**1931**

*Present :* **Macdonell C.J., Garvin S.P.J., and Dalton J.**

IN THE MATTER OF A REFERENCE UNDER SECTION 355 (2) OF THE CRIMINAL PROCEDURE CODE.

THE KING *v.* GODAMUNE.

41—*P. C. Kandy*, 32,498.

*Criminal misappropriation—Trust property—Payment of interest to trustee—Appropriation of payments—Particulars in charge—Ownership of property misappropriated—Direction to jury.*

By the terms of a marriage settlement, H, the owner of Belmont estate, settled a sum of Rs. 40,000 upon two trustees, of whom the accused was one, in trust for certain beneficiaries. H sold the estate to B and the trust fund was invested and secured by a mortgage of the estate in favour of the trustees. At the dates material to the prosecution, the accruing interest was payable to H.

No interest having been paid for some years, an action was instituted in the District Court of Kandy by the trustees to recover the principal sum and the accumulated interest, which amounted to Rs. 23,126.

Prior to the institution of the action, B had executed a conveyance of the estate in favour of a certain syndicate and they were made parties to the action for the purpose of affecting the property with liability in their hands.

At the date of the institution of the action, there was pending in the District Court of Colombo a case instituted by B against the syndicate alleging that they were holding the estate in trust for him.

Before the syndicate filed answer in the mortgage action, they entered into negotiations with the accused as trustee and agreed to consent to judgment on condition of their being allowed a year's time, on the understanding, however, that they made certain payments on account of arrears of interest.

It was further agreed that the accused should not certify of record any payments made on account of interest, should it become necessary to enforce writ for recovery of claim, but that, if the sale did not realize the amount of the decree, the money paid could be appropriated to make up the deficiency.

The accused was charged with misappropriating two sums of money paid to him as interest, alleged to be the property of H.

*Held*, by MACDONELL C.J. and DALTON J. (GARVIN S.P.J. dissenting), that there was evidence upon which the jury could find that the money misappropriated was the property of H.

*Per* MACDONELL C.J., *semble.*—It may not be necessary to designate in the indictment the owner of the property misappropriated.

CASE referred by Lyall Grant J. under section 355 (2) of the Criminal Procedure Code.

The reference is as follows :—

On Saturday, January 10, 1931, at the Kandy Assizes, one Albert Godamune was convicted of dishonestly misappropriating on a day between March 30, 1928, and January 21, 1929, at Kandy, a sum of Rs. 5,000, the property of Mr. C. Ensor Harris, and of having thereby committed an offence punishable under section 386 of the Penal Code. He was also convicted of having dishonestly misappropriated a sum of Rs. 3,000 belonging to the same person on a day between August 28, 1928, and January 21, 1929.

Various points of law were argued in the course of trial, one of which was that there was no evidence in the case upon which the jury could find that the money in question was at any time the property of Mr. Harris. In the circumstances of the case this question is not without difficulty and, owing to the absence of authorities in Kandy, it was not argued before me with the fulness which it deserved.

Although there was not very much direct conflict of evidence, there was great divergence in the course of the trial between the inference which Crown Counsel and Counsel for the defence respectively sought to draw from the facts which have been proved.

The facts are shortly and omitting details as follows :—

The accused, a Proctor, was co-trustee of a marriage settlement. The trust funds were invested in a mortgage over lands.

2. The trustor was Mr. Harris. During his lifetime the interest accruing

from the mortgage was payble to him. No interest was paid for a number of years and the trustees put the bond in suit. Mr. Harris was not a party to the action, but it was instituted with his consent. The claim was for Rs. 23,000 accrued interest and for the principal sum lent on the mortgage, Rs. 40,000. The principal defendant was the mortgagor, but there was also joined as defendants certain puisne encumbrancers. Judgment was entered by consent of all parties on March 30, 1928. Payments were made to the accused in the name of accrued interest and for the amount of that interest, namely, Rs. 23,000. These payments were made to the accused by the puisne encumbrancers under an agreement of November, 1927, entered into between him and them, and the payments were made at different times, being completed within a year from that date. The first payment was of Rs. 10,000 on November 26, 1927, and the payments in respect of the misappropriation of which he was convicted were made later. The accused undertook not to certify these payments on the record of the mortgage action.

The accused concealed the fact of these payments not only from Mr. Harris, but also from his co-trustee and also from the lawyers who were agents for the plaintiffs in the mortgage action. There was evidence to show that the first intimation that any of these persons had of the payment of the money to the accused was a letter received by the plaintiffs' lawyers, Messrs. Liesching and Lee, from Mr. Percy Cooke, the proctor for the puisne encumbrancers. About this time the puisne encumbrancers who had paid over the money to the accused asked that these payments should be certified in the mortgaged action.

3. The 21st January, 1929, was fixed as the date on which the plaintiffs were required to certify payments. There was evidence that the accused had spent the whole of the money on his private affairs. His co-trustee refused to certify that payments had been made on the ground that he was in ignorance of any such payments, although he was pressed by the accused to join in certifying the accused telling him that he had paid either the money or its equivalent to Mr. Harris. The Court certified the payments in consequence of a note from Mr. Harris being produced in Court informing the plaintiffs' proctor that with referene to the sum of Rs. 23,000 paid to Mr. Godamune on account of interest in the case and for which the defendants were claiming credit Mr. Godamune had settled the matter with him as life rentor by transferring Lunuwila estate in his favour. There was evidence that just before the case came up in Court for certification of the amount paid to the accused, the accused made desperate efforts to compound with Mr. Harris, and Mr. Harris' evidence was to the effect that he accepted the transfer of Lunuwila estate—a transfer which was made on the morning of January 21 in lieu of the Rs. 23,000 in consequence of misrepresentations made to him by the accused.

I instructed the jury that if they found it proved that the money in question was paid to the accused as Mr. Harris' agent for the purpose of being handed over to Mr. Harris and that the property had passed from Peiris and others, they might consider it to be the property of Mr. Harris from the time it reached the hands of the accused. That ruling has been objected to and it is argued that there was no evidence on which jury could have been directed to find that it was the property of Mr. Harris.

4. It was further argued that there was no evidence to show that it was the duty of the accused to pay over the money to Mr. Harris.

There are other points of law upon which Counsel for the defence asked for a reference ; for instance, whether it was open to the Court to direct the jury that they could find the accused guilty of criminal breach of trust.

I did not think it necessary to go into that point as in fact the jury did not find

the accused guilty of criminal breach of trust, and my direction to them was that as no charge of criminal breach of trust appeared on the indictment they should not consider that question unless they were unable to find that the sums in question were the property either of Mr. Harris or of Pieris and others.

The question whether on the indictment the accused could be found guilty of criminal breach of trust is therefore purely academic, and I do not think it necessary to refer it for fuller consideration.

Another point raised by the defence was one which may perhaps be conveniently considered by the Court in this case though personally I have not much doubt on the matter. The defence contended that there could be no offence under section 386 where the property in question was delivered to the accused by a person having a right to deliver it. In support of this argument I was referred to a case reported in 4 *Thambyah's Reports, p.* 71, where in an *obiter dictum* Layard C.J. appears to have given expression to this view.

5. On the other hand cases cited by Gour in his *Commentary on the Indian Penal Code* clearly show that in India the section is held to apply in cases where an agent failed to deliver to his principal a sum of money which had been given to him.

It seems desirable that as the point has come up and as there appear to be conflicting decisions it should be definitely settled. Accordingly I desire to refer for the opinion of two or more Judges the following questions :—

(1) Was there evidence upon which the jury could find that the property was the property of Harris ?

(2) Can a person be convicted of criminal misappropriation of money which has been entrusted to him ?

