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Interference With Land Access by Parked Vehicles

Janet Eterovich*

ONE OF THE MOST IMPORTANT rights of the motorist is his right (some say privilege) to park on the street and highway.¹ This right is very limited, however. It is restricted by the traffic regulations and nuisance statutes enacted and enforced in the various states under their police power to protect the health, safety and general welfare of their citizens.

Those most interested in the motorist's right to park are other motorists and landowners whose property abuts on the highways. The rights and remedies of these parties determine the scope of this review.

Does a landowner have the right to move a car blocking his driveway? At common law, a landowner could move it, using reasonable force, on the theory that an obstruction in the highway is a nuisance.² But in Ohio, only the police or public officers may remove vehicles which are illegally parked such as blocking a driveway, doubleparking or parking on a sidewalk.³

A regulation prohibiting the blocking of a driveway is clearly to protect the landowner's right of access to and egress from his garage. Therefore, one might conclude that the landowner has a right to park in front of his own driveway. Such was not the conclusion in *People of New York State v. Koenig*.⁴ The court said:

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¹ *Andrews v. City of Marion*, 221 Ind. 422, 47 N. E. 2d 968 (1943); *Kimmel v. City of Spokane*, 7 Wash. 2d 372, 109 P. 2d 1069 (1941); *School Distr. of McCook v. City of McCook*, 163 Neb. 817, 31 N. W. 2d 227 (1957); *Philips v. City of Valparaiso*, 233 Ind. 447, 120 N. E. 2d 402 (1954); *Walker v. State of Washington*, 48 Wash. 2d 587, 295 P. 2d 331 (1956); *Idaho Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P. 2d 726 (1941); *State v. Douglas*, 117 Vt. 425, 94 A. 2d 406 (1953); *City of Columbus v. Ward*, 65 Ohio App. 522, 31 N. E. 2d 142 (1940).

² *People v. Propp*, 172 Misc. 314, 15 N. Y. S. 2d 83 (1939).

³ *Ohio R. C.*, §§ 4511.68, 4511.99, 4511.67 and 4511.68; *Boesch v. City of Dayton*, 26 Ohio N. P. (n. s.) 137 (1926). Ordinances declaring illegally parked automobiles to be public nuisances subject to being impounded by police, held valid and constitutional in *Hughes v. City of Phoenix*, 64 Ariz. 331, 170 P. 2d 297 (1946); *McLaurine v. City of Birmingham*, 24 Ala. 414, 24 So. 2d 755 (1946).

⁴ 17 Misc. Rep. 2d 934, 187 N. Y. S. 2d 379 (1959).

The fundamental idea of a public street or highway is that it is public for all purposes. If the regulation had prohibited parking in front of a driveway by anyone except the owner of the property containing that driveway, the exemption of such owner from the operation of the regulation would be ruled discriminatory and designed for the interest of a special class and would accordingly be void.⁵

On the other hand, if another motorist blocks your driveway, under what circumstances may you move the vehicle without waiting for or calling the police? To the rugged individualists who cannot wait for the authorities, the following cases are dedicated.

The case of *Hart v. Jones*⁶ illustrates the remedy of self-help in the extreme. Hart was a peddler who sold fruit from his wagon on the street in front of Jones' Land Company. Jones asked Hart to leave, and when he remained Jones became angry and struck him. Hart sued Jones and the Company for assault and battery. Verdict and judgment were for Hart. The court reasoned that even if Jones, an abutting landowner, owned the fee in the street and if Hart was a trespasser on his land, then he still had the burden of showing that he used no more force than was reasonably necessary in removing Hart from his land. Actually the court in balancing the interests of the parties found that public peace is weightier than the right of a person to protect his private property by using force.

A more modern approach to self-help is presented in *Howard v. Deschambeault*.⁷ Plaintiff parked his automobile in front of the driveway to defendant's parking lot. One of defendant's patrons desired to leave. Defendant, in moving the car away from the driveway, drove it over a bank and into the nearby river, claiming that the brakes had failed. Plaintiff sought to recover damages for conversion of his automobile. The court held there is no conversion in removing the vehicle from the driveway when the purpose of removal is not to exercise dominion or control over it, but rather to remove the car to a more convenient parking place. The court suggested that the defendant may have been liable for negligence; however, this issue was not raised by the plaintiff.

⁵ *Id.*, at 934, 935.

⁶ 14 Ala. 327, 70 So. 206 (1915).

⁷ 154 Me. 383, 148 A. 2d 706 (1959).

In *Maggiore v. Laundry and Dry Cleaning Service*,⁸ the plaintiff asked a friend to help him push a truck blocking his driveway. The truck's motor started, the switch being unlocked, and the truck struck and injured the plaintiff. The court found that the plaintiff and his friend were not negligent as a matter of law, the only negligence being that of the truck driver.⁹

The Court of Appeals of Ohio handled a similar situation in *City of Toledo v. Hammond*.¹⁰ The complaining party parked her automobile in front of her next-door neighbor's property. She had space to park in front of her own property. Her neighbor came home and desiring to park in front of his premises pushed her car forward with his bumper so he could unload his passengers. No damage was done. She filed a complaint alleging reckless operation of his vehicle under a traffic ordinance of Toledo. On appeal, his conviction was reversed, the court wisely

⁸ 150 So. 394 (La. App. 1933).

⁹ Ohio R. C., § 4549.06 provides that any person who starts the motor, shifts gears or releases the brake of a standing motor vehicle, "with the intent to injure said machine" is guilty of a crime. See also, 42 A. L. R. 2d Annot., 624: "What constitutes tampering with motor vehicle or contents?" (1955).

The general rule is that if one leaves his car standing unattended in the street temporarily without being negligent and the car is locked, if it is set in motion by the wilful or negligent act of a third person that act is the proximate cause of the injury resulting and the owner is not liable: *Rhad v. Duquesne Light Co.*, 255 Pa. 409 L. R. A. 1917D, 864, 100 Atl. 262 (1917).

However, in *Ross v. Hartmen*, 78 App. D. C. 217, 139 F. 2d 14 (1943): a violation of an ordinance prohibiting the leaving of a motor vehicle unattended with ignition switch unlocked is negligence per se and the proximate cause of injury resulting from negligent operation of one starting the car.

The purpose of requiring motor vehicles to be locked is not to prevent theft for the sake of owners or the police, but to promote the safety of the public in the streets. The fact that the intermeddler's conduct was itself a proximate cause of the harm and was probably criminal is immaterial. The car owner created a risk of harm that a third person would act improperly. Therefore, he is responsible for injury to the innocent victim.

In *Moran v. Borden Co.*, 309 Ill. App. 391, 33 N. E. 2d 166 (1941): it was a question for the jury whether violation of statute leaving car unlocked is negligence.

