ALBERT DONDO WARE, Appellant, v. REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, GRAND CAPE MOUNT COUNTY.

Decided January 22, 1937.

1. It is the right and duty of the court to expound to the jury all written evidence procured in the course of the trial.
2. Rebutting evidence is that which explains, repels, counteracts or disproves facts given in evidence by one's opponent.
3. Impeaching evidence is that which by showing that a witness on the stand has made a statement wholly at variance and inconsistent with what he had previously said or done, tends to show that he is unworthy of credit.
4. In the case of the latter, or impeaching, evidence the effect is to cast a certain amount of moral obliquy upon the declarant, and hence he should be given notice before he leaves the stand of the intention of his opponent so to do, after his attention had been duly called to the inconsistency of the two statements, and be asked to reconcile them.
5. With rebutting evidence such notice cannot ordinarily be given as one cannot reasonably be supposed to know beforehand what testimony his opponent's witness will give, nor how far, especially when taken by surprise, rebutting testimony is available.
6. Such demurrers to an indictment as are in their nature dilatory pleas should be raised by motion to quash, or they will be considered as having been waived.
7. The old forms of indictment for embezzlement, after charging the fiduciary character in which the defendant acted when he received the money or article of value and his fraudulent conversion thereof, proceeded to charge that by such conversion defendant did steal, take, and carry away.
8. There is an essential difference between crime and tort. When then an employee deliberately, intentionally, and fraudulently converts to his own use money received by him for his employer, it is a crime and not a tort, and a criminal prosecution will lie.

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

A. B. Ricks and *P. Gbe Wolo* for the appellant. *R. F. D. Smallwood,* County Attorney for Montserrado County, for appellee.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

During the years 1932 and 1933 and up to April, 1934, A. Dondo Ware, appellant, was District Commissioner of the Tawor District, Grand Cape Mount County; and as such District Commissioner, according to the system then in vogue, it was his duty to collect from the Paramount Chiefs of his district the hut taxes assessed against them from year to year and deposit same with the Collector of Internal Revenue, Grand Cape Mount County, and obtain receipts and vouchers, the latter to be handed to the Chiefs to be by them later used in obtaining their commission at the Bureau of Internal Revenue in Monrovia upon due application and presentation of said vouchers.

Pursuant to said appointment, and in the line of his official duty, the District Commissioner A. Dondo Ware, between April 25 and December 13, 1932, collected the sum of one thousand four hundred ninety-eight dollars and eighty cents as hut tax; between January 21 and December 16, 1933, collected the sum of six hundred nine dollars and sixty-four cents as hut tax, and between March 3 and September 14, 1934, collected the sum of six hundred seventy dollars and fourteen cents as hut tax, making a grand total of two thousand seven hundred seventy-eight dollars and fifty-eight cents. See Indictment of Grand Jury for the County of Grand Cape Mount, found November 19, 1934.

Mr. J. C. John, Collector of Internal Revenue for the County of Grand Cape Mount, on oath, in support of the indictment in the court below, testified, *inter alia,* that immediately upon his appointment as Collector of Internal Revenue for the County of Grand Cape Mount, in July, 1932, he informed the District Commissioners of same and requested them to collect the hut taxes and send them down to his office in Robertsport as was the system in vogue at that time.

He said further that Mr. Ware, who was the District Commissioner of the Tawor District, acknowledged receipt of his letter and promised to do all he could to work

in harmony with him, the official head of the Bureau of Internal Revenue in Grand Cape Mount County. "He then asked me," states Mr. John, "to send up my clerk, Mr. Robert Gray, to help him in the collection of hut taxes. I did so. Mr. Robert Gray came down the first time and brought some money with a letter from the District Commissioner, Mr. Ware, stating the amount. Mr. Gray having receipted Mr. Ware of the amount received, I did not send up another receipt but wrote a letter of acknowledgment to Mr. Ware's communication, and attached a copy of a voucher from the bank showing that the money had been deposited. On one or two occasions the same thing as outlined happened, and monies were paid over to Mr. Robert Gray who receipted Mr. Ware for same, and I, in turn, sent him up the vouchers which were simply to be handed to the Chiefs so as to facilitate the receiving of their commission whenever they applied for it to the Bureau of Internal Revenue. I noticed, however, that the collection during this period was far below that for the preceding year. I wrote several communications on this matter to the Bureau of Internal Revenue and the Financial Adviser, and even handed a copy of one of these to Senator R. W. Gordon, with a request that he would take it up with the President. The Superintendent of the County was also verbally informed, as well as in writing, of the supposed laxity of the Tawor District to pay in their taxes."

