

satisfy the ends of justice. Of all the exceptions taken in this case only one will have our comment, viz: "1. Because Your Honor disallowed the question put to witness King to wit: 'You make the court and jury to understand that the defendant was the bailee of the one cent stamps surcharged to two cents stamps at that time?'" Question was properly disallowed by the court below as the question only involved an issue of law.

As the evidence in the case supports the verdict of the jury this court only modifies the judgment of the court below, to the effect that the time of the imprisonment shall be one calendar year.

In all other respects the judgment of the court below be and the same is hereby affirmed.

R. E. Dixon, for appellant.

L. A. Grimes, Attorney General, for appellee.

STANLEY C. CLARKE, H. E. SNETTER, E. J. WATTS, E. B. BURPHY SR., and NORWOOD THEODORE DENNIS,
Appellants, v. REPUBLIC OF LIBERIA, Appellee.

ARGUED DECEMBER 11, 1924. DECIDED JANUARY 6, 1925.

Johnson, C. J., Witherspoon and Bey-Solow, JJ.

1. A principal is one who being present either commits an offense himself or aids another in its commission.
2. Principals are either of the first degree or the second degree; the former being those who actually with their own hands commit the offense, and the latter those who although they do not actually commit the act with their own hands are nevertheless present aiding and abetting.
3. In practice so immaterial is the distinction between a principal in the first, and a principal in the second, degree, that if a man be indicted as principal in the first degree proof that he was present aiding and abetting another in committing the offense, although his was not the hand which actually did it, will support the indictment. And if he be indicted as principal in the second degree proof that he was not only present, but committed the offense with his own hand, will support the indictment.
4. To make a communication privileged from introduction into evidence there must exist some such fiduciary relationship between the writer and addressee of the letter as attorney and client, husband and wife etc.
5. On the day the parcels were divided between appellants in the Post Office Department witness Burphy stated that defendant Clarke tried on some and asked defendant Dennis how they fit, and defendant Dennis

tried on one and asked witness how his fit; the judge correctly refused to strike out said testimony on the ground of irrelevancy although it did not otherwise appear in evidence that some of the stolen parcels contained helmets.

6. It is illegal for the Postmaster General to sell unclaimed parcels at private sale, especially to members of the staff.

Mr. Justice Witherspoon delivered the opinion of the court:

Embezzlement. At the February term, A. D. 1924 of the Circuit Court of the first judicial circuit, Montserrado County, Stanley C. Clarke, Henry Eugene Snetter, John Henry Smythe, Edward Ballah Burphy Sr., Elijah James Watts and Norwood Theodore Dennis, appellants, were indicted by the grand jurors for the crime of embezzlement.

They were arraigned and plead "not guilty." A petit jury was empanelled, and after hearing the evidence in the case and the arguments on both sides retired to their room for deliberation, and finally returned a verdict finding the said defendants except John Henry Smythe guilty of the crime of embezzlement.

In keeping with the findings of the petit jury, sentence was pronounced against the defendants found guilty as follows: viz: To make restitution of the value of sixty-nine (69) parcels by them embezzled, amounting to five hundred and twelve dollars and seventy cents (\$512.70) being the declared value of said parcels, to pay a fine of two hundred dollars (\$200.00), and be imprisoned for ten (10) calendar months each from date of imprisonment.

From this judgment, verdict, and other proceedings of the court below the defendants excepted, and by bill of exceptions, the case is before this court of final jurisdiction for review.

We notice that there are seventeen exceptions contained in the bill of exceptions, which read as follows:

"1. Because when witness Karnga was asked the question 'Do you say that Stanley C. Clarke the then parcel post clerk, in the face of the then entry made by the then Secretary of the General Post Office, can be held responsible for the said parcels?' Your Honor disallowed the question to which defendants except.

"2. And also because Your Honor overruled objections to the question put by the State to witness Watson as follows: 'Did you recover some hats taken out of one or some of the parcels, and turn them over to the Department of Justice?' Which question defendants maintained was leading, and was a cross-examining of his own witness, and had a tendency of impeaching the credibility of his own witness; to which defendants except.

