

On the Spirit of Rights And their Relativity

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INTRODUCTION

1. — The simplest and surest figments of imagination are not always given the most credit by either universal or legal conscience: while specious sophisms resist indefinitely against the action of time like that of criticism,¹ there are eternal truths, strong points, or to speak in Anglo-Saxon parlance, fundamental *standards* which, although representing the infrastructure of all legislation from all time periods and all countries, are periodically or constantly subject to contestation, regression, even negation: within this number is the concept of *relativity*, and in consequence, the *abuse of rights* that constitutes one of the centerpieces of any civilized country's legal system, or, more exactly, the atmosphere, the "climate" in which these systems develop and operate.

When this concept was revived some thirty years ago and presented by different jurists,² following the example of the criticism stirred several years prior by an objective conception of responsibility for the **acts of things**, it roused certain civilians'³, and even stranger, certain historians'⁴ vigorous and even indignant criticism calling for a definitive condemnation: chimeric, inconsistent, absurd and dangerous, the allegedly new theory should be erased from our law.

In reality, the so-called novelty under fire constituted an infinitely venerable antique: anticipated and clearly expressed by Larombière⁵ as well as Demolombe,⁶

¹ It suffices to cite, in this order of ideas, the rule *nemo auditur propriam turpitudinem allegans* [No one is heard alleging his own turpitude], the alleged [equivalence] equipollence of gross fault to fraud, the principle that contracts have no effect on third parties, so many false **fundamental truths**.

² Saleilles, *Théorie générale de l'obligation*, 2d ed, p 370 note 1; "Rapport à la première sous-commission de la commission de revision du code civil, in *Bull. de la Société d'études législatives*, 1905; Charmont, *L'abus du droit*, in *Rev. trim. de droit civil*, 1902, p 113; Josserand, *De l'abus des droits*; M. Hauriou, S. 1901.3.57; 1905.3.17.

³ Planiol, *Traité de droit civil*, t II; Barde, *Traité des obligations*, in the collection Baudry-Lacatinerie, t. III, § 2855; H. Capitant, note D. P. 1926.3.10, col. 2.

⁴ A Esmein, S. 1898.1.17.

⁵ Larombière, *Théorie et pratique des obligations*, t. VII, on arts 1382, 1383, §§ 11 ff C civ.

it is as old as the coexistence and opposition of strict law with equity, legality with legal morality, **bright-line rules** with their practical realization. According to Gény: “all law is not confined in its legality”; an entire world of principles lives and bustles around **bright-line** rules and statutory law, directives and standards in which Maurice Hauriou very rightly distinguishes: “constitutional principles from legal commerce”⁷ like a sort of *superlegality*.⁸

Amid these **high-volume/productive directives** [*parmi ces directives à grand rendement*] can be cited the adage that fraud foils all rules of law – *fraus omnia corrumpit* – the rule *error communis facit jus* [common error makes jus], the principle according to which no one shall cause unjust prejudice to another with impunity, the theory of unjust enrichment, and above all else, that of the abuse of rights: even though no statutory positive law expresses them in their general form, the reality of these customary dogmas, especially the latter, is as certain as one of these principles promulgated in the most purposeful and imperative terms can be; it is even more so since **it escapes the arbitrary power of legislators who must understand the higher truths to which they are subordinated, that do not derive from them** [*painful, but so is the original* → “*elle échappe à l’arbitraire du législateur qui ne saurait méconnaître des vérités supérieures, ne venant pas de lui et auxquelles il est lui-même subordonné*”]. The rights legislators regulate are not abstractly achieved in a vacuum; they function in and for a social milieu; they act contingently on this milieu, socially, not in any one way, but in view of determined ends and in a given “climate”; their destiny is to achieve justice and they could not rebel against it except at the price of a legal error, an abuse that would attract a sanction.

2. — This phenomenon of the dissociation of the law in written legislation and procedures of implementation, administration and “legal police”⁹ can be observed in any country that has reached a certain degree of civilization. Following George Cornil’s observation, numerous traces can be found in sources of Roman law;¹⁰ as this author remarks, it appears that the **jurisconsult** Gaius had already formulated a general theory on the abuse of rights when, to justify the prohibition of prodigals and masters mistreating their slaves, he proclaimed that we should never misuse our law: “*male enim nostro jure uti non debemus*” [In fact, we must not use our law wrongly].¹¹ And another eminent Roman law scholar, Charles Appleton, wrote that the theory of abuse “is so hardly modern that the entire evolution of Roman law is based on it, from strict law to equity”;¹² the evolution goes back to the XII Tables to lead to Celsus’ famous definition: “*Jus est ars boni et aequi*” [Law is the science of what is good and just.], as well as to Paul’s no-less-famous affirmation “*non omne quod licet*

⁶ Demolombe, *Cours de Code Napoléon*, t. XXXI, § 471.

⁷ M Hauriou, *Police juridique et fond du droit*, Rev. trim. de droit civil, 1926, p 309.

⁸ *Ibid.*

⁹ Hauriou, *op cit.*

¹⁰ G Cornil, *Le droit privé*, p 102.

¹¹ Cornil, *op cit*, *eod loc.*

¹² Charles Appleton, *Les exercices pratiques dans l’enseignement du droit romain et plan d’un cours sur l’abus des droits*, in Rev Intern de l’enseignement, 1924, p 151.

honestum est”[It is not everything which is honourable that is permitted].¹³ The vile maxim “*Dura lex sed lex*”, that does not appear to be really Roman, is, in any case, completely false as an expression of Roman law during the golden age; it must let its corrector and antagonist “*summum jus summa injuria*”[Extreme law (rigour of law) is the greatest injury.] take the lead; and Praetorian law, in its admirable and harmonious development, constitutes the most brilliant illustration of the theory of abuse and is like its triumphal march.

3. — This conception, as human, lively and flexible as it is, may have temporarily sunk into obscurity during the Middle Ages with the disfavour of scholasticism; but it reappeared with the renaissance of Roman law; in the 16th century, Guy Coquille developed it in the now-classic formula: “Thus, our customs are our true civil law; and based on them we must hereunto reason and interpret *ex bono et aequo*, as did the Roman **jurisconsults** on laws and edicts: and it must be said *quod fit ars boni et aequi* [That science made for the good and just], and not a lair of subtlety and severity...”;¹⁴ in the following century, in his treatise on hypothecs, Basnage wrote that “there is sometimes injustice in wanting to be too just, *summum jus summa injuria*. Naturally contrary to an inflexible justice that pardons nothing, equity is easily pushed aside under the pretence of following the spirit of the law in all its severity...”;¹⁵ and Domat applies this rule of conduct to property law in deciding that an owner can become liable if he changes his inheritance with the only goal being to harm another “without use for himself. As, in this case, that would be malice which equity will not abide.”¹⁶

The tradition is thus constant and, it appears, uninterrupted; like the prudent of Ancient Rome, our earlier writers saw the science of good and justice in the law; like them, they considered that this science should tend toward the triumph of equity and not injustice, and that social **prerogatives/rights** can only be exercised socially, on proper grounds, with a view to legitimate ends; like them, in the end, they have grasped and affirmed this same opposition between strict legality and justice, an opposition that Voltaire set down in a classic verse:

“A right taken too far becomes an injustice.”

4. — In the presence of this long and constant tradition, how can the resistance – incidentally much weakened today and soon to become imperceptible – of part of contemporary French legal opinion be explained? How can it be understood that certain consciences, despite being well informed, were shocked by the development of a social thesis with such a past behind it and offering such **security/guarantees**?

Responsibility for this hostile attitude rests not with Roman law, or with Glossators or Post-Glossators by whose care it was so often distorted, but rather

¹³ Charles Appleton, *Notre enseignement du droit romain, ses ennemis et ses défauts*, in *Mélanges G. Cornil*, p 68 ff.

¹⁴ Guy Coquille, *Questions, réponses et méditations sur les articles des coutumes*, ch 1.

¹⁵ Basnage, preface to *Traité des hypothèques*.

