Extd 50. A.L.J.R. 593.
— — 133. C.L.R. 637.

[HIGH COURT OF AUSTRALIA.]

McNAMARA . . . . . APPELLANT;
RESPONDENT,

AND

LANGFORD . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

H. C. OF A. 1931.

SYDNEY, *Aug.* 17.

Gavan Duffy C.J., Rich, Dixon, Evatt, and McTiernan JJ.

Bankruptcy—Petition—Petitioning creditor's failure to "proceed with due diligence" —Change of petitioners—Substitution of another creditor—Debt due to latter—Existence at date of act of bankruptcy alleged in petition—Bankruptcy Act 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *sec.* 35.

The creditor who, under sec. 35 of the *Bankruptcy Act* 1924-1930, is substituted for a petitioning creditor who has failed to "proceed with due diligence on his petition" must be a person whose debt was in existence at the time of the act of bankruptcy alleged in the petition.

Decision of Judge *Lukin* reversed for this reason, although the point was not raised before him.

APPEAL from the Court of Bankruptcy, District of New South Wales and the Territory for the Seat of Government.

On 4th March 1931 Tanner Middleton Ltd. presented a bankruptcy petition against Joseph Patrick McNamara, the act of bankruptcy alleged being that McNamara had failed on or before 8th September 1930 to pay to Tanner Middleton Ltd. the sum of £134 14s. 7d. due by him to that Company, as required by a bankruptcy notice served upon him on 1st September 1930. No objections to such petition were filed. When the petition came on for hearing before *Lukin*, Federal Judge in Bankruptcy, on 23rd March 1931, Mrs.

H. C. OF A. 1931.

McNAMARA v. LANGFORD.

Gertrude Ada Maria Langford and another creditor were granted leave to appear. Mrs. Langford had, on 16th December 1930, obtained judgment by default against McNamara in the sum of £297, of which amount the sum of £126 became due on 25th September 1930 and the balance on 18th November 1930. The hearing of the petition was, at the request of McNamara, with the consent of the petitioning creditor and notwithstanding the opposition of Mrs. Langford, adjourned from time to time until 20th April 1931, on which date the petitioning creditor asked to be allowed to withdraw the petition on the ground that satisfactory arrangements had been made for payment of all moneys owing to it by McNamara. The application was opposed by Mrs. Langford who, pursuant to motion of which notice had been given, applied for an order that she be joined in the petition as a petitioning creditor with Tanner Middleton Ltd., or, in the alternative, that she be substituted for that Company as petitioning creditor in such petition; the reason given for such application being that the Company had "failed to proceed with due diligence on its petition" within the meaning of sec. 35 of the *Bankruptcy Act* 1924-1930. Consideration of the applications was adjourned until 29th April 1931, when his Honor Judge *Lukin*, refused leave to withdraw the petition, and made an order under sec. 35, substituting Mrs. Langford as the petitioning creditor in the petition in lieu of Tanner Middleton Ltd., and the further hearing of the matter was again adjourned. Although it was shown that an appeal to the High Court had been lodged against his order of 29th April 1931, his Honor, on 1st May 1931, made an order of sequestration, and directed that, in accordance with sec. 35, it be dated as of 27th March 1931, "the day it would have been dated if the original petitioner had proceeded with due diligence," the act of bankruptcy being non-compliance with the bankruptcy notice referred to above. A stay of proceedings was granted under sec. 38 of the *High Court Procedure Act* 1903-1925, such stay to operate upon the institution of an appeal against the sequestration order.

McNamara now appealed to the High Court against both orders. The grounds of both appeals, which were heard together, were similar in effect, and were substantially (1) that Judge *Lukin* was in error in holding that he had power to make a sequestration order

and that the institution of an appeal against the order of 29th April 1931 did not operate as a stay of proceedings thereon; (2) that the withdrawal of the petition by Tanner Middleton Ltd. should have been allowed; (3) that his Honor was in error (a) in substituting Mrs. Langford as the petitioning creditor as a period of more than six months had elapsed from the date of the act of bankruptcy alleged in the petition up to the date of the making of the sequestration order, and (b) in holding that Tanner Middleton Ltd. as petitioner had not proceeded on its petition with due diligence; (4) that in making the order for substitution and the sequestration order his Honor allowed Mrs. Langford to rely on an act of bankruptcy committed more than six months before she became petitioner in the petition; (5) that his Honor should have refused to make either order.

