

2do, This seems to be agreeable to reason, because the cautioner, though good at the time of finding caution, may become insolvent, before the arrester knows that the arrestment was loosed, or who is cautioner, so as to have an opportunity to prosecute him.

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Replied for Salmon the arrestee: Such intimation is not required by the act 1617. Ja. VI. parl. 22. cap. 17. The danger pretended is imaginary, seeing that act of Parliament provides all caution to be found to the clerk of the bills, who is liable for the sufficiency of the cautioner. Further, the will of letters of arrestment is only to secure the subject till caution be found. Of this the arrester may be certiorated at the Bill-chamber, which is a place of record, patent to all the lieges. Before the act 1617, when caution was found to a messenger only, intimation was necessary; and though now no longer so, yet the style of the letters continues the same. This point was decided in a case observed by Forbes, 18th July 1707, Grichton against Borthwick, No 144. p. 798.

THE LORD ORDINARY sustained the reason of suspension; and a reclaiming petition being offered,

* THE LORDS refused the same, and adhered.

For Bannerman, *David Grene*.
Wal. Stewart. *Fac. Col. No 83. p. 124.*

1760. July 22. JOHN MACARTHUR against DAVID BRUCE.

JOHN MACARTHUR, as executor nominated by Ludovick Grant, brought a process, in his own name, and in that of Elisabeth Leslie, a creditor of the said Ludovick Grant, in a bond of L. 150, against Barbara and Grizel Grants, his sisters; *alleging*, That, upon their brother's death, they had clandestinely introrried with and carried off sundry moveable effects belonging to him; and therefore concluding against them, as vicious introrriers, to restore the said effects, or to make payment of L. 150 Sterling as the value of the goods.

In this process compareance was only made for Barbara; and she having acknowledged her introrription with certain particulars of furniture, and other effects, of which a condescence was given in to process, but the values of which were not ascertained, she was decerned, by decret of the Court of Session, to return the said goods to the pursuer.—It was further *alleged*, That about the time of her brother's death, she introrried with L. 22 Sterling of cash, which was then lying by him. To this she made no answer, but withdrew her compareance; upon which she was also decerned to make payment to the pursuer of the said L. 22. Mrs. Grizel, the other sister, was decerned in absence, as a vicious introrrier with her brother's effects, to restore the money, goods, gear, and effects, introrried with by her; or otherwise to make payment to the pursuer of L. 150 Sterling, with interest and penalty, in terms of the libel.

No 149.
 Arrestment of goods contained in lockfast trunks and packages, being loosed, upon caution, and the goods afterwards given up by the arrestee to the common debtor, without any inventory or appreciation, the cautioner, in the loosing, found liable to the arrester to the extent of the debt upon which the arrestment was used.

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During the dependence of that process, the pursuer having learned that the sisters had conveyed certain trunks and packages, containing effects belonging to their deceased brother, to the warehouse of Robert Grant merchant in Leith, he immediately arrested the same in the hands of Robert Grant. Upon which, the two sisters having applied for a loosing of the arrestment, David Bruce, writer in Edinburgh, became cautioner in common form, 'That the goods and effects arrested in the hands of Robert Grant, at the instance of John Macarthur, should be made furthcoming to the said John Macarthur, in case, at discussing the process raised at his instance against Mrs Barbara and Grizel Grants, it should be found, that they ought to restore the goods, gear, and effects, or make payment of the sums of money therein libelled.' And the arrestment being accordingly loosed, the chests, &c. were given up by Robert Grant to the two sisters, without looking into them, or having any knowledge of the contents.

Macarthur thereupon commenced a process against Bruce, the cautioner, subsuming on the above facts; and concluding against him for restitution of the several goods which Barbara Grant had been ordained to restore, and the L. 22 Sterling in which she had been found liable; and likewise to restore the money, goods, and effects, which had been intromitted with by Grizel; or to make payment of the sum of L. 150 Sterling, with annuallents, &c. in terms of the decret against her.

