JACOB CUMMINGS, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, MARYLAND COUNTY.

Argued January 16, 1935. Decided February 1, 1935.

1. One can be properly accused of impersonating another only when there is a deliberate effort to mislead with intent to defraud.
2. If a juror is admitted to try a cause without objection, the verdict shall not be set aside for any disqualification existing before his acceptance as such juror.
3. The prosecuting attorney must try the case fairly and properly, or the defendant, if convicted, is entitled to a new trial.
4. Hence it is ground for a new trial if the prosecuting attorney used improper language that is prejudicial to the interest of accused, or argues on facts not on record in the case.
5. But in spite of the foregoing an accused person cannot successfully request that the verdict obtained after such improper remarks of the prosecuting attorney be set aside except he promptly objected thereto, and failing to obtain a ruling from the trial court as promptly excepted.
6. An objection must be sufficiently specific to inform the trial judge of the point on which a ruling is requested, as well as to avoid any ambiguity in presenting the precise question for the consideration of the court of appeal.
7. Generally speaking "hearsay is not evidence"; but the rule against the admission of hearsay evidence may be satisfied by: 1) Testimony at a former trial; 2) Depositions *de bene;* 3) Depositions *in perpetuam memoriam;* and 4) Testimony at the same trial pending.
8. Confrontation is the dramatic preliminary to cross-examination; and hence in most cases the hearsay rule is satisfied if there has been a cross-examination, or an opportunity therefor.

On appeal from conviction of grand larceny on retrial, *judgment affirmed.*

William V. S. Tubman for appellant. *James A. Gitten,* by appointment of the Attorney General, for appellee.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

At the November term, 1933, this case was before this Court upon an appeal from rulings and the final judgment, which had then been rendered against appel-

lant by His Honor Stephen E. Dickerson, Circuit Judge presiding in the Fourth Judicial Circuit by assignment. At that time, Mr. Justice Dixon, to whom we had delegated the task of preparing and filing the opinion, made a very exhaustive review of *all* the salient points in the case, and admirably interpreted the views we unanimously held that, save for one constituent element in the case, the charge against appellant had been conclusively proven, and but for that one missing fact the judgment should have been affirmed.

He, however, pointed out therein that in all jurisdictions where by statute, as is the case in Liberia, larceny is divided into two grades—grand and petit—it is absolutely essential to prove the value of the goods stolen, or the defendant is entitled to a new trial. That was the one missing link, and hence we felt ourselves compelled, most reluctantly, to reverse the judgment and award the appellant a new trial, in order that the new trial to which appellant was entitled might be duly had. *Cummings* v. *Republic,* 4 L.L.R. 16, 1 Lib. New Ann. Ser. 17 (1934).

The new trial accordingly came on at the May term, 1934, before His Honor E. A. Monger, Circuit Judge presiding by assignment; and it is a source of pleasure to us to be able to record our gratification at Judge Monger's adherence to the indication contained in the former opinion rendered in this case, and his care in seeing to it that the missing element in the case was duly supplied.

In spite of this, however, the case is for the second time before us upon a bill of exceptions containing fourteen counts. Of these only one seems to have been strongly relied upon by the appellant before this Court, and that was count twelve which complains that the trial judge overruled his motion for a new trial, consisting of five counts; and it is to the consideration of the second and fifth counts of the said motion for a new trial, part of the complaint in the twelfth count as aforesaid of the

bill of exceptions, that we shall now address our attention.

In the second count of said motion it is requested that the verdict should be set aside because, as appellant alleged, Daniel Bedell, one of the jurors, had impersonated one E. M. Farr; and Peter Hne, another juror, had impersonated one J. K. Seere. The word "impersonated" was incorrectly used, for it implies a deliberate effort to mislead with the intent of defrauding, which was clearly not intended in the case under consideration. Because, according to the explanations made at this bar during the argument, a custom seems to have arisen in Maryland County, and elsewhere in the Republic, that when a venire is issued, and a person summoned as a juror feels himself unable from illness, or other cause to attend, rather than be in default and risk the penalty for disobeying the summons, he is wont to induce a relative or friend to attend in his stead and respond to his name, with no intention whatever of defrauding anyone, and this is what appears to have happened in this cause. Defendant was, therefore, as Mr. Justice Dixon pointed out during the argument here, tried by twelve actual men against whom no complaint of being legally disqualified had been advanced; and even had there been, defendant could not have legally moved to set the verdict aside unless he had taken advantage of the supposed irregularity at the proper time. *McBurrough* v. *Republic,* 4 L.L.R. 25, 1 Lib. New Ann. Ser. 27 (1934); *Mason* v. *Republic,* 4 L.L.R. 81, 1 Lib. New Ann. Ser. 85 (1934). Judge Monger, in our opinion, therefore, did not err in overruling the said second count of said motion for a new trial upon the authority he cited, viz.:

