between the accused and the deceased, and of the disparity between their ages – she was some eight years older than he. It is submitted, with respect, that it is not the proper function of an appellate court to differ from a jury's finding of facts, if it is clear what the jury's findings were. It is the regrettable but inevitable consequence of general verdicts that no one knows by what tortuous paths the jury have come to their verdict, but in applying the dicta of Channell J. in *Cohen and Bateman v. The King*, the appellate court is not entitled to substitute its own interpretation of the facts for that of the jury. As Nield J. told the jury that they were to acquit Mraz if they were satisfied that no rape had been committed, and as his direction as to what constitutes rape was not incorrect[32] – the error related only to whether death resulting from the act of rape is murder or manslaughter – it is submitted that the jury were satisfied that rape had been committed, and in the circumstances of the case the erroneous direction was in the appellant's favour. Against this view, it may be said that the jury may not have properly considered the matter of rape, and may have brought in a verdict of manslaughter as a 'middle course' expedient. The case illustrates the difficulty an appellate court has in predicting the verdict of 'a jury of sensible persons anxious to do their duty'.[33]

JAMES D. MERRALLS

[32] See, however, the judgment of Fullagar J., *loc. cit.*, 941.
[33] *R. v. Haddy* [1944] K.B. 442, 445.

BANKRUPTCY — REPUTED OWNERSHIP — MOTOR CAR IN POSSESSION OF BANKRUPT — FOR PURPOSES OF SALE BY HIM — AND BELIEVED BY OWNER TO HAVE BEEN SOLD — POSSESSION NOT WITH OWNER'S CONSENT

National Discounts Ltd. v. Jacques[1]

A bankrupt at the commencement of his bankruptcy had in his possession a motor car which had been placed in his hands for sale, and which was believed by the owners to have been sold by him. The Federal Court of Bankruptcy held that the car was not in the possession order or disposition of the bankrupt with the consent and permission of the true owner under such circumstances that he was the reputed owner thereof.[2] On appeal, the High Court affirmed this decision.[3]

[1] [1955] A.L.R., 879. High Court of Australia; Williams, Fullagar and Taylor, JJ.
[2] The Bankruptcy Act 1924-54 provides:
'Section 52. A debtor commits an act of bankruptcy in each of the following cases:
(d) If with intent to defeat or delay his creditors he . . . departs from his dwelling house or usual place of business, or otherwise absents himself . . .'
'Section 91. The property of the bankrupt divisible amongst his creditors . . . shall not include . . .
(e) except as provided in paragraph (iv) of this section . . . chattels in

The debtor, when absent from his dwelling-house, had received a message which caused him to go into hiding. He had thereby committed an act of bankruptcy in that with intent to defeat or delay his creditors he departed from his dwelling-house or otherwise absented himself. He had subsequently telephoned his wife requesting her to drive the car to a named place. Was the car in his possession, order, or disposition at the commencement of his bankruptcy?

It has been held that a debtor's bankruptcy commenced at the moment of time when he presented his petition.[4] However, 'if, as in the present case, it is not a voluntary act of the bankrupt, but a proceeding *in invitum*',[5] the bankruptcy commences at the moment of time after the completion of the transaction which constitutes the act of bankruptcy.

In the instant case, the Court held that the bankruptcy commenced at the moment when the debtor received the message which caused him to go into hiding. It was further held that the car remained in his possession at least till his wife drove it to the place he had requested. At the commencement of the bankruptcy, therefore, the car was in the possession, order, or disposition of the bankrupt.

Claiming to be the owner of the car, the bankrupt had assigned it by bill of sale as security for money advanced. The bill of sale was a valid bill duly registered under the provisions of the Bills of Sale Act 1898-1938 (N.S.W.) but unenforceable, because the company to which it was given was carrying on the business of a money-lender and the requirements of s. 22 of the Money-lenders and Infants Loans Act 1941-8 (N.S.W.) had not been complied with.

Did this bill of sale fall within s. 91 (e) of the Bankruptcy Act 1924-54, so as to remove the car from the category of 'property of the bankrupt divisible amongst his creditors?' The Court had no hesitation in holding that paragraph (e) operated only to protect the proprietary rights in the goods created by the instruments to which it refers.

---

respect of which a valid bill of sale has been filed or registered and kept registered under any Act or State Act or law of a Territory . . . But, subject to this Act, it shall include . . . (iii) all goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof . . . (iv) the claim or right of the bankrupt to property under any contract, bill of sale, hire purchase agreement, mortgage or lien made by or with the bankrupt or debtor on his trustee discharging or offering to discharge any legal liability with respect thereto'.

[3] Ful'agar J., while agreeing in substance, expressed doubts as to the accuracy of the facts as found by the lower Court.

[4] *Re Bumpus. ex parte White* [1908], K.B. 330.

[5] *Ex parte Villars, in re Rogers* (1874) L.R., 9 Ch. App. 432, 445 per Sir W. M. James L.J.

