IN THE MATTER OF THE BANKRUPTCY OF STOBIE, FORLONG AND COMPANY;
AND IN THE MATTER OF THE CLAIM OF F. J. COLWELL.

1937
* Nov. 4, 5.
1938
* Mar. 18.

THE TRUSTEE OF THE PROPERTY OF STOBIE, FORLONG & COMPANY, A BANKRUPT, AND THE TRUSTEE OF THE PROPERTY OF STOBIE, FORLONG ASSETS LTD., A BANKRUPT ..... APPELLANTS;

AND

F. J. COLWELL ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Bankruptcy of firm of stock brokers—Customers' securities not identifiable or not in brokers' hands at date of bankruptcy—Ascertainment and proof of customers' claims on basis of brokers' conversion of securities as at date of bankruptcy—A customer subsequently asking to substitute claim on basis of conversion at dates of actual sales of securities by brokers—Question of allowance of such amendment—Bankruptcy Act (R.S.C., 1927, c. 11), ss. 76, 163 (4)—Discretionary power in the court—Circumstances of the case—Delay in making substituted claim—Customer's conduct—Customer's knowledge or lack of knowledge of facts—Change of position in course of administration of estate

Respondent had been a customer of a firm of stock brokers, who made an assignment in bankruptcy to M. on January 30, 1930. The brokers' books indicated that they carried for the accounts of their numerous customers many securities, but only a small proportion thereof were held by them at the date of bankruptcy. It was difficult, if not impossible, except in a few cases, to identify securities on hand as those of any particular customer or to ascertain from the brokers' books and records when or how the securities indicated in the respective customers' accounts as being carried, but not in fact on hand, had, if ever, been bought or disposed of. In these circumstances, in order to have an equitable basis of distribution among the creditors, M. (the trustee) wrote up each customer's account by crediting him with the value, at market price on date of bankruptcy, of the securities indicated by the books as being carried for him, and then, by charging him with the amount, if any, of his indebtedness to the brokers, the customer's equity or surplus was arrived at. A statement of his account, so worked out, as of January 30, 1930, was sent by M. to each customer, concluding with the words: "The Jan. 30th credits or debits above given show the market values of the stocks carried for your account, long or short, as of that date." The statement sent to respondent shewed a credit balance in his favour of $76,295.91. On February 26, 1930, respondent filed with M. a proof of claim as an ordinary unsecured creditor in that amount. His

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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claim was admitted as proved. The creditors generally proved their claims, for the purpose of ranking on the estate, on the same basis; and the administration of the estate proceeded upon that basis. But before any distribution among ordinary creditors had been made, a scheme of arrangement was submitted and approved, under which a new company was to be incorporated, to which all the assets vested in M. were to be transferred, the new company to assume all debts provable in the bankruptcy and to issue its debentures in a sum sufficient to cover all claims proved as certified by M., the debentures to be delivered to M. and by him "to creditors who have proved their claims, as in satisfaction thereof." Many creditors had not yet proved their claims. By the court order approving the scheme, the debts provable in bankruptcy to be assumed by the new company and the amounts thereof were required to be "ascertained by [M.] in accordance with the provisions of the Bankruptcy Act relating to the proof of debts and all the said provisions, including the provisions relating to appeals from disallowance by the trustee shall apply to the proof of such debts, and [M.] shall certify the debts so proved for the purpose of the issue of debentures under" the scheme. The new company was incorporated in August, 1930, it acquired the assets vested in M., issued its debentures, proceeded to realize upon the assets, made certain payments on the debentures, but not sufficient to meet requirements under the terms thereof, became in default, and was, in December, 1932, declared bankrupt. Its creditors proved their claims upon the debentures, and its trustee, on a realization of assets, paid certain dividends (in August, 1933, June, December, 1934, October, 1936).

Respondent voted (in May, 1930, upon his claim as proved) for approval of the scheme, his claim (according to his proof of claim filed) was certified by M., the new company issued debentures for the amount thereof, which were delivered to respondent in settlement thereof and accepted by him, he filed his claim against the new company's estate in bankruptcy, basing it upon the amount of said debentures, he was made an inspector of that estate, attended 23 inspectors' meetings, and accepted the aforesaid dividends from that estate without protest. According to his evidence, he had at first assumed or believed that his securities were still on hand at the date of the brokers' bankruptcy, but learned to the contrary about the beginning of 1933. In November, 1936, he forwarded to M. an amended or additional claim in which there was substituted for the market value of some of his securities at the date of bankruptcy the market value thereof on the respective dates on which, according to respondent, they had been disposed of by the brokers prior to their bankruptcy, the respondent thus increasing his claim by $73,486.61. M. replied, in effect, that he had no power to entertain the amended claim. Treating this reply as the disallowance of a claim under s. 127 of the *Bankruptcy Act*, respondent appealed to the bankruptcy Judge, who dismissed his appeal ([1937] O.R. 559, at 559-561). On appeal, the Court of Appeal for Ontario ([1937] O.R. 559) held that he was entitled to rank as a creditor in respect of his amended claim (subject to settlement of its amount) and that debentures be issued for the additional amount thereof (subject to s. 76 of the *Bankruptcy Act*). From this judgment the present appeal was taken (by special leave under the *Bankruptcy Act*) to this Court.

