clearly to recognise the competency of whipping up to the age of sixteen in respect of theft or in respect of crime against the person or property.

LORD SANDS—I concur. This case has a certain importance at present in view of the discouragement which the Legislature and public opinion have given to the imprisonment of boys between the ages of fourteen and sixteen. Magistrates find great difficulty in knowing how to deal with such cases. There is undoubtedly an idea in many courts that a boy cannot be whipped after he is fourteen, and learned sheriffs have told me that they have noticed that the idea is one which prevails in the minds of lads who are inclined to indulge in crime; the lads have apparently a notion that they are safe from corporal punishment after they have passed the age of fourteen, and that in practice nothing more serious than a period of probation will be imposed upon them. Magistrates have told me that even when the court is of opinion that it can punish by whipping up to sixteen, there is a difficulty in imposing such a sentence owing to the prevalent doubt as to its legality, which makes the officers on whom the duty falls reluctant to carry it through. I think therefore it is of importance that it should be formulated by this Court that it is competent to punish by corporal chastisement boys between the ages of fourteen and sixteen for common law offences.

The Court answered the second question in the affirmative, and found it unnecessary to answer the first question.

Counsel for the Appellant—Aitchison. Agent—Alex. Ross, S.S.C.

Counsel for the Respondent—The Solicitor-General (D. P. Fleming, K.C.)—Fenton, A.-D. Agent—John Prosser, W.S., Crown Agent.

COURT OF SESSION.

Thursday, November 23.

SECOND DIVISION.

[Sheriff Court at Elgin.

MUSTARD *v.* PATERSON.

Contract — Stabling — Nautæ, Caupones, Stabularii—Stabularii—Injury to Horse —Liability of Lessee of Stables.

The edict *Nautæ, caupones, stabularii*, as incorporated in the law of Scotland, applies to stablers as such, and not merely to persons carrying on stabling as an annexe of an inn. It applies also to cases of damage as well as of loss.

A farmer who had an arrangement with a stabler, under which for an annual payment he had the right to stable accommodation for his horse when in town, handed over the horse in a sound condition to the ostler, who put it into a double stall into which another horse was subsequently put. The farmer's contract gave him no right to the use of any particular stall. The horse was subsequently returned to the farmer in such an injured condition that it had to be shot. There was no direct evidence showing how the injury was caused. In an action at the instance of the farmer against the stabler for the loss of the horse, *held* that the edict *Nautæ, caupones, stabularii* applied, that the injury was not due to the "act of God," and that the defender was accordingly liable.

Observations per curiam as to the proof required in order to rebut the presumption of liability under the edict. Meaning of "act of God" as used with reference to the edict.

Opinion per the Lord Justice-Clerk that even if the edict did not apply the defender would have been liable at common law.

William Mustard, farmer, Muirton, *pursuer*, brought an action against Alexander Paterson, City Motor Works, Elgin, *defender*, in which he claimed £69, 0s. 6d. as damages for the loss of a horse.

The pursuer pleaded, *inter alia*—"1. The pursuer's horse having sustained injuries, which resulted in its death, while in the custody or charge of the defender, or of his said servant for whom he is responsible, the defender is liable to the pursuer in reparation."

The defender pleaded, *inter alia*—"2. The defender not being responsible for the injuries alleged, he is entitled to absolvitor, with expenses. 4. Any injury caused to the pursuer's horse having been the result of an accident for which the defender is not responsible, he is entitled to absolvitor with expenses."

The *facts* of the case and the import of the proof appear from the findings in fact of the Sheriff-Substitute (HOWDEN), who on 12th January 1922 assoilzied the defender.

The Sheriff-Substitute found in fact (1) that in 1919 defender was the lessee of the City Hotel Stables, Elgin; (2) that pursuer, who is a farmer in the neighbourhood of Elgin, had a verbal arrangement with defender, under which in respect of an annual payment of £2 he had a right to stable accommodation for his horse when he was in Elgin, but no right to the use of any particular stall; (3) that on 7th November 1919 pursuer handed over his horse to an ostler in defender's employment, who put the horse into a double stall in one of defender's stables, and that the said stall was 9 feet wide; (4) that the ostler afterwards put another horse into the stall beside pursuer's horse; (5) that on previous occasions these two horses had shared a stall, and that both horses were known to be quiet and not quarrelsome; (6) that pursuer's horse was sound when it was put into the stable; (7) that on the afternoon of the same day, when pursuer returned for his horse, the horse was lame on the off foreleg; (8) that in order to test the horse's condition pursuer yoked the horse and drove it at a walking pace out of the stable yard

and a few yards further, and then brought it back to the stable; (9) that pursuer then sent for a veterinary surgeon, who treated the horse; (10) that on 9th November 1919 the pursuer, on the advice of the veterinary surgeon, gave instructions that the horse should be destroyed, and accordingly it was destroyed; (11) that a post-mortem examination disclosed that the horse had wrenched its shoulder, and that there were bruises and inflammation between the thorax and the shoulder; (12) that there were no external marks of injury and no signs that the two horses had been fighting; (13) that there is no direct evidence to show how the injury was caused; (14) that there were no structural defects in the stable and that the ostler was a competent man; (15) that the value of the horse was £60, that the pursuer suffered loss and inconvenience in consequence of the injury to the horse amounting to £5, and that he incurred an account of £4, 0s. 6d. to the veterinary surgeon for attendance on the horse; (16) that the injury to the pursuer's horse was not caused by the fault or negligence of defender or of anyone for whom he was responsible."

