

THE MEANING OF THE TERM “STABULARIUS” IN SOUTH AFRICAN LAW

1 Introduction

What does “*stabularius*” mean? In *Swart v Shaw t/a Shaw Racing Stables* (1996 (1) SA 202 (C)), the court had to determine the meaning of the term “*stabularius*” and how this term, originally found in Roman law as set out in the Praetorian Edict (D 4 9 0), is to be applied in South African law. The Edict states that there is an undertaking by “sea-carrier, inn-keeper and a stable-keeper that their customers’ goods would be safe while on their ship or their premises” (Zimmermann *Law of Obligations: Roman Foundations of the Civilian Tradition* (1992) 515). The implementation of this principle was further elaborated upon in Roman-Dutch law, which increased the ambit of the defence against the Edict as compared to that which was applied previously. However, the Edict itself was still dogmatically applied. The court in *Swart v Shaw* challenged the prevailing interpretation of “*stabularius*” as “stable-keeper”, holding that it should not be interpreted as such but that it should rather mean an “ignoble inn-keeper” (*Swart v Shaw supra* 204D–E). Using *Swart v Shaw* as a basis for the discussion, this note will firstly assess whether this interpretation is correct and, secondly, it will determine what consequences will flow from such interpretation. The question is then posed whether it is fair to apply the Edict to certain situations but not to others. This ultimately determines whether, and to what extent, the Edict is still relevant in South Africa.

2 Legal issues in *Swart v Shaw*

The following facts founded the legal dispute in the *Swart v Shaw* case. The appellant was a racehorse owner and the respondent was a racehorse trainer. The two parties had concluded an oral agreement with each other, entrusting the racehorse to the racehorse trainer in 1990. The contract entailed that the trainer was required to train the horse and care for it. The horse died in 1992 while in the care of the respondent (203C–E). The respondent then instituted action against the appellant in the magistrate’s court, to claim fees for the training of the horse (203E). A counter-claim was launched by the appellant for damages suffered as a result of the death of the horse (203E–F). By agreement of the parties, in terms of which the appellant accepted liability in an agreed amount, the only matter before the court was the claim in reconvention (203F–G). The court *a quo* held against the appellant. However, this decision was appealed on the basis that the court *a quo* had erred in its use of the Praetorian Edict, and that the appellant constituted a bailee for reward under a contract of *depositum*

(203H). The latter contention was unsuccessful, and will not be discussed further, as it falls outside the ambit of this note.

The matter was heard in the Cape Provincial Division, where the court was tasked with the interpretation of the Edict, and more precisely, with the meaning of the term “*stabularius*”. The Praetorian Edict is described by the court as an action which is granted against “sea-carriers, inn-keepers and *stabularii*, if they failed to restore to any person any property of which they had undertaken the safekeeping” (203I–J). The court further acknowledged that the only three relationships to which Roman law applied this strict liability under the Edict were to the sea-carriers (*nautae*), inn-keepers (*caupones*) and *stabularii* (stable-keepers) (203I–J). Hodes AJ notes (204A–B) that the term “*stabularius*” is translated as “stable-keeper” in both Scott’s translation of the Digest (Justinian *Digesta* (tr Scott *The Civil Law* (1932)), and Gane’s translation of Voet’s commentary on the Digest (Voet *Commentarius ad Pandectas* (tr Gane *The Selective Voet being the commentary on the Pandects by Johannes Voet* (1955), along with the cases of *Davis v Lockstone* 1921 AD 153 157; *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) 761G; and *Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd* 1995 (3) SA 42 (A) 46C.

