

# The Innkeeper's Tale: The Legal Development of a Public Calling

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*At nyght was come into that hostelrye  
Wel nyne and twenty in a compaignye,  
Of sondry folk, by aventure yfalle  
In felaweshipe, and pilgrimes were they alle<sup>1</sup>*

Herry Bailly, Chaucer's ideal fourteenth-century host, would never turn away a pilgrim if a bed could be found.<sup>2</sup> It is uncertain whether this hospitality was also compelled by law, because English law concerning innkeepers' obligations to their customers was just beginning to develop during Chaucer's lifetime. This Article tells the story of how innkeepers came to be liable for the losses of their guests, how that liability became part of the common law, and how, in turn, the public right of access to inns grew out of that liability.

The commonly accepted explanations for the development of the public right of access to inns are untenable. According to one theory, the right developed in response to the monopoly power of inns.<sup>3</sup> This theory does not square with the facts.<sup>4</sup> Strict liability developed in the latter part of the fourteenth century when inns faced serious economic pressures.<sup>5</sup> The public right to accommodations was firmly established by the beginning of the seventeenth century when judges debated whether there were too many inns, not too

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1. GEOFFREY CHAUCER, *The Canterbury Tales*, in *THE WORKS OF GEOFFREY CHAUCER* 17, 17 (F.N. Robinson ed., 2d ed. 1957).

2. Herry Bailly (or Harry Bailey) was the innkeeper in *The Canterbury Tales*. *Id.* at 60.

3. Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 *HARV. L. REV.* 156, 157-61 (1903).

4. Edward A. Adler, *Business Jurisprudence*, 28 *HARV. L. REV.* 135, 141-49 (1914).

5. See discussion *infra* part II.C (discussing Black Death's effect on innkeepers).

few.<sup>6</sup>

According to another theory, offering services to the public was an undertaking to serve all members of the public.<sup>7</sup> But that is not so much a theory as a tautology. Innkeepers made no express promise to serve all comers, and an invitation to the public to request services does not necessarily imply a promise to provide them. When the court said innkeepers must serve the public, the obligation became an element of the status of an innkeeper; thereafter, the act of becoming an innkeeper included undertaking that obligation. Why the court imposed the obligation in the first place remains a question.

A refinement of the public undertaking theory suggested an analogy to public officeholders.<sup>8</sup> But there is no indication that innkeepers were considered similar to public officeholders when their obligations were created.<sup>9</sup> Anyone could become an innkeeper. Therefore, rooting the duty to serve in an analogy to public office puts the cart before the horse. The analogy to public officeholders, and thus the idea of a public calling, was a product of duties imposed rather than a cause of them.

The monopoly theory, the public undertaking theory, and the public office analogy responded to an American debate at the turn of the century over the government's power to regulate. Starting from the premise that the government could regulate inns and carriers, lawyers and scholars constructed rationales to justify governmental regulation of other businesses. However, this "lawyer's history" lost its reason for being when constitutional doctrine accorded deference to any rational basis for government regulation. Once off center stage in American constitutional thought, explanations for the obligation to serve the public received little attention. Uncritically accepted, these explanations nonetheless continue to play a role in justifying other legal theories.<sup>10</sup>

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6. Resolutions Concerning Innes, 123 Eng. Rep. 1129, 1129 (1624).

7. Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies* (pt. 1), 11 COLUM. L. REV. 514, 515-16 (1911).

8. *Id.* at 521-22.

9. Burdick was influenced by references to a "public trust" and an innkeeper's "profession of a public employment" in Chief Justice Holt's opinion in *Lane v. Cotton*, 88 Eng. Rep. 1458, 1462-65 (1702). But Holt's characterization came at least a century after establishment of the duty to serve the public.

10. See Matthew O. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247, 1249-50 (1967) (discussing reformation of common-law principle governing enterprises "affected with a public interest"); Leslie E. John, Comment, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2043-44 (1987) (discussing public service exception to exclusion of punitive awards);

It was, however, concern for criminal activity in the inn, rather than any monopoly or innkeeper promise, that led to the obligation to serve the public. The obligation supported the imposition of strict liability on innkeepers and carriers for their customers' goods, a liability that responded consistently with other contemporary police measures to fears of criminal activity.

### PROLOGUE

The earliest known inns in England were established by the Romans during their occupation of Britain.<sup>11</sup> These inns made no permanent mark on England, either physically or legally. Roman institutions had virtually disappeared from England by the sixth century.<sup>12</sup> But centuries later, Roman law returned as an object of study.<sup>13</sup> Its solutions for legal problems provided a model in some instances for English legal developments<sup>14</sup> and, more frequently, a basis for understanding the different direction that English law took.

If Roman law applied to the first English innkeepers, their freedom to refuse guests would have been linked to their liability for guests' losses. Under Roman law, guests had at least two legal actions against the innkeeper for damage to, or loss of, their goods. For example, if their goods were damaged or stolen by the innkeeper's employees, victims could recover double the value of the goods from the innkeeper.<sup>15</sup> Even where the perpetrator was un-

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Robert S. Trefry, Comment, *Judicial Intervention in Admission Decisions of Private Professional Associations*, 49 U. CHI. L. REV. 840, 846 (1982) (discussing departure from nonintervention rule in admission decisions of private professional groups); Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993, 1994-99 (1989) (discussing duty to serve and its relation to racial discrimination).

11. ANTHONY BIRLEY, *LIFE IN ROMAN BRITAIN* 50-51 (5th ed. 1976); FREDERICK W. HACKWOOD, *INNS, ALES AND DRINKING CUSTOMS OF OLD ENGLAND* 31-32 (1909); I.A. RICHMOND, *ROMAN BRITAIN* 91-92 (2d ed. 1963).

12. W. Senior, *Roman Law in England Before Vacarius*, 46 LAW Q. REV. 191, 192 (1930).

13. *Id.* at 191-206; PAUL VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE passim* (1929); 8 FRANCIS DE ZULUETA & PETER STEIN, *THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200, passim* (Selden Society Suppl. Series 1990).

14. References appear throughout Bracton's thirteenth-century treatise on English law. Samuel E. Thorne, *Introduction to 1 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND* at xxxii-xl (George E. Woodbine ed. & Samuel E. Thorne trans., 1968). Litigants and judges made references to and discussed the Roman civil law in the common-law courts of Edward II. *Introduction to 4 FLETA, BOOK V AND BOOK VI* at xix-xx (G.O. Sayles ed. & trans., Selden Soc'y No. 99, 1984).

15. DIG. 47.5.1. (Ulpian, Ad Edictum 18). The application of Roman law to provincial areas like Roman Britain is a complicated subject beyond the scope of this Article.

known, innkeepers were liable to their customers for the value of stolen or damaged goods.<sup>16</sup> Travelers needed to trust innkeepers and to give them custody of their property,<sup>17</sup> but a traveler may have had difficulty learning of the innkeeper's reputation among his neighbors. Strict liability protected travelers against untrustworthy innkeepers.<sup>18</sup> It also assured victims of recovery even when it was impossible to prove who committed the crime.<sup>19</sup>

Justinian's *Digest* stated that strict liability was not too harsh because the innkeeper could choose whether to accept the guest and thus whether to assume the risk.<sup>20</sup> The innkeeper could also obtain an agreement to limit liability, which was valid if made before the entrance of the guest into the inn. The innkeeper who secured such a waiver was liable only for negligence as bailee.<sup>21</sup> His ability to reject guests who failed to agree to the waiver became a justification for imposing strict liability on the innkeeper for loss or damage to his guests' goods.

When the Roman troops were recalled from England, Roman roads and inns fell into disrepair. The Roman governmental structure evaporated and Roman law faded from Britain.<sup>22</sup> With the military gone, trade and communication with other areas diminished. Inns no longer appear in the surviving records. Today English inns trace their lineage no further than the eleventh century.<sup>23</sup>

Travelers in the Middle Ages relied to a great extent on private hospitality—the wealthy staying at the castles of other noblemen or in religious houses, the poor in servant's quarters or with other

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16. DIG. 4.9.2. (Gaius, Provincial Edict 5).

17. DIG. 4.9.1.1. (Ulpian, Ad Edictum 14).

18. "[U]nless this provision were laid down, there would be given the means for conspiring with thieves against those whom they receive, since even now they do not refrain from mischief of this kind." *Id.*

19. J.B.C. Stephen, *The Water-Carrier and His Responsibility*, 12 LAW Q. REV. 116, 119–20 (1896).

20. DIG. 4.9.1.1. (Ulpian, Ad Edictum 14); see David S. Bogen, *Ignoring History: The Liability of Ships' Masters, Innkeepers and Stablekeepers Under Roman Law*, 36 AM. J. LEGAL HIST. 326, 354–60 (1992) (citing sources discussing justifications for strict liability).

21. JOHN CROOK, LAW AND LIFE OF ROME 226–27 (1967); MAX RADIN, HANDBOOK OF ROMAN LAW 255 (1927).

22. T.F.T. Plucknett, *The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey*, 3 TORONTO L.J. 24 *passim* (1939); Senior, *supra* note 12, at 192. *But see* John F. Winkler, *Roman Law in Anglo-Saxon England*, 13 J. LEGAL HIST. 101, 101–02 (1992) (discussing ways in which Roman law returned to Anglo-Saxon England via the church after Roman departure).

23. PETER CLARK, THE ENGLISH ALEHOUSE: A SOCIAL HISTORY 1200–1830, at 20–23 (1983); HACKWOOD, *supra* note 11, at 212, 224; W.A. Pantin, *Medieval Inns*, in STUDIES IN BUILDING HISTORY: ESSAYS IN RECOGNITION OF THE WORK OF B.H. ST. J. O'NEIL 166, 166 (Edward M. Jope ed., 1961).

local villagers.<sup>24</sup> Monasteries established guest houses to provide accommodation for travelers.<sup>25</sup> Some of the guest houses became public inns.<sup>26</sup> Inns flourished on the continent in the twelfth century,<sup>27</sup> and by the thirteenth century, as written records demonstrate, both reputable and disreputable inns were also well established in England.<sup>28</sup>

The rise of trade<sup>29</sup> and the breakdown of the feudal order<sup>30</sup> put more people on the roads and created a demand for places to stay. Lawlessness and disorder in the Middle Ages made travel dangerous and shelter at night very important to those who had goods that might be stolen. Bad roads made it desirable to travel light and purchase food at the inn rather than attempting to bring provisions.<sup>31</sup> The inn normally had a stable for the horses and provided food and shelter for the merchants, messengers, carriers, small landowners, and other members of the middle class when they travelled.<sup>32</sup> By Chaucer's time, innkeeping was a thriving business, and the law was forced to deal with the questions that it raised.

I. THE LONDON LODGER'S TALE: *William Beaubek v. John of Waltham* AND INNKEEPER LIABILITY IN LOCAL COURTS FOR THE LOSSES OF THEIR GUESTS (1345)

Fourteenth-century London had many inns to accommodate the visitors who came to the abbey and palace of Westminster.<sup>33</sup> With business to transact, whether secular or religious, the traveler might well stay more than one night in a London inn.<sup>34</sup> The longer

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24. CLARK, *supra* note 23, at 25-27.

25. HACKWOOD, *supra* note 11, at 59-60.

26. *Id.*

27. MARJORIE ROWLING, *EVERYDAY LIFE OF MEDIEVAL TRAVELLERS* 18 (1971).

28. RALPH V. TURNER, *THE KING AND HIS COURTS* 133 (1968) (noting innkeeper and his wife were accused of conspiring with robbers). A somewhat more distinguished inn was the Angel Inn at Blyth for which there is a record of a bill in 1274. HACKWOOD, *supra* note 11, at 228-29.

29. See ROBERT S. LOPEZ, *THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES 950-1350* (1971).

30. See WALLACE K. FERGUSON, *EUROPE IN TRANSITION 1300-1520*, at 190-206 (1962) (discussing transition from medieval to modern civilization).

31. HENRY S. BENNETT, *THE PASTONS AND THEIR ENGLAND* 128-43 (1968); J.J. JUSSEMAND, *ENGLISH WAYFARING LIFE IN THE MIDDLE AGES* 83-89, 149-57, 174-76 (Lucy T. Smith trans., 1925).

32. CLARK, *supra* note 23, at 5-6; JUSSEMAND, *supra* note 31, at 125.

33. A.R. MYERS, *LONDON IN THE AGE OF CHAUCER* 8 (1972).

34. Students of the law congregated together during term time which grew into the system of training in inns of court. J.H. Baker, *The Third University of England*, Address Before the Selden Society (July 4, 1990), in *THE THIRD UNIVERSITY OF ENG-*

stay and the likelihood of a return visit made it reasonable for travelers to seek redress in London for any injuries suffered at the inn.

