MOMOLU MASSAQUOI, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Decided February 9, 1933.

1. In a trial for embezzlement, the prosecution must prove (a) that the crime was committed by fraud or evil design; (b) that the accused did the act with guilty mind, or *mens rea;* and (c) that the conversion was done feloniously, that is to say, in violation of good faith and direction and not by mistake or carelessness.
2. The misdirection or wrong direction of a judge to a jury on a matter of law does not necessarily furnish ground for a new trial; where, however, it is clearly shown that the trial judge improperly exercised his discretion, a new trial will be granted by the appellate court.
3. A judgment predicated upon a verdict which is shown to be influenced by the bare statement of a lawyer for either party to the court, of matters which are not in evidence, nor intended to be proved, is held to be against the organic law and void.
4. There is a vital difference between justiciable matters and matters political. Courts of law are instituted for the purpose of deciding only such questions as are susceptible of determination by the application of well recognized rules of law or equity. Political questions shall not, however, be determined by courts of law because there are no principles of either law or equity by which they can be decided.

Appellant, defendant below, was convicted of embezzlement in the Circuit Court of the First Judicial Circuit, Montserrado County. On appeal to this Court, *reversed and remanded.*

Messrs. D. C. Caranda, Monroe Phelps, N. H. Sie Brownell and *P. G. Wolo* for appellant. *The Attorney General* for appellee.

MR. JUSTICE KARNGA delivered the opinion of the Court.

This appeal originated from the Circuit Court of the First Judicial Circuit, Montserrado County; the records in this case show that appellant was Liberian Consul

General in Germany and while on leave during the latter part of the year 1929, he was also appointed by President King Postmaster General of Liberia. The appellant avers that he found a system in his office inaugurated by his immediate predecessor, whereby all the monies of the Money Order Bureau were periodically deposited with the Postmaster General for safe custody. In keeping with the said system, Mr. M. Dukuly, the Comptroller of the Money Order Bureau, was instructed by the Postmaster General to deposit the money of his Bureau with him. Accordingly on February 1 and September 17, 1930, deposits were made aggregating £635:19:4 or $3,052.64.

It appears that on the third and tenth days of November of the same year the Assistant Auditor called at the Post Office Department for the purpose of auditing the accounts of the Money Order Bureau. He was informed by the Comptroller that all the funds of his office had been deposited with the Postmaster General and exhibited receipts for said amounts. Application was then made to the Postmaster General by the Assistant Auditor; the former however showed no money in the safe for checking. Whereupon on the 25th day of November, 1930, a memorandum of said deposits with a covering letter was sent to appellant by the Secretary of the Treasury. Two months later, to wit, on the 5th of January, 1931, a reply to the letter of the Treasury Department was made by the Postmaster General in which he stated that the amount of £400 sterling had been deposited with the Dutch Company for safe keeping; he made further deposit of fifty-seven pounds nineteen shillings and three pence in September, 1931, in the Banking Department of the United States Trading Company; and in October of the same year said account was balanced by the appellant making an assignment of his salary, which the Government of Liberia accepted.

Appellant was nevertheless indicted at the February

term, 1931, in the Circuit Court of the First Judicial Circuit, for Montserrado County; the case was heard and determined in the November term, 1931. Verdict was found in favor of the State and on December 2, 1931, final judgment entered against appellant.

The salient points in the appellant's bill of exceptions for review by the appellate court are as follows:

"1. That the appellant submits that no evidence was adduced at the trial of this cause to prove defendant's guilt, in that, criminal intent and fraud on the part of defendant to defraud the Government were not proven in evidence; wherefore the appellant says that the said verdict is contrary to law and evidence.

"2. That there was a misdirection on part of the court, in that, in charging the jury, the court said that because cash was received and salary duly assigned in settlement of deficit in the account of the Post Office Department, sufficient grounds had been established for a case of embezzlement.

"3. That the County Attorney in his argument to the jury prejudiced the case by saying that Counsellor Brownell, one of the counsellors for the defence, had just arrived from the League of Nations defending the cause of the aborigines, and the prisoner is an aborigine and an aspirant for the presidency of the Republic during the last campaign, and that Counsellor Phelps, one of the counsellors for the defence, is also a political agitator, all of which remarks prejudiced the case and swayed the minds of the jury from the testimonies of the witnesses and the intent of the law as laid out in the indictment."

