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THE INNKEEPER'S LIEN AT COMMON LAW

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The innkeeper's right of retaining is of very great antiquity. The earliest reported cases on the subject are found in the Year Books.[1] Joseph Henry Beale traces the origin of this lien to the year 1465 and declares that it is "doubtless a survival of an ancient power of legally permitted self-help."[2] Although the innkeeper's lien today is generally statutory, it still retains many of its common law characteristics.

The innkeeper's lien at common law is a specific lien, not a general lien.[3] It is founded on the general custom of the land.[4] In *Jones v. Thurloe*[5] the court declared that "by the *custom of the realm,* if a man be in an inn one night, the innkeeper may detain his horse until he is paid for the expenses" but if the innkeeper "let him depart without payment, then he has waived the benefit of that custom by his own consent, and shall never afterwards detain the horse for that expense."[6]

The law gives authority to a person to enter a common inn, and the innkeeper *(communis hospitator)* is generally bound to receive and to keep safely the goods with which he is travelling.[7] In *Rex v. Ivens*[8] the court announced that

> "the innkeeper is not to select his guests. He has no right to say to one, You shall come into my inn, and to another, You shall not, as everyone coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants . . ."[9]

And Lord Esher in *Robins and Company v. Gray,*[10] observed that

> "the innkeeper cannot discriminate and say that he will take in the traveller but not his luggage. If the traveller brought something exceptional which is not luggage—such as a tiger or a package of dynamite—the

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[1] *Cf.* Y.B. 5 EDW. 4, 2, pl. 20 (1465); Y.B. 21, HEN. 7, 14, pl. 19 (1505).

[2] BEALE, INNKEEPERS AND HOTELS, ¶ 252 n. 1, ¶ 257 (1906).

[3] *Cf.* JONES, LIENS, ¶ 498 (1914); BEALE, INNKEEPERS AND HOTELS, ¶ 254 (1906). But see BROWN, THE LAW OF PERSONAL PROPERTY 495 (1914).

[4] See p. 42 *infra.*

[5] 8 Mod. 172, 88 Eng. Rep. 126 (1723).

[6] *Id.* Eng. Rep. at 126.

[7] *Cf.* BLACKSTONE, 3 COMMENTARIES 164 (1823). See discussions of innkeeper's responsibility in BEALE, INNKEEPERS AND HOTELS, ¶¶ 181–191 (1906), and STORY, COMMENTARIES ON THE LAW OF BAILMENTS, ¶¶ 464–473 (1851).

[8] 7 C. and P. 213, 173 Eng. Rep. 94 (1835).

[9] *Id.,* Eng. Rep. at 96. The English court has held that an action would lie against an innkeeper for wrongfully refusing to receive and lodge a traveller, even though the traveller could prove no "actual damage." Constantine v. Imperial Hotels, Ltd. [1944] K.B. 693.

[10] [1895] 2 Q.B. 501.

> innkeeper might refuse to take it in; but the *custom of the realm* is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveller and his goods."[11]

At early common law, it was once said that the innkeeper's lien extended to the person of the guest himself, but not to his property. Bacon's *Abridgment* declared that

> "Innkeepers *may detain the person of the guest who eats,* of the horse which eats, till payment, and this they may do without any agreement for that purpose; for men that get their livelihood by entertainment of others cannot annex such disobliging conditions that they shall retain the party's property in case of non-payment . . . ."[12] (Emphasis added.)

And there is dictum, in *Newton v. Trigg*,[13] to the effect that the innkeeper can detain the person of the guest. This dictum, however, was vigorously repudiated as a "startling proposition" in *Sunbolf v. Alford*,[14] where the court observed that the innkeeper can neither detain the person of the guest, nor "strip the guest of his clothes." In *Carlisle v. Quattlebaum*,[15] where *A* "called and breakfasted" at *B*'s establishment, for which *B* charged thirty-seven and one-half cents, *A* tendered a twenty dollar "Georgia bill," which *B* could not change, and which *B* detained for his charges. In an action by *A* to recover the twenty dollar bill, the court declared:

> "An innkeeper has no right to detain the property of his guest, though he may detain his person; unless in the case of a horse, etc., which may be detained for his feeding. But a horse cannot be detained for the meat of his master. Nor does it appear that the defendant was an innkeeper, to which the privilege of detainer is given, because he is bound to receive."[16]

This erroneous statement of the law of innkeepers is based upon the dictum contained in Bacon's *Abridgment;* on the contrary, at common law, the

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[11] *Id.* at 504. Schouler says that "the option of an innkeeper to exclude or receive property brought by a guest is, of course, a dangerous principle to admit, and it cannot be freely exercised." He suggests that an innkeeper might refuse goods "which he perceived to be injurious and offensive . . . , or improperly secured, or such in kind, bulk, or value, that no traveller ought rightfully to make his host answerable for them." SCHOULER, BAILMENTS AND CARRIERS, § 284 (1897).