The pursuer appealed to the Sheriff (WATT), who on 8th April 1922 pronounced the following interlocutor:—"Adheres to the findings of fact Nos. 1 to 15 inclusive in the interlocutor of the Sheriff-Substitute of 12th January 1922 complained of: *Quoad ultra* recals said interlocutor: Finds in law that the edict *Nautæ, caupones, stabularii* applies, and in fact that the injury to the pursuer's horse was not due to 'the act of God': Further finds that even assuming the said edict does not apply, the onus is on the defender to show that the injury was caused through no fault on his part, and that he has failed to discharge said onus: Therefore finds the defender liable to the pursuer in the sum of £69, 0s. 6d. sterling, for which sum grants decree in favour of the pursuer against the defender."

The defender appealed, and argued—The edict did not apply where, as here, a person had undertaken to accommodate a horse for a limited time. As a question of mere construction of the civil law the edict never applied to a stabler of this sort. The word "*stabularius*" was evidently used in the second sense given for it in Facciolati and Forcellini's Lexicon (*sub verbo*) "Qui mercede *homines eorumque* jumenta hospitio excipit," quoted in note by Denman, J., in *Nugent* v. *Smith*, 1875, 1 C.P.D. 19, at p. 29. Ulpian gave an exposition of the edict, in which he limits its applicability to two classes—(1) *nautæ*, (2) *caupones et stabularii, i.e.*, those who carry on a "cauponam vel stabulum." The word "vel" was used because there were two classes of inn. The word "stabulum" meant (1) a stable, (2) a tavern or hostelry with accommodation for man and beast—Lewis & Short's Latin Dict., *s.v. Stabulum;* Facciolati's Dict. The latter says *stabulum* affords also *lectum* and *lectum, i.e.*, it was a public inn. This construction was supported by Ducange—Glossarium Mediæ et Infimæ Latinitatis—who quoting *stabularius* as used in the parable of the good Samaritan adds—"Unde stabularius ibi idem qui caupo." The English decisions had dealt with this point, and their effect was that the applicability of the edict depended on whether the owner of the horse had made himself a guest of the inn or not. An innkeeper was bound to receive the horse with the guest if he had accommodation. The Innkeepers' Liability Act 1863 (26 and 27 Vict. cap. 41), sec. 1, excepting him in certain ways, did not apply to a horse and carriage. According to the law of England all that a livery stabler was bound to do in such circumstances was to exercise reasonable care—*Searle* v. *Laverick*, 1874, L.R., 9 Q B. 122, and at p. 126 top, *per* Blackburn, J.; *Barnard and Another* v. *How*, 1824, 1 C. & P. 366; *Dawson* v. *Chamney*, 1843, 1 A. & E. 164; Halsbury's Laws of England, vol. xvii, p. 319; Addison on Contract (11th ed.), p. 766; *Morgan* v. *Ravey*, 1861, 6 H. & W. 266. The case of *Dawson* was distinguished, but not effectively. With regard to how far the edict had been adopted in Scotland, text-books were decisive. It had been recognised from the time of Stair onwards that there was a very strict limitation of its applicability, and that it would not apply to such a case as the present—Stair, i, 13, 3; Ersk., iii, 1, 28; Bell's Comm. (M'Laren's ed.), iii, 1, 1, and iii, 1, 5, pp. 488 and 495; Bell's Prin., secs. 155 and 236; Ross Stewart on Horses, p. 115. This view was supported by early Scots decisions—*Hay* v. *Wordsworth*, February 12, 1801, F.C.; Mor., App. I, *Nautæ; M'Donell* v. *Ettles*, December 15, 1809, F.C.; *Hagart* v. *Inglis*, 1832, 10 S. 506; *Laing* v. *Darling*, 1850, 12 D. 1279. So far as the obligation rested on voluntary undertaking, it extended no further than reasonable and prudent care. In Scotland the persons liable to the special responsibility imposed by the edict were public servants holding themselves out as such and therefore compellable to undertake the charge. *Esto* that an exception to this test of compellability existed in the case of *nautæ*, the applicability of the edict to their case was based not on the common law of the country but on the law of nations. Even if the edict applied to stablekeepers, it did not cover loss or destruction of property—Stair, *cit. sup.* Further, there were three exceptions to the operation of the edict, viz., natural and inevitable accident, the act of God, or of the King's enemies—Bell's Prin., secs. 235 and 237, note (*a*); *M'Donell* v. *Ettles*. In the present case the defender had proved that he fell within the first of the three exceptions, because he had proved that the injury arose without human intervention and he took all the care he reasonably could—*Laing* v. *Darling*, *per* Lord Mackenzie on *diligentia media* at p. 1285. If the edict did not apply there was no liability at common law. There was at common law no onus on the defender—*Sutherland* v. *Hutton*, 1896, 23 R. 718, 33 S.L.R. 769; *Wilson* v. *Orr*, 1879, 7 R. 266, 17 S.L.R. 132; *M'Lean* v. *Warnock*, 1883, 10 R. 1052, 20 S.L.R. 712. The custodian was not liable for the accident apart from fault, and there was no presumption of fault. The onus might be different

in the case of total or partial loss apart from injury or in the case of hiring, because the hirer had put himself in the position of owner for the time being, and had therefore inferentially obliged himself to restore the article in the same condition—*Wilson* v. *Orr*. In any event on the proof the defender had discharged any onus. The test was ordinary care, and there was no omission of ordinary care—Bell's Prin., sec. 155.

