JOSEPH F. DENNIS, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM CONVICTION OF EMBEZZLEMENT.

Decided April 29, 1938.

1. Our Constitution provides that a defendant in a criminal case should not be compelled to furnish or give evidence against himself.
2. The statutory provision that a witness shall be compellable to answer every question which may be put to him, unless he will swear that answering may subject him to punishment other than pecuniary fine, is inapplicable to a defendant charged with the commission of crime, and especially a felony.
3. It is the duty of the appellate court to correct improper questions put to a witness over the objections of counsel, especially in criminal cases.

On appeal from conviction of embezzlement, *reversed and remanded* for new trial.

Anthony Barclay and *S. D. Coleman* for appellant. *The Attorney General* for appellee.

MR. JUSTICE TUBMAN delivered the opinion of the Court.

On a bill of exceptions containing forty-three counts, this cause has been brought before the Supreme Court by appellant for review.

After days of patient listening to a fairly voluminous record and an exhaustive duel of forensic force between appellant and appellee's counsel, it has been brought to the point where we must settle the issues involved that are relevant to a fair and legal adjudication of the cause.

It is a fundamental principle of criminal law, universally upheld by the criminal law courts and recited by this Court in the case *Dyson* v. *Republic,* 1 L.L.R. 481, 483, that:

> "In all trials upon indictments the State, to convict, must prove the guilt of the accused with such *legal cer-*

tainty as will exclude every reasonable hypothesis of his innocence; . . ." (Italics added.)

We cannot in passing too strongly stress the adjectival phrase *"legal certainty,"* which term indicates certainty in point of law and fact, the court being sole judge of the law and the jury the judge of the facts.

In entering upon a consideration of the issues raised in the bill of exceptions, we have regarded three main points as sufficient to a disposition of the case as it is presently before us, and these issues are raised in counts 4, 11, 12, 15, 16, 17 and 39 of the bill of exceptions; for in our opinion the remaining counts of the bill of exceptions are not worthy of as serious legal consideration as those herein dealt with.

The first of the three points which we are to consider is couched in counts 4, 15, 16, and 17 and reads substantially and respectively as follows:

"4. And also because when on the 27th and 28th days of August, 1936, respectively, prosecution asked issuance of a writ of *duces tecum* on the defendant to produce original of letters marked 'P1' and 'P2' and another letter addressed to the defendant by the Attorney General of Liberia dated May 9, 1936. Defence counsel objected to the issuance of said writ for the reason that it would be a violation of defendant's organic right reserved to himself in Article 1, sec. 7 of the Constitution of Liberia, in respect to prohibition of defendant to furnish or give evidence against himself, Your Honour in ruling on said objection of defence counsel that the writ shall issue and upon the return it will then be time for the defence to raise the objection if they feel that the production of said letters would impugn on their constitutional rights.

. . . . .

"15. And also when on the said 31st day of August, 1936, prosecution asked the court for the call of the

defendant to take the stand as a witness and produce original letters in keeping with the writ of *duces tecum* served on him for the production of letters dated April 7, and March 30, 1936, written to him by Auditor Phillips. Defence counsel objected to the defendant taking the stand on behalf of the state on a constitutional ground that none shall be compelled to furnish or give evidence against himself when criminally charged. Your Honour propounded the following question to defence. 'Do you fear that the production of these letters will militate against the defence and subject your client to punishment in a criminal proceeding?' to which the defence counsel replied: 'The court's question refers to the statutory provision made for witnesses as found on page 60, section 22, Old Blue Book, whereas the objections of defense to his being made a witness is based upon Article 1, section 7 of the Constitution of Liberia and as all objections to the qualification to one subpoenaed as a witness should be made before he is qualified, defense counsel feels perfectly and fully within their rights both constitutionally and statutorily to make objections at this time.' Your Honour overruled said objection and said that in its opinion there is no conflict between the Constitution and the statute cited by the counsel. The only question that arises is to the time when oath required by the witness shall be taken, which oath must show that to answer such questions as are about to be put to him will subject him to punishment other than pecuniary. The court says that in its opinion it is after the witness has been sworn and he takes the stand that he can decline under the Constitution and statute just quoted to answer questions and not before. The objection therefore at this stage is overruled and the witness ordered qualified to take the stand.

