JAWA E. MASSAQUOI, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 5, 1961. Decided May 19, 1961.

1. The trial court may properly deny a motion for continuance in a criminal trial where continuance is requested for the purpose of procuring the attendance of a witness but the moving party has failed to exercise diligence to procure such attendance.
2. Failure of the government to seek recovery on a bond posted to secure performance of the official duties of a revenue agent is no bar to a prosecution for embezzlement.

On appeal from a judgment of conviction of embezzlement, *judgment affirmed.*

Joseph M. Dennis and *M. M. Johnson* for appellant. *Assistant Attorney General J. Dossen Richards* for appellee.

MR. JUSTICE WARDSWORTH delivered the opinion of the Court.

The trial of the above-entitled cause was had at the August, 1959, term of the Circuit Court of the First Judicial Circuit, Montserrado County, on an indictment found against Jawa E. Massaquoi by the grand jury of Montserrado County during the August, 1958, term of the aforesaid court. The said trial ended in the conviction of the present appellant of the crime of embezzlement by the verdict of the empanelled petty jury. Final judgment was accordingly rendered. The defendant recorded exceptions to the adverse rulings and final judgment of the trial judge, and has perfected his appeal to this Court for review and final adjudication.

We glean from the records before us that the appellant was employed by the Government of Liberia and served

in several capacities, the last of which was as revenue agent at Saniquellie, District Number 2, Central Province, Liberian Hinterland. As such official, and within the scope of his employment, he received into his custody and care government revenues. Upon inspection of appellant's accounts, he was found to be short in the sum of $5,375.62, which shortage or deficit he was unable to explain or account for.

Being dissatisfied with the verdict and judgment against him in this case as aforesaid, the defendant is before this Court as appellant on a bill of exceptions containing 13 counts. We deem Counts "1," "6," "8" and "10" as being worthy of this Court's consideration for the determination of this case.

In Count "1" of the bill of exceptions the defendant complains of the trial judge denying his motion for continuance. This motion was supported by a medical certificate which, in its body, reads as follows:

> "1. That in order to facilitate his going to trial to establish his innocence of the charge of embezzlement, he ought to be in a state of physical well-being and good condition; unfortunately he does not enjoy this health condition. For defendant submits that he is greatly impaired, and that he is greatly ill, because his health is physically incapacitated and so greatly impaired that he is very much unable to withstand the least physical or mental strain, which impelled him to secure medical treatment, and may have to remain thereat for some time, as will more fully appear from hereto attached self-explanatory facsimile copy of a medical certificate. Hence the defendant craves judicial consideration to grant him a continuance until the November, 1959, term of court when it might be possible for him to recuperate his health to enable him to withstand the mental and physical strain of his public trial.

"2. And that, in order to facilitate his going to trial to establish his innocence of the charge of embezzlement, defendant set the machinery of this court in motion a week before it convened to have his material witness, J. B. Massally, subpoenaed to attend the trial; but that up to the present, the sheriff has not done so according to said subpoena; and defendant's said witness has not been found to be summoned, as will more fully appear from said subpoena now in the possession of the clerk of court or the sheriff, of which defendant prays the court to take judicial notice; hence for the defendant to be made to go to trial in the absence of his said material witness would be prejudicial to defendant's interest, and the ends of substantial justice would not have been met. Defendant therefore prays continuance of this cause to the next term of court by which time it might be possible for said witness to be summoned.

"3. And also because said witnesses are to establish beyond reasonable doubt the innocence of the defendant in support of defendant's plea of not guilty to the charge of embezzlement; hence to compel defendant to go trial in absence of such material witnesses would be materially prejudicial to defendant's interest. Defendant therefore prays continuance of this cause to the next term of this court, by which it might be possible to have said witnesses subpoenaed."

The medical certificate annexed to the above motion for continuance reads, in its body, as follows:

"This is to certify that I have examined Mr. Jawa E. Massaquoi and found him to be suffering with a very high blood pressure with heart palpitation. I recommend he should be at complete rest for about a month while under treatment.

[Sgd.] J. B. TITUS, M.D.

