

NOTRE DAME LAW REPORTER
JUNIOR MOOT COURT

The following cases were argued orally by the respective attorneys named on the hypothetical facts stated. Only the cases citèy by the respective parties appear here. These cases will later be developed and submitted for trial in the Nòtre Dame Circuit Court by the lawyers who argued them in this court. The statements of fact and citations follow:

CAUSE NO. 1.

STATEMENT OF FACTS

John Reilly
vs.
Gerald Davenport

Plaintiff parked his limousine in Michigan Street, South Bend, Indiana, at right angles with the curbing, in violaton of a city ordinance. The defendant, while carelessly and negligently driving his automobile, crashed into the limousine and damaged it to the extent of \$1,000, for which plaintiff brings action.

Vincent B. Pater and
Aaron H. Huguenard,
Attorneys for Plaintiff.

Plaintiff should recover, notwithstanding his violation of the city ordinance, for this violation was only a condition and did not contribute proximately to the infliction of the damage. *Berry vs. Borough*, Pa. 43 Atl. 240; *Scheuerer vs. Banner Rubber Co.*, 38 L. R. A. 1207; *Steel vs. Burkhardt*, 6 Am. Rep. 191; *Spoffard vs. Harlow*, 3 Mass. 176; *Railroad Co. vs. Buck*, 115 Ind. 566; *Tackett vs. Taylor*, Ia. 98 N. W. 730; *Clopper vs. Coffey*, 44 Md. 117; *Railroad Co. vs. Price*, Ga. 32 S. E. 77; *Rider Case*, N. Y. 63 N. E.

Franklin E. Miller and
John J. Buckley,
Attorneys for Defendant.

The parking of plaintiff's car in violation of the city ordinance in the crowded, busy Michigan Street, was in itself such a negligent act as contributed proximately to the injury and therefore should bar recovery. *Norris vs. Litchfield*, N. H. 69 Am. Dec. 546; *Meyers vs. Meinrath*, 101 Mass. 36 -3 Am. Rep. 368; *Cranson vs. Goss*, 107 Mass. 309-9 Am. Rep. 45; *Cratty vs. City of Bangor*, 2 Am. Rep. 56; *Lloyd vs. Pugh*, Wis. 149 N. W. 150; *Ludke vs. Burek*, Wis. 152 N. W. 190; *Savett vs. M. & L. Ry. Co.*, 77 Am. Dec. 422; *Day vs. Cleveland, etc., Ry. Co.*, 137 Ind. 206; *Brazil Block Coal Co. vs. Heedler*, 129 Ind. 327.

CAUSE NO. 2.

STATEMENT OF FACTS

James Whitcomb
vs.
Marshall Carper

Plaintiff brings action to recover \$200 paid to defendant as purchase price for a horse, harness and buggy.

Plaintiff was a minor at time of purchase, a married man with wife and child, worked as a day laborer for support of himself and family, and did not use the purchased property except for pleasure riding. Plaintiff, at time of bringing action, had sold the harness and buggy, and the horse had been condemned by the Society for the Prevention of Cruelty to Animals as unfit for use. Notwithstanding plaintiff offered no return of the property he seeks recov-

ery of the money paid by him as stated.

Arthur Keeney and
Harry E. Denny,
Attorneys for Plaintiff.

This is an infant's voidable contract, is not for necessities, and plaintiff may recover without returning the consideration. Nor does the marriage of the infant change his status as infant. *Antonio vs. Miller*, 34 Pac. 40; *Goodman vs. Alexander*, 55 L. R. A. 781; *Guthrie vs. Murphy*, 28 Am. Dec. 681; *Price vs. Sanders*, 60 Ind. 30; *Beichler vs. Guenther*, 96 N. W. 895; *The Rose Case*, 27 Am. Rep. —; *Ryan vs. Smith*, 165 Mass. 303-43 N. E. 109; *House vs. Alexander*, 105 Ind. 109; *Wheaton vs. East*, 26 Am. Dec. 251; *Forda vs. Van Horn* 30 Am. Dec. 77; *N. & C. Ry. Co.*, 78 Am. Dec. 506; *Green vs. Green*, 69 N. Y. 553; *Miles vs. Lingerman*, 24 Ind. 385; *The Lemon Case (Ohio)* 15 N. E. 476; *Wallace vs. Leroy*, 50 S. E. 243-110 Am. St. Rep. 777; *Larkin vs. Foster*, 64 Atl. 1048.

