ROBERT C. PALMER

English Law in the Age of the Black Death, 1348–1381

A Transformation of Governance and Law

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CHAPTER TWENTY-THREE

Innkeepers and Jailers

After the Black Death, the king's government set out to make people abide by their obligations, particularly their occupational responsibilities; the aim was to preserve traditional society. Both innkeepers and jailers thus assumed additional legal liabilities. The innkeeper became liable to guests whose goods were taken by outsiders; jailers became somewhat more liable for the damages occasioned by the escape of prisoners. Both these liabilities were coercive; at least the innkeeper liability demanded no showing of actual fault. With the innkeeper liability, the defendant had kept an establishment in which something untoward had happened, but the harm came from third-party wrongdoers. The innkeeper may not have even been present when the guest had lodged at the inn. Neither he nor his servants had done anything wrong, and in the normal situation his inn was probably not reputed to be unsafe. No prior instance of theft had to be asserted to put the innkeeper on notice that his premises were insecure. He was liable the first time loss was sustained. The jailer liability would eventually become just as rigid, but did not do so in this period, probably because the focus of the new liabilities was more on people of occupation than on royal officials.

Innkeepers and jailers were held liable at a much farther remove from the injury than other defendants even in case. Smiths, of course, actually did the damage; as a removal of an occupational privilege, their liability was not difficult to conceptualize from either a fault or a causation perspective. *Scienter* was a good example of a liability in which people were held to be wrongdoers with an extended view of causation: the liability was founded on a knowing keeping of vicious dogs, not on the perpetration of a wrongful act. Nevertheless, the dog's owner had kept and controlled the agency of damage. Particularly with innkeepers, the agent of damage was an external wrongdoer over whom the innkeeper had no control. Innkeeper liability was a bold assertion of liability by the government.

Innkeepers

Innkeepers came to be held liable for keeping a safe inn, as long as they were common innkeepers: people of that occupation and not merely people who occasionally lodged guests for pay. The liability began in 1365; it rapidly assumed common form and changed little in the following centuries. The classic conceptualization of the innkeeper's liability for his guest's goods taken by outsiders (not by the innkeeper's employees) was that it was based on the common custom of the realm. The assertion of a custom came to be one of the normal methods of formulating a writ of trespass on the case. As the first of that genre, the innkeeper writ was particularly important. It is important likewise for the rapidity with which it reached a firm formulation. The king's council is responsible both for the form and its stability.

Origins of Innkeeper Liability

The Black Death probably had a severe adverse effect on inns. The decline in the population would have decimated the number of travelers on which inns had been built and maintained. The inns were still there; certain kinds of travelers (such as royal officials) would have remained relatively constant; and the increased affluence of travelers would have ameliorated the situation. Still, a substantial number of inns were probably becoming marginal merely because of the drop in population. The standards at those inns would drop markedly below the standards maintained generally prior to the Black Death. When the problem became severe and came to the attention of the government, very aggressive action resulted.

London practice, perhaps not typical, indicated that that city placed some liability on innkeepers long before the Black Death. An innkeeper's oath from 1318 indicated that innkeepers swore to look after alien merchants' goods in their inns.[1] London's position as a trading center undoubtedly prompted the imposition of that oath, but its dimensions are unclear. The wording of the oath might indicate that the innkeeper was responsible for his own or his servant's wrongdoings, but plausibly not for wrongs perpetrated by outsiders; however that may be, the oath regarded only alien merchants. The only relevant litigation came in 1345.

1. A18a.

That plea in closing cited the plaintiff's understanding that innkeepers had to respond for the lodgers' goods that they had taken in, but then, in line with the complaint he was making, showed how the innkeeper's servant was the wrongdoer and the innkeeper was himself not without fault.[2] Nothing in London's record indicates the later common law liability of the innkeeper for wrongs perpetrated by outsiders, although both documents could be used to argue such a hypothesis. As far as can be *proved* for London, the innkeeper's liability was similar to that of an ordinary bailee. In 1363, however, further burdens were placed on London innkeepers, making them responsible if their lodgers carried arms in the city because the innkeeper had failed to warn them.[3] Nothing in London's records will prove a London liability like the common law liability in trespass on the case; and even the London situation should not be presumed for the rest of the country.