The London lodger had access to a variety of courts. King's Bench settled permanently in Westminster in 1339, and the Chancellor, the Exchequer, and the Court of Common Pleas were already located there. But those bodies dealt with national business, and they had enough business without worrying about a traveler's tribulations. Further, London jealously guarded the autonomy of its local courts.<sup>35</sup> Routine writs<sup>36</sup> went to the Court of Hustings, while the more flexible bill,<sup>37</sup> or plaint, most frequently initiated actions in the court of the mayor and aldermen.<sup>38</sup>

Thus it was before the mayor and sheriffs of the city of London that William Beubek brought his bill in 1345, charging that his goods were stolen from the room he had rented from John of Waltham.<sup>39</sup> Beubek claimed he had asked John for lodging in a room where his goods would be safe. John, a "common innkeeper," showed him a room for an agreed weekly rate, "promised him that all the goods he brought within would well be safe,"<sup>40</sup> and gave

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LAND: THE INNS OF COURT AND THE COMMON-LAW TRADITION 10-11 (1990); *Introduction* to READINGS AND MOOTS AT THE INNS OF COURT IN THE FIFTEENTH CENTURY at xxvii-xxx (Samuel Thorne & J.H. Baker eds., Selden Soc'y No. 105, 1990).

35. Helen Cam, *The Law Courts of Medieval London*, in MEMORIAM WERNER NAF: SCHWEIZER BEITRÄGE ZUR ALLGEMEINEN GESCHICHTE (1960-61), reprinted in HELEN CAM, LAW-FINDERS AND LAW-MAKERS IN MEDIEVAL ENGLAND 85-94 (1962). In the twelfth and thirteenth centuries, jurisdiction of the royal courts was invoked only with the king's consent and for good reason. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 27 (3d ed. 1990).

36. A writ is "a mandatory precept, issued by the authority and in the name of the sovereign or the state, for the purpose of compelling the defendant to do something therein mentioned." BOUVIER'S LAW DICTIONARY 3496 (8th ed. 1914). In this context, the writ initiates the suit. A litigant could only obtain a writ in the form the authority was willing to issue.

37. "A bill is a petition addressed directly to a court in order to commence an action." BAKER, *supra* note 35, at 37; see Alan Harding, *Plaints and Bills in the History of English Law, Mainly in the Period 1250-1350*, in LEGAL HISTORY STUDIES 1972 (Dafydd Jenkins ed., 1975).

38. A.H. Thomas, *Introduction* to CALENDAR OF EARLY MAYOR'S COURT ROLLS OF THE CITY OF LONDON A.D. 1298-1307, at xiii-xxiii (A.H. Thomas ed., 1924) [hereinafter CEMR].

39. *Beubek v. John de Waltham, Corp. of London R.O., Plea and Memoranda Rolls*, A-5, m. 27 (1345), translated in ROBERT C. PALMER, ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-1381: A TRANSFORMATION OF GOVERNANCE AND LAW 377-78 (1993). Early cases cited in this Article were recorded in French. Citations, where possible, are to English translations. An abbreviated version of *Beubek* was extracted in CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON, A.D. 1323-1364, at 220-21 (A.H. Thomas ed., 1926) [hereinafter CPMR 1323-64], and reprinted in A.K. KIRALFY, THE ACTION ON THE CASE 236-37 (1951).

40. PALMER, *supra* note 39, at 377.

him a key. Later, John witnessed William's receipt of twenty pounds. William put ten marks of this in a strongbox in his room which already held ten pounds worth of other goods. The next Tuesday, while William Beaubek was out, his doors were opened and his strongbox was stolen. When William told John of the theft John replied that he suspected Roger, the inn's brewer, of the theft, "because this thing could not have been done without one of his servants."<sup>41</sup> John advised William to keep the theft secret and assured him he would get his money back. William alleged that, instead of helping to catch Roger and restore the money, John "by collusion" chased Roger off and thus damaged William to the amount of twenty pounds.<sup>42</sup>

The factual statements in Beaubek's bill provided a number of potential grounds for recovery: promise of safekeeping, vicarious liability, and even a hint that John was involved in the theft. Beaubek's prayer for relief focused on still another ground—"that every innkeeper is bound to answer to his guests for goods placed under his control,"<sup>43</sup> noting John was the only person who knew Beaubek had the money.<sup>44</sup>

Because the remedial request says the plaintiff "understands that every innkeeper is bound," the claim in *Beaubek* "appears to have been novel."<sup>45</sup> The records of the mayor's court in this period were not exhaustive—they contained only those actions the clerks thought significant.<sup>46</sup> Beaubek's claim was one of these.

The principle of the bill in *Beaubek*, that "each innkeeper is held to respond to his guests of the goods brought within their power," echoes the praetor's edict quoted in the *Digest*—"I will give an action against . . . innkeepers . . . in respect of what they have received and undertaken to keep safe, unless they restore it."<sup>47</sup> In general, Roman law had little impact on the development of English law,<sup>48</sup> but the identity of innkeeper liability rules suggests a Roman influence on the insertion of this principle in Beaubek's prayer for relief.<sup>49</sup>

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41. *Id.*

42. *Id.*

43. KIRALFY, *supra* note 39, at 151. Palmer translates the passage literally as "he understands that each innkeeper is held to respond to his guests of the goods brought within their power." PALMER, *supra* note 39, at 377-78.

44. PALMER, *supra* note 39, at 377-78.

45. KIRALFY, *supra* note 39, at 151.

46. Thomas, *supra* note 38, at vii.

47. DIG 4.9.1 (Ulpian, Ad Edictum 14).

48. R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 360-90 (Selden Soc'y No. 77, 1959); Plucknett, *supra* note 22, at 24.

49. Chief Justice Holt claimed that the principles of innkeeper and carrier lia-

The verdict stated that the goods and chattels were taken by John of Waltham's employees. Beaubek recovered judgment against John de Waltham for ten marks together with damages and obtained an order to commit John to prison, presumably to compel payment.<sup>50</sup>

In the absence of a stated rationale for the judgment, the verdict that the theft was by an employee may have been crucial to liability. Surely the mayor's court found it easier to impose liability on the innkeeper with a finding that his employee had stolen the goods. Borough customs often held masters liable for the wrongdoing of their apprentices.<sup>51</sup> It was, therefore, no great legal leap to find an innkeeper liable for theft committed by his servant.<sup>52</sup>

The importance of *Beaubek* to the development of innkeeper liability lies not in its facts or its verdict, but in the statement of general principle in the prayer which made it possible to broaden the decision for the future.

## II. THE TALE OF THE KING'S DEPUTY ESCHEATOR: *Navenby v. Lassels* AND INNKEEPER LIABILITY IN THE KING'S COURTS FOR THE LOSSES OF THEIR GUESTS (1367)

### A. *Novae Narrationes*—Form for Innkeeper Liability in Mayor's Court in London

The broadening of the principle in *Beaubek* can be traced in *Novae Narrationes*, one of the earliest form books. It contains a

bility for loss in English law were borrowed from Roman law. *Coggs v. Bernard*, 92 Eng. Rep. 107, 107 (1703); *Lane v. Cotton*, 88 Eng. Rep. 1458, 1463 (1702); see JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS 487-95 (5th ed. 1851) (discussing innkeeper liability); see also WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW 54-55 (1938); RADIN, *supra* note 21, at 254. Radin and Burdick trace the law of bailment to Roman law and cite WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 125 (Garland Publishing 1978) (1781), for this proposition. Jones compared the two systems and pointed to Bracton's use of the Digest but did not specifically assert that English law adopted Roman law. See *id.* at 14, 89-96.

50. PALMER, *supra* note 39, at 377-78. Damages were stated in the verdict as 40 shillings. Similarly, in a later case, the mayor and alderman "gave judgment by the custom of the City for the amount claimed, with 40s damages, and committed the defendant to prison till he paid." *John Sapy v. Thomas Hostiller* (1380), in CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON, A.D. 1364-1381, at 260, 260-61 (A.H. Thomas ed., 1929) [hereinafter CPMR 1364-81].

51. 1 BOROUGH CUSTOMS 222 (Mary Bateson ed., Selden Soc'y No. 18, 1904).

52. The innkeeper's oath of 1381 spoke of overseeing the alien merchant's goods "in person or by a deputy so sufficient that you will answer for at your peril." PALMER, *supra* note 39, at 377 (quoting CALENDAR OF LETTER-BOOKS . . . LETTER BOOK D, CIRCA 1309-1314, at 194 (Reginald R. Sharpe ed., 1902)); MUNIMENTA GILDHALLAE LONDONIENSIS: LIBER ALBUS, LIBER CUSTUMARUM ET LIBER HORN (Henry T. Riley ed., 1859) [hereinafter MUNIMENTA].



form for recovery against innkeepers in the mayor's court in London for goods stolen from guests:

To the mayor of London does John de W. etc. complain of G. de T., innkeeper, that whereas by [common] usage of the realm every innkeeper is bound to guard and keep safe without loss or damage the goods of those who leave their goods in their inns, there came the said John and lodged with the said G. such a day etc., and on the Tuesday next following a chest of the said John, being within the inn of the said G., was broken into and ten marks in gold was taken from the said chest and carried away; wherefore action accrued to the said John to demand the above-mentioned money from the said G.; wherefore the said John has often come to the said G. and asked him to make restitution to him, [but] he would not make restitution and still will not, wrongfully and to his damages etc.<sup>53</sup>

Unlike the bill in *Beaubek*, this form is based on the "common usage of the realm."<sup>54</sup> Thus it more closely resembles a later London case which alleged the "common custom of the realm that the keeper of a hostelry was responsible for the goods and chattels brought by lodgers to his hostelry."<sup>55</sup> Nevertheless, the facts of the model are those of *Beaubek*—a bill of complaint to the Mayor of London for a theft in the amount of "ten marks" that occurred on the "Tuesday next" after taking up lodging. Even the plaintiff's name in the form, "John de W.," seems taken from *Beaubek* where John of Waltham was the defendant. These similarities suggest *Beaubek* was the ancestor of the common usage.<sup>56</sup> Although the verdict in *Beaubek* included reference to the wrong done by the defendant's employee, the prayer for relief did not. Thus, the case supported the proposition that liability for loss exists regardless of who stole the goods.

The *Novae Narrationes* form demonstrates that the action against the innkeeper in the local court was well accepted at an early date. The exact date of this form is uncertain, but the reference to "usage of the realm" reflects the general acceptance of innkeeper liability in the king's courts that took place during the two decades following the *Beaubek* decision. That acceptance was possible because strict liability was consistent with English law at the time.

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53. NOVAE NARRATIONES 332-33 (Elsie Shanks ed., Selden Soc'y No. 80, 1963).

54. *Id.* at 332.

55. CPMR 1364-81, *supra* note 50, at 260.

56. An unpublished version of *Navenby v. Lassels*, see *infra* Part II.D (discussing *Navenby*), says that Chief Justice Knyvet referred to a decision in the London Guildhall which upheld such a claim against an innkeeper. KIRALFY, *supra* note 39, at 151.

*B. Medieval English Law and the Statute of Winchester*

The Statute of Winchester,<sup>57</sup> in 1285, used third-party strict liability to enforce the criminal law. The statute imposed liability on the community for the losses of robbery victims when the perpetrator escaped<sup>58</sup> and made hosts liable for their guests' behavior.<sup>59</sup> The first chapter of the Statute of Winchester complained that jurors let felonies committed on strangers pass unpunished to protect offenders who might be their neighbors.<sup>60</sup> The statute responded with a number of provisions to assure "that immediately, upon such Robberies and Felonies committed, fresh Suit shall be made from Town to Town and from Country to Country."<sup>61</sup> The second chapter of the Statute of Winchester punished the community for failure to capture and present a felon.<sup>62</sup>

The communal liability for damages made it easier to accept the strict liability of the innkeeper. Damages were customarily levied first against the most solvent inhabitants of the hundred.<sup>63</sup> The inn's owner was likely to be solvent and, therefore, likely to be one of the persons who paid when robberies took place. In time, his fellow citizens may have considered him the most appropriate person to pay damages when the robbery occurred in his inn. The hue and cry normally involved assistance to a neighbor and victim compensation to a member of the community. Sharing a neighbor's loss was likely more acceptable than paying for injury to a stranger.<sup>64</sup> The victimized guest at an inn was a stranger induced to stop by the presence of the inn. If the innkeeper was responsible for the victim being in the hundred, it would be fitting for the innkeeper to bear the costs.<sup>65</sup>

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57. 13 Edw. (1285) (Eng.), reprinted in *THE STATUTES AT LARGE FROM MAGNA CHARTA TO THE END OF THE LAST PARLIAMENT* 230, 230-36 (Danby Pickering ed., 1762) [hereinafter *STATUTES AT LARGE*].

58. *STATUTES AT LARGE*, *supra* note 57, at 231-32.

59. *Id.* at 232-33.

60. *Id.* at 230-31.

61. *Id.*

62. *Id.* at 231; see also 1 *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 173 (Carl Stephenson & Frederick G. Marcham eds. & trans., rev. ed. 1972).

63. 4 *W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW* 521 (3d ed. 1945).

64. *STATUTES AT LARGE*, *supra* note 57, at 230.