*H. V. Perera* (with him *Canakaratne* and *E. F. N. Gratiaen*), for accused.—If the money was Harris' money, it must be Harris' money in every contingency. But the agreement under which the money came into the accused's hands expressly contemplates the money being returned to Peiris in certain contingencies, *e.g.*, if the full amount of the decree was realized on the sale of the property. In the circumstances, there was no " payment of interest " such as would make Harris immediately entitled to the money. Peiris was under no legal obligation to pay any amount due under the decree. Boyagoda was the debtor. To constitute a legal payment of a debt due, there must be an irrevocable payment by or in the name of the debtor, and in his discharge (*Pothier on Obligations, I.* 330). Here there was no such payment. The mere payment of an amount equivalent to the sum due as interest does not constitute a payment of interest.

The true nature of the transaction is revealed in the document P 14. The presiding Judge left the interpretation of that document to the jury. This was a misdirection. The construction of a document led in evidence is always the function of the Judge (*vide Criminal Procedure Code, s.* 244 (1) (*b*), *Queen v. Setul Chunder Bagchee*[1]). Further, in construing a document, the Court must look at the whole instrument, and not at particular words, in order to discover the intention of the parties (*Ford v. Beech*[2], *Beal's Cardinal Rules of Legal Interpretation* (3*rd ed.*), *p.* 177, *Taylor on Evidence* (11*th ed.*), *p.* 45). If this test is applied, and the document P 14 is looked at as a whole, it becomes clear that there was no payment of interest, which alone would have entitled Harris to the money.

The fact that the accused was a trustee does not alter the true nature of the transaction, and cannot be held to give Harris a beneficial interest in the money. A trustee is not, *ipso facto*, the agent of the beneficiary (*Baker v. Archer Shea*[3]). A trustee, unlike an executor or an administrator, has no representative

[1] 3 *Sutherland's W. R.* (*Crim.*) 69.
[2] (1848) 11 *Q. B.* 852, 866.
[3] (1927) *A. C.* 849, *at page* 850.

capacity. His is always a personal liability (*Maraliya v. Gunasekera*[1], *Watling v. Lewis*[2]). A trustee can, by agreement, limit the extent of that liability, but he can never alter it (*Muir v. City of Glasgow Bank*[3]).

In their oral evidence, both Peiris and Cooke admit that the document P 14 embodied all the conditions under which the money was received by the accused. It is submitted that there was no evidence on which the jury could find that the accused was guilty of criminal misappropriation of Harris' money.

*Illangakoon, D. S.-G.* (with him *Obeyesekere, C.C*, and *Basnayake, C.C.*,) for the Crown.—The question whether the money belonged to Harris or to Peiris is only of academic interest. In an indictment for criminal misappropriation it is not necessary to specify the person to whom the property misappropriated actually belonged. (*Barpu v. Abdulla.*[4])

[GARVIN S.P.J.—But here the accused was expressly charged, in the alternative, with having misappropriated Peiris' money, and he was acquitted on that count.]

The statement in the indictment that the money belonged to Harris or to Peiris is merely descriptive. The crux of the case is whether the accused dishonestly converted to his own use money which he was not entitled to put to such a use. So long as the accused knew what sum of money he was charged with misappropriating, it does not matter whether the sum belonged to Harris or Peiris. What the prosecution has to establish is that the accused was not entitled to convert the money to his own use and that he did so dishonestly.

There are certain portions in the document P 14 which support the finding of the jury that there was a payment of interest, and that the money was therefore Harris' money. Where it becomes necessary to interpret a document in the course of a trial, and two constructions are possible, it is the function of the jury to decide which is the true construction. The intention of a person who writes an instrument is a question of fact (*Evidence Ordinance, s.* 3, *Rex v. Donald Smith.*[1])

There are also certain portions in the oral evidence which support the finding that the money was Harris' money. Where there is a conflict of evidence, the finding of the jury should not be disturbed (*Rex v. Grubb*[2]). It cannot be argued that there is "no evidence" to support the verdict.

The money received by the accused was received by him as a trustee, and it was his duty to hold it in trust for the beneficiary. Harris therefore had at least a beneficial interest in the money.

*H. V. Perera*, in reply.—The expression "no evidence" means no *reasonable* evidence. It does not mean that there must not be a scintilla of evidence (*Ryder v. Wombwell*[3]). The oral evidence of the witnesses Peiris and Cooke must be considered as a whole. If so considered, it is entirely consistent with the true construction of the document P 14.

March 2, 1931. MACDONELL C.J.—

This is a case stated under the provisions of section 355 (2) of the Criminal Procedure Code by Lyall Grant J. sitting as Assize Judge at Kandy Criminal Sessions, raising two questions for the consideration of this Court.

The accused has been convicted of dishonestly misappropriating on a day between March 30, 1928, and January 21, 1929, at Kandy, the sum of Rs. 5,000, the property of Mr. C. Ensor Harris, and on another count of dishonestly misappropriating on a day between August 28, 1928, and January 21, 1929, the sum of Rs. 3,000 the property of the same person, contrary to section 386 of the Penal Code. There were also two alternative counts charging the same offence on the same facts but laying the property in one Peris, but on

[1] 23 *N. L. R.* 261, 265.
[2] (1911) 1 *Ch.* 414.
[3] (1879) 4 *A. C.* 337.
[4] 7 *C. W. R.* 144.

[1] (1924) 2 *K. B.* 194.
[2] (1915) 2 *K. B.* 683, 690.
[3] (1868) 4 *Exch* 38.

these alternative counts the jury found the accused not guilty.

The points reserved for the opinion of the Court were the following :—

(1) Was there evidence upon which the jury could find that the property was the property of Harris ?

(2) Can a person be convicted of criminal misappropriation of money which has been entrusted to him ?

The facts were these. The accused, a proctor, became in 1920 joint trustee with one Mr. Westland of the marriage settlement of Mr. Harris whose property he was charged with misappropriating. The settlement was Rs. 40,000 secured by a property called Belmont. This property was sold in August, 1920, to a Mr. Boyagoda for Rs. 85,000. The purchaser paid Rs. 20,000 in cash and executed a primary mortgage bond to trustees for Rs. 40,000, besides puisne mortgages of Rs. 10,000 and Rs. 15,000 to Mr. Harris himself. The accused and Mr. Westland became joint trustees of this mortgage for Rs. 40,000. Recurrent interest was due on this sum and it seems clear that this interest was due to Mr. Harris either in his own right or as trustee for a minor child, one of the *cestuis que trust* under the marriage settlement. The interest fell into arrear and by March, 1927, it amounted to Rs. 23,000 or a little more. The trustees, the accused and Mr. Westland, put the bond in suit by plaint dated March 14, 1927. Mr. Boyagoda, the mortgagor, was made defendant and the members of a certain syndicate of five, of whom Mr. Peiris the witness was one, were also made defendants since they claimed to have bought the property from Mr. Boyagoda ; at the moment the latter had an action pending against them to have them declared trustees of it for him. The day for filing answer to this mortgage suit was November 26, 1927, and just prior to this the witness, Mr. Peiris, a member of the syndicate mentioned above, came to the accused and requested him to suspend proceedings in the mortgage suit. Other interviews took place about this time, November, 1927, between the accused and the same Mr. Peiris and Mr. Cooke, the proctor for the syndicate. As the result of these interviews the accused agreed to postpone further steps in the mortgage action for a year and Mr. Cooke, on behalf of the syndicate, paid him Rs. 23,000 as follows :—On November 26, 1927, Rs. 10,000, on March 30, 1928, Rs. 5,000, on August 28, 1928, Rs. 3,000, and on November 6, 1928, Rs. 5,000, on certain conditions. It was proved that the accused has spent this money and that it is no longer available. He kept the agreement he had entered into with these persons secret from his co-trustee, Mr. Westland, the proctors in the suit Messrs. Liesching and Lee, and from his *cestui que trust* Mr. Harris.