Held (Kerwin J. dissenting): The appeal should be allowed and the order of the Judge in Bankruptcy (declining to give effect to the amended claim) restored.

Sec. 76 of the *Bankruptcy Act* does not apply to a case such as this, where a creditor, having proved his claim in conversion on one basis of calculation (conversion at the date of bankruptcy), seeks in effect to withdraw his original proof and to substitute a proof for the same claim but on a different basis of calculation (conversion at the date of actual sales).

It is doubtful if the discretionary power in the court under s. 163 (4) of said Act applies to the filing or amending of claims with the trustee. But the court has in bankruptcy an equitable jurisdiction to deal with matters of this sort.

It could not be said that respondent was barred from his desired amendment on the ground of the doctrine of election. The evidence did not disclose that he had such knowledge of the facts when he filed his original claim as would put him to an election.

But, in view of there having been so much delay and so much change of position in the course of administration of the brokers' estate between the date of bankruptcy and the date of filing the amended claim (nearly seven years); in view of circumstances which should have enabled respondent to obtain much earlier the information (as to the sales of his securities) which he had when he filed his amended claim; in view of the situation with regard to the new company (which after its bankruptcy could not properly issue more debentures, and, moreover, was not, as such company, before the court) and with regard to other creditors in similar position to respondent; and in view of all the facts and circumstances of the case, and bearing in mind that the allowance, under such or like facts and circumstances, of such amendments as that now sought might lead, in this case and in similar cases, to endless delays and confusion in the administration and distribution of stock brokerage bankruptcies, it must be said that the Judge in Bankruptcy had exercised a sound discretion in declining to give effect to the amended claim, and an appellate court was not justified (in the circumstances of the case) in interfering with his exercise of that discretion.

Per Kerwin J. (dissenting): Sec. 76 of the *Bankruptcy Act* cannot be construed to prohibit under all circumstances a creditor who has filed a claim with a trustee in bankruptcy from withdrawing it and filing a new one or an amended one. Respondent was misled by the wording of M.'s statement aforesaid to such an extent that he filed a claim believing his securities were available; and this misunderstanding continued (justifiably, under the circumstances) until he ascertained the true facts about the beginning of 1933. Nothing that he did or omitted to do should debar him from making a new claim or filing an amended claim. His delay from the beginning of 1933 (when he ascertained that his securities were not on hand at the date of bankruptcy) to the date of filing his amended claim (during which period or part thereof he was considering his position, watching certain proceedings, and tracing sales of his securities) should not be held to debar him from amending, as the position of the trustee of the brokers' estate and that of the trustee of the new company's estate have not altered nor has either trustee been prejudiced in any way. It has been held in the Bankruptcy Court in Ontario (*In re Stobie, Forlong & Co.; ex parte Meyer Brenner*, 14 C.B.R. 405) that the

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bankruptcy of the new company did not prevent M. from certifying to a debt against the brokers when proved; and the trustee of the new company's estate still has assets on hand. The circumstance that there may be other creditors in a position similar to that of respondent cannot affect his rights. (*In re Safety Explosives Ltd.*, [1904] 1 Ch. 226, discussed. That case is not an authority applicable to the present question).

APPEAL by the trustee of the property of Stobie, Forlong & Company and by the trustee of the property of Stobie, Forlong Assets Ltd. from the judgment of the Court of Appeal for Ontario (1) which allowed the claimant Colwell's appeal from the judgment of McEvoy J. (2), sitting as Judge in Bankruptcy, dismissing the claimant's appeal from the refusal of the trustee in bankruptcy of Stobie, Forlong and Company to take cognizance of an amended claim of the said claimant.

Stobie, Forlong & Company, a firm of stock brokers, made an authorized assignment in bankruptcy on January 30, 1930. The claimant (the present respondent), a customer of the brokers, was one of their creditors, and filed a claim with the trustee in bankruptcy for $76,295.91, being the amount of the balance to his credit according to a statement (made out, along with statements for other creditors, on the basis and under the circumstances explained in the judgments now reported) sent him by the trustee.

A scheme of arrangement was proposed and was accepted by the necessary majority of the creditors and was approved by an order of the court. Pursuant to this scheme of arrangement, Stobie, Forlong Assets Ltd. was incorporated, in August, 1930, and the assets of the brokers' estate were transferred to it and debentures of Stobie, Forlong Assets Ltd. were issued to those creditors of the brokers whose claims were duly proved and allowed by the trustee of the brokers' estate. Stobie, Forlong Assets Ltd., operating as a holding and realizing company for said creditors, made certain payments to its debenture holders. It was subsequently (in December, 1932) adjudged bankrupt. Its creditors proved their claims upon the debentures, and its trustee, on a realization of assets, paid certain dividends.

