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LIABILITY OF DIRECTORS FOR CRIMINAL BREACH OF TRUST: RECOVERING A LOST INTERPRETATION

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Dishonest breach of trust by company directors was proscribed under section 405 of the *Penal Code* from inception. From this fundamental orientation departing from the English piecemeal treatment of embezzlement, false pretences and conspiracy to defraud, the article exposes differences in the way director's breach of trust is dealt with under section 405 and under the English statutory offence of embezzlement. Taking into account important backdrop perspectives which bear on the construction of section 409 as a punishability provision, it reaches conclusions opposite to the holding of the Court of Appeal in *Lam Leng Hung (CA)*. One is that directors who commit dishonest breach of trust acting within the scope of authority fall to be punished more severely under the second agency-limb of section 409. Directors who knowingly act without authority in the company's name also do so but under the first limb. Finally, directors who misappropriate company property for personal use or benefit do not fall within section 409 and are punishable exclusively under section 406.

I. INTRODUCTION

The recent case of *Public Prosecutor v Lam Leng Hung*[1] raised important questions as to the criminal liability of directors for breach of trust. The facts are very well-known, being widely and prominently reported in the national newspapers. City Harvest Church ("CHC") was an incorporated charity with advancement of religion as its general object. Mr Kong Hee was senior pastor and Mr Tan Yee Peng deputy senior pastor. Both were directors (members of the CHC Management Board), as was also Mr John Lam Leng Hung. The other co-accused, Ms Sharon Tan Shao Yuen, was an officer of the company. All save Sharon Tan were charged that they had conspired to commit criminal breach of trust as agents by dishonestly diverting CHC building funds into investments in sham bonds. All save Kong Hee and John Lam were charged for conspiracy to commit criminal breach of trust as agents by dishonestly misusing CHC funds to replace the funds which had been diverted. The material events if true amounted to what would under the common law be conspiracies to defraud the company by its directors and/or officer. The accuseds were not thus charged for the simple reason that the common law offence does not exist as such in Singapore. Under the Singapore *Penal Code*[2] which exhaustively sets out the

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1 [2017] 4 SLR 474 (HC) [*Lam Leng Hung (HC)*].
2 Cap 224, 2008 Rev Ed Sing.

offences which are triable, the offences for which both directors and officer were charged were essentially section 405 and 409 offences, namely committing criminal breach of trust in the way of their business as agents. After a lengthy trial, they were convicted and sentenced to varying sentences reflecting criminal breach of trust by an agent under section 409. All accused persons succeeded on their appeal against sentence, though not conviction. A majority of the High Court (comprising three judges) reduced their sentences, holding that as directors or officer they could not be liable for breach of trust as an agent under section 409 (and therefore conspiracy to do so).[3] They were not professional agents carrying on the business of agents and could only in law be held to have committed criminal breach of trust under section 405 and punishable under section 406. This decision of the majority resolved the conflicting views of the Privy Council in *Cooray v The Queen*[4] and Supreme Court of India[5] in favour of the former. The dissent *inter alia* appealed to the clear criminal policy of section 409 to deter fraud by businesses so that it would be anomalous to exclude corporate fraud by company directors or officers from its reach. To resolve doubts on what was an important question of law of public interest, the Attorney-General raised a criminal reference for a definitive decision by the Court of Appeal. This article concerns the unanimous judgment of the five-member Court of Appeal which upheld the High Court's judgment on reference. Considering the special position of a High Court of three judges as appellate tribunal on a criminal appeal, the final outcome therefore was in effect resolved by an exceptional majority of seven to one.

At the centre of the reference was the key phrase "in the way of his business... as an agent" contained in section 409. Contrary to the Court of Appeal's judgment, this article advances the view that that phrase is apt to describe company directors and officers committing "business fraud".[6] Part II highlights the historical United Kingdom ("UK") development which influenced the Court vitally, namely the *Punishment of Frauds Act, 1857* (UK),[7] which the Court said, criminalised breach of trust by directors for the first time but was omitted from the *Penal Code*. Part III draws attention to backdrop perspectives not canvassed in either the High Court or Court of Appeal. It centres on the overlooked 19th century innovativeness of section 405 to criminalise dishonest equitable fraud.[8] It also demonstrates that even before the breach of trust by company directors was prohibited by the *1857 Act*, the same liability was already created by section 405 as originally conceived in 1836. The *1857 Act* was therefore unnecessary as well as immaterial to the interpretation of section 409 as to whether it was applicable to company directors and officers. Parts IV and V share a common aim of tracking down the key phrase to its origins in the social and corporate

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3 *Lam Leng Hung (HC)*, *supra* note 1.

4 [1953] AC 407 [*Cooray's Case*].

5 *RK Dalmia v Delhi Administration* AIR 1962 SC 1821.

6 This word is used in the narrow sense of dishonest breach of trust in relation to entrusted property and not intended to cover reckless mishandling of property or dishonest business practices which deceive a transactor as to the nature of the transaction entered into.

7 20 & 21 Vict c 54 [*1857 Act*].

8 Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles" in Wing-Cheong Chan, Barry Wright & Stanley Yeo, eds, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Farnham: Ashgate Publishing Limited, 2011) 19.

context of Victorian England.[9] These investigations offer substantial arguments that it would make little sense that directors who committed business fraud within section 405 would not be liable to enhanced punishment for business fraud under section 409. On the other hand, the application of section 409 to directors committing business fraud would be perfectly sensible if it followed and adopted the external meaning of agency which was already a familiar conceptualisation of business fraud committed by employee agents of a sole proprietor and directors of a joint stock company, unincorporated.

II. The Court of Appeal Judgment

Before the Court of Appeal, there was no dispute that both directors and officer had committed criminal breach of trust under section 405. This section is reproduced for convenience:

> 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 that 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 has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits "criminal breach of trust".[10]

As for section 409, it was common ground that the same section 405 offence in the circumstances falling within section 409 is more 'heinous';[11] and those circumstances for the purposes of disposition by the High Court of the appeal from the District Court judgment as well as the Court of Appeal judgment were "[being] entrusted. . . in the way of his business as. . . an agent".

There is also little doubt that the Court of Appeal's conclusion that company directors and officers could not be punished under section 409[12] was heavily influenced by the Court's careful historical demonstration that the enactment of the offence

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9 The article does not discuss the judgment on preliminary matters as to what will amount to a question of law of public interest where a special coram is constituted to hear the appeal from the trial court. Nor does it discuss the precedential status of a Privy Council decision. Nor further does it discuss the refusal of the Court to make "dog-law", a term coined by Bentham in Jeremy Bentham, *Truth Versus Ashhurst, or, Law as it is, contrasted with what is said to be: written in December, 1792 and now first published* (London: T Moses, 1823) cited in *R v Rimmington* [2006] 1 AC 459 (HL) at para 33. See also *R v Withers* [1975] AC 842 (HL).

10 The Law Reform Commission of Hong Kong, *Report on Creation of a Substantive Offence of Fraud (Topic 24)*, (Hong Kong: The Law Reform Commission of Hong Kong, July 1996), online: The Law Reform Commission of Hong Kong <https://www.hkreform.gov.hk/en/docs/rfraud-e.pdf> seems to have misunderstood the provision, stating at para 4.45:

> We are advised that this provision is more often used in Malaysia and Singapore in complex commercial crime cases than the cheating provisions discussed above. However, the provision appears to be more akin to a theft offence than a general fraud offence, concentrating as it does on the conduct of the accused rather than on any deception offering inducement to the victim.

11 See *Cooray's Case, supra* note 4.

12 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 (CA) [*Lam Leng Hung (CA)*].

of criminal breach of trust in India and Singapore tracked very closely the English statutory law of embezzlement. The Court noted that the offence of criminal breach of trust was conceived by Macaulay in 1836. In the 1837 draft of Macaulay's *Penal Code* for India, section 386 set out the provisions which were to become section 405 in Singapore. Section 388 meted out aggravated punishment for public servants in the Post Office Department who misappropriated letters of packets entrusted to them. Section 409 did not exist then. It was clearly a later insertion superseding section 388.[13] The Court further drew attention to critical background light on this replacement. Following a series of English overtures to create a similar penal code for England and Wales (the English Digest), the Indian Law Commissioners in 1846 were directed to report on their analysis of comparisons between the draft Indian *Penal Code* and the results of the English counterpart. In the words of Andrew Phang JA:

> They expressly stated that ***the offence of CBT in the Indian Penal Code "takes the place" of embezzlement in the English Digest***, and that ***there was "no material difference between the two"*** *save that the English code exempted trustees from criminal liability* [emphasis added][14]

Proceeding to the lynchpin point, Andrew Phang JA said:

> Critically, in 1857 – which was three years before the enactment of the Indian Penal Code in 1860 *but almost a decade after the CBT provisions in the Indian Penal Code were reviewed in 1846 based on the English Digest* – the UK Parliament passed the Punishment of Frauds Act 1857 (c 54) (UK) ("the Punishment of Frauds Act 1857"). ***For the first time***, ***fraudulent misappropriation of property by trustees, bailees and directors and officers of body corporates was criminalised in the UK***.[15]

That was enacted in section V of the *1857 Act* after section II of the same Act reproduced the 'exception' which had made "bankers, merchants, brokers, attorneys and other agents" liable for embezzlement in the *Embezzlement by Bankers, etc Act 1812*;[16] but removing the writing restriction from it.[17] The juxtaposition of both offences, one new and the other pre-existing, was critically illuminating for the Court of Appeal since the Court regarded section II of the *1857 Act* as the precursor of section 409 through the *1812 Act*. To the Court, "it would have made *little sense* for the UK Parliament to have included s II alongside s V in the very same statute if it took the view that directors *already fell* within the scope of the prohibition in

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13 Thomas Macaulay, *A Penal Code prepared by the Indian Law Commissioners, and Published by Command of The Governor General of India in Council* (London: Pelham Richardson, 1838) at 52.

