all the evidence in this case, I am not prepared to say that there is not sufficient evidence to justify his finding.

Under these circumstances I have reluctantly come to the conclusion that we would not be justified in reversing the magistrate's finding on this question of fact, I say reluctantly because if we reversed his finding on this fact the judgment in her favour would stand, in part if not entirely, and because I feel that the appellant in adopting the policy of concentrating so much drainage on the east side of First Street in order to have the expense of the culvert lower down, introduced a new agency which could easily become a source of danger to respondent's property and cause her greater injury than she would have suffered had the natural flow of storm water not been interfered with, though it may be difficult of proof.

The appeal must, therefore, be allowed with costs and the judgment of the lower Court altered into one in favour of defendant with costs.

GREGOROWSKI, J., concurred.

Appellant's Attorneys: *Lance & Hoyle;* Respondent's Attorneys: *Gregorowski, Scheuerman and Knox-Davies.*

[J. M. M.]

REX v. SHAMOSEWITZ AND SCHATZ.

1915. *August* 23, *September* 28. DE VILLIERS, J.P., WESSELS and MASON, JJ.

Criminal law.—Procedure.—Indictment against partners.—Insolvency Law.—Inconsistent allegations.—Sec. 120, *Criminal Procedure Code.—Sections* 146 (*a*) *and* (*b*) *and* 147 *of Law* 13 *of* 1895.—"*Insolvent.*"—*Books of insolvent kept by bookkeeper.—Admissibility against insolvent.*

Where an accused person was charged with contravening section 147 (*a*) and (*b*) of Law 13 of 1895 it is unnecessary to set out in the indictment the manner in which the fraudulent dealing was carried out.

An indictment is good which charges an accused person with contravening section 146 (*a*) of Law 13 of 1895 in that he "alienated, embezzled, concealed or removed" property belonging to the insolvent estate over the value of £10 with intent to prejudice his creditors, and also with contravening section 146

(*b*) in that he "removed, concealed or destroyed" his books with a similar object.

Where two partners "or both or one or other of them" were charged in the same indictment with contravening sections 146 and 147 of Law 13 of 1895, *Held*, that the indictment was good.

The word "insolvent" in section 146 of Law 13 of 1895 refers to a person who has been declared insolvent whether as a partner or as a private individual.

The payment of partnership money by one of the partners in settlement of a private debt of his own constitutes an alienation, embezzlement, concealment or removal of assets within the meaning of section 146 (*a*) of Law 13 of 1895.

Where an insolvent is charged with an offence against the Insolvency Law, his books, even though not kept by him personally, are admissible in evidence against him without calling the bookkeeper to prove that they were correctly kept.

Argument on a point of law reserved by CURLEWIS, J., at the Criminal Sessions, Johannesburg.

The following was the statement of case reserved for the decision of the full Court by CURLEWIS, J., in the Criminal Sessions, Johannesburg:—

"The accused were charged with contravening (1) Sec. 146 (*a*) of Law 13/95 on two counts (2) Sec. 146 (*b*) (3) Sec. 147 (*e*) and (4) Sec. 147 (*f*) of the same law.

At the conclusion of the case for the Crown the charge of contravening sec. 147 (*e*) was withdrawn from the jury. Both accused were convicted of all the other charges.

I reserved one point for consideration of the Transvaal Provincial Division of the Supreme Court at my own instance, and at request of counsel for accused I reserved certain other points and also directed a special entry to be made as regards admission of certain evidence.

Exception had been taken on behalf of both accused to the whole indictment.

As regards the first three charges it was contended that the indictment should have stated in what manner the fraudulent dealing was carried out or intended to operate.

Mr. *Greenberg* stated that this point had recently been decided by GREGOROWSKI, J., against his contention, and he would therefore not ask the Court to go behind that decision, but would, if necessary, ask that the point be reserved for the full Court.

As regards the second charge, it was contended that the words "alienate, embezzle, conceal or remove" were embarrassing, and the Crown should elect on which of these it intended to proceed.

A similar objection was taken to the third charge, to the words "conceal remove or destroy."

As against the whole indictment it was contended that the words "both or one or other of them" were embarrassing, and that the allegation that the private estates of both accused had been sequestrated was irrelevant and should be struck out.

I overruled all these objections, and at request of counsel reserved for the consideration of the Transvaal Provincial Division whether the exception should not have been upheld.