Whether owner who leaves car unattended in street is negligent to render him liable to third person for injury by stranger is usually question for jury. This is true whether or not car was unlocked. *Tierney v. New York Dugan Bros.*, 288 N. Y. 16, 41 N. E. 2d 161, 140 A. L. R. 534 (1942); *Bergman v. Williams*, 173 Minn. 250, 217 N. W. 127 (1927).

Defendant may not be negligent as matter of law in some cases: *Tabary v. New Orleans Pub. Serv.*, 142 So. 800 (La. App. 1932); *Kaplan v. Shults Bread Co.*, 212 App. Div. 110, 208 N. Y. S. 118 (1925).

The intervening act of the intermeddler may be held to be the proximate cause of the injury and not the negligence of the owner in leaving the car unlocked: *Slater v. T. C. Baker Co.*, 261 Mass. 424, 158 N. E. 778 (1927).

¹⁰ 99 Ohio App. 286, 132 N. E. 2d 766 (1953). See also *Village of Strongsville v. McPhee*, 142 Ohio St. 534, 53 N. E. 2d 522 (1944).

pointing out that the bumper on a motor vehicle is designed to receive bumps. On the other hand, the purpose of the ordinance is to impose a duty on all persons using a public street not to endanger the life, limb, or property of any other person lawfully using the street. Since there was no danger to life, limb, or property and the complaining witness was using the court "as a channel for the venting of personal spleen and ill-humor," the complaint was dismissed.

Contrast this situation: One driver parks his car in illegal proximity to another. Upon his return, he finds his bumper mangled, the driver of the other car having attempted unsuccessfully to extricate himself. Is he liable for the damage? In *Conn v. Hillard*,¹¹ the court said he was. Since there was no reason to anticipate the amount of force used, he must exercise reasonable care.¹²

In *People v. Propp*,¹³ a driver blocked the sidewalk in front of defendant's tourist home for about 25 minutes. The defendant moved the car a few feet, although she had granted permission to park there. For moving the vehicle, the defendant was arrested, convicted, and fined \$10. She appealed, her defense being that the obstruction was a private nuisance and that she had a right to abate it. But the common law right to abate a nuisance is abrogated by the New York Vehicle and Traffic law. The court said:

As a matter of public policy it would be a serious inconvenience to the public to allow interference with the parked cars.¹⁴

Even assuming the right to abate a nuisance, the interference to be removed must be an unreasonable one, and a 25 minute ob-

¹¹ 82 A. 2d 368, 25 A. L. R. 2d 1220 (Mun. Ct. App. Dist. Col., 1951).

¹² A person is privileged to move chattels of another for the purpose of abating a private nuisance (as to him) if such movement is a reasonable means of abating the nuisance and if the possessor of the chattel, on demand, has failed to abate the nuisance or the actor reasonably believes that such demand is impractical or useless. The nuisance, *inter alia*, may interfere unreasonably with the actor's privileged use of a public highway. But a failure to act reasonably subjects the abater to liability for the slightest harm to the chattel.

The Restatement of Torts gives this illustration: "A parks his car on a highway at a point which completely obstructs B's egress from his land unto the street. B carefully pushes A's car out of the way. In so doing, a tire is accidentally punctured. B is not liable to A for the harm done to the tire." 1 Restatement of Torts, Sec. 264 (1934).

¹³ *Supra* note 2.

¹⁴ *Id.*, at 88.

struction, as in the instant case, is not an unreasonable time to park.¹⁵

Generally, failure to look back as one backs out of his own driveway is not a defense. Plaintiff, a passenger in defendant's cab, was injured when the cab stopped in front of a driveway and the other defendant's car backed into her. Verdict was affirmed against both defendants in *Bien v. Meyers*.¹⁶ It was for the jury to decide whether the cab driver was negligent in letting her off there and whether it was negligence on the part of the driver to fail to look behind him as he backed out.

But a motorist who backed his car from his garage down his private driveway where he struck plaintiff who was cranking his truck which he had parked in the driveway while making a delivery to the house, was held in *Caplan v. Reynolds*¹⁷ not to be negligent as a matter of law where he testified that he saw nothing when backing out. While the truck driver was not a trespasser, said the court, the fact that he was in a private driveway was a circumstance to be considered as bearing on the degree of care the motorist was required to use.¹⁸

A fairly safe conclusion at this point is that patience is a

¹⁵ In *Decker v. Goddard*, 233 N. Y. App. Div. 139, 251 N. Y. S. 440 (1931), an injunction was awarded for parking in front of a landowner's residence for several days for 7 hours each day against the property owner's protest. See also, *Furlong v. N. Deringer, Inc.*, note 66 below.

¹⁶ 9 N. J. Misc. 676, 155 A. 480 (1931).

¹⁷ 191 Iowa 453, 182 N. W. 641 (1921).

¹⁸ Backing from a driveway without taking steps to observe and avoid other vehicles parked in the street is negligence: *Ralph J. Rimer, Inc. v. Stanz*, 122 Ind. App. 178, 101 N. E. 2d 428 (1951).

In *Brown v. Babcock*, 265 App. Div. 596, 40 N. Y. S. 2d 428 (1943), a guest whose auto had been parked in her host's garage, entered her car and backed it into the host and his parked car. She was liable for resulting injuries where the evidence showed that she knew about the car in the driveway but forgot it was there and never looked behind her in backing. For a similar case, see *Frye v. Elkins*, 22 Tenn. App. 317, 122 S. W. 2d 827 (1938).

In the *Brown* case above, the host was not barred because of contributory negligence. Nor was it contributory negligence when the driver of a parked car started to walk toward the sidewalk and was hit by the car in front backing into her notwithstanding that she was in a "no parking zone" since he knew her car was there and he should have looked out for her: *LeBlanc v. Jordy*, 10 So. 2d 64 (La. App. 1942). See: *Suddarth v. Kirkland Daley Motor Co.*, 220 S. W. 699 (Mo. App. 1920).

An operator of a parked car who knows of the presence of another vehicle parked close behind, but deliberately backs into it to gain space, using force or failing to exercise care may be held liable for resulting damage or injury even though the car behind is improperly parked: *Conn v. Hillard*, supra note 11. *Wilgoren v. Pelton*, 266 Mass. 17, 164 N. E. 623 (1929): whether defendant should have avoided the collision was a question of fact for the jury.

virtue. A recent case of first impression in New York indicates that it pays off. An attorney and his wife, in *Harnik v. Levine*,¹⁹ were parked lawfully at the curb. When they returned to their automobile, defendant had unlawfully doubleparked next to them, and they could not move their car. Damages were awarded for \$25, on the theory of public nuisance. The "special damage" claimed was discomfort and inconvenience.