¹⁶ Domat, *Lois civiles*, book II, title 8, sect 3, § 9.

with our revolutionary law and great codifications that resulted in its culmination and to a great extent its official and, for a long time, definitive crystallization. Born from the excesses and abuses of the *Ancien Régime*, this law elaborated under the dominant influence of 18th century philosophers is marked by an exasperating individualism; its essential objective is to free Man from all political, legal, economic or social chains that *l'ancienne/Old France* had weighed so heavily upon him; and to reach that point, it recognized his pre-existing rights as an individual from an abstract social background, his innate, superior prerogatives/rights to laws and human conventions: these are the “*Human Rights*” of the famous Declaration of 1789, “natural, inalienable and sacred rights”, “natural and imprescriptible rights”, “inviolable” rights imposed on public authorities without exception for the legislature and the constituent himself. Such a conception explaining itself historically by the ineluctable gamble of social reactions, had to lead to the absolutism of subjective rights; through this conception, the individual has become sovereign, armed with intangible prerogatives/rights that he can use discretionarily against the State: by “fictionally” projecting “the individual outside of the social milieu”,¹⁷ the school of natural law fatally allowed him to exercise his rights in any – even asocial or antisocial – way. The authors of our great codifications and, more specifically, the drafters of our Civil Code, whatever may have been their wisdom and desire to make a transactional act, were unable to liberate themselves from the individualist imprint of the revolutionary period; if the First Empire was nothing other than the “Booted Revolution”, as it has been speciously written, the Napoleonic legislation permeated by the revolutionary spirit was called to crystallize around the fundamental axioms that had just been erected with a hatred of the past and to set up a dike in opposition of any offensive response: and yet, in the first row of these fundamental truths appeared the intangibility of the human personality whose free expansion and development seemed to imply the recognition of individual sacred, imprescriptible and, in theory, unlimited rights; man, who is himself a sufficient reason, an end to himself in Kantian doctrine, must be sovereignly and indefinitely able to exercise the prerogatives/rights which constitute the mark and affirmation of his personality; he would be incapable of abusing them.¹⁸

5. — The imperialist conception of the “individualist theory of the will”¹⁹ was a product of infinitely respectable and generous but conceptually artificial philosophical ideas, and was based on an erroneous postulate and an inadmissible fiction: the isolation of man within society. In reality, man does not interest legislators, public authorities and jurists as an individual, but as a social unit; he mustn’t assert and achieve his rights in interplanetary spaces, but in a social milieu of which he constitutes one of the countless, most fragile and infirm cells; as a subterranean cog embedded in a complex and formidable mechanism, he must conduct himself according to his milieu of origin; every time he exercises a right, be

¹⁷ Cornil, *op cit*, p 93.

¹⁸ Morin, *La révolte des faits contre le code civil*, p 10.

¹⁹ B Tabbah, *Du heurt à l’harmonie des droits*, thesis Lyon, 1936.

it in appearance the most individual and self-serving, it is again a social prerogative/right that he achieves and thus he must use it in a social way²⁰ in conformity with the spirit of the institution, *civiliter*.²¹

6. — Therein resides a cardinal truth that does not depend on a philosophical or legislative system for escape, and we will see that the Civil Code drafters themselves, as powerful as the imprint of revolutionary law was on their minds, sometimes had to render necessary homage to it; but they did it so rarely and with such discretion that this truth can be said to have been subjected to a partial eclipse during close to a century, above all in doctrine and legislation, because our jurisprudence, which deals in facts and whose main work is essentially practical, never distanced itself from social realities nor ceased to see caused prerogatives/actionable rights in subjective rights, unfit to serve the machines of war against society or against individuals; thanks to it, the traditional thesis of abuse was able to maintain many of its positions that authors with considerable authority claimed they had forced it to give up.

7. — And not only was the previously conquered ground preserved thanks to the wisdom of our tribunals, but it was also organized and expanded: the theory of abuse – and it is only current in this way – was developed in a double sense, in a double direction: on the one hand, indeed, it was propagated all the way to hitherto unexplored domains, it came to cause and limit rights with which it had previously had no contact;²² on the other hand, it changed in significance and criteria: while for Roman jurists, abusive acts were above all, if not exclusively, malicious acts; in the current state of our positive law it has become antifunctional acts, acts contrary to the spirit of a specific law; from an intentional criterion in the old days, the criterion has become social and the theory has thereby gained much in power and scope.

8. — This double evolution, this lead achieved by the theory of abuse in our courtrooms has made the divorce between jurisprudence and a part of doctrine more sensitive, one dealing with law as an exact and abstract science, while the other, focused on the facts, seeing within it a social science based on observation. The solution to this disagreement could not be ambiguous; reality had to win it over fiction; the spirit of finesse had to be right about the spirit of geometry; for over thirty years, the vast majority if not the unanimity of civilians had taken the side of the *relativity* of rights against the *absolutist* doctrine which the 18th century school

²⁰ Duguit, *Les transformations générales du droit privé depuis le Code Napoléon*.

²¹ Edmond Picard, *Le droit pur*.

²² It suffices to cite the law of custody which belongs to the father (*infra* § 71); the right that was conferred to the husband to authorize his formerly incapable wife, a right whose abuse was and remains possible in the narrow limits where it still exists, either in its positive form (*infra* § 80) or in its negative aspect (*infra* § 79); or even the right not to contract (*infra* §§ 9 ff), or to be substituted for another in the execution of a contract (*infra* §§ 129 ff), or, for an owner, to exercise the legally conferred right of repossession; or, finally, for a debtor, this completely new, paradoxical right arising both from the economic crisis and the crisis of the conscience that we are simultaneously going through: “the right not to pay one’s debts!”

of philosophy, the laws of the revolutionary period and the great Napoleonic codification had given a momentary favour that a desire for violent reaction against the past alone could explain, but that came to clash as a permanent doctrine with the essence of the law itself and its social mission; if, as noted by a great English jurist, the reception of the “leading *civilistes*” had been rather cold,²³ it thereafter gained much in sympathy and cordiality; and Georges Ripert himself, whose account is irreproachable, recognized that “the theory of the abuse of rights, formed at the end of the last century, has become a classic in a short time”.²⁴ Far from complaining that our jurisprudence has admitted the relativity of seemingly self-serving rights such as ownership or the right to contract, many authors over the last few years have openly declared themselves partisan to the idea of relativity and have undertaken to guide our **tribunals** in their difficult and fruitful task by being systematic;²⁵ instead of accumulating obstacles along the road of history, they endeavour to clear it, and, far from holding back our jurisprudence in its traditional tendencies, they are more inclined to encourage it, to motivate it, for all individual **prerogatives/rights**, to achieve this beneficial softening, this social compression outside of which the law becomes vile, since it can serve indifferently to endorse justice or injustice at the whim of anyone’s scruples or appetites. If it is true that the life of the law boils down to a struggle, nevertheless, it is agreed that this is not a struggle of **an earthen pot against an iron pot** and the arms given to the combatants by the public authorities are not poisoned arms, they can only be used wisely and in fair play, which is an invariable social rule.

9. — *General Outline* — This is the rule which we propose to research and set down over the course of this study on the abuse of rights. In order not to instil any prejudice, we will avoid giving a precise definition of abuse at the very outset of our inquiry: the physiognomy of this notion will gradually take form as we expound on *current French positive law*, as we then proceed to a summary outline of *comparative law*, and lastly as we undertake to accomplish in a third part, whose foundation has already been uncovered, a *general systematisation of the abuse of rights, according to their spirit*.

10. — For the moment, it suffices to note that, in the same way that there exists a *spirit of laws*, and, more generally, a *spirit of the law* understood objectively and as a whole, it must be admitted that there exists a *spirit of rights*, inherent to any subjective **prerogative/right** imagined in isolation, and that, no more than the law can be applied contrary to its spirit, no more than a river could change the natural course of its waters; our rights cannot be realized counter to and in contempt of their social mission, haphazardly: the end can be conceived to justify the means

²³ H C Gutteridge, *Abuse of rights*, p 35: “the leading “*civilistes*” are, in fact, somewhat covley [sic] disposed towards the theory of abuse, and the general tendency is against any further expansion of its ambit”. This observation, though perhaps correct at the time it was formulated, no longer corresponds today to the state of recent doctrine.

²⁴ G Ripert, *Abus ou relativité des droits*, Rev crit de législation et de jurisprudence, 1929.

²⁵ *Infra* § 235.

when they are themselves legitimate; but it would be intolerable if even intrinsically irreproachable means could justify any vile and inconceivable end.

It is precisely against such a possibility that the thesis of the *abuse of rights* takes a stand; its goal and *raison d'être* is to ensure that the *spirit of rights* prevails, and so to guarantee justice not only in statutory instruments and abstract formulas, which is relatively easy, but, what is a more substantial ideal, in their very application and even in daily life.

PART ONE

Current French Positive Law

11. — In its current composition and relationship with the thesis of relativity and the abuse of rights, our French legal system has above all else a jurisprudential formation and range; however, there are a certain number of dispositions in the legislative apparatus that come from the concept of abuse; some without contest, others more or less dubiously.

