of the public, the only conclusion is that in no case (but perhaps that of prepayment) is the utility actually possessed of "unregulated managerial discretion" in the making of its rules. Even the smoking and "move forward in the car" regulations of a street car company are subject to the full control of the commission.[139] As a result the inevitable conclusion is that there is no true field of unregulated "self-regulation"—as was said by the Missouri Supreme Court in a somewhat recent case, in speaking of the powers of the state commission, it possesses "plenary supervision of every business feature."[140]

SIDNEY J. MURPHY, '34.

THE MODERN INNKEEPER'S LIABILITY FOR INJURIES TO THE PERSON OF HIS GUEST

In the busy and complex social and business life of today the innkeeper plays an important part. It is his function to furnish a place of temporary abode to our vast transient population, and entertainment to travellers and others. His place of business may be in the small structure which the village calls "hotel" or in one of the enormously costly plants which go under the same generic name in our large cities and which cater to the guest's every whim. His business has developed from the isolated inns of feudal times into an enterprise which in 1928 ranked ninth among the great industries of the United States. In that year there were in the United States nearly twenty-six thousand hotels, representing an investment of over five billion dollars, employing over a half-million people, and supplying service and accommodations to millions of people yearly.[1]

It is the purpose of this paper to discuss the modern law as it relates to the innkeeper's liability for the personal injuries or death of his guest, while the guest is *infra hospitum*, that is, within the precincts of the inn and under the innkeeper's care.[2] Or, viewed conversely, it is the purpose of this paper to discover what degree of protection is afforded to the guest by the law as it has been developed by decisions or changed by statute. Because of the very nature of the topic, the paper will largely resolve itself into a survey of the pertinent law as it is in the United States today. But when the occasion offers the opportunity, a critical

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[139] *See* West End Business Men's Ass'n v. United Ry. Co. of St. Louis (1915) P. U. R. 1915 D, 482; Coombs v. So. Wis. Ry. Co. (1916) 162 Wis. 111, 155 N. W. 922.

[140] State v. Kansas City Gas Co. (1913) 254 Mo. 515, 163 S. W. 854.

[1] The Official Hotel Red Book (1928).

[2] Davidson v. Madison Corporation (1932) 247 N. Y. S. 789.

analysis of the material will be attempted and here and there, perhaps, a suggestion made as to desirable changes in the law.

At this point, it may not be amiss to remark parenthetically that a discussion of the modern innkeeper's liability is of more than merely academic interest. One illustration of its practical possibilities should suffice to prove that statement.

> "Last week in the Journal of the American Medical Association a committee of experts on sanitation and tropical diseases . . . reported its recent investiagtions in Chicago. The experts laid blame for the epidemic (of amoebic dysentery which has spread throughout the country) on an Act of God and defective plumbing in the two hotels which were the chief sources of the infection. The committee clemently referred to the hotels as C and A, but everyone knew it meant South Michigan Boulevard's big, popular Congress and its smaller neighbor, the Auditorium.
>
> "The committee found the hotel's water and sewerage piping systems so old and faulty that when heavily taxed they would let waste from bathtubs and toilets siphon back into drinking water pipes. Water and sewer pipes were cross-connected. . . ."[3]

41 deaths and 721 cases of amoebic dysentery have been traced to Chicago. It is conceivable, indeed, it is highly probable, that many actions for damages will be brought against the offending hotels by the injured parties or the representatives of their estates.

This discussion will be divided into four general parts. *First,* the innkeeper's liability for assaults committed upon his guest. *Second,* his liability for injuries suffered by the guest by reason of defective premises. *Third,* his liability for serving unwholesome food or for permitting the hotel premises to remain in an unsanitary condition. And, *fourth,* his liability for the injuries or deaths of his guests caused by fire.

But before going farther, it may be well to define our terms.

> "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."[4]
>
> "An innkeeper is a person who publicly professes that he keeps an inn."[5]

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[3] Time Newsmagazine, February 12, 1934, p. 45.

[4] Pettit v. Thomas (1912) 103 Ark. 593, 148 S. W. 501; Fay v. Pacific Improvement Co. (1891) 93 Cal. 253, 26 Pac. 1099; State v. Norval Hotel Co. (Ohio 1921) 133 N. E. 75; St. Louis v. Siegrist (1870) 46 Mo. 593; 32 C. J. 527.

[5] Roberts v. Case Hotel (1919) 175 N. Y. S. 123; Pettit v. Thomas, note 4, above; State v. Norval Hotel Co., note 4, above; 32 C. J. 529.

"A guest, within the meaning of the rules of law pertaining to the relation of innkeeper and guest and as distinguished from a person received and entertained without pay at the private house of another, is a transient person who resorts to, and is received at, an inn for the purpose of obtaining the accommodations which it purports to afford."[6]

I. LIABILITY FOR ASSAULTS COMMITTED UPON THE GUEST

At early Common Law, the innkeeper had no special duty to protect his guest's person. "If the guest be beaten in the inn, the innkeeper shall not answer for it."[7] This apparently is still the law in many American jurisdictions. This is illustrated by the famous *Clancy v. Barker* case which arose in the Federal Courts.[8] In a suit by a father for the injury suffered by his son at the hands of the defendant innkeeper's servant (a bell-hop), the court in denying recovery said, that an innkeeper is not an insurer of the safety of the person of his guest while the latter remains in the hotel against the negligent and willful acts of his servants, when they are acting without the course and without the actual or apparent scope of their employment. It was said that the obligation of the innkeeper is limited to the exercise of reasonable care for the safety, comfort and entertainment of his visitor; that only ordinary care is required, because the innkeeper's occupation is not fraught with danger, as is, for instance, that of a common carrier. In this court's opinion, the guest is in much the same position as an invitee; and the innkeeper is responsible for his servant's acts only on the general doctrine of *respondeat superior*.[9] And, further, the court is very stringent in determining what is within the course of the servants' employment. As are also the cases cited in the footnote as in accord.[9]

On the other side of the picture is the *Clancy v. Barker* case which was decided in the Nebraska courts.[10] This suit arose on the same facts as the federal case, it being brought however in the name of the injured boy. The Nebraska Supreme Court held, that the defendant was liable, for breach of an implied contract to protect his guest. The court likened the relations between innkeeper and guest to those between carrier and passenger,[11]

[6] De Lapp v. Van Closter (1909) 136 Mo. App. 475, 118 S. W. 120; Overstreet v. Moser (1901) 88 Mo. App. 72; 32 C. J. 533.

[7] Calye's Case (1584) 4 Coke 202.

[8] (1904) 31 F. 161.

[9] *Accord*: Rahmed v. Lehndorff (1904) 142 Cal. 681, 76 Pac. 659; Chase v. Nobel (1907) 46 Wash. 484, 90 Pac. 642; Hook v. Sanford (1923) 29 Ga. App., 116 S. E. 221; Buckley v. Edgewater Beach Hotel Co. (1928) 247 Ill. App. 362.

[10] (1904) 71 Neb. 83, 98 N. W. 440.

