

1700. July 19. ALEXANDER LESLIE and ALEXANDER GRANT *against* ROBERT RICHARDSON'S CHILDREN and MARGARET LAW.

CROCERIG reported Alexander Lesly, Provost of Banff, and Alexander Grant, against the Children of Mr Robert Richardson, and Margaret Law, his relict. The pursuers having taken a chamber in Mr Robert's house in Edinburgh, and brought in their cloak-bags, the same is carried into the closet of the said room, but the next morning is amissing. The Provost alleging there was a great quantity of money in it, pursues the relict and children, (Mr Robert dying *medio tempore*,) for reparation, and to be liable in the damage, to be liquidated by their *juramentum in litem*; and offered to prove the bringing in the cloak-bag, and that it was away the next morning.

ALLEGED, *1mo*. The Prætor's edict being only against mariners, innkeepers, and stablers, it cannot be extended to setters of chambers, (it being a singular law, founded on specialties,) who neither sell meat nor drink, nor have common servants, as taverners keep; and so the decisions on that edict do not meet in this case. *2do*. The pursuers had the key of the closet in their own keeping; which must exoner the landlord, unless his fraud, fact, fault, or accession, were proven. *3tio*. It is offered to be proven, that two fellows came in with the pursuers, and both behaved and gave themselves out to be their servants, and had access to the chamber; and it is very presumable they have been the robbers and thieves.

ANSWERED,—There be sundry grounds of law whereon setters of rooms are as much liable as common innkeepers, &c.: for they, being *depositarii* of the lodger's goods, are liable *actione depositi* or *locati*; likeas, they fall under the statute and signification of the word *caupones*, which Calepine makes to signify *quodcumque fit lucri causa*: And our Act 84, 1426, seems to infer that *hospitia* and *hostilaria* are near one. And there is the same parity of reason, that the *inquilinus* or *hospes* be secure in his person and goods in his hired rooms, as well as in a common *diversorium* or inn; and the edict has been extended to horses taken into parks and stolen there, though that cannot be called a *stabulum*; and to carriers and waggoners, though they be only *nautæ* by land: and on the 3d of January 1667, *Brand*, one was found liable for a pack. And as to the *second*, of the pursuer's having the key, *non relevat*; because you may have another key, or another private entry, or the lock may be insufficient. And Stair, lib. 1. tit. 13. and Molloy, *de Jure Maritimo et Navali*, show this does not exoner the master.

The Lords thought the case new, and that there might be danger in assoilyicing landlords; for then *non hospes ab hospite tutus*, as Ovid has it: and yet, in private houses, there is less resort, and so less danger of such thefts. They resolved, before determining the relevancy, to take probation, before answer, as to the haill points of fact alleged by either party, and the qualifications insisted on, either to load the defenders, or to exculpate them, by these two fellows intruding themselves as servants, and not as porters, &c.