John F. Heffernan and
T. Spencer McCabe,
Attorneys for Defendant.

Plaintiff, by marriage, assumes the contract obligations of an adult, with respect to his family, and for his purchase in this case made for the benefit of his family he is liable. At any rate he cannot disaffirm the contract without return of the consideration. *Glenn vs. Hollopeter*, Cal. 21 L. R. A. 847; *Cochrane vs. Cochrane*, 196 N. Y. 86; *Commonwealth vs. Graham*, 16 L. R. A. 578; *Aldrich vs. Bennett*, 56 Am. Rep. 529; *Houch vs. LaJunta Hdwr. Co.*, Col. 114 Pac. 645; *Coburn vs. Raymond* 100 Am.

St. Rep. 1000; *Taft vs. Pike*, 14 Vt. 306; *Words & Phrases*, vol. 8, pg. 680; *Englebert vs. Pritchett*, 26 L. R. A. 177; *Johnson vs. N. W. Mut. L. Co.*, 26 L. R. A. 187.

CAUSE NO. 3.

STATEMENT OF FACTS

John D. Carson as Admr. of the Estate of Ray Stephens, deceased

vs.

Charles D. Simpson and Edward Williams

Ray Stephens, in his lifetime, made an agreement with Charles D. Simpson to sell him a horse on approval. The understanding was that Simpson should take the horse and try him, and if the horse suited him, give Stephens his note with approved security; but if the horse did not suit him he was to return the horse to Stephens.

A few days after this agreement Stephens was killed. Simpson did not return the horse, but later traded it to the other defendant, Edward Williams.

Plaintiff brings action to recover the horse or its value.

Patrick E. Granfield and
Joseph J. Doran,
Attorneys for Plaintiff.

To support plaintiff's right of action the following cases are cited: *Wolf Co. vs. Monarch Refrigerator Co.*, 96 N. E. 1063; *Fox vs. Wilkenson*, Wis. 113 N. W. 669-14 L. R. A. (NS.) 1107; 2 Benj. on Sales 4th ed. 1051; *Cream Cirt Glass Co. vs. Friedlander*, 84 Wis. 53-21 L. R. A. (NS.) 135; *Dodsworth vs. Hercules Iron Wks.*, 66 Fed. 483; *Brown vs.*

Foster, N. Y. 15 N. E. 608; Vanwin-
kle vs. Crowell, 146 U. S. 42.

William A. Miner and
Clarence Smith,
Attorneys for Defendant.

The trading of the horse by Simp-
son to Williams constituted an ap-
proval of the horse for purchase and
a valid acceptance of the offer to sell,
so as to pass title to the defendants.
Plaintiff cannot therefore recover
property that belongs to defendants.
Mactier's Adm. vs. Frith, 21 Am.
Dec. 262; Bower vs. Detroit Ry. Co.,
20 N. W. 559; Sweeney vs. Vaaghor,
29 S. W. 903; Yale vs. Coddington, 21
Wend. 173; Bradbury vs. Marburry,
46 Am. Dec. 264; Girard vs. Taggert,
9 Am. Dec. 327; Grant vs. Groshaon,
3 Am. Dec. 725; Brackenridge vs.
State, 11 S. W. 630; Stephenson vs.
Repp, 25 N. E. 803; Foster vs. Ad-
ams, 15 Atl. 169.

CAUSE NO. 4.

