

edict *ut nautæ caupones stabularii recepta et investa restituant*, he convened him to make up the damage. *Alleged*, That law being penal, must be strictly interpreted, and can only be understood of things shewn to the skipper, or master of the house; or, 2<sup>do</sup>, of things so bulky as are visible, and cannot escape observation, as trunks, cloakbags, clothes, &c.; or, 3<sup>tio</sup>, of things not discoverable, but kept in pockets, as jewels, rings, gold, &c. and either shewn or trusted to the care of the landlord; in all which cases he must be liable: and the decisions finding them so among us are of that kind, as when Patrick Steil was decerned for the price of the Master of Forbes's scarlet cloak; No 2. p. 9233. but this defender is in none of these cases. The LORDS, before answer, allowed a conjunct probation of what money he brought out of Edinburgh with him, and when he missed it; and what care or dilligence was used by the servants for securing his chamber. And it was proven, that Mr Hay shewed his fellow travellers his purse in the evening, and found it lying empty on the table in the morning, and cried out the house deserved to be razed for such a robbery; as also that the servants offered him the key of his room, and advised him to bolt it within, so none could have access, and yet he could open it himself, in case of fire; and it was not proven that he had acquainted the house, or shewed them what he had about him. The LORDS advising the cause this day, remembered, that; on the 16th of November 1667, Whitehead *contra* Straiton, *voce* PERICULUM, the tacksman of a park was not found liable for a horse input, seeing a printed placart bore, they were to be on the master's peril; and here there was no certioration made to the inn-keeper, of what he had about him; and assoilzied the defender, and found him not in the case of the edict.

*Fal. Dic. v. 2. p. 2. Fountainhall, v. 2. p. 233.*

1707. June 5.

JAMES BROUSTER, some time Merchant in Perth, now residenter in Edinburgh, against WILLIAM LEES, Merchant and Inn-keeper in Douglas.

IN the action at the instance of James Brouster against William Lees, the pursuer having proved that he was received and lodged in the defender's house in Douglas, upon the first day of February 1704 years, and that his breeches were stolen from him before the next morning, He claimed a certain sum from the defender as the value of the breeches, and what was in them; and that his oath *in litem* might be taken thereupon.

*Alleged* for the defender, That the pursuer's oath could not be allowed to prove in this case; because, albeit in law *nautæ, caupones, &c.* are liable for trunks, cloakbags, &c. imported to their houses *in conspectu*, and committed to their care, they cannot be liable for things not *in conspectu*, nor in their custody; as the pursuer's breeches, that were only in his own custody, and not in the de-

No 7.

An inn-keeper, liable to a person who lodged in his house, for the value of a pair of breeches, and what was in them, stolen from the lodger before the next morning, and the lodger allowed to give his oath *in litem* thereupon, reserving to the Lords to modify.

No 7. fender's, more than his person was. And in the case of Thomas Hay, Sheriff-clerk of Aberdeen, against Williamson, the Lords found no process for gold that was seen the night before in Mr Hay's purse in his quarters, and found amissing the next morning. No 6. *supra*.

*Answered* for the pursuer, That he is in a very different case from Mr Hay, whose gold that was not *in conspectu* of the inn-keeper, was alleged to have been stolen out of his purse, and the purse left; for the pursuer's breeches, and all that was in them, being taken away *per aversionem*, his oath *in litem* ought to be received as a full probation in the matter.

THE LORDS found the defender liable for the value of the breeches, and the particulars therein; and allowed the pursuer to give his oath *in litem* thereupon, reserving to themselves to modify the same.