'The paragraph does not operate to protect the true owner of the goods if they are not in fact the property of the bill of sale holder'.[6]

This conclusion was reached on the basis that paragraph (iv) of s. 91 presupposes that the instruments mentioned in paragraph (e) would create enforceable legal liabilities which it would be the duty of the trustee to discharge or offer to discharge before any claim or right of the bankrupt to the goods could become part of his property divisible amongst his creditors.

Section 91 (e), therefore, provided no protection to the true owners of the car. There remained the question whether the possession order or disposition which the bankrupt had over the car was with the consent and permission of the true owners.

Such consent and permission necessitate the true owner unconscientiously permitting the goods to remain in the order or disposition of the bankrupt.

'At least . . . 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.'[7]

It has, however, been held: 'The right view to take is that, in the absence of any general custom as to hiring, the inference which a reasonable man would necessarily draw' from the possession and use of articles by a bankrupt is that these articles belong to the bankrupt, 'and that the inference so drawn is one which within the meaning of Vaughan Williams, L.J.'s statement of the law, must arise'.[8]

A custom, such as that of hire-purchase, by which goods are in the possession order or disposition of persons other than the true owner, unless held to be established by some decision, cannot be assumed but must be proved.[9]

However, consent and permission imply knowledge, and in the present case the true owners thought that the bankrupt had already sold the car. Therefore, though they did not take steps to remove the car from his possession order or disposition, their failure to so act could not be construed as consent to his continuing in such possession.

On this ground, the rights of the true owners were protected, and the car was not classifiable as part of 'the property of the bankrupt divisible amongst his creditors'.

This decision clarifies some of the ambiguities of s. 91. The result is one which is sound both on principle and authority, but it reveals only too clearly how open the section is to abuse by any owner who is astute and unscrupulous enough to deny knowledge of the con-

[6] [1955] A.L.R. 879, 883 per Williams and Taylor JJ.
[7] *In re Watson* [1904] 2 K.B. 753, 757 per Vaughan Williams L.J.
[8] *In re Kaufman Segal and Domb* [1923] 2 Ch. 89, 94 per P. O. Lawrence J.
[9] *Ex parte Brooks*, 23 Ch. D. 261; *In re Taylor* [1920] 1 K.B. 808.

tinued possession of the chattel in question by the bankrupt. The doubts expressed as to the true facts in the present case indicate the difficulty experienced when such subjective concepts as 'knowledge' become of direct relevance in bankruptcy proceedings.

P. G. NASH

LANDLORD AND TENANT — ASSIGNMENT — REFUSAL OF CONSENT — LANDLORD AND TENANT ACT 1953 (Vict.) s.14

Poulter v. Bigham[1]

Mr and Mrs P., carrying on a business on premises owned by B., wanted to sell out to X, and requested B. to consent to the assignment of their weekly tenancy; but the latter, anxious to run a business on the premises himself, refused consent, offering the P.'s instead a sum of money for the business. This offer was refused however, and Mr and Mrs P. sought an order under s. 14 of the Landlord and Tenant Act 1953 that a notice to quit pursuant to s. 37 (5) (n) of the 1948 Landlord and Tenant Act should not be given if the tenancy were assigned as proposed.

A stipendiary magistrate found that no reasonable sum had been offered in accordance with s. 14 (c) (ii) of the 1953 Act, but that consent to the assignment had not been unreasonably withheld, and therefore notice to quit could be given if the proposed assignment were carried out. Martin J. however, reversed this ruling, and ordered that no such notice to quit be given, since consent to the assignment *had* been unreasonably withheld.

In view of that conclusion, the most noteworthy part of this case would be classed by some as *obiter dicta*, since on the widest interpretation of 'reasonableness' the consent in this case would have been and, in fact, was held to have been withheld unreasonably.

The line of cases culminating in *Houlder Bros. & Co. Ltd. v. Gibbs*[2] was cited by counsel as laying down authoritatively that the reasonableness of the lessor's refusal is to be judged by reference solely to the 'personality' of the proposed assignee or the nature of his user or occupation.

This was doubted however by Lords Dunedin and Phillimore in *Tredegar v. Harwood*,[3] as Martin J. pointed out in an examination of the authorities. Lord Phillimore had put it thus:[4] 'If it is to be a question whether a man is acting reasonably, as distinguished from justly, fairly or kindly, you are to take into consideration the motives of convenience and interest which affect him and not those which affect somebody else.'

Evershed J.'s opinion in *Hill v. Swanson*[5] was that *Houlder Bros.*[6]

[1] [1955] A.L.R. 841. Supreme Court of Victoria, Martin J.
[2] [1925] Ch. 575.
[3] [1929] A.C. 72.
[4] *Ibid.*, 82.
[5] (1946) 62 T.L.R. 719.
[6] [1925] Ch. 575.