheriff to proceed to summon talesmen to supply the insufficiency. From the record of the 19th day's session, June 30, 1970, it is apparent that when the regular petty jury became exhausted, the court needed two more jurors to make up the fifteen and when summoned and brought to court their names were Annie Preston and Wellington Kiah. Under the circumstances it goes without saying that thirteen of the regular jurors had been selected to try the issues, but the panel lacks two; and as I have previously said, the deficiency is by law required to be made by talesmen from a logical sequence and from every legal aspect. It goes without saying that the two talesmen could never be regarded to sit as regular jurors, and if the talesmen had exceeded the number three then

> invariably that number less three would be legally clothed to sit as regular jurors in making up the twelve. So then, it is clear that the court said on empaneling the jury that Wellington Kiah and Annie Preston are serving this court as talesmen. The court went on further to say that Joseph Roberts, Sekey Yhonon and Betty Jallah are serving as alternates. This, on part of the court, is a gross but curable mistake, for even if you look at the three last names, you will still find a certain mistake. Nevertheless, the court is pleased to have been reminded of the situation before it becomes too late, and in correcting same, the court will have Annie Preston and Wellington Kiah and the last named regularly empaneled juror to serve as alternates. And it is hereby so ordered."

This ruling of the trial judge does not appear to be responsive to the prosecutor's observation. The prosecutor contended that the alternate jurors should have sat separate from the regular jurors on the panel; however, this Court finds no legal support for this contention. This Court also says that the trial judge's position in substituting the jurors, as he did, had no support in the statutes in vogue at the time of the trial of this case. The theory of the trial judge seems, however, to be in harmony with our present statute (Civil Procedure Law, Rev. Code, 2:23.3), which by virtue of §19.2 of the Criminal Procedure Law, Rev. Code 2, is the same process for jury selection for criminal cases.

Under the law in vogue at the time of the trial of this case, when a criminal case was called for trial, the judge should ask for a trial jury. The sheriff should thereupon call off the names of the twenty seven prospective trial jurors, four at a time, and the parties were entitled to examine them and to raise objections as to any or all of such persons. The first fifteen not challenged or objected to or as to whom objections have been overruled comprised the jury. The judge should name three of the fifteen as alternate jurors and appoint a foreman. If the panel was exhausted before the fifteen jurors had been selected, the court should directed the sheriff to summon a sufficient number of qualified persons as talesmen to serve without regard to other provisions of the law regarding the method of selection of jurors. Civil Procedure Law, 1956 Code 6:532.

Still under the law in vogue at the time of the trial of this case, the three alternate jurors sat with the twelve regular members of the jury, and all jurors were entitled to question witnesses, but none of such alternate jurors were entitled to participate in the deliberation of the jury or to sign the verdict unless he was named to serve in lieu of a regular juror who died or was otherwise incapacitated from serving during the course of the trial. In such latter event, a verdict signed by such alternate juror shall be valid. *Ibid.*, 6:530. If after the jury had been selected for a case it appeared that one or more jurors were absent or

incompetent, the court should substitute an alternate juror for such absent or incompetent juror. *Ibid.*, 6:534

This was the statute on the selection of jurors at the time of the trial of this case. There is no provision of that statute which requires that alternate jurors sit separate from the regular jurors. There is also no provision of that statute which makes substitution of an alternate juror for a regular juror discretional with the judge, to be done at any time. There are causes which necessitate substitution of a regular juror by an alternate juror during the trial, and they are: (i) death of a regular juror during trial; (ii) absence of a regular juror; or (iii) incapacitation or incompetency of a regular juror. It is only at this time and for one or more of such causes that an alternate juror may be substituted for a regular juror.

In the instant case it is not shown that any of the regular jurors had died or was absent, incompetent, or incapacitated to continue to serve on the panel when the judge made the substi-tution. In view of this error of the trial judge, count eight (8) of the bill of exceptions is sustained.

Count nine of the bill of exceptions relates to certain documents which were admitted into evidence over the objection of the appellant. The count reads as follows:

> "9. And also because when on the 11th day of June, A.D. 1970, at sheet 12 and 13 of the minutes for that day, the prosecution offered certain written documents introduced at the trial for admission into evidence, the defense objected to some of said documents on stated grounds; but Your Honour overruled the objections and had the document duly admitted into evidence. To which ruling, the defense duly excepted."