[12] BACON'S ABRIDGMENT, p. 236 (Bouv. Am. ed.).

[13] "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." Newton v. Trigg, 1 Show. 268, 89 Eng. Rep. 566 (1692).

[14] 3 M. and W. 248, 150 Eng. Rep. 1135 (1838). Lord Abinger observed that "it is the dictum of a single judge, unnecessary for the decision of the case, and resting perhaps on the authority of a doubtful reporter, who might not have heard accurately what was said: and I cannot conceive that it be any authority at all on such a subject." *Supra,* Eng. Rep. at 1137.

[15] 2 BAILEY 452 (S.C. 1831).

[16] *Id.* at 453.

innkeeper does have the right to detain the property of his guest;[17] he may not detain the person of his guest;[18] a horse can be detained for the meat of his master;[19] and the innkeeper's lien is founded not upon his obligation to receive, but upon the *custom of the realm.*[20] Joseph Henry Beale has observed that this case "must be regarded as overruled."[21] He states that the innkeeper's lien has never been "extended at common law to any other class of property than tangible personal property; and there is not the slightest authority for extending it to the person of the debtor."[22] And Justice Story declares that the cases cited by Bacon to support the proposition that the horse may be detained only for the expense of its own keeping, and not for the food and entertainment of the guest, "certainly do not support that doctrine."[23] Story adds that "the general rule seems to favor such a lien . . . ."[24] In *Mulliner v. Florence,*[25] where the innkeeper detained the horses, carriage, and harness for the keeping of both the horses and the guest, and later sold the horses, the court acknowledged the existence of the lien, and then held that it had been destroyed by the sale. Lord Bramwell refused to confine the lien to the horses for their keep alone—the lien had extended to the whole of the property for the whole of the guests's debt to the innkeeper.

An innkeeper, at common law, might receive animals and equipage into the inn-stable, even though the owner was neither lodged nor entertained as a guest at the inn. In such cases, he was presumed to have accepted them in his capacity as an innkeeper, not as a livery-stable keeper,[26] and he possessed a common law right to detain until paid for his specific charges.[27] Thus in the *Case of an Hostler,*[28] the court held that, in the ab-

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17 SCHOULER, BAILMENTS AND CARRIERS, ¶ 326 (1897).

18 Sunbolf v. Alford, 3 M. and W. 248, 150 Eng. Rep. 1135 (1838); *cf.* BEALE, INNKEEPERS AND HOTELS, ¶ 257 (1914).

19 Jones v. Thurloe, 8 Mod. 172, 88 Eng. Rep. 126 (1723).

20 See discussion, p. 42 *infra.*

21 BEALE, INNKEEPERS AND HOTELS, ¶ 252 (n.) 1 (1914).

22 *Id.* at ¶ 257. Story declares that the common carrier has no "lien on the person of the passenger, or the clothes he has on." STORY, COMMENTARIES ON THE LAW OF BAILMENTS, ¶ 604 (1851).

23 STORY. *op. cit. supra* note 22, at 503, n.5.

24 *Id.* at 504.

25 [1878] 3 Q.B. 484. Schouler declares that "the innkeeper's lien will subject all personal property brought by a guest *infra hospitium,* animals inclusive, to the satisfaction of the host's bill against him." SCHOULER, BAILMENTS AND CARRIERS, ¶ 326 (1897). Dobie adds that "there is a lien on the guest's horse, not only for the charges incurred for the horse itself, but for the entertainment of the guest, as well." DOBIE, BAILMENTS AND CARRIERS, ¶ 100 (1914).

26 The livery-stable keeper at common law has no lien. BROWN, THE LAW OF PERSONAL PROPERTY 463–64 (1936).

27 SCHOULER, BAILMENTS AND CARRIERS, ¶ 296 (1897).

28 Yelverton 66, 80 Eng. Rep. 46 (1605).

sence of a special agreement,[29] an innkeeper has a lien on a horse for his food and keeping, and that the horse may be sold after he has eaten his worth.[30] In *Robinson v. Walter*,[31] Chief Justice Mountague said:

> "*Communia hospitia* are compellable to receive guests and their horses. . . . the custom of London is good and reasonable, how long to stay, not till he eats out more than his head; the innholder [sic] may sell him presently, and this is justifiable."[32]

but a lien is ordinarily a right to detain, and not to sell the chattel. Thus *Jones v. Pearle*[33] subsequently denied the innkeeper's right of sale, except so far as it existed by custom in London. Stabling, therefore, was a special charge, for which the innkeeper was entitled to a lien, whether the owner of the animal lodged at the inn or not; it was otherwise in the case of money, baggage or other "dead" property left at the inn by one not a guest there.[34]

