[HIGH COURT OF AUSTRALIA.]

VAUGHAN . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

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SYDNEY, *Nov.* 8, 9; *Dec.* 7.

Latham C.J., Rich, Dixon and McTiernan JJ.

Bankruptcy—Offences—Proper books of account—Failure to keep, or to preserve—Omission "honest and excusable"—Conviction—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *sec.* 213.

A bankrupt, prior to his bankruptcy, had been excluded by his landlady from his business premises on account of non-payment of rent. At the time of his exclusion his books of account relating to the business were in a safe, owned by the landlady, on the premises. He had a key of the safe and he succeeded, by using the services of his brother, in obtaining certain vouchers which enabled him to support claims which he had against customers. He admitted that he made no attempt to obtain the books, which were not forthcoming or discoverable after his bankruptcy. He was convicted, under sec. 213 of the *Bankruptcy Act* 1924-1933, of not having preserved the books of account.

Held:—

(1) By *Latham* C.J. and *Dixon* J. (*Rich* and *McTiernan* JJ. *contra*), that the evidence showed that the bankrupt was guilty of the offence of not preserving the books of account.

(2) By *Latham* C.J. and *Dixon* J. (*Rich* J. dissenting), that the bankrupt had not discharged the onus of proving that the omission to preserve the books was "honest and excusable"; therefore he was not entitled to the benefit of the proviso to sec. 213 (1) of the Act.

A bankrupt was convicted of an offence under sec. 213 of the *Bankruptcy Act* 1924-1933 in that he, being a person engaged in a business, did not keep proper books of account throughout the period he was so engaged. The bankrupt admitted that one C. and he were partners in respect of the business. Although the books of account were not produced, the bankrupt stated that such books had in fact been kept by C.

Held that the evidence failed to prove that proper books of account relating to the business had not been kept, either by the bankrupt or C.; therefore the conviction should be quashed.

Decision of the Federal Court of Bankruptcy varied.

APPEAL from the Federal Court of Bankruptcy (District of New South Wales and the Territory for the Seat of Government).

Upon a compulsory application for an order of discharge, made by Harold Wilkinson Vaughan, against whom a sequestration order was made on 20th April 1936, the Court of Bankruptcy, having reason to believe that he had been guilty of certain offences against the *Bankruptcy Act* 1924-1933 punishable by imprisonment, ordered that he be charged and summarily tried for those offences.

Vaughan was accordingly charged before Judge *Lukin*, on 1st April 1937, on charges laid against him under sec. 213 of the *Bankruptcy Act*, as follows:—(*a*) that at Sydney, he being a person who had become a bankrupt, and who on a previous occasion, namely, on 23rd October 1933, made an arrangement with his creditors, and who during the period between 17th March 1934 and 31st August 1934, being a part of the two years immediately preceding the date of the presentation of the bankruptcy petition on 17th March 1936, engaged in a business under the name or title of "The New Cavalier Cafe," did not keep proper books of account throughout that period; (*b*) that at Sydney on 26th February 1937, he being a person &c., as more particularly set forth in charge *a* above, engaged in a business under the name or title of "The New Cavalier Cafe," had not preserved proper books of account kept throughout the period referred to; (*c*) that at Sydney he, being a person who had become a bankrupt, and who on a previous occasion, namely, on 23rd October 1933, made an arrangement with his creditors, and who during the period between 1st June 1935 and 30th November 1935, being a part of the two years immediately preceding the date of the presentation of the bankruptcy petition on 17th March 1936, engaged in a business under the name or title "Graham's Cafe," did not keep proper books of account throughout that period; and (*d*) that at Sydney he, being a person &c., as more particularly set forth in charge *c* above, engaged in a business under the name or title of "Graham's Cafe," had not preserved proper books of account kept throughout the period referred to.

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Judge *Lukin* found as regards the various charges as follows: (*a*) That books were kept, and Vaughan was given the benefit of the doubt that such books were proper books; (*b*) and (*c*) that Vaughan was guilty of these charges; and (*d*) that as Vaughan was guilty of charge *c* he could not be, and was not, guilty of charge *d*.

Vaughan was sentenced to imprisonment for three months in respect of each of the two offences of which he had been found guilty, such sentences to be concurrent. The convictions and sentences were conditionally suspended pending the determination of an appeal to the High Court.

An appeal against the convictions and sentences was made by Vaughan to the High Court.

Further facts appear in the judgments hereunder.

