

not get a *pretium affectionis*, seeing there is no delinquency on the defender's part, but a *quasi delictum* only.—Brouster having deponed he had some bonds and tickets extending to L. 100 in his pockets, the LORDS decerned Lees to pay the sum, on Brouster's assignidg him to the ground of these debts. After this it was discovered, that Brouster had got back his breeches and papers, and yet fraudulently concealed them, and raised this calumnious process.

Fountainball, v. 2. p. 369.

No 7.

1714. December 10. CHISHOLM of Comer against Mr DAVID FENTON.

CHISHOLM, in his way from the north, having lighted about mid-day at Mr Fenton's house, and caused put his horses in the stable, and there being a bag or valise on one of these horses, wherein there was money, the bag was cut, and 1000 merks of money taken out; which was discovered before drawing of the horses, and thereupon an instrument taken against Mr David Fenton the master of the inn where he alighted. Comer did thereupon pursue Fenton upon the edict, *nautæ, caupones, stabularii*; wherein, after a probation led, "the LORDS found it proven, that the bag or valise libelled was brought entire upon one of the pursuer's horses into the defender's stable about mid-day; and that the defender's servants assisted to lead in the horses into the stable; and that sometime thereafter the valise was cut before the horses were drawn out of the stable; and therefore found the defender liable for the money taken out of the valise, and allowed the pursuer to depone upon the quantity thereof."

The defender gave in a petition reclaiming, upon which the whole matter came again under the Lords' consideration; and it was *alleged* in behalf of the defender, That though he did keep a public house, yet he could not be answerable for what money was brought upon a horse put up in a common stable, without any intimation or advertisement to take a special care of that cloak-bag; in which case, if the landlord had taken the burden, or even acquiesced, he might have been liable, but otherwise not. *2do, Nautæ, caupones, stabularii* are not liable for any diligence, further than for such things as are in use to be brought into ships, inns, or stables *respective*; and therefore, if a traveller should bring a bag or valise containing jewels, or even gold or silver, more than is useful for the traveller's daily expense in a journey, the *stabularius* is not liable for such things as are not usual nor proper to be brought into his stable.

It was *answered*; That *nautæ, caupones, stabularii* are all liable to equal diligence with respect to their several trusts; and therefore what is said of any one of them in the law regards the whole; and 'lege 1. D. Nautæ, caupones, recipitantem salvum fore utrum si in navem res missæ,' or 'assignatæ sunt, an etsi non sint assignatæ; hoc tamen ipso quod in navem missæ sunt receptæ videntur; et puto omnium eum recipere custodiam quæ in navem illatæ sunt.'

VOL. XXII.

51 M

No 8.

The master of an inn and stable found liable for a traveller's money stolen out of his valise, which was upon his horse in the stable.

No 8.

And whereas it is *alleged*, That it does not belong to the trust of a *stabularius* to be answerable for money, jewels, or precious goods, but only for the horse and accoutrements, and such things as are usually carried about with horses, but that money is to be more cautiously managed, and brought into the inn; it is *answered*, The foundation laid down being established, that a *stabularius* is liable for all that comes under his trust, the extent of that trust is to be measured by the common practice and custom. It is acknowledged, that travellers, lodging all night with money in bags or valises, are in use to take off these valises, and carry them into the inn; and therefore a *stabularius* would not have been liable, if the pursuer had come to lodge all night with his money. But, on the other hand, travellers on the road, resting at mid-day for refreshment of man and horse, are not in use to loose their cloak-bags, but they remain upon the horses' back; and therefore it belongs to the trust of the *stabularius* to see to the security of all that was brought into the stable upon the horses' back.

It was *replied*; Supposing a *stabularius*' diligence to be as is laid down, and that the measure of his trust were according to custom, it is denied the custom will be found uniform, that travellers resting at mid-day do leave the trust of their money in cloak-bags to the servants of the stable, who are persons of the lowest condition; but some cautious travellers carry their cloak-bags into the house; others, who have servants, commit the trust and oversight of their money to them; and, in this particular case, Grant the pursuer's servant did call for the key of the stable, and got it, not indeed at the first, but got it before the horses were corned, and before the slitting of the valise was observed, and his master asked him, whether he had the keys of the stable, which he said he had, and was ordered to corn the horse; whereupon he opened the door, and then observed the slit in the valise, which might have been done after he had got the key, and by himself.

It was *duplicated*; That seeing the law is clear, and the custom clear also, that travellers resting at mid-day are not in use to take off their cloak-bags, the trust lies upon the master of the stable; and though some travellers, *ob majorem cautelam*, may allow or appoint their servants to take notice that no damage happen, yet that additional care does noways relieve the master of the stable.