After the case for the Crown had been closed Mr. *Greenberg* submitted that there was no case to go to the jury; he did not press his application as regards the last charge, viz., of contravening sec. 147 (*f*) of Law 13/95, but he urged as regards the two charges of contravening sec. 146 (*a*) that the only evidence to support these charges was that of Arenstein, which was obtained from the books of the insolvents, and as the books of the insolvents must be regarded as a confession, there was no evidence *aliunde* to prove that the crime had been committed as required by sec. 18 of Proclamation 16 of 1902.

I held that the books were not a confession of the commission of the crimes charged, and that moreover there was sufficient evidence of the commission of the offences to go to the jury.

As regards the third charge, it was urged that there was no evidence that the book accounts, receipts, etc., had been "concealed removed or destroyed", but only that they had not been received by the trustees, and as regards the whole indictment it was urged that the word "insolvent" as used in sec. 146 must in the present case be the two partners, and that it must be proved that they both committed the offences charged or that the one committed the offences with the knowledge and consent of the other, and that one of them alone could not be found guilty, but either both or none.

I withdrew the fourth charge (that of contravening sec. 147 (*e*)) form the jury, but held that there was sufficient evidence for the case to go to the jury on all the other charges.

After conviction, at counsel's request I reserved for the decision of the full Court whether I should not have withdrawn from the jury the two charges of contravening sec. 146 (*a*) and the charge of contravening sec. 146 (*b*).

During the evidence of one of the trustees, Mr. Arenstein, when he was about to give evidence as to the financial position of the

insolvents at the date of insolvency according to their books, Mr. *Greenberg* objected to the witness giving evidence as to what was contained in the insolvents' books; he urged that the books were not evidence, and also that the bookkeeper should first be called to prove that the books were correctly written up by him; he based the latter contention on the fact that a former witness (the co-trustee Credie) had stated in evidence that he understood from the accused Shamosewitz that their bookkeeper got his information for writing up the books from rough slips filed in the office, which were destroyed as soon as the bookkeeper had made up his books from them.

I overruled the objection and allowed the witness to give evidence as to the position of the insolvents according to their books. After conviction, at request of counsel, I directed a special entry to be made and gave leave to appeal against the admission of this evidence.

The point which I reserved *mero motu* was in connection with the second charge of contravening sec. 146 (*a*). I asked the jury for a special finding on the question "Whether accused Shamosewitz drew the £322 out of the business and used the money to repay his brother Jacob what he (Jack Shamosewitz) personally owed him, and whether this was done by accused Shamosewitz with intent to prejudice the rights of the creditors of the partnership?"

The jury answered this question in the affirmative.

From the evidence it appeared that the capital of the partnership of Shamosewitz & Schatz was contributed by the partner Shamosewitz, the partner Schatz did not and did not have to contribute any capital.

The money which Jack Shamosewitz contributed as capital he borrowed from his brother Jacob, and according to the finding of the jury Jack Shamosewitz drew the £322 out of the business on the 1st of September, 1913, and used the money to repay his brother Jacob what he (Jack Shamosewitz) personally owed.

In other words, he used the partnership money to pay his private debt to his brother, and as I had some doubt as to whether this was "an alienation, embezzlement, concealment or removal of property" within the meaning of sec. 146 (*a*) of Law 13/95, I reserved the question for the consideration of the Transvaal Provincial Division.

I may state that according to the evidence of the trustee Arenstein, no creditor proved in the private estate of Jack Shamosewitz."

J. Stratford, K.C. (with him *L. Greenberg*), for the accused Shamosewitz: Two points arise (1) the indictment is bad as the partners were charged jointly, and (2) at the conclusion of the case accused were entitled to be discharged. All references to the private estates should have been struck out of the indictment. At the close of the prosecution it was urged that the case should have been withdrawn from the jury as the crime was not committed by the two partners jointly, and it was necessary to show that under section 146 of the Insolvency Law. Under this section it is not enough to show that A. and B. are partners and that A. fraudulently dealt with partnership assets. It must be shown that both of them did so.

Moreover the partners are not insolvent. The partnership estate only is insolvent. Under this section the partners together or the individuals separately can be indicted. Here the Crown has elected to indict the partners together.

The estate of the partnership has been made insolvent, and where the section says "the insolvent" shall be guilty, it means the insolvent firm in the case of a partnership.

