Rex Vs. John Mciver

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Court : Chennai

Decided On : Jan-24-1936

Reported in : (1936)70MLJ635

Appellant : Rex

Respondent : John Mciver

Judgement :

Cronish, J.

1. Two points of law arising in the trial of John McIver for criminal breach of trust at the last Criminal Sessions have been reserved to us for decision under Clause 25 of the Letters Patent by the learned Chief Justice. They are (1) whether the plea of autrefois acquit was good in law, and (2) whether there could be a legal entrustment of the property having regard to the case put forward by the Crown. By ' case put forward by the Crown ', the learned Chief Justice has stated that he means the case alleged in the complaint.

2. The learned Crown Prosecutor has taken an objection to our jurisdiction to entertain the reference. His objection proceeds as follows: - The High Court derives its jurisdiction to decide the question of law referred from the order of reference; the referring Judge is only competent to refer questions which he can decide; and the Judge is only competent to decide such questions as are available for his decision. Applying these propositions to the points reserved, the learned

Crown Prosecutor has contended (1) that the question whether the plea of autrefois acquit was available to the accused could not be referred by the trial Judge because the point had already been decided by the High Court against the accused in the proceedings previous to the trial; (2) that the trial Judge has not referred the question of availability of the plea, but only the question whether it is good in law; (3) that the, question' of autrefois acquit could not be referred because it did not arise 'in the trial' or 'in the course of the trial' (according to Clause 25. Letters Patent or Section 434, Criminal Procedure Code) but was taken before the commencement of the trial; and (4) that the second point of law referred could not be referred because it had already been the subject of decision by a Bench of this High Court at an earlier stage of the proceedings against the accused.

3. With regard to the second of these grounds of objection I may say at once that I have no doubt upon the terms of the order of reference that the learned Chief Justice intended to refer not only the question of the availability of the plea to the accused but the question of its merits. As the points taken by the learned Crown Prosecutor relate to various stages of the proceedings in the prosecution of the accused it will be convenient here to state the sequence of events in these proceedings.

4. The complaint alleged that the accused had committed the offences of cheating and criminal breach of trust. Summonses were issued by the Chief Presidency Magistrate in respect of both offences. But when the parties appeared it was stated that the complainant wished to compound the -offence as the only offence was one of cheating under Section 420, Indian Penal Code. This was sanctioned by the Magistrate,. and an order made acquitting the first accused. Cheating being a compoundable offence the effect of the Magistrate's order sanctioning the composition was acquittal of the accused of that offence: Section 345 (6), Criminal Procedure Code. The result was as if the Court had found the accused not guilty of the offence compounded.

5. The Crown appealed against the acquittal alleging in the first place that the acquittal of cheating was bad as the Magistrate was not shown to have exercised

a discretion in allowing the composition; and secondly, that as the complaint disclosed the offence of criminal breach of trust and a summons had been issued in respect of that offence, which was a non-compoundable offence, the Magistrate must be deemed to have sanctioned the composition of this offence likewise in acquitting the accused. The appellate Court upheld the acquittal of cheating but directed the Magistrate to restore the summons in respect of the alleged breach of trust to his file and to dispose of it according to law. The judgment of the appellate Court is reported in The Crown Prosecutor v. J. Melver and Anr. : (1935)69MLJ681 No question of the acquittal of cheating being a bar to a trial for criminal breach of trust appears to have been raised in the arguments of counsel, and no opinion or decision upon that question was given in the judgment. In my view the Court did not and never intended to fetter the right of the Magistrate to deal with that plea if it should be taken before him in his disposal of the case. However, when the plea was in due course raised before him the learned Magistrate regarded the High Court's 'order as leaving him no option but to go on with the case. The terms of the Magistrate's order are important in relation to the later order made by King, J., because King, J.'s order has been interpreted by the learned trial Judge as deciding the plea of autrefois acquit against the accused. What the Magistrate said was this:

The accused raises the plea of autrefois acquit and states Section 403 (1) Criminal Procedure Code operates as a bar to the trial of the accused on the same facts when they have been acquitted for an offence under Section 420 Indian Penal Code and asks me in any event to refer the matter to the High Court under Section 432 Criminal Procedure Code. The learned Crown Prosecutor states that when the appeal against the acquittal was argued Mr. Grant raised the point and brought it to the notice of their Lordships that on the facts disclosed the only offence that can be made out was under Section 420 Indian Penal Code, and not under 406 Indian Penal Code. 'This contention was negatived and their Lordships held that on the facts disclosed two offences were made out both under Section 406 and Section 420 Indian Penal Code. When there is a specific direction by the High Court to restore the complaint for an offence under Section 406 Indian Penal Code, it is not open to me to challenge the correctness of that order or to go behind it. My duties are to carry it out.

6. He accordingly dismissed the petition. In my opinion the plain meaning of this order is that the Magistrate declined to decide the question of autrefois acquit raised by the accused, because he considered that he was precluded by the order of the High Court. The accused then applied for a revision of the Magistrate's order, and the matter came before Mr. Justice King: The learned Judge disposed of it in these words:

I see no ground for revision. The petitions are dismissed.

7. It has been argued before us that as the point of autrefois acquit was raised and argued before the Judge he must be taken to have decided it in dismissing the accused's petition. I find it impossible to read the order so. Obviously it was incumbent on the accused in support of his petition to show that his plea of autrefois acquit was prinia facie a good one, and that the Magistrate was wrong in refusing to decide it. But it by no means follows that because the learned Judge thought fit not to revise the Magistrate's order that he did so because he decided the plea of autrefois acquit was ill-founded. If that was the ground of his order, he would have been revising the Magistrate's order, for he would have been deciding the point which the Magistrate had refused to decide. But this would be quite inconsistent with his order that he saw no ground for revision. In my judgment the learned judge decided nothing more than that the case should go on, and he left the question of autrefois acquit open.

8. This brings me to the third point in the objection to our jurisdiction to entertain the Order of Reference. The plea of autrefois acquit was in fact raised by the accused's counsel in the Sessions Court after the charge had been read to the accused and before the accused pleaded to the charge. The learned Crown Prosecutor has seized on a phrase in the Order of Reference that the plea was taken 'before the Sessions trial began' as showing that the plea was raised dehors the trial. And from this he has argued that the point of law not being one which had arisen 'in the trial' (according to Clause 25 Letters Patent) or 'in the course of the trial' (under Section 434 Criminal Procedure Code) the point could not be referred by the learned trial judge. For the purpose of Clause 25 it is not necessary that the point referred should have been taken at the trial and and decided by the Judge.

The case of King Emperor v. Ramanujam (1934) 68 M.L.J. Sup. 73 : I.L.R. 58 Mad. 642 is in point. The learned Crown Prosecutor has submitted that Clause 25 is founded on the provisions in the English Court of Crown Cases Act providing for the reservation of a point of law arising 'on the trial'. I think that 'in the trial' in the Letters Patent and 'on the trial' in the English Act mean the same thing. But it has been held under the English Act that it was not necessary to give the Court of Crown Cases Reserved Jurisdiction to entertain a point of law reserved which was existing 'on the trial' that the point should have been formally taken at the trial : R. v. Brown (1890) 24 Q.B.D. 357. But if the point, was in fact taken at the trial, which is the normal occasion for taking a point of law, there is no difficulty, to my mind, in regarding it as a point arising 'in the trial'. The trial had commenced before the plea was raised. Under the sub-heading 'Commencement of Proceedings' in Chap. XXIII of the Code relating to trials before the High Courts and Courts of Session, comes Section 271 which says:

When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

9. This, in my opinion, indicates that the trial commences with the arraignment of the accused that is to say when the charge is read out to the accused and he is called upon to plead to it. It has been held to be the point of commencement in the trial of warrant cases In re Kali Mudaly (1911) I.L.R. 35 Mad. 701 , and I see no reason why it should not equally be the point of commencement of a trial at the Criminal Sessions of the High Court. There is no rule of practice defining the proper time for raising a plea of autrefois acquit in this country. The artificial English rule against pleading double is certainly not to be applied. Section 403 (1) simply lays down the rule on which a plea of autrefois acquit or convict is founded; and it would seem that the rule could be invoked by an accused person at any stage of the proceedings. However that may be I think that in the present case the plea was taken at the appropriate time. The trial had commenced and the plea of autrefois acquit was raised before the accused pleaded to the charge.

10. There remains the last ground of preliminary objection, namely, that the question of entrustment has already been determined in the case by an appellate Bench of the High Court and is not open to reference and review. It is enacted by Section 4?0 Criminal Procedure Code that judgments and orders passed by an Appellate Court upon appeal shall be final 'except in the cases provided for in Section 417 and Chapter XXXII.' The case provided for in Section 417 is simple enough. The difficulty is to discover whether the exception is intended to cover all or any of the cases provided for in Chapter XXXII, including the case provided for by Section 434 in that Chapter, or whether it is limited to the case provided for by Section 435 which gives a superior Court power to call for the record of an inferior Court whether exercising original or criminal jurisdiction. One would have thought that if the Legislature had intended to so limit the exception in Section 430 it would have said 'except in the cases provided for in Sections 417' and 435'. Chapter XXXII consists of Sections 432 to 442. Of these Sections 432, 433 and 441 relate to a reference to the High Court by a Presidency Magistrate and the disposal thereof. Sections 436, 437, 438, 439 and 440 implement Section 435 and lay down the powers to be exercised and the procedure when the record of an inferior appellate Court has been called for under that section. But it is obvious that Section 435 and its satellite sections would not furnish an exception to Section 430 when an appellate judgment of the High Court is concerned, because one Bench or Judge of the High Court is not an inferior court to another Bench or Judge of the High Court. Unless then, the power of revision conferred by Section 434 is an exception to the finality of an appellate judgment of the High Court (for Section 430 must include the judgment of the High Court as well as the judgment of an inferior appellate court) there is no means of questioning that judgment except in the case provided by Section 417. It has been contended by Mr. Venkatarama Sastri that a reference of a point of law, whether under Clause 25 of the Letters Patent or under Section 434 Criminal Procedure Code, does not involve a revision of a previous decision of that point of law by an appellate court in the same case. His contention is that if a point of law is taken at the trial, the Judge is bound to decide it. He may feel himself bound to decide it in accordance with a previous decision of the High Court, as the learned Chief Justice did here. But none the less he has a discretionary power to refer it. The Bench to which the question is referred does

not sit to review the previous decision of a High Court Bench, but to determine the point of law which has arisen in the trial. There is a precedent for the course which we are invited by Mr. Venkatarama Sastri to take in In re Rathnavelu : (1933)65MLJ529 where a Full Bench on a reference by a single Judge decided a question of law which had already been decided by an Appellate Bench in the same case. But the point which has been argued here as to the effect of Section 430 does not seem to have been brought to the notice of the Court there. It must be assumed that the Legislature in making exceptions to the rule in Section 430 'in the cases provided for in Chapter XXXII', had in mind the power which is given to the High Court to which a question of law has been referred whether under the Letters Patent or under Section 434 to review the case or such part of the case as may be necessary, and to finally determine the question of law referred. There seems to me nothing improbable in the intention to exempt from the absolute rule of Section 430 a review of the case, which means a review of the whole of the case presented at the trial, upon a reference under the Letters Patent or Section 434. The decision of the Appellate Bench that there was an entrustment of the property alleged to have been fraudulently converted could not conceivably conclude that question at the trial. It would not relieve the Crown from proving by evidence an offence under Section 405 nor would it deprive the defendant of his rights upon the plea of ' not guilty' to contend that there was no entrustment in fact or in law disclosed by the evidence. The learned trial judge was entitled to hold in accordance with the view taken by the Appellate Bench that the case for the Crown established an entrustment; but he was also entitled to reserve the question if he thought fit as a point of law which had arisen in the trial. In my opinion therefore we have jurisdiction to entertain the second point of law referred.

