[HIGH COURT OF AUSTRALIA.]

MAXWELL . . . . . APPELLANT;

AND

THE OFFICIAL ASSIGNEE IN THE ESTATE OF GILLESPIE } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 5, 6, 7, 8, 23,

Griffith C.J., O'Connor and Isaacs JJ.

Bankruptcy—Property divisible among creditors—Goods in the possession, order, or disposition of the bankrupt—Reputed ownership—Dairy cattle used by bankrupt—Custom—Bankruptcy Act 1898 (*N.S.W.*) (*No.* 25 *of* 1898), *sec.* 52, *sub-sec.* (*e*).

By sec. 52 sub-sec. (*e*) of the *Bankruptcy Act* 1898 the property of a bankrupt divisible amongst his creditors includes, *inter alia*, all goods at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt by the consent of the true owner, under such circumstances that the bankrupt is the reputed owner thereof.

In order to bring a case within the operation of that sub-section the circumstances of the bankrupt's possession of the goods must be such that the owner, in allowing the goods to remain in the bankrupt's possession, must be taken to have consented to a state of things from which the inference of ownership in the bankrupt must (not might or might not) arise.

If the conditions on which an industry is carried on are such that it is notorious to persons conversant with it that the stock used in the industry may or may not be the property of the person carrying it on, an owner who consents to his chattels being used by another in the industry cannot be said to have known that the inference of ownership must arise.

A bankrupt, engaged in business as a dairy farmer in a district which was mainly devoted to that industry, was at the commencement of his bankruptcy

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in possession of dairy cattle which he used in his business, and which had been leased to him for that purpose by the owner. On a motion by the official assignee to have the cattle handed over to him under sec. 52 sub-sec. (e) evidence was given on behalf of the person opposing the claim of the assignee of the widespread prevalence in New South Wales of systems of dairy farming in which the farmer was not the owner of the dairy stock used by him on his farm. There was also evidence of the existence of a practice of farmers taking in dairy stock for agistment. The Judge held that the existence of the agistment practice could not affect the case of dairy cattle used on a dairy farm, and found that none of the other systems had been generally practised in the particular district, and not to such an extent in New South Wales generally as to amount to a notorious practice or custom negativing reputation of ownership. His decision was affirmed on appeal by the Full Court.

On appeal to the High Court,

Held (*per Griffith* C.J., and *O'Connor* J.; *Isaacs* J. dissenting), that the Judge of first instance, although he correctly stated the principles of law applicable to such cases, yet in dealing with the facts had in effect misdirected himself in that he attached undue weight to the fact that in the majority of cases in the particular district dairy farmers were the owners of the cattle they used, and in that he erroneously treated the question rather as one of reputation in that particular district than as one of general reputation from the point of view of an owner who allowed his cattle to be taken to that district for use on a dairy farm without having reason to suppose that the practice in that district was exceptional; and, further, that on the evidence it was established that the practice of agisting cattle was common and well known, that the existence of several common systems of dairy farming in which the farmer carries on business with cattle of which he is not the owner was notorious to persons conversant with the industry over the whole State, and that, as there was no evidence that the particular district was notoriously an exception in that respect, the possession and user of the cattle by the bankrupt were equally consistent with his being the owner or with his holding them under one of the systems proved, and, therefore, the cattle were not in the reputed ownership of the bankrupt within the meaning of sec. 52.

Per Griffith C.J. and *O'Connor* J. It is not necessary to show that the practice relied upon to displace the reputation of ownership is the practice most commonly followed; it is sufficient to show that it is generally known to exist and not infrequently followed, so as to make the possession of the particular goods ambiguous.

Semble, *per Griffith* C.J. The mere possession and use of dairy cattle in New South Wales are not sufficient to raise a presumption of ownership.

Per Griffith C.J., and, *semble*, *per O'Connor* J. Admissions made by the official assignee after vesting of the estate in him as to the notoriety of a system by which the farmer held the stock under a lease from the owner were admissible to prove the existence of that system.

Per Isaacs J. If the official assignee proves possession by the bankrupt under such circumstances as, according to the ordinary habits of mankind, only exist in the case of possession by the owner, he has established a *primâ facie* case of reputation of ownership, which can only be displaced by proof of the existence of some custom to the contrary, whether universal or limited, so notorious that the Court will take judicial notice of it as part of the common knowledge. Such a custom must be general, clear and precise, certain, existing in or extending to the place where the goods are, known to persons likely to give credit to the bankrupt, and such as to make it reasonably possible that the goods in the position of those under consideration are not owned by the possessor. The Judge of first instance laid down the proper principle of law, and applied it properly to the facts; and his findings, that there was a *primâ facie* case of reputation of ownership, and that there was not sufficient evidence of a practice to displace it, should not be disturbed. Admissions by the official assignee, though in the particular case they were evidence of his intention to abandon his claim to the property under his statutory powers, were not admissible to prove the existence of a custom, inasmuch as he was only a trustee for the creditors, and had no authority to make admissions against their interest.

Decision of the Supreme Court, *Re Gillespie*; *Ex parte Official Assignee* (1908) 8 S.R. (N.S.W.), 192, affirming that of *Street* J., *Re Gillespie*, 24 N.S.W. W.N., 169, reversed by a majority.

APPEAL from the decision of the Supreme Court of New South Wales, on a motion under sec. 134 of the *Bankruptcy Act* 1898, for an order as to certain property in the possession, order and disposition of a bankrupt.

The bankrupt Gillespie, a dairy farmer, was at the date of his bankruptcy using certain dairy cattle in his business on a farm which he held under a lease from the appellant. The bankrupt being in arrear with his rent, the appellant after the act of bankruptcy distrained and seized the cattle. The official assignee claimed to be entitled to them by virtue of sec. 52, sub-sec. (*e*) of the *Bankruptcy Act* 1898, the "reputed ownership" clause, and motion was made under sec. 134 for a declaration of his title. *Street* J. before whom the motion came on for hearing decided in favour of the official assignee: *Re Gillespie* (1). The appellant appealed to the Full Court who dismissed the appeal: *Re Gillespie*; *Ex parte the Official Assignee* (2).

From that decision the present appeal was brought by special leave.

(1) 24 N.S.W. W.N., 169.

(2) (1908) 8 S.R. (N.S.W.), 192.

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The facts, and the material portions of the judgments appealed from, are sufficiently stated in the judgments hereunder.

Loxton (*Harriott* with him), for the appellant. The official assignee did not discharge the onus cast upon him. All that he proved was possession by the bankrupt, and ownership in another. There was no evidence of user by the bankrupt in his business. It was only proved that the cattle were running on the bankrupt's land. The Judge dealt with the case on the assumption that the facts established by the official assignee threw on the claimant the onus of satisfying the Court that the reputation of ownership did not arise whereas the onus was the other way. He held, in effect, that *primâ facie* reputation of ownership arises from mere possession by the bankrupt. That may be so where the ownership was originally in the bankrupt, and there has been no change in the possession. Here the bankrupt never was the owner. In such a case more than mere possession and use is necessary to give rise to the reputation of ownership. There must be something which the law recognizes as unconscientious in the circumstances under which the bankrupt is allowed to remain in possession, so that the goods ought not, or would not naturally be expected, to have been in his possession if he were not the owner.

[He referred to *Hamilton* v. *Bell* (1); *Joy* v. *Campbell* (2); *Lingard* v. *Messiter* (3).] On the whole of the evidence there was no reputation of ownership, and even if there was a *primâ facie* presumption, the evidence of the various customs or practices displaced it. Reputation of ownership cannot arise unless the circumstances of the possession are such that the inference of ownership necessarily arises. It is not sufficient to show that the bankrupt is probably the owner. Ambiguity of possession negatives reputation of ownership. All that the Judge had to consider was whether the circumstances were such that a reasonable man, dealing with the bankrupt and conversant with the ordinary course of the industry of dairying, was entitled to come to the conclusion that the cattle were the property of the bankrupt. He treated the case as if the claimant was bound to prove a custom in the strict legal sense, whereas it was sufficient to

(1) 10 Ex., 545. (2) 1 Sch. & Lef., 328. (3) 1 B. & C., 308.

establish the existence of a notorious practice, not universal, but of extensive prevalence.

[He referred to *Ex parte Watkins*; *In re Couston* (1); *In re Watson (William) & Co.*; *Ex parte Atken Bros.* (2); *Colonial Bank* v. *Whinney* (3); *In re Bourke* (4); *Collins* v. *Forbes* (5); *In re James*; *Ex parte the Swansea Mercantile Bank Ltd.* (6); *Ex parte Turquand*; *In re Parker* (7).]

[ISAACS J. referred to *Load* v. *Green* (8); *In re Goetz, Jonas & Co.*; *Ex parte the Trustee* (9).]