The *Harnik* case was the application of the old rule to new facts. Under the common law rule, an obstruction in the highway is a nuisance. But there are two types of nuisances—public and private. A public nuisance is an offense against the state, and is subject to abatement or indictment on the motion of the proper governmental agency. A private person, however, has a private remedy for damages resulting from a public nuisance where he has suffered a "special injury" different from that of the public in general.²⁰

The majority approach requires that damages to a private individual be different in kind rather than merely in degree from those to the public.²¹ The minority view accepts a showing that plaintiff suffered actual damages and does not follow the kind-degree distinction.²²

It is argued by the minority that unless the plaintiff is required to show actual damages, there would be liability to everyone coming in contact with a public nuisance. If a person suffers pecuniary damages, he should be compensated; but if there is no such person, the malefactor should be punished by the public officials. Plaintiff in the *Harnik* case claimed damages for discomfort and inconvenience. But this is tantamount to pecuniary damage under the minority view.²³

¹⁹ 106 N. Y. S. 2d 460 (Mun. Ct. of City of N. Y., 1951).

²⁰ Special injury rule: *Huebschmann v. Grand Co.*, 166 Md. 615, 172 Atl. 227 (1934); *Wolfe v. City of Providence*, 74 R. I. 192, 74 A. 2d 843 (1950); *Clinic and Hosp. v. McConnell*, 241 Mo. App. 223, 236 S. W. 2d 384, 23 A. L. R. 2d 1278 (1951).

²¹ *Davis v. Hampshire County*, 153 Mass. 218, 26 N. E. 848 (1891); *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600 (1901); *Bacich v. Port of Control of Calif.*, 23 Cal. App. 2d 343, 144 P. 2d 818 (1943); *Hillerege of City of Scottsbluff*, 164 Neb. 560, 83 N. W. 2d 76 (1957).

²² *Piscataqua Nav. Co. v. N. Y. N. H. & H. R. Co.* (D. C. Mass. 1898), 89 F. 362; *Lansing v. Smith*, 4 Wend. (N. Y.) 825 (1829); *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341 (1895). See also *Smith, Private Action for Obstructions to Public Right of Passage*, 15 Colum. L. Rev. 1 (1915); *Case Comment, Torts-False Imprisonment-Public Nuisance-Liability for Doubleparking*, 59 Mich. L. Rev. 1122 (1952).

²³ *Case Comment, Torts-False Imprisonment-Public Nuisance-Liability for Doubleparking*, 50 Mich. L. Rev. 1122 (1952).

Others contend that liability should not have been imposed for another reason. A New York statute defines a public nuisance as a crime (a misdemeanor). In New York, doubleparking is a violation of a traffic ordinance which is not a crime. If doubleparking is a traffic violation and not a crime, how can it be a public nuisance?²⁴

Dictum in the *Harnik* case indicated that an action might lie for false imprisonment, but the court did not have jurisdiction. The court drew an analogy between a "captive audience" and a "captive motorist" and concluded that if the former was entitled to relief, so is the latter.²⁵

It is generally stated that to constitute false imprisonment, there must be actual and total restraint. Those who would argue against false imprisonment in the foregoing case suggest that false imprisonment is based on freedom of movement. In the *Harnik* case, since the plaintiffs could have walked, the restraint was not total.²⁶ On the other hand, proponents say freedom of movement means freedom of locomotion, that is, a restraint of plaintiffs' automobile, depriving them of practical means of locomotion, amounts to complete restraint.²⁷

²⁴ Comment, Doubleparking as a public nuisance, 51 Colum. L. Rev. 1067 (1951): "Prior to the *Harnik* decision, only where the New York legislature designated a traffic violation a crime did the New York courts find the offense a public nuisance. On the premise that a traffic violation should not be treated as a crime, one New York court held that driving on the wrong side of the road is not a public nuisance, although such driving could be classified as an obstruction to the highway. And a private suit to abate the maintenance of public hack stands which obstructed the streets was disallowed on the ground that maintenance of the stands was a violation of a licensing ordinance and should not be held also to be a public nuisance."

A violation of the double parking statute under Pennsylvania's Motor Vehicle Code is negligence per se: *Bricker v. Gardner*, 355 Pa. 35, 48 A. 2d 209 (1946). However, the plaintiff must allege and prove proximate cause: *Marchl v. Dowling & Co.*, 157 Pa. Super. 91, 41 A. 2d 427 (1945).

²⁵ *W. Goldman*, Liability in nuisance for doubleparking, 3 Syracuse L. Rev. 195 (1951).

²⁶ Case Comment, Torts-False Imprisonment-Public Nuisance-Liability for Double parking, 50 Mich. L. Rev. 1122 (1952).

²⁷ *Freeman*, Torts-Doubleparking as false imprisonment and nuisance, 4 Ala. L. Rev. 309-12 (1952). See, *Great So. R. R. v. Denton*, 239 Ala. 301, 195 So. 218 (1940); *Scruggs v. Beason*, 246 Ala. 405, 20 So. 2d 774 (1945). *National Bond & Invest. Co. v. Whitborn*, 276 Ky. 204, 123 S. W. 2d 263 (1938): held, the defendants who seek to repossess a car driven by plaintiff, hail him to the curb and tow his car a short distance with him in it is false imprisonment even though he could have stepped out. In *Cordell v. Standard Oil Co.*, 131 Kan. 221, 289 P. 472 (1930): The defendant's filling station agent drained the gasoline from plaintiff's car and commanded her to wait until he called the police. He believed she was in collusion with thieves. This was a false imprisonment. *Griffin v. Clar*, 55 Idaho 364, 42 P. 2d 297, 301 (1935): "Even a partial restraint as prevention of one's ingress and egress from a place in a certain manner would be sufficient to constitute false imprisonment. The test is not the extent of the restraint but its unlawfulness."

While a doubleparker was in a store in *Newman v. Steurnagel*,²⁸ his guest waiting in his car moved it to afford a blocked car exit. The guest lost control and hit plaintiff's truck in the rear causing him injury. Plaintiff's truck was also doubleparked. The court held that the defendant's negligence in doubleparking was not the proximate cause of plaintiff's injury because he could not have foreseen that his guest would act as he did.²⁹

For further analysis on the question of liability, we go to sea and the English case of *Southport Corp. v. Esso Petroleum Co.*³⁰ The defendants' ship ran aground due to a steering defect. The master, afraid that the vessel would break up with loss of life and property, jettisoned the cargo of oil which floated to the plaintiffs' shore and caused extensive damage. Although the lower court found the master was not negligent in navigation, the appellate court found the defendants liable under the doctrine of *res ipsa loquitur*.