If a partner does a criminal act he should be separately indicted. Each partner is guilty of a separate crime. The private creditors of each partner may differ, and you therefore cannot charge them together. They are different crimes, and therefore in every case partners should be indicted separately unless it be shown that there are no private creditors.

[MASON, J.: Supposing that it is proved that the intention is to defraud partnership creditors?]

A partner cannot defraud partnership creditors if he is able to pay them in full out of his private estate.

On the second point, the accused were at the conclusion of the case entitled to be discharged as there was no evidence against them.

The word creditors means creditors of both private and partnership estates, and the evidence was simply directed to proving prejudice to the partnership creditors. The indictment says "both or the one or the other of them" alienated partnership assets. An agent cannot be liable under section 37 for an undue preference. See *Desai's Trustee* v. *Hack* (1910, T.P.D. 499). There is no presumption that A. can bind B. in an illegal act.

[The JUDGE-PRESIDENT referred to section 157.]

But in order to estimate whether the liabilities exceeded the assets, you must have the whole position before you; the partnership as well as the private estates. There may be a contemplation of insolvency by a firm, but if the private estates are solvent there can be no intention to prefer.

[WESSELS, J., referred to section 158.]

"Lawfully charged" means charged by operation of law. The Dutch word is "belast" which connotes the confirmation of some authority by operation of law.

The material facts constituting the crime are not set out in the indictment. It should have been alleged that the assets were alienated for the purchase of a worthless lease—that was the whole point: see *R.* v. *Raphoane* (1913, T.P.D. 241); *R.* v. *Caminsky* (*supra*, p. 129). You should give sufficient information as to the material facts charged to enable the accused to meet the charge. Here the accused would reply that the alienation was made for the purchase of a lease, and would consider this a complete answer. The whole point is the value of the lease.

The books were inadmissible as evidence against the accused. See *R.* v. *Pelunsky* (1914, A.D. 360). They were written up by a bookkeeper who was not called.

As to the alternative charge of "concealing, removing, alienating or otherwise dealing with" the books. This is too vague. The Crown should state which it was. See *R.* v. *Goldreich* (1910, T.P.D. 1028); Archbold's *Criminal Pleading* (22nd ed., p. 74); Halsbury's *Laws of England* (Vol. IX, p. 63).

On the special point raised by CURLEWIS, J., *mero motu*: The payment is either an alienation or an undue preference. It depends upon whether the payment was made to a firm's creditor or a private creditor. The Crown has chosen to regard all the creditors as being firm's creditors, otherwise this would not have been an undue preference.

H. Kent, for the accused Schatz: The Crown failed to offer any evidence on counts 1 and 2 against my client. The case should therefore not have been left to the jury. See sec. 120 of Ord. 1 of 1903. The charge was not the making away of £800. The real offence sought to be imputed was a contrivance to withdraw assets which would otherwise be available for distribution. These facts should have been set out. It is in such a case not sufficient to set out the section, but the facts relied upon must also be mentioned: *Queen*

v. *Aspinall* (2 Q.B.D. 48, at p. 56); *Nickelman* v. *R.* (1909, T.S. 459). The mere allegation of payment cannot constitute the charge.

With regard to the £322 there is nothing in the indictment indicating what the charge was, see *Davies* v. *The King* (2 M & R. 565).

From the indictment it would seem that either the acts were done by both or by the one without the knowledge of the other or *vice versa*. If that is the proper construction of the indictment, then the two accused should not have been jointly indicted. See *R.* v. *Enslin & Sanders* (2 Burroughs 980).

C. W. de Villiers, Attorney-General, for the Crown: Persons are not insolvent unless their private estates are sequestrated, and that is why the allegations are necessary in the indictment: Secs. 17 and 18, Law 13 of 1895. See also *R.* v. *Hyman Levy* (heard before the C.P.D. 15/7/15). If the allegations are unnecessary they are mere surplusage, and can be disregarded.

"His" estate in the case of a partnership refers to the common estate of the partners. An insolvent can defraud either his partnership or private creditors.

It would be impossible to set out the facts more fully than was done without pleading evidence. (He was stopped on this point.)

The fact that the allegations are not disjunctive is because they relate to a fact peculiarly within the knowledge of the accused as to which of the alternatives apply to the present case. *Cf.* sec. 46 of Ord. 32 of 1902.

