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Innkeeper's Right to Exclude or Eject Guests

The answers are in the future. What new legislation the Congress may enact in the name of general welfare no one may guess. One may venture into the field of conjecture, however, to state that as Congress seeks to expand its sphere of domination, the courts will move to let down their self-made barrier of "political question" and will take it upon themselves to decide the validity of Congressional "general welfare" legislation in a correspondingly wider field. It is submitted that the true worth of the courts as a check upon ill-advised legislation is thus demonstrated. The stabilizing influence of judicial decision will be necessary before a valid limitation upon the terms "general welfare of the United States" can be determined.

INNKEEPER'S RIGHT TO EXCLUDE OR EJECT GUESTS.—The duty of innkeepers to accommodate and serve all applicants, while unrecognized by the Roman Law,[1] has for centuries been affirmed and enforced in England[2] and America.[3] Though expressed as a universal obligation it is not without its limitations. To better understand the situations wherein the proprietor of a hotel may refuse the hospitality of his house or eject a patron who has been admitted, they will be viewed in the perspective of our tenuous knowledge regarding the genesis of this singular duty. No precise statement of the reasons which evoked this law is found in the early cases themselves and a departure from the decisions leaves the investigator groping in the mists of antiquity.

Origin of Public Service Duty

Monopoly has been pointed to as the parent of this public service duty. It is argued that necessity for a service brought upon those dispensing it a duty to serve the public, and that the division of business into public and private was based on economic grounds.[4] This argument is attacked on the ground that the cases establishing the obligation make no allusion to monopoly.[5] In fact, historical evidence shows that while common surgeons, barbers, and victuallers were under the obligation of indiscriminate service, there were numerous practitioners in these trades.[6] Moreover, not the innkeeper, but the *common* innkeeper, was regarded as a public servant.[7]

1. 3 SCOTT, THE CIVIL LAW (1932) 134; RADIN, ROMAN LAW (1927) § 94.

2. Anonymous, Keilwey 50, pl. 4, 72 Eng. Reprints 208 (K. B. 1450); Gordon v. Silber 25 Q. B. D. 491 (1890); 3 BL. COMM. *164.

3. Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837); State v. Steele, 106 N. C. 766, 11 S. E. 478 (1890); see L. E. Lines Music Co. v. Holt, 332 Mo. 749, 754, 60 S. W. (2d) 32, 34 (1933).

Some states have incorporated the common law rule of indiscriminate service into their statutes. GA. CODE (1933) § 52-103; ILL. REV. STAT. (Smith-Hurd, 1935) c. 38, § 125; CONSTITUTION AND STATUTES OF LOUISIANA (1920) § 457; ME. REV. STAT. (1930) c. 36, § 5; NEB. COMP. STAT. (1929) § 23-101; N. Y. CIVIL RIGHTS LAW (1935) § 40; OHIO GEN. CODE (Page, 1926) § 12940.

4. 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) § 1; Arterburton, *The Origin and First Test of Public Callings* (1927) 75 U. OF PA. L. REV. 411.

5. Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 156 n. 76.

6. See *id.*, at 155, n. 76. It is here pointed out that in the town of Beverley barbers and surgeons were numerous enough to impose taxes on others entering it.

7. Adler, *supra*, note 5, at 156, n. 76. The necessity of alleging that the inn was "com-

It would seem, therefore, that it was not the nature of the service, but the extent of the undertaking that determined the public or private character of a business. The explanation finding most support is that the legal duty to serve all was the result of a voluntary assumption of the public service obligation.[8] One who entered an occupation and professed to serve people indiscriminately, held himself out as ready to accommodate all, and came under judicial compulsion to abide by his undertaking. As soon as a man dedicated his business to the service of the public, he waived his privilege of discrimination. Lending strength to this view is the early development of actions on the case. An assumpsit and its breach were generally vital elements of this proceeding.[9] It was indispensible that an allegation of assumpsit be pleaded. But suits against persons in common callings formed a distinct exception. Actions on the case for refusal to serve were maintained against them without an averment of assumpsit.[10] This relaxation of procedure has been interpreted to mean that an allegation that the defendant was engaged in a common calling was an implied declaration that he had assumed to serve all.[11] Thus by a person in a common calling was meant simply one who held himself out as ready to serve all.[12]

With changing economic conditions, it became more usual for persons to hold themselves out to serve the public generally in all kinds of commercial activity. A "holding out" lost the distinctive significance it formerly possessed. Dedication no longer was the sole progenitor of the public service duty; now it sprang from public profession of a service affected with a public interest.[13]

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mon" is shown in Mason v. Grafton, Hobart 245, 80 Eng. Reprint 391 (K. B. 1725). It is there said that a house is *domus* not *hospitium* if it be not *commune.*

8. Anonymous, 2 Rolle 345, 81 Eng. Reprints 842 (K. B. 1623) (action for refusal to serve lies against innkeeper "because he hath subjected himself to keep a common inn."); 2 KENT'S COMM. (10th ed. 1860) *599; Burdick, *Origin of the Peculiar Duties of Public Service Companies* (1911) 11 COL. L. REV. 514, 515, 516; Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 151-4. "Also, if an innkeeper . . . hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action . . . will lie against him . . . , if he without good reason refuses to admit a traveler." 3 BL. COMM. *164.

9. Anonymous (1441), WYMAN (1909) CASES ON PUBLIC SERVICE CORP. 1, a famous case where right of action against horse docter denied in absence of allegation that the doctor expressly assumed to cure the plaintiff's horse; AMES, LECTURES ON LEGAL HISTORY (1913) 130.

10. HOLMES, THE COMMON LAW 184; 3 BL. COMM *164.

11. Burdick, *The Origin of Peculiar Duties of Public Service Companies* (1911) 11 COL. L. REV. 514.

12. The obligation to serve all was incident not only to innkeepers but to all of the "common" tradesmen and servants. A tradesman or servant was "common" if he professed to serve all. STORY, BAILMENTS (9th ed. 1878) § 494; 2 KENT'S COMM. (14th ed. 1896) *599. Even in the development of American public utility law "dedication" has been regarded as the paramount consideration in deciding whether a business is "public" and therefore subject to price regulation. "A business or property in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public". Tyson v. Banton, 273 U. S. 418, 434 (1926).

13. Burdick, *The Origin of the Peculiar Duties of Public Service Companies* (1911) 11 COL. L. REV. 514, 522.

The liability of the common surgeon, and the common farrier grew obsolete, but as to carriers and innkeepers the duty of coercive service was continued. Herein is visible the effect of a public policy favoring the ever growing numbers of merchants and travelers.[14] To insure the unhampered flow of commerce, carriers were compelled to transport all goods; and, to assure shelter and refreshment to the weary wayfarer, it was imperative that the law continue the hotelkeeper's obligation to furnish refreshment and lodging indiscriminately to all.

Solicitude for the traveler could not, however, preclude consideration for the safety and comfort of the patrons already in the hotel, nor could the law fail to take cognizance of the proprietor's expectancy of compensation, and the space limitations of the inn. To enforce service inflexibly for all might easily transform the inn from a haven of shelter to a house of spoliation; from a resort for rest, to a place of tumult.

Exceptions have been made, and the situations wherein an innkeeper has been given the right of excluding or ejecting patrons will now be presented.

EXCLUSION

Non-Traveler

A hotel proprietor may refuse to accept one who is not a traveler.[15] In the early days when the duty to serve arose solely from the profession of public service, the right to exclude a non-traveler was apparent, since the innkeeper undertook to serve only the wayfaring class.[16] His duty was co-extensive with his profession. As the element of public interest became a determinant of the common calling, limitation of the obligation to travelers was justified by the fact that inns are a real necessity only to travelers. There are compelling reasons why the keeper of a hotel should be forced to give lodging and food to a weary traveler, away from home, and in dire need of rest and refreshment, but none why others should be so favored. Today, traveler is not synonymous with journeyer. It is not essential that a person should have come from a distance.[17] So long as one resides away from the inn, whether far or near, and comes to it for transient entertainment, he is a traveler and entitled to accommodations.[18] A neighbor or a townsman has as much right to admission as a foreigner.[19] The essence of a "traveler" under this rule is that he comes

14. See *id.*, at 523.

15. Kisten v. Hildebrand, 48 Ky. 72, 48 Am. Dec. 416 (1848); Horner v. Harvey, 3 N. M. 307, 5 Pac. 329 (1885); Calye's Case, 8 Co. 32a, 77 Eng. Reprints 520 (K. B. 1584); Rex v. Luellin, 12 Mod. 445, 88 Eng. Reprints 1441 (K. B. 1701).