Could the court have found a trespass in the *Southport* case? The "traffic rule" as laid down in *Rylands v. Fletcher*³¹ is that traffic on a highway exposes persons who have their property near it to the risk of trespass, and therefore, such persons cannot recover damages without proof of negligence. The "traffic rule" is restricted to involuntary trespasses and does not extend to cases like this one where the defendant acted deliberately. This may then have been a trespass.³²

If discharging oil into navigable waters is a public nuisance, the plaintiffs in the *Southport* case may recover if they suffer a "special damage." Under the minority view above, a showing of pecuniary loss would seem sufficient.³³

²⁸ 132 Cal. App. 417, 22 P. 2d 780 (1933).

²⁹ Contrast: violation of a statute or ordinance prohibiting angle parking is negligence per se: *Pugh v. Akron-Chicago Transportation Co.*, 137 Ohio St. 164, 28 N. E. 2d 501 (1940); *Hataway v. F. Strauss & Son, Inc.* 158 So. 408 (La. App. 1935); *Telling Belle-Vernon Co. v. Wiggins*, 2 Ohio L. Abs. 373 (Ohio App. 1932).

A defendant's violation of statute requiring that vehicle be parked parallel to and within certain distance of curb is negligence: *Armour & Co. v. Yoter*, 40 Ohio App. 225, 178 N. E. 596 (1931); *Bartley v. Fritz*, 205 Minn. 192, 285 N. W. 484 (1939); *Matthews v. Mound City Cab Co.* (Mo. App. 1947) 205 S. W. 2d 243; *Trailer v. Schelm*, 227 Iowa 780, 288 N. W. 865 (1939).

³⁰ 3 W. L. R. 773 (1953); 3 W. L. R. 200 (1954).

³¹ L. R. 1 Exch. 265 (1866).

³² F. H. Newark, "Trespass or Nuisance of Negligence," 17 Modern L. Rev. 579 Nov. (1954).

³³ *Id.*, at 581. But see *Philadelphia Fire and Marine Ins. Co. v. Hirschfield Printing Co.*, *infra* note 34.

Back on terra firma, what happens when there is damage to a parked car? In *Philadelphia Fire and Marine Ins. Co. v. Hirschfield Printing Co.*,³⁴ the defendant's stalled truck was parked along the curb. The driver drained gasoline from the gas tank, into the street, which ran along the curb and under the insured's parked car. The blaze from a match discarded by another employee lighting a cigarette followed the gasoline down the gutter to the insured's car which was destroyed. The insurance company after paying the insured for his loss sought damages under its right of subrogation. The court found that by spilling the gasoline, a public nuisance was created. The duty to exercise reasonable care was a question of fact which the trial court decided in favor of the insurance company.³⁵

Note that in the *Philadelphia Fire* case, the court applied negligence rules to establish liability with no reference to the "special injury" rule.³⁶

In *Goggin v. City of Seattle*,³⁷ a policeman asked the owner to remove his car from an icy street which was barricaded to provide sledding for children. Before it could be removed, two boys collided with it while propelling their sled downhill. One boy was killed and the other injured. Plaintiff, their father, sued the City on the theory that it permitted a nuisance to exist under its ordinance which provided that any vehicle parked in a public place over 24 hours was a nuisance. The car had been there for 3 to 5 months. The court stated:

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures, or endangers the comfort, repose, health, or safety of others; offends decency, unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, . . . any

³⁴ 73 Ohio App. 627, 53 N. E. 2d 827 (1943).

³⁵ For a good analysis of the distinction between nuisance and negligence see: *Terrell v. Ala. Water Service Co.*, 245 Ala. 68, 15 So. 2d 729 (1943): Negligence and nuisance are distinct torts but both require a breach of duty owed by defendant to plaintiff. Liability for nuisance does not depend on the question of negligence, and may exist although there is no negligence.

³⁶ *Oleck, Nuisance in a Nutshell*, 5 Clev-Mar. L. R. 148, 149 (1956): "The same conduct may be negligence and also nuisance. But negligence is a violation of a relative duty while nuisance is a violation of an absolute duty. Nuisance-conduct is wrongful in itself, negligence is wrongful only in failure to perform a duty owed to the injured party, though the act itself is not wrongful. If damage is an inevitable consequence of what the defendant does or omits, his conduct is nuisance rather than negligence; but there must be some injury sustained, ordinarily, in order to have a right of private action for nuisance."

³⁷ 48 Wash. 2d 894, 297 P. 2d 602 (1956).

public . . . street or highway; or in any way renders other persons insecure in life, or in the use of property.³⁸

The City was negligent in failing to have this nuisance removed, yet the court found it was not liable, for the negligence was in the performance of a governmental rather than a proprietary function, for which a city is immune from liability.³⁹

In some cases the courts characterize the parking motorists as trespassers. In *Decker v. Goddard*,⁴⁰ the party became liable in trespass to the abutting property owner. Although you may bring an action in trespass for damage to the land you own, the question arises as to who owns the street. At common law, the landowner whose property abutted on a highway held title to the fee to the center of the highway, subject to the easement of travel.⁴¹ In many jurisdictions, today, however, the legal title to the street is in the municipality or state which holds the property in trust for the public.⁴²

³⁸ *Id.*, at 603. For other statutory definitions of nuisance, see: Cal. Civ. Code, § 3479; Burns Ind. Stats., § 2-505; and Ohio R. C. § 3767.01, note 45 below.

³⁹ Accord: *Lakoduk v. Cruger*, 287 P. 2d 338, 47 Wash. 2d 286 (1955); *Bradshaw v. City of Seattle*, 43 Wash. 2d 766, 264 P. 2d 265, 42 A. L. R. 2d 800 (1953); *Sultan v. Parker-Washington Co.*, 117 Mo. App. 636, 93 S. W. 289 (1906); *People v. Borden's Condensed Milk Co.*, 165 App. Div. 711, 151 N. Y. Supp. 47 (2d dept.) affirmed, 216 N. Y. 658, 110 N. E. 1046 (1942). Contra: *Downey v. Jackson*, 259 Ala. 189, 65 So. 2d 825 (1953).

For Ohio cases on the subject, see: *Chupek v. City of Akron*, 89 Ohio App. 266, 101 N. E. 2d 245 (1951); *Ware v. City of Cincinnati*, 93 Ohio App. 431, 111 N. E. 2d 401 (1952); *Ballinger v. City of Dayton*, 95 Ohio App. 62, 117 N. E. 2d 469 (1952): municipal corporations may be held liable for the maintenance of nuisances when they are performing a governmental function, as well as being held liable in damages for negligence when exercising their proprietary power.

Wall v. City of Cincinnati, 150 Ohio St. 411, 83 N. E. 2d 389 (1948): The duty imposed on a municipality by statute to keep its streets free from nuisance is an exception to the common law rule that no liability attaches to the municipality for negligence in discharge of a governmental function.

