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It was lastly contended for the appellant that even if the High Court could hold a preliminary enquiry into the conduct of a judicial officer, it had no jurisdiction to decide the matter finally, that the findings given by Balakrishna Ayyar J. should not be held to conclude the question against the appellant, and that the Government was bound to hold a fresh enquiry and decide for itself whether the charges were well-founded. No such question was raised in the petition or in the High Court, and we must, therefore, decline to entertain it.

In the result, the appeal is dismissed with costs.

Appeal dismissed.

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January, 11.

OM PRAKASH GUPTA

v.

STATE of U. P.

(with connected appeals)

(S. R. DAS C. J., BHAGWATI, VENKATARAMA AYYAR, S. K. DAS and GOVINDA MENON JJ.)

Implied repeal—Whether s. 409 of the Indian Penal Code is impliedly repealed by s. 5(1)(c) of the Prevention of Corruption Act, 1947 (II of 1947)—Whether the application of s. 409 of the Indian Penal Code to a public servant infringes Art. 14 of the Constitution—Sanction—Whether sanction under s. 6 of the Prevention of Corruption Act necessary for prosecution under s. 409 of the Indian Penal Code.

The offences under s. 409 of the Indian Penal Code and s. 5(1)(c) of the Prevention of Corruption Act, 1947 are distinct and separate, and there is no question of s. 5(1)(c) of the Prevention of Corruption Act, 1947 repealing s. 409 of the Indian Penal Code.

Amarendra Nath Roy v. *The State*, A.I.R. [1955] Cal. 236, approved.

The legislature would not have intended in the normal course of things, that a temporary statute like the Prevention of Corruption Act, 1947, should supersede an enactment of antiquity like the Indian Penal Code.

In the view that the two offences under s. 409 of the Indian Penal Code and s. 5(1)(c) of the Prevention of Corruption Act are distinct and separate there is no infringement of Art. 14 of the

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Constitution in the application of s. 409 of the Indian Penal Code to a public servant.

Sanction under s. 6 of the Prevention of Corruption Act, 1947 is not necessary for a prosecution under s. 409 of the Indian Penal Code.

State v. *Pandurang Baburao* A.R.I. (1955) Bom. 451, *Bhup Narain Saxena* v. *State*, A. I. R. (1952) All. 35 and *State* v. *Gulab Singh*, A. I. R. (1954) Raj. 211, approved.

State v. *Gurcharan Singh*, (1952) Punj. 89, overruled.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals No. 42 of 1954 and Nos. 3 and 97 of 1955.

Appeal by special leave from the judgment and order dated July 7, 1953, of the Allahabad High Court in Criminal Revision No. 1113 of 1953 arising out of the judgment and order dated June 24, 1953, of the Court of Sessions Judge, Kumaun, in Criminal Appeal No. 42 of 1953 (N). Appeal under Article 134(1) (c) of the Constitution from the judgment and order dated December 23, 1954, of the Allahabad High Court (Lucknow Bench) in Criminal Revision No. 141 of 1951 and Criminal Miscellaneous Applications Nos. 454 of 1952 and 159 of 1953 arising out of the judgment and order dated June 4, 1951, of the Civil and Sessions Judge, Sitapur in Criminal Revision No. 5 of 1951. Appeal by special leave from the judgment and order dated January 16, 1952, of the Judicial Commissioner's Court, Vindhya Pradesh, Rewa, in Criminal Revision No. 216 of 1951 arising out of the judgment and order dated September 29, 1951, of the Court of Sessions Judge at Rewa in Criminal Appeal No. 14 of 1951.

S. C. Isaacs and *P. C. Agarwala*, for the appellant in Criminal Appeal No. 42 of 1954.

S. C. Isaacs and *O. N. Srivastava*, for the appellant in Criminal Appeal No. 3 of 1953.

S. C. Isaacs, *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, for the appellant in Criminal Appeal No. 97 of 1955.

G. C. Mathur and *C. P. Lal*, for the respondent in Criminal Appeals Nos. 42 of 1954 and 3 of 1955.

Porus A. Mehta and *R. H. Dhebar,* for the respondent in Criminal Appeal No. 97 of 1955.

