BORSAY NYUMO, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT, BONG COUNTY.

Argued April 14 and 15, 1975. Decided May 2, 1975.

1. Witnesses may testify only to facts within their knowledge, except for expert witnesses who may testify as to their opinion on subjects within their expertise.
2. A witness who refuses to answer without excuse shall be deemed guilty of contempt of court.
3. A witness on cross-examination may be compelled to answer questions relating to his interest in the case, his motives, his inclinations, his prejudices, the manner in which the facts testified to by him were obtained and his use thereof.
4. Counsel may not lead his witness, although he may lead those of his adversary.
5. Generally, copies of writings are not admissible.
6. A request for the recall of a witness after presentation of testimony is addressed to the sound discretion of the judge presiding.
7. It is the exclusive province of the court to determine all questions of law arising in the course of a case and its conclusion prior to verdict, and it is the equally exclusive province of the jury to determine all questions of fact in the case.
8. For a verdict of guilt to be sustained, the evidence must be found to have established guilt beyond a reasonable doubt.
9. Generally, the burden of proof always rests upon him who maintains the affirmative.
10. As a general rule the mere failure of a fiduciary to pay over or return money is not, standing alone, sufficient to constitute the crime of embezzlement.
11. The Supreme Court cannot be expected to affirm a judgment of conviction against any person charged unless the evidence adduced is sufficient to satisfy the minds and consciences of the Justices that the accused was correctly charged and the evidence satisfactorily proved him guilty of the offense charged.
12. It is the mission of the Supreme Court to mete out justice to all alike, irrespective of race, color, nationality, tribe, or accident of social or political standing.

The appellant was charged with embezzlement of funds, indicted, tried, and convicted by a jury. The principal contention raised by him before the Supreme

Court in his appeal from the judgment, was an insufficiency of evidence to sustain the verdict of guilt.

The Supreme Court carefully examined the evidence and found a clear failure by the prosecution in establishing the guilt of the appellant. Therefore, the judgment was *reversed* and the appellant *discharged* without day from further answering the charge of embezzlement.

S. Benoni Dunbar for appellant. *Jesse Banks,* of the Ministry of Justice, for appellee.

MR. JUSTICE AZANGO delivered the opinion of the Court.

Appellant was charged, tried, and convicted of the crime of embezzlement in the Ninth Judicial Circuit, Bong County, during the February 1973 Term. He was sentenced to three months' imprisonment and ordered to make restitution in the amount of $4,697.35, and was fined $50.00 in addition. Appellant has appealed to this Court on a twenty-count bill of exceptions, ten of which we shall consider in order of importance, the rest being only procedural in nature. The counts to be considered are: 6, 8, 9, 10, 12, 13, 16, 17, 18, 19, and 20.

In count 6 of the bill of exceptions, appellant has taken exception to an overruled objection.

> "And also because on the 21st day of September, 1973, sheet four (4), the following question was put on direct, to prosecution's witness, Moses Freeman: 'Mr. Witness, when the defendant, Mr. Nyumo, was confronted with the shortage as reflected by the audit of his account as clerk-cashier, PUA, Gbarnga, what was his response or reaction, if you can recall?' To which defense objected on the ground of call for an opinion, which objection was not sustained."

While arguing this count of the bill of exceptions before us, appellant's counsel relied on the principle of law

which holds that witnesses may testify only to facts within their knowledge, except for expert witnesses who may testify as to their opinion on subjects concerning which they are qualified as experts. *Ammons* v. *Republic,* 12 LLR, 360 (1956). We cannot accept the applicability of this principle to the given question for, as we do understand it, the prosecution's only desire was to know from the witness whether or not appellant had accepted the results of the audit or expressed reservations.

It is well settled that the party who produces a witness, as in the instant case by the prosecution, has a right to elicit by questions any fact which the witness omitted to mention in his general statement before the cross-examination by the other party commences. *Cummings* v. *Republic,* 4 LLR 16 (1934). And more articulately it is stated in *Johnson* v. *Republic,* 15 LLR 88 (1962), a case involving embezzlement, where the Court ruled that a party producing a witness has a right to elicit by questions on direct examination, at any time before commencement of the cross-examination, any facts relevant and material to the issues, and not excluded by rules of evidence.