⁴⁰ 233 App. Div. 139, 251 N. Y. Supp. 440 (1931). See also, *Reynolds v. Clarke*, 1 Pitts. Rep. 9 (Pa., 1853); *Lipincott v. Lasher*, 44 N. J. Eq. 120, 14 Atl. 103 (1888); *Lloyd, The Parking of Automobiles*, 77 U. Pa. L. Rev. 336 (1928); 1 Restatement of Torts, Sec. 192, comment f (1934); 1 Harper and James, *The Law of Torts*, Sec. 1.14, p. 43, 44 (1956).

⁴¹ *Hickey v. Riley*, 177 Ore. 321, 324, 162 P. 2d 371, 374 (1945); *City of Decatur v. Robertson*, 251 Ala. 99, 361 So. 2d 694 (1948); *Mont. Glodt v. City of Missoula*, 121 Mt. 178, 190 P. 2d 549 (1948); *Chase v. City of Sanford*, 212 Miss. 237, 54 So. 2d 372 (1951); *Greenwood v. City of Washington*, 230 Ind. 220, 102 N. E. 2d 645 (1952); *Wilson v. City of Laramie*, 65 Wyo. 234, 199 P. 2d 121 (1948); *People ex rel. Hoffmaster v. LaDuc*, 329 Mich. 716, 46 N. W. 2d 442 (1951). See also, 1 Harper and James, *Law of Torts*, Sec. 1.14, p. 43 (1956).

⁴² *Loubach & Sons v. City of Easton*, 347 Pa. 542, 32 A. 2d 882 (1943); *Pa. County v. Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 823 (1899); *Hillerege*

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Lastly, the landowner has the remedy of injunction. The rules are similar to those already revealed, but their application is very much different.

At common law and in the majority of states, one may enjoin an obstruction caused by a parked vehicle which deprives the landowner of his right to access causing him "special injury" unlike that suffered by the general public. This is the general rule today.⁴³ The "special injury," however must be proved whether or not a statute or ordinance has been violated.⁴⁴

In Ohio,⁴⁵ a nuisance is that which is defined and declared by statutes to be such.⁴⁶ (Certain activities are declared by

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v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76 (1957); Cowin v. City of Waterloo, 237 Iowa 377, 21 N. W. 2d 705 (1946); Splinter v. Nampa, 70 Idaho 331, 215 P. 2d 999 (1950).

The Ohio Constitution, Article I, § 19 declares that "roads shall be open to the public" and while, by provisions of Ohio R. C. § 723.01, the legislature delegates to municipalities the control and regulation of the streets within their confines, it has in clear terms placed on them the duty to keep the streets "open, in repair and free from nuisance."

⁴³ Rose v. Miles, 4 M. & S. 101, 105 Eng. Rep. 773 (1815); Branahan v. Cincinnati Hotel Co., 39 Ohio St. 333, 49 Am. Rep. 457 (1883); Brauer v. Baltimore Refrig. & Heating Co., 99 Md. 367, 58 Atl. 21, 66 L. R. A. 403 (1904); Flynn v. Taylor, 6 N. Y. Supp. 98, 28 N. E. 418 (1891); Hill v. Pierson, 45 Neb. 503, 63 N. E. 835 (1895); People ex rel. L'Abbe v. Distr. Ct. of Lake County, 26 Colo. 386, 58 P. 604, 46 L. R. A. 850 (1899); Buchholz v. N. Y. Lake Erie & W. R. R., 148 N. Y. 640, 43 N. E. 76 (1895); Cf. Manhattan Bridge 3-Cent Line v. Third Ave. Ry., 154 App. Div. 704, 137 N. Y. Supp. 434 (2d dept., 1913).

⁴⁴ Graceland Corp. v. Consolidated Laundries Corp., 7 A. D. 2d 89, 180 N. Y. S. 2d 644 (1958). The "special injury" must be shown since equity will not enjoin a crime because of the constitutional rights of the accused person: Oleck, Nuisance in a Nutshell, supra note 36, at 158. Also, see State v. Ehrlich, 65 W. Va. 700, 64 S. E. 935, 23 L. R. A. (N. S.) 691 (1909); Ohio Rev. Code, Sec. 2767.24.

⁴⁵ Under Ohio R. C. § 3767.03: Whenever a nuisance exists, the attorney general, prosecuting attorney of the county in which such nuisance exists or any person who is a citizen of such county may bring an action in equity in the name of the state to abate such nuisance and to perpetually enjoin the person maintaining the same. . . . (Emphasis added.) For comparative legislation, see: Ky., K. R. S. 233.010; Mass. Ann. Laws, Ch. 139, Sec. 4; Penn. Purdon's Stat., Title 68, Sec. 467; Tenn., Williams Code, Sec. 9324.

Under Ohio R. C. § 5589.01:

"No person shall obstruct or encumber by fences, buildings, or otherwise, a public ground, a highway, street or alley of a municipal corporation."

To park automobiles in a street for purpose of sale is not an offense under this section: Fry v. State, 55 Ohio App. 264, 9 Ohio Op. 40, 9 N. E. 2d 701 (1936). Violators may be fined not more than \$500 under Ohio R. C. § 5589.99. For comparative legislation, see: Midwest Investment Co. v. Chariton, 248 Iowa 407, 80 N. W. 2d 906 (1957); Iowa Code, § 657.2, I. C. A. (5) (1957).

⁴⁶ Ohio R. C. § 3767.01.

statute to be a public nuisance such as a gambling house and houses of ill repute.⁴⁷)

The landowner has special common law property rights in the street, which include: (1) the right of reasonable access or of ingress and egress; and (2) the right to have the street open and unobstructed for public travel so as to benefit his adjoining property.⁴⁸

These two special property rights extend up, down and across the street and are not limited to the front of one's lot.⁴⁹ Furthermore, these rights are available whether the fee to the highway is in the name of the abutting landowner or not.⁵⁰

How these property rights are protected is the subject of the following cases. They have been classified as to specific types of landowners who are seeking to enjoin one of the following parties: (1) Another landowner on the same highway; (2) A competitor who is using the street to carry on the same business as the landowner; (3) A businessman soliciting in the street, such as a taxicab company; (4) The municipality, from installing parking meters; and (5) Operators of entertainment establishments.

(1) **Another Landowner.** In *Graceland Corp. v. Consolidated Laundries Corp.*,⁵¹ the owner of a tenement house in New York City desired to enjoin its next-door neighbor, a laundry which permitted its trucks and automobiles to park on the public pedestrian sidewalk in front of its building in violation of a city traffic ordinance. *Held*, it was a public nuisance. The "special damage" suffered by the hotel owner was a loss in rental of its property because the access of pedestrians to the hotel was

⁴⁷ Ohio R. C. §§ 2915.02 and 715.52.