“3. And also because when on the cross-examination, the question was put to one of the witnesses for the State, ‘Mr. Watson, what are the duties of your office and are they set out in any public document?’ That Your Honor disallowed said question to which defendants except.

“4. And also because question put to witness Watson: ‘By whose orders or by what regulations of the Customs Department did you deliver these parcels to Mr. Stanley C. Clarke?’ Was overruled by Your Honor on the grounds of irrelevancy, to which defendants except.

“5. And also because Your Honor overruled the question put to witness Watson on the cross-examination: ‘Have you as customs officer in charge of postal parcels ever seen, read, or in the line of your duty been instructed upon the convention with regards to postal parcels concluded with Great Britain?’ To which defendants except.

“6. And also because Your Honor overruled the question put to witness Watson on the cross-examination: ‘Have you as Customs Parcel Post Officer any knowledge of the special Postal Convention connected with Germany?’ To which defendants except.

“7. And also because Your Honor overruled the question put to witness Watson on the cross-examination: ‘Have you ever seen, read, or had any instructions upon the postal parcels instructions recently concluded at Rome?’ To which defendants except.

“8. And also because Your Honor overruled the question put to witness Watson on the cross-examination: ‘The address and number having been worn off, as you say, would it have been possible therefore to have returned them to the office of origin?’ To which defendants except.

“9. And also because Your Honor disallowed the question put to witness Burphy Jr., on the cross-examination: ‘To the best of your recollection, the parcels now in question are the first parcels that had been disposed of since your tenure there in office?’ To which defendants except.

“10. Also because Your Honor disallowed the question put to witness Burphy Jr. on cross-examination: ‘To the best of your recollection, was any disposition made of parcels received from the customs by the General Post Office at any time during your employment in said office?’ To which defendants except.

“11. And also because Your Honor in the face of the objections to document marked ‘E’ admitted same in evidence to which defendants except.

“12. And also because Your Honor denied the application of defense asking you to strike out of evidence in this case that part of witness Burphy’s testimony which refers to some helmets for the reason that same was irrelevant, as it did not appear in evidence that said helmets were some of the contents of the parcels in question, to which defendants except.

"13. And also because when defense gave notice to the court that witness Snetter would testify to certain facts only. Your Honor asked the counsel for defense the following question in the presence of the empanelled jury: 'Is the witness to testify to facts within his knowledge or of what he has been told to say?' To which defendants except.

"14. And also because Your Honor in charging the jury said *inter alia* that this is a plain case of embezzlement, and that Mr. Clarke is the principal and the other defendants accessories, to which defense excepts."

The indictment before us charges Mr. Clarke as principal, and the other defendants as principals in the second degree, or aiders and abettors. We can use no better language than that laid down by Mr. Bouvier in his definition of the term, principal in the second degree or aiders and abettors. He says: "The law recognizes no difference between the offense of principals in the first, and principals in the second, degree. And so immaterial is the distinction considered in practice that if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offense, although his was not the hand which actually did it, will support the indictment. And if he be indicted as principal in the second degree proof that he was not only present, but committed the offense with his own hand will support the indictment." (See Bouv. L. D., vol. 3, Principal in the second degree, p. 2687; 1 Archbold Criminal Practice and Pleading, p. 66; Wharton Criminal Law, p. 331, sec. 259; p. 332, sec. 260.)

Our statute's definition of principal in our opinion fully settles the point, it says:

"A person who being present either commits the act himself or aids in its commission is a principal."

The evidence shows that all of the defendants made their several selections of the goods taken from these parcels post in question. They were therefore not only present, but assisted in the crime with their own hands. The charge of the judge that Mr. Clarke was principal and the other defendants accessories did not affect the defendants' rights nor was there error committed to which the court's attention might be directed.

"15. And also because on the 6th day of March, Your Honor denied the motion for a new trial of this cause; to which defendants except.

"16. And also because on the 6th day of March, 1924, the petty jury empanelled to try the issue joined, returned a verdict

of guilt against the defendants which verdict was manifestly contrary to the evidence adduced at the trial and the law of the land; to which defendants except.