According to the records before us, there are two (2) categories of documents, the admission of which into evidence, the defense objected. The first category of documents is six (6) yellow deposit slips to which the State's third witness, in person of Olive Akinsanya, the General Accountant, had testified. She testified to the appellant's name on said slips and that they were deposit slips carrying the signature of the Bank of Monrovia.

The indictment under which the appellant stood trial does not specifically make reference to the six (6) yellow deposit slips to show their relation to the amount of $82,771.67 said to have been embezzled by the appellant or the amount alleged to have been entrusted to the care and possession of the appellant, neither did any of the State witnesses testify specifically to the materiality of the yellow deposit slips or to the establishment of any of the amounts laid in the indictment. The only exception is that in answer to a question on the direct as to whether witness Everton had in his possession any bank statement as testified to in his general statement, the said witness Everton said that he had in his possession the relevant

bank statement which he offered to be marked by the court. Witness Everton went on to say that he also had in his possession the six (6) bank deposit slips, dated January 1969 and signed by the defendant. But witness Everton did not explain, and there was no effort made by the prosecutor to have this witness explain what relation the six (6) yellow slips bore to either of the amounts laid in the indictment.

It is therefore unperceivable why these yellow deposit slips were ordered by the trial judge to be admitted into evidence over the objection of the defense.

The identity of those yellow deposit slips is unclear because witness Everton testified that they bore the signature of the defendant, while witness Akinsanya, on the other hand, testified that they bore the signature of the Bank of Monrovia and that she was sorry that someone had written the defendant's name thereon. The identity of those slips was therefore not clear for the purpose of admission into evidence.

The second category of documents, the admission of which the defense objected to, is the unsigned document purporting to be "summary of receipts and payment Buchanan cash account - July 1963 to June 1969," according to the heading. Besides this heading, no other explanation was given in this statement. It does not bear the signature of the writer; it was never testified to by the witnesses; and it was not shown as to who prepared it, or whether there was any book of original entry from which this unsigned document was prepared and introduced into evidence during the trial.

No attempt was made by the prosecutor, according to the records before us, to elicit on the direct examination some testimony on said document for the purpose of admission into evidence. Instead, when witness Everton was asked on the cross examination to take the documents marked by court and say how much money was paid into the appellant's office and received by him as cashier from July 1963 to June 1969, and to say whether it was in cash, coins or checks, the prosecution objected on the ground that the documents spoke for themselves, and the court sustained the objection. Hence, the documents marked by court were not sufficiently testified to and properly identified for the purpose of admission into evidence; and there was no book of original entry testified to and produced, from which the pur-ported summary of receipts and payments were made. Account books, when regularly kept, are admissible in evidence but they must be books of original entry; and when the entries are made by a clerk, they must be proved by him. *Harmon and Harmon v. W.D. Wooden & Co. Ltd.,* 2 LLR 334 (undated). The maker of the summary was not produced to stand the test of cross- examination, and the auditors did not testify that they prepared it. The ground for requiring sufficient identification of document in legal proceeding is primarily to avoid

reception of faked and false material. *Smart v. Proh,* 11 LLR 49 (1951).

The document marked by court "N" not having been signed by anyone and testified to by him or by others who are acquain-ted with his signature, cannot but be considered a faked and false material. Count nine (9) of the bill of exceptions, as it relates to the two documents marked by court "N" and "T," which are the six yellow deposit slips and the summary of receipts and payment, is therefore sustained.

The documents marked by court "A" to "H," which are the eight dishonored checks for which deposit slip was made out and signed by the defendant, were correctly admitted.