Count 6 of the bill of exceptions is, therefore, not sustained.

Count 8 of the bill of exceptions also involved a question and the court's sustaining an objection to it by the prosecution.

> "And also because on the 21st day of September, 1973, the following question was put on cross-examination to prosecution witness Moses Freeman, 'Mr. Witness, is it not a fact that when Mr. Nyumo took over the office as clerk-cashier, you handed him a receipt book 717/749 partly used, and not the triplicate because you had been doing this personally and Mr. Nyumo took the book, but before starting to complete it, he reported the matter to the accountant, Mr. Brown

who told Mr. Nyumo that he should obey his boss. Is this correct?' To which prosecution objected on the grounds: incriminating and hypothetical for the purpose of entrapping the witness, which objections of the prosecution were sustained. To which defense excepted."

In supporting the position of the trial judge the prosecution argued that according to Article I, Section 7th, of the Liberian Constitution, no person shall be compelled to furnish or give evidence against himself. The constitutional provision seems quite clear. But in the instant case Moses Freeman, who was being cross-examined by defendant, was not being tried as a defendant.

"A witness may be compelled to answer every question which is asked him at the trial or at the time of taking a deposition unless he claims his constitutional right not to be compelled to give evidence against himself or a special exemption granted by law or unless he is the confidential agent of one of the parties in the case and the question is one which the party himself could not be compelled to answer and about which the witness has no knowledge except that derived from the confidential communication of the party. A witness who refuses to answer without excuse shall be deemed guilty of contempt of court." Rev. Code 1:25.20.

The provision of the statutes also applies to witnesses for a party, and it is such witnesses who shall be compelled to answer every question unless they come within the exception permitted by the section quoted. We take the view that the law relied upon by the trial judge and the prosecution was absolutely inapplicable. He, therefore, erred. The cross-examiner is entitled as a matter of right to test the witness' interest, his motives, his inclinations and prejudices, his means of obtaining the correct and certain knowledge of the facts to which he bears

testimony and the manner in which he has used those means. *Bryant* v. *Bryant*, 4 LLR 328 (1935).

Count 8 of the bill of exceptions is, therefore, not sustained.

Count 9 of the bill of exceptions involves another objection to a question.

> "And also because on the 26th day of September, 1973, the following question was put on direct to prosecution's own witness Joseph Eid; 'The Republic of Liberia has charged the defendant with the crime of embezzlement in the amount of $4,597.35, which was received by him in his capacity of clerk-cashier for PUA, Gbarnga; in statements made by witness Thomas Brown, PUA accountant auditor, and Mr. Moses Freeman, mention was made of certain irregularities committed by the defendant in the receipt and disbursement of PUA funds. Please tell this court and the jury all you know surrounding this embezzlement charge for which the defendant is on trial.' To which defense objected on the grounds: instructive and assuming a fact not proven, which objections were overruled. To which defendant then and there excepted."

In appellee's brief it is conceded that the question put to Joseph Eid may have been instructive, but it is contended that inasmuch as it did not work any prejudice against defendant's case, the trial judge did not err when he overruled the objections; and that the admission of all evidence rests within the sound discretion of the trial court, and this exercise of judicial discretion will not normally be set aside by the appellate court unless it is used to work harm or prejudice against the defendant.

Addressing ourselves to this issue, the Court relies upon authority as indicated.

> "Generally, leading questions, those questions which suggest to the witness further facts about which to testify, are not permissible on the direct examination. A

question is not leading because it may be answered 'yes' or 'no' or because it may include something of detail, unless so specific as to suggest the answer or so framed so as to permit affirmative or negative answers. The test of a leading question is whether it suggests the answer thereto by putting into the mind of the witness the words or thought of such answer. Merely directing the attention of the witness to the subject-matter of the inquiry is not suggestive or leading in any proper sense." 3 WHARTON, *Criminal Evidence,* § 1269.