"16. And also because when on the said 31st day of

August, 1936, whilst on the direct examination of Defendant-witness J. F. Dennis, prosecution put the following question:—'Please say whether you have been served with a subpoena *duces tecum* to produce letters dated 9th May, 1936, from the Attorney General of Liberia to yourself, and March 30, 1936, addressed to you by James T. Phillips, Assistant Liberian Auditor, R.L. and April 7, 1936, addressed to you by James T. Phillips, Liberian Assistant Auditor, and if so, if you have the originals of these letters, will you please produce them?' Defence counsel objected to said question on the ground: That said question is a flagrant invasion of the constitutional right of the defendant, that is Article 1, sec. 7 of the Constitution; in that one criminally charged cannot be compelled to furnish or give objection said that it is prepared to entertain the objection provided the witness say on oath that it militates against his defence and to answer said question would subject him to punishment other than financial and cited Liberian Statute Chapter 12, sec. 22, page 60.

"17. And also because when on the said 31st day of August, 1936, Your Honour propounded the following question to Defendant-witness J. F. Dennis *sua sponte,* whilst on direct examination:—'And you consider that it would subject you to punishment other than financial.' Defence counsel objected to said question on the ground that it would tend to negative his plea of *'NOT GUILTY';* and to answer the Court's question as put would be placing the accused as witness in an awkward position since he does not know the import of the evidence sought to pass upon said evidence Your Honour overruled said objection."

Now in article 1, section 7, of the Constitution it is declared:

"No person shall be held to answer for a capital or infamous crime, except in cases of impeachment, cases

arising in the army and navy, and petty offences, unless upon presentment by a grand jury; and every person criminally charged, shall have a right to be seasonably furnished with a copy of the charge, to be confronted with witnesses against him,—to have compulsory process for obtaining witnesses in his favor; and to have a speedy, public and impartial trial by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself; and no person shall for the same offence be twice put in jeopardy of life or limb."

Appellant contends in count four that the writ of *duces tecum* should not have issued to him, he being defendant in the case then pending, and in which said writ was issued for him to produce certain letters to be used as evidence against him. His honor the trial judge held and ruled that the writ should issue, and that when the writ should be returned then it would be the proper time to raise the objections which they had raised at that stage of the proceedings.

The Constitution in the article and section above recited expressly, and in plain and emphatic terms, states: that "He," meaning a defendant in a criminal case, "shall not be compelled to furnish or give evidence against himself." Thus, while his honor was correct upon the general principle of law and the rule of the court before which the cause was being tried, the application for the writ as made by the prosecution, to have the defendant summoned to appear and produce certain letters in his possession to be used as evidence against himself and to testify as to their identity on behalf of the prosecution, in a case in which he was being tried for a felony, created a different and singular circumstance from the general rule; and the writ, as such, should not have permitted to issue, especially so when appellant objected and claimed his constitutional privilege. But the mere error of the trial judge in allowing the writ to issue in our opinion

did not in itself constitute sufficient irregularity to adversely affect the trial had in the court below, but for what subsequently followed.

The 15th, 16th and 17th counts of the bill of exceptions as recited before show objections taken by appellant to the court requiring the defendant to take the stand as a witness for the prosecution, to produce two letters as evidence in the case against himself and to identify them, unless he would swear that his doing so would subject him to punishment other than pecuniary fine.

In the early centuries, the Roman Law, and afterward the common law of England, permitted the most cruel punishments to be inflicted on persons suspected of crime in order to compel them to admit their guilt. The progress of civilization and Christianity aroused opposition to this method, and about the close of the seventeenth century it was abandoned and the opposite principle was incorporated into the common law of England: that no one should be compelled to incriminate himself.

This doctrine says Mr. Justice Brown in *Brown* v. *Walker,* 161 U.S. 591, 40 L.Ed. 819 (1895),

> "had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which had long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. . . . The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the

States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." (At page 596.)

The founders of this country, following in the wake of the advancement of civilization and Christianity, have also incorporated this provision into our Constitution in Article 1, section 7.

Mr. Black in his treatise on *American Constitutional Law,* under the title "Privilege against self criminating evidence" has laid down that:

"This guaranty does not create any new right, but merely reaffirms a common-law privilege. It is directed against the extraction of confessions by torture or otherwise, and against the inquisitorial method of trial. The seizure or compulsory production of a man's private books or papers, to be used in evidence against him, is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture, is equally within the constitutional prohibition.

"This privilege, however, is confined to such cases or proceedings as are criminal in form or criminal in their nature and consequences. It does not extend to cases involving questions of property only. But it applies to proceedings before a grand jury, as well as before the traverse jury; the defendant cannot be compelled to testify before the grand jury. And it applies to all proceedings which, though civil in form, are really criminal in their nature. . . ."