In count ten (10) of the bill of exceptions appellant contended, as follows:

> "10. And also because when on the 12th day of June, A.D. 1970, at sheet four of the minutes for that day, prosecutor, in closing arguments, referred to the character of the defendant, which under our law is reversible error. Defendant immediately interposed objection which Your Honour did not sustain until said counsel had finished his remarks on the point to the jury, even when defendant had not put in his own character as a defense. Then the court permitted counsel for defense to make his observation on record and prosecution requested the court to have said observation expunged from the minutes for ground stated on sheet five of the minutes for June 12, 1970. Your Honour, irrespective of your assurance recorded on sheet four of the minutes for that day that Counsellor Findley (the defense counsel) made said observation, still sustained the prosecution's submission and ordered said observation of counsel for the defense expunged from the minutes without any explanation to the jury as to the legal effect of such an allusion by the prosecution to the defendant's character. To which defendant duly excepted."

In this count of the bill of exceptions, it is not stated what statement was made by the prosecution in his closing argument which appellant regarded as referring to his character to enable this Court to determine whether or not such remarks in the argument were inflammatory, and could have influenced the decision of the empaneled jury. Nothing is also said as to what was the defense counsel's observation which the trial court expunged from the minutes of court.

The bill of exceptions also does not state what was the submission which was made by the prosecution and sustained by the court, and the observation which was expunged from the minutes of court. This Court has held that a bill of exceptions must state distinctly the grounds upon which the exception is taken; and that it is improper to place upon the appellate court the burden of searching the record in order to discover the exception taken

and the ground therefor. *Sampson and Johnson v. Republic*, 11 LLR 135, 138 (1952). An exception should be so taken upon its face as to inform the appellate court of the ground upon which it is based, and so as not to necessitate the appellate court referring to the records in order to discover the ground thereof. The Supreme Court will not consider any exception in a bill of exception if the ground is not distinctly set forth. *Foster v. Republic,* 2 LLR 403 (1922); *Quai v. Republic,* 12 LLR 402 (1957).

In view of what has been stated and the law controlling, we shall now see whether count eleven warrants consideration. It reads as follows:

> "11. And also because on the 15th day of June, A. D. 1970, Your Honour charged the jury without due regard to defendant's closing argument and summation in which defense respectfully prayed Your Honour to charge the jury on certain points stated at the bottom page of sheet three and top page of sheet four of the minutes for June 12, 1970. To which charge defendant duly excepted."

Based on what has already been stated above and the law relied upon, it is clear that count eleven (11) of the bill of exceptions does not conform to the standard to warrant the attention of this Court. Appellant has neglected to state with particularity the portion of the judge's charge to which he excepted, and to set forth in said count the certain points which he requested the trial court to explain to the jury so as to enable this Court to determine whether or not the judge committed a reversible error. Exceptions to the trial court's charge to the jury should specifically point out the particular portion or portions of the charge objected to in such a manner as to appraise the Supreme Court of the particular error and/or irregularities complained of. And it has been held that this requirement cannot be waived but that objections to the charge shall be regarded waived unless each ground of objection is specified. 23 C.J.S., *Criminal Law,* § 1345.

Counts twelve (12) and fifteen (15) of the bill of exceptions relate to exceptions taken to the verdict, the rulings of the trial judge on the motion for new trial, and the trial court's final judgment. Since appellant's contention is based on the evidence adduced at the trial, we shall open the records to determine whether or not the evidence adduced at the trial supports the verdict upon which the final judgment was rendered. Before doing so, however, let us see whether or not appellant's conten-tion contained in counts fourteen (14) and sixteen (16) of the bill of exceptions is supported by law. These counts read, as follows:

> "14. And also because Your Honour on the 23rd day of June, 1970, heard and determined defendant's motion in arrest of judgment, sustained the resistence thereto and denied said motion. To which the defense excepted".

"16. And also because said final judgment was rendered without term time, that is Your Honour's jurisdiction over the Second Judicial Circuit for the May A.D. 1970 Term had expired by one day and by passage of time, you were out of term time on the 23rd day of June A.D. 1970 when you undertook to render said judgment even though the court's attention had been called to that fact in the motion in arrest of judgment. Your Honour should have contacted the Chief Justice for an extension of your time before rendering said illegal judgment. To which defendant duly excepted."

The motion in arrest judgment referred to above reads, as follows:

"... the regular session of this Honourable Court adjourned on Thursday, June 11, 1970, and from that date to the 23rd is 12 days. Defendant submits that under the laws of Liberia, including the rules controlling this Honourable Court, all circuit court judges have 10 days before and 10 days after the regular jury session to conclude the work at any regular term to which they are accredited by assignments of the Chief Justice. This court having adjourned its jury session on the 11th day of June, 1970, should have adjourned *sine die* on the 22nd since in deed and in fact the 10 days were over on the 21st, a Sunday, which is also *non die*.

