JACOB S. TOE, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, MARYLAND COUNTY.

Argued March 29, 1967. Decided June 16, 1967.

1. Motions based on defects in the institution of prosecution in criminal cases, or in the indictment, must be made before trial, or they are deemed waived by the defense.
2. But motions in arrest of judgment based on failure of the indictment to show jurisdiction in the court, or to charge a crime, conceding the facts to be as alleged, may be made at any time before final judgment.
3. Motions in arrest of judgment will not be entertained by the Supreme Court when they allege particular defects in the indictment, and are not based upon demurrer.
4. A motion in arrest of judgment will be denied when a defendant has been convicted of a lesser offense under an indictment charging a greater offense, where such indictment contains allegations essential to constitute a charge of the lesser offense.
5. An agent appropriating to his own use articles of value accepted by him in lieu of money he was to have collected for his principal, is guilty of embezzlement, the cash equivalent of the articles converted by him being the amount charged against him.

The defendant was charged with embezzlement in his capacity as a revenue agent. It appeared that in some cases he accepted property in lieu of cash, which he withheld. The indictment charged a greater sum to the defendant than the prosecution established at the trial. He was found guilty by a jury, as charged. He appealed from the judgment entered against him. *Judgment affirmed,* modified in that restitution was ordered in the amount proved embezzled.

David A. T. Browne for appellant. *Solicitor General Nelson W. Broderick* for appellee.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

On September 3, 1964, at the City of Harper, in Maryland County, the grand jury of the said county indicted one Jacob S. Toe, now appellant in these proceedings, for the crime of embezzlement. Since much was said at the trial in respect to the indictment and a motion in arrest of judgment filed subsequent to the verdict, attacking the indictment, we have found it necessary to include the gravamen of the offense charged in the indictment:

> "The aforesaid Jacob S. Toe, defendant, of the Buah Sub-Revenue Agency, Maryland County, Republic of Liberia, previous to the finding of this indictment at divers times, between the month of August, 1963, to and including the month of April, 1964, while in the employment of the Liberian Government, and assigned in the capacities as Tax Collector and Acting Assistant Revenue Agent, for the said Sub-Revenue Agency, of then Buah Sub-District, now within Maryland County, R.L., did then and there, intentionally, fraudulently and feloniously embezzle from the Government of Liberia an amount which aggregates to the sum of three hundred fifty and 25/100 dollars ($350.25), collected by him as an agent of this Republic, to his own use and benefit, said amount being discovered by Inspector of Internal Revenue, Abel C. Sawyer, while on inspection in keeping with assignment in said area, between the months of June and August, 1964, the exact date to the grand jurors being unknown; the said defendant did receive and fraudulently convert said sum to his own use and benefit, and hereby did intentionally, fraudulently, and feloniously commit the crime of embezzlement, as evidenced by his signature on the sheet containing the statement of shortage of the amounts so embezzled, contrary to the statutory laws in such cases made and provided and against the peace and dignity of the Republic of Liberia."

The defendant was subsequently arraigned, at which

time he entered a plea of not guilty, thereby joining issue with the Republic.

The facts in this case that were adduced at the trial in support of the indictment were rather peculiar in nature and demand a pronouncement by this Court in respect to them. The prosecution's chief witness, a Revenue Inspector bearing the name A. G. Sawyer, in his testimony showed that the defendant, having been assigned to the Sub-Revenue Agency of Buah, in Maryland county, held out to sundry prospective taxpayers that he had not in his possession official flag receipt books to issue them receipts in accordance with Revenue Agency regulations, for taxes paid by them. Instead, he told them, he would issue provisional receipts, and at the time the regular receipts arrived, the necessary substitution would be effected. Additionally, there were instances when the aforementioned taxpayers did not have sufficient funds to meet their obligations, and thereupon the appellant agreed to accept in substitution for cash sundry items, that included a radio valued at $50.00. The provisional receipt for the radio read as follows:

"Receipt No. 12

"Received from George Nyantil radio, value $50.00 fifty dollars account part payment of his distilling license for 1964, 15-4-54.