STATEMENT OF FACTS

James Mansfield
vs.
Daniel O'Conner

James Mansfield, in company with
three others, went upon the farm of
Daniel O'Conner, to hunt. This was
without the permission and knowl-
edge of O'Conner. O'Conner had
signs tacked upon his fences on
which was printed: "No hunting al-
lowed on these premises.

O'Conne rowned and kept a big
shepherd dog. This dog had the
known habit of running to the fence
and barking viciously at passers-by.
On one occasion the dog had gone
through the open gate and bitten a

man, of which fact, O'Conner had
been informed.

Mansfield, on the occasion in ques-
tion, had no knowledge whatever of
the fact that O'Conner had a dog,
until the dog viciously attacked him
and seriously wounded him, biting
him three times in the legs. O'Con-
ner was not at home at the time of
the hunting trip of Mansfield and
knew nothing whatever about the af-
fair until he arrived home later. The
dog attacked and bit Mansfield while
he was on the premises of O'Conner.

Is O'Conner liable to Mansfield or
has he a defense to the action which
Mansfield brings for the injuries sus-
tained on account of the dog bites?

Edwin J. McCarthy and
Mark R. Healey,
Attorneys for Plaintiff.

Defendant is liable for the injuries
inflicted by his dog which he knew
was of a vicious character, even
though the plaintiff may have been
a trespasser. Partlow vs. Hagerty,
35 Ind. 178; Williams Case, 74 Ind.
25; Clanin vs. Fagan, 124 Ind. 304;
Sherfey vs. Bartley, 67 Am. Dec.
597; Woolfe vs. Chalker, 31 Conn.
121-81 Am. Dec. 175; Rider vs.
White, 65 N. Y. 54-22 Am. Rep. 600;
Grasson vs. Hofius, 80 Pac. 1002;
Marsh vs. Jones, 52 Am. Dec. 67;
Glidden vs. Moore, 45 Am. Rep. 98.

Joseph H. Farley and
William E. Krippene,
Attorneys for Defendant.

Plaintiff was a trespasser on de-
fendant's premises and defendant
owed him no duty except not to do
him wilfull injury. Defendant's dog
was kept on his own premises and
was not of such character as would

make defendant liable to trespassers. *Indiana Refining Co. vs. Nobley*, 24 L. R. A. (NS.) 497; *Victor Coal Co. vs. Muir*, 26 L. R. A. 435; *St. Louis R. R. Co. vs. Holsman*, 57 S. W. 770; *Benson vs. Baltimore Traction Co.*, 20 L. R. A. &14; *Muench vs. Heinman*, 96 N. W. 800; *Ritz vs. City, etc.*, 31 S. W. 993; *Galveston Oil Co. vs. Morton*, 7 S. W. 756; *Indpls. vs. Emmelman*, 108 Ind. 530; *Ind. B. & W. Ry. vs. Barnhart*, 115 Ind. 399.

CAUSE NO. 5

STATEMENT OF FACTS

Sadie Thompson
vs.
Carl Meyne

Carl Meyne and his wife were middle-aged people having no children of their own. They lived on a farm in a comfortable country home. Sadie Thompson was a girl of fourteen years, of the general size and health of girls of that age. Sadie went into the home of the Meynes and lived there three years. During the first two years, Sadie went to the country school during school terms of the year. At all other times, including morning and evenings she did the chores and work about a country home where there are horses, cows, chickens, etc., on the farm. Sadie did all kinds of house work, milking, churning, feeding, cleaning, etc. She worked about the kitchen and the rooms of the home. In fact, Sadie did everything she was directed to do.

The Meynes boarded and lodged Sadie and gave her some clothing, which, however, she claims was one pair of stockings, a calico dress and a pair of shoes, but what the Meynes claimed was all Sadie needed in ad-

dition to what she had when she came to their home.

