

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. IGNACIO CARLOS, DEFENDANT AND APPELLANT.

G.R. No. 6295. September 01, 1911

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PER CURIAM:

The information filed in this case is as follows:

"The undersigned accuses Ignacio Carlos of the crime of theft, committed as follows:

"That on, during, and between the 13th day of February, 1909, and the 3d day of March, 1910, in the city of Manila, Philippine Islands, the said Ignacio Carlos, with intent of gain and without violence or intimidation against the person or force against the thing, did then and there, willfully, unlawfully, and feloniously, take, steal, and carry away two thousand two hundred and seventy-three (2,273) kilowatts of electric current, of the value of nine hundred and nine (909) pesos and twenty (20) cents Philippine currency, the property of the Manila Electric Railroad and Light Company, a corporation doing business in the Philippine Islands, without the consent of the owner thereof; to the damage and prejudice of the said Manila Electric Railroad and Light Company in the said sum of nine hundred and nine (909) pesos and twenty (20) cents Philippine currency, equal to and the equivalent of 4,546 pesetas Philippine currency. All contrary to law.

(Sgd.) "L. M. SOUTHWORTH,
"Prosecuting Attorney.

"Subscribed and sworn to before me this 4th day of March, 1910, in the city of Manila, Philippine Islands, by L. M. South worth, prosecuting attorney for the city of Manila.

(Sgd.) "CHARLES S. LOBINGIER,
"Judge, First Instance.

"A preliminary investigation has heretofore been conducted in this case, under my direction, having examined the witnesses under oath, in accordance with the provisions of section 39 of Act No. 183 of the Philippine Commission, as amended by section 2 of Act No. 612 of the Philippine Commission.

(Sgd.) "L. M. SOUTHWORTH,
"Prosecuting Attorney.

"Subscribed and sworn to before me this 4th day of March, 1910, in the city of Manila, Philippine Islands, by L. M. South worth, prosecuting attorney for the city of Manila.

(Sgd.) "CHARLES S. LOBINGIER,
"Judge, First Instance."

A warrant for the arrest of the defendant was issued by the Honorable J. C. Jenkins on the 4th of March and placed in the hands of the sheriff. The sheriff's return shows that the defendant gave bond for his appearance. On the 14th of the same month counsel for the defendant demurred to the complaint on the following grounds:

"1. That the court has no jurisdiction over the person of the accused nor of the offense charged because the accused has not been accorded a preliminary investigation or examination as required by law and no court, magistrate, or other competent authority has determined from a sworn complaint or evidence adduced that there is probable cause to believe that a crime has been committed, or that this defendant has committed any crime.

"2. That the facts charged do not constitute a public offense."

The demurrer was overruled on the same day and the defendant having refused to plead, a plea of not guilty was entered by direction of the court for him and the trial proceeded.

After due consideration of all the proofs presented and the arguments of counsel the trial court found the defendant guilty of the crime charged and sentenced him to one year eight months and twenty-one days' presidio correccional, to indemnify the offended party, The Manila Electric Railroad and Light Company, in the sum of P865.26, to the corresponding subsidiary imprisonment in case of insolvency and to the payment of the costs. From this judgment the defendant appealed and makes the following assignments of error:

"I.

"The court erred in overruling the objection of the accused to the jurisdiction of the court, because he was not given a preliminary investigation as required by law, and in overruling his demurrer for the same reason.

"II.

"The court erred in declaring the accused to be guilty, in view of the evidence submitted.

"III.

"The court erred in declaring that electrical energy may be stolen.

"IV.

"The court erred in not declaring that the plaintiff consented to the taking of the current.

"V

"The court erred in finding the accused guilty of more than one offense.

"VI.

"The court erred in condemning the accused to pay P865.26 to the electric company as damages."

Exactly the same question as that raised in the first assignment of error was, after a thorough examination and due consideration, decided adversely to appellant's contention in the case of U. S. vs. Grant and Kennedy (18 Phil. Rep., 122). No sufficient reason is presented why we should not follow the doctrine enunciated in that case.

The question raised in the second assignment of error is purely one of fact. Upon this point the trial court said:

"For considerably more than a year previous to the filing of this complaint the accused had been a consumer of electricity furnished by the Manila Electric Railroad and Light Company for a building containing the residence of the accused and three other residences, and which was equipped, according to the defendant's testimony, with thirty electric lights. On March 15, 1909, the representatives of the company, believing that more light was being used than their meter showed, installed an additional meter (Exhibit A) on a pole outside of defendant's house, and both it and the meter (Exhibit B) which had been previously installed in the house were read on said date. Exhibit A read 218 kilowatt hours; Exhibit B, 745 kilowatt hours. On March 3, 1910, each was read again, Exhibit A showing 2,718 kilowatt hours and Exhibit B, 968. It is undisputed that the

current which supplied the house passed through both meters and the city electrician testifies that each meter was tested on the date of the last reading and was "in good condition." The result of this registration therefore is that while the outside meter (Exhibit A) showed a consumption in defendant's building of 2,500 kilowatt hours of electricity, the inside meter (Exhibit B) showed but 223 kilowatt hours. In other words the actual consumption, according to the outside meter, was more than ten times as great as that registered by the one inside. Obviously this difference could not be due to normal causes, for while the electrician called by the defense (Lanusa) testifies to the possibility of a difference between two such meters, he places the extreme limit of such difference between them at 5 per cent. Here, as we have seen, the difference is more than 900 per cent. Besides, according to the defendant's electrician, the outside meter should normally run faster, while according to the test made in this case the inside meter (Exhibit B) ran the faster. The city electrician also testifies that the electric current could have been deflected from the inside meter by placing thereon a device known as a 'jumper' connecting the two outside wires, and there is other testimony that there were marks on the insulation of the meter Exhibit B which showed the use of such a device. There is further evidence that the consumption of 223 kilowatt hours, registered by the inside meter would not be a reasonable amount for the number of lights installed in defendant's building during the period in question, and the accused fails to explain why he should have had thirty lights installed if he needed but four or five.

"On the strength of this showing a search warrant was issued for the examination of defendant's premises and was duly served by a police officer (Hartpence). He was accompanied at the time by three employees of the Manila Electric Railroad and Light Company, and he found there the accused, his wife and son, and perhaps one or two others. There is a sharp conflict between the several spectators on some points but on one there is no dispute. All agree that the 'jumper' (Exhibit C) was found in a drawer of a small cabinet in the room of defendant's house where the meter was installed and not more than 20 feet therefrom. In the absence of a satisfactory explanation this constituted possession on defendant's part, and such possession, under the Code of Civil Procedure, section 334 (10), raises the presumption that the accused was the owner of a device whose only use was to deflect the current from the meter.

"Is there any other 'satisfactory explanation' of the 'jumper's' presence? The only one sought to be offered is the statement by the son of the accused, a boy of twelve years, that he saw the 'jumper' placed there by the witness Porter, an employee of the Light Company. The boy is the only witness who so testifies and Porter himself squarely denies it. We can not agree with counsel for the defense that the boy's interest in the outcome of this case is less than that of the witnesses for the prosecution. It seems to us that his natural desire to shield his father would far outweigh any interest such an employee like Porter would have and which, at most, would be merely pecuniary.

"There is, however, one witness whom so far as appears, has no interest in the matter whatsoever. This is officer Hartpence, who executed the search warrant. He testifies that after inspecting other articles and places in the building as he and the other spectators, including the accused, approached the cabinet in which the 'jumper' was found, the officer's attention was called to the defendant's appearance and the former noticed that the latter was becoming nervous. Where the only two witnesses who are supposed to know anything of the matter thus contradict each other this item of testimony by the officer is of more than ordinary significance; for if, as the accused claims, the 'jumper' was placed in the cabinet for the first time by Porter there would be no occasion for any change of demeanor on the part of the accused. We do not think that the officer's declination to wait until defendant should secure a notary public shows bias. The presence of such an official was neither required nor authorized by law and the very efficacy of a search often depends upon its swiftness.

"We must also agree with the prosecuting attorney that the attending circumstances do not strengthen the story told by the boy; that the latter would have been likely to call out at the time he saw the 'jumper' being placed in the drawer, or at least directed his father's attention to it immediately instead of waiting, as he says, until the latter was called by the officer. Finally, to accept the boy's story we must believe that this company or its representatives deliberately conspired not merely to lure the defendant into the commission of a crime but to

fasten upon him a crime which he did not commit and thus convict an innocent man by perjured evidence. This is a much more serious charge than that contained in the complaint and should be supported by very strong corroborating circumstances which we do not find here. We are, accordingly, unable to consider as satisfactory defendant's explanation of the 'jumper's' presence.

"The only alternative is the conclusion that the 'jumper' was placed there by the accused or by some one acting for him and that it was the instrument by which the current was deflected from the meter Exhibit B and the Light Company deprived of its lawful compensation."

After a careful examination of the entire record we are satisfied beyond peradventure of a doubt that the proofs presented fully support the facts as set forth in the foregoing finding.

Counsel for the appellant insists that only corporeal property can be the subject of the crime of larceny, and in support of this proposition cites several authorities for the purpose of showing that the only subjects of larceny are tangible, movable, chattels, something which could be taken in possession and carried away, and which had some, although trifling, intrinsic value, and also to show that electricity is an unknown force and can not be a subject of larceny.

In the case of *U. S. vs. Genato* (15 Phil. Rep., 170) the defendant, the owner of the store situated at No. 154 Escolta, Manila, was using a contrivance known as a "jumper" on the electric meter installed by the Manila Electric Railroad and Light Company. As a result of the use of this "jumper" the meter, instead of making one revolution in every four seconds, registered one in seventy-seven seconds, thereby reducing the current approximately 95 per cent. Genato was charged in the municipal court with a violation of a certain ordinance of the city of Manila, and was sentenced to pay a fine of P200. He appealed to the Court of First Instance, was again tried and sentenced to pay the same fine. An appeal was taken from the judgment of the Court of First Instance to the Supreme Court on the ground that the ordinance in question was null and void. It is true that the only question directly presented was that of the validity of the city ordinance. The court, after holding that said ordinance was valid, said:

"Even without them (ordinances), the right of ownership of electric current is secured by articles 517 and 518 of the Penal Code; the application of these articles in cases of subtraction of gas, a fluid used for lighting, and in some respects resembling electricity, is confirmed by the rule laid down in the decisions of the supreme court of Spain January 20, 1887, and April 1, 1897, construing and enforcing the provisions of articles 530 and 531 of the penal code of that country, articles identical with articles 517 and 518 of the code in force in these Islands."

Article 517 of the Penal Code above referred to reads as follows:

"The following are guilty of larceny:

" (1) Those who with intent of gain and without violence or intimidation against the person, or force against things, shall take another's personal property without the owner's consent."

And article 518 fixes the penalty for larceny in proportion to the value of the personal property stolen.

It is true that electricity is no longer, as formerly, regarded by electricians as a fluid, but its manifestations and effects, like those of gas, may be seen and felt.. The true test of what is a proper subject of larceny seems to be not whether the subject is corporeal or incorporeal, but whether it is capable of appropriation by another than the owner.

It is well-settled that illuminating gas may be the subject of larceny, even in the absence of a statute so providing. (Decisions of supreme court of Spain, January 20, 1887, and April 1, 1897, *supra*; also (England) *Queen vs. Firth*,

L. R. 1 C. C, 172, 11 Cox C. C, 234; Queen vs. White, 3 C. & K., 363, 6 Cox C. C, 213; Woods vs. People, 222 Ill., 293, 7 L. R. A., 520; Commonwealth vs. Shaw, 4 Allen (Mass.), 308; State vs. Wellman, 34 Minn., 221, N. W. Rep., 385, and 25 Cyc, p. 12, note 10.)