⁴⁸ *Hall v. Pittsburgh C. C. & St. L. Ry.*, 85 Ohio St. 148, 97 N. E. 383 (1911); *City of Columbus v. Ward*, 65 Ohio App. 522, 31 N. E. 2d 142 (1940); *Cleveland Furnace Co. v. Newbury & S. S. R. R.*, 86 Ohio St. 354, 99 N. E. 1123 (1912); *Flynn v. Taylor*, 6 N. Y. Supp. 98, 28 N. E. 418 (1891); *City of Decatur v. Robinson*, *supra* note 41; *Loubach & Sons v. City of Easton*, *supra* note 42; *Lynn v. Duckel*, 139 Cal. App. 2d 792, 294 P. 2d 457 (1956); *Greenberg v. Snodgrass Co.*, 161 Ohio St. 351, 119 N. E. 2d 292, 49 A. L. R. 2d 974 (1954).

⁴⁹ *Madden v. Pa. R. R.*, 88 Ohio St. 649, 65 N. E. 1132 (1903); *Hall v. Pittsburgh C. C. & St. L. Ry.*, *supra* note 48.

⁵⁰ *People v. Propp*, *supra* note 2; *Pa. Co. v. City of Chicago*, 181 Ill. 289, 54 N. E. 825 (1899); *Schiabie v. Lake Shore & MS R. R.*, 10 Ohio C. C. 334, 6 Ohio C. C. Dec. 505 (1895); *People ex rel. Faulkner v. Harris*, 203 Ill. 272, 67 N. E. 788 (1903). But see: *Furlong v. N. Deringer, Inc.*, *infra* note 58.

⁵¹ *Graceland Corp. v. Consolidated Laundries Corp.*, *supra* note 44. In Ohio, a partial obstruction seems to be sufficient: *Madden v. Pa. Co.*, 21 Ohio C. C. R. 73 (affirmed), 66 Ohio St. 649, 65 N. E. 1132 (1902).

partially blocked. It is not necessary to show actual pecuniary damages. The laundry was enjoined from parking in front of its building, but parking was allowed for reasonable periods for the purpose of loading and unloading goods. A strong dissent felt that a court of equity should not act as a super traffic police force and that no real "special damage" had been shown.⁵²

*Flynn v. Taylor*⁵³ contains a similar decision based on different facts. Defendant was a manufacturer of articles for domestic consumption. Plaintiff operated a retail liquor store next door. Defendant, during several hours of every day, permitted its trucks to load and unload on the sidewalk in front of its factory. Plaintiff claimed that the "special damage" suffered was a decline in the rental value of his premises. The court maintained that the right to bring the suit did not depend on the amount of the "special damage":

We think that in a populous city whatever unlawfully turns the tide of travel from the sidewalk directly in front of a retail store to the opposite side of the street is presumed to cause special damage . . . because diversion of trade inevitably followed diversion of travel.⁵⁴

(2) **A Competitor.** A close cousin to the two foregoing cases above is *Strong v. Sullivan*.⁵⁵ At night, defendant parked his lunch wagon in front of the restaurant of plaintiff's tenant and sold food to people passing by on the sidewalk. Plaintiff argued that his "right of access" was being obstructed because customers were going to the defendant instead of to the tenant. *Held*, injunction granted because the "special damage" was a loss of customers.

⁵² Case Comment, Public Nuisance-Special Damage-extent thereof, 23 Albany L. Rev. 447 (May, 1959). (Although it was not necessary to show actual pecuniary loss in this case, it should be noted that this specific question has not been decided by the highest court in New York).

⁵³ *Supra* note 48.

Ice wagons obstructed the sidewalk several hours every day in *Brauer v. Baltimore Refrig. and Heating Co. of Baltimore*, 99 Md. 367, 58 Atl. 21, 66 L. R. A. 403 (1904). The court awarded a neighboring liquor store operator an injunction and declared:

"How far the abutting owner may obstruct his sidewalk in front of his premises is not to be determined by the necessities of his business but by the public convenience and enjoyment by adjacent owners of their property." (Page 22.)

Accord: *Wood v. City of Chickasha*, 125 Okla. 212, 257 P. 286 (1927).

⁵⁴ *Flynn v. Taylor*, *supra* note 48, at 419.

⁵⁵ 180 Cal. 331, 181 P. 59, 4 A. L. R. 343 (1919). Accord: *Pa. County v. City of Chicago*, *supra* note 42; *Comm. v. Morrison*, 197 Mass. 199, 83 N. E. 415 (1908); *Spencer v. Mahon*, 75 S. C. 232, 55 S. E. 321 (1906). Contra: *Rex v. Bartholemew*, 1 K. B. (Eng.) 554, 52 So. Jo. 208, 21 Cox, C. C. 556 (1908).

At common law this type of "nuisance" was early recognized and redressed. The damage was in taking away customers. The underlying policy was to keep competition free unless it was restricted by the King, common law or statute.⁵⁶ It does not seem "right" to the courts to have a landowner pay overhead and rent bills and yet to permit a traveling food wagon or truck which has no rent or overhead expenses to use the street directly in front of the landowner, obstructing his access.⁵⁷

(3) **A Businessman Soliciting in the Street** (not in direct competition with a landowner). In *Furlong v. N. Deringer, Inc.*,⁵⁸ defendant operated a customs brokerage business and was soliciting business through its agent who was parked opposite defendant's custom house. Plaintiff owned the land on both sides of the street where the parking took place. The car was parked from 8 a.m. until 5 p.m. daily except week-ends. Plaintiff claimed that defendant was using her land for the purpose of conducting a business for private gain. The defense: her right is subject to the easement of the public in streets to use them for reason-

⁵⁶ *McRae, The Development of Nuisance in the Early Common Law*, 1 U. Fla. L. R. 27, 37 (1948). In *Shamhart v. Morrison Cafeteria Co.*, 159 Fla. 629, 32 So. 2d 727, 2 A. L. R. 2d 429 (1947), a drugstore operator complained that access to his store was being obstructed by the cafeteria owner's customers. The cafeteria owner denied the existence of a nuisance and even if there was one, it was not of his creation. Held, the defendant has no duty to police the public streets and regulate their use. That responsibility rests on public authority. But where an abutting property owner uses the sidewalk in an unreasonable manner, a public and private nuisance results. If another abutting landowner suffers a special injury, he may have appropriate relief.

Dissent:

"Before there is liability, the acts done by the defendant must be the proximate cause of the creation of the nuisance complained of A person is not usually civilly liable for a nuisance caused or promoted by others over whom he has no control." (Page 731.)

See also, *Jacksonville, Tampa & Ky. Ry. v. Thompson*, 34 Fla. 346, 16 So. 282, 26 L. R. A. 410 (1894).

