ALFRED VICTOR JOHN, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM CONVICTION OF EMBEZZLEMENT.

Argued April 14, 15, 16, 20, 21, 1941. Decided May 3, 1941.

1. If amounts charged in an indictment represent cumulative shortages periodically transferred from the "store" account to the "private" account of defendant, for which shortages defendant was made to sign, such transfer is evidence of the intent to pass the title as well as the possession of the goods, thereby negativing the felonious conversion of the goods, which is the gravamen of embezzlement; this leaves defendant's responsibility to recompense the firm that of a mere debtor.
2. There is material variance between the indictment and the proof where evidence tended to prove that the amount defendant had received into his custody from time to time far exceeded the amount charged in the indictment, that payment for some of the goods delivered to him had been made directly by himself to the firm, that payments in discharge of other amounts were made by sundry debtors which the firm accepted, and that some of the goods were still represented by outstandings to be collected from various debtors. These facts are inconsistent with and vary from a charge of embezzlement.
3. Where a firm prohibits an employee from giving out credits, yet gives him printed forms of debit notes and accepts without protest the charging of amounts to several debtors, said firm tacitly acquiesces in the giving out of credits, and a charge of embezzlement cannot be upheld. Therefore, a refusal by the trial court to admit evidence in support thereof constitutes error.
4. Judges are to refrain from wedding either party to a suit and are admonished to view every case wholly objectively and impartially. They should not expunge evidence of witnesses from the record.
5. Where there is lumping of valuation in an indictment for embezzlement, conviction cannot be had upon evidence of stealing a fraction thereof.
6. In equity fraud may be presumed from circumstances, but in law it must be proved.
7. Embezzlement differs radically from larceny in that in the latter, the original taking is unlawful, involving trespass; in the former, the original taking is lawful but the owner retains title in himself, and the gravamen consists in the act or effort of the wrongdoer to convert the property entrusted to him and deny the owner of his title thereto.
8. Debt presupposes nonpayment of a sum advanced, but, unless there is an invasion of the title to the goods by conversion, embezzlement does not lie when the owner has transferred title from himself.
9. It is a cardinal doctrine of criminal jurisprudence that the accused has a right to be informed of the nature and cause of the accusation against him and to have the offense fully and plainly, substantially and finally described to him.

Defendant was convicted of embezzlement in the circuit court. On appeal to the Supreme Court, *judgment reversed and case remanded.*

Anthony Barclay for appellant. *The Attorney General* for appellee.

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

This is a case with many anomalies, the first of which to strike us was that the indictment was founded upon the testimony of two witnesses, W. Murdoch and Totimeh Mensah, neither of whom testified during the trial. As they were apparently the best witnesses for the prosecution, it should not be too surprising to discover, as the record shows, that the two persons adduced at the trial to support the indictment in lieu of them, Richard John Miller and George Egar, were compelled to answer some important questions with "I don't know" or "I was not in charge at the time."

One can hardly read the record certified here without having a conviction that the prosecution entertained the following hypothesis: granted that it could show a shortage in the account of stock entrusted to accused and that it had proved same by his signature to the stock sheet evidencing such shortage, its responsibility to satisfactorily prove the case had been fully met, and a conviction for embezzlement should follow as a logical sequence!

Several rulings of the trial judge on objections to the admissibility of evidence seem to indicate that he had been converted to the prosecution's theory of the case as above expressed.

On the other hand, the counsel for defense vigorously challenged the correctness of the prosecution's hypothesis and expended no little energy in endeavoring to show,

both in the trial court and at this bar, that the prosecution's theory was hopelessly wrong. In this manner each side proceeded with his own theory of the case, as indifferent to that of his opponent's as though each were a planet revolving in a separate and distinct orbit. Thus they presented to the court the novel spectacle of two persons engaged in mental combat without that direct and constant mental contact which the word "combat" primarily connotes—a sort of detachment which was continued throughout, even here at this bar.

It is in such a mutually detached atmosphere that the trial in the court below proceeded, ending in a verdict of guilt against defendant-appellant, who, being dissatisfied, presented to and secured the approval of His Honor Judge David to a twenty-nine count bill of exceptions, fifteen of which charge the trial judge with erroneous decisions on the admission of evidence, six, namely counts sixteen to twenty-one, of which will be hereinafter dealt with, two on his refusal to set aside the said verdict on motion, and the twenty-ninth on his pronouncing sentence upon an illegal verdict. And thus we now find ourselves brought into the picture.

