Roadside Protection through Nuisance and Property Law

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● A ROADSIDE use on private land along a highway directly interferes with the safety and convenience of highway users. But no legislation bars the use. May a court nevertheless stop it?

Smoke from a burning dump on Green's land blinds highway users Can a court require him to put the fire out even though there is no statute?

Recall the case of *Perlmutter v Greene.*[1] A roadside merchant, in spite of protests, started to erect an enormous billboard on his own business premises at a particularly dangerous curve where a busy, narrow road approached a bridge. To hide the dangerous sign, the superintendent of public works was permitted by the court to build a white lattice-work on a state-owned strip of right-of-way. Could he instead have protected the motoring public by simply getting a court injunction requiring the merchant to tear down the sign?

At the terminus of an oil pipe line, near a heavily traveled state trunk highway, six oil companies are proposing to build a tank farm. The town board has amended the zoning ordinance to permit the construction. Several large tanks are to be built right up to the right-of-way line. An access road with an estimated traffic of 120 trucks a day is to enter the highway at right angles, midway up a hill Can a court, even though there is no state or local legislation, order the tanks set back and make provision for safer access?

A $90-million expressway extending from the Pennsylvania Turnpike to and through Pittsburgh has been built.[2] As a part of the project it was necessary to tunnel through Squirrel Hill. As the motorist leaves the tunnel, going west, he enters a complicated interchange. Through a slip-up, a small piece of land in the middle of the interchange was not purchased by the state. An enormous electric advertising sign has been erected on this bit of land. There is no legislation to have it torn down. Can a judge nevertheless order it to be removed?

If affirmative answers can be given to these questions, then, the judicial injunction may be used to eliminate at least the worst abuses along our highways Not only that, but this common-law power in the courts may provide an additional, and solid, base on which to argue the validity of such roadside legislation as does get passed by legislative bodies.

Injunctions in cases of roadside abuses can be justified on any one of three lines of court-made case law: (1) the roadside owner has violated his property law duty as owner of a "servient tenement" not to interfere with the "dominant" rights of the public; (2) the roadside abuse is enjoinable as a public nuisance; and (3) the roadside owner is guilty of continuing negligent or intentional conduct, in breach of his duty to permit free and safe passage on the highway An injunction is appropriate since the wrong is continuing and the injunction may avoid many actions for damages.

All three lines of reasoning obviously come out the same way: substantial inter-

[1] 259 N.Y 327, 182 N E 5, 81 ALR 1543 (1932).

[2] See remarks by Mr Schmidt, AASHO, Right-of Way Committee, A New Look at the Roadside Problem (1950) 35-36.

ference with safety and free passage on the highway will be enjoined even though the cause of the interference originates on privately owned land abutting the highway. These three lines of reasoning have understandably been intertwined and intermingled by the courts. Further, in modern times abutting owners have, in an overwhelming stream of cases, sued to claim rights of access, of view, and of light and air.

These many claims of private rights have tended to blind us to the fact that the roadside owner has duties as well as rights. Accordingly, vigorous modern use of these three approaches to the problems of roadside protection is lacking. A recent property law text,[3] for example, presents an elaborate section on "rights of abutters," but makes no mention at all of "duties of abutters." Small wonder that highway officials and their lawyers think they are powerless to act against roadside abuses, in absence of police-power legislation. Nevertheless, modern cases sustaining sometimes drastic regulation of the right of access have clearly recognized that such right may be sharply qualified by an overriding duty owing to users of the highway.[4]

Actually the strong, though seemingly forgotten, historical fact is that judges as well as legislators have for centuries used the sovereign power of the state (call it "police power" if you want) to impose duties upon abutting landowners so that, "the people have more ready and easy passage" on the highway, to quote an old and vigorous Elizabethan statute.[5]

Let's look at each of the three lines of reasoning in order and at some of the precedents, both court cases and old legislation, which strongly suggest that we have here some rusting tools which can, at least in extreme cases of roadside abuse, be fitted and polished to modern needs.

[3] II American Law of Property (1952) Sec 9 54.

[4] See for example, Jones Beach Blvd Estate Inc v Moses, 268 N.Y 362, 197 N E. 313 (1935) and other cases noted in 100 ALR 491 (1936)

[5] 5 Eliz 13, sec 7 (1562) Highway protectionists may wish to consider adopting this phrase as a slogan for action

PROPERTY LAW DUTIES OF THE ROADSIDE OWNER

In the first great English law text, written only a hundred years or so after the Norman Conquest, we find Glanville saying that the king's rights in a highway are as absolute as his rights in royal demesne land.[6] An edifice built in the highway belongs to the king, not to the encroacher. A century later the great popularizer of English law, Bracton, was writing that the royal property in a king's highway was "a sacred thing, and he who has occupied any part thereof by exceeding the boundaries and limits of his land is said to have made an encroachment on the King himself." [7]

"King's Highway" in those days was much more than an honorary name for a road; it was a statement of property ownership. And the sovereign rights in the highway were "property" even though all that was owned was an easement of right-of-way, as distinguished from the fee simple in the highway strip [8] Very early it became clear that the king owned this property for all members of the public who wished to use the road.[9] Today, in this country, our courts, especially in motor-carrier tax and regulation cases, have repeatedly indicated that our public highways are "property," whether by way of easement or fee simple, held by the appropriate governmental unit in trust for the public,[10] and it is said: "The trust for street or other highway purposes is not a mere dry or passive trust but one in the execution of which the trustee has and holds the possession, control, management, and supervision of the trust property, and its primary object is the interest of the public, which must be always paramount to all other interests." [11]

[6] Book IX, c. 11 See also Street, Foundations of Legal Liability (1906) 212-213

[7] Vol 3, (Twiss ed 1880) I 149

[8] Dalton, The Country Justice (1666) pp 73, 75

[9] Ames, Lectures on Legal History (1913) 213

[10] Hertz Drivurself Stations Inc v Siggins, 359 Pa 25, 58 A (2d) 464, 7 ALR (2d) 438 (1948) and cases there cited Cf Bd of Road Com'rs v Markley, 260 Mich 455, 245 N.W 496 (1932)—"A highway is an easement of perpetual character, a freehold estate" And see Elliott, Roads and Streets (3rd ed 1926) sec 511 who would rest the legislative power to regulate with respect to highways upon the states' ultimate proprietary right in the road.