16. Wyman, *The Inherent Limitation of the Public Service Duty to Particular Classes* (1910) 23 HARV. L. REV. 339. See Hill v. Memphis Hotel Co., 124 Tenn. 376, 379, 136 S. W. 997, 998 (1911).

17. See Curtis v. Murphy, 63 Wis. 4, 6, 22 N. W. 825, 826 (1885); SCHOULER, BAILMENT AND CARRIERS § 280.

18. Orchard v. Bush & Co. [1898] 2 Q. B. 284.

19. Thompson v. Lacy, 3 B. & Ald. 283, 106 Eng. Reprints 667 (K. B. 1820); Walling v. Potter, 35 Conn. 183 (1868); see Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 246, 44 N. W. 226, 227 (1889); Roberts v. Case Hotel Co. Inc., 106 Misc. 431, 435, 175 N. Y. Supp. 123, 125 (Sup. Ct. 1919), BEALE, INNKEEPERS AND HOTELS (1906) § 63; Wyman,

for transient entertainment.[20]

Inability or Refusal to Pay in Advance

Nor is a hostler obliged to put trust in his guests for payment. He may insist on payment in advance,[21] and may exclude one who is incapable[22] or unwilling to pay. An action based on refusal to admit is defective if it fails to allege tender of pre-payment, or circumstances excusing a failure.[23] Thus, where a proprietor does not demand payment in advance as a condition for admitting a guest, the failure to make a tender is justified.[24] Likewise, tender is excused where it is made impossible, for example, by keeping the doors bolted.[25]

The fact that the guest is accompanied by baggage does not give him the right to forego tender in advance. The inconvenience and the hazards of relying on baggage as the sole security make it desirable that the innkeeper be permitted to insist on money. Of course, the right to demand payment does not mean the right to set an arbitrary price. The host may impose only reasonable terms, for were he permitted to charge what he pleased, he could nullify anyone's right to be received by calling for a prohibitive amount.[26] Furthermore, payment in advance cannot be demanded for more than one day's service. A bill for entertainment at a hotel accrues from day to day, and just as the day is the unit of charge, so it is the limit of the innkeeper's demand.[27]

The Inherent Limitation of the Public Service Duty to Particular Classes (1910) 23 HARV. L. REV. 339, 341. But see *Newton v. Trigg*, 1 Show. 268, 89 Eng. Reprint 566 (K. B. 1691) (innkeepers compellable to lodge *strangers*) (italics inserted); BEALE, INNKEEPERS AND HOTELS (1906) § 63 (in general one living in same town not traveller); STORY, BAILMENTS (9th ed. 1878) § 477; WANDELL, LAW OF INNS, HOTELS AND BOARDING HOUSES (1888) 56 (affirming that under old law neighbor had no action as guest).

20. Petit v. Thomas, 103 Ark. 593, 148 S. W. 501 (1912); Brams v. Briggs, 272 Mich. 38, 260 N. W. 785 (1935); see Curtis v. Murphy, 63 Wis. 4, 6, 22 N. W. 825, 826 (1885); SCHOULER, BAILMENT AND CARRIERS (3d ed. 1897) § 280. Where a man breaks up his home and goes to a hotel in the same town he clearly intends to "reside" there and is a boarder, not a guest. Meacham v. Galloway, 102 Tenn. 415, 52 S. W. 859 (1899). Likewise an employee of a railroad who stops at each end of the trip at a hotel rented by the month has been held not a guest. He is a "citizen of the community at both ends of the route." Horner v. Harvey, 3 N. M. 307, 5 Pac. 329 (1885).

21. Fell v. Knight, 8 M. & W. 269, 151 Eng. Reprints 1039 (Ex. 1841); see Pinchon's Case, 9 Co. 86b, 87b, 77 Eng. Reprint 861 (K. B. 1611); Mulliner v. Florence, 3 Q. B. D. 484, 488 (1878); 18 HALSBURY'S LAWS OF ENGLAND (2d ed. 1935) § 198.

22. See Markham v. Brown, 8 N. H. 523, 528 31 Am. Dec. 209, 210 (1837); Thompson v. Lacy, 3 B. & Ald. 283, 287, 106 Eng. Reprint 667, 668 (K. B. 1820). Criminal punishment is prescribed for one who gains admission on the false pretense that he can pay. Moreover, a false and fictitious showing of baggage is made presumptive evidence of fraudulent intent. N. Y. PENAL LAW (1923) § 925. For a discussion of the statute see N. Y. L. J., Sept. 6, 1938, p. 566, col. 1.

23. Fell v. Knight, 8 M. &. W. 269, 151 Eng. Reprints 1039 (Ex. 1841).

24. Rex v. Ivens, 7 C. & P. 213, 173 Eng. Reprint 94 (N. P. 1835).

25. See Fell v. Knight, 8 M. &. W. 269, 276, 151 Eng. Reprints 1039, 1042 (Ex. 1841).

26. See Morningstar v. Lafayette Hotel Co., 211 N. Y. 465, 467, 105 N. E. 656 (1914); BEALE, INNKEEPERS AND HOTELS (1906) § 57.

27. BEALE, INNKEEPERS AND HOTELS (1906) § 244. Inasmuch as the total charge for

Time and Space Limitations

The time of arrival is no justification for refusal to accept a traveler. In larger cities, where someone is in attendance throughout the night, no problem is presented. But in small-town, family-managed inns the arrival of a guest while the family slumbers must occur with distressing frequency. While the keeper of a hotel may close it at late hours of the night, one reaching it has the right to wake the host and insist on admission.[28] To spare him this brief discomfort and to abandon a weary traveler to the mercy of the night would be uncivilized. The later the arrival, the more urgent is the need for shelter.

Lack of room has always been a complete justification for rejection.[29] This excuse is often falsely given by innkeepers when a guest, undesirable but entitled to admission, presents himself. Such misrepresentation is actionable.[30] And there is a presumption that room does exist, so that a complaint need not allege the existence of available space.[31] An inn is "full" when all the bed chambers are occupied. An applicant has no right to demand that he be allowed to pass the night in a parlor, nor can he ask to share the room of another.[32] Whether an innkeeper would be compelled to tax the capacity of his house under extreme conditions, such as severe storms or large crowds converging on a small town, has not been answered by the cases. Inasmuch as a hostler is not bound beyond the extent to which he professes to accommodate the public, it would seem that the extent of his profession is the sole measure of his duty, regardless of external exigencies. Thus when the chambers dedicated to the public are occupied, an innkeeper has fulfilled his undertaking. There is no compulsion to expand the facilities of an inn, but only to exhaust the existing room by accepting guests indiscriminately.[33]

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any day cannot be forseen, how can a hotel proprietor obtain payment in advance? Surely, he could not insist on a deposit large enough to cover probable charges. Expediency seems to point one way. Some expenses are absolute and certain. Payment for these may be required before admission is granted. Other charges depend entirely on the number of services used by the guest. Before any such service is given, payment may be required, but until that time no-prepayment can be asked.

28. Rex v. Ivens, 7 C. & P. 213, 173 Eng. Reprints 94 (N. P. 1835).

29. White's Case, 2 Dyer 158b, 73 Eng. Reprints 343 (K. B. 1558); see Bennett v. Mellor, 5 T. R. 273, 275, 101 Eng. Reprints 154, 155 (K. B. 1793); Medawar v. Grand Hotel Co., [1891] 2 Q. B. 11, 20.

30. White's Case, 2 Dyer 158b, 73 Eng. Reprints 343 (K. B. 1558); see Bennett v. Mellor, 5. T. R. 273, 275, 101 Eng. Reprints 154, 155 (K. B. 1793).

31. Jackson v. Virginia Hot Springs Co., 213 Fed. 969 (C. C. A. 4th, 1914), *rev'g* 209 Fed. 979 (W. D. Va. 1913). The court in the earlier case discounts the argument that inasmuch as the matter as to whether room exists is peculiarly within the knowledge of the innkeeper, the burden of establishing that there was no room should be on him. But on appeal the burden was put where it logically belongs, on the proprietor of the house.

