MARTIN H. SETON, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM CIRCUIT COURT OF FOURTH JUDICIAL CIRCUIT, MARYLAND COUNTY.

Argued December 17–19, 1934. Decided January 18, 1935.

1. It is not necessary that an indictment should rehearse that a grand jury was legally selected, impanelled and sworn; the rehearsal: "The Grand Jury of ________ county upon their oath do present" is a sufficient averment *prima facie* that said body was selected, was impanelled, and was sworn.
2. An indictment which informs the accused of the time, place, circumstances and conditions of committing the unlawful act therein alleged, and that the act complained of is contrary to law, is generally a sufficient charge against him, especially if stated with sufficient certainty to enable him thereafter to plead *autrefois convict* or *autrefois acquit.*
3. A juror who, having been impanelled, has heard some of the evidence, enough to make out a *prima facie* case, and makes an exclamation tending to show that his mind is being made up on one side or the other is not thereby necessarily disqualified.
4. To disqualify a juror it should be shown that he had either formed an opinion in the case before being impanelled or there should be some evidence that, having been impanelled, he intended to disregard his duty and give a verdict without reference to the oath of impartiality he had taken.
5. A disclosure of the proceedings had before a grand jury may be made whenever it is necessary to determine the issue before the grand jury or the testimony given by any particular witness.
6. But the testimony of a grand juror will not be received to impeach the finding of an indictment, or the evidence on which it is based, or to show the vote that was taken on the question.
7. Embezzlement is the appropriation to one's own use or benefit of property or money entrusted to him by another in the line of his duty whilst employed for the purpose.

On appeal from conviction of embezzlement, *judgment affirmed.*

William V. S. Tubman and *D. B. Cooper* for appellant. *The Attorney General* for appellee.

MR. JUSTICE DIXON delivered the opinion of the Court.

This cause originated in the Circuit Court of the Fourth Judicial Circuit, Maryland County.

The facts disclosed by the record are as follows:

On the 3rd day of January, 1930, Martin H. Seton, defendant in the court below, now appellant, was employed as cashier of Customs, at the Port of Harper, Maryland County. During the period of said employment, that is, from the 3rd day of January, 1930, to the 10th day of September, 1931, the Collector of Customs at the said port from time to time discovered discrepancies in the account of the cashier, Martin H. Seton, and called his immediate attention to same, and the said cashier, now the appellant, promised to make these good in the future. As these discrepancies increased rather than decreased, the Collector of Customs, on the 19th day of December, 1930, served a query on the said cashier, to wit:

"COLLECTOR'S OFFICE,
PORT OF HARPER,
19th December 1930.

"From Collector of
Customs R. L., Harper;
To Cashier of Customs, Harper.

"Subject: Detention of Post Parcel and Baggage Entries.

"SIR,

"1. In checking up the Post Parcels, and Baggage slips' books I find outstanding up to the 19th date of the present month the following: 128 Post Parcel Baggage slips which makes up 9 sets of baggage entries amounting to $202.55 or £42.3.11½, this I cannot understand why they have not been brought to account. You will therefore please explain to this department as to whether you have received the money for said slips?

"2. My dear Cashier Seton, it is with regret that

I have to observe such a shortage which I never had the least idea, and would appreciate very much should you inform me as to how this came about.

"3. You are therefore ordered to have said entries accounted for no later than the 20th, otherwise I will be compelled to take further steps as to the safety of the Government's Revenue.

"4. Awaiting your reply.

"Obediently yours,
[Sgd.] S. W. PERRY,
Collector of Customs, R. L.,
Harper, Cape Palmas."

On the 13th of July, 1931, about seven months after the receipt of this query by Mr. Seton, he made the following reply:

"HARPER CITY,
13th July, 1931.

"MR. S. W. PERRY,
"DEAR SIR,

"You cannot imagine how miserable I am feeling ever since I got that letter from you dated the 10th of December 1931. Miserable from the fact that you who helped to secure this post for me to reflect shame on you and the Inspector who has put forth every effort to maintain me in this post as Cashier.

"Mr. Perry, you don't know the trouble connected in this work. I have been trying my utmost best to do all I possibly can to reflect credit to you and the Inspector.

