[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN WORKERS' UNION AND OTHERS . . . . . } APPELLANTS ;
APPLICANTS,

AND

BOWEN . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

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SYDNEY, *July* 23, 24; *Aug.* 23.

Latham C.J., Rich, Starke, Dixon and Williams JJ.

Bankruptcy—Equity suit—Joint plaintiffs—Joint defendants—Costs awarded to defendants—Non-payment of costs by plaintiffs—Bankruptcy notice against one plaintiff—Issue by defendants' solicitor—Non-compliance—Petition—Notice and petition not authorized by all defendants—Validity of notice—Regularity of petition—Joint petitioning creditor—No indemnity offered to non-consenting creditors—Solicitor's retainer—Procedure to challenge retainer—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *ss.* 7, 52 (*j*)—*Bankruptcy Rules, rr.* 152, 172.

The plaintiffs in an equity suit were ordered to pay the costs of an industrial union and a number of its members, the defendants in the suit. The defendants' solicitor, whose retainer did not extend beyond the equity suit, issued in the names of all the defendants as judgment creditors a bankruptcy notice against B. one of the plaintiffs, based on the order for costs. B. did not comply with the bankruptcy notice and a petition, based upon such non-compliance, in which all the defendants were named as petitioners, was presented for the sequestration of his estate. D. and M., two of the defendants, did not authorize the issue of the bankruptcy notice nor did they authorize the presentation of, or sign, the petition. Before the hearing of the petition the industrial union had in fact paid all the defendants' costs, but there was no evidence that it had offered any indemnity to M. or D. in respect of costs which they may have incurred in the bankruptcy proceedings. The petition was dismissed.

Upon appeal,

Held, by *Latham* C.J., *Rich*, *Dixon* and *Williams* JJ. (*Starke* J. dissenting), that the appeal should be dismissed on the ground ; (*a*) that the right to enforce the judgment was a joint right and accordingly the bankruptcy notice,

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being authorized by some only of the judgment creditors, was invalid; (*b*) that the petition, being founded on an invalid bankruptcy notice and not having been authorized by all the persons to whom the debtor owed the judgment debt upon which the bankruptcy notice was based, was irregular.

The right of a judgment creditor who has paid the costs of the other judgment creditors to enforce an order for costs and to use their names in so doing, discussed.

Re Darby, (1904) 22 W.N. (N.S.W.) 87, overruled.

The proper procedure for challenging a solicitor's retainer in a particular case referred to.

APPEAL from the Federal Court of Bankruptcy, District of New South Wales and the Australian Capital Territory.

A suit concerning the rule-making power of the branch and its relationship to the union was brought in the equitable jurisdiction of the Supreme Court of New South Wales by Australian Workers' Union, New South Wales Branch, Cornelius Joseph Patrick Bowen, branch secretary-treasurer of that union, and four other office-bearers and members of the union as plaintiffs against the Australian Workers' Union, Victor Johnson, C. A. Dalton, E. Withers, J. Ferguson, C. R. Cameron, W. J. Murphy, C. Golding, C. Oliver, W. Nicol, C. G. Fallon, T. Dougherty, W. J. Miller and H. O'Shea, the executive council of the union; James Cecil Barden, Joe Carpendale and Thomas William Hill, trustees of the plaintiff union, and Fallon, Dougherty and Withers as a committee of the union, as defendants.

On 11th September 1944 the Court dismissed the suit, made certain declarations upon a counterclaim and ordered the plaintiffs, other than the Australian Workers' Union, New South Wales Branch, to pay the taxed costs to the defendants. The costs were taxed at the sum of £670 19s. 3d.

Upon an application therefor purporting to have been made by all the defendants in the equity suit, a bankruptcy notice, sued out by the solicitor who acted for the defendants in that suit, was served upon Bowen on 25th January 1945, requiring him, within twenty-eight days of the service, to pay to those defendants the above-mentioned sum of £670 19s. 3d.

The requisitions of the bankruptcy notice not having been complied with, a bankruptcy petition was served upon Bowen on 5th July 1945, the act of bankruptcy alleged being Bowen's failure to comply with the bankruptcy notice referred to above. All the defendants in the equity suit were shown as being the petitioners and the petition was signed by Dougherty on his own behalf and as the authorized agent of all the other defendants other than Dalton and

Miller. The two last-mentioned persons did not consent to or authorize the issue of the bankruptcy notice or the presentation of the petition.

In an affidavit Dougherty, the general secretary of the Australian Workers' Union, stated that the whole of the judgment debt remained unpaid ; that no arrangement for the payment thereof had been made by Bowen with the petitioning creditors ; that none of the petitioning creditors other than the Australian Workers' Union had paid or become liable to pay any of the costs in respect of the equity suit ; that the whole of the said costs, so far as the defendants to the suit were concerned, had been paid by the Australian Workers' Union ; and that none of the petitioning creditors other than the Australian Workers' Union was entitled to retain the said £670 19s. 3d. or any portion thereof for his own benefit.

Neither in the bankruptcy notice nor in the petition were the defendants other than the Australian Workers' Union given the designations given to them respectively in the equity suit.

Bowen opposed the making of a sequestration order upon the following grounds :—

1. That the bankruptcy notice was invalid because (*a*) it was issued without the knowledge and consent of Dalton and Miller, two of the persons named therein ; (*b*) it did not designate the capacity of the persons issuing it in the manner in which this capacity was designated in the decree under which the judgment for costs (the subject matter of the bankruptcy notice) was obtained, and it should have required payment not to individuals but to a group of individuals collectively acting in a particular capacity. There was no debt due to the persons named therein as individuals but only in their respective collective capacities.