The innkeeper's lien extends to goods brought by the guest to the inn *(infra hospitium)*, even though the goods are never actually delivered to the innkeeper, but are retained by the guest in his own possession. Thus Beale has observed that the innkeeper's lien differs from

> "other liens created by the common law in that technical possession on the part of the innkeeper is not necessary for the enforcement of the lien. Although the goods remain in the possession of the guest, the innkeeper may prevent their being carried from the inn, take them into his own actual possession, and hold them as security for his charges."[35]

The innkeeper's lien, at common law, did not exist in favor of the keeper of a boarding or lodging house.[36] The distinction between an inn and a boarding house was pointed out in *Pinkerton v. Woodward*,[37] an early California case, concerned with the liability of an innkeeper for certain coin and gold dust belonging to the guest which had been stolen from the innkeeper's safe; the court said:

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[29] The old rule was, that a bailee loses his right to detain, if he stipulates for a particular price.

[30] The court explained the reason for this rule as follows: "if a tailor has my apparel to make, and he makes it accordingly, he is not obligated to deliver it till he is paid for the making of it; but although in that case he may detain till he is paid; yet for default of payment he cannot sell it, as in the other case he may sell the horse; the reason is, because the keeping of the horse is a charge, because he eats; but the keeping of the apparel is not any charge." Case of an Hostler, Yelverton 67, 80 Eng. Rep. 47 (1605).

[31] 3 Bulst. 269, 81 Eng. Rep. 227 (1616).

[32] *Id.*, Eng. Rep. at 228.

[33] 1 Stra. 557, 93 Eng. Rep. 698 (1723).

[34] *Cf.* SCHOULER, BAILMENTS AND CARRIERS, ¶ 251 (1897).

[35] BEALE, INNKEEPERS AND HOTELS, ¶ 251 (1906).

[36] STORY, COMMENTARIES ON THE LAW OF BAILMENTS, ¶ 475 (1851).

[37] 88 Cal. 557, 26 Pac. 366 (1867).

> "an inn is a public place of entertainment for all travellers who choose to visit it. It is distinguished from a private lodging or boarding house in this: that the keeper of the latter is at liberty to choose his guests, while the innkeeper is obligated to entertain and furnish all travellers of good conduct and means of payment everything which they have occasion for, as such travellers, on their way."[38]

In *Pollock v. Landis*,[39] the court declared that

> "there are two classes of persons who are entertained by innkeepers for reward, guests and boarders. Upon the goods of the former, the innkeeper has a lien, but upon those of the latter, he has not."[40]

And the common law rules as to inns, including the right of lien with regard to the distinction between guests and boarders, were extended to city hotels, in *Thompson v. Lacy*,[41] where the court defined an inn as "a house where the traveller is furnished with everything which he has occasion for whilst upon his way."[42] In *Fay v. The Pacific Improvement Company*,[43] the court announced that "an inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation,—a hotel."[44]

The common law recognizes different categories of goods received *infra hospitium*, and different situations or relationships under which the goods may be received. Thus, there are goods which the innkeeper is obligated to receive, and there are goods which he is not obligated to receive, but which, at his own election, he may receive. There are goods which are the property of the guest, and there are goods which are the property of a third person, but which are in the possession of the guest—in the latter case, the possession of the guest may be rightful (as in the case of a travelling salesman), or it may be wrongful (as in the case of a thief); and in either case, the innkeeper may or may not have *scienter* of the third party's property in the goods. The goods of the third party may be received by the innkeeper as the goods of the guest, or they may be received as the goods of the third

[38] *Ibid.*

[39] 36 Iowa 651 (1873).

[40] *Id.* at 652.

[41] 3 B. and Ald. 283, 106 Eng. Rep. 667 (1820).

[42] *Id.*, Eng. Rep. at 668.

[43] 93 Cal. 253, 26 Pac. 1099 (1892).