The evidence as to the agreement under which accused received these moneys is that of Mr. Peiris and Mr. Cooke and a letter (P14) of November 26, 1927, from Mr. Cooke to the accused. The important passages in Mr. Peiris' evidence are as follows :—"The claim in the plaint included a sum of Rs. 23,126 on account of accumulated interest. As purchasers of the property we were anxious to prevent its sale. I entered into an agreement with Mr. Godamune to pay up the amount" (*i.e.*, interest) "on behalf of myself and the other members of the syndicate . . . . The arrangement was for us to make payments on account of interest and for the trustees to give us one year's time to pay the balance of the accumulated interest Rs. 23,000 and they were not to advertise the estate for sale within that one year . . . . The only condition was that the money we handed to Mr. Godamune was to be held but these payments were not to be certified of record . . . . He undertook to certify payments whenever wanted . . . . We were advised by our lawyers not to make any payments until the final issue of the case" (*i.e.*, brought by Mr. Boyagoda) "if possible . . . . We did not want to be out of pocket in the event of our losing the property . . . .

I did not want the payments certified as, in case we lost the Colombo case, we would be paying the money to him and he would have the benefit of our payments. On the other hand I wanted to get this mortgage sale postponed because if it went through some third party would take the estate and we would be left in the air . . . . We asked Mr. Godamune to give time to pay up the amount. He wanted us to make some payments towards the interest so that interest may not get accumulated, the reason being that he would be taking a risk as a trustee . . . . The letter does not add anything further to what we all discussed together. Mr. Godamune was to certify payments whenever we wanted him to do so . . . . There was no obligation on Mr. Godamune to certify payments . . . . . We wanted a longer time than a year, but Mr. Godamune was not willing to give us more than a year's time . . . . He was to hold the money in confidence without telling anyone . . . . Mr. Godamune was anxious that interest should not accumulate. The interest had already accumulated to such an extent as Rs. 23,000 that he did not want that to go on indefinitely". In answer to the Court Mr. Peiris said : "I knew that the accused was a trustee and that this money was paid to him as a trustee. I knew that he had to pay this money to Mr. Harris or his son. I intended that he should not pay the money to Mr. Harris . . . . What we wanted him to do was to keep the money for himself and not to pay it to Mr. Harris. Accused was to hold the money at our disposal. The use of the payments was to satisfy Mr. Godamune who was asking something on account of the accumulated interest . . . . We wanted to show our *bona fides* that we were really prepared to pay the accumulated interest."

The important passages in Mr. Cooke's evidence were :—"The claim was Rs. 40,000 principal and Rs. 23,000 odd interest. My clients could not defend that action . . . . In November, 1927, Mr. Godamune had met Mr. Peiris and come to an agreement whereby they were given a year's time provided certain payments were made on account of interest . . . . My recollection is that Mr. Godamune was to give Peiris and others one year's time to pay the Rs. 40,000 mortgage provided they paid up the arrears of interest which amounted to about Rs. 23,000 first by paying Rs. 10,000 and the balance whenever they could within that year. This letter (P 14) is the letter I wrote to the accused embodying the conditions . . . . I knew that this money was being paid to Mr. Godamune as trustee. The first condition was that my clients be given a year's time and during that year my clients were to make payments on account of interest and Mr. Godamune was to undertake not to certify of record these payments . . . . I would have objected to the accused having paid the money to Mr. Harris because if my clients lost the case they would lose the money . . . . I knew Mr. Godamune was the trustee of a marriage settlement, but I did not know the terms . . . . I marked the letter (P 14) 'Confidential' because I did not want anybody to know that these payments had been made on account of interest . . . . . If Mr. Harris or Mr. Boyagoda came to know of the payments they may have attempted to enforce certification. There was no positive obligation on Mr. Godamune's part to certify payments." To the Court Mr. Cooke said : "In my letter there was no condition that Mr. Godamune should not pay the money to the beneficiary. There was nothing in my letter to show that I put that condition on him. At that time I did not know that the money had to go to Mr. Harris. I wished the accused to have control over the money till the case was decided, but I did not know what the conditions of the trust were."

I can only conclude that these statements were evidence from which the jury could conclude that there was a payment

of interest fettered by conditions, but still a payment of interest. If the moneys paid were interest then, as admitted in argument, they would be the property of Mr. Harris. A distinction was attempted to be taken between a payment of interest and a payment on account of interest but I cannot see that any distinction exists. If I owe a debt to a tradesman and pay him something on account of that debt, I am paying that debt *pro tanto*.

It is necessary perhaps to notice the position between the parties. The accused was safeguarding himself, he says so, by insisting that, if time be given, interest should be paid, but in giving time and in agreeing not to pay over interest he was preferring the advantage of himself and others to that of his *cestui que trust* when his duty was either to get him the interest at once, or to proceed with the action and enforce payment, and so he was committing, it seems to me, a breach of his duties as a trustee. The syndicate knowing he was a trustee, Messrs. Peris and Cooke say so, were inducing him to prefer their advantage to that of his *cestui que trust* and so to commit a breach of trust.

Now the agreement was embodied in letter P 14 from Mr. Cooke to the accused and it is important to see whether that letter contradicts the oral evidence of the agreement between the parties. It is as follows : " I understand from you at the interview you had with Mr. C. W. Peiris at my office some days ago that, provided you were paid Rs. 10,000 on account accumulated interest, you would get the case to lay by for one year and that during that period the balance interest should be paid from time to time as my clients were able. Further, that you would undertake not to certify of record any payments made by my client on account, should it become necessary for you to enforce writ for the recovery of the claim. Of course if the amount realized by the sale of the property does not fetch the amount of your claim, then you could appropriate the moneys paid by my clients towards the deficiency. The reason for this, as explained to you, is that my clients do not wish Mr. Boyagoda or anyone else to profit at their expense as the mortgage was one that was executed by Boyagoda. On receiving your confirmation of this I shall send you a cheque for Rs. 10,000."

I can only conclude on the best light I can obtain that this letter does not contradict the oral evidence but is in accord with it. Construing it as best I can, it seems to say, we pay interest but you must not certify it on the record. This is not inconsistent with it being interest, for it would still be the duty of the accused to keep it safe for his client, though the fact of the payment was to be concealed for a year from him and from everybody else ; it remains interest none the less. The sentence " If the amount realized by the sale of the property does not fetch the amount of your claim, then you could appropriate the moneys paid by my clients towards the deficiency " has been pressed in argument as showing that these payments would only become interest at all on a certain possibility. I do not so read it. One possibility is selected out of a number that might happen that, namely, that before the year of concealment had elapsed, it might " become necessary " for the accused " to enforce writ for the recovery of the claim" (see preceding sentence of the letter), in which case what had been paid would supplement a deficiency if there was one, so that Mr. Harris would be secured of the interest whatever happened, and would in the meanwhile remain a deposit of interest available to be paid him as such when the year had elapsed. Thus, whether this possibility occurred or not, the money paid would remain what the writer has called it, a payment on account of interest if an earlier payment, a payment of the balance of interest if the final payment, and the interpretation of the sentence contended for would ignore what seems to be the purport of what has gone before, namely, that at the end of a year accused would be free to pay over the interest to Mr. Harris. I cannot see that this

sentence negatives what has gone before so as to make that payment not to be interest which the earlier part of the letter has declared in the clearest terms to be interest.

In so construing the letter I seem to find myself in complete agreement with the construction put upon it by the witnesses Mr. Peiris and Mr. Cooke ; they do not seem to have any doubt that what they were paying was interest. Also Mr. Cooke in answer to the Court said that there was nothing in the letter debarring the accused from paying the money to the beneficiary. If paid, it could only be paid as interest.