In the case of Commonwealth vs. Shaw, supra, the court, speaking through Chief Justice Bigelow, said:

"There is nothing in the nature of gas used for illuminating purposes which renders it incapable of being feloniously taken and carried away. It is a valuable article of merchandise, bought and sold like other personal property, susceptible of being severed from a mass or larger quantity, and of being transported from place to place. In the present case it appears that it was the property of the Boston Gas Light Company; that it was in their possession by being confined in conduits and tubes which belonged to them, and that the defendant severed a portion of that which was in the pipes of the company by taking it into her house and there consuming it. All this being proved to have been done by her secretly and with intent to deprive the company of their property and to appropriate it to her own use, clearly constitutes the crime of larceny."

Electricity, the same as gas, is a valuable article of merchandise, bought and sold like other personal property and is capable of appropriation by another. So no error was committed by the trial court in holding that electricity is a subject of larceny.

It is urged in support of the fourth assignment of error that if it be true that the appellant did appropriate to his own use the electricity as charged he can not be held guilty of larceny for any part of the electricity thus appropriated, after the first month, for the reason that the complaining party, the Manila Electric Railroad and Light Company, knew of this misappropriation and consented thereto.

The outside meter was installed on March 15, 1909, and read 218 kilowatt hours. On the same day the inside meter was read and showed 745 kilowatt hours. Both meters were again read on March 3, 1910, and the outside one showed 2,718 kilowatt hours while the one on the inside only showed 968, the difference in consumption during this time being 2,277 kilowatt hours. The taking of this current continued over a period of one year, less twelve days. Assuming that the company read both meters at the end of each month; that it knew the defendant was misappropriating the current to that extent; and that it continued to furnish the current, thereby giving the defendant an opportunity to continue the misappropriation, still, we think, that the defendant is criminally responsible for the taking of the whole amount, 2,277 kilowatt hours. The company had a contract with the defendant to furnish him with current for lighting purposes. It could not stop the misappropriation without cutting off the current entirely. It could not reduce the current so as to just furnish sufficient for the lighting of two, three, or five lights, as claimed by the defendant that he used during the most of this time, but the current must always be sufficiently strong to furnish current for the thirty lights, at any time the defendant desired to use them.

There is no pretense that the accused was solicited by the company or any one else to commit the acts charged. At most there was a mere passive submission on the part of the company that the current should be taken and no indication that it wished it to be taken, and no knowledge by the defendant that the company wished him to take the current, and no mutual understanding between the company and the defendant, and no measures of inducement of any kind were employed by the company for the purpose of leading the defendant into temptation, and no preconcert whatever between him and the company. The original design to misappropriate this current was formed by the defendant absolutely independent of any acts on the part of the company or its agents. It is true, no doubt, as a general proposition, that larceny is not committed when the property is taken with the consent of its owner. It may be difficult in some instances to determine whether certain acts constitute, in law, such "consent." But under the facts in the case at bar it is not difficult to reach a conclusion that the acts performed by the plaintiff company did not constitute a consent on its part that the defendant take its property. We have been unable to find a well-considered case holding a contrary opinion under similar facts, but, there are numerous cases holding that

such acts do not constitute such consent as would relieve the taker of criminal responsibility. The fourth assignment of error is, therefore, not well founded.

It is also contended that since the "jumper" was not used continuously, the defendant committed not a single offense but a series of offenses. It is, no doubt, true that the defendant did not allow the "jumper" to remain in place continuously for any number of days as the company inspected monthly the inside meter. So the "jumper" was put on and taken off at least monthly, if not daily, in order to avoid detection, and while the "jumper" was off the defendant was not misappropriating the current. The complaint alleged that the defendant did on, during, and between the 13th day of February, 1909, and the 3d of March, 1910, willfully, unlawfully, and feloniously take, steal, and carry away 2,277 kilowatts of electric current of the value of P909. No demurrer was presented against this complaint on the ground that more than one crime was charged. The Government had no opportunity to amend or correct this error, if error at all. In the case of *U. S. vs. Macaspac* (12 Phil. Rep., 26), the defendant received from one Joaquina Punu the sum of P31.50, with the request to deliver it to Marcelina Dy-Oco. The defendant called upon Marcelina, but instead of delivering the said amount she asked Marcelina for P30 in the name of Joaquina who had in no way authorized her to do so. Marcelina gave her P30, believing that Joaquina had sent for it. Counsel for the defendant insisted that the complaint charged his client with two different crimes of estafa in violation of section 11 of General Orders, No. 58. In disposing of this question this court said:

"The said defect constitutes one of the dilatory pleas indicated by section 21, and the accused ought to have raised the point before the trial began. Had this been done, the complaint might have been amended in time, because it is merely a defect of form easily remedied. * * * Inasmuch as in the first instance the accused did not make the corresponding dilatory plea to the irregularity of the complaint, it must be understood that she has waived such objection, and is not now entitled to raise for the first time any question in reference thereto when submitting to this court her assignment of errors. Apart from the fact that the defense does not pretend that any of the essential rights of the accused have been injured, the allegation of the defect above alluded to, which in any case would only affect the form of the complaint, can not justify a reversal of the judgment appealed from, according to the provisions of section 10 of General Orders, No. 58."

In the case at bar it is not pointed out wherein any of the essential rights of the defendant have been prejudiced by reason of the fact that the complaint covered the entire period. If twelve distinct and separate complaints had been filed against the defendant, one for each month, the sum total of the penalties imposed might have been very much greater than that imposed by the court in this case. The covering of the entire period by one charge has been beneficial, if anything, and not prejudicial to the rights of the defendant. The prosecuting attorney elected to cover the entire period with one charge and the accused having been convicted for this offense, he can not again be prosecuted for the stealing of the current at any time within that period. Then, again, we are of the opinion that the charge was properly laid. The electricity was stolen from the same person, in the same manner, and in the same place. It was substantially one continuous act, although the "jumper" might have been removed and replaced daily or monthly. The defendant was moved by one impulse to appropriate to his own use the current, and the means adopted by him for the taking of the current were in the execution of a general fraudulent plan.

"A person stole gas for the use of a manufactory by means of a pipe, which drew off the gas from the main without allowing it to pass through the meter. The gas from this pipe was burnt every day, and turned off at night. The pipe was never closed at its junction with the main, and consequently always remained full of gas. It was held, that if the pipe always remained full, there was, in fact, a continuous taking of the gas and not a series of separate takings. It was held also that even if the pipe had not been kept full, the taking would have been continuous, as it was substantially all one transaction." (*Regina vs., Firth*, L. R., 1 C. C, 172; 11 Cox C. C, 234. Cited on p. 758 of Wharton's Criminal Law, vol. 1, 10th ed.)

The value of the electricity taken by the defendant was found by the trial court to be ₱865.26. This finding is fully

in accordance with the evidence presented. So no error was committed in sentencing the defendant to indemnify the company in this amount, or to suffer the corresponding subsidiary imprisonment in case of insolvency.

The judgment being strictly in accordance with the law and the merits of the case, same is hereby affirmed, with costs against the appellant.

Arellano, C. J., Torres, Mapa, and Carson, JJ.

DISSENTING

MORELAND, J.,

I feel myself compelled to dissent because, in my judgment, there is no evidence before this court, and there was none before the court below, establishing the most essential element of the crime of larceny, namely, the taking without the consent of the owner. As I read the record, there is no evidence showing that the electricity alleged to have been stolen was taken without the consent of the complaining company. The fact is that there was not a witness who testified for the prosecution who was authorized in law, or who claimed to be authorized in fact, to testify as to whether or not the alleged taking of the electricity was without the consent of the company or, even, that said company had not been paid for all electricity taken. Not one of them was, as a matter of law, competent to testify to either of those facts. Not one of them was an officer of the company. The leading witness for the people, Kay, was only an inspector of electric lights. Another, McGeachim, was an electrical engineer in the employ of the company. Another, Garcia, was an electrician of the company. These witnesses all confined their testimony to technical descriptions of meters, their nature and function, of electric light wires, the wiring of defendant's house, the placing of a meter therein, the placing of a meter outside of the house in order to detect, by comparing the readings of the two, whether the accused was actually using more electricity than the house meter registered, the discovery that more electricity was being used than said meter registered, and of the finding of a "jumper" in defendant's possession. One of these witnesses testified also that he had suspected for a long time that the accused was "stealing" electricity and that later he was "positive of it."

In order to sustain a charge of larceny under section 517 of the Penal Code, it is necessary to prove that there was a taking without the consent of the owner. This is unquestioned. The question is: Has the prosecution proved that fact? Has it proved that the electricity alleged to have been stolen was used without the consent of the company? Has it proved that the accused did not have a right to use electricity whether it went through the meter or not? Has it proved, even, that the accused did not have a right to use a "jumper?" Has it been proved that the company has not been fully paid for all the electricity which defendant used, however obtained? Not one of these facts has been proved. The only way to determine those questions was to ascertain the relations which existed between the accused and the company at the time the electricity alleged to have been stolen was used by the accused. There was certainly some relation, some contract, either express or implied, between the company and the accused or the company would not have been supplying him the electric current. What was that relation, that contract? No one can possibly tell by reading the record. There is not a single word in all the evidence even referring to it. Not one of the people's witnesses mentioned it. Not one of them, very likely, knew what it really was. The relation which a corporation bears to private persons for whom they are rendering service is determined by the corporation itself

through the acts of its officials, and not by its employees. While an employee might, as the act of a servant, have caused the contract between the company and the accused to be signed by the accused, it was nevertheless a contract determined and prepared by the company through its officers and not one made by the employee; and unless the employee actually knew the terms of the contract signed by the accused, either by having read it, if in writing, or by having heard it agreed upon, if verbal, he would not be competent to testify to its terms except rendered so by admission of the party to be charged by it. It nowhere appears that any of the witnesses for the prosecution had any knowledge whatever of the terms of the contract between the company and the accused. It does not appear that any of them had ever seen it or heard it talked about by either party thereto. The company has offered no testimony whatever on that matter. The record is absolutely silent on that point.

This being true, how can we say that the accused committed a crime? How can we say that a given act is criminal unless we know the relation of the parties to whom the act refers? Are we to presume an act wrong. Are we to say that the accused committed a wrong when we do not know whether he did. or not? If we do not know the arrangements under which the company undertook to furnish electricity to the defendant, how do we know that the accused has not lived up to them? If we do not know their contract, how do we know that the accused violated it?

It may be urged that the very fact that a meter was put in by the company is evidence that it was for the company's protection. This may be true. But is it not just as proper to presume that it was put in for defendant's protection also? Besides, it does not appear that the company really put in the meter, nor does it even appear to whom it belonged. No more does it appear on whose application it was put in. The witness who installed the meter in defendant's house did not say to whom it belonged and was unable to identify the one presented by the prosecution on the trial as the one he installed. But however these things may be, courts are not justified in "assuming" men into state prison. The only inferences that courts are justified in drawing are those springing from facts which are not only but which are of themselves sufficient to warrant the inference. The mere fact, if it is a fact, that the company placed a meter in defendant's house is not sufficient to sustain the conclusion in a criminal case that the defendant did not have the right to use electricity which did not pass through the meter. Much less would it warrant the inference that, in so using electricity, the defendant feloniously and criminally took, stole, and carried it away without the consent of the company. An accused is presumed innocent until the contrary is proved. His guilt must be established beyond a reasonable doubt. It is incumbent on the state to prove every fact which is essential to the guilt of the accused, and to prove every such fact as though the whole issue rested on it. The evidence of the prosecution must exclude every reasonable hypothesis of innocence. If the facts proved are as consistent with his innocence as with his guilt, he can not be convicted.