[44] *Id.* at 259, 26 Pac. at 1100. To be recognized in law as a common inn, it is not essential, at common law, that the establishment display a sign announcing that fact. Thus in *Collins' Case* it is reported that "fuit auxy tenus per cur', que si un keep un inn, & maintain sign, il est lie de hospiter estrangers; & s'il ceo deny, action sur le case gist; come 8 E. 4 est. Et Dodderidge observe, le plaintiff ne besoigne de alleager, que le inn fuit erect per authority and license: mes solement que le defendant teigne commune hospitium. Et ils teigne, que un innkeeper poet a son pleasure domolish son sign, & maintain inn sans sign, ceo remainera commune hospitium, & liable al estrangers." Palmer 373, 81 Eng. Rep. 1130 (Trin. 21 Jac. B.R.).

person, merely for the use of the guest; furthermore, the goods may be received by the innkeeper in his capacity as an innkeeper, or, in some cases, they may be received by him not as an innkeeper, but as a bailee, with or without compensation. In deciding whether the innkeeper has a lien against the goods, it is necessary, therefore, to determine the category of the goods, the relationship under which the goods were received by the innkeeper, and, sometimes, the innkeeper's *scienter* of the guest's property, or lack of property, in the goods. In some of the situations just recited, the innkeeper, at common law, has no lien against the goods.

Where the goods are the property of the guest and are received into the inn by the innkeeper in his capacity as an innkeeper, a common law specific lien attaches to those goods.[45] It is immaterial whether or not the innkeeper is obligated to receive the goods, for if he takes them in, the lien attaches in either case.[46] And the lien covers not only the expense of keeping the goods, but also the cost of the food and entertainment of the guest.[47]

The problem arises where the goods are the property of a third person and are merely in the possession of the guest. Where the possession of the guest is *wrongful,* as in the case of a thief coming to the inn with stolen goods, the innkeeper's lien at common law extends to such goods only if the innkeeper acts in good faith and is not aware of the guest's wrongful possession.[48] Thus, where X steals A's trunk and takes it to B's inn, B, having no knowledge of the theft, may detain the trunk for his charges regardless of A's title. But if B knows that X has stolen the trunk, he is not entitled to the lien.

In *Robinson v. Walter,*[49] where a stranger brought the plaintiff's horse to the defendant's inn and there set him up for some time and then went away, the court held that the innkeeper was justified in refusing to deliver the animal to the plaintiff until compensated for its keeping. Justice Croke declared that:

> "If a man's horse be stolen, and brought unto an inn, or if a man lends his horse to one for a day, and he keeps him three or four days, the innkeeper here was in no fault at all. If the horse was stolen and brought thither . . . . * * * * the innkeeper hath done no wrong at all, the owner is to satisfy him for his meat, because he was here compellable to receive him."[50]

And Justice Dodderidge observed that when a man has lost his horse,

> "if he should not be enforced to pay for his meat, this would be a trick, to have his horse kept for nothing, and to have him brought by his servant

[45] STORY, COMMENTARIES ON THE LAW OF BAILMENTS, ¶ 476 (1851).

[46] BEALE, INNKEEPERS AND HOTELS, ¶ 256 (1906).

[47] STORY, *op. cit. supra* note 45.

[48] DOBIE, BAILMENTS AND CARRIERS, ¶ 100 (1914).

[49] 3 Bulst. 269, 81 Eng. Rep. 227 (1616).

[50] *Id.,* Eng. Rep. at 228.

to the inn. The owner hath a benefit, meat for his horse, and for the which he ought to pay."[51]

In *Yorke v. Grenaugh*,[52] an action in replevin for a horse where the defendant pleaded that he was an innkeeper, that the horse had been brought to the inn by a person unknown to him, that he had stabled and fed it and detained it for his charges, the court declared:

"supposing that this traveler was a robber, and had stolen this horse; yet if he comes to an inn, and is a guest there, and delivers the horse to the innkeeper *(who does not know it)* the innkeeper is obliged to accept the horse; and then it is very reasonable, that he shall have a remedy for payment, which is by retainer. And he is not obliged to consider, who is the owner of the horse, but whether he who brings him is his guest or not."[53] (Emphasis added.)

In *Johnson v. Hill*,[54] an action of trover by the owner of the goods against an innkeeper who asserted a lien, Chief Justice Abbott charged the jury as follows:

"the question was, whether the defendant knew at the time when the horse was delivered to his custody, that Pritchard was not the owner of the property, but a mere wrongdoer; if he knew that fact, he made himself a party to the wrongful act of Pritchard and could not insist on any recompense for the keeping of the horse."[55]

In *Black v. Brennan*,[56] an innkeeper was allowed a lien on a stolen horse where he had no knowledge of the theft at the time the horse was received into the inn.

