SAMUEL M. SNYDER, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued December 5, 1935. Decided December 13, 1935.

1. When a bailment is determined by the wrongful act of a bailee, such as by the breaking open of a parcel entrusted to him, his conversion thereafter of all or part of the contents is larceny and not embezzlement.
2. Hence, the act of a person in abstracting and appropriating to his own use money from a sealed letter intrusted to him to mail renders him guilty of larceny.
3. Where it is contended that a grand juror who joined in the finding of an indictment had been disfranchised, such plea should be made and established by proof before any plea is made to the indictment.

This is an appeal from a conviction of grand larceny in the Circuit Court of the First Judicial Circuit, Montserrado County. *Judgment amended and affirmed.*

No appearance for appellant. *The Attorney General* and *R. F. D. Smallwood* for appellee.

MR. JUSTICE DOSSEN delivered the opinion of the Court.

This cause comes up on appeal upon a bill of exceptions from the Circuit Court, First Judicial Circuit, Montserrado County, Republic of Liberia, for the consideration of this Court. The appellant, defendant below, was indicted, tried and convicted for the crime of grand larceny at the November term of the aforesaid court, 1934, and sentenced to make restitution of the balance of an amount of £5 12s. 6d., and to be imprisoned in the county jail for a period of one calendar year with hard labor as from the date of said judgment.

To several of the rulings, opinions and the verdict the said appellant excepted, and motioned the court to arrest

the judgment, predicating said motion *inter alia* on the following grounds:

"1. Because there is material variance between the indictment upon which he had been arraigned and pleaded 'Not Guilty' and the entire evidence adduced at the trial on part of the prosecution, in that, the indictment specially charges the defendant with having committed the crime of Grand Larceny by stealing, taking and carrying away, United States Trading Company Treasury Check No. 106486 valuing seventy-five dollars ($75.00) in favour of one William Nevel and transferred to E. R. Elias, when the evidence conclusively proves to the contrary, that is to say, the private prosecutor E. R. Elias, in his evidence, states unequivocally that the said check was not stolen from him by the defendant but rather that said defendant was in his employ during that time when he delivered to him the said check to be taken to the Monrovia Post Office to be posted under registered cover to the Dart Tobacco Company of America, and that instead of the said check reaching its destination, it became missing. This variance between the allegation and the proof at the trial presents a distinct case of a misconception of the form of action chosen, thereby rendering it legally impossible for this Court to render a final sentence.

. . . . .

"4. And also because defendant says that the indictment upon which he was arraigned, tried and convicted is INVALID, in that it is fundamental in law that every Grand Jury whether composed of fifteen qualified men of the County or twelve of the fifteen qualified men necessary to make a presentment, there must be a Foreman of that Body

obligated to the Court constituting said Grand Inquest, in the prescribed Oath publicly administered in open court. The indictment in point having been founded under the foremanship of Thomas C. Lomax, a disfranchised citizen of the Republic of Liberia, from a valid indictment of this Honourable Court upon which he was tried and convicted, and the same affirmed by the Honourable the Supreme Court of Liberia, from decision the said Thomas C. Lomax absconded from justice and to date unknown to be enfranchised and this the said defendant is ready to prove."

These two points which appear to have been those principally relied upon by appellant in coming up to this Court, we shall now proceed to consider in the order raised.

Samuel M. Snyder, appellant, was in the employ of Elias Brothers of Monrovia. In the month of September, 1932, he was instructed to write a letter to the Dart Tobacco Company, and thereafter Mr. E. R. Elias, one of the brothers in whose employ he was, enclosed the check, the subject of the prosecution, placed same in the letter he, Snyder, had written, sealed the envelope, and gave it to Snyder to post. In course of time it was found that the letter reached its destination minus the said check. Later on the said check was found to have been sold to Messrs. A. Woermann by one William Henry Ketter, and upon investigation it was established that the check had been sold to Ketter by the said Snyder, the appellant. (*See* evidence of E. R. Elias, Anthony Barclay, and William Henry Ketter.)

The law on this point is as follows:

". . . the evidence of bailment may be rebutted by proof that *the contract had been determined by the wrongful act of the bailee,* previous to the act of larceny. A familiar illustration of this point is where a carrier breaks open a box or package intrusted to him.

Here the breaking open of the box is an act clearly and unequivocally evincing his determination and repudiation of the bailment, and his custody of the goods becomes thereby in law the possession of the owner; after which, his conversion of part or all of the goods to his own use is a felonious caption and asportation of the goods of another, which constitutes the crime of larceny." 3 Greenleaf, Evidence 168, § 162.

"As a general rule, a bailment passes the possession of the property to the bailee, as distinct from the mere custody, and hence a bailee cannot be guilty of larceny, because he acquires possession lawfully and therefore cannot commit the trespass necessary to render the offence larceny. This was the rule at common law, and except where modified by statute so as to make bailees generally guilty of larceny, it is still the rule. . . . Although a person has acquired lawful possession by a valid contract of bailment, if the contract is afterwards terminated by some tortious act of the bailee, whereby the possession reverts to the owner, leaving the custody merely with the bailee, a felonious conversion of the property to his own use by the bailee is larceny. Thus, the act of a person in abstracting and appropriating to his own use money from a sealed letter intrusted to him to mail renders him guilty of larceny. The doctrine here involved is that by breaking the package and abstracting the contents, the contract of bailment is determined and the former bailee stands in no better position in respect to the possession than a servant having the mere charge or custody of the goods." 17 R.C.L. 42, § 47.

Our own Criminal Code seems to be in harmony with this view since it specifically makes the offense of detaining, delaying or opening any letter in the course of transit through the Post Office larceny. Criminal Code of Liberia (1914), p. 16, § 73(5).

In view of the foregoing it is our opinion that the trial

judge correctly ruled that the appellant was correctly charged with larceny, and not embezzlement.

With respect to the allegation that the foreman of the grand jury which found the indictment was a disfranchised citizen, this Court says that it does not appear of record that the said plea was raised at the proper time. It was incumbent upon defendant to raise the said question before plea, and prove same by the record of his conviction and testimony aliunde of his identity.

For the same principle obtains as in the case *McBurrough* v. *Republic,* 4 L.L.R. 25, 1 Lib. New Ann. Ser. 27, where this Court said:

> "From a careful inspection of the records of the case in point, it is nowhere shown that the prisoner or his attorneys ever called the attention of the court below to the fact that the said juror was not an enfranchised citizen of this Republic, and established the allegation by the testimony of the justices of the peace who by law are supposed to have dispossessed him of his rights of franchise or other proof, and such failure on their part is tantamount to a waiver. Hence defendant cannot at this stage object to the said juror as he is also guilty of laches. . . ."

In view of the foregoing, and as we have been unable to find any merit whatever in this appeal, this Court is of the opinion that the judgment of the court below should be so amended as to increase the punishment from one year to eighteen calendar months, and should in all other respects be affirmed; and it is so ordered.

Amended and affirmed.