"August 4, 1959"

To this motion for continuance, appellee made resistance containing four counts which we quote hereunder as follows:

"1. That the motion for continuance has been filed contrary to law in that, although this case has been assigned and re-assigned for trial, the defendant in his attempt to baffle the trial of this case filed a motion on Saturday, and served a copy on Assistant Attorney General Richards at his private residence on Sunday, yesterday afternoon, notwithstanding the fact that this case was set down for trial definitely this morning.

"2. As to Count '1' of the said motion which alleges a pretended illness of defendant, same is a sham in that the defendant has been and still is going about his business in apparent good physical condition. He made profert in his motion a copy of a medical certificate purported to have been signed by J. B. Titus, M.D., although the original is not available for the inspection of the court. But be this as it may, the medical certificate dated August 4, 1959, recites that the defendant should be at complete rest for about a month. The prosecution submits that from August 4, 1959, to August 31, is about a month, less four days, so that the medical advice given the defendant has been substantially complied with; and moreover, the defendant, who pretends to be sick, supposedly had in his possession a medical certificate since August 4; yet, as late as Friday of last week, he made the court to understand that he was ready to go to trial.

"3. As to Count '2' of defendant's unmeritorious motion, the prosecution submits that it is defective in that it does not state what facts the so-called material witnesses are to prove at the trial, so as to put the court in a position to determine as to the materiality and relevancy of said testimony. The grounds set forth in Count '2' of said motion were

also submitted at the November, 1958, term of this court. And, although the defendant claims his witness to be material, it was not until Saturday of last week that he thought to put the machinery of this court in operation to secure the presence of said witnesses, and it was not until about nine o'clock of this morning that the sheriff was given the subpoena for service.

"4. Count '3' of the motion is worthless because the mere allegation that the witnesses will establish the innocence of defendant is in effect, saying nothing. Wherefore the prosecution prays that, because of what has been said and submitted, and because the sole purpose of the motion is delay, the trial be continued with."

Appellant should have surrounded his cause with the safeguards of the law, in that it was his bounden duty, at the proper time, to have obtained the necessary process to have his witnesses in court for the benefit of his case before same was assigned for hearing.

> "Witnesses for either side must be duly summoned, and evidence thereof must in every case be shown by the sheriff's returns, before the case is ready for hearing (except in criminal cases when and where a bystander might have knowledge of the matter at issue and be required to testify) ; and no postponement of the hearing will be allowed unless it can be shown to the satisfaction of the court that due diligence had been employed to secure attendance of the witness or witnesses." R. Circ. Ct. (1959) Rule 17.

It is evident that, in the motion for continuance, no reference is made to bystanders; moreover appellant made profert of a certified copy of a medical certificate in which it is recommended that appellant should be at complete rest for about a month while under treatment. This instrument was dated August 4, 1959.

As far as we can observe, there is no legal foundation for attaching the medical certificate to the motion for con-

tinuance in this case, since appellant was advised to be at complete rest for about a month as from August 4, 1959; yet he did not make known to the court his having obtained this certificate until it had expired, less a few days. It is our considered opinion that appellant's design was to baffle and delay the trial. The ruling of the trial court in denying said motion for continuance is hereby sustained.

Appellant in Count "6" of his bill of exceptions complains of the trial judge denying his motion to dismiss for want of jurisdiction. We recite hereunder the body of said motion to dismiss for want of jurisdiction:

> "Because existing statutes provide for a civil action for the recovery of any deficit of an official or employee of government charged with the collection and accountability of public funds as a prerequisite to a criminal prosecution. The embezzlement trial now being had is without legal foundation, as the plaintiff has not pursued such an authorized course as a basis; and therefore this court cannot exercise any jurisdiction over the criminal proceedings under the circumstances. Defendant submits that the plaintiff should have instituted an action for the recovery of the debt which the alleged violation of the bond, executed by the defendant, i.e., the fidelity bond, has occasioned by operation of law. Such a course not having been pursued, this court is without jurisdiction to hear and determine the case now on trial."

There is in effect on the statute books of this Republic a provision which reads as follows:

> "Upon completion of an action under the provisions of this section, and after the recovery by the Republic of all funds or other property found to be due together with costs of proceedings, the clerk of the Circuit Court where such action was brought shall refer the records of the action to the Department of Justice for information and possible criminal prosecution." 1956 Code, tit. 30, § 61.

