

NAUTÆ, CAUPONES, STABULARII.

1661. December 4.

WHITE against CROCKET.

No 1.

THOMAS WHITE pursues Patrick Crocket in Elliot, to make payment of the sum of 600 merks, which the pursuer alleged he had in a leathern girdle when he lodged with Crocket, being in an inn-keeper's house, and that the defender promised that the pursuer should want nothing, after the pursuer had shown him the said girdle; yet the defender came ordinarily in the chamber, where the pursuer lay that night, and he wanted his money from under his head, which he declared, and shewed to the defender the next morning; and therefore, according to the law, *nautæ caupones stabularii, &c.* (which is observed in our custom) the defender, as keeper, ought to be decerned to restore. The question was here only of the manner of probation.

THE LORDS found all the libel relevant to be proved, *prout de jure*, and declared, that these being proved, they would take the pursuer's oath *in litem*, upon the quantity.

Fol. Dic. v. 2. p. 1. Stair, v. 1. p. 63.

1687. February 17. The MASTER of FORBES against STEIL.

No 2.

THE Master of Forbes's pursuit against Patrick Steil, vintner in Edinburgh, is reported by Saline, how far he was liable for the Master's cloak stolen in his house, on the edict *nautæ, caupones, stabularii*; seeing Patrick alleged from the words of the edict *salvas fore receperint*, there behoved to be a tradition or delivery of the thing to their custody; and that the *caupona* amongst the Romans were, where travellers came to lodge with their cloak-bags, of which kind Patrick Steil's house was not; and that his doors being open, and near to the high streets, he could not be answerable for all comers and goers. Yet the LORDS

No 2. found him liable, especially seeing it was proved, that it was lying on the byetable, when the gentlemen's servants were removed to another room to get their suppers, during which time Steil's own servants attended, and then it was missed; and that Sir Robert Milne of Barntoun, Sir Robert Colt, and many others, had their cloaks thus stolen in this, and the other great taverns of the town; so the LORDS resolved to make an example.

Fol. Dic. v. 2. p. 1. Fountainhall, v. 1. p. 448.

* * * Harcarse reports this case.

IN a pursuit at the instance of the Master of Forbes against Patrick Steil, vintner, for the price of a cloak stolen out of the defender's house;

Alleged for the defender, That the masters of drinking-houses, where people do not lodge, cannot be answerable but for what is delivered to their care.—*2do*, The cloak was not stolen by any of the defender's servants, but by a gentleman who came in to drink.

THE LORDS having considered the preparative, and the common law of *nautæ caupones, &c.* they decerned against the defender for the price of the cloak.

Fol. Dic. v. 2. p. 1. Harcarse, (SUMMONS.) No 925. p. 261.

* * * Sir P. Home reports the same case.

THE Master of Forbes having obtained a decret against Patrick Steil before the Lord High Constable's Court, the time of Parliament, for the price of a stuff cloak stolen from him in Patrick Steil's house, being a tavern, founded upon that Pretorian edict in the common law, *Lib. 4. tit. 9. D. Nautæ caupones stabularii ut recepta restituant*; which being suspended upon these reasons, that by the said edict *nautæ, caupones, stabularii*, being only liable to restore the goods they shall receive, and the cloak not being delivered to the suspender, nor his servants, he cannot be liable upon the foresaid edict; as also, masters of taverns, by the foresaid law, are only answerable for themselves and their servants, *quorum opera utuntur*, and for those *qui habitandi causa in caupona sunt*; and not for those *qui hospitio repentino recipitur, veluti viator*, *Leg. 6. par. 3. eod.*, so that unless it were qualified and made appear, that the suspender, or his servants, did steal and take away the cloak, he cannot be liable; for there being many persons coming in and going out in a public tavern, the cloak might be stolen or taken away by them, and the defender cannot be liable for these deeds; and it appears by the foresaid edict, that it was only to take place in the case of travellers and passengers that came to lodge in a tavern, in respect of the implied trust betwixt the traveller and the keeper of the inn; but that cannot take place in the case of taverns and inn-keepers in a town to which many persons do daily resort, and are not in use to bring any goods along with them, but such as they wear, and have upon their persons, and

which they either ought to keep themselves, or commit the keeping to their own servants, or deliver them to be kept by the master or servants of the tavern; otherwise they cannot be liable, unless it were particularly instructed, that either the master, or his servants, did steal or take away the goods; seeing where there is so great resort to taverns in town, the goods may be taken away by strangers who come in to the tavern, for whom the master is not liable. *Answered*, That the words in the edict, that *nautæ caupones stabularii restituant quod salvum receperint* is explained *par. 8. leg. 1. eod.* and is understood *et si non sint adsignatæ, hoc tamen ipso, quod missæ sunt, receptæ videntur*, so that it is sufficient to make the suspender liable, that the charger brought the cloak into his house; and the reason mentioned in the edict is most just, *ne quisquam putet graviter hoc adversus eum constitutum, nam est in ipsorum arbitrio ne quem recipiant, et nisi hoc esset statutum materia daretur cum furibus adversus eos, quos recipiunt, evendæ, cum ne nunc quidem abstineant hujusmodi fraudibus*. And there is a double action that arises upon the foresaid edict, one *ex quasi contractu*, and another *ex quasi delicto*. By the action *ex quasi delicto*, the master is only liable *ob damnatum datum aut furtum factum in caupona*, either by the master or his servants, *quorum opera utitur*; and he is liable for his servants, *quia ei imputatur quod minus fidelium seu negligentium opera utatur*; but is only liable for any damage, where there is any prejudice or theft committed by strangers who come into the tavern, *quia respectu horum culpa exercitoris nequit imputari*. But by the action *ex quasi contractu*, the master of the tavern is answerable for the security of all the goods that are brought into the tavern, whether they be stolen or taken away by the master, servants, or strangers, *quia inducitur ex facto receptionis, qua exercitor caupona sensetur tacite promisisse salvas fore res receptas, Leg. 1. par. 2, 3, 6, and Leg. 2. eod.*; and the edict takes place as well in case of persons that come into taverns in the town, as in the case of travellers and passengers in the country; seeing there is the same parity of reason for both, and the law makes no difference, *et non est distinguendum ubi lex non distinguit*. THE LORDS repelled the reasons of suspension, and found the suspender liable for the value of the cloak.

Sir P. Home, MS. v. 2. No. 855.

1687. July.

EWING against MILLER.

No 3.

THREE packmen having hired a carter to carry their packs from Ayr to Kilmarnock, it was libelled that one of the packs was opened and L. 80 Scots taken out of it.

THE LORDS found, That it being proved, that the pack had been opened after delivery, the defender was liable *de receptis*; and that the packman might prove by his oath *in litem*, what money was in it when he delivered it.

Fol. Dic. v. 2. p. 2. Harcarse, (SUMMONS.) No 931. p. 261.