“17. And also because on the 6th day of March, A. D. 1924, Your Honor rendered judgment upon said verdict, to which defendants except and pray an appeal to the Honorable the Supreme Court of the Republic of Liberia for a review of said case.”

Within the bounds of these exceptions we are confined; exceptions taken and noted during the trial below, and not set out in the bill of exceptions, are considered waived and can not claim our consideration not being properly before us. But we will consider such of them as, to our minds, are pertinent only.

Exception 8 reads: “And also because Your Honor overruled the question put to witness Watson on cross-examination, ‘the address and number having been worn off as you say, would it have been possible therefore to have returned them to the office of origin?’” We hold that this question does not tend to prove nor disprove the allegation. Mr. Snetter, defendant, having set out in his letter to the customs requiring that the parcels be returned to the postal department that they were for reshipment to the sender, and further that some of the parcels had been paid for by the General Post Office, Monrovia. And it also appears in evidence that the certified copy of the customs tally of the number of the parcels when they were turned over to that department, contains the value relied upon in the indictment which was admitted by the court, the question was therefore correctly ruled out.

Exception 11, “and also because Your Honor in the face of objections to document marked ‘E’ admitted same in evidence.” This exception refers to a letter written by defendant Watts to Judge Worrell making certain admissions respecting the troubles through which he was passing growing out of the examinations that the defendants were undergoing in this parcel post matter. The defendants claimed that this letter was a privileged communication and should not be admitted in evidence; we fail to follow the arguments set up by the defendants.

In our opinion for a communication to be regarded as privileged the relation of attorney and client should exist, and the attorney or counsel should be so acting for the time being. Secret statements and communications between husband and wife, and a few others

are immune and may not be given in evidence. (1 Greenleaf on Evidence, sec. 237 et seq.) The judge ruled correctly.

Exception 12, "and also because Your Honor denied the application of defense asking to strike out of the evidence in this case that part of witness Burphy's testimony which refers to some helmets for the reason that same was irrelevant as it did not appear in evidence that said helmets were some of the contents of the parcels in question."

In the evidence of witness Edward Burphy Jr. it is stated that on the day the parcels were divided in the room of the post office he saw some helmets which Mr. Clarke was trying on, and asking Mr. Dennis how they fit, and Mr. Dennis also asked Burphy Jr. how his fit, and each said to the other it fits fine. The judge ruled correctly.

The question raised in exception 13 to the judge's asking the question, "is the witness to testify to facts within his own knowledge, or what he has been told to say," carries no influence over the jury. In our opinion, this question is a point of law which it is made the duty of the judge to explain to the jury. Let us suppose the question was put by the judge to influence them, yet still no injury is done to the defendants, and the law makes it the judge's duty to instruct the jury on matters of law.

Exception 15, raises the point of refusal by the judge to grant a motion for a new trial, and exception 16 sets up that the verdict of the jury is manifestly contrary to the evidence adduced at the trial, and the law of the land.

We shall now consider the evidence before us so as to discover whether the allegations of defendants set out in exceptions 15 and 16 are borne out as alleged.

Witness Karnga stated that sometime after he was appointed Postmaster General he was told that a certain number of parcels in his department had been broken open and the contents applied to the personal use of the defendants, that on the same day he held an investigation in the Department to ascertain the facts in the matter; that he called up Kaiser Cooper, at the time a cadet in the local post office, Monrovia, and asked him to tell what he knew about the matter; Kaiser Cooper said there were about forty-four parcels that had been broken open and the contents taken possession of by these defendants and sent to their respective homes, after

which Snetter the defendant came in brought the cash book and opened it to him and said Kaiser Cooper had been making misrepresentations, and that the goods had been auctioned by the late Postmaster General Fuller, and the parcels amounting to four hundred and seventy-five dollars (\$475.00) had been placed to the late Postmaster General Fuller's account; he also showed me the entry in the cash book.