[11] Chicago, etc. Ry. Co. v. Flexman (1885) 19 Ill. App. 250 holds that a carrier is liable for all torts of its servants committed against a passenger during carriage on an implied contract theory.

saying that by analogy, the innkeeper's contract imposes a like duty upon him to protect his guest. The analogy perhaps will not support the court's result, inasmuch as the peculiar conditions which place the passenger at the mercy of the carrier's servants do not exist in a hotel, which, obviously, is permanently placed rather than fast moving, and does not have the dangers attendant to extremely fast locomotion. This in fact was the Federal court's ground for not following the Nebraska decision. However, the analogy is close enough, it is submitted, to justify the decision. Realistically considered, the relation of innkeeper and guest does place the guest peculiarly within the mercy of the innkeeper and his servants. The guest is usually a stranger in the hotel, and, within limits, must accept whatever accommodations the innkeeper provides. The innkeeper employs servants to help provide the accommodations and to minister to the guest's needs. These servants are within the innkeeper's choosing; and he should be responsible for their acts if they injure a guest. The Nebraska decision seems to be in accord with the trend of the modern cases, which require a very high degree of care on the part of the innkeeper to protect guests against the assaults, insults, and negligent acts of servants, and which make free use of the analogy to the common carrier.[12]

But where a guest is injured by another guest, the few reported cases all agree in absolving the innkeeper of liability, unless he knew or should have known that the offending guest would, or probably would, act to the injury of another guest, and took no steps to prevent such action.[13] Such a result is in accordance with reason, inasmuch as the act of an independent third party, not within the innkeeper's control except to a slight extent, is involved. However, where the innkeeper operates a bar, it has been held that he owes a patron the duty to exercise ordinary care to protect him from an assault and battery by another patron, and is liable for an assault and battery, if, by the exercise of ordinary care he could have prevented the same.[14] This result is not out of line with the former result, if we take into consideration the fact that in operating a bar, an innkeeper dispenses to his patrons spiritous liquors, which easily inflame the passions.

In close relation to the cases of assault by a servant are those cases involving a wrongful entry into the guest's room by the innkeeper or his servants. A guest is entitled to the privacy of the

[12] Lehnen v. Hones (Kan. 1912) 127 Pac. 612; Overstreet v. Moser, note 6, above; Norris Hotel Co. v. Henley (1900) 145 Ala. 678, 40 So. 81; Tyler v. Phil. Ritz-Carleton Co. (1920) 73 Pa. Sup. Ct. 427: Mayo Hotel Co. v. Dancigar (Okla. 1930) 288 Pac. 309; Note (1904) 17 Harv. L. Rev. 575.

[13] Rommel v. Schambacher (1887) 120 Pa. St. 579, 11 Atl. 779; Bruner v. Seebacher Hotel Co. (1909) 133 Ky. 41, 117 S. W. 373; Gurren v. Casperson (1928) 147 Wash. 257, 265 Pac. 472.

[14] Moon v. Condey (1918) 9 Ohio App. 16.

room to which he has been assigned, and to remain there unmolested by improper or unjustified and unreasonable intrusions on the part of the hotel keeper or those acting under his authority.[15] "One of the things which a guest has a right to insist upon is respectful and decent treatment at the hands of the innkeeper and his servants. That is an essential part of the contract whether it is express or implied."[16] This right of a guest necessarily implies an obligation on the part of the innkeeper not to abuse or insult the guest.[17] Or, as was said in the Massachusetts case of *Frewen v. Page*,[18] generally, an innkeeper is liable if he, without sufficient cause, interferes with the peace and quiet enjoyment of the guests of the hotel, the rule being based on an implied obligation of the hotel keeper to furnish his guests with such conveniences and comforts as the inn affords. That the obligation of the innkeeper is implied out of his contract with the guest seems to be the general rule.[19] However, a Missouri case declares that the duty of an innkeeper to keep his guest safe is one imposed by law and not by contract (so that an action against the innkeeper did not survive against the estate of the innkeeper).[20]

Further, it has been held, in a case where the obligation of the innkeeper was said to rest upon contract, that registration is not essential to the contract, that the contract may be a mere matter of oral consent and is legal without further formality, and that the obligation of the innkeeper not to insult the guest arises out of such an oral contract.[21] As may have been inferred from the rule as stated in *Frewen v. Page* the innkeeper may enter the guest's room if he has probable cause for so doing. As in the case of *Hurd v. Hotel Astor Co.*,[22] where the guest who later became the plaintiff had registered at the hotel before her husband, who registered later. The husband got a different room, without disclosing to the innkeeper that he was the plaintiff's husband. When the plaintiff invited her husband into her room, the innkeeper, suspecting prostitution, forcibly entered the room, and ejected the couple. A verdict for the plaintiff was reversed, on

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[15] Newcomb Hotel Co. v. Corbett (1921) 27 Ga. App. 365, 108 S. E. 309.
[16] Dixon v. Tutweiler Operating Co. (Ala. 1926) 108 So. 26.
[17] *Idem.*
[18] Frewen v. Page (1921) 238 Mass. 499, 131 N. E. 475.
[19] Moody v. Kenny (1923) 153 La. 1007, 97 So. 21; Fisher v. Booneville (1920) 55 Utah 588, 188 Pac. 156; Hurd v. Hotel Astor (1918) 169 N. Y. S. 359, 182 App. Div. 49; Arky v. Leitch (1923) 131 Miss. 14, 94 So. 855; Jones v. Shannon (1918) 55 Mont. 225, 175 Pac. 882, Kalo & Sullivan v. Penn Hotel Co. (1927) 82 Pa. Sup. Ct. 259; Stevenson v. Grier Hotel Co. (1923) 159 Ark. 44, 251 S. W. 355; and cases cited in notes 14 to 17 inclusive.
[20] Stanley v. Bircher (1883) 78 Mo. 245.
[21] Moody v. Kenny, note 19, above; Fisher v. Booneville, note 19, above.
[22] Note 19, above.

the ground that it was against the weight of the evidence which clearly showed probable cause.

When the innkeeper violates his obligation to the guest, and invades her room, and orders her to leave the hotel, assaulting, falsely imprisoning, and slandering her, damages may be assessed for humiliation of the guest's feelings as well as for the unwarranted disturbance of her right of privacy, where such acts were not justified.[23] As the innkeeper's obligation was based upon contract, such a holding seems to be correct, inasmuch as the contract must be taken to include an agreement on the innkeeper's part not to injure the guest in her feelings, since his obligation is not to abuse or insult her. In the Arkansas case of *Stevenson v. John J. Grier Hotel Co.*[24] a complaint was held not to be demurrable, where it alleged only mental suffering without physical injury, since there was "constructive physical injury" in the actual coercion of the plaintiff, who was held not to be required to continue protesting until constructive coercion or force became actual. As is apparent from what has been said, the cases are strict in holding the innkeeper to his obligation not to disturb the guest's privacy. The Missouri case of *Dalzell v. Dean Hotel Co.*,[25] declares that the innkeeper, while not an insurer of the personal safety, and privacy, of the guest, owes her a very high degree of care—this holding is similar to that in the Nebraska *Clancy v. Barker* case. And the innkeeper is not excused of a wrongful entry into a guest's room because he drew a wrong inference as to the guest's sex from the signature on the register.[26] This would seem to require a high degree of care, as no jury could reasonably find that an ordinary man could remember the sex of every signer of the register of a large hotel.

II. LIABILITY FOR INJURIES TO GUESTS CAUSED BY DEFECTIVE PREMISES.

The cases unite in saying that an innkeeper is not an insurer of the safety of his guest.[27] But they all say that he must use

[23] Frewen v. Page, note 18, above; Emmke v. De Silva (C. C. A. 8th 1923) 293 F. 17.

[24] Note 19, above.

[25] (1916) 193 Mo. App. 379.

[26] Newcomb Hotel Co. v. Corbett, note 15, above.

