[HIGH COURT OF AUSTRALIA.]

RICHARDSON . . . . . APPLICANT;

AND

TRAUTWEIN AND OTHERS . . . . RESPONDENTS.

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MELBOURNE, *Mar.* 2, 3.

SYDNEY, *April* 9.

Rich, Starke, McTiernan and Williams JJ.

Bankruptcy—Practice—Notice of motion—Joinder of parties—Joinder of causes of action—Common element must exist—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *sec.* 25—*Bankruptcy Rules* 1934, *rr.* 7, 25—*Rules of the High Court, Order II., rr.* 1, 4, 5—*Judiciary Act* 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *sec.* 2—*High Court Procedure Act* 1903-1933 (*No.* 7 *of* 1903—*No.* 63 *of* 1933), *sec.* 2.

By force of rule 7 of the *Bankruptcy Rules* 1934, rule 4 of Order II. of the *Rules of the High Court* applies to proceedings in bankruptcy. In reliance on this rule, the official receiver and trustee of the estate of a bankrupt filed a notice of motion in the Federal Court of Bankruptcy claiming relief against a number of respondents in respect of properties alleged to belong to him as such trustee and of transactions alleged to be void as against him. The claim against each respondent was in respect of different properties and transactions. It was not alleged in the notice of motion, nor did it otherwise appear, that the relief sought was in respect of or arose out of the same transaction or series of transactions and that the case was such that if separate actions were brought against each of the respondents some common question of law or fact would arise.

Held that unless it was so alleged or made to appear, the above-mentioned rule did not authorize the Federal Court of Bankruptcy in the exercise of its discretion to hear and determine the matters comprised in the notice of motion at the same hearing.

Observations upon the joinder of causes of action under rules 1 and 4 of Order II. of the *Rules of the High Court.*

CASE STATED pursuant to the provisions of sec. 20 (3) (*a*) of the *Bankruptcy Act* 1924-1933.

Upon the hearing of a motion to the Federal Court of Bankruptcy District of New South Wales and the Australian Capital Territory, for orders and directions relating to the trial of matters referred to

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in a notice of motion previously filed in the Court, Judge *Lukin*, under the provisions of sec. 20 (3) (*a*) of the *Bankruptcy Act* 1924-1933, stated a case for the opinion of the High Court the material paragraphs whereof were substantially as follows :—

1. The estate of Theodore Charles Trautwein was sequestrated on 23rd September 1940 and Arnold Victor Richardson of Sydney in the State of New South Wales was appointed trustee thereof.

2. Arnold Victor Richardson has since his appointment continued to act and is still acting as official receiver and trustee of the estate of the bankrupt.

3. On 5th August 1941 Arnold Victor Richardson as such trustee filed a notice of motion in the Federal Court of Bankruptcy, District of New South Wales and the Australian Capital Territory, to which notice of motion Kathleen Gertrude Elizabeth Trautwein, Theo Nugent William Trautwein, Kathleen Waverley Frauenfelder, William Henry Trautwein, Austin Frauenfelder, Leslie Joseph Hooker and Francis Joseph Hosford were named as respondents.

4. On 20th October 1941 in the presence of counsel for Kathleen Gertrude Elizabeth Trautwein, Theo William Nugent Trautwein, Kathleen Waverley Frauenfelder and William Henry Trautwein and counsel for Arnold Victor Richardson I fixed the date of hearing of the notice of motion as 24th February 1942.

5. On 17th November 1941 a notice of motion was filed in the Federal Court of Bankruptcy on behalf of Kathleen Gertrude Elizabeth Trautwein, Theo William Nugent Trautwein, Kathleen Waverley Frauenfelder and William Henry Trautwein against Arnold Victor Richardson as trustee of the property of Theodore Charles Trautwein for orders and directions relating to the trial of matters affecting the applicants referred to in the notice of motion mentioned in par. 3 hereof, to which Arnold Victor Richardson was applicant and the applicants to the motion for directions were respondents.

7. The notice of motion mentioned in par. 5 hereof came on to be heard before me on 25th and 27th November 1941 as Judge of the Federal Court of Bankruptcy and counsel for the applicants Kathleen Gertrude Elizabeth Trautwein, Theo Nugent William Trautwein, Kathleen Waverley Frauenfelder and William Henry Trautwein submitted and contended that the Federal Court of Bankruptcy had no jurisdiction to hear and determine at the same trial the whole of the matters comprised in the notice of motion mentioned in par. 3 hereof.

8. Counsel for the applicants contended that the question of jurisdiction did not arise unless and until I had refused to give the

directions asked for by the applicants and he requested me to proceed with their motion.

9. Thereupon I as such judge and Arnold Victor Richardson desired to have the said submission determined in the first instance in the High Court of Australia.

The question submitted for the opinion of the High Court was as follows :—

> Has the said Federal Court of Bankruptcy jurisdiction to hear and determine as mentioned in par. 7 hereof the matters comprised in the notice of motion mentioned in par. 3 hereof ?