1957. January 11. The Judgment of the Court was delivered by

GOVINDA MENON J.— Though these three appeals have been filed against the decisions of different courts and are not connected either as regards community of purpose or the identity of the accused they have been heard together, because the points of law raised in them are identical and the arguments of counsel have proceeded on common lines. Hence a common judgment dealing with the legal aspect would be apt in the circumstances.

Criminal Appeal No. 42 of 1954 has been preferred by Om Prakash Gupta against the dismissal of his Revision Petition by the High Court of Allahabad, thereby affirming the appellate decision of the Sessions Judge of Kumaun who in his turn maintained the sentence of rigorous imprisonment for one year and a fine of Rs. 500 passed on the appellant by the Special 1st Class Magistrate of Nainital on April 30, 1953, under s. 409 of the Indian Penal Code. This appellant was a clerk in the Electric Department of Haldwani Municipal Board and the charge against him was that he received three sums of money :

Rs. 242/5/9 (Ex. P. 14) on July 28, 1951,

Rs. 70/- (Ex. P. 17) on October 19, 1951,

Rs. 135/- (Ex. P. 13) on October 23, 1951.

aggregating to Rs. 447/5/9 and misappropriated the whole amount, though his defence was that having received the money, he gave it to his official superior, Electrical Engineer Pandy ; and did not have anything more to do with the money. The Police charge sheet was under ss. 409 and 467 of the Indian Penal Code, but the conviction was only under the former section. The conviction and sentence imposed upon him by the trial court having been confirmed in appeal by the learned Sessions Judge and further having been affirmed by dismissal of his revision by the High Court of Allahabad, have now become the subject of

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appeal, as special leave has been granted on the question of law raised.

Om Prakash, the appellant in Criminal Appeal No. 3 of 1955, had obtained leave to appeal from the High Court of Allahabad against the opinion of a Full Bench of that court in Criminal Revision No. 141 of 1951, by which it affirmed the order of the Civil and Sessions Judge of Sitapur in Criminal Revision No. 5 of 1951, holding that Om Prakash was improperly discharged by the learned Magistrate of an offence under s. 409, Indian Penal Code, and directing the Magistrate to make a further inquiry into the matter of that offence. It may be mentioned that the learned 1st Class Magistrate held that sanction was essential for the prosecution of Om Prakash and as the same had not been granted, the prosecution was not maintainable. This view did not find acceptance at the hands of the learned Sessions Judge, whose decision was affirmed by the High Court of Allahabad. The charge against him was that as a canal accountant in a Divisional Engineer's office he committed criminal breach of trust of a certain sum of money.

Lal Ramagovind Singh, the appellant in Criminal Appeal No. 97 of 1955, was the Director of Agriculture in the Indian State of Rewa and for the offence of having committed criminal breach of trust of an amount of Rs. 586/10/- on December 4, 1948, he was prosecuted under s. 409 of the Indian Penal Code, on August 13, 1949, and after inquiry, charges were framed against him on February 24, 1950, resulting in a judgment of conviction by the trial court on September 29, 1950, and a sentence of one year's rigorous imprisonment and a fine of Rs. 500. His appeal to the Sessions Judge was dismissed on September 29, 1951, and the revision to the Judicial Commissioner shared the same fate on January 16, 1952. Special leave having been granted to him, Criminal Appeal No. 97 of 1955 was the outcome.

The first question for consideration is whether s. 409 of the Indian Penal Code, in so far as it applies to a public servant (in this case the three appellants were admittedly public servants), has been impliedly

repealed by the enactment of ss. 5(1) (c) and 5(2) of the Prevention of Corruption Act II of 1947, and if that is so, whether a prosecution of the appellants for an offence of criminal breach of trust without the requisite sanction and without conforming to the provisions of the Prevention of Corruption Act, can be legally sustained. Two other questions have also been urged before us and they are: Assuming that there was no such implied repeal, would the application of s. 409 of the Indian Penal Code to a public servant infringe Art. 14 of the Constitution, now that the provisions of the Prevention of Corruption Act and the procedure laid down thereunder are available to deal with a breach of trust by a public servant; and next, if the appellants do not succeed on the first two points, whether the provision for sanction required by the Prevention of Corruption Act would also similarly apply to a prosecution under s. 409 of the Indian Penal Code.