But what was the necessity of all this uncertainty? What was the force which prevented the company from proving clearly and explicitly the contract between itself and the accused? What prevented it from proving clearly, explicitly, and beyond all cavil that the electricity was taken (used) without its consent? Why did not some competent official testify? Why did the company stand by wholly silent? Why did it leave its case to be proved by servants who were competent to testify, and who did actually testify, so far as legal evidence goes, only in relation to technical matters relating to meters and electric currents? Why did the prosecution place upon this court the necessity of deducing and inferring and concluding relative to the lack of consent of the company when a single word from the company itself would have avoided that necessity? We have only one answer to all these questions: We do not know.

In the case of *Bubster vs. Nebraska* (33 Neb., 663), the accused was charged with the larceny of a buggy of the value of \$75. He was found guilty. On appeal the judgment of conviction was reversed, the court saying:

"There are two serious objections to this verdict. First, the owner of the buggy, although apparently within

reach of the process of the court, was not called as a witness. Her son-in-law, who resided with her, testifies that he did not give his consent, and very freely testifies that his, mother-in-law did not. She was within reach of the process of the court and should have been called as a witness to prove her nonconsent.

"The rule is very clearly stated in note 183, volume 1, Phillips on Evidence (4th Am. ed.). A conviction of larceny ought not to be permitted or sustained unless it appears that the property was taken without the consent of the owner, and the owner himself should be called, particularly in a case like that under consideration, when the acts complained of may be consistent with the utmost good faith. There is a failure of proof therefore on this point."

In the case of *State vs. Moon* (41 Wis., 684), the accused was charged with the larceny of a mare.. He was convicted. On appeal the court reversed the judgment of conviction, saying:

"In *State vs. Morey* (2 Wis., 494) it was held that in prosecutions for larceny, if the owner of the property alleged to have been stolen is known, and his attendance as a witness can be procured, his testimony that the property was taken from him without his consent is indispensable to a conviction. This is upon the principle that his testimony is the primary and best evidence that the property was taken without his consent, and hence, that secondary evidence of the fact cannot be resorted to, until the prosecution shows its inability, after due diligence, to procure the attendance of the owner."

In volume 1, Phillips on Evidence (5th Am. ed., note 183, sec. 635), the author says:

"In all cases, and especially in this, the larceny itself must be proved by the best evidence the nature of the case admits. * * * This should be by the testimony of the owner himself if the property was taken from his immediate possession, or if from the actual possession of another, though a mere servant or child of the owner, that other must be sworn, so that it may appear that the immediate possession was violated, and this, too, without the consent of the person holding it. Where non-consent is an essential ingredient in the offense, as it is here, direct proof alone, from the person whose non-consent is necessary, can satisfy the rule. You are to prove a negative, and the very person who can swear directly to the necessary negative must, if possible, always be produced. (Citing English authorities.) Other and inferior proof cannot be resorted to till it be impossible to procure this best evidence. If one person be dead who can swear directly to the negative, and another be alive who can yet swear to the same thing, he must be produced. In such cases, mere presumption, prima facie or circumstantial evidence is secondary in degree, and cannot be used until all the sources of direct evidence are exhausted."

I quote these authorities not because I agree with the doctrine as therein set forth. I quote them because there is a principle inherent in the doctrine laid down which is recognized by all courts as having value and effect. It is this: Failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case, direct or rebutting, or to examine such witness as to facts covered by his special knowledge, especially if the witness be naturally favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter, gives rise to an inference, sometimes denominated a strong presumption of law, that the testimony of such uninterrogated witness would not sustain the contention of the party. Where the party himself is the one who fails to appear or testify, the inference is still stronger. The nonappearance of a litigant or his failure to testify as to facts material to his case and as to which he has especially full knowledge creates an inference that he refrains from appearing or testifying because the truth, if made to appear, would not aid his contention; and, in connection with an unequivocal statement on the other side, which if untrue could be disproved by his testimony, often furnishes strong evidence of the fact asserted. As to this proposition the authorities are substantially uniform. They differ only in the cases to which the principles are applied. A substantially full list of the authorities is given in 16 *Cyclopedia of Law and Procedure* (pp. 1062 to 1064, inclusive) from which the rules as stated above are taken.

This court has recognized the value of this principle and has permitted it strongly to influence its view of the evidence in certain cases. In the case of *United States vs. Magsipoc* (20 Phil. Rep., 604) one of the vital facts which the prosecution was required to establish in order to convict the accused was that a certain letter which the accused alleged he mailed to his daughter, who was attending a boarding school in Iloilo, and which the daughter testified she had received, had not really been sent by the accused and received by the daughter but, instead, had been purloined by him from the post-office after he had duly placed it therein and after it had been taken into the custody and control of the postal authorities. It was conceded that the directress of the boarding school which the daughter was at the time attending knew positively whether the daughter had received the letter in question or not. This court held that, in weighing the evidence, it would take into consideration the failure of the prosecution to produce the directress of the school as a witness in the case, she being the only person, apart from the daughter herself, who really knew the fact.

Another of those cases was that of *U. S. vs. Casipong* (20 Phil. Rep., 178) charged with maintaining a concubine outside his home with public scandal. To prove the scandalous conduct charged and its publicity, the prosecution introduced testimony, not of witnesses in the vicinity where the accused resided and where the scandal was alleged to have occurred, but those from another barrio. No witness living in the locality where the public scandal was alleged to have occurred was produced. This court, in the decision of that case on appeal, allowed itself, in weighing the evidence of the prosecution, to be strongly influenced by the failure to produce as witnesses persons who, if there had really been public scandal, would have been the first, if not the only ones, to know it. The court said:

"In this case it would have been easy to have submitted abundant evidence that Juan Casipong forsook his lawful wife and lived in concubinage in the village of Bolocboloc with his paramour Gregoria Hongoy, for there would have been an excess of witnesses to testify regarding the actions performed by the defendants, actions not of isolated occurrence but carried on for many days in sight of numerous residents scandalized by their bad example. But it is impossible to conclude from the result of the trial that the concubinage with scandal charged against the defendants has been proved, and therefore conviction of the alleged concubine Gregoria Hongoy is not according to law,"

In the case at bar the question of the consent of the company to the use of the electricity was the essence of the charge. The defendant denied that he had taken the electricity without the consent of the company. The prosecution did not present any officer of the corporation to offset this denial and the company itself, although represented on the trial by its own private counsel, did not produce a single witness upon that subject.

In the case of *Standard Oil Co. vs. State* (117 Tenn., 618), the court (p. 672) said:

"But the best evidence of what his instructions to Holt were and the information he had of the transaction at the time it was made were the letters which he wrote to Holt directing him to go to Gallatin, and the daily and serial weekly reports made to him by Holt and Rutherford of what was done there, which were not produced, although admitted to be then in his possession. He was aware of the value of such evidence, as he produced a copy of his letter to Holt, condemning the transaction, as evidence in behalf of the plaintiffs in error. The presumption always is that competent and pertinent evidence within the knowledge or control of a party which he withholds is against his interest and insistence." (*Dunlap vs. Haynes*, 4 Heisk., 476; *Kirby vs. Tallmadge*, 160 U. S., 379, 16 Sup. Ct., 349, 40 L. Ed., 463; *Pacific Constr. Co. vs. B. W. Co.*, 94 Fed., 180, 36 C. C. A., 153.)

In the case of *Succession of Drysdale* (127 La., 890), the court held:

"When a will presented for probate is attacked on the ground that it is a forgery, and there are pertinent facts relating to the will in the possession of the proponent, and he repeatedly fails to testify when his testimony

could clear up many clouded and doubtful things, his failure to testify casts suspicion upon the will, especially when the one asking for the probate of the will is a principal legatee."

In the case of *Belknap vs. Sleeth* (77 Kan., 164), the court (p. 172) said:

"What effect should such conduct have in the consideration of a case, where the successful party thus living beyond the jurisdiction of the court has refused to testify in a material matter in behalf of the opposing party? It must be conceded that the benefit of all reasonable presumptions arising from his refusal should be given to the other party. The conduct of a party in omitting to produce evidence peculiarly within his knowledge frequently affords occasion for presumptions against him. (*Kirby vs. Tallmadge*, 160 U. S., 379, 16 Sup. Ct, 349, 14 L. Ed., 463.) This rule has been often applied where a party withholds evidence within his exclusive possession and the circumstances are such as to impel an honest man to produce the testimony.

In this case the witness not only failed but refused to testify concerning material matters that must have been within his knowledge."

In the case of *Heath vs. Waters* (40 Mich., 457), it was held that:

"It is to be presumed that when a witness refuses to explain what he can explain, the explanation would be to his prejudice."

In the case of *Frick vs. Barbour* (64 Pa. St., 120, 121), the court said:

"It has been more than once said that the testimony in a case often consists in what is not proved as well as in what is proved. Where withholding testimony raises a violent presumption that a fact not clearly proved or disproved exists, it is not error to allude to the fact of withholding, as a circumstance strengthening the proof. That was all that was done here."

In the case of *Funda vs. St. Paul City Railway Co.* (71 Minn., 438), the court held:

"The defendant having omitted to call its motorman as a witness, although within reach and available, the court was, under the circumstances, justified in instructing the jury that, in weighing the effect of the evidence actually introduced, they were at liberty to presume that the testimony of the motorman, if introduced, would not have been favorable to the cause of defendant."

In the case of *Gulf, C. & S. F. Ry. Co. vs. Ellis* (54 Fed. Rep., 481), the circuit court of appeals held that:

"Failure to produce the engineer as a witness to rebut the inferences raised by the circumstantial evidence would justify the jury in assuming that his evidence, instead of rebutting such inferences, would support them."

In *Wigmore on Evidence* (vol. 1, sec. 285), it is said:

"The consciousness indicated by conduct may be, not an indefinite one affecting the weakness of the cause at large, but a specific one concerning the defects of a particular element in the cause. The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted. The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause * * *."

Continuing this same subject the same author says:

"At common law the party-opponent in a civil case was ordinarily privileged from taking the stand (post, sec.

2217) ; but he was also disqualified; and hence the question could rarely arise whether his failure to testify could justify any inference against him. But since the general abolition both of the privilege and the disqualification (post, sees. 2218, 577), the party has become both competent and compellable like other witnesses; and the question plainly arises whether his conduct is to be judged by the same standards of inference. This question should naturally be answered in the affirmative * * *." (See *Aragon Coffee Co. vs. Eogers*, 105 Va., 51.)

As I stated at the outset, I have been unable to find in the record of this case any proof of legal value showing or tending to show that the electricity alleged to have been stolen was taken or used without the consent of the company. The defendant, therefore, should be acquitted.

There are other reasons why I cannot agree to the conviction of the accused. Even though the accused be found to have committed the acts charged against him, it stands conceded in this case that there is a special law passed particularly and especially to meet cases of this very kind, in which the offense is mentioned by name and described in detail and is therein made a misdemeanor and punished as such. It is undisputed and admitted that heretofore and ever since said act was passed cases such as the one at bar have uniformly and invariably been organized and punished under said act; and that this is the first attempt ever made in these Islands to disregard utterly the plain provisions of this act, and to punish this class of offenses under the provisions of the Penal Code relating to larceny. The applicability of those provisions is, to say the very least, extremely doubtful, even admitting that they are still in force. Even though originally applicable, these provisions must now be held to be repealed by implication, at least so far as the city of Manila is concerned, by the passage of the subsequent act defining the offense in question and punishing it altogether differently.

Moreover, I do not believe that electricity, in the form in which it was delivered to the accused, is susceptible of being stolen under the definition given by the law of these Islands to the crime of larceny.