This one-count motion in arrest of judgment, which appellant contends should have been granted by the trial judge, states for its ground that the trial judge was out of jurisdiction or term time when he rendered the judgment in the case on the 23rd day of June, 1970, which contention is the same as set forth in counts 14 and 16 of his bill of exceptions. Hence, these two counts of the bill of exception must be decided together.

The only grounds under our statute on which a motion in arrest of judgment may be granted are: (1) failure of the indict-ment to charge an offense, and (2) that the court has no juris-diction of the offense charge. Criminal Procedure Law, 1956 Code 8:310; Criminal Procedure Law, Rev. Code 2:22.2.

The trial judge therefore did not err when he dismissed the motion in arrest of judgment.

As to the point that the trial judge was out of term when he rendered judgment on the 23rd day of June, 1970, the record shows that the trial case was not concluded when the jury session was allegedly adjourned on the 11th of June, 1970, as it was on the 12th of June that the case was argued and submitted and the jury returned a verdict of guilty against appellant. According to the statute in vogue at the time of the trial of the case, a trial case in which a jury is empaneled, and the trial of which began on or before the forty-second day of the session of court, shall continue until the case is determined. In computing the forty-two days of a session of court, Sundays and holidays are not to be included. Civil Procedure Law,

6:37. Under this statute, even if the jury session did adjourn on the 11th day of June, 1970, the trial judge did not err when he continued the case until it was determined.

Of noteworthiness is that the trial records do not show that the jury session was in fact adjourned on the 11th of June, 1970, neither is it shown by the records that appellant had called the trial judge's attention as to the extension of his time by the Chief Justice in order to conclude the case and make a ruling thereon. There is no ruling entered by the trial judge on this issue and excepted to by the appellant for appellate review.

An exception taken during the process of a trial is a protest against the ruling of the court upon a question of law. It is designed as a warning that said point would be submitted to the appellate court for review so as to give the trial court the opportunity to reconsider its ruling or action, and opposing counsel the opportunity of consenting to a reversal thereof. *Johnson v. Powell and Russell*, 4 LLR 221 (1934). Where the bill of exceptions or assignment of errors in an appeal fails to show on its face that the exceptions taken and set forth in said bill of exceptions or assignment of errors conform to, and are supported by the records at the trial, the appellate court will not take cognizance of such exceptions upon an appeal. *Elliott v. Dent*, 3 LLR 111 (1929).

In view of what has been said hereinabove, counts fourteen (14) and sixteen (16) of the bill of exceptions are not sustained.

We will now open the records to see whether or not the evidence adduced at the trial supports the verdict of the empaneled jury finding the appellant guilty of the crime of embezzlement, and upon which verdict, the final judgment was rendered.

First, we take the testimony in chief of witness Darges, who allegedly audited the appellant's account and found him to have embezzled the amount of $82,771.67. Here is what he told the court and jury while on the witness stand under oath:

> "My concern in this case began on June 14, 1969, when I called at the office of the defendant to count the cash that was in his possession. He was employed as the branch cashier at the Buchanan office of LAMCO. On this day, he told me that he had been away from office on personal business and that his records are not up to date. He requested me to let him have time to write up these records and balance his cash. This I agreed to do. On June 16, 1969, I called at his office again and on this occasion he presented his funds to me for counting. The items included in this fund were cash amounting to $1,025.63, two small checks in the total amount of $33,433.97, which the defendant asserted he received from Lerone Bennet and Company, and also four checks in the total amount of $29,303.70, which he asserted came from the Die Hard

Agricultural Company. This was the total amount of his fund he had on hand and according to his records, this was to be reconciled against a balance of $63,795.71.