"The rule prohibiting leading questions in the examination in chief is to be liberally construed; and while as a rule leading questions are excluded, exceptions are recognized . . . where such a mode of questioning is logically consistent with a fair and honest development as to matters preliminary to the material evidence in the case, and questions merely introductory to others that are material are, in general, allowed to be asked in direct terms without objections." *Id.,* § 1270.

The questioner on direct examination requested his witness to tell the court and jury all he knew surrounding the embezzlement charge for which the defendant was on trial. The question not having suggested what answer to give, it is our opinion that the judge did not err in overruling it. On the second point of objection, assuming a fact not proven, we perceive in no wise by this question that the examiner based his question on a fact not established. The examiner merely stated some of the material averments of the indictment, as well as statements made by witnesses Brown and Freeman. We are, therefore, of the opinion that the judge did not err in overruling the objection on the two grounds mentioned.

Count 10 of the bill of exceptions relates to a question also.

"On the 26th day of September, 1973, the following

question was put on cross-examination to prosecution witness Joseph Eid: 'Mr. Witness, upon your oath, are you saying that the sum of $309.00 received by the defendant as well as $98.95 were embezzled; that is, converted to defendant's own use and benefit?' To which prosecution objected on the grounds: not the best evidence and assuming a fact not proven. But the court on its own motion disallowed the question on the ground of 'invading the province of the jury.' "

Because we are in complete agreement with the ruling of the trial judge we deem it unnecessary to detail our position. It is an established principle of law that the functions of the court and jury are distinct and each is supreme in its own domain. It is the exclusive province of the court to determine all questions of law arising in the progress of the trial of the case, and it is the equally exclusive province of the jury to determine all questions of fact in the case. In our opinion to seek an answer from the question posed in the bill, certainly invaded the province of the jury who was to say whether or not defendant embezzled the amount charged in the indictment after production of all evidence in his case. Count 10 of the bill of exceptions is, therefore, not sustained.

A question is again the subject in count 12 of the bill of exceptions.

"And also because on the 27th day of September, 1973, the following question was put on direct to prosecution witness K. K. Hassoun, 'The Republic of Liberia has charged the defendant in the dock, Mr. Nyumo with the crime of embezzlement for having misappropriated the sum of four thousand odd dollars, while serving in the capacity as clerk-cashier, PUA, Gbarnga, Bong County. If you have any knowledge or facts within your memory pertaining to said charge, will you please tell the court and jury?' To which defense objected on the grounds: leading and instructive and assuming a fact not proven, which

objections the court overruled. To which defense then and there excepted."

As we earlier commented in count 9 of the bill of exceptions, we are of the opinion that the reasons given therein are applicable to this count of the bill of exceptions with some additions:

According to authority, the general rule is that upon the examination of a witness in chief, the examining attorney is not to ask leading questions. A party must not lead his own witnesses, although he may lead those of his adversary. Leading questions should generally be confined to cross-examination, and excluded in examinations in chief. It has been held that the rule is as stringent in the case of impeaching witnesses as it is respecting other witnesses.

Further, leading questions may be defined as those which suggest to the witness the answer desired, or which assume to prove a fact which is not proved, or which, embodying a material fact, admit of an answer by a simple negative or affirmative. Putting a question in the alternative does not necessarily relieve it of the objectionable character of being leading. Questions to which an answer of yes or no would be conclusive of the matter in issue are not necessarily leading, for where the question calls for a direct affirmative or negative answer, and is no more suggestive of one than the other, it is not open to that objection. On the other hand, a leading question is not always capable of being fully answered by yes or no, for although not answerable by either of those monosyllables, it is leading if it suggests the response which the questioner desires. Questions intended to call attention to subjects about which testimony is desired, and not in themselves suggesting the answer expected, are not objectionable as leading. On the contrary, the allowance of leading questions on direct examination is within the discretion of the trial judge. As to the question put by the prosecution to his witness, we hold that inasmuch as it

had not suggested to the witness what desired answer to give, it is not a leading question. The trial judge did not, therefore, err in overruling the objections.