The court agreed with the argument made by the respondent that this translation is “loose and inaccurate” (204B), instead referring to *Cassell’s Latin Dictionary* which defines a “*stabularius*” as a “low inn-keeper” (Simpson *Cassell’s Latin Dictionary* (1977) 568). *Cassell’s Latin Dictionary* also defines a “*stabulum*” as “standing room quarters ... especially in a disparaging sense, a pothouse, haunt, brothel ... term of abuse” (Simpson *Cassell’s Latin Dictionary* 568). Furthermore, based on this translation, Hodes AJ stated that a “*stabularius*” is not technically a stable-keeper but rather a person who runs an inn (204C). The court, in this instance, decided that the translation of Gane is also adequate which states that “*stabula*” are “nothing but shelters for horses set apart for public relays, or, to use the expression of today, for the posts” (204D; and citing Gane *The Selective Voet* 765). Hodes AJ then, to a certain extent, combines the definition given in *Cassell’s Latin Dictionary* and that given by Gane, concluding that a “*stabulum*” is a “low-class establishment subject to disparaging remarks where the stable was in effect only a shelter for horses overnight” (204E). The stated rationale for choosing this definition is that it is more consistent with the purpose of the Edict, which is to protect travellers from unscrupulous persons in these industries (204E–H). Hodes AJ stated that it is only justifiable to allow the strict liability of the Edict to apply to situations where a person stays at an inn which also has a shelter for his animals (204G–H).

Noting the reception of the Edict into Roman-Dutch law and South African law, the court held that no court or writer extends the meaning of “*stabularius*” beyond the original meaning as found in Roman law (204J–205C). Furthermore, the court acknowledges the unique situation created by an agreement for safekeeping between a racehorse owner and racehorse trainer. This is most notable in the rigorous training which the horse is put through (205H). Therefore, the issue before the court was whether it is appropriate to extend the Edict to include racehorse training (205D). In the

court's determination of this question, it develops its interpretation of the Edict, holding that the public relay was a "low-class establishment subject to disparaging comments where the stable was in effect only a shelter for horses overnight" (205D–E). This is contrasted to the highly sophisticated nature of a horse-training establishment. Moreover, the Judge noted that pursuits such as this are very distant to the pursuits of the ignoble inn-keeper of Roman times (205F). The respondent further argued that there are separate horse-farms which take care of horses and, therefore, the horse-training establishment could not be seen as undertaking such a duty (205G).

The court held that a racehorse trainer does not fall within the meaning of "*stabularius*" for the following reasons (205H–I):

"(1) The owner of a horse who delivers his or her horse for training and racing submits the horse to a highly stressful, risky and intense routine in which injuries are inherent. Clearly any number of causes may result in the breakdown of a horse. It is wholly inappropriate that the exceptionally onerous burden under *custodia* liability should attach to such a trainer.

(2) The mischief at which the Edict was aimed, namely the conspiracy between inn-keepers and thieves, is completely inapposite in the present context."

The court then turns to the question whether the Edict should be extended to include racehorse trainers for modern purposes. In this instance the court acknowledges the Roman-Dutch writer, Van Bijkershoek, and states that because this is a particularly onerous action it would not be fair to implement the Edict as it is (206B–C). The Court, furthermore, referred to the reluctance of previous decisions, such as *Essa v Divaris*, to extend the meaning of these terms beyond their basic meaning (206C–E).

Thus the court in *Swart v Shaw* defines a "*stabularius*" as an ignoble inn-keeper and on the basis of fairness, asks whether it is appropriate to extend the meaning in South Africa (206C–D). The correctness of this definition, and whether it was correct to limit the interpretation in situations such as this will be assessed below.

3 Roman Law

"*Ait praetor: 'nautae cauponae stabularii quod cuiusque saluum fore receperint nisi restituent, in eos iudicium dabo'*" (D 4 9 1) (The *Praetor* states, "Sailors, inn-keepers, and stable-keepers do receive travellers' property for safekeeping. However, if this property is not returned to the owners, I shall grant an order against them [the sailor, inn-keeper, or stable-keeper].")

This is referred to as the Praetorian Edict *de nautis, cauponibus, et stabulariis*. The Edict originally served to protect vulnerable travellers who had to put their faith in sailors, inn-keepers, and stable-keepers. Zimmermann, referring to the Edict as the *receptum nautarum, cauponum, et stabulariorum*, states that it involved an undertaking by sailors, inn-keepers and stable-keepers to ensure that the customers' possessions would be kept safe (Zimmermann *Law of Obligations* 515). This means that the "*nauta*", "*caupo*" or "*stabularius*" would be held liable for loss due to damage, loss or destruction even if they are not at fault (*ibid*). It is important