At the conclusion of this cash count, I asked the defendant to prepare check deposit slips and he handed them together with the checks to me. I had the original of the checks deposited with me signed by the defendant. On my return to Yekepa, I handed the checks and deposit slips to the chief accountant so that they could be presented to the bank for collection of payment. The checks were presented to the bank and the eight checks purported to be received from Lerone Bennett and Company and the Die Hard Agricultural Company were returned by the Bank of Liberia with an endorsement that they were dishonored because the bank held no accounts in the names of these companies. A meeting of the LAMCO officials was held in Buchanan on June 19, 1969, and Mr. Keller was asked to attend this meeting and explain how he came to be in possession of these checks in his funds. He asserted that they had been delivered to him in the normal course of business and payment of invoices issued by LAMCO. It was however proved that such invoices had never been issued and that LAMCO had no account with these firms. It was also noted and pointed out to Mr. Keller that four of the checks appeared to bear his name and an attempt had been made to erase them, but he said that he was unable to see his name over the erasure. At the conclusion of this meeting, a further account was made of Mr. Keller's cash fund to confirm the position. This showed similar results to the previous cash count on June 16th and Mr. Keller signed the manuscript record of the cash count on June 19th.

Subsequent investigations showed that there had been similar irregularities for some time in the past, and particu-larly that 11 checks which Mr. Keller produced at the previous cash count on January 14, 1969, had neither been reported to LAMCO as being in his possession nor had they ever been paid into the bank for deposit. The checks had disappeared when the cash count was made. On June 16th, it was also found that the defendant had received a further $20,000.00 for reimbursement of his cash fund but had not made any record of this amount in his possession. This case was then handed to Counsellor Morgan for his advice. This is my general statement."

The witness neither testify to the $14,193,606.77 alleged to be the total amount received by the appellant from 1963 to June 1969, nor did he testify to the $82,771.67 said to have been embezzled by appellant as charged in the indictment. Yet the prosecution made no effort by way of direct examination to elicit from said witness such facts as would lead to reference of the two amounts. Despite the fact that this witness did not testify to the

amounts laid in the indictment, the following questions were put to him on the cross examination, which we quote along with the answer which he gave:

"Q. Mr. Witness, you proferted with your indictment statement of account - summary of receipts and payments, but to this point you have not spoken on that particular summary and really we are very interested in knowing when this 82 odd thousand dollars was received by the defendant, for what purpose and how he disbursed them. We on our part happen to have a photocopy of your summary and pass it to you under the usual restrictions, asking you in the meantime to please clarify the minds of the jury and this Honourable Court as to when this amount was paid to Mr. Keller and for what?

A. This amount would have been received by Mr. Keller in the normal course of his duty as cashier. It cannot be stated exactly during which period the defalcation oc-curred, but it appears that it probably happened over a period of five years."

This is one of the several answers given to questions on the cross examination by the auditor upon whose audit appellant was indicted for the crime of embezzlement. But here are a few more interesting questions put to the witness on the cross examination and the auditor's answers given thereto:

"Q. Are you the auditor who found the $82,71.67 against the defendant?

"A.No. I don't think I was sole instrument in finding the amount. It was a group operation from my cash account of June the 16th, 1969.

"Q. You have shown checks and other statements marked by court 'A to H,' which all refer to 1969 but you stated from the stand that the charge is based upon five years of embezzlement on part of the defendant. How much did you find the defendant embezzled in 1969?

"A.I do not know. It is impossible to reconstruct accounting records to obtain an actual total of defalcation of any one year."

Witness Darges also stated in his testimony in chief that several checks were given to him by appellant for deposit as part of the cash on hand during the cash count, but that these checks, which came from Lerone Bennet and Company and the Die Hard Agricultural Company when deposited in the bank, were dis-honored as the mentioned companies had no accounts with the bank. He did not state pointedly, however, that the value of these checks made up the $82,771.67 which was alleged to have been embezzled by appellant.

The whole exercise, as it appears from the record, seems to be that appellant was charged with embezzling the value of the dishonored checks by reason of their having been

dishonored by the bank, the two companies from which he received the checks not having maintained any accounts with the bank. Granting that those checks, which were made payable to LAMCO by the two companies were dishonored because they did not have any accounts with the bank, could appellant be said to have em-bezzled the amounts of the checks not paid to him by the banks? Or could any responsibility be placed on appellant for receiving those checks, not knowing that they were worthless in the absence of any evidence that the companies did not issue said checks? Our answer is "no."

