

It was also held that: "there is a difference in the legal meaning of complaint and a petition in probate matters."

The judge of the Probate Court is legally bound to hear all complaints made against administrators, and to investigate such complaints, and in cases of petitions he is not bound by the strict rules of law which govern the hearing of other complaints.

We will further observe that the 3rd and 4th points raised in the assignment of errors were questions to which the attention of the court below did not appear to have been called. They are not therefore properly before this court.

We see no reason why the judgment of the court below should be disturbed. Said judgment is therefore affirmed with costs against appellant.

*Barclay and Barclay*, for plaintiff in error.

*H. L. Harmon*, for defendant in error.

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FRANCIS C. W. HILL, Appellant, *v.* REPUBLIC OF LIBERIA,  
Appellee.

ARGUED DECEMBER 18, 1924. DECIDED JANUARY 6, 1925.

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

1. The general rule is that a witness who has an interest in the subject of the suit is not competent to testify on the side of his interest; but where a witness is produced to testify against his interest, the rule does not apply and the witness is competent.
2. In criminal actions, both the day and the year of the commission of the offense must be laid in the indictment; but there need not be any express averment, if they can be collected from the whole statement.
3. Where in a case of embezzlement, it is alleged by the State and proved at the trial that the prisoner embezzled goods marked in the manner described in the indictment; a variance between the number stated in the indictment and that proved at the trial may be regarded as immaterial.
4. Where want of jurisdiction over the cause appears upon the records, it may be taken advantage of by a plea in abatement or objection made to the jurisdiction at any stage of the proceedings; for any act of a court beyond the jurisdiction conferred upon it by law is null and void.
5. Territorial jurisdiction is given by law and can not be conferred by consent of the parties.
6. A privilege defeating jurisdiction may be waived, if the court has jurisdiction of the subject matter.

7. Where want of jurisdiction arises from formal defects in the process, or when the want is of jurisdiction over the person, advantage of it must be taken before making any plea to the merits, or it will be considered as waived.

Mr. Chief Justice Johnson delivered the opinion of the court :

Crime—Embezzlement. This was an indictment against Francis C. W. Hill, for embezzlement, and was tried in the Circuit Court of the second judicial circuit, Grand Bassa County, May term, A. D. 1924.

The prisoner was indicted for embezzling one case of cartridges, the property of one A. de Tessieres of Grand Bassam, containing five hundred cartridges. He was convicted, and the case is presented on exceptions taken during the trial.

The facts essential to a decision of the question presented for our consideration, appear to have been these :

The prisoner was employed as senior warehousekeeper, W. L. Crusoe, as assistant warehousekeeper, and J. E. Ricks, as assistant wharfinger. On the 11th of April, 1922, a package of cartridges numbered 19/28 and marked A. T. Grand Bassam consigned to one A. de Tessieres of the said place, which had become mixed up with packages marked A. T. T., Grand Bassa and intended for the Anglo Tropical Traders of the latter port, was landed at Lower Buchanan, Grand Bassa, from the S. S. "Cronshagan," of the Woermann Line.

On the return voyage of the ship, the company informed the agent of said line, at Grand Bassa, that the said case had been landed through a mistake at Grand Bassa, and requested him to ship it on to its port of destination by the first outward bound ship.

Application was therefore made by the said agent for said case but it could not be found; and although prisoner, W. L. Crusoe, the assistant warehousekeeper, and J. E. Ricks, the assistant wharfinger, were questioned, they denied having any knowledge of the case.

The Collector of Customs having instituted an investigation for said cartridges, the following facts were discovered, as will appear by the records in the case.

A certain number in the report of the warehousekeeper, appellant in this case, had been cancelled, but the collector comparing

same with tallies of the assistant wharfinger and others concluded that the case had been landed and insisted that Ricks and Crusoe should account therefor or threatened to suspend them. Whereupon Crusoe informed him what had happened to the case. The cartridges had been divided between prisoner, Crusoe and Ricks. Prisoner had sold and otherwise disposed of some of his portion; but the collector succeeded in recovering 440 cartridges which were returned by the said parties.

The main points in the bill of exceptions which are worthy of our consideration may be summarized as follows: 1. Because the court admitted W. L. Crusoe to testify on behalf of the State, in the face of the objection, legally made by the defendant, on the ground of his special interest which rendered him incompetent.