These applications of the theory of relativity, as much by our **tribunals** as by legislators, are so numerous and engage such varied **prerogatives/rights** that we cannot even dream of exhausting a never-ending list, but we must limit ourselves to the more interesting and suggestive amongst them; we will thus avoid needless repetition all while extracting the very substance of our subject.

12. — *Outline.* — We will successively connect these subjects to the concept of abuse:

1. Property
2. Securities
3. Judicial procedures
4. Family authorities
5. Law of contract
6. Individual and corporate freedoms
7. Administrative or statutory powers
8. Private and public international law

We will show the effective relativity that sometimes hides behind the appearance of a deceptive absolutism in a chapter dedicated to each of these **prerogatives/right** or disciplines.

CHAPTER ONE

THE LAW OF PROPERTY

13. — For every lord, every honour: the law of property is traditionally considered an individual right *par excellence*, as the prototype of absolute prerogative/right; this is a *dominium* conferring full powers, *plena in re potestas*, on the person in whom it is invested; revolutionary law, accepting and even fortifying the heritage of the past, solemnly recognized its value as a natural and imprescriptible, inviolable and sacred attribute of human personality, the same as freedom, security and resistance against oppression;²⁶ our Civil Code defines it as “the right to enjoy and dispose of things in the most absolute manner...”²⁷ In the age-old conception, the owner is a sovereign who, entrenched in his thing like in a fortress, acts exactly as he pleases, discretionarily, without any accountability for his actions and even less for the motives that inspired them.²⁸

14. — Nevertheless, this is a purely scholastic and legendary conception which is far removed from reality, and which represents its almost polar opposite; and it does not require an in-depth study of property to perceive that this supposedly unlimited right contains, especially in land issues, a multitude of restrictions, barriers and borders that compress its movements and which oppose its expansion; to obtain this conviction, it suffices to connect it to several particularly symptomatic decisions from the *Cour de la cassation*²⁹: “whereas, the *chambre de requêtes*³⁰ declares that the exercise of the property right remains subordinated to the condition of not causing damage to the property of another...”;³¹ “whereas, the *chambre civile* [Civil Division] proclaims in its turn that even the legitimate exercise of property rights triggers responsibility when the resulting trouble for another goes beyond the limit of ordinary neighbourhood obligations” ...³². Immediately upon reading these principled “whereas”, it appears that the *plena in re potestas* of

²⁶ Declaration of the Rights of Man and of the Citizen, arts 2, 17.

²⁷ Art 544 C civ

http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf

²⁸ See on this traditional conception of the law of property: Duguit, *Les transformations generals du droit privé*, p 147 ff – Cpr: M Morin, *Le sens des transformations contemporaines du droit*.

²⁹ Translator’s Note: La Cour de cassation is the highest court of appeal in France. However, it does not have jurisdiction to find on the facts or merits of a case, only to uphold or reject the lower court’s ruling based on a question of law. If a ruling is rejected, the case is sent for retrial. The noun “cassation” is derived from the verb *casser*, which means to break.

³⁰ Translator’s Note: La chambre des requêtes of La Cour de cassation ceased to exist in 1947, when it was replaced by La chambre commercial. See Loi n° 47-1366 du 23 juillet 1947 modifiant l’organisation et la procédure de la cour de cassation, JO, 23 July 1947.

³¹ Req. 23 March 1927, D. P. 1928. 1.73, note Savatier.

³² Civ. 29 May 1937, D. H. 1937.393.

Ancient Rome is singularly compressed in its development and its **full power/full exercise [plénitude]** is more verbal than effective.

Moreover, this is fortunate, because if this tyrannical right were left to its own devices and specific nature, it would invade everything and end up destroying itself. In his now-classic pages, Ihering noted the havoc that any landowner could wreak if allowed to use his full rights, even touching on the absurd: he “would establish a skinning business on his grounds fouling the surrounding air; a well containing substances that poison the neighbour’s land; a factory whose operation weakens the soil and causes the neighbouring houses to collapse, whose smoke kills the vegetation around it, or whose intense heat prevents anyone from staying in the proximity; he would dig a deep hole that causes the neighbour’s wall to collapse, etc. In doing all that, he would remain rigorously within the limits of his property”.³³

The social impossibility of an absolute property right cannot be more **vigorously brought to light**; the invasive nature of such a **prerogative/right** imperiously necessitates measures of compression. These salutary measures have been taken by legislators and jurisprudence; they are far-reaching and numerous; only, they do not convey a uniform legal significance; they do not all derive from the concept of abuse to which authoritative authors thought to indistinctly link them – far from it – and, before going deeper into the subject, there must be a distinction drawn between those that come from this concept and those who remain foreign to it: this is a task of rather delicate but indispensable discrimination to avoid confusion and detrimental mistakes capable of irremediably obscuring a problem that is already very complex and subtle unto itself.

15. — The center of the difficulty resides in the restrictions on **landownership** that are enacted or recognized in the interest of the neighbours and that are readily designated under the name of *neighbourhood obligations*.

Among these restrictions are those formulated and elaborated in statutory law, such as those concerning cutting open views or certain days or even distances to respect for plantings or certain constructions: if these imperative dispositions are unknown, if for example an landowner cuts open a view in a wall located at the edge of his property, there is not an abuse but a **defect of law**; the objective borders, not only the subjective limits, of property rights have been crossed; it is not the spirit of the institution that was unknown but the statutory law itself, and the situation does not greatly differ from an encroachment committed materially and directly on another’s estate;³⁴ in both cases, there is an incursion onto the neighbour’s land and in both cases this is why a sanction will occur, a sanction in kind – unduly cut openings in a wall must be sealed – and without it being necessary to consider the mental state of the contravener, the motives that could have incited him to encroach

³³ Ihering, *Œuvres choisies*, trad by Meulenaëre, t II, p 112 ff. Demolombe had expressed the same idea for rights in general, whose impassable limit is the rights of another (*Cours de Code Napoléon*, t. XXXI, § 471).

³⁴ For the case of anticipation on another’s estate and provoking a collapse, see a ruling from the *chambre des requêtes*, 3 June 1926 (D. H. 1926.345), where the principle is posited that if art 544 C civ confers the right to enjoy a thing in the most absolute manner to the owner, “he only enjoys this right on the condition of not violating the property of another”.

on the neighbour's rights. We are thus completely outside – and we do not believe that the contrary opinion is defensible – the range of the abuse of property rights.

16. — But these written restrictions in legislative form are not the only ones that weigh on **landownership**: next to them, outside of them, jurisprudence admits and doctrine teaches the existence of an extremely tight weave comprised of real neighbourhood obligations, reciprocal obligations like those in the preceding category, but that, unlike them, are not inscribed in the law,³⁵ being highlighted and defined by the judge, and all going back to a simple precept of sociability that all landowners are required not to annoy or inconvenience his neighbours beyond a certain limit, a moreover rather poorly defined limit of *ordinary neighbourhood obligations*; having barely **triggered his responsibility/liability** which will be applied in the form of damages, for example if he takes up noisy employ,³⁶ or if he causes noxious fumes to be emitted³⁷ or raises dust inconvenient for the neighbours³⁸ or if, more generally, he risks compromising his neighbours' health, security, tranquility, material or moral property.³⁹

These neighbourhood obligations are negative since they boil down to a general duty not to cause annoyance to neighbours exceeding common limits, and because they are a creation, or in any case a development, of jurisprudence, they necessarily raise numerous difficulties: notably, what are their nature and their source; do they constitute real obligations or rather should they be treated like servitudes? And, if the first point of view is accepted, the only precise one in our opinion, are we in the presence of **delictual/tortious** obligations? Or of quasi-contractual undertakings? Or perhaps obligations arising *ex lege*? This is not the place to raise these problems; one question alone has our attention: should the owner who contravenes one of these neighbourhood obligations be considered as committing an abuse of his right?

Sometimes a point of view has been defended whose formerly numerous and qualified partisans⁴⁰ have become more and more rare⁴¹: traditionally, like in our current positive law, abuse implies deviation from a right, its diversion from its purpose; and yet, the owner who causes inconvenience exceeding ordinary neighbourhood obligations commits no deviation, no diversion of this type; he acts

³⁵ However, these are presupposed, in any case in general theory, in art 1370 C civ which cites "undertakings between neighbouring owners" as an example of involuntarily formed undertakings.

³⁶ See Orléans, 22 Nov 1889, D. P. 1891.2.120.

³⁷ See Civ. 18 Feb 1907, D. P. 1907.1.385, note Ripert; Req. 14 Feb 1910, D. P. 1910.1.236; 18 June 1923, S. 1924.1.212.