(1) [1937] O.R. 559; 18 C.B.R. 409; [1937] 3 D.L.R. 380.

(2) [1937] O.R. 559, at 559-561; 18 C.B.R. 342.

In November, 1936, the claimant (the present respondent), alleging that he had ascertained that Stobie, Forlong & Company had, prior to their authorized assignment in bankruptcy, sold shares and securities belonging to the claimant without disclosing that fact to him and without giving him credit for the amounts received on such sales, made an additional claim for $73,486.61, the claim as amended by such addition being based on the market value of his securities on the respective dates on which, according to the claimant, they had been disposed of by the brokers, instead of the market value thereof on the date of the brokers' bankruptcy, the latter basis having been that adopted (as explained in the judgments now reported and for reasons there set out) in the statement sent to the claimant (as well as in the statements to other creditors) by the trustee, and according to which the claimant had filed his original claim. The claimant's right to allowance of his additional claim was the issue now in question.

The material facts and circumstances are more fully and particularly set out in the judgments now reported, and are indicated in the above head-note.

The order of the Court of Appeal declared that the claimant was entitled to rank as a creditor of the estate of Stobie, Forlong & Company for the additional amount of his amended claim, ordered that the trustee of said estate certify to the trustee of the estate of Stobie, Forlong Assets Ltd. the amount of the amended claim, and that the trustee in bankruptcy of Stobie, Forlong Assets Ltd. do issue debentures of Stobie, Forlong Assets Ltd. to the claimant for the additional amount of his amended claim, subject to the provisions of s. 76 of the *Bankruptcy Act*. Provision was made for, if necessary, the determination of the amount of the amended claim.

Leave to appeal to the Supreme Court of Canada was granted by an order of a Judge of this Court. By the judgment of this Court, now reported, the appeal was allowed and the judgment of McEvoy J. restored (Kerwin J. dissenting).

R. S. Robertson K.C. for the Trustee of the property of Stobie, Forlong & Company, appellant.

E. R. Read K.C. for the Trustee of the property of Stobie Forlong Assets Ltd., appellant.

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A. W. Roebuck K.C. and *G. B. Bagwell* for the respondent.

The judgment of the majority of the Court (The Chief Justice, and Crocket, Davis and Hudson JJ.) was delivered by

DAVIS J.—This is an appeal by special leave under the *Bankruptcy Act* to this Court from the judgment of the Court of Appeal for Ontario (1). The appeal arises out of a demand made by the respondent on November 13th, 1936, that he be permitted, in effect, to amend his proof of claim as an unsecured creditor in bankruptcy, filed February 26th, 1930, in the amount of $76,295.91 by increasing the amount of the said claim by the additional sum of $73,486.61.

Stobie, Forlong & Company were stock brokers carrying on business in partnership in Toronto. They made an assignment in bankruptcy on January 30th, 1930, to Martin, one of the appellants. The respondent had been a customer of Stobie, Forlong & Company with substantial transactions between September, 1929, and January, 1930. More than 4,000 claimants proved in the bankruptcy and their claims in the aggregate amounted to $3,835,794.12. The brokers' books of account indicated that they carried for the accounts of their numerous customers many securities, but as a matter of fact a very small proportion of these securities were held by them at the date of bankruptcy. The trustee in bankruptcy found it difficult, if not impossible, except in a few cases, to identify such securities as were on hand as the securities of any particular customer or to ascertain from the books and records of the brokers when or how the securities which were indicated in the respective customers' accounts as being carried, but which were not in fact on hand, had, if ever, been bought or disposed of. In these circumstances, in order to have an equitable basis of distribution among the creditors, the trustee, according to what is now a common and convenient method in stock-brokerage bankruptcies, wrote up each account by making an entry in it crediting the account with the value at the market price prevailing on the date

(1) [1937] O.R. 559; 18 C.B.R. 409; [1937] 3 D.L.R. 380.

of bankruptcy of the securities indicated by the books as being carried for the customer, and then, by charging the customer with the amount, if any, of his indebtedness to the brokers, the customer's equity or surplus in his account was arrived at. A statement of his account worked out in this way was sent by the trustee to each of the several customers, including the respondent.

The statement of account sent by the trustee to the respondent showed a credit balance in his favour of $76,295.91. On February 26th, 1930, the respondent filed with the trustee a proof of claim as an ordinary unsecured creditor in this exact amount. His claim was admitted as proved, and he did not ask to amend or to substitute any other proof of claim until November 13th, 1936.

