H. LAFAYETTE HARMON, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 25–27, and December 12–13, 1938. Decided December 16, 1938.

1. The burden of proof to establish the affirmative of an issue involved in an action rests upon the party alleging the facts constituting that issue, and remains there until the end.
2. It is one of the first principles of justice not to presume that a person has acted illegally until the contrary is proved.
3. In order that smuggling may be committed by exportation of an article, the export of said article must have been prohibited by statute.
4. Whenever the Republic of Liberia enters a court of justice of this country as a party, the government stands upon the same plane as the humblest litigant.
5. It is the mission of the court to mete out to all alike substantial justice irrespective of race, color, nationality or accident of social or political standing.
6. The Supreme Court cannot be expected to affirm a judgment of conviction against any person charged unless the evidence adduced is sufficient to satisfy the minds and consciences of the Justices that the accused is correctly charged and the evidence satisfactorily proves him guilty of the offense charged.

Appellant was convicted on charges of receiving stolen goods and smuggling in the lower court. On appeal from the conviction on the charge of smuggling, *judgment reversed and case remanded.*

H. Lafayette Harmon, assisted by *P. Gbe Wolo,* for appellant. *The Attorney General* for appellee.

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

The above entitled cause had its genesis as follows:

One Henry Bell was indicted, tried and convicted of grand larceny, the specific charge being that he had stolen a certain diamond, the property of one Zachariah A. Jackson. From a judgment sentencing him to a period of imprisonment and to make restitution of said diamond or its value, an appeal was prosecuted to this

Court, and after an exhaustive hearing the judgment of the court below was, on December 4, 1936, affirmed.

It was during the arguments of the case above mentioned in this Court that we were first apprised that during the trial in the court below the present appellant, who had been all the time counsel for Bell, had been accused of having received and secreted said diamond; but it was also alleged that for want of evidence no action could be taken against the said H. Lafayette Harmon. *Bell* v. *Republic,* 5 L.L.R. 283, 4 Lib. New Ann. Ser. 13.

When the curtain again rose upon this drama in this Court, it was upon an application for a writ of prohibition to prevent the said Harmon from collaterally attacking two indictments and from committing sundry irregularities with respect to the procedure which had been initiated against him.

In the record of said case of prohibition, decided by this Court on December 22, 1936 (5 L.L.R. 300, 4 Lib. New Ann. Ser. 33), it was shown in some way not exposed to the Court, that the Honorable the Attorney General of Liberia had discovered that one W. S. Murdoch had left Liberia for England on board the *Apapa,* and that to him on board said ship the said Harmon had given the diamond to be carried out of the country.

The record shows further that the Attorney General took steps to have said diamond returned to Liberia; and that shortly after the arrival of said W. S. Murdoch in Monrovia, he sought and obtained for himself and Harmon an interview with the Attorney General at the Department of Justice. There, after having read and submitted a sworn statement, Mr. Murdoch delivered the diamond to Mr. Harmon in the presence of the Attorney General, who seized same, claiming that it had been illegally exported and gave a receipt for same.

The statement then filed by Mr. Murdoch was, as taken from the transcript of records certified to this Court, the following:

"When leaving Monrovia on the *Apapa* on the 18th March a number of friends came on board to see me off. Before the vessel left, Mr. Harmon took me on one side and asked if I would do him the favour of taking a diamond to England for valuation. I was reluctant to undertake the responsibility of carrying such a small article of possibly high value, but he had no other reliable means of sending it and pressed me to do so; eventually, I acquiesced.

"I was in London about the beginning of the second week in May last. I was approached by my firm on the subject of the diamond; I explained that I had been asked to handle the matter by Mr. Harmon who was our Solicitor in Monrovia and asked what was the procedure on appraisal. I was told that our own Mineral Department would be able to get in touch with the proper quarter and I relinquished the stone to them. They said that owing to the Whitsun holidays it would probably be several days before they could get a valuation done. Actually it was about ten days later. I was then in Manchester and was on the point of leaving Queen Hotel en route to Scotland when a page informed me that I was wanted on the telephone. I found it was our Manchester Office. They told me that London had been seeking me by telephone and that I was to get in touch with them at once. I did so.