Concisely, then, I dissent because (a) this court, by its decision in this case, has, in my judgment, disregarded the purpose of the Legislature, clearly expressed; because (b) it has applied a general law, of at least very doubtful application, to a situation completely dealt with, and admittedly so, by a later statute conceived and enacted solely and expressly to cover that very situation; because (c) the court makes such application in spite of the fact that, under the general law, if it is applicable, the crime in hand is a felony while under the later statute it is only a misdemeanor; because (d), in my judgment, the court modifies the definition given by the Legislature to the crime of larceny, which has been the same and has received the same interpretation in this country and in Spain for more than two centuries; because (e) the decision disregards, giving no importance to, a positive statute which is not only the last expression of the legislative will on the particular subject in hand, but was admittedly passed for the express purpose of covering the very situation to which the court refuses to apply it. While the statute referred to is an act of the Municipal Board of the city of Manila, this court has held in a recent case that said board was authorized by the legislature to pass it. Therefore it is an Act of the Legislature of the Philippine Islands.

In this dissent I shall assert, and, I think, demonstrate three propositions, to wit:

First. That an electric current is not a tangible thing, a chattel, but is a condition, a state, in which a thing or chattel finds itself; and that a condition or state can not be stolen independently of the thing or chattel of which it is a condition or state. That it is chattels which are subjects of larceny and not conditions.

Second. That, even if an electric current is a tangible thing, a chattel, and capable of being stolen, in the case at bar no electric current was taken by the defendant, and therefore none was stolen. The defendant simply made use of the electric current, returning to the company exactly the same amount that he received.

Third. That, even if an electric current is a tangible thing, a chattel, and capable of being stolen, the contract

between the company and the defendant was one for use and not for consumption; and all the defendant is shown to have done, which is all he could possibly have done, was to make use of a current of electricity and not to take or consume electricity itself.

I shall therefore maintain that there is no larceny even though the defendant committed all the acts charged against him.

In discussing the question whether, under the law of the Philippine Islands, an electric current is the subject of larceny, I shall proceed upon the theory, universally accepted today, that electricity is nothing more or less than energy. As Mr. Meadowcroft says in his *A B C of Electricity*, indorsed by Mr. Edison, "electricity is a form of energy, or force, and is obtained by transforming some other form of energy into electrical energy."

In this I do not forget the theory of the "Electron" which is now being quietly investigated and studied, which seems to tend to the conclusion that there is no difference between energy and matter, and that all matter is simply a manifestation of energy. This theory is not established, has not been announced by any scientist as proved, and would probably have no effect on the present discussion if it were.

Based on this accepted theory I draw the conclusion in the following pages that electricity is not the subject of larceny under the law of the Philippine Islands.

Partida 3, title 29, law 4, thus defines "cosas muebles:"

"The term muebles is applied to all the things that men can move from one place to another, and all those that can naturally move themselves: those that men can move from one place to another are such as cloths, books, provisions, wine or oil, and all other things like them; and those that can naturally move themselves are such as horses, mules, and the other beasts, and cattle, fowls and other similar things."

Partida 5, title 5, law 29, contains the following:

"But all the other things which are muebles and are not annexed to the house or do not appertain thereto belong to the vendor and he can take them away and do what he likes with them: such are the wardrobes, casks and the jars not fixed in the ground, and other similar things."

Article 517 of the Penal Code, in that portion defining larceny, as charged against the accused in the case at bar, reads:

"Art. 517. The following are guilty of theft:

"1. Those who, with intent of gain and without violence or intimidation against the person or force against things, shall take another's personal property (cosas muebles) without the owner's consent."

This article of the Penal Code, as is seen, employs precisely the words defined in the Partidas. The definition of the word is clear in the law as written. It is also clear in the law as interpreted, I have not been able to find a writer on Spanish or Roman criminal law who does not say clearly and positively that the only property subject to larceny is tangible movable chattels, those which occupy space, have three dimensions, have a separate and independent existence of their own apart from everything else, and can be manually seized and carried from one place to another. This was the unquestioned theory of the Roman criminal law and it is the undoubted and unquestioned theory of the Spanish criminal law. Nor do I find a writer or commentator on the Spanish or Roman Civil Law who does not define a cosa mueble in the same way.

One of the leading commentators of Spain on criminal law writes thus concerning the property subject to robbery and larceny:

"Personal property belonging to another. - If robbery consists in the taking of a thing for the purpose and by the means indicated in the article in question, it follows from the very nature of this class of crimes, that only personal or movable property can be the subject thereof, because none but such property can be the subject of the *contrectatio* of the Romans; '*Furtum sine contrectatione non fiat*,' says Ulpian. The abstraction, the rapine, the taking, and all the analogous terms and expressions used in the codes, imply the necessity that the things abstracted or taken can be carried from one place to another. Hence the legal maxim: Real property '*non contractantur, sed invaduntur*.'" (6 Groizard, p. 47.)

"The act of taking is what constitutes the *contrectatio* and the *invito domino* which all the great ancient and modern jurists consider as the common ingredient (in addition to the fraudulent intention of gain), of the crimes of robbery and theft. From what has been said it follows that the taking, the act of taking without violence or intimidation to the persons, or force upon the things, for the purpose of gain and against the will of the owner, is what determines the nature of the crime of theft as defined in paragraph 1 of this section." (6 Groizard, pp. 261, 262.)

"The material act of taking is, therefore, an element of the crime which cannot be replaced by any other equivalent element. From this principle important consequences follow which we need not now stop to consider for the reason that in speaking of the crime of robbery we have already discussed the subject at great length. Immovable and incorporeal things cannot be the subject of theft for the reason that in neither the one or the other is it possible to effect the *contrectatio*, that is to say, the material act of laying hands on them for the purpose of removing the same, taking the same or abstracting the same. Hence the legal maxims: '*Furtum non committitur in rebus immobilibus* and '*Res incorporales nee tradi possideri possunt, ita contrectavit nee auferri*.'" (6 Groizard, p. 266.)

Criticising an opinion of the supreme court of Spain which held that illuminating gas was a subject of larceny, the same writer says:

"The owner of a certain store who had entered into a contract with a gas company whereby he substantially agreed to pay for the consumption of the amount of gas which passed through a meter, surreptitiously placed a pipe which he connected with the branch from the main pipe before it reached the meter and used the same for burning more lights than those for which he actually paid. The supreme court of Madrid convicted the defendant of the crime of *estafa* but the supreme court of Spain reversed the judgment, holding that he should be convicted of theft. The only reason which the supreme court had for so deciding was that the owner of the store had taken personal property belonging to another without the latter's consent, thereby committing the crime not of *estafa* but of consummated theft. But in our judgment, considering the sense and import of the section under consideration, it cannot be properly said that the owner of the store took the gas because in order to do this it would have been necessary that the said fluid were capable of being taken or transported, in other words, that the *contrectatio*, the meaning of which we have already sufficiently explained, should have taken place.

"Gas is not only intangible and therefore impossible of being the subject of *contrectatio*, of being seized, removed, or transported from one place to another by the exercise of the means purely natural which man employs in taking possession of property belonging to another, but, by reason of its nature, it is necessary that it be kept in tanks, or that it be transmitted through tubes or pipes which by reason of their construction, or by reason of the building to which the same may be attached, partake of the nature of immovable property. There is no means, therefore, of abstracting gas from a tank, from a tunnel or from a pipe which conveys the fluid to a building, for the purpose of being consumed therein, unless the receptacle containing the same is broken, or the tank or pipe bored, and other tubes or pipes are connected therewith at the point of the opening or fracture by means of which the gas can be conveyed to a place different from that for which it was originally intended.

"This exposition, or interpretation, if you choose to call it such, has a further foundation in our old laws which have not been changed but rather preserved in the definition of movable and immovable property given by the

Civil Code. According to Law I, Title XVII, Partida II, personal property means those things which live and move naturally by themselves, and those which are neither living nor can naturally move, but which may be removed; and Law IV, Title XXIX, Partida III, defines personal property as that which man can move or take from one place to another, and those things which naturally by themselves can move. Finally, corporeal things, according to Law I, Title III, Partida III, are those which may be the subject of possession with the assistance of the body, and incorporeal those which cannot be physically seized, and cannot be properly possessed. From these definitions it follows that unless we do violence to the plain language of these definitions, it would be impossible to admit that gas is a corporeal thing, and much less that it is movable property." (6 Groizard, pp. 268, 269.)

If the holding that gas, which is unquestionably a physical entity having a separate and independent existence and occupying space, has approached the verge of unstealable property so closely that the ablest of Spanish commentators believes that there is grave danger of the complete destruction of the ancient legislative definition of stealable property by judicial interpretation, what would be said in regard to a decision holding that an electric current is a subject of larceny?

It may be well to add just here, although it may be somewhat out of its regular order, what the author above quoted regards was the crime actually committed in the case he was discussing. He says:

"For us, for the reasons hereinbefore set out, it would be more in harmony with the principles and legal texts which determine the nature of the crimes of theft and estafa, to assign the latter designation to the fraudulent act which we have heretofore examined and which substantially consists in the alteration, by means of a fraudulent method, of the system established by an agreement to supply a store with illuminating gas and to determine the amount consumed for lighting and heating and pay its just value. We respect, however, the reasons to the contrary advanced in the hope that the supreme court in subsequent judgments will definitely fix the jurisprudence on the subject.

"Nor can the abusive use of a thing determine the existence of the crime under consideration. A bailee or pledgee who disposes of the thing, bail or pledge entrusted to his custody for his own benefit is not guilty of larceny for the reason that both contracts necessarily imply the voluntary delivery of the thing by the owner thereof and a lawful possession of the same prior to the abusive use of it.

"Not even a denial of the existence of the bailment or contract of pledge with intent of gain constitutes the crime of larceny for the reason that the material act of taking possession of the property without the consent of the owner is lacking." (6 Groizard, p. 269.)

That under the Roman and Spanish law property to be the subject of larceny must be a tangible chattel which has a separate independent existence of its own apart from everything else, which has three dimensions and occupies space so that it may of itself be bodily seized and carried away, is not an open question. That that was also the doctrine of the common law is equally beyond question.

In the consideration of this case the great difficulty lies in confusing the appearance with the thing, in confounding the analogy with the things analogous. It is said that the analogy between electricity and real liquids or gas is absolutely complete; that liquids and gases pass through pipes from the place of manufacture to the place of use; and the electric current, in apparently the same manner, passes through a wire from the plant to the lamp; that it is measured by a meter like liquids and gas; that it can be diverted or drawn from the wire in which the manufacturer has placed it, to the light in the possession of another; that a designing and unscrupulous person may, by means of a wire, surreptitiously and criminally transfer from a wire owned by another all the electricity which it contains precisely as he might draw molasses from a barrel for his personal use. And the question is triumphantly put, "how can you escape the inevitable results of this analogy?" The answer is that it is an analogy and nothing more. It is an appearance. The wire from which the electricity was drawn has lost nothing. It is

exactly the same entity. It weighs the same, has just as many atoms, arranged in exactly the same way, is just as hard and just as durable. It is exactly the same thing as it was before it received the electricity, at the time it had it, and after it was withdrawn from it. The difference between a wire before and after the removal of the electricity is simply a difference of condition. Being charged with electricity it had a quality or condition which was capable of being transferred to some other body and, in the course of that transfer, of doing work or performing service. A body in an elevated position is in a condition different from a body at sea level or at the center of the earth. It has the quality of being able to do something, to perform some service by the mere change of location. It has potential energy, measured by the amount of work required to elevate it. The weight or monkey of a pile driver is the same weight when elevated 50 feet in air as it is when it lies on top of the pile 50 feet below, but it has altogether a different quality. When elevated it is capable of working for man by driving a pile. When lying on top of the pile, or at sea level, it has no such quality. The question is, "can you steal that quality?"