One must never lose sight of the fact that according to the evidence the accused was only prepared to give these people time if they paid interest. They got the time, and what they paid for it was, it seems, the interest accumulated.

Construing the letter and the oral evidence as best I can, it seems to me beyond question that there was evidence for the jury from which they could, if they were so minded, determine that these payments were the property of Mr. Harris as charged in the indictment.

I would add one thing further. The accused having yielded to this solicitation to commit breach of trust was in this position: If he kept faith with the syndicate, he was doing so to the damage of his *cestui que trust*. If he decided on second thoughts to prefer his paramount duty as trustee and pay over the interest to Mr. Harris then he would have been breaking faith with the syndicate. It is not perhaps necessary to decide the point but I doubt they could have claimed the money back either from the accused or from Mr. Harris, had the former paid it over in breach of the agreement for the agreement seems to have been based on an illegal consideration and if so the rule *in pari delicto* would apply. But however this may be, it seems to me that there was clear evidence from which the jury could infer that the accused had received something, the property of Mr. Harris, namely, interest.

My answer to the first question put to us is then that there was evidence from which the jury could find that the property, *i.e.*, the money paid to the accused was the property of Mr. Harris, and that, being so I am of opinion that the conviction and sentence in this case should be affirmed.

The second question put to us does not seem, on the view I take of the case, to require answer, so I express no opinion thereon.

The case seems to me to call for some remarks. In *Barber v. Abdulla*[1], De Sampayo J. said : " The offence of criminal misappropriation consists in the dishonest conversion to the use of the party charged of the property of another. In *Reg. v. Parbutty*[2], the Calcutta High Court even held that the charge itself should specify the person to whom the property belonged. In this connection I do not think it absolutely necessary that the actual owner should be disclosed in all cases. It may be sufficient if there is some person entitled to the possession of the goods misappropriated ". If it be not absolutely necessary to designate in the indictment the owner of what has been misappropriated, then I think that it would have been better in the present case to have charged the accused with misappropriating such and such money , " the property either of Mr. Cooke or of Mr. Harris ". With the dates and amount of money duly set out, I cannot see that an indictment so drawn would have been vague or in any way embarrassing to the defence. Yet another possible way, as it seems to me, of drawing the indictment would have been to omit any assertion as to ownership of the money and simply to aver that the accused " received between certain dates certain sums of money from Mr. Cooke which money he did thereafter dishonestly misappropriate ". Again, I apprehend that such an indictment would have been definite and in no way embarrassing to the accused.

I must leave it to those it concerns to say whether the Penal Code would not be

[1] 7 *C. W. R.* 144 [2] 14 *W. R. Cr. P.* 13

the better for a section framed on the lines of the English Larceny Act, 1901—now section 20 (1) (iv.) (*a*) and (*b*) of the Larceny Act, 1916. That enactment makes it punishable for any person fraudulently to convert to his own use, or to that of any other person, any property or the proceeds of any property, which he solely or jointly with some other person, has been entrusted with, either for or on account of any person or in order that it, or any part of it or any proceeds of it, may be retained by him in safe custody or may be applied or paid or delivered by him for any purpose or to any person. The acts specified in that Statute as amounting, if done fraudulently, to a misdemeanour, may very possibly be implicit in section 386 or section 388, but the Statute referred to in making it punishable fraudulently to convert property "to the use of another" does seem to provide for a possibility as to which these sections 386 and 388 are not explicit.

GARVIN S.P.J.—

This is a reference under the provisions of section 355 of the Criminal Procedure Code. At the close of the evidence learned Counsel for the defence submitted that there was no evidence to go to the jury that the money which the accused is alleged to have misappropriated was the property of Mr. Harris. The learned presiding Judge overruled the objection and directed the jury " that if they found it proved that the money in question was paid to the accused as Mr. Harris' agent for the purpose of being handed over to Mr. Harris, and that the property had passed from Peiris and others, they might consider it to be the property of Mr. Harris from the time it reached the hands of the accused ".

The jury found the accused guilty on the second and fourth counts of the indictment, of criminal misappropriation of two sums of money alleged to be the property of Mr. Harris. But on the application of learned Counsel for the accused, the Judge has reserved for the consideration of this Bench, the question " whether there was evidence upon which the jury could find that the property was the property of Mr. Harris ".

The indictment originally presented against this accused contained seven counts. The first, second, and seventh counts were withdrawn and the remaining four counts were renumbered accordingly. The first and second counts of the amended indictment relate to a sum of Rs. 5,000. It is alleged in the first count that the accused, between March 30, 1928, and January 21, 1929, did dishonestly misappropriate this sum, " the property of Mr. C. W. Peiris and others ". The second count, which is expressed to be in the alternative, refers to the same sum of money as being " the property of Mr. H. F. Ensor Harris ". Similarly, the third and fourth counts relate to a sum of Rs. 3,000 alleged to have been misappropriated between August 28, 1928, and January 21, 1929, the said sum being referred to in the third count as " the property of Mr. C. W. Peiris and others ", and alternatively in the fourth count as " the property of Mr. H. F. Ensor Harris ".

Though no formal verdict appears to have been entered of record in respect of the first and third counts on this indictment, we must take it that inasmuch as the jury have found the accused guilty on the alternative counts 2 and 4, they have found him " not guilty " of the first and third counts.

It is convenient at this stage to note the submission made by the laearned Deputy Solicitor-General, that if we took the view that there was no evidence to support the finding that the property alleged to have been misappropriated was " the property of Mr. Harris ", that it was still open to us to enter a conviction of criminal misappropriation or criminal breach of trust against the accused upon yet another alternative, viz., that he has committed one or the other of those offences in respect of these two sums not being his property but paid into his hands by Mr. Cooke who was acting on behalf

of Mr. C. W. Peiris and others. This is a course which is not open to us. The only question submitted for our decision is "whether or not there is evidence to support the finding that this is the property of Mr. Harris" and if that question be answered in the negative then the logical and necessary consequence is that the conviction is bad. There is no power at this stage to frame a new charge or to consider the question of the guilt or innocence of the accused in relation to a charge which was never tried and upon which no verdict has been returned by the jury. It is by no means clear that, had the verdict of the jury been invited upon such a charge, that they would have found the accused guilty. Indeed, there is every indication that throughout the trial the main endeavour of the prosecution was to prove that the money which reached the hands of the accused was money which had been paid to him and received by him under circumstances which transferred the property in the money from the person who paid it to the accused, as trustee for Mr. Harris, and that he dishonestly misappropriated the same. The only question therefore with which we are concerned is whether there was evidence to support the finding of the jury that these sums of money were the property of Mr. Harris in the sense that it was money which Mr. Harris was entitled to receive from the accused as beneficiary of the trust of which the accused was the trustee.

Mr. Ensor Harris, the virtual complainant in this case, was once the owner of Belmont estate. By the terms of a marriage settlement made by Mr. Ensor Harris, he settled a sum of Rs. 40,000 upon certain trustees in trust for certain beneficiaries. In August, 1920, Mr. Harris sold Belmont estate to one Boyagoda and the trust fund was invested and secured by a mortgage of Belmont estate created by Boyagoda in favour of the trustee. The original trustees having left the Island, the accused, Mr. Godamune, and a Mr. Westland were appointed in their places. It is admitted that at the dates material to this prosecution, the accruing interest was payable to Mr. Harris. No interest appears to have been paid on the bond and on March 14, 1927, and action was instituted in the District Court of Kandy bearing No. 34,987 to recover the principal sum of Rs. 40,000 and the accumulated interest which at that date amounted to Rs. 23,126. Prior to the institution of the action Boyagoda had executed a conveyance of Belmont estate in favour of Messrs. Peiris, Batuwantudawe, and certain others whom it is convenient to group together and refer to as they have been referred to throughout these proceedings as the "syndicate". The members of this syndicate were made parties to this action for the purpose of affecting the property in their hands with liability to be taken and sold in execution of the hypothecary decree which the trustees were seeking. At the time of the institution of this action there was pending in the District Court of Colombo case bearing No. 19,574 instituted by Boyagoda against the syndicate alleging that they were holding Belmont estate in trust for him. November 26, 1927, was appointed by the District Judge of Kandy for the filing of the answer of the defendants in case No. 34,987.