[11] 25 Am. Jur (1940) 428.

Granting, then, that highway rights are property rights (whether they add up to an easement or to a fee simple), are they of such a character as to impose a burden on abutting land so that it can be said that, for some purposes at least, the public rights constitute a "dominant tenement," with the abutter's interest a "servient" tenement?

If I own a private right-of-way across your field so that I can get to my land, mine is the dominant tenement, yours the servient Of course if you block the driveway, I am entitled to judicial help to get it unblocked. But I can also restrain you from doing anything on your land near the road which will unreasonably interfere with my dominant rights of passage.[12]

So, too, when a railroad acquires a right-of-way, burdens are imposed on the abutting land limiting its use to such activities as will not interfere with use of the railroad track.[13]

There is no reason to suppose that if such servient obligations exist with respect to mere private, or quasipublic rights-of-way, they do not exist with respect to full-fledged public highways. The historical evidence collected here and in the next two sections of this paper strongly bears this out.

And the duties of the servient owner change as modes of transportation and travel on the highway change. The public's property in the highway, be it an easement or fee-simple ownership, does not limit the public to the means of travel or transportation in existence at the time the public rights were acquired. A highway easement acquired in horse-and-buggy days became available for auto travel without purchase of any additional rights from abutters.[14] The right to use the highway expands with technology, and so accordingly do the duties of the servient owners. And the laying down of street-car tracks and installation of facilities for the wide-scale supplying of heat, light, and power, above and below the highway have also been held to be appropriate exercises of public highway rights, even though the public rights were acquired before these means of transmission were known.[15]

That these expandable public rights dominate the servient estate of the abutter is established by six centuries of English statutory and case law, much of which migrated to America.[16]

We start with the noteworthy year of 1285. Edward I, in the thirteenth year of his reign, signed the Statute of Winchester,[17] directing lords whose lands border market town roads to set back their parks at least 200 feet from each side of the road and to cut all bushes and small trees within these 200-foot strips. Possibly Edward's purpose was to provide safer military roads less subject to successful ambush by bowmen. The announced purpose, though, was to protect travelers from highwaymen, as is evident from this passage:

> And further it is commanded, That Highways leading from one Market-Town to another shall be enlarged, whereas Bushes, Woods or Dykes be, so that there may be neither Dyke, Tree nor Bush, Wherby a Man may lurk to do hurt, within Two Hundred Foot of One Side, and Two Hundred Foot of the Other Side of the Way. . . .

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[12] See for example, Correlative Rights of Dominant and Servient Owners in Right of Way for Electric Lines, 6 ALR (2d) 205 (1949), Correlative Rights of Dominant and Servient Owners in Right of Way for Pipeline, 28 ALR (2d) 630 And see II American Law of Property (1952) Sec 814 Cf Walsh, Equity (1930) 200, " the wrong [of interfering with public rights of way] . is something more than a mere interference with the use of property or property rights in the state or city as owner, it is the injury to the public by interference with essential rights of its members "

[13] 51 C J 574 (1930) "In accordance with the rule of exclusive use and possession in the railroad company, the owner of the servient estate cannot so use his adjoining land as to interfere with the company's use of its right of way " See also 74 C J S 505 (1951), Cairo etc. R Co v Brevoit, 62 Fed 129, 25 LRA 527 (1894) and 2 Elliott, Railroads (1897) sec. 632

[14] See 1 Elliott, Roads and Streets (3rd ed 1926) sec. 886 and cases cited, II Amer Law of Property (1952) sec 9.51 and cases cited Elliott cit sec 556 says. "Where an owner of land dedicates it to the public for a road or street, he impliedly grants the appendant right to make such a use of it as shall suitably fit it for travel, and where land is seized under the power of eminent domain, compensation is measured upon the theory that the officers representing the public may so prepare and maintain it that the public may safely and conveniently use it as a passage way.

It is upon the principle stated that it is held in strongly reasoned cases that highway officers may prepare and maintain an ordinary road for use without incurring liability for casting surface water upon adjoining lands provided they are not negligent and do not collect it in a body and thus pour it upon the lands "

[15] 1 Elliott, Roads and Streets (3rd ed 1926) sec. 893, and following

[16] Elliott, Roads and Streets (3rd ed 1926) sec. 501.

[17] 13 Ed 1, c. V (1285).

English law-book writers continued to cite this 200-foot setback requirement as part of the law of the realm clear on into the nineteenth century.[18]

Following the Statute of Winchester and through more than five centuries there are English highway statutes which require roadside owners to: (1) scour ditches to drain the road,[19] not just ditches along the highway but also ditches through privately owned fields;[20] (2) clip hedges and lop trees on private land;[21] (3) install culverts for private access roads;[22] (4) refrain from planting trees, bushes or shrubs closer than specified distances from the center of carriageways and cartways;[23] (5) permit the draining of the highway into private ditches;[24] (6) permit highway supervisors to enter on private land and take stone or other material for road repair, at first without compensation, though later compensation was provided;[25] (7) refrain from fencing or plowing within 15 feet from the center of a highway[26]

Nineteenth century English statutes[27] required: (1) a 25-yard setback for unscreened steam engines, gins, and kilns; a 50-yard setback for unscreened windmills; a 15-yard setback for burning ironstone, limestone, bricks, clay or coke, all dating from the highway act[28] of 1835, and a 200-yard setback for windmills near turnpike roads dating from 1822;[29] (2) fencing of excavations;[30] (3) rounding the corners of buildings;[31] (4) safeguards with respect to barbed wire roadside fences;[32] (5) building and setback lines for structures in general;[33] and (6) fencing abandoned mines within 50 yards of a road.[34]

Six centuries of such legislative regulation of roadside owners in England culminated in the sweeping Ribbon Development Act[35] of 1935 and in the even-more-sweeping roadside regulation of the Town and Country Planning Act[36] of 1947.

While the British Parliament was thus occupied in imposing specific burdens and duties upon the "servient" roadside owner, the English courts were imposing duties of their own invention. Here are some of the holdings: (1) The abutting landowner must remove gates, logs, fences, etc. blocking the road. The cases are very early.[37] (2) There is a common law, as well as a statutory, duty to scour ditches and trim trees and hedges. This apparently dates from

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[18] See 3 Comyn's Digest (4 ed 1800) 39. See also 1 Hawkins, Pleas of the Crown (2nd ed 1774) c. 76, sec 58 and Dalton, The Country Justice (1666) 73, c 31.