³⁸ Req. 19 Apr 1905, D. P. 1905.1.256.

³⁹ Illuminated signs can be used to determine excessive annoyance that will be a source of damages for neighbours. *Justice de Paix*, Toulouse, 1 Apr 1925 (*Rec des sommaires*, 1925, § 2911 and **infra** § 27); See for a pigsty established in proximity to recreational-use land, Req. 5 Dec 1904 (D. P. 1905.1.77), and for a sledgehammer whose functioning compromised the stability of a neighbouring house, Montpellier, 1 Feb 1933 (D. H. 1933.212).

⁴⁰ In the first editions of their treatises, Colin and Capitant (t I, p 765) and Planiol (t II, § 872) all concurred with an explanation of abuse; the latest editions of these works abandon this point of view (Planiol and Ripert, *Loc cit*; Colin, Capitant and de la Morandière, t I, § 743).

⁴¹ The conception of abuse is taught by H and L Mazeaud, t I §§ 593 ff, notably § 621.

intensely and madly like an owner; he uses his right with a view to his own interest, thus in conformity with legislators' wishes and with the very essence of individual property: manufacturer, industrialist or farmer, he gives himself up to the exercise of his profession over his own field; he acts and remains well within the spirit of the institution. Under another form, in the dominant opinion as it emerges from the jurisprudence, abuse implies the commission of a conscious or unconscious fault; it boils down to the general notion of **delict/tort** or **quasi-delict/quasi-tort**; and yet, how can fault be imputed to the exercise of a licit profession in normal conditions?

The company would be particularly daring if the director of the harmful establishment had obtained, as frequently occurs, an administrative authorisation or recognition as having public utility, even a concession consented to by public authorities, as is the case for a railway administration which performs a function of general utility. Despite this official stamp, the director of the establishment and notably the owner would not be declared any less responsible for damages caused by fumes, emissions or sparks escaping from the factory or locomotives;⁴² but his responsibility could not be based on any fault, especially any deviation of his rights, or any illicit or reprehensible motive.⁴³

In reality, this responsibility is objective; it is explained not by a false direction impressed on the law but by the intensity itself of the damage caused; it derives not from a **delict/tort** but from the particular, exorbitant risk of the common law that the owner or head of the establishment had created in his own interest and without possible reciprocity; in the final analysis, this risk has to be assumed not by a third party foreign to its creation and use, but by the man who founded it for his own personal gain and who, because he reaps the profits, is designated to assume responsibility for harmful incidents: *ubi emolumentum ibi et onus esse debet* [Where there is advantage there must be also burden]. It is thus a question of balancing rival rights and interests; and this question is solved without putting into question either the morality or the opportunity of the act, neither scrutinising nor suspecting the agent's motives; it is objectively imagined beyond any psychological inquiry and according to the theory of risk;⁴⁴ as emerges from the jurisprudence and as we will subsequently show,⁴⁵ instead of abuse of rights constituting a subjective notion, at least from one side, it is *quantitative* and not *qualitative*; deciding differently would moreover give it a quasi-unlimited field, including within it almost the entirety of

⁴² See, concerning the damages caused by dangerous, inconvenient or unsanitary establishments that were duly authorized: Civ 26 March 1873 (D. P. 1873.1.353); Req 17 July 1875 (D. P. 1876.1.447); 18 Nov 1884 (D. P. 1885.1.71); 19 Oct 1910 (D. P. 1912.1.507) and for the damages caused by railway companies, public service agents, Cass 4 Apr 1905 (D. P. 1908.1.204); 24 July 1905, two cases (D. P. 1908.1.183); 17 July 1922 (D. P. 1923.1.172).

⁴³ The cases insist on this point that incriminated acts only constitute "the legitimate exercise" of property rights. See the above cited case from 19 Oct 1910.

⁴⁴ See L Josserand, *Cours de droit civil positif français*, 3d ed, t I, §§ 1495 ff. Belgian jurisprudence has constructed **responsibility/liability** for damage caused to neighbours through the normal, non-wrongful exercise of property rights along the lines of the plan indicated in the text. See Brussels, 20 May 1857 (*Belg judic*, 1857, col 965); Liège, 26 Nov 1902 (*Pasic*, 1903.2.147); and Campion, *La théorie de l'abus des droits*, § 67.

⁴⁵ *Infra* §§ 302 ff.

responsibility, contrary to tradition, terminology and the positions taken both by our jurisprudence and foreign legislation.

17. — We thus consider as a given that the restrictions on landownership, either by law and under a precise and concrete form, or by jurisprudence and under cover of so-called “neighbourhood” obligations, are invariably external to the theory of abuse of property rights, which implies a diversion of this right and its use in an illegal way in violation of the spirit of the institution.⁴⁶

18. — *The Case of Abuse of Property Rights.* — Our jurisprudence constantly proclaims that property rights are capable of abuse and notably that the right holder’s **responsibility/liability is triggered** by his malicious use of it at the expense of a third party.

Our jurisprudence sets out this principle in a very general form for property imagined as a whole, in its universality; but it must be observed that decisions have invariably come about regarding one attribute of this right or another; it is not property as a whole with its powerful synthetic value that was diverted from its purpose, but only one of its countless linked **prerogatives/rights**, in such a way that the abuse appears in a fragmented and specialised form.

19. — Observation is of great importance as a certain number of these **prerogatives/rights** are precisely impervious to the ordeal of abuse: granted to the owner in absolute terms and spirit, they can be exercised with a view to any possible end, for any possible motive, including malicious, without ever **triggering/activating** the agent’s **responsibility/liability**, provided however that his action remains within the objective and precise limits drawn by the law.

For – and this is an observation that will be repeated regarding most rights – the theory of abuse can be said to retreat before legislators’ specifications in the regulation of individual **prerogatives/rights**; *the better a right is delineated, the less willingly its exercise will become abusive*: the objective borders render the subjective borders less necessary; sometimes they even remove all of their utility.

Therefore, and by the application of this general law, the rules set down in the Civil Code that are incapable of abuse, such as those for planting trees (articles 671 ff), for cutting open views (articles 675 ff), a right of way in case of an enclave (articles 682 ff): for example, an owner whose grounds are invaded by the roots of the neighbour’s tree, can always take a devious pleasure in cutting them himself with complete impunity at the limit of the property line, as article 672 paragraph 2 gives him the absolute right to do, in much the same way as he could, very indiscreetly, multiply the openings he cuts in his wall provided that the distances set out in articles 677 ff are respected.

Perhaps it is equally convenient to classify along with a number of absolute rights incapable of abuse, the right held by any owner adjoining a wall to make it a

⁴⁶ *Sic Ripert, De l'exercice du droit de propriété*, p 336; *La règle morale dans les obligations civiles*, § 96; Picard, *Les biens*, in *Traité pratique de droit civil français*, Planiol and Ripert, §§ 470 and 471; Colin, Capitant and de la Morandière, t I, § 743.

party wall,⁴⁷ without the neighbour being able to object to a lack of legitimate interest. In any case, this is the stance taken by our *Cour de cassation*;⁴⁸ but it is worthwhile to note that in Belgium, the *Cour de Gand* [Court of Gand] took the opposite opinion in refusing an owner acquisition of **common ownership** by reason of the impossibility, according to the circumstances, of making normal use of it;⁴⁹ the right conferred on any owner by article 661 of the Civil Code is thus understood in France as an absolute right, and in Belgium as a relative right whose exercise is subordinated to the existence of a legitimate action.

Notwithstanding these sorts of discrepancies, the rights that we have just cited must be considered as rights detached from any purpose, **unactionable/uncaused rights** [*droit non causés*] which we would gladly call *amoral* rights; they lend themselves to any possible use with a view to any possible purpose provided that their holder respects the objective limits drawn with meticulous precision by the Civil Code.

20. — Even more numerous and above all more important are the **prerogatives/rights** coming from landownership that are considered to be bestowed with a particular purpose contrary to which they cannot be used with impunity, and which stem from the very essence of this institution: individual property as a self-serving right, at least in appearance, but not penetrating all the way to its *substratum*, is invariably social like any legal concept, and is dedicated to satisfying the owner's interest, or in any case – this is a reservation appearing in many decisions and has become a judiciary style – to satisfying his *serious and legitimate* interest. Insofar as he pursues this satisfaction, the holder uses his right properly; if he causes harm to a third party in doing so, his **responsibility/liability** will not be **triggered**, with an obvious reservation for the creation of an exceptional risk which we explained previously and to which we will have the occasion to return. From the moment the right takes a direction that is licit, the very one anticipated by legislators, the owner can act freely and resolutely, immunized as he is by his own legitimate interest and insofar as this interest exists.