What is first to be determined is whether s. 409 of the Indian Penal Code, deals with the same offence as that contemplated under ss. 5(1) (c) and 5(2) of the Prevention of Corruption Act, and if so, has there been an overlapping of legislation over the same field; and has the latter one impliedly repealed the earlier. For that purpose the provisions of the two statutes have to be succinctly analysed to understand the full scope and the import of the two.

The fasciculus of sections contained in Chapter XVII of the Indian Penal Code beginning with s. 405 of the Indian Penal Code and ending with section 409 of the Indian Penal Code deals with criminal breach of trust. Section 405 of the Indian Penal Code defines criminal breach of trust and s. 409 of the Indian Penal Code is an aggravated form of criminal breach of trust when the same is committed by a public servant, banker, merchant, etc. Analysing s. 405 of the Indian Penal Code, into its component ingredients, it is seen that the following essential ingredients are absolutely necessary to attract the operation of the section:

(i) The accused must be entrusted with property or dominion over property;

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(ii) The person so entrusted must (a) dishonestly misappropriate or convert to his own use that property, or

(b) dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation

(I) of any direction of law prescribing the mode in which such trust is to be discharged, or

(II) of any legal contract made touching the discharge of such trust.

In the above cases he is said to commit a criminal breach of trust.

Section 409 of the Indian Penal Code lays down the punishment when such criminal breach of trust is committed by a public-servant, banker, merchant, etc.

Now we have to ascertain the provisions of the Prevention of Corruption Act dealing with criminal misconduct.

The preamble of the Act makes it clear that the intention was to make more effective provisions for the prevention of bribery and corruption. From this itself, it is clear that the legislature was alive to the fact that something more stringent and drastic than s. 409 of the Indian Penal Code was necessary in the case of bribery and corruption by public servants and it was to effectuate that intention that the Act was put on the statute book. The duration of his piece of legislation in the first instance was only for a period of five years which later on was extended by Act II of 1952 for ten years which would mean that automatically the Act would expire by about the middle of 1957.

Section 3 lays down that offences under ss. 161, 165 and 165-A of the Indian Penal Code which under the provisions of the Criminal Procedure Code were not cognizable are made cognizable. Section 5 enacts that where a public servant accepts, agrees to or obtains gratification other than legal remuneration, then it shall be presumed unless the contrary is proved, that he accepted, obtained or agreed to accept or attempted to obtain that gratification or valuable thing as a motive or reward such as is mentioned in section 161, etc., etc. Sub-section 2 of s. 4 also deals

with this presumption. We are concerned in these appeals with s. 5. Sub-sections 1 (a) and 1 (b) of s. 5, which is designated as *criminal misconduct* in discharge of official duty by a public servant, deal with persons who habitually accept or obtain or agree to obtain gratification other than legal remuneration as a motive or reward as mentioned in s. 161 of the Indian Penal Code. It is not necessary to deal with these two sub-clauses in detail because there is no question of any acceptance of illegal gratification in the present cases but one thing that has to be remembered is that these sub-sections deal with habitual acceptance or obtaining, etc., whereas ss. 161 and 165 deal with even a single acceptance or obtaining. The result is that under ss. 161 and 165 of the Indian Penal Code a prosecution can be laid even in the case of a single act by which a public servant has accepted an illegal gratification, but in order to attract cls. 5(1) (a) and 5(1)(b), there must be habitual commission of the crime. Any stray or a single instance would not suffice to bring within the ambit of the section the offence as contemplated in ss. 5(1) (a) and 5 (1) (b). The result is that the offences under ss. 5 (1)(a) and 5 (1) (b) are an aggravated form of the offence under ss. 161 and 165 of the Indian Penal Code.

As we are concerned with s. 5 (1) (c), the same may be quoted in extenso :

"If he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do."