32. Browne v. Brandt [1902] 1 K. B. 696; BEALE, INNKEEPERS AND HOTELS (1906) § 91.

33. One writer suggests that the strength or weakness of an applicant, and his ability to get accommodation elsewhere ought to be considered. VAN ZILE, BAILMENTS AND CARRIERS (2d ed. 1908) § 344 (1). Such considerations may prompt charity, but would not seem to create additional legal duties. In Browne v. Brandt [1902] 1 K. B. 696, while there were no storms, plaintiff had been stranded on a road when his auto broke down.

Reservations in advance of arrival may be refused.[34] But it has been said that when a room has been reserved by an absent guest, so long as it remains unoccupied an applicant has the right to its use. However, at a reasonable time prior to the arrival of the person who made the reservation, the hotel proprietor may resume possession in order to put the room in readiness for him.[35]

Condition of Applicant

Inasmuch as the relationship between host and guest is not contractual but consensual,[36] mere inability of the applicant to contract is no grounds for denying him the use and service of the house. Prior to the enabling acts, married women, though without legal power to contract, could demand admission. Similarly, infancy[37] alone is no ground for rejection. Rather, the special need of women and persons of tender years would appear to buttress their right to be served. Nor is an innkeeper excused for failure of his public service duty by the fact that mental incompetency had rendered him powerless to contract.[38]

Before a traveler can insist on his right to accommodation, he must present himself in a clean and decorous condition. So, a chimney sweeper in his soot-covered working clothes can demand no rights in a hotel.[39] A hostler may

It was impossible to get lodging elsewhere. Defendant's sleeping rooms were all occupied, but there was other space in the house where plaintiff might have been allowed to sleep. The proprietor refused to lodge him. The court justified him saying that the inn was full, and to compel the admission of the plaintiff would be carrying the hotel keeper's duty too far. Even a carrier has the right to prevent overcrowding and to designate the number that will ride in any particular car. Brumfield v. Consolidated Coach Corp., 240 Ky. 1, 40 S. W. (2d) 356 (1931) (where seats of bus occupied, others may be excluded); see Commonwealth v. South Covington & Cin. Street Ry., 181 Ky. 459, 465, 205 S. W. 581, 583 (1918). But see De Glopper v. Nashville Ry. & Light Co., 123 Tenn. 633, 647, 134 S. W. 609, 613 (1911) (though car crowded, if there is room and passenger is willing to ride, carrier must accept him). Further, at common law, the ordinary carrier is under no obligation to provide additional facilities as the demand for transportation increases. But, railroads, operating under special franchises, are subject to extraordinary duties. They must expand their facilities to adequately meet the growing demands of a community. An extraordinary demand for transport is no excuse for failure to carry, if a railroad reasonably ought to have forseen it. Ocean S. S. Co. of Savanah Locomotive Works & Supply Co., 131 Ga. 831, 63 S. E. 577 (1909); see Louisville & N. R. R. v. Railroad Commissioners, 63 Fla. 491, 506, 58 So. 543, 548 (1912).

34. See Rothfield v. North British Railway Co., [1920] Sess. Cas. 805, 819.

35. See Medwar v. Grand Hotel Co., [1891] 2 Q. B. 11, 25.

36. See Gastenhofer v. Clair, 10 Daly 265, 267 (N. Y. 1881); BEALE, INNKEEPERS AND HOTELS (1906) § 111. The necessity of the consent of a hotelkeeper for becoming a guest is seen from the fact that a person who occupies a room without registering or notifying the management is not a guest. Thus, where a man, to the ignorance of the proprietor, roomed with a woman who was in fact his wife, he could have no recovery for the discourteous imputations of the hotel employees. A hotel owes a legal duty of courtesy only to its guests. Warren v. Penn-Harris Hotel Co., 91 Pa. Super. 195 (1927).

37. Watson v. Gross, 2 Duv. 147 (Ky. 1865); SHOULER, BAILMENTS AND CARRIERS (1897) § 318.

38. 1 WYMAN, PUBLIC SERVICE CORP. (1911) § 340.

39. Pidgeon v. Legge, 5 W. R. 649, 21 J. P. 743 (1857); see State v. Steele, 106 N. C. 766, 776, 11 S. E. 478, 482 (1890).

exclude from his premises applicants whose filthy condition would normally disturb the comfort of other patrons.[40] Considering that annoyance to others is the justification for rejection, it would seem that an applicant willing to remove himself from the public parts of a hotel ought to be admitted.[41] Indecency of costume strips an applicant of the right to insist on accommodations, but dress which is unconventional is no disqualification. Therefore, a woman in cycling "shorts" cannot be denied service if the garb is within the bounds of decency. She may, however, like coatless men,[42] be excluded from the main dining hall and assigned to take her meals at a separate part of the inn.[43]

Except for an old English case[44] where it is implied that a traveler can demand to be admited though he be suffering from small-pox, the innkeeper is generally conceded the right to reject as a guest one who ails with a contagious disease.[45] Considering the liability of a hostler who negligently exposes to infection the patrons of his house,[46] his right to exclude those suffering from a communicable sickness is undeniable. A physical condition, though not con-

40. See Markham v. Brown, 8 N. H. 523, 529, 31 Am. Dec. 209, 210 (1837). Travelers may be refused transportation on common carriers for the same reason. Pullman Co. v. Krauss, 145 Ala. 395, 40 So. 398 (1906).

41. Assume that while driving at night, a traveler developed mechanical trouble in his auto. In an unsuccessful attempt to repair the defect, his person and clothes were so coated with grease and dust that his presence would be objectionable. But remaining within his hotel room for the night would bring him in the sight of no one, so that his condition could hardly justify his exclusion. It is submitted that the innkeeper could not reject him even if at the time he applies there are patrons present. So long as he promises to keep out of the public rooms, his transitory appearance before others while reaching his chamber, can offend only the squeamish. Surely the necessities of the traveling public are superior to the over-delicate sensibilities of other guests.

42. Conceding that this separation was lawful it might be inquired whether a coatless man could be denied admission to a dining hall if no other dining facilities were offered him. Such dress would be merely unconventional, and if clean cannot extinguish his right to be served. Further, the wearing of an insignia cannot be grounds for refusing to admit. *Cf.* South Florida R. R. v. Rhoads, 25 Fla. 40, 5 So. 633 (1889).

43. Regina v. Sprague, 63 J. P. 233 (1899). WYMAN, CASES ON PUBLIC SERVICE CO. (1909) 232. The mere shape of the dress is no grounds for exclusion. The New York Court of Appeals, in a recent case, announced that to be within the limits of decency one is not obliged to wear "ordinary street attire." Many costumes, while unusual and ludicrous, are perfectly decent. "When it comes to the kind and sufficiency of clothes one must wear to appear decently in public, we of the law have generally left such matters to the good sense and force of public opinion." People v. O'Gorman, 274 N. Y. 284, 8 N. E. (2d) 862 (1937).

44. Rex v. Luellin, 12 Mod. 445, 88 Eng. Reprint 1441 (K. B. 1701). It has been said that the English common law forbade exclusion of those infected with contagion. 18 HALSBURY'S LAWS OF ENGLAND (1935) § 203.

45. See Jackson v. Virginia Hot Springs Co., 213 Fed. 969, 973 (C. C. A. 4th, 1914); VAN ZILE, BAILMENTS AND CARRIERS (2d ed. 1908) § 344(3). In an action for refusal to admit it would not be necessary to allege sound health. Jackson v. Virginia Hot Springs Co., *supra*, at 973. But if the issue of health is raised by the defense, the burden of proving good health is on the rejected applicant. BEALE, INNKEEPERS AND HOTELS (1906) § 101.

46. Gilbert v. Hoffman, 66 Iowa 205, 23 N. W. 632 (1885).

tagious, may render the sufferer so loathsome in appearance that his exclusion would be proper.[47] Even where a sickness is neither infectious nor loathsome, the keeper of an inn may deny admission to an applicant who would require more than ordinary attention.[48] So, one who is blind,[49] crippled,[50] or harmlessly insane, and unattended, may be excluded unless in spite of these afflictions he requires no more care than ordinary guests.[51] An innkeeper need not convert his house into a hospital, nor make nurses of his aides.