The witness, Mr. John, also testified that an amount of one hundred dollars had been paid to him, the Collector, by the District Commissioner at his residence, but upon being asked to state the name of the Chief or Chiefs who had paid in this amount, he told the Collector to have this amount in safekeeping until he could return to his District Headquarters, at which time he hoped to send him some more money with the allocation for the purpose of making the necessary vouchers.

The District Commissioner, Mr. Ware, neglected to

send in the name of the Chief who had paid in this amount as he had promised, even after his attention had been called thereto by letter. Later, he wrote the Collector's clerk, Mr. Gray, that fifty dollars ($50.00) of this amount was paid by the Paramount Chief of the Tawor District, but no allocation for the other fifty dollars was forthcoming, and the Collector, after keeping the amount for a long time in his safe, was obliged to deposit the second fifty dollars in the name of the Paramount Chief of the Tawor District as he had done with the first. The Collector's curiosity was aroused by this slackness and unbusinesslike manner in which District Commissioner Ware was handling public funds collected by him, and so the Collector reported the matter to the Superintendent of the County, and requested him to institute an investigation into the hut tax collections in the Treasury of the Tawor District.

In April, 1934, the Secretary of the Treasury, Republic of Liberia, and one Mr. K. J. Adorkor, Travelling Auditor, arrived in Robertsport ostensibly to audit the accounts of the Internal Revenue Bureau of Grand Cape Mount County but also to investigate the information received with reference to the hut tax collection in the Tawor District. The Chiefs were ordered to come to the City with their hut tax receipts issued to them by District Commissioner Ware. To this conference Mr. Ware was duly invited, but although he was in the City, he feigned sick and would not attend. The Chiefs were therefore requested to produce their various receipts for hut taxes paid to District Commissioner Ware, which receipts could not be traced by the deposit of their corresponding amounts in the Bureau of Internal Revenue. The conference was then closed without District Commissioner Ware's having attended although two letters had been written inviting him to attend said conference, and although his friends had used persuasion to induce him to attend the conference and exonerate himself, if he

could; but he would not yield to their advice, and hence there was no alternative but a criminal prosecution.

There was a first trial when at the November term of court, 1934, the said District Commissioner Ware was convicted; but upon appeal to this Court it was shown that the trial judge, His Honor Isaac A. David, had been present at an executive investigation presided over by the Superintendent of the County, which had decided upon the institution of this prosecution. The Court held that said Judge was thereby disqualified to try the case. We, therefore, upon that ground reversed the judgment so rendered against appellant, and awarded a new trial. *Ware* v. *Republic,* 5 L.L.R. 50, 3 Lib. New Ann. Ser. 36.

The new trial so awarded was heard at the February term, 1936, His Honor Edward J. Summerville, Judge presiding by assignment, and it is from this second trial that the present appeal has been prosecuted.

The evidence at the trial in the court below shows that the receipts produced by the Chiefs were issued either under the genuine and official signature of District Commissioner Ware himself, or that of his clerk, Mr. T. Sando Kandakai. The clerk, Mr. Kandakai, on the stand identified each receipt issued by District Commissioner Ware himself, which was relevant to the issue as having been issued by the District Commissioner himself, or by him, T. Sando Kandakai as district clerk, but with the knowledge and upon the instructions of District Commissioner Ware, his chief. So there does not arise any question in this case as to the genuineness of the receipts issued by District Commissioner Ware for hut taxes in the Tawor District, collected by him.

Witness K. J. Adorkor, the Travelling Auditor, confirmed Collector John's testimony, that of the two thousand seven hundred seventy-eight dollars collected by defendant A. Dondo Ware as District Commissioner for the Tawor District, the amount of one thousand six hundred seventy-seven dollars and ninety-seven cents only had been

deposited in the Bureau of Internal Revenue, which would leave a net balance of at least one thousand one hundred dollars sixty-one cents unaccounted for.

Witness Adorkor, besides corroborating the evidence of Collector John, in proving the genuineness of the signature of defendant Ware to the receipts, and also that of his clerk, T. Sando Kandakai, in answer to the question:

"Ques: To the best of your knowledge has Mr. Ware ever made any effort to pay this amount from the time of your discovery of this shortage?