Only in 1365 did chancery impose a general innkeeper liability for guests' goods taken by outsiders. Chancery provided the liability at first as a form of *assumpsit*, deriving the liability from a bailment and the physical undertaking of the goods. Unlike the *assumpsit* liabilities, however, it was here a third party who actually caused the damage. Likewise, *assumpsit* remedies, like detinue, considered negligence. That form of the writ thus vanished after only one appearance in the plea rolls. The initial liability, nonetheless, did not utilize any hint of a common custom of the realm: it was as much an imposition of a new liability as the other *assumpsit* writs.

Navenby v. Lassels and Staunford: Strict Liability

Navenby v. Lassels and Staunford[4] (M1367) was only the second writ issued, but it completely transformed the legal basis of the innkeeper's liability. *Navenby* eschewed bailments and receipts, reciting rather the law and custom of the realm in a mere assertion of liability. That formula became immediately standard in all future innkeeper writs:

> why, whereas according to the law and custom of the king's realm innkeepers who hold common inns to accommodate men traveling through the parts where such inns are and keeping in the same inns their goods are held to guard their goods being within those inns day and night without waste [*distractione*] or loss, such that by the default of the said innkeepers or their servants no damages of such kind should happen in any way . . .

2. A18b. Only in 1380 can one find a suit holding the innkeeper liable for his guest's goods by the common custom of the realm. After pleading the mayor, recorder, and aldermen visited the inn and saw the broken lock. They then examined P under oath about the alleged value of goods and as to whether he suspected any of his own servants. They rendered judgment for P for the amount claimed with 40s damages, committing the innkeeper to prison until he paid. *Calendar of Plea and Memoranda Rolls, A.D. 1364–1381*, ed. A. H. Thomas (Cambridge, 1929), p. 260.

3. *CCR*, 1360–1364, p. 534.

4. A19c.

This recitation of law and custom did not derive from statute. The only preceding legal liability was the ambiguous London custom and the chancery provision of the *assumpsit* innkeeper writ two years before. A general custom had been forged from normal (nonlegal) expectations and the single chancery decision to issue an *assumpsit*-style writ against innkeepers.

The form of *Navenby* was not revolutionary; other writs before had made reference to the law and custom of the realm to explain why a seemingly legitimate act was impermissible.[5] Writs of prohibition recited the law and custom of the realm to explain that jurisdictional limitations demanded a lower court to cease from holding a plea.[6] Recitation of the country's law and custom in such writs could mask the assertion of a completely new limitation that would withstand objections even precisely on that point.[7] Writs of rescue referred to the law and custom of the realm to indicate that the plaintiff had been distraining the defendant.[8] The prefatory matter was necessary to explain why it was wrong for the defendant to take back his own animals, an action that was otherwise lawful. Trespass writs *vi et armis* alleged the law and custom of the realm

5. Writs based on statutes did not refer to the "law and custom of the realm" but often used a "why, whereas" clause to add the statutory matter: "why, whereas by the common counsel of our realm it is provided that it shall be unlawful for anyone from the said realm to distrain outside his fee or on a royal or common highway except ourselves and our ministers having special authority for the purpose, the aforesaid B., who is not our minister, as it is said, took and impounded . . ." *ERW*, p. 164 (no. R232).

6. Ibid., pp. 141–42 (nos. R140, 142, prohibition against drawing anyone into a plea outside the realm); 223 (nos. R487–89, prohibition against debt/detinue plaints of 40s or more in lower courts). These are not "why, whereas" clauses, but only "whereas" clauses, such as: "Whereas pleas about debts which reach or exceed the sum of 40s ought not, according to the law and custom of our realm, to be pleaded without our writ, and B. is impleading A. for a debt of £40 in your county court without our writ, as we have heard, we command you . . ."

7. Robert C. Palmer, *The County Courts of Medieval England, 1150–1350* (Princeton, 1982), p. 257.

8. *ERW*, pp. 163 (no. R225), 180 (no. R317), 182 (no. R329). The "why, whereas" clause reads: "why, whereas the said A. caused the beasts of the aforesaid B. to be taken by C. his servant, for a certain default which he made against D. in the court of the said A. according to the judgment of the aforesaid court, and the said C. wished to impound those beasts according to the law [and custom of our realm], (the aforesaid B. rescued those beasts wf&a etc.)."

to explain why keeping distrained animals (which thus belonged to someone else) impounded without food was wrong.[9] *Navenby* now set forth in prefatory material why it was that a wrong done by a third party to a lodger was to result in the innkeeper's liability. Nothing in the use of that form alone was particularly innovative compared with practice prior to 1348.