Insanity alone does not disfranchise a traveler of his right to shelter and service. However, where the condition creates reasonable fears for the safety or comfort of the other guests rejection is permissible.[52] Likewise the right is not forfeited by intoxication,[53] except that where drunkenness has translated itself into violence which would endanger patrons, or into annoying boisterousness,[54] or incompetency to care for oneself,[55] a host may refuse to open his doors.

Restriction of Inn to Particular Class

A hotel keeper is under no compulsion to proffer all grades of accommodations.[56] It is within his sole right to determine whether his house will be luxurious, bourgeois, or poor. Stemming from this right, and within his prerogative to charge reasonable prices for the services offered, a proprietor may fix the grade of his inn so high as to exclude all but the wealthy.[57] Beyond this, it is doubtful that he can restrict his house to a certain class, and the suggestion that a hostler may confine his services to such persons as come with vehicles[58] has been criticized as unsound.[59] A proprietor may limit the use of his inn to members of one sex, or to soldiers and sailors, so that the exclusion of males or civilians would be justified.[60]

47. In Connors v. Cunard S. S. Co., 204 Mass. 310, 90 N. E. 601 (1910) plaintiff rested her right to admission on the fact that her illness was not contagious and was internal and not repulsive to others.

48. *Cf.* Illinois Cent. R. R. v. Allen, 121 Ky. 138, 89 S. W. 150 (1905); Croom v. Chicago, Milwaukee & St. Paul Ry., 52 Minn. 296, 53 N. W. 1128 (1893) (carrier, public servant like innkeeper, held not bound to receive for transport those requiring special care).

49. *Cf.* Denver & R. G. R. R. v. Derry, 47 Colo. 584, 108 Pac. 172 (1910) (carrier); Illinois Cent. R. R. v. Allen, 121 Ky. 138, 89 S. W. 150 (1905) (carrier).

50. See Hogan v. Nashville Interurban Ry., 131 Tenn. 244, 249, 174 S. W. 1118, 1119 (1915) (carrier).

51. *Cf.* Illinois Cent. R. R. v. Smith, 85 Miss. 349, 37 So. 643 (1905) (blind); Hogan v. Nashville Interurban R. R., 131 Tenn. 244, 174 S. W. 1118 (1915) (crippled).

52. *Cf.* Owens v. Macon R. R., 119 Ga. 230, 46 S. E. 87 (1903) (carrier).

53. *Cf.* Paris & G. N. Ry. v. Robinson, 53 Tex. Civ. App. 12, 114 S. W. 658 (1908). See Pittsburg, Cin. & St. L. Ry. v. Vandyne, 57 Ind. 576, 579, 26 Am. Rep. 68, 70 (1879).

54. See State v. Steele, 106 N. C. 766, 776, 11 S. E. 478, 482 (1890); Markham v. Brown, 8 N. H. 523, 529, 31 Am. Dec. 209, 210 (1837).

55. *Cf.* Chesapeake & O. Ry. v. Gatewood, 155 Ky. 102, 159 S. W. 660 (1913).

56. See De Wolf v. Ford, 193 N. Y. 397, 401, 86 N. E. 527, 529 (1908).

57. BEALE, INNKEEPERS AND HOTELS (1906) § 65.

58. See Johnson v. Midland Ry., 4 Exch. 367, 371, 154 Eng. Reprint 1254, 1256 (1849). It was here intimated that a man may keep an inn exclusively for those who come in their own carriage.

59. BEALE, INNKEEPERS AND HOTELS (1906) § 65.

60. See Rothfield v. North British Ry. [1920] Sess. Cas. 805, 812.

Disorderly Application

The application for admission must be peaceable and gentlemanly.[61] If a traveler enters an inn by breaking down the door, he may be refused shelter.[62] Vulgar, abusive language is a disqualification, but the mere expression "be damned to you", in answer to provoking personal inquiries is not such misconduct as to warrant a denial of entrance.[63]

In an early dictum it was suggested that an applicant was not bound to reveal his name and address as a condition for admission.[64] However, the common law right of a hotelkeeper, in managing his business, to keep a register and exclude those who refuse to give their names seems incontrovertible and has been judicially recognized.[65] Legislation in some jurisdictions has prescribed punishment for those who register under assumed names.[66] Some states have made the maintenance of registers compulsory[67] and prohibit the acceptance of a traveler who refuses to disclose his name and place of residence.[68] When a couple present themselves for a room, it seems within the innkeeper's right to demand a disclosure of their relationship and status. To prevent his house from use as a resort for immorality, he has the right to require evidence of marriage before allowing a man and woman to room together.[69] A rule excluding persons without baggage unless they identify themselves is reasonable. So, the rejection of a husband and wife who carried no baggage and failed to identify themselves is a legitimate exclusion.[70]

Nature of Baggage

The exceptional nature of the baggage carried by a traveler may warrant his rejection.[71] A tiger, a large dog, a scientist's tubes of germs are such poten-

61. Goodenow v. Travis, 3 Johns. 427 (N. Y. 1808); Rex v. Ivens 7 C. & P. 213, 173 Eng. Reprints 94 (N. P. 1835); see Hawthorne v. Hammond, 1 Car. & K. 404, 407, 174 Eng. Reprints 866, 869 (1844).

62. Goodenow v. Travis, 3 Johns. 427 (N. Y. 1808).

63. Rex v. Ivens, 7 C. & P. 213, 173 Eng. Reprint 94 (N. P. 1835).

64. *Id.*, at 219, 173 Eng. Reprints at 97.

65. Newcomb Hotel Co. v. Corbett, 27 Ga. App. 365, 108 S. E. 309 (1921). Failure to register does not deprive one of status of guest, where he was permitted to occupy the room. Moody v. Kenny, 153 La. 1007, 97 So. 21 (1923); Hill v. Memphis Hotel Co., 124 Tenn. 376, 136 S. W. 997 (1911); Fisher v. Bonnevile Hotel Co., 55 Utah 588, 188 Pac. 856 (1920).

66. MASS. ANN. LAWS (Lawyer's Co-op., 1933) c. 140, § 29; MISS. CODE ANN. (1930) § 5111 (gives innkeeper right to eject those registered under assumed name); N. C. CODE ANN. (1935) § 2283 (v); N. D. COMP. LAWS ANN. (Supp. 1925) § 10253a1, 2; OHIO GEN. CODE (Page, 1926) § 843-1a; VT. PUB. LAWS (1933) § 8190.

67. MASS. ANN. LAWS (Lawyer's Co-op., 1933) c. 140, § 27; N. Y. ELECTION LAW (1936) § 61; VT. PUB. LAWS (1933) § 8189.

68. MASS. ANN. LAWS (Lawyer's Co-op., 1933) c. 140, § 27; N. C. CODE (1935) § 2283 (v) (guest must register, if register kept); VT. PUB. LAWS (1933) § 8190 (applicant must register).

69. A couple falsely representing themselves as husband and wife are guilty of a misdemeanor in some states. N. C. CODE (1935) § 4345.

70. Coquelet v. Union Hotel Co. of Baltimore City, 139 Md. 544, 115 Atl. 813 (1921).

71. As a rule, the hotelkeeper must receive both the guest and his luggage. Robbins &

tial sources of injury to person and property that their exclusion is a safety measure which must be approved. Likewise, no guest can complain for being refused admission if he insists on bringing with him a package of dynamite or a container of poison gas.[72] Non-dangerous, but obnoxious property, may also be kept out. Thus, fertilizer exuding fetid odors, and loud barking dogs, whose wails would discommode the patrons of the house, need not be admitted by an innkeeper.[73] As to dogs, it has been intimated that a guest could never insist on bringing them into the public rooms of a hotel.[74] But, where a traveler comes with a dog, and the hostler refuses to shelter it in an outhouse, and there is nothing that could make it a cause of alarm or offense to others, the guest may be justified in bringing the animal to his room.[75] There is a class of property including musical instruments which, if abused, can become a nuisance, but the use of which can be regulated by the innkeeper so as to safeguard his patrons' comfort. Such luggage a guest may bring in with him.[76]

No Right to Particular Room

A guest has no right to any particular room.[77] However, the innkeeper's right to select the room must be distinguished from the right to dictate the grade of accommodations.[78] Suppose there are available rooms of two types, one for $3 and the other for $6. The host cannot arbitrarily assign the guest to a $6 room if the cheaper one is requested. Yet this form of discrimination is practised and its justification attempted in the name of the right to assign.[79] Because a guest is not entitled to the room of his choice, the innkeeper can so assign apartments as to effect a segregation of one sex from the other;[80] of persons in formal attire from those in street clothes;[81] of negroes from white persons.[82]

Co. v. Gray, [1895] 2 Q. B. 501. See L. E. Lines Music Co. v. Holt, 332 Mo. 749, 754, 60 S. W. (2d) 32, 34 (1933). Baggage is not limited to such articles as are ordinarily used by travelers stopping at hotels. Zeiger v. Woodson, 202 S. W. 163 (Tex. 1918).

