APPENDIX.

PART I.

NAUTÆ, CAUPONES, STABULARII.

1801. *February* 13. JAMES HAY *against* SAMUEL WORDSWORTH.

No. 1.
A stabler and horse-breaker found liable for the value of a mare which died of an accident while under his care.

JAMES HAY sent a mare to be broken by Samuel Wordsworth, stabler and horse-breaker in Edinburgh. Wordsworth's stables formed a part of the Circus, and the only entry to them was through the area or circular part of the building. He was lessee of the whole of it, but, by agreement with the proprietors, he was, on Sunday's, to allow the use of the area, and certain other parts of the house, to a dissenting congregation, for the purpose of divine service. On this account the area was filled with benches on Sundays, and the entry to the stables narrowed to a passage of between six and eight feet wide.

While a servant of Wordsworth's was riding Mr. Hay's mare, on a Sunday, through this passage, with the intention of giving her an airing, she was attacked by a strange dog which lay concealed among the benches; upon which the mare broke from the servant, leaped among the benches, and was so severely hurt, that she died, notwithstanding that all due pains were taken by Wordsworth for her recovery.

Mr. Hay brought an action against Wordsworth, concluding for payment of £50, as the value of the mare. The action was founded upon the principle of the edict, *Nautæ, caupones, stabularii; D. Lib.* 4. *Tit.* 9.

In defence, Mr. Wordsworth.

Pleaded: 1*st*, It was as a horse-breaker, not as a stabler, that the mare was put under his care. But the edict relates only to the latter description of persons; *L.* 3. §. 2. *D. h. t.* Voet. § 7. *h. t.* The reason of the distinction is indeed obvious. The risks to which a stabler is exposed are well known, and easily defined. But a young horse before he is trained is exposed to a variety of accidents,

No. 1. which the utmost vigilance of the horse-breaker cannot provide against, and to the risk of which, when there is no *culpa* on his part, he ought not to be subjected.

2dly, The edict contains an exception of accidents, arising *vi majori*, or *damno fatali*. Now, the accident in the present instance falls under the description of a *damnum fatale*, for which, even if the defender fell under the edict in his character of a horse-breaker, he would not be responsible.

Answered: *1st*, It is of no moment for what purpose the mare was placed in the defender's stables. He received hire for keeping her; and his stable is a public one. These facts are not denied, and they bring him under the very words of the edict.

2dly, The *damna fatalia* alluded to in the edict, are misfortunes arising from lightning, shipwreck, and the like. No case which great watchfulness on the part of the *caupo* or *stabularius* might have prevented, was regarded as *damnum fatale; L.* 1. § 1. *D. h. t.* In the present instance, if the defender chose to permit benches to be so placed as to narrow the passage to his stables, and thereby incur the danger of accidents to the horses under his care, he must be answerable for the consequences.

The Lord Ordinary found "the defence relevant, that the mare, in being "led from the stable through the Circus, in order to go out to exercise, was "attacked by a strange dog, whereupon she overthrew the groom, and leaped "in among the benches, and thence received a wound, of which, notwithstand-"ing all due care, she died; this being a misfortune, *quod cuivis patrifamilias*, "*etiam diligentissimo, accidere potest; L.* 11. *De Minor, D.* and allowed a proof "thereof to the defender, and to the pursuer a conjunct probation."

On advising a reclaiming petition for the pursuer against this judgment, with answers, several Judges were of the same opinion with the Lord Ordinary, and on the same ground. But a majority of the Court thought there was at least *culpa levissima* on the part of the defender, which, in his characters 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.

The Lords altered the Lord Ordinary's interlocutor, and found the defender liable for the value of the mare.

Lord Ordinary, *Meadowbank.* Act. *Jo. Clerk.* Alt. *H. Erskine.* Clerk, *Menzies.*

R. D. *Fac. Coll. No.* 219. *p.* 496.