APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1910. January 5, 6. February 2.

CHORAGUDI VENKATADRI, APPELLANT IN CRIMINAL APPEAL No. 487 OF 1909,
ORUGANTI VENKATA SUBBA RAO, APPELLANT IN CRIMINAL No. 522 OF 1909,
BODDUPALLI SUBBAYYA AND ANOTHER APPELLANTS IN CRIMINAL APPEAL No. 563 OF 1909,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code, Act V of 1898, *s.* 235—"*Same transaction*" *what is*—*Community of purpose or design and continuity of action necessary.*

In order that a number of acts may be so connected together as to form part of the same transaction within the meaning of section 235, Criminal Procedure Code, community of purpose or design and continuity of action are essential elements. To constitute community of purpose, the mere existence of some general purpose or design will not be sufficient. The purpose in view must be something particular and definite. There is no continuity of action where each act is a completed act in itself and the original design accomplished so far as that act is concerned.

Where a company is formed with the object of defrauding the public, it cannot be said that distinct acts of embezzlement committed in the course of several years form part of the same transaction by reason of such general object.

Appeal against the sentences of T. T. Rangachariar, Sessions Judge of Guntúr Division in case No. 13 of the calendar for 1909.

The facts are sufficiently stated in the judgment of Abdur Rahim, J.

P. R. Sundara Ayyar and *A. Krishnaswami Ayyar* for appellant in Criminal Appeal No. 487 of 1909.

The Hon. *Mr. L. A. Govindaraghava Ayyar* for appellant in Criminal Appeal No. 522 of 1909.

Dr. S. Swaminadhan for *E. R. Osborne* and *M. K. Narayanaswami Ayyar* for appellant in Criminal Appeal No. 563 of 1909.

The Public Prosecutor in support of the conviction.

JUDGMENT (BENSON, J.).—I agree with the conclusions arrived at by my learned brother whose judgment I have had the advantage

* Criminal Appeals Nos. 487, 522 and 563 of 1909.

of perusing. There can be no doubt, I think, that the so-called Provident Fund, with its hypocritical professions of philanthropy and large promises of profit to all, was, from its very inception, a gambling concern, cunningly devised to swindle the unwary and ignorant. Its articles of association were such that effect could be given to them only for a brief period while the number of subscribers was rapidly increasing and the number of deaths among the lives insured was few. While this condition of things lasted the few subscribers whose nominees died stood to receive handsome sums compared with the subscriptions paid, but as soon as the increase in the number of new subscribers slackened or deaths increased, it was bound inevitably to become impossible to continue to pay the benefits promised in the prospectus, and liquidation became a necessity. The articles of association are, however, so elaborate and involved that all this would not be apparent to any one reading them unless he was both an attentive and intelligent person, and, no doubt, the promoters of the Company, including the accused, counted on this, as well as on the cupidity and gambling spirit of those to whom they appealed, to secure subscribers to the Fund. Among the charges brought against the accused, there were three of having cheated specific persons, but the accused have been acquitted on these charges and there is no appeal against the acquittal, so it is not necessary to consider whether the conduct of the accused amounted to that offence.

As regards the offences of misappropriation of which they have been convicted I think it is clear that they must be acquitted. It has certainly not been shown that the "Company people" referred to in articles 10 and 14 mean the subscribers. In fact there is no doubt that those words must be held to mean the Directors, that is the accused themselves, and their heirs; and that both the entrance fees of Rs. 3 for each subscriber and the sum of 3 annas in each rupee subsequently paid as subscriptions were set apart under the articles for certain expenses including the profits of the Directors. The accused were therefore not guilty of any offence in appropriating these sums for themselves, and there is no charge of misappropriation against them except in regard to these sums. I also agree with my learned brother that the trial was illegal as contravening the provisions of the Criminal Procedure Code with respect to the joinder of more than one charge at one trial. The joinder of the various charges