Argued for the pursuer and respondent—The edict applied to the present case. So far as the edict was concerned, the primary meaning of *stabularius* was one who kept a stable, though it had also the secondary meaning of innkeeper—Monro's Translation of Justinian's Digest, vol. i, pp. 294, 295, quoting Ulpian on the edict; Sohm's Roman Private Law, pp. 411, 425; Hunter's Roman Law, p. 241; Leage, Roman Private Law, p. 340; Salkowski, Roman Private Law, &c., by Whitfield, p. 689; Buckland, Text Book of Roman Law, at p. 593; Girard, Manuel Élémentaire de Droit Romain, 3rd ed. p. 602; Lord Mackenzie's Roman Law, 7th ed. p. 222; Juridical Review, vol. iii, p. 306, The Edict *Nautæ, Caupones, Stabularii*, by Prof. Mackintosh, at pp. 309, 313, and 317; Ducange, Glossarium Mediæ et Infimæ Latinitatis, *s.v. Stabularius*, which was not adverse to this view; Green's Encyclopædia, vol viii, p. 496, art. *Nautæ, Caupones, Stabularii*. There was, further, no justification according to the law of Scotland for excluding stablers from the edict—Bankton i, 16, 1, at p. 379; Stair i, 9, 5, and i, 13, 3, and More's Notes to Stair, vol. i, p. 57; Ersk. Inst. iii, 1, 28; Ersk. Prin. (21st ed.), iii, 1, 11, at p. 303; Bell's Prin. (10th ed.), secs. 235, 236, and 237; Bell's Comm. iii, 1, 3, pp. 465 and 466, as to the reasons for the adoption of the edict in Scotland; Bell's Dict. pp. 477, 669, and 935; *Chisholm* v. *Fenton*, 1714, Mor. 9241. The reason for putting stablers on the same footing as the other classes was that things deposited in stables were exposed to the same risks from dishonesty, these places being open to all and sundry—Ersk. iii, 1, 28. Bell's Comm. iii, 1, 1, and iii, 1, 5, cited by the appellant, did not qualify the edict by reference to voluntary contract. The edict had been applied to classes of persons who were not compellable, *e.g.*, common lodging-house keepers who could select their guests. There was no trace of this distinction in Stair or Bankton. As to the cases of *Hagart* v. *Inglis*, 1832, 10 S. 506, and *Laing* v. *Darling*, 1850, 12 D. 1279, cited by the appellant, it was not clear that the edict could have been pleaded in them. *M'Donell* v. *Ettles*, December 15, 1809 F.C., *cit. sup.*, was not a decision on the extent of the edict. *Hay* v. *Wordsworth*, February 12, 1801, F.C., was distinct authority for the view that a person who owned stables not attached to a hotel might be under the edict. The English cases quoted *contra* were not in point, because the edict had never been made part of the law of England—*Nugent* v. *Smith*, 1876, 1 C.P.D. 423, *per* Cockburn, L.J., pp. 428 and 429. The case of *Searle* v. *Laverick*, 1874, L.R., 9 Q.B. 122, *cit. sup.*, was no authority for excluding stablers from the edict. If, however, a stabler was within the edict, he was not excused except on one of two grounds—the act of God or the King's enemies. The distinction which the appellant sought to make on inevitable accident did not exist—Bell's Prin. 235; Ersk. iii, 1, 28. It was only possible to prove inevitable accident by showing how the accident happened, and if this were not proved the defender was liable—*Pyper* v. *Thomson*, 1843, 5 D. 498, *per* L.J.-C. Hope at p. 499. In other words, there was a presumption of negligence against the defender—*Finlay* v. *North British Railway Company*, 1870, 8 Macph. 959. The same principle applied in England—*Morgan* v. *Ravey*, 1861, 6 H. & W. 265. Even if the edict did not apply, the onus was on the defender, and unless he could establish that the accident happened without his fault he could not escape. In circumstances such as these a very slight degree of proof that he delivered the horse sound would be sufficient for the pursuer, and the onus would then shift to the defender—*Craig* v. *Glasgow Corporation*, 1919 S.C. (H.L.) 1, 56 S.L.R. 186; *M'Lean* v. *Warnock*, 1883, 10 R. 1052, and *per* L.P. Inglis at p. 1054, 20 S.L.R. 712; *Wilson* v. *Orr*, 1879, 7 R. 266, *per* L.J.-C. Moncreiff at p. 268, 17 S.L.R. 132; *Pullars* v. *Walker*, 1858, 20 D. 1238, and *per* Lord Wood at p. 1244 foot, and 1245 top, and *per* Lord Cowan at p. 1245; *Marquis* v. *Ritchie*, 1823, 2 S. 386; *Moes, Moliere, & Tromp* v. *Leith and Amsterdam Shipping Company*, 1867, 8 Macph. 988. The case of *Sutherland* v. *Hutton*, 1896, 23 R. 718, 33 S.L.R. 769, *cit. contra*, was distinguishable, because it was decided on special circumstances and special pleading. There was here breach of duty on the part of the defender in putting the horse into a double stall and failing to exercise supervision when there.

Lord Justice-Clerk—Though this case involves but a small sum of money, it raises questions of importance and difficulty, and to aid us in its decision we have had the advantage of an able and elaborate argument from the Bar. The action relates to the death of a horse, which the pursuer, a farmer, entrusted for some hours, in accordance with an existing arrangement, to the care of the defender, who is the lessee of a stable. The horse was delivered by the pursuer to the defender in a sound condition, and was restored to the pursuer in such a state that on the advice of a veterinary surgeon he was obliged to destroy it. The pursuer sues the defender for the value of the animal, amounting with certain dues to £69, 0s. 6d. The parties are agreed that if liability is established, that is the amount for which decree should pass. The Sheriff-Substitute decided the case in favour of the defender. The Sheriff on appeal reversed that judgment, and gave decree for the sum sued for. It is unnecessary that I should recapitulate the precise facts which were held proved, because the learned Judges and parties to the action are agreed that the first fifteen findings in fact of the Sheriff-Substitute correctly set them forth.