2. That the petition was a nullity because (*a*) it was founded upon an invalid bankruptcy notice, and (*b*) some only of the persons entitled to the judgment had petitioned but these persons did not include Dalton and Miller and such judgment was a judgment in favour of all such persons jointly and not severally.

3. That none of the petitioners was entitled as a matter of law to present a bankruptcy petition for the reasons that the Australian Workers' Union was a body registered under the *Commonwealth Conciliation and Arbitration Act*, the *Industrial Arbitration Act* 1940-1943 (N.S.W.), and the *Trade Union Act* 1881-1936 (N.S.W.) and under none of these Acts was the Australian Workers' Union empowered to present a bankruptcy petition and accordingly the persons who respectively constituted the executive council of the union, and those persons who were the trustees of the New South

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Wales branch of that union, and the committee of the union were not entitled to present or join in a bankruptcy petition.

Miller was not present at the hearing of the petition but Dalton was present thereat and gave evidence.

Judge *Clyne held*: that the failure to describe in the bankruptcy notice the judgment creditors therein mentioned in the manner in which they were described as defendants in the equity suit was a formal defect and therefore not a sufficient reason for holding that the bankruptcy notice was invalid; that the bankruptcy notice was not a proper notice on the ground that it was not a notice issued on behalf of all the judgment creditors; that despite the decision in *Re Darby* (1) it should not be held that one or more of several persons jointly entitled to costs under a judgment or order could issue a bankruptcy notice under the *Bankruptcy Act* on behalf of and without the concurrence of all the persons so entitled; that as the bankruptcy notice was not a proper notice the act of bankruptcy alleged in the petition had not been established; that as the judgment creditors were jointly entitled to the order for costs they all should have joined in the petition; that the absence of the consent of Dalton and Miller respectively to the presentation of the petition could not be overcome by an offer of an indemnity against their costs; and that in the circumstances it was unnecessary to answer the objection thirdly raised on behalf of Bowen.

The petition was dismissed with costs against the petitioning creditors other than Dalton and Miller.

From that decision the petitioners other than Dalton and Miller appealed to the High Court.

Moverley, with *Miller* K.C., for the appellants. The evidence does not show that Dalton in fact ever objected to being a party to the issuing of the bankruptcy notice, or objected to being identified in any way with the presentation of the petition. Neither he nor Miller took any step to have his name removed from the proceedings (*Proudfoot* v. *Bank of New Zealand* (2)). The attitude adopted by Dalton was that he did not expressly authorize the inclusion of his name as a party to the proceedings. There is no evidence as to the attitude, one way or the other, adopted by Miller. In the circumstances of this case even if there had been express dissent on the part of Dalton and Miller, the other joint creditors were entitled to join both of them in the bankruptcy notice in order to proceed to recover the judgment debt in the bankruptcy jurisdiction. Neither Dalton nor Miller was beneficially entitled to the judgment debt or

(1) (1904) 22 W.N. (N.S.W.) 87. (2) (1885) 6 L.R. (N.S.W.) 170, at p. 176.

any part thereof. They, *a fortiori* Dalton, were bound by the proceedings taken by the Australian Workers' Union to recover the judgment debt. As members of that union Dalton and Miller were bound by the union's rules which provide that in order to protect its property the union might move in any court. If the decision appealed from be correct then if any one of several judgment creditors does not consent or he objects, the judgment debt is irrecoverable by bankruptcy proceedings. The appellants were entitled to use the names of Dalton and Miller in the bankruptcy notice unless these two persons dissented from such use. They did not dissent. In the circumstances, subject to proper indemnities as to costs, the union and such other judgment creditors who so desired were entitled to proceed in the bankruptcy jurisdiction. The appellants took advantage of the first opportunity, namely upon the hearing of the petition to offer an indemnity to Dalton and Miller as to the costs of the bankruptcy proceedings. The bankruptcy notice as issued was valid; its issue was procured in accordance with the *Bankruptcy Rules*. The application therefor was made by all the judgment creditors and was signed by the solicitor as solicitor for all the judgment creditors. The solicitor's retainer in that regard has never at any time been questioned, and, presumably, he was properly and lawfully retained. The decree as to costs in the equity suit meant no more than that it was to operate in favour of each and every one of the judgment creditors in so far as each and every one may have incurred costs. The Australian Workers' Union was the only party that incurred any costs and, therefore, was the only party upon which the decree as to costs conferred a right. This right was, *inter alia*, a right to recover the costs in bankruptcy proceedings. In the circumstances it was not necessary that Dalton and Miller should consent to or authorize the taking of bankruptcy proceedings (*Re Darby* (1)). There is nothing in the *Bankruptcy Act* or the *Bankruptcy Rules* to prevent the appellants from exercising their right, apart from any contractual relationship with the other creditors. The Australian Workers' Union was a sufficient petitioner because it was entitled at law and in equity to the judgment debt: see s. 55 (1) (*b*), *Bankruptcy Act* 1924-1933. It was entitled, in equity, to be reimbursed so much of the costs as it had paid, or, in other words, in equity it alone was entitled to the costs. Alternatively, the appellants are entitled, by reason of the agreement between the parties, to those costs which can be recovered from the debtor. It was not essential in the bankruptcy proceedings that all the joint creditors should be

(1) (1904) 22 W.N. (N.S.W.) 87.

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joined, because unless they were trustees for the Australian Workers' Union there was not any necessity to join them as petitioners and it was only to show that the person who had the real interest was the party (*In re Gamgee*; *Ex parte Gamgee* (1)).

[LATHAM C.J. referred to *Ex parte Jones*; *In re Jones* (2).

STARKE J. referred to *Ex parte Culley*; *In re Adams* (3).