We now turn to count 13 of the bill of exceptions.

> "And also because on the 28th day of September 1973, prosecution rested oral testimony and offered as written evidence both written and demonstrative evidence, marked and confirmed by court 'A' to 'F' inclusive. To which defense interposed legal objections. The court in ruling only excluded documents; that is, two letters, January 22 and 29, 1973, from being admitted into evidence; but ruled the admissibility of the rest of the documents marked and confirmed by court into evidence. To which defendant then and there excepted."

Under our Civil Procedure Law a copy of a writing is not admissible as evidence unless the original is proved to be lost or destroyed or to be in the possession of the opposite party who has received notice to produce it or unless it is a copy of some public record or a document proved as provided in section 25.10 of this chapter. Rev. Code 1:25.6(2). Also this Court has continued to hold that all documentary evidence which is material to issues of fact raised in the pleadings and which is received and marked by the court should be presented to the jury. *Walker* v. *Morris,* 15 LLR 424 (1963). Those documents marked by the court "A" to "F," having been identified before and not after admission, were admissible into evidence in keeping with the section cited *supra.* If the documents dated January 22 and 29, 1973, respectively, were marked by the court for identification, it is our view that the trial judge erred in excluding them from being presented to the jury.

Count 17 of the bill of exceptions is now before us for consideration.

> "And also because on the 3rd day of October, 1973, the announcement was made to court by prosecution, to the effect that they desire the recall of witnesses

Moses Freeman and Thomas Brown to clarify the mind of the court and jury on the question of the amount received from the defendant on unofficial receipts and also the check that was supposed to have been credited by Mr. Freeman from defendant for the purchase of a Volkswagon car. To which defense resisted on the grounds: that under the principle of law for the recall of a witness, notice must be given (sufficient) by the party applying. Defendant contends that in the instant case, prosecution has failed and neglected to enjoy this privilege under the laws extant in this jurisdiction, which resistance the court *sua sponte* overruled. To which the defense then and there excepted."

It is within the discretion of the trial court to allow the recall of a witness for further examination, before the case is submitted to the jury. *Scott* v. *Republic,* 1 LLR 430 (1904). However, this Court has held that notice is required as a prerequisite to the recall of a witness to the stand; and after both parties have concluded presentation of testimony and rested thereupon, the court, in the exercise of sound discretion, may properly deny an application to recall a witness to the stand. *Hill* v. *Parker,* 13 LLR 556 (1960).

In the instant case, on October 3, 1973, the prosecution requested the court to recall witnesses Moses Freeman and Thomas Brown for the purpose of clarifying the minds of the court and jury on the question of the amount received from the defendant on unofficial receipts, as well as the amount on the check that was supposed to have been credited by witness Moses Freeman for the purchase of a Volkswagon.

It is our opinion, therefore, that the trial judge did not err in granting the application. Count 17 of the bill of exceptions is not sustained.

In Count 18 of the bill of exceptions, appellant contends that,

"On the 4th day of October, 1973, defense objected to the charge of the judge to the empanelled jury, with particular reference to:

"1. That portion which states that receipts paid by the defendant in settling the bills of Mr. Freeman with the Lebanese traders in the sum of $791.41, were not corroborated.

"2. That corroboration is mandatorily essential to acquittal of the accused and not the specie of the evidence adduced at the trial.

"3. That portion stating that defendant failed in his testimony to account for the alleged shortage.

"4. No comments or explanation made on the request of defendant as to the lumping of valuation in the indictment.

"5. No comments made on the receipt book in the sum of $805.53, which was not credited to the defendant's account.

"6. No mention made of the sum of $2,736.78 not being credited to defendant.

"7. And lastly, the sum of $1,055.70, also not being credited to defendant, making a grand total of $5,892.03 not credited to defendant."

We find it necessary to turn to our Criminal Procedure Law.