to note that the liability of these groups does not depend on them being negligent (Tait and Vrancken “The Fire the Burglary and the Praetorian Edict *de Nautis, Cauponibus, et Stabulariis*” 2010 31(1) *Obiter* 167 169). The purpose of the Edict is to protect travellers against “the evil of unscrupulous inn-keepers colluding with thieves to steal from the guests of the inn” (ibid 168). The Edict states that “*necesse est plerumque eorum fidem sequi et res custodiam eorum committere*” (it is necessary to place faith in many people of this kind, and to commit one’s possessions to their custody) because “*nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi, cum ne nunc quidem abstineant huiusmodi fraudibus.*” (If the Edict was not made, opportunity may present itself for those who receive the goods to liaise with thieves, since even now they do not abstain from such fraudulent acts) (D 4 9 1 1). As noted by Tait and Vrancken, a common trait relating to these three groups of people is that they are all in a position which could be abused (Tait and Vrancken 2010 31(1) *Obiter* 168). This, therefore, is a necessary protection required for travellers who have to depend on the “good faith and honesty” of one of these groups of people (Tait and Vrancken 2010 31(1) *Obiter* 168). The Praetor indirectly justifies the Edict on the same basis, stating that it is not an unfair burden that is placed on this group of persons because they are entitled to refuse any customer and that it is necessary because of the purpose of the Edict (D 4 9 1 1).

The Edict was enforced through the *actio de recepto*, an action granted in addition to other civil actions based on the underlying contracts, such as stabling (Zimmermann *Law of Obligations* 517). Such action is therefore of a special form of action which arises *quasi ex contractu* premised upon the duty based on having being entrusted with another’s goods for safekeeping (Tait and Vrancken 2010 31(1) *Obiter* 169; and *Davis v Lockstone* 1921 AD 153 158).

The Edict defines a “*nauta*” as any person who captains the ship and states that the Praetor only holds the person who exercises control over the ship to be liable (D 4 9 1 2). Furthermore, the owner of the ship ought to be liable for any losses which come as a result of those who load and unload the vessel, because the owner ought to take responsibility for those who he employs in such crucial positions (D 4 9 1 2). Moreover, the Edict makes no reference to whether this applies to owners of rafts and boats. However, Labeo holds that it behoves the law to include these two categories in its definition (D 4 9 3 1). Although this definition does not directly link to the issues which are discussed in the case of *Swart v Shaw*, it does give a clear indication of how the terms ought to be interpreted according to the Praetor and Labeo. A “*stabularius*” and a “*caupo*” are defined as those who exercise control over a “*stabulum*” or a “*caupona*” (D 4 9 1 5). The *Lewis and Short Latin Dictionary* defines a “*stabulum*” as a “standing place, abode, or dwelling for animals or persons of a lower class” and a “*caupona*” as a “retail shop, an inn or a tavern” (Lewis and Short *A Latin Dictionary* (1962) 303 and 1749). The *praetor* interprets the phrase “receiving their goods for safekeeping” as receiving any property or a piece of merchandise (D 4 9 1 6). More critical to the interpretation of what defines a “*caupo, stabularius et nauta*” is seen in the commentary made by Gaius. He states that:

“Nauta et caupo et stabularius mercedem accipiunt non pro custodia, sed nauta ut traiciat vectores, caupo ut viatores manere in caupona patiatur, stabularius ut permittat iumenta apud eum stabulari: et tamen custodiae nomine tenentur” (D 4 9 5). (A sailor, inn-keeper and stable-keeper receive goods not for safekeeping, but rather a sailor is paid in order that he may transport passengers, an inn-keeper is paid so that travellers are able to stay at an inn, and a stable-keeper is paid in order that he may allow the “beasts of burden” in the barn. However, they are still liable for the safekeeping of the property.)

This paragraph is important to the understanding of what these groups of people are defined as. It shows the function which these groups played in Roman society, and in turn sheds more light on the definition of a “*stabularius*.”

