proposition could not be entertained. 'That it could not be meant to fetter all the substitutes *named*, and at sametime to leave all their unborn issue unfettered, as such a construction would be untenable and absurd. An entail imposing prohibitions and irritances upon the substitutes called by name, and yet leaving the entail to descend in fee simple to the heirs of those substitutes, was anomalous, and totally unprecedented in the law of Scotland.

Upon the report of Lord Stonefield, and having advised the memorials ordered, the Court pronounced this interlocutor: March 4, 1783.
"Sustain the reasons of suspension pleaded for Robert "Hunter of Thurston, and the defences pleaded for the "Countess of Glencairn and others, suspend the letters, as- "soilzie them from the declarator, and decern."

Against this interlocutor the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and ajudged, that the interlocutor be, and the same is hereby affirmed.

For the Appellants, *Henry Dundas, Ilay Campbell.*

For the Respondents, *Robt. Blair, Alex. Tytler.*

MARSHALL, and the STIRLING BANKING COMPANY, and Others, . . *Appellants;*

JAMES STEIN, ... *Respondent.*

House of Lords, 27th May 1803.

This case is reported in Vol. iv., p. 480, which had reference to certain objections stated by the creditors of a bankrupt, to his application for his discharge, with the usual concurrence. Since that report was published, the short-hand writer's notes of the full speech have been recovered, as below.

LORD CHANCELLOR ELDON said:—

"MY LORDS,*

"This case appears to me to be of great importance, and to call for your Lordships' particular attention before it is decided.

"My Lords, it is an appeal from the Court of Session in Scotland, in a case which I confess I read with some degree of sur-

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* From Mr Blanchard's short-hand notes.

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prise, that it was competent (though I find it so), for the appellants to take the opinion of this House upon the question which has been submitted for its consideration; it is, however, I believe the first of the kind.

"My Lords, the respondent in this case, is a gentleman of the name of Stein, who has been concerned in very large commercial transactions, and who became bankrupt according to the law of Scotland, in February 1788. The petition alleges he had become bankrupt as long back as 1788, and that in the course of the time till the petition was presented, five dividends had been paid, and that he had obtained the concurrence of four-fifths of his creditors, both in number and value, to his discharge. By the Act of Parliament (the substance of which I shall have to state presently), the concurrence of the creditors in the wish of the bankrupt to be discharged, is of no avail, until there has been a judicial proceeding in the Court of Session had upon it, which proceeding cannot take place till the expiration of three months from the day on which the petition is presented; the Court are then to judge of the principal circumstances mentioned in the Act of Parliament, as attaching to the conduct of the bankrupt; and if they are of opinion that he has conducted himself in the manner in which the law says he should, to entitle him to the benefit of that Act, they are to decide that he has so conducted himself, and he is thereafter discharged of his debts as to his personal estate and effects; if, on the other hand, the Court is of opinion that his conduct has been such that he ought not to have his discharge, although four-fifths of his creditors have signed his certificate, stating they thought he ought to be entitled to it, they dismiss the petition, and he remains in the state in which they found him at the time the petition was presented. Your Lordships see from this statement of the case, *first*, That a bankrupt in Scotland cannot be discharged as to his estate and effects, without the consent of four-fifths of his creditors; and, in the *next* place, that *that* consent will not discharge him, unless the view of the Court of Session has been judicially thrown over the transaction; and unless that Court shall be of opinion that the creditors have acted properly towards the bankrupt, in endeavouring to give him his discharge. Upon this occasion, the bankrupt had the unanimous concurrence of the Court of Session, with the opinion of the creditors, who concurred in the discharge.