[27] Scholl v. Belcher (1912) 63 Ore. 310, 127 Pac. 968; Dye-Washburn Hotel Co. v. Aldridge (1922) 207 Ala. 471, 93 So. 512; Reid v. Ehr (1919) 43 N. D. 109, 174 N. W. 71; Tamres v. Reed (Pa. 1933) 165 Atl. 538; Patrick v. Springs (1911) 154 N. C. 270, 70 S. E. 395; Walker v. Midland R. Co. (1887) 55 L. T. N. S. 489; Morris v. Zimmerman (1900) 122 N. Y. S. 900; Trulock v. Willey (C. C. A. 8th 1911) 187 F. 956; Rice v. Warner Hotel Co. (1916) 201 Ill. App. 530; Lyttle v. Denny (1909) 22 Pa. St. 395; Burgauer v. McClellan (1924) 205 Ky. 51, 265 S. W. 439; Thomas v. Wolcott (1920) 180 N. Y. S. 798; Halterman v. Hansard (1915) 4 Ohio App. 268; Polsey v. Wal-

care to keep his buildings and premises safe for the use of his guests, only differing on the degree of care that the innkeeper must exercise. Some few cases are in accord with the Oregon case of *Scholl v. Belcher,* in saying that it is the "duty of an innkeeper to take ordinary care to keep his buildings and premises reasonably safe for the use of his guests."[28] But the trend of the cases seems to be with *Trulock v. Willey,*[29] a Federal case, in which it was said:

> "A guest in a hotel is there on the invitation of the proprietor and for the proprietor's profit; and while he ought not, and cannot be said, to be an insurer of the safety of the person of his guest while within the hotel, yet the guest is received upon the implied understanding that while on the premises as a guest his life shall not be endangered by the rash, inconsiderate, and negligent acts of the proprietor or those who are his servants. By the implied contract between a hotel keeper and his guest, the former undertakes not only to furnish the latter with suitable food and lodgings, but there is also implied upon the part of the proprietor the further undertaking that the guest shall be treated with due consideration for his safety. The relation existing between an innkeeper and his guest is much like that existing between a common carrier and its passenger, and, while not an insurer of the personal safety of his guest, the proprietor is held, and ought to be held, to the exercise of *a very high degree of care* for the protection of his guests against the negligent acts of servants employed therein."

Where the guest is injured because of a defect in the hotel premises, it is pretty generally held that the doctrine *res ipsa loquitur* applies.[30] In the North Carolina case of *Patrick v. Springs,* Brown, J., said:

> "It seems now to be well settled that, in case of an injury occurring in consequence of the unsanitary and defective condition of the inn premises or room to which the guest is

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dorf-Astoria (1927) 220 App. Div. 613, 222 N. Y. S. 273; Burnison v. Souders (Mo. 1931) 35 S. W. (2d) 619; Topley v. Zeeman (Cal. App. 1932) 5 Pac. (2d) 561.

[28] Scholl v. Belcher, note 27, above; Reid v. Ehr, note 27, above; Lyttle v. Denny, note 27, above; Rice v. Warner Hotel Co., note 27, above; Burgauer v. McClellan, note 27, above.

[29] Trulock v. Willey, note 27, above; Morris v. Zimmerman, note 27, above; Hasson v. Wood 22 Ont. Rep. 66; Axford v. Prior, 14 Week. Rep. 611; Patrick v. Springs, note 27, above; Tamres v. Reed, note 27, above; Thomas v. Wollcott, note 27, above; Halterman v. Hansard, note 27, above.

[30] Patrick v. Springs, note 27, above; Trulock v. Willey, note 27, above; Morris v. Zimmerman, note 27, above; Tamres v. Reed, note 27, above.

assigned, the innkeeper is liable upon the same principles applicable in other cases, where persons come on the premises at the invitation of the owner or occupant, and are injured in consequence of their dangerous condition. The innkeeper is not an insurer of his guests' personal safety, but his liability does extend to injuries received by the guests from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. . . . One who keeps a public house extends an invitation to all to come on his premises, and is, therefore, liable for injuries sustained in consequence of the bad condition of his inn premises. . . . When the plaintiff proved the unsafe and defective condition of the gas fixtures in consequence of which gas escaped during the night and injured him, he made out a *prima facie* case of negligence, which it was the defendant's duty to answer."

And in *Morris v. Zimmerman,* where the plaintiff was injured when a large piece of plaster fell from the ceiling of his room and struck him on the head, there being no evidence as to what caused the fall of the plaster, the court said:

"Plaster does not fall ordinarily from properly constructed ceilings, unless the ceiling is out of repair, or there is some adequate external cause. If there was an external cause in this case, the fair inference is that the defenadants were responsible for it, and they have it in their power to explain it. If the accident was due to the defective condition of the ceiling, the defendants in the exercise of that watchfulness which an innkeeper owes to his guest should have discovered it. The plaintiff only knows that he was hurt by a fall of the plaster. I can see no distinction between the fall of plaster upon a guest in a hotel and the fall of a wall upon a pedestrian in the street. . . . Both occurrences point to negligence, to a defective condition which the defendants, in the exercise of the care which they owed to the plaintiff, could have discovered or to some external cause within the defendants' control. Under such circumstances, the rule applies, and the burden is cast upon the party having it within his power, to explain the accident."

Upon the innkeeper's duty to keep the inn premises in a safe and sanitary condition, there is, however, this limitation:

"The general duty of an innkeeper to take proper care for the safety of his guest does not extend to every room in his

> house at all hours of the night or day, but must be limited to those places into which guests may be reasonably supposed to be likely to go in a reasonable belief that they are entitled or invited to do so."[31]

Nor does the innkeeper owe any special care to a person going to the room of a guest, upon the latter's invitation, for the purpose of gambling, or for some other improper motive, except not wilfully or intentionally to injure him, i. e., the guest's guest in such case is a bare licensee.[31] Incidentally, where a guest goes to a hotel for an immoral purpose, viz., sexual intercourse with a prostitute, it has been held that he does not become a guest in a legal sense, and is not entitled to protection as a guest, in regard to recovering money left with the clerk for safe-keeping but stolen from the clerk during the night, the court asking,

> "Is the extraordinary rule of liability which was originally adopted from considerations of public policy to protect travellers and wayfarers, not merely from negligence, but the dishonesty of innkeepers and servants, to be extended to such persons? If so, why not to thieves?[33]

(This last case may be out of place here inasmuch as it involves liability for loss of property; but, since it deals with improper motives of the guest in going to the hotel, the writer thought it in point.) It is submitted that the guest's improper motive should not relieve the innkeeper from liability for injury to the guest's person or property. Making an exception in such instance does violence to the rule, without sufficient cause for so doing. The innkeeper may protect himself from sheltering wrongdoers by the simple process of ejecting them. If he does not choose to eject them, there is not reason for freeing him of liability when their persons or property are injured.

In regard to certain portions of the hotel premises, the care required of the innkeeper differs. This is particularly true of elevators. The Florida case of *Haile v. Mason Hotel & Investment Co.*[34] is the only case found which required only ordinary care—in this instance, ordinary care in providing a safe exit from the elevator. The decided weight of authority is to require "extraordinary diligence,"[35] or "the highest degree of care that is

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[31] Ten Broeck v. Wells (C. C., N. D. Cal. 1891) 47 F. 690. *Accord:* Walker v. Midland R. Co., note 27, above; Lander v. Brooks (Mass. 1926) 154 N. E. 265; McAlpin v. Powell (1877) 70 N. Y. 126.

[32] Jones v. Bland (1921) 182 N. C. 70, 108 S. E. 344.

