

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.*