65. The hue and cry and the liability of the hundred were designed primarily to enforce the criminal law rather than to compensate victims. The hundred was not responsible for the recovery of lost goods, only for the capture and punishment of the perpetrator of the crime. Further, victims were reluctant to raise the hue and cry unless they or their friends saw the crime being committed because victims could be held liable for disturbing the peace if they were wrong. *Introduction to 2 BOROUGH CUSTOMS* at xxii (Mary Bateson ed., Selden Soc'y No. 21, 1906).

While one provision of the Statute of Winchester imposed group liability for crimes committed in the community, another made individuals liable for the behavior of their guests.<sup>66</sup> This rule reflected the tension between the obligations of hospitality and the need to control outsiders. The stranger was not in frankpledge in the locality and thus would have no one to be responsible for his behavior. In the twelfth century, the Assize of Clarendon prohibited giving lodging to an unknown for more than a night, and the Assize of Northampton required the host to be legally responsible for any stranger who stayed more than one night.<sup>67</sup>

A city might control the behavior of its innkeepers, their guests, and other persons within its gates, but there was always concern that criminals might be harbored outside the city's reach. The Statute of Winchester provided a national response to that problem by imposing individual liability on persons outside of town who housed strangers, requiring them to answer for their guests.<sup>68</sup>

Although the statute did not apply to inns within the town, it was part of a legal environment in which it was appropriate for hosts to be held responsible for the acts of their guests. This, in turn, made it more acceptable to hold the innkeeper liable to a guest for losses which might be caused by other guests.

While the Statute of Westminster provided a general legal context for holding people responsible for criminal acts committed by others, local law made innkeepers the object of specific regulation. For example, London ordinances prohibited foreigners from keeping a lodging house,<sup>69</sup> required innkeepers to warn their guests of the city's law against carrying arms,<sup>70</sup> and specified that innkeepers must be good and sufficient people.<sup>71</sup>

Innkeepers were also subject to more general laws that had particular relevance to their business. The sheriff might command a person, especially an innkeeper, to provide lodging for members of the king's court as they traveled with the king.<sup>72</sup> The mayor and

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66. STATUTES AT LARGE, *supra* note 57, at 232.

67. 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 62, at 79–80.

68. STATUTES AT LARGE, *supra* note 57, at 232.

69. CEMR, *supra* note 38, at 7–12; MUNIMENTA, *supra* note 52, at 493.

70. CPMR 1323–64, *supra* note 39, at 154; CPMR 1364–81, *supra* note 50, at 146; MUNIMENTA, *supra* note 52, at 388.

71. MUNIMENTA, *supra* note 52, at 721. The entry is in a table of records and refers to the full regulation in Letter Book F, a register of city records from 1338 to 1353.

72. It was one of the privileges of London that the Crown could not seize lodgings of its citizens for their own purposes. MUNIMENTA, *supra* note 52, at lviii–lix. But that did not prevent cooperation between the sheriff and the crown to assure lodgings for those who needed it. *See Vilers v. LeGros* (1298), in CEMR, *supra* note

aldermen regulated the price and quality of bread and ale that innkeepers and others sold.<sup>73</sup>

New obligations imposing responsibility on innkeepers for their guests were less startling in such a regulatory environment. Further, the innkeepers in London already had some obligation to care for their guests' goods. As early as 1318, London innkeepers swore to "mind and work as far as you well may to be privy and oversee all manor of merchandise that any alien merchant who is under your said innkeeping and oversight has and shall have coming hereafter into his possession."<sup>74</sup> *Beaubek's* ambiguity on the nature of the innkeeper's liability moved the duty of care toward the strict standard found in Roman law.

All of these English institutions—community liability for failure to raise or pursue the hue and cry and for failure to capture robbers, the liability of hosts for strangers who stay with them beyond one day, and specific innkeeper regulation—made the strict liability principle acceptable. The innkeeper's liability for his guests' losses was new, but it was consistent with these existing legal traditions.

### C. *The Black Death—Impetus for Change*

Three years after the decision of *Beaubek v. Waltham*, the city of London was transformed by the plague, commonly known as the Black Death. The enormous death toll following the first plague and its subsequent episodes contributed to the nationalization of the law affecting innkeepers. The plague created a labor shortage that encouraged laborers to leave their positions in search of better. Prices rose for everything, including basic foodstuffs. This led to attempts to regulate prices and restrain movement. Previously, regulation of the quality and price of bread and ale had been enforced sporadically through the local assizes of bread and ale.<sup>75</sup> Now concern over food prices reached a national level. The Ordinance of Labourers in 1349 and the Amendment to the Statute of Labourers in 1353 were the first nationally promulgated and nationally enforced laws controlling victuallers.<sup>76</sup> In this way, the Black Death contributed to

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38, at 31 (referring to sheriff's securing king's lodging).

73. Thomas, *supra* note 38, at xxvii, 12–13, 24–25; MUNIMENTA, *supra* note 52, at 359–61.

74. PALMER, *supra* note 39, at 377.

75. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I at 559, 581–82 (2d ed. 1923) (1895); 2 *id.* at 519–20; see BERTHA H. PUTNAM, THE ENFORCEMENT OF THE STATUTES OF LABOURERS DURING THE FIRST DECADE AFTER THE BLACK DEATH 1349–1359, at 155 (1908) (discussing methods of enforcement of assizes of bread and ale).

76. Ordinance of Labourers, *reprinted in* PUTNAM, *supra* note 75, app. at 8–12

the context in which royal courts considered the behavior of innkeepers a matter for national concern.<sup>77</sup>

Professor Robert Palmer, who has carefully detailed the transformation of English law after the Black Death, argues that the plague spawned developments in the common law to provide remedies for performing work poorly. He speculates that inns lost customers due to the declining population and that those losses led innkeepers to cut corners and drop standards to remain in business. Palmer asserts that deterioration in standards led to government action imposing liability on innkeepers for the loss of their guests' goods.<sup>78</sup>

This explanation is incomplete at best. First, the assumption that the number of inns remained the same while, overall, fewer travelers used inns may not be true. For example, travel by government officers probably held constant while the number of pilgrims remained steady or even increased.<sup>79</sup> Palmer acknowledges the increased affluence of travelers may have encouraged more traveling and permitted a larger proportion of travelers to avail themselves of inns.<sup>80</sup> Indeed, to the extent Palmer is right about increasing pressures on innkeepers, the pressure may have come from an increase in the number of innkeepers rather than a decrease in the customer base. There is some suggestion that the number of alehouses rose after the Black Death and that by affording food and occasional lodging these alehouses brought establishments with significantly lower standards into the business and increased competition for customers.<sup>81</sup>

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(1353); Statute Against Violators of Ordinance of Kings Council, *in* PUTNAM, *supra* note 75, at 17.

77. Professor Norman Arterburn argued that the obligation to serve the public at a reasonable price arose to deal with the bargaining power of laborers and tradesmen after the sharp population drop caused by the Black Death and that the obligation was enforced through the penal law. Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 421-24 (1927). Citing the Statutes of Labourers, he argued that the duty to serve was placed upon all trades and callings during the time of the Black Death because when laborers and tradesmen were in such short supply they could exact any price they pleased. *Id.* at 421-22.

It was not until nearly a century after the Black Death, however, that the first decisions on the obligations to serve all members of the public appeared. Arterburn could not identify any statute regulating innkeepers' lodging of guests. The duty to "serve" applicable to other occupations under the Statutes primarily involved an obligation to remain in the same occupation or work for the same employer, not a duty to serve the public.

78. PALMER, *supra* note 39, at 253.

79. PHILIP ZIEGLER, *THE BLACK DEATH* 268 (1969).

80. PALMER, *supra* note 39, at 253.

81. The alehouse which occasionally accepted lodgers might not have been classi-

Second, Palmer contends that lack of competition produced poorer quality workmanship in other occupations.<sup>82</sup> Pursuant to that reasoning, competition for customers should have raised innkeeper standards rather than lowering them. The response of lower standards would be appropriate only if price was more important than standards. The price of foodstuffs was regulated separately and lodging was not a significant proportion of the total cost. Thus price competition seems unlikely. Nevertheless, some innkeepers may have had less money for maintenance of their property, resulting in less secure rooms. Further, innkeepers may have had less control over staff because help may have been more difficult to retain. Whether standards in fact rose or fell is simply unclear.

Third, Palmer's theory that lower inn standards led to the government imposing liability on innkeepers for guests' losses is untenable because the court applied *strict liability* to innkeepers. The court imposed liability for *negligence* in response to falling standards in other occupations.<sup>83</sup> Poorer innkeeper performance alone, therefore, cannot explain the choice of strict liability rather than negligence.

A more likely explanation for the imposition of strict liability on innkeepers is the apparent rise in crime following the Black Death.<sup>84</sup>

Contemporary chronicles abound in accusations that the years which followed the Black Death were stamped with decadence and rich in every kind of vice. The crime rate soared; blasphemy and sacrilege was a commonplace; the rules of sexual morality were

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fied as a common inn. Recognizing the loose use of terms (people calling alehouses inns and inns alehouses), Clark distinguished inns, taverns, and alehouses, noting that "[t]his three-fold categorization was recognized in statute and common law from the sixteenth century in the way that premises were licensed and the legal obligations of their landlords defined." CLARK, *supra* note 23, at 5.

Clark claimed that the liability of the innkeeper for loss or damage to the goods of his guest was in exchange for exemption from the licensing controls on the sale of alcohol imposed on alehouses. *Id.* at 10. This is mistaken because alehouse licensing was a product of the sixteenth century when innkeeper liability was already well established.

82. Palmer argues that Chancery responded to this problem with early writs of *assumpsit* that began in the 1350s. PALMER, *supra* note 39, at 169-70. Procedurally, Palmer explains the activity of Chancery by a proclamation of 1349 that directed petitioners to bring their problems to the chancellor first because the plague had forced the cancellation of Parliament and the king was busy with other matters. *Id.* at 108.

83. *Id.* at 169-70.

84. The incidence of homicide from 1349 to 1369 in England was about twice that of the period 1320 to 1340 despite the population decrease. ROBERT S. GOTTFRIED, *THE BLACK DEATH: NATURAL AND HUMAN DISASTER IN MEDIEVAL EUROPE* 97-98 (1983).

flouted; the pursuit of money became the be-all and end-all of people's lives. . . . When Langland dated so many of the vices of the age "sith the pestilens tyme" he was speaking with the voice of every moralizer of his generation.<sup>85</sup>

As long as people believed society to be more dangerous and threatening, they would be anxious to take steps to deal with the problems. Individuals were likely to feel most exposed when traveling outside of their home area. Strict liability for the innkeeper helped allay this anxiety.

Innkeepers were sometimes suspected of misbehavior. Duplicate keys could be slipped to a thief, the whereabouts of the lodger communicated to crooks, or the thief lodged in the same room as the victim on the pretense of overcrowding. An innkeeper and his wife were accused of conspiring with robbers as early as 1229.<sup>86</sup> In the next century, Chaucer's *Canterbury Tales* noted the danger of connivance when the parson attacked individuals who encouraged the evils of their subordinates "as thilke that holden hostelries, sustenen the thefte of hire hostilers."<sup>87</sup> Beaubek hinted at this when he noted that the innkeeper colluded to chase off the suspected thief and that the innkeeper was the only one who knew of the money in the strongbox.

Someone in the inn must have caused the loss—the innkeeper, his servants, other guests, or outsiders breaking into the place—and the innkeeper was the person in the best position to make sure such a loss did not occur. The imposition of liability on the innkeeper made the inns safer by discouraging connivance with robbers. The stricter the liability, the greater the likelihood innkeepers would take measures to ensure crime did not occur on their premises.<sup>88</sup> This strict liability apparently did not impose too great a cost on the inn's operations.<sup>89</sup>

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85. ZIEGLER, *supra* note 79, at 271.

86. TURNER, *supra* note 28, at 133.

87. CHAUCER, *supra* note 1, at 241.

88. According to Holdsworth, the ability of the poorer inhabitants to avoid payment led to the neglect of their duty to pursue criminals. 4 HOLDSWORTH, *supra* note 63, at 521.

89. The price of a bed was among the smallest of the charges at the inn, well below the price of food. JUSSERAND, *supra* note 31, at 126. But innkeepers sometimes did use their strategic position to their own ends. Travellers complained of excessive prices for food, and Edward III promulgated statutes to fix prices with no great success. *See id.* at 125–26 (discussing Edward III's attempts at keeping inn food costs reasonable).

D. *The "Custom of the Realm"*—Navenby v. Lassels

On October 5, 1367, Thomas of Navenby, deputy escheator of the king in Northampton shire, stopped on his way to London at the inn of Walter Lassels in Huntington.<sup>90</sup> William of Stanford, managing the inn while Walter was out of town, furnished Thomas and his servants with a room with a lock.<sup>91</sup> That night thieves broke into the room and robbed Thomas of both his own goods, worth four pounds, and of nine pounds he had collected for the royal treasury. The robbers apparently escaped, so Thomas's only hope of recovery was to sue his host. His suit is one of the earliest recorded cases in the royal courts on the liability of innkeepers to their guests and the first to assert "custom of the realm."<sup>92</sup>

Royal courts in Westminster probably knew of the *Beaubek* decision in the mayor's court.<sup>93</sup> But even if the innkeeper should be held liable, the recognition of a right to sue him in the king's court was another matter.

