

Present : Schneider and Lyall Grant JJ. and Driberg A.J.

NAGAIYA v. JAYASEKERE.

28—P. C. Colombo. 26,283.

*Electricity—Can it be subject of theft—Movable property—Penal Code, ss. 20 and 367.*

Electric current is not movable property within the meaning of section 20 of the Penal Code and cannot be the subject of the offence of theft.

**C**ASE referred by Lyall Grant J. to a Bench of three Judges on the question whether under the law of Ceylon electricity can be the subject of theft.

*H. V. Perera* (with *N. E. Weerasooriya*), for accused, appellant.

*Grenier, C.C.*, for the Attorney-General.

March 22, 1927. SCHNEIDER J.—

I agree with the judgment of my brother Driberg. An opportunity to read it has been kindly afforded me by him. The only observation I would desire to add is that as the Penal Code has not defined “corporeal property” or “movable property,” except to indicate what property of a corporeal nature is not to be regarded as included in the term “movable property,” that we must resort to the general law, that is, our common law, to ascertain the meaning to be attached to the terms “movable property” and “corporeal property” for the purpose of deciding the question raised by this appeal. Our common law is based purely on the Roman law. My brother has referred to the Roman law. I will refer only to two eminent writers, *Grotius*<sup>1</sup> and *van Leeuwen*.<sup>2</sup> They both agree in regarding corporeal things as those which “may be touched and seen” as distinguished from incorporeal things “which are not subject to the touch or sight but consist in rights and privileges.” In other words, they are “things” by a fiction of the law. They also agree that corporeal things are either movable or immovable. These conceptions are consistent with the explanation attached to the term movable property in the Penal Code. Electricity, viewed from the point of any explanation or definition of what it is, does not come within the conception of a “corporeal thing” according to our common law. It cannot, therefore, be the subject of a theft.

<sup>1</sup> *Introduction to Dutch Jurisprudence, Bk. II., Chap. 1, ss. 10-14.*

<sup>2</sup> *Commentaries, Bk. II., Chap. 1, ss. 4-6.*

1927. LYALL GRANT J.—

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This is an appeal from a conviction by the Police Magistrate of Colombo, which came before me, and which in view of the practical importance of one of the questions raised I reserved for the consideration of a larger Court.

The offence charged was that the accused committed theft of electric current, an offence punishable under section 367 of the Ceylon Penal Code. The accused was found guilty and fined Rs. 75.

An appeal was taken against the conviction on the ground that the evidence did not conclusively point to the accused being the offender, and also on the ground that under the law of Ceylon electricity cannot be the subject of theft.

Both these arguments were advanced before the learned Police Magistrate, but both were rejected by him.

On the question of whether the accused had abstracted the current I saw no reason to differ from the finding of the learned Police Magistrate after the first argument, and I am still of that opinion.

The only question which remained for consideration is whether under our law electricity can be the subject of an offence punishable under section 367 of the Penal Code; in other words, whether it can be the subject of theft.

In view of the tentative opinion which I formed on this point—an opinion which, if correct, would no doubt necessitate the introduction of remedial legislation—I thought it advisable to reserve the case for the purpose of ascertaining whether my opinion agreed with that of my brother Judges, and also in order that the Court should have the benefit of argument on behalf of the Crown.

Theft is defined in section 366 of the Penal Code as follows:—

“Whoever, intending to take dishonestly any movable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.”

The subject of theft under that section is movable property. Movable property is defined by section 20 of the Penal Code as follows:—

“The words ‘movable property’ are intended to include Corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.”

The question before the Court really is whether electricity is corporeal property not attached to the earth or permanently fastened to anything attached to the earth.

The first point to consider then is whether electricity is corporeal property. No definition of the word "corporeal" is given in the Penal Code.

Messrs. Boustead's engineer, who gave evidence in this case, was asked to define electricity, and he did so in the following words:—  
"Electricity is a state of tension in ether of the atmosphere—it is energy."

Webster's dictionary defines electricity as "a power in nature, a manifestation of energy, exhibiting itself . . . ."

The same dictionary defines corporeal property as "such as may be seen and handled (as opposed to incorporeal, which cannot be seen or handled and only exists in contemplation)."

Grotius divides particular things into corporeal and incorporeal, and defines corporeal things as such as are visible to the outward sense, as this house, this book, &c.

The definition of theft in the Indian Penal Code is the same as that in our code, and there is a similar correspondence between the respective definitions of movable property in the two Codes.

In India the difficulty as to whether electrical energy can be the subject of theft has been met by the provisions of the Electricity Act, No. 3 of 1903. Section 39 (1) of that Act provides that "whoever dishonestly abstracts, consumes, or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code," and section 2 of the Act defines energy as "electrical energy expended at a rate greater than 25 watts."

