H. WELLEH THOMPSON, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued March 26, 27, 1947. Decided May 9, 1947.

1. Each side to a criminal prosecution ordinarily must introduce all of its case in chief without interruption.
2. Our statute regulating the taking of depositions of witnesses whose testimony may not be available at the time of trial makes no provision for witnesses who may decide to leave the country before trial.
3. The taking of depositions in criminal cases was not contemplated by the said statute.
4. In all prosecutions for crimes the state to convict must prove the guilt of accused beyond a rational doubt.

On appeal from conviction of grand larceny, *judgment reversed.*

T. Gyibli Collins for appellant. *Samuel C. M. Watkins,* by request of the Department of Justice, for appellee.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

This case was filed not too long ago in the office of the clerk of this Court on appeal from the Circuit Court for the Fourth Judicial Circuit, Maryland County, wherein appellant, defendant below, was tried, convicted, and sentenced at its May term, 1945. From the records it would appear that appellant was an employee of the Firestone Plantations Company at Gedetarbo, Maryland County, serving in the capacity of stenographer and private secretary to the group manager, one A. H. Black, when in August, 1943 he was arrested on a charge of grand larceny for stealing one hundred and twenty dol-

lars in coin from the company's safe. At the trial T. Hugo Evans, the chief clerk of the office, stated that when he arrived at work on the morning of August 21, 1943, S. B. A. Gibson, another employee of the company, informed him that on the previous day, August 30, whilst Evans was away and Fred J. Poetzinger, the paymaster, had as usual left his safe door open and gone into the United States Trading Company in an adjacent building, Gibson had seen the following: the appellant first stood in front of the open safe and thereafter went immediately into the stationery room and thence into the manager's office where he asked leave to run home and get something, and on his way home appellant went back into the stationery room before he left the office.

After narration to him of these movements of appellant, witness Evans recited that Gibson asserted:

> " 'Welleh has taken the money out of the safe. I want us to call him when we close for lunch and ask him to bring it back. I would have reported him on yesterday, but I thought to await your return and maybe we could harmonize it in a better way without carrying it to the boss. We could slip the money back in the paymaster's office and the matter would be finished.' "

Evans' testimony continued as follows:

> "I then suggested a conference of the two gentlemen, Sam Gibson and Welleh Thompson, at twelve noon. This was on the 31st of August, A.D. 1943. Just about ten o'clock Mr. Poetzinger left his safe opened and went back into the trading company. I alone was then in the office. Welleh Thompson left his desk and I did not see where he went, nor did I at the time know that Mr. Poetzinger was not in his office. I got up from my desk with a voucher for Mr. Poetzinger's signature and started to his office. Just before reaching his office I heard the clicking of the safe, and in the doorway of the office, as I was entering, Welleh

> Thompson, the defendant, rushed out with his folded [*sic*] at his waist and went straight into the stationery office again. At once I said, 'Welleh wants to bring trouble on this office.' I rushed and called the paymaster and informed him that Welleh Thompson, the defendant, had been into his safe. Two days before, he and I jointly had balanced the cash in the safe, and stacked it by denominations in packages. On . . . balancing the cash in the safe after my report to him we discovered $100.00 [in] quarters, ten dollars in dimes, and ten dollars in nickles and pennies had been stolen away. . . ."

The record further shows that it was after allegedly checking the cash again that the appellant was accused of the theft of the sum allegedly missing, at which time appellant denied any knowledge of the missing sum and that he had committed the theft. The officials of the company, A. H. Black, manager, and Fred J. Poetzinger, accountant, however, proceeded to the appellant's home and there they made a search of his premises without a warrant. During the search, witness Evans testified, witness Poetzinger stepped "on something hard," which was found to be a bag containing pennies, whereupon appellant again denied any knowledge of the theft and then and there accused Poetzinger of bringing the bag of coins and placing it there in order to incriminate him. Though from the evidence there appears some uncertainty as to who mooted the idea the fact remains that the company officials of Firestone subsequently agreed to get a "doctor man" to find out whether or not appellant was really guilty, not withstanding appellant's persistent protestations of his innocence.

The record shows, through the testimony of witness Evans, that the company did actually send a delegation to the Garraway plantations to a "doctor man" for consultations as to who actually did the stealing, and the delegation of men returned and said that the "doctor man" had

declared the manager and the accountant were the culprits. It is interesting to state, and this was also testified to by witness Evans, that the company was responsible for and did pay the expenses of the delegation and of the consultation of the "doctor man." It was suggested in the evidence, though not conclusively proven, that the findings of the "doctor man" were influenced unduly by the accused who had sent ahead of the delegation asking the doctor to take such a position.

Whilst any findings of the "doctor man" would have no legal effect upon the conclusions of this Court or of any other in the judiciary of this country, we find it necessary to pronounce the willingness of certain of the officials of a company such as the Firestone Plantations to resort to "doctor men" for the discovery of alleged theft reprehensible and derogatory, especially when the character and reputation of said company is taken into consideration. It is apparent that these officials were laboring under the influence of some of their employees at the time.