After three years, Sadie left the Meynes. At no time did Sadie ever ask for money and at no time did the Meynes ever give her any money. At no time did Sadie ask for wages or pay for her services and at no time did the Meynes ever ask Sadie to pay them anything for her board and lodging. And when Sadie left the Meyne home, there was nothing said by either as to any charge or account between them.

Three months after leaving the Meyne home Sadie brings action for wages at the rate of two dollars per week for the entire time of her stay at the Meynes.

Paul V. Paden and
Frank M. Hughes,
Attorneys for Plaintiff.

There is an implied contract to pay plaintiff what her services are reasonably worth. *Hodge vs. Hodge*, Admr. (Wash.) 91 Pac. 764-11 L. R. A. 873, and Note on page 888; *Hefron vs. Brown*, 155 Ill. 322-40 N. E. 583; *Caven vs. Musgrave*, 73 Iowa 384.

Paul J. Schwertley and
Raymond J. Kearns,
Attorneys for Defendant.

One living in the household as a member of the family is not entitled to pay for services rendered, nor is there any liability for board and lodging. *Grohan vs. Stanton*, 58 N. E. 1023; *Walker vs. Taylor*, 64 Pac. 193; *Windland vs. Deeds*, 44 Iowa 98; *Smith vs. Johnson*, 45 Iowa 308; *Jackson vs. Jackson*, 31 S. E. 78; *Hall vs. Finch*, 29 Wis. 278; *Andrews vs. Foster*, 17 Vt. 556; *Butler vs. Store*, 50 Pa. St. 451; *Oxford vs. McFarland*, 3 Ind. 156.

TRIAL BRIEFS IN CASE OF
John Reilly vs. Gerald Davenport
Cause No. 1

Junior Moot Court

By

Aaron H. Huguenard for Plaintiff

Franklyn E. Miller for Defendant

STATEMENT OF FACTS

Plaintiff parked his limousine in Michigan Street, South Bend, Indiana, at right angles with the curbing, in violation of the city ordinance. The defendant, while carelessly and negligently driving his automobile, crashed into the limousine and damaged it to the extent of \$1,000, for which plaintiff brings action.

BRIEF FOR PLAINTIFF

Defendant is liable to plaintiff for a tort. Certainly the plaintiff had the right not to be damaged in his property; and certainly there was imposed on the defendant a duty not to cause the destruction of his limousine, as he did.

Defendant is liable for the specific tort of negligence. Negligence, according to many reliable authorities such as Cooley and Chapin, consists in failing to fulfill a legal duty to exercise a proper degree of care, whereby damage results to one to whom such legal duty is owing. Defendant "carelessly and negligently" ran into the plaintiff's limousine.

Has the plaintiff a right to damages? One of the facts given above is that the plaintiff's machine was parked in violation of a city ordinance; that the angle which it formed with the curb was greater than that which the city ordinance permits.

Now, it is a well-known rule of law that no one will be permitted to profit by his own wrong. It would be unreasonable to think that one would be allowed to commit an illegal act

and then as a result of it, enter into litigation and receive a handsome verdict, and we of the plaintiff's side realize this very well. We are ready to admit that if a person's unlawful act contributes *proximately* to his own injury, he may not recover damages of another for a negligent participation in that injury, but the mere fact that he is engaged in an unlawful act is not enough to bar his action unless the transgression of the law has contributed directly to the accident.

Consequently, if the illegal conduct of the injured party proximately causes his injury—remember, proximately causes—he will be without redress. It must be always kept in mind that the illegal conduct must be a proximate or concurring cause, for if the plaintiff's conduct merely renders the injury possible it will be merely treated as a condition. Concerning the defense of contributory negligence, in the case of *Rider vs. Syracuse Rapid Tr. Co.*, 171 N. Y. 139-63 N. E. 836-58 L. R. A. 125, it is said: "Plaintiff's negligence must be proximate cause in the same sense

in which the defendant's negligence must have been a proximate cause in order to give a right of action." In other words, if the plaintiff's act was merely a remote cause or condition, there can be no bar to his recovery.