Our Electricity Ordinance of 1906 contains a similar definition of energy, but contains no section corresponding to section 39 (1) of the Indian Act. Not very much assistance can be derived from the English law owing to the fact that the term "larceny" in English law is not the equivalent of the term "theft" as used in the Indian and Ceylon Codes. On this point see *Surr Venkatapayya Sastri v. Madula Venkanna*.<sup>1</sup>

It is noteworthy, however, that in England it has been found necessary to make special provision by statute against the fraudulent use of electricity. Section 23 of the Electric Lighting Act of 1882 provided that any persons who fraudulently used electricity should be guilty of simple larceny, and this section is now replaced by section 10 of the Larceny Act of 1916, which is in the following terms:—

"Every person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes, or uses any electricity shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny."

<sup>1</sup> (1904) I. L. R. 27 Mad. 531.

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Counsel has not been able to refer us to any case, either local or foreign, dealing specifically with the theft of electricity, nor have I been able to discover any such case.

There is a reference in the *English and Empire Digest* to a case of theft of electricity tried before the Central Criminal Court in 1899. No particulars are given in the *Digest*, and I have not been able to obtain access to the case. As, however, the case is subsequent to the Electricity Act of 1882, it would probably not help one to resolve the problem now presented.

That problem is two-fold. Firstly, is electrical energy corporeal, and secondly, if it is corporeal, is it permanently fastened to anything attached to the earth?

It is obvious that the same difficulty has presented itself to the lawyers of England and India, and although one cannot find any judicial decision on the point, the Legislatures of those two countries have found it necessary, or at any rate desirable, to make it the subject of larceny and theft respectively by special enactment.

The term "property" as defined in the larceny Act is not restricted to corporeal property, but under our law, as in the Indian, it is so restricted:

It was argued on behalf of the accused that the Courts in construing a penal statute will give to the accused the benefit of any reasonable doubt that exists as to its interpretation: There can be no doubt that this is a principle of judicial interpretation: I think there is a reasonable doubt as to whether the makers of the Code intended to include electricity under the definition of corporeal property, and in my opinion the accused is entitled to the benefit of a strict construction of the statute.

It is unnecessary to consider the further point whether assuming the electricity which is the subject of this charge to have been corporeal it was attached to the earth: No definite evidence was led on this point, and I do not think that we can presume that it was not attached.

I would allow the appeal, and quash the conviction.

DRIEBERG A.J.—

The appellant was convicted under section 367 of the Penal Code of the theft of electric current of the value of 25 cents and was sentenced to pay a fine of Rs. 75.

He appealed; the appeal was argued before my brother Lyall Grant on the question whether the offence of theft could be committed in the case of electric current, and he reserved the question for decision of a Bench of two or more Judges.

The matter was argued again before my brothers Schneider and Lyall Grant and myself. The question for decision is whether electric current is movable property within the meaning of section 20 of the Penal Code.

Movable property is defined as including corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

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The learned Police Magistrate has based his judgment on the ground that the antithesis of corporeality is spirituality, and that as electricity is not a spiritual substance it must be of a corporeal character.

But the division of things into corporeal and incorporeal is apparent, and not real. By incorporeal things the jurists did not mean such things as the soul, spirit, light, &c. Incorporeal things were mere legal entities (*quae in jure consistunt*), such as usufruct, inheritance, obligatio, which are not really things but aggregates of rights and duties.<sup>1</sup> Corporeal things are things which are tangible, and which, as the subject of theft, can be removed from the possession of a person.

It is not easy to see how electricity can be regarded as a corporeal thing of this nature.

Mr. Sharrock, an engineer of Messrs. Boustead Brothers, describes electricity as energy, a state of tension in the ether.

It is described in the Encyclopaedia Britannica as a physical agency which exhibits itself by certain effects.

My brother Lyall Grant has pointed out that in India, where the definition of theft and of movable property is the same as in our Code, the difficulty whether electric energy can be the subject of theft has been met by the provision in the Indian Electricity Act 3 of 1903, section 3 (1), that "whoever dishonestly abstracts, consumes, or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code," energy being defined as electrical energy expended at a rate greater than 25 watts.

He has also shown that in England special provision was made by statute against the fraudulent use of electricity, first by the Electric Lighting Act of 1882 (45 & 46 Vict. c. 56 s. 23), which was replaced by section 10 of the Larceny Act of 1916, which provides that—

"Every person who maliciously or fraudulently abstracts, causes to be wasted, consumes, or uses any electricity shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny."

I am of opinion that electric current is not movable property within the meaning of section 20 of the Penal Code and that it cannot be subject of the offence of theft.

I set aside the conviction and acquit the accused.

*Conviction quashed.*

<sup>1</sup> *Hunter, Roman Law, 4th edition, p. 287.*