"My Lords, I conceive according to a general principle, that the proceedings of the Court of Session are open to the review of this House, unless the Act of Parliament, which has given the Court of Session jurisdiction, has precluded the jurisdiction of this House. I am apprehensive it cannot be denied that it is competent to appeal, but I choose to mark the case, because I cannot but entertain a doubt which may (if it shall appear to be well-

founded), require some consideration, whether this jurisdiction as to bankruptcy, should not be made final in the Court of Session; because you will see, if a creditor for 16s. for instance, and I mark the sum (because one of the creditors (Marshall) has been represented to be a creditor for 16s. only); if after a bankrupt has undergone all the judicial inquiry of the Court of Session, which has concluded in an unanimous opinion with the four-fifths of his creditors who had previously judged he had done right,—I say, if a creditor for £5 or £20, can bring under the review of this House, the concurrence of the creditors, so followed by the decision of the Court of Session; in such a case (where the bankrupt is friendless and pennyless), your Lordships must see at once that he had better submit; indeed he must submit to the attempt to deprive him of his discharge, whether there be any sound reason for it or not, instead of coming to the bar to support his claim to that discharge, which four-fifths of his creditors, and the unanimous opinion of the Court of Session, have declared he is well entitled to.

"My Lords, the petition which was originally presented to the Court of Session, was a petition presented by the bankrupt, which stated the circumstances of a sequestration having taken place of his estates, real and personal, as long ago as the 28th of February 1788. It mentioned, after stating the title of the Statute, that after the examination of the bankrupt had taken place, and after he had given up his whole estate, the funds were converted into money, and that five dividends were made among the creditors, at different periods, the last on the 28th December 1797; and it is the law in Scotland that a bankrupt cannot petition for his discharge till there have been two dividends.

"My Lords, it appears that there were 114 creditors of the bankrupt, 95 of whom concur in opinion that he ought to receive his discharge. The debts, in respect of which the 114 creditors prove, were £163,073; the debts upon the estate were £199,497, so that it is quite clear there was a sufficient number of creditors, both in number and value, in his favour. It will appear to your Lordships, from this statement, both as to the amount and the number of creditors, that this person must have been a very considerable trader. And your Lordships will advert, that where it turns out that a debtor does owe so large a sum, it is no small proof, that before and since his bankruptcy, he has conducted himself honestly, that he has so large a proportion of the creditors in his favour.

"My Lords, this petition having been presented to the Court of Session, the appellants, under an Act of Parliament, become what they call objecting creditors. These appellants were Mr James Marshall, who stands upon the proceedings as a creditor for £24; and, it has been represented at your Lordships' bar, that this debt

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was made up of demands consolidated in the person of Marshall, to the number of thirty, which is 16s. each. There is Mr Telford, who represents the Stirling Bank, which has considerable demands; there are Messrs Campbell, Thompson, and Company, which includes a gentleman of the name of William Paterson, who has likewise a distinct debt in his own person. The only opposition to the petition, is the opposition of the four classes of creditors I have mentioned.

"My Lords, when this petition was presented to the Court, a question arose upon the Act of the 23d of his present Majesty, by which it is enacted, that it shall be competent to four-fifths in number and value of the creditors reckoned as before (that is, creditors whose debts are under twenty pounds, being reckoned in the value but not in the number), at any time after the period of the second dividend, to concur with the bankrupt in a petition to the Court of Session, praying that he may be held as finally discharged of all his debts contracted before the application for sequestration, so far as the same may affect his person after the date of the discharge. Your Lordships will allow me to observe, this is most admirable, compared with the law in this country. Your Lordships know that the creditors sign the certificate in England, and the certificate is advertised in the "London Gazette," and unless some creditor happens to look sharp, it comes to the Great Seal, as having been duly advertised and signed; but in Scotland it is not so; the party is not taken by surprise; he signs the concurrence, he concurs in the petition, and the Court of Session cannot proceed to discuss the merits of that application, till the petition has been laid before the Court for three months, in order to give all parties an opportunity to come in; so that it is a judicial act, instead of what is often in this country, the act of a few creditors, assembled over brandy and water: 'And this 'petition being intimated upon the wall, and in the two Edin-'burgh newspapers before mentioned (that is the "Caledonian 'Mercury" and "Edinburgh Evening Courant)," the Court shall, 'at the distance of not less than three months thereafter, resume 'the consideration thereof, and if no objection is made, they shall 'pronounce an act or order in terms of the prayer of the petition; 'and if appearance is made by any of the creditors, objecting that 'the discharge ought not to be granted on account of the bank-'rupt's not having made a fair discovery and surrender of his 'estate, or that he has refused to grant a disposition to the trustee, 'as ordered by the Court, or has wilfully not attended the diets of 'examination, or has been guilty of any collusion, or that his 'bankruptcy did not arise from innocent misfortunes, or losses in 'business, but from culpable or undue conduct, the Court shall 'judge of these objections and allow a proof of them, if it is thought 'necessary;' thus leaving a good deal to the discretion of the