11. It will be convenient to deal first with the second question referred because its practical importance is in relation to the plea of autrefois acquit. I think that apart from the alleged cheating in the procuring of the bonds there was an 'entrustment' of his bonds by the complainant to the accused when the bonds were delivered to him. It is clear that the complainant had no intention of parting with his property in the bonds, which, in his evidence, he explained had been purchased by him as an investment. Undoubtedly he indorsed the bonds to the accused's firm; but unless he had done that the bonds would have been of no use to the accused for the

purpose of 'satisfying the Bank' which was the purpose, as represented to the complainant, for which the accused required the temporary use of the bonds. But the complainant's statement, which is confirmed by his evidence, shows that he expected to have his bonds returned to him when the temporary purpose of satisfying the Bank was concluded. It was only on this understanding that the bonds were handed over to the accused. I think the word 'entrustment' aptly describes the delivery of these bonds by the complainant to the accused. It has been contended by Mr. Venkatarama Sastriar that an entrustment requires the elements of a trust - settlor, trustee and beneficiary and that those elements are wanting here. The language of Section 405, Indian Penal Code is very wide - 'whoever, being in any manner entrusted with property, or with any dominion over property' etc. This is sufficient to include the express trustee, the bailee of goods, and any person who is entrusted by its owner with the dominion over property, as, in my opinion, the accused was when the bonds were delivered to him by the complainant. But then it has been contended that an entrustment is inconsistent with the obtaining of the property from its owner by a trick or deception which amounts to theft or cheating. The decision of the House of Lords in Lake v. Simmons (1927) A.C. 487 has been relied on in support of this proposition. It was there laid down by Lords Summer and Atkinson, and in the Court of Appeal Lord Justice Atkin had laid down the law similarly, that the theft of property by means of a trick negatives the notion of an entrustment of property by the owner to the thief. 'If there was a trick' said Lord Summer,

which prevented any true consent arising there could be no entrusting. The terms are mutually exclusive.

12. And Lord Atkinson said:

The so called entrusting of the jewels to her, burnished to her - as she intended it should - the opportunity for and means of committing the theft.

13. Larceny by trick as defined by English Law is not to be found in the Indian Penal Code. Dishonestly taking property out of the possession of its owner without his consent is theft as defined by Section 378. It is cheating under Section 415 to fraudulently induce, by means of a deception, a person (not necessarily the owner)

to deliver property. It might equally be theft where the consent of the owner to the taking of his property had been obtained by a trick and was consequently no consent at all. The offence of criminal breach of trust is quite different from theft, and cheating. It is an essential ingredient of this offence that the person entrusted with property shall dishonestly convert it to his own use. But the state of facts may be so involved as to leave it uncertain which of these three offences has been committed. This difficulty is provided for by Section 236, Criminal Procedure Code which enables the accused to be charged with all these offences or with any one of them; and Section 237 further provides that in such case the accused if charged with one may be convicted of the other or one of the others if the evidence shows that it is the other offence which he has committed. But obviously if the evidence shows, that the offence is theft he cannot be convicted of cheating, or if cheating is proved he cannot be convicted of criminal breach of trust, because the same facts will not constitute both criminal breach of trust and cheating. It has, however, been contended for the Crown that property obtained by cheating-- the contention, as I understand does not cover a case of theft is capable of being fraudulently converted under Section 405 as property entrusted to the cheat. That is to say, when the deception succeeds and the property is delivered the property becomes the subject of entrustment, and the conversion by the cheat of the property so delivered becomes a fraudulent breach of trust within Section 405. Support for this proposition was sought in some observations of Lord Summer in Lake v. Simmons (1927) A.C. 487 where His Lordship pointed out the difference between a consent which was apparent but not real and a real consent obtained by fraud. But their Lordships were considering the construction of a clause in an insurance policy touching the entrusting of property to customers of the insured. Their observations seem to me to give no support at all to the theory that a confidence trickster or a cheat can be viewed in the light of a fraudulent trustee. The word 'entrusted' Lord Haldane has said in Lake v. Simmons (1927) A.C. 487 may have different implications in different contexts. We have here to construe that word as it occurs in a section of the Penal Code headed 'of Criminal Breach of Trust.' The notion of a trust in the ordinary sense of that word is that there is a person, the trustee or the entrusted, in whom confidence is reposed by another who commits property to him; and this again supposes that the confidence is freely given. A person who

tricks another into delivering property to him bears no resemblance to a trustee in the ordinary acceptation of that term; and Section 405 gives no sanction to regarding him as a trustee. The illustrations to the section show that it is intended to cover the case of property honestly obtained by the person entrusted with it, and subsequently dishonestly misappropriated by him in breach of his trust. As I have already said the essence of criminal breachv of trust is the dishonest conversion of the property entrusted. But the act of cheating itself involves a conversion. Conversion signifies the depriving of the owner of the use and possession of his property. When the cheat afterwards sells or consumes or otherwise uses the fruit of his cheating he is not committing an act of conversion, for the conversion is already done, but he is furnishing evidence of the fraud he practised to get hold of the property. It is not necessary to strain the language of Section 405 to catch the cheat, for he can be dealt with apart from that section. In fact, there would be little use for Section 415 if cheating is only a form of criminal breach of trust. For these reasons I think that cheating is a complete offence by itself and cannot be criminal breach of trust. My answer to the second question referred is, therefore, that there is not an entrustment within the meaning of Section 405 when property is obtained by cheating.

14. The accused having been acquitted of the offence of cheating it has to be determined whether this acquittal was a bar to his being tried for criminal breach of trust. The case of the Crown was that the accused by means of a false representation that his firm required the temporary use of the complainant's bonds, to satisfy the Imperial Bank until other bonds of the same description and value, alleged to have been purchased for the Bank by the accused's firm, were returned from Bombay after rectification of endorsements, induced the complainant to hand over his bonds to the accused on the understanding that they were to be immediately returned to him when the purpose of satisfying the Bank was concluded; and that the accused as soon as the complainant delivered the bonds to him sold those bonds without complainant's knowledge or consent and appropriated the proceeds to his own use. It was upon those facts that the accused was acquitted of cheating and it was upon those facts that the accused was charged, tried and convicted of criminal breach of trust. They are identically the same. But the argument of the learned Crown Prosecutor is that this was a

transaction in which there was a series of acts constituting more than one offence within Section 235 (1), Criminal Procedure Code. If this be right, then Section 403(2) will prevent an acquittal of the offence constituted by one act or set of acts being a bar to the trial of the accused for the distinct offence constituted by another act or set of acts. Illustration (b) to Section 235(1) clearly shows its import. Breaking into a house and committing adultery with a married woman within it are two distinct acts and offences. But I do not see how on facts proving house-breaking a person could be convicted of the offence of adultery, and I feel no doubt that an acquittal of adultery could not be pleaded as a bar to trial for house-breaking. The argument here is that the cheating disclosed upon the facts is one act and offence and that the fraudulent conversion is another act and offence. I have already given my reasons for thinking that a cheat does not develop into a fraudulent trustee when he proceeds to enjoy the fruit of his cheating. But the weak point in the learned Crown Prosecutor's proposition is that he was unable to establish his case of criminal breach of trust except by the same evidence necessary to prove cheating. A reference to the evidence called at the trial makes this plain. To establish the charge of criminal breach of trust the complainant was called to prove that he was induced to hand over his bonds by the representation made to him that the accused wanted them temporarily to satisfy the Bank. Another witness was called to prove that this representation was untrue; and another witness proved that the bonds were sold by order of the accused on the same day and immediately after they were received from the complainant. It was by force of the sameness of the facts that the Crown was constrained to seek to establish criminal breach of trust by evidence which would prove the very offence of which the accused had been acquitted.

15. It has been definitely laid down that Section 235(1) has no application where an offence is based upon the identical facts on which another offence has been charged; In re Ganapathi Bhatta (1911) 24 M.L.J. 463 : I.L.R. 36 Mad. 308; Sharbe Khan v. Emperor 10 C.W.N. 518. Illustration (a) to Section 236 and Section 237, Criminal Procedure Code, show that a man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made, Begu v. King-Emperor (1925) 48 M.L.J. 643 : L.R. 52 IndAp 191 >: I.L.R. 6 Lah. 226 and Section 403 (1), Criminal

Procedure Code, says that a person acquitted of one offence shall not be liable to be tried on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237. As already stated the facts of the cheating offence of which the accused has been acquitted are, in my opinion, identical with the facts on which he has been put upon his trial for criminal breach of trust. My answer, therefore, to the first question referred is that the acquittal of cheating furnished a valid plea of autrefois acquit in bar of the accused being tried for criminal breach of trust. It follows that the conviction which has resulted from that trial must be set aside.

16. Mockett, J. This is a reference under Clause 25 of the Letters Patent by the learned Chief Justice, before whom the first accused was tried at the Criminal Sessions for the City of Madras. The circumstances are so unusual that it is necessary to set out the history of this case. They raise several matters of importance relating to the powers of a Judge under Clause 25 of the Letters Patent and also to the rights of the accused persons under Section 345 and 403, Criminal Procedure Code.

17. On the 14th May 1935 one Rao Bahadur Soora Lakshmiah Chetty filed a complaint in the Court of the Presidency Magistrate, Egmore, against the iirst and the second accused, J. Mclver and K. Section Narasimhachari. The effect of that complaint was to allege that on the 24th March 1935 the second accused who was in the employment of the first accused's firm of Huson Tod & Co., Stotk brokers, called upon the complainant and represented to him that Huson Tod & Co., had entered into a contract with the Imperial Bank of India Minder which they were under an obligation to sell and deliver to them 6 12 per cent 1935 Bombay Development Loan bonds of the face value of Rs. 3,50,000 and that the last date to supply the same to the Bank was the 27th March 1935. He also represented that his firm had purchased from Bombay the requisite amount of bonds but that the Imperial Bank had returned them owing to irregular endorsement and the bonds had been sent to Bombay for rectification and that pending their return,

the complainant might oblige them temporarily by giving them his bonds of the said denomination and value to satisfy the Imperial Bank, as the date of completion of the contract was the 27th March 1935 and the Bank's accounts for the official year had to be closed, and that as soon as the bonds purchased by them were received back from Bombay with the endorsement rectified, the complainant's bonds would be returned to him.