The Judge misdirected himself as to the nature of the custom or practice necessary to be proved. Otherwise he would not have found as he did in view of the evidence. Two methods of dairy farming were proved to exist throughout the State, in each of which the farmer did not own the cattle, namely (1) a leasing system, under which the farmer leased the cattle and used his own or rented land; (2) a system under which the same person owns both land and cattle, and the farmer pays the landowner a proportion of the return from their use. Both these systems were shown to be very widely prevalent. The Judge dealt rather with the peculiar conditions of the particular district, and on the fact that in a majority of instances in that district the farmer owned the cattle that he used for dairying he partially based his finding that there was reputed ownership. But there was no evidence that an ordinary person conversant with the general course of business in the State would suppose that this district was exceptional in this respect. The actual knowledge of local witnesses was immaterial. [He referred to *In re Woodward*; *Ex parte Higgins* (10).] There was also abundant evidence of the practice of taking in dairy stock on agistment. The only possible inference from the evidence was that the bankrupt might or might not be the owner of these cattle. The evidence of the witnesses at the hearing is strongly supported by the admission of the official assignee that the practice of leasing dairy cattle could clearly be established.

(1) L.R. 8 Ch., 520.
(2) (1904) 2 K.B., 753.
(3) 11 App. Cas., 426.
(4) 19 L.R. Ir., 564.
(5) 3 T.R., 316, at p. 323.
(6) 24 T.L.R., 15.
(7) 14 Q.B.D., 636.
(8) 15 M. & W., 216, at p. 223.
(9) (1898) 1 Q.B., 787.
(10) 3 Mor., 75; 54 L.T., 683.

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Further, the official assignee disclaimed any interest in the contract by which the bankrupt held the cattle from the owner, and his attempt to claim them under the reputed ownership clause is inconsistent with his disclaimer. He should not be allowed to get rid of all the burden of the contract, *e.g.*, the liability for rent, and at the same time take the benefit of it so far as to retain the cattle. Disclaimer frees the bankrupt's estate from all claim in respect of the property in question. The property once disclaimed should be treated as if it never had been the property of the bankrupt. [He referred to *Bankruptcy Act*, No. 25 of 1898, secs. 52, 62; English *Bankruptcy Act* 1883, sec. 55; *Ex parte Allen*; *In re Fussell* (1); *Williams on Bankruptcy*, 8th ed., p. 273.] Even if there was no disclaimer, the official assignee is now estopped as the appellant has acted on his representations; at any rate the correspondence shows a compromise within the statutory powers of the official assignee.

[GRIFFITH C.J.—Special leave to appeal was not granted to raise these points, nor do I think that leave would have been granted to raise them if it had been asked. Those particular points might never arise again. It was said that the Supreme Court had assumed that mere possession of dairy stock was sufficient to give rise to reputation of ownership. That was the ground of general importance alleged. Certainly the appellant is free to argue all grounds, but there is a motion to rescind the special leave, and if this is the only ground on which the appellant can succeed, it may be rescinded.]

Wise K.C. and *R. K. Manning*, for the respondent. The general rule applicable to the present case may he stated thus: Where goods are leased by the owner to another person to be used by that other in his business or trade, and are so used, they are in the possession, order, or disposition of the person so using them, with the consent of the owner, within the meaning of sec. 52 sub-sec. (*e*). Where the user is under such circumstances as to necessarily create a *primâ facie* reputation of ownership the owner is presumed to have consented to such reputation, because it is the natural consequence of his conduct. The presumption

(1) 20 Ch. D., 341.

may be displaced by proving a custom or practice that such user is consistent with ownership in another. Directly the custom or practice is proved it becomes immaterial whether the goods were in fact held or used in accordance with the custom; it is sufficient if the creditor might reasonably have thought the custom might apply. In every instance the burden of proving the custom is on the person setting it up. In this case there was a presumption of ownership in the bankrupt. All the *indicia* of ownership were present. If an owner of goods allows another to use them as his stock in trade the presumption arises.

[GRIFFITH C.J.—It depends upon the evidence as to the nature of the business.]

As a general rule possession of utensils of trade raises a reputation of ownership: *Horn* v. *Baker* (1); *Ex parte Sheppard*; *Re Clapham* (2); *Sharman* v. *Mason* (3); *In re Singer*; *Ex parte London and Universal Bank* (4); *Dairies Supervision Act* 1901. There is no reason why a different rule should apply to the case of dairy cattle. Unless there is a practice or custom to the contrary the dairy farmer would be the reputed owner. Where the authorities use the word "unconscientious" in reference to the owner allowing the goods to remain in the trader's possession, nothing dishonest is intended, only that it is regarded as unfair that the trader should get the benefit of a reputation of ownership at the expense of his creditors.

[GRIFFITH C.J.—It is allowing goods to remain in the possession of the bankrupt under such circumstances as he knows will necessarily give rise to the reputation of ownership; *In re Watson (William) & Co.*; *Ex parte Atkin Bros.* (5).]

The Judge did not misdirect himself. In effect he put to himself the question whether the possession and use under the circumstances could give rise in a reasonable man's mind to a reputation of ownership, and if so, whether that had been displaced by evidence of other circumstances that should be known to all persons having a knowledge of the industry. The question is one of fact, and there was abundant evidence to support the Judge's

(1) 9 East., 215.
(2) 4 L.T.N.S., 808.
(3) (1899) 2 Q.B., 679.
(4) (1897) 2 Q.B., 461.
(5) (1904) 2 K.B., 753.

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finding in respect of it. There was evidence given by a number of persons conversant with the industry that they never supposed the cattle to be the property of another.

[GRIFFITH C.J.—Is that not admissible?]

Yes, as soon as some evidence is given raising a presumption of ownership. Reputation is constituted by the belief of a number of witnesses making up a body of opinion. [They referred to *Oliver* v. *Bartlett* (1).]

[GRIFFITH C.J.—*Williams on Bankruptcy*, 8th ed., at p. 226, says that the case of *Ex parte Watkins*; *In re Couston* (2) seems to throw doubt on that case.

ISAACS J.—Lord *Selborne* seems to have thought the evidence inadmissible.]

Apart from that there was evidence of reputation to go to a jury. The Judge from the particular circumstances of the possession and user came to the conclusion that there was a *primâ facie* presumption of reputed ownership, and that there was no satisfactory evidence of a practice which would rebut that presumption. That being the proper way to deal with the facts, this Court will not review his decision in a case where special leave was necessary. [They referred to *In re Horn*; *Ex parte Nassan* (3).] The evidence as to a practice such as will prevent the reputation of ownership arising must be clear and definite. On that point the Judge correctly stated the legal position. He said that it must be shown that the system is so common in the industry and has been practised so long and so extensively as to amount to a custom in the industry. It is not enough to prove merely a large number of instances.

[GRIFFITH C.J.—The thing must be so commonly practised that persons dealing with the bankrupt must know that it was common, and that therefore the goods might not belong to the bankrupt. If his Honor had read the rule in that way I think he ought to have found the other way.]

This Court cannot say that the Judge was wrong in finding as he did on the facts. The practice was not so clearly proved as to make a finding against it manifestly wrong. [They referred

(1) 1 B. & B., 269.
(2) L.R. 8 Ch., 520.
(3) 3 Mor., 51.

to *Ex parte Watkins*; *In re Couston* (1); *In re James*; *Ex parte The Swansea Mercantile Bank Ltd.* (2); *Ex parte Powell*; *In re Matthews* (3); *Ex parte Reynolds*; *In re Barnett* (4); *Ex parte Brooks*; *In re Fowler* (5); *Thackthwaite* v. *Cock* (6); *Watson* v. *Peache* (7); *Robson on Bankruptcy*, 7th ed., p. 739; *In re Jensen*; *Ex parte Callow* (8); *In re Hill* (9)]. The so-called practice that it was sought to prove was not a usage or practice in the legal sense; it was merely a state of things that according to one set of witnesses was frequent and according to another set was unusual, and in the particular district practically non-existent. There is no authority for the proposition that mere ambiguity of possession displaces the presumption of ownership. Even if the Judge should as a matter of law have held the evidence sufficient to establish the practice, that was not the ground on which special leave to appeal was granted. If the appellant can only succeed on that point or on questions of facts the special leave should be rescinded. As to the facts, the practice of agistment was immaterial because the Judge found that the cattle were used in the dairy, so that any person seeing that would know that they could not be merely on agistment. The evidence as to the leasing system and the share system was not sufficient to establish that it was a notorious practice for a dairy farmer not to own the cattle used on his farm, at any rate not as to that particular district. The point as to the leasing system was never seriously argued. The admission by the official assignee was without authority, and could not bind his *cestuis qui trustent*, the creditors of the estate.

Loxton, in reply.

Cur. adv. vult.

The following judgments were read:—

April 13.

GRIFFITH C.J. The question for determination in this case is whether some milch cattle, about 45 in number, which had been leased to the bankrupt by one Clift, and which at the commence-

(1) L.R. 8 Ch., 520.
(2) 24 T.L.R., 15.
(3) 1 Ch. D., 501.
(4) 15 Q.B.D., 169.
(5) 23 Ch. D., 261.
(6) 3 Taunt., 487.
(7) 1 Bing. N.C., 327.
(8) 4 Mor., 1.
(9) 1 Ch. D., 503 (*n*).