14 *Lam Leng Hung (CA), supra* note 12 *at* para 191.

15 *Ibid* at para 194. See also *ibid* at para 238.

16 52 Geo III, c 63 [*1812 Act*].

17 See *Lam Leng Hung (CA), supra* note 12 at para 205.

s II."[18] Thus, the Court saw in the *1857 Act*, compelling support for the conclusion that:

> [T]*he word "agent" in the phrase "a banker, merchant, broker, attorney, or agent" in s II (as taken from s 49 of the Larceny Act 1857 and later transplanted into s 409 of the Penal Code) was* ***not intended to include directors or officers of body corporates*** **(sic)**[19]... [Corroboratively,]... although the Indian Penal Code of 1860 was passed only after the introduction of the Punishment of Frauds Act 1857, ***the Punishment of Frauds Act 1857 and the socio-historical context leading up to its enactment did not form part of the material on which the Indian Penal Code was based***. This is because... *the CBT provisions in the Indian Penal Code were based on a review of the embezzlement provisions in the English Digest in 1846, which was* ***more than a decade before the enactment of the Punishment of Frauds Act 1857***.[20]

To sum up the reasoning, (1) the *1857 Act* premised that directors and officers of a company were not within section II (which reproduced the precursor of section 409); (2) a new section V had to be added expressly referring to directors and officers; (3) however in Singapore, section V's express reference was omitted from section 409 when sections 405 and 409 were enacted in 1860 presumably on the basis of the Indian Law Commissioners' review much earlier in 1846.

III. Section 405's Comprehensive Equitable Rationalisation

Presenting a different reconstruction of sections 405 and 409, this article first argues that Macaulay's criminal breach of trust was not, and should not be taken to be, a re-formulation of the statutory offence of larceny or embezzlement meaning fraudulent misappropriation. While it took the place of embezzlement in the sense that it subsumed it, it was much more than that. It encompassed important elements of the common law offence of conspiracy to defraud. It innovatively implemented its notion of fraud by dishonest breach of duty, which was then and indeed for a long while afterwards the usual basis for establishing criminal liability of directors for business fraud in England. This fact alone undermines the cogency of deriving the interpretation of the key phrase "in the way of his business... as agent" from a comparison with the Larceny Acts. In particular, it argues against drawing inferences from the interpretation of those Acts as understood by the UK legislature in 1857. In the absence of exact coincidence of embezzlement and section 405, the critical difference will not exist between section 409's omission of, and the *1857 Act*'s express reference to, company directors. From the outset, the director who committed business fraud would already be within the prohibition in section 405 as originally conceived. Therefore, whether or not the *1857 Act* was the first time fraudulent misappropriation by directors was criminalised in the UK would be immaterial so far as Singapore is concerned. The *1857 Act* would merely be a peculiar English

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[18] *Ibid* at para 197.
[19] *Ibid.*
[20] *Ibid* at para 215.

response to the regimented statutory piecemeal reform of larceny and embezzlement in England and of no assistance in the construction of section 409.

There is a second argument arising from the distinctive nature of section 405's comprehensive equitable rationalisation which shall be elaborated after the first. Although the received judicial interpretation of section II's class limitation wording excludes directors, not being professional agents,[21] within the scope of embezzlement, it does not follow that section 409 which adopts its class limitation wording in form must attract the same substantive effect. The important point which will be shown is that the differences between section 405 and embezzlement once again falsify the apparent formal resemblance of the adopted class limitation wording and require imputing a different substantive result to section 409.

A. *Section 405 and Criminal Equitable Fraud*

Predicated in the first argument, the backdrop to Macaulay's criminal breach of trust is crucial. It explains the unique approach adopted in section 405 to deal comprehensively with fraud by dropping common law distinctions and utilising equitable notions of breach of duty and dishonesty.[22] Not only was common law fraud less developed than equitable fraud in the civil law at this time, the well-known difficulty Macaulay faced was that the two common law offences of larceny and cheating fell significantly short of supplying a comprehensive answer to the problem of criminal fraud. Common law larceny followed closely the common law distinction between ownership and possession and its preoccupation with possession. Larceny was a trespassory taking of possession. Prompted by *R v Bazeley*,[23] statutory solutions were implemented progressively to reduce this pre-occupation with possession. These piecemeal statutory larceny or embezzlement statutes were passed after *Bazeley's Case* to make misappropriation without initial trespassory taking (in the sense of conversion by a person in lawful possession for personal advantage or embezzlement) an offence.[24] In contrast to larceny, there had been a statutory offence of false pretences from as early as 1541,[25] which was modernised and broadened in 1757.[26] This offence was then further expanded to include choses in action in the *Larceny Act*

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21 See *R v Portugal* (1885) 16 QBD 487 [*R v Portugal*].

22 Equitable fraud "properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another", see Joseph Story, *Commentaries on Equity Jurisprudence: as Administered in England and America* (Boston: Charles C Little & James Brown, 1846) vol 1 at §187.

23 (1799) 168 ER 519 [*Bazeley's Case*].

24 Beginning with the *Embezzlement Act* 1799, 39 Geo III, c 85 [*1799 Act*] criminalising embezzlement by servants and clerks.

25 *Counterfeit Letters, etc. Act 1541*, 33 Hen VIII, c 1 which was merely a codification of the common law crime of cheating.

26 *Obtaining Money by False Pretences, etc. Act 1757*, 30 Geo II, c 24. But the statute was little applied and the first significant case, *R v Young* (1789) 100 ER 475 was decided more than 30 years later. A later development of common law larceny, namely larceny by a trick, in *The King v Pear* (1779) 168 ER 208 further contributed to its marginalisation.

1861[27] so as to extend the reach of the common law crime of cheating.[28] In keeping with the strictness with which penal offences had to be construed, both embezzlement and false pretences statutes constructed around the distinctions between ownership and possession of property and on the notion of fraudulent obtaining as the case may be remained inadequate in prominent instances. One was where the fraudster merely had custody or a power to direct the movement of property, but not possession of it or where the fraud was perpetrated by ex post dishonest disposal of property. Another was where the fraudster made deals for the benefit of the owner but in fraud of third parties. Another exemplified in the large-scale investment frauds of the 19th century was where company directors provided misleading information to the company's creditors unaware of the true insolvent state of the company to induce entrustment of property by them. To cope with these frauds, which were out of the reach of the larceny and cheating statutes, the residual criminal law solution was to allege an agreement which went around the absence of a suitable definition of fraud. Common law fraud, framed as a conspiracy to defraud, allowed the offence to be developed in an accretional manner, centred around the agreement and the artificial notion that fraud by two was more serious than fraud by one. This was an advantage but with significant drawbacks. Devoting a prominent section to the procedural difficulties, Hadden exposed the shortcomings of conspiracy to defraud vividly.[29] While the common law offence could remain flexible without a definition of fraud on the pretext that agreement was the nub, unfairness to accused persons was always a real concern. Some courts tried to insist on prosecutorial detailing of particulars of the fraud. Others found tremendous difficulties with this stratagem since the whole idea of the offence was that the courts needed to look at every aspect of the alleged fraudulent scheme in order to determine whether there was indeed a conspiracy to defraud. The upshot was not far from this: fraud was what the jury subject to judicial discretion importing current ethical standards into the criminal law thought it to be. It would be reasonable to conjecture that a rule dependent entirely on jury sentiments and judicial discretion and development would fail to accommodate Macaulay's agenda to prescribe a manual of criminal law for the Indian colony, which was supposedly in want of a suitable indigenous criminal law. If it should be objected that were this true there should have been similar legislative reform of the conspiracy offence in England, the answer is that, for good or ill, the reluctance to intervene in corporate affairs kept the UK legislator away from attempting more radical statutory changes to the conspiracy offence. As Taylor has shown, an ambivalent attitude towards corporate fraud prevailed throughout much of the 19th century.[30] The suppression of all but the most serious corporate frauds rested heavily on self-interested private prosecutions. No public prosecution was thought necessary and possible until nearly the turn of the century. For Macaulay, the author of section 405, reliance on private prosecutions would have been out of the question in the non-settlement colony which India was.

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27 24 & 25 Vict, c 96 [*1861 Act*].

28 Although it remained the case that obtaining property by false pretences required that the thing must be the subject of larceny at common law. See *R v Robinson* (1859) 8 Cox CC 115; *R v Jones* [1898] 1 QB 119.

29 Tom Hadden, "The Origin and Development of Conspiracy to Defraud" (1967) 11 Am J Leg Hist 25.

30 James Taylor, *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth-Century Britain* (Oxford: Oxford University Press, 2013).