The creditors generally proved their claims, for the purpose of ranking on the estate, on the same basis as the respondent and the administration of the estate proceeded upon that basis. But before any distribution among ordinary creditors had been made, a scheme for the arrangement of the brokers' affairs was submitted to a meeting of creditors on May 12th, 1930. The respondent voted, upon his claim as proved, in favour of the approval of the scheme. It may be significant that his voting letter was signed on May 10th, the day he wrote Martin, the trustee, the letter to which we shall refer later, though he had on May 5th signed a similar voting letter against the scheme. Under the scheme of arrangement a new company was to be incorporated and organized and all the assets vested in the trustee in bankruptcy were to be transferred to the new company. The new company was to assume all debts provable in the bankruptcy and to issue its debentures in a sum sufficient to cover all claims proved as certified by the trustee in bankruptcy, the appellant Martin. These debentures were to be delivered to the trustee and by him "to creditors who have proved their claims, as in satisfaction thereof" on the basis of par as against the amount of each claim. It is common ground that at that time many creditors had not yet proved their claims. By the terms of the order of Mr. Justice Orde in Bankruptcy approving the scheme, the debts provable in bankruptcy to be assumed by the new company as men-

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tioned in the scheme of arrangement and the amounts thereof respectively were required to be ascertained by the trustee in accordance with the provisions of the *Bankruptcy Act* relating to the proof of debts and all the said provisions, including the provisions relating to appeals from disallowance by the trustee shall apply to the proof of such debts, and the trustee shall certify the debts so proved for the purpose of the issue of debentures under the provisions of the annexed scheme of arrangement.

The name of the new company, incorporated August, 1930, pursuant to the scheme of arrangement, was "Stobie, Forlong Assets, Limited" and it acquired the assets vested in Martin as trustee. A certificate was duly issued by the trustee certifying the respondent's claim in accordance with his proof of claim filed. Thereupon the new company issued its debentures for the amount of this claim, and the debentures were duly delivered to the respondent in settlement of his claim and were accepted by him. The creditors generally were dealt with in the same manner. Stobie, Forlong Assets, Limited, under the management of a board of directors (five of the seven being required to be debenture holders), proceeded with the business of realizing upon the assets which had been vested in it under the scheme of arrangement. The company paid to debenture holders on November 1st, 1931, three per centum, and on May 1st, 1932, two per centum, of the amount of each debenture. These payments were not equal to the amounts required to be paid under the terms of the debentures; the company became in default; and on December 13th, 1932, was declared bankrupt. The appellant Higgins became trustee in bankruptcy of the company.

Again it became necessary for creditors to prove their claims, and the respondent duly filed with the appellant, Higgins, his claim against the company's estate, basing it upon the amount of the debentures he had received. The respondent was made an inspector of the company's estate in bankruptcy and during the course of the liquidation has attended twenty-three meetings of inspectors. The trustee of the company, on a realization of assets, has paid four dividends to creditors, including the respondent, as follows: August 2nd, 1933, three per centum; June 1st, 1934, two per centum; December 20th, 1934, three per centum; and October 2nd, 1936, three per centum. The respondent accepted all these dividends without protest and took no step to amend his claim until November, 1936.

The claim of the respondent as originally filed was a claim for the balance of the equity in his account after deducting the amount he owed from the market value of the securities as of the date of bankruptcy. It is perfectly plain that the respondent had no credit balance upon any other possible basis than that of treating his securities as converted. He was indebted to the brokers in a sum in excess of $180,000 and only on the basis of a conversion of his securities could he rid himself of that indebtedness and turn it into a credit balance of $76,000 for which he filed his claim. In March, 1930, a month after he had proved his claim, the respondent says he was told by a relative, Midwood, who had been an employee of the brokers, that his securities were still on hand. Obviously it would have been to his advantage to obtain the securities and to pay what he owed against them rather than to rank as an ordinary unsecured creditor. The respondent accordingly wrote Martin, the trustee, on May 10th, 1930, demanding the return of the securities in his account. He admits now that the trustee did not in fact have any of his securities but he says he did not know that at the time. In any event, on May 12th of the same year, 1930, he attended a meeting of creditors and voted on his filed proof of debt in favour of the proposed scheme of arrangement. He now says he assumed, if he was not told by Martin, that the securities were in the trustee's hands and the trustee would not release them. A few months later, "about the end of 1930 or the beginning of 1931," he went to Mr. G. T. Clarkson, who had been made one of the directors of the new company, and asked him to investigate his claim to specific securities, giving him a list of some of the securities with the certificate numbers. Mr. Clarkson investigated and told him the securities were not on hand. The respondent now says that he assumed at that time that the bank had disposed of them. Subsequently the respondent obtained information while acting as an inspector of the new company's bankrupt estate, that his securities had been sold prior to the bankruptcy. He puts the date of this information not later than "about the beginning of 1933." And yet for nearly four years thereafter the respondent acted as one of the inspectors of the company's estate in bankruptcy and accepted the four

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dividends paid by the company's trustee and took no step to amend his claim as proved or to file another until, in November, 1936, he forwarded to Martin, the trustee of the brokers' original estate, an amended or additional claim in which there was substituted for the market value of some of his securities at the date of the bankruptcy the market value of these several securities on the respective dates on which, according to the respondent, they had been disposed of by the brokers prior to their bankruptcy. Upon this basis the credit to the respondent is increased by the sum of $73,486.61 above mentioned. No admission has been made by the appellants of the accuracy of this statement and the appellants say that they have no means at hand of verifying the dates on which the respondent alleges his securities were disposed of.