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could only be supported, if at all, provided they were "committed in one series of acts so connected together as to form the same transaction" within the meaning of section 235 of the Code. I do not think that it is necessary or advisable to attempt to define the expression "the same transaction" which the Legislature has left undefined. Whether any series of acts is so connected or not must necessarily depend on the exact facts of each case, but these are so varied in character that it is impossible, to provide a completely accurate definition. There is, however, usually no great difficulty in deciding whether any particular case comes within the rule. In the present case I do not think that it can be said that the alleged misappropriations, extending over the whole period of the Company's existence, were committed in the course of the same transaction within the meaning of section 235; for, if so, the expression would equally cover misappropriations of a similar kind extending, it may be, over 40 or 50 years. This would obviously render nugatory the provisions of the law which are designed to simplify and define within reasonable limits the charges that may be tried at one and the same time and so avoid the embarrassment of the accused and I may add of the jury, in attempting to deal with a multitude of charges at one and the same time. How necessary is a rule of the kind is well exemplified by the Sessions Judge's judgment in the present case. It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Code, instead of straining them to cover doubtful cases.

If we were of opinion that on the merits there was a case against the accused we should have had to order a retrial owing to the illegality of the trial of the various charges at one trial, but this is unnecessary in the view we take of the facts.

The accused must be acquitted and the fines if levied must be refunded.

In my opinion the Legislature might well consider whether some action is not called for with a view to protect the ignorant and unwary from the snares set for them by such Companies as that of which the accused are Directors.

ABDUR RAHIM, J.—In Sessions Case No. 13 of 1909 six persons were placed on their trial before the Sessions Judge, Guntur Division, and assessors. All the six accused were charged as Directors of the Circars Provident Fund, Bapatla, with having

committed breaches of trust in respect of three sums of money alleged to belong to the Company, viz., Rs. 469-13-3 between the 30th September 1905 and the 25th March 1906, Rs. 4,639-8-6 between the 25th March 1906 and the 25th March 1907 and Rs. 5,226-7-1 between the 25th March 1907 and the 18th September 1907, the misappropriation thus covering a period of nearly two years. The fourth and sixth accused were also charged with having falsified certain accounts by making false entries therein on the 20th and the 25th April 1905, and these two and the first accused with having falsified another document on the 24th June 1905. The sixth accused was further charged with having cheated two persons, one on the 6th March 1905 and another on the 29th March 1905, and the fourth accused with having cheated a third person on the 17th June 1905. Those among the six accused persons who were not charged with the substantive offences of falsification of accounts and cheating were charged with having abetted the commission of those offences. *Primâ facie* the trial is open to objection on the ground of multifariousness. It violates the express injunctions of the Legislature prohibiting the trial of several offences covering a period of more than one year at one trial and the trial together of a number of offences which are not of the same kind within the meaning of the Code. Objection on this score was taken on behalf of the defence before the Sessions Judge, but the Public Prosecutor contended that the trial was justified by the provisions of section 235, Criminal Procedure Code, and the Sessions Judge accepted the contention. The same section of the Code is relied on before us by Mr. Napier to uphold the legality of the trial and if the trial can be justified at all it must be by virtue of section 235, Criminal Procedure Code. It may be mentioned that the charges relating to falsification of accounts and cheating failed and all the accused have been acquitted of those charges. But if the joinder of those charges was in violation of the law the accused must have been considerably embarrassed in their defence on the remaining charges and their acquittal on the charges which the prosecution failed to prove cannot make valid the trial if it was illegal *ab initio*. Further the charges of criminal breach of trust as laid, and of which the appellants have been convicted are themselves in violation of the law, as the alleged acts of misappropriation extended over a period of more than twelve months.

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Section 235, Criminal Procedure Code, allows of a number of offences, even if exceeding three and extending over a period of more than twelve months, being tried at one trial if they are committed "in one series of acts so connected together as to form the same transaction." It is argued that the case of the prosecution being that the Provident Company was in fact a bogus concern and the object with which it was set on foot by its promoters, these being the six accused, was to defraud the public, the various offences charged against them came within the purview of section 235, Criminal Procedure Code.