"Ans: He did not make any attempt until recently, during the month of January of this year 1936, when he had a talk with me in Monrovia and stated his willingness to pay this amount. Once or twice he approached me again. The last time he called in my office in company with Senator Tubman. Whereupon, I told him to put that proposal in writing to the Secretary of the Treasury. Senator Tubman said to me, 'Is it your wish that Mr. Dondo Ware should put the proposal in writing so that it can form part of the evidence against him?' I told him it was up to them. I did not see anything more of him in my office."

Senator R. W. A. Gordon confirmed this statement by the following testimony:

"I remember one day while in Monrovia of being in the Treasury in Mr. Adorkor's Office. Senator Tubman and Mr. Ware came in the office and said they would like to speak with Mr. Adorkor. He excused himself and went out of the office in the hall way. I heard them talking. I heard Mr. Adorkor say, 'What you want to say touching the matter, or any arrangement to make in settling the matter, put it in writing and then I will have something to act upon; but I cannot take verbal talk.' When he came in the office I asked him what was the trouble. He told me that Mr. Ware said he wanted to make an arrange-

ment about the money for which he had been indicted as having embezzled, and he said further that Senator Tubman could give him any assistance in making said arrangement. He said he could not take a verbal conversation to go to the Secretary with."

Another strong evidence of the conversion of this revenue by District Commissioner Ware is brought out in the further testimony of Mr. K. J. Adorkor, the Travelling Auditor, when he testified, *inter alia,* that there is a record kept in the Treasury Department of all assessments of hut taxes, and when collections are made and deposited, the various Chiefs are credited. If there is any balance, it is shown by the record. It appeared from this record that an amount of two thousand odd dollars were outstanding claims against the Chiefs of the Tawor District. To ascertain this situation, it was necessary to send a letter to the Collector of Internal Revenue for Grand Cape Mount County—Mr. Johns. Prior to this, Chief Lamine Dandai of the Kposo Section in the county aforesaid, presented a receipt to the Bureau of Internal Revenue in Monrovia, for hut tax payment made by him to the amount of one hundred seventy-six dollars, claiming his commission thereon.

Upon searching the records of the Bureau, it was discovered that the amount in question had never been deposited. The said receipt signed by District Commissioner Ware was dated July, 1932, and up to March 16, 1934, a period of one year and ten months, the money had not been deposited in the Bureau of Internal Revenue.

The evidence of the prosecution having been rested, it was incumbent upon the defendant, in keeping with his plea of "not guilty," to show what had happened to this undeposited balance of one thousand one hundred dollars and sixty-one cents for which he had issued receipts to various Chiefs of his district, and which amount had not been deposited in keeping with the regulation of the Bureau of Internal Revenue. In this endeavor the de-

fendant sadly failed, but rather, he sought to introduce in evidence duplicate vouchers which would give him double credits of some of the genuineness of the amounts deposited. Defendant Ware acknowledged the receipts issued by him, as well as those issued by his clerk, T. Sando Kandakai, by his (Mr. Ware's) orders.

The trial judge on hearing the foregoing admission of Mr. Ware, as to the genuineness of the receipts issued by him and his clerk, put the following question to him when he took the stand as witness in his own behalf:

> "Ques: During the trial of this case at the present session the prosecution has had identified by several witnesses certain receipts which have been admitted into evidence which they alleged to have been issued by you as District Commissioner for the Tawor District, as well as by your Clerk upon your orders for hut taxes received by you, the sum total of which seems far in excess of the sum total of the amounts of your vouchers and official receipts, this being strenuously urged by the prosecution as being embezzled by you. Do you not think that in your own interest you should make some statement before this court and jury tending to show whether or not you really issued these receipts?
>
> "Ans: I do not care to answer that particular question."

This whole evidence having been submitted to the jury, they unhesitatingly brought in a verdict of guilt against the defendant, to which verdict he excepted, and filed a motion in arrest of judgment; and upon same being denied by the court below, he excepted to the final judgment when rendered against him, and has appealed to this Honorable Court upon an unduly extensive bill of exceptions, which bill of exceptions, upon being ordered to be condensed, was resolved into five counts. We will now proceed to consider them in due order.

"1. Because on the 22nd day of February A. D. 1936,

during said trial, prosecution having rested oral testimony offered in as written evidence documents marked by Court A–Z inclusive and AA–JJ6 inclusive, which said documents were objected to by the defence on the grounds of (1) insufficiency of notice; (2) that said documents had not been subpoenaed for in order to bring them under the jurisdiction of the court; (3) that said documents were irrelevant to the issue."