"Baggage account in this Branch here is one which is more intricate and hard to deal with, man not being perfect is allowed to make mistakes in calculations; whenever a person brings up a slip and a receipt is issued many times the exact amount is not

collected; if where you miscollect, and a receipt is issued you no doubt are required to account for it. Many shortages occur in this department, I am aware of this one fact that it is not due to misappropriation but miscollection, to have the entries and baggages to contend with at the same time is one of the dangerous things; many a time where baggage is being worked lot of import entries are being worked and at this instant such mistakes happen. I knowing from the persons I succeeded their trouble, I as a young man representing young folks I would not have messed myself. For, on the other hand, I am the only one my family has to look out for them. Willie is sick and is not doing anything. Charlie is useless and most especially I cannot do the work others can do owing to the operation I have had. Viewing all of these facts which are showing themselves every day I dare not off-handedly plunge into trouble as such. I must confess that ever since you took over as Collector, or ever since Jerome left me you have never one day offered me anything unbecoming. You have been nice and kind to me and you have tried your very best to demonstrate the family relationship which exists; also the friendship which can only be tested in time of need, which was shown when Inspector was here last (sic) you would have shown me up but being moved with that sincerity you fixed everything alright. You may think that I am not exerting myself in lines of posting this account; if you can imagine what trouble I am undergoing just to keep up your recommendation you would no doubt wonder. Being responsible for the account of these baggages which fact is shown by *miscalculations from time to time,* I want to suggest this, that you be authorized to get ⅔ of my salary (monthly) or what you may suggest towards the posting of this account. Man, just look at the affairs of things and times. I have already put forth efforts to

arrange elsewhere towards the same end. If ships were coming regularly I would give you a definite time. Please do this for my old lady's sake and not for mine, because her only reliance is on me. I am more than sure that this whole office is in the hands of you what you will say to whoever (sic) will come for any inspection will be effected. I am more than sure that Fred will help me too in this direction because he is your right hand man, inasmuch as the Inspector is coming for inspection I'll see what I can do in the lines of Parcel Post Baggage, (sic) much to say but reserve until some opportune time.

"Wishing to hear from you,

"Yours truly,
[Sgd.] M. H. SETON.

"P. S. Don't allow anyone to break though our ranks whatever lies in your power to do for your comrade friend do it irrespective of advices (sic) you are simply fulfilling God's work—many eager and over anxious persons are working here who are driving at this, but Mr. Perry use your own mind, this job isn't a small one; if I am clear of this I'll surely ask you for something—my only hope and assurance are in you and the Chief Clerk.

"Yours,
[Sgd.] SETON."

There also appears a certificate of E. G. W. King, Chief Inspector of Customs at the time, to the effect that the deficit account of cashier Martin H. Seton has been readjusted and the actual deficit is eight hundred forty-six dollars and seventy-one cents. This certificate is certified as correct, and then signed by Martin H. Seton.

Mr. Seton, having failed to post his account as requested, was by the grand jury for the County of Maryland at their sitting at the November term, 1931, of the Circuit Court, Fourth Judicial Circuit, indicted for the

crime of embezzlement. The case was heard at the August term of said Court, and a verdict of guilt was found by the petit jury sworn to impartially decide the issue joined according to evidence and the law of the land, whereupon the Circuit Judge then presiding confirmed said verdict by sentencing defendant, to which judgment and other incidents occurring during said trial he, Martin H. Seton, excepted and brought the case before this Court upon a bill of exceptions containing twenty-two counts.

Since counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, and 14 are exceptions to the rulings made by the court in respect to the examination of witnesses, which the law leaves to the discretion of the trial judge, and since as the answers to the various questions thus overruled, in the opinion of this Court, could not have affected the trial *pro* or *con,* we have decided not to waste the time of this Court in making special comments thereon.

Count one of the bill of exceptions attacks the sufficiency of the indictment in that it alleges a) that it does not show that it was found by a grand jury legally convoked; b) that it is indistinct, uncertain and vague in that it charges defendant with having received into his custody a large amount of sundry Customs revenues unknown to the grand jurors, and that the defendant appropriated to his use and benefit a portion of this amount, the particular numbers and denominations of which are to the grand jurors unknown, and at the same time sets forth the specific sums and denominations of each kind of the sundry Customs revenues alleged to have been appropriated by defendant, which, he contends, makes the indictment contradictory; and c) that the indictment fails to aver that the said sum of money is the property of any person.

Upon a careful inspection of the indictment, we find it to contain all the essential elements necessary to a valid indictment. With regard to (a), the rehearsal, "The

Grand Jury of Maryland County upon their oath do present" is a sufficient averment that said grand jury was legally selected, impanelled, and sworn; and hence unless specifically challenged, and evidence adduced to prove that any one of those prerequisites had been omitted, such particulars need not be alleged. Beale, Criminal Pleading and Practice, § 88.

As to points (b) and (c),

> "The indictment is sufficient where it informs the accused of the time, place, circumstances, and conditions of his alleged unlawful act and that the act is unlawful. He is then sufficiently informed of what he is required to meet. . . .
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> "When an information contains a statement of the acts in ordinary concise language and in such a manner as to enable the accused to know what was intended, and contains no prejudicial defects in matters of form, and apprises him of what he must meet, and is sufficiently definite to enable him later to plead former conviction, it is sufficient and not subject to demurrer." 1 Wharton, Criminal Procedure, §§ 583, 584, n. 2.