Perhaps, it would be well for me to go into detail more concerning the words, "cause" and "condition;" or, as sometimes differentiated "proximate cause" and "remote cause."

We find in the law dictionaries, condition defined as "a mechanical antecedent without casual power," cause, defined as "the responsible, voluntary agent, changing the ordinary course of nature." A proximate cause must be a "*causa causans*; not merely a *causa sine qua non*." All courts are agreed that there is an essential difference between a cause and a condition but the difficulty arises in trying to distinguish between them.

In the Railroad Company vs. Price, a Georgia case, 32 S. E. 77, the defendant negligently carried the plaintiff past her destination and the conductor advised her to spend the night at a certain hotel in the town at which she alighted, agreeing to pay her expenses and to carry her back in the morning. It was held that his negligence in carrying her past her station is not to be regarded as a cause of injuries received by her from the explosion of a lamp at the hotel.

Again, where a town negligently permits a tree to remain standing in a street notwithstanding its dangerous condition, which tree is blown down and strikes a motorman who is running his car at an illegal rate of speed, the illegal speed is a condition merely. Berry vs. Borough, Penn., 43 Atl. 240.

I cite these cases to show what the courts have held as conditions or remote causes. In our case, everything hinges upon these two words, condition and cause.

Was the fact that our client's car was illegally parked, a concurring cause of the collision or was it a mere condition? That is the issue. Upon the answer to this question depends the decision. If the car so parked was a concurring cause of the accident, then the plaintiff is without redress. If the car so parked was merely a condition, then the judgment must go to the plaintiff.

No reasonable person would hold that the mere parking of the car was a concurring cause of the accident. For the doctrine of contributory negligence to apply, the plaintiff's negligence must be concurrent of the same kind, immediate, and not something of a prior time. In this case, the plaintiff had already violated the ordinance, his act was of a past time, and it was not of the same nature as the defendant's.

In Scheurer vs. Banner Rubber Co., 227 Mo. 347-126 S. W. 1037-28 L. R. A. (NS) 1207, the court says: "If the plaintiff's negligence affords only an opportunity or occasion for the injury, or a mere condition of it, it is no bar to his action." And all we contend is that our case be decided in accordance with this principle.

True it is that the plaintiff's machine would not have been damaged, had it not been located where it was, but it does not follow that it would have gone unharmed, had it been parked in accordance with the city ordinance, for the conduct of the defendant was of such a grossly careless and negligent nature that it more than likely would have been ruined

even had it been a little closer to the curb.

The plaintiff's car is of a limousine type. Suppose it had been an ambulance backed at a right angle to the curb, waiting to receiving one on stretchers. The defendant's car, in its riotous meanderings, would have crashed into the ambulance far more easily than it would into the plaintiff's car, for the latter car was not parked at so blunt an angle. Could the defendant have pleaded contributory negligence or illegal conduct of the plaintiff in the ambulance case? Or, suppose it had been a truck backed at a right angle unloading articles of great weight. Both the ambulance and the truck would have protruded farther into the street than the limousine without constituting an illegal act or an act of contributory negligence. Plaintiff's action in parking his limousine cannot reasonably be considered a concurring cause while in the hypothetical ambulance and truck cases the positions of those machines do not constitute even so much as a remote cause. If the plaintiff's act in this case is not a concurring cause, then it must be a condition, and as such, decision must go to the plaintiff. Let us cite a few cases in point.

In *Steele vs. Burkhardt*, 104 Mass. 59- 6 Am. Rep. 191, this occurred: Plaintiff had his wagon parked at an angle which was prohibited by city ordinance. The defendant carelessly drove upon the plaintiff's horse and injured him. The case is exactly analogous to the present case and the judgment was for the plaintiff. The court said: "The plaintiff did show negligence in respect to keeping the ordinance, but did not necessarily show negligence that contributed to the injury." And we are willing to

admit the same here, namely: that the plaintiff did show negligence as to the ordinance but that he did not directly contribute to the injury.