18. On the 27th March the second accused repeated his request to the complainant saying that the bonds had not come ' from Bombay and that as that date was the last date for the completion of the contract with the bank:

The complaint should oblige the firm by giving his bonds temporarily for a few days and assured him that he hoped to receive the bonds sent for rectification by the 30th March, and that complainant's bonds would be returned to him on the 1st April, 193S positively.

19. The complainant believing these representations and on the faith of the assurance that the complainant's bonds would be returned on the first April handed over bonds to the value of Rs. 3,50,000:

To be endorsed and delivered over to the accused's firm by his brother and authorised agent on the said date, namely, 27th March, 1935. and on the understanding referred to above.

20. The bonds were not returned and after communications with the first accused (who was the senior partner of the. firm) and what I may term 'negotiations' that went on some days during which the complainant was asked to stay his hand for the ostensible reason that the firm's own bonds were still held up in Bombay it came to the knowledge of the complainant that the story of the accused was false, that no bonds had been sent to Bombay for rectification and that the complainant's bonds had been sold and the proceeds misappropriated by the accused. Paragraph 11 of the complaint goes on:

The complainant submits that in the circumstances the conduct of the accused in first obtaining the bonds in question on false representations and on promise to

return them within a specified time and thereafter disposing of them without the complainant's knowledge and consent and misappropriating the proceeds thereof and putting off the complainant by specious pleas that the bonds sent for rectification had not arrived from Bombay, is dishonest and fraudulent....

21. Paragraph 12 concludes:

In the circumstances, the complainant charges the accused with having committed the offences punishable under Sections 406 and 420, Indian Penal Code, and prays that they be dealt with according to law.

22. Section 420, Indian Penal Code, deals with the offence which in India is known as 'cheating' which is defined in Section 415; and under Section 420, when the subject of the cheating is a valuable security the penalty may extend to seven years imprisonment. Section 406, Indian Penal Code, deals with the offence of 'criminal breach of trust' which is defined in Section 405. The penalty for criminal breach of trust as charged is three years. The offence of criminal breach of trust, although the,, penalty for it is less than for an offence under Section 420, is non-compoundable, while the offence of cheating is compoundable.

23. On the 2nd July, 1935, a petition was put in before the Chief Presidency Magistrate by the complainant stating that:

As the facts alleged (that means in the complaint) would, if proved, amount to an offence under Section 420, Indian Penal Code, which is compound-able with the permission of the Court,

24. It was prayed that the Court will be pleased to grant permission for the case to be compounded. The Chief Presidency Magistrate granted leave and passed the following order:

Permission granted. Case reported compounded. Accused are acquitted.

25. He also made the following note:

The complainant himself and his Counsel both admit that the facts disclosed only an offence under Section 420, Indian Penal Code, which is compoundable with the

permission of the Court. I am also of the opinion that the offence disclosed is only under Section 420, Indian Penal Code.

26. Against that order the Crown filed an appeal which came before Madhavan Nair and Burn, JJ., in Criminal Appeal No. 344 of 1935, reported in Crozvn Prosecutor v. Mclver : (1935)69MLJ681 . The Crown Prosecutor contended that the complaint disclosed not only the offence of cheating but also of criminal breach of trust. They also asked the Court to say that the Magistrate in so far as the offence under Section 420 was concerned had not judicially exercised his discretion and asked that the acquittal be set aside. The learned Judges refused to interfere with the order of the Magistrate acquitting the accused of cheating. They took the view that the complaint did disclose as well as an offence under S.420 an offence under Section 406. It is not necessary to consider all the arguments advanced. It is however necessary to state that in resisting the appeal the learned Counsel for the first accused argued, according to the report, that only one offence, namely of cheating, was disclosed, and in particular argued that there was no ' entrustment ' of the bonds, and he relfed inter alia on the decision of the House of Lords in Lake v. Simmons (1927) A.C. 487. The Court rejected his contentions and discussed the meaning of the word ' entrusted '. They allowed the appeal, set aside the acquittal for criminal breach of trust, and said :

The learned Chief Presidency Magistrate should be asked to restore the complaint OR file and deal with it according to law.

27. Consequently the case proceeded before the Chief Presidency Magistrate. Before him both the accused raised the plea of autrefois acquit; that is to say, they relied on Section 403 of the Code of Criminal Procedure. But although it was attempted to be argued at the time the Magistrate indicated that it was useless to argue the matter and his point of view is clear from the order passed by him on the 12th November, 1935. He took the view that the matter was concluded by the judgment of Madhavan Nair and Burn, JJ. Dealing with the accused's contention he says:

This contention was negatived and their Lordships held that on facts disclosed two offences were made out both under Sections 406 and 420,Indian Penal Code.

When there is a specific direction by the High Court to restore the complaint for an offence under Section 406, Indian Penal Code, it is not open to me to challenge the correctness of that order or to go behind it. My duties are to carry it out.

28. He refused to make a reference under under Section 432, Criminal Procedure Code, and said it was open to the accused to move the High Court. Criminal Revision Petitions were filed by both the accused against that order. In the petition of the second accused it is specifically alleged that the Magistrate refused to decide the point, that is autrefois acquit. The matter came before King, J., who passed the following order:

I see no ground for revision. The petitions are dismissed.

29. That is, he declined to stay the trial.

30. Thereafter the proceedings went on. Both the accused were committed for trial. When the matter came before the learned Chief Justice it is agreed that the following was the course of events, and it is borne out by the shorthand note.

31. No point was taken before the accused was charged as was done in Queen-Empress v. Dolegobind Dass I.L.R. (1900) 28 Cal. 211, This is important and I respectfully agree with the view expressed by Maclean, C.J., that it is only after that stage that a point can be said to 'arise'. I prefer this view to that expressed by a Bench of the Calcutta High Court in Mahammad Yusuf v. Emperor I.L.R. (1931) 58 Cal. 1214, namely that a trial only commences after the empanelling of the Jury. If it were otherwise, an accused pleading autrefois acquit would be driven to making a double plea ' which in England at least would be fatal to his plea of autrefois acquit although there is no such rule in India. But it would be anomalous. The accused was called upon to plead and his counsel took the point that the trial was barred under Section 403, Criminal Procedure Code, and that there was no entrustment within Section 406, Indian Penal Code. Then, according to the learned trial Judge's order:

The Crown Prosecutor took a preliminary objection to the plea. He submitted that the plea of autrefois acquit was not open to the accused then, it having been

raised once before the Chief Presidency Magistrate and disallowed, and the matter having been taken up in revision to the High Court and King, J., having made a final order upholding the order of the learned Chief Presidency Magistrate. On this point I ruled that the Crown Prosecutor's preliminary objection must be upheld for that reason. I here also add a further reason, namely that Madhavan Nair and Burn, JJ., in Crown Prosecutor v. Mclver : (1935)69MLJ681 may have dealt with this plea by implication. I was further of the opinion that the plea was bad in law having regard to the principles laid down by Lord Reading, L.C.J., in Rex v. Barron (1914) 2 K.B.D. 570 in the Court of Criminal Appeal. I accordingly overruled that plea. A further legal point was also raised by the defence that there would not on the facts of the case be an entrustment in law of the property and hence the charge of criminal breach of trust would not lie. In view of the Bench decision in Crown Prosecutor v. Mclver : (1935)69MLJ681 , which being a decision of a Bench of two Judges is binding upon me, I felt that I was unable to allow that point to be argued. I have been requested to reserve this point also and I do so particularly having regard to the important case of Lake v. Simmons (1927) A.C. 487. I accordingly reserve for the consideration of the Full Bench the following Questions (1) whether the plea of autrefois acquit was good in law and (2) whether there could be a legal entrustment of the property having regard to the case put forward by the Crown.

32. Accordingly this matter has come before us on this reference.

33. The Crown Prosecutor took a preliminary objection that we are not competent to hear this reference because it was not within the learned Judge's power to reserve the points concerned, that the points never arose for the learned trial Judge's consideration and that a point which he could not decide could not be for his consideration. Before us the Crown Prosecutor has argued that the Magistrate decided the point of autrefois acquit relying on the decision of Madhavan Nair and Burn, JJ., who by implication decided the same point, and that King, J's order is final. Secondly he argued that the learned trial Judge only referred the question of the merits of the plea of autrefois acquit and did not refer the point taken in the preliminary objection of the Crown Prosecutor, namely that it was not available to the accused to plead it. I will deal with the second point at once. Speaking for

myself I am perfectly satisfied on a reading of the order of the learned trial Judge that he intended to refer, and did refer, to us the whole of the matters relating to autrefois acquit. If it were otherwise, the result would be that we are asked to say that the learned trial Judge while holding that the plea was not available, which order would be final if not referred, has asked us to deal with the merits of the plea, with the result that our dicision would be purely academic and have no effect on this case at all. If we had the least doubt on this I think we should have referred the matter back to the learned trial Judge who could have, if he thought fit, made a further reference, But as the matter is clear beyond doubt this was not considered necessary. All the matters relating to autrefois acquit referred to in the learned Chief Justice's order are therefore before us. It is not possible to get much assistance from the English procedure because Section 403 Criminal Procedure Code, is so generally worded, and there is nothing in the Criminal Procedure Code to amplify it, but it appears that the plea can be taken at any stage in a trial. Obviously the proper time for a plea in bar to be taken at Sessions is at the time when it was taken before the learned trial Judge. But it was also taken, as has been pointed out, before the Chief Presidency Magistrate. An order of the Chief Presidency Magistrate deciding a plea of autrefois acquit cannot possibly be binding on a High Court Judge sitting at Session. But I think it is clear that the Chief Presidency Magistrate did not decide the point at all; and neither did King, J. The accused were not even permitted to conclude their arguments on the subject. The Magistrate's order shows that he took the view that he was directed to proceed with the case and that being so it was useless to hear any arguments directed to preventing him doing so. His order was that the case should proceed. King J.'s judgment amounts in my view to nothing more than an order declining to interfere with that course. A plea under Section 403 Criminal Procedure Code, is a most important right given to an accused person and in England it is dealt with by a formal trial for which a Jury is specially empanelled, although as in Rex v. Barron (1914) 2 K.B. 570 Ridley, J., sitting as a Judge of Assize appears to have ruled out a plea of autrefois acquit without empanelling a jury. There is no procedure laid down, as I have said, in India and I respectfully agree with the course the learned trial Judge took in dealing with the plea himself, as I venture to think pleas of this nature are much more matters for a Judge than for a jury. It is necessary to point

out that the learned trial Judge decided both the questions raised namely, (1) that the plea was not available to the accused, but (2) if it was, that it was bad on the merits. It was at one time faintly argued before us that the point has been dealt with by Madhavan Nair and Burn, JJ. How a plea of autrefois acquit could be decided on an appeal against an acquittal, has not been pointed out. My view is that until the learned Chief Justice decided it, the plea of autrefois acquit had never been decided on the merits. The appellate Court did not decide it, the Magistrate refused to decide it, and King, J's order amounts to nothing more than this, namely, that the case should proceed. It was an order passed in revision, a discretionary order, indicating that he saw no reason to exercise his discretionary powers of interference. I find it impossible to suppose that the learned Judge intended to decide summarily so important a plea as is raised under Section 403, Criminal Procedure Code. Nor do I accept the learned Crown Prosecutor's suggestion that a plea of autrefois acquit can be 'constructively decided'.

