

1700. January 19.

GOODEN against MURRAY,

TEILMAN GOODEN, a German, resolving to go home, lodges in William Murray's inn at Kirkcaldy, till the ship should be ready to sail, and having brought in his cloak-bag with him to the chamber where he lay, next morning it is amissing; whereupon he pursues the said William on the edict *nautæ, caupones, stabularii, ut recepta restituant*, to pay his loss and damage, and that he may have his oath *in litem* thereupon. *Alleged*, The stranger having taken the cloak-bag with him into his own chamber, whereof he had the key, and not having delivered it to the landlord, nor expressly committed it to his care, he can never be answerable, neither in restitution of it, nor its value, and that the Roman law was made on political considerations, suiting the genius of that time, and it is a great stretch of natural equity to make one liable without either contract or edict; and if it should be rigorously extended with us, inn-keepers would be exposed to infinite hazards; and one bringing in a cloak-bag filled with stones, might throw these over the window, and cutting his own portmantua; by his oath make the poor landlord pay him a vast sum of money; and what encouragement might this prove to rogues and cheats? and therefore the custom of several nations has so far mitigated this, that inn-keepers are no farther answerable, but only for goods delivered to their custody; and Peckius, Vinnius, Bachovius, &c. *ad leges nauticas*, tell, that now to make the *nauta* liable *ejus scientia est necessaria*, and that they may enter a protestation that they shall not be liable, unless the goods be expressly committed to their care and custody; and that the Master of Forbes's decret against Patrick Steil, No 2. p. 9233., for his cloak, is but a single instance, and had sundry specialities. *Answered*, This law was both just and necessary, and without it, travellers can never be secured, either for their persons or goods; and by a *quasi contractus*, you engage that the strangers shall suffer no damage, unless it be such a *casus fortuitus et damnam fatale* that even exeems in this case, as *vis latronum*, if the house be openly assaulted or broken, or if the stranger's goods be consumed by an accidental fire, or the like; but if they be clandestinely stolen, you must be answerable, though it may be one lodger stealing from another; and the delivering him the key is not sufficient to exoner, for you may have other keys, or other doors and passages to enter by; neither need I any more than that you see my goods brought in under your roof: for the *l. 1. § 8. D. dict. tit.* is express that they are accountable, albeit they be not *traditæ et assignatæ*; and though that place speak of mariners, yet *l. 2. eod.* extends it to taverners and inn-keepers, by these words, *sicut et caupo viatorum*; and it has been so found by the LORDS in other cases, besides Patrick Steel's. THE LORDS found William Murray, the inn-keeper, liable for what the pursuer should depone.

No 5.

A traveller claiming his portmantua from an inn-keeper, alleging there was money in it, was required to show some evidence that there was money.

No 5.

On a bill given in by Murray, the LORDS ordained the pursuer to prove his bringing in a cloak-bag into the inn, and to give what evidences he can, that he had received money at Edinburgh a little before by a *talis qualis probatio*, and condescend what other things he had in his cloak-bag.

July 13. 1700. In the action, mentioned 19th January 1700, between Gooden and Murray, on the edict of *nautæ, caupones*, Murray *objected* against James Ross, one of the witnesses adduced by the pursuer, that he was ultroneous, and that he had prevaricated, in coming to the messenger, and desiring himself to be cited, and so *prodiderat testimonium*, and ought to be objected. *Answered*, No such objection was now receivable, not being proponed *debito tempore*, nor any reprobator protested for; likeas, before his deponing he had purged himself of partial counsel, and the design was to cast his probation, he having only two witnesses on the bringing in the clock-bag to his house. *Replied*, Reprobators were still competent, any time before sentence, though not protested for at the deponing, as the Lords have found, 14th July 1671, and 20th February 1672, Laird of Milneton against the Lady; as also on the 9th November 1676, Paterson and Johnston, (both *voce PROCESS*): And the defender was absent at his deponing, being hindered from coming to Leith by a great storm; and the purging of partial counsel does not comprehend this objection. The LORDS found it was yet receivable, though not protested for at the time; but the question arose, how it should be proven? Murray contended to have it proven by the messenger and other witnesses, who heard him desire a citation; and that in Milneton's case witnesses were admitted. The LORDS considered this was *nuda verborum emissio*, the import and situation whereof might be easily mistaken. What if he said, 'If I were called, I know that matter.' This differs much from this other, 'Call me, and I will prove that matter;' and yet the expressions are very near one another. And, in Milneton's case, the Lords were so sensible of the hazard, that they required witnesses *omni exceptione majores*. The LORDS here found it only probable by Rose, the witness's own oath, and granted a diligence to re-examine him; but withal, allowed the messenger and other witnesses, by whom Murray would prove the objection, to be present, and confronted with him. See PROCESS. PROOF.

*Fountainhall, v. 2. p. 82. 103.*

No 6.

A person who lost his purse in an inn, not having previously informed the inn-keeper of it, found to have no recourse on the inn-keeper.

1704. June 24. THOMAS HAY against JAMES WILLIAMSON.

THOMAS HAY, sheriff clerk of Aberdeen, pursues Mr James Williamson inn-keeper in Kinghorn, that returning from Edinburgh, after the parliament 1700, with the Earl of Errol going north, and lodging all night at his house, he had a purse containing fifty guineas stolen from him, and therefore, on the Prætor's