Nowhere in the record of this case has it been shown

that appellant established the fact that he, as an employee of the government, executed and filed a bond. It is our opinion that, to make clear this fact, appellant should have applied to the trial court for a writ of *duces tecum* for the production of said bond, if he executed and filed one; or he should have obtained a certified copy thereof as evidence of the existence of a bond; and his failure to have taken the necessary legal steps to establish what he sought to bring out through testimony of the witness is laches on his part; and as a result he is estopped from raising the issue. Hence the trial judge did not err in overruling said question.

Aside from appellant having failed to do for himself that which was legally incumbent upon him to have done, that is to say to have produced the said bond as evidence that he did file such an instrument, he should not expect this Court to pass on the alleged bond without having established its existence beyond a rational doubt.

A foreclosure proceeding instituted to recover the penalty on a bond executed in favor of the government by any public officer or employee is principally for the purpose of satisfying the obligation therein stated, as well as a fact-finding proceeding incidental to a criminal prosecution; but failure to pursue a foreclosure proceeding is no bar to the institution of a criminal prosecution against the party charged, provided the facts and prevailing circumstances should warrant same.

In Count "8" of his bill of exceptions, appellant complains that his objection to a question put to a witness on the stand by the prosecution as follows:

> "Is is not a fact that you admitted to certain persons that you loaned out this money to a Syrian, and that he had gone away and left you this trouble?"

was overruled; and the grounds of appellant's objections were that the answer to this question would be incriminating and unduly cumulative.

We do not understand why the learned judge permitted

the question to be answered. Defendant having been charged with misappropriation of the government's revenues, an answer to such a question as the one under consideration would have been contrary to the following statutory provision:

> "The defendant may testify as a witness in his own behalf, in accordance with the rules governing other witnesses; provided, however, that he cannot be compelled to testify and he cannot be compelled to answer questions which may incriminate him." 1956 Code, tit. 8, § 274.

It is our opinion that the trial judge did err in overruling the objection of defendant; therefore said ruling is not sustained.

In Count "10" of appellant's bill of exceptions, he complains of the trial judge as follows:

> "And also because, on September 10, 1959, defendant then and there excepted to the charge of Your Honor to the jury."

The trial judge approved the bill of exceptions tendered by appellant in this case in the following words:

> "Approved this 28th day of September, 1959, in keeping with the minutes."

Both the appellant and the trial judge referred to the minutes of court. Upon inspecting the minutes of September 10, 1959, the day and date when the trial judge delivered his charge to the petty jury in this case, it is revealed that appellant failed to enter an exception to the said charge as contended in Count "10" of his said bill of exceptions now under review.

> "When an instruction to the jury embodies several propositions of law, to some of which there are no objections, the party objecting must point out specifically the part to which he objects, in order to avail himself of the objection." BOUVIER, LAW DICTIONARY *Charge* (Rawle's 3rd Rev. 1914).

It is obvious that the appellant failed to enter his excep-

tions to the charge before the jury retired, as the law directs. As a result, this court is powerless to pass upon the merits of appellant's complaint against the trial judge as raised in the above-mentioned Count "10" of the bill of exceptions. (See 1956 Code, tit. 6, § 627.)

We will now refer to the evidence in this case, so as to get a clear picture of the surrounding circumstances. Witness Karpeh testified, in part, as follows:

> "In May, 1958, I had instructions from the Supervisor of Revenues, Mr. E. B. McClain, to proceed to Saniquellie and there conduct an exhaustive inspection and audit of the Saniquellie Revenue Agency. Prior to my receiving this instruction, the Bureau, through its Account Section, had discovered that the financial reports of the Saniquellie Agency for February, 1958, had not been received. Accordingly, letters were then directed to Mr. Jawa E. Massaquoi, the Revenue Agent at Saniquellie; but no satisfactory reply had been received. An inspection and audit of the agency by me, according to the document signed by defendant which I now hold, revealed a deficit in the sum of $5,510.12. Defendant then called my attention to certain miscellaneous payments that had been made for which he could show no supporting papers. I assured him that the necessary adjustment would be made in that account upon my returning to Monrovia and getting the confirmation of the bureau. That being done, the deficit was accordingly adjusted, and now shows the figure $5,375.62.
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> "Q. Please say, if you can recall, whether or not, after the inspection and audit was had by you, defendant made any explanation or statement as regards the deficit.
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> "A. Other than acknowledging the shortage, he made no explanation."

