

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. VICENTE CALIMAG, DEFENDANT AND APPELLANT.*G.R. No. 4852. February 01, 1909*

Ponente: WILLARD, J.

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On and prior to December 2, 1907, the accused was municipal treasurer of the town of Solana, Province of Cagayan, and also deputy provincial treasurer, receiving as salary for the former position P25 per month and for the latter P10 per month. On the said date, to wit, December 2, 1907, the district auditor for that district examined the books and cash of the accused, and informed him that there was a difference between the amount for which accused was responsible and the amount counted by said district auditor of P49.04. The auditor asked the defendant how this occurred, and he said that it was for the reason that he had to advance his salary of P10 a month from July to November, P50. The auditor then told him to get the money, and he went out and within ten minutes returned with P50, which he put upon the desk in front of the auditor. This was done before the examination was concluded. The auditor counted the P50 as a part of the money on hand and certified that the accounts of the accused were correct.

The defendant was convicted in the court below of a violation of Act No. 1740 and sentenced to two months' imprisonment. From that judgment he has appealed.

It was proven at the trial that the defendant had no authority to pay himself his salary of P10 a month as deputy to the provincial treasurer, and it must be considered that he had made personal use of the funds of the Government.

If this case had arisen prior to the enactment of Act No. 1740, it would have fallen under the provisions of article 392 of the Penal Code, and the punishment inflicted would have been a fine of from 5 to 25 per cent of the amount appropriated. (U. S. vs. Coates, 4 Phil. Rep., 581; U. S. vs. Valencia, 8 Phil. Rep., 729.) The offense, however, was committed after the enactment of Act No. 1740. The first and fourth sections of that Act are as follows:

"SECTION 1. Any bonded officer or employee of the Insular Government, or of any provincial or municipal government, or of the city of Manila, and any other person who, having charge, by reason of his office or employment, of Insular, provincial, or municipal funds or property, or of funds or property of the city of Manila, or of trust or other funds by law required to be kept or deposited by or with such officer, employee, or other person, or by or with any public office, treasury, or other depositary, fails or refuses to account for the same, or makes personal use of such funds or property, or of any part thereof, or abstracts or misappropriates the same, or any part thereof, or is guilty of any malversation with reference to such funds or property, or through his abandonment, fault, or negligence, permits any other person to abstract, misappropriate, or make personal use of the same, shall, upon conviction, be punished by imprisonment for not less than two months nor more than ten years and, in the discretion of the court, by a fine of not more than the amount of such funds and the value of such property."

"SEC. 4. Articles three hundred and ninety, three hundred and ninety-one, and three hundred and ninety-two of

the Penal Code of the Philippine Islands, in so far as the same may be in conflict with this Act, are hereby to that extent only repealed."

If the only law applicable to the case is Act No. 1740, the judgment must be affirmed, for the minimum penalty imposed upon a person who makes personal use of the funds of the Government is two months' imprisonment. There is nothing in the law which indicates that this penalty may be changed into a fine in case the defendant restores the money to the treasury.

It has been suggested, however, that this is not the only law now applicable to the case, but that article 392 of the Penal Code is still in force. This suggestion is due to the peculiar wording of section 4 of Act No. 1740 above quoted. It seems to have been the opinion of the legislative body that articles 390, 391, and 392 of the Penal Code were not wholly repealed and that some part of them still remains. It may be difficult to point out just what part is left of these three articles, but this court has already decided that article 392 has been entirely repealed. In the case of *The United States vs. Togonon*,¹ No. 4676, decided January 19, 1909, the court, speaking of Act No. 1740, said:

"The purpose of the Act was the formal repeal of article 392 as to the distinctions and subdistinctions stated in said article and maintains the leading idea of the crime, distinguishing it from that of estafa committed by a private person."

This result necessarily seems to follow from the fact that article 392 apparently supposes that the money misappropriated is returned and almost all of the article is devoted to a statement of the penalties which shall be imposed in such a case. The only part of the article which does not suppose a return of the money is the second paragraph, which says:

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

It is difficult to believe that the Commission, with their attention directed especially to article 392 and to the fact that its main object was to provide for a fine in case the money was returned, would not have expressly excepted the article from the repealing clause if it had been its intention to preserve that feature of the law.

The appellant claims that what was stated by the defendant to the auditor at the time of the examination amounted to a confession within the meaning of section 4 of Act No. 619, and no proof having been offered that the confession was freely and voluntarily made, it was inadmissible. Said section 4 is as follows:

"No confession of any person charged with crime shall be received as evidence against him by any court of justice unless it be first shown to the satisfaction of the court that it was freely and voluntarily made and not the result of violence, intimidation, threat, menace, or of promises or offers of reward or leniency."

It will be seen that this section relates only to a person charged with crime and can not, therefore, be applied to the present case because no charge had at the time of the conversation been made against the defendant.

The judgment of the court below is affirmed, with the costs of this instance against the appellant.

Arellano, C. J., Torres, Mapa, Johnson, Carson, and Tracey, JJ., concur.

[1] Page 516, *supra*.

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