Court, 'and shall either grant or refuse the discharge, as the 'nature and justice of the case may require.' My Lords, it does not stop there, for all these precautions being taken before this judicial discharge can be had, the bankrupt is to take an oath (which is inserted in the Statute for the purpose), or upon commission, when judgment is pronounced in his favour, and before the Act can be extracted, 'that he has faithfully complied with all 'the requisites of the Statute, and has used no undue influence, 'nor had recourse to any compromise with his creditors, or any of 'them, to obtain their concurrence.'

"My Lords, before I state the grounds upon which the creditors objected, your Lordships will permit me to state, from these notes of the speeches of the judges, what passed in the Court of Session, which, though not regularly before your Lordships, we are in the habit of referring to, because they give useful information, and I humbly concur with them, that some of these appellants are exceedingly reprehensible.

"My Lords, with regard to the Stirling Banking Company, it is alleged in these papers, and I need not tell your Lordships, who are in the habit of reading papers and cases that come from the northern part of this island, that they are not sparing of their allegations, and they seldom abstain from denying circumstances if they can do it, and generally say, they are ready to support their allegations by proof, if they are denied. With regard to the Stirling Banking Company, it is stated, that at a meeting, they entered into a formal resolution, not to concur in the discharge of the bankrupt without a consideration, and they actually specified the sum they would accept of; and if denied, this assertion was offered to be proved by sufficient evidence. There was no occasion to prove it, if it was not denied. I have read the papers from the beginning to the end, and cannot see this fact denied; and with regard to the next class, Campbell, Thomson, and Company, which includes Mr Paterson, as far as he is concerned, with regard to that part of his debt, they write a letter in these terms:—'Dear Sir,—Some 'time ago a proposal was made to Campbell, Thomson, and Com-'pany, and the Stirling Bank' (this is an allegation contained in a 'subsequent paper), 'for their concurrence to Mr Stein's discharge, 'and a composition of 2s. 6d. per pound was offered' (this is a fact which they state, but which is denied on the other hand), 'the 'Company, I believe, wished 5s., but when it was mentioned to 'me' (and that is Mr John Campbell, whom I understand to be the man of business), 'I recommended them to accept the offer; 'no person, however, appeared, although I have understood, not 'long ago, that some steps of the kind were on foot; I know the 'Company will not give their concurrence gratis, but if the offer 'of 2s. 6d. per pound is renewed, I shall do my endeavour, to get 'the partners to agree.'

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'Now, my Lords, I have had frequent occasion, since I have held the important place I do, to look at these transactions. It has become the practice, in our part of this island (at least it is not a very uncommon thing), for a man to say to a bankrupt, if he has behaved well, and is the bankrupt of misfortune, through which he is entitled to the protection of the law; I say it has become not very unusual when he has got near four-fifths in number and value, for the creditors to say, 'If you mean to have me, 'you must give me something for my concurrence.' The bankrupt 'stands out and says, 'That will not do, you know the situation 'in which I stand; you ought to have some compassion, but I want 'to get four-fifths in number and value, and rather than miss it, 'I will do it.' Perhaps some other creditor wants to have some money for his consent, and though the bankrupt knows his consent is worth nothing, yet he knows his dissent may create a great deal of confusion; the creditor presents a petition, stating his own allegations, and filled with all that ingenuity can put upon paper for him; and, I dare say, very often, my learned and noble friend, who sits near me, knows that, after reading them with a view to do justice to the creditors, and to take care that the bankrupt should have the benefit of the laws of the country, the consequence often has been, though the bankrupt has had four-fifths of his creditors in number and value unimpeachable, that he has been obliged to buy off other creditors, rather than experience the misery which attends the hearing a petition. Since I have had the honour of succeeding to the office I now unworthily fill, I have made it a rule, that the petition, if once tabled, shall be heard, in order that the Court may judge of it.

