WILLIAM N. WITHERSPOON, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued December 21, 22, 1937, and January 5, 6, 12, 1938.
Decided February 4, 1938.

1. It is the duty of the court, on the application of a prisoner, to send for his witnesses wherever they may be had, and, if necessary, to issue compulsory process in order to obtain them.
2. The term "hearsay" is used with reference to that which is written as well as to that which is spoken.
3. The general rule of law rejects all hearsay reports of transactions, whether verbal or written, given by persons not produced as witnesses.
4. Hence, although a written certificate may, in some instances, be received for evidential assertions, it cannot be so received for those of a testimonial character.
5. Subject to certain exceptions oral testimony will not ordinarily be allowed to impeach or explain written evidence.

Appellant was convicted of the crime of embezzlement in the Circuit Court of the First Judicial Circuit, Montserrado County. On appeal to this Court, *judgment reversed.*

C. B. Reeves and *S. David Coleman* for appellant. *The Revenue Solicitor* for appellee.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

This case is before this Court on appeal from the Circuit Court of the First Judicial Circuit at its November term, 1936.

The records in this case show that the defendant was indicted by the grand jury for the County of Montserrado for the commission of the crime of embezzlement based on the complaint of one George A. Brown, the private prosecutor; and that he was arrested on the 19th

day of August, 1936, and when arraigned on the 18th day of November, 1936, he pleaded "not guilty." Before joining issue in this case, the appellant on the 11th day of November, 1936, filed a motion for the continuance of said cause on the grounds of absence of a material witness in the person of Johnny, whom the sheriff for the Third Judicial Circuit had neglected to summon, and also that one old man Karnswehn and L. B. Roberts who were summoned as his witnesses were sick and could not proceed to Monrovia to testify in his behalf, and prayed the trial judge to continue said cause.

On the 19th day of November, 1936, when the motion was called for hearing, the counsel for the prosecution objected to said motion and asked the court not to sustain it. See resistance and records, sheets 3–4. The court in ruling sustained the objections of the prosecution and denied the motion. See minutes page 4, ninth day's session—court's ruling.

The petit jury was then selected and sworn to try the issue thus joined between the appellant and appellee who were at the time defendant and plaintiff respectively. The prosecution then introduced its witnesses and had them qualified and they deposed. See minutes of the court, page 4 *et seq.* After this the appellant, defendant in the court below, also introduced his witnesses, who were qualified and deposed. See minutes. While there is a great deal of irrelevant testimony given in this case as well as irrelevant issues injected therein, we are resolved not to sift them at this moment, but instead will allow the wheat and tares to grow together until the day of harvest.

After the conclusion of the testimony of the witnesses and of the arguments *pro et con,* the judge charged the empanelled jury, who retired to their room of deliberation and brought a verdict against the appellant, defendant in the court below, to the effect that he was guilty of the charge of embezzlement alleged against him. To

this verdict of the petit jury the defendant excepted, and gave notice that he would file a motion for a new trial at the proper time. On the 20th day of November, 1936, the defendant filed his motion for a new trial and the trial judge assigned it to be heard on the 4th day of December, 1936. When said motion was called for hearing, and after arguments for and against, the court denied said motion and rendered final judgment against appellant, "that he make restitution of the one hundred and fifty pounds sterling (£150:0:0) the subject of this prosecution, pay a fine of two hundred dollars ($200.00) and be imprisoned for three calendar months certain." To this final judgment of the trial judge the appellant excepted and tendered his bill of exceptions containing forty counts, in which he prays this Court to review said trial, and correct all errors and irregularities which in his opinion the trial judge had committed during the trial of this case.

Although the bill of exceptions contains forty counts, yet we are only considering the points which in our opinion are those necessary for the present determination of the case at this time.

We will now therefore proceed to consider only the points or counts of the bill of exceptions on which in our opinion the decision of this case should rest, and those counts are 1, 2, 10, 31, 38, and 39.