[19] 5 Eliz c 13, sec. 7 (1562); 18 Eliz c 10, sec 5 (1575), 29 Eliz c 5, sec 2 (1586), 13 Geo III, c. 78, sec. 14 (1773). Independent of statute this seems also to have been required by the courts See Sheppard's Abridgement (1675) Part IV, 201, "If one own Land adjoining the King's Highway, he is of common right to cleanse the Ditches adjoining and that without any Prescription" See also Dalton, The Country Justice (1666) p 75, c. 31, sec 9 and 1 Hawkins, Pleas of the Crown (2nd ed 1774) c. 76, sec 50, 10 Petersdorf, Abridgement (1831) 236, footnote, 4 Bacon's Abridgements, Highway E (Bouviers' Amer. ed 1876).

[20] 18 Eliz c 10, s 10, s 6 (1575) The highway supervisor shall ". . . have full power and authority to turn any such watercourse or spring of water, being in any of the said highways, into any ditch or ditches of the several ground or soil of any person or persons whatsoever next adjoining to the said ways. . . ."

And 13 Geo III, c 78, sec. 14 (1773) provided in part, ". . . and every person who shall occupy any lands adjoining to or near the highway through which the water hath used to pass from said highway, shall open, cleanse and scour the ditches, water courses or drains for such water to pass without obstruction. . . ." See also sec. 8 of this statute

Sheppard's Abridgement (1675) Part IV, 203 states, "And if there be any Spring or Water in the High-way that doth annoy it, they may turn the same out of the High-way into any mans Ditches they please"

[21] 5 Eliz c 13, sec. 7 (1562); 18 Eliz. c 10, sec. 5 (1575), 3 and 4 Wm and Mary c 12, sec 7 (1691) "that there may be a free and clear passage for travellers, and all sorts of carriages loaden, without being any ways prejudiced or obstructed by any hedges, trees, boughs or branches whatsoever, and that the sun may freely shine into the said ways to dry and amend the same

Like the duty to scour ditches, this duty to lop branches is said to be by common law. 1 Russel, Crimes and Misdemeanors (Am. ed 1824) 460 See authorities cited by 1 Hawkins, Pleas of the Crown (2nd ed 1774) c 76, sec 50 and 4 Bacon's Abridgement, Highways, par. E (Bouvier's Amer ed 1876)

[22] 13 Geo III, c 78, sec 8 (1773) and 1 Hawkins, Pleas of the Crown (2nd ed 1774) c. 76, sec 55.

[23] 3 and 4 Wm and Mary c 12, secs. 6 and 7 (1692)

[24] See footnote 20 supra and 3 and 4 Wm and Mary c 12, sec. 12 (1692) "to make new ditches and drains in and through the lands next adjoining to the said highways. . . ."

[25] 5 Eliz. c 13, sec 3 (1562)

[26] 13 Geo. III, c 78, secs. 38, 64, 78 (1773) Surveyor of highways may order cut or pruned hedges or trees which exclude sun or wind from highway If owner doesn't comply, survevor may do it at owner's expense

[27] See Wisdom, Index to British Highway Law, 115 Justice of the Peace 324 (1951)

[28] 5 and 6 Wm IV, c 50, sec 70 (1835).

[29] 3 Geo IV, c 126, sec 127 (1822)

[30] See Barnes v Ward, 2 Carr & K 661 (1847)

[31] Pub Health Act, 1907, sec. 22

[32] 56 and 57 Vict c. 32, sec 3 (1873) Dangerous places adjoining highways in general, Pub Health Act 1875, sec. 160.

[33] Road Imp Act 1925, secs 2, 5.

[34] 50 and 51 Vict c 58, sec 37 (1887) For a similar requirement for quarries see 50 and 51 Vict c. 19 (1887)

[35] Restriction of Ribbon Development Act of 1935, sec 13

[36] 10 and 11 Geo. 6, c. 51, Pt II, sec 10 and Pt III (1947) For typical rulings of the Minister of Housing and Local Government relating to placement of roadside signs see 1952 J of Planning Law 301-302

[37] See for example Y. B. 2 Hen IV 11, 48 (1400), Ames, Lectures on Legal History (1913) 231.

around 1493[38] (3) A roadside owner is responsible for leaving an excavation near the highway unguarded.[39] (4) Even a tenant at will occupying a ruinous house likely to fall onto a public highway is guilty of a crime if he does nothing about it.[40] (5) If the way is founderous, the public has a right by the common law to travel over adjoining private lands and even to break through fences for that purpose. This dates from at least 1675, and probably originated much earlier.[41] This common-law rule has been repeatedly recognized and applied in this country.[42] (6) If a landowner "encloses," that is fences, the highway on both sides, he becomes duty bound to keep the highway in repair.[43]

Other case-law holdings imposing duties on roadside owners are collected as illustrations of highway nuisances in Halsbury's Laws of England[44] under subheadings such as the following: keeping large quantities of explosives or inflammables near the highway; blasting; conducting a rifle range; maintaining dangerous fences; causing smoke from a bonfire to cross the highway; and using premises for exhibitions likely to draw crowds and obstruct the highway.

It may well be that the English statutes summarized above, even those that antedate our American constitution or even our colonial period, are not technically preserved by constitutional provisions as part of our common law. Our states have, after all, passed their own detailed highway legislation. On the other hand, some, at least, of the English case law just summarized is a part of our common law and has been so treated.[45] But both the English statutes and the English cases illustrate a basic principle which certainly is part of our common legal inheritance, namely that the roadside owner may not in using his land interfere with the public's dominant right of passage on the highway.

How much influence did this principle have upon early legislation and court-made case law in this country? I have not attempted the formidable job of combing early highway statutes for even our oldest states. Here are a few illustrative statutes turned up by the unsystematic search I was able to make.

A Pennsylvania act[46] of 1802 permitted highway supervisors to enter land near a public highway, "to cut and open drains and ditches . . . through [the private land] as he or they may judge necessary to carry off and drain water from such roads. . . ," thereby giving voice to a right of highway drainage across private land which originated in earlier English statutes and possibly in earlier English case law.