Even this early in the liability the issue of stringent liability was controversial.[10] The case was pleaded twice, first in M1367, then again in E1368; judgment was rendered finally in M1368. In the first pleading, Lassels argued that the plaintiff had suffered no injury by his fault, because he had been in Essex when the plaintiff lodged in his inn in Huntingdon. Staunford, the other defendant, claimed that he had given the plaintiff a room with a sufficient lock, that the plaintiff had held himself contented, and that the inclosure of the inn was sufficient. Lassels had distanced himself from the injury, and his servant had given a reasonable reply. If the liability depended on fault or if under the original conception innkeepers and lodgers could contract out of the liability by the guest holding himself contented, those matters should have constituted issues determinable by the jury.

The second pleading indicates that actual fault was irrelevant; the loss sustained was the primary determinant of the liability. The plaintiff there protested that he did not acknowledge any of what the defendants had said about being in Essex or having been given a sufficient room, but then demurred. Because the defendant had not denied that he was a common innkeeper and that Staunford had received the goods and chattels and lost them (by the actions of external wrongdoers) and because common innkeepers were bound to hold their lodgers protected from harm, he thought he should be awarded the judgment without going to a jury. The case was adjourned to M1368, when Knyvet CJKB and Ingleby JKB rendered judgment for the plaintiff. The loss of the goods, without actual fault and despite the allegation that the plaintiff had held himself contented (thus an allegation of contracting out of the liability), was sufficient for the liability. In treating of the execution of the recovery, Knyvet explicitly denied that there was any fault in the defendants. In law, innkeeper liability was strict.

The source of that strict liability was the king's council. In rendering judgment in *Navenby*, Knyvet referred to a similar judgment rendered in

9. Ibid., p. 184 (no. R335). This assertion of the law and custom of the realm was not even in a prefatory clause: "why wf&a he took and impounded at N. beasts of the said prior and kept them impounded without food against the law and custom of our realm for so long that a great part of those beasts etc."

10. A19c.

king's council in a previous case,[11] rendered on the ground that "an innkeeper should answer for himself and his household in respect of the rooms and stables."[12] That determination by the king's council undoubtedly had set the form of the innkeeper writ and explains why the form did not vary thereafter. Despite that assertion by the king's council, Knyvet and Ingleby associated with themselves their companion justices and the serjeants in the judgment in *Navenby*: "by the advice of their fellows, and of the serjeants"[13] they rendered the judgment. At this point, Knyvet and Ingleby were the only justices on the king's bench; the justices who could be considered their companions would be the common pleas justices; the serjeants also were normally associated with the common pleas. That Knyvet wanted this united front even after the decision by the king's council shows the controversial nature of the liability.

The Development of Defenses

The liability of innkeepers was a new and potentially very stringent imposition. Not only were the cases often contested, but the defendant innkeepers rapidly developed successful defenses. Two obvious defenses, both allowed by the court, were in the nature of the modern defenses of assumption of risk and contributory negligence. A third method was the preference for the general issue over the demurrer, relying on the jury and its ability to focus on a potentially defendant-favoring element of the writ. Still, the law about innkeeper liability was very stringent.

A suit pleaded in M1368, as the court rendered judgment in *Navenby*, showed the pleading consequences. With the demurrer in *Navenby*, the court had applied strict liability standards. The defendant in this case thus took the general issue, hoping that his reputation would help him before the jury, because taking the general issue submitted the question to the jury in the terms of the writ.[14] The language about the defendant's default thus was put to the jury.[15] That strategy would allow actual fault to play a role in the verdict, depending on jury conduct and the charge to the jury.

11. Most likely the case came after the first innkeeper writ issued from chancery (in the *assumpsit* form). Perhaps it was that case itself, drawn out of the court of common pleas into council for determination. Since the single enrollment of that case in the common pleas rolls has no notation to that effect, however, that remains entirely speculative.

12. *SEL II*, p. 554.

13. Ibid.

14. A19e. The form apparently found its way into the Register of Writs. *ROB*, f. 104r. The money amount is different, but the form is the same. The register also has a margination: "This writ was brought in 1368, Easter term; and note the same plea, because it is good and very useful." The note cited the current term for the issue of the writ, not the term of pleading.