A copy of the notice of motion referred to in par. 3 above was annexed to the case. By it declarations that certain property belonged to the applicant as trustee of the estate of the bankrupt and that certain transactions were void against the applicant were, together with consequential relief, claimed against each respondent. The claim against each respondent was a several and distinct claim, relating to different property and transactions from those involved in the claims against the other respondents.

Weston K.C. (with him *A. M. Cohen*), for the applicant. There is no specific practice under the *Bankruptcy Rules* 1934 ; hence the motion is covered by the High Court Rules, Order II., rules 1 and 4 (*Bankruptcy Rules* 1934, rule 7). It is in similar terms to the English *Rules of the Supreme Court*, Order XVI., rules 1 and 4. In order to join parties the matter should arise out of the same transaction. There is a further condition that some common question of law and fact should arise : that applies to rule 1, dealing with the joinder of plaintiffs, but rule 4, dealing with defendants, contains no such limitation. There is a discretion contained in rule 4. These rules have been the subject of much judicial discussion (*Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co. Ltd.* (1) ; *Thomas* v. *Moore* (2) ; *Payne* v. *British Time Recorder Co.* (3)). These rules as originally framed under the *Judicature Act* were limited by the House of Lords to joinder of parties and not joinder of causes of action (*Smurthwaite* v. *Hannay* (4)). After that decision the rules were amended in England to their present form and the Court of Appeal after some fluctuation of opinion held that the enlargement of rule 1, by its reference to separate causes of action, had enlarged the scope of the whole order, with the consequence that no limitation was placed on rule 4 that the

(1) (1910) 2 K.B. 354.
(2) (1918) 1 K.B. 555.
(3) (1921) 2 K.B. 1.
(4) (1894) A.C. 494.

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matter should arise out of the same cause of action (*Oesterreichische Export A.G.* v. *British Indemnity Insurance Co. Ltd.* (1)). Order XVI., rule 5, is purely explanatory of rule 4. Joinder under rule 4 is not a matter of right, but rather one of discretion. Clearly there is jurisdiction in the English Courts to join defendants irrespective of the causes of action. It is a question of discretion in each case as to whether the court will allow the joinder. That discretion is to be exercised by the Court of Bankruptcy. The respondents here have attacked the motion on the question of jurisdiction.

Maughan K.C. (with him *Moverley*), for the respondents Kathleen Gertrude Elizabeth Trautwein, Theo William Nugent Trautwein, Kathleen Waverley Frauenfelder and William Henry Trautwein. It is submitted that Order II. of the High Court Rules does not apply, and, if it does, that it has not been complied with. There is no inherent power in the Court of Bankruptcy or any other court to join different causes of action together in one notice of motion. Again, there is nothing in this notice of motion to make it an action with plaintiffs or defendants; therefore rule 7 of the *Bankruptcy Rules* 1934 does not operate to make applicable Order II. of the High Court Rules, which deals with parties to an action, to this notice of motion. You must go to Order XXXVII. of the High Court Rules. Under Order II. there are two conditions precedent to jurisdiction. The first is that the request for relief has to be in respect of or arising out of the same transaction or series of transactions. The second is that if separate actions were brought there would have been some common questions of fact or law which would arise. These conditions should appear on the face of the originating process. The cases show that you must read rule 4 in the same way as rule 1. The English Order XVIII. should be compared with English Order XVI. You must test the matter on the face of the notice of motion.

Weston K.C., in reply. It is not necessary when there is one plaintiff and a number of defendants that there should be matters arising from the same transaction or series of transactions, but there should be some common question. Order XVIII. in England is not reproduced in the High Court Rules. A plaintiff can join as many defendants as he likes with as many separate deciding causes of action as he likes, subject to the discretion and control of the court. [He referred to *Ex parte Butters*; *In re Harrison* (2).]

Cur. adv. vult.

(1) (1914) 2 K.B. 747, at p. 752.

(2) (1880) 14 Ch. D. 265.

RICH J. In the bankrupt estate of T. C. Trautwein the official receiver filed a notice of motion to which seven persons were joined as respondents. Against each of these respondents a declaration was asked in respect of the properties standing in their names that the properties belonged to the bankrupt estate. In this proceeding a notice of motion in the nature of an omnibus summons was filed on behalf of the respondents asking for directions as to the trial of the matters comprised in the original notice of motion. When the motion for directions came on to be heard before the Judge in Bankruptcy the applicants contended that the Court of Bankruptcy had no jurisdiction to hear and determine at the same trial the whole of the matters comprised in the original notice of motion. The contention submitted was that the question of jurisdiction did not arise unless and until the judge had refused to give the directions asked for by the applicants: See pars. 7 and 8 of the special case now before us. Thereupon the judge, under the provisions of sec. 20 (3) of the *Bankruptcy Act* 1924-1933, stated the special case referred to and asked the following question: "Has the said Federal Court of Bankruptcy jurisdiction to hear and determine as mentioned in par. 7 hereof the matters comprised in the notice of motion mentioned in par. 3 hereof?"