Points of law ought to be reserved before conviction. Only irregularities in procedure can be reserved after conviction. Whether there is evidence to go to the jury is a point of law, and should therefore, under section 270 of Ord. 1 of 1903, have been reserved before conviction.

The case can only be withdrawn from the jury before the defence is entered upon. The Court should at that stage have been asked to reserve the point as to whether there was sufficient evidence to go to the jury. It cannot be reserved later. Sec. 173 Ord. 1 of 1903 details the judge's duties after the defence is entered upon. See also *Storer* v. *R.* (1907, T.S. 207); *R.* v. *Pincus* (1911, T.P.D. 470).

[DE VILLIERS, J.P., referred to *R.* v. *Morris Khan* (1912, T.P.D. 712), which shows that the judge must decide whether to withdraw the case or not.]

On the point reserved *mero motu*: The money was paid to a private creditor, and the jury found that it was done to the knowledge of Schatz. If that was so he is guilty. Alienating is where the creditors, as a whole, get no benefit. An undue preference is where one or other of the creditors are benefited.

Stratford, K.C., and *Kent* replied.

Cur. adv. vult.

Postea (September 28).

DE VILLIERS, J.P.: The accused, who were trading in partnership at Springs as speculators, were charged on five counts under the Insolvency Law, viz., with contravening: (1) and (2) sec. 146 (*a*) of Law No. 13 of 1895; (3) sec. 146 (*b*) of Law No. 13 of 1895; (4) sec. 147 (*e*) of Law 13, 1895; and (5) sec. 147 (*f*) of Law No. 13 of 1895. At the conclusion of the case for the Crown, the charge of contravening section 147 (*e*) was withdrawn from the jury. Both accused were convicted of all the other charges. At the conclusion of the trial, the presiding Judge, at the request of counsel for the defence, reserved the following questions of law for the decision of this Court:—

(1) As regards the first three charges, the defence contended that the indictment should have stated in what manner the fraudulent dealing was carried out or intended to operate.

(2) As regards the second charge the contention for the defence was that the words, "alienate, embezzle, conceal or remove" were embarrassing, and the Crown should have elected on which of them it intended to proceed.

A similar objection was made to the words, "conceal, remove or destroy."

(3) As against the whole indictment it was contended that the words "or both or one or other of them" were embarrassing, and that the allegation that the private estates of both accused had been sequestrated was irrelevant and should have been struck out.

(4) Whether after the case for the Crown was closed, the two charges for contravening section 146 (*a*) and the charge of contravening section 146 (*b*) should not have been withdrawn from the jury, as was requested by counsel for the defence.

(5) The learned Judge also, *mero motu*, reserved a further question of law in connection with the second charge of contravening section 146 (*a*) which may be shortly stated as follows: does the

payment of partnership money by one of the partners for a private debt of his own constitute "an alienation, embezzlement, concealment or removal of property," within the meaning of section 146 (*a*).

(6) After the conviction, at counsel's request, the learned Judge directed a special entry to be made and gave leave to appeal on the question of the admission of certain evidence to which objection had been taken at the trial.

These points will be dealt with in their order. In support of the first objection the cases of *R.* v. *Raphoane* (1913, T.P.D. 241) and *R.* v. *Caminsky* (*supra*, p. 129), were relied on, but they are not in point. A reference to the indictment will show that all the essential particulars required by section 120 of the Criminal Procedure Code as constituting the crime and of which the accused may reasonably ask to be informed have been set out in the indictment. To have added in what manner the fraudulent dealing was carried out or intended to operate would have been superfluous, as that was sufficiently clear from the indictment itself.

Nor is there any substance in the second objection. As far back as 1844 it was decided by a strong Bench consisting of 15 Judges in the English Courts that the count, in an indictment on the Statute 1 Will. IV, c. 66, s. 20, which speaks of "destroy, deface or injure" which charges that the prisoner "feloniously and wilfully did destroy, deface *and* injure" a parish register, was not bad for duplicity. (*R.* v. *Bowen*, 1 C. & K. 501.) I apprehend the decision would have been no different if the charge had followed the wording of the statute and had said "or" instead of "and". As a matter of fact that is the usual way of charging a contravention of section 46 of the Liquor Ordinance, and I have never heard any objection taken to that. To hold otherwise might lead to very grave miscarriage of justice. The Crown lays the facts before the jury, but whether those facts amount to one or other of the alternatives is often a matter of great nicety. The only alternative for the Crown would be to frame a separate count for each of the alternatives; a clumsy method which does not commend itself. In my opinion the practice in our Courts is a convenient one, and does not prejudice the accused. The same must also be said about the third objection. It was urged that the accused should have been charged separately, but in my opinion the learned Judge exercised a wise discretion in refusing separate trials. The accused were speculating in partnership; the charge against them was that of alienating pro-