1. *The Propriety of the Writ*

Cases were brought in royal courts through a writ obtained from the chancellor's office.<sup>94</sup> None of the usual writs quite fit

90. The report specifies that the inn was in the town of "Cant.," which Fifoot says is Canterbury. C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 75, 80-81 (1949). The writ, however, says the innkeeper is of "Huntingdon," and the accounts in the Assize Yearbook likewise specify that the inn was in "Huntingdon." See Assize Yearbook, Y.B. 42 Ass., fol. 260b, pl. 17, translated in Coram Rege Roll, No. 428 (1367) m. 73., in 6 SELECT CASES IN THE COURT OF KING'S BENCH 152, 152-54 (G.O. Sayles ed., Selden Soc'y No. 82, 1965) [hereinafter 6 KING'S BENCH]; J.H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 552, 552-54 (1986); A.K.R. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 202, 202-04 (1957).

91. Navenby v. Lassels, Coram Rege Roll, No. 428, m. 73 (1367), reprinted in 6 KING'S BENCH, *supra* note 90, at 152, 153.

92. Introduction to 1 SELECT CASES OF TRESPASS FROM THE KING'S COURTS 1307-1399, at lxvi (Morris S. Arnold ed., Selden Soc'y No. 100, 1985) [hereinafter 1 SELECT CASES OF TRESPASS]. Palmer noted that Chancery issued a writ in *assumpsit* to an innkeeper for loss of a guest's goods and another writ in 1367 for forcible ejection from an inn. PALMER, *supra* note 39, at 165.

93. See KIRALFY, *supra* note 39, at 151. Of course, Justice Knyvet may have been referring to a decision of the King's Council and the yearbook author may have confused the Guildhall with Westminster. See *infra* note 108 (discussing possibility of Knyvet being misquoted). But confusion was possible only if a judge of the King's Bench was likely to be familiar with significant decisions in the city.

94. The writ was issued to the sheriff to bring the defendant to answer in the king's court. See Baker, *supra* note 35, at 49-52. The writs were issued by a bureaucracy that channeled them into specific forms. The categories of writs subsequently affected legal thought. "The forms of action we have buried, but they still rule us from the grave." F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (A.



Thomas Navenby's situation. Covenant, detinue, and other writs appropriate for business relationships were unsuitable for this problem. Covenant was available only for a promise under seal.<sup>95</sup> Detinue was available only for specific goods in the possession of the defendant, and the innkeeper never held Thomas's goods.<sup>96</sup> Further, detinue was not an attractive form of action because a defendant had a right to wager at law.<sup>97</sup>

Chancery had issued a writ in 1365 against an innkeeper for the losses of his guest, but its form posed problems for Navenby. That writ stated that the plaintiff had placed his horse and chattels in an inn, that the innkeeper undertook ("assumpsisset") to keep them safe, and that they were stolen "by default of D's due guarding."<sup>98</sup> The claim probably reflected the loss of horse and saddle—both of which would have been placed in the inn's stables under the innkeeper's control. A writ derived from bailments alleging an undertaking might have been appropriate for goods delivered to an innkeeper for safekeeping,<sup>99</sup> but Navenby kept the goods in his room. Any obligation concerning goods a traveler left in his room was incidental to providing a room and unlikely to be the subject of any express undertaking. Further, similar writs for other occupations applied to negligent injuries inflicted by the defendant while the harm to Navenby was done by a third person and the defendants denied any negligence.<sup>100</sup> Thus the bailment-derived *assumpsit* was not appropriate.

Thomas of Navenby chose to seek a writ of trespass.<sup>101</sup> This

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Chaytor & W. Whittaker eds., 1962) (1909).

95. Milsom suggests the seal was in part a device of jurisdiction allocation. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 248-49 (2d ed. 1981).

96. Detinue was, however, the appropriate action to recover goods from a bailee, even if the bailee lost the goods or they had been stolen. Milsom suggests theft excused a bailee in the fourteenth century but not in the fifteenth. MILSOM, *supra* note 95, at 371-72; see also FIFOOT, *supra* note 90, at 157-60 (discussing dispute over fault as relevant to bailment).

97. HAROLD POTTER, *POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS* 318-19 (A.K.R. Kiralfy ed., 4th ed. 1958). A party "waged his law" by having a certain number of persons swear on his behalf. Where cases were heard before the royal courts in Westminster in London, the party could wage his law by hiring professional oath takers who knew nothing of the matter.

98. PALMER, *supra* note 39, at 378, A19a.

99. See *id.* at 211 (describing how some forms of assumpsit writ originated with law of bailments).

100. *Id.* at 254.

101. A writ would not issue unless requested. See *id.* at 304. Palmer has shown that Chancery exercised broad discretion in issuing the writs and did not simply act ministerially. *Id.* "The crucially important argument in the beginnings of many new fourteenth-century remedies took place in chancery by convincing the clerks to issue a new form of writ, an argument in which the attorneys were involved, but not the

writ had a number of procedural advantages. Growing out of the criminal process, the trespass action usually entitled the plaintiff to have the defendant appear in court and to have the merits of any factual issue decided by a jury.<sup>102</sup> At least on the face of the writ and pleadings, trespass did not involve negligence.<sup>103</sup> But trespass too did not seem to fit Navenby's case. Most trespass writs were for direct injuries and stated that the trespass was *vi et armis* (by force and arms) and *contra pacem* (against the peace). Trespass lay against the robbers, but the innkeeper's failure to prevent the robbery was not so clearly a trespass. The innkeeper's behavior was simply nonfeasance and could not reasonably be described as *vi et armis* or *contra pacem*.

The usual writ of trespass issued by the Chancery was a form with no place for discussion of the facts of the case. Without an explanation, however, nothing on the writ's face indicated the defendant was liable for a theft done by others. Thus, Navenby needed a writ that incorporated a statement of the case. Further, Navenby had to convince the court to accept the writ without any showing that the defendant had acted against the peace.

It was not unknown for the Chancery to include in the writ a statement of the circumstances that provided the basis for liability. A number of trespassory writs did not involve a breach of the peace or forcible action by the defendant against the plaintiff.<sup>104</sup> After the Black Death, Chancery issued such writs for new situations. Nevertheless, new writs were decided on a case-by-case basis, and a plaintiff seeking a remedy for an indirect or consequential injury faced a difficult challenge.<sup>105</sup> The plaintiff not only had to per-

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serjeants." *Id.* at 298. It is not clear, however, what impact the attorney had on the wording of new writs. Chancery clerks may have responded to a party's statements of injury with appropriate writs, by creating new writs according to chancery policy, or by requiring parties to specify the writ requested and requiring the requesting party to draft any new writ before deciding the policy question of whether it should be issued.

102. BAKER, *supra* note 35, at 71. Justice Knyvet refused to order the defendants' arrest to bring them before the court in *Navenby* because the crux of the action did not allege fault. *See infra* note 103.

103. Negligence was not recognized in the pleadings of trespass in 1367 where factual issues were resolved by a jury rather than by wager at law. Plaintiff sued defendant for causing injury and defendant responded not guilty, thus concealing the nature of the facts and the problem of fault. MILSOM, *supra* note 95, at 345-46.

104. Even before the plague, writs existed for failure to repair river or sea walls or for violation of an individual's franchise to operate a market. *Id.* at 258, 262; PALMER, *supra* note 39, at 283-93.

105. In his discussion of trespass on the case, Palmer notes that the extension of liability to farriers for laming horses initially used the traditional trespass *vi et armis* form. PALMER, *supra* note 39, at 225. A form that might be recognizable as

suade the authorities that a wrong had been done, he also had to persuade them it was a wrong of which the king should take cognizance. Even if the plaintiff's attorney persuaded Chancery to issue a writ, the court could refuse to accept it.<sup>106</sup>

In Navenby's case, both Chancery and the court supported him. Perhaps the issue had been decided before he had even made his request. The King's Council may have previously responded to a luckless traveler's petition.<sup>107</sup> According to one version of *Navenby*, "[Justice] Knyvet said that such a case had been decided some time before in the Council, and the reason for the judgment was that the innkeeper must answer for himself and his staff for the rooms and stables."<sup>108</sup> In any event, the writ Navenby obtained stated that the innkeepers' obligation to look after their lodgers' goods was already established "according to the law and custom of the king's realm."

[W]hereas according to the law and custom of the king's realm innkeepers who keep common inns for the accommodation of men travelling through the districts where such inns are situated and staying in them, are bound to look after the goods of those who stay in the said inns, night and day without impairment or loss, so that through the negligence of the innkeepers or their servants loss may not in any way befall such guests. . . .<sup>109</sup>

This "law and custom of the king's realm" was recent and quite debatable.<sup>110</sup> The factors leading to the imposition of liability on innkeepers did not guarantee the ultimate result. The assertion that it was "the law and custom of the realm," however, became one of the normal methods of formulating the writ of trespass on the case. This suggests the writ of trespass was no longer a special decision for a particular case but rather referred to a larger princi-

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trespass on the case was not established for negligence with respect to fire until 1371, *id.* at 275, and for writs against jailors in 1369, *id.* at 265-66. The few miscellaneous cases Palmer cites were special writs. *Id.* at 268-71.

106. See, e.g., *The Miller's Case*, Y.B. 41 Edw. 3, fol. 24, pl. 17 (1367), translated in FIFOOT, *supra* note 90, at 80, 80 (denying relief to plaintiff who claimed miller improperly charged toll because plaintiff used wrong writ).

107. The King's Council was a body which, *inter alia*, considered petitions addressed to the king for extraordinary relief. See Baker, *supra* note 34, at 113-14.

108. *Navenby v. Lassels*, Y.B. 42 Ass., fol. 260b, pl. 17 (1368), reprinted in BAKER & MILSOM, *supra* note 90, at 552, 553-54.

Of course, Justice Knyvet may have been referring to *Beaubek* and been misquoted. See *supra* notes 54-56 and accompanying text (discussing case whose facts and names suggest it may be *Beaubek*).

109. *Navenby v. Lassels*, Coram Rege Roll, No. 428, m. 73 (1367), reprinted in 6 KING'S BENCH, *supra* note 90, at 152, 152-53.

110. See PALMER, *supra* note 39, at 254-56 (noting controversy over issue of strict liability).

ple of decision.

The writ the Chancery issued in Navenby's case kept close to the traditional form for trespass. It retained the averments of trespass *vi et armis* and *contra pacem* by phrasing the body of the requested writ in terms of the injury done by the thieves. The only nontraditional element of Navenby's writ was a clause blaming innkeeper Walter Lassels and his manager, William Stanford, for the robbery:

[C]ertain malefactors, through negligence on the part of the said Walter and William, with force and arms broke at night into a room in which Thomas, on a journey to London on the king's business, was accommodated within such an inn of Walter's at Huntington, and they took and carried away Thomas's goods and chattels, found there, to the value of four marks as well as nine pounds of the king's money which were there in the said Thomas's keeping, and they inflicted other outrages upon him in contempt of the king and to his loss and to no slight expense and grievance of the said Thomas and in contravention of the peace etc.<sup>111</sup>

The crucial question was whether the king's court should decide such cases, but here the King's interest in obtaining redress for the specified injury was apparent on the face of the writ—violence was done and the king's money was taken.

## 2. *The Advantages of Royal Jurisdiction*

The increasing concern with local trade practices following the plague encouraged jurisdictional growth in the king's courts generally, but the special characteristics of *Navenby* made it peculiarly suited to the royal court's jurisdiction. Victims of theft in inns preferred royal justice because the disputes involved local businesses and outsiders passing through. Thus, local courts were likely to be inconvenient and biased against the stranger.

In Navenby's situation, the local court was also inappropriate: most of the money stolen belonged to the king. The royal court was better suited for recovery of the king's sums, even though Navenby's claim for personal sums did not clearly fit the Exchequer's jurisdiction. King's Bench had jurisdiction in trespass actions for theft, and Navenby's personal losses exceeded the forty shilling minimum needed to get into the royal courts.<sup>112</sup> By letting Navenby bring

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111. *Navenby v. Lassels* (1367), reprinted in 6 KING'S BENCH, *supra* note 90, at 152, 153.

112. Statute of Gloucester, 1278, 6 Edw., ch. 8 (Eng.), in STATUTES AT LARGE, *supra* note 57, at 123. Writs of trespass were not granted for cases involving damage to goods of less than 40 shillings, leaving them to be brought in shire court. *Id.* The

trespass in this case for innkeeper liability, the court could provide a new source for recovering stolen royal money.