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ment of the bankruptcy were in the bankrupt's possession, were in his possession, order or disposition by the consent and permission of the true owner Clift, under such circumstances that the bankrupt was the reputed owner thereof. The question is one of fact. The law is well settled. In the words of *Vaughan Williams* L.J., delivering the judgment of the Court of Appeal in the case of *In re Watson (William) & Co.*; *Ex parte Atkin Bros.* (1), "it is essential before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise."

The value of the stock is less than the appealable amount, but special leave to appeal was given in view of the importance of the case to the dairy industry, which has quite lately assumed very large proportions in several of the States of the Commonwealth.

The case for the official assignee was launched by evidence that the stock in question, being the property of Clift and leased by him to the bankrupt, were in the possession of the latter and used by him. He also had running with them some cows and a large number of heifers and calves of his own. At the close of the official assignee's case an application in the nature of an application for a nonsuit was made on behalf of the appellant, but was refused, the learned Judge being apparently of opinion that mere possession and use of dairy stock was sufficient to raise a presumption of ownership. Pausing here for a moment, I have great difficulty in accepting this view. I do not see any necessary analogy between the case of furniture in a man's house, or clothes that a man wears, and that of stock, or even of dairy stock. The industry of dairy farming in New South Wales as a separate avocation must have had some beginning, which we know to be recent; and, considering that, having regard to the practices of agistment and of leasing sheep and cattle, (of which, after an experience of over half a century, I cannot pretend to be ignorant,) the mere possession of stock did not in Australia necessarily import ownership, it might well be that when the industry was

(1) (1904) 2 K.B., 753, at p. 756.

first established it was generally carried on either with the stock of the dairy farmer or with that of another person leased to him, or with both. In the absence, therefore, of anything beyond evidence of possession, and left to my own unguided reason, I should have thought that it was impossible to draw any inference, one way or the other, as to the ownership of stock in the possession of a dairy farmer. But it is not necessary to pursue this aspect of the subject further.

The appellant then adduced evidence to establish that in New South Wales dairy farming is carried on under three distinct systems as to ownership of the stock: (I.) the stock being owned by the dairy farmer himself; (II.) the stock being leased by the owner to the dairy farmer: (III.) land and stock being leased to him by the owner of the land. This third system is called the share system. They also adduced evidence to show that agistment of stock is common in New South Wales. Before referring to the evidence I will quote another passage from the judgment of the Court of Appeal in *In re Watson (William) & Co.*; *Ex parte Atkin Bros.* (1).

"The doctrine of reputed ownership was first embodied in the *Bankruptcy Act*, 21 Jac. I. It has been couched in various words in the successive bankruptcy Statutes, but this principle has run through them all, and the statement of Lord *Redesdale* in *Joy* v. *Campbell* (2) (a case which has been approved and acted on again and again: see *Belcher* v. *Bellamy* (3), *Hamilton* v. *Bell* (4), and many other cases), that the true owner must have unconscientiously permitted the goods to remain in the order and disposition of the bankrupt, justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise: see *Hamilton* v. *Bell* (4); *Gibson* v. *Bray* (5); *Ex parte Bright* (6). The question for us then is, Did . . .

(1) (1904) 2 K.B., 753, at p. 757.
(2) 1 Sch. & Lef., 328, at p. 336.
(3) 2 Ex., 303.
(4) 10 Ex., 545.
(5) 8 Taunt., 76.
(6) 10 Ch. D., 566.

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(the true owner) consent to the possession by the bankrupts . . . under such circumstances that customers were entitled to assume that . . . (the bankrupts) were the owners of the goods in their trade or business?"

In New South Wales the words "in their trade or business" are not in the Statute. The question, therefore, is, "Did Clift consent to the possession of the stock by the bankrupt under such circumstances that persons doing business with the bankrupt were entitled to assume that he was the owner of them?" The lease of the stock, which was dated 25th February 1905, was for a term of two years, at an annual rent, with an option of purchase. The stock were then in the district of Bowral, running on land leased by the bankrupt from three separate owners, and the lease stipulated for due payment of the landlords' rent. They were afterwards—it must be taken with Clift's consent—removed by the bankrupt to the Camden district—some sixty or seventy miles away, and placed with other stock of his own upon land which he held under lease from the appellant, and which comprised two blocks of about 400 acres and 133 acres respectively. To what, then, did Clift consent by granting this lease and assenting to the removal?

I apprehend that it is not open to dispute that, if the conditions on which the industry is carried on in the relevant locality are such that it is notorious to persons conversant with it that the stock may or not be the property of the person carrying on the industry, an owner who consents to his chattels being used in the industry cannot be said "to have known, if he had considered the matter, that the inference of ownership by the bankrupt must (not might or might not) arise." The only fair inference is that it is uncertain whether the chattels are or are not the property of the industrial.

I proceed now to the evidence, and, first, to that relating to the practice or system—custom, as has been more than once pointed out, is a misleading word—of leasing dairy stock. The industry of dairy farming has for some years been carried on in several districts of New South Wales. The witness Little, who was for many years an auctioneer at Taree on the Manning River on the North Coast, deposed:—"I did all my business with dairy

farmers. Sometimes the man running the farm owns the cattle; sometimes they are leased or lent to him. I have lent cattle myself when I had no grass. When I have known cattle leased the farmer had the cows to milk and kept the calves. The dairyman's name appeared on the dairy, not the landlord's. The system of having cattle on lease was one that was well known in the district. The principal dairying districts are North Coast South Coast and Camden Districts."

The witness Percival, a dairyman in the Hawkesbury District, (a well known agricultural district of New South Wales) said:— "I was at one time manager of a butter factory at Mudgee. I have had considerable experience as to dairying. There had been some dairying at Mudgee for twenty years. In the Mudgee District many dairymen own their own cattle, some have them on the share system, and some pay so much a week or so much a month for them. Business people know that these methods of carrying on exist. As far as I know this is general in dairying districts throughout New South Wales."

The witness Lakeman, a farmer resident in the Camden District, for 38 years, said:—"I have let cattle out to be milked at so much per week, and have let cattle out to be milked, getting no returns except the rearing of a calf. In some few instances I know of people taking cattle on their land to graze and being allowed to milk them in return. Sometimes an owner of stock may not have any use for his stock at that particular time. It is to his interest to lend the stock out until he wants them, getting in return the rearing of the calves. Shortage of grass would be one reason why an owner would do this. I do not think a dairy farmer in the occupation of land and milking and using the cattle on it would get credit on the presumption that he was the owner of the cattle."

In the course of a conversation between the appellant's solicitor and the respondent, after the bankruptcy, with reference to the stock in question, of which the person whom the appellant represents was then in possession under a distress for rent, and to a proposal for a compromise, the respondent (who has had many years' experience in New South Wales as an official assignee) said:— "Although the point has not been decided there is no doubt that

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it could be proved to be customary to lease stock in this way." I cannot doubt that this evidence was admissible. In *Fenwick* v. *Thornton* (1), *Abbott* C.J., rejected evidence of an admission made by an assignee of a bankrupt before he became assignee, but it did not occur to anyone to doubt that an admission made by him after appointment would be admissible.

No attempt was made to controvert the appellant's evidence on this point.

With regard to the share system several witnesses were called, who gave evidence to the effect that that system had for many years been regularly practised in the Camden District, principally upon an estate called Camden Park, which comprises about 20,000 acres and forms a large portion of the district, and upon another large estate called Brownlow Hill comprising six or eight farms, while other land holders in the district have also from time to time let farms on the same system, and that these facts were well known to persons conversant with the industry in the district. The term "Camden District" was used in a vague and indefinite sense as referring to land in the neighbourhood of the small town or village of Camden. Evidence was also given that the same system was followed in the other dairying districts of New South Wales, including that in which Bowral is situated.

There was abundant evidence, if any was necessary, as to the notoriety of the practice of agisting stock in New South Wales, but it did not appear what proportion, if any, of the stock in question were merely depasturing in the bankrupt's paddocks and not in actual use as milk-givers.

The answer set up by the respondent to this case was that in so much of the Camden District as did not consist of the Camden Park and Brownlow Hill estates it was in fact more usual for the dairy farmer to be the owner of the stock than to work on the share system. Unfortunately the learned Judge seems to have confined his attention almost entirely to this aspect of the case. He first stated the question which he thought he had to determine, thus:—"The questions then which I have to determine are whether the alleged practices or usages do or do not exist, and if they do whether they are generally known or ought to be known

(1) Moo. & M., 57.

to persons dealing with dairy farmers in the way of their business." To this no exception can be taken. But he then proceeded to review the evidence, saying that evidence was called on behalf of the respondent to show that the practice of dairy farming on the share system existed throughout New South Wales, or failing this that it was "the practice generally in vogue" in the Camden District. With respect, I think that the question is not whether the share system was "the practice" generally in vogue (by which I understand that most commonly followed), but whether it was "a practice" generally known and not infrequently followed. This fallacy pervaded and vitiated all the learned Judge's reasoning. If the existence of such a system is notorious, it is quite immaterial for the present purpose whether the number of persons who for the time being take advantage of it is greater or less than that of those who do not. The relevant fact is the existence of the practice, which makes the mere fact of possession ambiguous, pointing in either of two or more directions, but not with certainty in either.