> ". . . But if a juror is admitted to try a cause without objection, or after objection has been taken and disallowed, the verdict shall not be set aside on account of any disqualification existing before his acceptance as a juror." 1 Rev. Stat. § 360.

In the fifth count of the motion for a new trial appellant complains that he was entitled to a new trial because the prosecuting attorney, arguing the case to the jury, made use of the following remarks:

> "Gentlemen of the jury, we are the only Negro Republic in the world; in China, Japan has a sister; but we are single-handed and great criticism has been offered against our judiciary. Today we stand in a very difficult position before the world, and the money and goods alleged to have been stolen are the property of foreigners."

This exception of appellant raises a very important point, and, as far as we have been able to ascertain, it is for the first time presented for the consideration of this Court.

According to the principles we have been able to find:

> "The prosecuting officer must try the case fairly and properly, or the defendant is entitled, if convicted, to a new trial. So an improper line of examination of a witness, reflecting wrongly on his character, is erroneous, since it prejudices the jury." Beale, Criminal Pleading and Practice, § 220.

Hence,

> "Improper language of the prosecuting attorney, if prejudicial to the defendant's case, is ground for a new trial; but not if it is not shown to be prejudicial.
>
> "In arguing to the jury, the prosecuting officer must keep within the bounds of legitimate argument; he must confine himself to the facts proved. 'The weapons of wit and satire and of ridicule are all available to him so long as he keeps within the record. He may draw inferences, reject theories and hypotheses, impugn motives, and question credibility, subject only to the restriction that, in so doing, he must not get clearly outside the record, and attempt to fortify his case by his own assertions of facts, unsupported by the evidence.' Thus it is not legitimate for coun-

sel to use abusive language of the defendant; and if this is done in such a way as to prejudice the defendant, a new trial will be granted.

"It is erroneous for the prosecuting attorney to argue on facts not in evidence, or to state in the hearing of the jury the existence of such facts; and if such error was allowed to pass unrectified, a new trial will be granted. . . . But facts on record in the case, though not proved by evidence at the trial, may be stated; as that defendant was convicted in the inferior court. . . . Fair comments, like remarks on the prevalence of crime and the dangers of allowing criminals to escape punishment, are legitimate. . . ." Beale, Criminal Pleading & Practice, § 221.

The Judge, however, ruled that:

"The defendant never called the court's attention to any improper remarks made by the prosecution in the course of arguing this case; hence he has waived his right to take advantage thereof." See Ruling of Judge Monger on the Motion for a New Trial in the Records filed here.

This Court says that the ruling of Judge Monger above quoted does not appear to us to be erroneous; for, although according to the better practice, the trial judge should *sua sponte* check any attempt on the part of the prosecuting attorney, or the counsel for defense, to go beyond the bounds of legitimate argument, slight indications of which have been hereinbefore given, yet if he does not, and the aggrieved party fails to object promptly, it is not ground for complaint in this Court. We have briefly alluded to this in the case *Phillips* v. *Republic*, 4 L.L.R. 11, 1 Lib. New Ann. Ser. 12, pointing out that:

"The office of an objection is twofold. In the first place it presents to the trial judge the point or points on which a ruling is asked, together with the grounds for the ruling. In the second place it presents to the court of review the precise questions which were

raised in the trial court and the grounds on which the trial court was asked to base its ruling. . . . It is certainly not unreasonable to require a party desiring to review in an appellate court the action of the trial court, to call the attention of the trial court, by seasonable objections, to the proceeding complained of." 8 Ency. of Pl. & Prac., "Exceptions and Objections," I l., 2. a.