15. A19g, h.

A different approach after *Navenby* was to take precautions on admitting lodgers at inns, a tactic suggesting widespread knowledge of the new liability. A case in T1372 seems to show an innkeeper trying both to remove himself from the new legal category of common innkeeper and also to make the lodger assume the risk of any damage happening to him during his stay. The plaintiff had come to the inn in Aylesbury. The innkeeper admitted that his inn was ruinous and refused to lodge him unless the plaintiff accepted the risk. With no place else available, the plaintiff lodged at the inn under that condition. The innkeeper thus protested that he was not a common innkeeper and did not run a common inn; he tried to put the matter on the assumption of risk. The parties joined issue on whether the plaintiff had lodged at the inn as at a common inn or under the conditions claimed. If an innkeeper was willing so to discourage lodgers and drive them to find other accommodations first—which there probably often were in Aylesbury—he might well avoid liability. Those who were not common innkeepers could thus plead that the plaintiff had assumed the risk, thus contracting out of the new liability.[16] Even though the writ purported only to cover common innkeepers, it thus seems that the liability covered innkeepers generally.[17]

The court allowed a different avenue of defense in T1374. There the innkeeper had been worried about the lack of a complete inclosure for the inn, so that he also made the defendant assume the risk. The assumption of risk, however, seemed not as important as the allegation that he had given the plaintiff a sufficient room with a key, and the plaintiff and his horse had stayed in the room but had neglected to lock the door. Not only had the defendant assumed the risk, his own negligence had contributed to his loss. The defendant did not feel obliged to deny that he was a common innkeeper. The plaintiff claimed that the loss came through the defendant's fault, and the jury agreed. This plea was essentially the same as the modern plea of contributory negligence; the innkeeper succeeded in the legal point but lost on the facts before the jury.

The law regarding innkeepers was thus fairly clear. If the parties demurred, the defendant innkeeper would probably lose. On a plea on the general issue, the matter of fault might carry over before the jury by the alleged loss by the innkeeper's "default." If the lodger had assumed the risk and the defendant was not a common innkeeper, issue could be

16. A19i.

17. Otherwise, it would seem that the issue would have been on whether D was a common innkeeper. If it was accepted (as it seemed to be) that he was not a common innkeeper and the writ was tightly restricted to common innkeepers, he should have demurred on that point and won outright.

taken precisely on the assumption of risk, although the jury might also have to determine whether the defendant was a common innkeeper, an ambiguous matter. Finally, even if the defendant was a common innkeeper, if there was both an assumption of risk and contributory negligence, the court would allow that issue to go to the jury. The liability of the common innkeeper was strict, but susceptible to some modulation by contract and considerations of fault. Thus, while the liability was provided in chancery and council, the court had to determine the parameters of the liability by forging the rules to be applied in pleading.

The innkeeper writ became frequently used and remained hotly contested. Of the eight innkeeper cases brought through T1372, six were pleaded. From 1373 through 1381 there were twenty-three more cases, more than two each year. Eight of those were pleaded; fifteen were not.[18] No other new action had such a high rate of pleaded cases. Plaintiffs and defendants felt very strongly about these issues; the liability itself was controversial and the defendants were willing and able to contest the action.

Jurisdiction and Form

Inferior courts could enforce the liabilities imposed by the new remedies. In one case the plea was claimed successfully by the bailiffs of Coventry. The court of Coventry was then ordered to handle the plea expeditiously, or else it could be brought back into the king's court.[19] Such claims of court occasionally took cases out of the king's court. Once a liability took hold, however, plaintiffs could enforce it in certain liberty courts from the beginning. London, of course, handled such cases.[20] The court of Canterbury accepted such cases, including a plea brought by bill in Canterbury in 1379. The bill was drawn according to the words of the common form writ, although citing only the common custom of the realm, not the law and custom of the realm. The issue was taken on whether the loss had occurred while the plaintiff was at the inn. The jury returned a verdict for the defendant innkeeper, and the disappointed plaintiff brought a case of attaint against that jury in the court of common pleas.[21] In all ways, the case in Canterbury conformed to common law rules; it was even subject to consideration by the justices under attaint. Certain liberty courts were thus authorized also to administer the new liability without needing warrant by chancery writ.

18. A19.

19. A19n.

20. *Calendar of Plea and Memoranda Rolls, 1364–1381*, p. 260.

21. A19gg.

Conclusion

Innkeeper liability was peculiar in that it received its form from the king's council. Between the first and the second writ, the king's council itself resolved a case altering the writ from one assimilable to *assumpsit* to one citing the law and custom of the realm. That form remained stable and asserted a strict liability of the innkeeper for his guest's goods taken by outsiders. While that liability was an imposition of policy by chancery and council, the court, likewise a part of the government, then had to forge the legal content of the liability. The court allowed the defenses of assumption of risk and contributory negligence. Standard procedure still might allow questions of fault to influence the jury when the defendant pleaded the general issue. The liability, however, was considered abnormally stringent, because it involved the innkeeper's liability for wrongs done by a third party over whom he had no control; even after the decision by the king's council, the court in *Navenby* associated all the justices and serjeants in the judgment. This new liability was a coercive imposition, deriving from chancery, strengthened by the king's council, endorsed by the whole bench.