Where the possession of the guest is rightful, as in the case of a travelling salesman coming to the inn with the goods of his employer which he has been entrusted to sell, there has been a split of authority as to whether the innkeeper's lien extends to such goods.[57] Some American courts have allowed the lien only where the innkeeper has no *scienter* that the goods are the property of a third person; they assert that the innkeeper has no lien on goods that he knows are not the property of the guest. *Cook v. Kane*[58] was an action by an innkeeper against the guest to enforce a lien on a piano which had been sent by a third party to the guest to sell, this fact being unknown to the innkeeper who had received the piano into the inn as the property of the guest. The Oregon court declared:

[51] *Id.*, Eng. Rep. at 229.
[52] 2 Ld. Raym. 866, 92 Eng. Rep. 79 (1703).
[53] *Id.*, Eng. Rep. at 79.
[54] 3 Stark. 172, 171 Eng. Rep. 812 (1822).
[55] *Id.*, Eng. Rep. at 812.
[56] 35 Ky. (5 Dana) 310 (1837).
[57] BEALE, INNKEEPERS AND HOTELS, ¶¶ 261–62 (1906).
[58] 13 Oregon 482, 11 Pac. 226 (1886).

> "Nor is the lien confined to property owned by the guest, but it will attach to property of third persons for whom the guest is bailee, provided only he received the property on the faith of the innkeeping relation. *But the lien will not attach if the innkeeper knew the property taken in his custody was not owned by his guest,* nor had any right to deposit it as a bailee or otherwise, except some proper charge incurred against the specific chattel."[59] (Emphasis added.)

This view was also taken by the North Carolina court in *Covington v. Newberger.*[60] In *Lines Music Company v. Holt,*[61] where the statute was said to have "re-established the common law right of a lien to hotel and innkeepers as it existed at common law," the court took the position that the innkeeper's lien extended to the goods of a third party where the innkeeper was unaware that the guest did not own them.

The English courts, and, in general, the American courts, hold that it is immaterial whether the innkeeper has *scienter* of the third party's ownership of the goods, and that the innkeeper's lien attaches to all goods rightfully in the possession of the guest which are brought to the inn by the guest, regardless of the question of actual ownership.[62] Thus in the leading English case, *Robins and Company v. Gray,*[63] the court declared that

> "an innkeeper is bound to take in goods with which a person who comes to the inn is travelling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches; and that the question of whose property the goods are, or of the innkeeper's knowledge as to whose property they are, is immaterial."[64]

Lord Esher protested "against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries."[65] He declared that the duties, liabilities, and rights of innkeepers in respect to the goods brought into the inn by the guest are founded upon the custom of the realm, and are dependent upon that and that alone. The innkeeper is bound by law to take in the goods of the traveller, unless they are of an exceptional character; he is bound by law to keep the goods he has taken in safely; and by law he has a lien upon the goods for his expenses in keeping them, as well as for the food and entertainment of the guest. He added:

> "That has been the law for two or three hundred years; but today some expressions used by judges, and some questions—immaterial, as it seems to

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59 *Ibid.*

60 99 N.C. 523, 6 S.E. 205 (1888).

61 332 Mo. 749, 60 S.W.2d 32 (1933).

62 DOBIE, BAILMENTS AND CARRIERS, ¶ 100 (1914).

63 [1895] 2 Q.B. 501.

64 *Id.* at 505.

65 *Id.* at 503.

> me—which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn, he may refuse to take them in, or, if he does take them in, he has no lien upon them . . . . Now, is there any decided case in which it has been held that, although goods have been brought to an inn as the luggage of the traveller and received as such by the innkeeper, he has no lien upon them if he knows they are not the goods of the traveller? There is not one such case to be found in the books."[66]

It is sometimes necessary to determine the nature of the relationship under which the goods were received into the inn, *i.e.*, whether they were received as the goods of the guest, or whether they were received as the goods of a third party to be delivered to the guest for a special temporary purpose. The case of *Broadwood v. Granara*[67] can be distinguished on this basis. Where the plaintiff sent Monsieur Hababier a boudoir grand pianoforte to practice on, and the innkeeper claimed a lien upon it until compensated for his charges, the court declared:

> "We are all of opinion that the lien claimed by the defendant cannot prevail . . . . This is the case of goods, not brought to the inn by a traveller as his goods, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that person . . . it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose."[68]

Justice Platt added that this "case does not fall within the principles of law relating to the lien of innkeepers."[69] Justice Parke declared that

> "it is not necessary to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of *goods brought by a guest to an inn* in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretense for saying that the defendant has any lien."[70]

In *Robins and Company v. Gray*,[71] Justice Kay referred to an analogous case put before the court in the argument by the Master of the Rolls; thus

> "suppose a jeweller in the town sent, with the knowledge of the innkeeper, certain jewels to a guest at the inn on approval, and allowed them to remain in the inn for some days—could the innkeeper claim and enforce a lien upon those jewels? I should think he could not because they were sent for

[66] *Id.* at 505.
[67] 10 Exch. 417, 156 Eng. Rep. 499 (1854).
[68] *Id.*, Eng. Rep. at 501.
[69] *Id.*, Eng. Rep. at 502.
[70] *Id.*, Eng. Rep. at 502.
[71] [1895] 2 Q.B. 501.