On December 15th, 1936, the trustee Martin wrote the respondent's solicitors with regard to the amended claim, stating briefly in effect that he had no power to entertain it. The respondent treated this letter as the disallowance of a claim under sec. 127 of the *Bankruptcy Act*, and appealed to the Bankruptcy Judge. Mr. Justice McEvoy, the Judge in Bankruptcy, did not regard the matter as the disallowance of a new claim under sec. 127 of the Act, but rather as an attempt by the respondent to amend a claim that had already been allowed. Whether sec. 163 (4) of the Act has any application to the proof of claims or whether it relates only to proceedings in the Court itself, the learned judge was of opinion that in the circumstances of this case no amendment of the claim should be allowed. Although the respondent's notice of motion by way of appeal was directed only to Martin, the trustee of the brokers, counsel for the trustee of the new company appeared on the motion and was heard in opposition to the granting of the relief sought.

The respondent appealed to the Court of Appeal. Counsel for both trustees again appeared and the matter was dealt with in the Court of Appeal broadly as an appeal from the disallowance of the claim. The learned judges in the Court of Appeal appear to have been in error in assuming that the respondent's first proof of claim was made after the approval of the scheme of arrangement; it was, of course, made before it. This understanding involved an

omission to consider, if it is of any consequence, the position of the respondent as one who had proved his claim prior to the scheme of arrangement and who by virtue of that proof had voted for approval of the scheme. The Court of Appeal further appear to treat the case as if the respondent, in proving his original claim, did so on the assumption that his securities were then on hand and that he was claiming for the amount of his equity in these securities so on hand. If by this was meant that the respondent assumed that his securities were actually available to him, it is difficult to reconcile such an assumption with the claim as then filed. The respondent proved only for a sum of money as an ordinary unsecured creditor. It was for the equity in his account, not for an equity in securities, that he claimed. He did not claim any securities or any interest in them. The only difference between his first claim and the claim now in question is that an increase in amount is arrived at by taking the market values of some of the securities at the dates of their alleged sale by the brokers prior to bankruptcy instead of the market values of these securities prevailing at the date of bankruptcy.

The Court of Appeal was of opinion that, under sec. 76 of the *Bankruptcy Act*, the respondent is entitled to be considered, in respect of the additional amount, as a creditor who had not proved his debt, and who now comes in before final distribution of the bankrupt estate and asks to be allowed to participate. As an alternative ground, the Court was of the opinion that under sec. 163(4) there is power to make any necessary amendment to the claim as originally filed. The Court therefore held that the respondent is entitled to rank as a creditor of Stobie, Forlong & Company for the additional amount of his amended claim and to receive further debentures to make up the amount of his claim as amended, and ordered that the trustee of Stobie, Forlong & Company should certify the amount of the amended claim, and that debentures of Stobie, Forlong Assets, Limited, should thereupon be issued for the additional amount. A reservation for settling the accuracy of the new statement was part of the order.

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Counsel for the respondent contends that his client is entitled as of right to amend his claim and invokes sec. 76 of the *Bankruptcy Act*. That section reads as follows:

> 76. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled upon proof of such debt to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend or dividends but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

But this statutory provision does not apply to a case such as this where a creditor, having proved his claim in conversion on one basis of calculation, seeks in effect to withdraw his original proof and to substitute a proof for the same claim but on a different basis of calculation. The respondent's original claim was founded on a conversion at the date of bankruptcy; the new or amended claim is founded on a conversion at the date of actual sales in so far as they can be traced.

In the alternative, counsel for the respondent invokes sec. 163 (4) of the *Bankruptcy Act*. That subsection reads as follows:

> 163. (4) The court may at any time amend any written process or proceedings under this Act upon such terms, if any, as it may think fit to impose.