With reference to the first count of the appellant's bill of exceptions, we are of the opinion that the prosecution in case of embezzlement must prove: (a) that the crime was committed by fraud or evil desire; (b) that the ac-

cused did the act with guilty mind, or *mens rea;* and (c) that the conversion was done feloniously; that it is to say, in violation of good faith and discretion. It may be legitimate for the accused to prove that the commission of said acts was done either by mistake or carelessness, or with intent to restore the things taken, after it had served some casual purpose to its lawful owner. But proof as to the intent to defraud would be material to support an indictment under such statutory clauses. Broom, Philosophy of Law, 245–251. In case of failure, however, on part of the accused to establish his innocence, especially where public welfare is concerned, *mens rea* will be presumed. In short, in prosecution for embezzlement no party should rest his case upon the weakness of his adversary.

Counsel for the defense contends that there was a misdirection on the part of the judge in the court below, in that, in charging the petit jury he said because cash was received by the accused and his salary thereafter duly assigned in settling the deficit in the account of the Post Office Department, sufficient grounds had been established for a case of embezzlement. He agrees that the defense had been surprised by such a charge because the assignment of salary in lieu of cash was not made a point in the prosecution; and that furthermore, settlement of deficit in accounts by salary of officials of government furnishes no evidence of criminal liability.

After carefully considering the contention raised in the above court by the defense, we are of the opinion that the misdirection, or wrong direction of a judge to a jury on a matter of law, does not necessarily furnish grounds for a new trial; where, however, it is clearly shown that the trial judge improperly exercised his discretion, a trial *de novo* will be granted by the appellate court.

> " 'Discretion,' it was said in an old case, 'is a science or understanding to discern between falsity or truth, between right and wrong, between shadow and sub-

stance, between equity and colourable glosses and pretenses, not to do according to the will and private affections.' It must be exercised, said Lord Halsbury some centuries later, in accordance with 'the rules of reason and justice, not according to private opinion; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular.'" Robson, Justice and Administrative Law (1928), 229.

"The first condition imposed on the exercise of discretion is that the possessor of it must put his mind to the case and really use judgment in coming to a decision. He must not, that is to say, approach the matter with his mind already made up. He must not share the outlook of a certain Income Tax Commissioner, who, when an appellant came before him seeking relief from liability to tax, asked him whether he had already seen the local surveyor of taxes, adding 'If you have, and cannot convince him, I am afraid there is little likelihood of your convincing us.' It is a desire to avoid this sort of prejudice that underlies the principle that if the jury do not 'honestly and judicially' approach the question before them, a new trial may be ordered. The case in hand must be looked at on its merits, and not be determined without investigation by the light of some preconceived opinion on the subject." Robson, Justice and Administrative Law (1928), 231.

Judge B. N. Cardozo in his work, *The Nature of the Judicial Process,* observes that the judge "is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'" (At p. 141.) In order to fully understand what was meant by Judge Cardozo, the trial judge may do well if he were to take judicial notice not only of the organization of the principal departments of government but also the

administration of affairs by those departments in relation to local matters affecting the public as a whole, as well as those matters with which their employees or servants are more directly concerned.

With reference to the contention of appellant raised in the third count under consideration, our opinion is that a judgment predicated upon a verdict which is shown to be influenced by the bare statement of a lawyer for either party to the court, on matters which are not in evidence, nor intended to be proved, is against the organic law of the land and void. Constitution of Liberia, art. 1, sec. 7. Matters which are by their nature solely political should be confined within the realm of politics. There is a vital difference between justiciable matters and matters political. Courts of law are instituted for the purpose of deciding only such questions as are susceptible of determination by the application of well recognized rules of law or equity. Political questions cannot, however, be determined by courts of law because there are no principles of either law or equity by which they can be decided. The only rule applicable to the adjustment of such questions is the rule of conciliation or compromise; and when a court of law embarks on such turbulent seas, it immediately loses its office as a judicial tribunal and abdicates its forum where pettifogging politicians resort to ventilate their little minds. Any verdict based upon non-justiciable matters is therefore illegal, and the appellate court shall remand the cause to be tried *de novo*.

It is expressly laid down in our statutes that, "After the evidence has been submitted on the part of both parties to the action, they may address the Court in person and by Attorney for such a length of time as the Court shall fix; but they must confine themselves to the evidence in the case." Rev. Stat. § 391. There is no Constitutional provision which limits the office of President to any certain group of citizens; nor is it illegal for any citizen of the Republic to practice the profession of law because his

political view appears not to be in accord with any existing administration.

In view of the foregoing circumstances we are of the opinion that this case should be remanded to be tried *de novo* as outlined in the first count of this opinion at the February term, 1933, of the Circuit Court of the First Judicial Circuit, for Montserrado County; and it is hereby so ordered.

Remanded.