a special temporary purpose, and the innkeeper knew it; they were therefore, not sent as the goods—I do not mean the property—of the guest."[72]

The *Restatement of Security* takes the position that the hotelkeeper's possessory lien, as to persons other than the guest who have an interest superior to that of the guest in chattels brought on the premises of the hotel by or for the guest, extends to such chattels

"unless the hotelkeeper (a) knows that the guest is wrongfully in possession of the chattels, or (b) knows that another person has an interest in the chattel superior to the guest and circumstances do not justify the inference that the guest is permitted to bring them to or receive them at the hotel as if they were his own."[73]

The *Restatement* maintains that the hotelkeeper's lien sometimes can be defeated by third persons on a showing that the innkeeper had *scienter* of the superior interests of the third persons at the time the chattels are received. Thus if *B* knows that *A* is wrongfully or criminally in possession of *C*'s chattels, *B* need not participate in *A*'s wrong or crime by receiving the goods, but if he does then no lien exists upon the goods, except in respect of *A*. Where *B* learns of *A*'s wrongful possession after *A*'s arrival, the lien is limited to charges arising before *B* acquired such knowledge.[74]

The guest's ownership of the goods is not necessarily the determining factor in respect of the hotelkeeper's lien, however, because the guest's possession of the goods may be authorized by the owner—*i.e.*, the case of the travelling salesman who does not own the samples but who is privileged to take them to any hotel on his route. In such case, the *Restatement* declares, the

"guest's lack of ownership is immaterial, and likewise immaterial is the hotelkeeper's knowledge of the facts. The knowledge of the hotelkeeper of the superior interest of third persons is important only if, added to this knowledge, there are circumstances which are inconsistent with the inference that the guest is permitted to treat the chattels as his own, at least so far as his stay in the hotel is concerned."[75]

As pointed out above, there is a "grave conflict" at common law among the courts as to whether the innkeeper's lien will attach to goods brought to the inn by a guest who is not the owner of the goods.[76] The root of this conflict is traceable to a collision between two fundamental principles of the law—namely, the right of the innkeeper to detain, which is founded upon the *custom of the realm*, and the principle that the property of one

[72] *Id.* at 508.

[73] RESTATEMENT, SECURITY, § 63 (1941).

[74] *Ibid.*, Comment on Subsection (2).

[75] *Ibid.*

[76] DOBIE, BAILMENTS AND CARRIERS, ¶ 100 (1914).

man shall not be taken for the debts of another man, against the owner's consent, unless he has done some act or has neglected some duty creating the liability. Justice Thayer, dissenting in *Cook v. Kane*,[77] declared that

> "a party cannot be deprived of his ownership to property to satisfy the claim of another, unless he has in some form obligated himself to submit to it. He must have agreed to it in terms, or have done some act directly or remotely authorizing it."[78]

Thus, the courts that allow the lien, in cases like those of which we have just been speaking, seem to ignore the right of property, and under the cloak of custom,[79] make the innkeeper's rights superior to those of the property owner. The following section will examine this principle upon which the innkeeper's lien is said to depend.

The Principle Upon Which the Innkeeper's Lien Depends

It is necessary to take a close look at a certain principle enunciated in the cases and in the treatises concerning the lien of the innkeeper—namely, that *the innkeeper's right to detain is founded upon the custom of the realm, and is dependent upon that, and that alone.*[80] This principle, which was formulated sometime prior to the sixteenth century, has undergone an interesting development which can be traced through the decisions and dicta of the courts.

The courts have not always been content to say that the innkeeper's right to detain is founded simply on *custom*. The old judges sought to explain what was meant by custom and to found the lien upon some specific obligation. Thus in the reasoning of the cases the innkeeper's lien has been made to depend upon various grounds: in some of the early cases it was founded exclusively upon his obligation to receive; by a shift in the reasoning of the courts, it was later made to depend exclusively upon his strict liability; still later the courts took the position that the lien arose both from the obligation to receive and the strict liability; now it is said that the innkeeper's lien is founded upon the custom of the realm, and is dependent upon that alone. The lien and the liability arise, it is said, from the fact that the innkeeper has taken the goods in, regardless of whether there is

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[77] 13 Oregon 482, 11 Pac. 226 (1886).

[78] *Ibid.*

[79] "Judges have found the formula of immemorial usage a convenient cloak beneath which they might perform no end of tricks to dazzle the credulous." Brown, *Customary Law in Modern England*, 5 COL. L. REV. 561 (1905).