In *Spofford vs. Harlow*, 3 Mass., 176, it was held that though the plaintiff's sleigh was on the wrong side of the street in violation of law, the defendant was liable, if his servant ran into the plaintiff carelessly and recklessly, the plaintiff's negligence not contributing to the injury.

In the *Railroad Company vs. Buck*, 116 Ind. 566-19 N. E. 453, a laborer while working on Sunday was injured through defendant's negligence. The defendant plead the fact that plaintiff was violating the Sunday working law. The court said: "Our conclusion is that a person injured through the negligent omission of another, even though he violated the observance of the Sunday law, will not be denied a recovery."

This case while not so similar in facts as the two Massachusetts cases cited is exactly in point in that violation of a statute by the plaintiff will not preclude a recovery where defendant has been negligent, if the plaintiff has not been a proximate cause of the injury.

In *Tackett vs. Taylor*, 123 Iowa 149-98 N. W. 730, an Iowa case, it was held that conducting a machine across a defective bridge in an unlawful manner does not bar recovery unless it contributes directly to the injury.

And so we might go on citing numerous cases, all bringing out this point: Plaintiff can maintain an action for damages caused by defendant's negligence, even though plaintiff does violate an ordinance, provided that he does not contribute directly to the injury. But that these will

suffice to bring out the general principle.

That the plaintiff violated an ordinance is admitted, but we vigorously contend that violation is only an occasion for the injury, or a condition of it, and therefore, decision should be in plaintiff's favor.

BRIEF FOR DEFENDANT

There is no distinction between the violation of a state statute and the infraction of a municipal ordinance; both are, by the law, placed upon the same plane: *Hayes vs. Michigan Central R. R. Co.*, 111 U. S.; *Yanke vs. Lange et al.*, Wis., 170 N. W. 722; 21 Am. and Eng. Ency. of Law 483; 33 Minnesota 323.

The judge should peremptorily instruct the jury that the act of the plaintiff in parking his car in violation of the city ordinance constituted negligence per se: *Lloyd vs. Pugh*, Wis. 149 N. W. 150; *Ludke vs. Burke*, Wis. 152, N. W. 190; *Smith vs. M. B. & T. E.*, 91 Wisconsin 360-64 N. W. 1041-30 L. R. A. 504-51 Am. St. Rep. 912.

The law is uniform to the effect that a person, being engaged in violation of law, cannot recover if his own illegal act was an essential element of his case as disclosed upon all of the evidence: *Norris vs. Litchfield*, 35 New Hampshire, 271-69 Am. Dec. 546; *Meyers vs. Meinrath*, 101 Mass. 366-3 Am. Rep. 368; *Cranston vs. Goss*, 107 Mass. 309-9 Am. Rep. 45; 119 Mass. 66-Rep. 315; *Smith vs. Boston and Maine R. R. Co.*, 120 Mass. 490-21 Am. Rep. 530; *Newcomb vs. Boston Pro. Ass'n.*, 146 Mass. 596-4 Amn. St. Rep. 354; *Cratty vs. City of Bangor*, 57 Me. 423-2 Amn. Rep. 56; *Johnson vs. Town of Irasburgh*, 47 Vt. 28-19 Am. Rep. 111.

The rule of law as applied to an action of tort for injuries inflicted upon the plaintiff while he is engaged in an unlawful act is that if his illegal act did not contribute to the injury, but was independent of it, he is not precluded thereby from recovering. And this, we submit, is the true rule of the law. *Schultz vs. Paul*, Ind. Law Report 10; *Spofford vs. Harlow*, 3 Allen 176; *Kearns vs. Sowden*, 104 Mass. 63; *Steele vs. Burkhardt*, 104 Mass. 59-6 Am. Rep. 191. However, if the jury find that the conduct of the plaintiff either proximately or contributorily affected the injury of which he now complains, he will not be entitled to recover: *Lloyd vs. Pugh and Ludke vs. Burck*, *supra*. In other words, whether or not the act of the plaintiff either proximately or contributorily affected the collision is a question of fact for the jury: *Milw. and St. P. R. R. Company vs. Timothy Kellogg*, Iowa. 94 U. S. 469-24 Law. Ed. 256; *Chapin on Torts* 103; *White vs. Long*, 128 Mass. 598-35 Am. Rep. 402.

