

[ G.R. No. 2969. March 29, 1906 ]

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. FRANCISCO J. REYES,  
DEFENDANT AND APPELLANT.**

**D E C I S I O N**

**TORRES, J.:**

On June 10, 1905, the provincial fiscal of Occidental Negros filed a complaint charging Francisco J. Reyes with the crime of embezzlement of public funds in that on or about the aforesaid date in his capacity as treasurer of the municipality of Victorias and deputy provincial treasurer of Occidental Negros, which positions he held since January 1, 1905, he had received various amounts pertaining to the said municipality and province from which he appropriated to himself the sum of P2,361, contrary to the statute in such cases made and provided.

The case having been tried upon the said complaint, the court, as the result of the trial, found the defendant guilty of the crime of embezzlement of the sum of W,361, under articles 390 and 392, paragraph 2, of the Penal Code, and sentenced him to imprisonment for six years and one day *presidio mayor*, accessory penalties, eleven years special temporary disqualification, and costs. From this judgment the defendant appealed.

It appears from the evidence introduced at the trial that the defendant, Francisco J. Reyes, had been the municipal treasurer of the town of Victorias and deputy provincial treasurer of Occidental Negros from January 1 to June 10, 1905; that upon assuming charge of his office he received from his predecessor, as appears from Exhibit A, which is an inventory dated January, 1905, and shown on page 7 of the record, the sum of P2,177.28, of which he entered upon his books and subsequently paid to the provincial treasurer only P1,569.10 failing to account for the balance of P608.18. It was for the embezzlement of this latter amount that criminal proceedings were instituted pursuant to the order appearing on page 14 of the record.

An examination of defendant's accounts made June 9 showed, however, that he should have had in his possession the sum of P3,959.07, of which P2,204.33 were found in the safe, thus leaving a balance P1,754.74: unaccounted for. This latter sum added to the P608.18 received from his predecessor and not entered upon his books made a total of P2,362.92, as testified to by the examiner (p. 36).

The defendant, upon being arraigned June 16, 1905, pleaded not guilty (p. 17), and on the 20th of the same month filed an affidavit (p. 53) asking the court to find that the embezzlement had been committed not by the taking (*sustraccion*) but by mere diversion (*distracion*) of the funds under his control, to wit, P2,361, which sum he refunded to the Government June 20, as shown by receipt marked "Exhibit A 1" (p. 52).

Article 392 of the Penal Code provides:

"The official who to the detriment or hindrance of the public service shall apply, to his own use or that of others, funds or property under his charge, shall be punished with the penalties of temporary special disqualification and a fine of from 20 to 30 per centum of the amount diverted.

"If restitution be not made, the penalties prescribed in article 390 shall be imposed on him.

"If such unlawful use of the funds caused no detriment or hindrance to the public service, he shall incur the penalties of suspension and a fine of from 5 to 25 per centum of the amount diverted."

The defendant refunded to the municipal treasury the sum of P2,362.92 which he, as treasurer of the town and deputy provincial treasurer, had received. There is no proof that the defendant took the money with the intent of appropriating the same to his own use, but it is evident that he diverted the funds in question, applying the same to his own use or that of others. It seems that it was not his purpose to keep and retain the money indefinitely, he having returned the same immediately after the result of the examination was made known to him and the exact amount of his liability ascertained. The defendant introduced in evidence on the fifth day of the trial the receipt given him by the provincial treasurer for the sum thus returned. There is no evidence of record to show that there was any detriment or hindrance to the public service. The defendant, Reyes, is therefore guilty of the crime of

embezzlement in the aforesaid sum of P2,362.92, he having diverted and applied the same to his own use. He has consequently incurred the penalties of suspension and fine provided for in paragraph 3, article 392 of the Penal Code.

Paragraph 2 of article 392 of the Penal Code provides that if restitution of the funds embezzled be not made, the defendant shall, upon conviction, be punished with the penalties provided in article 390, but does not fix the time within which the restitution should be made. Inasmuch as the liability of a defendant in such cases can not be determined until after the examination of his accounts has been fully completed, it would seem evident that the funds embezzled may be refunded during the trial and as soon as the exact extent of his liability is ascertained. It is during the course of the proceedings that the crime is investigated and established, and in a prosecution for embezzlement the amount embezzled and the guilt of the defendant are the two main things to be ascertained.

Courts in rendering judgment in cases of embezzlement, where the defendant has diverted (*distraindo*) the funds intrusted to him, shall expressly find whether or not the amount embezzled was actually returned. If it appears that restitution was made during the trial or prior thereto, this fact will be considered in favor of the accused provided such restitution took place before the rendition of final judgment. The law does not prescribe the time within which the funds diverted should be returned.

In the case at bar the defendant, upon being informed as to the total amount embezzled, paid the same into the treasury. In view of the fact that no detriment or hindrance resulted to the public service, he should be punished in accordance with paragraph 3, article 392 of the Penal Code.

No aggravating or extenuating circumstances having attended the commission of the crime, the penalty should be imposed in its medium degree.

For the foregoing reasons we are of the opinion that the judgment appealed from should be reversed and the defendant, Francisco J. Reyes, sentenced to three years' suspension from public office, right of suffrage, active and passive, profession or trade, and to pay a fine equal to 10 per cent of the amount embezzled and in case of insolvency to suffer one day additional suspension for every P2.50 unpaid, such additional suspension not to exceed one year, "with costs of both instances.

Let the case be returned to the Court of First Instance with a certified copy of this decision and of the judgment to be entered for its execution. So ordered.

*Arellano, C. J., Johnson, Carson, Willard, and Tracey, JJ., concur.*

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