[33] Curtis v. Murphy (1885) 63 Wis. 4, 22 N. W. 825.

[34] Haile v. Mason Hotel Co. (1916) 71 Fla. 469, 71 So. 540.

[35] Bullard v. Rolader (1921) 26 Ga. App. 742, 107 So. 548; Manzy v. Kinzel (1886) 19 Ill. App. 571.

consistent with the efficient use of the means and appliances adopted,"[36] which is the same care and diligence as a railroad is required to use for the safety of its passengers.[37] And the *res ipsa loquitur* doctrine applies.[38] In *Stott v. Churchill*,[39] a New York case, in referring to the innkeeper's duty to provide a safe elevator, if he provides one at all, the court said:

> "A personal duty cannot be delegated to another so as to relieve the person bound to perform the duty from liability for its nonperformance."

This was said in answer to the defendant's claim that the plaintiff's injury was due to the fault of an independent contractor in installing the elevator. The cases are in accord that the innkeeper's duty in regard to elevators cannot be delegated,[40] *Burr v. Curtis* saying that so far as passengers are concerned, a carrier is responsible for the negligence of the manufacturer of the vehicle used for the transportation.[40] The basis of this case was clearly an analogy to the common carrier's duty towards its passengers.

And there are quite a number of cases involving injuries sustained by guests in falling down hotel stairways. It seems to be the general rule that it is the duty of the innkeeper to his guests to have and maintain his premises in a condition of reasonable safety, that is, he must exercise ordinary care.[41] This rule as to premises includes stairways.[42] Whether or not the innkeeper used ordinary care is, of course, a question for the jury.[43] And it has been held, that the absence of handrails from an ordinary interior stairway, walled on both sides, is not actionable negligence.[44] But it is the duty of the innkeeper to have a flight of

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[36] Fraser v. Harper House Co. (1908) 141 Ill. App. 390.

[37] Fraser v. Harper House Co., note 36, above; McDowell v. Rickey (1929) 32 Ohio App. 26; Gardner v. Newhouse Realty Co. (Utah 1928) 267 Pac. 186.

[38] Bullard v. Rolader, note 35, above.

[39] (1895) 157 N. Y. 692, 51 N. E. 1094; Sciolara v. Asch (1910) 198 N. Y. 77, 91 N. E. 263.

[40] Sciolara v. Asch, note 39, above; Storr v. Churchill (1895) 15 Misc. Rep. 80, 36 N. Y. S. 476; Manzy v. Kinzel, note 35, above; McLenan v. Segar (1917) 2 K. B. 325; Burr v. Curtis (1922) 151 Minn. 200, 186 N. W. 302; Barker v. Pollock (1906) 4 West. L. R. 327.

[41] West v. Thomas (1892) 97 Ala. 622, 11 So. 768.

[42] Robertson v. Weingart (Cal. 1928) 267 Pac. 741; Armstrong v. Yakima Hotel Co. (1913) 75 Wash. 477, 135 Pac. 233; Braman v. Stewart (1906) 145 Mich. 548, 108 N. W. 964; Willimaa v. Maki (Minn. 1925) 204 N. W. 25; Cook v. McGillicudy (1909) 106 Me. 119, 175 Atl. 378; Ferguson v. Sturch (1915) 61 Pa. Super. Ct. 516.

[43] Armstrong v. Yakima Hotel Co., note 42, above; Braman v. Stewart, note 42, above.

[44] Willimaa v. Maki, note 42, above; Cook v. McGillicudy, note 42, above.

stairs lighted.[45] However, if the lights in a stairway are put out by someone without the innkeeper's, or his servants', knowledge, there is no liability for an injury to a guest due to lack of light on the stairway.[46] Such a holding is based upon the theory that the innkeeper used the care that an ordinary person would use. However, due to the nature of an inn, and due to the fact that most guests are strangers and are unacquainted with the inn premises, it is submitted that the innkeeper should be compelled to keep the stairways well lighted at his peril. But no cases have been found so holding, the courts, rather, being prone to find a guest guilty of contributory negligence if he uses a dark stairway.[47] But, justly, if there is no other way for the guest to reach the ground floor except by using a darkened stairway, it has been held that he does not assume the risk of injury in attempting to reach the ground floor by using such stairway.[48] One of the cases so holding, *Ritter v. Norman*,[49] apparently might sustain the contention made above, that the innkeeper should be bound at his peril to keep the stairways lighted. It was said in that case:

> "A guest in a hotel has a right to depend upon a stairway, and the fact that it is open and stands as an invitation at all times, and especially when the elevator, if there is one, is out of use, puts the burden upon the innkeeper to put the means he has provided for the safety of his guests into operation."

III. LIABILITY FOR SERVING UNWHOLESOME FOOD OR FOR PERMITTING THE HOTEL PREMISES TO REMAIN IN AN UNSANITARY CONDITION

The inn must be kept in a sanitary condition. Where a guest had smallpox, an innkeeper was held liable to another guest who was exposed to it and contracted it, the guest who contracted it not having been informed of the presence of the disease.[50] And unsanitary conditions caused by flies in the dining room justify a guest in committing a breach of contract to stay for a certain time.[51] But the innkeeper is not liable for a physician's negligence in treating a guest, since the negligence is that of a third

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[45] Thomas v. Walcott, note 27, above; Hendrick v. Jones (1922) 28 Ga. App. 335, 111 S. E. 81.

[46] Ferguson v. Sturch, note 42, above.

[47] De Honey v. Harding (C. C. A., 8th 1926) 300 F. 696; Baker v. Butterworth (Va. 1916) 89 S. E. 849; Sneed v. Moorehead (1893) 70 Miss. 690, 13 So. 235; Cook v. McGillicudy, note 42, above; Thomas v. Walcott, note 27, above; Hendrick v. Jones, note 45, above; Castleberry v. Fox (1922) 29 Ga. App. 35; 113 S. E. 110.

[48] Ritter v. Norman (Wash. 1913) 129 Pac. 103; Marmeduke v. Cook (1891) 154 Mass. 235, 28 N. E. 140.

[49] Note 48, above.

[50] Gilbert v. Hoffman (1895) 66 Ia. 205, 23 N. W. 632.

[51] Williams v. Sneed (1920) 119 Me. 228, 110 Atl. 316.

party not under the innkeeper's control (the court also gives as a reason, that the innkeeper is not an insurer of a guest's safety—this seems to be out of point).[52] And where a guest sustained burns to his knees from chemicals used in spraying beds, the Supreme Court of Louisiana sustained a decision finding for the plaintiff, the spray being the proximate cause of the injury.[53]

In many states it is provided by statute that the hotel shall be kept in a sanitary condition, the statute usually dealing with specific matters, such as clean bedding, towels, screened windows, etc.[54] These statutes provide that for any violation of them, the innkeeper shall be guilty of a misdemeanor. But as the statutes are intended for the benefit of the guest, civil liability would probably be imposed upon the innkeeper for an injury resulting from their violation. (This point will be discussed later in reference to fire escapes, where the cases will be cited.)

The cases conflict on the point of the innkeeper's liability for injuries suffered by his guests in eating spoiled food in a restaurant attached to the inn. It was declared in an early English case *arguendo*, that "if a man sell victuals which is corrupt, without warranty, an action lies, because it is against the commonwealth."[55] An Illinois case, *Greenwood v. Thompson,* proceeds upon the same ground, saying that the law imposes upon a restaurant keeper an implied warranty that the food he serves and sells to his patrons is wholesome and fit to be eaten, and he will be held liable if it proves otherwise, whether he was negligent or not.[56] This case represents the weight of authority. One of the cases in accord with it says that the furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicine, from which a liability springs irrespective of any question of privity of con-

[52] Barry v. Merriman (1926) 215 App. Div. 294, 214 N. Y. S. 66.