"My Lords, in the present case, Mr Inglis answered this letter of Mr Campbell; and in that answer he suggests, that the family of Mr Stein knew nothing of this offer of 2s 6d. in the pound; and there the correspondence ended. It is quite clear, taking it to be true, that they offered 2s. 6d. in the pound, the matter does not go on; for the creditors say, we will not consent. On the other hand, it appears to be a dispute, whether it shall be 2s. 6d. or 5s. With regard to Mr Paterson, there is no allegation, and, of course, no proof in the proceedings, that he, with regard to his distinct debt, was dealing for a corrupt consideration. But Mr Paterson is a member of that Company who is so dealing; and, therefore, the motive which might be taken to influence the partnership, might have some influence upon his conduct, with regard to the debt in his own person.

"My Lords, with regard to Mr Marshall, he represents the sum of £24; that £24 being made up of thirty debts, his own debt amounting originally to 16s. When this came before the Court, your Lordships observe, their duty was to be satisfied that there were four-fifths of the creditors in number and value; those under

£20 being reckoned in value, but not in number, and that they concurred. They were also to hear the objecting creditors; and if they could be satisfied by the objecting creditors, that the bankrupt had not made a fair discovery and surrender of the estate; that he had refused to grant a disposition to the trustee; had wilfully not attended at the periods of the statutory examinations; had been guilty of any collusion, or that the bankruptcy did not arise from any misfortunes or losses in business, but from culpable or undue conduct, they were to judge of those objections, and allow a proof of them, if necessary, and either grant or refuse the discharge, as the nature and the justice of the case should require.

"My Lords, the first objection made by the objecting creditor was this, that the Court could not grant this petitioner's discharge in consequence of the bankrupt having retired to a foreign country. Your Lordships observe, in the terms of the Act of Parliament, the bankrupt is to take an oath before the Court, or upon commission, which last words are inserted in the Act of Parliament, expressly with reference to the case of absence (that, though the bankrupt might be absent, he might have duly observed all that was required by the Act); and it was accordingly decided by the Court of Session, that it was not necessary for the bankrupt to be in this country. The bankruptcy took place in 1788; all the requisites have been complied with; the parties were in possession of all the books and papers; therefore, how can it be necessary to the question, whether a man shall be discharged or not, that he shall be personally present at the time that the question is discussed in the Court?

"My Lords, the next objection was this, that several of the persons stated had not concurred in the discharge; and I observed the learned counsel fell into expressions which belong rather to the proceedings in bankruptcy here than in Scotland; and the objection is, that it had not been proved that the persons who signed the concurrence, were vested with sufficient powers from creditors. With reference to that, your Lordships will see what the mode of proceeding is in Scotland. The Court of Session require the creditors to sign what is called a deed of concurrence, and the deed of concurrence, in this case, is signed by those persons who had acted as the attorneys of the creditors throughout the proceedings, in 1788. The application is the application to the Court of Session; and if application is made to that Court by the bankrupt, and by counsel for the creditors, stating to that Court they appear for the creditors, is not that ground enough for that Court to proceed upon? And you cannot state a case more vexatious than *that* of bringing an appeal from the Court of Session up to this House, in a case of bankruptcy, where, ninety-nine times out of a hundred, the bankrupt would be unable to

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defend himself in point of expense; and out of those ninety-five creditors in this case, the counsel at the Bar have not been able to state to your Lordships the name of any one creditor, who has not agreed to the discharge, in the manner I have stated.

"My Lords, the next objection is, as to the conduct of the bankrupt.

