

1712. July 11. RODERICK CHISHOLM of COMER *against* MR DAVID FENTON.

RODERICK Chisholm of Comer coming to Edinburgh, in June 1711, and about mid-day lighting at Dunkeld to refresh himself and his horse, he went to the house of Mr David Fenton, the principal innkeeper there; and his servant put in his horse in the said Mr David's stable, with a little cloak-bag or walise tied to the saddle, and went to his master's chamber to see what orders or directions he had for him; and, after a quarter of an hour's absence, he returns to the stable to look after his horse; and finding it locked, he called for the key, which being a-missing, after search was found lying thrown out in the open street; and having entered, he found the cloak-bag cut, and a bag containing 1000 merks stolen out of it. Whereon giving the alarm, his master told the landlord he must either find out the thief and his money, or be liable to make up his loss. He regretted the accident; but told he was not concerned, no intimation being made to him or his servants of the horse's having a walise; which if it had been committed to his care, he should have answered for it. So Comer, getting no satisfaction, raised a process against Mr Fenton, founded on the prætor's edict in the Roman law,—*Nautæ, caupones, stabularii, ut recepta restituant*, for securing passengers' goods, both by sea and land; for though, by the common rules, a depositary is only liable for fraud or supine negligence, yet, in such a special trust as in ships and taverns, law has extended the obligation to restore, though no special meddling can be fixed on him or his family: for, *ex malis moribus, bonæ leges*. And here, you keeping a stable for accommodation of travellers, and my servant having put in my horse there, with my cloak-bag, you must be liable for all the consequences, whether it was specially intimated to you or not: for your office and trust obliged you to know, when you saw a gentleman booted and spurred come into your house, that he was not on foot; and so you ought, by yourself or servants, to have looked after his horses and furniture. And what more iniquity is there in this, than in the practice of our neighbouring nation, that the sheriff of the county is bound to make up the damages of all robbed betwixt sun and sun?

ALLEGED,—The libel is noway relevant, unless they subsume, in the words of the edict, that it was *receptum*; that is to say, that the cloak-bag was delivered to the landlord, at least that it was intimated to the master to take care of his cloak-bag: but this is not so much as pretended. And it is much more probable he has lost it the night before, in the inns where he lodged, than to imagine, in so short a space, as an hour's stay at mid-day, with up-sun, such a work of darkness should have been attempted. And it has been known, by sundry instances, that this law has been abused, and made a cover and screen to reach landlords, where there has been no real loss at all; at least not so much by far as was given out: the design of laws being to protect the subjects, and not, by calumnies, to ruin them. And Bruneman and others, who write on that edict, expressly say, that the goods must be committed to the care of a servant appropriated for that use, otherwise the innkeeper is not liable. What if one should bid the cook-boy look to his horses or furniture, that could never oblige the master; these *servi mediastini* or *atrienses* not being destinate for that use. 2do, Likeas, any traveller endowed with a very common measure of prudence, caution, and foresight, will never leave bags of money in an open stable,

but bring them along with him to his chamber; and, if he neglect this, *sibi imputet*: he must not charge his own fault on the master; it is a damage *quod sua culpa sentit*. *Stio*, The edict does not so much relate to money as to *res quæ ad quotidianum usum habentur*; and the *Leges Navales Rhodiæ*, sec. 14, make not the skipper liable for money brought into his ship, *nisi apud eum deponatur*. And if the *vector* says he has lost it, *hi sermones irriti sunt, quod apud exercitorem pecuniam suam non deposuerit*. And Walwood, in his Collection of Sea-laws, cap. 9. says, the skipper is only bound to purge himself upon oath. And in a late case betwixt *Hay and Williamson, innkeeper at Kinghorn*, he was assoilyied, though it was proven that Hay brought a purse of gold with him into the inn.

ANSWERED for Comer,—To take the edict in this limited restricted sense were to make it of no use at all; though the policy of all nations has adopted it into their laws for security of travellers. And the word *receptum restituere* must not be so narrowly scanned as that the goods must be delivered to the inkeeper: the putting my horse into your stable was a receiving it, that being the end for which you keep one; and if you have not an hostler or *institor stabuli* to look after gentlemen's horses, that is your fault. And, on the 3d January 1667, a chapman's pack being stolen in an inn, he got his oath *in litem*, what was in it: and travellers are not willing to discover what money they are carrying with them; that were to tempt people to steal it. And Stair, *lib. 1, tit. 13*, tells, that, in the case of *Patrick Steel and the Master of Forbes*, the Lords did not put them to prove that the cloak was delivered or shown either to the landlord or his servants. And it cannot escape observation that the urging the hardship on innkeepers is more than balanced by necessity; for, if this happy edict be not kept in its full latitude, pickery would be encouraged and go unpunished, which would bring a stop or total lethargy on all travelling and correspondence. Then Ovid's iron age returns, *non hospes ab hospite tutus*. And the law presumes the master's knowledge, as *Vinnius ad Petrum Peckium, de Re Nautica*, speaks, that *vel sciunt vel scire potuerunt et debuerunt*; and so *lex statuit super præsumpto*.

The Lords, to shun the inconveniences on both sides, and not to evacuate the edict, allowed a probation, before answer, of the hail matter of fact *ex quo oritur jus*, that he brought a cloakbag with him to the stable, and that the key was found in the street, and, on their entry, the cloakbag was found slitted and cut; and what circumstances can be adduced of the landlord's knowledge of the horses being put in his stable, &c.

Some cited an old Act of Parliament, (Act 56th 1425,) ordaining travellers to lodge in hostillaries, and not in the houses of their acquaintances and friends, unless they were carrying money along with them. But the act was for reforming our barbarity, and erecting public houses for accommodation of strangers, and was a good politic for those times; but is now in desuetude. Some years ago there was a process of this kind pursued by a *Servant of my Lord Polwart's* against *William Murray, Vintner in Kirkaldy*, where the edict was sustained; but, on the probation, it was discovered the pursuer had suborned witnesses to depone he brought a cloakbag into the kitchen; whereon he deserted the process, and retired out of the kingdom.