By way of substantiation, it should be stressed that Macaulay's omnibus approach to criminal breach of trust in section 405 was not merely a consolidation of all antecedent statutory changes to larceny and obtaining property by deception. It was fundamentally and deliberately a bold and innovative rationalisation and systematisation. In *A History of the Criminal Law of England*[31] where Stephen discussed embezzlement under the Larceny Acts, he noted that: "The fraudulent misappropriation of property is not a criminal offence, if the possession of it was originally honestly acquired, except in the case of (1) Servants embezzling their masters' property, who were first excepted in 1799. (2) Brokers, merchants, bankers, attorneys, and other agents, misappropriating property intrusted to them, who were first excepted in 1812. (3) Factors fraudulently pledging goods intrusted to them for sale, who were first excepted in 1827. (4) Trustees under express trusts fraudulently disposing of trust funds, who were first excepted in 1857. (5) Bailees stealing the goods bailed to them, who also were first excepted in 1857".[32] Unlike the Larceny Acts,[33] however, section 405 does not create the offence of criminal breach of trust by way of exception.

Second, unlike statutory larceny fraudulent misappropriation is only one of the conduct proscribed under section 405. Dishonestly using or disposing of the property in violation of duty and wilfully suffering another person to do so are included. Especially distinguishing is that dishonesty is the essential element, not fraudulent acquisition (false pretences) or misappropriation (embezzlement). This is vital to appreciate. 'Fraudulent' as conceived under the common law has two indispensable elements; namely, a falsehood and deception of a specific person.[34] Dishonesty is a wider opprobrium. One can be dishonest without being fraudulent, as where he deliberately uses another's property without his consent in circumstances of entrustment to make a gain for himself known as a secret profit. Nor is it requisite that a specific person must be targeted.

Third, whereas the Larceny Acts in certain instances require entitlement to receive property or entrustment of property in some stipulated capacity as an element of liability, section 405 takes no interest in whether the person is entrusted as director, public servant, private servant, bailee, carrier, or agent. Entrustment in a stipulated capacity is only relevant for the purposes of aggravated punishment under section 408 to section 409. In contrast with the Larceny Acts which only employ the particular language of entrustment when criminalising the embezzlement of professional agents

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31 James Fitzjames Stephen, *A History of the Criminal Law of England* (London: Macmillan and Company, 1883) at 157-158.

32 *Ibid* at 158-159.

33 This term is used in a collective sense to describe the entire series of larceny or embezzlement statutes up to the material time.

34 In the context of the *1812 Act*, *supra* note 16, fraudulent misappropriation is a wider notion but still requires misapplication (in violation of good faith) for personal advantage with intent to defraud. In this connection, the inclusion of the factor in section 409 marks a conspicuous difference with the *1812 Act*. The factor was not in the *1812 Act*, but was added in 1827 by the *Larceny (England) Act 1827*, 7 & 8 Geo IV, c 29, (the first consolidating statute) specifically in relation to pledging goods to be sold. That was the first time the notion of abusing one's position for personal advantage appeared and then, not generally but specifically in connection with the factor. Section 409 however accords to the factor the same general context and propositional contents as the banker, merchant and attorney, without limiting the factor's exigibility to enhanced punishment to pledging the goods to be sold.

but not the embezzlement of servants,[35] section 405 predicates entrustment in all instances of criminal breach of trust.[36] What entrusting means is not defined; but if it is to mean anything at all, it must at least mean something beyond the creation of a mere relationship of debtor and creditor, bailor and bailee,[37] or other commercial arrangement, whether or not for services, for mutual benefit.[38] Receiving or taking of the master's property by a servant on orders of his master is clearly an entrustment by the master.[39] Evidently also, it need not be posited that the relationship must be a fiduciary one although there will in all probability be an entrustment where property is transferred for the purposes of such relationship. To avoid making criminal a mere breach of contract, a confidential relationship or one of good faith is enough; as where the trustor transfers property for a specified and limited purpose (such as custody) in good faith trusting that the transferee will carry out the purpose.[40] Evidently also, there cannot be a requirement that the trustor must vest title in the actor in order that there be an entrustment of property. An employee may merely have custody of property as where he receives a bare charge of his employer's property for some limited purpose or if he is given possession in order to perform a ministerial act with the property. But section 405 will also prohibit a misappropriation by that employee who has dominion of his employer's property. Again, consider the manner in which a stockbroker comes into a relationship of property or quasi-property with his customer. So far as title is concerned, the contract of agency may set up at least three possible situations. A stockbroker may be given possession of the share certificates to sell, but not title. In some cases, a stockbroker employed to sell shares may be given both title to the shares and their sale proceeds either with or without the beneficial interest. In other cases, the client will have a running account with the stockbroker, and will likely be a creditor of the stockbroker who will be owner of the sale proceeds of the client's shares deposited in the account. However, for the purposes of section 405, there is entrustment of the client's property in all three instances. Irrespective of what property relationship is set up between client and stockbroker, what is determinative is the stockbroker's assumption of fiduciary duties of loyalty to the client.

Fourth, unlike the Larceny Acts, section 405 does not require that the entrusted property must belong to the trustor who alone can constitute an entrustment relationship. Entrustment by any other means will suffice. On the one hand, a settlor can entrust his property to a trustee, passing legal ownership to the property in trust. This entrustment can only be made by a trustor who is owner. On the other, a non-owner employee can entrust his employer with his wages which are due to him from his employer as where his employer undertakes to set aside money in the latter's possession in order to assure the employee of payment.[41] Again, entrustment of *any*

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35 Where the operative language used was the property coming into the hands of the servant by delivery for or in the name of the master or for his account making it clear that only tangible property capable of delivery could be embezzled by a servant. The term 'entrusted' was employed where intangible property such as choses in action was involved or the actor was a professional agent.

36 So that there is no limitation to the concept of property and anything of value can be entrusted.

37 Although many bailments will involve an entrustment of property.

38 Otherwise, breach of contract would be criminally actionable under s 405.

39 Otherwise, s 405 would have irrationally left out cases clearly rendered embezzlement offences by the *Embezzlement Act 1529*, 21 Hen VIII, c 7.

40 Such as in the case of a deposit that the banker will return it on demand.

41 *Cf Commonwealth v Mitchneck*, 198 A 463 (1938); *State v Polzin*, 85 P (2d) 1057 (1939).

dominion need not be made by an owner but can be made by a bailee to a sub-bailee with or without consent of the owner. Section 405 thus neither requires that the property entrusted must belong to the trustor nor be in the possession of the person entrusted with ownership. Moreover, since entrustment of any dominion of property is included, it will be possible for owners to entrust their property for safe-keeping to a custodier company as bailee which is in turn entrusted by the company to the control of its directors. There is no doubt that the director of a company is within section 405's prohibition when he is entrusted with control of the company's property. No objection that the trustor is a body corporate is possible. Further, no concern arises that the property entrusted to a company is not directly entrusted by their owners to the directors of that company who commit criminal breach of trust in relation to the entrusted property.

Fifth, in especially sharp contrast to the Larceny Acts, section 405 takes no notice of the existence of loss, injury, or where there is such damage, its incidence. The Acts stipulate and therefore require averments that the actor has converted the property received or taken to his personal advantage or that he has misapplied the entrusted property in violation of duty for his personal advantage. They predicate that he has gained at the expense of the trustor. Section 405 however contemplates that the trustor may be a person who does not suffer any loss from the dishonest misappropriation or abuse of duty by the entrusted person, avoiding any suggestion that it is loss to the trustor that is to be protected. Trustees are of course entrusted by the settlor but the settlor not reserving a power to intervene in the trust administration drops out thereafter and may not suffer any loss from the entrusted person's dishonesty. That is just as irrelevant as where the company is the person entrusting the property to a director but does not suffer any loss from the director's criminal breach of trust.[42] The fact that the incidence of loss is irrelevant to existence of liability is a strong hint that section 405 is concerned also with systemic loss such as loss of confidence in the market in which the fraudster operates as a result of his betrayal of trust.

Sixth, the fact that the provenance of entrustment is a matter of indifference implies that there is no concern with whether the entrustment is dishonestly or fraudulently obtained. At common law with only one exception the misappropriation of property by fraudulent inducement was not a crime if the fraudster obtained both possession and title to the property.[43] As was said, the statutory crime of false pretences was a response to this gap. However, under section 405 there would be no such gap where property is obtained for a purpose other than as specified in good faith. A person, whether or not a fiduciary, who by inducement obtained both possession and title for a purpose other than as stated in good faith would be entrusted with property and his continuing intent to steal or violation of good faith would relate solely to the subsequent act of appropriation making it both a misappropriation and a dishonest one.[44] As illustration, consider the case of an investor in a company's

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[42] Again, the payor may be the one entrusting the payee's agent with a sum of money to be turned over to the agent's principal. The trustor making payment in good faith would not suffer any loss if the agent absconded with the money leaving his principal high and dry. In circumstances where the agent is authorised to collect payment for the principal, payment to the agent will be a discharge of the payor's liability to pay.

[43] The exception arose when title and possession was obtained by use of a false symbol or token. See *R v Walsh* (1812) 168 ER 624.

[44] See *Superintendent and Rememberancer of Legal Affairs, West Bengal v SK Roy* AIR 1974 SC 794.

shares. The mere fact of purchasing a company's stocks in the secondary market will not give rise to an entrustment of the investor's property to the company. There is only a commercial sale and purchase between him and a vendor of the shares. The matter alters fundamentally where directors of a company solicit investment funds from investors or deposits from customers for limited investment or custodial purposes as specified but in reality to pay off the company's debts. Under section 405, there is an entrustment of property which was transferred for expressly or impliedly stated purposes. The absence of a misrepresentation as to purpose is immaterial. It is enough if these directors were under a statutory or other implied duty to disclose the true purposes for which the transfer was solicited.