It should be recalled that in an answer to a question on the cross examination as to the detail engagement of the appellant as cashier, witness Darges, the auditor, stated, and I quote:

> The defendant was employed to make payments mainly in cash from his cash funds. He was also authorized to receive cash, checks and other documents in settlement of debts and other amounts due to LAMCO."
>
> Auditor Everton took the witness stand next and here is what he said:
>
> "My connection with this case first arose in January 1969, and in fact on the 14th of January, 1969. In my capacity as an internal auditor, I called upon the defendant, Mr. Keller, to produce to me certain records, documents, cash and any other matter pertaining to the cash balance at the Buchanan cash office, which said cash balance was the property of the LAMCO Joint Venture Operating Company. The defend-ant, upon my request, produced the records which included a daily report. The purpose of said cash report was to show the balance on hand in terms of cash or other documentary evidence at the end of the particular day referred to. The responsibility for the daily cash balance was solely Mr. Keller's, and each daily cash report was to be signed by him as an acknowledgment of his responsibility. The notes, coins and checks were produced to me, examined, counted and recorded by me in manuscript. Upon conclusion of the said count, etc., Mr. Keller appended his signature thereto.
>
> During the course of that day, I specifically pointed out to Mr. Keller that he should not under any circumstances keep checks received during the normal course of daily business transaction as part of the cash. Office balance, that is to say checks so received, were to be deposited with the Bank of Monrovia for account of the LAMCO J. V. Operating Company, so that all of said checks should preferably be deposited with the bank not later than the day following receipt. It was to my certain knowledge that the defendant, Mr. Keller, had previously received these instructions referred to.
>
> Upon my return to Nimba, that is to say on January 15, 1969, the manuscript of the

cash counts was typed and copies thereof given to the comptroller, the chief accountant, Price Waterhouse and Company (official auditors of the LAMCO J. V. Operating Company) and a further copy was given to Mr. Keller. The chief internal auditor received no indication from the defendant at that time to the effect that the defendant was in disagreement with the details of the cash counts carried out by me.

The results of my cash count and the questions arising therefrom were, namely: There was a large number of checks and in high value presented to me as part of the Buchanan cash balance. So I made certain recommendation in the memorandum to the comptroller of LAMCO J. V. Operating Company. The underlying reason for my recom-mendations in the memorandum of January 18, 1969, were: (1) the cash balance was far too high in total value, in my opinion, for a normal business in the Buchanan cash office; (2) the presence of checks having high value were not deposited with the bank for collection and the checks represented the bulk of the Buchanan cash balance as of January 14, 1969; (3) no satisfactory explanation was given to me by Mr. Keller at the time on January 14, 1969, for the origin of certain checks, eleven in number, and which are indicated on my manuscript copy of that cash count.

The checks in question were all drawn on the Bank of Liberia and it was impossible, as far as my memory recollects, to ascertain who were the payor or payors of those checks and for what purpose the amounts were received by the defendant during the normal course of business. The defendant having been instructed by me to deposit all checks in his possession as soon as possible, informed me by telegram on January 15, 1969, that he had done so and this was indicated in my manuscript of January 15, 1969, which manuscript Mr. Keller received a copy. Having sent my recommendation to the comptroller, I started to check the daily deposit receipts from the Buchanan cash office, which receipts were amounts to be paid into the main checking account of LAMCO J.V. Operating Company with the Bank of Monrovia. The reason for my doing this was to trace the clearing and collection of the eleven checks referred to. However I was unable to continue this normal audit return because, as far as my memory collects, LAMCO required me to take over the duties of temporary paymaster in Nimba. After the expiration of these temporary duties, I was transferred by the comptroller to take over the position and duties of budget chief, that is to say, my present position within LAMCO. That concludes my general statement."

It does not seem to us that there is need for any further comments to be made relative to this witness' testimony in view of the fact that besides not testifying to the $14,193,606.77

said to have been entrusted to the care and possession of appellant and the $82,771.67 alleged to have been embezzled by him, as the charged in the indictment, as well as any report showing appellant's shortages during the audits, the witness concluded his said testimony by saying that he was unable to conclude the audit because of his temporary assignment as paymaster and his transfer thereafter to the position of budget chief.