[80] *Cf.* Robins & Co. v. Gray, [1895] 2 Q.B. 501. Azo (died 1230), who knew from experience what custom was, declared: "A custom can be called *long* if it was introduced within ten or twenty years, *very long* if it dates from thirty years, and *ancient* if it dates from forty years." Quoted in HALL, READINGS IN JURISPRUDENCE 875 (1938).

an obligation to receive. Thus, the obligation to receive, the strict liability, and the right of lien are viewed as independent propositions.

Under the Roman Law, the innkeeper had no lien, unless expressly bargained for, but he had the right to choose and select the persons that would be received into the inn as guests.[81] And he was held strictly accountable for the goods of his guests.[82] Under the common law, the innkeeper had no right of choice, except in limited circumstances, but by law he was given a lien against the goods of the guest. He also was held strictly accountable for the goods of the guest.[83] In the reasoning of some of the earlier cases, this right of lien seems to have been looked upon as a substitute for the right of choice.

In the *Six Carpenters' Case*[84] (1610), which discusses the distinctions between *trespass vi et armis* and *trespass ab initio,* the court, by way of dictum, declared that "the law gives authority to enter a common inn, or tavern, so to the lord to distrain."[85] This is a distinct statement that the innkeeper is obligated by law to receive, and *for this reason,*[86] by law, he may distrain until compensated for his charges. In *Robinson v. Walter*[87] (1616), where a horse had been left at the inn by a stranger and the innkeeper refused to deliver the animal to its true owner until paid for the keeping, the Justices engaged in a friendly colloquy concerning the right of the innkeeper to detain. Chief Justice Mountague argued that the innkeeper might detain the horse "because he is compellable at the first to receive him."[88] Justice Dodderidge maintained that the innkeeper's "retainer here is *grounded upon the general custom of the land*: He is [bound] to receive all guests and horses that come to his inn: . . . and therefore there is very great reason for him to retain . . . ."[89] (Emphasis added.) But Justice Croke declared that the innkeeper could detain the horse "because he was compellable to receive him."[90] When a similar situation arose

[81] JUSTINIAN, DIGEST, 4, 9, 1, 1.

[82] According to Max Radin, the innkeeper was held strictly accountable for the goods, because he had this right of choice. RADIN, ROMAN LAW, ¶ 94 (1927).

[83] Although the innkeeper's liability is frequently referred to as "common law" liability, Max Radin argues that it was taken over from the Roman Law. RADIN, ROMAN LAW, ¶ 94 (1927); *cf.* JONES, LIENS 125 ff. (1914). Justice Holmes, on the other hand, maintains that it arose as a "fragmentary survival from the general law of bailment" whereby the bailee, not the bailor, was the only person who could bring an action against a wrongdoer. HOLMES, THE COMMON LAW 180 (1881).

[84] 8 Coke 146a, 77 Eng. Rep. 695 (1610).

[85] *Id.,* Eng. Rep. at 696.

[86] "So" as an adverb: *for this reason* (denoting sequence or consequence). Thus, the law gives authority to enter, *so* the law gives authority to the lord to distrain.

[87] 3 Bulst. 269, 81 Eng. Rep. 227 (1616).

[88] *Id.,* Eng. Rep. at 228.

[89] *Id.,* Eng. Rep. at 227.

[90] *Id.,* Eng. Rep. at 228.

in *Yorke v. Grenaugh*[91] (1703), the court said that "the innkeeper is obligated to accept the horse; and then it is very reasonable, that he shall have a remedy for payment, which is by retainer."[92] And Chief Justice Holt cited the unreported case of the *Exeter Carrier* where it was held that "since the law compelled him [the carrier] to carry them [the goods], it will give him remedy for the premium due for the carriage." The court added that "the same reason holds in this case."[93]

In *Broadwood v. Granara*[94] (1854), where a piano was sent to the guest for a special purpose, and the innkeeper knew that the piano was not the property of the guest and did not receive it as a part of the goods of the guest, the court denied the lien. Judge Parke's dictum is now famous, namely that

> *"the principle on which the innkeeper's lien depends, is that he is bound to receive travellers and the goods which they bring with them to the inn. . . . the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive."*[95] (Emphasis added.)

In the two decisions of the *Borwick* case (1872 and 1875) the court is seen making the transition from "an obligation to receive" to "strict liability" as the basis for the innkeeper's right to detain. In deciding that the lien extended to goods which the innkeeper might possibly have refused to receive, the court found a new basis for allowing the lien—*i.e.*, the strict liability of the innkeeper. Thus in *Threfall v. Borwick*[96] (1872), where the innkeeper received the piano as the goods of the guest, Justice Mellor declared:

> "When, having accommodation, he has received the guest with his goods, *and thereby has become liable* for their safe custody, it would be hard if he was not to have a lien on it. And under such circumstances, the lien must be held to extend to goods which he might possibly have refused to receive."[97] (Emphasis added.)