Similarly, in the case of goods in the possession of a warehouseman, the question is not whether the majority of warehousemen are not the owners of the goods in their warehouses, or whether a majority have in their warehouses some goods which are not their own, but whether it is notorious that many warehousemen often have in their warehouses goods which are not their own.

The learned Judge, following this line of thought, remarked in the course of his judgment:—"I am satisfied that outside two well known farms in that district—that is to say, Camden Park and Brownlow Hill—it not only is not and never has been the general practice for dairy farming to be carried on on the share system, but that the cases in which it has been and is being done are few and exceptional"; and again:—"Other witnesses called on behalf of the respondent (the present appellant) would lead me to believe that in the Camden District the majority of the farms are held on the share system. I am satisfied, however, that this is not so." He then quotes from the evidence of a witness for the respondent as follows:—"The general practice is for dairy farmers to farm with their own cattle except where the

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share system is adopted; the share system is limited principally to Camden Park Estate and to Brownlow Hill. There are other smaller properties where the share system is or has been in vogue. Outside those two estates the general practice is for farmers to dairy farm with their own stock." He concluded his reasoning on this point as follows:—"In order to establish such a custom it is not necessary to show that dairy-farmers never carry on their business otherwise than upon the share system, but on the other hand it is not, in my opinion, sufficient merely to show that dairy farming is sometimes carried on upon this system. What must be shown is that the system is so common in the industry and has been practised so long and so extensively as to amount to a custom in the industry. As regards New South Wales generally the evidence in the present case falls a very long way short of this, while as regards the Camden District I think that the evidence shows that, though the system is practised to some extent, it is the exception rather than the rule for it to be done, and the respondent had not discharged the onus which is on him of satisfying me that the practice is so usual and so extensively acted upon as to amount to a common practice or custom sufficient to negative the rule in bankruptcy as to reputed ownership. I think that Mr. Cowper probably described the position correctly when he said that it was the exception in the Camden District for a farm to be carried on on the share system during the last ten years outside Camden Park and Brownlow Hill."

In my opinion the learned Judge in effect misdirected himself in three respects: (1) by attaching undue weight to the mere numerical preponderance of one class over the other in the Camden District; (2) in treating the question as one of reputation in the Camden District, regarded as an isolated district with a reputation of its own (for which there was no warrant in the evidence); (3) in treating the question as one of reputation attaching to the lands of a particular person or particular persons in that district, and not from the point of view of an owner of dairy cattle who allows them to be taken into a locality where he has every reason to believe that mere possession does not create the reputation of ownership.

The learned Judge thought that there was no satisfactory

evidence of a practice amongst dairy farmers of taking cattle on agistment. Possibly not. But the practice of agistment is relevant only to negative the suggested presumption of ownership from mere possession: See *Re James*; *Ex parte The Swansea Mercantile Bank Ltd.* (1). If that presumption does not generally arise, the onus of proving that it does arise in the case of dairy-farms is on the party alleging that fact.

The learned Judge did not advert at all to the uncontradicted evidence of the practice of leasing cattle for dairy farming, although the point was distinctly raised in argument as well as by the evidence.

For the reasons which I have given, I think that the reasons assigned for his judgment were erroneous in point of law. The Full Court, which agreed with him, also omitted to notice the point last mentioned, although it was distinctly raised in argument.

It therefore devolves upon this Court to express its own opinion upon the evidence, and to apply the law to the facts established by it. In my opinion it was established beyond doubt that in New South Wales the practice of agisting cattle is common and well known; that the industry of dairy farming is carried on in three distinct systems, viz.: (1) Sometimes the dairy farmer owns the stock; (2) Sometimes he leases the stock from a person who is not the owner of the land; (3) Sometimes he takes both the land and stock on lease from the same person; and that this three-fold system is notorious to persons conversant with the industry in New South Wales, including the Camden District.

Possession of stock by a dairy-farmer is therefore *primâ facie* equally consistent with his being the owner of them, or with his being the lessee of them, or with his holding them on the share system, or, possibly, as to some of them, with his having them on agistment.

It follows that, quite apart from any question of the notoriety of the share system, no inference of ownership can be drawn in New South Wales from the mere possession of cattle by a dairy farmer. This being so, Clift, by granting the lease of the stock and assenting to their removal from Bowral to Camden, cannot

(1) 24 T.L.R., 15.

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be held to have consented to the possession of them by the bankrupt under such circumstances that persons dealing with the bankrupt were entitled to assume that he was the owner of the stock. On the contrary, he must be taken to have known that no such inference could be drawn from mere possession. It is, of course, immaterial whether the stock were in fact held on agistment or on lease or on the share system: *Re James*; *Ex parte The Swansea Mercantile Bank Ltd.* (1). Even if the Camden District, or the part of it which does not consist of the two named estates, were an exception to the rest of New South Wales with respect to the notoriety of the share system of dairy farming, as one generally practised, it would at least be incumbent upon the party alleging so remarkable a condition of things to establish it—*i.e.*, to show that what is elsewhere notorious is there generally reputed not to be the fact—in other words, that Clift must have known, if he had considered the matter, that by his allowing the stock to be taken to the Camden District the inference of ownership by the bankrupt, which would not arise elsewhere, must (not might or might not) arise there. No such evidence was or could be offered.

In some countries, no doubt, it might be possible to prove that separate localities were so far differentiated by distance or want of intercourse that what is notorious in one is unknown in another. But in the actual conditions of New South Wales, as we know them, notwithstanding its extensive area, such an undertaking would be hopeless.

For these reasons I think that the appeal must be allowed.

O'CONNOR J. The claim of the official assignee in this case has been considered by the Courts below in several aspects. But on this appeal we are concerned with one question only, namely, whether the dairy cattle leased by Clift to the bankrupt were on a certain material date "in the possession, order, or disposition of the bankrupt by the consent and permission of the true owner under such circumstances that he was the reputed owner thereof" within the meaning of sec. 52 of the New South Wales *Bankruptcy Act*. There can be no difference of opinion as to the

(1) 24 T.L.R., 15.

interpretation of the section or as to the principles on which it is to be applied to the facts. Mr. Justice *Street*, in laying down the law for his own guidance followed well recognized authorities, and the general propositions formulated by Mr. *Wise* as the basis of his argument are common ground. The difficulty has arisen in the application of the general principles to the facts established in evidence. In using the section the safest guide is to keep in view the reasons underlying it, and before adverting to the error into which the Courts below have, in my opinion, fallen, I shall refer to a well recognized authority in which these reasons are clearly expounded. In *In re Watson (William) & Co.; Ex parte Atkin Bros.* (1), Lord Justice *Vaughan-Williams* says:—"In our opinion, it is essential before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise." Again, referring to the consent of the true owner, he says (2):—"This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise." The inference of ownership by the bankrupt does not *primâ facie* arise in every instance where he is allowed by the true owner to have the use as well as the possession of goods. The nature of the goods and of the use must always be important factors in the determination of such a question. But in the case of dairy cattle where the bankrupt is permitted by the true owner to use them in the ordinary way of a dairy business, bearing in mind all that such use implies, and nothing else appears, I think there is good ground for holding, as Mr. Justice *Street* did, that, *primâ facie*, the inference of ownership in the bankrupt must arise. The onus is then thrown on the real owner to show the existence of some facts or circumstances which will

(1) (1904) 2 K.B., 753, at p. 756. (2) (1904) 2 K.B., 753, at p. 757.