Moverley (with him *Officer*), for the appellant. The meaning and import of the word "preserved" in sec. 213 of the *Bankruptcy Act* 1924-1933, is not limited to "has not been retained" as held by the trial judge. It was not proved that the appellant had been guilty of culpable negligence in not being able to produce the books relating to the New Cavalier business, therefore, having regard to the circumstances surrounding the closing down of that business and the dispossession of the appellant, the judge should have given effect to the proviso to sec. 213 (1). The words "engaged in any trade or business" in sec. 213 (1) can only relate to the trade or business which is carried on by the bankrupt as his own trade or business, and not as an employee (*In re Mutton*; *Ex parte Board of Trade* (1)). Upon the evidence it was not open to the judge to find that the appellant was in any way engaged in a proprietary sense in connection with the Graham's business so that it became in any sense his duty to keep books. This, as upon a criminal charge, should have been proved beyond a reasonable doubt (*Re Ah Gan* (2)), upon the evidence as a whole and not a part thereof only (*Jack* v. *Smail* (3)). It has not been shown that the person Curbey did not keep books relating to the business. The court should have regard to the form of the questions put to the appellant upon

(1) (1887) 18 Q.B.D. 615; 19 Q.B.D. 102.
(2) (1930) 2 A.B.C. 79.
(3) (1905) 2 C.L.R. 684, at p. 695.

his examination; and the confusion caused to, and the nature of the answers induced from, the appellant thereby (*In re Tillett*; *Ex parte Harper* (1)). There was a mistaken apprehension by the judge of the facts of the case, which, doubtless, had some bearing on the punishment imposed. In the circumstances, the sentences imposed were excessive (*R.* v. *Dandridge* (2)). The non-keeping of books is not so serious an offence as to justify the punishment of the offender with a lengthy term of imprisonment.

S. G. O. Martin, for the respondent. The *Bankruptcy Act* placed upon the appellant a positive duty to preserve the books of the New Cavalier business. Although he had a complete legal right to obtain the books he did nothing. That omission was not " honest and excusable " within the meaning of that expression in the proviso to sec. 213 (1) (*Dalrymple* v. *Melville* (3)). The evidence shows that the appellant was recklessly careless in the sense of not caring whether his omission to preserve the books was or was not a breach of his duty (*In re City Equitable Fire Insurance Co. Ltd.* (4)). The excuse given by the appellant is not a reasonable one (*Anderson Ltd.* v. *Daniel* (5); *Fox* v. *Burgess* (6); *Gould and Birbeck and Bacon* v. *Mount Oxide Mines Ltd.* (*In Liquidation*) (7)). The onus of showing that his acts and omissions were " honest and excusable " is upon the appellant. The facts show that the appellant was a partner in the business of Graham's (*Williams* v. *Robinson* (8)), therefore he was under a duty to keep books relating to that business. The meaning of the words " trade " and " business " was considered in *In re a Debtor* (9). That case shows that in the circumstances the appellant should have kept books.

[DIXON J. referred to *Halsbury's Laws of England*, 1st ed., vol. 27, p. 576, and *Rolfe* v. *Rolfe* (10).]

Whether he was or was not a partner the appellant still comes within the operation of sec. 213. The excessiveness or otherwise of

(1) (1890) 7 Morr. 286.
(2) (1931) 22 Cr. App. R. 156.
(3) (1932) 32 S.R. (N.S.W.) 596; 49 W.N. (N.S.W.) 206.
(4) (1925) Ch. 407, at p. 434.
(5) (1924) 1 K.B. 138.
(6) (1922) 1 K.B. 623.
(7) (1916) 22 C.L.R. 490.
(8) (1890) 12 L.R. (N.S.W.) Eq. 34, at p. 36.
(9) (1927) 1 Ch. 97.
(10) (1846) 15 Sim. 88, at p. 90; 60 E.R. 550, at p. 551.

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the sentences imposed upon the appellant is a matter entirely for the court.

Moverley, in reply.

Cur. adv. vult.

Dec. 7.

The following written judgments were delivered :—

LATHAM C.J. The appellant Vaughan was charged under sec. 213 of the *Bankruptcy Act* 1924-1933 with offences of not keeping proper books of account and not preserving books of account. Sec. 213 applies only to persons who on a previous occasion have been made bankrupt or made a composition or arrangement with their creditors and who subsequently become bankrupt. A sequestration order was made against Vaughan on 24th April 1936. On 23rd October 1933 he had made an arrangement with his creditors. Thus he was a person to whom the section applied. The section provides that such a person " shall be guilty of an offence, if, having during the whole or any part of the two years immediately preceding the date of the presentation of the bankruptcy petition been engaged in any trade or business, he has not kept proper books of account throughout those two years or part thereof, as the case may be, and, if so engaged at the date of presentation of the petition, thereafter, whilst so engaged, up to the date of the sequestration order, or has not preserved all books of account so kept." There is a proviso in the following terms :—" Provided that a person who has not kept or has not preserved those books of account shall not be convicted of an offence under this section if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable." The date of the presentation of the bankruptcy petition was 17th March 1936.

Vaughan was admittedly engaged in the business of a night-club proprietor at the New Cavalier Cafe during the period 12th March 1934 to 21st August 1934. He satisfied the learned judge in bankruptcy that he had kept proper books of account and he was therefore acquitted upon a charge of not keeping proper books of account in relation to that business.

He was, however, convicted of not having preserved the books of account kept. He appeals to this court.