perty belonging to the partnership estate, and they should therefore in the ordinary course, in the absence of strong reasons to the contrary, be tried together. The argument that they are either both guilty or both innocent cannot be supported. It is quite true that section 17 of the Insolvency Law makes provision for the sequestration of the partnership estate apart from the private estates of the partners, but it does not follow that for insolvency purposes a partnership is a separate *persona*. The Insolvency Law has done no more than to give effect to the peculiar position of a partnership under our law. When a partnership is said to be insolvent, all that is meant is that the partners as partners are insolvent. The word "insolvent" in section 145, therefore, refers to the person who has been declared insolvent, whether as partner or as private individual. And as the partnership is not a *persona*, it follows that the allegation that the private estates of the partners had been sequestrated was not irrelevant. I do not wish to be understood to agree with the argument which has been addressed to us by the *Attorney-General* that there can be no contravention of section 146 if the private estates of the partners have not also been sequestrated. But where this is the case, it is a relevant fact.

The fourth objection relates to the sufficiency of the evidence at the close of the case for the Crown. It will therefore be dealt with together with the sixth.

As regards the question reserved *mero motu* by the learned Judge, I have come to the conclusion that it must be answered in the affirmative. Although Jack Shamosewitz borrowed the capital which he contributed to the partnership in the first instance from his brother Jacob, the money which he used to repay his brother was partnership money as the jury found, and, therefore, fell within the section. There remain the fourth and sixth objections to be dealt with. It appears that when one of the trustees, Arenstein, was about to give evidence as to the financial position of the accused at the date of insolvency according to their books, counsel for the defence objected to the witness giving evidence as to what was contained in the books on the ground that the books were not evidence against the accused, as they had not been kept by the accused personally and the bookkeeper had not been called to prove that they had been correctly kept. This objection cannot be sustained. Stephens in his digest of the *Law of Evidence* defines an admission as a statement, oral or written, suggesting any inference as to any fact in issue or relevant to any such fact, made by or on behalf of

any party to any proceedings. And he points out that such an admission (subject to exceptions with which we are not now concerned) is deemed to be a relevant fact as against the person by or on whose behalf it is made, but not in his favour. As the bookkeeper was the bookkeeper of the accused, and was therefore authorised to keep the books, the books are evidence against the accused, and there is no necessity to call the bookkeeper to prove that they were correctly kept. This also disposes of the fourth objection, as by the light of the evidence afforded by the books, I am of opinion that there was sufficient evidence to go to the jury. As regards the position of Schatz, I agree with the views of my brother MASON. The points reserved are, therefore, answered in favour of the Crown, and the appeal is dismissed.

WESSELS, J., concurred.

MASON, J.: The two accused were convicted on two counts of contraventions of sec. 146 (*a*) of Law 13, 1895; on one count of contravening sec. 146 (*b*); and on one count of contravening sec. 147 (*f*). They were acquitted on the charge of contravening sec. 147 (*e*).

Exceptions were raised against the indictment as not disclosing any offence and as being bad in law, vague and embarrassing, but they were overruled. The presiding Judge at the request of counsel reserved for the decision of this Court the questions whether the exceptions should not have been upheld, and whether the charges under sections 146 (*a*) and 146 (*b*) should not have been withdrawn from the jury, and directed a special entry to be made as to whether the insolvents' books were admissible in evidence until it had been shown that they had been made up from the slips recording the transactions of the business.

The presiding Judge of his own motion reserved the question whether the payment of the £322 to Jacob Shamosewitz was an alienation in terms of section 146 (*a*) of the Insolvency Law.