As I understand the question it does not purport to inquire as to the extent of the jurisdiction conferred on the Bankruptcy Court by sec. 25 of the Act in respect of claims by the official receiver against strangers to the bankruptcy, but asks whether in the circumstances the Court would be justified in hearing the several claims alleged in the notice of motion in one proceeding. A perusal of the relief sought by the official receiver raises questions which appear to come within the very wide provisions of sec. 25 of the Act and there is no doubt, in my opinion, that the Bankruptcy Court can hear and determine the matters in respect of which the official receiver seeks relief. The right of action or relief is one of those which may be enforced by the official receiver by virtue of the higher and better title conferred on him by the *Bankruptcy Act* (*Ex parte Brown*; *In re Yates* (1); *Halsbury's Laws of England*, 2nd ed., vol. 2, p. 186). But the real question to be determined is whether the right to relief sought by the official receiver can be heard and determined in the one proceeding. The answer to this question depends upon the construction of rules 1 and 4 of Order II. of the High Court Rules, which are applicable to proceedings in the Bankruptcy Court by rule 7 of the *Bankruptcy Rules* 1934. And having regard to the interpretation sections in the *High Court Procedure Act* and in the

(1) (1879) 11 Ch. D. 148.

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Judiciary Act, under which Acts the High Court Rules were made, the respondents to the notice of motion must be regarded as defendants to an action. Rules 1 and 4 of Order II. are an adaptation of rules 1 and 4 of Order XVI. of the English Rules. These have been the subject of judicial decision in many cases which are collected in the *Annual Practice*; see also *Halsbury's Laws of England*, 2nd ed., vol. 26, p. 19. The authorities are not, perhaps, as clearly expressed as might be desired, but I think the better opinion is that rule 4 should be read as a corollary of rule 1, and that if under rule 4 it is sought to join a number of persons as defendants in respect of different causes of action there must be some question of law or fact that is common to all. Although it is not within the question this Court has to determine, it appears to me that there is no reason to conclude that the respective reliefs sought against the various respondents are other than separate and distinct questions. Certainly there is nothing before the Court to show that there is any nexus or interdependence between the respective reliefs sought. And the fact that these questions arise out of the same bankruptcy does not afford any connecting link. Nor is there any allegation of a combination amongst the respondents to take and remain in possession of the effects of the bankrupt: Cf. *In re Beck*; *Attia* v. *Seed* (1).

Summing up my conclusions, I am of opinion that the Court of Bankruptcy has jurisdiction to hear and determine the matters comprised in the notice of motion, but they should not be heard and determined in the one proceeding unless there is some question of law or fact which is common to all. If there is such a nexus, rule 4 admits of their being taken together, and there is no reason why they should not, in the absence of special circumstances, the onus of establishing which would be on the defendant.

STARKE J. Case stated pursuant to the provisions of sec. 20 (3) (*a*) of the *Bankruptcy Act* 1924-1933.

The official receiver and trustee of the estate of Theodore Charles Trautwein, a bankrupt, gave notice that the Federal Court of Bankruptcy, District of New South Wales, would be moved for declarations and orders that certain property belonged to the bankrupt's estate or that its alienation by the bankrupt was void as against the official receiver and trustee by reason of sec. 94 of the *Bankruptcy Act* or the Statute of Elizabeth, 13 Eliz. ch. 5, and the *Conveyancing Act* 1919-1939 (N.S.W.), sec. 37A. Notice of the motion was given to no less than seven persons, but there is nothing

(1) (1918) 87 L.J. Ch. 335, at p. 340; 118 L.T. 629, at p. 633.

on the face of the notice of motion which suggests that the claims against these persons are connected together or that they arise out of or in respect of the same transaction or series of transactions or that they raise some common questions of law or fact. It was, however, suggested at the Bar that the various alienations attacked by the official receiver were in the main to members of the bankrupt's family and formed part of a scheme or system or perhaps a conspiracy on the part of the bankrupt and the respondents to the notice of motion to defraud the bankrupt's creditors. But no such facts are stated in the case and this Court is therefore precluded from entertaining the suggestion. It is unnecessary, therefore, to consider whether the official receiver can or cannot amend or extend his motion to cover them.

Before the *Judicature Act* the courts of law and of equity would not have entertained a proceeding framed as is the motion in this case, and the Judicature Rules, as originally framed, precluded such a proceeding (*Smurthwaite* v. *Hannay* (1)). The official receiver relies, however, upon the *Bankruptcy Act* 1924-1933, sec. 25, and the *Bankruptcy Rules* 1934 No. 77, rules 7 and 25. Rule 7 (1) is in these words :—" Where any practice or procedure of the Court is not regulated by these Rules, the practice or procedure shall be regulated as nearly as may be by the Rules of the High Court for the time being in force." There is no practice or procedure of the Court of Bankruptcy regulating the joinder of parties and causes of action, and so the official receiver relies upon the rules of this Court, Order II., rules 1, 4, and 5 : See *Judiciary Act* 1903-1933, sec. 2 ; *High Court Procedure Act* 1903-1933, sec. 2.