B. *Section 405 and Criminal Conspiracy to Defraud*

Just how comprehensive section 405 was conceived to be is especially apprehended by comparing certain cases on the common law offence of conspiracy to defraud.[45] Those cases involved large scale investment frauds in the same time frame which were solved by recourse to the common law conspiracy to defraud in circumstances where no statutory offence of embezzlement or false pretences could be charged. In those frauds, the act in question was not a crime in itself (of embezzlement or false pretences) and the act as a means of obtaining property was dishonest but not fraudulent. In the infamous *Royal British Bank Case*,[46] directors of the bank concealed information which showed the bank to be in an 'embarrassed and failing condition'. The means used to defraud fell short of a criminal act. The act of concealment was dishonest but not fraudulent. The court however accepted a generalised charge, for the jury to decide, as to whether the directors were guilty of the common law offence of conspiracy to defraud "such of the shareholders as were not aware of the true state of the bank".[47] The generalised charge with the jury returning a general verdict became a matter of course in *R v Gurney*[48] and *R v Aspinall*.[49]

It is easy to see that the Royal British Bank fraud would be caught by section 405's reference to disposal of entrusted property in dishonest breach of duty which reaches any dishonest mishandling or misapplying of the property without regard to the actor's want of personal advantage. Nor would it matter that the defrauded shareholders were not the people who had entrusted the property to the directors but that the company was the trustor. Unlike conspiracy to defraud, however, section 405 with its equitable definition of fraud as dishonest breach of trust would not incur the definitional and procedural niceties which plagued the amorphous conspiracy

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45 See *R v Weaver* (1931) 45 CLR 321 (HCA) for a history of the evolution of the offence of conspiracy to defraud. Macaulay's *Penal Code* which became the authoritative codification in India, Sri Lanka, Nigeria, Zimbabwe, Malaysia, and Singapore was not the only successful codification at the time. The comparable codifications adopted in Australia and New Zealand codified the common law conspiracy to defraud unlike the *Penal Code*. See *Adams v The Queen* [1995] 1 WLR 52 (PC) where the Privy Council considered s 257 of the *Crimes Act 1961* in New Zealand.

46 *R v Esdaile* (1858) 175 ER 696 [*R v Esdaile*].

47 The Court of Appeal in *Lam Leng Hung (CA)*, *supra* note 12, referred to this case but with respect did not fully appreciate the nature of the charge of conspiracy to defraud.

48 (1869) 11 Cox CC 414 (CA).

49 (1876) 2 QBD 48 (CA).

to defraud, as was mentioned earlier.[50] Significantly also, when section 405 was enacted, there was no offence of conspiracy to defraud in the *Penal Code*, in recognition that there was no need to prohibit conduct which was already an offence under section 405.[51]

C. *Section 405 and the* 1857 Act

A significant implication of section 405's comprehensive rationalisation of criminal fraud is that it casts serious doubts on the cogency of the inferences the Court of Appeal sought to draw from comparing section 409 and the *Punishment of Frauds Act* 1857, (known as the *Fraudulent Trustees' Act* 1857).[52] The *1857 Act* made it a misdemeanour for any "Director, Public Officer, or Manager" of a company to take or apply, for his own use, any of the money or other property of the company or to receive any of the money or other property of the company for anything other than payment of a just debt, and "with intent to defraud" omit to record this in the company's books.[53] The Court was persuaded that while this was the first time that trustees and directors were criminalised for criminal breach of trust, the same effects had not been replicated in section 409. That reasoning however overlooks the fact as just shown that section 405 (or more exactly its precursor in 1836) already in its terms covered the crime of dishonestly misappropriating entrusted property by company directors, officers, and employees; indeed by agents generally, whether professional or not. There was accordingly no need to create a similar offence of embezzlement by company directors, officers, and employees in the 1860 *Penal Code* and later the Singapore *Penal Code*. Section 409 was not needed for this purpose.

Moreover, contrary to what the Court of Appeal thought, the *1857 Act* was not "*the* ***first time***, ***fraudulent misappropriation of property by trustees, bailees and directors and officers of body corporates was criminalised in the UK***."[54] Prior to the enactment, such behaviour was already proscribed under the *Joint Stock Companies Winding-Up Act 1844*[55] and could have been thus prosecuted albeit indirectly by way of a charge of fraudulent accounting.[56] It could also have directly been prosecuted as by a charge of common law conspiracy to defraud.[57] So the just quoted

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50 That definition emerged as late as *Scott v Metropolitan Police Commissioner* [1975] AC 819 (HL) at 840:

> An agreement by two or more by dishonesty to deprive a person or of something which is his or to which he is or would be or might be entitled, or. . . an agreement by two or more by dishonesty to injure some proprietary right (of the victim).

51 It was only much later, in 2007, that s 120A was enacted to provide for a conspiracy offence of a general nature. Even then, arguably, the general would not derogate from the specific conspiracy to defraud offence embodied in s 405 as of 2007.

52 *1857 Act*, *supra* note 7, ss 5–6.

53 By virtue of s VI.

54 *Lam Leng Hung (CA)*, *supra* note 12, at para 194.

55 7 & 8 Vict, c 111 [*Joint Stock Company Act 1844*].

56 *Ibid* at s XXXI.

57 "Prior to the enactment of the Fraud Act 2006, the principal generic offence used by prosecuting authorities against [directors and officers of a company] involved in complex or serious fraud was the offence of conspiracy to defraud." See G Scanlan, "Offences concerning directors and officers of a company: Fraud and corruption in the United Kingdom – the present and the future" (2008) 15:1 J of Financial Crime 22 at 25.

remarks of the Court of Appeal must be confined as being a reference to criminalisation by making fraudulent misappropriation by directors a statutory larceny.[58] A little historical background reveals that in the UK the *1857 Act* was passed in order to overcome the difficulties which were felt to hamper prosecutions under the common law of conspiracy to defraud. Even before the Royal British Bank collapse, when Sir Alexander Cockburn was Attorney-General, Sir Richard Bethell was already planning to move a bill which later became the *1857 Act*. The public outcry following the Royal British Bank collapse made the move imperative. It gave the new Attorney-General Sir Richard Bethell, appointed after Sir Alexander was made Chief Justice, full support to move his Punishment of Frauds bill when Parliament re-assembled.[59] Sir Richard's motivation was to secure better punishment for fraudulent directors by making proof of fraudulent misappropriation more accessible and not so much to create new criminal liabilities. It was recognised that the offence of conspiracy to defraud already covered the field. What was desired was circumvention of the procedural niceties to which the conspiracy to defraud was subject (and hence provide better punishment) by holding directors personally and individually responsible for all documents and especially accounting documents issued in the name of the company under their sanction. This was done by creating additional specific exceptions to the embezzlement offences which would ensure that prosecutions would be out of the hands of shareholders but in the Government as well as overcome the procedural niceties of the common law offence.[60] In Singapore, however, section 405 already established the desired criminal liability. Section 405 prosecutions would not be in the hands of private prosecutors[61] and section 405 was already shorn of the procedural niceties of the common law conspiracy to defraud. What was lacking was not another piecemeal extension of the Larceny Acts but merely enhanced punishability for fraudsters such as company directors and others. As to this, the *1857 Act* was also immaterial.

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58 Hadden, *supra* note 29 at 35 has shown that until 1850:

> [T]he development of the offence of conspiracy to defraud, except in its guise as a species of attempt, was almost identical with that of the statutory offence of obtaining by false pretences. Both were considered more or less as an extension of the existing law of larceny, as new forms of dishonest misappropriation, in which it was necessary to allege and prove as far as possible the identity and ownership of the property involved.

This explains the route taken in the *1857 Act* to extend the existing law of larceny rather than tinkle with conspiracy to defraud. In hindsight, the move was wise. After 1850, the rules governing conspiracy to defraud "began to diverge more seriously", *ibid*.

59 See Taylor, *supra* note 30 at 111 *et seq*.

60 The prosecution of the directors involved in the Royal Bank fraud for conspiracy to defraud is added proof that the 1857 criminalisation was focused on punishment. Prosecution of the directors under the Act was not possible since the Act could not be applied retrospectively. Sir Richard Bethell ordered their prosecution under the common law offence of conspiracy to defraud. See *R v Esdaile*, *supra* note 46. See also Henry Lloyd Morgan's comments in Henry Lloyd Morgan, *Personal Liabilities of Directors of Joint Stock Companies under the Fraudulent Trustees' Act, (20th and 21st Victoria, Cap. 54): with Remarks on Limited Liability*, 2d ed (London: Effingham Wilson, 1858) at 3:

> The conviction of the Royal British Bank Directors has demonstrated that the old law, when set in motion at a prodigious cost, was sufficiently powerful, without the aid of the Fraudulent Trustees' Act, to punish those who conspired, by false statements and misrepresentations, to inveigle the public into purchasing Shares in an insolvent enterprise.

61 *Cf Joint Stock Company Act 1844*, *supra* note 55 at s LXXVII.

D. *Section 409 and Cooray's Reliance on the Larceny Acts*

The second argument arising from the comprehensive and innovative rationalisation of Macaulay's criminal breach of trust is that any analogies to the use of phrases in contemporaneous piecemeal English legislation such as the Larceny Acts are likely to be unhelpful beyond serving as an initial and abstract point of statutory interpretation. This point bears directly on the use of analogy in construing the key phrase "in the way of his business as an agent" in the decision of the Privy Council in *Cooray's Case*.[62] For the Privy Council, section 409's juxtaposition of "in the way of his business. . . as an agent" bore an obvious resemblance and connection to the 1861 *Larceny Act*'s "or other agent"; so that it tracked the spirit if not the letter of the latter Act and like it was a reference to the professional agent and not a director of a company.