"I was asked to confirm where I had got the stone and I again explained that it had been given to me aboard the *Apapa* by our Solicitor Mr. Harmon for valuation. They asked me where Mr. Harmon had obtained the stone. I told them I hadn't the faintest idea; it had come into my possession so hurriedly that I hadn't thought to inquire. They then told me that they heard from the Diamond Corporation, to whom the diamond had been sent for valuation, to the effect

that the diamond was one that had probably been stolen from Sierra Leone. It appears that experts have methods of valuation which enable them to state with considerable certainty the origin of any particular diamond.

"I gathered from the telephone conversation that the Diamond Corporation wished to seize the stone. I replied to the effect that this would place me in an awkward position because if I could not return it I might be faced with an action for its recovery in Liberia. Our people have some influence with the Diamond Corporation, and they got them to agree to permit me to take the stone back to Liberia.

"At the same time, I was given the valuation. It was described as being an 8 carat diamond, valued between £6.–.– and £7.–.– per carat, i.e. approximately £50.–.–.

"It was towards the end of June that I received a letter from the Attorney General of Liberia dated 1st June to the effect that he had received information about the stone, that it was the subject of an action for Grand Larceny pending in the court here and that in order to assist the prosecution I should bring the stone back to Liberia. I was to deliver it to the Attorney General against his receipt. I returned to Monrovia per *S.S. Ashantian* on the 21st July, and declared the stone to Customs. It occurred to me that if I relinquished the stone to the Attorney General, I might still be involved in a claim from Mr. Harmon. I decided therefore that my best plan would be to take Mr. Harmon along to the Attorney General and in the presence of two witnesses make a statement of the facts as I knew them and formally hand the stone to Mr. Harmon. The Attorney General would then be in position to deal with Mr. Harmon direct and I would be free of the responsibility of the Stone's re-

turn. The matter was slightly delayed by Mr. Harmon's absence in Bassa. Here is the stone.

"[Sgd.] W. S. MURDOCH."

Out of this incident two criminal prosecutions were initiated against Harmon, the former charging him with receiving stolen goods, and the latter is the case of smuggling, now under review. In both cases Harmon was convicted, and in both he prosecuted appeals to this Court.

The former case, that of receiving stolen goods, was disposed of during our November term, 1937, and the records show that said cause was decided by this Court by majority opinion, 6 L.L.R. 186, 5 Lib. New Ann. Ser., the Chief Justice being one of those in the minority as will be seen from the dissenting opinion filed by himself and Mr. Justice Grigsby on file. The present case, however, commencing during our last April term could not be concluded until the present session.

Before proceeding further we have to explain that each of the two cases belongs to crimes of a different genus; the former, to those of the genus *mala in se,* the latter to those known as *mala prohibita.*

The distinction between these two, as explained in 8 *Ruling Case Law* page 55, paragraph 5, is as follows:

"An offense malum in se is properly defined as one which is naturally evil as adjudged by the sense of a civilized community. An act which is malum prohibitum is wrong only because made so by statute."

In 12 *Cyclopedia of Law and Procedure,* page 131, we have the same principle stated as follows:

"The former class [*mala in se*] comprises those acts which are immoral or wrong in themselves, such as murder, rape, arson, burglary, and larceny, breach of the peace, forgery, and the like, while the latter class [*mala prohibita*] comprises those acts to which, in the absence of statute, no moral turpitude attaches,

and which are crimes only because they have been prohibited by statute."

There is an explanatory note under the last quoted citation which reads:

"*An offence is regarded as strictly malum prohibitum* only when, without the prohibition of a statute, the commission or omission of it would in a moral point of view be regarded as indifferent. The criminality of the act or omission consists not in the simple perpetration of the act, or the neglect to perform it, but in its being a violation of a positive law."

Taking the foregoing as a background, and keeping clearly in mind the distinction made in the above citations between the two classes of cases, let us now address ourselves to the consideration of the one now under review, as has been seen, the fourth in the series resulting from the theft by Bell of the diamond in question. The indictment in this case charges that the appellant