The first question which we have to decide is whether a stabler falls within the Prætor's edict "Nautæ, caupones, stabularii." The edict is in these terms—"Nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo." Its necessity arose from the opportunities for collusion between persons falling within the categories alluded to and their servants, guests, or others—opportunities which in the view then taken justified the imposition of a high standard of care upon them. No doubt the liability imposed is a stringent one, and accordingly the edict must be strictly construed. The defender maintained that while the edict unquestionably covered the case of an innkeeper who afforded accommodation to a guest and also to his horse, it did not apply to the case of a stabler who merely accommodated a horse. For that distinction there appears to be no warrant in the commentators upon Roman law whose works were cited to us, and with a detailed reference to which I think it unnecessary to trouble your Lordships. The dictionaries to which we were referred yield the same result. Curiously enough the question does not appear to have been expressly decided in any case which has hitherto come before the Scottish Courts. But after carefully considering the arguments adduced and surveying the authorities cited I own that I am unable to find in our law any warrant for the suggested discrimination. I am of opinion that stablers as such as well as innkeepers, according to the law of Scotland, fall within the ambit of the edict. The views of our institutional writers are I think clearly to this effect. I refer in particular to the following passages:—Bankton i, 16, p. 379; Stair i, 9, 5, p. 76, i, 13, 2 and 3, pp. 122-3; Ersk. Inst. iii, 1, 28; Bell's Comm. iii, 1, 5, pp. 498, 499 (5th ed.); Bell's Prin. p. 236; Ersk. Prin. iii, 1, 11, p. 203 (21st ed.), *cf.* also Bell's Dictionary, "Innkeeper," p. 534 (7th ed.). I am unable on a survey of these passages to adopt the view urged on us by the defender that our custom has not received the edict to the effect of including within its ambit *stabularii*, or that it applies only to travellers. Bankton, for example, in the passage cited *supra* says—"The edict was principally intended for the security of the necessaries that passengers and travellers have along with them for their journey or passage; but it likewise concerns . . . all manner of things which innkeepers, stablers, or masters of ships receive in the exercise of their respective callings or occupations." I will only add that the principle upon which the edict was applied to innkeepers appears to me to apply with equal force to stablers.

As regards case law in Scotland, *Hay* v. *Wordsworth*, Feb. 12, 1801, F.C. 496, Mor. App. 1, "Nautæ," suggests, if indeed it does not assume, that stablers are included within the edict. The defender referred to three cases in which he says that the edict was not pleaded, and in which he maintains it would have been pleaded if it had been thought that it had any application. These cases were—*Haggart*, 10 S. 506; *Laing*, 12 D. 1279; *Ettles*, December 15, 1809, 1 F.C. 460. The pursuer's counsel pointed out with regard to the first two cases that inasmuch as the horse was not said to have received an injury in the defender's stable it is not plain that the edict had any application. I may add that in *Laing's* case (12 D. 1279) the application of the edict seems to have been at least mooted, as Lord Mackenzie's opinion on p. 1285 clearly shows. With regard to the third case, the defender referred to a phrase in the judgment to the effect that the edict "applied exclusively to the profession of innkeepers." I cannot regard this phrase as meaning that the Court deliberately excluded stablers from the category. The question was not before them, and it is manifest that if the phrase be construed literally it would also exclude "nautæ," who are admittedly within the ambit of the edict. I cannot therefore read the cases decided in Scotland as in any way detracting from the clear and definite statements made by the institutional writers on the matter.

As regards cases decided in England they must be handled with care. Indeed I am disposed to think that they are irrelevant to the issue. For it is I think clear that the edict was not incorporated in the law of England in the same manner as it has been in the law of Scotland. The defender founds on an expression of Blackburn, J., in the case of *Searle* ((1874) 9 Q.B. 122, at p. 126) to the effect that the edict is confined to innkeepers and carriers. But that view is guarded by the statement that the matter is regulated by the "custom of England." A note by Denham, J., in the case of *Nugent* v. *Smith* (1 C.P.D. 19, at p. 29) was also referred to by the defender. The case related not to an innkeeper but to a common carrier, and while the note no doubt favours the defender's contention it relates only to the law of England. I arrive at the conclusion that in Scotland at any rate the edict applies to stablers as well as to innkeepers, and that accordingly the defender in this case falls within its scope.

Assuming, then, that the defender is within the ambit of the edict, *quid juris?* I think it is plain that he can only escape liability by proving that the injury to the horse confided to his care arose from inevitable accident or from the action of the King's enemies. The onus is, I think, on the defender to prove this. If so, I am clearly of opinion that he has failed to discharge it. Indeed, he has not made the attempt. It was suggested in argument by the defender that all he had to prove in order to escape liability was that he had taken all usual precautions. I cannot accept that view if for no other reason than that if it were sound the edict would confer no advantage whatever upon a depositor. It was faintly argued by the defender that the edict was confined to a case of loss and did not cover a case of damage. I consider the argument untenable and unsupported by authority. Accordingly I reach the conclusion that inasmuch as the edict applies to the defender, and inasmuch as he has not succeeded in proving, and has not even attempted to prove, that he falls within

the well-known exceptions to it, that he is liable to the pursuer in damages.