The action which will be taken against a person who is found liable is one based on the facts of the matter (D 4 9 3 1). As noted by Zimmermann, on the guarantee alone by the sailor, inn-keeper, or stable-keeper that the property would be kept safely, the praetor was willing to make an order against them (Zimmermann *Law of Obligations* 515). This guarantee was originally an absolute guarantee and therefore, regardless of fault, they would be held liable (D 4 9 3 1). This can be seen in Pomponius’ reasoning in that there are alternative civil remedies which can be used. However, for these remedies liability is limited either specifically to fraud or to negligence (D 4 9 3 1). Zimmermann states that delictual actions for theft and damage were reserved for very specific reasons, whereas the Praetorian Edict is for the very general provision of “keeping the possessions safely” (Zimmermann *Law of Obligations* 517). Moreover, the damages for “*actiones furti* and *damni in factum adversus nautas* lay for *duplum*, whereas the redress under the *actio de recepto* was geared to compensation (*simplum*)” (Zimmermann *Law of Obligations* 517). The absolute nature of the Edict was, however, derogated from by Labeo’s statement that it is not equitable to grant an order in the case of a shipwreck or in the context of violence by pirates. This principle of not ordering the action, in the instance of violence or a situation of *vis maior*, was extended to *stabularii* and *caupones* as well (D 4 9 3 1). Inn-keepers and stable-keepers are not liable for goods which they receive outside of the trading of their businesses (D 4 9 3 2). It must be noted that these groups of people are able to contract out of liability before doing business with a customer. Therefore, according to Ulpianus, if they state beforehand that each customer is responsible for their own property and the customer agrees to this condition, the inn-keepers will not be held responsible for any loss (D 4 9 7; and Zimmermann *Law of Obligations* 520).

4 Roman-Dutch law

The law did not alter significantly during the Roman-Dutch period. As a rule, skippers, inn-keepers and stable-keepers concluded a contract of *locatio conductio operis* with their clients during the Roman-Dutch period (Thomas “The Praetorian Edict *De Receptis Nautarum, Cauponum, Stabularium: Gabriel v Enchanted Bed and Breakfast* CC 2002 6 SA 597 (C)” 2003 66(3) *THRHR* 516 518). Voet expands on the *actio de recepto*, noting that the purpose of the Edict was to explicitly govern this selected group of persons.

Furthermore, he states that the action arises *quasi ex contractu* and applies when a fee has been arranged, the customer is staying as a guest, or is being transported for free (Gane *The Selective Voet* 766). The purpose of the Edict is to “make good” any loss suffered due to theft, spoiling or otherwise, with the exception of what perished by inevitable loss or *vis maior* (Gane *The Selective Voet* 767). Voet states that this addition by Labeo clearly applies in situations where the stable or inn has been broken into by burglars, provided that there is no negligence or fault of the keeper (Gane *The Selective Voet* 767). The burden is on the sailors and inn-keepers to prove that they were not negligent or at fault (Gane *The Selective Voet* 767). It must be noted that in the case of where a traveller causes damage to the property the owner will not be held liable, provided that the traveller was not providing his services at this time. Voet emphasises the point that if there is a notice excluding the owner from liability, and the traveller agrees, then he is absolved from liability (Gane *The Selective Voet* 770). Moreover, Voet states that the fact that one gets double penalty for this action is obsolete. He notes that, although this principle is obsolete, the strictness of the Edict continues in other ways (Gane *The Selective Voet* 772).

De Groot in his *Inleiding tot de Hollandsche Rechts-Geleertheyd* states that sailors, inn-keepers, and stable-keepers are held liable for damages done by their *schip-gezellen*, *huis-dienaers*, *stal-knechts* (deck-hands, domestic workers, and stable-hands) if the property is on the ship, in the house or in the stable (De Groot *Inleiding tot de Hollandsche Rechts-Geleertheyd Beschreven door den Heer Hugo De Groot* (tr Fockema *Inleidinge* (1895) 3 38 9). The term “*stal*” used by De Groot is translated in *Van Dale’s Nieuw Groot Woordenboek Der Nederlandse taal* as an “omsloten en overdekte ruimte, houten of stenen gebouw dat tot verblijf van paarden, runderen, schapen ... dient” (a fenced and roofed area, built with wood or stone which serves to shelter horses, cattle, sheep, *etcetera*) (Kruyskamp and De Tollenaere *Van Dale’s Nieuw Groot Woordenboek Der Nederlandse Taal* (1950) 1709).