In the case at bar the indictment charged that the property was received by defendant as Customs cashier, and that it was Customs' revenue. As all Customs' revenue is the property of the Republic of Liberia, and the Customs cashier is that agent of the Government responsible for the receipt of, and accounting therefor, the indictment is good in spite of the neglect to charge that the money embezzled was the property of the Republic of Liberia, his principal.

It is contended by defendant, now appellant, in count eleven of his bill of exceptions, that the court below erred in admitting in evidence the books, entries, and stubs submitted by the prosecution against his objection. We also opine that it is legal and equitable, and it is the duty of the trial court to admit in evidence all evi-

dence tending to throw some light on the disposition of a cause: document "A1" being a typewritten copy of the query submitted to defendant, then cashier of the Customs by S. W. Perry, Collector of Customs at that port, calling his attention to the amount of two hundred two dollars and fifty cents from post parcel and baggage slips, issued December 19, 1930; document "1" being a certificate issued in duplicate by E. G. W. King, the Inspector of Customs, as to the deficit of the defendant in his account with the Liberian Government in the sum of eight hundred forty-six dollars and seventy-one cents, which was accepted as correct by defendant; document "A" being a note from defendant to Collector of Customs Perry, accusing him, the Collector of Customs, of putting spies upon him, and "A1" being a letter written by defendant to Collector of Customs Perry acknowledging his deficit and indicating the cause of said deficit to his neglect in posting his baggage and post parcel slips' accounts in which he uses these words "you may think that I am not exerting myself in lines of posting this account. If you can imagine what trouble I am undergoing just to keep up your recommendation you would no doubt wonder. Being responsible for the account of these baggages which fact is shown by miscalculations from time to time, I want to suggest this, that you be authorized to get ⅔ of my salary (monthly), or what you may suggest, towards the posting of this account. Man, just look at the affairs of things and time. I have already put forth efforts to arrange elsewhere towards the same and if ships were coming regularly, I would give you a definite time." The other documents are also pertinent to the issue, and the court below was justified in their admission as evidence in the case.

The twelfth exception is taken to the refusal of the court below to make record of the information of juror Emedy Delaney's exclaiming while defendant was on the stand testifying on his own behalf, and after the

prosecution had made a prima facie case against defendant: "This man is on the stand talking a lot of foolishness, and has me sleeping here in this cold house. I was not there when he was eating that Customs money."

Had an expression of this import been made by the said Emedy Delaney before he was impanelled, or at the beginning of the trial before a prima facie case had been made out, it could have been construed as such an indication of bias as to raise a doubt of his ability psychologically to impartially weigh the evidence to be adduced. But, in the case at bar, it must be remembered that all of the evidence of the prosecution had been submitted: that of the defense had been put in up to the point where the defendant was on the stand, and the rule of law applicable thereto is:

> "Whenever it can be clearly gathered from remarks made by a juror while sitting in a case that he intends to disregard the duties imposed on him and which he has sworn to perform, the verdict will be set aside.
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> "The fact that, during the progress of a trial, a juror made remarks indicating a leaning towards one or the other of the parties will not of itself furnish ground for a new trial, where the verdict does justice and there is no reason to suppose that the juror's opinion was not derived from the evidence. Thus, where it was assigned as error that, after retirement, one juror made remarks to another indicating that the speaker had a belief in the guilt of the defendant, the court refused to interfere with the conviction, it not being shown that the juror was so prejudiced as to be unable to give the accused a fair and impartial trial." 12 Ency. of Pl. and Prac. 563, subsec. 5.

See also notes thereunder, especially where in a prosecution for an attempt to commit rape "one of the jurors, during the cross-examination of the prosecuting witness as to the details of the attempt, exclaimed: 'We have

heard enough now,' and it was held that this did not indicate any partiality of the juror . . ." *Ibid.*

In count fifteen it is contended that the trial court erred in not permitting one J. P. Jackson, a grand juror at the August term of court, to testify to a statement made before that body by one Joe Barde in relation to a presentment alleged to have been made by that body against S. W. Perry, Collector of Customs, in which he was charged, it is alleged, with larceny of the said amount of defendant's deficit. The rule of law is