THE LORD ORDINARY 'found the cautioner David Bruce liable in payment of the sum of L. 150 Sterling to the pursuer.' But the cause having been afterwards reported, Mr Bruce *insisted* in the following defences:

imo, The defender can be no further liable than to make the arrested goods furthcoming, or pay their values as they shall be ascertained by the pursuer. The effect of an arrestment of goods is only to attach them in the hands of the person in whose possession they happen to be, and thereby to subject him to the obligation of making these goods furthcoming, or so much thereof as shall be equal to the debt upon which the arrestment is used. The arrestee can never be made further liable, unless he has been guilty of unwarrantable breach of arrestment; and when a person becomes cautioner in a loosing, the nature of such obligation is, that he becomes bound in the same manner, and to the same extent, that the arrestee would have been if the arrestment had not been loosed. The pursuer, therefore, in this action, concludes improperly. The defender has no concern with the extent of the sums decerned for against Barbara and Grizel Grants; he is only obliged to make the goods furthcoming which were arrested in Robert Grant's hands, or to account for the values thereof, in the same way as Robert Grant himself would have been, had the arrestment not been loosed. The sole effect of the defender's becoming cautioner was, to substitute him in Robert Grant's place; and it is incumbent upon the pursuer to ascertain what was the value or extent of the goods arrested. To that extent only the defender is liable, by the nature of the transaction, as well as the express words of the bond of cautionry above recited. Agreeable to this doctrine, the LORDS have decided, that

the cautioner, in a loosing of arrestment, can be decerned to pay no more than what appears, from the oath of the arrestee, to have been then owing by him ; Durie, 21st June 1626, and 2d February 1627, Lord Balmerino *contra* Laird of Lochinvar, No 126. p. 788.

It is true, that in this case the goods arrested were contained in lock-fast trunks ; and Robert Grant, who has been examined upon oath, says, he is ignorant of the value of the goods. But this circumstance ought not in reason to make any difference ; the defender knew nothing about the goods being contained in any locked repositories ; he did not think it incumbent on him to take any inventory of these goods ; and as he was certainly guilty of no unlawful act, in becoming cautioner in common form in the loosing of an arrestment, it would be very hard to subject him to the pursuer's whole debt, however considerable, and however far exceeding the value of the goods, merely from this reason, that they were given up without any inventory being made of them.—Suppose the pursuer had used an arrestment in the hands of a debtor to Barbara or Grizel Grant, whose debts could be no otherwise instructed but by the debtor's oath ; that the defender had become cautioner in common form for loosing the arrestment ; and that, in the mean time, the arrestee had died, so that the mean of proof for establishing his debt was lost : it could not in such case have been maintained, that it was the defender's duty, when he became cautioner in the loosing, to have inquired, and informed himself, what was the precise extent of the debt arrested, or that he would have been subjected in payment of the whole debt upon which the arrestment was used. Besides, in the present case, it cannot be said, that the proof of the value of the goods arrested has become impracticable ; the value and extent of them may still be proved by the oaths of Barbara and Grizel Grants, to whom they were delivered up ; and, while that mean of proof remains, it would be hard to subject the defender in payment of the whole debt said to be due to the pursuer :

2do, The defender cannot be made liable in L. 150 upon the decret, as obtained either against Mrs Barbara Grant or against Mrs Grizel. For, with regard to Mrs Barbara, she is not found liable in L. 150, but only to restore certain particulars of furniture contained in an inventory or consignment, and to make payment of L. 22 Sterling of cash said to have been intromitted with by her ; which last part of the interlocutor was in absence, and without proof. And, with regard to Grizel, though she is indeed found liable in L. 150 Sterling, as the value of the goods supposed to have been carried off by her ; yet as the decret, *quoad* her, was entirely in absence, so it is still competent to her to reduce that decret, unless proper evidence be brought of her intromission, and if so it is equally competent to the defender to reduce that decret ; or, even without the form of a reduction, to object to it in this process, as obtained against her without evidence.

Answered for the pursuer, There is no occasion to dispute the general principle assumed by the defender, that an arrestment can carry no more than what is in the arrestee's hands at the time of laying it on ; and that, if there is no other mean of proof to ascertain the value or amount of the subject arrested, recourse