5 South African law

The *actio de recepto*, received, in this context, “virtually without adaptation” into South African common law from Roman and Roman-Dutch law (Thomas 2003 *THRHR* 519), is still relevant in modern South Africa. The modern interpretation of this principle is that liability exists when a sailor, an inn-keeper, or a stable-keeper had received the property of his customer for safekeeping during the period of their business transaction, unless it had been specifically excluded by the parties (Zimmermann *Law of Obligations* 520). As noted by Tait and Vrancken, it is now commonly accepted that where an event is “unforeseen, unexpected, and irresistible and which human foresight cannot guard against,” this can be raised as a special defence (Tait and Vrancken 2010 31(1) *Obiter* 170; in *Stocks & Stocks (Pty) Ltd v TJ Daly supra* 761F–H the acknowledged exceptions to liability under the Edict are listed as “*casus fortuitus*; *damnum fatale* or *vis maior*, negligence of the consignor or inherent vice or latent defect in the goods themselves”). However, if the inn-keeper contributed to such an act through

his own negligence, then the defence falls away (ibid). Debate still surrounds the question whether this principle arises from an implied contract, or whether it arose, as if from contract, at the moment the property is received for safekeeping (Zimmermann *Law of Obligations* 520). Furthermore, it is well noted that the reasons for incorporating this action into the law of the Republic, as given in the Digest, are not satisfactory in modern times. This is because as a group of persons, sailors, inn-keepers and stable-keepers, cannot be seen as exceptionally disreputable (Zimmermann *Law of Obligations* 521). This has resulted in the certain groups of persons petitioning that the rule of *cessante ratione lege, cessat lex ipsa* (if the reason for a law ceases, the law itself ceases to exist) be applied to the Edict (Zimmermann *Law of Obligations* 521). These attempts failed, according to Zimmermann, because there is a completely valid reason, aside from those forwarded by Ulpanius, to rely on the Edict (Zimmermann *Law of Obligations* 521). The most notable reason is that a customer and his property are inherently in a disadvantageous position emanating from a "sphere which only the other party is able to organise and control" (Zimmermann *Law of Obligations* 521). This reasoning is followed by Tait and Vrancken, who state that, because alternative remedies are particularly difficult to prove when it comes to *dolus* and *culpa*, it is necessary to keep the Edict relevant in South Africa (Tait and Vrancken 2010 31(1) *Obiter* 175).

The application of the Edict has been very narrow. However, following the argument that the Edict can expand its scope of operation, it is argued that this strict type of liability should apply to other professional activities (Zimmermann *Law of Obligations* 521). Therefore, it is notable that over time the Edict has been extended to other groups of persons. This is seen in the extension of the Edict to carriers by land (Zimmermann *Law of Obligations* 522). The inclusion of this group has been accepted in South African law. The extension of the Edict has led to the question of whether the Edict must be extended to carriers by air (Zimmermann *Law of Obligations* 522). This question has not yet been tested in court.

6 Application of the Edict in South African law

It was argued in the case of *Harvey S. Crocker v W.D.S. Doig and J.S. Murray* that the term "*stabularius*" ought to be extended to person in the business of trading horses, because factually it can be shown that they act in this role ((1879–1880) 1 NLR 111). The court in this instance had no doubt that the defendant ought to be held liable for the horses, but was uncertain about whether the defendant should be held liable in terms of the Edict (117–118). The court in this instance reasoned that because the Edict was for those specifically acting as stable-keepers, if they act outside of their capacity as stable-keepers, they should not be held liable in terms of the Edict, because of its burdensome nature (118). The court held that the salesman was not acting as a stable-keeper in the sense of the Edict, but was rather acting as an agent for the person wishing to sell the horses (118).

The case of *Davis v Lockstone* (1921 AD 153) confirmed that the Edict is still relevant in South Africa because it rejected the arguments posed by the defendant, who argued that there is no reason for this law and that therefore

it should no longer apply. The court held that because this principle had recently been applied to sailors, this shows that the Edict is still relevant in South Africa and therefore there is no reason for it not to be extended to hotel-owners (167).

In *Marriott's Garage v Kilburn* (1942 NPD 269) the court held that there is no ground for a garage-proprietor who repairs cars to be considered an equivalent of the stable-keeper. The court does acknowledge in this case that there is a much greater link between a parking-garage proprietor and the stable-keeper, but that there was no evidence to show that the current defendant was in anyway in that business (270).