DIXON J. referred to *Ex parte Cooper*; *In re Baillie* (4).]

In equity the decree creates a joint and several right. As a matter of principle the Equity Court was concerned with what was due to the respective defendants in the suit having regard to the liability they were under and to the nature of the suit, and it made the order for costs in the form in which it did to protect the respective defendants having regard to the costs paid by them: see *Steeds* v. *Steeds* (5).

[LATHAM C.J. referred to *Powell* v. *Brodhurst* (6).]

Barwick K.C. (with him *Isaacs*), for the respondent. The liability or source of the debt is the decree and certificate of taxation. The debt is a purely legal debt on a judgment as at law in favour of a group of persons for one money sum: *Judgment Creditors' Remedies Act* 1901 (N.S.W.). The appellants' affidavits show that the judgment debt "represented the costs incurred by all the defendants" to the equity suit, "all the defendants being the petitioning creditors." Thus the certificate of taxation was rightly founded upon a liability to the solicitor on behalf of all the defendants, they having incurred the costs. The order created only a joint right in the defendants (*In re W. Tucker*; *Ex parte J. W. Tucker* (7)). All joint creditors must join in a bankruptcy petition (*Williams, Law and Practice of Bankruptcy*, 15th ed. (1937), p. 48), *a fortiori* a bankruptcy notice. Substantial grounds for requiring all parties to be parties to the bankruptcy notice are (*a*) the question of cross-demand, and (*b*) the question of compounding (*In re a Debtor* (8)). A bankruptcy notice issued by some of the joint creditors would direct a compounding of the debt to the satisfaction of some only of the judgment creditors. Under rule 172 of the *Bankruptcy Rules* an objection to the bankruptcy notice can be taken at the hearing of the petition founded thereon. In courts of common law and equity, where the court itself has its own practitioners and a solicitor issues a process without authority, that court, as a matter of discipline, has jurisdiction to

(1) (1891) 8 Morr. 182; *sub nom. Re Gamgee*; *Ex parte Ward* 60 L.J.Q.B. 574: 64 L.T. 730.
(2) (1881) 18 Ch. D. 109, at p. 120.
(3) (1878) 9 Ch. D. 307, at p. 311.
(4) (1875) L.R. 20 Eq. 762.
(5) (1889) 22 Q.B.D. 537.
(6) (1901) 2 Ch. 160, at p. 164.
(7) (1895) 2 Mans. 358.
(8) (1911) 2 K.B. 718, at p. 724.

deal with the solicitor. The basis upon which the solicitor is made liable is his own misconduct as an officer of the court (*Myers* v. *Elman* (1)). Solicitors are not, however, solicitors of the bankruptcy court. They are officers of this Court or of the Supreme Court of a State who, by s. 22 (2) of the *Bankruptcy Act*, are given the right to practise in the Court of Bankruptcy. The position which obtains in those other courts that a solicitor's authority to act for his clients cannot be challenged because the court gives credence to its officer's statements, and that challenge will lie only by way of substantive proceeding, does not apply in this case for the reasons that a solicitor is not an officer of the Court of Bankruptcy and a substantive proceeding is a disciplinary proceeding. There is no real parity between a writ or initiating process up to the court and a bankruptcy notice (*Re Parkes* ; *Ex parte Pneumatic Tyre Co.* (2)). The issuing of writs is, in one sense, part of a solicitor's functions, the issuing of a bankruptcy notice is not such a function. It follows from s. 42 of the *Bankruptcy Act* that a solicitor must have specific authority to issue a bankruptcy notice. This requirement is not cut down by rule 144 of the *Bankruptcy Rules*. Authority was not given, either expressly or impliedly, by Dalton or Miller. The payment of the whole of the costs by the Australian Workers' Union, voluntarily made and without the consent of the other joint creditors, does not confer upon that union any greater right, or deprive those other joint creditors of their respective rights, in the judgment debt. On the facts of this matter there never has been an offer to indemnify either Dalton or Miller. An offer of indemnity, if made at all, should be made prior to the use of the name. A party is exposed to costs as soon as his name is used in a proceeding. Miller was not present at the hearing of the petition, therefore the offer said to have been made then cannot be said to have been made to him. There is no evidence of any contractual arrangement between the Australian Workers' Union and the other judgment creditors with respect to the payment of the costs of the solicitor out of which an implied authority could be construed. There was nothing proved, nor sought to be proved, of any relationship giving rise to equities between the joint creditors or any of them with respect to the judgment debt ; equities out of which it might be suggested some implied authority to use the name of the others could arise. There is not sufficient in the facts to warrant a conclusion that the fund, if it be a fund, constituted by the judgment debt, was to be applied to the satisfaction of the solicitor's liability.

(1) (1940) A.C. 282, at pp. 302, 307.

(2) (1896) 3 Mans. 95.

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[DIXON J. referred to *Auster* v. *Holland* (1) and *Chambers* v. *Donaldson* (2).]

Special factors were present in those cases which are not present in this case. The verbiage used in the petition and in the supporting documents is inappropriate to anything but a joint claim and a joint debt. It cannot be disputed that in a bankruptcy petition in respect of a joint debt all the joint creditors must be the petitioners. In this case two of the joint creditors did not sign or consent to the petition. Every part of the petition now before the Court would have to be changed in order to meet the circumstances of this case.

Moverley, in reply. In the event of the bankruptcy notice being held to be good an opportunity should be given to the appellants to apply to the Judge in Bankruptcy for leave to amend. All the personal parties are shown to be members of the Australian Workers' Union. In the circumstances there is an equitable right in the Australian Workers' Union to the costs as against the debtor.

