18th Feb., 1669 (4958.) Leiper, 9th July, 1822. (1 Shaw and Dunlop, p. 552.) Nov. 17, 1830.
3 Ersk. 8. 99. 3 Ersk. 9. 16. 4 Stair, 20. 37. 3 Ersk. 8. 97 and 98.

J. BUTT—A. M'CRAE—Solicitors.

JOHN M'TAGGART and OTHERS, (Executors of M'TAGGART,) No. 42.
Appellants.—*John Campbell—J. Wilson.*

WILLIAM JEFFREY, (M'KERLIE'S Trustee,) Respondent.—
Lushington—Robertson.

Discharge.—Held (reversing the judgment of the Court of Session) that a discharge 'of all and sundry claims and demands, debts, and sums of money indebted and owing,' did not include a right of relief from a cautionary obligation existing prior to the date of the discharge, but on which the cautioner had not then been distressed;—there having been executed unico contextu with the discharge, a disposition in security to the cautioner of whatever sums of money, principal, interest, and expenses, he might advance and pay in consequence of 'any cautionary obligations, letter of guarantee, or other such obligations granted, or that may be granted.'

Process.—Held (reversing the judgment of the Court of Session) that under the A. S. 12th November 1825, it is imperative to remit a petition and complaint against the judgment of a trustee on a Bankrupt estate to the Lord Ordinary, where facts require to be investigated.

Nov. 24, 1830.
1ST DIVISION.

MR M'TAGGART of Ardwell, merchant in London, had given very extensive support—said to have been to the amount of thirty thousand pounds—to the house of M'Kerlie and M'Taggart of Glasgow, the partners of which were his brother-in-law and brother; but that house having failed, these advances were lost.

He also, in 1807, became guarantee for M'Kerlie as an individual to Fermin de Tastet and Co. for L.6000, and to Dennison and Co. to a similar amount.

In 1810 M'Taggart visited M'Kerlie, who was then engaged in a spinning concern at Glasgow, called the Gorbals Spinning Company, and the following arrangement took place:—M'Kerlie executed a disposition, dated 23d August, by which he conveyed 'to and in favour of John M'Taggart, Esq., merchant in 'London; whom failing by decease, without having otherwise 'conveyed or assigned the property hereinafter disponed, then 'to John M'Taggart, jun. Esq., merchant in London, his son, 'and his heirs or disponees, heritably but redeemably, always 'and under reversion, in manner after expressed; in the first 'place, all and whole, &c., all in real security to the said John

Nov. 24, 1830. 'M'Taggart; whom failing as before mentioned, then to the 'said John M'Taggart, jun. his son, and his foresaids, of the 'payment of whatever sums of money, principal, interest, and 'expenses, they, or either of them have advanced, or may 'advance to me, from and after the 25th day of May last; like-'wise in security of whatever sums of money, principal, inte-'rest, and expenses, they or either of them may advance and 'pay in consequence of any cautionary obligations, letters of 'guarantee, or other such obligations, granted, or that may be 'granted by them, or either of them, to bankers or others, for 'me, as the same shall be ascertained from time to time by the 'cash accounts to be kept by them for me in their books, and 'the vouchers of debt uplifted or retired by them, the same 'not to exceed in whole the amount of L.20,000 sterling, at 'any time, with all expenses to be disbursed by them in rela-'tion to the premises, to be ascertained by the oaths of the 'disbursers, if required, when in life, and by such account alone 'in case of death, in place of all other proof, and the interest 'of these disbursements from the several times of disbursing 'the same.'

At the same time M'Taggart granted to M'Kerlie the following discharge:—'I, John M'Taggart, Esq., merchant in London, 'do hereby exoner and discharge the late company of M'Kerlie 'and M'Taggart, merchants in Glasgow, and Alexander M'Ker-'lie, merchant there, my brother-in-law, as a partner of that 'company, and as an individual, of all and sundry claims and 'demands, debts and sums of money, indebted and owing by 'them or him the said Alexander M'Kerlie, to me, upon any 'cause or account whatever, at and preceding the 25th day of 'May last, and of all action and execution competent to me for 'the same.'

Both deeds were drawn by the same agent, and signed before the same witnesses.