The position of the syndicate was an extremely difficult one. If they paid and discharged the principal and interest secured by the mortgage on Belmont estate for the recovery of which the Kandy case had been instituted, and litigation between them and Boyagoda should result in their being declared to be only trustees and not absolute owners, they stood in grave risk of losing both the land and the sum of Rs. 63,000 and probably more, paid to relieve it of the burden of the mortgage. If, on the other hand, they let hypothecary decree be entered and ultimately succeeded in the litigation with Boyagoda, they stood in grave risk of losing the fruits of

that litigation by a sale which might in the meantime be held of Belmont estate under the hypothecary decree. Before filing answer therefore, they took the step of approaching Mr. Godamune with a view to obtaining time. Certain negotiations took place between Mr. Peiris, who was apparently the most active member of the syndicate, and the accused and later the negotiations were continued and concluded in the presence of Mr. Cooke, a proctor of the Supreme Court, who was acting on behalf of Mr. Peiris and the syndicate. An arrangement was made by which the syndicate was allowed one year's time. It was a condition of the arrangement that they should consent to judgment. This they did, and judgment was formally entered on March 30, 1928, in favour of the trustees, and in compliance with the terms of the arrangement Mr. Cooke, acting on behalf of the syndicate, from time to time sent to the accused Godamune the following cheques :— On November 26, 1927, Rs. 10,000 ; on March 30, 1928, Rs. 5,000 ; on August 28, 1928, Rs. 3,000 ; and on November 6, 1928, Rs. 5,000. These cheques were duly received by the accused and are proved and admitted to have been paid into his banking account. The sums of Rs. 5,000 and Rs. 3,000, respectively, referred to in the second and fourth counts of the indictment, for the misappropriation of which the accused has been convicted, are the proceeds of the two cheques for these respective amounts dated March 30, 1928, and August 28, 1928, sent to the accused by Mr. Cooke in pursuance of this arrangement.

Now, the only evidence of the purposes for which the circumstances under which and the conditions upon which these cheques were sent by Mr. Cooke to the accused consists of the letter P 14, the evidence of the witnesses Peiris and Cooke, the statutory statement of the accused, and the evidence given by him at the trial. The cheques were all drawn by Peiris and endorsed by Cooke. They were paid out of Peiris' funds. It is therefore proved that the money was originally the property of Peiris. Before a single cheque was sent by Cooke to the accused he wrote him letter P 14 dated November 18, 1927, setting out the terms and conditions upon which the moneys were being placed in his hands. The letter is as follows :—

Dear Mr. Godamune,

*D. C. Kandy No.* 34,987.

I understoód from you at the interview you had with Mr. C. W. Peiris at my office some days ago that, provided you were paid Rs. 10,000 on account of accumulated interest, you would get the case to lay by for one year, and that during that period the balance interest should be paid from time to time as my clients were able. Further, that you would undertake not to certify of record any payments made by my clients on account, should it become necessary for you to enforce writ for the recovery of the claim. Of course, if the amount realized by the sale of the property does not fetch the amount of your claim, then you could appropriate the moneys paid by my clients towards the deficiency. The reason for this as explained to you, is that my clients do not wish Mr. Boyagoda or any one else to profit at their expense as the mortgage was one that was executed by Boyagoda. On receiving your confirmation of this I shall send you a cheque for the Rs. 10,000.

Yours sincerely,

P. G. Cooke.

The arrangement was confirmed by the accused, and in due course the cheque for Rs. 10,000 was sent, and thereafter the other cheques on the dates specified. This letter therefore embodies the conditions upon which these moneys were sent to Godamune and upon which he received them. It is not suggested that they were altered by any subsequent arrangement.

It is necessary, therefore, to construe this letter with a view to ascertaining

whether it can fairly be said that these moneys were sent to Godamune with the intention of transferring the property in the money, from Peiris to Godamune, so that they may go in payment of the interest due by Boyagoda, and in discharge of his obligation to pay the same.

Great emphasis was laid throughout this hearing on the words "paid", "payments", and "on account of accumulated interest" which appear in this letter, and it was urged that these words must be given their full legal value and be construed to mean that the moneys sent by Cooke on behalf of Peiris were intended to be received by the accused and applied by him as legal "payment" of interest in discharge of an obligation which was Boyagoda's and not theirs.

The first sentence in this letter taken apart from the rest of the letter is undoubtedly susceptible of the interpretation that the money referred to therein would be paid in discharge of the interest due and payable on the mortgage bond. But the rest of the letter cannot be ignored. A well established rule of construction requires that the letter should be read and construed as a whole. The words "pay" and "payment" with reference to money are sometimes used—perhaps misused—to indicate the transfer or delivery of money without obligation to do so and without any intention to transfer the property in that money in discharge of a legal obligation. Whether the words in the opening clause are to be given their full legal significance or effect or whether they are loosely used or misused must depend upon a consideration of the rest of the letter which contains the conditions which Mr. Cooke required the accused to accept before he sent him the money. The first condition was that these "payments" were not to be certified of record "should it become necessary (for you) to enforce writ for the recovery of the same". The writer here contemplates the possible case of Godamune, notwithstanding that he had given time, being compelled by some unforeseen circumstance "to enforce writ" for the recovery of his claim, and insists that these were not to be treated as "payments" made in part satisfaction of the decree and certified as such. He next contemplates the possibility of a sale in execution not realizing the full amount of the decree and costs, and he says to the accused "then you could appropriate the moneys paid by my clients towards the deficiency". It is clear therefore that the moneys were not to be appropriated immediately as "payments" of interest or "payments" against the amount of the decree, but that they were only to be appropriated if upon a sale for the realization of the claim, there was a deficiency, and to the extent of that deficiency. To make what appears to me to be clear on the face of the document, still clearer, the accused is reminded that Mr. Cooke's clients "do not wish Mr. Boyagoda or any one else to profit at their expense as the mortgage was one that was executed by Boyagoda". The debt secured by the mortgage was one which Boyagoda alone was under a legal obligation to discharge, however much it may be in the interests of the syndicate to do so, if and when their position as legal and beneficial owners of Belmont estate was definitely established. It has been urged that the condition that when applying for execution the accused was not to certify these as payments, is not inconsistent with the money having in fact been paid in discharge of the liability to pay interest. To this there is a sufficient answer in the very next sentence which authorizes the accused to "appropriate" the moneys so paid towards any deficiency on sale. Money paid in discharge of interest has been appropriated and is not available to be again appropriated towards a deficiency on sale. Moreover, I see no justification for adopting the suggested interpretation which involves the assumption that having paid the moeny in discharge of the