Prison Breach

Prison breach was a related case liability, but one that appeared prior to the Black Death. As with the innkeeper liability, the jailer's liability was for a third party's actions that injured the plaintiff; like the innkeeper's liability, the obligation had to do with maintaining a secure establishment. Defendants in these writs were always officials in charge of prisons; the wrong they did was in allowing the third party to leave prison. The injury to the plaintiff was the resulting inability to recover his goods, chattels, or debt or, when the plaintiff was the sheriff, the amercement laid on him for the escape allowed by the jailer. The remedy was for damages against the jailer. The allegation was always that he permitted the prisoner to leave, and the liability seems to have been strict from the beginning. Because the jailer was a royal officer, he was subject to closer supervision; injured parties received various remedies against him prior to the Black Death. Despite development after the Black Death, however, the remedy prior to the Peasants' Revolt did not reach as far as it would by the eighteenth century.

Blackstone's Analysis of Liability for Prison Breach

In the eighteenth century Blackstone distinguished prison breach liability both by remedy and by fault. Distinguishing remedies, he discussed an escape of a prisoner taken on mesne process, prior to the rendering of a

judgment: the appropriate action was case against the jailer. When a prisoner escaped after judgment rendered and was thus liable for a specific amount of money, the appropriate remedy was debt for the specific sum. Thus, debt lay whenever there was a specific sum owed. Otherwise, one sued in case.[22]

Blackstone also distinguished prison breach cases based on fault, so that escapes were either voluntary or negligent. If the prisoner was free with the consent of the jailer (a voluntary escape), the sheriff could not capture him again, although the creditor might. In a negligent escape, when the prisoner got free without the consent of the jailer, the prisoner could be retaken on fresh pursuit; that recapture would excuse the jailer from liability if the prisoner was again in custody prior to the bringing of an action against the jailer. The distinction between voluntary and negligent escapes, however, did not usually alter the underlying liability of the jailer to the creditor for prison breach.[23] Even a rescue of the prisoner, that is, an escape brought about by friends, did not limit the jailer's liability. For judgment debtors who escaped, Blackstone considered the jailer simply liable, barring act of God or foreign enemy.

Development of Jailer Liability

Various prison breach liabilities existed prior to the Black Death. Under the Statute of Merchants creditors could sue jailers in both debt and trespass. Sheriffs amerced by the justices for a prisoner's escape could recover against their responsible underlings in covenant. Ordinary creditors could sue jailers in debt for the debt owed by a judgment debtor. Creditors could even sue jailers in trespass for voluntary escape. Nevertheless, creditors apparently did not use these remedies frequently.

Since the reign of Edward I, Parliament had made special provisions for merchant debts; those special privileges included a jailer liability. The Statute of Merchants (1285) had mandated that prisoners committed for default of repayment of an obligation properly recorded should be guarded well, or else the jailer would be liable for the debt.[24] Accordingly,

22. *CLE*, 3:163–64.

23. The distinction between voluntary and negligent escapes for criminals, however, was relevant to the jailer's liability: a negligent escape made the jailer liable to a fine; a voluntary escape made the jailer liable for the penalty that would have been inflicted on the criminal, if he was in fact convicted. Ibid., 3:415–16, 4:130.

24. Statute of Merchants, 1285 ("Et bien se garde le gardein de la prison qe ily coviendra respoundre del corps ou de la dette"); T. F. T. Plucknett, *Legislation of Edward I* (Oxford, 1962), p. 140. A writ of 1360 still cites the Statute of Acton Burnel of 1283: "why he permitted to go free Thomas son of Walter Donnyng of Tattersett taken lately by our writ directed to the aforementioned sheriff by pretext of a certain recognizance of 20m made to the aforementioned John by the aforementioned Thomas according to the form of the statute declared lately at Acton Burnel at the prosecution of the same executor, [Thomas]

in 1346 a creditor brought a statutory trespassory claim against a bailiff. The convoluted writ asked why the bailiff had allowed a prisoner to leave prison. She had been arrested and imprisoned on the nonpayment of a debt made by recognizance for £12 10s under the Statute of Merchants by warrant of a writ properly delivered to the bailiff for execution, but he allowed her to leave without paying the plaintiff.[25] A trespassory remedy, without *vi et armis* but based on the Statute of Merchants, thus was available against jailers and provided compensation, but only to such creditors.