It has not been easy to disentangle the exact points on which the decision of this Court is invited owing to the many questions involved in the exceptions and the application that the first three charges should have been withdrawn from the jury, but I believe they may all be summarised in the following contention on behalf of the appellants:—

1. That the whole indictment is bad in charging the accused jointly and severally in respect of matters concerning their partner-

ship estate, because under the Insolvency Law a partnership is in substance a separate *persona* and joint criminal acts only can be indicted.

2. That the reference to the sequestration of the private estates should have been struck out of the indictment.

3. That the first two charges in the indictment are bad, because they do not set forth the nature of the fraudulent transaction which is attacked.

4. That count 2 of the first charge is bad for duplicity.

5. That the charge under sec. 146 (*b*) is also bad for duplicity.

6. That the books were not admissible in evidence without calling the bookkeeper or proving that they are made up from documents supplied by the insolvent.

7. That there was not sufficient evidence to go to the jury on the first two charges in the indictment, because there was no proof of the alleged alienations apart from the books.

8. That there was not sufficient evidence to go to the jury on the third charge, the mere non-production of the books and documents mentioned being insufficient for that purpose.

9. That there was no evidence connecting Schatz with the first three charges in the indictment.

10. That the payment to Jacob Shamosewitz of the £322 was not an alienation in terms of sec. 146 (*a*).

The first of these grounds of appeal was raised not only upon the exceptions but also in connection with the contention that there was no evidence to go to the jury on which they could convict. Mr. *Stratford* argued that the word "insolvent" in sections 146 and 147 must mean the insolvent partnership, and could, therefore, only affect transactions done by both partners jointly as for the partnership, and he supported this argument by reference to sec. 2 (*c*) and the practice of the Court in granting rehabilitations of partnership as proving for the purposes of the Insolvency Law that a partnership had a separate *persona*.

He also contended, as I understood him, that there could be no intention to defraud unless the partners were insolvent in their private capacities, and that, therefore, it was only in connection with their private estates, which would also be liable for the partnership debts, that they could be properly charged with fraudulent transactions.

Now the general principle that the partnership does not constitute a *persona* but merely consists of individuals having a certain

relationship to each other is firmly established in our law. Is there any reason for thinking that the Law 13 of 1895 has introduced a sweeping innovation by constituting a partnership a *juris persona?*

The practice of the Court in granting rehabilitations to partnerships is one of long standing. If the matter were *res nova*, objections to such a rehabilitation of a dissolved association might well be raised. But there are a large number of provisions in the statute which, in my opinion, show conclusively that a partnership is considered as consisting of the individuals, not as an entity, but as persons standing in a special relation to each other. Sec. 8 (*b*) has frequently been put into operation where only one partner has been concerned. It is difficult to suppose that sections 33 and 34 were not intended to include alienations coming otherwise within their provisions, when made by one of the partners only. Sections 53, 54 and 55 would become nugatory if recalcitrant partners could escape from the obligations of these sections because other partners had complied with them. Many of the sub-sections of sections 146 and 147 quite clearly have an individual and not a joint application, unless we are to assume that the legislature contemplated that partners might defy all their provisions provided that they did not do so in concert and as a partnership set. There can, to my mind, be no doubt whatsoever that the provisions of these sections are binding upon the partners individually, and if they commit a breach of them, they are guilty of the crime of fraudulent or culpable insolvency as the case may be; and this seems to be accepted in England.

In the case of *Reg.* v. *Beck* (61 L.T. 596) one of the partners of Beck, Horton & Co. was charged with wilfully concealing, destroying or mutilating a certain document, and the only allegation as to insolvency was the bankruptcy of the partnership. In *Ex parte Bratt* (1 Ch. D. 150) the case of a charge against a member of an insolvent partnership was also considered, and no objection was raised upon the ground taken in this case.

With reference to the second point which was argued before us, namely, that the reference to the sequestration of the private estates was irrelevant, the *Attorney-General* maintained that this was a necessary averment where there was a charge involving the intention to prejudice the rights of creditors, because if the private estates were solvent and sufficient to pay all the debts of the partners including the partnership debts, there could be no intention to defraud.

I am not satisfied that this argument is correct, but there can be no question about it that the sequestration of the private estates as insolvent is a relevant fact in investigating the position and conduct of the insolvents. It seems to me, therefore, that this averment, if not an essential of the indictment, was a fact which could be proved in evidence and which at the most it might be unnecessary to allege in an indictment.

Mr. *Stratford* laid stress in argument on the failure to investigate the condition of the private estates of the partners, but the evidence of one of the trustees that he found no assets in either of the private estates was uncontradicted.