Lord Porter delivering the judgment said:

> We notice that the Larceny Act [1861], a portion of the 75th section of which we are called upon to construe, after in earlier sections classifying various places and things from and of which larceny may be committed, - see sections 31, 38, 40, 50, 60, 62, and 63, - proceeds to specify certain classes of persons who may be guilty of the offences therein described; for instance, from section 67 to section 73, clerks, servants, or persons in the public service are classified; in section 74, tenants and lodgers are classified; and in section 75 and afterwards the class aimed at is that of agents, bankers, factors. In our judgment section 75 is limited to a class, and does not apply to everyone who may happen to be intrusted as prescribed by the section, but only to the class of persons therein pointed out.[63]

From those remarks, Black LJ in *Russell v Thompson*[64] subsequently elicited a principle of statutory construction as follows:

> Where words and expressions used in an Act of Parliament are plainly taken from earlier statutes dealing with similar subject matter, and those words and phrases have received judicial interpretation, it is a fair presumption that Parliament intended that the language so used by it in the latter statute should be given the meaning which has been judicially attributed to it.[65]

As Black LJ put it, the class limitation principle is in the end a rebuttable presumption. It certainly should not be applied where it would go against the grain of Macaulay's criminal breach of trust. Essentially, having noticed the resemblances between section 75 and section 409, the Privy Council considered that the word "agent" in the Sri Lanka equivalent of section 409, should have the same meaning

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62 *Supra* note 4.
63 *Ibid* at 418.
64 [1953] NI 51.
65 *Ibid* at 68.

of "professional agent" as in section 75 of the *1861 Act*.[66] With respect, however, what was overlooked was that the *1812 Act*,[67] which section 75 reproduced, aimed to create a new offence of embezzlement prohibiting fraudulent misappropriation by bankers, brokers, etc and other agents, and not merely to punish more severely an existing offence.[68] In contrast, the same conduct was already prohibited by section 405 and section 409 was designed purely to impose greater punishment after a proper charge under section 405 had been made out and liability ascertained. A phrase used to delimit an offence-creating statute ought not to be decisive when scoping a standalone punishment statute. In the former, the charge is required to allege all such facts and circumstances (especially the alleged class of the accused) as would bring the accused within the statute. If, for example, the accused was charged with embezzlement of property entrusted to him as a banker, it would be enough ground to acquit him, even if there was nothing else, that there was reasonable doubt as to whether he was a banker as opposed to a factor.[69] In the latter, where the identity of class members who merit greater punishment is the only concern, those designated should be ascertained within their own frame of reference though as an organic part of the overall criminal proscription. To this end, there would be every criminological reason to ensure comparability between the enumerated classes subjected to greater punishment according to the fair import of the terms of section 409, to promote penological justice and to effect its particular purposes.

A more particular and significant reason leads to the same conclusion that the *1812 Act* provides little assistance in interpreting section 409. There was a special consideration not present in section 409 which dictated that the agent in the *1812 Act* to be a professional agent. Embezzlement was conceived of as being fraudulent misappropriation of property owned by the trustor.[70] There could be no fraudulent misappropriation if the person entrusted was owner or co-owner of the property. Such person could not be misappropriating his own property. For this reason, although a partner was an agent of another partner when conducting the partnership's business, he could not be found guilty of embezzlement of partnership property entrusted to his control. When the *1812 Act* made the banker and others or other agent who misappropriated entrusted property for his own use and benefit guilty of statutory larceny, such businesses were predominantly carried on by partnerships as well as the joint stock company, unincorporated. The "other agent" could not have been intended to include a partner of a partnership carrying on the business of the partnership as its agent and thereby entrusted with partnership property. It followed that the agent had to be a professional agent with no interest in the entrusted property.

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66 *Supra* note 27. Especially *R v Portugal, supra* note 21.

67 *Supra* note 16.

68 The precursor prohibitions in the *Larceny (England) Act 1827*, *supra* note 24, s 49 *et seq* in turn reproduced the 1812 Act, *supra* note 16.

69 Since a charge on one could not support a conviction on another. See generally Joseph Chitty, *A Practical Treatise on the Criminal Law: Comprising the Practice, Pleadings and Evidence, which Occur in the Course of Criminal Prosecutions*, vol 1 (Philadelphia: Edward Earle, 1819) at 172-173.

70 Section I focused on misappropriation for the actor's personal benefit with intent to defraud of security for money entrusted to the care of the actor as a specified commercial class. See the key phrases "sell, negotiate, transfer, assign, pledge, embezzle, secrete or in any manner apply to his or their own Use or Benefit" and "with intent to defraud". S II focused on property including title instruments deposited with those classes for specified purposes. See the key phrase "shall in any manner apply to his or their own Use or Benefit" and "with intent to defraud".

Two further special considerations underlay the *1812 Act*.[71] First, the Act's prohibitions were limited to security instruments which were hardly if at all within the purview of employee agents. Second, the Act's notion of entrustment by an owner of the property also had the effect of excluding employee agents within the meaning of "other agent", reinforcing its meaning as other professional agent. Of these employee agents there were two kinds; namely the ministerial and the fiduciary agent. The ministerial agent clearly was excluded. Prior to the *1812 Act*, the earlier *1799 Act*[72] had already criminalised embezzlement by a clerk, servant, or an employee employed for the purpose of collecting or receiving property of his employer. The word 'agent' did not appear expressly. It was however clear that the *1799 Act* was intended to repeal *Bazeley's Case*[73] where a clerk who was a confidential agent of the banker to give a discharge for money received was acquitted of larceny at common law. Furthermore, the inclusion of the employee implicitly targeted at an employee agent ministerially entrusted by the employer banker, corporation, or partnership to receive into his care and custody his employer's funds, securities and other property. It was necessary that the Act should address this concern since it was difficult to detect fraudulent misappropriations by ministerial agents such as clerks, who were confidential agents, and employees authorised for the purposes of receiving their employer's property. Such agents were typically put in charge of a number of acts of entrustment by their employers and left in control to work under confidential relations existing between employer and employee. As mere instrumentalities of their masters they would however not be an "other agent", not being authorised to conduct the master's business as a fiduciary agent. The second kind of employee agent was the fiduciary agent authorised to carry on a specific part of the master's business.[74] In these perhaps then less frequent situations where an employee was expressly or held out as being authorised to conduct business by the master who was a banker, or professional agent, there was equally little doubt that the employee fiduciary agent who could bind his master by contract was also excluded from being an "other agent". For the purposes of the *1812 Act*, the master was contemplated as being a fiduciary agent. He alone was the person who could be entrusted by the owner of property. Any misappropriation by his employee agent would be the master's act or attributed to the master who alone could be the person entrusted with property by the owner of it. The Act however was intended to criminalise the fraudulent misappropriation of the "other agent". It followed that the employee agent was not and could not be an "other agent" because it was his master who would be criminally liable for his act.

In short, there were two solid reasons that the "other agent" in the *1812 Act* had to be a professional agent. First, an "other agent" had to be a professional agent without ownership of the property entrusted to him. However, section 405 was neither confined to entrustment of possession by the owner-trustor nor fraudulent misappropriation of property of the trustor. Thus, it did not matter that a trustee entrusted by the settlor had legal ownership. Such trustee could be convicted of

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71 *Supra* note 16.

72 *Supra* note 24.

73 *Bazeley's Case*, *supra* note 23.

74 Such agent was not a servant within the Larceny Acts, not being bound to obey his employer's orders so as to be under the latter's control. See *R v Negus* (1873) LR 2 CCR 34 [*R v Negus*].

criminal breach of trust by dishonest conversion[75] as well as for dishonest breach of fiduciary duty. Similarly, a partner entrusted with possession of property by the other partners although a co-owner could be convicted of criminal breach of trust if he dishonestly converted the property or dishonestly dealt with it. Second, the statutory offence of embezzlement was constituted by fraudulent misappropriation of the very property entrusted by its owner to the professional agent. An entrustment by the professional agent, being a non-owner trustor, to his employee agent was legally impossible. All this however was not true of section 409 or the Sri Lanka equivalent, which *Cooray's Case* overlooked. Section 405 plainly contemplated that there could be an entrustment by one having only possession to another such as by way of sub-bailment, by one having legal but not beneficial ownership to another, and by an employer to an employee fiduciary agent.