Webb, for the appellant. The Judge in Bankruptcy was wrong in substituting the respondent as the petitioning creditor more than six months after the act of bankruptcy upon which the petition was founded (*In re Maugham*; *Ex parte Maugham* (1); *In re Maund*; *Ex parte Maund* (2)).

[EVATT J. From the affidavits it appears that the respondent's debt was not in existence at the time of the act of bankruptcy alleged. If so, you must succeed.

[*E. F. McDonald*, for the respondent. That point was not taken in the notice of appeal. It is a new point.

[EVATT J. But it goes to the whole basis of the petition (see *In re Debtors* (3).]

The debt of the creditor substituted for the original petitioning creditor must be a debt which existed at the time of the act of bankruptcy relied upon in the petition. In this case the date of the act of bankruptcy relied upon is 8th September 1930, but the debt owing by the appellant to the respondent did not arise until 25th September 1930.

[RICH J. Another ground of appeal would be that at the date of the substitution the act of bankruptcy relied upon had gone.]

(1) (1888) 21 Q.B.D. 21. (2) (1895) 1 Q.B. 194.
(3) (1927) 1 Ch. 19.

H. C. OF A. 1931. McNAMARA v. LANGFORD.

Yes, on account of the lapse of time (*In re Maund*; *Ex parte Maund* (1)). The rights of a substituted petitioning creditor are not greater than those of an original petitioning creditor.

[RICH J. The words "any other creditor" in sec. 35 of the *Bankruptcy Act* mean any other creditor for the purposes of the Act —that means a creditor having a sufficient debt and a good act of bankruptcy.]

Even assuming there had been a lack of diligence on the part of the petitioning creditor, that in itself does not entitle a particular creditor to be substituted for the original petitioner: the substituting petitioner must possess the necessary qualifications as to amount and date of debt.

[He was stopped.]

E. F. McDonald, for the respondent. The true construction of sec. 35 is that it confers upon the Court the power of substituting another creditor for the purpose of proceeding upon an existing petition. Where a petitioner does not proceed with due diligence on his petition the Court may substitute as petitioner on that petition any other creditor provided that he has a debt in the amount required. That this is so is shown by the fact that sec. 35 does not make any provision for the dismissal of the existing petition as is provided in sec. 56 (6), and it is supported also by reference to bankruptcy legislation from 1849 onwards.

[GAVAN DUFFY C.J. Sec. 35 must mean either one of two things —a creditor who was a creditor at the time of the act of bankruptcy or a creditor generally.]

Under that section there is either a power of amendment in the Court or a power to allow a fresh creditor to take or continue proceedings only on the basis of his being an original petitioning creditor, the Court merely inserting a new date in a new petition. Sec. 35 does not say that the debt of the substituted creditor must have been in existence at the date of the act of bankruptcy relied on. The concluding words of the section confer a power to date the petition back. Sec. 55 is cut down by sec. 35 in the case of substitution or amendment by bringing in a new creditor because the new creditor is not presenting

(1) (1895) 1 Q.B. 194.

the petition. The petitioning creditor is only a representative for all creditors. The case of *In re Maugham*; *Ex parte Maugham* (1), is distinguishable because there the petitioning creditor no longer existed: the Court could not substitute a person for somebody who did not exist. In *In re Maund*; *Ex parte Maund* (2), there was no good petitioning creditor's debt at all, so that the whole basis of the original petition had gone. Sec. 35 empowers the Court to amend a petition leaving it still "alive" (*Ex parte Dearle*; *In re Hastings* (3)). The point that the respondent's debt did not arise until after the date of the act of bankruptcy was not taken previously and does not come within the grounds of appeal; therefore that point should not be considered by this Court.

GAVAN DUFFY C.J. The Court is of opinion that the person substituted under sec. 35 must be a person whose debt was in existence at the time of the act of bankruptcy alleged in the petition, and for that reason the appeals must be allowed. I wish to say for myself that, although I do not dissent from that view, I do not wish to state my formal adherence to it. The Court thinks that the appeals ought to be allowed with costs.

Appeals allowed with costs. Orders of Judge Lukin set aside.

Solicitor for the appellant, *Emil E. J. Ford.*

Solicitors for the respondent, *Teece, Hodgson & Co.*

J. B.

(1) (1888) 21 Q.B.D. 21.
(2) (1895) 1 Q.B. 194.
(3) (1884) 14 Q.B.D. 184, at p. 190