### 3. *The Decision*

Although the writ referred to the innkeeper's negligence (*per defectum*), Thomas of Navenby demurred to William of Stanford's answer that he was not negligent. He also demurred to Walter Lassell's answer that he was not liable because he was out of town. The Court of King's Bench upheld the demurrers and awarded damages to Thomas, saying that an innkeeper must pay for the robbery of a guest even if the innkeeper is not at fault.

In *Navenby v. Lassels*, King's Bench Chief Justice Knyvet denied a request for a writ of *Capias ad Satisfaciendum* to arrest defendants until they satisfied the judgment. Knyvet noted that *capias* was not available against the hundred for damages under the statute where the hue and cry is raised and reasoned that the same should be true for innkeepers who had to pay for their customers' losses because, like the hundred, "they are charged by law and not for fault."<sup>113</sup>

*Navenby* was one of the leading cases in the latter half of the fourteenth century in the development of trespass on the case. Although not the first successful action on the case,<sup>114</sup> it foreshadowed a greater willingness on the part of Chancery to issue and the court to accept such actions. It was a short step from a writ that clearly indicated the defendant had not broken the peace to a writ that abandoned the allegation of breach of the peace altogether. The actions of the court in the next few years demonstrated this.<sup>115</sup>

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statute did not prevent local courts from hearing cases involving more than 40 shillings. See John S. Beckerman, *The Forty-Shilling Jurisdictional Limit in Medieval English Personal Actions*, in *LEGAL HISTORY STUDIES* 1972, at 110, 110-17 (Dafydd Jenkins ed., 1975).

113. *Navenby v. Lassels*, Y.B. 42 Edw. 3, fol. 11, pl. 13 (1368), translated in KIRALFY, *supra* note 90, at 204, 205. The hue and cry action was appropriate for royal courts pursuant to the statute, which may have suggested that innkeeper liability involving theft be an issue for royal courts as well.

114. According to Fifoot, *Navenby* was the first successful action on the case. FIFOOT, *supra* note 90, at 75. However, Palmer cites a variety of successful writs that employed a form which stated the circumstances of the case and requested relief for indirect or consequential damages, but that was otherwise identified with trespass. Only a few of these earlier writs had records of pleadings and a decision by a court on their form. PALMER, *supra* note 39, at 377-78.

115. A number of cases are commonly discussed in casebooks on the development of the action on the case. See, e.g., *The Surgeon's Case*, Y.B. 48 Edw. 3, fol. 6, pl. 11 (1375), reprinted in BAKER & MILSOM, *supra* note 90, at 360; *Toundu v. Mareschall* (1375), reprinted in PALMER, *supra* note 39, at 226 n.36, app. at 368; *The Farrier's Case*, Y.B. 46 Edw. 3, fol. 19, pl. 19 (1373), reprinted in S.F. CHARLES MILSOM,

*E. Innkeeper Defenses*

Defendants developed three lines of defense to innkeeper liability suits after Navenby: (1) the plaintiff didn't lose the goods; (2) the goods were stolen by someone for whom the plaintiff was responsible; or (3) the defendant was not in the innkeeping business. As Judge Morris Arnold's work demonstrates, suits often went to a jury for decision without a ruling on the substantive law, and these defenses emerged only gradually.<sup>116</sup>

Plaintiffs naturally followed Navenby's successful form which contained the allegation of fault. Surprisingly, defendants often followed *Lassel's* losing form, pleading that plaintiffs lost nothing by defendants' fault.<sup>117</sup> The judges allowed this double plea, and some cases went to the jury on these pleadings.<sup>118</sup> The parties may have understood from the preamble that the innkeeper's failure to keep the goods safe was itself fault. Therefore, the plea either denied a loss occurred or pointed to an external cause.

Defendants were more likely to specify a cause for the loss and contend they could not be held accountable for losses in that situation. Defendants claimed the goods were stolen by the plaintiff's own servants<sup>119</sup> or by a third person in whose room the plaintiff

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STUDIES IN THE HISTORY OF THE COMMON LAW 26 n.17 (1985); Stratton v. Swanlond, Y.B. 48 Edw. 3, fol. 6, pl. 11 (1373), reprinted in KIRALFY, *supra* note 90, at 185; Waldron v. Marshall, Y.B. 43 Edw. 3, fol. 33, pl. 38 (1370), reprinted in BAKER & MILSOM, *supra* note 90, at 359; *Robert de Stratton and Agnes his wife v. John Swanlond surgeon*, reprinted in PALMER, *supra* note 39, at 193 n.27, app. at 346.

116. *Introduction* to 1 SELECT CASES OF TRESPASS, *supra* note 92, at lxvi-lxviii; see also 2 SELECT CASES OF TRESPASS FROM THE KING'S COURTS 1307-1399, at 437-46 (Morris S. Arnold ed., Selden Soc'y No. 103, 1987) [hereinafter 2 SELECT CASES OF TRESPASS] (citing cases on actions against innkeepers).

117. *William Latimer v. John Trentedens*, CP 40/483, m. 590 (1381), reprinted in 2 SELECT CASES OF TRESPASS, *supra* note 116, at 441, 441-42; *Agnes Bolas v. John Peacock*, KB 27/454, m. 65, Coram Rege Roll (1374), reprinted in 2 SELECT CASES OF TRESPASS, *supra* note 116, at 441, 441; see also *Introduction* to 1 SELECT CASES OF TRESPASS, *supra* note 92, at lxvii n.508 (citing additional cases).

118. *Introduction* to 1 SELECT CASES OF TRESPASS, *supra* note 92, at lxvii. The point of pleading was to refine the case to a single point of fact which could then be put to the jury for a yes or no answer. A double plea, which could not be answered simply because it posed additional alternatives, was generally unacceptable. The plea that plaintiffs lost nothing by defendant's fault created issues as to whether loss and fault existed, a result that should not have been permitted. Nevertheless, the plea was apparently allowed. For example, *Agnes Bolas v. John Peacock* went to the jury when both parties "put [themselves] on the country" on allegations that loss was not through fault. *Agnes Bolas v. John Peacock* (1374), reprinted in 2 SELECT CASES OF TRESPASS, *supra* note 116, at 441, 441.

119. *Thomas Tetsworth v. Nicholas Bailey*, CP 40/499, m. 345d (1385), reprinted in 2 SELECT CASES OF TRESPASS, *supra* note 116, at 444, 444-45; see also *Horspole v. Wayt*, Coram Rege Roll, No. 588, m. 69d (1408), reprinted in 7 SELECT CASES IN

insisted on staying contrary to the room assignment offered by the defendant.<sup>120</sup> By the middle of the fifteenth century, the court allowed the defendant to assert that the plaintiff had intentionally given the thief access to his belongings. In *Horslow's Case*, John Prisot argued on behalf of the defendant that the plaintiff's goods were taken by the friends who stayed with him in his room. The court said that if the goods were taken by persons the plaintiff invited, the innkeeper was not liable. But if the goods were taken by persons with whom the innkeeper had forced the lodger to stay, the innkeeper would be liable. The parties joined issue over whether the named persons were invited.<sup>121</sup>

Innkeepers sometimes claimed that their guests had expressly assumed the risk of loss. The first cases did not resolve the sufficiency of this defense. Some plaintiffs did not risk demurring to the allegation, so the court did not decide the legal issue.<sup>122</sup> In other cases, the issue for the jury was whether the defendant was at fault<sup>123</sup> or whether the plaintiff was lodged with the defendant.<sup>124</sup> The parties often went to the jury on whether the defendant was a "common" innkeeper,<sup>125</sup> i.e., whether the defendant was in the business of providing lodging to the general public.<sup>126</sup> The best justification for making guests responsible for their own goods was that the host was not in the business of innkeeping.

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THE COURT OF KING'S BENCH 1377-1422, at 179, 179-81 (G.O. Sayles ed., Selden Soc'y No. 88, 1971) [hereinafter 7 KING'S BENCH] (holding innkeeper liable for guest's stolen horses, despite innkeeper's assertion that guest's own servant led horse away).

120. Richard Waldegrave v. Thomas, KB 27/486, m. 26d (1382), *reprinted in* 2 SELECT CASES OF TRESPASS, *supra* note 116, at 443, 443. "The inns of the fifteenth, sixteenth and seventeenth centuries . . . had large chambers, up to 20 feet square, capable of containing two, three or four beds, and accommodating up to half a dozen bed-fellows . . ." Pantin, *supra* note 23, at 184.

121. *Horslow's Case*, Y.B. 22 Hen. 6, fol. 21, pl. 38 (1444), *translated in* JOSEPH H. BEALE, A SELECTION OF CASES ON CARRIERS AND OTHER BAILMENT AND QUASI-BAILMENT SERVICES 4, 4-6 (1909). Prisot's first argument asked for judgment on the ground that the claim was based on custom and not that it was heard by the common law, but Chief Justice Newton said custom is the law of the land. *Id.* at 5-6.

122. *E.g.*, William Bolton v. Thomas Ede, CP 40/449, m. 350 (1373), *reprinted in* 2 SELECT CASES OF TRESPASS, *supra* note 116, at 439, 439.

123. *E.g.*, Nicholas Pound v. John Folksworth, KB 27/453, m. 90 (1374), *reprinted in* 2 SELECT CASES OF TRESPASS, *supra* note 116, at 440, 440-41.

124. *E.g.*, Newland v. Ruddock, Coram Rege Roll, No. 471, m. 54 (1378), *reprinted in* 7 KING'S BENCH, *supra* note 119, at 11, 11-12.

125. *E.g.*, Barnolby v. Willyn, Coram Rege Roll, No. 564 (1402), *reprinted in* 7 KING'S BENCH, *supra* note 119, at 121, 121-22; William Thomas v. John Sampson, CP 40/495, m. 502 (1384), *reprinted in* 2 SELECT CASES OF TRESPASS, *supra* note 116, at 443, 443-44.

126. "He is in a common employment who is in it as a business; the word defines his *profession*, his *undertaking*." Adler, *supra* note 4, at 152.

The distinction between persons who performed an act sporadically and those who performed it as a regular business applied to numerous businesses besides innkeeping. It was an innkeeper's business to prevent misfortune from befalling a lodger's goods, just as it was the doctor's business to perform surgery skillfully. Individuals could not expect the same skill and care to be demonstrated by someone who acted only sporadically. Thus, in the new action on the case for injury done by someone hired to work on the person or property of another, plaintiffs had either to allege that the defendant specifically undertook to perform the task skillfully or that the defendant was in the business—a "common" veterinarian<sup>127</sup> or a "common" innkeeper.<sup>128</sup>

The courts ultimately accepted the principle that hosts' liability depended on whether they were in the regular business of providing lodging. For example, in 1410 a plaintiff brought trespass on the case alleging that his horse had been stolen while he was lodging at the defendant's inn. The defendant responded that he was not a common innkeeper and, therefore, could not be responsible for the goods. The suit was abated when the justices said the failure to allege that the defendant was a common innkeeper was fatal to the suit.<sup>129</sup> The courts debated the proper pleading procedure long after the substantive principle was settled. Thus, in *Horslow's Case*, Chief Justice Newton said that the plaintiff did not have to allege that the defendant was a common innkeeper, but the defendant should have pleaded as an affirmative defense that he did not operate a common inn.<sup>130</sup> Questions about the proper pleading of common innkeeper status plagued litigation for centuries, but each case reinforced the special obligations of the common innkeeper as distinguished from the individual who sporadically boarded travelers.<sup>131</sup>

The distinction between standards of liability for common innkeepers and incidental hosts appealed to common sense. It also

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127. *E.g.*, Marshal's Case, Y.B. 19 Hen. 6, fol. 49, pl. 5 (1441), reprinted in FIFOOT, *supra* note 90, at 345, 345-47.

128. *E.g.*, Cooper v. Lorchon, Coram Rege Roll, No. 602, m. 6d (1411), reprinted in 7 KING'S BENCH, *supra* note 119, at 203, 203-05; see also *supra* note 121 and accompanying text (discussing *Horslow's Case*).

129. The Innkeepers Case, Y.B. 11 Hen. 4, fol. 45, pl. 18 (1410), reprinted in BEALE, *supra* note 121, at 3, 3-4.

130. BEALE, *supra* note 121, at 4-6.

131. By the sixteenth century, the plaintiff clearly was required to allege that the defendant kept a common inn, but the reference to the custom of the realm in the usual writ sufficed. *E.g.*, Mason v. Grafton, 80 Eng. Rep. 391, 391 (1618); Calye's Case, 77 Eng. Rep. 520, 521 (1584); Sanders v. Spencer, 73 Eng. Rep. 591, 591 (1568).



made economic sense. Businesses could pay for their liability from the fees they received, spreading the risk as part of the cost of doing business. Those whose sporadic service prevented them from avoiding the impact of liability were excused. In the innkeeper's case, factors which pointed to the imposition of liability on the businessman pointed away from strict liability in the casual lodging arrangement: the casual lodger did not come to the neighborhood to stay with the particular lessor; the casual lessor may not have had significant assets; the sporadic nature of the arrangements prevented the casual lessor from passing on liability costs to customers; and the casual lessor would probably not improve security arrangements just to reduce liability for an occasional guest. Strict liability for persons not in the business of renting rooms to travelers would make occasional boarding so risky that lodgings might be denied. This would be to everyone's disadvantage.