34. The next objection by the Crown Prosecutor was that the Chief Justice did not decide the question of entrustment holding himself bound by the decision of Madhavan Nair and Burn, JJ. There is nothing in Clause 25 of the Letters Patent to show that he must decide the point; but when the learned Judge indicates that a decision is binding upon him I think it is clear that he is following the decision of the Bench and so deciding the point.

35. Then it is argued that neither of the points arose in the course of the trial. According to Wallis, J., sitting as a member of the Full Bench who decided the case of Narayanaswami Naidu v. Emperor (1908) 19 M.L.J. 157 : I.L.R. 32 Mad. 220 a trial begins when the accused is charged. See also In re Kali Mudaly I.L.R.(1911) 35 Mad. 701 . Both the objections here were taken after the accused was charged. But it is in any case quite clear from the shorthand note that the 'entrustment' point was also taken at the close of the case for the Crown. It is argued that the learned trial Judge could not reserve a point which he could not decide. I do not know what point a Judge cannot decide. If it is at large, he can decide it; if there is an authority binding on him, he can decide it according to that authority. The words of Clause 25 of the Letters Patent seem to me to give a most important and unfettered right of reservation of points of law at Sessions and in

view of the fact that until 1923 at least there was no right of appeal to anybody from a conviction at Sessions, Section 449 Criminal Procedure Code. I should expect that this most important right, if it was to be in any way restricted, would be done in the clearest possible terms. The alteration affecting the words 'there shall be no appeal' in Clause 25 of ttj,e Letters Patent is made quite plain by the words in Section 449 Criminal Procedure Code specifically referring to the Letters Patent. Under the rules of this High Court a reference under Clause 25 of the Letters Patent is to a Full Bench. Had the learned trial Judge refused the reference and left the first accused to any rights of appeal which he possessed, this point of entrustment must necessarily have come, under the wording of the Code, to a Bench of two Judges. The learned trial Judge has informed us, although it is clear from the shorthand note, that his reference is made under Clause 25 of the Letters Patent and not under Section 434 of the Criminal Procedure Code. The learned Crown Prosecutor argued that this was a reference under Section 434 Criminal Procedure Code, and relied on Section 430 Criminal Procedure Code which reads as follows:

Judgments and orders passed by an appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Chapter XXXII.

36. Section 417 refers to the Local Government's right to appeal against any order of acquittal passed by any Court other than a High Court. Chapter XXXII deals with reference and Revision and includes Section 434. But, as I have alraady stated, it is clear that this is a reference under Clause 25 of the Letters Patent. Mr. Venkatarama Sastri has rightly pointed out that there is no rule of res judicata in criminal matters except when proceedings end in an acquittal or conviction. In so far as the history of litigation such as this exists it is impossible to obtain any assistance from English procedure where such a state of affairs would be impossible. There is no record as far as can be seen of any precedent even here of a matter coming for trial before a Judge of this High Court in which a Bench had heard arguments on the very points arising before him in the same matter. It must be remembered that the arguments of the accused before Madhavan Nair and Burn, JJ., were raised in resistance to an appeal against an acquittal. If he had not raised certain points before those learned Judges, can it be doubted that he would

have had the right to ask the learned trial Judge to refer them to the Full Bench? The learned Judge who admitted the Government's appeal against the acquittal was entitled had he thought fit to post the matter before a single Judge and I presume that the Crown Prosecutor's argument, if right, could have been logically applied to the decision of a single Judge. It seems therefore that 'by the happening of an appeal against an acquittal an accused person may put himself accidentally in the position of losing his important rights under the Letters Patent. Personally I should require the clearest possible authority for such a proposition. As observed by Ramesam, J., when delivering the judgment of the Full Bench in: Dhanaraju v. Motilal Doga : AIR1929 Mad641 .

One would have thought that an attempt by the Indian Legislature to to alter or amend the provisions of the Letters Patent would have been made in express and unambigous terms and not left to be inferred by implication.

37. The judgment of Madhavan Nair and Burn, JJ., was, as I have pointed out, that the acquittal under Section 406 by the Magistrate should be set aside and that the trial should proceed. Both these things have been done. Nothing that is decided by us can in any way affect their order which has worked itself out, for that order was confined purely to the proceedings before the Magistrate. It is, in this 'view unnecessary to consider the decision of the Full Bench reported in Rathnavelu, In re : (1933)65MLJ529 on which Mr. Venkatarama Sastriar relies. For the above reasons I am against the preliminary objections raised by the Crown Prosecutor.

38. It is convenient first to consider the second point referred to us, namely, whether there could be a legal entrustment of the property having regard to the case put forward by the Crown. We have referred to the learned trial Judge who has told us that that means, on the allegations contained in the complaint. I have already summarised the salient features of the complaint. Both the learned Crown Prosecutor and Mr. Venkatarama Sastri have made considerable reference for the purpose of argument to the English Criminal law and I think a comparison between certain offences under the English Law and under the Indian Penal Code is helpful. Section 378 of the Code deals with 'theft' and makes inter alia a striking departure from the common law offence of larceny in that under the Code it is not

necessary to prove that the accused intended to deprive the owner of the property in his goods; dishonest taking out of the owner's possession is enough. The taking must however be against the will of the owner as in larceny. But in India it is not necessary when the taking is facilitated by a trick, for example as in the case of the well-known confidence trick, to invoke the doctrine of no real consent accompanying the handing over of the property so as to make it 'theft'. It is not economine an offence in England to obtain possession of property by false pretences; but the doctrine of larceny by a trick covers such an obtaining. The language of Section 420 of the Indian Penal Code is all comprehensive. Dishonestly obtaining possession of property or property in property is covered by that Section; that is to say, the English felony of larceny by a trick and the misdemeanour of obtaining goods or money by false pretences. The Section of course includes many other forms of cheating, but it is only relevant here to mention those two. On a general examination of the Code I think it is clear that in many cases it faithfully reproduces the Criminal Law of England, although, as in the case of larceny, it anticipated English legislation. For instance, a person who took a motor vehicle for a 'joy ride' and abandoned it by the road side could always be convicted under the Code of theft. It was not until the English Road Traffic Act of 1930, that (by Section 28) such a person was liable to more than a civil action, but dishonestly taking property out of the possession of any person without an intention to deprive him permanently of it was always theft in India since 1860. In my view all the essentials of the English offence of larceny by a trick are contained in Section 415 of the Code. Archbold. 28th Edition, at page 533, describes 'larceny by a trick' as

where a man having the animus furandi obtains in pursuance thereof possession of goods by some trick, the owner not intending to part with his entire property but only the temporary possession of it, this is such a taking as to constitute felony.

39. So the moment the confidence trickster has obtained the wallet containing bank notes from his' victim, he can be arrested. Similarly when by deceit a person is induced to hand the property over to the cheater, the offence of cheating has been accomplished. I mention these matters because, although a Court cannot import English criminal law into the Indian Criminal law, it will naturally treat with

the greatest respect the views of English Courts who have dealt with the every matter with which it is concerned. In India offences are divided into compoundable and non-compoundable offences. It is especially important therefore to consider whether the Legislature in India intended to confine one offence to any given set of facts. Section 405 of the Indian Penal Code defines the offence of criminal breach of trust. It reads, 'whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property... commits criminal breach of trust.' The word 'entrusted' is there used. It is used, in Section 20(4-A) of the Larceny Act of 1916 which is reproduced from the Larceny Act of 1901. There has been in India until this case no considered discussion of the meaning of the word 'entrust' although there are two decisions of this High Court which support the view put forward by the Crown. So far as the text books are concerned I observe that the learned editors of Ratanlal's Law of Crimes, 12th, Edition, at page 987, draw a clear disinction between 'cheating'' and 'criminal breach of trust'. 'Cheating' say the editors, differs from criminal breach of trust in that the cheat takes possession of the property by deception. I think this sentence indicates the difference; and that there is a very real difference between the two offences appears also in other contexts. The distinction between the various offences of theft, cheating, criminal misappropriation and criminal breach of trust are stated in a case reported in Narsinghdas v. Emperor (1928) 106 I.C. 678 where the learned Judge apparently finds the distinctions free from difficulty. The proviso to Section 178 of the Indian Contract Act, before it was amended, when dealing with the pledging of goods etc., makes express provision against their being obtained from their lawful owner by an offence or fraud. In the Mercantile Bank of India v. Central Bank of India : AIR1935 Mad936 the question whether the railway receipts concerned had been 'obtained' by fraud or, as argued by the appellants, had only been the subject of fraudulent conversion or criminal breach of trust, was closely examined. The Crown Prosecutor argues that the word 'entrusted' may be given the most general meaning in the Indian Penal Code; it can mean merely 'handed over'. This argument is derived from an observation of Lord Haldane in Lake v. Simmons (1927) A.C. 487. In that case the House of Lords considered the meaning of the word 'entrusted' as contained in an exception in a policy of insurance and the

question arose as to whether a we man who had induced the plaintiff to let her have possession of jewellery by fraudulently representing that she was the wife of a certain person and that she wanted them for the purpose of showing them to her husband and to a purely fictitious person for their approval, had been 'entrusted' with the jewellery within, the meaning of the exception. To quote the headnote, the trial Judge found that the woman's conduct was fraudulent throughout, and held that she was guilty of larceny by a trick, and the Court of Appeal and the House of Lords accepted these conclusions. The House of Lords decided that the plaintiff had not ' entrusted ' the necklets to the woman and secondly that the woman was not a customer within the meaning of the clause. The important question so far as this case is concerned was the discussion by the learned Law Lords of the term 'entrusted' and it was in that connection Lord Haldane remarked as follows: (p. 499)

Entrusted' is rot necessarily a term of law. It may have different implications in different contexts. In its most general significance, all it imports is a handing over the possession of some purpose which may not imply the conferring of any proprietary right at all.