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prevent the inference from necessarily arising. If evidence is given of such facts and circumstances, and it is also proved that persons having dealings with the bankrupt in his dairy business may be reasonably taken to have knowledge of them, then the Court must set itself to determine the following question—Would a person who was aware of these facts and circumstances and had business dealings with the bankrupt be necessarily led from the bankrupt's possession and use of the goods to the inference that they were his own property? If the proper answer to that question is in the affirmative the section will apply. If the proper answer is in the negative the section will not apply. When the fact relied on to displace the ordinary inference arising from the possession and use of goods is the existence of what Mr. Justice *Street* properly describes as "an established usage, habit, course of trade or custom" the weight and effect of that fact on the mind of an ordinary prudent business man, in deciding what is the proper inference to be drawn from the bankrupt's possession and use of the goods, must be measured on the same principles as would be applied to any other fact or circumstance which might prevent the *primâ facie* inference of ownership from necessarily arising. The position in such a case is well put by Lord *Selborne* L.C., in *Ex parte Turquand*; *In re Parker* (1) in the following words:—"When the existence of a custom notorious in a particular trade or business is proved, the effect of which is that every one who knows the custom knows that articles to which it is applicable, and which are in the place in which the trade or business is carried on, may or may not be the property of the person who is carrying on the trade or business—may or may not be held by him for other persons—then the doctrine of reputed ownership is absolutely excluded as to all the articles which are within the scope of the custom." Lord *Selborne* uses the word "custom," as indeed do most of the Judges whose decisions have been quoted, but not in the narrow sense of a mercantile custom. The expressions "usage," "practice," "system adopted in a business," "incident of a business," would, I think, correctly describe the meaning with which the word "custom" is used in these authorities. The proof required to establish a custom in that sense is, therefore, different

(1) 14 Q.B.D., 636, at p. 643.

from that necessary to prove a custom of trade in the ordinary legal meaning of that term. In *Ex parte Powell*; *In re Matthews* (1), *Mellish* L.J. delivering the judgment of the Court in the Court of Appeal, on a question raised as to the amount of evidence required in such cases, says:—"We think that the result of the cases is, that in order to establish a custom it must be proved to have existed so long, and to have been so extensively acted upon, that the ordinary creditors of the debtor in his trade may be reasonably presumed to have known of it." No doubt the usage or custom must be definite and substantially uniform in its incidents, but when once its existence has been established to the extent indicated by *Mellish* L.J., it is immaterial whether there is or is not proof of its being actually adopted in particular instances. Nor is the true owner of the goods restricted to relying on any one usage or custom. It may be, as in this case, that there are several different and distinct usages or systems universally known and recognized in the business under either of which the bankrupt might have the possession and use of goods not his own. Proof of that state of things will be just as cogent to prevent the inference of ownership from necessarily arising as if the existence of one usage or custom only had been proved. Such being, in my opinion, the general principles which should guide the Court in the application of the section, I now turn to a consideration of the facts. In answer to the *primâ facie* case of reputed ownership arising out of the bankrupt's use of Clift's cattle in the business of dairying, the appellant contended that he had proved that there were in use in New South Wales three systems of carrying on the business of dairying under either of which the cattle used by the dairyman might not be his own property—(1) The hiring of cattle for dairy purposes at a fixed rental; (2) the letting of them with the land on which they are to be used, generally described as the share system, the owner being remunerated by a share of the profits of the dairy business; (3) the possession by a landholder of dairy cattle depasturing on his land for agistment. The appellant went on to prove that these systems of dairying were so long established, so extensively adopted, and so well known throughout New South Wales that no business man of

(1) 1 Ch. D., 501, at p. 507.

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ordinary intelligence dealing with a dairy owner could fail to be aware of their existence. He further contended that, even if the existence of these systems throughout New South Wales generally was not established, there was sufficient evidence of their existence in the Camden Dairying District for the time, in the manner and to the extent laid down by *Mellish* L.J. in the passage last quoted. In his Honor's opinion the appellant failed to establish the existence either in New South Wales generally or in the Camden District of these systems, or either of them, in such a manner or to such an extent as was necessary to displace the *primâ facie* inference arising from the possession and use of the cattle by the bankrupt in his business; and this Court has now to consider whether that decision, and that of the Supreme Court which affirmed it, can be allowed to stand. In determining that question two of the systems relied on by the appellant may well be left out of consideration. No doubt the custom of agisting cattle was clearly enough proved, and if possession only was the case to be met there would have been great force in this part of the appellant's contention. But I gather from the evidence that all the cattle were off and on in use in the dairy, those not in actual use being held for such use. But there was no attempt to prove any custom to use agisted cattle in a dairy. It may, therefore, well be held that the appellant's case, in so far as it relied on the custom of agistment to displace the *primâ facie* inference arising from the use of the cattle in the dairy, failed. The evidence as to the system of using cattle let at a fixed rental was, with the exception of the official assignee's admission, very scanty. A question has been raised as to his power to bind the creditors in this claim by an admission made in the exercise of his discretion under sec. 62 of the *Bankruptcy Act*. I can see no reason why this particular admission should not be allowed to have the same effect as the admission of any other party in a suit. But in the view I take of the evidence it is unnecessary to decide the point. The appellant's case as to the share system is, to my mind, so strong that it is unnecessary to enter into consideration of the other systems. The evidence establishes beyond doubt that there exists in New South Wales a definite well recognized system of dairying on leased lands under which the dairy farmer uses in his business

not his own cattle, but those of his landlord, on terms of payment by a share of profits, and that the system is so extensively adopted throughout New South Wales that every person having business dealings with a dairyman in any part of the State must know, if he applies his mind to the matter with ordinary care, that the cattle used in a dairy may belong either to the dairyman or to the owner of the land. From the evidence of Percival, Little, McIntosh, Perry and Onslow Thompson, that is the only reasonable inference to be drawn. Their evidence is, on this point, contradicted by one only of the respondent's witnesses, Wylie, who apparently knew so little of the incidents of the dairying business that he had never heard of such a system in dairying in New South Wales. Cowper, Larkin, and the other witnesses on the same side confine their evidence to the use of the system in the Camden District. Turning now to the appellant's alternative position, the evidence completely establishes, to my mind, that the share system in dairying had been in use in the Camden District for such a length of time, and over such a considerable proportion of the district as to make it impossible for any person exercising ordinary care and intelligence in dealing with a dairyman in the way of business to be ignorant of the existence of the system.

It seemed difficult to deny that the evidence established the use of the share system of dairying over a large proportion of the area of the district, but the respondent strongly relied on the position that it was not shown to be in actual use in a majority of the farms. The learned Judge of first instance seems to have given effect to that contention. Having regard to the evidence I can explain his decision in no other way. But the contention involves, to my mind, a confusion between the existence of the system to the extent required and the number of instances in which it is being used—issues which may be identical in some cases, but are not in this. When once it is established that the system exists in the district, is definite and well recognized, and has been adopted in so many instances that every person of ordinary knowledge dealing with a dairy farmer in his business must be taken to know of its existence, it is immaterial whether it is in actual use in a majority of the farms or not. Under these

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circumstances the learned Judge's judgment necessarily involves a misdirection of himself which deprives his decision on the facts of that weight to which it would otherwise be entitled in a Court of Appeal. This Court is therefore in a position to give effect to its own unfettered opinion upon the evidence. Applying the legal principles to which I have referred in the early part of this judgment to the facts in evidence, I have come to the conclusion that the appellant has succeeded in establishing both as to New South Wales generally, and as to the Cambden District the existence of the share system of dairying for such a period, and to such an extent that persons dealing with dairymen, situated as the bankrupt was, must be taken to know of it. Taking that view I find it impossible to hold that under the circumstances proved in this case an inference of the bankrupt's ownership of the cattle in question must necessarily arise from his possession and use of them in his dairy, nor that any other inference could reasonably be drawn than the cattle might or might not be the property of the bankrupt. It follows that, in my opinion, the official assignee has failed to establish that the cattle claimed were at the time alleged in the order and disposition of the bankrupt with the consent of the true owner within the meaning of sec. 52. The appeal must therefore be allowed and judgment entered for the appellant.

ISAACS J. The questions before this Court are:—

(1) Whether the law as laid down by the Full Court of the State was accurate;

(2) Whether there was *primâ facie* evidence given on behalf of the official assignee upon which the Court could find the reputation of ownership of the cattle by the bankrupt; and

(3) Whether the evidence established a contrary custom so as to negative the conclusion of reputation of ownership otherwise arising.

Now as to the law on the subject, the general principles seem quite clear.

In order to establish that goods, the actual property of another, are by virtue of the reputed ownership clause part of the property of the bankrupt and divisible among his creditors, the

official assignee or trustee must under sec. 52 (3) establish that, at the commencement of the bankruptcy or at some subsequent point of time prior to sequestration, three facts concurred with respect to the goods, namely:—That they were in the possession or the order or the disposition of the bankrupt; that such possession or power of ordering or of disposition existed under such circumstances as would necessarily indicate the bankrupt's ownership of the goods, to an ordinary careful observer asked to give credit to the bankrupt; and that the situation of the goods so circumstanced was consented to or permitted by the true owner.

To establish the second condition, the only one really in controversy here, (for as *Street* J. said the stock was admittedly on 18th October 1906, and for some time afterwards, in the possession of the bankrupt by the consent and permission of the true owner), there must be proved to exist apparent circumstances which must lead an ordinary person using the common prudence of life, and reasonably considering the position in which the goods were placed, to believe the bankrupt to be the owner.

The principle cannot be better stated with reference to the present case than in the words of *Parke* B. in *Load* v. *Green* (1) "where he" (the true owner) "leases the goods, under such circumstances as that possession will necessarily, according to the habits of society, carry with it the repute of absolute ownership." And the learned Judge proceeds:—"These cases proceed upon the principle that the true owner does consent to an apparent ownership in the bankrupt contrary to the truth, because that is the natural result of the consent which he gives."