And Justice Quain declared: "If, therefore, the innkeeper be liable for the loss, *it seems to follow* he must also have a lien upon them."[98] (Emphasis added.) When *Threfall v. Borwick*[99] (1875) came on appeal, the court held that it is immaterial whether the innkeeper is obligated to receive the

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[91] 2 Ld. Raym. 866, 92 Eng. Rep. 79 (1703).
[92] *Id.*, Eng. Rep at 79.
[93] *Id.*, Eng. Rep. at 80.
[94] 10 Exch. 417, 156 Eng. Rep. 499 (1854).
[95] *Id.*, Eng. Rep. at 502.
[96] [1872] 7 Q.B. 711.
[97] *Id.* at 712.
[98] *Id.* at 715.
[99] [1875] 10 Q.B. 417.

property of the guest; if he receives the goods, and thereby becomes liable, then he is entitled to the lien.

In *Cook v. Kane*[100] (1886), where the innkeeper received the piano as the property of the guest, unaware that it was actually the property of a third person, the court cited the *Borwick case* as authority, and then declared:

> "Whenever, by virtue of the relation of innkeeper and guest, the law imposes this extraordinary responsibility for the goods of the guest, it gives the innkeeper a corresponding security upon the goods put by the guest into his possession."[101]

The new reasoning had now taken hold; thus a case "Note" in the *Harvard Law Review* in 1895 declared: "*As the innkeeper's lien is grounded . . . on the extraordinary liability imposed on him by law,* it seems only just that on all goods which he is bound to receive he should have his lien, whether or not he knows them to be the property of another than his guest."[102] (Emphasis added.)

The new reasoning was sometimes combined with the old, namely where the goods in question were of a kind the innkeeper was obligated to receive. Thus in *Gordon v. Silber*[103] (1890), where the innkeeper detained the lugluge of the wife, which had been received into the inn with the luggage of the husband, for the entertainment and keep of the husband, the court first recited the fact that under common law an innkeeper is obligated to receive the guest and his goods, and then declared:

> "The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be sued and made liable in damages if he fails in this respect. As a compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food . . . . It seems, therefore, that the lien is commensurate with the obligation to receive the guest and to keep safely and securely his goods. The right of lien of an innkeeper depends upon the fact that the goods came into his possession, in his character of innkeeper, as belonging to the guest."[104]

In *Robins and Company v. Gray*[105] (1895), where the innkeeper accepted the goods with full knowledge that they were not the property of the guest, and then sought to detain them for the guest's keeping, the court declared that:

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[100] 13 Oregon 482, 11 Pac. 226 (1886).
[101] *Ibid.*
[102] 9 HARV. L. REV. 216 (1895–1896).
[103] [1890] 25 Q.B. 491.
[104] *Ibid.*
[105] [1895] 2 Q.B. 501.

> "The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, *but upon the custom of the realm* with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone . . . ."[106] (Emphasis added.)

The obligation to receive, the strict liability, and the right of lien are recited as independent propositions founded on the custom of the realm. Thus, Lord Esher was of the opinion that

> "an innkeeper is bound to take in the goods with which a person who comes to the inn is travelling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches, and that the question of whose property the goods are, or of the innkeeper's knowledge as to whose property they are, is immaterial."[107]

The lien arises from the fact that the innkeeper has taken the goods in, not from any obligation to take them in. Thus,

> "suppose the things brought are such things as the innkeeper is not bound to take in, he may . . . refuse to take them in . . . but if after the innkeeper changes his mind and does take them in, then they are in the same position as goods properly offered to the innkeeper according to the custom of the realm."[108]

So, too, the court adds that the "liability [is] fixed upon the innkeeper by the fact that he has taken the goods in."[109]

Justice Kay, in a concurring opinion, took a long reach back into history, and came up with Judge Dodderidge's 1616 dictum in *Robinson v. Walter*,[110] and this, Justice Kay said, "is a distinct statement that the innkeeper's lien is founded on the general custom of the land . . . ."[111]

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The development of the innkeeper's lien at common law has been essentially a process of equating interests—those of the innkeeper on the one hand with those of the property owner on the other, and at the same time adjusting to the requirements of a changing and expanding society. The right to detain property amounts to the right to destroy property, at least insofar as the owner out of possession is concerned. But the right of the innkeeper to compensation for services rendered upon property or to the owner of property is equally compelling. The development of the inn-

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[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] See quotation, page 44 above.
[111] [1895] 2 Q.B. 501.

keeper's lien, therefore, has been essentially a problem of balancing these interests.

It has been correctly said that "The common law like its English king never dies; it persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain . . . ."[112]

[112] Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 160 (1903–1904).