It is doubtful if this discretionary power applies to the filing or amending of claims with the trustee. But the court in any event has in bankruptcy an equitable jurisdiction to deal with matters of this sort. Counsel for the appellants, however, contend that the respondent must fail on the doctrine of election, a doctrine which some historians think sprang from the jurisdiction of equity over bankruptcy and the administration of estates of deceased persons. But it is not established that the respondent, at the time he filed his original claim, was confronted by an option and put to his election. The trustee's statement to him carried an unfortunate, if not a misleading, footnote that the debits and credits showed the market value as of the date of bankruptcy "of the stocks carried for your account, long or short." If the respondent thought that his securities were actually in the hands of the brokers at the date of the bankruptcy, it is obvious that he would not have filed a claim at that time as an ordinary unse-

cured creditor in what must have appeared to be an almost hopeless situation, but would have taken up his securities and realized in cash the equity of some $76,000 at the then prevailing market prices of the securities or would have arranged to hold and carry the securities through some other agency. But the material before us does not make it at all plain what the respondent really did think or believe when he received the trustee's statement of "the stocks carried for your account." He says that when he found out at the end of 1930 or about the beginning of 1931 from Mr. Clarkson that his securities were not on hand, he assumed that the bank had disposed of them. It is not unreasonable to suppose that he may have thought, when he filed his original claim, that his securities had been either impounded by the trustee or had before the bankruptcy been pledged in mass by the brokers to their bankers and could not be released as individual transactions. It was not, he said, until the beginning of 1933 that he learned that the securities had not been on hand at the date of bankruptcy. The evidence does not disclose that he was in possession of such knowledge of the facts at the time he filed his original claim as would put him to an election.

Where, however, there has been so much delay and so much change of position in the course of the administration of the estate of the brokers during the period commencing with the date of bankruptcy, January 30th, 1930, to the date of the filing of the amended claim, November 16th, 1936 (close on to seven years), the question is whether the Court should lend itself under all the facts and circumstances of this case to the aid of the respondent.

The information the respondent acquired at the time he filed his amended claim in November, 1936, as to actual sales of his securities by the brokers before bankruptcy, was just as easily obtainable by him at the date of the bankruptcy or at the beginning of 1933 when, at latest, he learned, he says for the first time, that his securities were not on hand at the date of bankruptcy. It was only about three months before the bankruptcy, on October 29th, 1929, that he had transferred to Stobie, Forlong & Company a large trading account that he had been carrying with another firm of Toronto brokers. All that he had to do, and

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what in fact he subsequently did, was to ask these brokers for the numbers of the share certificates which they had delivered to Stobie, Forlong & Company when he closed and transferred his account with them, and then enquire from the transfer agents of the several companies as to the records on their books of the transfer of these particular shares. The date of registration of a transfer of a certificate is not, of course, evidence of the date of the sale by any particular holder of the certificate in question and if the amended claim were allowed it would necessitate further investigation to ascertain, if possible, the actual sale prices obtained by the brokers from the sale of the several securities.

The Assets Company went into bankruptcy in December, 1932, and, while it may be a subsisting company entitled to function within the circumscribed ambit of its curtailed powers (all its assets having become vested in its trustee in bankruptcy), it cannot after its bankruptcy properly issue more debentures. In any event, the company as such is not before the Court. Further, the debentures were transferable and the outstanding debenture holders are not before the Court except in so far as those of them who have filed claims with the company's trustee in respect of their debentures may be said to be represented by the company's trustee. The decision in this case will, no doubt, apply not only to other creditors of the same estate but will have a general application to similar cases that may arise in other bankruptcies. The allowance of such amendments may well lead to endless delays and confusion in the administration and distribution of stock-brokerage bankruptcies if, seven years after bankruptcy, the courts are to re-open the door to creditors with such amended claims as the respondent in these proceedings seeks to have admitted. The conduct of the stock brokerage business in Canada necessarily follows very closely, if indeed it does not precisely conform with, the practice in New York which seems to be the common practice throughout the United States, and in the case of a bankruptcy some plan of distribution or scheme of arrangement, as a practical matter, is usually accepted by the creditors, as it was in this case, to avoid endless litigation and delay in the distribution of the bankrupt estate.

The learned Judge in Bankruptcy in the exercise of his discretion declined to give effect to the amended claim and referred to the language of Stirling, L.J., in *In re Safety Explosives, Ltd.* (1):

> But I prefer to rest my decision on the ground that the granting of leave to amend or to withdraw a proof is not a matter of right, but is subject to the control of the court, and leave ought not to be given in a case in which in the interval between the carrying in of the proof and the application for leave to amend the position of all parties, and of the liquidator in particular, has been altered.

We are of opinion that the Judge in Bankruptcy exercised a sound discretion in declining to give effect to the amended claim, and that an appellate court is not justified in the circumstances of this case in interfering with the exercise of that discretion.

The appeal should be allowed and the order of McEvoy J. restored. The appellants (trustees) should have their costs, as between solicitor and client, in the Court of Appeal and in this Court out of the estate of Stobie, Forlong Assets, Limited. There will be no order as to costs against the respondent, Colwell.