Then how is that apparent ownership to be proved? In my opinion the trustee or assignee sufficiently launches his case by giving evidence from which the Court could draw the conclusion *primâ facie*—that is, he need not go on to negative the existence of every possible contrary custom or usage. If according to the ordinary habits of mankind the possession under the given circumstances—and circumstances include place, time, nature of business, mode of user, and so forth, including everything apparent to the careful observer acquainted with the general facts of

(1) 15 M. & W., 216, at p. 223.

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the locality—is such as only an owner would according to accepted habits of society *there* be expected to enjoy, that is enough to start the case against the true owner or other person disputing the title of the assignee or trustee. If there exists some custom to the contrary, whether universal or limited, so notorious that the Court will take judicial notice of it as part of the common knowledge, then the assignee fails. See, for example, as to the habit of builders to take away their unused material, which indeed is hardly in derogation of ordinary habits: *per Bigham* J. in *In re Keen*; *Ex parte Bristol School Board* (1). In that case the bankrupt's possession has not necessarily the appearance of ownership; it is only *possibly* or at most *probably* the indication of ownership. But that is not enough to work the statutory estoppel enacted by the section. It leaves the proposed creditor without that apparent absolute assurance of ownership on which alone he is entitled to rely, and which the section intends to be an essential condition to bar the actual owner. If there be no custom or usage of trade so notorious as to demand judicial notice, as by repeated decisions (*per Mellish* L.J. in *Powell's Case* (2), and *per Brett* M.R. in *Ex parte Turquand* (3)); then if any such be relied on to displace the *primâ facie* proof already adverted to, the burden of proving it rests on the person disputing the assignee's title (see *In re Horn*; *Ex parte Nassan* (4); *Watson* v. *Peache* (5).

Now, what proof will satisfy this burden? Will it suffice to show some or even many instances of the practice relied on; is it enough to prove that it often occurs? For a very long time this question has, as it seems to me, been consistently answered by the Courts.

Horn v. *Baker* (6) lays down the whole scheme, and covers the grounds. It shows in this connection that, to displace the reputed ownership which there arose out of the possession and use of things in trade, the usage relied on must be "*known*" (*per* Lord *Ellenbough* C.J.); or have acquired "notoriety" (*per Lawrence* J.) In *Thackthwaite* v. *Cook* (7) the frequency of a practice set

(1) (1902) 1 K.B., 555, at p. 561.
(2) 1 Ch. D., 501.
(3) 14 Ch. D., 636, at p. 645.
(4) 3 Morr., 51, at p. 56.
(5) 1 Bing. N.C., 327.
(6) 9 East., 215.
(7) 3 Taunt., 487, at p. 489.

up was proved, but Sir *James Mansfield* C.J. said it must be "such a custom that persons dealing with the trader *may see and know* that the goods may possibly not be the property of the possessor." This passage received the sanction of Lord *Selborne* in *Ex parte Watkins* (1). *Mansfield* C.J. also observed that there was not such a "clear, distinct, and precise custom proved as would enable others to *see* that these may not be the hops of the possessor." In the same way *Mellish* L.J., in *Powell's Case* (2), referred to the difficulty of ascertaining from the evidence what the "precise" custom was.

In *Watson* v. *Peache* (3) *Tindal* C.J. said the direction always given to juries was "to consider whether the usage set up in answer to a *primâ facie* case of reputed ownership has been a *general usage*, and *known* to those who have dealings with the bankrupt," and his Lordship added—"When the jury are satisfied that the usage relied on *is notorious* to all who are likely to have any dealings with the bankrupt, there is sufficient to warrant their verdict and the question which they were directed to consider."

And this view has been retained through the various English cases, as *Ex parte Powell* (2) and others, down to *Ex parte Goetz, Jonas & Co.* (4).

Consequently merely to establish that in some, or even numerically many cases, a certain practice was followed is insufficient to derogate from the ordinary business conclusion otherwise implied, or using Lord *Selborne's* words in *Watkin's Case* (5) "to exclude all legitimate ground from which those who knew anything about that situation (that is of the goods) could infer the ownership to be in the person in actual possession."

The person setting up the practice falls short of his task unless he satisfies the Court that the practice was *so common* that it had become one of the known habits of persons in a situation like that of the bankrupt, so that persons likely to be creditors (I advisedly refrain from using the expression trade creditors, see *per Mellish* L.J. in *Ex parte Watkins*; *In re Couston* (6)), could not reasonably be presumed to give credit on the

(1) L.R. 8 Ch., 501, at p. 530.
(2) 1 Ch. D., 501.
(3) 1 Bing. N.C., 327, at p. 335.
(4) (1898) 1 Q.B., 787, at p. 789.
(5) L.R. 8 Ch., 520.
(6) L.R. 8 Ch., 520, at p. 533.

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mere strength of possession and user, but would be expected to make inquiry as to the fact of ownership, a process which is opposed to reputed ownership.

Now, what is meant by "known" or "notorious"? In the first place "known" does not merely mean known to some people, but to all those likely to give the bankrupt credit; nor does it mean a practice which in their opinion possibly or probably exists. They must *know* it; its existence must be to them a matter of certainty, as clear, distinct, and positive as the other circumstances attendant on the possession. That makes it indispensable to state precisely what the alleged custom is, to make it out, and define it with respect to persons, goods and other incidents. If a person, in fact unacquainted with it, were to inquire he would, it is presumed by the law, be told without any doubt or hesitation of the existence, nature and extent of the particular trade practice. Further, whatever individual instances there may be, if they have not consolidated into a definite and recognized general usage, but remain occasional and perhaps variable departures by particular persons from the ordinary recognized method of dealing in the trade, they fall short, as in *Thackthwaite* v. *Cock* (1) of the necessary "custom." It must, as *Mellish* L.J., says in *Powell's Case* (2) "have existed *so long*, and to have been *so extensively* acted upon" that the necessary persons may be presumed to have *known* it. See also *Mullett* v. *Green* (3).

Another condition is also requisite. The qualities adverted to must attach to it in the very *place* where the goods are situate. The "custom" must be known to exist there, otherwise it is irrelevant to the matter in hand. The "place" is one of the "circumstances" intended by the Statute—and is by its nature one of the most important of the circumstances attending the possession and use of the goods. The reputation inquired after is the reputation of the goods situated *there*, and not of similar goods situated elsewhere. The custom may be confined to that place—and that is enough if "known" as already mentioned—or it may extend beyond the place, but unless it is shown to include the place it is useless. The mere fact that such a

(1) 3 Taunt, 487.

(2) 1 Ch. D., 50, at p. 508.

(3) 8 C. & P., 382.

custom prevails in other places cannot affect the reputation of the goods, whether those other places are far or near, because one material circumstance, and, in view of the custom, a vital circumstance may be different. If, for instance, a certain custom in the farming industry prevailed in Yorkshire, that would not affect Devon—and no one would say that if a certain custom is proved to exist in the one county that gives the rule for all England. It is not, as I view it, a different law for Yorkshire and for Devon, it is the same law for both counties applied to different facts. In exactly the same way, a custom prevailing in the dairying industry in the Northern District of Victoria just across the Murray, will not necessarily now, and if the same bankruptcy law existed throughout Australia, would not then necessarily regulate the reputation of dairy farming stock in the Riverina; and if not, why should the Riverina farmer be necessarily bound by the practice that prevails, say, in the North Coast District of New South Wales? To apply to the Camden District, for example, a custom not proved to have obtained notoriety there merely because it has, *ex hypothesi*, become well known in the South Coast District, is, in my opinion, opposed not only to the reason of the thing, but also to the expressed views of learned Judges. In *Ex parte Vidler* (1), a case arising under the *Bankruptcy Act* 1849, the question was whether some straw was in the order and disposition of the bankrupt who was a farmer in Kent and Sussex. It was urged that a certain practice was sufficiently notorious in the neighbourhood to take the property out of his order and disposition. Mr. Commissioner *Holroyd* said he thought it was usual in some parts of England to pursue the practice. He did not hold that therefore the whole farming industry was to be governed by that custom, but he said:—"If that be the usual course *in Kent and Sussex* it will take the case out of the order and disposition clause." The learned Commissioner was in complete accord with the case of *Storer* v. *Hunter* (2) decided nearly 40 years before, where *Bayley* J. said, of a usage regarding the ownership of furniture in a furnished house, that in such a case a prudent and cautious man ought to inquire "what the nature of the

(1) 11 W.R., 113.

(2) 3 B. & C., 368.

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usage is, *in the place where the property is situate.*" See also *In re James; Ex parte The Swansea Mercantile Bank Ltd.* (1).

Summarizing these views—the "custom," in order to derogate from the reputation of ownership which would arise from the other circumstances, must be :—

(1) General—that is, not confined to particular instances, however individually frequent;

(2) Clear and precise;

(3) Certain, and not merely possible or probable;

(4) Existing in or extending to the *place* where the goods are;

(5) Known to persons likely to give credit to the bankrupt;

(6) Such as to make it reasonably possible that the goods in the position of those under consideration are not owned by the possessor.