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court shall instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The court shall instruct the jury on every issue of law arising out of the facts even though no requests to charge thereon have been submitted by counsel. The

court shall instruct the jury in writing if requested and may give its instructions in writing on its own motion. No party may assign as error all or any portion of the charge or any omission therefrom unless he excepts thereto before the jury retires to consider its verdict." Rev. Code 2:20.8(1).

It appears that the section was not fully complied with *in extenso,* even though the prosecution has contended that the trial judge did not commit reversible error when he charged the jury in the manner he did with particular reference to (a) that portion of the charge stating that receipts paid by the defendant in settling the bill of Mr. Freeman with Lebanese traders in the sum of $791.51, were not corroborated; and (b) that portion of the charge stating that the defendant had failed in his testimony to account for the alleged shortage. However, judges should be reminded that the function of a charge to a jury is: first, to explain the issues; second, to notice the positions taken by the parties and suggest, as far as the case may require, the rules of evidence and their application therein; and third, to declare what rule or rules of law are applicable to any state of facts which may be found. In other words, the object sought is enlightenment of the jury; and nothing should be given in way of instruction that does not promote the object. It is the purpose of instructions to direct the conduct of the jurors in the controversy which they are called upon to decide, rather than for a judge to arrive at a conclusion of the matter or to declare what are the failures and successes of either party in the case, or to declare a verdict. We feel this is the responsibility of the jurors who are the sole judges of the facts.

The functions of the court and jury are distinct, and each is supreme in its own domain. It is the exclusive province of the court to determine all questions of law arising in the progress of the case, and upon the whole case after evidence and argument, and it is the equally

exclusive province of the jury to determine all questions of fact in the case. Hence, an instruction or a charge which takes away from the jury a matter within its exclusive province amounts to an invasion and is erroneous. Presumptions of fact are for the jury alone, and a court goes beyond its powers where it charges or instructs as to what inferences are to be drawn from the evidence. In criminal cases the jurors are the sole judges of questions of fact and the weight and sufficiency of the evidence to support the allegations of the indictment or information. So that, in our opinion, for the trial judge to have charged the jurors that defendant in settling the bill of Moses Freeman with the Lebanese traders in the sum of $791.41, was not corroborated, and that the defendant had failed in his testimony to account for the alleged shortage, was invading the province of the jury, and therefore, erroneous.

In counts 19 and 20 of the bill of exceptions, appellant has also contended (a) that on October 4, 1973, the jurors after deliberating for about twenty minutes, returned with a verdict of guilt. To which verdict he then and there excepted and gave notice that he would file a motion for a new trial. He also excepted to the fact that the verdict was corrected in open court. And (b) that on October 5, 1973, the defense withdrew its announcement of filing a motion for a new trial, whereupon the judge proceeded to render final judgment, confirming the verdict of the jury and sentencing the defendant to imprisonment in the common jail, Gbarnga, Bong County, for a term of three months, a fine of $50.00, and restitution of the amount embezzled in the sum of $4,697.35. To which judgment appellant excepted and prayed for an appeal, as aforesaid.

This Court has consistently held that the evidence sifted in a case should satisfactorily establish the guilt of the accused beyond a reasonable doubt. *Lewis* v. *Republic,*

5 LLR 358 (1937); *Dunn* v. *Republic,* 1 LLR 401 (1903). As it has also held that a verdict to be valid must be in conformity with the facts submitted and the legal instructions of the court. *Birch* v. *Quinn,* 1 LLR 309 (1897). This Court has long taken the position that the *onus probandi* or burden of proof, always rests upon him who maintains the affirmative, except under certain circumstances. *Hance* v. *Republic,* 3 LLR 161 (1930).