interest due Mr. Cooke entered into a compact with the accused to conceal that fact from the Court and by the practice of a deceit to obtain execution for the full amount of the claim. Such a compact would be wholly unnecessary and futile since the interests of all parties were amply secured by placing in the hands of the accused moneys up to the amount of the accrued interest with authority to appropriate the whole or such part as may be necessary to make up the deficiency on sale. If, when reading this letter, we remind ourselves of the situation in which the members of the syndicate found themselves at the time, it is manifest that their sole purpose was to obtain time by an arrangement which would enable them to await the decision of their litigation with Boyagoda before they were compelled to decide whether they would discharge the debt charged upon the property. The most obvious course was, to place in the hands of Godamune a sum of money equivalent to the amount of the accumulated interest. The property was mortgaged to secure the original loan of Rs. 40,000. The amount of interest which had accrued up to the time of the decree was Rs. 23,126. To this would have to be added costs of the action and a sum of about Rs. 3,000 for yet another year's interest. A plaintiff was bound to contemplate the possibility of the property not realizing sufficient to pay that aggregate amount. But if a sum of Rs. 23,000 was placed in his hands with the right to appropriate from that amount so much as was necessary to meet any deficiency upon sale, then his position was not merely as good but possibly even better than it would have been had he proceeded to execution at once. By such an arrangement the accused would have secured not only the original trust fund, but all the accumulated and accruing interest and the costs of action, in consideration of which he was to refrain from proceeding to execution for one year. This it is said is the purpose of this letter, and the sense in which it should be construed, and for my own part, it seems to me, that it is the plain meaning of this letter, that Peiris and the other members of the syndicate were to make " payments " to the accused up to the amount of the accumulated interest, taken for the purpose of the arrangement at a round figure of Rs. 23,000, upon the condition that it was not to be treated as a " payment " in discharge of the liability to pay interest or in part extinction of the decree to be entered thereafter, but to be held by the accused and " appropriated " in one contingency only, the event of a deficiency upon sale and execution of the property under mortgage.

It may be legitimate as the learned presiding Judge has done to refer to these as " payments " made to the accused " in the name of accrued interest and for the amount of that interest ", but they were payments made under conditions which makes it impossible to say that it was the intention either of Mr. Cooke or Mr. Peiris that it should go in discharge of Boyagoda's debt, and that the property in the money be thus transferred to Godamune as trustee for Harris. It was of course possible, notwithstanding that the obligation to pay was Boyagoda's and not theirs, for the members of the syndicate to pay his debt, but it is only possible to say that they did this, if they made the " payments " in his name, and in his discharge. But this cannot be said when the letter states expressly and explicitly that Mr. Cooke's clients do not wish Boyagoda or any one else to profit at their expense and also that the moneys " paid " by them into his hands may be " appropriated " in the event of a deficiency upon sale.

The terms and conditions upon which this money was placed in the hands of the accused are those set out in P 14, and if this letter is construed, as I think it must be, as meaning that these sums of money were placed in his hands as a security for any loss which he may

sustain by granting to the syndicate the concession of a year's time, and not in discharge of the interest payable by Boyagoda, then it is impossible to say that there is evidence upon which the jury could have legitimately found that these moneys were in any sense the property of Mr. Harris.

What ever Mr. Cooke or Mr. Peiris, both of whom have been called by the prosecution, may now say, the terms and conditions upon which they expressed their willingness to send these moneys to the accused and which they insisted upon his accepting before any money was sent are contained in the letter P 14. It is not suggested that these conditions were modified, added to, or varied by any subsequent agreement. The question therefore so far as it affects the accused depends upon the correct construction of the letter P 14.

This is a question for the Judge and not one for the jury—*vide* Criminal Procedure Code, section 244 (*b*). In the view I take of this letter there was no evidence to be submitted to the jury on which they could find that the money which the accused is alleged to have misappropriated was the property of Mr. Harris. If, as is suggested, the letter is not clear and its meaning doubtful or ambiguous, there is still no evidence to go to the jury upon which they can hold affirmatively that these moneys were the property of Mr. Harris. In such a view of the letter only two courses were possible—one, to direct the jury that there was no evidence, the other to admit evidence of the sense in which the ambiguous words were used and should be understood in construing the letter as a whole. The second of these alternatives I am merely considering in view of the course which the trial has taken and I must not be understood to hold that in the circumstances of this case such a course might legitimately have been taken. Neither Mr. Cooke nor Peiris appear at any stage of their examination to have been asked any questions for the purpose of clearing up the supposed ambiguities in the letter P. 14. Neither of them was apparently asked at any time whether the words " paid " and " payments " on account of interest in the letter P 14 were intended to imply that the moneys sent to the accused were to be applied in satisfaeton of the amount due as interest. Their examination indicates that they were examined generally for the purpose of establishing. If possible independently, by their parol evidence that the moneys were paid in immediate discharge of the accrued interest. I am by no means satisfied that, even if in their evidence they do say any thing which militates against the meaning to be attached to the letter P 14, such statements can be legitimately admitted in evidence or submitted for the consideration of the jury in a case where the terms and conditions upon which the money was placed in the hands of the accused were submitted to him in writing in the letter P 14, and accepted by him. But it is unnecessary to consider this question more fully since I can find nothing in the evidence of either of these witnesses which is in conflict with, or varies in any material particular the terms of the letter P 14. Indeed, both these witnesses accept the letter P 14 as correctly setting out the conditions upon which these " payments " were made, and I can find nothing in the evidence of either of them which would justify a jury in holding that this was an absolute " payment " in discharge and not one which was made upon the conditions set out in P 14.

It is perfectly true that as in his letter, so in his evidence Mr. Cooke uses the word " paid " and " paid on account of interest ". He states early in his evidence " Mr. Godamune was prepared to give an year's time. ' provided they ' (his clients) paid up the arrears of interest which amounted to about Rs. 23,000 ". But in the very next sentence he says " This is the letter P 14 I wrote to the accused embodying the conditions ". A

little lower down he says "The conditions under which these 'payments' were to be made were arrived at by Mr. Godamune and Peiris before they came into my office". He then states that the first condition was that his clients be given a year's time, and that during that year they were to make "payments on account of interest" and Mr. Godamune was to undertake not to certify these "payments of interest" adding in explanation "At that time I was aware that there was an action brought against my clients by Mr. Boyagoda, pending. This special arrangement was made because I wanted to safeguard my clients in case they lost that action. We did not want anybody else to benefit in the event my clients lost the case". Then, again, almost immediately afterwards, he adds "I would have objected to the accused having paid the money to Mr. Harris because if my clients lost the case, they would lose the money. My clients wanted their money protected. I said that Mr. Godamune was to hold the money in terms of my letter. Being plaintiff I held him responsible for that money". Later in his evidence he says "Accused was to hold this money pending further instruction from me, and I held the accused responsible for the money". And at the end of his evidence, in answer to the Court he said: "I wished the accused to have control over the money till the case was decided but I did not know what the condition of the trust was. I did not inquire into that. I relied more on accused having the money to be accounted for at any time I called upon him to do so". These statements, and the objects, purposes and the intention in the minds of those who placed this money in the accused's hands as revealed by these statements are irreconcilable with the suggestion that they intended that these moneys should go immediately as they were paid, in discharge of the interest payable on this mortgage. The argument that Mr. Cooke says one thing at one time and another thing at another is one which I can neither understand nor admit. If Mr. Cooke has in his evidence talked of "payments" on account of interest he has consistently stated that these payments were made subject to conditions specified by him and which are irreconcilable with the suggestion that these moneys were paid in discharge of any liability on the part of the syndicate or of Boyagoda to pay the interest due on the bond. The evidence of a witness must be read as a whole. Mr. Cooke has not said nor is there any thing in his evidence from which it can fairly be inferred, that he intended to say that the accused was free to appropriate these moneys and apply them in payment of the interest due by Boyagoda.

Similarly the evidence of Peiris read as a whole cannot fairly be construed in any other sense. Early in his evidence he has said in answer to Counsel for the prosecution "We were liable to pay interest accrued on that property". In the sense that it was in his interest to do so rather than suffer the property to be sold and purchased by another this statement is understandable. But as a statement of his legal position it is manifestly incorrect. Peiris then refers to the payments and like Cooke proceeds to state the conditions upon which these payments" were made. "The only condition was that the money we handed to Mr. Godamune was to be held, but those payments were not to be certified of record. All the conditions were embodied in Mr. Cooke's letter." He next says "the only condition I made was that payments were not to be certified although the money was paid". The letter P 14 speaks for itself and contains other conditions.