72. See Robins & Co. v. Gray [1895] 2 Q. B. 501, 504.

73. See Regina v. Rymer, 2 Q. B. D. 136, 140 (1877) (property annoying to others may be excluded).

74. See Regina v. Rymer, 2 Q. B. D. 136, 141 (1877).

75. See Regina v. Rymer, 2 Q. B. D. 136, 140 (1877).

76. See Threfall v. Borwick, L. R. 10 Q. B. 210, 212 (1875). BEALE, INNKEEPERS AND HOTELS (1906) § 68.

77. Fell v. Knight, 8 M. & W. 269, 151 Eng. Reprint 1039 (Ex. 1841); Regina v. Sprague, 63 J. P. 233 (1899), WYMAN, CASES ON PUBLIC SERVICE CO. (1909) 232; see DeWolf v. Ford, 193 N. Y. 397, 402, 86 N. E. 527, 529 (1908).

78. By statute in New York a hotel keeper must conspicuously post a statement of the rates for lodging by the day and for food. N. Y. GEN. BUS. LAW (1909) § 206.

79. By maintaining an elaborate, expensive suite, and making it the only one available to persons he would exclude, an innkeeper could, in so far as a large body of the public is concerned, effectively evade the duty to serve, and arm himself with discriminatory powers. The law would give travelers little protection, if it sanctioned such conduct.

80. Boyce v. Greeley Square Hotel Co., 181 App. Div. 61, 168 N. Y. Supp. 191 (2d Dep't 1917), *aff'd*, 228 N. Y. 106, 126 N. E. 647 (1920).

81. Regina v. Sprague, 63 J. P. 233 (1899), WYMAN, CASES ON PUBLIC SERVICE CO. (1909) 232.

82. 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) § 566.

Civil Rights

At the common law no one could be excluded from a hotel solely because of his race, color, or creed.[83] By professing to serve the public, the innkeeper invested everyone with a common right to use his inn. The essence of a common right is equality and equality precludes discrimination. It is undeniable that pecuniary hardships will be sustained by a hotel proprietor compelled to admit persons of a color or race against which prejudices are current in the community.[84] One southern court, sensing these hardships, was so impressed as to announce in dictum that a hotel keeper could deny accommodations to persons whose race made them so objectionable to the patrons of his inn that it would injure his business to admit them.[85] This dictum is unsound and discrimination is unlawful, regardless of the effect on the proprietor's business.[86] Segregation, however, has been sanctioned.[87] So long as substantially equal accommodations are given, the mere separation of the races constitutes no discrimination. But if the rooms quartering one race are furnished with clean bedding and with washing facilities, while these conveniences are absent from the parts occupied by the other race, separation would be unlawful.[88]

Following the Civil War, the agitation for the abolition of color and race discriminations was consummated in the enactment of a civil rights statute by the Federal Congress.[89] Although this perished of unconstitutionality[90] it stimulated and moulded country wide legislation[91] on the subject. The new

83. Rothfield v. North British Ry. [1920] Sess. Cas. 805 (fact that applicant was Jewish no excuse for rejecting); see Charge to Jury-Civil Rights Act, 30 Fed. Cas. No. 18,258, at 1000 (C. C. W. D. N. C. 1875); Civil Rights Cases, 109 U. S. 3, 41 (1883) (dissent by Harlan, J.); Brown v. J. H. Bell Co., 146 Iowa 89, 96, 123 N. W. 231, 233 (1909); Ferguson v. Gies, 82 Mich. 358, 365, 46 N. W. 718, 720 (1890); West Chester & P. R. R. v. Miles, 55 Pa. 209, 211 (1867); 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) § 565.

84. 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) § 565.

85. See State v. Steele, 106 N. C. 766, 782, 11 S. E. 478, 484 (1890).

86. BEALE, INNKEEPERS AND HOTELS (1906) §§ 65, 92.

87 Regina v. Sprague, 63 J. P. 233 (1899), WYMAN, CASES ON PUBLIC SERVICE CO. (1909) 232; 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) § 566; BEALE, INNKEEPERS AND HOTELS (1906) § 56. The same right of segregation was recognized in common carriers, also under duty to serve all equally. Chiles v. Chesapeake and Ohio Ry., 218 U. S. 71 (1910); West Chester & Philadelphia R. R. v. Miles, 55 Pa. 209 (1867).

88. *Cf.* The Sue, 22 Fed. 843 (D. Maryland 1885). Unless the respective accommodations were substantially equal, separation would be illegal. BEALE, INNKEEPERS AND HOTELS (1906) § 56.

89. The Federal Civil Rights Act, 18 STAT. 335 (1875).

90. Civil Rights Cases, 109 U. S. 3 (1883). In this celebrated decision the Supreme Court denied that either the Thirteenth or the Fourteenth Amendments authorized Congress to enact legislation defining the civil rights of individuals. The Thirteenth Amendment abolished slavery, and while the court concedes that under it Congress could pass laws to obliterate servitude, it ridicules the suggestion that denial of admission to a hotel is slavery. The Fourteenth Amendment prohibited discriminatory legislation by the states, and empowered Congress to pass laws to nullify such legislation. But this Civil Rights Act was not corrective. It was of an original character, hence void.

91. ILL. REV. STAT. (Smith-Hurd, 1935) c. 38, § 125; IND. STAT. ANN. (Burns, 1933)

statutes ordered equality of treatment not only at hotels, but in theatres and other places of public amusement,[92] and one of their major effects was to banish segregation. Where an act provides that all persons, regardless of race or color, shall be entitled to *equal* accommodations, and the New York statute so orders,[93] it is violated if the patrons are separated according to racial or color lines.[94]

Character and Reputation

The decisions abound in dicta giving an innkeeper the right to refuse accommodations to one whose character or reputation is bad. A rule so broadly expressed is of little practical value. Can it be that any fault of character will disqualify a traveler from his right to admission? In *Nelson v. Boldt*,[95] the rejected applicant was a professional prizefighter at a time when boxing was illegal. While the court implies that something more than mere law-breaking[96] is required to warrant exclusion, it makes no disclosure of additional considerations. In the Scottish case of *Rothfield v. The North British Railway*,[97] a money-lender, whose business practises had been publicly attacked, was refused accommodations. The court justified the innkeeper on the grounds that the presence of such a person at the hotel would have been disagreeable to the other patrons and prejudicial to the house. This test is unsound. Neither loss of patronage, nor mere "disagreeableness" to the other guests,[98] has ever been

§ 10-901; IOWA CODE (1935) § 13251; KAN. GEN. STAT. ANN. (1935) c. 21, § 2424; ME. REV. STAT. (1930) c. 134, §§ 7, 10 (publications calculated to produce discrimination prohibited); MASS. ANN. LAWS (Lawyer's Co-op., 1933) c. 272, § 98; MINN. STAT. (Mason, 1927) § 7321; N. H. PUB. LAWS (1926) c. 171, § 3 (publications calculated to produce discrimination prohibited); N. J. COMP. STAT. (1911) *tit.* Civil Rights, § 1; OHIO GEN. CODE (Page, 1926) § 12940; PA. STAT. ANN. (Purdon, 1936) *tit.* 18, § 1211; R. I. GEN. LAWS (1923) § 6040; WASH. REV. STAT. ANN. (Remington, 1932) § 2686; N. Y. CIVIL RIGHTS LAW (1935) § 40; WIS. STAT. (1935) § 340.75.