Section 5 (1) (d) lays down that if a public servant by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage, he commits the offence.

Section 5(2) makes the offence of criminal misconduct punishable with imprisonment which may extend to seven years or with fine or with both. Sub-section (3) is an important piece of legislation to the effect that where a person is charged under s. 5(1) and it is found that the accused person cannot satisfactorily

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account for the pecuniary resources or property disproportionate to his known sources of income, then the fact that he has such extensive pecuniary resources or property is sufficient to presume, until the contrary is proved, that the accused person was guilty of criminal misconduct in the discharge of his official duty and a conviction for that offence shall not be invalid by reason only that it is based solely on such presumption. It is clear, therefore, that where a person is charge with criminal misconduct and it is seen that he is in possession of property or income which could not have been amassed or earned by the official remuneration which he had obtained, then the court is entitled to come to the conclusion that the amassing of such wealth was due to bribery or corruption and the person is guilty of an offence of criminal misconduct. Such a presumption cannot be drawn in the case of a prosecution under ss. 161, 165 and 409 of the Indian Penal Code.

Section 6 provides that for the prosecution of an offence of criminal misconduct under s. 5(2) or for an offence under s. 161 or 165 of the Indian Penal Code, previous sanction is necessary of either the Central Government or the State Government or the authority competent to remove the Government servant. The last section of the statute is a departure or deviation from the procedure till then obtaining in a criminal case and thereby an accused person is held competent to be a witness on his behalf. Whereas under s. 342, Indian Penal Code, as it stood before the recent amendment, no accused person was entitled to be administered on oath and thereby competent to testify in a court of law in a case in which he is accused; under s. 7 any person charged with an offence punishable under s. 161 or s. 165 or 165-A of the Indian Penal Code, or under sub-s. (2) of s. 5 of the Prevention of Corruption Act, is a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial; and there are also certain safeguards provided in the matter of giving such testimony.

We have now referred to the relevant provision of Act II of 1947 in which the most important one for our present consideration is s. 5(1)(c). It will be useful to institute a comparison between s. 405 of the Indian Penal Code and s. 5(1)(c) of Act II of 1947. The question of entrustment is common under s. 405 of the Indian Penal Code and under s. 5(1)(c) of the Prevention of Corruption Act. Whereas under section 405 of the Indian Penal, Code dishonest misappropriation or conversion to his own use of that property would be the necessary criterion, with regard to s. 5(1)(c) the misappropriation or conversion may be either dishonestly or fraudulently or otherwise.

Then again there is a further fact under s. 5(1) (d) that if the public servant by corrupt or illegal means or otherwise abuses his position as a public servant and obtains for himself or for any other person any valuable thing or pecuniary advantage, then he will be guilty of the offence. We may, therefore, give below the ingredients of the two sections :—

Section 405 of the Indian Penal Code.

1. Entrusting any person with property or with any dominion over property.

2. The person entrusted

(a) dishonestly misappropriating or converting to his own use that property.

(b) dishonestly using or disposing of that property or wilfully suffering any other person to do so in violation—

(i) of any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust.

Prevention of Corruption Act II of 1947 : *Section* 5(1) :

(c) dishonestly or fraudulently misappropriating or otherwise converting for his own use any property entrusted to him, or under his control as a public servant or allowing any other person to do so.

(d) If he by corrupt or illegal means or by otherwise abusing his position as a public servant,

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obtains for himself or for any other person any valuable thing or pecuniary advantage.

Now 'dishonestly' as defined in s. 24 of the Indian Penal Code connotes the doing of anything with the intention of causing wrongful gain to one person or wrongful loss to another person and s. 25 defines 'fraudulently' as doing a thing with intent to defraud but not otherwise. It is, therefore, clear that s. 5(1)(c) is wider in ambit than section 405 of the Indian Penal Code.