[53] Nelson v. Ritz-Carleton Hotel Co. (1931) 9 N. J. Misc. 1240.

[54] Code Ala., 1923, sec. 4465; Dig. Stat. Ark., 1921, secs. 5559 to 5563; Gen. Laws Cal., 1931, Act 3442; Comp. Gen. Laws Fla., 1927, secs. 3360 to 3385; Burn's Anno. Ind. Stat., 1926, secs. 8726, 8727; R. S. Kan., 1923, secs. 36-107; R. C. Mont., 1921, secs. 2485 to 2502; Comp. Stat. Neb., 1922, sec. 7552; N. C. Code, sec. 2283 plus; Page's Anno. Ohio Gen. Code, 1926, sec. 4665; Okla. Stat., 1931, sec. 4527; R. C. Ariz., 1928, sec. 2691; Idaho Comp. Stat., 1919, secs. 1799 to 1809; La. Gen. Stat., 1932, secs. 3816 to 3822; Nev. Comp. Laws, 1929, secs. 3337 to 3348; Comp. Laws N. D., 1913-1925 Supplement; Comp. Laws S. D., 1929, sec. 7837; Comp. Laws Utah, 1917, secs. 2945 to 2953. In some of the remaining states, provisions for sanitary conditions may be found under "Health Regulations" in the statutes.

[55] Roswel v. Vaugh, Cro. Jac. 196.

[56] (1919) 213 Ill. App. 371. *Accord*: Heise v. Gillette (1925) 83 Ind. App. 551, 149 N. E. 182; Smith v. Carols (1923) 215 Mo. App. 488, 249 S. W. 155; Temple v. Keeler (1924) 238 N. Y. 344, 144 N. E. 635; Doyle v. Fuerst & Kramer, Ltd. (1911) 129 La. 838; 56 So. 906; Bishop v. Weber (1885) 139 Mass. 411, 1 N. E. 154.

tract between the parties.[57] And it is not necessary for the guest who was made sick by eating unwholesome food served by the innkeeper to prove that the defendant knew of the injurious quality of the food, if it appear that he ought to have known.[58] The New York courts apparently limit the innkeeper's implied warranty of fitness to instances where the food is prepared by him (or by his servants, of course).[59] This seems to be a desirable limitation. The rule is harsh which fastens liability upon the innkeeper for injuries caused to his guest by defects in food not apparent to the senses, where canned foods of good quality are served. Only one case denies recovery to the injured guest. There it is said that in the absence of statute, a restaurant keeper is not liable on the ground of an implied warranty of fitness of the food furnished by him.[60] In the states which have adopted the Uniform Sales Act (Missouri has not adopted it), section 15 of that act would of course be applicable here. That section provides, that where the seller (restaurant keeper or innkeeper, here) knows the purpose (consumption) for which the buyer wants the object of the sale (food), there is an implied warranty of fitness for that purpose.

IV. LIABILITY FOR PERSONAL INJURIES TO GUESTS CAUSED BY FIRE

The innkeeper's obligation to protect his guest *infra hospitum* from fire is of modern origin. The duty to provide fire escapes for buildings properly constructed and not peculiarly exposed to danger of fire from the character of the work to be carried on therein did not exist at common law.[61] Accordingly, at common law there was no obligation to provide fire escapes on properly constructed inns for the safety of the guests or lodgers.[62] But statutes imposing such duty have been passed in most of the states.[63] The constitutionality of such statutes has been sus-

[57] Bishop v. Weber, note 56, above.

[58] *Idem.*

[59] Barrington v. Hotel Astor (1918) 184 App. Div. 317, 171 N. Y. S. 840.

[60] Loucks v. Morley (1919) 39 Cal. App. 570, 179 Pac. 529.

[61] Panley v. Steam Gauge & Lantern Co. (1892) 131 N. Y. 90, 29 N. E. 999; Jones v. Granite Mills (1878) 126 Mass. 84.

[62] Yall v. Snow (1907) 201 Mo. 511, 100 S. W. 1; Johnson v. Snow (1903) 102 Mo. App. 233, 76 S. W. 675; Schmalzried v. White (1896) 97 Tenn. 36, 36 S. W. 393.

[63] Code Ala., 1923, secs. 4048, 4049; Dig. Stat. Ark., 1921, sec. 5562; Gen. Stat. Conn., 1930, secs. 2613, 2614, 2615; Comp. Law. Colo., 1921, secs. 5473, 5474, 5472; Comp. Gen. Laws Fla., 1927, sec. 3370; Ga. Code, 1926, sec. 1770 (83), 501 (1); Cahill's Ill. R. S., 1929, Ch. 71, par. 10; Burn's Anno. Ind. Stat., 1926, sec. 4422; Carroll's Ky. Stat., 1930, sec. 2095a; R. S. Kans., 1923, secs. 36-107; Comp. Law Mich., 1929, sec. 2737; Gen. Stat. Minn., 1923, secs. 5896, 5897, 5910, 6016; R. C. Mont., 1921, secs. 2779 to 2784; R. S. Mo., 1929, secs. 13096, 13097; Miss. Code, 1930, sec. 4693; P. L. N. H., 1926, ch. 147, sec. 9; Comp. Stat. Neb., 1922, secs. 8155 to 8157; N. C. Code, 1927, sec. 6081; Cahill's

tained. *Cincinnati v. Steinkamp* was an Ohio case in which it was held, that the owner was not deprived of property without due process of law, because of no trial by jury, where the statute gave the court of equity power to enforce the provisions of the statute, and to restrain the use of any building erected or maintained in violation thereof.[64]

The provisions of these statutes vary considerably. The most frequent provision being simply that hotels over a certain number of stories in height (usually two) must provide fire escapes made of rope, of specified thickness and of sufficient length to reach the ground, in each room.[65] These statutes, it is submitted, are clearly insufficient to effect their purpose—protection of the guest's life. A rope fire escape is of help only to an able-bodied person. Most women, aged people, cripples, and very young children, are not physically able to lower themselves to the ground by such means, as the Buckingham Annex holocaust, which occurred in St. Louis some five years ago, illustrated so horribly. Only partial protection may be said to be afforded by such statutes.

Only about a dozen states require that the fire escapes be constructed of iron or some other incombustible material.[66] These states, in the writer's opinion, provide adequate protection. Ex-

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Consol. Laws N. Y., 1930, ch. 21, sec. 205; Page's Anno. Ohio Gen. Code, 1926, secs. 4658 to 4660; R. C. Ariz., 1928, sec. 408; Idaho Comp. Stat., 1919, secs. 1797, 1798; La. Gen. Stat., 1932, secs. 3520 to 3533; R. S. Me., 1930, ch. 35, secs. 38, 39; N. J. Comp. Stat., 1910, "Fire and Police," secs. 25, 27; Comp. Law N. D., 1913, sec. 2977; Comp. Law S. D., 1929, sec. 7833; Gen. Law Vt., 1917, sec. 6327; Laws Vt., 1921, sec. 6327; Comp. Laws Utah, sec. 2951; Oregon Law, 1920, secs. 8250 to 8253; Pa. Stat., 1920, secs. 10913 to 10920; Gen. Laws R. I., 1923, secs. 2465, 2466; Code Tenn., 1932, secs. 5669 to 5672; Complete Tex. Stat., 1928, sec. 3956; Va. Code, 1924, sec. 1587; Rem.'s Comp. Stat. Wash., 1922, secs. 6871, 6872; Wyo. Comp. Stats., 1920, secs. 3659 to 3664; Barne's W. Va. Code, 1923, ch. 15N, sec. 13; ch. 15S, sec. 1.