Even if I am wrong in holding that the edict applies to the defender, I am of opinion that he is liable to the pursuer in damages. Once it is proved—and indeed in this case it is admitted—that the horse was delivered sound to the defender, and was restored after it had been in his custody for some time in such a state that it had to be shot, I am of opinion that the onus is on the defender to show that the injury was sustained without fault on his part or on the part of those for whom he is responsible. The doctrine appears to be well established by the following cases:—*Marquis*, 2 S. 342; *Pullars*, 20 D. 1238; *Wilson*, 7 R. 266; *M'Lean*, 10 R. 1052. The defender suggested that a distinction existed between cases of hiring and cases of custody. But it is to be observed that in, for example, the case of *Wilson* Lord Gifford, whose opinion has, I think, a direct and indeed conclusive bearing upon this part of this case, bases his judgment on custody, not on hire. I am of opinion that the distinction suggested by the defender is not sound. The defender further suggested in argument that the case of *Sutherland* (23 R. 718) was inconsistent with this view. The decision, if I may respectfully say so, does not appear to me to be a satisfactory one, but I do not think it is inconsistent with those in the cases to which I have referred *supra*. *Sutherland* appears to have been a decision upon the pleadings. The pursuer undertook to prove fault; the Court were of opinion that he had not done so, and they accordingly held that his action failed. That that was the ground of judgment appears from the opinion of the Lord Justice-Clerk. As I observe that all the cases which I have mentioned above were cited in argument (the case of *M'Lean* being erroneously cited as *M'Laren*), and that they were neither doubted nor disapproved, I am confirmed in my interpretation of the judgment, and, indeed, the doctrine of *M'Lean's* case seems to be consonant with good sense and reason. The stabler alone knows or can know what happens to the horse. The owner who has surrendered the custody of the animal is not in a position to know. If the horse has been injured while in the custody of the stabler, it seems to be in accord with common-sense that he should be obliged to afford an explanation of the occurrence rather than that the depositor, who is at arm's length and without means of exact knowledge, should be remitted to prove fault. Assuming the law to be as I have stated it, I am clearly of opinion that the defender has not discharged the onus which lies upon him. He leaves the accident entirely unexplained. But inasmuch as it is proved that despite remonstrance the defender stabled two horses, including the pursuer's, in the same stall—a practice which several of the witnesses condemn—an explanation of the accident may not be far to seek. If he undertook responsibility for this course, I think that an exceptional degree of supervision was required from his ostler, and though that official, who unfortunately died before the date of the proof, is not alleged to have been incompetent, I am of opinion that the evidence led by the defender falls far short of establishing that degree of supervision which the circumstances demanded of him. On this branch of the case I am well content with the judgment of the Sheriff, and I do not desire to supplement further what he has said.

On the whole matter I reach the conclusion that whether the edict applies or whether it does not apply, the defender is liable to the pursuer for the sum sued for, and that therefore the judgment of the Sheriff falls to be affirmed.

LORD HUNTER—The principal question argued to us in this appeal was as to whether or not the provisions of the Roman edict *Nautæ, caupones, stabularii*, as to liability apply by the law of Scotland to livery stable keepers. The Sheriff-Substitute held that they did not, but the Sheriff took a different view.

In reaching the conclusion which he did the Sheriff-Substitute appears to have been largely influenced by the opinion of Mr J. Blackburn in the case of *Searle* v. *Laverick*, (1874) L.R., 9 Q.B. 122. The following passage from the opinion of that learned Judge may be cited as containing a succinct and accurate account of the state of English law on the matter. At p. 126 he says—"This kind of bailment (*i.e.*, of a livery stable keeper) is included in what in the celebrated case of *Coggs* v. *Bernard* (2 Ld. Raym. at p. 917-918) Lord Holt classes as the fifth sort, viz., 'a delivery to carry or otherwise manage for a reward to be paid to the bailee,' as to which, says Lord Holt, 'those cases are of two sorts—either a delivery to one that exercises a public employment or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events.' The language of Lord Holt is general and applies this to all that exercise 'a public employment,' and in the Prætor's edict, *Nautæ, caupones, et stabularii*, which is generally considered the origin of this head of the law, stablemen are expressly named—see Dig. Lib., 4, tit. 9, 1, 1. But we" (he is expressing the opinion of JJ. Mellor, Lush, and himself) "take it to be established law that by the custom of England this extreme liability, making the bailee an insurer, is confined to carriers and innkeepers, and that livery stable keepers and warehousemen come within what Lord Holt calls the second sort, as to which he says—'The second sort are bailees, factors, and such like.' As to this sort he says the bailee is only bound to take reasonable care, and '*the true reason of the case is it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it.* But it is allowed in the other cases' (*i.e.*, the carrier and innkeeper) 'by reason of the necessity of the thing.'"

This opinion proceeds on the assumption that stablemen were under the edict, but that by the custom of England the liability imposed upon them by English law was of a less exacting character. In the case of

Nugent v. *Smith* ((1876) 1 C.P.D. 423) Cockburn, C.J., explained that it was a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law. Expressions of opinion by English judges, however authoritative upon English law, will not therefore assist in solving the question as far as Scots law is concerned if the provisions of the edict were adopted as part of the law of Scotland and if the terms of the edict extend to stablemen.

I always understood that the provisions of the edict had been adopted in Scotland, and this view was confirmed by the full citation from institutional writers which we received in the course of a very able and interesting argument submitted to us by counsel on both sides. It is not necessary to refer to these authorities in detail. In Ersk. Inst., iii, 1, 28, occurs this passage—"There are several special kinds of deposit which deserve our particular notice, in so far as they differ in their nature from the common contract now explained. By an edict of the Roman Prætor, called *Nautæ, caupones, stabularii*, which is with some variations adopted into the law of Scotland, an obligation is induced by a traveller's entering into an inn, ship, or stable and there depositing his goods or putting up his horses, by which the innkeeper, shipmaster, or stabler is bound to preserve for the owner whatever is entrusted to his care. This obligation is formed by the law itself, for the bare act of receiving goods lays them under it without covenant. It is limited to what is done in the ship, inn, or stable."