"The objection must state the grounds thereof, and point out specifically the errors complained of, in order that an opportunity may be given to correct them; if not sufficiently specific it will not afterwards avail the party raising it." 8 Ency. of Pl. & Prac. 163.

Dealing specifically with the point under consideration, Beale lays it down as a rule that:

"If remarks of the prosecuting attorney are objectionable they must be objected to at the time; it is too late in another court. So where he has stated facts not in evidence, or has stated his own opinion of defendant's guilt, or has commented on defendant's failure to testify, no new trial will be granted unless seasonable objection was made. The objection must take the form of a request for instruction to the jury to disregard the language, or for a discharge of the jury; and refusal of the request must be duly excepted to. . . ." Beale, Criminal Pleading & Practice, § 223.

Judge Monger's ruling therefore appears to us to have been consciously or unconsciously predicated upon the last cited section of law, and hence we feel bound to uphold it.

There does appear to us, however, one important error committed by Judge Monger, the trial judge, during the trial; and although by no means the same emphasis was laid upon it during the argument as upon the other two points already dealt with, since the defense has not insisted that his interest was materially prejudiced thereby, yet inasmuch as one of the duties of this Court is to settle

the procedure of the subordinate courts whenever a proper case presents itself, as pointed out in the case *Yancy and Delaney* v. *Republic,* 4 L.L.R. 3, 1 Lib. New Ann. Ser. 3 (1933), the Court has elected to carefully consider and correct the error to which our attention has been directed in the record of the trial. The facts to which we refer are as follows:

During the former trial of this cause in the court below, one Heinrich Renken, as agent of the firm whose goods had been stolen by appellant, was called as a witness for the prosecution, testified, and was cross-examined by the appellant. In the interval between the first appeal and the new trial awarded by order of this Court, the said witness Renken left the jurisdiction of the Republic, and returned to his home in Germany. Witness A. Dashwood Wilson, Jr., an attorney at law for the private firm, who testified at both trials, stated in the course of his testimony on the second trial that the return to this jurisdiction of witness Renken was exceedingly problematical. Two efforts were made, therefore, to have extracts from the evidence given by him placed before the jury (1) by interrogating one W. P. Wilson, and (2) by having the clerk of the court to produce the record of his testimony given at the former trial. Both of these efforts the judge disallowed and based his ruling upon the decision of this Court in the case *Beysolow* v. *Gordon,* 2 L.L.R. 95, 1 Lib. Semi-Ann. Ser. 12 (1913).

We have no criticism to offer against the decision of this Court in that case,—our criticism is rather against the application made by the judge inasmuch as he did not, in our opinion, evince that amount of perspicacity in discriminating between the facts of the two cases that he showed in sundry other matters which the counsel for appellant ingeniously presented for his consideration during the trial. For example, in the case *Beysolow* v. *Gordon,* when the case came on for a new trial, the parties, upon the suggestion of the trial court, waived the

production of any witness who had testified at the former trial, and permitted the testimony which they had given to be read *en bloc* from the records to the jury. This is what this Court condemned at that time. In the case now under review all of the witnesses who testified at the former trial, with the exception of said witness Renken, were produced in court and testified on oath, and additional ones were also adduced. Hence the difference between the two cases.

The general principle of law may be stated as follows: Hearsay is not evidence, and hence,

> "The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine the witness. But where the testimony was given under oath, in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties. It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party. . . . The two inquiries that thus arise, when we ask whether the Hearsay rule is satisfied by testimony offered, are:
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> "A. Has the opportunity of cross-examination been had? B. Has there been confrontation? We proceed now with the former.
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> "We may here distinguish four situations in which the principle may require to be applied: (1) Testimony at a former trial; (2) Depositions *de bene;* (3) Depositions *in perpetuam memoriam;* (4) Testimony at the present trial." 1 Greenleaf, Evidence § 163.