Two pile drivers, owned by different persons, are located near each other. The one owner has, by means of his engine and machinery, raised his weight to its highest elevation, ready to deliver a blow. While this owner is absent over night the owner of the other pile driver, surreptitiously and with evil design and intent, unlocks the weight and, by means of some mechanical contrivance, takes advantage of its fall in such a way that the energy thus produced raised the weight of his own pile driver to an elevation of forty feet, where it remains ready, when released, to perform service for him. What has happened? Exactly the same thing, essentially, as happened when the electric charge of one battery is transferred to another. The condition which was inherent in the elevated weight was transferred to the weight which was not elevated; that is, the potential energy which was a condition or quality of the elevated weight was by a wrongful act transferred to another. But was that condition or quality stolen in the sense that it was a subject of larceny as that crime is defined the world over? Would the one who stole the battery after it had been elevated to the ceiling, or the weight of the pile driver after it had been elevated 50 feet in the air, be guilty of a different offense than if he stole those chattels before such elevation? Not at all. The weight elevated had more value, in a sense, than one not elevated; and the quality of elevation is considered only in fixing value. It has nothing whatever to do with the nature of the crime committed. It is impossible to steal a quality or condition apart from the thing or chattel of which it is a quality or condition. The quality or condition of a thing affects the value of the thing. It is impossible to steal value. The thing, the chattel is that which is stolen. Its quality or condition is that which, with other circumstances, goes to make the value.

A mill owner has collected a large amount of water in a dam at such an elevation as to be capable of running his mill for a given time. A neighboring mill owner secretly introduces a pipe in the dam and conveys the water to his own mill, using it for his own benefit. He may have stolen the water, but did he steal the head, the elevation of the water above the wheel? The fact that the water had a head made it more valuable and that fact would be taken into consideration in fixing the penalty which ought to be imposed for the offense; but it has nothing whatever to do with determining the nature of the offense of which the man would be charged.

Larceny cannot be committed against qualities or conditions. It is committed solely against chattels, tangible things. A given chattel is a composite result of all its properties, qualities, or conditions. None of the qualities which go to make up the complete thing is the subject of larceny. One cannot steal from a roof the quality of shedding rain, although he may bore it full of holes and thus spoil that quality; and this, no matter how much he might be benefited thereby himself. If, in a country where black horses were very dear and white horses very cheap, one, by a subtle process, took from a black horse the quality of being black and transferred that quality to his own horse, which formerly was white, thereby greatly increasing its value and correspondingly decreasing the value of the other horse which by the process was made white, would he be guilty of larceny? Would he be guilty of larceny who, with intent to gain, secretly and furtively and with the purpose of depriving the true owner of his property, took from a bar of steel belonging to another the quality of being hard, stiff and unyielding and

transferred that quality to a willow wand belonging to himself? Is he guilty of larceny who, with intent to defraud and to benefit himself correspondingly, takes from a copper wire belonging to another the quality of being electrified and transfers that quality to an electric light? An electric current is either a tangible thing, a chattel of and by itself, with a perfect, separate and independent existence, or else it is a mere quality, property or condition of some tangible thing or chattel which does have such an existence. The accepted theory today is, and it is that which must control, that electricity is not a tangible thing or chattel, that it has no qualities of its own, that it has no dimensions, that it is imponderable, impalpable, intangible, invisible, unweighable, weightless, colorless, tasteless, odorless, has no form, no mass, cannot be measured, does not occupy space, and has no separate existence. It is, it must be, therefore, simply a quality, a condition, a property of some tangible thing or chattel which has all or most of those qualities which electricity has not. Being merely the quality of a thing and not the thing itself, it cannot be the subject of larceny.

To repeat: As we know it, electricity is nothing more or less than a condition of matter. It has no existence apart from the thing of which it is a condition. In other words, it has no separate, independent existence. It is immaterial, imponderable, impalpable, intangible, invisible, weightless and immeasurable, is tasteless, odorless, and colorless. It has no dimensions and occupies no space. It is the energy latent in a live horse. It is the power potential in the arm of the laborer. It is the force stored in the wound-up spring. It is an agency, not a "cosa mueble." It is a movement and not a chattel. It is energy and not a body. It is what the laborer expends and not what he produces. It is strength stripped by an unknown process from arms of men and atoms of coal, collected and marshalled at a given place under the mysterious leash of metal, ready to spring like a living servant to the work of its master. is not a chattel, it is life. It is as incapable of being stolen, by itself, as the energy latent in a live horse. It is as impossible to steal an electric current as it is to steal the energy hidden in a wound-up watch spring. One may steal the horse and with it the energy which is a quality of the horse. One may steal a watch and with it the energy which is a property of the wound-up spring. But can we say that one can steal the energy in the watch spring separate from the spring itself, or electricity apart from the wire of which it is a quality or condition?

A laborer has stored up in his muscles the capacity to do a day's work. He has potential energy packed away in little cells or batteries all through his body. With the proper mechanism he can enter a room which it is desired to light with electricity and, by using the stored-up energy of his body on the mechanism, light the room by transforming the energy of his muscles into the electricity which illuminates the room. We have, then, a laborer who, by moving his hands and arms in connection with the appropriate machinery, is able to light the room in which he is at the time. What causes the light? The energy in the laborer's muscles is transformed into light by means of the intermediate phenomenon known as electricity. As a concrete result, we have the energy in the laborer's muscles transmuted into light. Now, is the energy passing through the wire, more capable of being stolen than the energy in the muscles of the laborer? Or is the light or heat any more or less a subject of larceny than the electric current of which they are a manifestation? Could the energy which performed the day's work be stolen? Could the electric current which lighted the room be stolen apart from the wire of which it was a quality? One might kidnap the laborer and with him the energy which constitutes his life; but can we say that the energy, of itself, is the subject of separate larceny? But, it, the laborer's energy cannot be stolen while it resides in and is a quality of his arm, can the same energy any more be stolen when it resides in and is a quality of a wire in the form of electricity? If so, just where is the dividing line, where is the point at which this kinetic energy ceases to be incapable of being separately stolen and becomes a subject of theft? Is it at the crank by which the laborer turns the machine? Is it at the armature, the conductor, the field coils, the field magnet, the commutator, the brushes, the driving pulley, or the belt tightener? Is it where the current enters what is called the electric-light wire, or is it where it enters the bulb or arc and produces the light? In other words, at what point does the unstealable laborer's energy become stealable electrical energy?

An electric-light wire placed in a house for the purpose of furnishing light for the same has its precise counterpart in a laborer placed therein for the same purpose. Like the laborer, it is filled with energy which will, when released, perform the service intended. The wire is simply a means of transmitting the energy of the laborer's muscles, and that stored in the tons of coal which he handles, from the electric plant or factory to the house where the light is produced. The wire simply avoids the necessity of the laborer being in the very house where he produces the light. Instead of being there, he, by means of the so-called electric-light wire, is located at a distance, but produces the light in exactly the same way, transmitting his energy for that purpose. The wire stands in exactly the same relation to the person in whose house it is put as would a laborer who had been sent to that house to render services. The energy may be diverted from the purpose for which it was intended, or a wrong account given of the amount of work performed by that energy; but it is impossible to steal, take and carry that energy away. One cannot steal days' works; and that is all an electric current is. One may use those days' works in hoeing corn when it has been agreed that they shall be used in picking cotton; but that is not larceny of the days' works, as larceny has been defined by the jurisprudence of every country. Or, one may report to the owner of those dayB' works that he had used three of them when in reality he used thirty and pay him accordingly, but that is not larceny of the twenty-seven.

But, it is argued, the illustration is not a fair one; energy in a laborer's arm or in the muscles of a horse or in a wound-up spring is, so far as its capability of being stolen is concerned, quite different from energy which has been separated from the arms of the laborer or the muscles of the horse and driven through a wire; from such wire electricity may be drawn like water from a barrel; and while it is impossible to steal the energy of a man or a horse because it would destroy the life of the animal, an entirely different question is presented when the energy has actually been separated from those animals and confined in a wire.

This argument has several fundamental defects. In the first place, it assumes the whole question at issue. By asserting that electricity is separable from the object of which it is a quality or state is to assume that electricity is a material thing, which is the real question to be resolved. In the second place, if electricity is, in the real sense of that term, separable from the object to which it belongs, then it must be admitted that it is capable of a separate and independent existence apart from any other object. This is not so. It is not only admitted but contended by every scientist who has touched this subject that electricity is incapable of an independent existence apart from some given material object. In the third place, this argument overlooks the fact, even if we assume that it can be separated, that the thing when separated is not the same thing that it was before separation; in other words, when the so-called separation occurs there is not only a transference of energy from the horse to the battery but there is also a transformation. In the horse it is muscular energy. In the wire it is electrical energy. In the horse it is potential. In the wire, kinetic. It is not the same thing in the wire that it was in the horse. In the fourth place, the argument makes the stealability of a thing depend not on its nature but on where it is located. This is an assumption wholly unwarranted and impossible under the law. To say that whether or not a thing is stealable depends not on its nature but on where it is located is absurd. A diamond ring in a burglar-proof safe is as much a subject of larceny, under the definition of the law, as if it lay in an open showcase. If energy is stealable at all, and it must be remembered that I am proceeding, as we must necessarily proceed, upon the accepted theory that electricity is nothing more or less than energy, it is so by reason of its nature and not by reason of its residing in a battery rather than in a horse; and if it is stealable by virtue of its nature it can be stolen from the horse as well as from the battery or wire. A thing is subject to larceny because, and only because, it is a *cosa mueble*, not because it is inside a horse, a wire or a safe. If it is a *cosa mueble* it is the subject of larceny although it be located on the moon; and if it is not a *cosa mueble* it is not subject to larceny although it be placed in a den of thieves. The difficulty or ease of getting at a thing has nothing whatever to do with its stealability. In the fifth place, this argument overlooks the very important fact, to be dealt with more at length later, that the electric current used by

the accused was returned to the company, after use, absolutely undiminished in quantity.

What then, is the difference between corn, for example, and an electric current? It is this. One is a *cosa mueble* while the other is not; one is produced by a wholly different process from the other and from wholly different materials, if we may call materials those changes which result in the immaterial thing called an electric current; in the case of corn we deal not with the quality or energy of corn, but with corn as a composite and concrete result of all its qualities and uses; we deal with a tangible thing, a chattel, and not with a condition or quality of a tangible thing; we deal with things instead of ideas, with things which exist separate and independent and which do not depend, as does electricity, wholly upon some body not only for the capability of manifesting its existence, but also for very existence itself; because we deal with something which changes its form but never its nature as a physical entity. It is always a chattel, a tangible thing, a *cosa mueble*.

On the other hand, in the case of the electric current we deal not with a thing, a chattel, a *cosa mueble*, but with a condition or quality, a property of a *cosa mueble*; with an idea which always, before it has any significance or meaning whatever, associates itself with an entity, a body or chattel, as a characteristic or quality of such body or chattel; with lines of force which are merely and solely a quality, a property, a characteristic of the magnet, instead of with grains of corn which are absolute entities, independent of and apart from everything else, and not mere characteristics or qualities of some entity or body which does exist as an absolute physical entity in itself; with the rose and the violet and not their perfume; with the lily and not its beauty; with the clouds and not their color; with entities and not accidents; with realities and not the imponderable, impalpable ideas and qualities which make up the reality.