92. The constitutionality of these laws, insofar as hotels were concerned, is obvious, since they merely iterate the common law. See Brown v. J. H. Bell Co., 146 Iowa 89, 96, 123 N. W. 231, 233 (1909); Ferguson v. Gies, 82 Mich. 358, 365, 46 N. W. 718, 720 (1890). Yet their validity was affirmed even as to other places. Western Turf Ass'n v. Greenberg, 204 U. S. 359 (1907) (race-course); Donnell v. State, 48 Miss. 661, 12 Am. Reports 375 (1873) (theatre); People v. King, 110 N. Y. 418 (1888) (skating rink).

93. "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodations, resort or amusements . . . ." N. Y. CIVIL RIGHTS LAW § 40.

94. Jones v. Kehrlein, 49 Cal. App. 646, 194 Pac. 55 (1920); Baylies v. Curry, 128 Ill. 287, 21 N. E. 595 (1889); Fruchey v. Eagleson, 15 Ind. App. 88, 43 N. E. 146 (1896); Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718 (1890).

95. 180 Fed. 779 (E. D. Pa. 1910). The case has been criticised in (1911) 24 HARV. L. REV. 239.

96. Mere previous law-breaking should be no proper cause for exclusion. See 1 WYMAN, PUBLIC SERVICE CORP. (1911) § 611.

97. [1920] Sess. Cas. 805.

98. See (1911) 24 HARV. L. REV. 239. It is there set down that " . . . the mere interest of the public servant should be no excuse. . . . Engaged in a public undertaking, the innkeeper can justify his failure to perform it only on grounds in which the public is interested."

sufficient to justify exclusion. However, under such a rule it would be permissable to deny entrance to a gangster whose notorious affiliations with corruption would make him unwelcome in decent society.

In defining the character and reputation that warrant rejection at a hotel, it will be helpful, because of the analogous liabilities of these occupations, to note the corresponding right which justifies a carrier in refusing to transport a traveler.[99] It is held that the private character of the traveler is no concern of the carrier, unless it will affect his conduct on the train. No matter how infamous a person is, if his public demeanor is respectable, he must be given transport. Thus, a known prostitute cannot be denied carriage when her behavior in public is unimpeachable.[100] Such a rule can well be incorporated into the law of hotels.[101] True, an innkeeper may keep out one who would bring discomfort to his guests. But the presence of a person, known to be privately immoral, yet acting decorously, can disturb only the fastidious, and the necessities of the traveling public must be protected before these nice sensibilities.[102] It is submitted that the presence of a bad character brings no direct physical discomfort, but offends only the moral sense. An advocate of euthanasia would hardly be less offensive, yet who would deny his right to accommodation at a hotel?[103] Private virtue cannot be made a condition precedent to admission. But the inveterate thief, who probably will purloin the goods of host and fellow guests can rightfully be denied admission;[104] similarly, a woman of such immoral nature that misconduct in the hotel is reasonably expected, cannot complain if refused accommodation. Obviously, one who intends objectionable conduct forfeits his right to enter.[105]

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99. It might appear that the relation between guests at a hotel is so much closer than that between fellow-passengers on a train, that the admission of a disreputable person on a carrier is no argument for his admission to an inn. However, travelers on a transcontinental rail trip live for several days under the same roof, dine at the same table, and experience an intimacy so similar to that of hotel guests, that the analogy is sound.

100. Brown v. Memphis & C. R. R., 7 Fed. 51 (C. C. A. 6th, 1881). Unless one has such a tendency toward an offensive vice, that, if permitted to remain, he will put it in action and disturb passengers, he cannot be excluded. The telephone company, though a public servant like an innkeeper, cannot refuse telephone service to a woman engaged in an immoral business. If the house wherein the service is required is reputable, the collateral immoral enterprises of the woman are no concern of the telephone company. Goodwin v. Carolina Tel. & Tel. Co., 136 N. C. 258, 48 S. E. 636 (1904).

101. " . . . it is incorrect to say as is incautiously said that one may be rejected by reason of his evil reputation. Where the past misconduct has no relation to the present service, there certainly can be no refusal. Mere past conduct, as such, cannot justify refusal." 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) § 642. But see Raider v. Dixie Inn, 193 Ky. 152, 154, 248 S. W. 229 (1923); State v. Steele, 106 N. C. 766, 782, 11 S. E. 478, 484 (1890); Watkins v. Cope, 84 N. J. L. 143, 148, 86 Atl. 545, 548 (Sup. Ct. 1913); Rothfield v. The North British Ry., [1920] Sess. Cas. 805, 811.

102. See (1911) 24 HARV. L. REV. 239.

103. A non-union laborer, against whom there is popular wrath, cannot be refused transport on a train. Chicago & A. R. R. v. Pillsbury, 8 N. E. 803 (Ill. 1886).

104. See Markham v. Brown, 8 N. H. 523, 528, 31 Am. Dec. 209, 210; Watkins v. Cope, 84 N. J. L. 143, 148, 86 Atl. 545, 548 (Sup. Ct. 1913).

105. BEALE, INNKEEPERS AND HOTELS (1906) § 136. See Markham v. Brown, 8 N. H.

The doctrine of probable cause seems to pervade all of the excuses for rejection.[106] It would be harsh to say that since no proper applicant can be refused, the innkeeper acts at his peril. So long as it reasonably appears that, for example, the guest has a contagious disease,[107] or is intoxicated, exclusion is justified, even though in fact the objectionable condition did not exist.[108] More than mere suspicion is required. Thus, where a group of militiamen had been ejected for disorderly conduct, an innkeeper was not justified in excluding an independant member of the same company. His fear that disorder was to be expected from anyone wearing the uniform of that company was held unreasonable.[109]

Non-Guests

Business invitees of a guest must be admitted, unless their entry would violate a proper rule of the house.[110] Certainly, if a hotel forbids women from having male visitors in their rooms, this would also exclude business men. While social invitees have sometimes been given the same right,[111] it is the more general rule that they enter only under an implied license, revocable at will by the proprietor.[112] Their admission is permissive rather than of right. And clearly, one who has not been invited and who comes for a social visit may be kept out.[113]

The rule that the innkeeper must admit all is restricted to those who offer themselves *as guests*.[114] A guest is one who comes to receive the customary lodging or entertainment of the hotel.[115] One who comes not as a guest, nor

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523, 529, 31 Am. Dec. 209, 210 (1837); Curtis v. Murphy, 63 Wis. 4, 8, 22 N. W. 825, 827 (1885); State v. Steele, 106 N. C. 766, 778, 11 S. E. 478, 482 (soliciting from patrons regarded as annoying, and those who come with intent to solicit may be excluded).

106. See Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209, 210 (1837); 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) §§ 643, 645.

107. *Cf.* Paddock v. Atchison, T. &. S. F. R. R., 37 Fed. 841 (C. C. W. D. Mo. 1889).

108. See Connors v. Cunard S. S. Co., 204 Mass. 310, 316, 90 N. E. 601, 603 (1910). In Regner v. Glens Falls R. R., 74 Hun. 202, 26 N. Y. Supp. 625 (Sup. Ct. 1893) one suffering from St. Vitus disease exhibited movements which, to the conductor of the train, appeared to be the actions of an inebriate. He proceeded to eject, and the carrier is held liable. This case would not seem to disturb the doctrine that a public servant may act on probable cause. This conductor acted rashly, not on probable cause.

109. Atwater v. Sawyer, 76 Me. 538, 49 Am. Rep. 634 (1884).

110. See Goldstein v. Healy, 187 Cal. 206, 210, 201 Pac. 462, 464 (1921); Markham v. Brown, 8 N. H. 523, 529, 31 Am. Dec. 209, 211 (1837) (it is even the opinion of this court that if one dispenses a service appropriate to travelers *as such* he may enter though not invited). It has been said that guest has right, not merely privilege, to invite persons, and this right is one of the accommodations given by a hotel to its patrons. Goldstein v. Healy, *supra*.