Rule 1 is in these words :—" All persons in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, may be joined in an action as plaintiffs, provided that the case is such that if such persons brought separate actions some common questions of law or fact would arise. Provided that the Court or a Justice may, in any case in which separate and distinct questions arise, order that separate pleadings be delivered, or separate trials had, or may make such other order as is just."

Rule 4 is as follows :—" All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such of the defendants as are found to be liable, according to their respective liabilities, without any amendment."

(1) (1894) A.C. 494.

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And rule 5 provides:—"It shall not be necessary that every defendant shall be interested as to all the relief claimed in the action, or as to every cause of action included in the action; but the Court or a Justice may make such order as is just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he has no interest."

The arrangement of the words in these rules is not quite identical with that of the present English Judicature Rules, Order XVI., rules 1, 4, and 5, but the two sets of rules have the same legal effect. It should, however, be observed that the High Court Rules have no rule dealing with the joinder of parties such as is found in the English Judicature Rules, Order XVIII., rule 1. The construction of the English Rules was thus expounded by *Scrutton* L.J.:—"Order XVI. deals with joinder of parties; Order XVIII. deals with joinder of causes of action, and it was therefore held in *Smurthwaite* v. *Hannay* (1) that several plaintiffs having separate and distinct causes of action could not join together in one action against the defendants" (*Payne* v. *British Time Recorder Co.* (2)). In a later case the learned Lord Justice also said:—"Within the last twenty years a complete change has taken place in the attitude of the courts towards the joinder of parties and causes of action on the same writ. After a number of cases all pointing to the necessity for an amendment, Order XVI., rule 1, was amended and now stands in this form: 'All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise.' . . . That relates to the joinder of plaintiffs. The rule relating to defendants is Order XVI., rule 4:—'All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative.' This rule, it will be noticed, omits the words 'arising out of the same transaction or series of transactions,' and the words 'where . . . any common question of law or fact would arise.' The first step taken by the Court was to hold that rule 4 covered the same ground as rule 1. The next was to decide that, notwithstanding certain decisions limiting the power of joining matters and parties on one writ, those rules were to be construed liberally, with the result that many matters, formerly the subject matter of separate actions, could now be tried in one action. . . . 'The result of the later decisions is that you must look at the language of the rules and construe them liberally, and

(1) (1894) A.C. 494.

(2) (1921) 2 K.B., at p. 14.

that where there are common questions of law or fact involved in different causes of action you should include all parties in one action, subject to the discretion of the Court, if such inclusion is embarrassing to strike out one or more of the parties' " (*Bailey* v. *Curzon of Kedleston* (*Marchioness*); *Bailey* v. *Duggan* (1)).

Rule 4, it should be noted, says "the right" not "a right" or "any right": its construction, however, must conform to the provisions of rule 1 and extend to "the right to any relief" alleged to exist in respect of or arising out of the same transaction or series of transactions provided that some common questions of law or fact are involved. It is said that rule 4 contains no restriction or qualification such as is found in rule 1, and consequently that a plaintiff may join disconnected causes of action against any number of defendants subject only to this, that it is in the discretion of the court to say whether a joinder shall be permitted or not: See *Payne* v. *British Time Recorder Co.* (2); *Green* v. *Berliner* (3). But rule 4 must be construed with reference to the provisions of rule 1 and the general scope of the order. As *du Parcq* J. said in *Berliner's Case* (4): "It is plain that when a plaintiff is claiming relief arising out of the same set of circumstances against several persons he may join any number of them as defendants in the action, either jointly, or severally, or in the alternative, the word 'severally' meaning that his claims against them are separate claims." And in *Payne's Case* (5) the generality of the expressions there found is in relation to an argument that the operation of rule 4 must be so limited that separate and distinct causes of action against defendants could only be joined if there were some contractual or other link between the defendants or in substance one injury suffered by the plaintiff from one or other of them: See *Payne's Case* (6). But no case, unless it be the Victorian case, *Guilfoyle* v. *Bean and Mackerras*; *Rothacker* v. *Bean and Mackerras* (7), has ever yet been decided in which separate and disconnected causes of action have been joined against defendants which do not arise in respect of or out of some transaction or series of transactions in which some common question of law or fact arises. The Victorian case adopts the generality of the expressions in *Payne's Case* (5), which I have already mentioned, but it is rather curious to adopt a construction of the Victorian rule which should not be acted upon as a matter of discretion. In my opinion the construction of the English Rules so clearly stated by *Scrutton* L.J. is the construction of Order II.,

(1) (1932) 2 K.B. 392, at pp. 397, 398.
(2) (1921) 2 K.B., at pp. 9, 10, 11, 13.
(3) (1936) 2 K.B. 477, at p. 484.
(4) (1936) 2 K.B., at p. 484.
(5) (1921) 2 K.B. 1.
(6) (1921) 2 K.B., at pp. 7, 12.
(7) (1926) V.L.R. 498.

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rules 1 and 4, of this Court which should be adopted and acted upon.