As has already been said, the difficulty in the elucidation of the question comes from the confusion of qualities with things, of appearances with realities. Apparently an electric current does things. It produces phenomena. It, therefore, appears to be something. But it must not be forgotten that many times appearances are deceitful. They do not always insure realities. It is not judicial to say that, because a thing looks so, it is so. It is not judicial to say that, simply because it looks as if one committed larceny, therefore he is guilty of larceny. Before we may legally convict one of larceny, we must know exactly what he did. Justice is not founded on guess work nor on appearances. Men's rights are preserved by definitions, and definitions are founded on facts, not fancies, on realities, not appearances. Because, when one taps an electrically charged wire belonging to another and, by means of a contrivance, transfers the charge to his own uses, it looks as if he was stealing something, is not sufficient to convict him of larceny. We must first know what larceny is, as well as what an electric current is, and what is meant by its use in producing light. To know what larceny is we must know what legislators and Judges during the development of jurisprudence have always said and agreed it is. In other words, we must know its definition. It approaches tyranny to convict one of murder when he is actually guilty of homicide only. Yet the only thing which separates the two crimes is a definition. It is wrong to convict one of robbery who is guilty only of larceny. Yet these two crimes are distinguished only by a definition. If, as in the case at bar, whether or not one is declared a felon and is sent to prison for one year eight months and twenty-one days, is forever disqualified from holding public office and of exercising the right of suffrage, or whether, instead, he is declared guilty of a misdemeanor simply and punished lightly with no accompanying disqualifications, depends upon whether he has committed larceny as defined by the Penal Code or whether he has merely violated a city ordinance, the question whether he actually committed larceny or not begins to assume importance. It assumes importance not only to him but to society as well. If a court today palpably modifies a definition in order to convict an offender of larceny, how can society be assured that tomorrow the same court will not modify some other definition to convict a citizen of treason? When definitions are destroyed no man is secure in his person or his property. When men act on appearances instead of realities justice will be shortlived. A whale looks like a fish, acts like a fish, swims like a fish and lives all its life in the water like a fish. But it is not a fish. It is an animal. It is air-breathing,

warm-blooded, and viviparous, and suckles its young. Now, if whether or not a whale is a fish or an animal is the potent factor determining whether a man goes to state prison as a felon with all the deplorable consequences resulting, or whether he is lightly sentenced as a mere misdemeanor, is it not of the supremest importance to determine whether a whale is a fish or an animal? I am informed that it used to be a common sight in the New York Zoological Gardens to see Mr. Crowley, the large and extremely intelligent chimpanzee, dressed in faultless attire, sit at the table and take his food and wine like a gentleman. Children believed him to be a man; and many intelligent grown people honestly believed that he was as much man as chimpanzee. But if the officials of the city of New York had been indicted for kidnaping, based upon the seizure and forcible detention of Mr. Crowley, would it not have been of the most solemn importance to them to throw away appearances and determine accurately what Mr. Crowley really was? And in case of doubt as to what he was, could they not justly have demanded the benefit of that doubt?

So, where one who diverted an electric current has been accused by reason thereof of the crime of larceny, which crime, it being admitted, can be committed only against tangible things, chattels, is it not of the very greatest importance to determine what an electric current is, that is, whether it is a tangible thing, a chattel, or not and what is the nature and meaning of the process by which it transforms itself into electric light? And in case of doubt as to what it is, cannot the accused justly demand the benefit of that doubt? To convict one of larceny it is not sufficient to show merely that a wrongful act has been done; but it must appear that a wrongful act of a particular kind has been committed. To constitute larceny it must be proved that the wrongful act was committed against chattels, against tangible things, which were seized upon and asported by the one accused. In the case at bar it has not been shown that the accused laid unlawful hands upon and asported a tangible thing, a chattel, *una cosa mueble*. The very least that the prosecution must necessarily admit is that no one knows what electricity really is. That being so, it seems to me to be a contradiction of terms to say that larceny, which must admittedly be committed against a known thing, can be committed against a thing absolutely unknown. At least it would seem that there is a grave doubt about the definition of larceny covering wrongful acts relative to an electric current; and by reason of that doubt the conviction ought not to be sustained. And if it is true, as I have herein attempted to show, that, under the prevailing and generally accepted theory, electricity is nothing more or less than a condition, a quality, a property of some tangible thing, some chattel or body, then, certainly, the charge of larceny must fall, as that crime can be committed only against the thing and not against a quality of the thing.

Although the only question in this case is whether electricity is such a tangible thing as can, under the definition of larceny contained in the Penal Code, be the subject of larceny, nevertheless the court dismisses that question substantially without discussion, the only reference thereto being the following:

"It is true that electricity is no longer, as formerly, regarded by electricians as a fluid, but its manifestations and effects, like those of gas, may be seen and felt. The true test of what is a proper subject of larceny seems to be not whether the subject is corporeal or incorporeal, but whether it is capable of appropriation by another than the owner.

* * * * *

"Electricity, the same as gas, is a valuable article of merchandise, bought and sold like other personal property and is capable of appropriation by another. So no error was committed by the trial court in holding that electricity is a subject of larceny."

This statement fails to touch the essential question involved and is wholly beside the point for the following reasons, laying aside for the moment the nature of the act which the accused actually committed, assuming that he committed the act described by the witnesses for the prosecution:

In the first place, as I understand the law, the statement is not quite correct that, in the Philippine Islands, "the true test of what is a proper subject of larceny seems to be not whether the subject is corporeal or incorporeal, but whether it is capable of appropriation" unless the word "appropriation" has the same meaning as the word "taking" used in the article of the Penal Code defining larceny. If the court intended to use the word "appropriation" in the sense of "taking," then its use was unnecessary and may be misleading. If it did not so intend, then the rule of law laid down by the court is not as I understand the law to be. An appropriation in addition to or different from the taking is not an essential of larceny anywhere. Wharton says that "larceny is the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner and without his consent." Article 517 of the Penal Code provides that they shall be guilty of larceny "who * * * take (toman) (not appropriate) another's cosas muebles (movable chattels) without the owner's consent." Unless, therefore, the word "appropriation" is used in the same sense as "taking," the paragraph in the court's decision above quoted does not contain a correct statement of the law. If it means the same thing then the use of the word in no way enlightens the situation; for it is just as difficult to determine whether a cosa mueble can be appropriated as it is to determine whether it can be taken. The question before us is whether or not electricity is such a cosa mueble that it can be taken under the law of larceny. To substitute in that problem the word "appropriation" for the word "taking" does not aid in its solution in the slightest degree when it is admitted that the word substituted means exactly the same thing as the word in the place of which it was substituted.

An illustration will serve further to show the fallacy inherent in the statement quoted: Let us suppose that the Penal Code defined larceny thus: "Any person who, with intent to gain, takes from another his cake without his consent shall be guilty of larceny." Let us suppose that some one should then define the subject of larceny as anything, corporeal or incorporeal, which can be "appropriated," It would be obvious that such definition would be erroneous, for the reason that, while pie is as capable of being "appropriated" as cake, still, under the terms of the law, larceny cannot be committed against pie. So that where the statute prescribes that the only thing subject to larceny is a cosa mueble and the definition of the subject of larceny is claimed to be anything that can be "appropriated," the answer at once is that such definition is inaccurate under the law as it may be too broad. There may be some things which can be "appropriated" that are not cosas muebles.

In the second place, the quoted paragraph from the court's decision contains another error in the statement of the law. I am of the opinion that, under the common law, and I am sure under the Spanish law, the statement that "the true test of what is a proper subject of larceny seems to be not whether the subject is corporeal or incorporeal * * *" is not accurate. Professor Beale, of Harvard, says in his article on larceny that -

"At common law the only subjects of larceny were tangible, movable chattels; something which could be taken in possession and carried away, and which had some, although trifling, intrinsic value. Any substance which has length, breadth, and thickness may be the subject of larceny. * * * A chose in action being in its essence intangible could not be the subject of larceny at common law, and the paper evidence of the chose in action was considered merged with it."

Wharton says;

"Choses in action, including bonds and notes of all classes, according to the common law, are not the subjects of larceny, being mere rights of action, having no corporeal existence; * * *."

I have already quoted at length from writers on the

Spanish and Roman law to show that only tangible, corporeal chattels can be the subject of larceny.

In the third place, by entirely begging the question, it leaves the whole proposition of whether electricity is a subject of larceny not only unsolved but wholly untouched. As we have already seen, the word "appropriation"

nowhere appears in subdivision 1 of the Penal Code in connection with larceny. But if it were there used in connection with such crime, it would necessarily refer entirely to a cosa mueble as that is the only thing under that article which is the subject of larceny and, therefore, of "appropriation." So that, before we can possibly know whether a thing is capable of appropriation or not under the Penal Code, we must know whether that thing is or is not a cosa mueble, as that, as we have said, is the only thing that can be taken or appropriated in committing the crime of larceny. But, as is readily seen, that brings us right back to the question we started with, What is a cosa mueble? It is more than apparent, therefore, that the quoted paragraph adds nothing whatever to the discussion.

In the fourth place, the word "appropriation" in the paragraph quoted is there used with a complete misapprehension of its meaning as found in the article of the Civil Code from which it is taken. Articles 334 and 335 of the Civil Code seek to divide all property capable of appropriation into classes. They read:

"Art. 334. Son bienes inmuebles:

"1.º Las tierras, edificios, caminos y construcciones de todo genero adheridas al suelo."

* * * * *

This article has ten subdivision dealing with all kinds of real property. It is not necessary to quote it all at this time.

The English of the part quoted is as follows:

"Art. 334. Real property consists of:

"1. Lands, buildings, roads, and constructions of all kinds adherent to the soil."

* * * * *

"Art. 335. Se reputan bienes muebles los suceptibles de apropiacion no comprendidos en el capitulo anterior, y en general todos los que se pueden transportar de un punto a otro sin menoscabo de la cosa inmueble a que estuvieren unidos."

This article in English is as follows:

"Art. 335. Personal property is considered anything susceptible of appropriation and not included in the foregoing chapter, and, in general, all that which can be carried from one place to another without damage to the real estate to which it may be attached."

As is seen from the terms of the article, two expressions are used in defining "bienes muebles," one of elimination and the other of description. The clause of elimination provides that all property subject to appropriation shall be personal property except that property described in article 334. But this description was found to be too broad. It included too much; and it was, therefore, necessary to make use of a limiting or restricting clause in connection with the exclusion clause. To that end the article further provided that appropriable property shall be, "in general, all property which can be carried from one place to another." Under this restricting clause, then, property to be personal property must be not only property not included in article 334 but also property which can be transported from one place to another. It must fulfill two requirements instead of one. Besides, under the Spanish law, real property is as much subject to appropriation as personal property. The word in Spanish seems to be broader than its legal use in English.

From the foregoing it is plain that property to be personal property must not only be susceptible of appropriation, which the court in the quoted paragraph claims is the only requirement, but it must also be capable of being of itself manually seized and transported from one place to another.

This presents the fourth reason why I say that the proposition laid down by the court in the quoted paragraph is laid down under a complete misapprehension of the definition of una cosa mueble.

And finally, the word "appropriate" which the court has used is found in subdivision 2 of article 517 of the Penal Code. It provides that those are guilty of larceny, "who, finding a thing {una cosa mueble} lost and knowing its owner, appropriate it with intent to gain." The signification which the word here has is quite different from that of the word "take" (toman) used in the first subdivision, being considerably limited in its reach. As used here it is very like "convert." There is no removal from the possession of the owner, as in the first paragraph. In the Penal Code the word "taking" means something more than "appropriation." It means a removal from the possession of the owner a transportation or asportation of the thing from one place to another from the possession of the owner to the possession of the thief; while "appropriation" means, rather, the making use or the converting of the property after the taking is complete, or without any "taking" at all. Under the Spanish law, while real estate is not, of course, subject to asportation, to "taking," and, therefore, not the subject of larceny, it is subject to "appropriation," In the same way while electricity is, under the Spanish and Roman laws, wholly incapable of seizure and asportation, of the manual "taking," the trespass essential to larceny, it may possibly, in one or another sense of the word, be subject to appropriation." If at one extreme of the scale of things, namely, real estate, the thing is too tangible to be stolen, is it not logical to expect that at the opposite extreme the thing, electricity, for example, may be found too intangible to be stolen?

We have seen that, in all the history of Roman and Spanish jurisprudence, the crime of larceny has been confined to tangible things, to chattels, which have an independent existence of their own; which have three dimensions; which occupy space; which are capable of having a trespass committed against themselves; which can be, of themselves and alone, taken physically into possession and. carried away (asported).