40. In discussing the case Lord Haldane takes the view that in the same policy in the general clause the word 'entrust' might be used in a general sense, and in that general sense ' the woman might have been entrusted with the necklets. The question arises; in what sense is the word used in Section 405, Indian Penal Code? Lord Sumner at page 505 says:

The whole argument as to the meaning and effect of the word ''entrusted' in the exceptions clause in the policy is at once vitally affected, if the expression 'larceny by a trick' is used in anything but its strict, that is its legal sense.

41. And speaking of the exception, at page 508 he points out that:

The language is the insurer's own, and in an exception it must be read contra proferentes.

42. If he says:

They intended no more than'handed over, they should have said so, and the more plainly the better.

43. I should have thought that that observation was even more applicable to a Criminal Statute which has divided offences in categories as has the Penal Code and where the turning of a phrase or the meaning of a word may decide that an offence can or cannot be compounded. The rules of construction of a penal statute are shortly stated in Halsbury's Laws of England, Vol. 27, page 177 and Harries and Rachpal Singh, JJ., of the Allahabad High Court in Emperor v. Girja Prasad I.L.R.(1935) 57 All. 717 have only recently reiterated that:

It is a well established rule of construction that words in a statute creating a criminal offence must be construed strictly.

44. Lord Sumner apparently differs from Lord Haldane in that (page 508) he takes the view that 'entrusting' has the same sense in the exception as in the general words. At page 506 he points out that, the manner of the trick is immaterial if the result is an absence of consent on the part of the person tricked. There occurs at (page 508 in Lord Sumner's judgment this most important passage:

If there was a trick, which prevented any true consent arising, there could be no entrusting. The terms are mutually exclusive. In my opinion, the natural meaning of 'entrusted' involves that the assured shou Id by some real and conscious volition have imposed on the person, to whom he delivers the goods, some species of fiduciary duty.

45. Now it seems to me that when the second accused was handed over the bonds for a minutely stipulated purpose and to return them after a given time, there was only if there was a real and conscious volition such a fiduciary relationship between Soora Lakshmiah Chetty and him. The Crown Prosecutor agrees that we have to look at the state of mind of Soora Lakshmiah Chetty in this matter; and that his view is correct is borne out by Lord Sumner who says that the word clearly connotes a definite state of mind, and that is the mind of the assured. Now 'handing over' does not connote a state of mind. In the leading case of The Queen v. Tolson (1889) 23 Q.B.D. 168 , Stephen, J., states as follows:

The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition.

46. It would seem then that if, as Lord Sumner says, a trick - and deceit is a trick - prevents any true consent arising, and there can thus be no entrustment, it follows that here the chief element in the offence under Section 406 Indian Penal Code, must be missing. Lord Atkinson's judgment contains so much that seems to me of the greatest assistance in this matter that I venture to quote that part of it in extenso. He said, (pp. 511 and 512):

I think Miss Esme Ellison obtained the possession of the jewellery, handed to her by the appellant by an operation which is appropriately described as larceny by a trick. That, when she got possession of it, she feloniously appropriated it, is not disputed. But the operation of entrusting the possession of the jewellery but not the property in it to her, which, prima facie, would mean handing it over to her to be devoted by her to some legitimate purpose, was treated rather as if it were something separable from, and unconnected with, the theft committed. It really was nothing of the kind. The theft was a composite thing. It consisted first of the false representation the woman made to the appellant, which he apparently believed, secondly, the action he took, acting on that belief, and third, the felonious appropriation of the goods when obtained by her to her own use. The so-called entrusting of the jewels to her, furnished to her - as she intended it should - the opportunity for and means of committing the theft. It does not appear to me to be possible to separate the handing over of the possession of the jewels from the, falsehood which preceded it, and the felonious1' action which followed it. The entrusting of goods to a customer mentioned in the exception cannot mean the delivery in all good faith by a dealer of goods to a customer which that customer has planned to steal, and by that very delivery enabling the customer to effect her felonious purpose. The true character of the operation was larceney of the appellant's goods by means of a trick--the trick being the false and fraudulent representation which this woman made to the appellant, by which the delivery to

her of the possession of the jewels was obtained. The appellant had no suspicion, apparently, that he was about to be robbed through the medium of this trick. He acted perfectly honestly in giving over the possession of the jewellery. So does everyone, presumably, who suffers from larceny by a trick. It is the honest belief of the person robbed in the false statements node which enables the intending thief to defraud him. That, however, does not alter the real character of the entire transaction.

47. It is right to say that in the Court of Appeal Atkin. L.J. (as he then was) took the same view in a minority judgment reported in Lake v. Simmons (1926) 2 K.B. 51 and McCardie. J., the trial Judge similarly, reported in Lake v. Simmons (1926) 1 K.B. 366, We therefore have before us the considered opinion of five Law Lords, a learned Lord Justice, and a learned Judge of the King's Bench Division, on the meaning of the word 'entrusted', as applied to this exception in an insurance policy. But it seems to me that their view goes very much farther in so far as 'entrusting' is concerned, because it amounts to this, that a person from whom goods are obtained by larceny by a trick does not entrust them to the person to whom they were handed. When the Code introduced the word into Section 405, it was, I presume, intended to have a meaning and I am more than content to accept the meaning put upon it by Lord 'Sumner. There was no true consent if there was a trick, says Lord Sumner. I venture to say that there can be no true consent if there was deceit. All the cases of larceny by a trick where possession only was handed over, might equally have been described as 'larceny by deceit'. It seems to me to follow that there can be no consent by a person who is cheated, and so, to adopt Lord Sumner's language, if there was deceit which prevented any true consent arising, there could be no entrusting; the terms are mutually exclusive.

48. Is there any authority which prevents me adopting the above view? Madhavan Nair and Burn, JJ., shortly noticed the case of Lake v. Simmons (1927) A.C. 487 but said that, read in the light of the facts of the case, the decision was not helpful in interpreting the word 'entrusted' and agreed with Lord Haldane that the word might have different implications in different contexts. They seem to take the view that in its most general significance all it imports is a handing over the possession for some purpose which may not imply the conferring of any proprietary right at all.

In this case it seems to me that the accused had a limited proprietary right over the bonds, a very much greater proprietary right than a confidence trickster has who is handed a wallet containing Bank notes to be returned the following day as a token of his victim's (supposed) confidence in hvm. Lord Haldane arrives at the same conclusion, that there was no entrustment, as did the other learned Law Lords. But an examination of his judgment shows, I think, that he largely relied on the fact that the woman was not a customer, as did Lord Blanesburgh who expressed his entire agreement with the judgment of Lord Sumner; and both Lord Sumner and Lord Atkinson divide the argument as to whether the woman was a customer and whether there was any real consent, very definitely. There are two decisions of the Madras High Court, Re Venkatagurunatha Sastri : AIR1923 Mad597 and In re Raniappa (1911) 22 M.L.J. 112 in which persons were convicted of criminal breach of trust under circumstances which show that the property was obtained by means of a trick; but in neither of those cases has the question before us ever really been discussed. They were both long before the decision in Lake v. Simmons (1927) A.C. 487 and it will be observed that the learned trial Judge expressly referred this matter to us 'having regard to the important case of Lake v. Simmons (1927) A.C. 487'. Beyond the fact of the conviction there does not appear to be very much to assist us in either of the above two cases. My learned brother Lakshmana Rao, J., has pointed out that under Section 410, Indian Penal Code, property, the possession whereof has been transferred by theft, or by extortion, or by robbery, or by criminal breach of trust, is 'stolen property', which means that property obtained by cheating is not stolen property, as it unquestionably is in the case of larcency by a trick. This Section 410 is a definitive section for the purpose of the offence of 'receiving stolen property'. I do not see how that can affect the meaning of the word entrust' which is a matter affecting the state of the mind of the trustor. Because the property of a person cheated is for the purpose of another section treated in a certain way with regard to its future, it does not seem to me that the question of whether the victim of the cheating intended to pass the property or the possession or any right at all is as between him' and the cheat in any way affected. It is surely the relations between those two that is material in this case. The English cases were also decided before the case of Lake v. Simmons (1927) A.C. 487. It seemed that on a first reading of Rex v.

Morter (1927) 20 Cr. App. Rep. 53 some assistance might be forthcoming. It appears to have been argued in that case that there was no entrustment, though the facts might amount to larceny by a trick. The Judgment of the Court does not deal with this aspect of it and the facts do-not appear to fit in with larcency by a trick. The question, there was whether the appellant had control of the property charged or not in circumstances whereby he became entrusted. The appellant who was the managing director of a company was given two signed blank cheques to buy respectively a, typewriter and a motor car. He bought these articles but filled up each cheque with a figure greater than the purchase price and appropriated the surpluses. The Lord Chief Justice referred to the case of Rex v. Grubb (1915) 2 K.B. 683 which I have naturally read with great care. The following, sentence occurs in that judgment:

If the accused has obtained or assumed the control of the property of another person under circumstances whereby he becomes entrustejd... then he has committed an offence within the section. For the purpose of determining whether the offence has been committed, the words 'being entrusted' should not be read as being limited to the moment of the sending, or delivering of the property by the owner, but may cover any subsequent period during which a person becomes entrusted with the property.

49. With regard to the last sentence, the basis on which this case proceeded - and I asked the question - was that the two accused were acting in collusion and it is not suggested that the entrusting, if there was one, was at any time other than, when the bonds were handed over by Soora Lakshmiah Chetty. The Court does not deal with the circumstances under which a man can become entrusted that is, what facts constitute an entrustment. In Grubb's case (1915) 2 K.B. 683 the money was handed over to a Company by the prosecutor, but in fact came into the pockets of the accused, and it was held that the entrusting could be said to be to the accused himself. There was no question there of a fraudulent obtaining, and the decision seems to be that where the money is entrusted to one person and goes into the possession of another, it is possible on an examination of the circumstances to hold that it was also an entrustment to him. Apart from the above two Madras cases there does not seem to be any example of a clear-cut case of in

India of cheating, and in England larceny by a trick, in which there has been any conviction on the basis of a fraudulent breach of trust or an offence under Section 20(4-A) of the Larceny Act. On the wording of the Code it has been argued that the words, 'in any manner ' are important. I think that Mr. Venkatrama Sastri's answer that because goods may be ' entrusted ' ' in any manner ' that does not mean that they need not be ' entrusted ' at all, is a sufficient answer. Again stress is laid on the words ' dominion over property '. But there is to be an ' entrustment ' of the dominion over property equally as of property.

50. The point referred is very difficult and obviously of very great importance. I am saying that advisedly because the Legislature has thought fit to allow persons to compound serious offences having the effect of acquittal, and it is therefore most necessary to examine with precision the exact set of facts which constitute a compoundable and a non-compoundable offence. I think that alone is a sufficient reason for saying that the word 'entrust' must be strictly construed. In an immense number of cases a cheat disposes of, that is to say misappropriates, the property he obtained. I do not think it occurred to anybody before that a second prosecution, that is, after a composition or acquittal or conviction can be launched against him for that reason. Lord Atkinson in Lake v. Simmons (1927) A.C. 487 has dealt so comprehensively with that in the passage above quoted that I need not say more.