If auditor Everton did not conclude his audit of January 14, 1969, which evidently he did not, he could not have given a true statement of any shortage by the appellant in the June cash count since he did not take part in the audit, having been transferred to another job prior to the audit. Why then didn't the prosecution have the witness, auditor Everton, answer questions in support of the $14,193,606.77, being the total amount alleged to have been entrusted to the care, possession and control of appellant, since this amount is the basis of the audit from which the shortage of $82,771.67 was allegedly discovered?

Here are two questions put to the witness, auditor Everton, on the cross examination:

"Q. I pass you court's marks 'N,' look at it please and say how much money was received by the defendant and paid into his office as cashier from 1963, 17th July to 19th June 1969, and say also if you know whether said amounts were paid in cash, coins or checks?"

Court's mark "N" is the unsigned document purported to be a summary of receipts and payments from July 1963 to June 1969. The prosecution objected to this question on the ground that the document spoke for itself, and the court sustained the objection.

"Q. Now Mr. Witness, document "N" which you hold in your hands shows that $14,193,606.77 was paid into the office of the cashier. There is no indication on said document as to whether these receipts and deposits were made in cash, by checks, or otherwise. We are in doubt as to how the payments were made. Please clarify our minds as to whether they were made by checks, cash or coins?"

To this question on the $14,193,606.77, as laid in the indict-ment and for which this witness was introduced to established, the prosecution noted the following objection:

"Grounds: unduly cumulative, see last question and court's ruling thereon, and also other objections stated to the last question."

The court again sustained the objection, thereby resulting in the prosecution depriving itself of the opportunity of establishing the allegations laid in the indictment.

Here is what Olive Akinsanya, the last witness for the prosecution, testified to:

"A.I know that on June 9, 1969, one of the auditors came from Nimba to conduct an audit of Mr. Keller's cash. It was reported that he was short $82,771.67. This is all."

This is the only witness who testified to the shortage of $82,771.67, but this was information from what she heard reported by the auditor from Nimba. As it was not information based on her own certain knowledge, it was subject to exclusion under the hearsay rule. On cross examination, however, some interesting questions were put to the witness in respect of whether she knew how the shortage of the $82,771.67 came about. Here are the questions and her answers:

"Q. Mrs. Akinsanya, you said on the general examination that when the defendant's cash count was made on June 19, 1969, he was short. Please explain yourself and say if you know how this shortage came about?

"A.During the cash count, I was in the office with Mr. Keller and Mr. Darges. Mr. Keller was asked to bring all the monies and papers he had in his possession. When the monies and papers were brought the cash was counted and there were some checks drawn on the Bank of Liberia. These checks were taken to Nimba for deposit which were found not genuine.

"Q. Do you know if these checks you just referred to were substituted for cash in the safe?

"A.I cannot say for a fact that these checks were substituted for cash but I would assume they were since they brought his balance which he was carrying in his report."

From the answers given by this witness, we must assume that the alleged shortage of $82.771.67 must have been the value of the checks which auditor Darges counted as cash reported to be on hand during the cash count of June 1969. They are the same checks that the said auditor received along with deposit slips prepared by appellant and that he, the auditor, took with him to Nimba for deposit collection of the cash; but the said checks were not honored by the bank. Granting that the checks were not genuine as testified to by witness Akinsanya, it having been shown that the said checks from the Lerone Bennet and Company and Die Hard Agricultural Company, were drawn on the Bank of Liberia where the companies did not maintain accounts, it would appear that the issuance of the worthless checks by those companies and the receipt thereof by the appellant in the line of his authority to receive cash, checks and other documents in settlement of debts and other amounts due LAMCO, as testified to by auditor Darges, cannot constitute the crime of embezzlement by appellant. Also it cannot be concluded from this evidence that appellant can be held for the issuance of the worthless checks by the companies or be held criminally liable in the absence of fraud for receiving the checks in keeping with his authority to receive cash, checks and other documents in settlement of debts owed to LAMCO, his employer.