Accordingly, the question stated should be answered that the *Bankruptcy Act* 1924-1933 and the rules made thereunder do not warrant the joinder of all the causes of action or claims to relief set forth in the notice of motion already mentioned. But the question stated is, I think, merely academic even if the Act or the Rules did warrant the joinder of all these disconnected and separate causes of action and claims to relief in one proceeding for the hearing of them all in one and the same proceeding could not be justified as an exercise of discretion. Injustice might be caused and a proper hearing manifestly prejudiced.

McTIERNAN J. The question asked in this special case is: Has the Federal Court of Bankruptcy jurisdiction to hear and determine at the same trial the whole of the matters comprised in the notice of motion? The trustee is by the notice of motion making a separate claim against each of the seven respondents, but it is not made to appear that the claims have any connection with one another or that they arise out of the same circumstances. The authority relied upon by the trustee for joining all the respondents in one motion is Order II., rule 4, of the High Court Rules. This rule applies by force of rule 7 of the *Bankruptcy Rules* to proceedings in bankruptcy, and it is clear from sec. 2 of the *High Court Procedure Act* and sec. 2 of the *Judiciary Act* that Order II. applies to a motion in bankruptcy. The question turns upon the construction of rule 4. Order II. begins with a rule relating to the joinder of plaintiffs. This rule and rule 4 adopt, with unimportant variations in language, Order XVI., rule 1 and rule 4 respectively of the English Rules. It is settled that since Order XVI., rule 1, was amended by the insertion of the words that are printed in brackets in the English Rules, the Order relates to joinder of causes of action. Before this amendment was made, it had been decided that both Order XVI., rules 1 and 4, related only to joinder of parties (*Smurthwaite* v. *Hannay* (1); *Sadler* v. *Great Western Railway Co.* (2)). Order XVI., rule 4, was not amended. But in consequence of the amendment of rule 1, the principle was accepted that rule 4 relates also to joinder of separate and distinct causes of action. This construction is in accordance with the literal meaning of the rule. Order II., rule 4, is, as has been observed, substantially a copy of Order XVI., rule 4. Is Order II., rule 4, to be construed as giving unlimited authority for the joinder in one action of persons against each of

(1) (1894) A.C. 494.

(2) (1896) A.C. 450.

whom a separate and distinct cause of action is alleged to exist irrespective of the question whether there is any connection between the causes of action? In *Payne* v. *British Time Recorder Co.* (1) the point was taken that the plaintiff had no right under Order XVI., rule 4, to join the two defendants. After citing the rule, Lord *Sterndale* M.R. said :—" The argument was this. It was said you must apply this test, that in order to join two distinct causes of action there must be some link between the two defendants or the damage to the plaintiff must be common to both of them. The first observation to be made on that is that that proposition is not to be found in the rule. But it is said that it is to be found in the decisions of this Court. I do not think that is so. The decisions of the Court are certainly not consistent. Some part of the inconsistency is to be found in this that, after the alteration of the rule to its present form in consequence of the decision in *Smurthwaite* v. *Hannay* (2), the courts have not always taken notice of the alteration. I think what *Fletcher Moulton* L.J. said with regard to those decisions in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co. Ltd.* (3) is correct. 'A number of decisions of the Court of Appeal have also been cited to us. I confess that I find it difficult to reconcile all those decisions, and so I am driven back upon the plain meaning of the words of rule 4, which, as I have said, appear to me clearly to contemplate such a case as the present.' I agree that the cases made by the plaintiff against the two defendants are not the same. They are sued on different contracts, in the one case for the price of goods sold and in the other for damages, and the amounts claimed differ in each case. But the words of limitation sought to be read into the rule are not to be found there. I think, as I said in *Thomas* v. *Moore* (4), that 'joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the court to do so if it thinks right.' I said that because I thought that was the conclusion established by *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co. Ltd.* (5), and the subsequent case of *Oesterreichische Export A.G.* v. *British Indemnity Insurance Co. Ltd.* (6). It was argued that those two cases did not support my proposition. I think what was said in those cases by *Fletcher Moulton* L.J. and *Buckley* L.J. does support the proposition I stated in *Thomas* v. *Moore* (4). And in another case of *In re Beck*; *Attia* v. *Seed* (7) *Swinfen Eady* L.J. stated the

(1) (1921) 2 K.B. 1.
(2) (1894) A.C. 494.
(3) (1910) 2 K.B., at p. 356.
(4) (1918) 1 K.B., at p. 565.
(5) (1910) 2 K.B. 354.
(6) (1914) 2 K.B. 747.
(7) (1918) 87 L.J. Ch., at p. 338; 118 L.T., at p. 631.