The indictment charges that Alfred Victor John, defendant-appellant, employed by the Cavalla River Company, Ltd., as storekeeper, on the thirty-first day of October, 1937, and "on other divers days before," did, by virtue of his said employment, receive into his custody, possession, and control for and on behalf of his principals goods, wares, and merchandise to the value of £242:14:0, £239:16:2 of which he embezzled, appropriating same to his own use. Thus simply and tersely does the indictment state the specification brought forward in explanation of the charge.

The defendant-appellant, having pleaded "not guilty," thus putting each and every allegation in issue, proceeded to set up several additional reasons why the evidence had

failed to establish the charge. His counsel contended: (1) That inasmuch as witnesses in the employ of the company testified, and brought the firm's ledger to corroborate, that the amount charged in the indictment represented cumulative shortages periodically transferred from the "store" account to the "private" account of defendant, for which shortages defendant-appellant had to sign, such transfer was evidence of the intent to pass the *title* as well as the possession of the goods, thereby negativing the felonious conversion of the goods, which is the gravamen of the crime of embezzlement, and thereby leaving defendant's responsibility to recompense the firm that of a mere debtor; (2) That there was a material variance between the indictment and the proof, since evidence tended to prove that the amount he had received into his custody from time to time far exceeded the amount of £242:14:0 charged in the indictment, that payment for some of the goods delivered to him had been made directly by himself to the firm, that payment in discharge of other amounts had been made by sundry debtors of his which the firm had accepted, according to the testimony of witness Egar, and that some of the goods were still represented by outstandings to be collected from various debtors of his, which facts were inconsistent with and varied from the charge of embezzlement; (3) That although he was compelled to admit having given out goods on credit contrary to the express directions of the firm, yet they had tacitly acquiesced in his doing so by (a) giving him printed forms of debit notes and (b) accepting without protest an amount of twenty pounds odd charged to one G. B. A. Johns and L. B. Jacobs and sixteen pounds odd obtained by one G. B. A. Johns.

When the defense was examining witness R. J. Miller in order to prove that the delivery of the printed form of debit notes to defendant represented an implied acceptance of the defendant's policy of giving credit, the trial

judge sustained objections. This ruling is the subject of complaint in the ninth count of the bill of exceptions. Among the many other rulings of the trial judge adverse to the defendant's rights, one of the most patent was that complained of in the eighth count of the bill of exceptions and which briefly stated is as follows: One T. W. D. Leigh, called as a witness for the defense, in the course of his testimony and with specific reference to an amount of sixteen pounds alleged to have been obtained from defendant by one G. B. A. Johns was asked, "Do you know anything about this case at all?" The trial judge *sua sponte* interrupted the witness, forbade further testimony on said point, and ordered deleted so much of the answer as had already been written down. This is truly one of the many rulings of the trial judge in this case which are really inexplicable to us, especially so as the Court has more than once warned our judges to refrain from wedding either party to a suit and has admonished them to view every cause wholly objectively and impartially. If, as it would seem to appear, defendant was by this witness endeavoring to prove that sixteen pounds of the amount he was charged with embezzling had been given on credit to Mr. G. B. A. Johns with the knowledge or connivance of the company, we should think he had a right to do so; if, on the other hand, testimony tended to show that this suggestion was contrived, so far so good, but either way the testimony should have been allowed for any evidentiary or probative value it might have had. But now, expunged from the record by order of the trial judge, we have no means of knowing what was said in the presence of the jury on that score, albeit said bit of testimony was subsequently withdrawn from their consideration! Moreover, the judge overlooked the following important rule of law:

> "It is the right of the court, to decide on the admissibility of evidence, but when it is admitted, it is the

right of the jury to decide upon its credibility and effect.

"Consequently the court have [*sic*] no right to instruct the jury, that there is no evidence of any particular fact, if any evidence not written has been given in the case." Stat. of Liberia (Old Blue Book) ch. VII, §§ 10, 11, 2 Hub. 1543.

And so, proceeding in reverse order, we come now to the point of submission preceding that just finished.