The bankrupt was not charged with an offence under sec. 210 (2) (*c*). Under that section any person against whom a sequestration order is made is guilty of an offence if after or within six months before the presentation of the petition he conceals, parts with, destroys, mutilates, &c., any book or document affecting or relating to his property or affairs. If he had been charged under this section with concealing or destroying his books it would have been necessary for the prosecution to prove concealment or destruction. But no such proof is required under sec. 213. It is sufficient under that section to prove that he did not preserve the books.

The evidence showed that Vaughan kept books of account relating to the business of the New Cavalier Cafe and that these books were kept in a safe belonging to the landlady of the premises in which the business was carried on. Vaughan had difficulty in meeting his accounts and ultimately the landlady re-entered and took possession of the premises. Vaughan did make two attempts to obtain what he referred to as personal belongings. He had a key of the safe and he succeeded, by using the services of his brother, in obtaining certain vouchers which enabled him to support claims which he had against customers. He admitted that he made no attempt to obtain the books and the books were not forthcoming or discoverable after his bankruptcy. He simply did nothing with respect to the books. He did not even ask for them. The landlady was not entitled to detain the books. They were not held under any distraint for rent, the right to distrain having been abolished in New South Wales in 1930, and there was no judgment against Vaughan under which execution was being levied.

The contention for the appellant was that as he did not have the books in his possession after the time when he was excluded from his business premises he could not be subject to any duty to preserve them. But the section, subject to the proviso, imposes a positive obligation on a person who has previously been a bankrupt or made an arrangement with his creditors. That positive obligation is a duty to preserve books of account. If in fact he fails to preserve them he prima facie is guilty of an offence under the section. In this case the appellant plainly did not in fact preserve the books in

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any sense which can be attributed to the word "preserve." He did not even attempt to preserve them.

The proviso does not assist the appellant in this case. Under the proviso the onus of proof is placed on the person charged. The effect of the proviso is that if a person to whom the section applies has not in fact preserved his books he cannot be convicted if he succeeds in proving that in the circumstances in which he traded or carried on business the omission was honest and reasonable. In order that the proviso should apply he must obtain a positive finding from the court that in the relevant circumstances the omission was honest and excusable. Upon appeal he may contend that he was entitled upon the evidence to obtain such a finding. In view of the terms of the section, which plainly place the onus upon the accused, it cannot be presumed in his favour that his conduct was honest or excusable. The persons to whom the section applies are persons who have already been subject to the provisions of the *Bankruptcy Act*. It is assumed against them that they are aware of the importance of keeping books and of preserving books so that their affairs can be thoroughly examined, their liabilities accurately ascertained, and their assets fairly distributed among their creditors.

The neglect to pay any attention to the preservation of books when a subsequent bankruptcy occurs places upon such a person a very real onus if he attempts to prove that the omission was honest and excusable. In this case it cannot be assumed that if the appellant had asked for the books he would not have been able to obtain them. He did succeed in obtaining some things which were of value to him personally, namely, the vouchers already mentioned. He took no pains to obtain the books which should have shown, *inter alia*, what debts he owed. He has given no evidence of his state of mind at all. There is, in my opinion, no evidence which entitled the appellant to a finding that his omission was honest.

Further it would be necessary, in order that the proviso may be applied in favour of the appellant, that he should prove that the omission to preserve the books was excusable. The facts in relation to which such a defence must be considered are those already mentioned. In my opinion those facts provide no excuse. If he had honestly tried to get the books and had failed he would have been

protected by the proviso. But there is no evidence of any such endeavour.

In my opinion, the conviction for not preserving the books of account should stand.

The appellant also appeals against a conviction for not keeping proper books of account in connection with another night club with which he was associated, namely, Graham's. He was connected with this club from June 1935 to November 1935. He did not keep any books showing any of the transactions of the business. The obligation to keep proper books of account is an obligation which rests upon the bankrupt only if he is engaged in a trade or business. The appellant contends that the evidence does not show that he was engaged in a trade or business by reason of his connection with and his working at Graham's. He was the entertainment manager, and one Curbey is said by him to have been the proprietor of the business. If the bankrupt were only an employee in the business it could not be said that books of account of the business were " proper " books to be kept by him. Further, if proper books of account of the business were kept by a clerk in the ordinary course of business no person associated with the business could properly be held not to have kept proper books of account of that business. Such books of account would have been kept by the clerk on behalf of all persons engaged in the business who would therefore, by their servant, have kept proper books of account.

The finding that Vaughan was engaged in the business depends upon his own evidence. It shows that on occasions, but not regularly or as part of his normal functions, he ordered some goods for the club, and in the same way occasionally paid employees when Curbey was absent. The main evidence against him consists of admissions made during his examination under sec. 68 of the *Bankruptcy Act*. He was asked whether he was not a partner of Curbey and he said that he was a partner. It is urged that he only assented to suggestions made to him during his examination. But witnesses should be careful in giving such assent. They cannot complain if they are taken at their word, unless there is something to show that there was some misunderstanding. Further, the bankrupt did not merely assent to suggestions made. For example he was asked :

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"The position was that you and Curbey were in partnership in that business?" His answer was: "Yes, it was intended to be a partnership." Again, it was put to him: "At any rate there is no doubt that there was a verbal partnership between you and Curbey?" The answer was: "Yes, there was a definite verbal partnership." Other examples could be added to show that the bankrupt plainly admitted the existence of a partnership in which he, to use his own phrase, was "a working partner." A document was proved which showed that the bankrupt and Curbey intended to form a company to take over the business, and that they were to have an equal number of shares in the company. There was, in my opinion, ample evidence to support the finding that the bankrupt was engaged in the business of Graham's.