51. In view of the above I need only notice another argument of Mr. Venkatrama Sastri, which was that as the bonds were endorsed over to the accused for the purpose of being endorsed to the Bank, (because the answers in evidence show that that was what was in the complainant's mind), there could be no entrustment. He relied on three cases which he cited : Rex v. R.V. Holchester (1865) 10 Cox. 224 : 176 E.R. 815, Rex v. Cosser (1876) 13 Cox. 349 and Queen v. Oxenham (1876) 13 Cox. 349 and he argued that the question o(f divesting the title of the owner does not turn on the intention of the transferor. I do not think it is in the least clear that it was in the mind of the complainant that these bonds were ever to be endorsed over to the Bank. Section 405, Indian Penal Code, shows that the ' entrustment ' (assuming an ' entrustment ') can be in the widest possible terms, and I think that there was a clear arrangement that these bonds should be kept for

a limited period and returned. All the decisions in the above cases were before, the legislation, now represented by Section 20 (4-A.) of the Larceny Act of 1916. I am against Mr. Venkatarama Sastri on this point.

52. I think the answer to the learned trial Judge's second question is in the negative.

53. In view of the above answer the first question does not seem to me to arise now; but having been referred, I will endeavour to answer it. I do so of course on the assumption that my answer to the second question should have been in the affirmative, namely that there was a legal entrustment. In approaching the first question referred it is necessary to bear in mind the peculiar position, that I must regard a man who had never been tried at all in exactly the same position as one who after full hearing had been tried and acquitted by a jury. The Crown Prosecutor did, it is true, argue that as there had been no first trial there could be no second trial under Section 403, Criminal Procedure Code, the words of which are:

A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall... not be liable to be tried again....

54. But Section 345 of the Code which deals with the compounding of the offences states that a composition of an offence shall have the effect of an acquittal of the accused with whom the offence has been compounded. If authority for the proposition that a composition has the same effect as an acquittal is required, it is to be found in the case In re Dudekula Lal Sahib : AIR1918 Mad231 , where Wallis, J., considers the question and expressly holds that this statutory acquittal under Section 345, Criminal Procedure Code, is intended to bar further proceedings. As the learned Judge points out, it is difficult to know what effect a composition can have if it does not bar a subsequent prosecution. It must be further taken that the evidence which has been before the Court is the evidence contained in the complaint. I think it is clear that the evidence to be called before the learned trial Judge under Section 406 was precisely the same as that which would have been called on a trial under Section 420, Indian Penal Code. The

importance of this seems to be that the acquittal must be taken to have been on the same facts; and a part of those facts, and a very important part, that proves the guilt of the accused, was the sale of the bonds. Section 403, Criminal Procedure Code, says that:

A person who has once been tried...and convicted or acquitted.... shall... not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237.

55. Section 236, states that if a single act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences. The illustration is that where an accused does an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating, he may be charged with all the four jointly or in the alternative. It is only when there is a doubt under Section 236 that Section 237 arises. It has been held in Naa Po Kyone v. King-Emperor I.L.R.(1933) 11 Rang. 354 that the doubt in Section 236 may be both either with regard to the law or with regard to the facts. Had there been no composition in this case, it seems to me it would have been competent for the learned trial Judge, having regard to what I suggest is a definite doubt about the law in view of the decision in Lake v. Simmons (1927) A.C. 487 to have directed the jury that if they accepted the facts they could convict the accused of cheating. The Crown relies on Section 403(2) read with Section 235(1) of the Criminal Procedure Code. The latter section reads:

If, in one series of acts so connected together as to form the same transaction, more offences, than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

56. The illustrations to Sub-section (1) seem to suggest that the various offences, although intermingled, are complete in themselves. Illustration (a) is: A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. Illustration (b) is: Where a man commits house-breaking

by day with intent to commit adultery and in the house entered commits adultery. The evidence in each seems to be separable. I confess to finding this point difficult of solution. If the second offence alleged was criminal misappropriation under Section 403, I personally should be much more inclined to accept the argument advanced by the Crown. One naturally turns to the authorities for assistance. The Judicial Committee in Begu v. The King-Emperor (1925) 48 M.L.J. 643 : 52 I.A. 191 : I.L.R. 6 Lah. 226 decided that on a charge of murder when the evidence established against three of the accused that they had assisted to remove the body knowing that a murder had been committed, they could without a further charge be convicted under Section 201, Indian Penal Code, read with Section 237, Criminal Procedure Code. The evidence in that case seems to have been all comprehensive on both the offences. In Manhari Ckowdhuri v. Emperor I.L.R. (1917) 45 Cal. 727, the question arose as to whether an acquittal under Section 380 and Section 411, Indian Penal Code, charged in the alternative, bars a subsequent trial for. an offence under Section 54-A of the Calcutta Police Act. The judgment of the Bench (at page 731) points out,

The present proceedings relate to the same act or series of acts to which the previous trial related, and it appears to us that before that trial it might have been said, in the terms of Section 236 that it was doubtful whether the facts which could be proved would constitute theft, or receiving stolen property or an offence under Section 54-A of the Calcutta Police Act....It seems to us that the petitioner in the present case is about to be tried a second time on the same facts for an offence cognate to, or involved in, the offences with which he was previously charged. It is not suggested that if the previous conviction and sentence had been upheld by this Court, the; petitioner could now be punished a second time under Section 54-A.

57. That seems to me a valuable test. Let it be assumed that the accused had been formally tried and convicted or acquitted of cheating. On the general principle that a man should not be tried twice for the same offence, it would surely have been, to say the least, surprising that at the next Sessions he could have been charged with criminal breach of trust. Mr. T.R. Venkatarama Sastri relies also on Emperor v. Jhabbar Mull Lakkar I.L.R.(1922) 49 Cal. 924 in which Sanderson,

C.J., takes a broad view of the principle of autrefois acquit. In that case the accused was tried and acquitted under Section 408, Indian Penal Code, for criminal breach of trust of three sums of money alleged to have been dishonestly misappropriated on three dates. It was. part of the prosecution case at the trial that he had made three false entries to conceal the acts of misappropriation. The learned Judge (p. 927) says,

If he were so tried, in my judgment, it would in effect amount to trying him again for the same offences as those upon which he has already been tried and acquitted by the jury, although the charges now before the Court are framed in a different manner.

58. It should be noted that in that case it was apparently a prominent part of the prosecution case at the trial that three false entries had been made. The principle of autrefois acquit seems to have been liberally applied in this case and Sanderson C.J., expressly confined his decision to the facts before him. An examination of the cases shows that for the application of the principle it is necessary to examine the particular facts closely and the reports do not always set them out. I think In re Ganapathi Bhatta (1911) 24 M.L.J. 473 : I.L.R. 36 Mad. 308 wherein Sundaram Ayyar and Ayling JJ., deal with an interesting case shows how the principle is applied in Madras. The accused was tried and convicted under Section 211, Indian Penal Code, that is, making a false charge with intent to injure. The conviction was quashed on the ground that the accused had not committed an offence under that section but under Section 182 of the Code (giving false information to a public servant) for which no sanction had been granted. The complainant had thereupon obtained sanction to prosecution and was met by a plea in bar. The Bench held that the prosecution was barred by Section 403, Criminal Procedure Code. At p. 312 the learned Judges say,

Section 235(1) seems to us to be inapplicable when the accused is sought to be charged with another offence on the identical facts on which he was charged before with one offence.

59. In Queen Empress v. Erram Reddi I.L.R.(1885) 8 Mad. 308 Brandt, J., held that when an accused was first charged with committing mischief by cutting certain

branches and acquitted, he could not be charged with theft on the same facts. However he thought that the imputed offences of mischief and theft were not distinct offences, nor was there a series of acts but one act or transaction only, the cutting of the tree and the removal of the branches cut. It seems to me that the cutting of the tree constituted mischief without introducing evidence of the removal of the branches. What seems to have been in the learned Judge's mind was very much what has been stated, as above set out, by the Bench in In re Ganapathi Bhatta (1911) 24 M.L.J. 463 : I.L.R. 36 Mad. 308 namely, that when the acts are identical to prove one offence a man cannot afterwards be charged on precisely the same facts with another. The most recent decision of the Madras High Court is that reported in In re Janakirama Raju (1933) 66 M.L.J. 653 : I.L.R. 57 Mad. 554 wherein it was held that an acquittal under Section 397, Indian Penal Code, was a bar to a prosecution under Section 307. The ratio decidendi in that case however was that Section 397 combined several offences including that under Section 307. The Crown have relied on the case of Rex v. Barron (1914) 2 K.B. 570. In that case Lord Reading, C.J., in giving judgment refers to a statement of the law by Hawkins, J., as follows:

It is against the very first principles of the Criminal law that a man should be placed twice in jeopardy upon the same facts. The offences are practically the same, though not their legal operation.

60. Lord Reading says:

It is quite plain that the learned Judge did not intend to lay down, and did not lay down, as a general principle of law, that a man carrotte placed twice in jeopardy upon the same facts if the offences are different.

61. But Section 403 of the Code shows that it may be that Hawkins J's judgment would have been correct in India. It might well be that the evidence might be doubtful to establish the felony referred to in that case, in which case in India the accused could have been convicted of the misdemeanour under Section 236 read with Section 237. Generally, Section 403 is very much wider than the rule of autrefois acquit in England. In the case in Queen v. Dwarknath (1867) 7 W.R. 15 it would be seen that under Section 55 of the old Code of Criminal Procedure there

was a reference only to a 'trial for the same offence'. The Act now is far more explicit and detailed. As Lord Reading observes, the application of the principle laid down in Section 403 is difficult. As an example of this it will be seen (at page 575) that the principles approved by Hawkins and Cave, JJ. in the case of R. v. King (1897) 1 Q.B. 214 while not being actually disapproved, required to be explained and distinguished. The true test seems to be whether as laid down in In re Ganapathi Bhatta (1911) 24 M.L.J. 463 : I.L.R. 36 Mad. 308 an accused person is sought to be tried on the identical facts a second time. I think that is the case here, for it is difficult to see how the facts in this case could be separated as they appear to be inextricably intermingled. The whole basis of the prosecution case is the 'cheating'. In any case it was in my view doubtful which offence had been committed and therefore this case comes within Section 236. I must repeat that by reason of the artificial acquittal under Section 345, Criminal Procedure Code, the result is anomalous, but it must be remembered that that composition was considered by a Bench of this High Court who did not think fit to interfere with it. I of course am concerned not with the merits but with abstract questions of law and as to the first question proposed I think that the proper answer is in the affirmative. I agree with Cornish, J., that the result of these conclusions is that the conviction must be set aside.

Lakshmana Rao, J.