Upon the third point brought before us the contention of the appellants was that the first count of the first charge should have stated the manner in which the alleged fraud was intended to operate to the prejudice of creditors. The indictment charged the alienation to one Greenberg, in contravention of sec. 146 (*a*), between the 12th and 25th September, 1913, of certain two promissory notes, cash and other property to the value of £828. The property in question purported to have been alienated as the purchase price of the goodwill of a lease, and the evidence showed that it was a fictitious transaction. It was contended that this transaction should have been set forth in the indictment, and reliance was placed on the cases of *R.* v. *Raphoane* (1913, T.P.D. 241), and *R.* v. *Caminsky* (*supra*, p. 129); but those cases do not seem to me analogous. There the actual facts necessary to be proved were not set forth at all. Here the date of the alienation, the person to whom the alienation was made, and the property alienated, are all set forth, together with the unlawful and fraudulent intent. All that was necessary to prove was that the partnership received no consideration for this alienation, and that the circumstances were such as to show the intention to fraud. The fact that the insolvents purported to have made an alienation for a good consideration would have been, if substantiated, a good defence, and the Crown were entitled to anticipate such a defence in their evidence, but the alienation without good consideration and with the accompanying circumstances as to the position of the insolvents' estate, would have been sufficient to prove a contravention of the section. It is the absence of consideration, and not the manner in which the insolvents tried to conceal the transaction which is the essential question.

There can, of course, be no question that there was no prejudice of any sort occasioned to the accused by the form of the indictment.

The same objection was taken to the second count, but as particulars were supplied, showing that the £322 referred to was the alienation to Jacob Shamosewitz referred to in the preliminary examination, the objection has no substance in it.

It will be convenient to take the 4th and 5th objections, namely, to count two of the first charge and to the third charge under sec. 146 (*b*), together.

It is alleged that they are bad for duplicity, and in respect of this contention *Goldreich* v. *R.* (1910, T.P. 1028); 9 Halsbury, par. 663, and Archbold's *Crim. Pleading* (p. 74, 22nd ed.) were cited. In *Goldreich's* case the charge was held to be bad on the ground of embarrassment, because the alternatives were widely different ways in which the alleged offence was said to have taken place. Here in the one charge it is alleged that the insolvents alienated, embezzled, concealed or removed certain property, and thus contravened sec. 146 (*a*). It is quite clear that only one contravention is charged, and it is stated to have been done by either alienating or embezzling or concealing or removing the property in question, all similar modes in which the offence might be committed. The main fact is that the estate was deprived of this property; the exact method in which it was so deprived is a matter peculiarly within the knowledge of the insolvents. There can have been no embarrassment in meeting the charge after the references to the particulars contained in the preliminary examination. There was, therefore, no duplicity and no embarrassment in this count.

A similar question is raised on the third charge. It is contended that the Crown should have elected whether to charge the concealment, removal or destruction of the stock-book and other document, but the same remarks which were made as to the preceding objection apply in this case also. Only one contravention of sec. 146 (*b*) is alleged. The exact method by which that contravention was carried out is known only to the accused. There was, therefore, no duplicity and no embarrassment. The case of *Reg.* v. *Beck*, to which reference has been already made, contains a similar charge of concealing, destroying or mutilating a certain document. No one seems to have imagined that there was any objection to this disjunctive form.

The sixth objection raises the important question whether the books of an insolvent are *prima facie* evidence against him of the

transactions therein recorded without production of the bookkeeper or of the materials from which the books were compiled. The case of *Pelunsky* v. *R.* (1914, A.D., p. 360) was relied upon in support of this argument. There the Court of Appeal held that secondary evidence was inadmissible without an express waiver in a criminal case, and that the counterfoils of certain alleged fraudulent tickets which were put in evidence instead of the tickets themselves, the very *instrumenta criminis*, were secondary evidence. It is argued that the insolvents' books are only secondary evidence of the original data from which they are compiled. In this case, however, the real question is whether the books are not the insolvents' own record of their transactions. Invoices, for instance, sent to the insolvents would not be evidence against them, but their record of them in their own books may very well be evidence against them. As is said by INNES, C.J.., in *R.* v. *Rorke* (1915, A.D., p. 155) an entry in a book kept by the Sheriff or under his supervision, purporting to record the receipt of any money, would be evidence of its actual receipt by him. Taylor in his book on *Evidence*, section 812, deals with many cases in which possession of documents affords a presumption of the knowledge of their contents. A man's own business books would clearly come within the authorities which he quotes.