M'Taggart died in October thereafter; and in 1811 his executors were called upon by Fermin de Tastet, and Dennison and Company, to pay the amount of the sums guaranteed, with interest. The payment was accordingly made. In 1815, the estates of the Gorbals Spinning Company, and of M'Kerlie as an individual, were sequestrated under the bankrupt act, and Jeffrey appointed trustee.

The executors of M'Taggart claimed to be ranked for the amount of the payments made under the guarantees, namely, L.14,974, under deduction of the estimated value of the subjects secured. The trustee challenged the security by an action

of reduction, founding on the act 1696, c. 5: The result was a Nov. 24, 1830.
remit to an accountant.

Thereafter, before the accountant had reported, the trustee issued the following deliverance:

'The trustee upon the sequestrated estates of the Gorbals 'Spinning Company, and of Alexander M'Kerlie as an indi- 'vidual, having considered the claim and affidavit of John 'M'Taggart, Esq., merchant in London, stating himself to be 'one of, and acting for the other executors of his father, the 'late John M'Taggart, merchant there, lodged with the trus- 'tee for the purpose of being ranked on the said sequestrated 'estates, for the sum of L.14,974 3d., arising out of certain 'alleged payments made to Messrs. de Tastet and Co., and 'Messrs Joseph Dennison and Co., merchants in London, in 'consequence of guarantee letters granted by the late Mr John 'M'Taggart to them, on account of the said Alexander M'Ker- 'lie, under deduction of L.3,400, being the estimated value of 'certain heritable subjects in Gorbals or Hutchinsontown, 'Glasgow, conveyed in security to the late Mr John M'Tag- 'gart by the said Alexander M'Kerlie, on the 23d August '1810; and that although the trustee, in a note issued by 'him on the 8th May last, called on the claimant to pro- 'duce the guarantee letters alleged to have been granted by 'the late Mr John M'Taggart to Joseph Dennison and Co., 'merchants in London, and the original accounts and relative 'vouchers instructing the claim, and to give such further 'explanations as might be necessary, on or before the 1st June 'last, the claimant has in answer to that note, of this date, re- 'fused to produce either the letters of guarantee to Dennison 'and Co., or the original accounts, and the vouchers which 'ought to be in his hands; and taking into view all the circum- 'stances of this case, particularly the terms of the discharge 'granted by the late John M'Taggart to the said Alexander 'M'Kerlie, of this date, (23d August, 1810,) wherein he "dis- 'charged the late company of M'Kerlie and M'Taggart, mer- 'chants in Glasgow, and also Alexander M'Kerlie, merchant 'there, my brother-in-law, as a partner of that company, and 'as an individual, of all and sundry claims and demands, 'debts and sums of money, indebted and owing by them or 'him, the said Alexander M'Kerlie, to me, upon any cause 'or account whatever, at and preceding the 25th day of 'May last, and of all action and execution competent to me 'for the same. In witness, &c.;" and further taking into view 'that the late John M'Taggart was in Scotland at the date of