It is therefore our opinion that it was a flagrant and gross disregard of the constitutional privilege of the defendant for the prosecution with the approval of the court to have issued a writ to defendant to produce private letters written to him and require him to identify them to be

used as evidence against himself in a case pending against him upon an indictment of the grand jury for a felony and in the trial of the identical cause.

The position taken by his honor the trial judge, that in order for the defendant, a native inhabitant, to be exempted from producing the said letters and identifying them in a case in which he was being tried for a criminal offense, he would need to swear that to produce the said letters and identify them would subject him to punishment other than pecuniary, was in our opinion invidious. For the provisions of the statute under the chapter on oral testimony which require that

> "A witness shall be compellable to answer every question which may be asked him, unless he will swear that his answers may subject him to punishment, other than pecuniary fine. . . ."

is absolutely inapplicable, as a defendant charged with the commission of crime, and more especially a felony, is obviously being sought by the prosecution to be found guilty of the charge against him, and if convicted will be subjected to punishment other than pecuniary fine, for imprisonment is an indispensable part of the punishment for such a grade of crime; and it would seem extremely prejudicial to the interest of a defendant for him to be required to swear that for him to testify or furnish evidence required of him by the prosecution would be to subject him, by operation of law, to punishment other than pecuniary fine.

Let us notice that the Constitution does not only grant immunity to one who is a defendant in a criminal case being compelled to give evidence against himself; but he, said defendant, shall not even be commanded or compelled to *furnish* evidence against himself.

The provisions of the statute requiring a witness to answer every question put to him unless he swears that his answer may subject him to punishment other than pecuniary fine is therefore inapplicable to this case; but applies to witnesses who are capable under the law of

becoming a witness for a party, and it is such witnesses whom the statute intends shall be compelled to answer every question unless they swear as aforesaid. A defendant, however, who elects to take the stand as a witness for himself, falls under the same rule as any other witness and shall in such circumstances alone be compelled to answer every question that is put to him. But even then he shall not be required to answer questions that will tend to incriminate him. See Acts of Legislature of 1907–08, page 31, "An Act to Render Competent the Evidence of Parties to Suits":

> "Sec. 3. That in criminal cases the defendant cannot be compelled to testify as in civil cases, but having elected to take the stand said defendant testifies under the rules which govern witnesses except that the said defendant can not be compelled to answer questions which may tend to incriminate himself."

We are therefore of opinion that his honor the judge erred by compelling the defendant to produce private letters written to him and to indicate them.

Let us now pass on to the second of the three counts of the bill of exceptions which we have decided to consider, wherein the appellant urges that his honor the judge asked witness Lartey the following questions:

> "Turn to your account under April 1935 date the fourth and see whether an entry appears thereon of Real Estate Tax to an amount of $7.50 paid by N. G. Muhlenburg. Turn to your account under September 20, Williams Lucas et al. Whiteplains $44.30. It is entered?"

and that to those questions defense counsel excepted alleging that the book which the witness was required to refer to had not been identified was therefore not before court, never was offered in evidence, and hence the defendant was denied the privilege of cross-examination with witness Lartey on the questions put to him by the trial judge.

In passing on this objection we will reiterate the prin-

ciple of law handed down by this Court in the case *Gartargar* v. *Republic,* 4 L.L.R. 70, 1 Lib. New Ann. Ser. 73, that

> "It is the duty of the court, especially in criminal cases, to ask such questions as appear to be necessary for the complete development of truth, but, with the sole exception of leading questions, the court has no more right than counsel has to ask an improper question; and should he do so over the objection of counsel, it is the duty of the appellate court to correct same." (Syllabus, 4.)

Continuing in the elucidating of this principle the Court held, upon the authority of 8 *Encyclopædia of Pleading and Practice,* page 73, where it is laid down:

> "Indeed, it is said to be the duty of the court, especially in criminal cases, to ask such questions as appear to be necessary for the complete development of the truth, but the judge has no greater right than counsel has to ask an improper question, and should he do so, against objection, the error may be corrected in the appellate court."

In this respect, the trial judge was in error, for by such question he caused to be placed on record evidence that showed the existence of better evidence contrary to the statutory provision that says the best evidence should always be produced, that is, no evidence is sufficient that supposes the existence of better evidence.

The account was the best evidence to show if the amounts referred to in the question of the judge below, had been entered, and this could only be legally done by first having the books of account identified by someone who had kept them or who was familiar with the said account, and then have same regularly admitted in evidence; for, as upheld by this Court in the case *Johnson* v. *Republic,* 1 *Liberian Law Reports,* page 75, the identity of a written document is essential to the proof of its character and authenticity. What is more is that it appears

that the account or book upon which the judge questioned witness Lartey and from which the said witness made his answer was not only never identified, but was not offered in evidence and does not appear in the record. The judge therefore erred in his ruling.