"[Sgd.] JACOB S. TOE,
Actg. Asst. Rev. Agent, Buah."

There were receipts numbered 1 to 12, which totaled $350.25. This amount was fixed in the indictment as the amount that had entered the possession of the appellant custodially, in consequence of his relationship with the Liberian Government as acting Assistant Revenue Agent. However, a recourse to these receipts shows that receipt numbered 11, for fifteen pennyweight of raw gold and receipt numbered 5, for one typewriter, did not specifically state on the faces thereof that the value of these articles were intended as payment to the Revenue Agency.

It was only stated in receipt numbered 5 that the typewriter was so intended and in receipt number 11 that the gold would be paid over to one Vaneh Sanifu in cash.

The defendant strongly contended during the course of the trial, and subsequently in his motion for a new trial, that there was a variance between the indictment and the proof adduced at the trial, and therefore, the verdict should be set aside and a new trial awarded defendant in the court below. It was contended by the defense that since some of the items included in the amount of $350.25 as set forth in the indictment were personal transactions of the defendant and, therefore, were misclassed as embezzlements, the whole indictment must fail. This motion, which we shall refer to more specifically later on in this opinion, was followed by a motion in arrest of judgment, which contended that the indictment was loosely drawn, for it was indistinct, unclear, and failed to show the artifice, or fraudulent means whereby the proceeds evidenced by the receipts were obtained and by virtue of the prosecution's failure to attach to the indictment a bill of particulars, or statement of account.

After denial of these motions, appellant filed his bill of exceptions containing six counts. Count one of the bill of exceptions had to do with the question of whether or not a new trial should have been ordered by the trial judge by virtue of the fact that the monies actually converted were less than the amount set forth in the indictment. The facts show that $249.25 was actually received by the appellant in his capacity as Revenue Agent, for the account of the Liberian Government. An argument urged by appellant, admitting the receipt of $249.25, is that the taxpayers were thereafter required by the Revenue Agency to pay again and, therefore, the previous amounts paid by them to him were converted into a personal transaction involving his obligation to them for the amounts first paid. In this argument the strongest contention advanced is the fact that the amount proved

misappropriated differed from that set forth in the indictment. In the circumstances, the issues are, was the indictment sufficiently bad in the light of existing statutes, to sustain a motion in arrest of judgment? Secondly, where an indictment claims embezzlement but the proof shows that the amount embezzled was less than that alleged, does this constitute a ground for new trial? Lastly, where one is required to receive funds for his principal, but instead of so doing accepts substituted property valued at the amount of other funds, does the acceptance of the substituted property and a subsequent conversion thereof to the benefit of the agent constitute him an embezzler?

Reverting now to the first point, relating to the motion in arrest of judgment, the following is found in our Criminal Procedure Law, 1956 Code 8:310:

> "Motion in Arrest of Judgment.—A motion in arrest of judgment based on failure of the indictment to show jurisdiction the court or to charge an offense may be made before the rendition of final judgment, whether or not a defense or objection on such ground was previously raised."

According to the above-quoted statute, the motion may be made irrespective of a previous demurrer to the indictment by way of a motion to quash. In the circumstances, the issue here is one of determining whether or not the grounds laid were sufficient to sustain the motion.

The following is found in 15 AM. JUR., *Criminal Law,* § 436:

> "When a motion in arrest of judgment presents only the question of the sufficiency of the indictment or information, it can be sustained *only when* (emphasis ours) all that is alleged may be true and yet the person convicted committed no offense; that is, a motion in arrest cannot be granted when the indictment or information states facts, constituting a public offense, even though it may be insufficient in matter of form or fullness. If any indictment is sufficiently certain

> to sustain a judgment according to the verdict and all other proceedings are regular a motion in arrest of judgment will not be granted.
>
> "A motion in arrest of judgment convicting a person of a lesser, under an indictment charging a greater, offense is properly overruled where such indictment contains allegations essential to constitute a charge of the lesser, since, upon the hearing of such a motion, the court looks only at the indictment and the verdict, the presumption being that the evidence authorized the verdict."