### III. THE TALE OF THE OVERCROWDED INN: *White's Case* AND THE INNKEEPER'S DUTY TO SERVE THE PUBLIC (1558)

The common innkeeper's liability for customer losses developed quite differently in England than it did in Rome. The common innkeeper in Rome was free to reject lodgers. In England, however, he had a duty to serve the public. Roman law demonstrates that a common innkeeper does not necessarily undertake an obligation to serve the public. English law, not the innkeeper's express commitment, imposed the duty to serve the public as a standard of performance that the common innkeeper must meet.<sup>132</sup>

The English innkeeper's obligation to serve the public was a product of numerous factors. The profit motive combined with crime-control mechanisms to create a context in which the duty to serve appeared to be a familiar principle. It became familiar in abstract discussions of law in arguments, lectures, and dicta that never focused on its utility. Finally, it became accepted as a means of making effective the earlier principle of innkeeper liability for the losses of their guests.

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132. Thus, Professor Burdick's suggestion that "common" as a description of an innkeeper implied an undertaking to serve all who should apply and to serve them with care does not explain the origin of the duty. Burdick, *supra* note 7, at 516-17; cf. Arterburn, *supra* note 77, at 418-20 (arguing "common" usually distinguished those engaged in trade from those who performed occasional acts).

A. *Business Practices and the Assignment of Strangers in Town*

The customary practices of innkeepers influenced the development of the duty to serve the public. To some extent the inns were heirs to a medieval tradition of hospitality,<sup>133</sup> but the innkeepers' hospitality was not free. The tradition of hospitality was in tension with the suspicion of strangers that is reflected in the laws requiring hosts to answer for their guests. But the prospect of payment induced innkeepers to take anyone other than a known criminal. In addition to losing income when they turned persons away, if their rejection became known, the innkeepers also risked discouraging others from planning to stay at the inn. Innkeepers were more likely to stuff as many lodgers as possible into a room than to turn any lodgers away. Medieval travelers expected innkeepers to accept all members of the public because innkeepers normally did.

Another factor that supported the expectation of service in inns was the assignment of foreigners to inns. Innkeepers might want to reject people from other countries, but the crown had a particular interest in preventing that. Aliens were under the king's protection, and the crown might occasionally intervene to assure their comfort and their return.<sup>134</sup> But the crown was less concerned with protecting foreigners than with realizing its full potential revenues from them and keeping them under watchful eye, as demonstrated by the twelfth- and thirteenth-century laws making hosts responsible for foreigners.<sup>135</sup> In the fifteenth century, parliament required city officials to assign foreign merchants a host and to report the assignment to them.<sup>136</sup> This was obviously a measure to control

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133. "Throughout the Middle Ages the principle of free hospitality for travellers was accepted as a corner-stone of Christian charity." CLARK, *supra* note 23, at 25-26; Noël Coulet, *Inns and Taverns*, 6 *DICTIONARY OF THE MIDDLE AGES* 468 (Joseph R. Strayer ed., 1985).

134. A seventeenth-century judge said that aliens had been abused in earlier times and the justices in eyre assigned them inns. *Resolutions Concerning Innes*, 123 Eng. Rep. 1128, 1128 (1635). The justice was not speaking from memory—action by justices on eyre would indicate that the royal officers were protecting aliens by assigning hosts in the thirteenth century. To the author's knowledge, there is no published record of such cases, but such assignments may have occurred as incident to the assizes which required hosts to be responsible for their guests. *See supra* note 68 and accompanying text (discussing Statute of Winchester's imposition of individual liability on people outside city limits for boarder's crimes). The judge may also have attributed the fifteenth-century assignment by city officials to the justices on eyre. *See infra* note 135 and accompanying text (discussing assignment of lodging to aliens).

135. *See supra* notes 66-69 and accompanying text (discussing laws making hosts liable for their guests).

136. *CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON, A.D. 1437-1457*, at 34-35 (Philip E. Jones ed., 1954).

aliens and strangers rather than to facilitate their lodging. An alien or stranger who failed to have a host assigned would be punished.<sup>137</sup> In this context, any assignment of lodgings to aliens, whether by the justices in eyre or the city mayor, did not establish a general duty to serve all comers.

The customary practice of receiving all comers and the assignment of strangers to inns combined to support the principle that the expectation of service was enforceable. Yet these factors fell short of establishing such a principle. Almost a century passed before the principle was finally accepted.

*B. The Roman Agency Case—Division over  
the Innkeeper's Duty (1460)*

In 1460, Judge Walter Moyle of the Court of Common Pleas said, "[I]f I come to an innkeeper to lodge with him and he refuses to provide lodging for me, I shall have upon my case an action of trespass against him."<sup>138</sup> Chief Justice John Prisot quickly responded that "the innkeeper is not bound . . . to provide lodging for you if he does not want to."<sup>139</sup>

The litigation which provoked the disagreement between Prisot and Moyle did not even involve an innkeeper. It was an action in debt brought by a plaintiff who claimed he had been hired to go to Rome to obtain a papal bull.<sup>140</sup> The issue in this case was whether the defendant could "wage his law"<sup>141</sup> after making a general denial. The court agreed that wager of law was appropriate for the case at bar. Prisot noted that wager did not lie for employment governed by statute (presumably the Statute of Laborers<sup>142</sup>) but that employers could wage their law in debt actions where an agreement provided the basis of liability, giving as one example the hiring of priests.

Although all the judges concurred that wager of law applied to

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137. *Id.* at 45.

138. Anonymous, Y.B. 39 Hen. 6, fol. 18, pl. 24 (1460), reprinted in BAKER & MILSOM, *supra* note 90, at 217, 217.

139. *Id.*

140. The content of the bull was not specified, but the Church was a central political and economic institution in the fifteenth century. The pope's declarations could control economic assets as well as affect religious developments.

141. Wager of law involved the assertion or denial on oath of a formal claim by a party supported by a number of other persons who swore to belief in the truth of the assertor's oath. POTTER, *supra* note 97, at 318-19.

142. The Statute of Laborers was passed after the Black Death in an effort to secure adequate labor at the rate prevailing before the catastrophe. PUTNAM, *supra* note 75, at 2-3.

the case before them, Justice Moyle challenged Prisot's theory that wager of law in a debt action was available only when the services were furnished by agreement and not when services were compelled by law. Moyle said innkeepers and victuallers were bound to serve by the common law, but if they sued their customer in debt, the customer could wage his law. Prisot agreed that the customers of innkeepers and victuallers could wage their law if sued in debt, but he contended the relationship was founded in consent and not compulsion.<sup>143</sup> Thus Prisot's denial of innkeepers' obligation to serve the public was part of his attempt to limit the scope of the increasingly unpopular wager of law.<sup>144</sup>

### C. *The Development of the Principle*

For nearly a century after the even division of the judges in the Roman agency case, attorneys and judges continued to discuss the innkeeper's obligation to provide shelter without satisfactory resolution. The division of the judges was resolved by finding there was such an obligation, but the obligation was enforceable only locally. Within thirty years, the innkeeping profession grew to believe the obligation could be enforced in common-law courts, and the courts in turn agreed. But as the principle became increasingly familiar and accepted in discussion, the earlier views—that there was no obligation or that an obligation was not enforceable in the royal courts—continued to be voiced, and innkeepers' obligation to provide shelter was never the direct subject of litigation.<sup>145</sup>

#### 1. *Judicial Dicta—Only Local Officials Enforce (1465)*

Five years after the Roman agency case, the justices said that if a common innkeeper refused to provide shelter, the rejected guest had no action against the innkeeper in the king's court, but the guest could complain to local authorities who had control over the

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143. BAKER & MILSOM, *supra* note 90, at 217–18.

144. Prisot's position in support of innkeeper choice was also consistent with his representation of the defendant more than 15 years earlier in *Horslow's Case*. See *supra* note 121 (discussing Prisot's argument in *Horslow* that innkeeper should not be liable for lodger's room guests).

145. An exigent was ordered on a 1367 writ for forcibly ejecting a woman from an inn at night so that she was stranded in the dark. *Robert de Garton v. Adam Dodmore*, in PALMER, *supra* note 39, at 165 n.48, app. at 378. The writ, however, was premised on initial permission to lodge at the inn. The writ did not raise the issue of whether the innkeeper could have denied the woman permission before a relationship was formed. Although further research in the writs might find a direct action for an innkeeper's refusal to allow a customer to lodge in an inn, *Garton* provides the best example of a direct action of which the author is aware.

inn.<sup>146</sup> This statement was made in response to counsel's argument on the right of hostlers, tailors, or horse sellers to hold the property of a party until the party tendered payment.<sup>147</sup>

The reported view of the justices seems to compromise the prior disagreement over the innkeepers' duty. Prisot's contention, that innkeepers were not subject to royal writ for improperly refusing a guest, prevailed. This diverted a low monetary issue from the king's court. On the other hand, Moyle's assertion that common innkeepers had a duty to serve the public gained recognition although the duty was enforced by local authorities.<sup>148</sup> The reference to the local authority suggests that the judges were thinking of enforcement measures similar to the assignment of strangers to hosts in London rather than to private suits for damages. Yet there is no clear statement of the mechanism for local enforcement, and Moyle could accept the decision as reflecting recognition of a local form of trespass on the case.

## 2. *The Private Right of Action (1499)*

The statement of principle in 1465 left some ambiguity about enforcement. Specifically, it did not explain how the local authorities were to respond to complaints. This ambiguity left the door open to the argument that innkeepers' obligation to serve the public was enforceable by the injured party in a civil action for trespass on the case. In turn, recognition of a civil action at the local level translated into a common-law right as the business of the common-law courts expanded.

### *(a) Green's Reading and Rex v. Chester—Recognition by the Bar (1499)*

In 1499, John Grene (Green) gave a reading in the inns of court on the Statute of Marlborough<sup>149</sup> in which he dealt with the propriety of distraint for chattels<sup>150</sup> of a traveler lodging somewhere

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146. Anonymous, Y.B. 5 Ed. 4, fol. 2, pl. 21 (1465).

147. The innkeeper's lien and its relationship to the innkeeper's duties was a continual topic for discussion in Common Pleas. See Y.B. 22 Edw. 4, fol. 49, pl. 15 (1483).

148. Prisot was no longer on the bench of Common Pleas, but Needham, who had joined Prisot in the Roman agency case, still sat on Common Pleas. Danby, who had joined Moyle, was now the Chief Justice, and Moyle was still on the bench. 4 EDWARD FOSS, *THE JUDGES OF ENGLAND* 391 (AMS Press, Inc. 1966) (1851).

149. 1267, 52 Hen. 3, reprinted in *STATUTES AT LARGE*, *supra* note 57, at 55, 55-74.

150. Distraint of chattels is seizure of chattels by distress which is "a taking, without legal process, of a personal chattel from the possession of a wrongdoer into

other than a common inn. Green said distraint was appropriate because immunity from distraint was proper only for staying at a common inn. Others argued the immunity from distraint was for the benefit of the traveler, not the innkeeper, and should apply wherever the traveler was forced to stay. But all acknowledged a key difference between the keeper of a common inn and other lodgings. "For instance, if he will not receive a stranger, and he has no cause against him (for instance, that he is a felon . . . or the king's enemy, or such like), the party may have an action on his case against him if he is thereby damaged."<sup>151</sup> Green's reading shows that the members of the profession accepted Moyle's position, but no one cited any holding to that effect.

In the same year as Green's reading, Sergeant Higham stated in his argument before the Court of Common Pleas in *Rex v. Bishop of Chester*.<sup>152</sup>

If I go to an innkeeper and ask to be lodged with him, and he says that he will not do it now, but if I come another time he will do so willingly; I will have an action on the case because it was his duty to shelter me, and by the law he was bound to do this.<sup>153</sup>

Although local courts might accept process that could be described as an action on the case, the argument was used in a common law court where its weight was dependent on its being acknowledged as common law and not just as a possible local variant. Thus, Higham assumed that the common-law court would find that action on the case lies for refusal to shelter a traveler.

(b) *Judicial Dicta (1503)*

In 1503, the discussion in the inns and argument presented by the attorneys took effect. The court specifically recognized the traveler's cause of action against the innkeeper for shelter: "[W]here a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done; for it does not sound in covenant."<sup>154</sup> The court continued, saying suit would not lie in trespass

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the hands of a party grieved, as a pledge for the redressing of an injury, the performance of a duty or the satisfaction of a demand." JOWITT'S DICTIONARY OF ENGLISH LAW 64 (2nd ed. 1977).

151. Grene, *Reader, On the First Chapter of the Statute of Marlborough*, in THE NOTEBOOK OF SIR JOHN PORT 163, 167-68 (J.H. Baker ed., Selden Soc'y No. 102, 1986).