The law contemplates that persons in business should keep books. These books were produced by the insolvents as the books of their business. It seems to me, therefore, that they are clearly *prima facie* evidence of the transactions referred to in them. It would, of course, be open to the insolvents to show that transactions had been recorded, of which they had no knowledge and of which they did not approve; but there is no pretence in the present case that the record in the books does not represent the transactions in the shape which the insolvents intended them to assume.

This view of the effect of the books disposes of both the 6th and the 7th objections.

The point raised at the trial that the books were a confession and required, therefore, to be supplemented by independent evidence was abandoned at the argument in this Court.

The eighth objection is that the case should have been withdrawn from the jury in respect of both the accused upon the third charge, because there was no proof of any concealment, removal or destruction of the stock-book and other documents; there was no evidence except the fact that the book and documents were asked

for and not produced. But this does not really exhaust the evidence upon this charge. There is proof that very shortly before the insolvency the stock-book and the documents were in possession of the accused. There is proof that search was made in the places where they would most likely be found without any avail, and that seems to me sufficient to cast the *onus* upon the accused; otherwise the more skilful the destruction, concealment or removal of the books, the less possible would be any proof beyond the mere fact of their non-production or destruction.

Mr. *Kent*, on behalf of Schatz, contended that his client stood in a different position to the other insolvent, and that there was no evidence connecting him with the first three charges in the indictment. With reference, however, to count one for contravening sec. 146 (*a*), at the meeting of creditors on the 10th October, 1913, both debtors are stated to have said, in answer to a question with reference to the farm, that they took a five years' lease of it, and paid £100 rent for the first year and £750 for goodwill. With reference to both counts under sec. 146 (*a*) it seems to me that the books are *prima facie* evidence against both partners, so that it is impossible to consider that there is no evidence implicating Schatz upon these two charges, and the same remark applies really to the third charge, because Schatz is clearly connected with the books and he himself was asked to secure their production.

There remains for consideration the point reserved by the presiding Judge, namely, whether the use of partnership money by the accused, Shamosewitz, to pay his private debt to his brother Jacob was an alienation, embezzlement, concealment or removal of property within the meaning of sec. 146 (*a*).

Where a partner fraudulently takes money away from the business under circumstances which bring him within sec. 146 (*a*), it, would appear to be immaterial to what private purposes of his own he applies the money, whether to pay his own private debt, or to spend for his own personal pleasure. So far as the firm is concerned and so far as its creditors are concerned, the injury is exactly the same.

It seems doubtful whether the actual transaction was really a payment of money. The insolvent firm sold cattle to Messrs. Brice Bros. for £330, for which that firm gave a promissory note, made out in favour of Jacob Shamosewitz, the brother. The £330 was credited to the Brice Bros.: the bill was handed over to Jacob Shamosewitz; with interest it amounted apparently to £333 15s.

It was discounted by Jacob Shamosewitz on the 30th August, 1913, at the Standard Bank, Springs, and the proceeds were credited to his account and drawn out from time to time by him.

In the firm's books the £330 is debited on September 1st to Jacob Shamosewitz thus:—To Brice Bros. £330. On the same day Jacob Shamosewitz's account is credited thus:—By Jack Shamosewitz £322; and the private or drawing account of Jack Shamosewitz is debited thus:—To Jacob Shamosewitz £322. The only explanation of this sum instead of £330 being transferred seems to me to be that Jacob Shamosewitz's account is thus squared. The difference of £8 is clearly not due to discount as the promissory note included interest and was for less than two months.

It is quite clear, therefore, that what was really alienated was either Brice Bros'. indebtedness to the firm or their promissory note, and that the only benefit that the firm received was a credit of £8 in the accounts between them and Jacob Shamosewitz.

Such a transaction, which the jury found to have been done with the deliberate intention of defrauding the creditors and with the knowledge of both partners, comes clearly within sec. 146 (*a*).

All the objections, therefore, which have been taken fail, and judgment must accordingly be entered in favour of the Crown.

Attorneys for Accused: *Gluckmann & Marks.*

[A. D.]