The appellant maintained that by the law of Rome the edict did not apply to stablers, but only to innkeepers who keep stables for the accommodation of their guests' horses. The word "*stabulum*" was used in two different senses—first, as a standing-place which serves as an abode or shelter for man or beast, and second, as an inn or public-house for the temporary accommodation of travellers. In the latter sense the word is said to have referred to an inn for the accommodation of the horse as well as the rider as distinguished from *caupona*, which was intended for the accommodation of lodgers who travelled on foot. *Stabularius* meant either a livery stable keeper who keeps a set of stables and takes in horses to bait, or an innkeeper or master of a *stabulum* which afforded accommodation for man and beast. Mr Justice Denman in *Nugent* v. *Smith*, 1 C.P.D. 19, has a note at the foot of p. 29 to the following effect:—"The word '*stabularii*' here (*i.e.*, in the edict) is evidently used in the second sense given for it in Facciolati and Forcellini's Lexicon (*sub verbo*)—'Qui mercede *homines eorumque* jumenta hospitio excipit.' Passages from Ulpian, Seneca, and Apuleius, clearly showing that the word was used to describe a person almost identical in character with a modern innkeeper, are cited by the authors, who add to the above definition the remark—'Nam stabulum tum ad jumenta pertinet, tum ad homines.' There is no doubt that the word *stabularii* had the two meanings ascribed to it, but I have not been able to find justification for restricting the sense in which it is used in the edict to that of an innkeeper with stabling accommodation. In the passages from Ulpian and other learned jurisconsults who commented upon the edict, referred to in an article by Professor Macintosh on the edict in the Juridical Review, 1891, vol. iii, p. 306, there does not appear to be any suggestion that *stabularii* was used in the above restricted sense. The wealthier citizens of Rome, who travelled in carriages drawn by horses, frequently enjoyed private hospitality while they left their carriages and horses in the custody of a *stabularius*.

We were not referred to any decision in Scotland where the point as to a livery stable keeper being under the edict was actually decided. In the cases of *Hagart* v. *Inglis* (10 S. 506) and *Laing* v. *Darling* (12 D. 1279) the question hardly arose, as although the point in each case was as to the liability of a stabler, in neither case had the injury to the horses in respect of which the defender was sought to be made liable been sustained in the stable. In the latter case Lord Mackenzie said—"It does not matter whether the case comes under the edict *Nautæ, caupones*, &c., or not. I think there was a want of due care and attention in not obtaining security against an obvious and already experienced danger." In the earlier case of *Hay* v. *Wordsworth*, M. App., *Nautæ, caupones, stabularii*, No. 1, however, it was assumed both by the Bar and the Bench that the edict applied to stablers. In that case a mare had been sent to a stabler and horsebreaker to be broken. It was attacked while in charge of defender's servant by a strange dog which lay concealed near the stable, broke away, and was injured. The only plea taken in defence was that the horse had been put under the defender's care in his capacity of horse-breaker and not as a stabler. The defender was held liable, the ground of liability apparently being that "a majority of the Court thought there was at least *culpa levissima* on the part of the defender, which in his character of a stabler and horse-breaker ought to subject him in the loss both on the edict and at common law. He ought to have taken good care that his stables should not be exposed to such accidents."

In cases to which the edict applies the defender is liable unless he shows that the loss of or injury to the thing arose from a *damnum fatale* (*i.e.*, the act of God) or the act of the King's enemies. For the appellant it was maintained that there was a third exception which he designated natural accidents.

This argument was founded upon the passage in Bell's Principles, section 235, where the learned author, referring to cases under the edict, says—"The rule is that common carriers, innkeepers, and stablers are responsible for the loss of things committed to their charge, although no neglect can be proved, if such loss do not arise from natural and inevitable accident, the act of God, or of the King's enemies." I do not think that it matters whether the exceptions to liability are treated under

two or three categories. It is generally recognised that the exception act of God, as used in Roman and Scots law with reference to the edict, has a wider significance than that given to it in other branches of law. Lord Chancellor Westbury in *Tennant* v. *Earl of Glasgow* (2 Macph. (H.L.) 22, at p. 27) explained that what are denominated in the law of Scotland *damnum fatale* occurrences relate to circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility, and which when they do occur therefore are calamities that do not involve the obligation of paying for the consequences that may result from them. This interpretation of *damnum fatale* has not been accepted as determining whether a case comes within the exception to the edict or not. In *M'Donell* v. *Ettles* (15th December 1809, F.C) it was held that accidental fire in the stables of an inn causing injury to a horse which had been lodged there formed an exception to the edict. Cockburn, C.J., in *Nugent* v. *Smith* (1 C.P.D., at p. 429) said—"The Roman law made no distinction between inevitable accident arising from what in our law is termed the 'act of God,' and inevitable accident arising from other causes, but, on the contrary, afforded immunity to the carrier, without distinction, whenever the loss resulted from *casus fortuitus* or as it is also called, '*damnum fatale*,' or '*vis major*'—unforeseen and unavoidable accident." In the same case James, L.J., said—"The 'act of God' is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him." Accepting this view as sound (and I think it is) of the exception "act of God" within the meaning of the edict as interpreted in Rome and Scotland, the appellant has, in my opinion, entirely failed to bring himself within the exception. He has not given any explanation of the circumstance that the pursuer's horse which was entrusted to him in a sound condition left that custody suffering from injuries that necessitated its being shot.

In this view of the case it is unnecessary to consider whether the Sheriff was also right in finding that on the assumption that the edict did not apply the defender would still be liable. My own opinion is that a proper application of the principle recognised in *Marquis* v. *Ritchie* (2 S. 342), *Pullars* v. *Walker* (20 D. 1238), *Wilson* v. *Orr* (7 R. 266), and *M'Lean* v. *Warnock* (10 R. 1052, Lord Shand, at 1055) to the proved facts of this case justify the conclusion of the Sheriff.

LORD ANDERSON—This important and interesting case has been carefully considered by the Sheriffs, and we had the advantage of a thorough and able argument on the appeal. I have reached a conclusion adverse to the defender with a certain measure of regret, as I do not think that he is proved to have been blameworthy in connection with the custody of the horse, and liability only attaches to him because of the stringent law of the edict. But our duty is to declare what the law is, not what it ought to be; and if the edict applies, the the defender must be held responsible however harsh that law may seem to be in a case like the present.