If, on the contrary, he uses his property right with a view to achieving an end extraneous to his legitimate interest, our jurisprudence will not allow him to go any further; it will not let him cause harm to another; it will make him **responsible/liable** for the prejudice arising from the false use of his **prerogatives/rights** which it will consider he has abused; once the act, licit in itself, is committed, if imagined intrinsically, it becomes illicit by its defining motives and the purpose it attempted to achieve.

⁴⁷ Art 651 C civ.

⁴⁸ Civ. 11 May 1925, S. 1926.1.22; the Supreme Court points out that article 661 only imposes the obligation to pay half of the value of the wall to the wall's owner, and half of the value of the ground on which it was built, and that these are the only conditions to which the exercise of the right is subjected. In reality, this is answering the question with a question; for it is a matter of knowing if this right is conditioned subjectively and by applying the general theory of abuse.

⁴⁹ Gand, 22 June 1907 (*Pasic.*, 1907.2.313).

21. — In first place for these improper, inadmissible motives vitiating the owner's act is the *intention to harm*, the **malicious mind**. The intention to cause harm to another is antisocial, thus anti-legal by its very essence; it can never meet the purpose or mission of any right,⁵⁰ including an apparently self-serving right like individual property; it will thus invariably constitute a deviation from this right, and reveal its abuse.

This simple idea of absolute evidence and justice that Roman law had already established by the rule "*malitiis non est indulgendum*" [The wicked or malicious are not tolerated.]⁵¹ has always been accepted by our jurisprudence and applied more and more frequently to a mass of situations, some regarding *air space*, some regarding *subsoil*, and lastly others regarding the ground *surface*.

22. — I. — *Abuse Committed by the Owner in Using his Air Space*. — According to the terms of article 552 of the Civil Code, the owner of the ground owns the property above it, such that it confers on the owner the right to have "any plantings and constructions that he deems appropriate, save the exceptions established in *des Servitudes ou Services fonciers*" [*On Servitudes or Land Services*]. It therefore seems that, notwithstanding this final reservation which speaks for itself, the owner of a property, master at the same time of its vertical vastness, can benefit discretionarily and as he pleases of its overhead space, its surface and its subsoil. And yet our jurisprudence draws an impassable limit for him that is both social and subjective, represented by the satisfaction of a serious and legitimate interest; notably, it will not accept that he be guided by the desire to harm his neighbours, which is an illicit desire that the law will not protect.

More than three quarters of a century ago, the *cour de Colmar* [Court of Colmar] had the occasion to apply these principles to the owner of a house who had raised a fake chimney of imposing height onto his roof; this construction had no utility for him, and was intended solely to overshadow the dwelling of the neighbour, who sought legal recourse to cease this permanent and malicious harm and to obtain the demolition of the fake chimney in the name of the thesis of the abuse of rights.

Indeed, the court proclaimed on this occasion that "... if in principle property rights are a sort of absolute right authorising the owner to use and abuse his thing, nevertheless, the exercise of this right, *like any other*, has to be limited to *the satisfaction of a serious and legitimate interest*"; and it added that "the principles of morality and equity oppose justice sanctioning an action inspired by ill intention, committed under the influence of an evil passion, *unjustified by any personal utility* and causing grave prejudice to another."⁵² Therefore for the *cour de Colmar*, what justifies the exercise of property rights and characterizes its regular use is a serious and legitimate interest and personal utility: the landowner is required to act in his

⁵⁰ We have, however, several reservations on this subject. **Infra** §§ 269 and 306.

⁵¹ V. P. Huvelin, *Cours élémentaire de droit romain*, t. 1, pp. 445 and 446.

⁵² Colmar, 2 May 1855 (D. P. 1856.2.9).

own interest, seriously and legitimately included; he is thus not exclusively but notably not to be guided by the intention to harm or by ill will.⁵³

These fortunate formulas from the ruling by the *cour de Colmar* can be found in a judgement by the *tribunal civil de Sedan* [Civil Tribunal of Sedan], rendered on analogous facts to those we have just mentioned, with the secondary difference being that the work carried out “with the goal of teasing” consisted this time of a fully boarded fence, erected by an owner on his property at a short distance from the separating line between the two contiguous properties. It did not give him any advantage other than annoying and bullying the neighbour who obtained its demolition through the application of the rule *malitiis non est indulgendum* and article 1382 of the Civil Code. For more details, we simply refer to this judgement for its reference to the notion of *serious and legitimate interest*, previously highlighted by the *cour de Colmar*.⁵⁴

Even more recently and relevant to a current situation, the *tribunal civil de Compiègne* [Civil Tribunal of Compiègne], the *cour de Amiens* [Court of Amiens] and the *chambre des requêtes* successively had the occasion to recall and set out these same principles. A landowner neighbouring a hanger where an airship builder stored his devices, had erected enormous wooden frames on his land, as high as houses and topped with sharpened iron rods. No doubt in the mind of its creator this dreadful set-up was an attempt to damage the airships whose coverings greatly risked being torn during flight; and it indeed transpired that one of the devices fell victim to an accident of this type during a test-run prior to its delivery to the Ministry of War; hence the builder bringing action claiming damages from the landowner and the demolition of the evil constructions. Vainly the defender objected that article 544 of the Civil Code gave him the right to enjoy his thing in the most absolute manner and that article 552 authorized him to construct anything he deemed appropriate; all three jurisdictions successively declared with different tones that in reality property rights, a social prerogative/right, can only be exercised socially and never with the intention of harming another. Yet, in this case, the existence of such an intention cannot be doubted: it becomes apparent from either the tense relations between the two adversaries or from the date and price of the defendant’s acquisition of the terrain, or lastly and above all from the lack of utility, indeed even the annoyance for him of constructing such extraordinary edifices on an abandoned terrain. He thus indeed committed an abuse of his right rendering him accountable to his victim, who could rightly obtain damages and the demolition of a part of the constructions.⁵⁵

23. — The case thus seems to resemble the case that over a half-century before was deferred to the *cour de Colmar* or the case decided by the *tribunal de Sedan* in 1901; nevertheless, a rather important nuance must be pointed out: while the builders of

⁵³ Comp. Brussels Trib. 24 Nov. 1880 (*Journ. des trib.*, 1880, col. 1562). In this decision rendered on construction carried out by an owner, it is said that one can “in using his rights cause harm to another with impunity, unless it is done spitefully and deliberately to harm...”

⁵⁴ Civ. Trib. Sedan, 17 Dec 1901 (S. 1904.2.217, note G. Appert).

⁵⁵ Civ. Trib. Compiègne, 19 Feb 1913 (D. P. 1913.2.177, note L. Josserand); Amiens 12 Nov 1913 and Req. 3 Aug 1915 (D. P. 1917.1.79). This famous case is called *Clément-Bayard*.

the fake chimney and the fence acted out of pure ill intention, it does seem that the enemy of the airships was pursuing a less passionate and rather more lucrative goal; he was without a doubt hoping to make the situation untenable for his neighbour and thus force him into a position where he had to acquire the strangely fortified parcel of land at a high price; his goal was to render himself undesirable; in other terms, here the intention to harm represented not the agent's mental state but only one of the elements of this mental state; achieving the prejudice was not the goal but only a means of pressure employed with a view to a more distant purpose. Nevertheless, it is noteworthy that the *chambre de requêtes*, like the *tribunal de Compiègne* before it, in its reasoning only states the sole intention to harm, as opposed to the *cour de Amiens* that, when considering the hypothesis of the interested calculation as it was moreover produced by the owner, replied that "if it is permissible for a property owner to seek the greatest benefit possible from his property, and if speculation is by and in itself a perfectly licit act, this is only so on the condition that the means employed in the circumstances are not illegitimate or employed exclusively for an ill intention." Furthermore, the *tribunal de Compiègne* itself implicitly rejected the defendant's counterargument by generally proclaiming that a right holder cannot exercise a right "with a view to any other goal than that which has been recognized by legislators, notably with a view to causing prejudice to another." In any case, the act was thus antisocial and abusive, the intention to harm was the primary and exclusive cause or only the secondary cause for the damage; such an intention has no place in the creation of the exercise of rights, when this very two-part [à double détente → means something that occurs with two steps] creation contains another licit factor proper in itself; ill intention vitiates everything: *fraus omnia corrumpit*.⁵⁶

24. — II. — *Abuse Committed by the Owner in Using his Subsoil*. — The domination of the subsoil to the landowner's benefit is set out by the very statute that gives him power over the air space;⁵⁷ article 552 paragraph 3 of the Civil Code authorizes him to "make below all constructions and excavations which he deems proper..." He can thus proceed with any drilling work all while remaining fully within his rights even if the work carried out results in "cutting the veins that supply a spring to a neighbouring site."⁵⁸

But, in this way like the previous one, his rights/prerogatives contain a subjective border represented by the satisfaction of a serious and legitimate interest; beyond the pursuit of this satisfaction, there is no security for him; his responsibility/liability can be triggered/activated if he puts his right to illegitimate use and notably if he carries it out with the goal of harming another.