He speaks of the action then pending between Boyagoda and the syndicate and adds "we were advised by our lawyers not to make payments until the final issue of the case if possible, that is why the payments were not to be certified . . . . That was our idea in making payments but not getting them certified".

In answer to the Court he said :—

> I knew that the accused was a trustee and that this money was paid to him as trustee. I knew that he had to pay this money to Mr. Harris or his son, I intended that he should *not* pay the money to Mr. Harris. If he was to give the money to Mr. Harris or his son he had to certify payment and, in the event of our losing the Colombo case which was going on, we would have lost all that money. That is why we asked him to hold that money at our disposal without certifying payment. What we wanted him to do was to keep the money for himself and not to pay it to Mr. Harris. Accused was to hold the money at our disposal. The use of the payment was to satisfy Mr. Godamune who was asking something on account of the accumulated interest. At that time I did not know that the money was to be paid to Mr. Harris. At that time I was under the impression that the payments should be made to Mr. Godamune for the benefit of the minor. We wanted him to be satisfied with that money till a time when we asked him to certify payments. Our position at that time was that he was to hold that money in trust for ourself until such time when we were prepared to ask him to certify payment. We wanted to show our *bona fides* that we were really prepared to pay the accumulated interest.

Mr. Pieris is not a member of the legal profession and it is not surprising that he should find it difficult to speak clearly with reference to the exact legal relationship which came or were intended to come into existence upon the conclusion of the arrangement with Godamune. But whatever be the defects in his evidence he says nothing from which it can fairly be inferred that the right to these monies was transferred or intended to be transferred to Mr. Godamune under such circumstances as would affect them in his hands with a trust to pay the same to Mr. Harris. Further it is clear that the "payments" were made upon conditions and to use his own words "I still say that the terms of the arrangements were fully set out in Mr. Cooke's letter. That letter does not add anything to what we all discussed together". The letter referred to is the letter P 14.

In the result, therefore, the evidence of both Mr. Cooke and Mr. Peiris is consistent with the interpretation I have placed on the letter P 14. Neither of them has said that these moneys were to go immediately as they were received in discharge of the interest due on the bond. Their evidence on the contrary militates strongly against any such suggestion. Both of them abide by the letter P 14 as correctly setting out the terms and conditions which they insisted on prior to acceptance by the accused before they sent him any money. The matter is therefore brought back to the position in which it stood before I entered upon a consideration of the evidence of these two witnesses. The question at issue turns upon the construction of the letter P 14 which sets out the conditions upon which the accused received the money. I have already discussed that aspect of the matter and have stated my own view of the letter. But if as has been contended the letter is ambiguous and its meaning cannot be arrived at with certainty, then there was no evidence upon which the jury could have found affirmatively that the money was "the money of Mr. Harris".

The order I would make upon this reference is that the conviction be set aside and the accused acquitted.

DALTON J.—

The facts upon which this Court has been asked to express an opinion are set out in the case stated, and in the judgment of my Lord the Chief Justice and it is not necessary for me to set them out again.

Upon these facts this Court is asked to answer the following two questions :—

(1) Was there evidence upon which the jury could find that the property was the property of Harris ?

(2) Can a person be convicted of criminal misappropriation of money which has been entrusted to him ?

The property mentioned in the indictment is the sums of Rs. 5,000 and Rs. 3,000, alleged to be the property of H. C. E. Harris. It is not contested by Mr. Perera for the accused that if these payments by Peiris to the accused Godamune were interest due upon the mortgage to which Harris was entitled, then the matter was rightly left to the jury. The argument for the accused very shortly put is as follows : The terms of the agreement between Peiris and the accused as to the payments were settled at an interview between them and were subsequently put into writing by Peiris' proctor, Mr. Cooke. The letter is the document P 14. It is as follows :—

*Confidential.*

November 18, 1927.

Albert Godamune, Esq.,
Proctor,
Kandy.

Dear Mr. Godamune,

*D. C. Kandy, No.* 34,987.

I understood from you at the interview you had with Mr. C. W. Peiris at my office some days ago that provided you were paid Rs. 10,000 on account accumulated interest you would get the case to lay by for one year, and that during that period the balance interest should be paid from time to time as my clients were able. Further that you would undertake not to certify of record any payments made by my clients on account, should it become necessary for you to enforce writ for the recovery of the claim. Of course if the amount realised by the sale of the property does not fetch the amount of your claim, then you could appropriate the moneys paid by my clients towards the deficeincy. The reason for this, as explained to you, is that my clients do not wish Mr. Boyagoda or any one else to profit at their expense as the mortgage was one that was executed by Boyagoda. On receiving your confirmation I shall send you a cheque for the Rs. 10,000.

Yours sincerely,
P. G. COOKE.

Mr. Perera argues, so I understand, that this letter can only possible mean one thing, namely, that Peiris in return for the one year's delay given by the accused to him and his co-defendants agreed to put into the hands of the accused sums of money, which happened to coincide with the amount of accumulated interest on the mortgage due, but which were in fact sums which in certain eventualities he might use to recoup himself for any loss or damage he might sustain by allowing this time to the defendants, in other words as security to indemnify him for the risk he ran in being negligent in his duty as trustee.

The references therein to the payment being made for " accumulated interest ", and to payments of " balance interest " being made from time to time as Peiris and his syndicate were able, it is urged, must and can only be interpreted having in view the clearly expressed intention contained in the latter part of the letter that it was not to be a payment of interest at all, since the payers did not wish Boyagoda or any one else to profit at their expense. The argument, so far as it went to suggest that this letter was only capable of one meaning and that advanced by counsel for accused, I fear, quite failed to convince me. Further, why it should be necessary to ask the accused to undertake not to certify a payment as a payment in the mortgage action when in fact it was a personal payment to him for quite another purpose, does not appear. A very good reason for this request as disclosed in the evidence would be the wish of the payers to obtain their year's delay, since if payment was certified, their object in obtaining the delay would be defeated.

There is no doubt from the letter that Peiris and his syndicate, although they had no difficulty in asking for and obtaining for themselves an improper benefit from the trustee at the expense of the beneficiary to the trust, did not wish Boyagoda or any one else to benefit at their expense, but whether they could in law, under the circumstances here, prevent Harris obtaining the benefit of the payments in any event, had he come to know of it is in my opinion doubtful. The letter must be read as a whole. It must further be remembered that it is written by their proctor, who must have understood the ordinary meaning of the various terms he used, and who, as his evidence shows, was fully aware that Godamune was a trustee in the matter.