"did fraudulently conceal on his person, carry out of the port of Monrovia and ship aboard the said steamship *Apapa* one diamond stone of the value of one thousand four hundred and forty dollars which the defendant then and there did unlawfully, feloniously, fraudulently and secretly deliver to one W. S. Murdoch, the Agent of the Cavalla River Company, Limited, a British firm, doing mercantile business in the city of Monrovia, County and Republic aforesaid, who was then and there aboard said ship enroute to Europe, with instruction that he should take the said stone to the city of London in order to wilfully, feloniously and fraudulently evade payment to the Government of Liberia of the just collection of its revenue due to be paid on said diamond stone, in contravention and violation of the revenue laws of this Republic, and the said diamond stone of the value hereinbefore stated was by the said H. Lafayette Harmon, defend-

ant, at the time and place aforestated, unlawfully, secretly, feloniously and fraudulently exported to the city of London, in the British Empire, aboard the same steamship *Apapa* by and through the said W. S. Murdoch, with intent in so doing, to unlawfully, feloniously, secretly and fraudulently evade payment to the Government of Liberia of the customs duty to be paid on said diamond stone, and to defraud the Government of Liberia of the just collection of its revenue due on said diamond stone, in contravention and violation of the revenue laws of this Republic."

Appellant contends that he was illegally convicted because 1) to constitute smuggling under the laws of Liberia when the fact alleged is the *export* of an article, the exportation of said article must have been prohibited; 2) that as he sent the diamond away only for valuation, and not for sale, or to be otherwise disposed of, such act did not come within the definition of an exported article, which term export he contends is defined as follows:

". . . to send goods and merchandise from one country to another; to send or carry out of the state, for the purpose of sale, trade or disposition . . ." and that "except in cases where such article is severed from the mass of things belonging to this country with an intention of uniting it with the mass of things belonging to some foreign country," there is no "exportation." He cites to that effect 19 *Cyc.* "Export," "Exportation." See also the 9th count, sub-sec. (b) on page 6 of the brief of appellant.

The Honorable the Attorney General, traversing this argument, contended that the evidence did not support appellant's contention that the diamond was sent away for valuation only, but asked us to assume that had the valuation been sufficiently attractive, an order would have been given to sell the stone, and return appellant the proceeds. As appellant and Murdoch were the only two persons present when the conversation between appellant

and W. S. Murdoch took place on board the *Apapa* at the time when the former delivered the diamond to the latter and the latter received said stone, the sworn statement of witness Murdoch and his subsequent testimony under direct and cross-examination were carefully analysed by both parties during the arguments here, each contending that by said testimony his contention had been supported. The Attorney General quoted extensively from the testimony on record of John A. Dunaway, Supervisor of Revenues, and C. C. Bryant, Collector of Customs of the Port of Monrovia, endeavoring to show he admitted to these Customs officials that he had done wrong in not having first reported the stone and had it sent away upon a provisional bill of entry.

But to the minds of the Court, there is still an ambiguity as to the real object for which the diamond was sent away, which has not been satisfactorily removed, especially as the parties neglected in cross-examining witness Murdoch to endeavor to discover if any such ulterior motive as that of eventually selling the stone had been disclosed. But, applying the rules of law, in every such case the benefit of the doubt must operate in favor of the accused.

> "The burden of proof to establish the affirmative of an issue involved in an action rests upon the party alleging the facts constituting that issue, and remains there until the end. . . ." 10 R.C.L., "Evidence," § 48.

> "When a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative—at least when the means of proving the fact are equally within the control of each party; but when the opposite party must, from the nature of the case, be in possession of full and plenary proof to disprove the negative averment, then he must adduce it, or it will be presumed that the fact does not exist. Where the presumption of law is in favor of

> the affirmative, as where the issue involves a charge of culpable omission, it is incumbent on the party making the charge to prove it, although he must prove a negative; for the other party shall be presumed innocent until proved to be guilty. It is one of the first principles of justice, not to presume that a person has acted illegally till the contrary is proved." *Id.* at § 49.

Our own statutes on the subject provide:

> "Where party charges another with a culpable omission or breach of duty he shall be bound to prove it, although it involve a negative. . . ." Old Blue Book, ch. X, p. 52, § 2.

The next important point to which our attention was directed was: in the event the ultimate object had been to authorize W. S. Murdoch to sell the diamond, thus bringing the act within the definition of export above cited, would the offense of smuggling have been thereby committed?

To answer said question the Court is compelled to interpret the statute declaring what smuggling is, which statute reads as follows:

> "SMUGGLING. 1. Smuggling is hereby declared to be the fraudulent bringing into this Republic, or carrying out of it, merchandise which is lawfully prohibited.
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> "2. The importation of dutiable merchandise not properly or truthfully invoiced, with intent to evade the payment of legal duties.
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> "3. The purchasing on board steamers or sailing vessels of merchandise, and bringing it on shore without reporting to evade the payment of legal duties thereupon.
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> . . . . .
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> "5. The surreptitious landing of any merchandise by night or at a wharf not legally designated, whether such goods are invoiced or not, without the knowledge

or consent of the revenue officers, and with the intent to evade the payment of legal duties.