As mentioned earlier in this opinion, there was no showing in the prosecution's evidence either that the two companies denied issuing such checks, or that it was appellant who, with the intent to defraud his employer, issued said checks and substituted them for cash; and there was no attempt made by the prosecution to establish the identity of the signatures on the checks by a comparative examination of appellant's handwriting by the Criminal Investigation Division of the Government as would have established the alleged fraudulent act for which appellant was charged.

To convict an accused of the crime of embezzlement, it is not sufficient to show that there is a shortage in his account. The evidence must prove that the accused fraudulently and feloniously converted the goods or the money laid in the indictment to his own use. *Hodge v. Republic*, 3 LLR 7 (1928).

In the case at bar, the amount alleged to have been embezzled by appellant was the face value of checks produce by him as cash on hand during his cash count, but which checks had been dishonored by the bank, as there were no accounts maintained with the bank by the payors. The evidence did not show that those worthless checks were issued by the defendant and substituted in his depository for cash or good checks. It was also not shown that any investigation was conducted by the Criminal Investigation Division or the National Bureau of Investigation when the matter was reported to those government agencies to establish the existence or nonexistence of the two companies, Lerone Bennet and Company and Die Hard Agricultural Company; neither was there any evidence adduced at the trial to show that those companies did not issue the checks or that the companies did not exist. It is clear therefore that the appellant could not be held criminally liable when such checks received by him in the line of his duty and authority to receive cash, checks and other papers in settlement of debt due LAMCO, as aforesaid, were later discovered to be worthless checks.

Embezzlement is the appropriation to one's own use and benefit of property or money entrusted to him by another in the line of his duty whilst employed for that purpose. Therefore, a conviction for embezzlement cannot be affirmed where it is shown that the money alleged to have been embezzled is in the form of checks, which are negotiable instruments issued by one, other than the accused, in settlement of his debt, and which checks were represented by the accused as cash on hand.

In criminal cases, the burden of proof is upon the State; that is, the prosecution must prove beyond a reasonable doubt the facts laid in the indictment. *Capps v. Republic*, 2 LLR 313 (1919). There is a doubt in this case which must operate in favor of appellant as to how

the amount of $82,771.67, as cumulative shortage covering the period of five years in the appellant's cash count, was arrived at when indeed the face value of the eight dishonored checks marked by the trial court as exhibits "A" to "H" and said to constitute the shortage found against the appellant by auditor Darges was $62,465.67, according to the records. What then is the source of the difference of $20,396.04? The records do not make this clear.

Auditor Darges, in attempting to prove the amount of $82,771.67, alleged that in the January 14, 1969, audit conducted by auditor Everton, covering the same period of five years, appellant could not account for eleven checks which, according to the records, amounted to $61,148.92, same being the eleven checks marked by court "A" to "K." He testified that the eleven checks disappeared in the cash count of June 1969. However, this Court observes from the records that the face value of said checks is $61,148.92. Auditor Darges also testified that it was discovered that appellant had received the amount of $20,000.00 for reimbursement of his cash, which amount was in his possession, and regarding which appellant had made no record touching the same.

If we must take auditor Darges's testimony as being true and add the value of auditor Everton's eleven checks to the eight dishonored checks, and the $20,000.00 which appellant gave no account of, the total shortage would have been $148,614.59 instead of the $82,771.67 laid in the indictment. This clearly presents a material variance between the amount testified to by this witness and the amount he claimed to have found appellant short, and which was laid in the indictment. If what auditor Darges testified to is true, why was appellant charged with embezzling $82,771.67 instead of $148,614.59? This doubt must operate in favour of the appellant (the defendant in the trial court).

If the testimony of auditor Darges, the principal witness for the prosecution, as to the various amounts totaling $148,614.59, is not true, on what basis can we hold that the appellant has embezzled $82,771.67? An accused in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt, he is entitled to an acquittal. Criminal Procedure Law, Rev. Code, 2:2.1.

This Court will confine itself to and decide upon the records on appeal before it, and will not do for a party that which he ought to have done to prove his side of the case at the trial. The evidence in this case not having shown the guilt of the appellant, it is the considered opinion of this Court that the judgment of the lower court be, and the same is hereby reversed. And it is hereby so ordered.

Judgment reversed.