The second witness to take the stand for the prosecution was E. B. McClain, who testified as follows:

"Some time towards the end of April, 1958, the Account Section of the Bureau of Internal Revenue brought to my attention that Revenue Agent Massaquoi, serving at Saniquellie, had transmitted receipts issued during the month of February, 1958, but had not sent along statements as to classification of the revenues which he had collected, nor any indication as to whether he had sent down the revenue collections. I at once addressed a letter to Revenue Agent Massaquoi, informing him to forward a full statement. I also queried him as to why the February report was so late, when it was then time to prepare the April report. I received no reply. About three weeks later, when I had to go down to Cape Palmas, I left instructions with the assistant supervisor to send an inspector to Saniquellie to find out what could be the cause for the delay, because meanwhile, Revenue Agent Massaquoi had sent his April report without any mention as to the whereabouts of the money of the February report. The inspector who was assigned to to the auditing at Saniquellie said Massaquoi could not produce the amount of over $5,300 which he had collected during the month of February, 1958. I had returned to Monrovia from Cape Palmas, and further instructed the Inspector to make a field survey of the Saniquellie account, and thereafter to make a full report. He did so; and when he confirmed that Revenue Agent Massaquoi had notified him of the shortage reported by the Inspector, Mr. Massaquoi was suspended from office and notified that, unless he refunded the amount in deficit immediately, it would be necessary to dismiss him and forward the matter to the Department of Justice for prosecution."

Appellant, after having deposed in his own behalf, as defendant below, made answer to the following questions on cross-examination:

"Q. Your lawyer, Counsellor Michael Johnson, in out-

lining the theory of your defense to the jury and speaking as your agent, said that you are not saying that the money did not get out of your hand. Will you please tell us where did this government revenue go after it got out of your hand?

"A. I already said that the money was missing, and I have not up to this time discovered who took the money.

"Q. Now, Mr. Witness, you want to impress this court and jury that you have $5,000 and odd dollars of Government revenue in your custody; it was stolen; and you did not break breath of the news to the commissioner at Saniquellie nor any of the officials of the revenue so that some effort might have been put forth to apprehend the alleged thief?

"A. I made this court to understand the reason why I did so; the reason I did not report. This is in my general statement.

"Q. As a revenue official, tell this court and jury who is responsible for amounts of revenues collected by revenue agents, such as you were at the time, as to give accountability of amount collected by you?

"A. I am responsible as revenue agent."

Having made a survey of the evidence adduced at the trial, including that given by the defendant in his own behalf, we cannot but conclude that the failure of appellant to report the alleged loss sustained by theft of Government revenues in his custody, especially in such a large sum, does appear to be unreasonable and inconsistent with the usual trend of business. Why should anyone in the employ of the Government conceal the entry of a thief who unlawfully takes and carries away, without the knowledge, will or consent of the owner, personal property, cash or goods?

We cannot bring ourselves to believe that appellant pre-

ferred criminal prosecution rather than to have, in due time, reported the alleged incident, even to the commissioner in whose jurisdiction he was operating, who might have buttressed his allegation that the revenues subject to this prosecution, were indeed stolen. We recite hereunder the statutory definition of the crime of embezzlement, which expressly applies to any person who:

> "(a) While employed by another and by virtue of such employment, received and takes into his custody money or other articles of value, and intentionally, fraudulently and feloniously converts them to his own use; or
>
> "(b) Whether for reward or not, receives money or other articles of value to deliver to another, and during the continuance of the bailment intentionally, fraudulently and feloniously converts the whole or any part thereof, to his own use...." 1956 Code, tit. 27, § 299.

Appellant in the case at bar having failed to account for the shortage discovered in his account in keeping with documentary evidence signed by the said appellant, this Court is of the opinion that the said appellant is guilty of embezzlement. In view of the foregoing, the judgment of the trial court is hereby affirmed; and it is so ordered.

Affirmed.