We would here observe that it does not appear to us that counsel opposing each other in this cause followed the arguments with that amount of sedulousness which a case of this importance seems to us to have demanded, and hence there were several points in the respective contentions of each other that seemed to have escaped them mutually. A rule of this Court provides, however, that a brief should be filed in the office of the Clerk of the Court by each party and a copy served upon his opponent, and this it is which gives each side information in advance of the high spots, and the high spots only, which each party will pursue in his argument.

Profiting by the knowledge thus obtained, the learned Attorney General argued that although the allegations were imperfectly alleged in the indictment, defendant-appellant's neglect to demur by offering a motion to quash or to otherwise specifically attack the indictment by a motion to arrest judgment, or otherwise, operated as a bar, because of laches, to his arguing the question before this Court for review. To this defendant-appellant countered that he was not here contending that the indictment was demurrable, but rather that, taking the allegations therein set out and the proof offered in support, there was such an irreconcilable inconsistency that a verdict founded upon such a variance could not legitimately be allowed to stand. One of the many groups of items in an account produced at the counsel table during the arguments at this bar was substantially as follows:

DEBITS			CREDITS		
Sept. 1	To Balance bfd.	£72. 9.8	Sept. 30	By Com. on sales	£6. 3.9
" 15	" Cash drawn	7. 9.–	" " "	Balance bfd.	170.16–
" 30	" Commission over credited	1. 8.3			£176.16.9
" "	" Deficit in stock	3.15.8			
" "	" Sales short paid	91.18.2			
		£176.19.2			

This statement would logically lead *prima facie* to the conclusion that defendant-appellant was guilty of embezzlement, provided the defendant-appellant had been so charged with such an item or group of items in the indictment. The attention of the Honorable Attorney General who appeared for appellee was drawn to the neglect to charge this and other items in that manner so as to give defendant-appellant notice of what he intended to prove. Had that been done defendant's guilt might thereby have been fixed, all other constituent elements of the crime being present, for there would be proof beyond any reasonable doubt. The Attorney General replied, agreeing with the proposition from the Bench and admitting the patent defect in the indictment, but insisted that it could not inure to the benefit of defendant in the absence of a motion to quash.

The Attorney General added that it was the duty of the court to "dissect" (to use his own language) the accounts and charge the jury accordingly. He was, however, forced to admit that in this Court we have neither dissecting table nor dissecting knives; hence we feel we can correctly say that if "dissection" can be done, even if only metaphorically, such facilities abound when the manner of charging the offense warrants such an operation.

Counsel for appellant contended that it was impossible for him to have anticipated such a fatal variance between the indictment and the proof offered.

Now it is worthy of note that an indictment is not demurrable *per se* merely because it makes an omnibus charge of goods taken and "lumps the valuation," but the prosecutor thereby pleads at his peril if the evidence should fail to support a charge as laid and tends to prove only detached parts thereof.

In Wharton, *Criminal Procedure,* we have the following:

> *"Articles of different kinds, e.g.,* 'sundry bankbills, and sundry United States treasury notes,' being thus lumped with a common value, the indictment can not be sustained by proof of stealing only a part of the articles enumerated. Nor can a conviction for stealing a part of the articles charged be sustained unless to such part sufficient value is assigned or implied." 1 Wharton, Criminal Procedure § 266, at 305 (10th ed. 1918).

In the case at bar no specific goods are charged to have been stolen, but defendant was accused of a shortage of stock, which shortage he had acknowledged, and had asked for time to collect, while, as other parts of the record show, said shortages were charged to his private account.

Before proceeding to discuss the last of the points submitted by counsel for defendant-appellant we intend considering at this time, it is necessary that we should advert to one of the points strongly insisted upon by the learned Attorney General. He contended that defendant filed a list of outstanding indebtedness, many persons whose names appeared thereon being fictitious, and from that fact we should presume fraud.

The rule, stated by Lord Hardwicke, in 2 Ves. Ch. 155, and restated in *Bouvier's Law Dictionary* is that "in equity fraud may be presumed from circumstances, but in law it must be proved." 2 Bouvier, Law Dictionary *Fraud* 1306 (Rawle's 3d rev. 1914). "His meaning is, unquestionably," says the commentator in *Bouvier,* "no more than

this: that courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; . . ." *Ibid.*