Cur. adv. vult.

Aug. 23.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Court of Bankruptcy dismissing a petition by the Australian Workers' Union and others for the sequestration of the estate of the appellant, C. J. Bowen. The petition was founded upon a bankruptcy notice and was dismissed upon the ground that the bankruptcy notice was invalid, and upon the further ground that the petition was not presented by all the persons to whom the debtor Bowen owed the judgment debt upon which the bankruptcy notice was based.

The judgment debt of which the bankruptcy notice required payment was a debt for costs in an equity suit ordered to be paid by plaintiffs in the suit, including Bowen and four other persons, to the defendants in the suit. The bankruptcy notice was issued by the solicitor who acted for the defendants in the equity suit. It is not disputed that his retainer in the Supreme Court did not entitle him to institute bankruptcy proceedings on behalf of his clients. Two of the defendants, C. A. Dalton and W. J. Miller, it was found by the learned Judge in Bankruptcy, did not in fact authorize him to issue the bankruptcy notice on their behalf. It is clear that they gave him no express authority. It was contended that the rules of the Australian Workers' Union, of which they were members, entitled the secretary of the union to present a bankruptcy petition on their

(1) (1846) 15 L.J. Q.B. 229. (2) (1808) 9 East 472 [103 E.R. 653].

account, but the rule which was relied upon plainly refers only to the authority of the secretary to take proceedings with respect to claims &c. of the union itself and not of members of the union. The judgment debtor failed to comply with the bankruptcy notice and a petition for sequestration of Bowen's estate was presented in which the petitioners relied upon that failure as an act of bankruptcy. The petition was not signed by either C. A. Dalton or W. J. Miller.

The decree made in the equity suit ordered that the costs of the defendants be taxed and that such costs, when taxed and certified, be paid by the plaintiffs other than a plaintiff described as the New South Wales Branch of the Australian Workers' Union, which was held not to be in existence. The costs were taxed and certified at the sum of £670 19s. 3d. The liability of Bowen and his co-plaintiffs under the order for costs was joint and several. In such a case a bankruptcy notice may be issued against one of the joint judgment debtors without including the others and failure to comply with the notice would be an act of bankruptcy on the part of that judgment debtor: *In re Low*; *Ex parte Gibson* (1). The *Bankruptcy Act* 1924-1933, s. 52 (*j*), provides that a bankruptcy notice may be issued upon the application of a creditor who has obtained a final judgment. A judgment creditor can issue a bankruptcy notice only if he is in a position to issue execution (*Ex parte Woodall*; *In re Woodall* (2); *Ex parte Ide*; *In re Ide* (3)). Only one writ of execution can be issued for the one judgment debt to which joint judgment creditors are entitled, and a bankruptcy notice in the case of such creditors can be effective only when issued by or on behalf of all the judgment creditors. So also a bankruptcy petition must be presented by all the joint judgment creditors: *Ex parte Owen*; *In re Owen* (4); *Brickland* v. *Newsome* (5) and see *Re Tucker*; *Ex parte Tucker* (6). The decision in *Re Darby* (7) that one of a number of joint judgment creditors was entitled to obtain the issue of a bankruptcy notice in the name of all the creditors cannot be supported as against the authorities to which I have referred.

The position, therefore, is that the bankruptcy notice was issued without the authority of two of the judgment creditors and accordingly was prima facie invalid. The petition was not signed by or by the authority of the two judgment creditors, C. A. Dalton and W. J. Miller. Accordingly the petition was irregular and was prima facie rightly dismissed upon the ground that it was founded upon an invalid bankruptcy notice and upon the further ground that

(1) (1895) 1 Q.B. 734.
(2) (1884) 13 Q.B.D. 479.
(3) (1886) 17 Q.B.D. 755.
(4) (1884) 13 Q.B.D. 113.
(5) (1808) 1 Camp. 474 [170 E.R. 1026].
(6) (1895) 73 L.T. 170.
(7) (1904) 22 W.N. (N.S.W.) 87.

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all the joint creditors entitled to the judgment debt were not petitioners. Under the wide provisions of *Bankruptcy Rule* 172 both of these objections were open to the debtor upon the hearing of the petition.

But it is sought to escape the consequences of these defects in the proceedings by a contention that one only of the judgment creditors, the Australian Workers' Union, was beneficially interested in the judgment debt. The union had paid all the costs of the defendants' solicitors and the other defendants were under no liability to pay any of those costs. It was accordingly contended that, upon the offer of an indemnity against costs to the other defendants and, in particular, to C. A. Dalton and Miller, those defendants were bound to allow their names to be used in the bankruptcy proceedings. There is no satisfactory ground for holding that the other joint creditors have released their interest in the debt, which is created by the decree, to the union. Further, although counsel for the defendants stated in the Court of Bankruptcy that the union was prepared to give an indemnity against costs to C. A. Dalton and Miller, and Dalton was present in the court, there is no evidence of what can properly be called an offer to Miller of an indemnity. There was only a statement that the union was prepared to offer him such an indemnity. It is not necessary to consider what the position would have been if a satisfactory indemnity had actually been given to the two omitted judgment creditors or had been offered to them and they had refused to accept it.

In my opinion, the appeal must be dismissed.

RICH J. I agree with the order made by the learned primary judge and with his reasons for holding that the bankruptcy notice and the petition for sequestration founded thereon were invalid. No doubt substantive applications might have been made to test the validity of the bankruptcy notice and the adequacy of the solicitor's retainer to issue it but the objections to both these matters in these respects were discussed at the hearing and satisfactorily disposed of by observations from the bench.

The appeal should be dismissed.