[64] (1896) 54 Ohio St. 284, 43 N. E. 490; see also, Miller v. Strahl (1915) 239 U. S. 426; and Adams v. Cumberland Inn Co. (1907) 117 Tenn. 470, 101 S. W. 428.

[65] Dig. Stat. Ark., 1921, sec. 5562; Comp. Law Colo., 1921, sec. 5473; Cahill's Ill. R. S., 1929, ch. 71, par. 10; Burn's Anno. Ind. Stat., 1926, sec. 4422; R. S. Kan., 1923, secs. 36-107; Miss. Code, 1930, sec. 4693; P. L. N. H., 1926, ch. 147, sec. 9; Cahill's Consol. Laws N. Y., 1930, ch. 21, sec. 205; Ohio Gen. Code, 1926, sec. 4658; Idaho Comp. Stat., 1919, sec. 1798; La. Gen. Stat., 1932, sec. 3820; N. J. Comp. Stat., 1910, "Fire and Police," sec. 25; Comp. Laws N. D., 1913, sec. 2977; Comp. Laws S. D., 1929, sec. 7833; Code Tenn., 1932, sec. 5269.

[66] Comp. Law Colo., 1921, sec. 5474; Gen. Stat. Conn., 1930, secs. 2613, 2614; Comp. Gen. Laws Fla., 1927, sec. 3370; Carroll's Ky. Stat., 1930, sec. 2095a; R. S. Mont., 1921, sec. 2780; Comp. Stat. Neb., 1922, sec. 8155; Gen. Stat. Minn., 1923, secs. 5897, 5910; Comp. Laws Utah, sec. 2951; Ore. Laws, 1920, sec. 8250; Code Tenn., 1932, sec. 5669; Complete Tex. Stat., 1928, sec. 3856; Rem.'s Comp. Stat. Wash., 1922, sec. 6871; Wyo. Comp. Stat., 1920, sec. 3659; Barne's W. Va. Code, 1923, ch. 15S, sec. 1.

cept that a few states, such as Missouri,[67] Colorado, Kentucky, and Minnesota, only require rope fire escapes on hotels of less than three stories, iron fire escapes of the stairway variety being required for hotels over three stories in height. The difference in height of the building, while perhaps it may be justified as a reason for the different requirements on some basis, such as probable differences in the financial abilities of a small hotel to meet the extra expense involved in erecting and maintaining iron fire escapes, is unjustifiable if we keep in mind that the primary purpose of these statutes is the protection of human life.

Many of the states make provision for fire extinguishers and sprinklers.[68] And many require that the hallways of the hotels be constructed in a certain way, so as to provide ready means of egress for the guests, and that all ways of ingress and egress be kept free and unobstructed.[69] Some states provide that the hotel must have such fire escapes as the fire marshal, or other designated state or local officer, may direct.[70] These statutes, while providing flexibility for their enforcement, which is sometimes desirable, make it possible that adequate protection will not be had at all, because of the possibility of bribery, which is apparent to anyone who has observed the workings of city politics. The writer personally knows of two instances in which tenement houses in St. Louis were not properly equipped with fire escapes because the owners "knew somebody." Of course, the answer to this objection may be found in the old saying, that abuse is no argument against proper use. Nevertheless, it is submitted that it is more desirable to make abuse impossible, so far as may be done. To this end, the more rigid requirement of simply demanding an iron stairway fire escape is more desirable. Especially in view of some decisions, which hold, that, where the duty to provide fire escapes is entirely dependent upon a fire marshal's order, no recovery may be had where a guest is injured by fire in a hotel not equipped with fire escapes, the fire marshal not having ordered fire escapes to be provided.[70a]

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[67] R. S. Mo., 1929, secs. 13096, 13097; see also, sec. 13757.

[68] Comp. Gen. Laws Fla., 1927, sec. 3370; Cahill's Ill. R. S., 1929, ch. 71; R. S. Kans., 1923, secs. 36-107; R. C. Mont., 1921, sec. 2779; Comp. Stat. Neb., 1922, sec. 8157; Idaho Comp. Stat., 1919, sec. 1800; Pa. Stat., 1921, sec. 10914; Va. Code, 1924, sec. 1587; Rem.'s Comp. Stat. Wash., 1922, sec. 6871.

[69] Carroll's Ky. Stat., 1930, sec. 2095a; R. C. Mont., 1921, sec. 2780; R. S. Mo., 1929, sec. 13096; Comp. Stat. Neb., 1922, ch. 147, sec. 9; N. C. Code, 1927, sec. 6081; Ohio. Gen. Code, 1926, sec. 4659; Pa. Stat., 1920, sec. 10914; Ore. Laws, 1920, sec. 8250; Rem.'s Comp. Stat. Wash., 1922, sec. 6871; Barne's W. Va. Code, ch. 15N, sec. 13.

[70] R. C. Ariz., 1928, sec. 408; R. S. Me., 1930, ch. 38, sec. 39; N. J. Comp. Stat., 1910, "Fire and Police," sec. 27; N. Mex. Stats., 1929, secs. 90-402; Gen. Law Vt., 1921, sec. 6327.

[70a] De Ginther v. N. J. Home (1896) 58 N. J. L. 354, 33 Atl. 968; Perry v. Bangs (1894) 161 Mass. 35, 36 N. E. 683.

Where the death or injury of a guest is caused by fire in a hotel not properly equipped with fire escapes and other means of protection, the innkeeper is held liable in damages for such death or injury in many states. However, the means by which such a result is obtained differs. In a half dozen states the question is settled by statutes which provide for civil as well as criminal liability.[71] But the great majority of the states provide for only criminal liability, that is, they provide that the innkeeper shall be guilty of a misdemeanor for every violation (usually it is provided that for each day that passes while the statute is being violated, there shall be a separate offense), subjecting him most frequently to a fine of varying amounts.[72] Nevertheless, civil liability may be imposed in those states, on the ground that the statute requiring fire escapes was for the benefit of the injured guest. As a general principle it may be stated, that every person who violates a statute is a wrongdoer, and, as such, *ex necessitate*, negligent in the eye of the law; and that every innocent party who is injured by the act constituting a violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have.[73] This principle has frequently been enunciated in cases involving railroads.[74] In cases involving injuries or deaths caused by hotel fires, where the hotel was not properly equipped with fire escapes or other means of protection required by statute, recovery by the person injured or the representative of his estate has frequently been allowed, on the principle above stated, that the statute was for the benefit of the injured guest.[75] In the Nebraska case of *Hoopes v. Creighton*,[76] it was said, that the violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negli-

[71] See statutes of Conn., Ill., Ind., Ohio, La., N. J., and Pa., cited *supra*, note 63.

[72] See statutes of Ala., Ark., Colo., Fla., Ga., Ky., Kan., Mich., Minn., Mont., Miss., N. H., Neb., N. C., N. Y., Ariz., Idaho, Me., N. D., S. D., Vt., Utah, Ore., R. I., Tenn., Tex., Va., Wash., Wyo., W. Va.; all cited *supra*, note 63.

[73] Jetter v. N. Y. & H. R. Co. (1865) 2 Keyes 154; Pitcher v. Lennon (1896) 12 App. Div. 356, 42 N. Y. S. 156.