That on the same day he told Mr. Snetter to address letters to each of the officers in the post office asking them to explain by what means they came in possession of the goods in question which was done, and each of them replied that the goods were sold to them at an auction and that the value for same had been paid over to the late Postmaster General Fuller before his death; defendant Burphy failed to reply. That he also addressed a letter to defendant Snetter requesting him to give some information about these parcels; that he did so, see his letter. At the same time Snetter said that there were some parcels lying in the customs, and that the late Postmaster General Fuller directed him, on the 17th of November, 1922, to communicate with the customs and order that the said parcels be returned to the post office and he did so. These parcels were accordingly sent over by the customs, and auctioned by the late Postmaster General Fuller, which realized four hundred and seventy-five dollars (\$475.00) which amount he entered in the cash book against Mr. Fuller's account. When asked "how is it that the entered item was without date, Snetter said in bookkeeping the last date governs the entry below," and the last date in the book was the 17th of November, 1922. Witness Karnga also among other things said that, Liberia became a member of the Universal Postal Union in the sixties, that in 1906 Liberia and the rest of the union countries sent their plenipotentiaries to Rome, Italy for the purpose of concluding the postal convention, that according to the local regulations of 1893 parcels returned from the customs to the post office unclaimed are considered to be abandoned by addressee, and in accordance with the agreement they are to be returned to the place of origin.

In accordance with the present parcel post agreement with the United States, Great Britain and Liberia a certificate of parcels unclaimed is to be sent to two addressees, a period of 30 days is allowed the second addressee. In the event consignee of the goods

or the first addressee refuses to take up the said goods within thirty days in the case of abandonment of parcels by first and second addressee or by both, then after sixty days limit the parcels are to be returned to the British Office of Exchange in accordance with International Parcel Post Convention of Rome which has been ratified by the Senate of Liberia. Parcels from Germany lying in the possession of the post office are to be considered as abandoned by addressee after three months and are to be returned to the office of origin. That it is contrary to the parcel post agreement between Great Britain and Ireland and the Republic of Liberia to sell parcels lying in the possession of the post office, though as he understands it had been done by previous Postmaster Generals. He also stated that the bulletin of verification, which he then held in his hand, together with others had been sent to him since his appointment as Postmaster General from the London office respecting parcels sent from Liverpool to Liberia for several years before his incumbency. He further stated that it appears from the entry that the owners or addressees of some of the parcels did not know that they had parcels coming to them, as in the case of Bishop Gardiner.

The owner of one of the parcels was dead. That from the entry in the customs parcel post book when the first batch of these parcels was received by Stanley C. Clarke, the parcel post clerk, one of the defendants, the late Mr. Fuller was then Postmaster General; when the second batch was received, Mr. Fuller was dead and naturally the Secretary of the General Post Office Department would be in charge, who was Mr. Snetter, another one of the defendants. That Burphy defendant himself made the following statement to him, said he: "There were sixty-nine parcels; that sixty-eight were returned from the customs, and one was from Germany and had not been sent to the customs which made sixty-nine, that it contained three white helmets, that parcel was opened by Mr. Stanley Clarke a defendant, then parcel post clerk, and he was invited to participate in the disposition of the goods, i. e. the appropriating of same to their own use and benefit."

Witness G. L. Watson stated that the Collector of Customs received a letter from the Secretary and Accountant of the Post Office Department requesting the return of parcels lying in the customs over ninety days unclaimed, said letter was handed to him by the Collector of Customs for execution; it was signed by Mr. Snetter

the defendant. This letter was received on the 18th day of November, 1922 in the afternoon. That he immediately prepared and took the parcels over to the Post Office Department and delivered them to the parcel post clerk, Mr. Stanley C. Clarke, for which he signed.

On the 29th of November he took the last lot and obtained the said clerk's signature as in the first lot. That when the first lot was delivered Mr. Fuller, Postmaster General, was sick in bed and when the last lot was delivered he was dead and buried. That about the latter part of March, 1923 Mr. Stanley Clarke, defendant, gave him some hats to sell for him, Stanley Clarke, which he said were still remaining of certain goods he had ordered out for Christmas. During the month of December, Mr. Clarke had some goods imported to the country which he had out for sale. On hearing of this parcel post trouble he went and told Postmaster General Karnga about the matter, as to how these goods of Clarke came into his possession. He asked him to send them down to him, which he did.