It is said that the law of Scotland has *adopted* the edict, but perhaps that is not quite an accurate mode of expressing what has been done. If a legal system like ours desires to borrow from the law of another country this may be done in one of two ways—(1) By formal and express adoption by means of an Act of Parliament. A noted example of this mode is found in the Act 1567, cap. 14, which borrows the ancient Jewish law embodied in the 18th chapter of Leviticus· (2) The other method is by the establishment of customary law similar to that which is copied. That is the method which has been followed with reference to the edict in this country.

Where formal adoption by statute takes place it will be necessary to ascertain exactly what the law was which has been assimilated. Had the edict been adopted in this way it would have been necessary to determine what the law of Rome was as set forth in the edict, and in particular what was the signification in that law of the term *stabularii*. But where the second method of appropriation is followed, the system which borrows may expand or circumscribe what is borrowed. Thus the law of England, if it has copied the edict, does not exact the extreme decree of diligence prescribed by the edict from a livery stable keeper—*Searle*, (1874) 43 L.J., Q.B. 43. Again, both in England and Scotland the scope of the edict has been expanded so as to embrace public carriers by land as well as by water. These considerations, in my opinion, make the question purely academic as to what was the meaning of the term *stabularii* in the law of Rome. Our business is to ascertain not what was the law of Rome but what is the law of Scotland. I have no hesitation, however, in stating on this point that in my opinion the term *stabularii* meant, or at all events included, livery stable keepers. The epoch of the Prætorian edict (367 B.C. till the reign of Hadrian, when the whole edict was revised and consolidated by Salvius Julianus) included the period at the latter end of the Republic and beginning of the Empire, when the wealth and luxury of Rome had reached their zenith. I have no doubt that livery stables unassociated with inns then existed, and that the Prætor designed to apply to the keepers of these the provisions of the edict. There were in such establishments opportunities for dishonesty equal to those which offered themselves to carriers and innkeepers.

But it is unnecessary to pursue this topic further, as the point to be ascertained is whether the law of Scotland subjects livery stable keepers to the observance of the

exact diligence prescribed by the edict. Has, then, the customary law of Scotland applied the edict to those who keep livery stables unassociated with an inn?

The evidence that an alleged custom is part of our common law is to be derived (1) from the institutional treatises on the law of Scotland, and (2) from the decisions of the Court which declare the common law. Of our institutional writers, Stair, Bankton, Erskine, and Bell have each something to say regarding the edict. Stair (Inst. i, xiii, 3, and i, ix, 5) seems to regard the edict as having applied by the civil law to the master of a stable as well as of an inn, but he expresses no opinion as to the law of Scotland on this point. In More's note H (p. 57, vol. i.) stablers as well as innkeepers are held to fall by our law within the scope of the edict. Bankton (Inst. i, xvi, 1) states that the three classes in Scotland affected by the principles of the edict are masters and owners of ships, innkeepers, and stablers, the latter being liable if they "suffer" horses and cattle to be brought into the stables. Erskine (Inst. iii, i, 28) states that the law of Scotland applies the provisions of the edict to "an inn, ship, or stable," and imposes the edictal obligations on "the innkeeper, shipmaster, or stabler." Bell (Com. iii, 3, 5, vol. i., p. 495, M'Laren's ed.) says—"As the persons comprehended within this edict, shipmasters and carriers, innkeepers and stablers, have frequent opportunities of associating themselves or their servants with robbers, thieves, and pilferers of all descriptions, while the secret connection often cannot be detected, and as even their negligence cannot always be proved so as to ground a claim, the safety of the public is to be secured only by presuming everything against those persons, and taking nothing as an excuse or justification for the loss or injury to goods received by them but evidence of a natural and inevitable accident." Again, when dealing with the "Persons liable to this responsibility" (pp. 496-499) he refers to "Innkeepers and Stablers' (p. 498) under distinct heads, his statement as to stablers being that they "are liable not only for the horses placed under their charge, or that of their hostlers or servants, but also for the horse furniture, etc., which is brought into their stables" (p. 499). In his Principles Mr Bell (section 235) enumerates the three classes to which the edict is applied by the law of Scotland as "common carriers, innkeepers, and stablers" and again (section 236) he states that amongst persons who are subject to the rule are "innkeepers, vintners, and stablers." The institutional writers would thus seem to support the view contended for by the pursuer's counsel.

When the decided cases are examined, the matter seems to be put beyond doubt and the defender's contention negatived. That contention was that both by the laws of Rome and Scotland the responsibility of the edict only applies in the case where a guest in an inn has placed his horse in the stable of the inn. There are, as it seems to me, three decisions which are hostile to this contention.

The first is that of *Chisholm* (M. 9241), in which a stabler was found liable under the edict for a traveller's money stolen out of his valise which was upon his horse in the stable. It is true that the defender was also an innkeeper, but the pursuer was not a guest in the inn. He had merely made a temporary stoppage for the purpose of baiting his horse. The defender, indeed, founded on this circumstance, and argued that "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." But on a reclaiming petition 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."

The next case is that of *Hay*, February 13, 1801, F.C., and M. App. 1, *s.v. Nautæ, caupones, stabularii.* This decision is exactly in point, as there was no inn associated with the stable. The action was based on the principle of the edict, and the stabler was found liable for the value of the injured mare both on the edict and at common law. The Sheriff has found the interlocutor in *Hay's* case puzzling because of its reference to *culpa lévissima* of the defender, but if the pleadings are carefully examined the judgment is quite intelligible. The defender in answer to the case under the edict pleads *damnum fatale* — to wit, the attack of the strange dog. But this was only one of the causes of the mare's injury; the other was the presence of benches in the area which had to be traversed by the mare, and for this the defender was held responsible. It is not enough in reply to an action based on the edict to establish that an act of God occurred; a defender must also show that the consequences of such act could not have been averted by the exercise of due care on his part. All this is explained in the judgment of Cockburn, C.-J., in *Nugent*, 1 C.P.D. 423, at pp. 435 and 436.