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proposition in much the same way. I think therefore that the first point fails and that there is power to join these defendants, but that that is subject to the right of the Court to order either one of them to be struck out. I do not think there is any decision which governs the exercise by the Court of its discretion in this case" (1). *Warrington* L.J., whose judgment follows, said that he was of the same opinion (2). *Scrutton* L.J. said :—" There are later decisions which lay down that rule 4 may be applied to causes of action as well as to parties ; and that where there are common questions of law or fact defendants sued in respect of different causes of action may be joined. *Thomas* v. *Moore* (3) is one of the latest of such decisions, and since that case was decided there has been the decision in *In re Beck* (4). The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing, to strike out one or more of the parties. It is impossible to lay down any rule as to how the discretion of the court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried" (5). In *Green* v. *Berliner* (6) *du Parcq* J., in disposing of an objection which was taken to the joinder of two defendants, made the following observation :—" Mr. *O'Connor* said that the plaintiff was not entitled to join in one action these four defendants against whom he was asked for different relief in the sense that, although he claimed a penalty from each of them, the facts upon which he relied in each case were necessarily different from those relied upon in the other cases. In the Rules of the Supreme Court the order dealing with the joinder of parties is Order XVI. In comparatively recent times a change was made in the rules of that Order, and the tendency of the courts has been to give a very liberal interpretation to them as they exist at present. Having regard to rule 4, which deals with the joinder of defendants, and to such cases as *Thomas* v. *Moore* (3) and *Payne* v. *British Time Recorder Co.* (7), I think it is plain that when a plaintiff is claiming relief arising out

(1) (1921) 2 K.B., at pp. 9-11.
(2) (1921) 2 K.B., at p. 12.
(3) (1918) 1 K.B. 555.
(4) (1918) 87 L.J. Ch. 335 ; 118 L.T. 629.
(5) (1921) 2 K.B., at pp. 15, 16.
(6) (1936) 2 K.B. 477.
(7) (1921) 2 K.B. 1.

of the same set of circumstances against several persons he may join any number of them as defendants in the action, either jointly, or severally, or in the alternative, the word 'severally' meaning that his claims against them are separate claims. If he sought to join several persons as defendants in an action when his claims against them were wholly unconnected and no common question of fact or law arose, the Court would certainly take steps, as it has power to do, to prevent him from proceeding with his action in that form. In this case, however, it cannot be said that the claims against the several defendants are wholly unconnected. Taking the view, as I do, that it is a matter in the discretion of the Court to say whether a joinder shall be permitted or not, and being satisfied that the joinder can cause no embarrassment or expense to any of the defendants, I think that this joinder should be allowed and that in short there is no substance in the point raised" (1).

In *Halsbury's Laws of England*, 2nd ed., vol. 26, p. 19, the case of *Payne* v. *British Time Recorder Co.* (2) is cited for the proposition that: "Under this rule, a plaintiff is entitled to join several defendants in respect of several causes of action, subject to the discretion of the Court to strike out one or more of the defendants." There follows a citation from the passage quoted from the judgment of *Scrutton* L.J., in which his Lordship says that "where claims by or against different parties involve, or may involve, a common question of law or fact bearing sufficient importance to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried" (3). However, in *Oesterreichische Export A.G.* v. *British Indemnity Insurance Co. Ltd.* (4), it was said by *Swinfen Eady* L.J. that "the rules of Order XVI. are a code dealing with the joinder of parties and whatever construction is placed upon rule 1, a similar construction must be placed upon rule 4." In *Bailey* v. *Curzon* (5) *Scrutton* L.J. said: "This rule" (rule 4), "it will be noticed, omits the words 'arising out of the same transaction or series of transactions' and the words 'where . . . any common question of law or fact would arise.' The first step taken by the Court was to hold that rule 4 covered the same ground as rule 1." His Lordship then referred to "the elaborate judgments" delivered in *Payne* v. *British Time Recorder Co.* (2) by Lord *Sterndale* and himself, and cited the passage from his own judgment referred to in *Halsbury*.

(1) (1936) 2 K.B., at pp. 484, 485.
(2) (1921) 2 K.B. 1.
(3) (1921) 2 K.B., at p. 16.
(4) (1914) 2 K.B., at p. 756.
(5) (1932) 2 K.B., at p. 398.

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It is not possible to discern in the judgment of Lord *Sterndale* that his Lordship thought that the authority for the joinder of defendants under rule 4 is limited by conditions expressed in rule 1, but not in rule 4. But the notes in the *Annual Practice* (1940), p. 243, show that it is not the practice to treat rule 4 as allowing the joinder of causes of action regardless of the consideration whether there is any connection between them. The notes say that persons may be joined as defendants against whom the relief is claimed, if the claims to relief are claims "in respect of or arising out of a set of circumstances involving a common question of law or fact." The cases are cited and the notes continue :—"The effect of the construction placed by the above cases upon this Order is stated by *Pickford* L.J. in *Thomas* v. *Moore* (1) to be that 'joinder of parties and joinder of causes of action are discretionary in the sense that if they are joined there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right.' There are no words of restriction in rule 4 as are contained in rule 1, but the 'relief' in respect of which defendants may be joined must be relief arising out of the same set of circumstances (see per *Eady* M.R. in *Re Beck* (2)), or circumstances involving a common question of law or fact (see *Thomas* v. *Moore* (1)); see also *Green* v. *Berliner* (3) (claim by common informer)."

The present question should be answered by saying that it would not be a proper exercise of the discretion of the Court to hear the claims for relief against two or more of the respondents at the same trial unless it is made to appear that the claims arise out of the same set of circumstances or out of circumstances involving a common question of law or fact.

WILLIAMS J. I agree, and my own remarks will be as brief as possible.