Wharton supports this view. In his treatise on *Crimi-*

nal Evidence, volume I, section 227 we find the following:

> "To the rule excluding hearsay, the first exception is what a deceased witness testified to on a former proceeding against the same defendant for the same offense as that under trial, or for an offense substantially the same, and it may be proved by witnesses who heard the testimony of such witness; nor is such oral evidence excluded by the fact that the original testimony was reduced to writing; nor, in criminal cases, by the constitutional provision as to confrontation by witnesses. The deposition of a witness taken in defendant's presence is admissible; what a deceased witness swore to on a preliminary hearing before the committing magistrate is evidence at the trial in chief, if taken in the presence of the defendant; otherwise not.
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> "Where the testimony offered on the subsequent trial was *non coram judice,* or the witness was not sworn, or cross-examination was precluded or restricted, or the witness was incompetent, the ground for the admissibility of such evidence fails.
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> "It is not necessary, however, that there should be an actual cross-examination where the opportunity for such was provided, and there was liberty to cross-examine."

Section 228 deals with testimony given on a former trial, and the several grounds of admissibility. In this Wharton says:

> "Testimony taken at a trial connot be read at a subsequent trial, if the witness is obtainable. But where former testimony is admissible, it is admissible in criminal cases, on the same ground as in civil cases. . . ."

Of these grounds of admissibility the second he gives is absence, which he deals with as follows:

> "Mere absence, or a reliance on the witness's prom-

ise or promise of adverse party that witness will be present, is not sufficient, but to be sufficient to admit former testimony, absence from the state must be shown." *Ibid.*

This absence of witness Renken, as has been seen, was shown in the case under consideration by the testimony of A. Dashwood Wilson, Jr. The only point then left upon which to quibble was the constitutional provision about confrontation, and thus it now becomes necessary for us to consider, what is confrontation?

According to Greenleaf:

"The notion of confrontation is that the witness shall be now in court at the time of testifying and in the presence of the tribunal and the opponent. The purposes of this are two, one a chief and vital one, the other a minor and dispensible one. (a) The chief purpose of confrontation is to secure the opportunity for cross-examination; this has been repeatedly pointed out in judicial opinion; so that if the opportunity of cross-examination has been secured, the function and test of confrontation is also accomplished; confrontation being merely the dramatic preliminary to cross-examination. (b) The second and minor purpose is that the tribunal may have before it the deportment and appearance of the witness while testifying. But the latter purpose is so much a subordinate and incidental one that no vital importance is attached to it; consequently, if it cannot be had, it is dispensed with, provided the chief purpose, cross-examination, has been attained. So far as confrontation is concerned then, the only question is whether it can be had under the circumstances of the case; if it can be, it must be; if not, it may be dispensed with. . . .

"The general principle, therefore, should be that in all cases where the party has without his own fault or concurrence irrecoverably lost the power of pro-

> ducing the witness again, he should be dispensed from doing so, if there is at hand his testimony already subjected to cross-examination; and this general notion underlies all the cases of dispensation." 1 Greenleaf, Evidence § 163 f. (16th ed.).
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> According to the same book, section 163g:
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> ". . . The *absence* of the witness *from the jurisdiction,* out of reach of the Court's process, ought also to be sufficient, and is so treated by the great majority of Courts; mere absence, however, may not be sufficient, and it is usually said that a residence or an absence for a prolonged or uncertain time is necessary."

From Judge Monger's literal adherence, without discrimination, to the rule laid down in *Beysolow* v. *Gordon,* which case will hereafter have to be read in conjunction with this, it will be seen that had said ruling of his not been corrected as we have now done, great injustice might have resulted to a party unable, through no fault of his own, to produce an important witness at a retrial of a case already previously heard, and this error, made by one who has impressed us as usually a careful and wide awake judge, might have been obviated had he only remembered that under certain circumstances even depositions taken *de bene* and in *perpetuam rei memoriam* have been admitted even in criminal cases and thereby have dived deeper down into the law so as himself to discover and elucidate the principle which he has thrown upon us the responsibility of herein enunciating.

Nevertheless, as has already been indicated, since no material harm has been shown to have been done the appellant by this erroneous ruling of the judge, which appears to have damaged the prosecution even more than the defense, and inasmuch as the only two subsections of the one count out of fourteen counts in the bill of exceptions upon which appellant seemed to have based his reliance for a reversal have had to be decided against ap-

pellant, and as the principal points in the evidence have already been completely reviewed in the opinion of this Court handed down in the previous series, it is our opinion that the judgment of the court below should be affirmed; and it is so ordered.

Judgment affirmed.