Kaiser Cooper stated that on the 18th day of November, 1922, late Postmaster General Fuller instructed Mr. Snetter defendant to send over to the customs for some parcels and he did so; forty-four parcels were sent over during his, Mr. Fuller's, life time. Mr. Clarke, one of the defendants told Johnny the runner to bring a knife and have the parcels opened and he did so; Mr. Snetter another defendant came in with a foolscap paper and took account of the contents of the parcels; the day after Mr. Fuller took with a chill and before leaving the office he said he was going to see the President about the parcels and inquire whether they should be sold at auction or be sent back, but after Mr. Fuller went home he took seriously ill; he then sent a message by Jimmy Norfleet to Mr. Snetter informing him that he was sick, that this message was sent after the parcels were opened. Postmaster General Fuller died on the 27th of November and was buried on the 28th, and on the 29th of November, twenty-seven parcels more were received from the customs. These were also cut open by Johnny, Mr. Clarke, Mr. Snetter, Mr. Smythe, Watts, Dennis and Burphy Sr., who went into the room of the Secretary and Accountant Mr. Snetter, a defendant, and held a conference, but he was not present; when they came back Mr. Clarke opened the cupboard containing the parcels, threw

them on the floor of the office, Mr. Smythe took up one black dinner coat and tried it on, it fitted him just as if it was made to his measurement, and Smythe put it aside, then every one of the prisoners began to take out what they wanted; Mr. Smythe also took out one light striped pair of tweed trousers, one morning gown, one pair ladies black shoes, one dinner suit complete including the coat just referred to, three dozen wooden pipes, two pieces of window curtains, one pair of pillow cases, some perfumes, sweet soap and caps, that this is all he can remember of his lot. He continued in this way stating to the court and jury the portion received by each of the defendants charged in the indictment. Mr. Clarke also gave Kaiser Cooper two caps, one ladies silk handkerchief; he also gave Burphy Jr. two caps, one large lady's handkerchief; he gave Johnny Richards one khaki helmet, four caps and one large silk handkerchief; and to Jimmie Norfleet one cap, one purse, one pipe. He also said he saw the distribution of the parcels sent over on the 29th of November, only that he saw Snetter take a list of the parcels sent over on that day.

Edward B. Burphy, Jr., said he was in the office one day when a number of parcels were returned from the customs to the Post Office Department before the death of the late Postmaster General T. G. Fuller. After his death more parcels were again sent to the Post Office Department one afternoon; on his return from up town he met the door of the parcel post room of the local post office closed. There were several persons inside, he went to the room where they were and rapped at the door, but the noise they were making was so great that they could not hear him, so he opened the door and went into the room. He met Messrs. Smythe, Watts, Clarke, Burphy, Sr., Dennis, J. K. Cooper and Snetter, the defendants. He was in a short time sent twice out of the room to serve persons who called to purchase stamps; he, however, returned again and met in the room, hats, sweet soap and many other things. He was ordered again to go to the general delivery room to serve the people; he then became offended and went no more. In a short while Kaiser came into the room where he was and brought two handkerchiefs and said to him the people are dividing the things, and Mr. Clarke does not want any of these handkerchiefs, so he gave them to Mr. Watts to be divided amongst us cadets, one handkerchief each. So Kaiser gave him his and he

took it. Cooper then went back into the room to the defendants, afterwards the said door was thrown open, he saw first Mr. Burphy, Sr., then Kaiser Cooper behind him with a bundle; Kaiser said the bundle belonged to Burphy, Sr., and on asking what was contained in the bundle, he said plenty of things, white drill, white flannel serge, white shoes; that he could not remember all Kaiser named; that on entering the room he found the other defendants there; each having his goods in different piles; as far as he could remember he named to the jury what goods each defendant's pile contained. That about two or three weeks after he saw Mr. Clarke, defendant, one morning come into the office with the same helmet which he saw in the broken parcel.