Counts one and two of the bill of exceptions read as follows: (1) "Because on the 17th day of November A.D. 1936 appellant filed a motion on for continuance of the cause as set forth in said motion as of record," and count (2), "And also because on the 18th day of November A.D. 1936 appellant filed a subsequent motion for continuance of the case as set forth in said motion as of record." Count 38 which is relevant to the first two counts also reads as follows: "And also because on the 4th day of December A.D. 1936 the court denied appellant's motion for a new trial as of records." The relevant portions of

the motions thus referred to may be set forth respectively as follow:

"1. . . . Because the Sheriff of Sinoe County did not make every possible effort to serve the subpoena on witness Johnny.

"2. And also because Old Man Karnswehn and L. B. Roberts, two of the witnesses for defendant who were actually summoned, were ill, and consequently unable to travel to the place of holding the court at the term it was taken up.

"3. Because witness W. H. Tayler, needed by appellant, was a member of the Honourable the House of Representatives which was in session at the time the court met, and was unable to obtain an excuse therefrom to attend the trial."

Mr. Watson, speaking of obtaining witnesses in favor of defendant criminally charged, says that:

"Compulsory process, within the meaning of this clause, means that the power of the court may be invoked by the defendant to compel the attendance of witnesses who will testify in his behalf. This provision, unlike the preceding provision, was not taken from the common law. It was never a part of the common law. In England in very early times, and down to the seventeenth century, the defendant in a criminal case was not allowed to have witnesses. Subsequently the practice changed and witnesses for the defendant were allowed, but they could not testify under oath. This resulted in the witnesses for the government being believed by the jury rather than those of the accused, because the government's witnesses were sworn, while those of the accused were not. Early in the seventeenth century, being about the year 1620, the House of Commons passed a bill, and it was then passed in the House of Lords, that in all cases covered by *that special act* witnesses for a defendant as well as for the government should be sworn.

Later, in the reign of William and Mary, and about the year 1690, another act was passed providing that in cases of *treason* the witnesses should be sworn. A few years later, in the reign of Queen Anne, being about 1700, an act was passed which allowed witnesses to be sworn both for the government and the accused in all cases of felony as well as treason.

"The beneficent effect of this act of Parliament, together with the sense of justice and right which must have appealed to every member of the Convention, no doubt secured the introduction of this wise and humane clause into the amendment.

"It is the duty of the court, on the application of the prisoner, to send for witnesses, wherever they may be had, within the jurisdiction of the court. . . ." 2 Watson on the Constitution, p. 1485; Lib. Const. art. I, sec. 7.

The ruling of the trial judge on the aforesaid motions in our opinion lacks sound discretion. Fairness or impartiality is expected of every judge in the trial of every cause brought before him, in order that untainted and transparent justice may be meted out to both parties that are before him, and under the sound of his gavel, within the sacred walls of justice. The overruling by the trial judge of the aforesaid motions of the appellant, is not supported by law and is therefore erroneous.

Count ten of the bill of exceptions reads as follows:

"And also because on the 20th day of November A.D. 1936 the court admitted in evidence a letter from one Anthony Barclay a witness for appellee which appellant excepts as of records."

In the case *Yancy and Delaney* v. *Republic,* 5 L.L.R. 182, 3 New Ann. Ser., dealing with a similar question this Court said:

"With respect to said paper the court was compelled to call the attention of counsel, during the arguments, to the fact that said paper could not be ac-

cepted as evidence inasmuch as it was admitted in violation of the hearsay rule since the declarant had never been subjected to the ordeal of the cross-examination; and there was patent on the face of the document a big hiatus which would undoubtedly have been explained had the maker of the document been cross-examined. The principle is:

"'The term "hearsay" is used with reference to that which is written as well as to that which is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person. Hearsay evidence, as thus described, is uniformly held incompetent to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge. That this species of testimony supposes something better, which might be adduced in the particular case, is not the sole ground of its exclusion. Its extrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

"'. . . Subject to these qualifications and seeming exceptions [to be later examined,] the general rule of law rejects all hearsay reports of transactions, whether verbal or written, given by persons not produced as witnesses. The principle of this rule is, that such evidence requires credit to be given to a statement made by a person who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of his testimony; namely, that oral testimony should be delivered in the presence of the Court or a magis-