But it was necessary for the prosecution to establish that books of account of Graham's were not kept by the bankrupt. In one sense that fact was established. He admitted that he himself did not keep any books. But, as already stated, he would not be guilty of the offence under the section if his partner or an employee kept proper books. The difficulty of proving a negative proposition is well known. I do not think that it is necessary for the prosecution to show that neither the bankrupt nor any other person in the world on his behalf kept proper books. If the prosecution shows that the accused himself did not keep books, then a prima-facie case is made justifying a conviction if the other elements of the offence are proved. The prosecution need not prove, as part of its case, that neither the partner, nor the father or mother or brother, nor any servant or friend of the accused kept books of the business in question. If the accused proves that some other person did in fact keep the books which were "proper" in that business, he completely displaces the case for the prosecution. If, without achieving this standard of proof, he adduces evidence from which, on a balance of probabilities, it may be inferred that books were kept on his behalf by some other person, then, though not absolutely disproving the case for the prosecution, he may raise a reasonable doubt which will suffice to prevent his conviction. In the present case there is no evidence from which it can be concluded that there were no books recording the transaction of the business. The evidence with respect to books connected with

Graham's was as follows:—"Cannot you tell me more precisely what the turnover was?"—"I cannot tell you, Curbey could produce the books." "You are in a serious position. Again Mr. Vaughan, you have not produced the books."—"I had nothing to do with the books." "But you were liable just the same."—"I am sure the books could be produced." "Well I strongly advise you to have them produced."—"I definitely considered it no obligation on my part—I had nothing to do with the books." "It may not have been part of your duties as a partner, but it is your duty to produce the books. I would like to suggest to you for your own protection that you produce the whole of the books. It will be extremely awkward for you if you do not." The registrar: "Can you get the books?"—"Yes." "I will strongly advise you to do so. Failing that you may have to face a charge in respect of not having produced the books."—"I have not seen Curbey for months but I am sure he will have them." This is the only evidence on the matter which was before the court. There was no evidence that any inquiries had been made from Curbey about the books. If this evidence as to Curbey having the books is believed, it shows that some books were kept, but not whether they were proper books or not. If it is disbelieved, then the position is that there is no evidence as to books at all except that the bankrupt contended (as distinct from proved) that he had nothing to do with the books—a contention which may be true or false. Whether the evidence is believed or disbelieved, there cannot be said to be evidence that proper books of account were not kept by or on behalf of the accused. In my opinion the conviction for not keeping books should be set aside.

The bankrupt was sentenced to three months' imprisonment for each offence of which he was found guilty, the sentences to be concurrent. If, as I think, he was proved to be guilty of only one offence, it would seem proper that he should not serve as long a sentence as if he were guilty of both offences, even if, technically, the same sentence was pronounced in respect of each offence separately. The effective administration of the bankruptcy law is highly important to the community. It is the only means of dealing with certain more or less polite and popular forms of crime which

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cause more grievous suffering to innocent people than some more obvious offences. A thief injures one person where a bankrupt frequently injures scores of persons. Vaughan has shown himself to be quite indifferent to the requirements of the law. If it were not for the difference of judicial opinion upon the matter I would have been disposed to allow a sentence of some term of imprisonment to stand. In the circumstances, however, I agree with the order proposed by my brother *Dixon*.

RICH J. The appellant is a bankrupt complaining of an order for three months' imprisonment imposed upon him by the Federal Court of Bankruptcy. The term of imprisonment consists of concurrent sentences in respect of two charges under sec. 213 of the *Bankruptcy Act* 1924-1933.

One of the charges is that he did not keep proper books of account, the other is that he did not preserve them. The charges relate to separate periods in a career of what might pass for bohemianism—a career devoted to the management of night clubs or cabarets frequented by those who tend to secede from conventionality and prefer free and irregular habits. A night club of which for a period he was the proprietor was called the New Cavalier. Although his evidence suggests that his conduct gave pleasure to the patrons and brought notoriety to the cabaret his occupation of the premises appears to have been rendered precarious through a recurrent difficulty in finding the rent, and his period of proprietorship was punctuated by an assignment for the benefit of his creditors, a circumstance which fulfilled the first condition of sec. 213. That books were kept for the business does not appear to be disputed. Distress for rent having been abolished in New South Wales his landlady, if the evidence is to be credited, adopted a direct method of her own for extorting the rent when it fell into arrear. She placed locks on the doors of the premises and excluded her tenant until he paid. His desire to open the premises to his customers in the evening of several of the days on which this was done provided a sufficient incentive to lead him to surmount the difficulty he had experienced in finding the rent. But at length a day came when either his financial ingenuity or the earnestness of his desire to serve the bohemian public

proved insufficient and he abandoned the premises leaving the precious books within. He says they were locked in a safe which, among other things he appeared to value, he left in the possession of his triumphant but unpaid landlady. Since then he has not seen them; neither has the official receiver. His offence under sec. 213 consists in the facts I have stated. Upon those facts he has been convicted for that he has not preserved all books of account kept in connection with the New Cavalier cabaret.