Miss Elíma Randall stated that James Henry Deputie told her that there was a parcel in the customs belonging to the late Dr. C. C. King; she went and inquired of Mr. John Nelson Moore the clerk at the customs for the parcel and he said the parcel had been returned to the post office; she went over to the post office and met Mr. Stanley Clarke, Snetter, and Joseph Chesson standing together, she inquiring of Mr. Snetter concerning the parcel, he said look amongst the parcels for it; on looking she came across it. Snetter, defendant, told her that it had been there a long time and that she would have to pay plenty of money for it. She inquired how much, he replied, "send what you got." He then said to her go home as soon as he got things straight he would inform her some day. A few days after she met Snetter in the street, and he told her to send down and get the raincoat. She sent a boy with a note to Mr. Snetter, but he returned and said Mr. Snetter said she must send the money; she sent the boy with fifteen shillings, and he returned with the coat.

We shall give in substance the evidence of Mr. Snetter, one of the defendants, first as contained in his letter of date, Monrovia, June 1923, "In the month of November last and on the 17th of said month I directed a letter by direction of the Postmaster General to the Collector of Customs of Monrovia to transmit to the department all parcels lying in the Customs house for a period of ninety days and over in order that they may be disposed of as required by the International Parcel Post Agreement of Madrid and other countries. When these parcels were transmitted to the

department or in other words the exact time, I do not know, as I sent the letter in the morning of said day, and having some other matter to attend to that afternoon I did not come back to the office that day. As to the number of the parcels being forty-four I can not say as I did not take stock of them, but they were delivered to the parcel post clerk who took stock of them. I do not know of that. On the following week I would not say positively, but I think it was on Tuesday the Postmaster General informed me to make an entry and debit his cash account with \$475.00 as the amount realized from the private sale of these or other parcels. As to Mr. Clarke, the parcel post clerk, dividing the contents to the officers of the department I know nothing of the same." In Mr. Snetter's re-examination, he said, he was verbally informed by His Excellency President King to take control of the office after the death of Postmaster General Fuller, and that he did so, and served in this capacity until June, 1923,—record, p. 37. In answer to the question, "since the memorandum debited to defendants during Mr. Fuller's life time was locked up with Mr. Fuller's private papers, where were the debits made for the second sale and who kept it?" He said, "As I have already said, all of the vouchers and papers pertaining to the office were locked up in Mr. Fuller's safe as well as in the safe which I used while in the office which have been handed over to Mr. Karnga upon his request"—record, p. 36. In Mr. Snetter's explanation made to Postmaster General Fuller he sent a letter to the customs on the 17th of November, 1922, requesting them to return all parcels for over ninety days in their possession to the post office which he did, that the parcels were received and auctioned off by the late Postmaster General Fuller, and the amount realized was received by him, Mr. Fuller, amounting to \$475.00 which he entered against said Mr. Fuller's account, as already stated and shown in Mr. Fuller's account before this court. See record, p. 3.

Now it must be admitted that Mr. Snetter has some peculiar qualities for putting together statements and for answering questions, but let us examine a few of his answers in order to find whether they can be sufficiently relied on as grounds upon which the jury could reasonably consider his evidence with credit sufficient to establish his innocence in the face of the evidence against

him by witnesses for the State, Kaiser Cooper, Postmaster General Karnga and Burphy Jr., and which have been fully corroborated by Norfleet, Eliza Randall, Johnny Richards, etc. See record, pp. 23, 25 and 26. In witness Snetter's evidence, set out in his letter, June, 1923, he sent for the parcels, and they were received by the post office, when, he knew not; whether the parcel post clerk took stock of them, he knew not; but about Tuesday of the following week Postmaster General Fuller directed him to make an entry and debit his cash account with \$475.00 as the amount realized from the private sale of these or other parcels.

The question to our minds is this, on the 17th of November, 1922, Snetter's letter was written to the customs, this letter was not received or acted upon by the customs until the 18th, in the afternoon, which was Saturday.