The *cour de Lyon* [Court of Lyon] decided the case of the Saint-Galmier springs in 1856 in light of these very directives. The owner of one of a spring's

⁵⁶ See however: Ripert, *La règle morale dans les obligations civiles*, § 98. The author supposes that the damaging act has a double cause of which only one is illicit and he wonders, leaning towards the position, if it is necessary to admit that a sole licit motive can suffice to justify the exercise of a right.

⁵⁷ Arts 544 and 552 C civ.

⁵⁸ Req. 16 June 1913 (S. 1914.1.266).

outlets had customized a continuously running pump for his well that diminished the output of another spring on the contiguous land by two thirds. The ill intention was sufficiently revealed by the fact that the pump owner did not use the surplus of mineral water generated by the installation. It was lost in the neighbouring river without any benefit to him. Sued in court, he resorted to article 544 of the Civil Code, which proclaims the absolute character of property rights, as well as the rule *nemo injuria facit qui jure suo utitur* [He who stands on his own rights injures no one]. But the *cour de Lyon*, after the tribunal, retorted that “the owner’s right is necessarily limited by the obligation to let one’s neighbour enjoy his property, too”, and that “the power to abuse one’s thing cannot work to colour an act that, inspired exclusively by the desire to harm, takes on a character of an incursion onto the neighbouring land...”; and recalling the maxim *malitiis non est indulgendum* and applying article 1382 of the Civil Code, the court confirmed the tribunal’s ruling condemning the malicious owner to pay damages, but nevertheless refused the specific performance awarded to the victim by the first instance judges in the form of a limit to the number of faucets and the concoction of diverse works designed to prevent the damage from reoccurring. This reservation, whose value we will explain later, concerned the proceedings and means, the nature of the sanction to be applied; on the contrary, the tribunal and the court found themselves in perfect agreement on the necessity of a sanction like on the origin of the **responsibility/liability** that they attached to article 1382 of the Civil Code and to the theory of abuse.⁵⁹

Much later and still regarding the Saint-Galmier springs, this agreement between the *tribunal civil de Saint-Étienne* [Civil Tribunal of Saint-Étienne], the *cour de Lyon* and the *Cour de cassation* would reappear. This time again work had resulted in a well being systematically drained, causing serious prejudice to the neighbouring springs whose depth and mineralisation were greatly diminished. Nevertheless, these operations taken by themselves did not constitute abuse of property rights; indeed, as the tribunal observed in its judgment, evidence was required that the drilling was carried out with full awareness, that is to say, knowing on the one hand that it could not bring any advantage, and on the other that it would harm the neighbours; and yet the owner had been apprised precisely of this double requirement by the expert reports which the tribunal had designated to elucidate notably the first point; he thus could not allege any valid reason for persisting in his attitude and prolonging a state of affairs prejudicial to another and without any advantage for himself; once informed of the situation, he deliberately violated his neighbours’ rights without such an incursion being justified by the preservation of his personal interests; this is why the tribunal declared him liable for the damage caused, but only, which is essential, starting from the day when his belief had been officially declared, this is to say starting on the day of the notification by the expert’s report. On appeal, this decision was purely and simply confirmed by the *cour de Lyon* whose holding was subsequently approved by the *chambre des requêtes* which upheld three orders in order to reject the appeal: (1) the drilling was prejudicial to the neighbouring springs; (2) it had no utility for the owner who carried it out; (3)

⁵⁹ Lyon, 18 Apr 1856 (D. P. 1856.2.199).

since the official notification by the expert reports, this owner had been acting with full awareness and thus causing serious prejudice to another deliberately and without any benefit to himself. In the same way as the tribunal and the Court of Appeal, the *Cour de cassation* thus clearly brought to light the conscious and subjective character of the abuse of property rights.⁶⁰

25. — III. — *Abuse Committed by the Owner in Using his Ground Surface.* — In practice this rubric targets noisy acts and noise disturbance planned by an owner on his land that may **trigger/activate** his **responsibility/liability** as inconvenienced neighbours have sometimes claimed.

Here again two sorts of limits to the landowner's **prerogatives/rights** must be distinguished, one sort being objective and quantitative, the other being subjective and related to the concept of abuse.

The former is taken from the very excess of noise and the well-known notion of ordinary neighbourhood obligations:⁶¹ the person carrying out the work or noisy activities must compensate the neighbours for the damage he causes them, even if he causes it in an irreproachable way while properly exercising a licit profession, even a profession of public interest; by creating an exceptional risk, preferably he must assume the definitive repercussions instead of third parties who mustn't suffer them since they contributed neither to their development nor their realization.⁶²

The subjective limits, on the contrary, are taken from the mind of the agent, from the motives that could have incited him to resort to **noisy incidents**; whether this motive is proper or reprehensible will determine his **liability/responsibility** or protection; it will become an issue notably if he was guided by the intention to harm his neighbour, for example if he planned a deafening noise disturbance with the goal of terrifying the game and making it futile to have a hunt on the contiguous land; it would thus be punishable by damages awarded by judges to the victim, but while taking care to emphasize the persecutory or obviously abusive character of the manoeuvres carried out to his detriment.⁶³ On the contrary, if the planner of the noise disturbance was pursuing a legitimate goal, if, for example, he proposed to keep the game on his own terrain, he would thus escape all **liability/responsibility**.⁶⁴ As in the use of air space and subsoil, the problem thus appears under the double aspect of a problem of the agent's morality and the **purpose/finality [finality in the sense of absoluteness]** of rights.

26. — *Recap* — If we wished to summarize and characterize the jurisprudence that we have just analyzed, we would end up distinguishing between three categories of acts by which an owner, and notably a landowner, can **trigger/activate** his

⁶⁰ Req. 10 June 1902 (D. P. 1902.I.454; S. 1903.1.11).

⁶¹ *Supra* § 16 and M. Picard, *op cit*, §§ 460 ff.

⁶² Metz, 25 April 1863 (D. P. 1864.2.111); Dijon, 10 March 1865 (D. P. 1865.2.144); Req. 24 April 1865 (D. P. 1866.1.35); Orléans, 22 Nov 1889 (D. P. 1891.2.120); Civ. Trib. Tours 25 March 1904 (D. P. 1905.2.199); Comp. Req. 5 Dec 1904 (D. P. 1905.1.77).

⁶³ Paris, 2 Dec 1871 (D. P. 1873.2.185); Amiens, 7 Feb 1912 (D. P. 1913.2.177, note L Josserand); Civ. Trib. Saint Omer 26 March 1925 (*Rec. des sommaires*, 1925, § 2779).

⁶⁴ *Ibid.*

liability/responsibility: *illegal* acts; *wrongful* acts which correspond if not absolutely, then in any case for a major part, to the abusive acts; and lastly *excessive* acts.

(1) *Illegal* acts: these are committed in violation of a legislative or regulatory measure; thus proceeding, the owner goes beyond the objective limits to his right; for example, he constructs or plants on his neighbour's terrain, or even on his own soil, but without respecting the regulatory distances. His **liability/responsibility** is objectively **triggered/activated** by this no matter how pure his intentions were, and without even requiring the plaintiff to prove a prejudice; in any case, the situation created contrary to the law, without a right, must come to an end; for example, unduly cut openings in a wall must be sealed; any trees, branches or roots encroaching on neighbouring land must be cut down or felled.

(2) *Wrongful* acts and, more specifically, unjust or *abusive* acts: the owner exercised **prerogatives/rights** that belonged to him; he did not go beyond the objective limits; he built or dug on his own land. The act is thus indeed legal, and is irreproachable if seen intrinsically by detaching it from the intention that was realized and the motives that formed it. But the judge has the duty to go back all the way to these motives; if they are reprehensible, if they contradict the purpose of the right, and if, for example they are malicious, the owner's **liability/responsibility** can be **triggered/activated** on the grounds of abuse: subjective **liability/responsibility** or more exactly mixed **liability/responsibility** since it can be inferred both from the right's social purpose and the holder's mental state, the latter no longer matching the former; and **liability/responsibility** subordinated to the existence of a prejudice whose evidence is incumbent on the plaintiff seeking compensation to provide.