Additionally, even if defects which would be fatal to an indictment upon demurrer are of the character which are aided by a verdict, judgment will not be arrested after conviction. *People* v. *Jackson,* 191 N.Y. 292.

That is what has been said on this score. We have quoted so extensively primarily because of *Attoh* v. *Republic of Liberia,* 9 L.L.R. 3 (1945), wherein Mr. Justice Barclay, speaking for the Court, held that a motion in arrest of judgment is properly sustainable where the indictment was not properly drawn and did not give defendant sufficient notice of what the prosecution intended to prove against him. The *Attoh* case continued with these words at p. 10:

> "Hence in our opinion the said indictment was defective and bad, and the motion in arrest of judgment should have been sustained by the trial judge."

This Court, irrespective of its desire to be guided by previous pronouncements from its bench, must strictly adhere to the statutory laws of this country, except in instances wherein those laws contravene the Constitution.

Our Criminal Procedure Law provides, 1956 Code 8:184:

> "Defenses and objections which must be raised before trial.—Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show

jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. . . ."

Additionally, § 310 of our Criminal Procedure Law, quoted *supra* also relates to motions in arrest of judgment. Let us examine these statutes in relation to the *Attoh* case. According to § 184, except for failure to show jurisdiction in the Court or to charge an offense, all defenses or objections in respect to the indictment or the institution of the prosecution must be raised by motion before trial. In the premises, unless it can be shown that the particular defect being complained of falls in the category of those specifically enumerated in §§ 184 and 310 quoted, *supra,* the motion in arrest of judgment cannot properly be entertained. Let us emphasize that the Court is not passing upon the merits of the points enumerated but, instead, has concerned itself with the procedure employed in bringing the matter properly before the Court. In the circumstances, this particular contention of appellant must fail.

The next point which we find necessary to touch upon relates to the issue of variance between the allegation as contained in the indictment and the proof adduced at the trial. A variance may be properly termed a divergence in a matter of law and amounts to the misconception of form. In other words, you cannot sue for a horse and recover by proving that you are entitled to a cow. In a criminal action, as in the one at bar, the prosecution may not have entered an action based on the crime of embezzlement and proved the defendant guilty of larceny. The proof must relate to the charge.

What have we here? The indictment charged the defendant with having embezzled $350.25 belonging to

the Republic. The proof adduced at the trial showed that the conversion of funds amounting only to $249.25 for the $80 typewriter and the $21.00 in gold received by the appellant, totaling $101.00, were not funds received by him for the Revenue Agency. This, however, cannot erase the existence of the ultimate fact, that the crime of embezzlement had been committed as charged in the indictment.

Let us now turn to the last point. During the cross-examination of the prosecution's chief witness, Inspector Sawyer, counsel for defense continuously propounded questions to the witness in respect to whether or not it was a policy of this State to receive articles in lieu of cash in payment of taxes. The issue that has been focused upon here is to determine whether or not one entrusted to receive cash, who receives in lieu thereof other properties, may be held answerable in embezzlement for the equivalent value.

A definition of embezzlement is provided in our Penal Law, 1956 Code 27:299:

> "Embezzlement.—Any person who:
>
> "(a) While employed by another and by virtue of such employment, receives and takes into his custody money or *other articles of value* (emphasis ours) 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,
>
> "is guilty of embezzlement and punishable by a fine of not more than five hundred dollars and by imprisonment for not less than three months nor more than two years where the amount embezzled is more than one hundred dollars, or by a fine of not more than one hundred dollars or imprisonment for not

more than six months where the amount embezzled is one hundred dollars or less. Restitution shall be required."

Subsection (a) of the above-quoted section uses the phrase "or other articles of value." It seems, therefore, that use of the disjunctive "or other articles of value" equates them with money, and where there is a felonious conversion of the articles within the meaning of this statute, the crime is then complete.

In view of the above, the judgment of the court below shall be and the same is hereby affirmed, with a modification to the effect that restitution be required in the sum of $249.25 and that the period of imprisonment be increased from one month to three months, in conformity with the statute. And it is hereby so ordered.

Affirmed as modified.