E. *Section 409's True Purport as a Punishability Provision*

It is possible by a process of elimination to uncover the probable true intention of section 409. On the one hand, as has been shown, the offence of criminal breach of trust by directors and officers of a company already existed from the inception of section 405. The omission to replicate the *1857 Act* was thus inconsequential. On the other hand, the apparent employment in section 409 of a class limitation phrase copied partly from the *1812 Act* could not be a replication in substance of the intention and effects of the *1812 Act*, which was limited to criminalising embezzlement by the limited enumerated mercantile classes. That would have negated or contradicted the wider scope of section 405 prohibiting dishonest breach of duty, not resulting in personal advantage to the offender, as a serious fraud on the commercial public. It would thereby have artificially excluded a large and important class of section 405 offences (those involving dishonest breach of fiduciary duty) from greater punishability under section 409. Between those two untenable positions, one other is tenable. Section 409 would make perfect sense as penological justification for punishing business fraud as opposed to dishonest conversion to personal use or benefit or personal fraud. Section 405 was of course applicable to a director entrusted by the company with control of company property who dealt with it dishonestly otherwise than for personal benefit. For the reasons just mentioned, it was also applicable where a corporate banker entrusted with property of the trustor in turn entrusted that property to the care and control of its director who committed dishonest breach of duty otherwise than for personal benefit. In both situations, the dishonest breach could produce internal effects in some cases but would more likely produce external effects on those doing business with the company. So a company director who dishonestly pays out the company's money as dividends when there are no profits available for such payments commits an 'internal' breach of duty. But a company director who dishonestly solicits deposits for the company's business and continues to trade using the company's property knowing the company is unable to meet its debts commits an 'external' breach of trust. The important point is that both situations are differentiated in kind and degree from fraudulent misappropriation for the director's own use and benefit. Such an 'external' breach of trust is plainly more serious and merits

[75] Which would include for the use or benefit of not of himself but another not entitled.

greater punishment because the fraud in business is liable to injure both the company (including its shareholders and employees) and the creditors and other parties doing business with the company. It would be both sensible and necessary to manage this external dimension described as business fraud by adopting special penological policies. If so, this context for greater punishment could not have been achieved from the drafting perspective by simply referring to the director as committing breach of trust by virtue of his office as director. Nor could it have been effectuated by employing part of the wording of the *1857 Act* which postulated entrustment to a director or officer of the company. Such a formula would have reached both internal and external breach of trust indiscriminately. However, as shall next be shown, the wording used in section 409 would be apt for it would distinguish the internal breach from the external breach committed by a director. It would answer precisely to the merits of imposing greater punishment for an external breach of trust.

IV. Impossibility of Corporate Criminal Liability and Section 409

The arguments in this next section pursue the theme that if section 409 was intended to address business fraud generally, it was impossible that it should exclude company directors perpetrating business fraud in the company's name but include all natural business proprietors committing business fraud. Under the dogma of the time a company could never be criminally liable under the common law. Corporate criminal liability was from its inception in 1635 of a statutory nature, conceived of as a vicarious liability imposed in a manner separate from the criminal liability of directors and officers and shareholders.[76] Throughout the 19th century, this notion of vicarious corporate criminal liability persisted until direct civil liability was recognised in the early 20th century.[77] So, aside from the omission of the conspiracy to defraud from the *Penal Code* previously mentioned, an egregious lacuna would have been created by excluding company directors committing business fraud in the name of the company from section 409.

This important point about the backdrop to section 409 strongly argues against reliance on *Cooray*'s *Case* and the Court of Appeal's reasoning that section 409 was not directed at company directors since they cannot be said to be professional agents. So as to sharpen the contrary argument, some related observations are helpful. On its own terms, the Court's reasoning produces an oddly limited effect. While section 409's specific enumeration of banker, broker, factor, and attorney may be suggestive of entrustment as a professional agent, the inclusion of the merchant without any qualification as a storage, forwarding or commission merchant is falsifying. A merchant ordinarily carries on business as principal, not as agent. A mercantile agent can carry on the business of an agency. But if it were intended to limit section 409 to such merchants, the standalone reference to "agent" its phrase "in the manner of his business. . . as agent" would have sufficed without any need to specifically list the "merchant" among the specific enumerations. The limiting implications of *Cooray's*

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[76] See *R v The Severn and Wye Railway Co* (1819) 106 ER 501. See also *R v ICR Haulage Ltd* [1944] 1 KB 551 (CA) [*ICR Haulage*] at 554.

[77] With judicial recognition of the directing mind of a company as being the company's mind in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL). This test was restated in *R v St Regis Paper Co Ltd* [2012] Cr App R 14 (CA). See also *ICR Haulage*, *ibid*.

Case and the Court of Appeal's reasoning are awkward. Consider the business of the natural banker by way of exemplification. While he acts as the depositor's agent to collect cheques or other commercial paper payable to the depositor or to make remittances on the depositor's behalf, he carries on a greater range of non-agency activities. A banker may even publicly solicit brokerage business seemingly as a professional agent. But if he is buying and selling securities for investment purposes for accounts for which he acts as a trustee, or otherwise on behalf of his trust accounts, he is doing his business as trustee and not as professional agent. So the decisions in *Cooray's Case* and of the Court of Appeal prove to be oddly circumscribed and seriously under-inclusive. They entail artificially separating the activities of a natural banker into those which are agency activities in relation to his customers and those which are lending and investment activities which are not without more agency activities.

The wording of section 409's class limitation phrase is not so circumscribed of course. It is apt to cover the natural proprietor of any enumerated business, whether an agency business or otherwise.[78] Where the business is a professional agency, there will be direct entrustment of property or control, by the principal to the agent. But direct entrustment will also occur where the business is not a professional agency and depositors as investors entrust their property to a trading company which specially solicits such entrustment for limited and specified purposes. It would be remarkable if 'entrustment' as a crucial element of criminal breach of trust was not to reach these equally obvious instances of entrustment.

For the sake of argument, however, let it be supposed that section 409 was directed solely and exclusively at professional agencies. The arguments should of course be situated in the Victorian context where prior to 1850 such business of any reasonable scale was likely to be done by a joint stock company, unincorporated. The business of the joint stock company, unincorporated, was in law that of a partnership. The partner-directors of such joint stock company were agents carrying on the business of all the partners. On the supposition that section 409 was directed at professional agencies, the partners of an enumerated business partnership would fall within section 409. The directors as agents of the partners however would not be within section 409, not being professional agents. For that matter, neither would an employee appointed as an agent to transact some business of the joint stock company, unincorporated.

The exclusion of such directors and employees from greater punishment would not be an incomprehensible impediment to the problem of suppressing business fraud. However, it would be a very unattractive oversight for irrationally leaving out obviously essential instances of indirect entrustment. At the material time, when section 409 was inserted alongside section 405, the businesses specifically enumerated were still commonly carried on by director-partners and employee agents entrusted with property by their principals. To omit indirect entrustment by the natural and subsequently the corporate business proprietor to such agents and company directors would also be dubious logic. After passage of the *Joint Stock Company Act 1844* (making incorporation universally available), all the businesses enumerated were also conducted by companies; in due course on a greatly increasing scale. Where that was the case, the individual liabilities of members of the company, whether

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[78] *Cf R v Parker & Bulteel* (1916) 25 Cox CC 145 as to obtaining credit by false pretences.

directors or shareholders, for the contracts and acts of the company were totally destroyed. Such acts done for the company were simply not acts of the members of the company but attributable to the company. Not only was this legal difference between the incorporated and unincorporated joint stock company firmly acknowledged,[79] the destruction of individual liabilities, it is submitted, would also imply the absence at common law of any vicarious corporate criminal liability for imputed acts of company directors. As for statutory vicarious corporate criminal liability, a much overlooked but critical phrase in section 409 postulated the impossibility of corporate criminal liability in line with the prevalent assumptions of the 19th century.[80] Any supposition that section 409 envisaged direct or vicarious corporate criminal liability would equally be falsified by its prescription of life imprisonment as punishment for the offence. So as was said, not only would there be no direct corporate liability for business fraud. There would also be no vicarious corporate liability for the business fraud perpetrated by company directors and other company members in the company's name.

For the foregoing reasons, if business fraud committed by the incorporated joint stock company was to be suppressed by section 409, the omission of directors of an incorporated joint stock company would be completely disastrous. It would be self-defeating, negating the fact that the move in 1844 shortly to be replicated in India and Singapore to allow incorporation without a charter or private act of Parliament, was itself intended to be a corporate fraud prevention measure.[81] It would further insensibly ignore a significant problem of moral hazard. Then as now, directors were apt to apply a different rule to their representative acts from what they observed in their purely personal conduct. They could readily forget that they could be responsible for their company's unconscionable acts. If directors were not to be criminally responsible for the criminal acts done in the company's name, there would again be an inexplicable omission to deal with the temptation to do in the company's name what one might not do in one's name.

The arguments go further than this because an urgent need is proof that a construction of section 409 including company directors was indeed that adopted and intended. The undeniable facts were: the prevalent knowledge, in the material time frame, of the ease with which corporate fraud could be perpetrated, the menace to commerce it posed, and the unusual circumstances of India (as well as Singapore) in which the Indian equivalents of sections 405 and 409 were to be implanted. They suggest that a construction of section 409 which imputes to the legislature a policy of eliminating any incentive to perpetrate business fraud by exploitation of the corporate form in any kind of business would not only be salutary but also urgent. The historical evidence of rising corporate fraud and the corresponding need for a general

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79 Although directors of an incorporated joint stock company were appointed by the shareholders on terms that limited their terms of service, they were not appointed as agents of those appointing them but of the company, when acting within the scope of their agency.

80 Baron Thurlow LC once said: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?", see in John C Coffee Jr, "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry Into the Problem of Corporate Punishment" (1980-1981) 79:3 Mich L Rev 386 at 386 (quoting Edward, First Baron Thurlow 1731–1806). See also *Pharmaceutical Society v London and Provincial Supply Association* (1880) 5 App Cas 857 at 869; *ICR Haulage*, *supra* note 76 at 554. *Cf US v Allegheny Bottling Co* 695 F Supp 856 (ED Va 1988).

