JUDO JLO TUGBA, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM JUDGMENT OF CONVICTION FOR EMBEZZLEMENT.

Argued April 25, 1955. Decided August 5, 1955.

1. Moving papers in a motion for continuance must allege that the continuance is not sought for the mere purpose of delay.
2. The contents of a document may not be proved by a copy thereof if the original is not accounted for.
3. Errors and irregularities in a criminal indictment which do not affect the jurisdiction of the court are deemed waived by the defendant upon proceeding to trial without objecting thereto.
4. In order to sustain an indictment for embezzlement it must be proved that the defendant acted with felonious intent and made an intentionally wrong disposal indicating a desire to cheat and deceive the owner.

On appeal to this Court from judgment of conviction for embezzlement, *judgment reversed.*

J. G. Kolenky for appellant. *The Solicitor General* for appellee.

MR. JUSTICE HARRIS delivered the opinion of the Court.

On November 30, 1950, Judo Jlo Tugba, a resident of the Municipality of Grand Cess, County of Maryland, was indicted for embezzlement. The defendant was subsequently arraigned and pleaded not guilty. In keeping with law a jury was empanelled and the case was tried before the said jury, whereupon the trial judge instructed them and ordered them to repair to their room of deliberation. After due deliberation the jury returned a verdict of guilty. The defendant filed a motion for new trial, which was denied, and final judgment was rendered sentencing him to imprisonment for not more than five months and restitution of the sum of seven hundred and

twenty dollars and seventy cents. Defendant has appealed to this Court for a review and final determination upon a bill of exceptions containing twelve counts, of which we consider Counts "1," "3," "7," "8," "11," and "12" as pertinent.

Count "1" of the bill of exceptions states that, after the case had been assigned for trial, the defendant moved for a continuance on the ground that one Tor, an important witness, was absent from Maryland County, being creditably reported as being in Montserrado County; but the said motion for continuance was denied. Although, under our Constitution, a defendant must be confronted with witnesses against him and have compulsory process for witnesses in his favor, yet, "if a defendant desires to take advantage of his privilege, he must comply strictly with the statute (in this case the Constitution) granting the right. "The application must be seasonably made, at the earliest opportunity, and not withheld until the case is actually called for trial." 8 R.C.L. 82 *Criminal Law* § 38.

The record shows that the motion for continuance was not filed until the very day of the trial. The record further shows that the papers filed in support of the said motion contained no allegation whatsoever to the effect that the said motion had not been made for the mere purpose of baffling the trial. This Court is therefore of the opinion that the trial court did not err in denying the said motion, and that Count "1" of the bill of exceptions is without merit.

Count "3" of the bill of exceptions alleges that documentary evidence marked Exhibit "A," submitted by the defendant to the County Attorney as his challenged statement of account, was obtained by persuasion and with the promise that no criminal action would be instituted. Nowhere in the records certified to this Court is this allegation supported by proof. Count "3" must therefore fail.

Count "7" of the bill of exceptions alleges that the

lower court tried the case in the absence of one of defendant's material witnesses, Joseph W. Tor. Our ruling that Count "1," *supra,* is without merit is equally applicable to Count "7."

Count "8" of the bill of exceptions alleges that certain documents offered as evidence to prove that Tom Tugba and Forkey were accepted by the complaining witnesses, and treated with independently of defendant, were excluded by the trial court. The record reveals that the documents referred to are copies, and that the originals thereof were not accounted for; hence the court below did not err in rejecting the said documents. Count "8" is therefore not well taken.

Count "12" alleges, in substance, that the trial court should have granted a motion in arrest of judgment on the grounds that:

"1. The defendant admitted indebtedness in the amount of some ninety-five dollars, which amount is not within the jurisdiction of this court which therefore could not enter valid judgment thereupon.

"2. The *situs* of the alleged offense, as laid out in the indictment, was not proved on the trial, thereby creating a variance between a material part of the indictment and the proof."

The record certified to this Court is devoid of proof that the defendant's deficit amounts to about $95.00 and merely shows that the defendant contended that his deficit is of that amount. As for the place laid out in the indictment not having been proved on the trial, the defendant, having been served with a copy of the indictment upon his arrest, had ample and timely notice of the place whereat the crime is alleged to have been committed, and should have attacked the indictment by means of a motion to quash and not by a motion in arrest of judgment.

"A party pleading to an indictment and going to trial

thereon shall be deemed to have waived his right to thereafter plead or take advantage of any error, or irregularity therein, except the jurisdiction of the court over the subject matter of the proceeding." Rev. Stat., sec. 788.

It follows that Count "12" of the bill of exceptions cannot properly be sustained by this Court.

Count "1" of the bill of exceptions alleges that the evidence is insufficient to sustain a verdict of conviction, and that a new trial should therefore be granted.

Now let us re-examine the evidence and see whether the crime of embezzlement is proved in the light of the settled principle of law that "Every deficit in the account of a factory man does not amount to the crime of embezzlement." *Bouvier* v. *Republic,* 2 L.L.R. 616 (1927). The star witness for the prosecution in the present case, one S. Webbe, testified on cross-examination as follows:

"Q. Please say as to whether or not the said defendant, in an attempt to give an account of the said deficit or outstanding amount, submitted a list of debtors to you.

"A. He presented a list of debtors, but I did not see the people."

On redirect examination, the same witness testified as follows:

"Q. How did you come to know that the amount in question was embezzled?

"A. Because I saw all my goods going to Bauh, and when we came to take stock he could not give any account of the goods."

Questioned by the trial court, the same witness further testified as follows:

"Q. Do you swear that the defendant in the dock became unmindful of his trust, and that he fraudulently, feloniously and intentionally embezzled the above amount alleged in the indictment?

"A. Yes.

"Q. By what reasoning did you arrive at such conclusion?

"A. We did not meet the goods in the store of the defendant, hence we concluded that he converted them to his own use."

The complaining witness deposed that the defendant was not authorized to extend credit; but the fourth paragraph of the defendant's employment agreement makes the defendant responsible for the same. In explaining the deficit in his accounts the defendant presented his employer with a list of outstanding debts and debtors, thereby indicating that the sums in question had not been fraudulently converted to his own use. Nor are we of the opinion that the evidence establishes such a fraudulent and felonious conversion as would constitute embezzlement. In order to constitute embezzlement, it must distinctly appear that the defendant acted with felonious intent and made an intentionally wrong disposal, indicating a design to cheat and deceive the owner. No such intent has been proved in this case. The judgment of the lower court is therefore reversed and the defendant is ordered discharged forthwith.

Reversed.