A Connecticut statute[47] was interpreted as authorizing town selectmen to enter private land and remove trees which tended to obstruct the road. And the South Carolina legislature[48] early authorized road commissioners to cut trees on private abutting land to the extent that timber was required in connection with road building or repairing. Other early statutes[49] authorize the removal of sand and gravel from adjoining land without the owner's permission but on condition that the land owner be com-

[38] See footnote 19 supra

[39] Barnes v Ward, 2 Carr & K 661 (1847), Blithe v Tophem, 1 Roll. Abr. 88 (1607), Attorney General v Roe (1915) 1, c 235

[40] Regina v Watts, 1 Salt 357 (1703), 91 Eng Rep 311 (1909)

[41] See Absor v French, 2 Show 29 (1794) and cases cited And see Williams, Principles of Law of Real Property (21st ed 1910) 425

[42] Williams, Real Property (17th International ed. Hutchins Amer Notes 1894) 505, Campbell v Race, 7 Cush (Mass) 408 (1851), Holmes v Seeley, 19 Wend (N Y) 507 (1838), Williams v Safford, 7 Barb (N Y) 309 (1849) The right *extra viam* is the label given this right to deviate, it is a designation familiar to generations of American lawyers.

[43] 10 Petersdorff, Abridgement (1881) 231, " Inclosure of a highway takes away the liberty and convenience which the public have of going upon the adjoining lands when the highway is out of repair he is bound to make a perfect good way as long as the inclosure lasts . " This rule is said to explain why fences were set back leaving waste strips between the traveled way and the fences If the road became impassable the public could travel on the waste strips without breaking fences and invading private fields Steel v Prickett, 2 Starkie 463 (1819) and Williams, Principles of Law of Real Property (21st ed 1910) 425

[44] 16 Halsbury's Laws of England (2nd ed 1935) 355-362 See also Pearce and Meston, Nuisances (London 1926) 138-147 and cases cited

[45] See note 42 supra

[46] 3 Laws, Com of Pa 516-517, sec X (1810) And see 1 Elliott, Roads and Streets (3rd ed 1926) sec 556

[47] See Ely v Parsons, 55 Conn 88, 10 Atl 499 (1886) See also Winter v Peterson, 24 N J L 524, 61 Am Dec. 678 (1854)

[48] See Ewes v Terry, 4 Mc Cord (S C) 125 (1827)

[49] See for example, 3 Laws, Com of Pa 517 (1810). But see Steres v S Vancouver Dist Corp, 6 Br Col 17 (1897) involving a statutory right to enter lands and take gravel for roads without payment.

pensated. In Massachusetts [50] surveyors of highways and road commissioners were authorized to "cut down or lop off" trees and bushes for the benefit of the highway, but it is not completely clear that this extended to trees and bushes growing on abutting land as well as in the highway right-of-way itself. But later American legislation authorizing highway officials to use self-help in trimming hedges and trees on private abutting land in the interests of the highway has been upheld [51]

Early American case law permitting use of private land to get around impassable spots in the highway has already been alluded to.[52] And other important bodies of case law will be summarized in the sections which follow.

Actually, the real question is not whether the abutter owes duties; that he owes some duties is evident [53] The real question is the extent and nature of these duties in the middle of our century. We have never related this age-old principle with specificity to the high-speed facts of mid-twentieth-century travel. Today the principle as applied in particular cases may no longer require the scouring of ditches or the frustrating of highwaymen by cutting bushes and trees, but it may demand the setting back of structures to improve sight distance, removal of roadside lights, and relocation or redesign of private access roads. Unfortunately, there is an amazing scarcity of reliable, objective data about the actual effect of roadside uses (billboards, commercial and residential structures, access roads, etc.) upon the highway-accident rate. For most effective use of the principle we badly need studies that show the causal relationship between particular roadside uses and free passage and safety on the highway.

But before discussing further how this historical material can be adapted to modern needs, let us move on to a summary of the nuisance and modern tort law approaches to the problem.

THE PUBLIC (HIGHWAY) NUISANCE

The notion that interference with free passage on a public highway is a public nuisance is almost as old as our law.[54] The highway nuisance [55] involves an interference with public convenience by (1) obstructing a highway or (2) doing an act which makes the highway inconvenient or dangerous, whether (a) the act is done on the highway itself or (b) is done on privately owned land abutting the highway.[56]

"Nuisance" is a chameleon-like word with many shades of meaning.[57] One of its connotations is that of a noisome or loathsome activity involving stench, dust, noise, soot, smoke, or vibration. This is because most so-called private nuisances (and many public nuisances as well) involve noisome or loathsome land uses. But a roadside abuse may be a nuisance even though it is in no way noisome or loathsome: [58] a fine, but misplaced building; a beautiful tree growing in the wrong spot It may well be that many a state's attorney has mistakenly failed to sue for highway nuisance injunctions because he fell into the common error of assuming that a highway nuisance must be noisome, loathsome, or at least unpleasant.

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[50] Mass Pub Stats (1882) p 348, c 52, sec 10

[51] Chaput v. Demaro, 120 Kans 273, 243 Pac 1042 (1936) and Kentucky v Watson, 233 Ky 427, 3 S W (2d) 1077, 58 ALR 212 (1928)

[52] See note 42, supra

[53] See 1 Elliott, Roads and Streets (3rd ed 1926) sec 501 "He [the abutting owner] has no right to do an act on his own land outside the limits of the road which will make the way inconvenient or dangerous, nor has he a right to deprive the highay of lateral support given it by his adjoining land"

[54] Glanville, writing about 1188, makes reference to nuisances affecting the King's Highway, Glanville, Treatise on the Laws and Customs of the Kingdom of England (Beame's ed 1900) 194. One of the earliest law abridgments, that of Brooke (1573) under the heading "Chimin" makes reference to various highway "nuisances"

[55] Prosser, Torts (1941) 566, "It [a public nuisance] includes interferences . . with public convenience, as by obstructing a highway . or creating a condition that makes travel unsafe"

7 McQuillin, Municipal Corporations (3rd ed. 1949) Sec. 24.574, "All unauthorized and illegal obstructions to or interferences with the free public use of streets are within the legal meaning of a nuisance"

Pearce and Meston, Law of Nuisances (London 1926) devote 9 pages to English cases dealing with erections or excavations near a highway as nuisances, see pp 138-147

[56] See 1 Elliott, Roads and Streets (3rd ed 1926) sec. 501.