2. Because the court admitted Josiah E. Ricks to testify on behalf of the State in the face of the objections made by defendant, on the grounds of his interest in the cause, and defect of moral character which rendered him incompetent.

6. Because the court overruled and would not sustain defendant's motion for arrest of judgment.

7. Because the court overruled the motion of defendant requesting the court to refuse jurisdiction on the grounds of there being no legal returns to the writ of arrest.

The first and second points in the bill of exceptions, being exceptions to the admission of the testimony of W. L. Crusoe and J. E. Ricks, will be considered together.

There is no merit in the contention raised by appellant that a *particeps criminis* can not be used as a witness in a criminal case on the part of the State, on the ground that he has an interest in the case. The general rule according to the common law is that a witness who has an interest in the subject of the suit is not competent to testify on the side of his interest, but that where a witness is produced to testify against his interest the rule does not apply, and the witness is competent.

Moreover, the common law with reference to the disqualification of a witness on the ground of interest has been modified by an Act of the National Legislature entitled "An Act to render competent the evidence of parties to suits" which reads as follows:

"All laws, Acts, or parts of Acts which declare the evidence of parties to suits incompetent and prohibit either of said parties

from giving testimony in causes in which they are parties are hereby repealed.

“That the evidence of no person shall be excluded on the ground of interest; and immediately after the passage and publication of this Act the evidence of parties to suits shall be admissible and competent, and the same may be produced in any suit, or cause in the Courts of the Republic of Liberia subject to the rules which govern the production and admissibility of the evidence of other witnesses.

“That in criminal cases the defendant cannot be compelled to testify as in civil causes, but having elected to take the stand said defendant testifies under the rules which govern witnesses except that the said defendant cannot be compelled to answer questions which may tend to incriminate him.”

✕Even if Crusoe and Ricks had been indicted jointly with appellant, they could have been used as witnesses in behalf of the State. Of course the latter by the entry of a *nolle prosequi* in their favor.

Under the circumstances of this case, the court did not err in admitting the testimony of Crusoe and Ricks, the objection of the latter on the grounds of infamy not having been sustained by the production of the record of his conviction and by identifying his person which were essential to disqualify him. Hence, as aforesaid, the objection was properly overruled.

The sixth objection relates to the motion in arrest of judgment which reads substantially as follows:

1. Because the indictment upon which he is charged, arraigned and tried is fatally defective in that the time is not pleaded with sufficient certainty so as to give the defendant notice of the day on which he is charged to have committed the offense.

2. Because the said indictment is further defective in that it does not state in what capacity said defendant was at the time employed whether as warehouse keeper, watchman, messenger or otherwise at the said customs warehouse so as to fully constitute the offense.

Because there is a material variance between the allegations contained in the said indictment, and the evidence adduced at the trial in that the said indictment charges the said defendant with having embezzled one case containing five hundred cartridges, valued at one hundred and twenty dollars, marked A. T. No.

28/916, when the evidence shows that the only case of cartridges landed at this port, during that period, was a case marked A. T. No. 19/28, and valued at thirteen dollars and sixty-eight cents, which case landed at this port, on the 11th day of April, A. D. 1922 which said case of cartridges has been since shipped to Grand Bassam to the original owners, the plaintiff thereby failing to establish the actual appropriation of the said case by defendant.

4. Because there were thirteen jurors duly qualified to try the issue one of whom was struck from the panel, after being disqualified without discharging the panel and awarding a new trial.

6. And also because the verdict of the jury is contrary to the law and evidence adduced at the trial.

We will now consider the points relied on for the reversal of the judgment by appellant.

In criminal actions both the day and year of the commission of the offense must be laid in the indictment; but there need not be an express averment, if they can be collected from the whole statement. The indictment in this case charges the offense to have been committed on the 28th day of February, A. D. 1922, that is to say between the said 28th day of February and the 18th day of June, A. D. 1922. This in our opinion was sufficient averment of time.

As to the second point; we find the appellant was described in the indictment as an employee in the customs service of the Republic of Liberia in the customs warehouse in the City of Lower Buchanan, County of Grand Bassa. We are of the opinion that the defendant was sufficiently described and the judge did not err in refusing to arrest judgment.

As to the alleged variance, we are of the opinion that the variance was on an immaterial point. It having been alleged by the State, and proved at the trial, that the appellant embezzled a case of cartridges marked A. T. a variance between the number stated in the indictment and that proved at the trial may be regarded as immaterial.