In order for the plaintiff to recover he must show that he exercised due care in the prevention of the injury of which he now complains. *Savett vs. Manchester and Lawrence R. R. Co.* 77 Am. Dec. 422; *Heland vs. City of Lowell*, Mass. 81 Am. Dec. 670; *Damon vs. Inhab. of Scituate*, 119 Mass. 66-20 Am. Rep. 315; *Smith vs. Boston & Maine R. R. Co.*, 21 Am. Rep. 538; *Norris vs. Litchfield*, 35 N. H. 271-69 Am. Dec. 546; *Newcomb vs. Boston Pro. Ass'n.* 146 Mass. 596-4 Am. St. Rep. 354.

In the leading case of *Savett vs. R. R. Co.*, *supra*. the court held, that a passenger in a railway car is wanting in ordinary care, if, knowing that the train is moving, he goes out on the platform of a car, and steps there-

from upon the platform of the station while the car is still in motion, and he cannot recover from the railroad company for an injury resulting therefrom.

If a person needlessly and recklessly exposes himself to open and obvious danger by his failure to exercise due care, and thereby suffers an injury as the result thereof, he will be guilty of such negligence as will prevent a recovery for such injury; *Day vs. Cleveland, etc., R. R. Co.*, 137 Ind. 206-36 N. E. 854; *Brazil Block Coal Co. vs. Hoodler* 129 Ind., 327-27 N. E. 741. In the first of these cases the court held, that where a railroad employee, a car repairer, in helping to move a car upon the track, took a position at the draw bar, under a running board, one end of which rested on the car that was being moved and the other end on another car, one of which, when the car had been moved far enough fell on the employee, injuring him, the employee being ignorant of the fact that such board had not been removed, but which he could easily have seen if he had looked, the danger being as obvious to the employee as to the employer—the employee cannot recover; and in such case, it is the duty of the trial court to instruct the jury to find for the defendant, the employer.

A fortiori, if a person exposes his property to open and obvious danger through his failure to exercise due care, as did the plaintiff do in this case, in that he permitted his limousine to be parked in violation of a municipal ordinance, to protrude out and obstruct the public highway for

a period of time exceeding three hours, a highway whereon a heavy traffic was in the course of operation, it follows that he cannot now complain of the injury inflicted upon his property, which injury—in part at least—was attributable to his failure to exercise due care. The law, I take it, requires that men shall use the senses with which nature has endowed them, and when, without excuse, they fail to do so, they alone must suffer the consequences, and they are not excused when they fail to discover the danger if they made no attempt to employ the faculties with which nature has blessed them.

Especially is this true when the law imposes an obligation or duty on an individual and charges him with the duty to exercise due care. *Brazil Block Coal Co. vs. Hoodler, supra*; *Stewart, Admr. vs. Pa. Ry. Co.* 130 Ind. 242-29 N.E. 916; *Pa. Ry. Co. vs. Meyers* 136 Ind. 242-36 N. E. 32.

Therefore when the plaintiff in this case failed to exercise even slight care in the protection of his property, when he neglected to call into operation his reasoning power to work upon the material supplied him by experience, namely, that it was dangerous and an unnecessary risk for a man to allow his property to project into a congested highway, when he absolutely ignored and broke the provisions of the municipal ordinance, he did then and there assume all responsibility for any damages which might be inflicted upon his property through the negligence of some other person.

Franklin Elliot Miller,
Attorney for the Defendant.