[57] See Prosser, Torts (1941) 549 "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance"

[58] Of course a highway nuisance may also be obnoxious as where acid is made near a highway Rex v. White, 1 Burrow Rep 333 (1757)

We are prone to think of a public nuisance relating to a highway as a description of a particular type of tortious conduct different from (1) intentional torts on one hand and (2) negligent torts on the other. And in addition we assume that nuisances are specific wrongful acts which can be catalogued and listed. Both tendencies are in the tradition of law digests and abridgments Thus, for example, Bacon, in his Abridgement in 1736 said: [59]

> It is a nuisance to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it; and it is said, that the owner of the land next adjoining the highway, ought of common right to scour his ditches. . . . Also it is said, that the owner of trees hanging over a highway, to the annoyance of travellers, is bound by the common law to lop them, and it is clear that any other person may lop them, so far as to avoid the nuisance.

Actually it is more in accord with modern legal analysis to treat the term "public nuisance" as it relates to highways as a short-hand way of saying that the public's *interest* in passage is being wrongfully interfered with either by intentional or by negligent action, or inaction. Nuisance then is not really a description of a separate tort; it is a way of describing the interest which the law is protecting.[60] The terms "roadside nuisance" and "public highway nuisance" as I have used them mean that Johnny Jones, roadside owner, has intentionally obstructed sight-distance by building a structure too close to the highway or has negligently failed to fence an excavation or has intentionally or negligently done (or failed to do) something else in consequence of which the public's interest of free and safe passage on the highway is impaired.

The duties of "servient roadside owners" discussed in the previous section are, then, merely different ways of stating highway nuisance doctrine. The roadside owner must not intentionally or negligently interfere with the dominant public interest, the so-called right of passage. We continue to talk about interference with this dominant right as a public nuisance largely because the early remedy was a criminal action in the name of the king to "abate a public nuisance." [61] As has so often happened in the history of our law, the procedural remedy has come to describe the substantive right-duty relationship.

But we no longer abate highway nuisances through the criminal process. Instead there is available the more-modern remedy of the equity injunction.[62] In addition, we have in many places molded and built upon the hoary old remedy of self-help. Originally the highway user could himself do whatever was necessary to clear his right of passage, even though entry upon the privately owned land of the wrongdoer was necessary [63] (Of course he could not "breach the peace" in effectuating his self-help remedy) Today, this self-help remedy has been transferred in many places to governmental officials.[64] But usually they are

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[59] IV Highways, par E. (Bouvier's Am. ed 1876) 675 See also Dalton, The Country Justice (1666) 75, c 31, sec 8, 1 Hawkins, Pleas of the Crown (2nd ed 1774) c 76, sec 5 8147, and 1 Russel, Crimes and Misdemeanors (Am ed 1824) 460 and the heading "Nuisance" in either Corpus Juris Secundum or American Jurisprudence.

[60] See 4 Restatement, Torts (1939) pp 215-216 and Prosser, Torts (1941) 553 and following.

[61] Street, Foundations of Legal Liability (1906) pp. 212-213 "The wrong of nuisance is one of the most ancient injuries known to the common law . As might be expected, the early nuisance, like the early trespass was criminal The courts were evidently on the alert to prevent encroachments on the rights of the crown, and as an incident to this they very naturally fell into the habit of punishing all nuisances affecting the public at large." See also Glanville, Book IX, c 11 and Ames, Lectures on Legal History, "Injuries to Realty" (1913) 231, Walsh, Equity (1930) 197

[62] On use of the injunction to abate public nuisances in general see 39 Am. Jur 408 (1942), Walsh on Equity (1930) 198-199 and 4 Pomeroy, Equity Jurisprudence (5th ed 1941) sec 1349 For cases where injunctions were issued to restrain roadside nuisances, see Milburn v. Fowler, 27 Hun (N Y) 568 (1882), excavation near road, and Charlotte v Pembroke Iron Works, 82 Me. 391, 19 Atl. 902, 8 LRA 828 (1890)—raising mill pond so as to flood road. Numerous injunction cases for direct obstruction of highways are given in Ames, Cases in Equity Jurisdiction (1904) 568, 612, and 1 Pomeroy, Equitable Remedies (1905) sec. 542, fn. 183

[63] On right of private citizens to use self-help to abate highway obstructions and interferences, see Freund, Administrative Power of Persons and Property (1928) secs 102-103, Street, Foundations of Legal Liability (1906) 215; Ames, Lectures on Legal History, Injuries to Realty (1913) 231, Blackstone, Commentaries (1765) Bk 3, c. 1, IV.

[64] Power of summary abatement of public nuisances is generally delegated to municipal corporations by the legislature, but by the majority rule it exists at common law without special grant of power

39 Amer Jur 457 (1942), McQuillin, Municipal Corporations (3rd ed 1949) sec 24 71 It has frequently been held that municipal corporations not only have the power but the duty to abate public highway nuisances. Baumgartner v Hasty 100 Ind 575, 50 Am. Rep 830 (1884), Joseph v Austin (Tex Civ App.), 101 S W. (2d) 381 (1936), Neff v. Paddock, 26 Wis 546 (1870), Hubbel v. Goodrich, 37 Wis. 84 (1875). Power by a municipal cor-

required to notify the offender and give him a chance to cure the situation, before they can do it for him.[65] Even so they normally have a power to act without notice in cases of clear emergencies.[66] The books are full of admonitions to public officials not to attempt summary abatement of public nuisances, but to avoid possible personal damage suits by bringing an action in equity to get the judge to order the nuisance abated by injunction instead.[67]

It may well be that highway officials frequently ignore this admonition and use summary abatement procedures instead of court injunctions. In any event, there are almost no modern reported cases involving injunctions against nonstatutory roadside abuses, though there are quite a number dealing with obstructions in the right-of-way as such.[68]

There seems to be little doubt, however, that just as an injunction is available to abate public nuisances in general, so it is available in particular to abate those which exist on privately owned roadside land. Certainly it is true that the duty by public officials to abate highway nuisances by summary action has been extended to roadside uses[69] and has not been confined to direct obstructions of the right-of-way as such.