I think this contention of the prosecution is clearly unsustainable. Now what is the nature of the connection contemplated between different acts which would bind them into the "same transaction"? The idea conveyed by the words "same transaction" seems to be obvious enough and it may be doubted whether it can be compendiously expressed in simpler and clearer language. And generally speaking there can be very little difficulty in arriving at a proper conclusion in a concrete case. For instance, in this case what is said to connect the different acts charged into one transaction is the allegation that these acts were committed by the six persons in pursuance of a systematic scheme for defrauding those members of the public who might subscribe to the Fund. If this contention were sound then if the Company was carried on for ten or twenty years and a hundred acts of embezzlement were committed during that period the accused would be liable to be tried at one trial for all these offences. Obviously this cannot be the scope of section 235, Criminal Procedure Code. No doubt proximity of time any more than unity of place is neither a necessary nor decisive test of what constitutes the "same transaction," though such proximity often furnishes good evidence of the connection which unites several acts into one transaction, see *Krishnasami Pillai* v. *Emperor*(1). I think—and this seems to be the effect of the decisions reported in *Emperor* v. *Sheruf Alli*(2), *Emperor* v. *Datto Hanmant Shahapurkar*(3), *Queen-Empress* v. *Fakirapa*(4) and *Queen-Empress* v. *Vajiram*(5)—that at least in a certain class of cases—the present case is alleged to be within that

(1) (1903) I.L.R., 26 Mad., 125.
(2) (1903) I.L.R., 27 Bom., 135.
(3) (1906) I.L.R., 30 Bom., 49.
(4) (1891) I.L.R., 15 Bom., 491.
(5) (1892) I.L.R., 16 Bom., 414.

category—community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to those acts. But mere community of purpose is not sufficient; there must also be continuity of action. For it may happen that an act is done with a particular objective in view but the final aim is abandoned for some time and pursued afterwards. For instance, suppose a man forges a document with a view to cheat a certain individual and then foregoes his intention for two years and afterwards reverts to his original intention and uses the document for the fraudulent purpose which he had in mind when he committed the forgery, it would be difficult to say in such a case that the offences of forgery and of cheating by means of the forged document were committed in course of the same transaction. As regards community of purpose I think it would be going too far to lay down that the mere existence of some general purpose or design such as making money at the expense of the public is sufficient to make all acts done with that object in view part of the same transaction. If that were so, the results would be startling; for instance, supposing it is alleged that A for the sake of gain has for the last ten years been committing a particular form of depredation on the public, viz., house-breaking and theft, in accordance with one consistent systematic plan, it is hardly conceivable that he could be tried at one trial for all the burglaries which he committed within the ten years. The purpose in view must be something particular and definite such as where a man with the object of misappropriating a particular sum of money or of cheating a particular individual of a certain amount falsifies books of account or forges a number of documents. In the present case not only is the common purpose alleged too general and vague but there cannot be said to be any continuity of action between one act of misappropriation and another. Each act of misappropriation was a completed act in itself and the original design to make money was accomplished so far as the particular sum of money was concerned, when the misappropriation took place.

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This also holds good with reference to the several charges of cheating though the falsification of accounts may have connection with the charges of misappropriation.

In my opinion therefore the trial was illegal.

I am also of opinion that the convictions of the accused are not justified by the evidence in the case and there should not be a retrial. The proposed objects of the Company were to enable people of the middle class to secure "high profits" in return for the money subscribed by them and the advancement of charitable works. Its *modus operandi* may be shortly described as follows. The fund of the Company was to consist of subscriptions paid by persons who are called "pattadars" and also described as "subscribers" or "nominees" or "diploma-holders." The subscriptions payable were to be at the rate of Re. 1 a month and no subscription was to be paid after 53 payments or after the death of the person called "Darkhastdar" or "applicant." At the end of each year, half the amount of the money collected during the year was to be distributed among the "nominees" of those "applicants" who happened to die during that year in proportion to the amount of money paid under each patta subject to the maximum of Rs. 1,000. By rule 14 of the articles of association 8 annas out of every rupee subscribed was to go towards the bonus fund, while the remaining 8 annas was to be dealt with as follows :—