The law generally sanctions many defenses in the administration of justice in order that persons charged with crime may not be unjustly convicted. Hence, the fraudulent conversion essential to the crime of embezzlement consists of an appropriation by the embezzler to his own personal use of the money embezzled, or the placing of it to some use other than the purpose for which it was received, or the failure to account for and pay over the money on proper and lawful demand, and that as a general rule the mere failure or neglect of an agent, trustee, officer, or other person standing in a fiduciary capacity to pay over or return money entrusted to him is not, standing alone, sufficient to constitute the crime of embezzlement, since there may be losses and failure to pay, or even to account, where the failure is due to misfortune or other cause not criminal. We felt it our duty to read the entire record in this case commencing with September 14, 1973, up to and including October 4, 1973, with great care so as to determine whether or not there is any support for the contentions raised in counts 19 and 20 of the bill of exceptions. This having been done, we have observed the following: (a) Even though defendant introduced into evidence things calculated to explain the PUA transaction in connection with the charge, so as to enable the jury to view the issues fairly in order to arrive at a just verdict, it did not. Example, no consideration was given to the deprivation of the appellant's right by PUA authorities to re-audit his account when a demand

was made of it to do so by letter, which has been set forth below.

"January 23, 1973

"Dear Honourable Major:

"Through this instrument, I have the honor most respectfully to submit to you a protest filed against the recent audit conducted by Messrs. E. Thomas Browne and Daniel E. Milton at the Gbarnga PUA System for following reasons to wit:

"(1) that before the audit my receipt file got missing in the office which Mr. Moses Freeman, the Station Superintendent holds the key, which I also reported but they paid no attention to me. In that, they did not do anything about it until they audited us and declared a shortage of about $4,500.00, and after they had gone Mr. Freeman collected some of the office records and burnt them in a night outside of the office which PUA Driver Frank Myers was around.

"(2) that the Outstation Manager only asked me to stop working and left Mr. Freeman on the job when we both are charged for the shortage. Which act I would consider as being unfair to me in its nature, especially for me who is bonded for $10,000.00.

"(3) that all the employees of the Gbarnga Power Station do not pay light bills and yet Mr. Freeman disconnected by electricity after the auditing for payment of bills leaving out his own house, his girl friend's house, his Holyground (the Church of the Lord) who pray for him, his friend Mr. S. Boniface Nat, who do not even have accounts with the Management together with those of overdue customers who do not care to pay bills for reasons best known to him.

"(4) that I signed the auditor's report under duress as I was threatened to be arrested by Police hadn't Mr. Browne been present to convene Mr. Milton, who wanted me to be arrested.

"In view of the foregoing, I am respectfully re-

questing that you please use the influence of your good offices to audit the office (Station) from the time Mr. Freeman took over as Superintendent from Mr. Logan up to the present and in the meanwhile the two of us either work or stop until the auditing is done.

"I have the honor to be,

"Respectfully yours,
"[Sgd] K. F. BORSAY NYUMO,
Clerk-Cashier."

This was an arbitrary denial of defendant's rights by a subterfuge of the court and the jury. Had appellant's account been re-audited perhaps appellee would have been in a position to know the exact shortage, its unaccountability, and to make a demand for payment. (b) Why were not Freeman and defendant charged and indicted jointly for the alleged shortage, since Brown's audit showed that they were short; and why did Taylor Major refuse to testify, even though he was subpoenaed upon a writ of *duces tecum* to do so? (c) Even though appellant was charged with having converted to his own use and benefit the amount of $4,597.00, yet the evidence showed that he should have been credited in the amount of $5,892.41, far over and above the sum allegedly embezzled by appellant, of which $2,736.00 was admitted by the prosecution during the trial in the court below when he requested the trial court in writing to credit the amounts listed on the temporary receipts to the defendant's account, because it was shown that said amount was not in fact embezzled, but it was ignored by the court. (d) On the accountability of the balance due, we shall quote testimony by Thomas Brown at the trial upon being recalled as a witness by the state.

"Q. Mr. Witness, during the testimony of defendant Borsay Nyumo, he contends that certain amount of money received from him on unofficial receipt was not credited to his account during the audit. Please, for the benefit of the court and

jury, say whether you have come across any document to clarify this serious contention of the defendant.