As would be expected from the Statute of Merchants, the action of debt also remedied escapes that prevented recovery under a debt recognizance. In 1347 a plaintiff recited a debt recognizance for £50 made before the mayor and clerk at Bristol under the statute. By proper process the bailiffs of Winchester, the present defendants, had arrested them pursuant to a royal order, but then "allowed them to leave from prison without having made satisfaction" to the plaintiff; thus the action of debt accrued to them. Issue was taken on whether the bailiffs had had custody of the prisoner after they received the order.[26] Such Statute of Merchant–based remedies, in debt or trespass, were not frequent, but laid the groundwork for subsequent case remedies.

Likewise before the Black Death, covenant could enforce a different jailer liability. Prison breach could result in the court levying a penalty on the sheriff, particularly for the escape of criminal prisoners;[27] the jailer,

being in the custody of the same sheriff at Brisley, the aforesaid executor not at all satisfied of the absd 20m, against the will of the same executor, to the same executor's grave damage and in retardation of the execution of the absd recognizance and of the absd testament as he says." William Donnyng executor of John parson of Markshall v. John de Ratelesdene sheriff of Norfolk, CP52/34 Edw. 3, quindene of Easter.

25. John de Skryvain of London v. Nicholas Robertzmultne of Heytesbury, the prioress of Amesbury's bailiff of Melksham (1346), CP40/347, m. 105d, Wilts: "why he permitted to go free [*liberam abire permisit*] Ellen le heir of Brixton Deverill in the absd county, digger, recently taken by the aforementioned bailiff by royal writ directed to the sheriff of the county and returned to the aforementioned bailiff according to the absd liberty by pretext of a certain recognizance of £12 10s made to P by the aforementioned Ellen according to the form of the Statute of Merchants lately provided and being in the custody of the bailiff at Brixton Deverill, against P's will without having paid P the £12 10s, in retardation of the execution of the absd recognizance." A different context in which the *abire permisit* form appeared was with the rescue of villeins: CP40/343, m. 357 (1345).

26. CP40/350, m. 209 (Hants): "they permitted him to leave from prison etc., without having made satisfaction to P, whereby an action accrues according to the form of the statute etc."

27. KB136/4/25/2/1 (1351), Northants. This was a plea of contempt in which a justice sued the bailiffs concerning a voluntary escape of Thomas Griffyn of Weston. Longevill and his associates had been commissioned to hear and determine felonies, trespasses, and evil deeds and had had Griffyn attached *propter enormes transgressiones et maleficia*

often bound by specialty to the sheriff, was then liable in covenant to hold the sheriff undamaged.[28] Under covenant, clearly, the liability was not one accessible by most of those people injured by an escape: a judgment creditor could not take advantage of the sheriff's specialty. Litigation in covenant was rare, but the liability was probably firm.

Nevertheless, after the Black Death it was precisely for that kind of liability that chancery provided the case writ. In E1358 the guardian of Stortford prison sued the jailer he had hired to guard prisoners in his absence; the jailer had permitted three prisoners to leave before they could be delivered to the bishop of London for delivery to Newgate.[29] The following three writs (M1362, H1365, and M1366) were all brought by superiors whose jailers or executioners had permitted prisoners accused or convicted of criminal misdeeds to escape.[30] The plaintiff's damages were distinctly consequential, not inflicted forcibly on the plaintiff. Moreover, in each case, whether by hiring, bailment, or undertaking, a privity was alleged between the parties, so that this jailer liability could have fit in *assumpsit*, had the jailer been a person of occupation. The new writ did away with the need for specialty and also produced more litigation.

The broader liability of the jailer to the creditor for the debtor's debt, not based on the Statute of Merchants, may have appeared before 1348. In 1345 an executor used debt to sue jailers whose prisoner had escaped after being imprisoned for being in arrears on an accounting.[31] Here the

eidem Georgio et sociis suis predictis in sessionibus suis apud Northampton rebellice facta. He was delivered to the bailiffs to be guarded without bail until delivered from the jail by the justices and to be retaken if he escaped. The bailiffs nevertheless delivered him and permitted him to go where he wanted (*abire permisit*), whereon Griffyn threatened the justices and the bailiffs refused to capture him. The writ was tested 22 March 1351; the incident may have been part of the scenario leading up to the Statute of Treasons. This action of contempt is obviously not the ordinary jailer liability. Longevill also brought an action against Griffyn himself for riding armed against the Statute of Northampton and putting such threats on him that he was less able to do his duties. See also an example from 1276: A6a.