The offence of not preserving books implies that they have been destroyed or have disappeared or in some other way have been lost beyond recovery by the bankrupt or his trustee. It also implies some wilful act or some neglect or default on the part of the bankrupt leading to loss. The section creates a crime punishable by imprisonment, and therefore should be construed as covering only conduct in some way reprehensible. No evidence was given to show that the books had been destroyed or that they had been lost beyond recovery. It was sought to infer their loss from a complete failure of the bankrupt, either of his own accord or under the instigation or warnings of the official receiver, to interest himself in their recovery. But the onus is not upon the bankrupt in this criminal proceeding, and his failure to produce the books can be explained upon more than one very natural hypothesis not inconsistent with their continued existence. It would be unsafe to found any inference of destruction or loss upon their non-production. Further, I would hesitate to treat his flight from the premises unencumbered by *impedimenta* and his failure to apply for a release of his books from the detention of a custodian who would continue to demand the rent as a wilful act or neglect or default rendering him liable. But, in any case, there is a proviso to sec. 213. It runs as follows: "Provided that a person who has not kept or has not preserved those books of account shall not be convicted of an offence under this section if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable." According to Lord *Hewart* C.J., who was construing the proviso to sec. 158 of the English Act from which the proviso to sec. 213 is adopted: "Honesty is a *sine quâ non* if the accused person is to bring himself within the proviso, but, clearly, the section contemplates that there may be

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circumstances in which the omission to keep books, although honest, is not to be excused " (*R.* v. *Dandridge* (1)). His Lordship speaks of honesty in the sense of the absence of any criminal intent. It does not mean honesty in general but honesty in relation to his creditors, actual or potential. I do not think that the bankrupt had the least thought of affecting his creditors, or the least desire to relinquish his books. Excusable is a vague word, but it seems to refer to the moral qualities of the act and to provoke the question: Is the bankrupt's conduct reprehensible or deserving of censure? According to this standard, I think his failure to extract his books from his landlady on or immediately after his abandonment of the premises was excusable. I therefore think that the conviction for this offence should be quashed.

The conviction for not keeping books was plainly not sustainable. This offence consisted in his participation at a later date in the conduct of another cabaret or night club called " Grahams." His legal and financial status in respect of this business was vague and ambiguous but the basis of the charge was that he was a partner. Accepting this assumption the man who was his co-partner appears to have kept books. If so, there was no need for each partner to keep a separate set of books. It is enough to say that it was not proved that books were not kept in the business in which the bankrupt was engaged.

In my opinion the appeal should be allowed and the order of the Court of Bankruptcy discharged.

DIXON J. This appeal is brought by a bankrupt against an order of the Federal Court of Bankruptcy convicting him summarily of two offences against sec. 213 of the *Bankruptcy Act* 1924-1933, and imposing a sentence upon each charge of imprisonment for three months concurrent.

Sec. 213 is one of three provisions in the *Bankruptcy Act* dealing with a failure on the part of a bankrupt to keep books of account. Sec. 119 (7) (*b*) includes such a failure among the matters which require the court to refuse or suspend a bankrupt's discharge or to impose prescribed conditions. In that provision the failure is

(1) (1931) 22 Cr. App. R., at p. 158.

described simply as an omission to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the five years immediately preceding his bankruptcy. Sec. 209 (*g*) makes the failure an offence punishable with three years imprisonment, and defines the offence in the terms used by sec. 119 (7) (*e*), except that the words " during any period " are introduced before the words " within five years."

Sec. 213, under which the bankrupt was convicted, creates a distinct offence, or rather offences, which consist of a number of elements. The offence of failing to keep books which sec. 213 creates is made up of the following ingredients :—1. The offender must become a bankrupt. 2. He must on a previous occasion have been a bankrupt or have made a composition or arrangement with his creditors. 3. He must have engaged in a trade or business. 4. The time when he was so engaged must have been within two years of the presentation of the petition under which his existing bankruptcy arose, but the period during which he was so engaged may form either a part or the whole of that two years. 5. He must have been guilty of an omission defined by simple but general words, viz., " he has not kept proper books of account." 6. The period of the omission must have been " throughout those two years or part thereof, as the case may be, and, if so engaged at the date of presentation of the petition, thereafter, whilst so engaged, up to the date of the sequestration order."