We have seen that the fact that electricity is not such a thing is admitted by all.

And we have asked the question, "How, then, can the charge of larceny be sustained?"

But let us assume, for the sake of argument, that electricity is a tangible thing, like water, for instance. Still the crime committed, if any, is not larceny. Let us modify the illustration already given of the surreptitious removal by A of water stored in a dam by B for milling purposes. Let us suppose that B has built a reservoir on an elevated portion of his farm for the storage of water for irrigating purposes. He has built ditches or conduits from the reservoir to every part of his farm to carry the water to the places needed. During the dry season while B is engaged in irrigating his lands A surreptitiously and with intent to gain, constructs a small mill upon one of the conduits and utilizes the rapid fall and swift flow of the water to operate his mill. For many months A thus takes advantage of B's conduit and water and enriches himself by reason thereof. Did A commit the crime of larceny? The water, every drop of it, after being used by A, went to its work of irrigating the lands of B, pausing only long enough to turn the water wheel of A's mill. Certainly then, no water was stolen. A simply made use of the "head," the fall of the water. If anything was stolen it was the "head," the elevation of the water, the energy developed by its passage from high to low ground. This is precisely what happens when an electric current passes through an electric bulb or arc and produces light. Whether the current operates one light or one hundred, the volume, the amperage, of the current, that is, the quantity of it, if we may use the term (and it must be remembered that I am assuming electricity to be a tangible thing and will speak accordingly) remains exactly the same. The volume or quantity of the electricity is just the same when it comes out of the hundredth light as it was when it entered the first. While there is a difference between the current as it comes from the last light and as it entered the first, it is simply one of condition, or state. All of the electricity is still there. Like the water; it has simply lost its "head," its energy. It has been deprived of its pressure, of its electro-motive force; but it is the same old electricity, in the same old quantity. So that, when the accused in the case at bar, by means of a "jumper," burned thirty lights,

instead of the three for which he paid the company, he Was not stealing electricity. Exactly as much electricity went back into the company's wire after serving the twenty-seven lights for which he did not pay as came out of that wire in the first place. The defendant took nothing; he used something. In larceny there must be a taking. Here there is only a use. Electricity is a utility, not a thing. The company, in the case at bar, lost no more than did the owner of the irrigation system in the example heretofore given. As no water was taken, so no electricity was taken. The same amount of water remained to the owner after its use by A. The same amount of electricity remained to the company after its use by the defendant.

The well-known Italian author, Avv. Umberto Pipia, in his very able work entitled "U Elettricità nel Diritto" puts the question thus (translation of Mr. Percy R. Angell, Manila, 1911) :

"From the point of view of the jurist can electricity be stolen? A person connects a deflecting wire to the main conduit of electricity; he thus makes a secondary circuit in which he introduces a resistance and profits by the electro-motive power which is developed, to supply his lamps or put his motor in movement. In such case can we apply article 402 of the Penal Code, which provides that whoever takes possession of movable property of another in order to derive profit thereby, taking it from the place where he finds it without the consent of the owner, is punished with reclusion up to three years?"

The author then refers to the decisions of certain courts of Europe which hold that electricity is stealable, and continues :

"The Roman court of cassation has lost sight of that fundamental principle of interpretation of law (a principle which it ought to have had well in mind before applying to new manifestations of force legislative provisions enacted in view of totally different cases) by which penal laws do not extend beyond the cases and the times in them expressed. *Nulla poena sine lege*, is the rule in terms of penal law, unless we wish to bring about a deplorable confusion of powers, and the judiciary desires to i If in the written laws gaps or breaks are encountered, it is the duty of the court to point them out to the legislator, to the end that he take the necessary measures; but it is not lawful for him by analogous interpretation to apply a penal provision where such has not been explicitly enacted.

"In the unanimous opinion of jurists, two elements are necessary to constitute the crime of theft, legally speaking; the first is the taking possession of the personal (movable) property of another, *contractatio*, and the taking away of the thing from the place where it is found without the consent of the person to whom it belongs, *ablatio*.

"Now we have conclusively shown that electric current is not a thing, but a state, a vibration following certain converging" waves. It can not therefore be taken possession of as the personal property of another. A person who unlawfully uses electric current for his personal enjoyment places himself in a state of unlawful enjoyment of a utility, but he does not take possession of personal property. It was a grave error, that of the court of cassation, in holding electric current to be a thing imprisoned in wires, and composed of particles that can be subtracted. In connecting a second circuit one does not subtract electric current; not a particle of electric energy enters into the possession of the so-called thief; the same amount in amperes that was found and derived on connecting the second circuit, is found at the end of this circuit. The current has only suffered a diminution of potential; while continuing to be of the same volume, it becomes less adapted for the use intended, because, having overcome a resistance, it has lost in potential, its electro-motive power.

"* * * * It leaves the circuit in the same amount in which it entered. Only its power for work has diminished. Not a single particle or molecule of electric current is taken by such abusive use, only the state of undulation. The movement that first follows the principal, and then the second circuit, and by these undulations the so-called thief illegally derives benefit. But the extraordinary provisions of crime are not applicable to all illegal actions.

"Another powerful argument in favor of my position is this: That in no case of usurpation, the using of things protected by law (*diritto*) that are not material things, do we speak of theft. To repress abuses the legislator has been obliged to establish special provisions of law, but has explicitly recognized those relating to theft to be inapplicable. A trade-mark, trade-name, *modello de fabrica*, a scientific or artistic work, undoubtedly constitute objects of law similar to things; form the contents of various juridical relations; have a more or less economic value; pertain to the patrimony of the person who has produced them or brought them into being. If a third person makes use of the trade-mark or trade-name, the scientific work or artistic production of another, nobody denies that he takes possession of a utility that does not belong to him; that by the very illegal act he derives profit, and at the same time diminishes the patrimony of the person having legitimate rights herein. But with all that, it has never occurred to anyone to bring an action for theft against the usurper of the firm name, the counterfeiter of the trade-mark or the plagiarist. The legislator, desiring to protect this new species of property, has provided special repressive measures; but in their absence, the courts can not apply the *actio furti*, because it is not applicable to cases and conditions other than those provided for.

"If this be so, why different conceptions on the score of electricity? Here likewise, there is no substraction of personal property, but the illegal use of an advantage, of the right pertaining to another, which remain however unchanged. Hence the legal solution should be the same.

"The second and not less essential condition of theft is that of the *ablatio*, the necessity of taking the thing from the place where it is found. But here we have nothing of that; the current is deviated from its course, true, but it returns to the place where it was undiminished. The statement in the foregoing decision that there are particles transportable from place to place is inexact; the undulation is in itself, it has its own efficiency, but it is neither taken away nor substracted. It has been justly said that all that is done is to erect a bridge over which the undulations of the particles are transported in the wire attached, but nothing corporeal passes from one wire to another, since not one of the vibrating particles moves with the current which flows through the connected wire.

"Consequently, in whatever aspect the question is considered the presumption of theft grows less. In fine, although there be a usurpation of a utility to the prejudice of another, it should not be held to constitute theft, because that is the vulgar, not the legal conception. That in civil and commercial law we may resort to analogous interpretation, and that, in the absence of special provisions we should apply the rules which govern similar matters and analogous cases, there is no doubt. The courts can not refuse to say what the law is (*dire ie diritto*) nor dismiss the litigants on the pretext that the law had made no provision for their case; and it is from this concept that electricity, as a rule, in the various relations where it constitutes the object, is considered to be a thing, with all the attributes of such. But the penal law is restrictive; under certain aspects it is exceptional. Here we have to do with limitations and restrictions on the most sacred rights of persons, the right to liberty, the right to honor. And these rights can not be abridged without definite and explicit provisions of the law. Where these are lacking we can pray, as I do, that they be supplied, but a decision in such case is an arbitrary act (*arbitrio*), not justice: *nulla poena sine lege*.

* * * * *

"So in the wrongful use of electric current; profit is derived from its high potential which is produced by the work and expenditure of money on the part of the furnishing company; the current is returned exactly as it was delivered except it has lost a certain amount of electromotive power that was illegally (*antigiuridicamente*) employed to overcome the resistance introduced by the third party.

* * * * *

"* * * penal law must be strictly construed (*e di interpretazione restrittiva*). It punishes the *contrectatio* of a movable thing which is taken from the place where it is found without the consent of the owner. In the proposition under discussion, we have not to do with movable things, there is no true transporting to another place; therefore the *figura giuridica* of theft is wanting.

"It can not be doubted that by movable things is meant even liquids and fluids, because these are material, concrete, and corporeal things, but their physical external manifestations can not affect the juridical relation. But in our case there is not a thing, fluid or liquid; there is a state of undulation, of movement, which one uses illegally, assuming however the obligation to indemnify for all the damages resulting from his illicit action, but there is no theft, any more than there would be where a person applied a pulley to the shaft of an engine in order to put his own machinery in motion, so far as there would be no appropriation. The current which injuriously traverses the lamp or electric motor is not appropriated or destroyed by the person who uses it; it flows out from the lights and continues its course in the circuit undiminished in intensity; it has only lost part of its power, because, having encountered a resistance, it has developed certain energy to overcome it, energy which has produced light, traction, or mechanical work.

"Nor may it be said that electricity would then be deprived of any legal protection. Do we not have articles 1511 et seq. of the Civil Code that provide for fraud? Is there not the civil crime and quasi crime? To protect electric energy is it necessary to imprison one who uses it *antigiuridicamente*, while the letter of the law does not consent? In any case it is known that *adducere inconueniens non est solvere argumentum*. As in the laws of our country provision is made for the illegal use of a firm name, trade-mark and works of genius (*l'ingegno*) ; in England, where provision has been made for the matter we are discussing, they have enacted a law imposing severe penalties upon persons who illegally use electric energy, and I am of the first to applaud them. But let there be laws, not merely judicial opinion (*arbitria di interpretati*).

"Nor does it avail to argue that when we have to do with benefits that are useful to man, which serve his ends, that he can appropriate, these benefits are considered as things in the eyes of the law. But it is necessary to make a distinction. From the standpoint of the civil law, they are, because a wide and analogous construction is permissible and permitted; but from that of the penal law, they are not, because such construction is expressly forbidden by article 4 of the preliminary provisions of the Civil Code.

"If a trade-mark is not a benefit to man, in what does it serve him? Is not a literary or artistic production such? Does not the counterfeiter illegally appropriate such benefits? But if it is required to inflict criminal penalties upon him, a special law must be enacted; the provisions relative to theft can not be applied in his case.

* * * * *

"Nor is it a conclusive argument to say that the manufacturer spends large sums of money and erects costly machinery to generate the electricity, and when others steal it from him, such action, according to juridical conscience and social morals, constitutes theft.

"Let us suppose an individual acquires a ticket of admission, and enters a hall where there is being produced a play of some sort. He, on the strength of the legal negotiation with the impresario and the acquisition of the ticket has a right to the most ample enjoyment that his optical and acoustic senses are able to realize. But he arranges a phonograph and a cinematograph, and surreptitiously fixes and appropriates part of the acoustic and visual enjoyment that does not belong to him, takes it outside of the theater and later avails himself thereof to his benefit by reproducing the harmony of the sounds and the optical illusion of the scene. Is he liable for theft?

"From the standpoint of the doctrine I am combating, he is. The impresario has sacrificed money or work to produce the spectacle. Our friend has the right to enjoy it to the limit of the capacity of his organs of vision and hearing, but not beyond that. By means of suitable instruments he has caught up the sounds, movements, and colors for the purpose of gain, and he commits a theft because there enter the *contractatio* and the *ablatio*.

"From the point of view of the law he is not. He would be held to reimburse the impresario for all damages, but he can not be called a thief, nor be punished as such. The sounds and forms of light are states, not things; therefore they can not form subjects of theft.