Having stated the law proper to be applied to this case, I turn to the judgments to inquire whether the learned primary Judge, or the Full Court departed from the proper path. After carefully considering those judgments I frankly confess I can detect no error with regard to the legal standards set by the learned Judges.

Street J. anchored himself to Lord *Selborne* in *Ex parte Watkins* (2); and *James* L.J. in *Ex parte Wingfield*; *In re Florence* (3).

Lord *Selborne's* observations were quoted with approval by *James* L.J. in *Ex parte Vaux*; *In re Couston* (4), and in the House of Lords by Lord *Blackburn* in *Whinney's Case* (5), and are I believe universally accepted as correct. See Lord *Halsbury's Laws of England*, p. 180, and *Williams on Bankruptcy*, 1908 edition. They are not, as I understand them, at all out of line with *Watson's Case* (6) because, adverting to one questioned passage, it is clear that when once a notorious custom to the contrary is established, all legitimate ground for inference of the bankrupt's ownership arising from the situation of the goods is necessarily excluded. Taking that law as a guide, *Street* J. found, first, that "not only were the stock in the *possession* of the bankrupt but they were *used* by him in such a way as *primâ facie* to confer

(1) 24 T.L.R., 15.
(2) L.R. 8 Ch., 520, at p. 528.
(3) 10 Ch. D., 591, at p. 594.
(4) L.R. 9 Ch., 602, at p. 605.
(5) 11 App. Cas., 426, at p. 436.
(6) (1904) 2 K.B., 753.

the reputation of ownership." Of course there is no such thing as *primâ facie* reputation of ownership; there either is or is not that reputation; see *per Lindley* L.J. in *Turquand's Case* (1); and a creditor is supposed either to know or not to know an alleged habit or usage, and to take or not to take it into account as one of the revelant facts. In the one case there is not, in the other there is (the circumstances otherwise concurring) a reputation of ownership. But what the learned Judge clearly meant was what *Tindal* L.C.J. expressed in *Watson* v. *Peache* (2) in the quotation already made. In some parts of his judgment *Street* J., it is true, speaks of "possession" without explicitly mentioning the "use," but having once found the necessary facts, it would, I conceive, be improperly straining his meaning to attribute to him forgetfulness both of the standards of law he had himself stated, and of his own conclusions of fact. I can find no fault so far.

Then the learned Judge states the then respondent's contention as he understood it—namely, that the respondent relied on two customs or usages only—the "share system" and "agistment"; and his Honor proceeds to lay down the law as to the legal requirements of a custom or usage to support such a contention.

The views of law expressed seem to me quite unimpeachable, and simply to repeat what has been laid down by the recognized authorities. Then he deals with the facts regarding those two customs, and finds them against the respondent, and they being the only two bars as the learned Judge understood which were set up against the *primâ facie* case of reputed ownership, gives judgment for the official assignee. When the case came up before the Full Court the learned Chief Justice and *Cohen* J. contented themselves on these points with approval of the judgment of the learned primary judge both in fact and in law. *Pring* J. stated in his own words the views he had formed, and on this branch of the case first addressed himself to the *primâ facie* evidence, holding without doubt that it established reputed ownership. He also stated what the Full Court understood the respondent's contention to be, namely, reliance on the two usages "share system" and "agistment," and re-examining the evidence came to the same conclusion.

(1) 14 Q.B.D., 636, at p. 647. (2) 1 Bing. N.C., 327.

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As in the case of the primary tribunal the Full Court held that the appellant Maxwell had failed to substantiate his defence upon either of the customs—as to the share system, because it was not established as a custom either in New South Wales generally, or in the Camden District specially, which could affect Gillespie's cattle; and as to the agistment, because the cattle were obviously not subject to it.

It is remarkable that both Courts examining the subject as carefully should have understood the learned counsel for the appellant to confine his arguments as already mentioned, and yet be mistaken. It is still more remarkable that after the judgment of the learned primary Judge was delivered his attention was not at once or at any time afterwards called to his omission to deal separately with the alleged "leasing" custom; and the marvel is further increased by the absence on the appeal to the Full Court of some direct and unmistakeable indication by learned counsel, not merely to the point itself, but to the fact of its strange absence from the primary judgment. How this third suggested "custom" succeeded in eluding the vast and closely woven net of judicial consideration in both Courts—if it were presented as a distinct and separate ground of rebuttal—is surprising to me. Had it not been that it was practically conceded at the bar that the point was understood to be urged, I should have felt precluded by the statements in the judgments from regarding it now as open to the appellant. As the matter stands, however, it is open, though to neither Court can be attributed any want of perception of the argument. The learned counsel for the appellant I have no doubt had it in his mind, he thought he was presenting it to both Courts; there is some evidence bearing on the point, and the other side do not maintain that the submission is new. The truth seems to be that the argument on the other two customs completely overshadowed it and obscured its identity. It is, however, quite separate from, and in no way affects the findings with regard to the other two.

I shall take each of the questions of fact separately:—The official assignee's *primâ facie* case is overwhelming. Gillespie was carrying on business as a dairy farmer, he duly registered his name as the occupant of the dairy, and his name was over the

dairy. The bulk of the cattle used for his dairy purposes were those under consideration: as he says they were substantially all the cattle he had at Camden. They had been brought there by him in November 1905 and remained until January 1907, and to all outward appearance Gillespie acted as if he were the owner. It is not suggested that during all this time defendant or his agent was unaware of the situation of the cattle, and it is scarcely conceivable it should be so. The residence on the farm was one of some importance and, as stated, was not at all of the class of house usually occupied by share farmers or mere wage farmers. Apart from the alleged custom, no serious doubt could exist that he was the apparent owner, and that the possession under the circumstances was consented to or permitted by the lessor.

Then as to agistment. This issue is on the face of it not sustainable. Even the appellant's own witnesses do not support it. Mr. Thompson admitted that agistment means sending young cattle for grass not to be used by the owner of the lands to which they are sent; and Mr. Inglis said "I have never heard of milch cows taken on agistment being used by the owner of the paddocks where they are being agisted."

Consequently no reasonable person observing these cattle used as they were for dairying purposes could for one instant take agistment into account in considering whether Gillespie was the true owner.

With regard to the evidence respecting the share system the effect of it is thus stated by *Street* J. Outside two well known estates in that district, that is to say Camden Park and Brownlow Hill, "it not only is not and never has been the practice for dairy farming to be carried on on the share system, but that the cases in which it has been and is being done are few and exceptional. Camden Park and Brownlow Hill are two large and well known estates in the neighbourhood of Camden, and it appears to be a matter of common knowledge in the district that the owners of those estates have subdivided them into dairy farms which are worked on the share system." His Honor quotes from the evidence and shows that there were once 21 dairy farms on Camden Park worked on the share system, at present only

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15; 4 to 8 on Brownlow Hill, and a few other isolated instances; and that even limiting the Camden District to about 12 to 16 miles round Camden, there are at least 200 dairy farms, on all of which—except the few already mentioned—the cattle are owned by the dairy farmers. He concludes from the evidence also that neither taking New South Wales as a whole country, an aspect of the case which receives distinct and explicit consideration at the hands of the learned Judge, nor taking Camden District on its own footing, does a practice of share system farms so generally or so well understood to apply indiscriminately to dairy farms irrespective of well known and identifiable properties, as to derogate from or affect the ordinary reputation of ownership which obtains in the absence of a contrary custom; and therefore a prudent business man would disregard in the case of Gillespie's farm any idea of the cattle belonging to some one else.