For the purpose of giving more particularity to the expression " kept proper books," a sub-section provides that a person shall be deemed not to have kept proper books of account if he has not kept such books or such accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including those of the descriptions it proceeds to specify. These are the ingredients upon which the inculpation of the offender depends. But a proviso confers upon him the benefit of a ground of exculpation. It is a defence by way of confession and avoidance which he must make out. It consists in proof that in the circumstances in which he traded or carried on business the omission was honest and excusable. It is to be noticed that the circumstances in which he carried

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on his business are to govern the honesty and excusableness of his omission. It is not a general excuse covering the ground of accident, mistake, or other absence of guilty intention, the relevancy and sufficiency of which as matters of defence must always be a subject of doubt in offences defined as are those now in question.

Sec. 213, besides creating the offence of failing to keep books consisting of the elements I have described, goes on to include another offence, an offence of failing to preserve all books of account "so kept." The first four ingredients set out above must be present before this offence can be committed. But the offence supposes that at least some books of account have been kept, but that they have not been preserved. The fifth ingredient is, therefore, an omission described by the words "has not preserved all books" of the description required.

The sixth ingredient in the offence of failing to preserve books consists in the description of the books which must be preserved. The words "so kept" refer back to the preceding part of the provision creating the offence of failing to keep books, and so confine the offence of failing to preserve them to books of account kept throughout the two years before the presentation of the petition or part of those two years, or, if the bankrupt is engaged at the date of the petition in a trade or business, during the period between that date and the sequestration order.

The proviso gives the same ground of exculpation, and again the honesty and excusableness of the omission are to be governed by the circumstances in which the offender traded or carried on business.

The section does not impose any special penalty in respect of the offence and, therefore, under sec. 219 the punishment upon conviction on indictment is imprisonment for not more than two years and, on summary conviction, for not more than six months.

The bankrupt in the present case was held to have engaged during different periods within two years before the bankruptcy petition in two different businesses. In respect of one he was convicted of failing to preserve books of account. In respect of the other, of failing to keep books of account. It is from these convictions and from the sentences thereon that he now appeals.

The pursuit or vocation to which for some years the bankrupt has devoted himself, apparently with greater enlargement of his reputation or notoriety than of his fortunes, has brought him into repeated collision with the sanctions of the law. In the past he has survived the conflict with but little personal inconvenience, and, doubtless, surprise has heightened his feelings of grievance at receiving a sentence of imprisonment in a matter so remote from his usual round of activity as book-keeping. His trade is that of conducting cabarets or night clubs, a thing which he could not, or at all events did not, do in strict accordance with the legislation governing liquor, eating-houses, and the relations of employer and employee. In April 1933 he became the proprietor of a cabaret called the " New Cavalier," which had premises above a shoe store in King Street, Sydney. It was a night business, open in his time only from nine o'clock onwards. He carried on the enterprise until August 1934, notwithstanding that in the midst of doing so, namely, on 23rd October 1933, he found it necessary to make an assignment for the benefit of his creditors. It is this assignment that satisfies the requirement forming, according to the order in which I have stated them, the second among the ingredients common to the offences of which he has been convicted. It appears that he did cause books of account to be kept of the business of the The New Cavalier. Of the efficiency and sufficiency of the books, which are not forthcoming, he speaks highly. There were several of them, he says, a cash book, a journal and others. It was his job to get the people into the premises, and so great a demand did it make upon his energies that, as he candidly allows, he had nothing personally to do with the books, but he does know the system was a very good one, because each morning you could always tell the number of eggs and other commodities consumed. Unfortunately the enterprise was embarrassed by the insistence of the landlady of the premises upon punctual payment of the rent. Her insistence was manifested in an inconvenient practice of excluding the proprietor and his staff from the premises when the rent fell into arrear. It was accomplished by placing new locks on the doors and shutting up the premises, which the landlady would not open until he found the unpaid rent. Whether any lawful justification existed for this form of self-help does not appear. At the time,

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what the bankrupt calls his lease had expired, and it may be that his holding over was of a special character. Like the books, the landlady, whose name was Mrs. Harris, was not produced. But a witness, who, though describing himself as an auctioneer, said that in his time he had done fifty thousand repossessions, supplied complete confirmation of the bankrupt's account of his landlady's proceedings. Finally, she locked the doors against him without achieving her object, if her object was to force payment of the rent. Instead of responding by paying the rent the bankrupt abandoned the New Cavalier, leaving the articles which were his upon the premises in her possession, that is, in the custody of the witness last mentioned. Among them were the books, locked in an iron safe. What became of them the evidence does not disclose ; but the conviction of the bankrupt upon the charge that he did not preserve books of account rests upon his failure to secure the books against whatever fate befell them.

The question is whether on the facts appearing it can be said that within the meaning of sec. 213 he "has not preserved all books of account so kept." What happened in respect of the books appears only from the bankrupt's depositions and evidence. The depositions of his public examination state that he had put in lights and other fixtures which, in view of the rent he owed, he thought he could not claim ; that Mrs. Harris put first one person and then another in possession of the premises and in control of his business and then took the place over herself ; that she was very antagonistic towards him and kept his books and other things ; and that "he was absolutely more or less thrown out of the premises by a foolish woman." He said that his personal belongings were destroyed, but he did not know whether the books had been ; that an emissary of his had got some dockets while the cleaners were at the premises, and that it is possible that the two books might have been got.