STARKE J. Appeal from a judgment of the Court of Bankruptcy dismissing a petition on the part of the appellant union and others praying for the sequestration of the estate of the respondent. The act of bankruptcy relied upon was that the respondent had failed to comply with a bankruptcy notice which required him to pay the amount of a final judgment obtained by the petitioners in the Supreme

Court of New South Wales in Equity or to secure or compound the amount of that judgment. This notice was issued upon the request of the solicitor for the judgment creditors who verified his authority as their solicitor. It is regular in form and has not been set aside or stayed.

The plaintiffs in the suit in the Supreme Court were the Australian Workers' Union, New South Wales Branch, the respondent Bowen the branch secretary and treasurer of the union, John Moss, Oliver Hearne and Thomas William Dalton, president and vice-presidents of the union, and Thomas Renwick, a member of the union as representing himself and all other members of the union, and the defendants were the Australian Workers' Union, Victor Johnson, C. A. Dalton, E. Withers, J. Ferguson, C. R. Cameron, W. J. Murphy, C. Golding, C. Oliver, William Nicol, C. G. Fallon, T. Dougherty, W. J. Miller and H. O'Shea, the executive council of the union, James Cecil Barden, Joe Carpendale, Thomas William Hill, the trustees of the union, and C. Fallon, T. Dougherty and E. Withers, a committee of the union.

The suit was dismissed and certain orders were made on a counter claim and it was ordered that it be referred to the proper officer to tax and certify the costs of the defendants of the suit and of the counter claim and that such costs when so taxed and certified be paid by the plaintiffs other than the plaintiff Australian Workers' Union, New South Wales Branch, to the defendants within fourteen days after the service upon the plaintiffs, other than as aforesaid, of an office copy of the certificate of such taxation. The costs were taxed and allowed at the sum of £670 19s. 3d. and it was certified that this sum was the proper amount to be paid as directed by the decree.

This was the final judgment alleged in the petition and upon which the petitioners relied.

But the certificate or allocatur does not appear to have been noted or entered upon the decree.

The learned judge in bankruptcy found that neither Dalton nor Miller, who were two of the defendants in whose favour the order for costs was made, though their names were joined as petitioners, consented to or authorized the issue of the bankruptcy notice or the presentation of the petition. And the petition in bankruptcy was not signed by Dalton or Miller and accordingly their signatures were not attested (See *Bankruptcy Rule* 152). Under these circumstances the petition was dismissed.

The order for costs in favour of the defendants in the suit in the Supreme Court gave them a joint right; they may be described as joint creditors.

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A party to legal proceedings brought without his authority is entitled to have the proceedings stayed (*Reynolds* v. *Howell* (1); *Fricker* v. *Van Grutten* (2)); and so is a defendant to those proceedings (*Hubbart* v. *Phillips* (3); *Bayley* v. *Buckland* (4); *Bowen* v. *Bowen* (5)). But joint contractors or joint creditors have a right to join all the joint contractors or joint creditors in a legal proceeding subject to an application on the part of any joint contractor or joint creditor who objects, to stay the proceedings until an indemnity against costs is given. Thus in *Chitty's Archbold's Practice*, 12th ed. (1866), p. 1385, it is said, "Where a *cestui que trust* brings an action in the name of his trustee, or in the case of joint-tenants or joint-contractors, or in other cases where a person is obliged to use another's name in an action, the proceedings will not be stayed upon the application of the trustee, etc., excepting temporarily, until he be indemnified against costs. In these cases, a demand of indemnity ought to be made before making the application" (Cf. *Emery and Middleton* v. *Mucklow* (6); *Laws and Belcher* v. *Bott* (7)).

But this view depends upon the right of a *cestui que trust* to use the name of his trustee or of joint-contractors or joint-creditors to join his co-contractor or co-creditor. In such a case it is not a joinder without authority. But a joint creditor who is made a co-plaintiff without his consent is entitled to an indemnity against his costs (*Laws and Belcher* v. *Bott* (7)). Thus "one of several partners has a clear right to use the names of the other partners" who if they object may apply for an indemnity against costs (*Whitehead* v. *Hughes* (8)). A joint contractor or joint creditor is in the same position (Cf. *Kendall* v. *Hamilton* (9)). Thus it is a general rule that "all the persons with whom a contract is made must join in an action for the breach of it" (*Dicey, Parties to an Action*, 1st ed. (1870), p. 104). And opposite a side note "Action by plaintiff in name of co-plaintiff" he adds (p. 108), "One of two co-plaintiffs has a right to bring an action in the name of both, nor has the Court any power to interfere, unless the co-plaintiff's name be used, not only against his will, but fraudulently. Hence, 'one of several partners has a right to use the name of the firm,' in order to bring an action. But a co-plaintiff whose name is used without his permission is not without protection.

(1) (1873) L.R. 8 Q.B. 398.
(2) (1896) 2 Ch. 649.
(3) (1845) 13 M. & W. 702 [153 E.R. 294].
(4) (1847) 1 Exch. 1 [154 E.R. 1].
(5) (1873) 7 I.R. Eq. 251.
(6) (1833) 10 Bing. 23 [131 E.R. 813].
(7) (1847) 16 M. & W. 300 [153 E.R. 1203].
(8) (1834) 2 C. & M. 318, at p. 319 [149 E.R. 782].
(9) (1879) 4 App. Cas. 504, at pp. 542, 543.

1st. He may obtain an indemnity against costs from the party who makes use of his name ; i.e., he may apply to the Court to have such party's proceedings stayed till he gives security for costs.

2ndly. He may release or settle the action.