Before the alteration of rule 1 of Order XVI. (English) it had been decided by the House of Lords in *Smurthwaite* v. *Hannay* (4) and *Sadler* v. *Great Western Railway Co.* (5) that rules 1 and 4 applied to joinder of parties and not to joinder of different causes of action. Rule 1 was then amended so as to authorize the joinder of plaintiffs claiming relief in respect of separate causes of action arising out of the same transaction or series of transactions, provided that the case was such that if such persons brought separate actions some common question of law or fact would arise, while rule 4 was left untouched. Rules 1 and 4 of Order II. of this Court are to the

(1) (1918) 1 K.B. 555.
(2) (1918) 87 L.J. Ch. 335; 118 L.T. 629.
(3) (1936) 2 K.B. 477.
(4) (1894) A.C. 494
(5) (1896) A.C. 450.

same effect as rules 1 (as amended) and 4 of Order XVI. In *Oesterreichische Export A.G.* v. *British Indemnity Insurance Co. Ltd.* (1) *Swinfen Eady* L.J. said :—" It is said that the defendants could not, before the alteration in 1896 in Order XVI., rule 1, have been joined in the same action under Order XVI., rule 4, and that the alteration which was made in 1896 in rule 1 has not the effect of allowing the defendants to be joined under rule 4, as it only applies to rule 1. In my opinion the alteration in rule 1 has made a considerable change in the practice. Before the alteration Order XVI. dealt merely with the joinder of parties in respect of the same cause of action, and not with the joinder of separate causes of action. *Smurthwaite* v. *Hannay* (2) is clear upon that. Since the alteration it can no longer be said that Order XVI. relates only to joinder of parties and not to joinder of causes of action. With regard to the contention that the alteration is only in rule 1 and not in rule 4, I may first cite what Lord *Herschell* said in *Smurthwaite* v. *Hannay* (3) : ' Order XVI., rule 1, purports to deal merely with the parties to an action, and has, I think, no reference to the joinder of several causes of action.' And he says : ' It cannot be doubted that whatever construction is put upon the rule I have been considering must be applied equally to rule 4 of the same Order ' (4). So that in his view the rules of Order XVI. are a code dealing with the joinder of parties, and *whatever construction is placed upon rule* 1 *ought to be applied also to rule* 4."

In *Payne* v. *British Time Recorder Co.* (5), where the earlier decisions are reviewed, Lord *Sterndale* used language which, if read disjunctively from the point with which he was dealing, might suggest that since the amendment of rule 1, rule 4 must be construed as being wide enough to enable a plaintiff to combine separate causes of action against different defendants, subject to a discretion in the court to strike out any cause of action in which there was no common element, whereas *Scrutton* L.J. (whose judgment appears to be in complete accord with those of *Fletcher Moulton* L.J. and *Buckley* L.J. in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co. Ltd.* (6)) considered that the rule only authorized the joinder of causes of action in which some common question of law or fact arose. But it appears to me that Lord *Sterndale* was dealing with the contention of the appellants that the test was " in order to join two distinct causes of action there must be some link between the two defendants or the damage to the plaintiff must be common to

(1) (1914) 2 K.B., at pp. 755, 756.
(2) (1894) A.C. 494.
(3) (1894) A.C., at p. 500.
(4) (1894) A.C., at p. 501.
(5) (1921) 2 K.B. 1.
(6) (1910) 2 K.B. 354.

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both of them " as opposed to the only alternative position mentioned in the argument that " the fact there is one common question of fact to be determined is not sufficient to justify a plaintiff in joining two defendants " (1) and that his Lordship's remarks must be read conjunctively with these circumstances. In his judgment (2) he refers to his previous judgment in *Thomas* v. *Moore* (3), but what he said in that case related to causes of action which had to comply with rule 1 because there were eight plaintiffs.

For all practical purposes there is little difference between the two views, because the justification for such a joinder must be the convenience of trying all the causes of action together, which could only exist where there was some common element playing an important part in the determination of them all, and it would only be common sense not to sanction in the first instance the joinder of causes of action which would almost inevitably be struck out automatically if the propriety of the joinder was challenged.

It would seem from the statements of the scope of the rule in the *Annual Practice* (White Book) and *Yearly Practice* (Red Book) that, if there is any divergence, the opinion of *Scrutton* L.J. is accepted in England. But there is no suggestion in the judgment of *Scrutton* L.J. in *Bailey* v. *Curzon of Kedleston* (*Marchioness*) (4), to which my brother *Starke* has referred, that he was conscious of any divergence. The question that has arisen in all the cases as to what is sometimes called " the propriety of joinder " and at other times " the exercise of discretion " (in the absence of an Order similar to Order XVIII. (English) the test would be propriety) is not whether rule 4 could ever authorize the joinder of completely separate causes of action having no common element in the one proceeding against different defendants, but whether the common question of fact, which has invariably been present, was of sufficient materiality to make the different causes of action " one cause of action as regards the investigation of the facts upon which the liability alleged against them " (i.e. the defendants) " respectively depends " (*Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co. Ltd.* (5), per *Buckley* L.J.). This is made clear in the judgment of *Swinfen Eady* L.J. in *In re Beck*; *Attia* v. *Seed* (6) where his Lordship, in discussing the earlier case of *Bullock* v. *London General Omnibus Co.* (7), and dealing with rule 4, specifically refers to the limitation of causes of action imposed by rule 1, and of *Scrutton* L.J. in *Horwood* v. *Statesmen Publishing*