The argument of the learned counsel for the appellants is that though the offences under the two provisions are indetical, there are some advantages where the trial is under s. 5(1) (c) and certain disadvantages as well. The advantages are :—

(1) The punishment for criminal mis-conduct is less than the punishment for breach of trust by a public servant ;

(2) It is necessary to obtain previous sanction for a prosecution under s. 5 (1)(c), whereas in the case of breach of trust by a public servant, such sanction may or may not be necessary ;

(3) The investigation of an offence under s. 5(1)(c) should be by an officer of a higher grade though that does not obtain so far as the present appeals are concerned ;

and

(4) The accused person has the right of giving evidence on his behalf.

The disadvantages are that in such a trial the presumption referred to in s. 4(3) can be drawn against the accused if it is found that he has pecuniary resources or property disproportionate to his known sources of income and also the two presumptions regarding the acceptance of a valuable thing from any person by a public servant as contemplated in sub-ss. (1) and (2) of s. 4. These differences, according to the learned counsel for the appellant, do not in any way make the offence under s. 5 (1)(c) different from the offence under s. 409 of the Indian Penal Code, but that only another method of procedure is prescribed and a different mode of approach is laid down when an offence under s. 5(1)(c) is enquired into or tried.

Mr. Isaacs strenuously urges that if there are two different statutes, one enacted later than the other, and if the later statute deals with the same subject matter, the two cannot stand together and the earlier one being redundant or repugnant must be deemed to have been repealed. The result is that whereas in this case there are penal statutes dealing with the same subject matter and the penalties and procedure prescribed by the statutes are different from each other, then the later one must be taken to repeal or supersede the earlier.

Reliance is placed on certain observations contained in *Zaverbhai Amaidas* v. *The State of Bombay*( ) containing some quotations from the judgment of Goddard J. in *Smith* v. *Benabo*(2) to the following effect :—"That if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute : see *Michell* v. *Brown*(3), per Lord Campbell and also *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(4).

On the footing that s. 5 (1) (c) of Act II of 1947 deals with the same subject with regard to public servants as that portion of s. 409 of the Indian Penal Code, Mr. Isaacs drew our attention to *The State* v. *Gurcharan Singh*(5). In that case Falshaw J. in delivering the judgment of a Bench consisting of himself and Khosla J. held that so long as s. 5 of Act II of 1947 remained in force, the provisions of s. 409 of the Indian Penal Code, so far as it related to offences by public servants, stood repealed. The learned Judge after referring to the various provisions of the Prevention of Corruption Act came to the above conclusion. After adverting to s. 26 of the General Clauses Act and its counterpart, s. 33 of the Interpretation Act and also passages from Maxwell on Interpretation of Statutes, the learned Judge was of opinion that it is not possible to infer that there was no implied repeal.

Before we advert to the Indian cases, the first thing that has to be remembered in this connection is that

(1) [1955] 1 S.C.R. 799 at pp. 807-809.
(2) [1937] 1 K.B. 518.
(3) [1858] 1 E. & E. 267,274,117 R.R. 206.
(4) [1896] A.C. 348.
(5) 1952 Punj. 89.

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the Prevention of Corruption Act being a temporary one, the legislature would not have intended in the normal course of things that a temporary statute like the one in question should supersede an enactment of antiquity, even if the matter covered the same field. Under s. 6(a) of the General Clauses Act if by efflux of time the period of a temporary statute which had repealed an earlier statute expires, there would not be a revival of the earlier one by the expiry of the temporary statute.

A Full Bench of the Bombay High Court in *The State* v. *Pandurang Baburao*(1) held that the language used by the legislature in s. 5 (4) of the Prevention of Corruption Act clearly negatived any suggestion that the legislature intended to repeal the provisions of s. 409 of the Indian Penal Code. It cannot also be held that s. 409 of the Indian Penal Code is impliedly repealed by the Prevention of Corruption Act because it is impossible to say that the provisions of the two are wholly incompatible or that the two statutes together would lead to wholly absurd consequences. Therefore, it was open to the prosecution to proceed with a trial under s. 409 of the Indian Penal Code or under s. 5(2) of the Prevention of Corruption Act even before the amendment of the latter Act by Act LIX of 1952 and if the prosecution was launched under s. 409 and if the status of the accused was such that no sanction was required under the provisions of the Criminal Procedure Code, then the prosecution is good and the conviction is proper notwithstanding the fact that if the prosecution had been lauched under s. 5(2), a sanction would have been necessary. The learned Judges dissented from the opinion expressed by Falshaw J. in *The State* v. *Gurcharan Singh* (supra) and also overruled certain earlier Bombay cases. This court is in agreement with the expression of opinion by the learned Chief Justice of the Bombay High Court in the above Full Bench decision.