Any one of several co-plaintiffs may give the defendant a release from the action, which is good, and may be pleaded, unless it is fraudulent " (see also *Re Darby* (1)). *Brickland* v. *Newsome* (2), *Ex parte Owen* ; *In re Owen* (3) and *Re Tucker* ; *Ex parte Tucker* (4) are illustrations of the general rule that joint obligees or the survivors of them must join in legal proceedings. A joint contractor or joint creditor cannot have proceedings stayed if he be given an indemnity. There is no justification for staying an action in such a case on the part of a defendant if the joint creditor does not move. It is not an answer on the part of a debtor to a petition for the sequestration of his estate (Cf. *Richmond* v. *Branson & Son* (5) ; *Bowen* v. *Bowen* (6)).

It has not been contended that the judgment in this case was not one upon which a bankruptcy notice and petition for sequestration could be founded. So I merely draw attention to the cases of *In re Crump* ; *Ex parte Crump* (7) ; *Re Tucker* ; *Ex parte Tucker* (4).

But in my judgment the petition is irregular. It was not signed by Dalton or Miller or by any attorney for them and it was not attested as required by the *Bankruptcy Rules* 1934-1942, rule 152 (Cf. *Ex parte Wallace* ; *In re Wallace* (8)). Still, in my opinion, an act of bankruptcy was committed in not complying with the bankruptcy notice. The persons who obtained the issue of the notice were entitled as joint-creditors with Dalton and Miller to join them in the proceeding and to authorize their solicitor accordingly. The notice was not a void or unauthorized proceeding. Dalton and Miller have never sought to set aside the notice or to stay it until indemnified against costs. And the *Bankruptcy Act*, s. 7, provides that no proceeding under the Act shall be invalidated by any formal defect or by an irregularity unless the Court is of opinion that substantial injustice has been caused thereby and that the injustice cannot be removed by an order of the Court (*In re Collier* ; *Ex parte Dan Rylands Ltd.* (9)). The irregularity can be cured if Dalton and Miller sign the petition and if they refuse the other joint-creditors may act in their names indemnifying them against costs if so required.

The appeal should be allowed and the petition remitted to the Court of Bankruptcy for further consideration.

(1) (1904) 22 W.N. (N.S.W.) 87.
(2) (1808) 1 Camp. 474 [170 E.R. 1026].
(3) (1884) 13 Q.B.D. 113.
(4) (1895) 73 L.T. 170
(5) (1914) 1 Ch. 968, at p. 974.
(6) (1873) 7 I.R. Eq. 251.
(7) (1891) 8 Morr. 174.
(8) (1884) 14 Q.B.D. 22.
(9) (1891) 8 Morr. 80.

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DIXON J. The appeal is from an order of the Federal Court of Bankruptcy dismissing a creditors' petition for sequestration.

The debt relied upon by the petitioning creditors, who are the appellants, is for costs, payment of which was ordered by a decree of the Supreme Court of New South Wales in Equity. The suit in which the decree was pronounced was brought in the name of the New South Wales Branch of the Australian Workers' Union and of some of its office bearers as plaintiffs against the Australian Workers' Union and some of its office bearers as defendants. The suit was dismissed. It appears to have been held that the New South Wales Branch of the Australian Workers' Union was not a body entitled to sue under that name. The decree ordered that the defendants' costs of the suit should be taxed and when so taxed and certified should be paid to the defendants by the plaintiffs other than that body. The respondent was one of the office bearers joined as plaintiff in the suit. The costs were not paid and, as one of the persons decreed to pay them, he has been made the object of proceedings in bankruptcy. The solicitors for the defendant obtained in the name of all the defendants a bankruptcy notice against him based upon the order for costs. Upon his failing to comply with the bankruptcy notice, a petition for sequestration was filed in which all the defendants in the suit were named as petitioners. Two of the defendants, however, abstained from signing the petition and it was filed without their signatures. The abstainers are named Christopher Alfred Dalton and William John Miller. Before filing the petition the solicitor had armed himself with authorities from all the defendants except these gentlemen, and from them he failed to obtain an authority. Thus he had no express authority from either of them to issue the bankruptcy notice.

It appears, however, from the affidavit in support of the petition that the whole of the costs incurred by the defendants in respect of the suit have been paid by the Australian Workers' Union and that neither Miller nor Dalton nor any one but that body would be entitled to retain anything that might be paid by or recovered from the plaintiffs for costs under the decree. It may, therefore, be concluded that, although the decree operates to confer a right on all the defendants to recover costs from the individual plaintiffs, the Australian Workers' Union is the party beneficially entitled to whatever sum may be produced by the decree for costs, and, therefore, to the right to enforce that decree, a right which is now vested in all the defendants as trustees for the defendant the Australian Workers' Union alone. If this conclusion is well founded, the Australian Workers' Union upon taking the appropriate steps would be entitled

to require Miller and Dalton to lend their names to any proceedings provided by law for the enforcement of the decree for costs, including proceedings in bankruptcy. But, except where he has the express or implied authority of the party in whose name he desires to proceed, the person beneficially entitled in the subject of a proceeding must, as a general rule, seek the consent of the nominal party and offer him a sufficient indemnity against any liability for costs to which the use of his name might expose him. Unless the real actor does this, or unless special circumstances exist excusing him from doing so, the courts will not permit him to join, or proceed in the names of, nominal parties without their actual authority, express or implied: See *Chambers* v. *Donaldson* (1); *Spicer* v. *Todd* (2); *Auster* v. *Holland* (3); *Coleman and Davis* v. *Biedman* (4). And as to who may apply to set aside or stay, see *Hubbart* v. *Phillips* (5); *Fricker* v. *Van Grutten* (6). If one of two creditors or claimants desired to put a joint right in suit, he might, upon giving a proper indemnity, be permitted by the common law courts to sue in the name of the other creditor or claimant as well as his own. But preparedness to afford a proper indemnity was a condition of his being allowed to proceed in their joint names.