(1) (1921) 2 K.B., at p. 6.
(2) (1921) 2 K.B., at p. 10.
(3) (1918) 1 K.B., at p. 565.
(4) (1932) 2 K.B. 392.
(5) (1910) 2 K.B., at p. 370.
(6) (1918) 87 L.J. Ch., at p. 339; 118 L.T., at p. 632.
(7) (1907) 1 K.B. 264.

Co. Ltd. (1), where (2) he refers to the passage in his own judgment in *Payne's Case* (3) cited by my brother *Starke*, which significantly mentions the court allowing "*the joinder of plaintiffs or defendants* subject to its discretion as to how the action should be tried", thereby putting plaintiffs and defendants in the same boat, when it is manifest joinder of actions in the case of plaintiffs must comply with rule 1. Moreover, in *Payne's Case* (4), his Lordship directly associated the second proviso to rule 1 with rule 4.

In my opinion rule 4 must be construed in the context of an Order which is dealing, not with the simple case of an action between the same plaintiffs and defendants but generally with the more complex cases where it is convenient to allow combinations of actions between different plaintiffs and defendants to be tried together. It enlarges the common-law rights to join plaintiffs and defendants in the one action and defines the common element that must exist between the separate causes of action included in it. Rule 1 defines the extent to which the plaintiffs can be joined in such actions. Rule 4 only relates expressly to joinder of parties. It authorizes the joinder of defendants against whom the right to any relief is alleged to exist jointly, severally, or in the alternative. The causes of action upon which this right to relief could be founded have already been specified. The rule is therefore silent as to causes of action, because rule 1 has already dealt with those which can be combined in the one action. Rule 4 marks the arrival of the stage at which it becomes necessary to define the defendants who can be joined in such action. Standing alone it is capable of being construed narrowly as being restricted to actions in which the whole of the relief can be alleged to exist against each of the defendants jointly with, severally as against, or in the alternative to, the other defendants. This would require each defendant to be interested in the whole of each cause of action, so rule 5 was added to provide that defendants can be joined who are only interested in part of the relief claimed or in some of the causes of action. Thus rule 5 is complementary to rule 1. They each operate to define the scope of rule 4, and, between them, enable a liberal construction to be placed upon it sufficiently wide to authorize the joinder of actions that can be conveniently tried together, with safeguards to prevent defendants being prejudiced by any confusion as to the claims against them respectively, by authorizing the Court to order the delivery of separate pleadings and if necessary to hold separate trials, or penalized by having to incur costs in respect of unnecessary attendances in court. The

(1) (1929) 141 L.T. 54.
(2) (1929) 141 L.T., at p. 57.
(3) (1921) 2 K.B. 1.
(4) (1921) 2 K.B., at p. 15.

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amendment of rule 1 of Order XVI. was not a restriction but an enlargement to a limited extent of its operation, but it is difficult to see how the previous scope of rule 4, without any amendment, could have been thereby widened in excess of this enlargement. Rule 4 applies whatever the number of plaintiffs, and it would be strange if it is wider in the case of a single plaintiff than where there are several. Moreover, an unlimited construction of rule 4 involves a different meaning being placed upon the reference to causes of action in rule 5 according to whether it is or is not necessary to invoke rule 1 to authorize the joinder of the plaintiffs.

A notice of motion does not, like a pleading, allege the cause or causes of action. It merely specifies the relief that is claimed. The present notice of motion does not include a prayer for any relief complete or partial in which the respondents as a body are interested, nor any declaration or other indication that any common question of fact or law will arise. There is no affidavit or other evidence to supply the missing link. The relief claimed against each respondent is in respect of different properties and such as could only flow from the establishment of entirely separate and distinct causes of action resting on different states of facts. The joinder of the respondents in the notice of motion in its present form is therefore not authorized by rule 4 and is improper.

Question stated answered: The Federal Court of Bankruptcy is not authorized by rule 7 of the Bankruptcy Rules 1934 *in the exercise of its discretion to hear and determine the matters comprised in the notice of motion referred to in par.* 3 *of the special case at the same hearing unless it is alleged by an amendment of the notice of motion, a pleading or an affidavit or otherwise established to the satisfaction of the Court that the relief sought is in respect of or arises out of the same transaction or series of transactions and the case is such that if separate actions were brought against each of the respondents some common question of law or fact would arise. Costs of all parties, those of the official receiver as between solicitor and client, to be paid out of the estate of the bankrupt. Special case to be remitted to the Judge in Bankruptcy to deal with the notices of motion referred to therein in accordance with the above answer.*

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

Solicitors for the respondents, *A. R. Baldwin & Co.*

O. J. G.