Nov. 24, 1830. ‘ executing this discharge, and perfectly aware that the princi-
‘ pal sums of L.6000 each, guaranteed by him to the said Messrs
‘ de Tastet and Co., and Joseph Dennison and Co., forming the
‘ present claim, had been due to these companies for several years
‘ preceding the date of the discharge, and that it appears to the
‘ trustee to have been the evident intention of the late Mr Mac-
‘ Taggart to relieve the said Alexander M'Kerlie of these two
‘ claims, at the date of granting the discharge, from its broad and
‘ unqualified terms; and having advised with the commissioners
‘ on the sequestrated estates, finds, 1mo, That the claimant was
‘ bound to have produced the original or authenticated copies
‘ of these accounts of Joseph Dennison and Co., and the rela-
‘ tive vouchers instructing the same; finds, 2do, That it is
‘ admitted by the claimant that the debt due by M'Kerlie to De
‘ Tastet and Co., on the 31st December, 1809, was L.6923,
‘ and that it was a debt truly due at that date by the late Mr
‘ M'Taggart, under his guarantee obligation for Mr M'Kerlie,
‘ and that De Tastet and Co. looked to him alone for payment.
‘ That the claimant does not deny that the debt due to Joseph
‘ Dennison and Co. was in a similar situation at that date, and
‘ that both debts continued without any material diminution
‘ down to 23d August, 1810, the date when the heritable secu-
‘ rity was granted, and remained in nearly the same situation
‘ until 1811, when they were paid by the present claimant;
‘ finds, 3tio, That at the date of the said discharge by Mr M'-
‘ Taggart to Mr M'Kerlie, there was no other debt or claim by
‘ the former against Mr M'Kerlie as an individual, but the debt
‘ arising out of the credit obtained by Mr M'Kerlie in conse-
‘ quence of the said guarantee letters; and that the parties to
‘ the said discharge appear to have had it in view, by the broad
‘ and unqualified terms of that discharge, and by the manner in
‘ which the grantor of it, while he lived, and his executors sub-
‘ sequently, treated the debts for which the claim is now made,
‘ by making no claim or demand whatever against Mr M'Ker-
‘ lie until after his sequestration, 14th September, 1815, al-
‘ though a period of upwards of four years, with respect to the
‘ debt due to De Tastet and Co., and of three years and eleven
‘ months, with regard to the debt due to Dennison and Com-
‘ pany, was allowed to elapse before it appears that any direct
‘ claim was made against Mr M'Kerlie, during all which time
‘ Mr M'Kerlie continued to conduct his business in the ordinary
‘ way; from which it appears that it was the intention of the
‘ late Mr M'Taggart entirely to relieve Mr M'Kerlie of these
‘ debts, to confine the security granted over Mr M'Kerlie's

'heritable subjects to debts subsequently to be contracted, and 'to his relief of any subsequent obligations which he might 'grant for Mr M'Kerlie; therefore, and upon the whole, the trus- 'tee, with advice as foresaid, rejects in toto the above claim.' Nov. 24, 1830.

The Executors then presented a petition and complaint to the Court of Session, praying the Court, inter alia, to alter the deliverance, find them to be just and true creditors of M'Kerlie, 'or to give the petitioners such other relief in the premises 'as to your Lordships may seem just.' Answers having been lodged, the petitioner's counsel moved, that in terms of A. S. Nov. 1825, § 25, the case should be remitted to the Lord Ordinary for preparation.

Lord Gillies.—There is nothing to remit. The discharge plainly applies to the claim. There can therefore be no use for a remit.

Lord President.—The words of the discharge are sufficiently broad to comprehend the obligations to De Tastet, and Dennison and Co.; and therefore I see no necessity for a remit.

The Court accordingly dismissed the petition, but found no expenses.*

The Executors appealed.

Appellants.—1. By statute 6 Geo. IV. c. 120, and by the subsequent act of sederunt, Nov. 1825, it was imperative on the Court of Session to remit the petition and complaint to the Lord Ordinary. The prayer of the petition was sufficiently broad for the purpose; and, at all events, the Court were bound to obey the statute. They have thus shut the door against evidence, without which they had no termini habiles to decide upon.

2. The discharge cannot, according to sound construction, and with reference to the circumstances, be held to apply to the cautionary obligations. The fact of M'Taggart taking a security for his relief, shows that he did not intend to discharge M'Kerlie from the consequences of these obligations. It is of no importance that the sums were advanced by De Tastet and Co. and Dennison and Co. to M'Kerlie previous to the discharge. The material fact is, that at the date of the discharge, they had not been paid by M'Taggart. The discharge had reference to

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* 6 Shaw and Dunlop, p. 611.

Nov. 24, 1830. other debts due to him by M'Kerlie; and it never was the intention of M'Taggart to include the guaranteed sums within the discharge. The respondent only reaches his conclusion by a violation of the recognised rules of interpretation; the rule being, that general words will not discharge a clause of relief. Besides, while he now alleges that the guaranteed debts were discharged on the 23d August, 1810, he is maintaining in the reduction, that the security granted on the same day was for future advances, and so liable to the operation of the act 1696, c. 5.

Respondent.—1. Neither the statute nor act of sederunt are imperative. Indeed this matter is regulated by the bankrupt statute, 54 Geo. III. c. 137; authorizing the Court to decide cases of the present character 'summarily.' Besides, there is no prayer for a remit; and the appellants have never lodged the accounts or documents, so that there was nothing which could be laid before, or received by, the Lord Ordinary.

