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 innkeeper of it, found to have no recourse on the innkeeper.

1704. *June* 24. THOMAS HAY *against* JAMES WILLIAMSON.

THOMAS HAY, sheriff clerk of Aberdeen, pursues Mr James Williamson innkeeper 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

edict *ut nautæ caupones stabularii recepta et invecta 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*do*, of things so bulky as are visible, and cannot escape observation, as trunks, cloakbags, clothes, &c.; or, 3*tio*, of things not discoverable, but kept in pockets, as jewels, rings, gold, &c. and either shewn or trusted to the care or 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. No 6.

Fol. 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.

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.

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-