Ramaswami J. of the Madras High Court in *Re. V. V. Satyanarayanamurthy*(2) came to the conclusion that s. 5(1) (c) of the Prevention of Corruption Act

(1) A.I.R. [1955] Bom. 451. (2) A.L.R. [1953] Mad.

does not repeal s. 409 of the Indian Penal Code, and he accordingly dissented from the view taken in the case *The State* v. *Gurcharan Singh* (supra).

The Calcutta High Court in *Amarendra Nath Roy* v. *The State*(1) has taken a similar view dissenting from *The State* v. *Gurcharan Singh* (supra). There is a large body of case law in this direction and it is unnecessary to mention all except the following :

(a) *Mahammad Ali* v. *The State*(2),

(b) *Bhup Narain Saxena* v. *State*(3),

(c) *Gopal Das* v. *State*(4).

As against all these cases the long voice of the Punjab High Court in *State* v. *Gurcharan Singh* (supra) is the only dissentient one and after considering the matter carefully, it seems to us that the view taken by the Punjab High Court is not sound.

We now proceed to consider whether the two sections are identical in essence, import and content and in our opinion the argument on behalf of the State carries much force when it is suggested that by enacting the Amending Act of 1952 and creating sub-s. 4 to s. 5 the legislature specifically stated that the offence under s. 5(1)(c) is different from any previous existing offences under any penal statute and there can, therefore, be no scope for speculation about repeal. The words used in sub-s. 4 "any other law" made the position quite clear and explicit. Other law does not mean identical law in which case the word 'other' will have no meaning. At an earlier stage of this judgment we have already tabulated the different elements constituting the two offences and a clear comparison and contract of these elements would show that an offence under s. 405 of the Indian Penal Code is separate and distinct from the one under s. 5(1)(c). There are three points of difference between s. 405 of the Indian Penal Code and s. 5(1) (c). The dishonest misappropriation contemplated in s. 405 of the Indian Penal Code is different; whereas that under section 5 (1)(c) is either dishonest misappropriation or fraudulent misappropriation. The latter section is much wider in amplitude

(1) A.I.R. [1955] Cal. 236.
(2) A.I.R. [1953] Cal. 681.
(3) A.I.R. [1952] All. 35.
(4) A.I.R. [1954] All. 80.

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than the former. In s. 405 of the Indian Penal Code the words used are "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." There are no such expressions in s. 5(1)(c). It is clear, therefore, that whereas under s. 405 of the Indian Penal Code there are three essential ingredients to constitute the offence, each one of them being separate and distinct, in s. 5(1)(c) there are only two. Now considering s. 5(1)(c) there are certain matters in it which are absent in s. 405 of the Indian Penal Code. The words 'dominion' and 'entrustment' connote two different things. The word 'dominion' is not in s. 5(1)(c). We have already stated that the word 'fraudulently' is not present in s. 405 and in s. 5(1)(c) the gist of the offence can also be made out if the offender allows any person so to do, *i.e.*, allows any person to derogate from the law as contemplated in the earlier portion of the section. The meaning put on the word 'allows' would certainly be different from 'dishonest misappropriation' by the offender himself. It may be that the word can mean allowing by negligence or without any volition on the part of the offender. It may also mean that there is some kind of positive and tacit acquiescence necessary to bring home the offence. In any event, allowing other persons so to do does not find a place in s. 405 of the Indian Penal Code though this section also contemplates "wilfully suffering any other person so to do." There is an essential difference between "allowing" a person and "wilfully suffering" a person to do a certain thing.