[74] See 9 L. R. A. (N. S.) 339, note, and cases cited.

[75] Hoopes v. Creighton (1916) 100 Neb. 510, 160 N. W. 742; Strahl v. Miller (1915) 97 Neb. 820; aff. (1915) 239 U. S. 420; Rose v. King (1892) 49 Ohio St. 213, 30 N. E. 267; Friedman v. Shindler's Prairie House (1928) 224 App. Div. 232, 230 N. Y. S. 44; Love v. New Fairview Hotel, 10 B. C. 330; Landgraf v. Kuh (1901) 188 Ill. 484, 59 N. E. 501; Louisville Trust Co. v. Morgan (1918) 180 Ky. 609, 203 S. W. 555; Yall v. Snow, note 62, above; Willey v. Mulledy (1879) 78 N. Y. 314; Johnson v. Snow (1907) 201 Mo. 450, 100 S. W. 5.

[76] Note 75, above.

gence, if the other elements of actionable negligence concur; that a hotel owner may not omit to do those things which are reasonably necessary for the safety and protection of the guests of the house, and if he disregards the provisions of the law concerning the establishment of fire escapes upon the building, and such other devices as the law provides for, he will be held liable for the damages sustained because of the death of any guest which may be brought about by his negligence; and that the fact that the statute does not in terms impose a civil liability for its violation does not affect such evidence of its violation as may go to show negligence. And in an Ohio case, *Rose v. King*, the court said:

> "Such liability followed as a consequence of the terms of the original act . . . which enjoined the duty, and resulted from the principle, which we have supposed to be of universal application, that where a statute imposes a duty but gives no penalty to the party aggrieved by its nonperformance, that party is entitled, on common law principles, to maintain an action for his damages."[77]

(The statutes providing for fire escapes frequently extend to some buildings besides hotels; for a proper exposition of the law it has been necessary in note 73, and in the cases cited as in accord in note 77 to cite cases relating to factories and tenements as well as to hotels.)

But it has been held, that such statutes do not necessarily give a right of action to individuals injured as a result of a failure to comply with their requirements. In *Grant v. Slater Mill and Power Co.*, a Rhode Island case, a statute required every building in which operatives were employed in any of the stories above the second to be provided with proper and sufficient fire escapes; and provided that any person violating any of the provisions of the act should be fined, and that the supreme court might restrain by injunction any violation of the act. It was held, that the statute did not give a right of action to an individual who, while working as an operative in such building, is compelled to jump from an upper window, and is injured; since the purpose of the act was to secure safe structures as a police measure and for the general safety, and not to create any duty which can be made the subject of any action by an individual. The court said, that were it not for the provision that the supreme court could enforce the act by injunction, the remedy by an action by individuals in-

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[77] Note 75, above. *See also* Wardwell v. Cameron (1914) 126 Minn. 149, 148 N. W. 110. *Accord*: Mullins v. Nordlaw (1916) 170 Ky. 169, 185 S. W. 825; Amberg v. Kinley (1915) 214 N. Y. 531, 108 N. E. 830; Story v. Cowen (1912) 170 Ill. App. 902; Steiert v. Soulter (1913) 54 Ind. App. 643, 102 N. E. 113.

jured would not be excluded, but that this remedy by suit in equity was not purely a public remedy, and that, since in addition to the purely public remedy, another not purely public was provided, it must be presumed that these two were intended to be the only remedies.[78] This was the only case found denying recovery to the injured person or his representative. The trend is distinctly to allow recovery, if the other elements necessary to attach liability, such as proximate cause, are present.

But the failure to construct fire escapes as required by statute or ordinance, does not make the proprietor liable for the death or injury of a guest by fire, unless the death was caused by the lack of fire escapes.[79] That is, the lack of fire escapes must have been the proximate cause of the death. So, where the guest could not have reached a fire escape or used an extinguisher had one been provided, recovery was denied, on the ground that the failure to provide fire escapes or extinguishers was not the proximate cause of the death.[80] Whether the failure to provide fire escapes was the proximate cause of the death is a question for the jury.[81] The question of proximate cause is discussed in all the cases cited in the footnotes which involve a suit against an innkeeper occasioned by an injury to or death of a guest caused by fire in the hotel.

Throughout the cases runs the statement, that an innkeeper is not an insurer of the safety of his guest. "Yet he may not omit to do the things that are reasonably necessary for his safety and protection."[82] He is only required to exercise reasonable care under the circumstances.[83] What is reasonable care under the circumstances is, of course, a jury question.[84] It has been held, however, that the mere accumulation in the basement of a hotel of such boxes and rubbish as would ordinarily accumulate in such places is not evidence of negligence on the part of the innkeeper, which will charge him with liability for an injury to a guest who attempted to escape when such boxes and rubbish took fire and filled the building with smoke.[85] And there is no presumption of

[78] (1884) 14 R. I. 380.

[79] Weeks v. McNulty (1898) 101 Tenn. 495, 48 S. W. 809; Louisville Trust Co. v. Morgan, note 75, above; Strahl v. Miller, note 75, above; Pertle's Adm'x v. Hargis Bank & Trust Co. (1932) 241 Ky. 455, 44 S. W. (2d) 541; West v. Spratling (1920) 204 Ala. 478, 86 So. 32.

[80] Louisville Trust Co. v. Morgan, note 75, above.

[81] Adams v. Cumberland Inn Co., note 64, above.

[82] Strahl v. Miller, note 75, above.

[83] Strahl v. Miller, note 75, above; Weeks v. McNulty, note 79, above; Bell v. Daugherty (1924) 199 Iowa 412, 200 N. W. 708; Stewart v. Weiner (1924) 108 Neb. 49, 198 S. W. 159; Ritchey v. Cassone (1929) 296 Pa. 249, 145 Atl. 822; Parker v. Kirkwood (1932) 134 Kan. 749, 8 Pac. (2d) 341.

[84] See cases cited, notes 79 to 83, inclusive.

[85] Bell v. Daugherty, note 83, above.

negligence arising from the fact that a fire breaks out in the inn.[86] But an innkeeper is not acquitted of a charge of common law negligence by proof of his compliance with a statute. The statutory requirements are held to fix only the minimum below which negligence *per se* arises.[87] What due care requires in excess of the statutory duty is a question of fact for the jury.[88] It has been held, that due care requires the innkeeper to warn his guests of the fire; or perhaps, it should be said, in the words of the case, that he has "the duty" to warn his guests.[89] This seems to be the rule in this country. However, a British case refused to place this duty upon the innkeeper.[90] There it was held, on demurrer, that an innkeeper is not responsible for neglecting to warn his guest of the breaking out of a fire in the hotel, so as to enable him to escape, and, therefore, that the innkeeper is not liable for the death of the guest resulting from such fire. The fire there appeared to have been accidental, and the death of the guest resulting therefrom seems to have been regarded as of the same nature. However, the court said:

> "We ought to be very careful in creating a new liability, and we think this declaration attempts so to do. Even if the duty of the innkeeper were as extensive as the plaintiff seeks to put it, it would be quite consistent with the pleading, that the defendant had reason to believe that the fire would not reach that part of the building where Hare was, and was engaged all the time in trying to extinguish it, believing that he could succeed in so doing. Any pleading seeking to fasten such a liability on a mere nonfeasance ought to show beyond a reasonable doubt a clear neglect of some legal duty."