Lord Wynford.—The nature and import of these accounts and vouchers may be produced, and be of importance if the case goes before the Lord Ordinary. But a remit has been refused, because the release was held to have applied to the claim of debt.

Lushington.—Then we shall not dwell longer on the accounts, but proceed to the second question, that of discharge. Now look to the terms of the two deeds, as explained by the circumstances under which they were granted. And recollecting that the appellant, when called in the action of reduction, insisted that the act 1696, c. 5, did not apply, because the money had been advanced at the date of the security; and remembering that at the date of the discharge M'Taggart was aware of the bankruptcy of M'Kerlie, is it possible to deny that the release must have been intended to discharge these guaranteed debts, being debts at that very time incurred by M'Kerlie to De Tastet, and Dennison and Co.?

Lord Wynford.—Did the Court proceed on the books and vouchers or not? If they relied on the state of accounts, yet rejected the books, there was no evidence before them; if they had the books and vouchers before them, the case may be different. We must see our way clear. No doubt, if the discharge of itself be so wide as represented, the Court need not have gone into the accounting. But if the terms are not so wide, then the accounting was plainly a matter of enquiry.

Robertson.—The Court held from the case before them, and the terms of the discharge, that the question was at once susceptible of a decision. It was a summary matter. Sending the

case to the Ordinary that accounts might be examined into, was losing time and incurring unnecessary expense. Nov. 24, 1830.

Lord Wynford.—Still, even if the case were 'summary,' if it were necessary to ascertain facts, the cause should have been remitted to the Lord Ordinary.

Robertson.—Certainly, if the Court had any difficulty as to the facts. But they had not. They confined their minds to the discharge.

LORD WYNFORD.—My Lords, it has been objected in this case, that the Court of Session ought to have remitted this case to the Lord Ordinary. The Court of Session seem to have been of opinion that there was nothing to remit to the Lord Ordinary. The Lord Ordinary is a Judge both of law and of fact. If there be any matter of fact or law to be decided, in any case, the Court of Session are, I think, bound by their Act of Sederunt, to send such case to the Lord Ordinary. This Court of Session, in matters of bankruptcy, under the 54th Geo. III., proceed summarily; that is to say, there is no personal summons, no condescendence, as in other Courts. But it has been admitted, that if there be any facts to be enquired into, it is usual to send cases of bankruptcy to the Lord Ordinary to enquire into such facts; and if any question of law should be found to arise, to give his opinion on the question of law. The Court of Session should have the assistance of the Lord Ordinary in all cases where any thing is to be decided. This is provided by the Act of Sederunt. That Act of Sederunt is binding on the Court, until it be rescinded by another act of the same authority. If a Court of Justice takes upon itself to dispense with an Act of Sederunt made for the regulation of its practice, the suitors of the Court can never know what the practice of the Court is, and much confusion, delay, and expense will be occasioned. I think, therefore, that as there was matter of fact to be inquired into, this case should have been remitted to the Lord Ordinary.

This brings me to the main question raised in this case, namely, does a release of debts, due on or before a certain day, discharge a debtor from the repayment of a sum paid by his creditor after that day, in consequence of a security which the creditor had given for his debtor before that day? This question depends on the construction of another instrument. In giving a construction to this instrument, your Lordships will look only at the instrument, and not to any evidence out of the instrument. If the intention of parties to written instruments is not to be collected from the instruments, but from other evidence, the security which written documents are calculated to afford is destroyed. Now, if an instrument speaks of debts due *on a certain day*, it means such as were counted debts on that day. Such as the creditor could on that day have required the payment of from his debtor, and not engagements, which, although they might occasion future claims, give no immediate right of action. This point is decided by the case of Oliphant v. Newton, in Morrison's Dictionary, 5035. 'A credi-
'tor having given a general discharge to his debtor, for whom he was

Nov. 24, 1830.

'then cautioner, but not distressed, it was contended that the general 'discharge,' (and these words are very important,) 'did also cut off the 'relief of the cautioner, seeing that the debtor was in effect bankrupt, 'and had sold his lands to pay his debts, which far exceeded the price, and 'yet here there was no reservation of cautionary in the discharge.' But the Lords found that the general discharge did not extend to cautionary and relief, whereon the grantor was not distressed at the time of the discharge.