In the case of *Essa v Divaris* (1947 (1) SA 753 (A)) Tindall JA decided that the term "*stabularius*" ought not to be applied to the owner of a parking garage. In this instance, he argued that a horse and a motor vehicle are so significantly different that there is no option but to refuse to extend the Edict to the owner (765). This view was supported by Greenberg JA and Schreiner JA. Schreiner JA states that it is highly artificial to treat horses and vehicles as legal equivalents (775). The learned Judge goes on to state that his reluctance to extend this matter to motor vehicles is a "consideration of fairness" because the extent to which this principle will be applied, if it is extended to inanimate moving property, will lead to certain absurdities (775). Furthermore, it is in the interest of fairness because those attempting to solve the issue of parking it town ought to be encouraged and not burdened by the edict (776). Zimmermann comments on this reasoning, stating that "one is left to wonder what the somewhat quixotic pronouncement on the similarities and dissimilarities between horses and motorcars was intended to prove" (Zimmermann *Law of Obligations* 522).

In the case of *Gabriel and another v Enchanted Bed and Breakfast CC* (2002 (6) SA 597 (C)) the court applied the Praetorian Edict. In this instance a couple's room at a bed and breakfast had been robbed. The court applied the Edict as was set out in the case of *Davis v Lockstone* (*supra* 153). The court held that, because the robbery had not been accompanied by any form of violence, and because robberies had been occurring frequently in this area, it was foreseeable, therefore, the plaintiff could not raise the defence to the Edict that the loss was unforeseen, unexpected and irresistible (*Gabriel v Enchanted B&B supra* 600). Moreover, there were reasonable steps which could have been taken by this inn to protect its customers more (605; for further discussion of this case, see Thomas 2003 *THRHR* 516; and Tait and Vrancken 2010 31(1) *Obiter* 171).

The Edict was most recently applied in the case of *Roy v Basson NO* (2007 (5) SA 84 (C)). In this case a French tourist lost her possessions when the inn burnt down due to fire. The court found that the inn catching alight was as a result of *maior casus fortuitus* and, therefore, the owner would not be held liable in terms of the Edict. Moreover, the court held that there was no negligence on the part of the inn-keeper and therefore his defence of *vis maior* does not fall away (88). The court added that "care must be taken in looking at these definitions not to mistake the concept of foreseeability in those definitions by equating it with foreseeability in a normal Aquilian liability situation" (86). The court, differing in approach to the *Gabriel* case,

states that consideration must not be given to whether there have been plenty of fires but rather it must look at the specific facts of this fire (87; and for further discussion of this case, see Tait and Vrancken 2010 31(1) *Obiter* 172).

The cases, as set out above, give a clear indication of the extent to which the Edict is applied in South Africa. Furthermore, the *Roy* and *Gabriel* cases give a clear indication as to how the court will apply the defences which can be raised against the Edict.

7 Commentary

In the light of the law set out above, the decision in the *Swart v Shaw* case falls to be considered. The court in *Swart v Shaw* applied a very narrow meaning to the term “*stabularius*”, apparently to limit the strict liability of *custodia* so that it does not apply to other groups of persons, because of the undue burden which it places upon them (*Swart v Shaw supra* 206B–C). The court therefore limited liability to inn-keepers who have standing place for animals (204E). It is submitted that this interpretation is too narrow. As discussed above, a “*stabularius*” is not described as a “lowly inn-keeper” but rather described a person who receives money so that he or she can keep “beasts of burden” in a barn (D 4 9 5). This description is much wider than that provided by *Cassell’s Latin Dictionary*. This view is further supported by the definition of a “*stabulum*” given in the *Lewis and Short Latin Dictionary*, such that a “*stabulum*” is an abode for both animals and lowly persons (*Lewis and Short Latin Dictionary* 1749). This does have an element of the definition put forward by Hodes AJ, in that it can be an “ignoble” inn, but that does not limit it from being seen as a stable (a place where animals are kept). Furthermore, the interpretation of the Edict by De Groot indicates that the Roman-Dutch writers did not intend to limit the Edict to the “ignoble inn-keeper,” but rather intended that it include persons who provide shelter for animals (De Groot *Inleidinge* 3 38 9). Moreover, the court does not acknowledge the fact that by defining a “*stabularius*” as it does, it is rendering the term “*caupo*” a tautology. An inn-keeper is liable for any property which is under his care (D 4 9 1 6). This definition would include beasts of burden which are kept on the inn-keeper’s property. Therefore, by stating that a “*stabularius*” is an inn-keeper who houses beasts, the court is in fact unduly limiting the Edict. The distinction between the ignoble and an ordinary inn-keeper is also unnecessary. This can be seen in the statements made in the Digest about the fact that a small raft and boat are included in the definition of a ship (D 4 9 1 2). Following this line of thought, it is most likely that an ignoble inn-keeper will also be interpreted under the term “*caupo*”. Therefore, the courts limited interpretation of the term “*stabularius*” is too narrow and should be read so as to include a stable (as per the translations of Gane and Scott (above) and as per the writings of De Groot).