"And if this is so, the same conclusion must be reached with respect to electricity."

The supreme court of the German Empire, sitting at Leipsic, October 20, 1896, in a decision holding that electricity was not a subject of larceny, said:

"The court below found that the act did not constitute theft or unlawful appropriation, because electricity is not to be considered a thing within the meaning of paragraph 242 of the Penal Code, and because by things the law means portions of material nature; that corporeal existence is an essential ingredient of the thing. Even the Penal Code starts from this principle. Incorporeal things, as for example rights, intellectual products and machine power, are not subjects of theft. The same must be said of electricity. Experts say that the science is not yet determined. We well know what must be done to produce electric energy, but we do not comprehend these vital operations, any more than we understand what it is that makes the muscles of the human arm capable of exerting force. In the conclusions of the Court of First Instance there is no error of law. That court starts from the principle that the corporal existence of the thing must be the essential element to come within the meaning of article 242. This assumption is not based upon the precepts of the Civil Code, but, rather, upon the idea which is at the bottom of the Penal Code, namely, the movable and independent thing, which presupposes the corporeality of the object. If then, under articles 242 and 245, the condition precedent to the commission of larceny is that the object of theft or unlawful appropriation be a piece or portion of material substance in either a solid or liquid state, or in form of gas, the Court of First Instance committed no error in finding there was neither theft nor illegal appropriation. Whether or not the notion of a thing, in the sense of the penal laws, requires something corporeal, is a question of law; but the question whether electricity is a substance, a corporeal thing, or a force, a movement of minute particles, is a question of fact that can not be decided by the rules of law, but by physical research alone. The consideration of the great importance of electricity in commercial life and the place awaiting it among the vital conveniences and the fact of its having commercial value, is not an argument to prove that electricity is a corporeal thing, because the quality of being a vital convenience and having commercial value does not constitute a necessary standard of corporeality, since force, operations, intellectual products are vital conveniences (*beni*) and have commercial value. When, in the jurisprudence of the day the need for penal laws for the punishment of unjust appropriation of electric current becomes apparent, the legislator should provide them. The courts can not be called upon to supply the lack of legal provisions by analogous applications of rules not made to fit the circumstance. In penal law the principle *nulla poena sine lege* is supreme."

These authorities fully support my contention that electricity is not stealable under the provisions of the Spanish Penal Code. They also support the proposition that even if electricity is a tangible thing, like water, and therefore stealable, the crime, if any, committed by the defendant in this case is not larceny, because the company had just as much electricity after the illegal act as it had before. In other words, it has lost no electricity. Having lost no electricity it can not charge anyone with stealing it. If a thousand lights were burned, no more electricity would be consumed than if one light were burned, just as, no more water is consumed in running a thousand water wheels placed one below another than in running one. Just as much water flows over the thousandth wheel as flowed over the first. In the same manner there is just as much electricity flowing out of the thousandth light as flowed into the first. Just as, in using the water, nothing is consumed but the head, the quantity of water remaining the same, so, in using electricity, nothing is consumed but the head (the pressure, the potential, the electro-motive force), the electricity itself remaining undiminished. No electricity was taken. It was used and then returned to its owner.

For a clear understanding of this problem, and a logical and philosophical, as well as legal, solution thereof, we must never, for a moment, forget the fact that the real contract between the company and the defendant was one to furnish labor and services; a lease, if you please, of an agency, a contract of precisely the same nature as one by which the company lets to the defendant the use of one of the company's workmen to turn by hand, in the defendant's own house, an electrical machine and thereby produce light for defendant's use. This is the crux of the whole question. While no contract was proved we know of necessity, from the principles which underlie and

govern electric lighting, that the contract must have been as above stated. If the defendant should require the laborer thus placed in his house to work overtime and should not pay the company therefor, thus taking advantage of the situation, there would be no larceny. To be sure, the defendant would return the workman to the company fatigued and reduced in strength by reason of the overtime he had required him to put in, but it would be the same workman which he had received. It is this which shows the absurdity of the claim that the defendant in this case is guilty of larceny. The company never intended to sell the workman to the defendant and the defendant never expected to buy him. It was the use that was the basis of the contract. In exactly the same manner, the company never intended to sell electricity to the defendant and the defendant never intended to buy electricity. The basis of the contract was the use of electricity. Just as the laborer was returned by defendant to the company fatigued and reduced in strength by reason of the overtime which the defendant had wrongfully and illegally required him to put in, so the current of electricity was returned by the defendant to the company fatigued and reduced in strength by reason of the lights which the defendant had wrongfully and illegally caused it to supply; and just as, notwithstanding the reduction in strength, it was the same identical workman returned that was sent out, so the electric current returned to the company after the illegal use by defendant was the same identical current which the company had furnished him. Where then, is the foundation for the charge of larceny?

Let us now see what are the results of the holding of the court that electricity is subject to larceny.

The Spanish Law of the Philippine Islands has not been changed by any legislative enactment. A cosa mueble is the same now as it was in the days of the Partidas. No legislature has changed the law of larceny as. it came from the jurisprudence of Rome and Spain. Nor has any legislature touched the law of the personal chattel to give it a new definition or one which changes its ancient signification. Its present definition is the same as that given by Sanchez Roman, Pacheco, Scaevola, Manresa, and Groizard as drawn from the decrees of kings and acts of legislatures. That definition having been framed by the lawmaking power of Spain, from the idown to the Penal Code, it ought not to be changed by any agency short of the lawmaking power of the United States. The substance and nature of crime ought not to be changed by courts in a country where crimes are purely statutory. It has the appearance of a usurpation of the functions of the lawmaking body, an unwarrantable assumption of legislative attributes.

The holding of the court in this case is, in effect, an amendment to the Penal Code. It has changed materially the definition of a i and, therefore, of the crime of larceny, as made by the lawmaking bodies of Spain and the United States. I do not assert that the courts have not the right to determine whether a given set of facts do or do not fulfill the definition of a given crime. What I do say is that the very greatest care should be exercised in cases which may involve as a consequence of their decision the changing of the scope of the substantive law of crime. The fact, admitted by all, that whether the phenomenon which we call electricity really is a "cosa mueble," under the accepted definition of that word, is open to doubt, should give us pause. Before holding that electricity is a i, the fact whether it is or not ought to be substantially free from doubt. This is particularly true in a country where crimes are purely statutory, and in which, therefore, the legislature is presumed to have had in mind in framing its definition of "cosas muebles" only such chattels, or those of the same nature, as were known to the legislature at the time it acted. At the time the Penal Code became operative substantially nothing was known by those who created it of the phenomenon, electricity. It is more than clear that at the time of the enactment of the laws relating to larceny, of which article 517 of the Penal Code is a reproduction, nothing whatever was known of that phenomenon. We have, therefore, no means of knowing what would have been the legislative action in relation thereto. The legislative authorities of those times might have treated it as substantially every other legislative body has treated it that has touched the question; namely, as a thing separate and distinct from chattels, and unlawful acts affecting it and its use as crimes distinct from the crimes against tangible property, such as robbery and larceny. In this jurisdiction the legislature is the only authority for the definition of crime. Where a new situation

arises by virtue of discoveries which reveal agencies never known before, and whose real nature is unknown even to the discoverers, the legislature is the body to take the initiative in determining the position of such agencies among the affairs of men, unless they clearly fall within a class already established and defined; and it appears that some legislative bodies have done that very thing and have passed special laws touching the place which should be given electricity in the civil and criminal law. This was done here by the passage of the ordinance of the city of Manila. The fact that legislatures in many jurisdictions have enacted special laws relative to electricity is the very clearest proof that there was the gravest doubt among learned men of the applicability of existing laws to acts committed against the rights of producers of electricity. The legislature of the Islands having acted through the council of the city of Manila and by such action made illegal acts against the producers of electricity a special crime wholly distinct from larceny, such act should be conclusive on this court as to the legislative intent.

Section 649 of the Revised Ordinances of the city of Manila provides in part:

"No person shall, for any purpose whatsoever, use or enjoy the benefits of any device by means of which he may fraudulently obtain any current of electricity or any telephone or telegraph service; and the existence in any building or premises of any such device shall, in the absence of satisfactory explanation, be deemed sufficient evidence of such use by the persons benefiting thereby."

This section was enacted under the authority of the Legislature of the Philippine Islands, as was section 930 of said ordinances, by the terms of which one who violates the provisions of section 649 "shall be punished by a fine of not more than two hundred pesos or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court, for each offense."

Articles 517 and 518 of the Penal Code read in part as follows:

"Art. 517. The following are guilty of theft:

"1. Those who, with intent of gain and without violence or intimidation against the person or force against the things, shall take another's personal property (cosa mueble) without the owner's consent.

* * * * *

"Art. 518. Those guilty of theft shall be punished : "1. With the penalty of presidio correccional in its medium and maximum degrees if the value of the stolen property should exceed 6,250 pesetas.

"2. With the penalty of presidio correccional in its minimum and medium degrees should it not exceed 6,250 pesetas and be more than 1,250 pesetas.

"3. With arresto mayor in its medium degree to presidio correccional in its minimum degree should it not exceed 1,250 pesetas and be more than 250 pesetas..

"4. With arresto mayor to its fullest extent should it be more than 25 but not exceed 250 pesetas.

"5. With arresto mayor in its minimum and medium degrees if it should not exceed 25 pesetas; if exceeding 25 and not more than 65 pesetas, a theft of nutritious grains, fruits, or wood shall be punished with a fine of from 325 to 500 pesetas."

Under subdivision 2 of the article last quoted, which is the paragraph under which the accused is punished in the case at bar, the penalty prescribed is from six months and one day to four years and two months. The accused in this case was actually sentenced to one year eight months and twenty-one days of presidio correccional, to indemnify the company in the sum of P865.26, to the corresponding subsidiary imprisonment in case of failure to pay said sum, and to the accessory penalties provided by law.

Having before us these two laws, we may now see to what untoward and unfortunate results the majority opinion

leads us in holding that a person who commits a crime against an electric current can be punished under either, or both, of two different statutes. As we have seen already, there is, relatively speaking, an enormous difference in the penalties prescribed by said laws. That imposed by the ordinance of the city of Manila can not in any event exceed six months' imprisonment and a fine of P200; while that provided in the Penal Code may be as severe as four years and two months imprisonment, with indemnity equal to the value of the property stolen, with corresponding subsidiary imprisonment in case of nonpayment. To this must be added all those accessory penalties prescribed by the code, such as suspension from any public office, profession or trade, and from the right of suffrage. To me it is wholly unbelievable that, under the circumstances of this case and the nature of the offense itself, it was the intention of the legislative authority to permit the concurrent existence of two laws, both in force, punishing the same crime with penalties which bear no relation to each other and which are widely different in severity. Note what results from such a holding. Prosecution under the ordinance must be in the municipal court. Prosecution under the Penal Code may be in the municipal court or it may be and generally must be, as in this case, in the Court of First Instance. But it is certain that, under the ordinance, every case may be prosecuted in the municipal court, whatever the value of the electricity taken; or, if the value is sufficient, the prosecution may be brought in the Court of First Instance. The selection of the court is left to the complainant. This means that the complainant is able to say within certain limits what punishment shall be inflicted; for, if he desires that the accused shall be lightly punished he will bring the action in the municipal court, which he always can do if he wish, and if he desires to punish him very severely he will bring it in the Court of First Instance, which he can generally do if he cares to. It is inconceivable that the legislature intended that such a condition should exist. It is in violation of every sense of fairness, is against every rule of statutory construction, and is clearly inimical to public policy. To assert that the complaining party in a criminal prosecution may select not only the court in which he shall prosecute the accused but also, in effect, the crime of which he shall be charged, as the decision in this case holds in effect, is to assert a proposition, the bare statement of which is its own completest refutation.

For these reasons the judgment of conviction should be reversed.

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