"A. After Mr. Nyumo, the defendant, had left the stand and put on record certain unofficial receipts given to him by Mr. Freeman and PUA Supt. and were introduced into evidence and after the recess of the court, I called Mr. Freeman into office here in Gbarnga and asked him why it was necessary for him to give the defendant, Mr. Nyumo, unofficial receipts and if he did was there a daily cash summary made for same, if not if he could tell me what he did with the amount; I further asked him whether he too had copies of these unofficial receipts, he answered, yes. Thereupon he went to the safe, opened it and brought out copies of some receipts signed by defendant attached thereto. All receipts were handwritten; receipt for the amount of $2,100.87, representing checks carried to Monrovia by Mr. Freeman and deposited with the PUA revenue, which receipts for the same I have requested our central office to send to me. Central office sent me three deposit slips amounting to $2,100.97, under signature of the Chief Cashier, Monrovia. I now discover that at the time of my audit, Mr. Freeman never brought to me either the unofficial receipts or the attached receipts from me or daily cash sheet, therefore the amount of $2,100.97 was never credited to the defendant.

"Q. I hand you this instrument, please take it and say what you take it to be.

"A. These are three copies of deposits in the bank of Monrovia for PUA; attached thereto is a receipt signed by the chief of Monrovia crediting our Gbarnga Office which is known accounting

wise as 184.13, for the total sum of two thousand no hundred and ten dollars and ninety some cents ($2,010.90).

"Q. Mr. witness, it was also brought in evidence by defendant that the check of $337.16 was issued to PUA by the Methodist Mission of Gbarnga and that Mr. Freeman credited this amount to purchase Volkswagon, please take this check and say whether or not the deposit was made in the PUA account?

"A. The check number 003460 issued on April 30, 1972, to PUA from the United Methodist Mission in Gbarnga, which states April bill for the amount of $337.16, was regularly reported by our Gbarnga Office on a regularly daily cash report and the check properly checked in Monrovia by the accountant stamp which says, Public Utility Authority, Gbarnga Power Station, and the chief cashier's stamp which says, for deposit only, Public Utility Authority operating account, power division. This is the only endorsement for all public utility checks.

"Prosecution rests with this witness."

On cross-examination:

"Q. Mr. Witness, you have been recalled by the prosecution to refresh your memory as to whether you intentionally or not omitted to credit the defendant with certain amounts when you made the alleged audit of the PUA, Gbarnga Station . . . identified some receipts which accordingly aggregate two thousand ten dollars and ninety seven cents as well as the check in the amount of $337.16; perusing the receipts we observed the total amount appearing thereon of Oct. 27, and 28, 1972, respectively, aggregate to $4,101.94, instead of the figure you mentioned; so we are to understand that instead of two thousand and ten

dollars ninety seven cents, it should have been $4,101.94, that you did not credit defendant with?

"A. The figure which made up these deposits are as follows: Sheet one, six checks totaling $1,057.73, the second deposit slip for nine checks, totaling $613.78, the third deposit slip also for nine checks, totaling $227.26; attached to the three deposit slips is a receipt to the station which is identified on 184.13 which means PUA Gbarnga; attached to the deposit slip is receipt from the chief cashier crediting our Gbarnga Station with the deposit counted on the three clips and not four thousand odd dollars.

"Q. We observed in your answer that you mentioned $337.16, as not having been credited the defendant, please say if this amount includes the amount of the check together with the two thousand dollars and ninety seven cents.

"A. The amount, I think it is misquotation on that sheet, with reference to this check, I stated that it was properly recorded and the defendant credited; this was in May, 1972, and have no bearing on the PUA audit.

"Q. Mr. Witness, please harmonize the answer you gave in a question propounded by the court as to whether the $337.16, the amount of the check . . . just referred to was reflected in your audit, finding the defendant short and your answer, I quote 'the amount of $337.16 which was paid by check by the Methodist Mission to PUA in Gbarnga was not included in my audit,' now your answer is that the $337.16 was credited the defendant.

"A. I stated that the amount of $337.16 covered by a check for the Methodist Mission bearing April bill under date of April 30, 1972, was regularly

received on the correct daily cash form, and at that time the defendant was credited and now I said that the check in question did not form part of my audit transaction . . . closed in May 1972."