In the case *Briston v. Wright* it was held that any part of the averment may be struck out without destroying plaintiff's right of action, if it is unnecessary to prove it, which is as applicable in criminal cases as in civil cases and was expressed by Lord Ellenborough in *Hunts Case* (2 Camp. 585) as follows: "It is a distinction that runs through the whole of the criminal law, that it is

enough to prove, so much of an indictment as to show the prisoner to have committed a substantive crime therein specified." And therefore it is the common practice in English courts to indict a man for stealing several articles, when in fact he has only stolen one, on proof of which the allegation respecting others is rejected as surplusage, and he is convicted of the larceny which he has really committed. Following this rule we may regard the number of the case as a surplusage, and therefore an immaterial allegation as there was only one case in the customs warehouse marked A. T. (See *Briston v. Wright*.)

We come now to the consideration of the question raised by appellant that the court should have refused jurisdiction because there were no legal returns to the writ of arrest.

Jurisdiction is defined as the authority by which judicial officers take cognizance of and decide causes.

We will consider the question from two viewpoints, viz: Jurisdiction over the cause and jurisdiction over the person.

The former is the power over the subject matter given by law; the latter is that obtained by the appearance of the defendant before the court. Where want of jurisdiction over the cause appears upon the records, it may be taken advantage of by a plea in abatement or objection made to the jurisdiction at any stage of the proceedings; for any act of the court beyond the jurisdiction conferred upon it by law, is null and void. This applies also to courts acting beyond the limits of the territory within which its powers are to be exercised.

Such jurisdiction is given by law and can not be conferred by consent of the parties. But a privilege defeating jurisdiction may be waived, if the court has jurisdiction of the subject matter.

Where want of jurisdiction arises from formal defects in the process or when the want is of jurisdiction over the person, advantage of it must be taken before making any plea to the merits or it will be considered as waived. The decision in the case *Cadogan v. The Republic of Liberia* is therefore overruled.

From this view of the several points raised in the motion in arrest of judgment, it follows that the judge of the court below did not err in refusing to arrest judgment. The evidence clearly establishes the prisoner's guilt. He it was who suggested the embezzling of the cartridges, and after the division was made, sold cartridges at sundry times, part of which were recovered from the purchaser,

and identified as some of those which had been contained in the case marked A. T., the subject of this prosecution. When the theft was discovered and the cartridges recovered, prisoner begged the collector not to expose him. See evidence of Collector Manly. It seems that if after the panel is qualified, one of the jurors is found to be totally incompetent, it is not too late to set him aside and call another, without discharging the panel; See the *People v. Damon* (13 Wend. Rep. 355). See also *Tooles Case* (11 Leigh 714 [Va.]). Referring to the action of the court in re the jury, it appears that the jury had been empanelled before the judge informed the parties that in keeping with the statute relating to jurors, Luther Scott who is related to prisoner and Thomas Dillon who is not twenty-one years of age had been excused from the panel at the time the jury was being empanelled. No exception was taken by prisoner to this action of the court.

The question is therefore not properly before this court.

The judgment of the court below is therefore affirmed.

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ALFRED D. J. KING, Plaintiff in Error, *v.* HIS HONOR H. B. WILLIAMS, Judge of the Monthly and Probate Court, Grand Bassa County, Eddie G. W. King and Clavender V. King, his wife, Defendants in Error.

ARGUED DECEMBER 23, 1924. DECIDED JANUARY 6, 1925.

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

1. If a defendant, though not served with process, takes such a step in an action, or seeks relief at the hands of the court as is consistent only with the proposition that the court has jurisdiction of the cause and of his person, he thereby submits himself to the jurisdiction of the court, and is bound by its action as fully as if he had been regularly served with process.
2. Likewise if a defendant has been served with process, any objection he may have to the irregularity of the service must be made promptly, otherwise his failure to appear and object will amount to a waiver of his right to do so.
3. Where a party to a judicial proceeding admits by some act or conduct the jurisdiction of the court, he may not thereafter, simply because his interest has changed, deny the jurisdiction, especially where the assumption of a contrary position would be to the prejudice of another party who has acquiesced in the position formally taken.
4. The court which is competent to decide on its own jurisdiction in a given case, may determine that question at any time in the proceed-