He also states that these parcels were auctioned off by Mr. Fuller and the amount of \$475.00 realized and placed to his account. It is in evidence also that Mr. Fuller left the office on the 18th in the afternoon leaving the information that he would call to inquire of the President whether the parcels in question should be sold, and that he never returned to the office again before he died. And though as he said on Tuesday of the next week he was ordered to make the entry in the cash book for said amount he impliedly says this entry was entered on the 17th of November the day he wrote the letter asking the customs to forward the parcels in question.

It is clear to the mind of the court, taken from the evidence before us, that Mr. Snetter's statement is contradictory and evasive and the jury could not consider it with credit.

It is also said by Mr. Snetter that he acted as Postmaster General during the interval between the death of the late Postmaster General Fuller and the appointment of Postmaster General Karnga, from November to June a period of seven months.

The fact is, it is impossible to conclude that Postmaster General Fuller had in his private safe the memorandum of the sales had in the post office on the 29th of November when he was buried on the 28th of November, neither could he, the Postmaster General Mr. Fuller, sell the parcels on the 29th under the circumstances. and order him, Snetter, to charge the same in the cash book under date 17th November. Witness Watson, the customs officer, said Mr. Fuller was sick in bed when the first lot of parcels were sent

over by him, and he was dead and buried when he took over the last lot. Kaiser Cooper said, Snetter came in with a foolscap paper and took account of the contents of the parcels, and the day after Mr. Fuller took with chill which was from the evidence on Sunday. Witness Norfleet says he only saw the parcels that were sent over on the 29th of November and Snetter was there and took a list of them.

It is not necessary that we should extend our research further to find whether or not the evidence given by the foregoing witnesses fully corroborated each other in the proof of the charge of embezzlement as set forth in the indictment as in our opinion the statement of the remaining witnesses in the case fully corroborated the evidence above traversed.

Defense's counsel attempted to argue from his brief (a) value had not been proven, as laid in the indictment; (b) what should be the punishment of under-officers as in this case. We should like to make a comment upon these points, but they not being laid in the bill of exceptions are not properly before us. See remarks made by this court respecting arguments made in this form, in the case *Stewart v. Republic* (Lib. Semi Ann. Series, No. 6, p. 37, esp. p. 39). (See also *Tisdall v. Howard*, Lib. Semi Ann. Series, No. 6, p. 45, esp. p. 48; Lib. Stat., Appeals, ch. X, sec. 10; *Yates v. McGill Brothers*, I Lib. L. R. 2; *W. S. Anderson v. McLain*, I Lib. L. R. 44.)

This court says that the act of the Postmaster General in selling parcels to the customs staff at private sales is illegal and can not be upheld by the laws of the land, and all sales, other than at public auction, are illegal; the attempt by the defense to prove that there was a sale failed as the evidence shows.

The verdict of the jury is in keeping with the evidence adduced at the trial, and the law of the land. The judgment of the court below in our opinion should be amended to read: That the prisoners pay the value of the sixty-nine parcels amounting to five hundred and twelve dollars and seventy cents, two hundred dollars fine and imprisonment for five calendar months each; and with this amendment the judgment of the court below is affirmed.

Mr. Chief Justice Johnson read and filed the following dissenting opinion: I am of the opinion that the decision in this case

establishes a very dangerous precedent. The principle decided may be stated as follows:

That clerks and other subordinate employees in Government offices can be made principals in a criminal action, for obeying the orders of their superiors, if afterwards those are found to be irregular or illegal. That such employees may be indicted for embezzlement, for receiving goods or money from heads of departments, or other superiors, if the transaction turns out afterwards not to have been in strict conformity with law. Such a doctrine would place every employee in Government service at the mercy of his superiors, and could be construed to embrace all other businesses.

The facts in the case are substantially those stated in the majority opinion. It is admitted, as was found at the trial, that Snetter in selling the articles to the postal employees, had followed a long standing custom; that he had a precedent for his action, that he had been instructed by Postmaster General Fuller to send for the parcels in order that they might be sold. An attempt was made to suggest that they were intended to be reshipped to the consignors, which was not possible because many of the parcels had been in the customs for two years or longer, and were therefore considered as abandoned or unclaimed parcels, and in many cases the number and address had been obliterated by lapse of time. It was therefore obvious that following the precedent therefore established, the Postmaster General had sent for the parcels in order to dispose of them by sale.