152. *Roy v. Evesq. of Chester*, Y.B. 14 Hen. 7, fol. 22, pl. 4 (1499).

153. *Id.* at 22 (translation by author).

154. Anonymous, *Keilway*, fol. 50, pl. 4, 72 Eng. Rep. 208 (1503), reprinted in

against a carpenter for failing to build a house, but would only lie in covenant unless the suit was for doing a bad job.<sup>155</sup>

In context, the judges appear to be discussing common-law actions that could be appropriately filed in the Court of Common Pleas. Although the judges apparently agreed there was a common-law action for trespass on the case for an innkeeper's failure to serve the public, the author of the report left the matter in disarray.

The report noted that a man had no suit against an innkeeper in the king's courts but only in local jurisdictions, citing the 1465 decision. Despite the conflicting statement of the 1503 court quoted above and the 1499 statement of Sergeant Higham in the *Bishop of Chester* argument cited in the reporter's note, the note clung to the 1465 decision.<sup>156</sup>

(c) *Hale's Reading—Continued Denial of Cause of Action (1530)*

Despite the statements of court and counsel at the onset of the sixteenth century upholding the innkeepers' obligation, the issue remained open. Indeed, the note in the 1503 report appears to have been more influential with the bar than were the statements of the bench. In 1537, James Hale gave a reading on costs at Gray's Inn in which he discussed situations when an action on the case lay for nonfeasance. He stated that an individual could bring an action on the case against a blacksmith who maliciously refused to shoe a horse where no other smith was available. He continued: "It is otherwise if I go to someone who has a common inn, and request him to lodge me, and tender him money to do so, and he refuses, I shall nevertheless not have an action."<sup>157</sup>

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BRUCE WYMAN, *CASES ON PUBLIC SERVICE COMPANIES: PUBLIC CARRIERS, PUBLIC, AND OTHER PUBLIC UTILITIES* 1, 1 (2d ed. 1909).

155. Yearbook cases are frustrating to modern lawyers when, as here, they do not even suggest who the parties were or what they were litigating. This case set forth the principle that an action on the case lies against an innkeeper who refuses to provide entertainment. It linked smiths and innkeepers together and distinguished carpenters from them without explanation. The discussion apparently was reported to illustrate the distinction between trespass on the case and covenant, but the reporter's note is insufficient for that purpose. Adler suggests the carpenter in building a house had only one employer and, thus, should have been able to refuse employment, unlike the smith or innkeeper who would have had many customers simultaneously. Adler, *supra* note 4, at 146-58.

156. Anonymus, Keilway, fol. 50, pl. 4, 72 Eng. Rep. 208 (1503), reprinted in WYMAN, *supra* note 154, at 1; see E.W. Ives, *The Origins of the Later Year Books*, in LEGAL HISTORY STUDIES, *supra* note 112, at 136, 145-46 (discussing origins and eclectic nature of Keilway's reports).

157. *James Hales' Reading on Costs (1537)*, in BAKER & MILSOM, *supra* note 90, at 345, 347.

### 3. *Absence of Litigation*

The obligation of innkeepers to serve the public remained in disarray because no litigation directly involved the issue. Judicial statements were dicta, and the views of counsel, the bar, and even the Yearbook authors remained uncertain. The explanation for this state of affairs is simple. Litigation in the Middle Ages against an innkeeper who refused to serve all comers faced major obstacles. The traveler between cities needed food and lodging for the night—if these were refused, there would be little chance of getting the royal courts to intervene before the night was through. Thus, unless someone intervened locally, the traveler would simply have to seek lodging elsewhere (e.g., a monastery or someone's home).<sup>158</sup> Damages for the innkeeper's refusal to serve a traveler were less than the cost of obtaining a writ in the king's court and well below the forty shilling minimum for crown jurisdiction.<sup>159</sup> Thus, if redress were sought, it would have been in local courts.<sup>160</sup> The potential plaintiff's travels would militate against pursuing remedies in any local forum.<sup>161</sup>

For many centuries after innkeeper's liability for guests' losses was established, these practical barriers deterred litigation in royal courts that would have compelled innkeepers to pay damages for refusing to lodge a traveler. There may have been a general expectation that innkeepers could refuse lodging on specific grounds (e.g., that the customer was a criminal or a member of the lower classes).<sup>162</sup> Whether the power to reject a potential lodger on specified

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158. An issue in several cases was whether the plaintiff was lodged with a "common" innkeeper or someone who was not in that business. This suggests that travelers often made do with what accommodations they could find when the inn was full or they needed to stop short of the next inn.

159. See *supra* note 112 and accompanying text (explaining minimum damage requirements for trespass writ and for royal jurisdiction).

160. For damages to be sufficiently high to make it economically sensible to obtain a writ in the king's court, the plaintiff would have to claim that his property or his person was injured by failure to obtain lodging. It would be difficult to show that the rejection caused the injury. The greatest likelihood of serious injury would come from assault or robbery by third parties. While innkeepers were liable for third-party injuries done to their guests, it would have been a further stretch to find them liable for third-party injuries done to persons they refused to serve. The liability of the physician, carpenter, veterinarian, or smith for injuries flowing from refusal to perform was still in question, and in most of those cases at least the injury flowed naturally from the environment and would not have been a product of an intervening person's action.

161. Records at the local level are not readily available, so it is difficult to determine whether any intervention occurred.

162. CLARK, *supra* note 23, at 7–8, 86, 129.



grounds was a defense to an action for failure to serve could not be determined until suit was brought, and no such litigation is known.<sup>163</sup>

Nevertheless, judges considered the question of the innkeeper's duty to serve the public in connection with cases involving the scope of wager at law in employment, the right of a hostler to retain a horse until paid for its care, and breach of contract actions against a carpenter. Lawyers borrowed reasoning from innkeeper liability when discussing issues of advowson<sup>164</sup> and the right of distraint. In the end, the principle that travelers had a right to maintain suit for denial of lodgings became familiar through its use in cases involving other issues. The principle did not, however, become fully accepted until the court used it as a basis for its decision, and the principle's scope seems never to have been worked out in detail.

#### *D. Business Regulation in the Late Medieval Era*

The innkeeper's obligation to serve the public was compatible with existing related law. For example, the assizes of bread and ale set prices for these basic commodities. Indeed, price regulation existed in a variety of trades in the fourteenth and fifteenth centuries.<sup>165</sup> In some cases, price regulation may have compelled service. If a seller attempted to obtain a higher price, the customer would probably pay the higher price and then have the seller indicted.<sup>166</sup> In practice, this prevented the seller from obtaining more than the price fixed by the assize. Since the attempt to get more money was likely to be the primary reason for a seller's reluctance to part with his stock in trade, the local authorities effectively compelled service in the guise of price regulation of basic commodities.

Direct compulsion to serve also had analogues in the statutes regulating labor. The Statute of Laborers imposed an obligation of service on individuals throughout the latter half of the fourteenth century.<sup>167</sup> Similar principles were at work in the Statutes of Arti-

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163. No one to the author's knowledge has found any local cases from the thirteenth to the sixteenth century that address recovery of damages from an innkeeper who refused to lodge a stranger.

164. Advowson is "[a] right of presentation to a church or benefice." BOUVIER, *supra* note 36, at 157. The "right of presentation" refers to the right to name the priest, who in turn receives the revenues of the position. The right of presentation was at issue in the *Bishop of Chester* case in 1499. See *supra* notes 152-53 and accompanying text.

165. E. LIPSON, AN INTRODUCTION TO THE ECONOMIC HISTORY OF ENGLAND: THE MIDDLE AGES 300-02 (4th ed. 1926).

166. Arterburn, *supra* note 77, at 424.

167. See PUTNAM, *supra* note 75, at 1-5.

ficers in the sixteenth century.<sup>168</sup>

*E. Comparative Law Note—France (1563)*

The link between enforcement of regulated prices and the obligation to serve the public was explicit in France. In 1563, Charles IX proclaimed an ordinance to set prices for meals at inns and taverns.<sup>169</sup> Responsibility for the law was ascribed to Chancellor l'Hospital who was familiar with the innkeepers' gouging of customers.<sup>170</sup> Article 19 of this ordinance forbade innkeepers from refusing without cause to receive travelers. According to a French court in the nineteenth century, Article 19, "far from being a measure of the general police power, was only a way to assure the enforcement of the fee schedule."<sup>171</sup>

The French experience raises the possibility that the English duty to serve the public was also a lever to secure ends beyond access to lodgings. In contrast to France, the obligation to serve the public in England was not part of the statutes regulating prices. Lodging was relatively inexpensive and does not seem to have been directly regulated. Innkeepers did not condition lodging on payment of an unlawful price. There was, however, one condition that innkeepers might have been anxious to see their guests accept. Innkeepers were likely to insist that their guests waive the right to sue them for property loss or damages. Thus the duty to serve the public in England forestalled attempts to dilute the strict liability of innkeepers for their customers' goods.

*F. White's Case (1558): Liability for Guest's Losses Where Rightful Rejection Is Supplanted by Waiver and Lodging*

While the innkeeper's obligation to serve the public had become a familiar principle that was compatible with English law, there were no occasions to apply it. It was not until the obligation to serve became a part of the law on liability for losses of customer goods that the principle took on a practical utility. The obligation to serve then prevented innkeepers from avoiding strict liability for losses of guests.

Throughout the century after *Navenby*, innkeepers continually

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168. See JOYCE YOUNGS, SIXTEENTH CENTURY ENGLAND 291-99 (1984) (discussing Statute of Artificers' attempt to create universal obligation to work).

169. DALLOZ, RECUEIL PÉRIODIQUE DE JURISPRUDENCE 1863, at 485 n.3 (1863).

170. *Id.*

171. *Cour de Cassation*, 18 Juillet 1862, in DALLOZ, *supra* note 169, at 485-86 (translation by author). In the case, the court held that the termination of price regulation resulted in the abrogation of the obligation to serve.

argued that they were not liable for losses suffered by a guest who had agreed to assume the risk of inadequate lodgings. In 1558, the court made the duty to serve the public a pivotal element of this defense. In *White's Case*, an innkeeper claimed he had refused the plaintiff lodging because the inn was full of guests, but the plaintiff said "he will make shift among the other guests."<sup>172</sup> The Court of Common Pleas agreed that the loss fell on the plaintiff, who insisted on the overcrowded quarters after being refused, but stated that "if the cause of the refusal be false, the guest may have his action on the case for his refusal."<sup>173</sup>

*White's Case* held that the innkeeper has a common-law duty to harbor travelers if he has room.<sup>174</sup> It is less clear whether the court's statement referred to an action on the case for denying lodging or to an action on the case for loss of goods in a common inn. The first reading assumes that "his action on the case for his refusal" describes the gravamen of the action on the case. It focuses on the loss as the result of the innkeeper's refusal to lodge the traveler in a secure, available room without other lodgers. The action would be for the improper refusal to harbor the guest, and the loss of goods would simply be a measure of the damages suffered.

Alternatively, "his action on the case" may refer to the action then before the court, which was premised on liability for a guest's loss rather than on denial of service. The sentence preceding "his action on the case" stated that the innkeeper's refusal was a valid defense to the action for lost goods.<sup>175</sup> Thus, it follows that if the grounds for the refusal were false, the defense should fail. In the action on the case for lost goods, the issue would be whether the refusal was false. Under that interpretation, the phrase "for his refusal" applies to the issue in dispute rather than to the cause of action, i.e., he will have his action for lost goods tried on the issue of the propriety of the rejection.

Under either reading, there is a link between the innkeeper's liability for losses and his duty to serve the public. If the innkeeper had a satisfactory basis for rejecting the lodger, the innkeeper could shift the risk of loss to the lodger. Without a sufficient reason, however, the innkeeper bore the risk. *White's Case* shows that innkeeper liability for guests' losses was a factor in the development of the duty to serve the public.

The duty to serve the public enhanced the likelihood that the

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172. *White's Case*, 73 Eng. Rep. 343, 343 (1558).

173. *Id.* at 344.

174. *Id.* at 343-44.

175. *Id.* at 344.

traveler would obtain security in lodgings, but under *White's Case*, it also increased the effectiveness of the strict liability rule. It permitted waiver of liability where the innkeeper, acting in a proper professional fashion, could not provide safe accommodations, but it prevented innkeepers from avoiding their liability by conditioning admission to the inn on a waiver of rights to recover.