111. BEALE, INNKEEPERS AND HOTELS (1906) § 84.

112. Money v. Travelers' Hotel Co., 174 N. C. 508, 93 S. E. 964 (1917).

113. BEALE, INNKEEPERS AND HOTELS (1906) § 84.

114. See Gordon v. Silber, 25 Q. B. D. 491, 492 (1890).

115. Carter v. Hobbs, 12 Mich. 52 (1863); Arcade Hotel Co. v. Wyatt, 44 Ohio 32, 4 N. E. 398 (1886); Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825 (1885); see *In re* Doubleday, 173 App. Div. 739, 743, 159 N. Y. Supp. 947, 950 (3d Dep't 1916). One who

at the request of a guest, but out of curiosity or cupidity for profit to be derived from mingling with the patrons, cannot invoke the hotel keeper's compulsory duty to admit applicants.[116] Although a person coming on his own business, uninvited by a guest, may be refused admission,[117] if he trades in a service appropriate to travelers as such, for example transportation, it is unlawful for the innkeeper to exclude him and admit his rival.[118] But where a collateral business like a barber-shop, a news-stand, or a laundry is operated by the proprietor himself, or its exclusive rights have been given to another for a *per centum* return, the innkeeper may rightfully refuse to admit competitors.[119] So long as the hotel proprietor is financially interested in this collateral service, competitors may be refused admission even though they come at the request of a guest, and their exclusion will tend to create a monopoly.[120]

EJECTION

Loss of Status as Traveler

When a person ceases to be a traveler, or transient, and takes up a permanent abode, even at an inn, he ceases to be an object of the law's special solicitude. He is no longer a guest, but a boarder; no longer a traveler, but a resident,[121] and subject to ejection. Length of stay though significant does

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intends to use the room for a purpose of business distinct from his accommodation as a guest may be denied admission. 2 KENT'S COMM. 596. Thus an innkeeper is not bound to furnish a guest with rooms for displaying merchandise. See Burgess v. Clements, 4 M. & S. 306, 310, 105 Eng. Reprints 848, 849 (K. B. 1815). Similarly, one who comes to decoy away patrons to another inn has no legal right to admission, for he does not come as guest. Jencks v. Coleman, 13 Fed. Cas. No. 7, 258, at 444 (C. C. D. R. I. 1835). Diverting travelers from one hotel to another by false representations and for the purpose of gain is a misdemeanor. N. Y. PENAL LAW (1932) § 925-a.

116. State v. Steele, 106 N. C. 766, 11 S. E. 478 (1890). While a non-guest sometimes enters as of right, it is never in his own right, but only under the right of a guest to receive business visitors.

117. See *id.* at 782, 11 S. E. at 484.

118. Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837).

119. State v. Steele, 106 N. C. 766, 11 S. E. 478 (1890).

120. Champie v. Castle Hot Springs Co., 27 Ariz. 463, 233 Pac. 1107 (1925).

121. Berkshire Woollen Co. v. Proctor, 7 Cush. 417 (Mass. 1851); Horner v. Harvey, 3 N. M. 307, 5 Pac. 329 (1885); McIntosh v. Schops, 92 Ore. 307, 180 Pac. 593 (1919). Rooms were occupied under a written agreement stipulating a term of six months and for a weekly "rental". The court properly finds that the contract contemplated the relation of landlord and tenant. Hackett v. Bell Operating Co., Inc., 181 App. Div. 535, 169 N. Y. Supp. 114 (1st Dep't 1918). In another New York case, a laborer working in the city and regarding the city as his residence, took rooms at a hotel, and after remaining approximately two months, lost some articles. He was held a guest, the court stressing his failure to bring furniture with him. Both the length of stay and the fact that the city was his residence show a permanence which seem to make him a boarder in a furnished room, rather than a guest.

In some states, the length of time during which a patron remains a transient is fixed by statute. N. C. CODE (1935) § 2283 (a) (one week); S. C. CODE (1932) § 5097 (one week).

not automatically effect a change in status.[122] In the celebrated case of *Hancock v. Rand,*[123] General Hancock and his family had entered the hotel in November with an understanding that they would remain until the following summer, unless the general was ordered elsewhere sooner on military duty. For seven months they made their residence at this inn, and in an action for goods lost it was held that the general and his family were still guests. According to this case officers of the army and navy, who have no permanent residence which they can call home, may well be regarded as travelers though their stay is prolonged. They are essentially transients subject to change by their superiors at any moment. Similar liberality was shown to a legislator and his family, who had taken quarters in a hotel at the capital city during the session.[124] Generalizing on these cases, it would seem that where the duration of the stay is subject to the volition of the guest a prolonged residence converts him into a lodger. Where the time of stay is subject to contingencies out of his control and which may occur at any moment, and the innkeeper has notice of it, the status of guest continues though the residence is prolonged.

Method of payment is another circumstance to be considered in determining whether an inmate at a hotel is a guest or a boarder. The fact that the hotel charges are paid at a fixed rate per week or month does not necessarily break the host-guest relation.[125] In some cases little importance is attached to the question whether the fixed rate per week or month is in pursuance of an agreement to remain for a definite period.[126] Other courts, in declaring that such payment does not strip a patron of his character as guest, have labored to emphasize the absence of a contract to remain for a definite time.[127] The fixity of the time of stay should hardly brand one a boarder, if the stipulated period is short and shows transiency.

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122. Norcross v. Norcross, 53 Me. 163 (1865); 18 HALSBURY'S LAWS OF ENGLAND (2d ed. 1935) § 201. There may be circumstances, such as illness, where a person's status as a traveler survives a prolonged stay. See Lamond v. Richard, [1897] 1 Q. B. 541, 546.

123. 94 N. Y. 1 (1883).

124. Fisher v. Bonneville Hotel Co., 55 Utah 588, 188 Pac. 856 (1920) (held guest though intent was to remain for duration of session).

In any case, even if a prolonged residence is intended, the innkeeper-guest relation may be created by special contract to that effect. Baldwin Piano Co. v. Congress Hotel, 243 Ill. App. 118 (1928).

125. Pettit v. Thomas, 103 Ark. 593, 148 S. W. 501 (1912); Berkshire Woollen Co. v. Proctor, 7 Cush. 417 (Mass. 1851); Norcross v. Norcross, 53 Me. 163 (1865); Polk & Co. v. Melenbacker, 136 Mich. 611, 99 N. W. 867 (1904). In fact the presumption that one who enters as a traveler retains that status is not even rebutted by proof that he paid fixed weekly or monthly rates, and that these were lower than the rates charged to transients. Luske v. Relote, 22 Minn. 468 (1878). A situation of this sort ought to be closely scrutinized, for the great probability is that the rates were lowered in consideration for a more prolonged stay, the effect of which would be to change a patron from a guest to a boarder.

126. Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657 (1867); Metzger v. Schnabel, 23 Misc. 698, 52 N. Y. Supp. 105 (Sup. Ct. 1898).

127. Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037 (1907). In Hancock v. Rand, 94 N. Y. 1, 6 (1883), considerable emphasis is put on the absence of an absolute contract as to time.

Failure to Pay, Appearance, and Manners

A guest who refuses or is unable to pay the reasonable charges of the innkeeper may be rightfully put out.[128] Likewise, public appearances in a filthy condition or in immodest dress works a forfeiture of a patron's right to remain. Small breaches of etiquette do not warrant ejection. One reaching across a table for food may be disagreeable, but he cannot be put out.[129] Those who are being served with the general public cannot be too fastidious.

Breach of Reasonable Regulations

The internal management of the hotel is within the control of the proprietor. He may promulgate and enforce reasonable regulations governing the conduct of his patrons and the infraction of these rules by a guest subjects him to removal.[130] Any rule is reasonable which tends to prevent immorality or misconduct that may be offensive to other inmates. Thus a prohibition against women entertaining men visitors privately has been held proper.[131]

Disease

A guest who contracts a contagious disease can be removed. This removal must be effected with due regard to the guest's condition.[132] For default in care, the offending host is liable in damages. Thus, where the ejected guest was, to the knowledge of the proprietor, so infirm as to be unable to walk or stand, and he fell into a stream of snow and water on a cold night, recovery for his death from exposure was allowed against the innkeeper.[133]

Misconduct

Improper behavior[134] is the most frequent cause for the ejection of guests. Where their conduct is illegal, dangerous, or calculated to disturb the comfort of others, they have forfeited their right to remain.[135] Persons using the inn

128. Morningstar v. Lafayette Hotel Co., 211 N. Y. 465, 105 N. E. 656 (1914); see Raider v. Dixie Inn, 198 Ky. 152, 153, 248 S. W. 229, (1923).