RS.	A.	P.	
0	2	0	Reserve fund.
0	0	6	Guarantee fund up to Rs. 5,000.
0	0	6	Charity fund.
0	2	0	Commission to agents; the rest, *i.e.*, 3 annas

out of each rupee "will go towards the expenses of the Company, viz., office establishment charges, printing charges, etc., and towards the profits of the *company people* (the vernacular word being "*company varu*"). Another rule (No. 10) provided that the first three rupees paid by a subscriber would be treated as entrance fee and not as subscription and "this entrance fee will be appropriated by the *company people* for expenses etc., and shall not form part of the bonus which will be distributed." The object of the guarantee fund was to secure to the nominees at least twice the amount paid by the subscribers. Thus the benefit which is promised in express words to the nominees or subscribers is the

bonus which in no case is to fall short of twice the amount paid as subscriptions but which may extend up to Rs. 1,000. The "applicant" or "darkhastdar," on whose death alone his pattadar or nominee is to get the bonus that may fall to his lot, need not be under any particular age-limit, nor is any certificate required as to the state of his health, nor need he be in any way related to the nominee so as to give the latter an insurable interest in his life. A lucky pattadar therefore stands to win a prize of Rs. 1,000 for paying in a few rupees, may be 12 or may be 53, but not exceeding fifty-three rupees and in any case a pattadar whose darkhastdar happens to die before the company is wound up is sure to get twice the amount subscribed. There is no proper provision for the profitable investment of the funds of the company and the company may go into liquidation whenever it chooses. Such a concern can only last so long as there is an accession of new diploma holders every year and a fair proportion of the "applicants" do not happen to die in the course of the year. As a business undertaking it has no sound or stable financial basis and the so-called Provident Fund appears to be more in the nature of a lottery than anything else. It may be assumed that the promoters of the company must have foreseen this and it could not be expected that they should have promoted a concern of this nature without at least securing for themselves an adequate return for their trouble. The case therefore of the accused is that by the company varu in Rules 10 and 14 they meant themselves and not the diploma-holders. This has been their contention from the time the Fund was started and the entrance fee as well as the 3 annas out of each rupee have been treated in the books of account as money over which they had absolute control to be disposed of in meeting the expenses and providing their own profits. At the meetings of the diploma-holders the balance sheets were circulated among them and these showed that the very sums which the accused are alleged to have misappropriated were treated by them as their own money and no objection was taken to this by any one. Those diploma-holders to whom bonuses became due were regularly paid, the reserve fund, the guarantee fund, and the charity fund have not been touched and no irregularity of any importance has been pointed out in the conduct of the business such as it was. All the books were regularly and correctly kept. Under these circumstances it would be very difficult to say, even if the action of the accused were not

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justified by the rules as we think they ought to be interpreted, that they in dealing with the amounts as their own did not believe in good faith that they had a right to do so. But I may say without entering into a detailed consideration of the question that I am not satisfied that by the "*Company people*" in Rules 10 and 14 is meant the diploma holders or darkhastdars or both. On the other hand having regard to the fact that express provision is made for bonus to diploma-holders and no rules whatever are made for declaration of dividends which I should have expected to find if the diploma-holders were regarded as share-holders of an ordinary Joint Stock Company, I am inclined to the view that by the phrase "*company varu*" the promoters of the Fund alone were meant.

No doubt the accused from time to time submitted to the Registrar the names of the applicants or the diploma-holders and issued notices to those persons in accordance with the rules of the Companies Act which would not have been necessary in law unless they thought the diploma-holders were really the shareholders. I do not however think that the inference which might thus be suggested by this conduct of the accused is sufficient to override the provisions of the articles of association especially when we find that the sums now alleged to have been dishonestly misappropriated were appropriated by the accused with the knowledge of the diploma-holders and with their approval in assertion of a right inconsistent with the claim which is now put forward by the Public Prosecutor on behalf of the diploma-holders. I would set aside the convictions and sentences and acquit the accused. The bail bonds of such of the accused persons as are on bail will be discharged. The fines if levied will be refunded to the accused.