62. The accused was tried for and convicted at the Fifth Criminal Sessions of the offence of criminal breach of trust under Section 406 of the Indian Penal Code in respect of certain Bombay Development Loan Bonds of the face value of Rs. 3,50,000 and the following questions have been reserved by the learned trial Judge for the consideration of this Bench.

(1) Whether the plea of autrefois acquit was good in law.

(2) Whether there could be a legal entrustment of the property having regard to the case put forward by the Crown.

63. A preliminary objection was taken to the competency of the reservation, and the material facts are that on 14th May, 1935 one Rao Bahadur Soora Lakshmiah

Chetty through his brother and authorised agent Gopalaswami Chetty, filed a complaint against the accused, the Senior Partner of Messrs. Huson Tod & Co., a firm of stock brokers as the first accused and K.S. Narasimhachari one of the assistants of the firm as the second accused charging them with offences punishable under Sections 406 and 420 of the Indian Penal Code that is, 'criminal breach of trust' and 'cheating and dishonestly inducing delivery of property'. The case as set out in the complaint is that in or about November 1934 Messrs. Huson Tod & Co., purchased for and delivered to the complainant 6 1/2 per cent 1935 Bombay Development Loan Bonds of the value of Rs. 3,50,000 receiving full payment therefor, and that in or about the last week of March 1935, (that is 24th March, 1935 as admitted during the trial) the second accused represented to him that the firm had entered into a contract with the Imperial Bank of India to sell and deliver to them 6 1/2 as per cent 1935 Bombay Development Loan Bonds of the face value of Rs. 3,50,000 that the last day for supply for the same to the Bank was 27th March 1935, that their firm had purchased from Bombay the requisite quantity of paper but that the Imperial Bank had returned the same owing to irregular endorsement, that the bonds had been sent to Bombay for rectification, that pending receipt of the same from Bombay, the complainant might oblige them temporarily by giving them his bonds to satisfy the Imperial Bank, as the accounts of the Bank for the official year had to be closed, and that as soon as the bonds purchased were received back from Bombay with the endorsement rectified the complainant's bonds would be returned to him. The complainant stated that he would consider the matter if the bonds were not received from Bombay before the due date, and the second accused renewed his request on 27th March 1935 saying that as the bonds had not arrived the complainant should oblige the firm by giving his bonds temporarily for a few days and assured him that they hoped to receive the bonds sent for rectification by 30th March, 1935 and that the complainant's bonds would be returned to him on 1st April, 1935 positively. Believing these representations and on the faith of the assurance that his bonds would be returned in any case on 1st April, 1935, the complainant caused his bonds to be endorsed and delivered over to the firm through his brother and authorised agent Gopalaswami Chetty and the second accused passed a receipt on behalf of the firm. The bonds were not returned by 1st April 1935 and when the

complainant telephoned to the firm on 2nd April 1935 the first accused replied saying that he was writing to him about the matter that very day. This was followed by a letter from the firm signed by the first accused, that the relative bonds had not been received from Bombay duly rectified and that on receipt of the same, the complainant's bonds would be forwarded to him. The bonds were not received and the complainant wrote to the firm on 17th April, 1935 demanding immediate return of the bonds. The first accused replied on 18th April 1935 that the bonds had not arrived from Bombay and to avoid delay they would repurchase and deliver similar bonds by the end of the month if the originals were not got back before 23rd April 1935. The promise was not kept and the first accused represented to the complainant on 29th April, 1935 that his application for a loan to the Imperial Bank was not sanctioned, that he was not then able to purchase similar bonds as promised or pay their value in full, that the Bombay bonds had not been received, and promised that he would pay Rs. 1,00,000 on 30th April 1935, another sum of Rs. 1,00,000 within a fortnight or a month and the entire balance before 31st July, 1935. The first accused further assured the complainant that the financial position of his firm was quite sound and offered to give a letter of guarantee from the second accused. Believing these statements the complainant yielded to the first accused's request for time without any knowledge or suspicion that the accused would have mishandled or otherwise dishonestly dealt with the bonds or that any fraud had been played, and the first accused sent Rs. 50,000 and a guarantee letter from the second accused. A further sum of Rs. 30,000 was received later and when pressed for the payment of Rs. 20,000 to make up the promised initial payment of Rs. 100,000 the first accused denied responsibility for the transaction throwing the blame on the second accused though he himself had been repeatedly taking time for payment of the same. This aroused the suspicion of the complainant and on enquiry it transpired that the story of any bonds being sent to Bombay for rectification was a myth and that after obtaining from the complainant his bonds on false representations and promise to return them in specie the firm sold them away to third parties and misappropriated the sale proceeds. Summons was issued to the accused under Sections 406 and 420 of the Indian Penal Code and an application signed by the Counsels for the complainant and the accused was filed on 2nd July, 1935 that the facts alleged would, if proved amount to an

offence under Section 420 of. the Indian Penal Code which is compoundable with the permission of the Court, that the Court may be pleased to permit the case to be compounded as against the first accused and that on such permission being granted the complainant would report the case compounded against the first accused and will not press the case against the second accused without prejudice to the complainant's civil rights against both the accused. The agent of the complainant was examined and he stated that under instructions from the complainant he wished to compound the case, and offer no evidence. The offence under Section 406 of the Indian Penal Code being not compoundable it was elicited from him that permission to compound was requested as the offence was one under Section 420 as stated in the petition signed by the Counsels for all parties, and the Magistrate passed an order in these terms:

Permission granted, case reported compounded. Accused are acquitted.

64. The order is silent about the offence under Section 406 of the Indian Penal Code though on the application for permission to compound there is a note by the Magistrate that he too was of opinion that the offence disclosed is only under Section 420 of the Indian Penal Code, and the Crown preferred an appeal against acquittal on the ground that the complaint disclosed offences under Sections 406 and 420 of the Indian Penal Code of which the former is not compoundable and the further ground that in the circumstances of the case permission should not have been, granted to compound the offence under Section 420- of the Indian Penal Code.

65. The appeal was heard by Madhavan Nair and Burn, JJ. and by their judgment reported in Crown Prosecutor v. Melver : (1935)69MLJ681 they confirmed the acquittal under Section 420 of the Indian Penal Code but held that the complaint disclosed also an offence under Section 406 of the Indian Penal Code, and ordered a retrial of the accused for that offence.

66. The Magistrate issued process for 11th October, 1935 and applications were filed on behalf of the accused that their acquittal under Section 420 of the Indian Penal Code is a bar to their trial under S, 406 of the Indian Penal Code, and under Section 403 of the Code of Criminal Procedure. Arguments were heard and

without deciding the question the Magistrate intimated that the evidence will be taken. An application was filed on behalf of the accused, protesting against the reception of evidence but the Magistrate observed that in view of the order of the High Court he felt bound to proceed with the trial and an application was filed on 12th November, 1935 requesting the Magistrate to refer the case to the High Court under Section 432 of the Code of Criminal Procedure. The Magistrate declined to make a reference and passed the following order:

In this case the High Court set aside my alleged order of acquittal for an offence under Section 406 Indian Penal Code and directed me to restore the complaint and dispose of the case according to law in Criminal Appeal No. 344,of 1935.

The accused raised the plea of autrefois acquit and stated Section 403(1) Criminal Procedure Code, operates as a bar to the trial of the accused on the same facts when they have been acquitted for an offence under Section 420 Indian Penal Code, and asks me in any event to refer the matter to the High Court under Section 432 Criminal Procedure Code. The learned Crown Prosecutor states that when the appeal against acquittal was argued Mr. Grant raised the point and brought it to the notice of their Lordships that on the facts disclosed the only offence that can be made out was under Section 420 Indian Penal Code and not under,406 Indian Penal Code. This contention was negatived and their Lordships held that on the facts disclosed two offences were made out both under Section 406 and Section 420 Indian Penal Code. When there is a specific direction by the High Court to restore the complaint for an offence under Section 406 India Penal Code, it is not open to me to challenge the correctness of that order or to go behind it. My duties are to carry it out. In the light of ray view I do not think any useful purpose will be served by making a reference under Section 432 Criminal Procedure Code, to the High Court. It is open to the accused to move the High Court, raise the plea there and obtain a stay if they are so advised. Meanwhile the case against the accused for an offence under Section 406 Indian Penal Code, will proceed day to day from tomorrow onwards. Petitions are dismissed.

67. The accused moved the High Court to revise the order and stay further proceedings on among other grounds that the Magistrate had no jurisdiction to

proceed with the case before deciding the objection and after hearing the Crown Prosecutor King, J., passed an order in these terms:

I see no ground for revision. The petitions are dismissed.

68. The accused were ultimately committed for trial by the High Court and from the order of reservation it appears that before the Sessions Trial began a point was taken on behalf of the accused that by reason of the compounding of the offence of cheating under Section 420 of the Indian Penal Code in respect of the same transaction and the consequent acquittal of the accused, the trial of the accused for an offence of criminal breach of trust was barred under Section 403 of the Code of Criminal Procedure. The Crown prosecutor took a preliminay objection that in view of its disallowance by the Magistrate and the final Order of King, J., upholding that order, the plea of autrefois acquit was not open and the objection was upheld. The learned trial Judge also added a further reason that Madhavan Nair and Burn, JJ., may have dealt with the plea by implication and recorded his opinion that the plea was bad in law having regard to the principles laid down by Lord Reading L.C.J. in Rex v. Barron (1914) 2 K.B. 570 in the Court of Criminal Appeal. The plea was accordingly overruled and a further legal point was raised that on the facts of the case there could not be an entrustment in law and the charge of criminal breach of trust would not lie. The trial Judge felt unable to allow the point to be argued in view of the decision of Madhavan Nair and Burn, JJ., which he considered to be binding on him, and the plea of the accused was recorded. This question was raised again during the trial and while disallowing it on the ground that the decision of Madhavan Nair and Burn, JJ., had concluded the matter, the learned Judge intimated that should it become necessary, the point would be reserved under the Letters Patent. The jury was told that the facts if true would bring the case within Section 406 of the Indian Penal Code and by a majority of 8 to 1 the jury found the accused guilty of criminal breach of trust. The trial Judge was subsequently requested to reserve the questions for the consideration of the Bench and the request was granted.