(3) *Excessive* acts: committed by virtue of an incontestable right and with a legitimate goal, these are nevertheless likely to cause excessive prejudice to another; composed of risks, they place a burden of responsibility, which is objective like those in the first category, on the person who carries them out, but with the difference that their realization is subordinated to the existence and the proof of a prejudice, and even a prejudice excessive to the point of being unjust, like if an industrialist compromises the neighbouring crops with the fumes and gases from his factory's chimney.

The first types of acts are intrinsically improper in themselves; the second become so by their creation because the person who carries them out does so without legitimate reason, thus contrary to the spirit of the institution; the third become generators of **liability/responsibility**, not by themselves, but by the material consequences to which they lead.

The acts fitting into the second category alone are or can constitute an abuse of property rights.

27. — Criterion for Abuse of Property Rights. — In the current state of jurisprudence, this criterion is given to us by the notion of a *serious and legitimate interest*; the purpose of individual property, in any case without penetrating so far as its ultimate and deep objectives, is to satisfy its holder's interests; in a similar matter, and when it is a question of exercising a self-serving **prerogative/right**, being self-serving is compulsory; it becomes a virtue. However, being self-serving

again has to be satisfied in conformity with social morality and in a legitimate way, otherwise the owner's **liability/responsibility** will be **triggered/activated**, in any case to suppose that his intervention caused a prejudice to third party.

As a result, it is not exclusively the intention to harm that constitutes an **abuse of property rights**;⁶⁵ certain acts are considered abusive, thus generators of **liability/responsibility**, even though they do not exclusively proceed from an ill intention and the person who carried them out seeks at the same time, even essentially, to realise a personal profit.⁶⁶

(1) We have seen an application of this principle in the decisions rendered regarding the case of Clément-Bayard, the landowner who built offensive works of grand style, in the end intended less to harm his neighbour than to force him to acquire the fortified parcel of land at a high price: a fraudulent manoeuvre and illicit speculation which went against the purpose of property rights. This owner indeed had in sight the satisfaction of a personal interest, but not a serious and legitimate interest.⁶⁷

(2) French jurisprudence, and even more so Belgian jurisprudence, have had to appraise the quality of the act committed by an owner who, having to choose between several manners of exercising his right, opted for the one causing the most serious prejudice to a third party; and they have consistently decided that in such a case, if the option had been taken deliberately, with full awareness, then the right showed an abusive character. In this order of ideas and direction, an interesting judgement by the *tribunal civil de Draguignan* [Civil Tribunal of Draguignan] regarding a bauxite mining operation must be pointed out, where it was proclaimed that "if, as a general rule, there is neither an illicit act or **delict/tort**, nor, in consequence, **liability/responsibility** incurred by the person causing damage to another by using his thing according to its purpose, there is a true fault in the sense of article 1382 of the Civil Code by the person who, having several manners of exercising his right, chose, without necessity and with the manifest design to harm, the one that could be prejudicial to another ..."⁶⁸

28. — For several years, this directive has inspired the numerous decisions that have been rendered on broadcasting and with a view to protecting radio devices threatened by the functioning of electric phonographs⁶⁹ or a radiotherapy device,⁷⁰ or an illuminated sign;⁷¹ the owner of these installations has to take effective measures to reduce to a strict minimum the annoyance caused by the parasitic waves to the T.S.F. stations located in the neighbourhood, otherwise he is committing a fault that may **trigger/activate** his **liability/responsibility**; he misuses

⁶⁵ V H & L Mazeaud, t I, §§ 568 ff.

⁶⁶ Delmolombre notes that this was the point of view of Roman law, at least in its final state: "*Expedit rei publicae ne sua re quis male utatur*" (*Cour de Code Napoléon*, t IX, § 545).

⁶⁷ *Supra* §§ 22 and 23.

⁶⁸ Civ. Trib. Draguignan, 17 May 1910 (D. P. 1911.2.133). Comp. Req. 23 March 1927 (D. P. 1928.1.73, and the note by M Savatier).

⁶⁹ Douai, 1 Dec 1930 (*Gaz. Trib.* 24 Feb 1931).

⁷⁰ Civ. 29 May 1937, D. H. 1937.393.

⁷¹ Trib. Com. Seine, 14 Nov 1933, S. 1934.2.23.

his right from the moment he no longer exercises it prudently, reasonably, and taking care not to harm another, but instead with negligence and carelessness; it is not even enough for him to be shy and discreet; he has to be well-advised and up-to-date, and give his device all the improvements recommended by science and technology; abstention is a fault;⁷² routine for him becomes the beginning of **liability/responsibility**, while modernism is the beginning of wisdom and immunity; he is at fault by the sole fact that he does not conform to progress,⁷³ because at the same time, he chooses one way among several of using his thing that, without any benefit to himself, is nonetheless likely to prejudice another: the economic mistake he makes constitutes a fault in the exercise of his right, an abuse of right.

Belgian jurisprudence⁷⁴ has gone in the same direction many times, notably regarding the landowner's right to erect constructions: if the work was carried out in an untimely manner, in a place⁷⁵ or at a time⁷⁶ or by particularly poorly chosen means⁷⁷ for the neighbours, and were unnecessary, the third parties harmed by the wrongful installation have grounds to bring a complaint; because, as the *Cour de cassation* of Belgium declares: "... among the different ways to exercise one's right with the same utility, it is not permitted to choose the one that would be harmful to another."⁷⁸

And yet, it is obvious that in this kind of possibility, the intention to harm does not constitute the exclusive motive for the act, but only one of the conditions of its creation. The owner is determined to complete the work that he finds has utility and that could even have a sense of urgency; only he chose his timing or means poorly, and with awareness and without any profit for himself; this intrusion of inopportunity, of useless "carelessness", this defect of technicality in the realization of the right, suffices to constitute abuse of property and to **trigger/activate** the guilty person's **liability/responsibility** under the terms of article 1382 of the Civil Code.

(3) The French legislator has agreed with these views many times, but notably when the public authorities, by a decree of 1 December 1933 rendered in enforcement of article 114 of the *loi de finances* [*Law of Finances*] of 31 May 1933, enjoined constructors, operators, resellers and holders of electrical installations or devices to equip them with systems protecting radio broadcasting waves from their parasitical effects;⁷⁹ thereafter, a **quasi-delict/quasi-tort** committed by a person causing the damage became specialized and the victim drew the principle of the action not only from the general rule in articles 1382 and 1383 of the Civil Code, but also from the measures established with a view to a precise goal, *secundum subjectam materiam*; non-conformism to the great law of progress has become a

⁷² On the *fault of abstention*, see H and L Mazeaud, t. 1, §§ 524 ff.

⁷³ See P de Harven, *Est en faute celui qui ne se conforme pas au progress*, in *Rev. gén. belge ass. et resp.*, Jan 1930.

⁷⁴ See on this jurisprudence, Campion, *La théorie de l'abus des droits*, § 54.

⁷⁵ T de P Arlon, 20 Jan 1883 (*Pasic.*, 1884.3.228).

⁷⁶ Gand, 28 Jan 1901 (*Pasic.*, 1884.3.228).

⁷⁷ Brussels, 18 July 1913 (*Belg. judic.*, 1913, col. 1181).

⁷⁸ Belgian Cass, 12 July 1917 (*Pasic.*, 1917.1.65).

⁷⁹ See M Berthier, *La lutte juridique contre les perturbations radioélectriques en matière de radiodiffusion*, thesis, Lyon, 1935.

named **delict/tort**, provided for and sanctioned by a regulatory measure, itself emerging from the enforcement of statutory legislation.

29. — (4) **(Types of) Common Interest Ownership.** — It sometimes occurs that the notion of legitimate interest is specified and limited because of the nature of ownership, its legal configuration and its object.

Indeed, there exist types of ownership whose use can be of direct interest not only to the holder, but also to other people who have equal or competing rights; we will call them **(types of) common interest ownership**. The incentive is less self-serving than in ordinary individual property; legitimate interest, which remains the touchstone of the correction of acts committed by the holder, is appreciated according to the common purpose of the thing by which it is conditioned and specialized. This is also the case for ownership over letters and co-ownership.