⁵⁷ Under Ohio R. C. § 2923.22 (Penal Code):

"No person shall set up a table, stand, tent, wagon, or other article, to use or let for profit, on a public street . . . or obstruct . . . the material of which it is composed."

This is punishable by fine and imprisonment. In view of this section, a city has no authority to grant permission to use a street for private business purposes: *Rowe v. Cincinnati*, 26 Ohio App. 87, 159 N. E. 492 (1927); *Gerspacher v. Cleveland*, 21 Ohio Op. 537 (Common Pleas, 1941).

Loading and unloading goods from wagons standing on the sidewalk from 3 to 40 minutes at a time from one to two hours each day and causing pedestrians to walk in the street is a violation of this section: *McCormick Harvesting co. v. Kauffman-Lattimer Co.*, 5 Ohio N. P. 505, 5 Ohio Dec. 468 (1894).

⁵⁸ 111 Vt. 220, 13 A. 2d 186 (1940). Accord: *People ex rel. Hoffmaster v. LaDuc*, *supra* note 41. But see, *Pa. Co. v. City of Chicago*, *supra* note 50.

able transportation of persons and things and dissemination of information. *Held*, injunction granted. Nothing was said about nuisance doctrine or "special injury."

Probably the bulk of cases under this category, however, involve taxicab companies. One of the earliest English cases was *Rex v. Cross*.⁵⁹ There was an indictment for maintaining a common nuisance, against the owner of a stagecoach concern whose coaches stood for unreasonably long periods ranked in two and three tiers upon the public highways in London. *Held*, that every unauthorized obstruction of the highway to the annoyance of the public is an indictable offense.

The Ohio Supreme Court was confronted with such a problem in *Branahan v. Cincinnati Hotel Company*.⁶⁰ The hotel sought an injunction and damages against the owners of hackney coaches due to interference with free access to its storerooms rented in the hotel building on the first floor. The coaches parked in front of the storerooms, waiting for customers. The Court granted the injunction since an abutting owner has a valuable "right of access" for business purposes to the street. The coach company argued that users of the hacks were accommodated more readily and on better terms. The court said that the right of access is more important. The implication was that the "special injury" was loss in rental value and loss of customers.

(4) **The Municipality from Installing Parking Meters.** Plaintiff, in *Hickey v. Riley*,⁶¹ leased property abutting on a public street. Parking meters were installed in front of and immediately adjacent to his leased property. He asked that the meters be removed and the city be enjoined from continuing their use because they interfered with his right of access to his premises by himself and his customers. Although the court found that he suf-

⁵⁹ 3 Camp. Rep. (Eng.) 224, 170 Reprint 1632 (1812).

⁶⁰ *Supra* note 43. *Waldorf-Astoria Hotel Co. v. City of New York*, 212 N. Y. 97, 105 N. E. 805 (1914): Ordinance for hack stands valid and not interference with hotel's right of ingress and egress; *Red Top Cab Co. v. McGlashing*, 204 Iowa 791, 213 N. W. 793 (1927); *McFall v. City of St. Louis*, 232 Mo. 716, 135 S. W. 51 (1911): Ordinance valid giving abutting property owner right to grant permission to certain passenger vehicles in streets subject to mayor's approval; *Kansas City Terminal Ry. Co. v. James*, 298 Mo. 497, 251 S. W. 57 (1923): Railway cannot grant monopoly in one taxicab company by excluding other cabs from its approach even if it owns the approach; *Park Hotel Co. v. Ketchum*, 184 Wis. 182, 199 N. W. 219, 33 A. L. R. 351 (1930): Injunction denied. If two other competing cab companies did not interfere with the hotel's right of access, then defendant did not either.

⁶¹ *Supra* note 41. Accord: *City of Columbus v. Ward*, *supra* note 48.

ferred a "special injury" in losing some of his customers and in not being able to park there himself, the injunction was denied. The court reasoned that part of the police power of the city is the regulation and control of the use of the streets and maintaining them in safe condition.⁶²

In *Kimmel v. City of Spokane*,⁶³ plaintiff sought to enjoin installation of parking meters in front of his storeroom. Decree for plaintiff was reversed on appeal. Plaintiff argued that the parking meters were an unlawful interference with his right of ingress and egress. He said his right of access was subservient only to the right of the traveling public. It was not subservient to the privilege of parking in front of his storeroom. But the court said:

Under the exigencies and complexities of modern life, it is impossible to guarantee to respondent free and uninterrupted access to his premises at all times. The use of the streets and highways for the parking of motor vehicles has been too long and too well established by custom to now be denied because of the theoretical right of the occupant of abutting property to free and uninterrupted access to his premises at all times. . . . It is obviously to the interest of the occupant of abutting property that such time limits be strictly enforced, for the shorter the limitation and the more effectively it is enforced, the greater is his freedom of access to his premises.⁶⁴

Clearly, until something better comes along, the use of parking meters is an accepted method of easing traffic congestion.

(5) **Entertainment Establishments.** A private nuisance suit is a different action from one for a public nuisance. In a private nuisance action, the interest invaded is in the use and enjoyment of land. More specifically, the use defendant is making of his land is interfering with plaintiff's use and enjoyment of his land.

The courts, in considering the operation of dance halls and the conduct of public dances, determine whether a private nuisance exists by giving weight to the fact that large numbers

⁶² In *Andrews v. City of Marion*, *supra* note 1, the plaintiff contended that the parking meter ordinance required him and his friends to pay for parking in front of his own property and therefore he was deprived of his property without due process of law, contrary to the 14th Amendment of the Federal Constitution. But, injunction was denied. The regulation is necessary under the police power in order to keep traffic moving, to minimize congestion in busy streets, and to fairly distribute the privilege of parking among the members of the public using the street.

⁶³ *Supra* note 1. Accord: *City of Decatur v. Robinson*, *supra* note 41.

⁶⁴ *Id.*, at 1071.

of cars recurrently congregate, causing traffic, parking problems and other annoyances. For example, in *Barrett v. Lopez*,⁶⁵ an action to abate defendant's operation of a dance hall near plaintiff's properties as a private nuisance was instituted in the Village of Loving, New Mexico. The activities complained of were: (1) the blocking of private driveways by automobiles belonging to defendant's customers; (2) love making in the vehicles parked in the vicinity and the disposition of evidence of the same on nearby property; and (3) loud horn honking.

The trial court refused relief not because it did not believe a private nuisance existed but because: (1) defendant was using every reasonable means to keep his dance hall in reasonable order and decorum; and (2) the police authorities should afford plaintiffs their remedy, not the courts. This was reversed by the Supreme Court of New Mexico, which stated that, where it is clear that a private nuisance exists, relief should be given by the courts if the civil authorities will not take action.