Nowadays, we have become accustomed to the legislature's passing a statute declaring this, that, or another roadside use to be a public nuisance. This is in the tradition of the early law. Often, as just indicated, these statutes specify rigorous self-help remedies by which highway officials may cure violations without going to court. This, too, as we have seen, is very much in the tradition of the early law. But it was never assumed, in our law, as some highway officials seem now to believe, that courts are powerless to declare and to abate roadside nuisances quite independent of, and without support from, the legislature. Courts can act even though legislators have not. Judging from the paucity of reported cases, we have given this latent judicial power little chance for development since horse-and-buggy days.

CONTINUING NEGLIGENT OR INTENTIONAL TORT BY A ROADSIDE OWNER IS ENJOINABLE

Hundreds of damage cases by highway users against roadside owners have been published in court reports. Most, as suggested in the previous section are disguised as actions for harm done because of a public highway nuisance. But on close examination the cases can more readily be premised on either (1) the claimed negligence of the roadside owner—on his failure to exercise due care with respect to highway users, resulting proximately in an injury or damage to the highway user—or (2) on an intentional wrong done by the roadside owner.

It is perhaps convenient, though certainly not conducive to preciseness in thinking, to continue to treat these actions as nuisance cases. As nuisances, it is easy to argue that, in addition to the damage remedy, an injunction is available to abate the nuisance in an action either by public officials or by a specially damaged private litigant.[70]

But equitable principles are not so hidebound as to require such semantic idolatry to old-fashioned terminology. As will be seen, practically all of the cases involve, not just a momentary act or condition, but a long continuing, or recurring, condition.

poration to abate a public nuisance has been extended to nuisances existing on private abutting land, Parker v Macon, 39 Ga 725 (1867) and Vossler v De Smet, 204 Ill App 292 (1917), Langan v Atchison, 35 Kan 218, 11 Pac 38 (1886), Grogan v Broadway Foundry Co, 87 Mo 321 (1885), Kiley v City of Kansas, 69 Mo 102 (1878), Inabinett v State Highway Dept, 196 S C 117, 12 S E (2d) 848 (1941), Restatement, Torts (1939), sec 202, comment (f) and sec 212 (4), McQuillin, Municipal Corporations (3rd ed 1949) sec 24 72, 66 C J S 859 (1950)

[65] Statutory summary abatement procedures must be strictly followed, 66 C J S 859 (1950), McQuillin, Municipal Corporations (3rd ed 1949) sec 24 75

[66] McQuillin, Municipal Corporations (3rd ed 1949) sec 24 75

[67] See Oglesby v. Winnifield, La App, 27 So (2d) 137 (1946) and McQuillin Municipal Corporations (3rd ed 1949) secs 24 71, 24 72, 24 87, and 30 118

[68] See Ames, Cases in Equity Jurisdiction (1904) 568 612 and cases cited and 1 Pomeroy, Equitable Remedies (1905) sec 542, fn 182

[69] See footnote 64 supra.

[70] See Walsh, Equity (1930) 198-201, Ames, Cases in Equity Jurisdiction (1904) 568, 612.

Once it is established that such a continuing or recurring condition is wrongful under the law of negligence, or as an intentional tort, an injunction to abate it is available on the familiar ground that this will prevent multiplicity of suits.[71]

This summary of damage suits against roadside owners excludes cases of direct blocking of highways and is confined to alleged intentional or negligent wrongs which took place outside the traveled part of the highway or outside the right-of-way lines.

The horse-and-buggy era in this country, as in England, gave rise to a large group of personal injury cases involving the scaring of horses by objects along the roadside. Many of these cases turn on the special duty of the abutting landowner not to maintain a nuisance which will unreasonably interfere with the public's use of the highway. Other cases in the horse-fright group involve injury or damage claims against a municipality charged with a statutory duty to maintain the highway, it being argued that the roadside wrong was a defect in the highway which should have been removed by the public authorities.

Illustrative of a claim against a roadside owner is the early Connecticut case of *House v. Metcalf*.[72] In 1824, the defendant, having purchased an old mill, installed a new 12-foot, overshot water wheel some 47 feet from the highway. In 1857, the plaintiff's horse was frightened by the motion of the wheel, the sulky he was pulling was overturned, and both the plaintiff and his horse were injured. The jury brought in a verdict for the plaintiff. The defendant appealed, contending among other things that there was a fatal variance between the plaintiff's original claim that the nuisance was in the highway and the actual proof at the trial. Said the court:

> And whether the wheel was within or without the legal as distinguished from the practical limits of such highway, was unimportant—its injurious character arising, not from its interposing a material obstacle in the way of travelers on the road, but from its rendering traveling there unsafe, by the effect which the sight of it produced upon their horses.

In another case,[73] a railroad was held responsible for injuries caused when a horse was frightened by an unloading derrick (located on railroad land) with a boom that swung 4 feet out onto the highway.

Most of the American cases [74] of this type happened to involve objects that were located within the legal limits of the right-of-way, but this fact was not treated as controlling. But, as might be expected, American judges required strong proof before they would penalize a commercial or industrial use outside the right-of-way by finding that it frightened a horse unreasonably. Thus, the owner of a stave factory that hissed steam was not responsible for injuries caused when the plaintiff's horse was frightened,[75] nor was the owner of a roadside steam engine.[76]

As already indicated, local units of government charged with the duty of maintaining the highway have been held liable for damages caused by a roadside nuisance. Thus, in one case, bales of hay aboard a railroad car caught fire. They were dumped off the car onto the roadside within the highway right-of-way line and lay, charred and black, for some hours after a town selectman knew of it. The plaintiff's horse was frightened by the bales, and the plaintiff was injured as a result. "The statute [on maintenance of roads]," said the Vermont court, "has armed the towns with full authority to interfere with appropriation of it to any private use inconsistent with unembarrassed enjoyment of the public easement." [77]

The rule that grew out of these cases was

[71] 1 Pomeroy, Equity Jurisprudence (5th ed 1941) sec 243 and 1 Pomeroy, Equitable Remedies (1905) secs 514, 516 and 542

[72] 27 Conn 630 (1858).