> trate, under the moral and legal sanctions of an oath, and where the moral and intellectual character, the motives and deportment of the witness can be examined, and his capacity and opportunities for observation, and his memory, can be tested by a cross-examination.' 1 Greenleaf, Evidence, §§ 99–99a; *Cummings* v. *Republic,* 4 L.L.R. 284, 2 Lib. New Ann. Ser. 122 (1935).
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> "And the Court desires here to make it clear that although a written certificate may, in some instances, be received for evidential assertions it cannot be so received for those of a testimonial character. . . ."

The foregoing excerpts from one of our adjudicated cases are in complete harmony with the Constitutional provision of confrontation which any person criminally charged must have as of right. It is therefore extremely surprising that, despite these provisions of our law, the trial judge admitted into evidence a letter written by a witness, when it was not possible for the defendant, now appellant, to cross-examine said witness on his said letter. And in thus admitting said letter, the trial judge denied the appellant a very vital privilege guaranteed to him by our sacred Constitution. The ruling of the trial court respecting the admission of said letter is therefore erroneous and illegal.

As to count 31 of the bill of exceptions which reads: "And also because on the 24th day of November A.D. 1936, the court *sua sponte* disallowed further witnesses to testify for and on behalf of appellant, as will appear from the records of the case." By inspection of the records of this case and particularly sheet 12 of the minutes of the 24th of November, 1936, cited by appellant, it is well to observe that nothing whatever appears in the records to support what the appellant says in count 31 of his aforesaid bill of exceptions; and although the trial judge approved appellant's bill of exceptions as a whole,

yet this count 31 not being recorded as set out by appellant, it cannot be legally considered by this Court, since indeed the latter is to review cases as of record only.

> "The court to which the appeal may be taken shall examine the matter in dispute, upon the record only, they shall receive no additional evidence, and they shall reverse no judgment for any default of form, or for any matter to which the attention of the court below shall not appear to have been called, either by some bill of exceptions, or other part of the record." Lib. Stat. (Old Blue Book), ch. XX, p. 78, § 10.

Count 35 of the bill of exceptions reads as follows: "And also because on the 25th day of November A.D. 1936 the court *sua sponte* ordered witness Witherspoon who was re-called to the stand to desist giving further evidence in his behalf *re* document dated 15/3/36." Sheet seven of the minutes of the 25th day of November, 1936, shows that witness Witherspoon in his testimony was attempting to explain the contents of written document dated 15/3/36, which in our opinion is contrary to the principle of our statute governing written evidence. Therefore we are of opinion that the trial judge did not err in disallowing him to give oral testimony to explain a written instrument. Lib. Stat. (Old Blue Book) ch. XI, p. 57, § 38.

The Supreme Court of this country, as well as those of other countries, has but one great and important duty to perform and it is regarded as being the soul of the law.

Rights, order and liberties are concentrated within its jurisdiction, and it is expected that it will keep immediately within the spirit of the law. It is not to be supposed that the conduct of this Court will be against plain legal proceedings, and as far as supervision is concerned, it is of right its duty and function to explain the law in the manner conducive to justice and equity.

The present case coming up before this Court fails to meet the simple requirement of the law, in one grand

particular. The responsibility is upon this Court to see that justice is done to all, whether it be the humblest and poorest individual in the land; and while we shall not reverse any judgment on the ground of any mere technicality, yet, where the liberty of the citizen is involved, it is the duty of this Court to see that it is not taken away unless by the law of the land.

Even if a crime should be committed, the proceedings to punish it should strictly conform to the constitutional and statutory requirements. For the foregoing reasons and the laws supporting same, we have arrived at the following conclusion: That the judgment of the court below should be reversed and the case be remanded to be tried *de novo;* and that the appellant may be allowed to enjoy his constitutional right of "compulsory process to obtain witnesses in his favor" which was denied him in the former trial; and it is so ordered.

Reversed.