You may say that the custom was irregular and bad, that a stop should be put to it; granted, but why punish these young men so terribly, for following a bad precedent?

From the record of cases coming up to this court in which employees of the postal service are concerned, it would seem that conditions in that department are not ideal; and the present Postmaster General is to be commended for his efforts at house cleaning, but why blast the career of these young men, simply to show that we are improving the postal service?

Passing by all other questions that arise in the case, I will consider the verdict and judgment entered against appellants.

The verdict in my opinion was inconsistent and illegal, because it acquitted Smythe who was jointly indicted with appellants, but

convicted the other prisoners; although they all took the goods at the same time and under the same circumstances.

Because the evidence did not prove that the prisoners were guilty of the crime of embezzlement; the sale of the articles was made openly and was held by order of Snetter, Secretary of the General Post Office, who was then the head of the department, Postmaster General Fuller having died; and embezzlement is defined, in criminal law, as the fraudulent conversion to one's own use of the money or goods entrusted to one's care by another. In the Criminal Code it is defined as follows (p. 15, sec. 69, embezzlement):

"Embezzlement is the appropriation to one's own use or benefit, of property or money entrusted to him by another; as where clerks, agents, common carriers, servants, public officers, treasurers or other officers of a society, corporation or association, appropriate to themselves money or property entrusted to them in the line or course of their duty."

Now let us see if Clarke, who was indicted as principal, could legally be convicted of embezzlement.

The parcels were delivered to him, he being the parcel post clerk, when they were sent over to the general post office from the customs, but his responsibility ceased when he was ordered by Snetter, the head of the department, to deliver them up for sale. Could Clarke, a clerk, legally refuse to obey the chief of the department? I hold that he was bound to obey Snetter's orders. This being granted, the case of embezzlement made against Clarke falls to the ground; and the whole case fails. The judgment was also inconsistent and illegal.

1. Because it was based on an illegal verdict.
2. Because although the jury acquitted Smythe the judge of the court below did not deduct Smythe's share of the goods from the amount of restitution.
3. Because although the evidence showed that twenty-five (25) parcels containing twine bags were turned over to the Postmaster, the amount of such articles was not deducted from the amount of restitution. See Stubblefield's evidence.

The only thing that made it possible to estimate the value of the articles was the entry made by Snetter of the 17th of November which was \$475.00.

The judgment of the court below was to the effect that appellants were to make restitution to the value of the whole sixty-nine (69) parcels.

In view of this admission, and the acquittal of Smythe, the jury should have given the appellants the benefit of a doubt in their favor. In other words, there were strong doubts about prisoners' guilt and the verdict should have been set aside and a new trial awarded.

The prosecution seems to have lost sight of the main point in issue, and to have laid particular stress upon certain matters, which in my opinion had very little weight in deciding the guilt or innocence of prisoners, such for instance as the letters written by some of the prisoners, in answer to queries propounded to them in *re* the parcels; particularly a vulgar letter written by Watts, one of the appellants, a letter which the court should have rejected not on the ground that it was privileged communication, but because it was regarded as irrelevant, not containing any confession or admission of the prisoners. In my opinion the letter was only insisted upon because the prosecuting officers wanted to show how clever they were in collecting evidence, and to prejudice this case against prisoners.

There were other matters that were injected into the case, for instance the episode between Clarke and Dennis about the helmets; the prevarication of Snetter and other of the prisoners which while they tended to expose defects in the postal service, did not really establish the case of embezzlement charged in the indictment. It has been alleged that unless the conviction of the appellants is affirmed, it may affect our position in the postal union.

I have nothing to do with the scales of justice proposed between litigants. Let justice be done, though the Heavens fall. Actuated by that high sense of honor, honesty and fair play which has always characterized my action on the bench of this court, I can not conscientiously concur in the majority opinion and therefore give this dissenting opinion. The judgment of the court below should be reversed.

R. E. Dixon, for appellant.

L. A. Grimes, Attorney General, for appellee.