Before the trial could be had, however, Poetzinger found it necessary to leave the Republic and, upon application to the Resident Judge of the Fourth Judicial Circuit, an order was given to Samuel A. D. Thompson, stipendiary magistrate for the Firestone Plantations Company, to take the deposition of his, the said Poetzinger's, testimony, which was done on November 11, 1944 in the presence of the accused. During the trial of the case and at the rebuttal stage the prosecution offered the deposition into evidence. It was admitted over the objections of the accused on the grounds that it was contrary to the provisions of our statutes.

What is singularly peculiar is that the evidence of Fred Poetzinger, the paymaster and accountant of the company, who was responsible for the safe from which the money was alleged to have been stolen, was never sought to be brought in except as rebutting testimony, notwith-

standing, as the record discloses, that the deposition containing said evidence had been previously taken before Magistrate Thompson upon obvious orders of the resident judge of the circuit. This method of procedure in legal practice is so irregular and peculiar that mention should be made of it, for, supposing after the prosecution had rested the accused had deemed it necessary to produce any evidence, how would the prosecution have been able to bring in this evidence of Poetzinger, important and necessary as it should be? Without saying what legal weight this evidence would carry or the possible inconvenience its absence would cause, we are of the opinion that the suspension of its introduction until rebuttal is so palpably irregular and legally inconsistent that the possibility of its being deprived of certain effects is apparent.

> "Each side to a criminal prosecution ordinarily has the right to introduce all of its case in chief without interruption, and should be required so to do. Generally, only evidence tending to make out the affirmative case of the prosecution should be admitted on its case in chief, but the court has discretion to permit deviation from such rule.
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> "The rules of practice as set forth in statutes or otherwise usually require and permit each party to introduce all of his evidence in chief when proving his case. Hence, evidence tending to prove matters of which the prosecution has the affirmative of the issue is admissible as part of its evidence in chief, and, in the absence of exceptional circumstances, the state should be required to put in all of its case in chief before requiring accused to proceed with, or disclose, his defense, regardless of accused's theory of defense, the state having the right to reserve only its rebuttal testimony to meet the evidence adduced by accused. . . .
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"Whether evidence proper in chief may be admitted on rebuttal rests largely in the sound discretion of the court.

"As stated in § 1049 supra, the regular order of proof usually requires each side in a criminal prosecution to put in all of its evidence in chief at the time it puts in its original case, it being the proper and better practice for the adversaries to introduce all substantive evidence on the case in chief and not on rebuttal. Hence it is frequently held, sometimes by reason of statute, that it is irregular and improper to permit the state to introduce in rebuttal evidence which properly pertains to the state's case in chief, and that nothing which tends directly to prove the commission of the crime or its immediate circumstances, and which does not bear directly upon the subject matter of the defense, should be admitted in rebuttal after defendant's evidence in chief has been closed." 23 C.J.S. *Criminal Law* §§ 1049, 1051, at 448, 455 (1940).

It should be easily conceded that the evidence of Poetzinger is the testimony in chief in the case and it cannot legally and consistently be accepted as a rebuttal to the evidence of the defendant. Equally so is it seen from the above citation that there are few limitations or exceptions to this rule, and they rest within the sound discretion of the court and are not a right of the prosecution to enjoy. To say the least, therefore, we are of the opinion that the reservation of the deposition containing the evidence of Poetzinger to be used *only in rebuttal* was both irregular and legally improper and tended to prejudice the case against the accused.

It seems to us necessary, in order to prove the larceny in this case wherein the theft is alleged to have been from a safe, to show by both competent and sufficient testimony how much money was in the safe immediately prior to the time of the alleged stealing and how much was discovered

therein afterwards so as to indicate the difference in the figures as the amount allegedly stolen and also to enable the trial court to pronounce with certainty and definiteness upon the amount of restitution. It would be setting a dangerous precedent to say that it is sufficient for a private prosecutor merely to state just how much money was stolen from a safe without also showing how much was in it immediately prior to and after the alleged theft which would indicate by what process of computation or calculation the alleged shortage is arrived at, since to do this would be to create a loophole through which mischievously inclined and wickedly bent minds can pass in making or exaggerating criminal charges against their fellows.

The alleged confession of the accused as brought out in evidence by witnesses Dash Wilson and Moses Blidi is not so conclusive that it will exclude every reasonable hypothesis of the accused's innocence, for from the testimony of Evans, Gibson, and Poetzinger it appears that at every stage of the development of the charge against him appellant protested and insisted upon his innocence. To accept such an alleged confession as true without corroboration and in the face of appellant's denial would be both unfair and legally unjust. The testimony of these two witnesses does not agree as to times, place, and circumstances of the alleged confession.