Prior to the creation of the obligation to serve the public, it was possible to conceive of the innkeeper's relationship to the customer as primarily contractual, anachronistic though that term may be in an era when *assumpsit* was still developing and a general doctrine of contract had not yet emerged. After the duty to serve the public became established, however, the status-based nature of the relationship was clearly recognized. Common innkeepers could not disclaim liability because liability was a function of status and not of contract. For example, the Court of Common Pleas in 1586 nonsuited a plaintiff for lack of jurisdiction because the suit was not brought in the county of the inn.<sup>176</sup> The court noted that an action on the case for words or on a contract might be brought elsewhere, but that suit for safekeeping guests' goods must be brought in the county of the inn.<sup>177</sup> The crux of the case was not what the parties said to each other about staying there, but what was inherent in the nature of common innkeepers. Thus liability was based on status rather than agreement.<sup>178</sup>

### G. *The Principle Accepted*

The liability established in the sixteenth century for refusals to serve the public was imposed by an action on the case—a private cause of action brought for damages by the person excluded. The following century saw the suggestion that the innkeeper's obligation was enforceable through criminal measures as well.

#### 1. *The Constable's Role (1622)*

In his 1622 manual for justices of the peace, Michael Dalton said the duty to serve the public was enforceable through the constable.

If a common Inne-holder or Alehouse-keeper will not lodge a travel-

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176. Anonymous, 78 Eng. Rep. 26, 26 (1586).

177. *Id.*

178. One legal scholar tied recovery in quantum meruit to the duty to serve the public—since the innkeeper is required by law to serve individuals, it is only fair that he receive reasonable compensation. POTTER, *supra* note 97, at 467; see Warbrook v. Griffin, 123 Eng. Rep. 927, 927 (1609).

ler, any Constable, or Justice of peace, may compel him thereto; but how the officer shall compel him, *quare*: it seemeth that all the officer can do, is either to cause such Alehouse-keeper to be suppressed; or else to present or prefer such offence at the sessions of the peace, that so such offender may be thereupon indicted.<sup>179</sup>

Although the king's courts said that the rejected lodger had an action on the case, it was not a practical remedy. The rejected traveler needed an immediate order from the local authorities addressed to the innkeeper and backed by the threat of criminal sanctions. Local constables would be more effective than a slow judicial process—with low damages—in obtaining shelter for a stranger who was passing through.

The *quare* in Dalton's discussion indicates that the constable's role in enforcing the duty to serve was not well established in the seventeenth century. Constables had control over taverns because of concern with the sale of alcohol, but there was no suggestion that the power over the sale of alcohol had previously been used as a mechanism to impose unrelated obligations on the tavernkeeper. Earlier guides to justices of the peace, such as the sixteenth-century *Boke of Justices*, contain no suggestion of any such duty.<sup>180</sup> Thus Dalton's statement about the constable's power to compel innkeepers to serve the public was theoretical rather than descriptive of established practice. Constables probably did not begin to assert the power to compel lodging until after the courts had said that a person refused lodgings could have an action on the case.

## 2. *The Resolution of the Judges (1624)*

Dalton's observations appeared around the time the justices engaged in one of their most in-depth considerations of the obligations of innkeepers. In 1623, four persons were indicted for common nuisance for erecting four inns. The judges said that establishing an inn was not a common nuisance unless there were particular circumstances that made it so—such as its use to shelter thieves, its inappropriate location, or its addition to an area where too many inns existed already. Since no special circumstances appeared in the four cases, the indictment should have been quashed.<sup>181</sup>

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179. MICHAEL DALTON, *THE COUNTRY JUSTICE* 26 (photo. reprint 1972) (1622).

180. See *THE BOKE OF JUSTICES OF PEAS passim* (photo. reprint 1976) (1506); BERTHA H. PUTNAM, *EARLY TREATISES ON THE PRACTICE OF THE JUSTICES OF THE PEACE IN THE FIFTEENTH AND SIXTEENTH CENTURIES passim* (1924). The author has found no indictment of any innkeeper for failing to serve a traveler in his review of English documents generally available in American libraries.

181. The indictment was also quashed on the ground that it constituted several indictments rather than one and should be brought separately. Anonymous, 81 Eng.

The justices mentioned the obligation to serve the public when they discussed whether innkeeping was a common nuisance. They noted that the status of common innkeeper existed without any governmental approval.<sup>182</sup> Justice Chamberlaine noted that simply by putting up a sign and lodging travelers, an individual became liable to an action on the case for refusing someone shelter.<sup>183</sup> That person could avoid liability by removing the sign and getting out of the business, but Chief Justice Lea pointed out that an innkeeper who once held herself out as a common innkeeper could not avoid liability by removing the sign if she continued to take guests.<sup>184</sup> Similarly, the reporter mentions Justice Dodridge's observation that the writ for the action on the case against innkeepers did not specify a source of authority for the defendant's common innkeeper status.<sup>185</sup> Since one could be a common innkeeper for the purposes of the common law without approval, the justices concluded that no special permission was necessary and that the erection of an inn was not a common nuisance.<sup>186</sup>

Prodded by the indictments, the judges conferred among themselves and announced that licenses were not required to erect an inn.<sup>187</sup> Chief Baron Tanfield thought that inns had been licensed by the justices of the eyre in the past, but the other judges disagreed.<sup>188</sup> "[N]othing could be shewn to that purpose."<sup>189</sup>

Chief Justice Lea denied that the justices in eyre licensed inns, but he did say "because that strangers which were aliens were abused and evilly intreated in the inns, it was (upon complaint thereof) provided that they should be well lodged, and inns were assigned to them by the justices in eyre."<sup>190</sup> The experience of London suggested that the assignment of aliens to inns was more likely to protect the citizens from the aliens than vice-versa. Inns could be suppressed as a common nuisance if they were built in a remote and inconvenient place where they were dangerous to travelers and

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Rep. 842, 842 (1623).

182. *Id.* at 842-43.

183. *Id.* at 843.

184. *Id.*

185. *Id.*

186. *Id.*

187. Resolutions Concerning Innes, *supra* note 6, at 1129.

188. *Id.*

189. *Id.* Whether the justices on eyre licensed inns, there is evidence of specific local laws requiring licensing or its equivalent. See *MUNIMENTA*, *supra* note 52, at 281-83, 721 (discussing ordinance requiring innkeepers to be good and sufficient people and ordinance providing that foreigners must have grant of franchise from city to operate inn).

190. Resolutions Concerning Innes, *supra* note 6, at 1129.

harbored men of bad fame who were likely to commit robbery. Also, a man of bad behavior could be stopped from running the inn. But these were factual issues traversable in the suit. It was clear to the justices that erection of an inn by itself was not improper and no license was necessary to operate it.

Finally, in their conference the judges considered "by what way or means the multitude of inns might be prevented."<sup>191</sup> The judges responded, as Dalton had suggested, that control over inns could be accomplished by regulating drinking. Inns could be suppressed if they were nuisances, and restrictions on granting liquor licenses would prevent the proliferation of inns.

This review of the status of inns reveals innkeeping was not an exclusive business, and indeed, there were often concerns that too many inns existed and there was too much competition.<sup>192</sup> Nevertheless, all the judges concurred that innkeepers were bound to accept members of the public so long as the innkeepers had room.

### 3. *The Status of Innkeepers*—*Newton v. Trigg (1691)*

By the end of the seventeenth century, the obligation of the innkeeper to serve the public was firmly established. The special characteristics of the innkeeper were analyzed in *Newton v.*

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191. *Id.*

192. Professor Bruce Wyman argued that the common-law obligation imposed on those engaged in a common calling to accommodate all who applied was based on a virtual monopoly. Wyman claimed that the inns in medieval England had such power. But Wyman's theory may have determined his "facts." Wyman, *supra* note 3, at 157–61.

The court did not offer monopoly power as an explanation for the innkeeper's duty to serve the public. Monopoly did not lead to such a duty in other businesses, and innkeeping was not a monopoly. No case cited by Wyman mentions monopoly power as a basis for its decision. When commerce was just beginning and towns were quite small by modern standards, many occupations had only one or a small number of practitioners. Carpenters, smiths, tailors, and other specialized crafts existed in numbers proportionate to the demand in the area. H.S. BENNETT, *LIFE ON THE ENGLISH MANOR: A STUDY OF PEASANT CONDITIONS 1150–1400*, at 66–67 (1956). That did not inevitably lead to a duty to serve the public. Further, inns did not have complete monopoly power. Resolutions Concerning Innes, *supra* note 6, at 1128–29. Where inns were not available or were overcrowded, travellers could often find shelter with private individuals or with the church. JUSSERAND, *supra* note 31, at 122–25. The prices charged for food were regulated by statute at one time in the fourteenth century, but there was no attempt to legislate room charges. Statutes 23 Ed. III, ch. 6; 27 Ed. III, st. I, ch. 3; see JUSSERAND, *supra* note 31, at 128–29 (noting lodging was inexpensive and food very simple for ordinary travelers). This suggests the provision of shelter was not so restricted as to call for government intervention. The difficulties of a traveller faced with rejection from an inn may have been an element in establishing a duty to serve all who request service, but it is unlikely to be the sole explanation for the result.

*Trigg*,<sup>193</sup> where the court decided that an innkeeper was not a trader within the Statute of Bankrupts and therefore could not declare bankruptcy. Bankruptcy, the court said, is available only for those who act pursuant to agreements. The innkeeper is governed by rules derived from his status: he must lodge strangers; he is liable for losses they suffer; and he is paid a reasonable sum of money for his services. Citing the *Resolutions Concerning Innes* on the erection of inns, Justice Eyre said:

Inns are of necessity; the keeper is chargeable to the public, and compellable to lodge all comers, he cannot refuse whom he pleases . . . . Inn-keepers are compellable by the constable to lodge strangers; they may detain the persons of the guests who eat, or the horse which eats, till payment. . . . They do not deal upon *contracts* as others do; they only make bills, in which they cannot set unreasonable rates; if they do, they are indictable for extortion . . . .<sup>194</sup>

For the proposition that inns “are of necessity,” Justice Eyre cited the report of the 1623 indictments that declared inns run by four defendants to be a common nuisance. The judges said the indictment failed to allege any specific grounds to show the inns were a nuisance, such as there were now too many inns in the town.<sup>195</sup> It appears, however, that the court said that “*this* inn is of necessity.”<sup>196</sup> That statement was not a generalization on the necessity of inns, but a specific response to whether there were “too many” in this town. Far from considering inns a necessity, the judges were debating whether their erection was a common nuisance. They subsequently discussed how to control the proliferation of inns. In that context, the case is a slim reed for finding that “[i]nns are of necessity.” Justice Eyre seems to use it to explain why innkeepers have an obligation not common to other trades. The obligation to serve the public was now well accepted, even if there was little occasion to enforce it. The rationale for that obligation, however, had never been expressed. If inns were a necessity, the need to provide service would follow. But it is more likely that Eyre reasoned from the existence of the obligation to the necessity of the inn.

Justice Eyre also referred to the innkeeper as “compellable by the constable to lodge strangers.”<sup>197</sup> He did not indicate when the constable forced innkeepers to lodge guests they did not want to

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193. 89 Eng. Rep. 566, 566 (1691).

194. *Id.* (citations omitted).

195. “Que fueront ore too many innes in le ville.” 81 Eng. Rep. 842, 842 (1623).

196. “Ceo est inn de necessity.” *Id.*

197. *Newton v. Trigg*, 89 Eng. Rep. 566, 566 (1691).



lodge, but it seems likely he derived his understanding from statements made after 1600 like those of Dalton in *Country Justice*.<sup>198</sup> By the end of the seventeenth century, then, the court viewed innkeeping as a business quite different from other businesses—one which the authorities could compel to serve the public.

#### IV. CONCLUSION

An inn is a refuge from the perilous world outside, and its obligation to serve the public might logically have flowed from the public's need and desire for access to it. But life does not always follow logic. Dangers outside the inn were less significant than the dangers within, and this factor played an important role in the origins of the duty to serve the public.

The duty to serve the public was incidental to the innkeeper's liability for losses of his lodgers. That liability derived from Roman law which was compatible with the victim compensation provisions of the Statute of Winchester. It also encouraged innkeepers to keep their lodgers safe during the period after the Black Death when people perceived lawlessness around them. Exceptions to strict liability arose to assist travelers in finding lodging where there was no inn or the inn was crowded. These exceptions in turn led to the duty of the innkeeper to serve those for whom there was room. This duty also served a national interest by protecting trade and encouraging alien traders.

The link between strict liability and the obligation to serve the public has long been severed. Limitations on liability now appear in bold letters on your hotel room door. But some laws endure long after their original rationale has disappeared because they have proved to be valuable for other reasons. The common-law service obligations of inns fulfill different functions today than at their inception. The main significance of the right of access today is to protect against discrimination. Just as English law responded to the problems of its time by departing from Roman rules, so law today must respond to current realities. The obligation to serve the public extended from the inn to include the common carrier,<sup>199</sup> and today concern for whether there is or ought to be a right of public access extends to the newest of innovations like the Internet and broadband communications. Ancient rules of law provide a comfortable form with which to address modern problems. It is up to us to de-

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198. DALTON, *supra* note 179, at 26.

199. *Jackson v. Rogers*, 89 Eng. Rep. 968, 968 (1683) (holding action on the case lies for common carrier's failure to carry goods, analogizing to innkeeper's duty to accept guests).

termine whether and in what circumstances the old rule should be given current meaning.