69. The plea of autrefois acquit was not considered by the Magistrate on the ground that the order of the High Court precluded him from going into the question

and the order of King, J., dismissing the petition of the accused to revise the order of the Magistrate cannot be treated as a decision on the plea of autrefois acquit. There was therefore no prior decision of the High Court on the point and the plea was available. It was raised before the trial Judge after the accused was asked to plead to the charge and as observed in Venkata-chennaya In re : (1920)38MLJ370 'trial' may reasonably be taken to be every proceeding which is not an enquiry. The proceeding before the trial Judge was not an enquiry nor can an accused be discharged after being asked to plead to the charge. He can only he convicted or acquitted thereafter and as pointed out in Narayanaswami Naidu v. Emperor (1908) 19 M.L.J. 157 : I.L.R. 32 Mad. 220 not to mention In re Kali MudalyS 'trial' begins when the accused is charged and called on to answer. The contention of the Crown that the trial had not commenced cannot therefore be accepted and even otherwise the plea if available and good, would under the Indian Law, vitiate the entire proceedings. The question need only arise on the trial, to be reserved and it is not even incumbent that the trial Judge should decide the question. It was therefore open to the trial Court to reserve the point and there is no substance in the contention that the availability of the plea has not been reserved. The objection to the reservation of the first question is therefore untenable and in view of a doubt raised during the arguments it was ascertained from the learned trial Judge that the reservation was under Clause 25 of the Letters Patent and not Section 434 of the Code of Criminal Procedure. It is therefore unnecessary to consider the contention of the accused that Section 434 of the Code of Criminal Procedure which is contained in Ch. XXXII of the Code, introduces an exception to Section 430 of the Code which confers finality on judgments and orders passed by appellate Courts except in the cases provided for in Section 417 and Ch. XXXII, nor would it in my opinion make any difference. The finality of the decisions of the High Court in the exercise of its appellate and revisional criminal jurisdiction rests on the absence of any provision for any appeal or revision against such decision and not Section 430 of the Code of Criminal Procedure, nor is Section 417 applicable to orders of acquittal by the High Court. Ch. XXXII deals with references and revisions generally and the power of reservation under Section 434 is also restricted to questions which arise in the course of the trial and the determination of which would affect the event of the trial. The Section does not confer any power

to review or alter prior decisions of the High Court in the same case in the exercise of its appellate or revisional criminal jurisdiction and it is well settled that apart from the express provisions of the Letters Patent or the Code of Criminal Procedure, the High Court has no power of review in criminal matters. This aspect was not raised or considered in Rathnavelu, In re : (1933)65MLJ529 , wherein the order of the High Court at an earlier stage of the case was upset at a later stage but as urged on behalf of the accused, it cannot strictly be said that this Bench has been constituted to review or alter the decision of the High Court in the appeal against acquittal, and Clause 25 of the Letters Patent confers an unfettered discretion on the trial Court to reserve for the opinion of the High Court any point of' law arising at the trial. No doubt this leads to an anomaly but no appeal or revision lies against the order of the trial Judge and the question of entrustment was raised during the trial. It was for the trial Judge to consider whether, there being a prior decision of the High Court, at an earlier stage of the case, the question should be reserved, and on this ground, though not without considerable hesitation, I would overrule the objection to the reservation of the second question.

70. The second question was argued first and the Crown case as alleged in the complaint and explained in the evidence is that believing the false representation of the accused that the bonds were required for being kept or lodged with the Imperial Bank of India temporarily till the receipt of their bonds after rectification of endorsements from Bombay, and on the faith of the assurance that they will be returned in specie on or before 1st April, 1935, the complainant caused his bonds to be endorsed and delivered to the firm through his agent for the express purpose of being so kept or lodged with the Imperial Bank, and that having obtained the bonds by cheating, the accused sold them the same day and misappropriated the proceeds. The bonds could under Section 46 of the Negotiable Instruments Act be endorsed and delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein, and the prosecution case is that they were so obtained by cheating as denned in the Indian Penal Code. That independently of any further act the offence would be obtaining property or dominion over property by cheating was not seriously disputed, and the real question is whether or not when property or dominion over property is obtained by cheating there can be criminal breach of trust in respect of that property. Theft as

defined in the Indian Penal Code, is a dishonest taking or moving of property out of the possession of any person without his consent, and it differs materially from the offence known as larceny in the English Law. Property obtained by cheating is not stolen property under the Indian Law; vide Section 410 of the Indian Penal Code, and the offence of criminal breach of trust is defined in Section 405 of the Indian Penal Code, as follows:

Whoever being in any manner entrusted with property or with any dominion over property dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of the property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract express or implied which he had made touching the discharge of such trust or wilfully suffers any other person so. to do, commits criminal breach of trust.

71. The terms of the section are very wide and entrustment may be brought about in any manner. It may be of mere dominion over property and the word ' entrustment' has not been defined anywhere. It is not a term of law and in the ordinary sense it includes a case of misplaced confidence as well as a case of well justified confidence. That there can be an entrustment obtained by false pretences as distinguished from an obtaining by larceny by trick or theft is recognised under the English Law, and the distinction between the two is emphasised by the Law Lords in Lake v. Simmons (1927) A.C. 487 not to mention the admission of Jowitt, K.C., at page 489. In larceny by trick or theft, the owner is tricked into making delivery and intends to deliver only the physical possession, whereas in entrustment obtained by false pretences there is an intention to transfer some proprietary right. The former is a case of unreal consent extorted by trick, while the latter is one of real consent obtained by deceit. The dividing line is substantial though narrow, and in the latter it is the state of mind of the person who entrusts or reposes confidence that is material. The case on hand falls under the latter category and the offence would not be larceny by trick or theft even under the English Law. It would be ' false pretences ' as defined in Section 32 of the Larceny Act of 1916 and it is clear from Section 20 of that act that there can be entrustment in law to a person who is not a trustee in the strict sense of the term. That there can be entrustment in law when real consent is obtained by deceit is recognised in

the speeches of Lords Sumner and Atkinson in Lake v. Simmons (1927) A.C. 487 and the decision of the House of Lords does not lay down anything more than that obtaining articles by a trick by a person with whom the owner did not intend to deal cannot amount to an entrustment as in that case there could be no real consent by the owner. Esme Ellison was treated by Lake as a mere intermediary and there was no contract between her and the Company. She never proposed to be the buyer herself nor was she authorised to negotiate or to conclude a bargain or to pass property to the proposed purchasers. She never acquired nor was meant to acquire any property from the owner, and I fail to see how that case would support the contention that there can be no entrustment in law when property or dominion over property is obtained by deceit. There was in this case no mistake as to the identity of the person, and there was real consent though it was obtained by deceit. The delivery was not of mere physical possession and there was an intention to vest dominion over the bonds to enable the accused to keep or lodge them with the Imperial Bank till receipt of their bonds after rectification of indorsements from Bombay. There was thus an entrustment of the bonds for a special purpose, and as pointed out in In re Ramappa (1921) 22 M.L.J. 122 and Re Venkatagurunatha Sastri : AIR1923 Mad597 it is immaterial how the accused became entrusted with property or dominion over property. He would be guilty under Section 420 of the Indian Penal Code, of obtaining property by cheating as soon as delivery is obtained and subsequent misappropriation will bring him under Section 406 of the Indian Penal Code, as well. There is therefore no force in the contention that on the case put forward by the Crown there can be no legal entrustment of the property and I would reject it.

72. The plea of autrefois acquit remains to be considered and the question is whether the acquittal of the accused under Section 345 of the Code of Criminal Procedure of the offence under Section 420 of the Indian Penal Code, bars a trial for the offence of criminal breach of trust. That the acquittal relied upon was an acquittal under Section 345 of the Criminal Procedure Code, cannot make any difference vide Re Guggilapu Paddaya I.L.R. (1910) 34 Mad. 253 and Re Dudekula Lal Sahib : AIR1918 Mad231 : I.L.R. 40 Mad. 976 and the answer depends on the correct interpretation of Sections 235, 236, 237 and 403 of the Code of Criminal Procedure. Section 235, provides as follows:

1. If, in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence.

2. If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

3. If several acts of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts.

4. Nothing contained in this section shall affect the Indian Penal Code. Section 71.

73. Section 236 enacts that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once or he may be charged in the alternative with having committed some of the said offences, while Section 237, provides that if in the case mentioned in Section 236, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

74. Section 403 so far as is material provides:

1. A person who has once been tried for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236 or for which he might have been convicted under Section 237.

2. A person convicted or acquitted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 235 Sub-section (1).

75. The plea would not be valid if the case is not covered by Section 236 and falls under Section 235 Sub-section (1), and it cannot be denied that the acts alleged against the accused, namely, obtaining delivery of the bonds by deceit and subsequent conversion are so connected together as to form the same transaction. More offences than one were committed, namely, obtaining delivery of property by cheating under Section 420 of the Indian Penal Code, and criminal breach of trust under Section 406 of the Indian Penal Code, and as stressed by the Crown Prosecutor, acts constituting the offence of obtaining property by cheating cannot by themselves constitute the offence of criminal breach of trust. The ingredients of the offences are different and so is the evidence requisite to establish them. There can be a breach of trust independently of cheating and the offences are distinct and separate. The offence under Section 420 is complete as soon as-delivery is obtained by cheating, and without the further act of misappropriation there can be no breach of trust. Sub-sections 2 and 3 of Section 235 deal respectively with cases in which the same acts constitute an offence falling within two or more separate definitions of any law and cases of compound offences and its component minor offences and Section 236 cannot be invoked unless the act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute. The facts alleged in the complaint in this case if proved - constitute two distinct offences and Sections 236 and 237 would not apply. That the complaint sets out the series of acts forming the transaction, is not material nor has the nature of the evidence adduced any bearing vide Subbiah Kone v. Kandasamy Kone (1931) 62 M.L.J. 197 : I.L.R. 55 Mad. 788 What is barred is a second trial on the same facts for any other offence for which a different charge from the one made against the accused might have been made under Section 236, and as urged by the Crown the accused is not sought to be tried on the very facts which constitute the offence under Section 420 of the Indian Penal Code. The plea of autrefois acquit cannot therefore be upheld and the decisions relied upon are not applicable. There was but one act in Queen-Empress v. Errant Reddi I.L.R.(1885) 8 Mad. 296, namely, the cutting and

removal of the branch of a tree for which the accused could have been charged for theft or mischief or both, while in Ganapathi Bhatta v. Bmperor : (1913)24MLJ463 in which a false complaint was made by the accused to the. Police, it was doubtful whether the offence committed was under Section 211 or Section 182 of the Indian Penal Code. So also in Begu v. King Emperor (1925) 48 M.L.J. 643 : L.R. 52 IndAp 191 : I.L.R. 6 Lah. 226 where on the facts established against the particular accused it was doubtful whether they would be guilty of murder or causing disappearance of evidence of murder, and the offence for which the accused were sought to be tried in In re Janakirama Raju (1933) 66 M.L.J. 653 : I.L.R. 57 Mad. 554 was involved in the offence for which they were previously tried and acquitted. There is no doubt in this case either as to the facts or the offences committed, and as pointed out in Sidh Nath Awasthi v. Emperor I.L.R.(1929) 57 Cal. 17 the decision in Emperor v. Jhabbar Mull Lakkar I.L.R.(1922) 49 Cal. 924 would not fall under Section 403 of the Code of Criminal Procedure. I would therefore hold that the plea of autrefois acquit is not good in law.

76. The conviction is therefore right and should in my opinion stand.