Plaintiff owned a farm in *Amdor v. Cooney*.⁶⁶ Defendant owned an adjoining farm with a baseball diamond on it. The diamond was across the road from plaintiff's buildings. Plaintiff sought to enjoin as a private nuisance the use of the diamond for baseball games. The annoyances were the parking of automobiles in front of plaintiff's buildings on the road, blocking his access. The court ordered the diamond to be moved to the northwest corner of the field where the spectators then would park their cars. The courts, in a case where a "private nuisance" is shown, will consider and adopt alternatives.

⁶⁵ 57 N. Mex. 697, 262 P. 2d 981 (1953). Many activities have been held to be nuisances, under circumstances which produced an unreasonable annoyance to the plaintiff, including ballparks and dance halls.

Ballparks: *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 27, 53 Atl. 289 (1902). Dance halls: *Parker v. Truehart* (1922, Tex. Civ. App.) 246 S. W. 267: Even a city license or permit will not prevent equity from enjoining a nuisance; *Whitcomb v. Vigeant*, 240 Mass. 359, 134 N. E. 241, 19 A. L. R. 1439 (1922); To operate a dance hall without a license is a crime and a public nuisance: *Linden v. Fischer*, 154 Minn. 354, 191 N. W. 901 (1923); *Thurman v. State*, 67 S. W. 2d 382 (Tex. Civ. App. 1934); A dance hall is a public nuisance: *Blanton v. State*, 38 Okla. Crim. 149, 259 P. 655 (1927) and *Ahr v. State*, 31 S. W. 657 (Tex. Crim., 1895); *Phelps v. Winch*, 309 Ill. 158, 140 N. E. 847, 28 A. L. R. 1169 (1923); *Meadowbrook Swimming Club v. Albert*, 173 Md. 641, 197 Atl. 146 (1938); *Bartlett v. Moats*, 120 Fla. 61, 162 So. 477 (1935); *Asmann v. Master*, 151 Kan. 281, 98 P. 2d 419 (1940); *Sipe v. Dale*, 183 Okla. 127, 80 P. 2d 569 (1938). Also see, 1 Harper and James, *The Law of Torts*, Sec. 1.25, p. 75 (1956).

⁶⁶ 241 Iowa 777, 43 N. W. 2d 136 (1950). But see: *Galveston Comm. Ass'n v. Ort*, 13 Okla. Crim. 563, 165 S. W. 907 (1914): The construction of a baseball park under purported municipal authority may be enjoined as interference with abutting landowner's special property right of access.

Plaintiff owned a farm about .8 of a mile from a gambling house. Business was so good that traffic backed up as far as plaintiff's home. The motorists parked in front of and on his premises, drank and made love. His driveway was often blocked by parked vehicles. Inquiries by telephone and personally were made of him as to where the "Club" is. The foregoing facts occurred in the Ohio case of *Widmer v. Fretti*.⁶⁷ At first blush, it may appear to be a private nuisance action, but it was not so held.⁶⁸ In Ohio, a gambling house is a public nuisance per se. Therefore, it is necessary only to prove the commission of the act and not that the nuisance interferes with enjoyment of property since this is conclusively presumed from the act. A permanent injunction was granted because of plaintiff's proximity to the gambling house.

In the *Widmer* case compensatory damages were not awarded by the Court of Appeals of Ohio. To be liable for the alleged damages of the trespassers requires that the defendant have direction or control over them. No control was shown. The damages with respect to the telephone calls were speculative in absence of proof that defendant instigated the calls. No loss in rental value was proved because the house was not being rented.

⁶⁷ 95 Ohio App. 7, 52 Ohio Op. 343, 116 N. E. 2d 728 (1952).

Stegner v. Bahr & Ledoyen, Inc., 126 Cal. App. 2d 220, 272 P. 2d 106 (1954), (Syllabus #5): "Where operation of rock quarry caused an increase in truck traffic on highway abutting plaintiff's property but it was not shown that this traffic obstructed or interfered with plaintiff's right of ingress or egress nor that the increased traffic unlawfully obstructed the free passage or use in any customary manner of the highway, the increased traffic on the highway did not furnish a basis for enjoining the quarry operation."

Furthermore, the violation of a penal ordinance does not of itself create a nuisance per se, and in the absence of special injury, an injunction will not be granted on the application of a private individual merely to prevent violation of a penal ordinance.

The operation of a quarry is not a nuisance per se: *Morton v. Superior Ct.*, 124 Cal. App. 2d 577, 269 P. 2d 81, 47 A. L. R. 2d 478 (1954).

⁶⁸ A distinction is made between an absolute nuisance and a nuisance per accidens. "In the case of a nuisance per accidens, a clear case of nuisance and irreparable injury must be established and conflicting equities must be weighed, but in the case of a nuisance per se, the liability is absolute and injury to the public is presumed. If the evidence tends to show irreparable injury to the plaintiff, separate and distinct from that suffered by the public, by reason of the unlawful conduct, the injunction should issue." *Widmer v. Fretti*, *supra* note 67.

Per accidens: *Goodall v. Crofton*, 33 Ohio St. 271, 31 Am. Rep. 535 (1877); *Eller v. Koehler*, 68 Ohio St. 51, 67 N. E. 89 (1903); *Powell v. Craig*, 113 Ohio St. 245, 148 N. E. 607 (1925); *Antonik v. Chamberlain*, 81 Ohio App. 476, 78 N. E. 2d 752 (1947); *World Realty Co. v. Omaha*, 113 Neb. 396, 203 N. W. 574 (1925); *Green City Bd. of Comm. v. Usrey*, 221 Ind. 197, 46 N. E. 2d 823 (1943); *Bell v. Pollak Steel Co.*, 28 Ohio Dec. 50, 19 Ohio N. P. (n.s.) 531 (1917).

That the house could have been rented for a certain sum is speculation.⁶⁹

Conclusion

Tort law with respect to the parked motorist is in the early stages of development. There is a sprinkling of legislation abating the parking of an automobile as a nuisance and providing fines and imprisonment for various offenses under the penal and civil codes of the various states. The realization that such legislation exists should be a sufficient deterrent to citizens to refrain from moving another's automobile in the streets. But when local law enforcement agencies are slow to act or refuse to do so, resort may be had to the courts for relief. And the trend is definitely in this direction.

Most courts have not welcomed the trend. By juggling the feudal concepts of property rights with the limited legislation available today, the result is usually confusion. It is recommended that the law in this area be re-evaluated so as to keep it abreast of one of the most commonplace but vitally important instruments of our century—the automobile.

⁶⁹ Nominal damages awarded in *Hazen v. Perkins*, 92 Vt. 414, 105 Atl. 249 (1918); *Graceland Corp. v. Consolidated Laundries Corp.*, *supra* note 44; *Bannon v. Murphy*, 18 Ky. 989, 38 S. W. 889 (1897).