The American rule imposing the duty upon the innkeeper seems clearly preferable. The guest should be given every opportunity to save himself from injury. In a building the size of the average hotel, a guest may not discover the presence of the danger until it is too late to save himself from it, unless he is warned of it in time.

Fire may be caused by a structural defect in the hotel. The only American case found on the point, one which was decided in California by the Supreme Court of that State, held, that an inn-

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[86] Burt v. Nichols (1915) 264 Mo. 1, 173 S. W. 681; Mitchell v. Hotel Berry (1929) 34 Ohio App. 259, 171 N. E. 39; Weeks v. McNulty, note 79, above; Ritchey v. Cassone, note 83, above.

[87] Mitchell v. Hotel Berry, note 86, above.

[88] Mitchell v. Hotel Berry, note 86, above.

[89] West v. Spratling, note 79, above; Mitchell v. Hotel Berry, note 86, above; Parker v. Kirkwood, note 83, above.

[90] Hare v. Henderson (1878) 43 U. C. Q. B. 571.

keeper was not liable to a guest's guest for an injury which was due to a structural defect in the hotel.[91] As the California court holds that an innkeeper owes the guest's guest the same degree of care as the guest, the fact that a guest was not suing is immaterial for our present purpose. This is an unsatisfactory rule. The innkeeper's duty to provide safe premises for the guest should include his duty to provide premises that are structuarally secure. For, with an exceptional instance here and there, a guest cannot possibly know of a structural insecurity of an hotel building. He should not be made to assume the risk of structural insecurity, as the California decision makes him do. England has a far more satisfactory rule. There, the innkeeper's duty to protect his guest includes an implied warranty on his part that the premises are safe. This may make him liable for the negligence of an independent contractor. In *Maclenan v. Segar*,[92] the plaintiff was injured while trying to escape from a fire caused by defects in the arrangement of a flue, designed by an architect and installed by a building contractor, for the purpose of conveying smoke from the kitchen in the defendant's hotel. The court held, that the contract between the defendant and the plaintiff carried with it an implied warranty that the premises were as safe as reasonable skill and security could make them. It said:

> "Where the occupier of premises agrees for a reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between them—unless there is an express provision otherwise—contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them. The rule is subject to the limitation, that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of *any person* concerned with the construction, alteration, repair, or maintenance of the premises."

Whether the remaining American courts will apply this salutary rule, or will follow the California rule, remains to be seen. At all events, the case is of particular interest at the present time because of the amebic dysentery epidemic, which, as was explained in the introduction, was caused, at least in part, by faulty plumbing in two Chicago hotels.

When a guest is injured by fire, the injury being caused by lack of proper fire escapes or other equipment required by statute,

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[91] Goldstein v. Healy (1921) 187 Cal. 206, 201 Pac. 462; Borgnis v. Cal.-Ore. Power Co. (Cal. 1927) 258 Pac. 394.

[92] (1917) 2 K. B. 325.

it frequently happens that it is not desirable to bring an action against the innkeeper. In a frequently cited case, *Yall v. Snow*,[93] it was held, that the Missouri statute applied to the owner of the building as well as to the lessee. Accordingly, the defendant owner was held liable for an injury caused by the lack of fire escapes, even though the building was not constructed to be used as a hotel. No general rule in this respect, however, can be formulated. Whether the duty of erecting and maintaining fire escapes rests upon the owner of the building or on the tenant, or on both, depends upon the language of the statute creating the duty.[94]

There are some instances in which a guest who is injured by fire or because of some other case cannot recover from the innkeeper for such injury. Where the plaintiff is injured in making improper use of a fire escape by going out upon it when there was no necessity for its use, it has been held, that there could be no recovery, since no duty is owed by the owner of the building to keep the escape safe for other than fire purposes.[95] There also may be a waiver of the statutory requirement. Where a person occupied a room in a hotel as a guest for six months, knowing that there was no rope or other appliance in the room, to be used in case of fire, and made no complaint, it was held, that she could not recover against the owner because of his failure to supply a rope, as was required by statute.[96] A guest has been held to be contributorily negligent when, with knowledge of the defective construction, he remained a guest at the hotel.[97] But the trend of the cases reported is, that the fact that the guest knew of the condition of the building does not relieve the innkeeper of liability (or the owner of the building),[98] even where the guest occupied the room for six months.[99] This on the ground that the statutory duty was absolute, and that the statute was intended for the bene-

[93] Note 62, above. *Accord*: Carrigan v. Stillwell (1903) 97 Me. 247, 54 Atl. 389; Johnson v. Snow, note 75, above; Landgraf v. Kuh, note 75, above; Adams v. Cumberland Inn Co., note 64, above; Courtant v. Snow (1906) 201 Mo. 527, 100 S. W. 5; McLaughlin v. Armfield (1890) 58 Hun. 376. *Contra*: Lee v. Smith (1885) 42 Ohio St. 458; West v. Inman (1912) 137 Ga. 822, 74 S. E. 527.

[94] See statutes cited, note 63, above.

[95] McAlpin v. Powell, note 31, above; Landers v. Brooks (Mass. 1926) 154 N. E. 265.

[96] Armaindo v. Ferguson (1890) 37 App. Div. 160, 55 N. Y. S. 769; Radley v. Knepfly (1911) 104 Tex. 130, 135 S. W. 111.

[97] Glass v. Coleman (1896) 14 Wash. 635, 45 Pac. 310.

[98] Hoopes v. Creighton, note 75, above; Love v. New Fairview Corp., note 75, above; Cittadino v. Shackter (1912) 83 N. J. L. 593, 85 Atl. 174; Willey v. Mulledy, note 75, above; Adams v. Cumberland Inn Co., note 64, above; Burt v. Nichols, note 86, above.

[99] Adams v. Cumberland Inn Co., note 64, above.

fit of the guest. This is clearly the preferable view. If the innkeeper is allowed to excuse himself by saying that the guest had knowledge of the fact that the inn was not properly equipped with fire escapes or other devices for protection against fire, the effect is to allow him to subvert the intent of the statute, which, after all, was to protect the lives of the guests.

As this survey has shown, the innkeeper's duty to protect the person of his guest varies in the different jurisdictions of this country. Sometimes the variance between the holdings is considerable, as the two *Clancy v. Barker* cases illustrate. Lack of uniformity seems to be particularly undesirable in this field of the law, concerned as it is largely with our great transient population, which moves freely back and forth across state boundaries. The traveller should be able to know to what extent he may rely upon the innkeeper to protect him from injury. This is particularly true in regard to the sanitary condition of the inn and protection from fire. As has been indicated in the preceding discussion, the fire protection which is required by many states is exceedingly inadequate. Fire escapes constructed of iron or some other incombustible material should be the universal requirement for all hotels not of fireproof construction which have guest rooms above the ground floor. A uniform fire escape law would be highly desirable. Such a law should embody the fire protection requirements found in the more advanced states (that is, in states whose law on this subject is more advanced), such as Connecticut; and statutory provision should be made for civil liability for injuries resulting from failure to comply with the fire protection statutes, again following the Connecticut example (the Connecticut statute—Gen. Stat. 1930, sec. 2616—not only provides for civil liability, but goes on to provide that the guest's knowledge of the improper condition of the inn is no defense to an action for damages for injuries caused by the lack of the equipment required by statute).

In view of the added emphasis placed upon human values today, as is reflected by the "New Deal" in its broad field, the time seems ripe for bringing the country's ninth greatest industry to a fuller realization of the burden it should bear in protecting the life and limb of him who is its sole cause for existence, its guest.

EDWARD LOUIS EYERMAN, '34.