From an inspection of the written evidence herein objected to we find that A–Z comprise the official receipts issued to the various Chiefs by the defendant, and by his clerk under his instructions. These receipts were identified by several witnesses for the prosecution as well as by the defendant's witness, Mr. Kandakai, his clerk, as being genuine and official. The record further shows that JJ1–JJ6 represent the folio of the cash book of the office of the Collector of Internal Revenue, Grand Cape Mount County, for hut taxes deposited with him by the several District Commissioners. Witness J. C. Johns, Collector of Internal Revenue for that county, being recalled testified as follows:

"Ques: Did you keep a cash book of hut taxes deposited by A. Dondo Ware?

"Ans: I did.

"Ques: Have you the cash book here?

"Ans: I have.

"Ques: Please state for the benefit of the court and jury what amount of hut taxes was collected by the defendant as District Commissioner of the Tawor District during the years 1932 and 1933, and exhibit the page or pages on which said entries were made.

"Ans: The total amount deposited by Mr. Ware as District Commissioner for Tawor District for 1932 and 1933 was $1,677.97. The several entries made with respect to the respective amounts deposited will be found in the cash book folios 94 and 95; 104 and

105; 126 and 127; 136 and 137; 162 and 163; 168 and 169.

"Ques: Besides these amounts which you have just shown has the defendant deposited any other amount for these two years?

"Ans: No."

From this evidence and the method of introducing it, we are of the opinion that said evidence was not improperly admitted nor irregularly introduced as contended by the defense in count one of his aforesaid bill of exceptions.

As to count two of the aforesaid bill of exceptions, which raises the question of the rejection of two pieces of defendant's written evidence, viz.: xx-12 and xx-24, we will here remark that the record in this case shows that Collector Johns stated that xx-11 and xx-12 were vouchers which related to the same amount, and to have allowed the admission of both into evidence would have had the effect of doubly crediting the defendant with the same amount. This also applies to documents xx-13 and xx-14. Whereupon the court below eliminated xx-11 and xx-13 and retained xx-12 and xx-14 to form part of the evidence for the defendant. We feel no hesitancy, therefore, in saying that the court did not err in excluding the written evidence mentioned and retaining those that he admitted. For, "It is the right and duty of the court, to expound to the jury all written evidence, procured in the course of the trial; . . ." Statutes of Liberia (Old Blue Book) ch. VII, p. 47, § 9; *id.* at ch. XI, p. 57, § 37.

As regards count three of the bill of exceptions, which raises the question, that Honorable R. W. A. Gordon was subpoenaed as a rebutting witness after the defense had rested evidence, and that same was done without any notice of producing rebutting evidence, we will here remark that according to Greenleaf on *Evidence*, volume 1, section 466a (16th ed., 1899), it is said:

"So far as the evidence of the opponent is to be ex-

plained away, contradicted, or otherwise refuted, by any process which consists merely in diminishing or negativing its force, the original party has a right to do this, either by a re-examination following immediately upon the cross-examination of his witness, or by new witnesses called in rebuttal after the opponent's own evidence has been put in."

Counsel for appellant seems not to have been able to discriminate between rebutting and impeaching evidence, hence the objection he made, and the necessity imposed upon us for settling this question.

The object of impeaching the testimony of a witness is to show that by some affirmative statement, more or less consciously made, he has given testimony at this time inconsistent with what he had said at a previous time and that, therefore, the witness is unworthy of credit. As evidence so given tends to cast a certain amount of moral obliquy upon the witness more or less permanently, it is but fair that (1) his attention should be called, on cross-examination, to the apparently irreconcilable inconsistency of the two statements while on the stand; and (2) that he be given an opportunity to explain, which explanation, if not satisfactory, he should receive notice before his discharge from the witness stand, that his opponent intends to impeach. Statutes of Liberia (Old Blue Book) ch. XII, p. 61, § 36; 1 Greenleaf, Evidence, §§ 461f, 462, 462a (16th ed., 1899).

On the other hand rebutting evidence, as we endeavored to make clear in the case *Bryant* v. *Bryant,* 4 L.L.R. 328, 2 Lib. New Ann. Ser. 169, is that which "is given . . . to explain, repel, contradict or disprove facts given in evidence on the other side." It is given:

"In denial of some affirmative fact which the answering party has endeavored to prove. Where the evidence is clearly rebuttal, the one offering it is entitled to have it admitted, and its exclusion is error." *Id.* at 187.