There can, therefore, be no doubt whatever that s. 5(1)(c) of the Prevention of Corruption Act creates a new offence called "criminal misconduct" and cannot by implication displace the offence under s. 405 of the Indian Penal Code. In this connection it is useful to compare ss. 5(1)(a) and 5(1)(b) with ss. 161 and 162 of the Indian Penal Code. As has already been referred to, these two sections are aggravated forms of ss. 161 and 162 of the Indian Penal Code and the intention cannot be to abrogate the earlier

offence by the creation of the new offence. These two offences can co-exist and the one will not be considered as overlapping the other. A course of conduct can be proved when a person is arraigned under ss. 5(1)(a) and 5(1)(b), but such a course is impossible to be let in evidence when an offence under ss. 161 and 162 is being enquired into or tried. Similarly there are a number of elements which can be proved in an inquiry or trial under s. 5(1)(c) that cannot be let in by the prosecution when a person is charged for an offence under s. 405 of the Indian Penal Code. In s. 405 of the Indian Penal Code the offender must wilfully suffer another person to misappropriate the property entrusted, but in s. 5(1)(c) if he allows another person to dishonestly or fraudulently misappropriate or otherwise convert for his own use any property so entrusted, then it is an offence. There is a vast difference between wilfully suffering another and allowing a person to do a particular thing and in our view the word "allows" is much wider in its import. Wilfully pre-supposes a conscious action, while even by negligence one can allow another to do a thing.

It seems to us, therefore, that the two offences are distinct and separate. This is the view taken in *Amarendra Nath Roy* v. *The State* (supra) and we endorse the opinion of the learned Judges, expressed therein. Our conclusion, therefore, is that the offence created under s. 5(1)(c) of the Prevention of Corruption Act is distinct and separate from the one under s. 405 of the Indian Penal Code and, therefore, there can be no question of s. 5(1)(c) repealing s. 405 of the Indian Penal Code. If that is so, then, article 14 of the Constitution can be no bar.

The last argument of Mr. Isaacs is that despite the fact that the prosecution is under s. 409 of the Indian Penal Code, still sanction to prosecute is necessary. Quite a large body of case law in all the High Courts has held that a public servant committing criminal breach of trust does not normally act in his capacity as a public servant, see

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(a) *The State* v. *Pandurang Baburao* (supra),
(b) *Bhup Narain Saxena* v. *State* (supra),
and
(c) *State* v. *Gulab Singh*(1).

We are in agreement with the view expressed by Hari Shankar and Randhir Singh JJ. that no sanction is necessary and the view expressed by Mulla J. to the contrary is not correct.

Criminal Appeal No. 3 of 1955 will accordingly be dismissed. Criminal Appeals Nos. 42 of 1954 and 97 of 1955 will be heard on merits.

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January, 22.

L. J. LEACH AND COMPANY LTD.

v.

JARDINE SKINNER AND CO.

(BHAGWATI, VENKATARAMA AYYAR, B. P. SINHA and S. K. DAS JJ.)

Amendment of plaint—Addition of alternative ground for claim —Necessary allegations present in plaint—Fresh suit on amended claim barred by limitation—Whether amendment should be allowed— Action in trover—When maintainable.

The appellants filed a suit for damages for conversion against the respondents on the allegations that the respondents were the agents of the appellants, that the appellants had placed orders for certain goods with the respondents, and that the respondents had actually imported the goods but refused to deliver them to the appellants. The suit was dismissed on the findings that the parties stood in the relationship of seller and purchaser, and not agent and principal and that the title in the goods could only pass to the appellants when the respondents appropriated them to the appellants' contracts. In appeal before the Supreme Court, the appellants applied for amendment of the plaint by raising, in the alternative, a claim for damages for breach of contract for non-delivery of the goods. All the allegations necessary for sustaining a claim for damages for breach of contract were already present in the plaint and the only allegation lacking was that the appellants were, in the alternative, entitled to claim damages for breach of contract by the non-delivery of the goods. But a fresh suit on the amended claim was barred by limitation on the date of the application.

Held, that this was a fit case in which the amendment should be allowed. The fact that a fresh suit on the amended claim was

(1) A.I.R. [1954] Raj. 211.