In his evidence he swore that the books were in an iron safe forming part of the leased premises, that on the final occasion, which occurred in August 1934, he was refused admission unless he paid £50 and that, as he was unable to do so, he considered that he could not take even his belongings.

The charges against the bankrupt were laid under sub-sec. 1 (*a*) of sec. 217 and heard under sub-secs. 2 and 3. The evidence against the bankrupt upon the charges upon which he was convicted consisted of nothing but his own depositions and, unsatisfactory as his account of the fate of the books is, it must be borne in mind that the burden of proof is upon those seeking to establish the charges, and that the ingredients of the offences must be proved beyond reasonable doubt.

The question which demands consideration is whether the element which I have called the fifth has been established. Of the first, second and third there can be no doubt. He is a bankrupt, he did make a composition, and he engaged in a business thereafter; for he continued to carry on the New Cavalier cabaret. The fourth element, which relates to time, has also clearly been made out. Mrs. Harris did not exclude him until August 1934, and he had carried on the carbaret without any interval since his composition in October 1933. The presentation of the petition was in March 1936. That during the required period he caused books to be kept may be assumed. But is it sufficiently shown that he did not "preserve" them? There seem to me to be two elements involved in a failure to preserve books. The first is that the books must have been destroyed, lost, or in some other way rendered unavailable or inaccessible. The second is that this must have happened through some neglect or default of the bankrupt, or through his misconduct. There is no direct proof that the books are no longer obtainable or available. But, though repeatedly requested and even directed to produce them, the bankrupt has thrown no light on their present whereabouts, if they still exist.

On the whole, I think that it may safely be concluded that they are lost or destroyed, or at any rate cannot easily be traced. The neglect or default of the bankrupt depends upon the reasonableness of his conduct in leaving them on the premises when Mrs. Harris finally assumed possession. Again there is no information except the statement of the bankrupt. If her title to re-enter or to exclude the bankrupt were inquired into, it might turn out that she had more justification than appears and that in retaining his goods and chattels she was not committing a wrongful act. His vague description of

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her as his landlady may not represent the real legal relations which her solicitor had succeeded in establishing between her and the bankrupt after the expiration of his so-called lease. But on the bankrupt's evidence and admissions it would seem that, after the date of the abolition of distress in New South Wales, a landlady had re-entered demised premises for non-payment of rent and had seized the tenant's chattels including the books in question and that the latter had made no request for their redelivery to him and no attempt to regain them. In these circumstances I think that the bankrupt must be regarded from the point of view of the bankruptcy law as in fault. The fault, doubtless, was honest, but it cannot, in my opinion, be considered as excusable under the proviso, because excusableness is governed by, or is to be determined by reference to, the circumstances in which the bankrupt carried on business. His failure to recover the books from Mrs. Harris was quite independent of such circumstances. But I cannot regard his default as a matter deserving grave punishment. He found himself turned out of the premises and facing the necessity of finding some other means of pursuing his vocation or earning a livelihood. The business of the New Cavalier was continued by his successor, and his general attitude is probably that which most men in his situation would have adopted. I think the sentence of imprisonment imposed ought not to stand.

In the year following his departure from the New Cavalier cabaret the bankrupt became a co-adventurer with one Curbey in a new enterprise of a similar nature. A cabaret was opened by them in Hunter Street, Sydney, under the name "Grahams." Their intention was to form a company named Grahams Ltd., in the capital of which each was to subscribe for 200 £1 shares. They were to pay the full amount of the shares in cash. The cabaret was opened at the end of June 1935, before the company was formed, and in fact it has never been registered. Apparently no regular course was taken in formulating the relations of Curbey and the bankrupt either to one another or to the business. The bankrupt contends that Curbey was the proprietor and he was the manager. On the doorway of the cabaret a legend was inscribed, "Harold Vaughan presents Grahams," which might lead the less thoughtful to believe

that it was his, and the more thoughtful to suspect that it was not.

In his examination the bankrupt readily assented to the view that he and Curbey were partners, and this view is probably correct. They were at least promoters carrying on in combination the business of the intended company pending its registration. On the view that he was a proprietor, the bankrupt has been convicted of not keeping books of account. This forms the second conviction against which he appeals. He says that Curbey kept the books. He dissociated himself from the adventure in November 1935 and left Curbey in charge. After an interval, during which he was employed at a place called the "400 Club," he returned to Grahams on 13th July 1936, but as an employee only. After some fifteen weeks of further life Grahams then closed. Again the books are not forthcoming. But again the bankrupt is clear that books were kept, though repudiating any personal connection with the work of accounting.

There is, in my opinion, no evidence that books were not kept, and if Curbey did keep them or cause them to be kept, as probably he did, the bankrupt is not guilty of the offence of failing to keep books of account. In *In re M'Intyre* (1), a bankruptcy case, the Supreme Court of Victoria, consisting of *Higinbotham*, *Williams* and *Holroyd* JJ., speak of the responsibilities of partners under provisions like sec. 213 as follows:—"The liability of one member of a firm for the acts of other members, in connection with the keeping of accounts and entries of receipts and payments, is a question on which we do not propose to give an opinion now. It certainly appears that it should be dealt with on the facts of each case. It may well be, as a general rule, that a member of a partnership firm is liable for the acts and defaults of his co-partners, and yet that in any particular case if it should be proved to the satisfaction of the court that one partner was not the member of the firm who kept the books, but he was engaged in a totally different branch of the business, he should be relieved from liability for the acts of his partners."