There has been a very strong effort made by the accused during the argument of his counsel before us to show the legal impropriety of the admission of the deposition of witness Poetzinger into the evidence against him on the grounds that the said admission was a violation of the Constitution on the point of confrontation and was without statutory authority. Whilst it is true that it does not appear that the question was as forcefully and plainly raised before the trial court, since the only record of the objections of the accused to the admission of said deposi-

tion is that found in count four of his bill of exceptions which was approved by the trial judge, nevertheless because of the gravity of the issue involved we deem it necessary to say something about the issue. It appears that our statute regulating the taking of depositions of witnesses whose testimony it is feared may not be available at the time of trial makes no provision for witnesses who may desire to depart from the realm before trial, as in the case of Poetzinger. Said statute also does not seem to include the taking of depositions in criminal cases. We quote:

> "Whenever any action is pending before any Court, and a party shows to a Judge thereof that a necessary witness *is infirm, or sick,* and may likely die before the trial; or if he can show to the Court that any necessary witness *is absent from the Republic,* he may secure the appointment of one or two suitable persons to take the deposition of such person, as follows:
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> "1. . . . If the witness be within the Republic, both parties or their attorneys may appear with the commissioner and take the deposition of the witness. The moving party must give three days notice of his intention to take such deposition and the witness shall make such deposition, unless excused therefrom from doing so by the Judge of the Court." 1 Rev. Stat. 470. (Emphasis added.)

From the foregoing statute it can be seen that the taking of depositions in criminal cases was not contemplated by this statute, and the anticipated departure of a witness from the country whose testimony might not be available at the trial was not made a ground for the taking of depositions even in civil cases.

However, from *Corpus Juris Secundum* we have the following:

> "While the propriety of using depositions against accused has been recognized, where he has had an op-

portunity to cross-examine the persons whose depositions are used and there has been due compliance with an applicable statute, the use of depositions may violate the right of confrontation.

"Unless there is a waiver of the right of confrontation under the rules stated infra § 1009, or unless accused has had opportunity to confront and to cross-examine the witness, and the deposition is otherwise taken and executed in the manner prescribed by statute, it is not permissible for the prosecution to introduce depositions of an absent or a deceased witness against accused on his trial, unless, it seems, it appears that the witness is absent by the suggestion, connivance, or procurement of accused. . . .

"It has been held that a statutory provision which confers on the prosecution the right to take depositions for use on the trial must be followed in all substantial particulars in view of the fact that it creates an exception to the general rule requiring confrontation. . . ." 23 *Id. Criminal Law* § 1001, at 370 (1940).

The accused seems to have waived objections to the taking of these depositions at the time he was cited to attend and take part in the taking of the deposition of witness Poetzinger before Magistrate Thompson, for appellant took part and cross-examined said witness without questioning the legality of the procedure.

"In general the benefit of a constitutional or statutory provision for confrontation may be waived either expressly or by implication.

"Accused may waive the benefit of a constitutional or statutory right of being confronted with, or of meeting face to face, witnesses against him, either by express consent, as where accused consents to the reading of testimony or depositions taken elsewhere or of testimony given at a preliminary examination or at a former trial; by a failure to assert the right in apt

time; or by other conduct inconsistent with a purpose to insist on it. There must be strict compliance with the applicable law, however, in order to effect a waiver of the right, and a waiver is effective only to the extent that the law prescribes." *Id.* § 1009, at 376.

Before depositions in criminal prosecutions can be taken there must be a statute permitting or regulating it. It is not shown that there is any statute permitting it and it does not appear that the accused interposed any objections to the taking of the depositions as ordered by the judge. The declaration of his counsel while arguing before us that said accused was not afforded an opportunity to procure legal counsel can make no favorable impression upon us since there is nothing in the record to show that the accused was deprived of the right of legal representation or that he made application to be given the opportunity, which was refused or denied him. The record, however, shows that during the trial of the case before the lower court and at the time the deposition was offered for admission in evidence, the counsel for accused entered objections in a general and apparently casual manner without stating in what particular way its admission would be contrary to the statute laws of the Republic. Consequently sufficient notice was not given the prosecution to resist and the court to fairly pass upon it. It is our opinion, therefore, that to accept for the first time the full and complete purport of the objections before this Court would be unfair both to the prosecution and to the trial court whose judgment and other rulings in the case as presented in the bill of exceptions we are called upon to review.

In all prosecutions for crimes, the state to convict must prove the guilt of the accused beyond a rational doubt and this is intended to mean that the guilt of the defendant must be so shown as to exclude every reasonable hypothesis of his innocence. *Dunn* v. *Republic,* 1 L.L.R. 401

(1903); *Dyson* v. *Republic,* 1 L.L.R. 481 (1906); 23 C.J.S. § 910, at 159 (1940). Otherwise he will be entitled to a discharge.

It is our opinion that the guilt of the accused in this case has not been proved with that degree of certainty that would warrant his conviction so that he is entitled to a discharge without day; and it is hereby so ordered.

Reversed.