KERWIN J. (dissenting).—Section 76 of the *Bankruptcy Act*, R.S.C., 1927, chapter 11, enacts:—

> Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled upon proof of such debt to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend or dividends but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

In my view this provision cannot be construed to prohibit, under all circumstances, a creditor who has filed a claim with a trustee in bankruptcy from withdrawing it and filing a new one or an amended one. I agree with the Court of Appeal that so to do would be placing too narrow a construction on the section.

It was then urged that under the circumstances here existing, the respondent should not be permitted to do either of these things, and it therefore becomes necessary to investigate what exactly did occur.

It appears that while respondent was a customer of the debtor brokers, Stobie, Forlong & Company, the latter sent statements to the former showing, as in exhibit 5, that the

(1) [1904] 1 Ch. 226, at 236.

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respondent owed the brokers a considerable sum of money, for which they held certain securities. This particular exhibit is dated January 11th, 1930. The debtors made an authorized assignment on January 30th, 1930, and a statement bearing that date was sent by the trustee, Martin, to the respondent. This statement shows a credit balance in favour of the respondent of over $76,000 and reads, at the bottom, in red ink:—

> The Jan. 30th Credits or Debits above given show the market value of the stocks carried for your account, long or short, as of that date.

The respondent argues that he relied on that statement and, believing it to be correct, filed his proof of debt. The declaration proving the debt is dated February 26th, 1930, and on the assumption that respondent's argument is correct, the statement in clause 3 of the declaration, that the creditor has no security for his claim, is true. That is, the respondent relied on the representation of Martin that the latter had in his possession or under his control the shares in question, and the respondent was satisfied to accept the valuation put upon those shares by Martin as of the date of the authorized assignment. It is not suggested that this valuation was not in fact correct.

It is true that the respondent voted for a scheme of arrangement under which a new company was formed; that he received debentures issued by the new company in pursuance of the arrangement, of the face value of his claim as proved; that he received dividends on these debentures and that he acted as an inspector of the estate of the new company as it, in turn, had become bankrupt; but can it be denied that he did all these things in ignorance of the true position? Attention should be directed to his letter of May 10th, 1930, in which he asked Martin for his securities. So far as the material indicates, he did not speak to Martin about the securities until some time in June, 1930, although he had received no reply to his letter. According to the evidence given by the respondent on his cross-examination on his affidavit, all that Martin said on that occasion was that if Colwell were given his securities, he (Martin) would be compelled to deal similiarly with the other creditors. It is significant that in his affidavit, sworn to after the completion of Colwell's cross-examination, Martin does not deny this.

The next step is that Colwell asked Mr. G. T. Clarkson to investigate to ascertain if the securities were on hand. It should be recollected that this could not be until after the new company had been formed, because it was only after Clarkson had been appointed a director of the new company that he was approached by Colwell. Clarkson was given a list by Colwell but after investigation he reported, according to Colwell, that he could not find the securities. Colwell explains that he thought this might mean that, if the securities had been pledged to a bank, the latter might still have them or might have disposed of them. It is not unreasonable that Colwell should be under this impression, because, when he had had his account transferred from other brokers to Stobie, Forlong and Company, the securities which Colwell had pledged with the former were actually transferred by the bank with whom the earlier brokers had done business.

As an inspector of the estate of the new company, Colwell discovered that his securities were not on hand at the date of the assignment in bankruptcy of the old company. The date of this discovery he places "about the beginning of 1933." He did not do anything immediately thereafter. From time to time other customers, (he states), were sued for their debit balances but escaped liability by showing that the securities they had instructed the brokers to purchase either had not been purchased or had not been carried for them by the brokers. It was only considerably later, after pondering over the matter from time to time, that Colwell obtained back from Clarkson the list and then made attempts of his own to find out what had happened to the securities; and it was in September, 1936, that he received a letter from National Trust Company showing the dates of transfer of various shares. Within two months after the receipt of that letter, Colwell filed a new claim, stating that Stobie, Forlong and Company had sold these shares without his knowledge or instructions and that he took the price which they had received as the basis of his new claim.

The order of the Bankruptcy Court, approving of the sale by the trustee of Stobie, Forlong and Company to the new company, provides that the debts of the bankrupt shall be assumed by the new company

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and the amounts thereof respectively shall be ascertained by the trustee in accordance with the provisions of the *Bankruptcy Act* relating to the proof of debts and all the said provisions, including the provisions relating to appeals from disallowance from the trustee shall apply to the proof of such debts, and the trustee shall certify the debts so proved for the purpose of the issue of debentures under the provisions of the annexed scheme of arrangement.

It has already been held in the Bankruptcy Court in Ontario that the mere fact that the new company had been declared bankrupt did not prevent Martin, as trustee, from certifying to a debt against the old company when proved; *In re Stobie, Forlong & Co., ex parte Meyer Brenner* (1). This judgment was given on an application made by Martin for the Court's advice and direction. At page 407 the Judge in Bankruptcy states:—

> In my opinion the scheme of arrangement endures, notwithstanding the bankruptcy of Stobie, Forlong Assets Limited, and I direct the trustee to certify and deliver debentures for the sum of $100,000 to Meyer Brenner, in accordance with the scheme of arrangement hereinbefore mentioned, and the same procedure will be adopted with respect to other creditors as and when the amounts of their respective claims are determined or settled by agreement, notwithstanding the bankruptcy of Stobie, Forlong Assets Limited.