28. JUST 1/682, m. 102 (Notts. eyre, 1330). The writ of covenant ordered DD to hold to the covenant made concerning the custody of Nottingham jail about safeguarding two named prisoners and delivering them when need be. P here was the sheriff; DD had granted and undertaken to safeguard the prisoners and to hold the sheriff undamaged for any loss by default of their custody. The prisoners escaped; the sheriff was adjudged to pay £8 and was distrained to pay, but DD did not hold him undamaged. In court now DD acknowledged the covenant, so that P recovered the £8. For such written contracts, see Palmer, *County Courts*, pp. 52–53.

29. A21a.

30. A21b–c.

31. CP40 343, m. 225 (T1345), Glos. debt for £8 13s: "that, whereas a certain John Everard skinner of Bristol for a long time was P's receiver of moneys for rendering an

jailers were not said to have permitted the escape; the prisoner merely escaped. This case, well before the Black Death, is the only indication discovered during the period that can possibly be construed as liability for a negligent escape. The lack of litigation for over three decades thereafter suggests that the 1345 case was simply anomalous in relationship both to liability for negligent escape and to a general liability in debt for creditors.

The debt liability to recover from the jailer really began in 1378. In H1378 a plaintiff brought a bill of debt against the warden of the Fleet, who had allowed a judgment debtor to go at large without satisfying the plaintiff of the debt and damages awarded in a plea of debt.[32] Another plea of debt claimed £11 14s. The plaintiff had recovered that sum against his debtor before the mayor of Queenborough, who thus had the debtor in his custody; that mayor delivered the debtor to his successor, who set him free. The creditor thus sued the new mayor for the debt owed, with £100 in damages.[33] Suing a jailer in debt was certainly possible, although creditors did so only infrequently.

The trespassory remedy for the creditor against the jailer appeared only twice before the Black Death, in 1335 and 1336, and then only by bill. The plaintiff sued the jailers for permitting the escape of a defendant in account who had been taken by mesne process, alleging contempt of the king and claiming £40 in damages.[34] The next year a judgment creditor sued the jailer who allowed a defendant convicted in a trespass case to leave jail without having paid the damages; he likewise claimed £40.[35] These plaints were probably a special king's bench initiative to

account P, and afterward it was found before certain auditors deputed to hear the account of the absd John that the absd John, the account having been accounted and the allocations allocated, stood in this part in arrears of the absd account in the £8 13s contained above, which certain John was delivered to DD at that time bailiffs of Bristol to be guarded in the nearest royal prison by statute until etc., and the same John thus being in the custody of DD escaped [*evasit*] from the absd prison etc., such that the action for seeking the absd debt from DD accrued to P by cause of escape, DD although often required etc., refused to render to P the absd debt and still refuse, whereof he says that he is worse off and has damages to the value of 100s." Bristol claimed the case.

32. CP40/469, m. 259: a bill recited in full in French, addressed to the justices of the common bench, claiming that D wrongfully did not render £10 6s 8d owed him. The owing derived from the fact that P in the previous reign had sued John Broun of Bristol for £10 and in H1377 had recovered the debt of £10 and damages of 6s 8d, wherefore Broun was committed to the Fleet until he had paid the debt and damages. He remained there until 23 March, when he was allowed to go at large. On that P claimed that an action accrued to him against D; D had not paid him; P claimed damages of £20. D had oyer of the bill and day was given.

33. CP40/470, m. 128d, Kent.

34. A20a.

35. A20b.

discipline jailers, but that initiative was soon discontinued. The obvious indicators are that they both came in king's bench within nine months of each other and by plaint without chancery approval, without further instances so far discovered before the Black Death. A further indication is that both claimed £40 in damages. That figure of £40, frequently alleged, was seemingly fixed by the justices, without relating to actual damages. Finally, one of the bills alleged contempt of the king; the other, the loss of the king's amercement. These two early suits thus seem to have been a special and limited initiative, but were brought without the allegation of *vi et armis*.

The liability then was revived after the Black Death in tandem with other new initiatives. In 1358 two jailers, bailiffs of Canterbury, had compensated the creditor for the 100s that he had been adjudged in an action of trespass; they then sued the escaped debtor to recover their own damages: £40.[36] Had the bailiffs' compensation of the creditor been gratuitous, it is unlikely that they could then have sued the debtor. In 1359 a creditor recovered by bill 40s from a bailiff who had allowed his debtor to escape, thus delaying the creditor's recovery against the debtor.[37] These two cases accompany the development of the case writ for sheriffs against jailers for their default in custody, as well as the proliferation of *assumpsit* writs.