I have carefully examined the evidence for myself and most thoroughly agree with that learned Judge. To deal with it first in relation to the Camden District specially, I shall take one or two instances. Mr. Downes is the Member of Parliament for the Camden District, and possesses considerable personal experience in the dairying industry. He owns Brownlow Hill estate, in which the Camden estate is interested, so that there is some unity between the two. Besides those two estates he "thinks" there are others who let farms on the share system. Mr. Lakeman leases some cattle on the share system, and he "thinks" Mr. Beard did so. Even with 38 years experience he can go no further. Mr. Percival says: "In the Mudgee District *many* dairymen own their cattle; *some* have them on the share system *and some* pay so much a week for them. Business people know that these methods of carrying on exist. *As far as I know* this is general throughout New South Wales." His knowledge, so far as appears, does not extend to Camden. And if the "some" on the share system are situated similarly to those at Camden, viz., on well recognized and identified blocks, that does not advance the matter in any case, because that is as if the "board" referred to by Lord *Selborne* in *Ex parte Watkins* (1) or the "brass plate" in *Ex parte Bright*; *In re Smith* (2) had been erected over the entrance to the

(1) L.R. 8 Ch., 520, at p. 530. (2) 10 Ch. D., 566.

farms. The third class, the "some" who pay so much a week or a month, are nebulous in number, frequency, or extent. And when we come to test practically the state of mind of the witnesses in order to ascertain how deeply the supposed usage would affect the judgment of a creditor, what do we find? Mr. Boardman of wide experience and one of the appellant's witnesses says—speaking of New South Wales as a whole:—"If I saw a man occupying land or using the stock on it I would give him credit on the assumption that he owned the stock." He adds: "I do not think other business people would do so." His own mind is certain; he "thinks" others would act differently. But when he comes to the Camden District he says, without qualification with special reference to the place in question: "I would have assumed that Gillespie was the owner of the stock for the purpose of purchasing them from him." There is *no certain custom* such as the authorities I have cited insist upon even upon the appellant's case. Larkin and nine other experienced men were called in reply, and I must say their evidence in point of clearness, consistency, and definiteness impresses me as far surpassing that on the other side. I will select only very short examples. Mr. Larkin, like Boardman, believed the stock to belong to Gillespie. Cowper, the bank manager, with 21 years residence there for 13 of which he was connected with dairying companies, actually gave credit to Gillespie without security, and in the belief that he owned the cattle. It would be hard to expect a more practical or convincing proof of the absence of the supposed custom. In a case like this an ounce of practice is worth a ton of precept. Mr. Porter of vast practical knowledge also believed Gillespie to be the owner of the stock. Does this evidence establish the custom as required by law, or does it not really negative such a custom?

With regard to the generality of the share system over New South Wales it is remarkable how scanty the appellant's evidence is, and how significant is the silence of some of his most important witnesses.

Mr. Perry, a grazier and dealer in stock in the Camden District, is the only one who really speaks of it at all, and his statements are extremely meagre. He says:—"Sometimes the dairyman owns the stock, sometimes he does not. I should think that this

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is a fact which would be generally known to business people in a dairying district. I have *very frequently* heard of dairy farms being leased on the share system. Under that system the landlord owns the cattle. I should *think* this is so general in systems that ordinary creditors of a dairyman might be expected to know of its existence."

But he fails to distinguish between the well known *indicia* of at least most of the farms with self-owned stock, and those with leased stock, and his evidence, read with the rest, is perfectly consistent with everyone knowing which were the share farms and which were not.

Apart from him, what do the witnesses say? Mr. Onslow Thompson says he has a general knowledge of the dairying industries throughout New South Wales, and yet he does not venture one word about a general share system throughout New South Wales. Mr. Inglis is in exactly the same position. He does, furthermore, speak of a general system of agistment throughout New South Wales, but preserves a marked silence as to a general share system. Lakeman confines his share system evidence to Camden District, but extends his agistment statement to the whole State. And none of the remaining witnesses for the appellant advance the matter. Mr. Little limits his evidence upon this to Taree. Percival's evidence is already dealt with, and does not prove a custom general over the State. "As far as I know," from a man who only knows part of New South Wales, is a phrase too indefinite, and would hardly influence an intending creditor in a district as to which the witness pretends to no personal knowledge. Mr. Boardman's own practical opinion, based on New South Wales generally, is opposed to the custom. There is, therefore, inherent weakness in the general evidence, regarding the State as a whole, and in any case the great body of direct negative evidence as to the Camden District that has been adduced on the part of the assignee destroys whatever *primâ facie* effect on this case it might have if standing alone.

Remembering the onus of proof rests on the appellant, that his own body of evidence is vague, inconclusive, and in some respects adverse, that the opposing testimony is clear, strong and consistent, that four Judges of the Supreme Court, whose office has for

many years afforded them abundant opportunities of becoming acquainted with such a custom as is relied on, have after two arguments unanimously found against it, it would require, in my opinion, some extraordinary feature to entitle me, sitting here, to reverse the finding. If it had become a matter of common knowledge in respect of *any* dairy farmer *whatever land he occupies* they must have known it, and the witnesses must have known and acted on it, or known it to be acted on. If it is put as a mere local particular fact applicable to the Camden District, or as an exceptional feature of life in New South Wales, Judges cannot, unless under the circumstances mentioned by *Mellish* J., bring their own knowledge or belief of such a fact into operation. That would convert them into witnesses, and, of course, that cannot be done. I do not doubt it is well known that in this and other States there are many dairy farmers who act on the share system. There are very many private persons who have their household furniture on the hire system, but as was said in *Ex parte Brooks*; *In re Fowler* (1), that does not justify any person in saying that it destroys the ordinary reputation of private ownership of furniture. The furniture, it is true, "may" not belong to the householder, but a reasonably prudent man would not allow that possibility to weigh with him. An idea must not be run to death. That could easily be done. A very large number of persons suffer from appendicitis, or have been fined for drunkenness. But would that justify a person in saying that any given individual, whatever his position, may—*that is, may reasonably*—be considered as suffering from appendicitis or as having been so fined? The answer would be that his ability to attend to his affairs is so inconsistent with the malady, or his continued position in life so incompatible with the offence, that no reasonable man would be justified in taking the bare possibility into consideration. And so here, the known fact that Gillespie's land was not part of the well known share system estates would prevent any reasonable person from entertaining the notion of Gillespie being a share farmer.

Not only therefore do I find no exceptional fact justifying a reversal of the finding in the concurrent judgments of the two

(1) 23 Ch. D., 261.

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Courts, one of them having seen and heard the witnesses and judged of their credibility respectively, but exercising my own judgment on the mere words of the evidence I agree with the conclusions recorded by the Supreme Court on this branch of the subject, and consider the weight of testimony to be in favour of the official assignee.

This completes the consideration of the two phases dealt with by the Court below.

The leasing system remains to be dealt with for the first time. The strongest piece of evidence is that of Mr. Marshall in stating the admission of the official assignee that "there is no doubt it could be proved to be customary to lease stock in this way." Mr. *Manning* urged that, as the plaintiff was only trustee for the creditors, that statement was not really evidence, the official assignee having no authority to make admissions against his own *cestuis que trustent*. It certainly does seem strange that in a Court, which is really proceeding upon equitable principles in distributing a bankrupt's estate, the statement of a trustee admitting that the beneficiaries are not entitled to disputed property should be even evidence against them. Possibly in a purely legal action, in a jurisdiction ignoring equitable interests and looking only to legal title, it would be evidence (see *Bauerman* v. *Radenius* (1)), but that is not now necessary to decide. Here the reason given by Lord *Kenyon* is absent, and the law should therefore cease to apply. Lord *Denman's* judgment in *Gibson* v. *Winter* (2) supports this view. On the whole I am of opinion the statement is not evidence for this purpose. It was clearly evidence on the point of abandonment, upon which it was directly given. The trustee's acts within the scope of his powers, together with contemporaneous verbal explanations of them, really inseparable from the acts themselves, are admissible. See for instance as to acts, *Butler* v. *Hobson* (3), where a bankruptcy trustee was held as "true owner" to have permitted the apparent ownership of goods to be in the bankrupt under a second bankruptcy. But if, for instance, Mr. Palmer had ceased to be representative of the estate, and another person had become official assignee, there is no principle on which Mr. Palmer's mere expression of personal opinion as to custom, unsworn, not subject

(1) 7 T.R., 663. (2) 5 B. & Ad., 96. (3) 4 Bing N.C., 290.

to cross-examination, and to the prejudice of his trust estate, would have been admissible. I think it ought to be disregarded. Apart from that, the evidence in favour of the supposed custom consists of the following. Percival's evidence, which for the reasons already given seems worthless ; Vicary's evidence, in which he said "I have known cattle to be leased out for milking at so much per week. I could not say whether business people know that cattle are sometimes leased." If Vicary, a dairy farmer for 50 years in the district, can say so little as to the notoriety of the practice, who can say more ? Then there is Mr. Perry's evidence as to leasing, and that is limited to his belief that *bulls* are leased to farmers.

Mr. MacCabe used to lease Russell Vale, and Mandemar—neither in the Camden District—on half profits. Really this was the share system. At Taree—says Mr. Little—cattle are sometimes leased ; the system being well known in the district. But no similar evidence is given as to the Camden District.

Mr. Maxwell, the appellant himself, not only says nothing about this third system, but swears "The general repute is that the district is a share system district." On the other side, Larkin's evidence inferentially excludes leasing of cattle except on the share system. So does Cowper's—the leasing he refers to being evidently on the share system, and limited to Camden Park and Brownlow Hill. The same may be said of all the rest. I cannot, therefore, find any satisfactory, or even tangible evidence for the appellant on this point, and have no hesitation in determining it against him.

In the result, my opinion is that the judgment appealed from is sound in fact and law, and should be affirmed.

Appeal allowed. Order appealed from discharged and motion dismissed with costs. Respondent to pay the costs of the appeal to the Full Court and of this appeal. Motion to rescind special leave dismissed with costs.

Solicitor, for the appellant, *H. O. Marshall.*

Solicitor, for the respondent, *F. R. Cowper.*

C. A. W.