"6. Merchants or other persons desiring to land merchandise after 6 o'clock p.m. must give notice to the Wharfinger in due time; who shall himself or by proxy remain at his office and oversee the landing of such merchandise and receive from Government an extra allowance, to be fixed by the Secretary of the Treasury; which amount shall be paid to Government by the merchant so landing.

"Any person convicted of Smuggling according to this section, shall forfeit the goods smuggled, or if said goods can not be found, shall be fined in a sum equal to their value and the duty thereupon, and in the discretion of the court may be further fined in a sum not exceeding one thousand dollars." Criminal Code of Liberia, 35, § 124.

As the construction of said statute appeared to our minds to be the real crux of the case, the Honorable the Attorney General of Liberia was during his argument at this bar, pressed with questions from the Bench to satisfactorily show to us that the facts proven brought the case within the inhibition of the statute. Eventually he cited the following as a sort of forlorn hope from the Export Tariff Law of 1923, ch. XIV of the Laws of 1923–24:

"Mining Products: All products mined, such as minerals, metals, or oil, which are produced from any mine operated within the Republic are to pay a royalty in the form of export duty of 20 per centum on a sum represented by difference between the actual cost of production and the selling price. Cost to be figured only to point of dispatch in Liberia."

It will be observed that said statute has no vindicatory clause, but even then we cannot substitute the penalty for the violation of one law for the violation of another.

At this point the Court reached the conclusion that

appellant could not, had he tried, have enlisted a more able ally, or secured, perhaps unintentionally, a more powerful advocate than he had in the Honorable the Attorney General himself when he brought forward said citation from our tariff law in support of his thesis. For it appears from the statute that in order that smuggling may be committed by *exportation* of an article, the export of said article must have been prohibited by statute. The law cited by the Honorable the Attorney General however would appear to show conclusively that not only was the export of a diamond not prohibited, but rather that it was permitted and encouraged under the restrictions therein stated.

The Court would be remiss in its duty were it to neglect, at this point, to remark upon the offensive manner in which the Honorable the Attorney General presented this case in behalf of the Republic, or upon the aspersions he endeavored to cast unwarrantedly, so far as the facts in this case are concerned, upon appellant. We cannot too often reiterate, as has often heretofore been expressed, that whenever the Republic of Liberia enters the courts of justice of this country as a party, in spite of all of its power and its prestige, in the courts the government must stand upon the same plane as the humblest ligitant. Our only mission is to mete out to all alike substantial justice irrespective of race, color, nationality or the accident of social or political standing.

Accordingly this Court has repeatedly held that the government cannot be allowed to indict a defendant for one offense and convict him upon evidence tending to prove another.

In the case *Yancy* v. *Republic,* 4 L.L.R. 268, 2 Lib. New Ann. Ser., Mr. Justice Russell speaking for this Court said:

> "Hence this Supreme Court cannot be expected to affirm a judgment of conviction against any person charged, unless the evidence adduced is sufficient to

satisfy our minds and consciences that the accused is correctly charged, and the evidence satisfactorily proves him guilty of the offense as charged."

That the diamond was sent away in violation of a Customs Regulation appears to our minds to have been quite clearly established, and, moreover, as the Honorable the Attorney General pointed out was admitted by appellant himself. For in conversation with witness Dunaway, as related by appellant when on the stand, he said:

"I went to see Mr. Dunaway. Mr. Dunaway said to me, 'Mr. Harmon, I don't know what to do, you sent the diamond and you brought the diamond back, whether we should require import duty on the stone is what is not clear to my mind.' I said to him, 'Well, Mr. Dunaway, I am very sorry that I did not think to present the stone to the Customs before I took it away but I did it so hurriedly and with no intent to fraud the revenue, and I did not think at the time. I admit that it is a mistake but not an intentional mistake.' "

But, nevertheless, we have not been convinced that the violation of said regulation constituted the offense of smuggling with which appellant is on trial as defined by our Code.

In view of the foregoing the only conclusion we feel that this Court can legitimately reach from the premises is that the judgment of the Court below should be reversed, and the case remanded for any further proceedings not inconsistent with this opinion; and it is hereby so ordered.

Reversed.