> "The oath taken by grand jurors, under the English law, contained the words, 'The King's counsel, your fellows, and your own, you shall keep secret.' Because of this, the proceedings of the grand jury were always conducted in secret, and at one time it was held that the grand jury was to remain silent as to what transpired in the grand jury room at all times. The obvious reasons for this secrecy were, 1. That the grand jurors themselves ought to be perfectly free to debate and exchange opinions without a public accountability as to what was said; 2. The witnesses called before the jury ought to be likewise protected; 3. The innocent man who might be presented, but not found against, ought to be protected; 4. The party indicted ought not to have knowledge to enable him to escape.
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> "Obviously the 1st and 3rd reasons are continuous; the 2nd and 4th reasons are temporary, and when the reason ceases, the rule ceases. The law, therefore, now is, that a disclosure may be made of the proceedings before the grand jury whenever it is necessary to determine the issue before the grand jury, or the testimony given by any particular witness. Hence, it is proper to show that an indictment was endorsed 'A true bill' by mistake; that the jury acted upon evidence in finding an indictment; that a mistake oc-

curred which ought to be set aside; that the accused made a confession to the grand jury; that a person was a witness before the grand jury; that a witness's testimony before the grand jury differed from his testimony on trial; or whenever a disclosure is necessary to the furtherance of justice. But the grand jurors' testimony will not be received to impeach the finding of an indictment, or to state the evidence on which it is based, or to show the vote that was taken on the question." Wharton, Criminal Evidence, 1051, § 510 (10th ed.).

No record was produced as to the truthfulness of said allegation of a presentment, and Collector Perry not having been indicted, the statement of the said Joe Barde who was also deceased not having been made in the presence of Collector Perry in order to afford the opportunity of cross-examination, the judge below was correct in disallowing said testimony in the trial of defendant Seton.

The defendant further contends in count sixteen that the documents marked respectively "101" and "102" as offered by him were illegally overruled. On inspection of the documents we are of the opinion that they contain no facts which have any tendency to benefit the defendant in his defense, they being only communications to the effect of the insecurity of the safe in which the cashier kept money pending his depositing it in the bank at the end of each day as was required by the Customs Regulations, or complaining that he had only one key.

The court below was correct in denying the motion of defendant for a new trial because count one of said motion proposes that inasmuch as persons were seen to enter the Customs at night and he having only one key for the safe, this might have been responsible for his shortage as this proposition was not supported by sufficient evidence, and the defendant had otherwise acknowledged his responsibility for his deficit.

We have expressed our opinion in relation to counts 2 and 3 of said motion *supra.*

Having already expressed our views with respect to the sufficiency of the indictment *supra,* it is not necessary to reiterate said expressions, as the motion in arrest of judgment is only a recapitulation of defendant's criticism of the indictment.

During the course of the arguments of W. V. S. Tubman, of counsel for the defense, he strenuously laid emphasis on two elements necessary to constitute the offense of embezzlement, namely: "That there must be some evidence of the appropriation to his use of the amount or some portion thereof, proved by the prosecution to warrant a conviction"; and "That the refusal of one to deliver money entrusted to him for safekeeping does not in itself constitute embezzlement." This proposition he contended was supported by the decisions handed down by this Court in the cases *Massaquoi* v. *Republic,* 3 L.L.R. 411 (1932) ; and *Sancea* v. *Republic,* 3 L.L.R. 347, both cases being for embezzlement. He also quoted sufficient common law in respect thereto. But this Court will remark that our present statute on embezzlement is substantially in accord with the old common law principle, and the wording of our statute defines "embezzlement as the appropriation to one's own use or benefit, of property or moneys entrusted to him by another; as where clerks, agents, common carriers, servants, public officers, treasurers or other officers of a society, association or corporation, appropriate to themselves money or property entrusted to them in the line of their duty whilst employed for the purpose." Criminal Code of Liberia 15, § 69.

When one to whom money or other property is entrusted for safekeeping or into whose possession should come money or other property in the course of his duty, and who, when demand is made for his delivery of same to the owner thereof, fails to show a legitimate disposition

of it or any portion thereof, he is guilty of embezzlement under our statute. Therefore the defendant Martin H. Seton, now appellant, having acknowledged and accepted the deficit in his account in the sum of eight hundred forty-six dollars and seventy-one cents, and having failed to establish his innocence as to the conversion of said amount to his personal use nor his having disposed of same in accordance with the rules and regulations of his institution, that is the Customs Service of Liberia, this Court is of the opinion that the charge of embezzlement as instituted in these proceedings has been substantially proven; and insofar as the opinions in the cases *Massaquoi* v. *Republic,* 3 L.L.R. 411 (1932), and *Sancea* v. *Republic,* 3 L.L.R. 347 (1932), actually relied on or others of similar import are in conflict with the views herein, they should be recalled; wherefore it is our opinion that the judgment of the court below should be affirmed; and it is so ordered.

Judgment affirmed.