129. 1 WYMAN, PUBLIC SERVICE CORP. (1911) § 555. But see Strathearn Hydropathic Co. v. Inland Revenue, 8 R. 798, 800 (1881) where a hotel keeper is said to have the right to exclude persons "because their manners and habits are not suitable to the class of people whom he receives."

130. State v. Steele, 106 N. C. 766, 11 S. E. 478 (1890); *cf.* Texas Midland R.R. v. Geraldon, 103 Tex. 402, 128 S. W. 611 (1910). An ejection, even though authorized must be reasonably executed.

131. Hurd v. Hotel Astor Co., 182 App. Div. 49, 169 N. Y. Supp. 359 (2d Dep't 1918); Boyce v. Greeley Square Hotel, 181 App. Div. 61, 168 N. Y. Supp. 191 (2d Dep't 1917).

132. Levy v. Carey, 1 City Ct. Rep. Supp. 57 (N. Y. 1884).

133. McHugh v. Schlosser, 159 Pa. 480, 28 Atl. 291 (1894).

134. The reception of an applicant as a guest engenders, in the legal eye, an agreement that the hotel proprietor will use reasonable care for the safety and comfort of the guest, and that the patron will refrain from offensive behavior. Lehnen v. E. J. Hines & Co., 88 Kan. 58, 127 Pac. 612 (1912)..

135. Obviously a servant of the public will not be compelled to give cover to public wrongs—crimes. And there is an impressive array of cases supporting the innkeeper's right to spare his patrons discomfort and molestation by ejecting the boisterous and the

for gambling, conspiracies, prostitution[136] or other criminal activities can be put out. Rowdyism and clamorous intoxication,[137] as well as injuries to the other patrons or to the property of the hotel render a guest removable. Nor need an innkeeper wait for an act. It is sufficient if under the circumstances the improper act is reasonably forseen as imminent.[138] An interesting question is whether a guest who threatens to commit suicide may be put out. Such a person has ceased to use the inn as a place for lodging and entertainment, and the consequent loss of his status as guest divests him of the right to remain. Moreover, self-destruction was a crime at common law[139] and today is defined by statute[140] as a grave public wrong. No hotel proprietor should be under compulsion to permit the use of his house for such offensive and essentially immoral conduct.

Remedies

While an old English case[141] speaks of compelling a delinquent innkeeper to specifically perform his duties toward the public, modern authorities uniformly restrict the person wrongfully excluded or ejected to an action for damages,[142] and in some states subject the offending host to criminal punishment.[143] In actions for refusal to admit, the rejected applicant must establish his right to enter,[144] but in suits based on ejection, the burden of justification is on the

insolent. Holden v. Carraher, 195 Mass. 392, 81 N. E. 261 (1907); Jones v. Shannon, 55 Mont. 225, 175 Pac. 882 (1918); Chase v. Knabel, 46 Wash. 484, 90 Pac. 642 (1907).

136. Not only was ejection sanctioned in one such case, but the innkeeper was allowed to recover damages against the offending guest on the grounds that prostitution created a private nuisance. Hall v. Galloway, 76 Wash. 42, 135 Pac. 478 (1913). But see Curtis v. Murphy, 63 Wis. 4, 8, 22 N. W. 825, 827 (1885) where the court said that once a man had become a guest "he could not have been turned into the street, though his profligate conduct was outraging all decency. . . ." This dictum cannot be supported.

137. McHugh v. Schlosser, 159 Pa. 480, 28 Atl. 291 (1894).

138. See Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209, 210 (1837).

139. 2 BISHOP, CRIMINAL LAW (9th ed. 1923) § 1187; see Shipman v. Protected Home Circle, 174 N. Y. 398, 406, 67 N. E. 83, 85 (1903).

140. N. Y. PENAL LAW (1909) § 2301.

141. "Innkeepers are compellable by the constable to lodge strangers. . . ." Newton v. Trigg, 1 Show. 268, 269, 89 Eng. Reprints 566 (K. B. 1691).

142. Willis v. McMahan, 89 Cal. 156, 26 Pac. 649 (1891) (exclusion); Dalzell v. Dean Hotel Co., 193 Mo. App. 379, 186 S. W. 41 (1916) (ejection); Cornell v. Huber, 102 App. Div. 293, 92 N. Y. Supp. 434 (2d Dep't 1905) (exclusion).

143. ILL. REV. STAT. (Smith-Hurd, 1935) c. 38, § 126; MASS. ANN. LAWS (Lawyer's Co-op., 1933) c. 14, § 7; NEB. COMP. STAT. (1929) § 23-102; N. Y. PENAL LAW (1918) § 513; UTAH REV. STAT. ANN. (1933) tit. 103, c. 29, § 2. The criminality of an innkeeper's refusal to accept an applicant was established at common law. Rex v. Ivens, 7 C. & P. 213, 173 Eng. Reprints 94 (N. P. 1835); see Mateer v. Brown, 1 Cal. 221, 230, 52 Am. Dec. 303, 311 (1850); 1 BISHOP, CRIMINAL LAW (1923) § 532.

144. 1 WYMAN, PUBLIC SERVICE CORP. (1911) § 634. However, as to matters peculiarly within the innkeeper's knowledge, plaintiff is relieved of the burden. Thus, where an innkeeper defends the exclusion of an applicant on the grounds that his accommodations were exhausted, the burden of proving this condition would seem, by authority and logic, to be on him. See Jackson v. Virginia Hot Springs Co., 213 Fed. 969, 973 (C. C. A. 4th, 1914).

hotel keeper.[145] Compensation for the injury is the measure of damages.[146] Recovery has been allowed for loss of health consequent upon the non-use of mineral waters appurtenant to the hotel from which the plaintiff was excluded.[147] A sick woman unlawfully removed from her apartment was awarded damages for a miscarriage induced by this experience.[148] Mental distress and injury to feelings resulting from humiliation are compensable,[149] even though there is no accompanying physical harm.[150] When an innkeeper "locks out" a guest unlawfully, and a patron has belongings inside his room, is the hostler liable for their conversion? It seems obvious that the innkeeper has no intention to deprive the owner of the goods. The paramount intent is to sever the guest not from his belongings but from the room. Yet, by such behavior wrongful possession of the goods *is* assumed, and unless the host tenders their return, conversion can be made out. Where goods are detained by one who has acquired possession unlawfully, demand by the owner is unnecessary to work out conversion.[151]

Conclusion

In recent years some judges have intimated a desire to emancipate the innkeeper from this compulsion. The duty to admit guests would be limited by them to cases of strict necessity, where an applicant is incapable of being lodged elsewhere.[152] No doubt these emanations are prompted by hard cases, where proprietors have been confronted with applicants whose business or nationality makes them odious in a prejudiced community, and whose admission would cause the withdrawal of lucrative patronage. But the trend favors the retention of this obligation, the desirability of which has been proven through the many years of its existence. It has become obvious that the host's right to protect his patrons from discomfort is his main premise for refusing incoming guests and for ejecting objectionable inmates. Since every hotel is public, the only annoyance and discomfort that can justify the exercise of this right is such conduct as would reasonably annoy or discomfort an ordinary member of the public. So, the extent of this power may well vary with a change in public tastes and customs.

145. Dixon v. Hotel Tulwiter Operating Co., 214 Ala. 396, 108 So. 26 (1926); 1 WYMAN, PUBLIC SERVICE CORP. (1911) § 634.

146. Jones v. Shannon, 55 Mont. 225, 175 Pac. 882 (1918).

147. Willis v. McMahan, 89 Cal. 156, 26 Pac. 649 (1891).

148. Dalzell v. Dean Hotel Co., 193 Mo. App. 379, 186 S. W. 41 (1916).

149. Morningstar v. Lafayette Hotel Co., 211 N. Y. 465, 105 N. E. 656 (1914).

150. Frewen v. Page, 238 Mass. 499, 131 N. E. 475 (1921). *Contra*: Dalzell v. Dean Hotel Co., 193 Mo. App. 379, 186 S. W. 41 (1916).

151. See HARPER, LAW OF TORTS (1933) § 30.

152. See Rothfield v. North British Ry., [1920] Sess. Cas. 805, 828.