I agree in the suggestion their Honours make and it covers the facts of this case.

In my opinion the conviction for failing to keep books at the Graham cabaret should be quashed.

(1) (1885) 11 V.L.R. 312, at p. 318.

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On the conviction for not preserving the New Cavalier books, I think the sentence should be set aside and that, upon his giving before the Court of Bankruptcy security by his own recognizance in the sum of £100 to be of good behaviour for twelve months and during that period to comply with the provisions of the *Bankruptcy Act* and regulations, the bankrupt should be released without sentence being passed upon him (Cf. sec. 20 (1) of the *Crimes Act* 1914-1932).

McTIERNAN J. The onus of proof was on the prosecution to establish beyond reasonable doubt the commission of the offences. It is to be observed that both allegations against the bankrupt are in a negative form. It is not for the bankrupt to prove in the first instance that, in one case, he did keep proper books of account or, in the other case, that he did preserve all books he was bound to keep.

I agree that the evidence fails to prove that the bankrupt, who will be referred to as the appellant, had not kept books for the business which he conducted under the name of "Graham's" in association with a so-called partner. The section does not bind a person to whom it applies to keep books by his own hand. The appellant's evidence shows that the so-called partner did keep books relating to the business. It is not to be presumed, even if this evidence is not believed—it is not contradicted—that books of account were not kept.

I agree that, upon the true construction of sec. 213, the appellant's duty under this section would be satisfied if his business associate had kept books, as the appellant deposes. If this evidence is not believed, the question whether books were not kept is one which cannot be determined. Presumption cannot upon this charge of crime lawfully supply proof of the negative allegation which it is essential for the prosecutor to establish.

I agree that the conviction of the appellant on this charge should be set aside.

The other charge upon which the appellant was convicted was that "he had not preserved all books of account so kept." This charge related to another business conducted under the name of the "New

Cavalier." It seems to me that it is necessary to show that books have been destroyed or lost before it can be said of them that they have not been preserved. If either of these facts were proved, the next question which would arise would be whether the person charged was responsible for such destruction or loss. The section does not exhibit an intention to make the bankrupt an insurer of the safety of the books, and it does not attach any importance to neglect on his part for the safety of the books, if, notwithstanding such neglect, they are preserved. I agree with my brother *Rich* that the words of sec. 213 creating the offence imply that the books have been destroyed or have been lost beyond discovery and that some wilful act or default on the part of the bankrupt is the proximate cause of this destruction or loss. In the present case, it was proved that books had been kept and were in existence—they were in a safe on the appellant's premises—at the time the landlady excluded him from occupation. There was no evidence that the books were destroyed or that they had been lost beyond recovery. The evidence does not establish beyond reasonable doubt that the books were not at the date of prosecution in a state of preservation in some accessible place.

This offence is not established by proving that he did not produce the books. The non-existence of the books is not a necessary inference from the non-production of them. Indeed, the failure to produce books and documents, which are in fact in existence and accessible, is only too common in legal proceedings. In my opinion, it was essential for the prosecution to prove that the books were destroyed or lost beyond recovery. There is not, in my opinion, evidence from which either of these facts can be inferred, and the failure of the appellant to trouble about getting the books is not sufficient to ground such an inference as that they were lost or destroyed, or if the books had suffered either of these fates, as that the appellant was the person responsible.

I think that the case for the prosecution breaks down because there is no proof that the books were not in existence or had been lost beyond recovery. I would add, however, that I do not think that the bankrupt neglected to demand his books from the person who excluded him from the premises, on which he left them, soon

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after he was ejected, or at any time afterwards, because he had any deliberate intention of suppressing his financial transactions. His failure in this respect is more readily attributable to lack of interest in the books; for, in the case of a man of his habits and fortune, I do not think that any such interest in the books of the business would survive the termination of his personal concern with it. However blameworthy it may have been for the appellant not to have troubled about getting the books of the business, after he was ejected from the premises, his default in this respect is not relevant unless and until it is shown that the books have not been preserved.

In my opinion the appeal should be allowed and both convictions quashed.

Conviction for not keeping books quashed. Order of Federal Court of Bankruptcy upon the charge of not preserving books varied by setting aside the sentence of imprisonment for three months and by ordering that upon the bankrupt giving before the Federal Court of Bankruptcy security by his own recognizance in the sum of £100 *to be of good behaviour for twelve months and during that period to comply with the provisions of the Bankruptcy Act and regulations, he should be released without sentence being passed upon him.*

Solicitor for the appellant, *Frank McTague.*

Solicitor for the respondent, *H. F. E. Whitlam,* Commonwealth Crown Solicitor.

J. B.