81 See Taylor, *supra* note 30 at 80.

criminal response to it have been well documented in several in-depth period studies of which only one needs to be noticed. In his valuable study of Victorian corporate crimes, already mentioned, Taylor convincingly traced the serious criminalisation of dishonest promotion and management of companies to the 1840s.[82] Before then, such dishonesty was seen as a matter of private dispute "best resolved among the educated, affluent individuals involved".[83] Such attitudes were rational when companies were few in number (they had to be charter companies or established by private act of Parliament) and shareholders might be supposed to prefer civil redress as a means of self-regulation over private criminal prosecutions.[84] However, the *Joint Stock Company Act 1844* made the company widely available as a business vehicle. The perhaps unanticipated result was that a series of large-scale investment frauds by corporate bankers targeting the working class in the 1870s down to the end of the century raised political concerns that could no longer be brushed off. Sooner than later, it became clear that self-regulation by self-interested shareholders could no longer be relied on adequately to check the rise of corporate fraud. As Taylor wrote, "[t]he ability of shareholders to keep their executives in check was shown to be distinctly limited when directors could so easily conceal losses",[85] and neutralise dissent by marshalling proxy votes. "Shareholders struggled to resist the allure of unrealistically large dividends, while depositors fell for improbably high interest rates, and policyholders for impossibly low premiums: every new fraud which broke seemed to retell an age-old moral tale of gullibility and greed."[86] The upshot was an eventual change in the system of private prosecutions, with the state by the end of the century assuming the lead role in enforcing the penal law against rogue directors.[87]

From the Indian perspective, there would have been two cogent reasons for not hesitating to bring directors of companies by charter or Act of Parliament and then by incorporation already under the prohibitions in section 405 within the enhanced punishability of section 409. First, this would secure the introduction and promotion of the company as a business vehicle to and in India (and then Singapore), a country without an indigenous modern company law as perceived in English eyes. Where the country of transplant was lacking in any corporate culture of self-regulation by self-interested corporators, it would be unwise to introduce a law of companies which would assume that companies would be essentially pockets of educated and affluent gentlemen best left to self-regulate their affairs. By the 1870s when faith in self-regulation as a check on corporate fraud had broken down in England,[88] this refusal to leave the directors as perpetrators of corporate fraud to the devices of self-interested regulation would have been proven to be entirely wise in hindsight. The

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82 *Ibid*.

83 *Ibid* at 249.

84 Only after the 1860s did private prosecutions become more conspicuous; typically, after investigations carried out in the course of winding up in the Court of Chancery under the *Joint Stock Companies Winding-Up Acts 1848*, 11 & 12 Vict, c 45, or in the Court of Bankruptcy under the *Joint Stock Company Act 1844*, *supra* note 55.

85 Taylor, *supra* note 30 at 251.

86 *Ibid*.

87 *Ibid* at ch 7.

88 From 1862 the power of Chancery judges to order criminal prosecutions paid for out of company assets became increasingly wielded. 17 years on, the public prosecutor came into the picture when the UK government "formalized its involvement in criminal prosecutions" of corporate fraud. See *ibid* at 184.

Court of Appeal's observations in *Lam Leng Hung (CA)* about the gap years between the 1846 review and 1860 when the *Penal Code* was finally enacted may be recalled. They appeared to hint that the omission to replicate the *1857 Act*'s express reference to company directors could be the result of oversight due to the long effluxion of time in the interim.[89] With respect, the better explanation consistent with the distinct and unique nature of section 405 is that section 409 was not a substantial replication of the *1812 Act*. Unlike it, section 409 was intended to deliver enhanced punishment to directors committing business fraud.

V. Is Company Director Agent in His Business Or Trustee?

In order to complete the arguments of this article, it is necessary to inquire whether the juxtaposition of "in the way of his business" and "as agent" in section 409 can be comprehensible in relation to a director of a company as way of conceptualising business fraud. The affirmative arguments in this final section fall into two parts. The first shows that the pronoun "his" in the phrase "in the way of his business" is not an ontological usage. It does not signify that the business belongs to the agent. It is relational in meaning, for the sake of excluding things done by an agent for his own benefit and purposes or the benefit of another in a personal relationship to him. In its second meaning, it relationally includes things done in the name of the principal or for the principal's benefit and within the scope of authority. It follows that the company director entrusted with property or dominion when carrying on the business of the company within his authority as director is entrusted as an agent in his business. The second part shows that a director carrying on the business as trustee for the company's benefit is contrasted with him carrying on his business as an agent. Both situations however are separately accommodated in section 409.[90]

That a director with actual control over the company's property is or is akin to a trustee is now firmly accepted.[91] The question of whether or when the director is an agent of the company is more doubtful. For the purposes of the civil law, the answer depends on the context in and purposes for which the director is acting whether the director is an agent. That is enough to show that seeking answers from the multifarious civil cases on when a director is an agent for the purposes of criminal law will be more confusing than elucidatory on the question of criminal liability. In the criminal context, such uncertainty would be unacceptable.

Another consideration not to be overlooked is the ubiquitous fact that a company is a creature of statute, the incorporation of which gives it the privileges accorded by the state of incorporation.[92] It therefore only has such rights against others and is subjected to such burdens as the state is pleased to confer or impose. As business expanded, the result over time has been a panoply of regulations introduced and

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89 See text above at 3-4.

90 These questions were immaterial in *Lam Leng Hung (CA)* since the Court of Appeal's decision was that both directors and officer could not be punished under s 409.

91 See *Re Lands Allotment Company* [1894] 1 Ch 616 at 631, 639; *Re Forest of Dean Mining Co* (1878) 10 Ch D 450 at 453; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 at 1575.

92 Assumed or never questioned since it was stated that "a capacity to take in succession cannot be without incorporation; and the incorporation cannot be without the King", see *The Case of Sutton's Hospital* (1612) 10 Coke 23 at 26.

maintained by a copious amount of legislation. As soon as one regulation is repealed and another erected in its place, the true effect of the change must be clarified by judicial construction in due course. This familiar experience of the 20th century was already presaged in the late-19th century, as Taylor showed.[93] If a criminal solution to corporate fraud must be found under such circumstances, it must acknowledge the backdrop of copious regulatory law as reality. It must abstract from it since the multiplicity of company-specific offences would not provide a common platform to the problem of suppressing corporate fraud directed at the commercial public. This common platform must depend on one singular test capable of withstanding the impact of changes in the multiplicity of regulations over time. Anything less than a supreme test would fail to furnish a stable and definite answer for the criminal law. This is another way of saying that unless the sense in which the director is an agent in his business can be made precise, there can be little confidence that section 409's highlight on business fraud is justifiably distinguished from section 405's elemental definition of criminal breach of trust.

A. *Meaning of 'In the Manner of his Business as Agent'*

According to the ensuing arguments, a supreme test exists if "in the way of his business as agent" means an agent acting in the principal's business when he is authorised to carry on the business either by contracting with third persons within his authority and does so for the company's benefit; or when he is authorised to act and does so in the company's name. It has already been shown that section 409 must represent a general criminal response to business fraud. If so, there are three limbs much like triptychs to notice. The breach of trust by a public servant is not presently relevant and need not be considered. That leaves the two relevant limbs, namely the breach of trust by the natural business proprietor (the second limb) and the breach of trust by an agent of the corporate business (the third limb). As was said earlier, the third limb must include an agent acting for a natural business proprietor or an unincorporated joint stock company, such as an employee or independent contractor who is specifically authorised to conduct the business in question and does so within his authority for the employer's benefit.[94] Omission of the business proprietor's agent cannot be countenanced since commercial business of the specifically enumerated kind could not otherwise be prosecuted as a matter of business practice. For the sake of one supreme test, if the principal or proprietor doing business is a company, only the third limb is relevant since corporate criminal liability for breach of trust is impossible under sections 405 and 409. It follows that the correct sense of "in the way of his business as agent" must be one common to an agent acting for the natural business proprietor or business partnership, whether the agent is an employee or independent contractor. That test must also establish a common platform for ascertaining whether a company director, officer, or employee is carrying on his business as an agent of the company. The commonality which threads through all of these persons has to be whether the employee is authorised to do the act in question rather than whether he holds a specific rank or office. If rank or office alone is germane, nothing more will

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93 Taylor, *supra* note 30.

94 See text above at 17-19.

be necessary than that the offender is a director or person of some equivalent rank. This however will immediately be falsified by reference to a company employee who does not have the responsibilities of rank but may have specific authorisation to conduct a part of the company's business.

Additionally, the common test must put a difference between employees as agents within section 409 and employees as servants within section 408. It can be seen by contrast with section 408 that those employees who are not agents and commit criminal breach of trust in their capacity as servants are less severely punished. There are servants who are trusted with possession or dominion of the master's property and ministerial agents who are trusted to receive their employers' property. Such servants and employees who commit breach of trust are punishable under section 408. Thus if those within section 408 are not to be characterised as agents and punishable under section 409, the distinction intended must be the common law distinction employed also in the Larceny Acts between servants and agents.[95] Servants with special responsibilities to conduct the master's business were treated for the purposes of common law offences as authorised agents. So if the servant was authorised not merely to be in possession but to sell with liberty to decide on the terms of dealing, he was an agent. In order to accommodate such employees within section 409, they not being within section 408, the test again must not be one of rank but responsibilities implying authority to contract with third parties or conferment of express authority to do so. Applying this commonality, it follows that a company director (and for that matter a company officer or employee) with authority to contract with third parties will be an agent in his business when he transacts within his authority and for the benefit of the company. It does not matter for criminal purposes that a director has authority to transact business for the company's benefit by virtue of his rank (qua director) and that no more is necessary than that the director acts as a director. In whatsoever manner this authority originates, a director will commit breach of trust in his business as an agent in exactly the same sense as an employee or company officer or independent contractor who is authorised to transact business for the company's benefit and does so within that authority for the principal's benefit.