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must be had to the arrestee's oath. But the present case is somewhat particular. It is a fact admitted on all hands, that the subjects arrested were trunks full of goods, the contents unknown; and as, by loosing the arrestment, whereby the sisters were allowed to possess themselves of the goods, it is now rendered impracticable to prove the extent or value of them, the law must presume, that they were in value equal to the sums for which the arrestment was used. The matter is not otherwise extricable. And if the defender's plea were to be listened to, all such arrestments might be evacuated, and rendered of no effect. The pursuer can have no decret against the arrestee, as the loosing the arrestment warranted him as effectually to deliver up the goods, as if no arrestment had ever been used; so that any difficulty which now occurs in ascertaining the value of the goods, arises from the defender's neglect, in allowing the sisters to possess themselves of these effects without inventory or appretiation. The pursuer cannot agree to hold the oaths of the sisters as a proper mean of proof, for ascertaining the quantum and value of these goods. This would be a most dangerous precedent, as they are plainly interested to conceal and depretiate the goods. The law will presume, that the defender knew the goods arrested to be at least of equal value with the sums for which the arrestment was used, otherwise he would not have allowed them to be given up, without using some precaution for ascertaining their value: he knew that the purpose of loosing the arrestment, was to put the sisters in possession of the goods; and if he did not previously know their value, it was his duty to have inventoried and appretiated them.

With regard to the other defence, founded on the objections to the decret against the two sisters; in the *first* place, It is clearly proved, by the depositions of a variety of witnesses examined in that process, and by Mrs Barbara's own confession, that she had a considerable intromission with her brother's effects; and she was accordingly ordained to restore them. Those goods which she acknowledged to have been in her possession, were, to appearance, of considerable value; but it has now become impossible to ascertain the precise worth of them, because they have been carried away and disposed of by the sisters, which they had access to do by the defender's loosing the arrestment: And therefore, as it has become impossible, either for Mrs Barbara or the defender, to restore the identical goods, or values of them, he must be liable in the alternative which the pursuer concluded for in that process, of L. 150 Sterling, as the supposed value of the goods abstracted. *2dly*, With regard to Grizel, though it is true, that the decret *quoad* her was in absence, yet this does not alter the case; for the two sisters, by joining in an application to have the arrestment loosed, did acknowledge their joint interest in the goods arrested; and the consequence of the loosing was, that they possessed themselves of and carried away these goods, without inspection or inventory; and as the defender, by interposing his cautionary security, without any notice or intimation to the pursuer, and without any precaution taken for ascertaining the particulars or values, suffered the goods themselves to be withdrawn, the presumption of law is, that these goods were acknowledged to be of superior value to

the sums libelled; and consequently, as the defender has rendered it impracticable to say, what was the value or extent of the goods themselves, he must be liable in their presumed value of L. 150. The defender cannot be in a better case than Grizel herself, were she insisting in a reduction of that decret; and as by taking the goods out of the arrestee's hands, and disposing of them, it has been rendered impracticable to prove the precise value of them, it would be impossible for her to prevail in such reduction; and therefore the defender, who gave her an opportunity of so doing, must be liable in terms of the decree that stands against her.

'THE LORDS adhered to the Lord Ordinary's interlocutor; but remitted to his Lordship to hear parties procurators upon any objections that might be to the decret against Grizel Grant.'

N. B. The cause having come back to the Lord Ordinary, the above objection was again stated by the defender to the decret against Grizel Grant; to which the pursuer having made answer as above, the LORD ORDINARY, upon the 21st February 1761, 'repelled the objections, and allowed the decret formerly pronounced to be extracted.'—And the LORDS, upon advising a reclaiming petition and answers, upon the 8th July 1762, adhered.

Act. Macqueen & Lockhart.

Act. Da. Grene.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 44. Fac. Col. No 239. p. 435.

1779. August 11. VINCENTSON against WILSONS.

THE LORDS found, That arrestments on blank admiral precepts, might be loofed without caution.

Fol. Dic. v. 3. p. 45.

Ranking of Arrestments.

1583. January. WALLACE against SCOT.

THERE were certain sums of money that pertained to Mr John Majorbanks advocate, arrested in the hands of one Mungo Tenant, by two sundry creditors. The first quha had made the first arrestment were the bairns of ane Scot, mariner in Leith; the second arrestment was made by the spouse of umquhile John Wallace writer. The first arrefter intented action against the said Mr John; and the second arrefter has obtained decret against the said Mr John, sua the person in whose hand the silver was having complained to the Lords upon double purfuit, configned the silver into the clerk's hands, unto the time it was found be the

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The first arrefter, with the second decret of furthcoming, preferable to the second arrefter with the first decret.