It is true that when the person beneficially entitled sued in the name of the nominal party, or one co-obligee sued in the name of all the co-obligees, the proceedings would not be struck out or stayed once a satisfactory indemnity was provided. But it does not appear to me to matter for the purpose in hand whether the condition of giving an indemnity is regarded as strictly precedent or not. It is enough that, speaking generally, it was indispensable. It could not be said that the bankruptcy notice was applied for as required by s. 52 (*j*) of the *Bankruptcy Act* 1924-1933 by the persons entitled to enforce the decree for costs, if one or some only of them applied without an authority in law or in fact from all the others which was complete and absolute.

There was, in my opinion, neither express nor implied authority in the Australian Workers' Union or in the solicitor to use the names of Miller and Dalton. The suggestion was made that the general rules of the union, by which the latter were bound as members, contained a contractual authority to the secretary on the part of members to use their individual names in legal proceedings for the

(1) (1808) 9 East 472 [103 E.R. 653].
(2) (1831) 2 C. & J. 165 [149 E.R. 69]; 1 L.J. Ex. 59.
(3) (1846) 15 L.J. Q.B. 229.
(4) (1849) 7 C.B. 871 [137 E.R. 345]; *sub nom. Collman* v. *Biedman* (1849) 18 L.J. C.P. 263.
(5) (1845) 13 M. & W. 702 [153 E.R. 294].
(6) (1896) 2 Ch., at p. 657.

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benefit of the union, but on the text of the rules that suggestion cannot be sustained.

The solicitor was, it may be assumed, retained by each and all of the defendants, including Miller and Dalton, for the defence of the suit; but such a retainer would not enure or avail to authorize him to take on their behalf proceedings in bankruptcy for the recovery of costs awarded by the decree in the suit. No indemnity appears to have been offered to Miller or to Dalton and indeed it is not even proved that they were requested to lend their names. Upon an application, therefore, by them or by the respondent, the bankruptcy notice might have been set aside. As the authority of the solicitor who obtained it was in question, it would seem that an independent application would have been the more regular way of attacking it: see *Banco de Bilbao* v. *Sancha* (1), to which *Williams* J. referred in this Court. But in the Federal Bankruptcy Court that question was gone into upon the hearing of the petition without objection, and the facts then appearing showed that the bankruptcy notice was not authorized by all the persons who were for the time being entitled to enforce the order for the payment of the debt relied on; see s. 52 (*j*) of the *Bankruptcy Act* 1924-1933. The right to enforce the judgment was vested in those persons jointly, and not severally, and, therefore, it was necessary that it should be obtained in the names of all of them by a person authorized either in fact or in law so to obtain it. As the authority of Miller and of Dalton was not given in fact and the appropriate steps were not taken to secure an authority in law, or rather equity, for the use of their names, the bankruptcy notice could not stand.

The petition for sequestration, as it was framed, is entirely irregular, because it is not signed by or on behalf of all the petitioners. If the use of the names of Miller and of Dalton was necessary, then the foregoing reasons would again operate to show that to use their names as parties to the petition was not proper.

But if the defendants, other than the Australian Workers' Union, had come to have no beneficial interest in the decree against the plaintiffs for costs and were in the position of absolute trustees of their rights under the decree for the union, it may be said that the union became a creditor to whom the debt under the decree was due in equity: see s. 55 (1). In that case perhaps the petition might be presented in the name of the Australian Workers' Union alone: *Ex parte Cooper*; *In re Baillie* (2) and see per *Starke* J. in *McIntosh* v. *Shashoua* (3).

(1) (1938) 2 K.B. 176, at p. 192.
(2) (1875) L.R. 20 Eq. 762.
(3) (1931) 46 C.L.R. 494, at pp. 506, 507, and cf., at pp. 504, 517, 519.

The form of the petition, however, seemed to acknowledge the necessity of joining the other defendants as persons entitled to enforce the decree, and the facts were not proved in detail which would enable the Court to say with any certainty that the Australian Workers' Union was the absolute beneficial owner of the debt payable under the decree for costs.

In these circumstances, I think that, independently of the failure of the bankruptcy notice, the petition could not be supported in its present form and should not be amended into a form in which, given proper proof of the requisite facts, it might be supported.

On both grounds I think that the petition was rightly dismissed. The appeal should, therefore, be dismissed with costs.

WILLIAMS J. The decree of the Supreme Court in Equity ordered the plaintiffs, other than the Australian Workers' Union (N.S.W. Branch) to pay the taxed costs of the suit and counterclaim to the defendants within fourteen days after service of an office copy of the certificate of taxation. Section 3 of the *Judgment Creditors' Remedies Act* 1901 (N.S.W.) provides that such an order has the effect of a judgment at law. The order created a joint right in the defendants to be paid and a joint liability in the plaintiffs to pay the costs within the specified period. The costs were not so paid and the defendants became entitled to issue a writ of execution against the plaintiffs jointly, which could be levied upon the property of any one or more of them individually: *Halsbury's Laws of England*, 2nd ed., vol. 14, p. 12. It was the defendants jointly and not severally who were persons for the time being entitled to enforce the order as a final judgment against the plaintiffs within the meaning of s. 52 (*j*) of the *Bankruptcy Act* 1924-1933. They could issue the bankruptcy notice against one of the debtors without including the other: *In re Low*; *Ex parte Gibson* (1). The solicitor who had acted for the defendants in the equity suit applied in their names to the Federal Court of Bankruptcy for the issue of a bankruptcy notice against one of the plaintiffs, namely the respondent. A bankruptcy notice in the names of all the defendants was served on the respondent but he did not comply with its requirements. A petition for a sequestration order was then presented by the same solicitor in the names of all the defendants but was not signed by two of them as required by the *Bankruptcy Rules*. The act of bankruptcy relied on was the failure by the respondent to comply with the bankruptcy notice.