But even supposing that in law also, as this case is, fraud could be presumed, then let us for the sake of argument look more closely at some of the Attorney General's premises. One of these is that defendant submitted a list of persons indebted to him, most of whom were fictitious persons. Defendant's reply was that none of them was fictitious, but that the list was, with the consent of his principals, given to Mr. Harmon for collection. However, the latter, having been at the time suspended from practice by orders of this Court, was still being surreptitiously retained as solicitor by the company, but was impotent to come out in the open and represent them; hence he sat supinely down, unable to make any move to locate, much less to interrogate, any of the debtors. Consequently, when at the last moment, during the production of rebutting testimony, the company sent a subpoena to look for the debtors, it did not have time to locate them. Even with respect to one E. C. Williams, who was known but who was reported to have been burnt out and to have moved to some other place, the sheriff tried to obliterate the return made by his officer, and when defendant called the attention of the judge to it, the judge refused to have the investigation defendant demanded so as to ascertain the truth or falsity thereof. These are the complaints made in counts sixteen through twenty-one of the bill of exceptions.

The conduct of the trial judge in respect to the rulings on these exceptions is most censurable. These rulings and the decision of the parties to elude the ruling of this Court will not be dealt with as component parts of this case, but are cited here to show that defendant was not so void of good faith as the prosecution tried to imply; and the fact that some of the debtors included on that list

were known to be real persons and actually indebted tends to establish at least such a melange of good and bad faith as to necessitate a more complete dissection than this Court would be warranted in making or than the indictment would justify.

Returning to the submission of counsel for defense, we must now examine the legal difference between embezzlement, the offense charged, and debt, which counsel submits was the extreme limit of defendant's delinquency.

And first we must premise that embezzlement and larceny are cognate offenses, differing radically in the following particulars: (1) In the latter the original taking is unlawful, involving a trespass upon the property of the owner, and the unlawful taking and transportation of the property deprive the owner of his *possession* of, and dominion over, his own property; (2) In embezzlement, on the other hand, the original taking is lawful, for the owner voluntarily surrenders the possession of his property to a bailee for a specific purpose, being careful to retain the title in himself. The gravamen of embezzlement is the act or effort of the bailee to so convert the property entrusted to him as to deprive the owner of his *title* thereto. The contention of appellant here was that the owner voluntarily parted with the title to the goods, as witnesses who were employees of the company say was done and as the company's ledger discloses, by debiting the defendant periodically with the deficits; that that destroyed the gravamen of the offense of embezzlement; and that to hold otherwise would be equivalent to charging defendant with an illegal conversion of goods debited to him as to any other ordinary debtor. That debt presupposes nonpayment of a sum advanced, but, unless there is an invasion of the title to the goods by conversion, then when the owner has transferred title from himself, embezzlement does not lie.

No one can read the record certified here purely objectively without being struck by a few acts on the part of

defendant which must arouse strong suspicion, but suspicion is not proof. Mr. Bouvier states that:

> "Proof is the perfection of evidence; for without evidence there is no proof, although there may be evidence which does not amount to proof: for example, if a man is found murdered at a spot where another has been seen walking but a short time before, this fact will be *evidence* to show that the latter was the murderer, but, standing alone, will be very far from *proof* of it." 3 Bouvier, Law Dictionary *Proof* 2749 (Rawle's 3d rev. 1914).

And among the constituent elements of proof is the necessity of having an indictment sufficiently certain to meet the requisites of the case. For, according to the rule adopted in this country:

> "It is a cardinal doctrine of criminal jurisprudence, declared in the Constitution of the United States, that *the accused has a right 'to be informed of the nature and cause of the accusation'* against him; or, as it is expressed in the other constitutions, to have the offence *'fully and plainly, substantially and formally, described to him.'* This is the dictate of natural justice as well as a doctrine of the common law. The description, whether in an indictment, or information, or other proceeding, ought to contain all that is material to constitute the crime, set forth with precision, and in the customary forms of law. . . . This rule is deduced from a consideration of the purposes of an indictment: which are, first, to inform the accused of leading grounds of the charge, and thereby enable him to make his defence; secondly, to enable the court to pronounce the proper judgment affixed by law to the combination of facts alleged; and, thirdly, to enable the party to plead the judgment in bar of a second prosecution for the same offence." 3 Greenleaf, Evidence § 10, at 15 (16th ed. 1899).

In view of the premises, it is the opinion of this Court

that the judgment of the court below should be reversed and the case remanded to the court below with instructions to entertain such further proceedings against appellant as may not be inconsistent with the principles herein enunciated; and it is hereby so ordered.

Reversed.