Lastly we come now to consider the question of exceptions taken to the charge of the judge below, which was upon the request of appellant reduced to writing and forms a part of the record in this case.

An inspection of said charge shows that his honor charged the jury, with the fourth paragraph thereof as follows:

> "In proof of this allegation the state has produced witnesses who have shown that the defendant embezzled this money by using license sheets, receipts, etc. which he never submitted to the Accountant to be entered into the accounts of Government provided for the purpose. Further, that these collections have not been deposited in the Government depositary in keeping with the rule of the Bureau of Internal Revenue that Collectors and/or cashiers must make daily deposits of revenues collected into the Government depositary designated."

In this we are of opinion that his honor erred, for he exceeded his power and functions and invaded the province of the jury when he told them that the plaintiff had produced witnesses who have shown that the defendant embezzled this money by using license sheet, receipts, etc.

Again his honor in another part of his charge said to the jury:

> "Mr. Dennis on the other hand has attempted to show that the system employed by Mr. Phillips was erroneous and that there was a better system known in the world of accounting which Mr. Phillips should have employed, but this attempt has been rendered abortive by the evidence of Mr. Sawyer, Comptroller of the Treasury, who stated that the systems are multi-

farious. Mr. Pilot, the Auditor, stated that the audit made by Mr. Phillips was checked by him and found correct."

The question as to whether plaintiff has proven the charge or defendant's effort to prove his innocence had proven abortive were questions exclusively within the province of the jury, and not the court, for the Liberian Statutes (*Old Blue Book*), chapter XII, page 58, section 2, say that:

"It shall be the right of the court to decide on the competency or admissibility of oral testimony, and of the jury to judge of its credibility and effect."

The judge's charge was therefore illegal and contrary to law. We feel it necessary to observe in passing that the questions as to the sufficiency of the indictment were raised in a motion in arrest of judgment and strenuously argued in the court below in the 9th of September, 1936. That the indictment is actually defective the trial judge himself admitted, for on the 26th day of August when the first witness J. T. Phillips was on the stand testifying on behalf of the prosecution, upon the objection to a question put to him by the prosecuting attorney the judge made the following record:

"The court says in ruling that at the reading of the indictment he was surprised at its brevity. In the case *Republic* v. *Cummings,* the Supreme Court maintained the universally accepted principle of law that the accused has a right to be informed of the nature and cause of the accusation against him, and same should be plainly and fully, substantially and formally prescribed to him so as to enable him to make his defence. The court cites section 10 of 3 *Greenleaf; Cummings* v. *Republic,* 4 L.L.R. 16, 1 Lib. New Ann. Ser. 27; the same case in 4 L.L.R. 284, 2 Lib. New Ann. Ser. 22; Wharton, *Criminal Evidence* 1197, section 5828. The defence however did not raise any question to the insufficiency of the indict-

ment but entered a general plea of 'not guilty.' As this plea involves a denial of every material fact against the prisoner, and as the burden devolving upon the prosecution is to prove the whole indictment, the court is of the opinion that by the plea of 'not guilty,' the defence has waived the point of the insufficiency of the indictment, which objection, if it had been entered prior to the plea, the court would have been bound to sustain. The objection is therefore not sustained and the evidence of the witness to be continued."

Although all pleas to the sufficiency of the indictment should be raised before the joining of issue on the facts according to our statute, yet defendant was charged with having during the whole course of his employment received a total sum of $3,365.41, which total sum he is also charged with having embezzled. The evidence adduced at the trial tends to prove that the total sum received by appellant during the course of his employment was $33,365.76. The judge in his charge to the jury told them that the shortage of defendant was $5,568.13; after making sundry deductions he directed the jury to bring a verdict for $1,810.07. The jury brought a general verdict of guilty of the crime as alleged according to evidence, and upon said verdict the judge sentenced the defendant to make restitution of a sum of $1,810.07.

We find here certain inconsistencies which should be remedied before the defendant could legally be convicted.

Although the evidence in this case seems strongly to point toward the commission of the crime by defendant, he has not in our opinion had a legal trial. Since it is upon his application that judgment and verdict are being set aside, it is the opinion of this Court, therefore, that the judgment of the court below should be reversed and a new trial awarded and it is so ordered.

Reversed.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA

AT

NOVEMBER TERM, 1938.