“THE LORDS, in respect that the pursuer was not to lodge in the house all night, but only to rest and refresh himself and horse at mid-day, adhered to their former interlocutor, finding the defender liable.”

Fol. Dic. v. 2. p. 2. Dalrymple, No 126. p. 175.

* * * Bruce reports this case :

1715. June 14.—THE Laird of Comer arriving at the said Mr Fenton's house about mid-day, with design only to bait his horses for an hour and a half or

thereby ; Mr Fenton's hostler did accordingly help to lead in the horses to the stable, upon one whereof there was a bag or valise, whole and entire, wherein were 1000 merks ; but a little thereafter, when the horses were drawn out again, the said bag was found slitted or cut, and the money away. Whereupon Comer having pursued the master of the inn, upon the Roman edict, *nautæ, caupones, &c.*

It was answered for the defender, That there was no *receptum* in this case, as *receptum* is taken in the edict, because the money or valise was not received by the defender, or any servant of his, whose trust that was ; but put in on the horse in a common stable, which he contended was not *receptum* ; and when money or precious goods are brought into an inn, they do no otherwise oblige the inn-keeper to restitution, *nisi specialiter sint assignata*, either to the inn-keeper or his proper servant, whose trust that is. And that because, *1mo*, It were against natural equity, that an inn-keeper should be liable, for example, for a precious diamond, only because it was put into a common stable, or contained in a small leather bag. *2do*, Here the pursuer's own *culpa precessit*, as not having done what men of common prudence would do, who doubtless would bring their mails or bags containing money, &c. into the lodging house itself ; so that the omission of this was *culpa viatoris*. Nor is it any great inconveniency to do so, since it was but a small bag ; and though it had some inconveniency, yet that will never overpoise the solid and unavoidable hazard on the other hand. *3tio*, This is confirmed by *L. 7. D. h. t.* where it is said, ' Item, Si prædixerit ut unusquisque vectorum res suas servet, neque damnum se præstiturum, et consenserint vectores prædictioni, non convenitur caupo seu stabularius ;' where the inn-keeper is allowed *prædicere viatoribus, &c.* But how shall he make this intimation, if goods of the greatest value may be thus huddled into a common stable ? So that the law, which allows the inn-keeper this faculty *prædicere ut res suas servent*, does undoubtedly imply, that they must be *assignatæ* ; for how can a man make an intimation, concerning a thing whereof he knows nothing. *4to*, This is further confirmed by the authority of Bruneman, upon § 5. *L. 1. D. b. t.* where commenting upon these words of the law, ' Cæterum si opera mediastini fungitur, non tenetur,' he says, ' Si quis vilibus mancipiis aliquid committit custodiendum non obligatur exercitor cauponæ, nam isti servi viles non sunt ideo accepti, ut res custodiant ; sed ut purgent atria et labores sordidores expediant.' To which also agree Mor-nacius and Mansuerius.

Replied for the pursuer, As to the valise not being assigned, it contradicts the *L. 1. § 6. D. h. t.* which binds the inn-keeper. ' Sive assignatæ, an et si non sint assignatæ ; hoc tamen ipso, quod in navem missæ sunt, receptæ videntur.' The reason is obvious, and delivered by Ant. Faber, ' Quia si bonus est exercitor vel caupo, ignorare non debet quid et a quo illatum sit.'—And if he does not know, law will not indulge his negligence. As to the first enforcement from equity, replied, That this edict was introduced for public

No 8.

advantage, to which any man's, or set of mens, private interest must give place. To the second *replied*, That the pursuer did what most travellers use to do, having alighted at the defender's house, not at night, but mid-day; not to rest for any time, but only to give his horses corn; he delivered his horse, with the valise on him, to the defender's servant, whose office was to take care of the stable, and who bound his master *ut præstet receptum*; and no man who cares for his horse will take off a valise while his horse is hot after travel. To the third *replied*, That this is already answered, from *l. 1. § 6. D. h. t.* which requires no express intimation to the inn-keeper, but obliges him, as a diligent and careful man ought, to know what is brought into his house; and it were of fatal consequence very often, if persons were obliged to use an intimation to the inn-keeper. But in the present case, the valise was in effect delivered to the servant, he having led in the horse to the stable. To the fourth, *replied*, That the citation from Bruneman does not hit the case; for the servant here was not a *servus vilis*, such as the *mediastini*, but was *hostler*; and, consequently, *custodiæ causa præpositus*, whose deed obliges the master, *D. l. 1. § 3. D. h. t.*