But the notion of agent in his business cannot be limited to a person specifically authorised by a business principal to contract with a third person for the principal's benefit or a director qua director who actually does transact within this authority. The "attorney"-reference in section 409 is significant support for an extended definition of agent in his business. This attorney should not be mistaken for the attorney-at-law. He is an attorney in fact. Such attorney will be an attorney-at-law where he is engaged to act as a legal representative. Notably, an attorney acts on and according to the tenor of the instructions of his principal in the principal's name. There is a narrower conception under which an agent is a person empowered with authority to bind his principal to a contract with a third person. The significance of the "attorney"-reference is that it confirms that there is a wider meaning; an agent in his business includes one empowered (however empowered) to direct the business of the principal in the principal's name. By parity of reasoning from the "attorney"-reference, so also before a director can be said to be an agent, it is not necessary that he must be carrying on the business of the company in relation to contracting with a third party

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[95] See *R v Negus*, *supra* note 74.

and within his authority. It will be enough that he has done business in the name of the company. Accordingly, a director who falsifies the accounts and makes them available to third parties in the name of the company will also be an agent in his business. In this respect, it may be observed that a company employee or officer can never do the company's business in the company's name unless actually appointed by the company as its attorney. Only a director can do so qua director without any such appointment. The conclusion, it is submitted, must be that the categorisation of a director acting in the company's business as an agent within scope of authority and for the company's benefit or in the company's name is neither dubious nor artificial. It is a comprehensible conceptualisation of business fraud which section 409 aims to suppress.

B. *Distinction Between Ultra Vires Capacity and Excess of Authority?*

One complication unique or peculiar to the company director should be dealt in order to avert a possible objection to the foregoing categorisation. It concerns the relevance, if any, of the distinction between an *ultra vires* act and excess of authority. This distinction has been substantially disapplied for the purposes of civil law as a result of section 25 of the *Companies Act*.[96] So far as criminal liability goes, it is enough to predicate that a director must act within scope of authority for the company's benefit or in the company's name if he is to be regarded as acting as an agent in his business. Second, consistent with the *mens rea* principle of criminal culpability, a director should not be seen as acting as an agent if he knows or should know that what he has purposed to do and is doing in the company's name or for the benefit of the company is in excess of authority. If he knowingly exceeds or should know that he is exceeding his authority when transacting with third persons or in the name of the company, he should not be held to have acted in his business as an agent. Thus, a director ceases to act in his business as agent if he deliberately exceeds his powers or authority or though he acts within his powers, he knows or should know that the act is objectively ultra vires the company's capacity. Where he does not know of the *ultra vires* nature of his act, and does not otherwise act in excess of authority, there is no difficulty in saying that he has acted in his business as agent if he has done so for the company's benefit or in its name.

Does this mean that a director who knowingly acts in excess of his power when dealing with third parties gets away from section 409 and is only to be punished under the more lenient section 406? The answer is in the negative. Such director though not acting in his business as an agent will fall within the meaning of the first limb of section 409 as being a trustee of the company's property conducting an enumerated business. In substantiation of this, the salient contrast with the employee as agent in his business should first be noted. When an employee authorised to be the company's agent to conduct the company's business acts without authority, he is not conducting the business of an agent. He has no capacity to do so beyond his express authority. Aside from that authority, he has only the capacity of an employee. Section 408 will therefore be relevant as he has committed breach of trust in his capacity as a servant;

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[96] Cap 50, 2006 Rev Ed. See also Walter Woon, "Ultra Vires and Corporate Capacity in Singapore" (1989) 1 Sing Ac LJ 52.

and if he misappropriates the property instead of conducting the business, section 406 will be relevant. Section 409 however will be irrelevant.

The director of a joint stock company, unincorporated, who knowingly acts without authority is altogether in a different position from an employee agent. The director is an agent of the member partners who are bound by the director's contracts made within the scope of authority. If as agent acting within authority and for the partnership's benefit the director commits breach of trust, section 409 will be relevant. If the director does not act within the scope of authority he will as partner be a principal conducting his own business as a merchant. Accordingly, he will be caught by the first limb of section 409. In a fairly similar manner, the company director who knowingly acts without authority in conducting the company's business for the company's benefit stands alongside the director of a partnership and in a different position from the employee agent. He will still be conducting business, as trustee of the company's property, although not as agent in his business. To elaborate, the director with control of the company's property is a trustee of that property and will be trading as a trustee in business if he knowingly exceeds his authority whilst transacting the company's business for its benefit or in its name.

There is some indirect judicial support for thus delineating between the two business-oriented limbs of section 409's class limitation phrase. Following passage of section 409, two landmark cases on the legality of unincorporated joint stock associations with transferable shares were decided in the English Court of Appeal.[97] In *Smith v Anderson*,[98] a shareholder of an association with transferable shares sought to wind it up as being an illegal company for want of registration. Acceding to this, Sir George Jessel MR thought it plain that the association was an illegal company despite being set up as a trust. The trustees so-called were directors in substance of a joint stock company with transferable shares. The Court of Appeal disagreeing was of the contrary opinion that the directors were truly trustees vested with the legal title and absolute control of property in a trading trust. The trustees were not agents of the beneficiaries nor were the beneficiaries responsible for their acts and contracts. The beneficiaries were interested in the profits by way of transferable certificates but that was immaterial. Besides the absolute control of the trustees of the property, weighing uppermost in the appellate court's mind was the fact that the arrangement envisaged the trustees incurring a personal liability on their trading contracts, assuming the same risks and liabilities as persons dealing on their own account. The appellate court concluded that the business in that case was that of the trustees as principals, not as agents of the shareholders so far as there was any business to be carried on. Registration therefore was irrelevant. In the earlier case, *Cox v Hickman*,[99] the same reasoning was decisive. The creditors were partners in control of the trust estate created by the joint deed of a debtor and his creditors. But this merely indicated that a partnership could exist behind a trust embarked in business where complete control was ceded to the trustee. This did not mean that the partnership was formed to carry on business. It was still the business of the trustees which was being conducted.

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97 By 1862, it had become mandatory for an association of more than 22 members for gain to be registered and incorporated.

98 (1880) 15 Ch D 247 (CA).

99 (1860) 8 H L Cas 268.

To be sure, the above two cases endorse a criminal law distinction which post-dated the inception of Macaulay's criminal breach of trust in 1837 besides exemplifying a fact-sensitive approach to penal legislation touching companies. However, fact-sensitivity is similarly indispensable in the application of section 409 and the same distinction which is not merely technical but substantial will give section 409 an appropriate nuance. If it is applied, a director who conducts the company's business within the scope of authority for its benefit is acting in his business as an agent. But a director, being a trustee of property, who knowingly conducts the company's business outwith the scope of his authority will be conducting business as trustee of the company's property. In both cases, section 409 will be applicable. The difference in criminal liability is a difference between the two business-oriented limbs of section 409 which should not be construed *ejusdem generis* but as disjunctive limbs. The upshot is a salutary differential effect on acting without authority for business purposes. The director entrusted as trustee by the company who knowingly conducts the business without authority when this is not something an honest director will do will be guilty of breach of trust without more. On the other hand, a director who transacts the company's business within authority can be guilty of criminal breach of trust only if there is some distinct dishonest breach of duty in the course of doing so. Thus, a director who transacts the company's business within his authority as director will not be guilty of criminal breach of trust by reason only that the company was in a state of insolvency at the time. He can only be found thus guilty if he knows of the insolvent estate but conceals what he knows from those dealing with him, so that there is a fraud committed in his business as agent. It will of course be immaterial that the dishonest director embarks on a systematic course of soliciting funds for investments by the company knowing that the company is insolvent intending thereby to save the company's business or taking a chance that he could save the business through a spurt of highly successful investments for the company's clients.

This is not saying that section 409 can never apply whenever a banker or broker absconds after soliciting funds from the public for his business. In the investment fraud cases, section 409 would be applicable because the business of an investment bank is to solicit investment funds. A banker who solicits deposits for his banking business and absconds with them is within section 409's prohibition. The key is not the absconding which is for the banker's personal benefit but that the entrustment is by way of business as a banker albeit the breach of trust occurs in conducting the banking business. Similarly, a director who sets out fraudulently to obtain funds for his own benefit by holding out the company's banking business will be conducting that business as agent in his business within the first limb of section 409. The fact that his subsequent act of misappropriation for his own benefit is only relevant as a breach of trust in the conduct of his business as agent.

VI. Concluding Remarks

This article is longer than might be expected because it has not been content to offer a working hypothesis of what Macaulay had in mind when devising the offence of criminal breach of trust. It has adopted a bolder projection of well-documented corporate fraud histories onto Macaulay's criminal breach of trust for the sake of exposing the problems he had to overcome by his innovation in turning to a concept

of criminal equitable fraud. It has also argued and concluded in a more minute and systematic fashion that directors who commit breach of trust when conducting the company's business within authority or in the company's name fall to be punished under section 409. It has given four reasons for this. First, section 409 was intended to embrace the common law offence of conspiracy to defraud which is the primary solution at common law to corporate fraud committed by directors. Second, the then prevailing common law principle that companies could not be held criminally liable for their specific intent to commit a crime would otherwise imply a complete inexplicable lacuna to deal with corporate fraud. Third, agents of business proprietors could not have been omitted from section 409 since such business could not realistically have been carried on without the participation of employee agents or professional agents. Fourth, by the same token, section 409 could not have omitted directors conducting the company's business within their scope of authority.