[73] Jones v Housatonic R. R. Co, 107 Mass 261 (1871)

[74] For a collection of such cases see 1 Wood, Law of Nuisances (3rd ed 1893) 363-369 and 37 Cyc. 290 (1911) Typical cases are Lynn v Hooper, 93 Me. 46, 44 Atl 127 (1899), white haycap, Dinmock v. Town of Suffield, 30 Conn 129 (1861), pile of colored plaster, Foshay v Glen Haven, 25 Wis 288 (1870), blackened log, Gult v Wolver, 103 Ill App 71 (1902), machine

[75] Ft Wayne Cooperage Co. v Page, 170 Ind 585, 84 N E 145, 23 LRA (NS) 946 (1908)

[76] Wabash, St Louis & Pac. Ry. Co v Farver, 111 Ind 195, 12 N E 296 (60 Am Rep 696 (1887))

[77] Morse v. Town of Richmond, 41 Vt 435 (1868)

broadly stated by a legal encyclopedia [78] in 1911: "Objects calculated to frighten horses in or near the road constitute defects in the road rendering the municipality liable for injuries caused thereby, although not dangerously near the traveled way, and although there is ample room to pass around them."

The mechanical horses of today's sleek high-powered cars are not frightened by wayside objects, but the human being who seeks to control this power at high speeds is easily distracted, confused, blinded, or startled by roadside structures, lights, signs, objects, and uses. The nineteenth-century concern to protect the "ordinary gentle horse" from roadside fright might well now be shifted to an even greater concern for the ordinary automobile driver

We turn now from horse-scaring objects to excavations, tottering walls, insecure signs and trees ready to fall Here the long parade of cases starts with *Regina v. Watts* [79] decided in England in 1703 and cited repeatedly by American judges since. That was a case of a ruinous building located near the highway's edge It was held that even a tenant at will was guilty of a misdemeanor in not repairing the building so as to remove the threat to the highway.

Where the danger is very close to the street, there is a substantial group of cases holding municipalities responsible for resultant injuries to highway users [80] Just as in the horse-scaring cases, this has been done under street maintenance statutes, the courts having found that failing to erect a guardrail for an excavation just outside the right-of-way, or failure to remove a tottering wall, sign, or tree, constitutes a defect in the street within the meaning of the statute.

Cases holding landowners liable for injuries to travelers due to unfenced excavations, coal holes and area ways located near but not on the street are also legion.[81] Many talk the language of negligence, some the language of public nuisance. All impose special duties of care because of the proximity of the highway.

Building above the street has also been a frequent subject of litigation. Statutes and ordinances regulating awnings, marquees, overhead signs, and projecting outside stairways have been upheld as reasonable protectors of the traveling public from the danger of falling objects, even though no actual present physical interference with passage on the street was involved.[82] And landowners are normally held responsible in damages for injuries caused by the falling of such overhanging objects.[83]

Also of interest are the many cases where abutting landowners or occupants are held responsible to highway users for injuries

[78] 37 Cyc. 290 (1911)

[79] 1 Salk 357

[80] *Excavations* City of Norwich v Breed, 30 Conn 535 (1862), Town of New Castle v Grubbs, 171 Ind 482, 86 N E 757 (1908), White v Suncook Mills, 91 N H 92, 13 A (2d) 729 (1940), Bunch v Town of Edenton, 90 N C 442 (1884), Biggs v City of Huntington, 32 W Va 55, 9 S E 51 (1889) where the court said "The true rule is that if either an obstruction, excavation, or hole be permitted by a town to exist, though not actually within one of the public streets of the town, yet so close to such a street as to produce danger to a traveler or passenger who is using such a highway or sidewalk prudently and properly, the corporation is liable for an injury for permitting such nuisance, though it be only close to the street, and not immediately in the street" See also 13 ALR (2d) 922 (1950) *Other Openings* Beardsley v City of Hartford, 50 Conn 529 (1883), McIntire v. Roberts, 149 Mass. 450, 22 N E 13, 4 LRA 519 (1889) *Tottering Walls.* Parker v Macon, 39 Ga 725 (1867), Head v Augusta, 46 Ga App 705, 169 S E. 48 (1933) *Falling Billboards* Langan v City of Atchison, 35 Kan 218, 11 Pac 38, 57 Am Rep 165 (1886), Temby v Ishpeming, 140 Mich 146, 103 N W 588, 69 LRA 618 (1905), no liability *Falling Tree* Inabinett v State Highway Dept 196 S C 117, 12 S E (2d) 848 (1941) See also 11 ALR (2d) 626 (1950) and 14 ALR (2d) 186 (1950) *See also* 37 Am Jur 933 (1941) and McQuillin, Municipal Corporations (3rd ed 1949) sec. 54 72. "If a municipality has the power to declare and abate nuisances, and it has actual or constructive notice of the dangerous condition of a structure on private property so near the street as to threaten the safety of persons travelling thereon, it is liable to persons in the street injured by the fall of such structures . . ."

[81] Buesching v St Louis Gaslight Co, 73 Mo 219 (1880), Temperance Hall Assn of Trenton v Giles, 33 N J L 260 (1869), State v Soc for Useful Mfgers, 42 N J L 504 (1880), criminal indictment for maintaining a nuisance, Beck v Carter, 68 N Y 283, 23 Am Rep 175 (1877), Ann v Herter, 79 N Y Supp 825 (App. Div. 1903), Downes v. Silva, 57 R I 343, 190 A 42 (1937)

[82] See for example Woodward Ave Corp v Wolff, 312 Mich 352, 20 N W (2d) 217 (1945) and Gustafson Co v. Minneapolis, 231 Minn 271, 42 N W (2d) 809 (1950).