The first reason for why the court chose not to apply the Edict in this instance was that the horse-owner knowingly placed his horse in a situation of risk and therefore the trainer ought to be absolved from liability (*Swart v Shaw supra* 205H). It is submitted that this argument is flawed and that the Praetorian Edict should extend to include a horse-trainer who has contracted

to take care of the horse, because the meaning of “*stabularius*” ought to be read wide enough so as to include this instance. However, it ought to be argued that there is a tacit agreement by the two parties that if the horse dies during training then the horse-trainer is absolved from liability because of the high risk nature of the training. This is an important point to make because it acknowledges that the horse can be stolen or damaged outside of its training, and is consistent with the idea that the parties can agree to contract out of the consequences of the Edict (D 4 9 7; and Zimmermann *Law of Obligations* 520).

The second reason for denying that the term “*stabularius*” be extended to include horse-trainers is that the remedy for the mischief set out in the Digest is unsuitable for this instance (*Swart v Shaw supra* 2051). This mischief is limited to that given in the Digest, but does not consider the approach of adapting the Edict to the modern context (as favoured by Tait and Vrancken, and Zimmermann (above)). The difficulty of proof which arises in instances where the Edict is not being applied provides cogent reasons for a wider application of the Edict in modern South Africa. The interpretation by Hodes AJ flies in the face of this pragmatic approach.

The court in *Swart v Shaw* then went on to consider if this interpretation of “*stabularius*” ought to be extended to other professions in South Africa (206). In coming to its decision the court made reference to the decision of *Essa v Divaris* which held that for the consideration of fairness the court ought not to apply the harsh burden of the Edict to other groups of persons (206C–D). The case of *Essa v Divaris* is in itself susceptible to criticism. After the “quixotic comparison” between cars and horses on the part of Schreiner JA, the learned judge proceeds to state that, because parking in towns and cities is a problem, those who seek to solve this problem ought not to be placed under a greater burden by the courts, by extending the Edict (*Essa v Divaris supra* 776). This is because in the view of Schreiner JA it is beyond what can be considered fair.

Applying the consideration of fairness gives rise to interesting questions. The court states, in *Swart v Shaw*, that it is unfair to extend the Edict to include a horse-trainer because of the nature of the relationship between the two parties (*Swart v Shaw supra* 206C–D). The question must then be asked why it is fair to extend the Edict to inn-keepers but not to a horse-trainer, both of whom are in a position to abuse their position and both of whom it will be difficult to find liable because of the requirement of *dolus* and *culpa*. If the court holds that it is unfair to extend the Edict to horse-trainers because of the harsh burden, is it fair that these three groups are burdened to such an extent, especially considering the classical reason for having the Edict – the heightened possibility of criminal conspiracy between unscrupulous safe-keepers and thieves – has no special relevance in South Africa? Conversely, the question must be asked: if the reasons given by Tait and Vrancken, and Zimmermann, for the ongoing relevance and utility of the Edict are sound, is it fair not to extend this remedy to situations where it would be helpful to have the Edict?

It is submitted that in the light of the demonstrated utility of the Edict in *Roy* (*Roy v Basson NO supra* 88) and *Gabriel* (*Gabriel v Enchanted B&B*

supra), it is necessary to maintain the application of the Edict. Moreover, it is further submitted that in the modern context, the Edict ought to be extended to other relationships similar to those currently specified in the Edict, in which the customer is in a disadvantageous position emanating from a “sphere which only the other party is able to organise and control” (Zimmermann *Law of Obligations* 521).

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