In my opinion, the respondent, Colwell, was misled by the representation made by Martin to such an extent that he filed a claim believing his securities were available, and that nothing he has done or omitted to do should debar him from making a new claim or filing an amended claim. Whether the claim now filed by him be treated as a new one or whether he be given liberty to withdraw his first proof of debt and to file a new one, is immaterial.

The only difficulty I have ever felt was caused by the fact that Colwell discovered in the early part of 1933 that his securities were not on hand at the time of the assignment in bankruptcy. But can he be blamed for taking some time to consider his position and in watching the proceedings taken by the trustee against certain alleged debtors, and in finally securing from Mr. Clarkson the list or memorandum he had left with the latter and then in tracing, through the transfer agents, the sales of his securities? I would say that if he had commenced the tracing process and had instituted these proceedings in 1933, there could be but one answer to that question. Should the answer be otherwise because of the delay that occurred?

(1) (1933) 14 C.B.R 405.

I conceive it should not, as the position of the trustee of Stobie, Forlong and Company and the position of the trustee of the new company have not altered nor has either trustee been prejudiced in any way. As I have already indicated, it has been held in the Bankruptcy Court in Ontario that the bankruptcy of the new company did not prevent Martin from certifying to a debt against the old company. The trustee of the new company still has assets on hand, according to his own affidavit. Colwell brings into account the dividends he has received, and in accordance with section 76 of the Act does not attempt "to disturb the distribution of any dividend declared before his debt was proved." The circumstance that there may be other creditors in a position similar to that of the respondent cannot affect his rights.

When Colwell had been misled by Martin's written statement of January 30th, 1930, by Martin's neglect to answer his letter of May 10th, 1930, and by Martin's equivocal statement to him when he personally demanded the return of his securities, why should a delay during which he endeavoured to make sure of his facts be held to debar him from amending his claim when no prejudice has been suffered by the trustee of either company? The case of *In re Safety Explosives, Limited* (1), referred to by the judge of first instance, does not appear to me to be of any assistance.

In that case, solicitors who had a lien for costs upon title-deeds of a company, which were in their possession, proved their debt in the winding-up of the company, stating in the proof that they held no security for the debt and voted at a meeting of creditors in respect of the whole debt. Subsequently, while acting for the liquidator in completing the sale of the company's property, they handed over the title-deeds to a purchaser upon receiving the purchase price, without any express bargain with the liquidator that their lien should not be prejudiced. They claimed to retain their debt out of the purchase money, and applied for leave to amend their proof by stating in it their security and the estimated value of it, or, in the alternative, to withdraw their proof and rely on their security for payment.

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Clause 8 of Schedule I of the *Companies (Winding up) Act, 1890,* governed the matter, which clause is as follows:—

> For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence.

The point for determination was whether what had been done constituted "inadvertence" within this clause. Vaughan Williams, L.J., was of opinion that the onus of showing that the proof was sworn by inadvertence had not been satisfied. While Stirling, L.J., was not prepared to say that inadvertence had not been made out, he preferred to rest his decision on the ground that the granting of leave to amend or withdraw a proof is not a matter of right

> but is subject to the control of the court and leave ought not to be given in a case in which in the interval between the carrying in of the proof and the application for leave to amend the position of all parties, and of the liquidator in particular, has been altered.

As has already been mentioned, the title-deeds were in the hands of a third party and it is quite evident, as Vaughan Williams, L.J., points out in supplemental reasons, at page 238, "that an order giving leave to amend or withdraw the proof would under the circumstances be illusory."

I must confess my inability to see how that decision can in any way be relied on as an authority governing this case.

So far no issue has been raised as to the correctness of the amount because the appellants took the position throughout that the respondent was not entitled to file any claim. Clause 4 of the order of the Court of Appeal provides:—

> that if the Trustee in bankruptcy of the Debtor Stobie, Forlong & Company herein is not satisfied that the amount of the amended claim is correct, and if the parties herein are unable to agree as to the proper amount of the amended claim, the amount shall be determined by the Registrar in Bankruptcy.

This affords the trustee of Stobie, Forlong and Company an opportunity of investigating the correctness of the amended claim and disputing it, if so instructed.

I would dismiss the appeal with costs.

Appeal allowed.

Solicitors for the appellant, Trustee of the property of Stobie, Forlong & Company: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitor for the appellant, Trustee of the property of Stobie, Forlong Assets Ltd.: *E. R. Read.*

Solicitors for the respondent: *Roebuck & Bagwell.*