(1) (1895) 1 Q.B. 734.

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The respondent filed a notice with the Registrar in Bankruptcy under rule 172 stating that he intended to oppose the making of the sequestration order on the ground, *inter alia*, that the bankruptcy notice was issued without the knowledge or consent of W. J. Miller and C. A. Dalton who were two of the defendants. C. A. Dalton was called at the hearing of the petition and upon his evidence, which was not contradicted by the solicitor, the learned Judge in Bankruptcy found that he had not authorized the solicitor to apply for the issue of the bankruptcy notice.

Formerly when a solicitor instituted proceedings in the name of a plaintiff without authority, the plaintiff was bound by what was done and his remedy was against the solicitor who had wrongly used his name. But after it had been held at common law that a defendant who had paid the amount of a judgment to a solicitor, not having the authority of the creditor to issue the writ, was liable to pay the creditor all over again, it became the practice at common law and subsequently in equity, to allow either the plaintiff or the defendant to move the Court for an order to stay or strike out the proceedings and for an order that the solicitor pay the costs of the plaintiff (including any costs for which he had become liable to the defendant) and the costs of the defendant (*Reynolds* v. *Howell* (1); *Fricker* v. *Van Grutten* (2)).

The proper procedure for a defendant who wishes to challenge the retainer of the solicitor for the plaintiff is to file a substantive motion and not to raise the want of authority by way of defence to the proceedings (*Richmond* v. *Branson & Son* (3); *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (4); *Banco de Bilbao* v. *Sancha* (5)). I think that the issue of a bankruptcy notice which is a process of the Court comes within the principle of these cases and that the respondent should have raised the question in this manner. But it was held in *John Shaw & Sons (Salford) Ltd.* v. *Shaw* (6) that the Court has inherent jurisdiction to stay or strike out the proceedings at whatever stage the facts establish want of capacity or authority to sue. In the instant case no objection was taken to the procedure. If it had been taken, the petition could have been stood over to enable the respondent to launch a substantive application. It is now too late to take the objection. As the solicitor had no authority to apply for the issue of the bankruptcy notice on behalf of Dalton, the respondent was served with a notice issued on behalf of some only of the joint creditors.

(1) (1873) L.R. 8 Q.B. 398.
(2) (1896) 2 Ch. 649.
(3) (1914) 1 Ch. 968.
(4) (1925) A.C. 112, at p. 130.
(5) (1938) 2 K.B., at p. 192.
(6) (1935) 2 K.B. 113.

In England, since the *Judicature Rules*, a person cannot be joined as a plaintiff without his consent in writing, but may be joined as defendant. Rule 9 of Order II. of the rules of this Court is to the same effect. Rule 7 of the *Bankruptcy Rules* provides that 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. In *Johnson* v. *Stephens & Carter Ltd.* (1), *Atkin* L.J. said that, " at the present day as a general rule, in the absence of special circumstances, if one of two joint contractors refuses to join as plaintiff in an action for a breach of the contract, the party seeking to sue should offer the other an indemnity, and then if he still refuses is entitled to join him as a defendant. That is a great advance on what was the strict rule at common law, according to which one joint contractor could not join another as plaintiff in an action against his will, except where the joint contractors were partners, in which case one partner might use the names of his co-partners on his giving them an indemnity if it was asked for."

It would appear therefore that a joint creditor who is unwilling to join in the presentation of a bankruptcy petition after being offered an indemnity against costs could be made a respondent to the petition. But there is no rule which authorizes some of the joint creditors of a judgment debt to issue a bankruptcy notice.

There is some evidence that the defendant, the Australian Workers' Union, paid the costs of all the defendants to the solicitor and thereby became solely entitled to the benefit of the judgment debt in equity. But the defendants are still the persons who have the right in law to issue execution to enforce the judgment and so to issue a bankruptcy notice (*In re Palmer*; *Ex parte Brims* (2)). Rule VI. of the *Consolidated Equity Rules of the Supreme Court of N.S.W.* provides that, where none of these rules is applicable, the practice for the time being of the Supreme Court of Judicature in England exercising its equitable jurisdiction shall be followed as far as applicable. It may be that the Australian Workers' Union could apply to the Supreme Court in Equity under the *English Consolidated Rules*, Order 42, rule 23, for leave to issue execution on the judgment, and if this were granted it might then become the person for the time being entitled to enforce the judgment within the meaning of s. 52 (*j*) and to issue a bankruptcy notice (*Forster* v. *Baker* (3)). It could then present a bankruptcy petition as a creditor to whom a debt

(1) (1923) 2 K.B. 857, at pp. 860, 861.
(2) (1898) 1 Q.B. 419.
(3) (1910) 2 K.B. 636.

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amounting to £50 was due in equity (*Bankruptcy Act*, s. 55 (1) (*b*); *McIntosh* v. *Shashoua* (1)).

But so far there has been no non-compliance by the respondent with a valid bankruptcy notice. It therefore becomes unnecessary to discuss the objections that were raised to the validity of the petition or to decide whether the appellant should have leave to amend the petition.

For these reasons I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellants, *J. J. Carroll, Cecil O'Dea & Co.*
Solicitors for the respondent, *C. Jollie-Smith & Co.*

J. B.

(1) (1931) 46 C.L.R. 494.