If we examine the evidence of Peiris as to what took place at his interview with the accused at which the agreement was made, we find he states—

> " The claim in the plaint included a sum of Rs. 23,126 on account of accumulated interest. As purchasers of the property we were anxious to prevent its sale. I entered into an agreement with Godamune to pay up the amount on behalf of myself and the other members of the syndicate . . . . The arrangement was for us to make payments on account of interest and for the trustees to give us one year's time to pay the balance of the accumulated interest, Rs. 23,000, and they were not to advertise the estate for sale within that one year . . . . The only condition was that the money we handed to Mr. Godamune was to be held, but those payments were not to be certified of record. All the conditions were embodied in Mr. Cooke's letter. The only condition I made was that payments were not to be certified although the money was paid. He undertook to certify payments whenever we wanted. "

He goes on to say that Boyagoda had brought an action against the syndicate alleging the syndicate held the mortgaged property Belmont in trust for them, and in the event of Boyagoda being successful in that action they would lose the property. " We did not want to be out of pocket in the event of our losing the property. That was our idea in making payments, but not getting them certified. "

Of the Rs. 23,000, Rs. 10,000 was paid to the accused on November 26, 1927, and Rs. 5,000 on March 30, 1928. These payments were concealed by accused from Harris, from Boyagoda, and from his own proctors in the mortgage action, Messrs. Liesching and Lee. Early in September, 1928, for the first time according to Mr. de Vos, a member of the firm of Liesching and Lee, accused told him (de Vos) that he had received a cheque apparently for Rs. 3,000 from Mr. Cooke or some of the defendants in the action and asking for time, accused adding that he was taking Harris' instructions on the matter. Accused did in fact receive Rs. 3,000 from Mr. Cooke on August 28, but he denies that he ever told de Vos Rs. 3,000 was available for Harris ; it is clear however from the letter P 3 that on September 15 accused wrote to Harris saying—" After I saw you I have received a further sum of Rs. 15,000 to be held by me on the same terms as was suggested first. I have mentioned this to Mr. de Vos and I would like to know what your wishes are ". It is not denied of course that accused's letter P 3 contains a false statement, for the Rs. 15,000 had been received from Cooke very much earlier, Rs. 10,000 on November 26, 1927, and Rs. 5,000 on March 30, 1928, and had been used by the accused for his own purposes at the time he wrote. The further fact that he asks Harris what Harris' wishes were with regard to the money is also a matter that has to be taken into consideration ascertaining the nature of the payments.

The evidence of Mr. Cooke, Peiris' proctor, and the author of the letter P 14, is of importance on this question. He admits that he knew the accused, so far as he was concerned in the mortgage action, was a trustee and he states he knew

the payments he was making to the accused were made to him as trustee, although he only knew later that Harris was the beneficiary. He states that the conditions under which the payments were to be made were arrived at between Peiris and accused, and that he put it into legal form. " The first condition was that my clients be given a year's time, and during that year my clients were to make payments on account of interest and Mr. Godamune was to undertake not to certify of record these payments. I marked the letter ' confidential ' because I did not want anybody to know that these payments had been made on account of interest . . . . If Mr. Harris or Mr. Boyagoda came to know of the payments they may have attempted to enforce certification."

These are of course only extracts from this witness' evidence, but they are most important statements by him bearing upon the intention of the parties. He further points out, as Peiris did, that he wanted to prevent his clients losing the money, if they lost the action. How he could under the circumstances do it by these means I have great difficulty in seeing, his clients claiming to be the owners of the land that was subject to the mortgage and Godamune a trustee and receiving the payments as such. The witness at any rate nowhere suggests that he made the payments to Godamune as security for any damage or loss he might suffer for committing a breach of his trust, or to indemnify him in any other way, and perhaps one need not express surprise that such suggestions were not made to Mr. Cooke, for if true they would clearly show that he was fully cognisant of the breach of trust involved in the transaction whichever view of the payments be accepted. Upon this evidence a reasonable inference that may be drawn is that the chief intention of Peiris and the defendants was to gain time in the mortgage action by the payment of the accumalated interest, otherwise the property would be sold under the decree and be lost to them. Added to this is their expressed desire as far as possible not to let any one else benefit by these payments to Godamune, if the property was sold.

The correspondence that passed between Cooke and Godamune's proctors, Liesching and Lee, later in 1928 is further relevant to this question of the real nature of the payments. In November, 1928, Mr. Cooke states he saw an advertisement in the *Gazette* that the property was to be sold. In reply to his inquiry he received certain information from Messrs. Liesching and Lee as a result of which he wrote the letter P 19 to the proctors and D 2 to the accused, both on November 23. He asked the accused to instruct the proctors to certify " the following payments made to you on account of interest by the defendants in the above action " (*i.e.*, the mortgage action), without delay. The payments were the Rs. 23,000 paid in four sums to accused by Peiris and his syndicate through Mr. Cooke. To Messrs. Liesching and Lee he wrote (P 19) asking them to have the four payments " made to the second plaintiff Mr. Alfred Godamune on account of interest amounting to Rs. 23,000 " certified of record. Mr. Cooke adds in this letter that " when these payments were made Mr. Godamune was asked not to certify any of the payments of record but as the decree had been assigned the defendants wished it to be done now ". When Messrs. Liesching and Lee replied that they knew nothing about the payments and the sale must proceed, Mr. Cooke wrote in reply the letter P 20 of November 26 headed " D. C., Kandy, No. 34,987, Belmont estate", expressing his surprise that accused had not accounted for the Rs. 23,000, " I had paid him on account of the above action", and stating that he proposed to apply to the Court to certify the payments, asking for a stay of sale.

Against this evidence on the one side as to the nature of the payments made is the evidence of accused and so it is urged the latter part of the letter P 14 upon which so much stress has been laid.

Mr. Perera urged, as I have stated, that as the letter contained the essential terms

of the agreement between Peiris and the accused, it is only capable of one meaning, that although called a payment on account of accumulated interest it was not in any view of the agreement a payment of interest inasmuch as it was clearly not a payment of Boyagoda's debt, and if it was not that, it was not a payment of interest on the mortgage. He further urged it was nothing but a payment of a sum of money to Godamune for him to hold at the disposal of the payers, and from which he could recoup himself in case he incurred any risk in giving the payers a year's time in the mortgage action. That the letter is only capable of the construction put upon it in this argument I am unable to agree. I agree however that it was the duty of the Judge, if in his opinion the letter could not on any reasonable interpretation afford evidence that the payment was a payment of interest, to have so instructed the jury. In my opinion he was correct here is not doing so. If a document is capable of two or more meanings, with regard to the transactions being entered into, it is in my opinion the duty of the Judge, whilst leaving it to the jury as a question of fact to decide what was the meaning intended by the parties as expressed in the document, to state to the jury the legal effect of any reasonably possible meaning having regard to the words used. For this purpose the whole document must be carefully looked at, greater regard being had to the intention of the parties rather than to the precise words used.

Great stress has been laid in the course of the argument upon the provisions of section 244 (1) (*b*) of the Criminal Procedure Code, where it is laid down that it is the duty of the Judge to decide upon the meaning and construction of all documents given in evidence at the trial, but it is clear from the provisions of section 245, that it is the duty of the jury to decide all questions that are to be deemed in law to be questions of fact and to decide which view of the facts is true. Having regard to the terms of this letter and the other evidence led to which I have referred, it seems to me to be eminently a question of fact for the jury to decide what was the true nature of the transaction between Peiris and the accused, in other words what was the nature of the payments made to Godamune, and that the learned Judge correctly directed them that there was evidence for them to consider that the money was interest and as such the money of the beneficiary Harris.

I would therefore answer the first question referred for the opinion of this Court in the affirmative.

Having regard to the answer I would give to this first question submitted for our opinion, it is not necessary for me to consider the two further questions raised in the course of the argument by Crown Counsel in the event of the answer to the first question being in the negative, first whether it is in any case necessary in a charge of criminal misappropriation to specify the person whose property is alleged to have been misappropriated following the decision of De Sampayo J. in *Barber v. Abdulla*[1], and secondly whether on the present indictment, in the absence of any charge of criminal breach of trust the learned trial Judge applying the provisions of section 182 of the Criminal Procedure Code, was correct in charging the jury that if they took a certain view of the facts they could find the accused guilty of criminal breach of trust.

With regard to the second question submitted for our opinion, Mr. Perera stated that, having regard to the Indian authorities on the point, he was not prepared to argue that a person could not be convicted of criminal misappropriation of money that had been entrusted to him. It is not necessary therefore for this Court to deal with this question.

[1] 7 Ceylon, W.R. 114.