Thus it will be seen that until the witnesses for the de-

fense shall have deposed, the party maintaining the affirmative has ordinarily no means of knowing whether or not there will be any necessity of rebutting anything, and hence it would be preposterous for him to give notice that he will offer testimony in rebuttal.

Count four of the bill of exceptions relates to the exception taken to the verdict of the petty jury. From the records in the case we find that the evidence hereinbefore traversed was sufficient to rivet on the minds of the jury the fact of the fraudulent conversion of the revenues collected by the defendant in his capacity as District Commissioner for the Tawor District, which revenues according to the receipts issued by him and his clerk to the Chiefs had not been regularly and fully deposited. Therefore the verdict of conviction of the defendant for the crime of embezzlement, as alleged in the indictment, was well supported in law and should not be disturbed.

Coming lastly to count five of the bill of exceptions which raises the question of the denial by the court below of the defendant's motion in arrest of judgment, we will confine ourselves to the salient points raised in said motion.

The two counts in the motion in arrest of judgment which, in our opinion, seem to have any shadow of merit are count 4, which attacks the indictment for duplicity, in that said indictment recites:

> "Defendant aforesaid in manner and form aforesaid feloniously did steal, take and carry away said amount, etc."

and count 6:

> "That the indictment is not well founded, in that it averred that the conversion of the amount which the defendant is charged to have collected from the several Chiefs of the Tawor District, and embezzled, was while defendant was employed as District Commissioner of the aforesaid district by the Republic of Liberia, plaintiff, during the years 1932, 1933 and

1934, and as such an official defendant was a bonded officer under contract with the Republic of Liberia, plaintiff, which contract was in the custody of her agent, the Superintendent for the County of Grand Cape Mount. Defendant therefore says that if he had violated the terms of his contract the only and proper remedy or action for the plaintiff to have instituted against him would have been an action for the violation of contract on the Bond and not a charge of embezzlement."

With respect to count four of the motion, the Court will observe that it is true that according to the technical and approved mode of pleading and practice in criminal procedure there are words of art that are to be used to give a full description of the crime together with the essential elements thereof, and which ought in practice to be used. But these are demurrers that go to the sufficiency of the indictment and which ought to be raised as dilatory pleas to quash the indictment before the defendant pleads generally to it. Where, however, no such objections are made and the defendant pleads to such indictments, the law holds that defects of this nature are aided or cured by the verdict.

"By pleading generally to an indictment or information, it is usually held that the defendant admits its genuineness, and waives all matters that should have been pleaded in abatement. . . ." 14 R.C.L. "Indictments and Informations," § 52.

"Objections to an indictment, presentment, or information after verdict come too late, and will not be considered where the defect is merely a matter of form or ambiguity, and one which might have been bad on demurrer. . . ." *Id.* at § 55.

Moreover in the forms of indictment for embezzlement found in Archbold's *Criminal Pleading and Practice,* page 643 (24th ed., 1910), after charging the fiduci-

ary character in which the defendant was acting when he had received the money or other articles of value, and his fraudulent conversion thereof, said forms proceed to charge that by such conversion he did "steal, take, and carry away" the money or other article of value, in the identical words to which appellant took exceptions during the trial.

As to the sixth count of the motion, which relates to the choice of a civil action instead of a criminal one, we will here observe that crime is to be distinguished from tort. Torts may be *ex delicto* or *ex contractu*. If District Commissioner Ware, in the exercise of his duties, had committed some wrong by way of trespass on the person or property of his employer, an action for tort might have arisen. But in the case at bar he appears to us to have abused the fiduciary relationship established between the Republic of Liberia and himself as District Commissioner and to have deliberately, intentionally and fraudulently converted the money received to his own use and benefit, which conduct is not a mere trespass, but a crime, and thus brings him within the prohibition of our statutes, Laws of 1922–23, chapter XIX. The actions of the defendant in this respect in appropriating money collected for his employer during the course of the bailment, are properly punishable under the act above mentioned, for embezzlement, the exact amount laid in the indictment need not be proved as laid. If the evidence proves fraudulent conversion of the whole or any part of the article received and had for the principal, the indictment will be upheld for the whole or the part of the amount of the article so proven.

In view of the foregoing, and the laws supporting same, we are therefore of the opinion that the trial below was fair and regular, and therefore the judgment of the court below should be affirmed; and it is hereby so ordered.

Affirmed.