What is most disturbing is that while Brown was undergoing cross-examination on the unaccountability of the balance due, he declared clearly and positively that "there was no shortage of December, 1972 to January, 1973," even though the indictment charged the commission of the criminal act to have been between September 1, 1972, up to and including January 18, 1973. It is clear that the testimony of Brown has not supported the indictment in this respect. The following testimony by the same witness further highlights the matter.

"Q. You mentioned in your statement in chief that the station Superintendent of PUA Gbarnga telephoned Mr. Milton to the effect that clerk-cashier Mr. Nyumo was not preparing daily cash reports and turning over collections; tell us then if your alleged audit reflecting daily cash report in the sum of $1,559.70, which was prepared by the clerk-cashier, the defendant, and certified by the Superintendent of PUA Gbarnga, cover the months of December, 1971, and January, 1972.

"A. It is true that all collections for the period of December 1 to December 31, 1972, and from January 1 to 18, 1973, daily cash summary were prepared and amount received therefrom deposited except for the receipts which I mentioned earlier that the clerk has said he cancelled and several alterations; you will also note on my shortage sheet that there is no figure of any shortage of December 1972 to January, 1973.

"Q. Then, Mr. Witness, could you explain what document you consider as daily cash report issue

commencing December 8, 1972, up to January 17, 1973, by Mr. Nyumo and certified by you as true and correct in the sum of $1,559.70?

"A. Yes. According to my testimony that the shortage of Mr. Nyumo for the following period of the months of September, October and November 1972; December and January deposits were made regularly. Therefore, I certified the report. December and January not part of it."

When asked on what date he submitted his report, he replied "on January 22, 1973," and that based upon said report the appellant was charged and indicted for embezzlement of $4,697.35. He also stated that the $337.16 from the Methodist Mission was not included in his daily cash report. He also gave as the reason for issuing receipts for $2,736.78 that defendant refused to make his daily cash report and he wanted money to send to Monrovia, as well as to pay some employees their travel allowance. However, he later refused to produce them for audit, because they were not presented at the time of the audit.

The record shows that no witness was introduced at the trial to clearly testify to the averments in the indictment, but all such proof offered was collateral. That the indictment must be proved as charged, is a principle as old as the Republic, and any deviation therefrom is a legal travesty. Furthermore, it is well established that the burden of proof to establish the affirmative of an issue involved in an action rests upon the party alleging the facts constituting that issue, and remains there until the end.

It is one of the first principles of justice not to presume that a person has acted illegally until the contrary is proved. The Supreme Court cannot be expected to affirm a judgment of conviction against any person charged unless the evidence adduced is sufficient to satisfy the minds and consciences of the Justices that the accused was cor-

rectly charged and the evidence satisfactorily proved him guilty of the offense charged. *Harmon* v. *Republic,* 6 LLR 308 (1938). It is the mission of this Court to mete out to all alike justice, irrespective of race, color, nationality, tribe, or accident of social or political standing.

To affirm a judgment, this Court has insisted that it must be supported by the evidence presented at a fair trial. By it we mean evidence that is not confined to oral testimony and statements made by witnesses alone, but all other as well.

This Court has held, and continues to hold, that proof is the perfection of evidence; for without evidence there is no proof, although there may be evidence which does not amount to proof. *John* v. *Republic,* 7 LLR 261 (1941). A judgment of conviction in a criminal case must be supported by proof of all the necessary elements of the crime charged beyond every hypothesis and a rational doubt. Fraud as one of the essential elements of embezzlement should have sufficiently been stated and proven at the trial. We take the view that defendant should have been afforded every opportunity to account for whatever money that may have come into his possession and his failure to account for it.

Having carefully examined the evidence produced at the trial in the court below by the prosecution, we have not discerned such evidence as could have warranted the jury in arriving at the conclusion of guilt, confirmed by the court in its final judgment. The said judgment is, therefore, reversed and the defendant ordered discharged without day from further answering the charge of embezzlement.

The Clerk of this Court is hereby ordered to send a mandate to the court below informing it of this judgment. And it is so ordered.

Reversed.