So in the case of Campbell v. Napier, the Court held that a general discharge was not to be extended to a sum, for which the grantor of the discharge was cautioner, and was charged, unless before the general discharge he had made payment. There is a passage in Mr Erskine precisely to the same effect. That being the law, it is quite clear that the discharge in this case, applying to the instrument the rule of construction of Scotch law, did not discharge this, which afterwards became a debt, but which was not a complete debt at the time. The words are, 'I, 'John M'Taggart, Esq. merchant in London, do hereby exoner and dis-'charge the late company of M'Kerlie and M'Taggart, merchants in 'Glasgow, and Alexander M'Kerlie, merchant there, my brother-in-law, 'as a partner of that company, as an individual, and also as a partner in 'that firm,' of all and sundry 'claims and demands, debts and sums of 'money, at and preceding the 25th day of May last.' So that it exonerates from no debt except that which existed 'preceding the 25th day of 'May last.' Then let us look at the other part of the instrument. 'Mr 'M'Kerlie sold and disponed to, and in favour of, John M'Taggart, Esq., 'merchant in London; whom failing by decease, without having other-'wise conveyed or assigned the property hereinafter disposed, then to 'John M'Taggart, junior, Esq., merchant in London, his son, and his 'heirs or disponees, heritably but redeemably, always and under re-'vision, in manner after expressed; in the first place, all and whole, '&c., all in real security to the said John M'Taggart; whom failing, as 'before mentioned, then to the said John M'Taggart, junior, Esq., and 'his foresaids, of the payment of whatever sums of money, principal, 'interest, and expenses, they, or either of them have advanced, or may 'advance to me, from and after the 25th day of May last'—the same day to which reference has before been made. It is given in satisfaction of 'whatever sums of money they or either of them have advanced, or 'may advance, to me, from and after the 25th day of May last; like-'wise in security of whatever sums of money, principal, interest, and 'expenses, they or either of them may advance and pay in consequence 'of any cautionary obligations, letters of guarantee, or other such obli-'gations granted, or that may be granted, by them or either of them, to 'bankers or others, for me, as the same shall be ascertained from time to 'time by the cash accounts to be kept by them for me in their books, 'and the vouchers of debt uplifted, or retired by them, the same not to 'exceed in whole the sum of L.20,000 sterling.' This does not infringe the construction of the previous release of debts due before the 25th May. It makes a provision for the payment of such as should become

due afterwards, and it contains words which show that the parties did not mean that the release should discharge any claims but for debts actually due; for an express provision is made for what M'Taggart might advance and pay in consequence of any cautionary obligations granted, or that might be granted. Nov. 24, 1830.

I should, therefore, humbly recommend to your Lordships, that this case should be remitted to the Court of Session, with directions to examine into this matter; and that a declaration be introduced into the order of this House, that the House do not consider the release as a discharge of the debt, which was contracted subsequent to the execution of that instrument, by Messrs M'Taggart and Company having been called on to pay L.12,000 after the 25th of May, although the obligation which rendered them liable to the payment was executed before the date of the release.

The House of Lords accordingly ordered and declared,

"That the discharge in the pleadings mentioned, and dated 'the 23d of August 1810, did not extend to exoner or discharge 'the house of M'Kerlie and M'Taggart, or the said Alexander 'M'Kerlie, as an individual, from any monies paid by John 'M'Taggart, the father, or by his executors, on account of the 'said house, or of the said Alexander M'Kerlie, subsequent to 'the date of the said discharge: And it is Ordered and Adjud-'ged, That the said interlocutor complained of in the said Ap-'peal, so far as is necessary to carry the above declaration into 'effect, be, and the same is hereby reversed; And it is further 'ordered, That, with this reversal and declaration, the cause 'be remitted back to the First Division of the said Court of 'Session, to proceed therein according to the terms of the Sta-'tute 6 Geo. IV. cap. 120, and the Act of Sederunt, made in 'pursuance thereof, and in conformity with this judgment."

Appellants' Authorities.—3 Ersk. Inst. 3. 65—4. 9 1 Stair. 18. 2. Mor. Dict. *voce* "General Discharge." 4 Brown's Supplement, p. 9.

MONCRIEFF, WEBSTER, and THOMSON—RICHARDSON and CONNELL—Solicitors.