Nevertheless, the formulation of that writ, and thus the regularization of the remedy, came only in 1369. In H1369 a servant's master sued constables who had permitted a thief to go free even though the servant, from whom the goods had been stolen and who had pursued the thief, was willing to prosecute. The master had thus lost his goods.[38] The injury was solely in their negligent performance of duty: letting the thief leave after pledges to prosecute had been offered. Similar cases reciting appeals of felony were brought also in M1374[39] and T1379.[40] In M1372 another plaintiff sued a jailer who had taken with him and loosely guarded a prisoner who had been convicted of damages for a trespass to the creditor. The prisoner, thus loose, practiced extortion such that the judgment creditor was unable to recover.[41] Chancery was willing to move further in H1375, handling problems with the release of a defendant in a case of debt prior to judgment. The damage done there was not in releasing the prisoner debtor himself, but in releasing to the defendant the boat by

36. CP40/395, m. 266; *SCTKC*, no. 7.1, 1:69.

37. A21b.

38. A21f.

39. A21h.

40. A21j.

41. A21g.

which he had been attached to appear in the suit of debt.[42] Releasing the boat to him had allowed the debtor to go free. This isolated instance was a dramatic extension of jailer liability, but one that was not pursued immediately. Jailer liability prior to 1381 was infrequently prosecuted and normally reinforced criminal or trespassory process.

Conclusion

The jailer's liability was not new with the Black Death, but it was revived, broadened, and strengthened in various ways with the development of case. The liability of the jailer to compensate the sheriff for amercements received its remedy only in covenant before 1348; in 1358 writs much in the form of *assumpsit* remedies allowed the sheriff to recover against jailers without producing specialty. That a creditor should have recovery against the jailer derived from the Statute of Merchants, receiving occasional remedy in either trespass or debt. Creditors who could not rely on the Statute of Merchants possibly had a remedy, but it can only be shown in 1335–36. King's bench enforced such a trespassory remedy by bill in 1359; chancery formalized the remedy only in 1369, beginning with the liability of jailers of accused felons whose default caused owners of goods to lose them.

The remedies against jailers were not frequently used. Even under the Statute of Merchants not many cases arose by creditors against jailers. The innovations after the Black Death certainly increased both the ease and the level of litigation, but litigation was still not frequent. Still within the period of this study, however, there is no clear evidence that the jailer's liability extended to instances of negligent escape, as distinct from instances of voluntary escape in which the jailer was at fault. The extension of the liability to that known to Blackstone was the work of another era.

Conclusion

Both innkeepers and jailers were the subjects of the new remedies devised after the Black Death. Innkeepers in particular were probably in need of regulation. The case writ provided that regulation, the first to appeal to the "law and custom of the realm." That formulation apparently derived from the council and remained stable. The courts nevertheless developed the pleading forms for the action. While the remedy was strict in law, the court accepted pleas of contributory negligence and contract; pleading the general issue might have put issues of fault before the jury. The

42. A211.

liability, however, was considered oppressive, evidenced by the high degree of contested cases.

The jailer liability was not absolutely new but resembles the development with penal bonds: the extension of a remedy that had been restricted before the Black Death. The new writs made it easier for sheriffs to sue their subordinates; chancery finally formalized a writ allowing creditors to sue jailers even when there was no reliance on the Statute of Merchants. Unlike the innkeeper liability, however, the remedy against jailers did not become frequently used in this period, nor did it develop to its later extent.

Both innkeepers and jailers looked after people. The innkeeper was not an official but only offered his services generally to the public; nevertheless, his occupation became the subject of a strict liability often enforced. He was responsible for outsiders who took his guest's goods, barring some extenuating circumstance; the liability was not supposed to be based on personal fault but on negligence proved by the loss itself. The jailer was an official, but his liability seems at this stage less rigorous: we cannot prove that the liability extended to negligent escapes. In this, as in some other matters, governmental officials received more forgiving treatment than those who served in the ordinary occupations. That weighing of the innkeeper liability as against the jailer liability corresponds to the analysis that occupational liabilities derived from reinforcement of the Statute of Laborers, neither from a conceptual breakthrough in legal thought nor from clever lawyers finding points of stress in the remedy structure and taking advantage of them for their clients.