It was further *urged* for the defender, That the word *receptum*, in the sense of the edict, did not extend to this case; for the law says, 'Ait prætor, nautæ, caupones quod cujusque salvum fore receperint; hoc est, quamcunque rem sive mercem receperint, inde apud Vivianum relatum est; ad eas quoque res hoc edictum pertinere quæ mercedibus accederint, veluti vestimenta quibus in navibus uterentur, &c. quæ ad quotidianum usum habemus.' Which is confirmed by the Lord Stair, *Inst. l. 1. tit. 13. § 3.* who notices the *Leges Navales Rhodias*, § 14. 'Si vector navem ingressus fuerit, qui pecuniam habet, eam apud exercitorem deponito, quod si non fecerit, aurum argentiumve se perdidisse si dixerit, hi sermones ipsius irritæ propterea sunt, quod apud exercitorem non deposuerit.'—And Welwood, in his *Collection of Sea Laws*, says, That if money, or other goods, be kept in a coffer, the skipper is only liable to purge himself by oath. And that the case of the *caupones et stabularii* is the same in law with that of the *nautæ*, will not be contested. And this is further confirmed by decisions, as in the case of Hay against Williamson in Kinghorn, No 6. p. 9238. which was money in his pocket; and yet the defender was there assoilzied; which certainly must have been for this reason, because the purse contained a five guinea piece, and other pieces, not so proper *ad quotidianum usum*; nor was that purse particularly consigned or intimated to the inn-keeper. And as to the case of Forbes, No 2. p. 9233. it was a cloak that was brought into a tavern *ad quotidianum usum*. And, as to the sum, it was *urged*, That such a sum can never fall within the words of the edict; that is, 'Ad eas quoque quæ mercibus accedunt;' such as 'vestimenta, &c. quæ ad quotidianum usum habemus;' *i. e.* 'ad quotidianum usum' in travelling. For so the same Vivianus's opinion is repeated by Paulus, in *l. 4. in fin. D. h. t. Ut vestimentorum penoris quotidiani, quæ hæc ipsa cæterarum*

' rerum locationi accedunt.' It were absurd to say, that a cloak-bag, with 1000 merks *accedebat* to the horse and saddle; or that it was for his daily use in his journey, as the *vestimenta*, the only species mentioned in the law; so that the money was not *receptum* in the sense of the law, unless it had been specially intimated to the defender, or put in the custody of some servant entrusted by him for such uses. And the last words of the same law are certainly to be taken in conjunction with the words above cited in § 6. ' Et puto ' omnium eorum recipere custodiam, quæ in navem illata sunt;' which are to be thus understood, ' Omnium, scil. mercium et rerum quæ mercibus accedunt, veluti vestimenta.' The case of a ship and of an inn justify this sense; for, as the skipper is liable for the *merces*, so is the inn-keeper for the horses. And these things ' quæ viatoribus accedunt, sicuti vestimenta, &c. quæ ad ' quotidianum usum habemus.'

Answered for the pursuer, That the l. 1. § 6. makes *receptum* to be *quæcunque res vel merces*: So that the edict has been principally designed for the advantage of traders, and such as in course of business may be obliged to carry about any subject of value. This moves Vivianus to put the question, whether *vestimenta*, and such daily necessaries, come under the edict? which he determines they do, *quia mercedibus accedunt*; so that the principal design of the edict seems clearly to have been the security of travellers in their money and goods of value: And such things as are barely necessary for travelling, fall under the edict only *per interpretationem*; and, therefore, here comes in the rule, that, *sive assignatæ, an etsi non sint assignatæ*, the inn-keeper from his presumed knowledge is liable; 2do, The citation from the *Lex Rhodia* is not to the purpose, that law did not contain any edict of this kind. And the Roman law did in this, as in several other articles, amend the laws of Rhodes, which, in this case, did only allow a simple *actio depositi*, regulated by quite different rules from the present action.

THE LORDS, in respect the pursuer came to the defender's house at mid-day, and only to bait for about an hour and an half, without design of any longer stay, did, upon the 17th December last, find the defender liable upon the edict. And, upon a reclaiming bill given in this day, their Lordships adhered to their former interlocutor, and refused the desire of the petition.

Act. Sir James Nasmyth.

Alt. Advocatus.

Clerk, Sir James Justice.

Bruce, v. 1. No 95. p. 115.

1769. December 2.

MANNERS against STEWART.

No 9.

A CARRIER, who had undertaken to carry certain goods from Edinburgh to Kilmarnock, and to wait two hours for them, was found liable upon the edict