"My Lords, there seems to have been a great deal of dispute in the Court below, what was the situation in which the bankrupt stood, with reference to the demands which the creditors could make upon him in the Court of Session. The bankrupt had become such; he had undergone extraordinary difficulties; he had given up all his property, which had been applied to pay his debts (though it is but fair to say it made but a small part of his debts); after proceedings had been had from 1788 to 1802, and the number of creditors I before specified had agreed to concur in the application to the Court of Session; in other words, saying, we are four-fifths of the creditors in number and value, and agree, that before the bankruptcy, and since, the bankrupt did not demean himself dishonestly; and although the objecting creditors have not shown any instance of misconduct, yet they say, we call on you (the bankrupt) to give an account of all your transactions, and to make out to the Court of Session that you have acted as properly as your creditors say you have. But that is not the proper mode of proceeding. The bankrupt has had the testimony of the Court of Session that he had acted properly; and after a vast deal of representation, attended with a great deal of expense, with reference to what had been the conduct of that gentleman before he became bankrupt, speaking with those morals I have got into my head, and infected with that sort of feeling which I possess, I do confess, I do not think the conduct of a man, who has been going on speculating with his own money, and the money of others, till he gets himself involved in a bankruptcy, and with him fifty other persons,—I confess, I do not think all the transactions about accommodation bills (which I wish never had been heard of), for they are frauds unquestionably on the law; and how it has ever happened that they have been endured, expressing on the face of them that they are given for value received, when in fact, they are of no real value, does seem to be a whimsical thing, and has done a great deal of mischief in this country; for it often turns out that a man has no effects, after putting his hand to them. But, on the other hand, I do not know how it is to be remedied, without subverting the system of our bankrupt laws, and the bankrupt laws of Scotland, because he has been doing that which honourable men upon change are constantly doing; and because he has been speculating to raise himself into opulence, or endeavouring, by speculation, to relieve himself from difficulties, and avoid penury and ruin.

"My Lords, the next objection made in the Court below, was, that the bankrupt had been himself buying the concurrence of his creditors. With reference to that, the Court of Session were of opinion that he had not done so, and gave them leave to condescend upon particulars; and, when they did so, the Court of Session were of opinion, the condescendence they put in did not contain sufficient grounds of complaint, and your Lordships, upon reading the papers, will agree with that opinion. It appears to me, this is an appeal dictated upon corrupt motives, and brought forward by persons who have been dealing corruptly; and every case which is brought under such circumstances, is to be looked at with great jealousy and suspicion. I say it is wise and proper to do so. In addition to that, your Lordships will allow me to say, that although this jurisdiction does exist, and that it is competent for Mr Marshall, or any other person, who has a debt of 16s., to draw a bankrupt here, even when it is an appeal from the unanimous decision of the Court of Session, under such circumstances as appear in this case, it is grave matter for your Lordships' consideration, whether such right of appeal should continue. It is particularly so in the case of a bankrupt, under all the disadvantages I have alluded to; and, therefore, in a case where there are creditors, in number and value, enough to give a sanction for the certificate, and the bankrupt has complied with every requisite imposed upon him—in a case where the acts have come under the review of the Court of Session, and that Court has unanimously been of opinion that the bankrupt ought to have his certificate—in a case where there is suspicion that the objecting creditors have been dealing, not for the justice of the country, to withhold the certificate, but that they have been dealing for the proportion of dividend they ought to have; in such a case as that, it is not too much to say, that a bankrupt who is brought here by appeal from the Court of Session in Scotland, and who receives the confirmation of your Lordships, should come here without being put to any expense; and, under such circumstances, unless your Lordships should be of opinion that the case made out by the appellants at the bar, calls for the reversal of the decision of the Court below (for which, it appears to me, there is no ground), I conceive that decision should be affirmed with £150 costs."

SAMUEL STIRLING, and Others, . *Appellants;*

ROBERT FORRESTER, Esq., Treasurer to the Governor and Company of the Bank of Scotland, ... *Respondents.*