The third case is that of *M'Donell*, December 15, 1809, F.C. It does not appear from the report of the case whether or not the pursuer was a guest in the defenders' inn, which would make it seem as if this circumstance were immaterial. The defenders were sued as stablers under the edict in respect of the loss of three of the pursuer's horses, which had been put up in the defenders' stables and had been destroyed by a fire which burnt down the stables. The defenders pleaded that the fire was a *damnum fatale*, and this defence was sustained by the Court. The authorities I have referred to seem to me to establish the proposition that the principle of the edict applied to the defender.

It was maintained, however, for the defender that even if the edict did apply, the defender had discharged the burden of proof which is thereby laid upon him. In an action of this sort, as in every action, a pursuer must prove his case. But in an action based on deposit a pursuer proves

his case if he establishes (1) that an article was deposited; (2) that it was lost or injured while in the custody of the depositary; and (3) the extent to which the pursuer has thereby been damnified. Having proved these matters, a presumption of negligence is established which shifts the *onus probandi*, and if the principle of the edict applies, a defender can only rebut this presumption by showing that the loss occurred (*a*) by the pursuer's own fault, (*b*) by the act of God, or (*c*) by the act of the King's enemies. A defender must also show, as I have pointed out, that the consequences of the act of God founded on could not have been averted by the exercise of care on his part. In every case where the act of God is pleaded in defence it is essential that the defender should prove how the accident occurred as a first step in his task of rebutting the presumption. Now in the present case the defender has failed to take that first step, for the proof leaves us entirely in the dark as to what caused the injury to the horse, or what led it to injure itself. The defender has therefore failed to establish the defence of *damnum fatale*.

The only other point taken by the defender's counsel on the edict was that it did not apply to loss as the result of accident. This contention is not well founded, as both the law of Rome and that of Scotland make those to whom the edict applies responsible for loss as the result of accident as well as by theft. As to the law of Rome, Gaius puts the matter quite conclusively—D. iv, 9, 5—"Quæcumque de furto diximus, eadem et de damno debent intellegi: non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recipere videatur." As to the law of Scotland, Erskine (Inst. iii, 1, 28) makes it plain that damage as well as loss by theft is covered by the provisions of the edict, and Bell (Comm. vol. i, p. 499) says expressly that there is responsibility if the deposited goods have perished "or have suffered injury by inevitable accident." The case of *Hay* is a direct authority to the same effect.

If the principle of the edict applies, as in my opinion it does, this is a sufficient ground for the decision of the case in favour of the pursuer, and it is therefore unnecessary to determine whether or not the defender is also liable at common law. I have already indicated, however, that the impression I have formed on this part of the case is that the defender has proved that he exercised due care in the discharge of his duty as custodier of the horse.

LORD ORMIDALE did not hear the case.

The Court pronounced this interlocutor—

"Dismiss the appeal: Recal the finding of the Sheriff in his interlocutor of 8th April 1922 that 'even assuming the said edict does not apply, the onus is on the defenders to show that the injury was caused through no fault on his part and that he has failed to discharge said onus,' in lieu of which find that inasmuch as the horse was delivered to the defender in a sound condition, and was returned to the pursuer by him in such a condition that it had to be shot, an onus lay upon the defender to show that the injuries to the horse were not due to his fault or that of anyone for whom he is responsible, and find that he has failed to discharge said onus: *Quoad ultra* find in fact and in law in terms of the findings in said interlocutor: Of new grant decree in favour of pursuer against defender for the sum of £69, 0s. 6d.'

Counsel for the Pursuer and Respondent—Wark, K.C. — Scott. Agents—Scott & Glover, W.S.

Counsel for the Defender and Appellant—A. M. Mackay, K.C.—J. R. Dickson. Agent—Arthur F. Frazer, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, December 2.

(Before the Lord Justice-General, Lord Cullen, and Lord Sands.)

[Police Court at Glasgow.

HEMPHILL *v.* SMITH.

Justiciary Cases — Statutory Offence — Using a Furnace so that Smoke Issues therefrom—Charge of Using a Furnace so that Smoke of "Unnecessary Density" Issued therefrom—Relevancy—Vicarious Responsibility—Glasgow Police (Further Powers) Act 1892 (55 *and* 56 *Vict. cap. clxv*), *sec.* 31.

Justiciary Cases — Review — Suspension — Irrelevant Complaint—Accused not Misled or Prejudiced in his Defence—Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65), *sec.* 75.

The Glasgow Police (Further Powers) Act 1892 (55 and 56 Vict. cap. clxv) enacts—Section 31—"Every person who so uses, causes, permits, or suffers to be used, any furnace or fire within the city (except a household fire) as that smoke issues therefrom, unless he proves that he has used the best practicable means for preventing such smoke, and has carefully attended to and managed such furnace or fire so as to prevent as far as possible smoke issuing therefrom, shall be liable for the first offence to a penalty not exceeding forty shillings, and for a second or any subsequent offence if committed within twelve months of the immediately previous conviction, to a penalty not exceeding five pounds."

The owner of a steam waggon having a furnace connected with it was charged with having caused the furnace to be used in one of the streets of Glasgow in such a way that smoke of unnecessary density issued from it in contravention of section 31 of the Glasgow Police (Further Powers) Act 1892. It was proved that on the occasion complained of the waggon was in charge of the