*Fol. Dic. v. 2. p. 2. Forbes, p. 166.*

\*.\* Fountainhall reports this case :

JAMES BROUSTER, chapman, pursues William Lees inn-keeper in Douglas, on the edict *nautæ caupones*, that he, on a great fair or market-day at Douglas, in 1704, having lodged at his house all night, found his breeches stolen from him next morning; wherein he had not only sundry tickets, and other papers, but also money, and several parcels of goods.—*Alleged*, That he never acquainted the master of the house at his entry, but at his own hand crept into a garret, the town being then very throng; and so they cannot be answerable for his loss, if he had any. *2do*, Whatever may be pretended, if he had brought in a valise, or cloakbag, and shown it to the landlord, yet he can never be liable for what fell not under sight; now, what he had in his breeches was not *in conspectu*, so as any could be made accountable for it.—*Answered*, He offered positively to prove, that he was so far from intruding himself privately, that he openly supped with others in that house, and was conveyed and lighted to his bed-chamber by the servants of that house, and paid his reckoning.—THE LORDS allowed a conjunct probation, as to the manner of his entry, and entertainment in the house. And the same coming to be advised, they found Brouster proved his supping with other company in the inn that night, and his being seen without his breeches next morning, till he borrowed a new pair; and that they heard him make a heavy complaint of his loss. And Lees the defender not having proven his allegiance; they allowed his oath to be taken as to what he had in his breeches, and the value of the same, that they might restrict and modify it, as they should see cause. Some remembered lately, that Mr James Williamson in Kinghorn was assoilzied from a pursuit against him, at the instance of Mr Hay, sheriff-clerk of Aberdeen, who had 50 guineas stolen out of his pocket there; but the LORDS thought that case not alike, for there his breeches were not stolen, but only the purse of gold taken away. Here all was gone *per aversionem*; and therefore they allowed the pursuer his oath *in litem*; but he will

not get a *pretium affectionis*, seeing there is no delinquency on the defender's part, but a *quasi delictum* only.—Brouster having deponed he had some bonds and tickets extending to L. 100 in his pockets, the LORDS decerned Lees to pay the sum, on Brouster's assignidg him to the ground of these debts. After this it was discovered, that Brouster had got back his breeches and papers, and yet fraudulently concealed them, and raised this calumnious process.

*Fountainball, v. 2. p. 369.*

No 7.

1714. December 10. CHISHOLM of Comer against Mr DAVID FENTON.

CHISHOLM, in his way from the north, having lighted about mid-day at Mr Fenton's house, and caused put his horses in the stable, and there being a bag or valise on one of these horses, wherein there was money, the bag was cut, and 1000 merks of money taken out; which was discovered before drawing of the horses, and thereupon an instrument taken against Mr David Fenton the master of the inn where he alighted. Comer did thereupon pursue Fenton upon the edict, *nautæ, caupones, stabularii*; wherein, after a probation led, "the LORDS found it proven, that the bag or valise libelled was brought entire upon one of the pursuer's horses into the defender's stable about mid-day; and that the defender's servants assisted to lead in the horses into the stable; and that sometime thereafter the valise was cut before the horses were drawn out of the stable; and therefore found the defender liable for the money taken out of the valise, and allowed the pursuer to depone upon the quantity thereof."

The defender gave in a petition reclaiming, upon which the whole matter came again under the Lords' consideration; and it was *alleged* in behalf of the defender, That though he did keep a public house, yet he could not be answerable for what money was brought upon a horse put up in a common stable, without any intimation or advertisement to take a special care of that cloak-bag; in which case, if the landlord had taken the burden, or even acquiesced, he might have been liable, but otherwise not. *2do, Nautæ, caupones, stabularii* are not liable for any diligence, further than for such things as are in use to be brought into ships, inns, or stables *respective*; and therefore, if a traveller should bring a bag or valise containing jewels, or even gold or silver, more than is useful for the traveller's daily expense in a journey, the *stabularius* is not liable for such things as are not usual nor proper to be brought into his stable.

It was *answered*; That *nautæ, caupones, stabularii* are all liable to equal diligence with respect to their several trusts; and therefore what is said of any one of them in the law regards the whole; and 'lege 1. D. Nautæ, caupones, recipitantem salvum fore utrum si in navem res missæ,' or 'assignatæ sunt, an etsi non sint assignatæ; hoc tamen ipso quod in navem missæ sunt receptæ videntur; et puto omnium eum recipere custodiam quæ in navem illatæ sunt.'

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No 8.

The master of an inn and stable found liable for a traveller's money stolen out of his valise, which was upon his horse in the stable.