[83] *Walls* Lauer v Palms, 129 Mich 671, 89 N W 694, 58 LRA 67 (1902), Simmons v Everson, 124 N.Y 319, 26 Atl 911 (1891), but see Evansville v Miller, 146 Ind 613, 45 N E 1054, 38 LRA 161 (1897) where an ordinance requiring all burnt walls to be removed or repaired was declared too sweeping *The falling of other objects* Foley v Farnham Co, 135 Me 29, 188 Atl 708 (1936)—sign fell on weary pedestrians sitting on doorsill, Muray v McShane, 52 Md 217 (1879)—brick fell on pedestrian tying his shoelace, Wilkinson v Detroit Steel & Spring Works, 73 Mich 405, 41 N W 490 (1889)—part of roof fell, Gray v Boston Gaslight Co, 114 Mass 149 (1873)—chimney to which telegraph wire was attached, McNulty v Ludwig & Co, 153 N Y App Div 206, 138 N Y S 84 (1912)—sign, Brown v. Milwaukee Terminal Ry Co, 199 Wis 575, 227 N W 385, (1929)—dead tree But see Price v Travis, 149 Va 536, 140 S E 644 (1927) There are numerous ALR notes of which the most recent are 107 ALR 596 (1937) and 138 ALR 1090 (1942).

resulting from water, mist, seepage, or snow which gets onto or over the highway because of a structure or use on abutting land. Examples: snow slides from steeply pitched roofs; [84] water spread from drain pipes; [85] and mist from a roadside dam freezing on the highway [86]

Closely allied are the roadside sports activity cases where golf-course or baseball-park proprietors are held responsible for damages to passersby who are struck by golf balls or baseballs.[87]

And then there are the cases of barbed-wire fences,[88] charged wires,[89] or dangerous activities [90] like blasting [91] or the firing of guns near the road.[92]

Of interest to those who must struggle with traffic knots on main thoroughfares created by the presence of outdoor theaters is the line of cases going back many centuries, which holds that it may be a public nuisance to cause crowds to assemble and block the highway.[93]

In a day when it required a fast trot to move a vehicle down the highway at 12 miles an hour, we could hardly expect much concern with sight distance. Even so, there was considerable legislative attention both in England and in this country to the trimming of trees, bushes, and hedges There are, in addition, American court decisions [94] involving the duties and powers of highway officials to trim or remove trees. Liability for damages has been imposed on the roadside owner when smoke from a bonfire or coke burning operation causes an accident on the highway,[95] and in a relatively recent case there has been talk about confusing drivers through profusion of lights at night [96]

CONCLUSION

On three lines of reasoning a basic duty by an abutting owner to do nothing on his land which will interfere with free and safe passage on the highway has been established. The existence of the duty has been reflected not only in police-power legislation but also in court-made case law, particularly in numerous personal injury actions brought by highway users against abutting owners.

The natural instinct of a case-taught lawyer is to find a case on "all fours" with his client's case before venturing into court. He wants a decided case the facts of which are closely comparable to his client's problem. As a result, he is always looking back for exact precedents If he fails to find an "all fours" case he may convince his client not to risk a court action In his search for specific holdings he is prone to overlook the basic reasoning behind the cases he does turn up.

I have found no case on "all fours" with the Pittsburgh expressway problem about the lighted signboard in the complicated interchange, nor have I found any that says an oil tank farm built flush with a right-of-way line and provided with a dangerous access road is an enjoinable roadside nuisance [97] But it seems to me that the scattered material gathered here (and the gathering makes no pretense of being a complete harvesting) does clearly establish

[84] See Hannom v. Pence, 40 Minn 127, 41 N W 657, 12 Am St Rep 717 (1889) and Klepper v Seymour House Corp, 246 N Y 85, 158 N E. 29, 62 ALR 955 (1927)—both the landowner and the municipality were held liable

[85] Hynes v Brewer, 194 Mass 435, 80 N E 503, 9 LRA (NS) 598 (1907)

[86] Clawson v Central Hudson Gas & Elec Corp, 298 N Y 291, 83 N E (2d) 121 (1948)

[87] Liability of Ball Park Owner to Street User, 16 ALR (2d) 1458 (1951), Salevan v. Wilmington Park Inc, 45 Del 290, 72 A (2d) 239 (1950), Gleason v Hillcrest Golf Course, 148 N Y Misc 246, 265 N Y Supp 886 (1933), Robb v City of Milwaukee, 241 Wis 432, 6 N W (2d) 222 (1942), Golf Course near Highway as a Nuisance, 138 ALR 541 (1942)

[88] Bower v Watsontown, 1 Pa Dist Rep 116 (1892) But see Williams v City of Hudson, 219 Wis 119, 262 N W 607 (1935)

[89] Ruocco v United Advertising Corp, 98 Conn. 241, 119 Atl 48, 30 ALR 1237 (1922)

[90] Explosives stored near road, 11 ALR 719 (1921)

[91] Regina v Mitters, Le and Ca 491 (1864)

[92] Cole v. Fisher, 11 Mass 137 (1814), Shooting Gallery or Rifle Range as a Nuisance, 140 ALR 415 (1942)

[93] Betterton's Case, Holt 538 (K B) (1695), Rex v Carlile, 6 Carr & Payne 636 (1834), Fairbanks v Kerr, 70 Pa St 86 (1871), Baker v. Commonwealth, 19 Pa St 412 (1852), 1 Wood, The Law of Nuisances (3rd ed 1893) 325

[94] Ely v Parsons, 55 Conn 83, 10 Atl 499 (1886), Winter v Peterson, 24 N J L (4 Zab) 524, 61 Am Dec 678 (1854), Ewes v Terry, 4 McCord (S C) 125 (1827) and Chaput v Demars, 120 Kan 273, 243 Pac 311, 244 Pac 1042 (1926).

[95] Holling v Yorkshire Traction Co Ltd, 2 All Eng Rep 662 (1948)

[96] Woodward Avenue Corp v Wolff, 312 Mich 352, 20 N W (2d) 217 (1945)

[97] Even so attorneys may find some "all fours" cases in the material gathered here See for example the smoke case at footnote 95 and the roadside excavation cases at footnote 80

a basic principle Attorneys for state highway commissions are urged to consider using this principle and some of this background material in nuisance actions to enjoin roadside abuses, even without support from specific legislation. It is, of course, sensible to begin with the worst cases where causal connection between the roadside use and endangerment of the safety or free passage of the highway user is clear and obvious I think cases such as those given in the opening paragraphs of this paper are of that type. Once precedents in obvious cases are established, the rusting tool of the highway "nuisance" injunction can be polished and sharpened for effective elimination of less obvious abuses.

But the job is not one for lawyers alone. It should be obvious that the essence of a roadside injunction case is the factual proof of the effect of the roadside use upon "free and safe passage" on the highway. Here traffic and highway accident surveys play a vital role.