30. — *Letters*⁸⁰ provide us with the example of an individual and interesting type of ownership, however with different aspects; two or more people, sender, receiver and some third parties. Solidly established jurisprudence is known to attribute this ownership to the receiver at the time of reception;⁸¹ but the rights belonging to him in this quality are considerably inferior to those held by an owner of any material good, limited as they are by the equally respectable rights of either the sender or perhaps third parties targeted by the correspondence; to determine them, tribunals proceed with a sensible balancing; they take into account an infinity of nuances either of the letter's character, which can be more or less confidential,⁸² or the circumstances in which it is used,⁸³ or also the motives driving its holder to benefit from it, notably in disclosing it. And yet all these sometimes subtle and controlled but always equitable and rational distinctions and nuances are established according to the letter's purpose, an essentially variable and more or less collective purpose; insofar as it appears in the very content and form of its decisions,⁸⁴ the essential concern of our jurisprudence can be said to be avoiding the abuse of rights by bringing in the notion of serious and legitimate interest; this is why a confidential letter cannot be disclosed with impunity during a trial,⁸⁵ unless, however, the

⁸⁰ **Cons. [consult? consider?]** regarding *Letters*, the classics by Gény and Valéry; Compare Maurice Picard, *Les biens*, §§ 580 ff (*Traité pratique* by Planiol and Ripert).

⁸¹ Req. 9 Feb 1881 (D. P. 1882.1.73; S. 1881.1.193, note Labbé); Toulouse, 10 June 1909, under Cass. 24 Oct 1910 (S. 1913.1.437); Montpellier, 21 June 1928 (D. H. 1928.552); Trib. Civ. Seine, 27 Nov 1928 (D. H. 1928.616).

⁸² The question of knowing if the letter is confidential, is to what extent, is itself a question of fact that must be resolved on a case-by-case basis, by the first instance judges. Req 5 Feb 1900 (S. 1901.1.17); 20 Oct 1908 (S. 1909.1.253). See Gény, *op cit*, t. 1, §§ 81 ff.

⁸³ As noted by Gény (*op cit*, t. 1, § 83), "there are degrees, variations, nuances in the very confidentiality ...", and "it is conceivable, for example, that a letter asking for secrecy from one person will not require it from another and that some correspondences can be communicated to the family or other friends without entailing legal disclosure.

⁸⁴ The decisions that refer literally to the notion of abuse are numerous. See, among others: Req. 5 Feb 1900 (D. P. 1901.1.45); Caen, 5 Feb 1898 (D. P. 1899.2.2).

⁸⁵ Req. 5 May 1897 (S. 1901.1.454). This would be otherwise if the litigants were in agreement on the opportunity to produce the confidential letter.

disclosure is made legitimate by the circumstances in which it occurs, notably when it is a question of supporting a claim in separation from bed and board or divorce⁸⁶ or to establish the simulation of an act;⁸⁷ and again, even in this instance, our jurisprudence does not accept the production of correspondence that the litigant may have procured by illicit or disloyal means,⁸⁸ in such a way that the very interest of judiciary truth does not confer **full powers [plénitude]** on the owner of the letters: even in an extreme case, ends do not justify all means. All of this fortunate and equitable jurisprudence becomes instantly clearer when seen from the angle of the abuse of property rights and with the help of the concept of legitimate interest; the receiver as owner of the letter can use it with impunity insofar as and only for a legitimate interest which is appreciated not only in relation to him but in relation to all rights holders, and which is thus a *common legitimate interest*.

31. — *Co-ownership* is the most typical example of this adaptation of legitimate interest to a collective ideal. Stemming from this **tenure community [communauté de tenure]** is a community with a goal and use that both limits and harmonizes the communists' ability to act; the thing belonging to several people with or without indivision can be used by each of the co-owners on the condition that its communal purpose is respected as set by the law, by use or convention, and that the other communists' equal rights are not violated. Such is the rule established for society by **article 1859-2 of the Civil Code [1859-2° → not sure how to deal with this! The current art 1859 C civ FR does not have a second paragraph, since it was modified in 1978.]**,⁸⁹ and **as has precisely/indeed been remarked/noticed/observed**, simple indivision should be extended, for it does not derive from *affectus societatis*; "it only recognizes the right belonging to any co-owner to use the common thing when it is used within the limits expressed above."⁹⁰ The *Cour de cassation's* jurisprudence was deeply set in this sense, notably by the cases from 28 February 1894 and 13 March 1934, according to which the rights of each co-owner "consist of freely using the common thing on the condition of not changing the purpose without the unanimous consent of all of the co-owners, and of not causing either damage or disruption to any of their possession", a solution logically flowing from this postulate that each communist has "an equal and reciprocal right"⁹¹ over the thing.

More recently, the *chambre civile* had the occasion to solidify its jurisprudence by proclaiming that "each of the owners in indivision of a common thing has a complete right over it that is only limited by the equal right of each one of the other communists", and that "this right ... consists of freely using the common thing on the

⁸⁶ Civ. 15 July 1885 (D. P. 1886.1.145); Req. 5 Mar 1918 (S. 1918-1919.1.175).

⁸⁷ Req. 5 May 1897.

⁸⁸ *Supra* note 86, Civ 15 July 1885; *supra* note 83 [or could be note 81! → there are two 5 Feb 1900 cases], Req 5 Feb 1900; *supra* note 86, 5 March 1918, reasoning.

⁸⁹ According to the terms of this disposition [which no longer exists! How to cite?]: "each partner can use the things belonging to the partnership provided that they use them for the purpose set out by common usage, and that they do not use them contrary to the interest of the partnership, or in such a manner as to hinder their partners from using it according to their rights."

⁹⁰ Capitant, *L'indivision héréditaire*, p 20.

⁹¹ See Civ 28 Feb 1894 (D. P. 1894.1.253); Req 13 March 1934 (D. H. 1934.268; S. 1934.1.148).

condition of not changing the purpose without the unanimous consent of all of the co-owners and of not causing either damage or disruption to any of their possession.”⁹²

It is permissible for the co-owners to exercise hunting and fishing rights in applying these directives, as well as to use an undivided passageway built for access to several houses, but on the condition of respecting the purpose of this path which they are forbidden from obstructing by leaving any materials⁹³ or by installing a main sewer pipe.⁹⁴ Depending on the case, a common courtyard between the owners of several houses could be used to get light, as a passageway for vehicles or to ensure drainage for rain or household water, but not to hold permanent warehouses and especially not filthy stores that would constitute an annoyance and an inconvenience incompatible with the common purpose of the thing; a common alleyway meant to ease traffic could not be encumbered by one of the co-owners building a store out of stone⁹⁵ or parking cars there⁹⁶. The latter would divert the thing from its true purpose; it would be putting it to a use that satisfies another interest than the common legitimate interest; it would be committing an abuse of right.

32. — Through this it becomes clear how supple and nuanced the notion of legitimate interest is, which constitutes the touchstone of morality and the social value of acts committed by the owner.

It also becomes clear how important and efficient the jurisprudence regarding the abuse of property rights is; in 1804, dominated by the individualist spirit of the Revolution, legislators proclaimed the sovereign character of this right; in article 544 of the Civil Code, they gave it a definition that, following G Cornil’s fair observation, “is pervaded by an exaggerated individualism.”⁹⁷ But realities and facts are stronger than definitions and systems: our jurisprudence knew how to retrieve this social function of property that the Civil Code had left in shadow, and to connect to it by referring to the concept of abuse; it *caused* this supposedly absolute and sovereign right; it made it the centre of more and more numerous positive duties incumbent on its holder; it softened and socialized it by attributing a its own purpose to it, according to the milieu in which it is meant to develop, and in consideration of its object.

Regarding the latter, the efforts of public authorities have, if not exclusively, then at least mainly, dealt with landownership: the vast majority of rulings target the abuse of **prerogatives/rights** that belong to the owner of a terrain or a building and sometimes it is difficult to find links to movable goods: movable property does not have the same social function to fulfil as immovable wealth; it has a more fugitive and more strictly individual character; it remains attached to the person “*mobila personae inhoerent*” [Movables inure to the person]; its use also more rarely

⁹² Civ 10 May 1937 (S. 1937.1.191).

⁹³ Pau, 5 May 1890 (D. P. 1891.2.213).

⁹⁴ Req, *supra* note 91 13 March 1934

⁹⁵ Bordeaux, 17 July 1889 (D. P. 1890.2.142).

⁹⁶ Grenoble, 28 Nov 1868 (S. 1869.2.252).

⁹⁷ G Cornil, *op cit*, p 99.

occasions prejudice to third parties: and yet, we already know and will explain at greater length that the abuse of a right only practically exists and only **triggers/activates** the agent's **responsibility/liability** as long as it caused damage: "no interest, no cause of action".⁹⁸ It is because of this double reason that the abuse of movable property rights is so rare in practice; but there are nevertheless objects whose use has a social angle and can cause prejudice to another, such as letters and broadcasting devices; they have effectively provided our jurisprudence with the occasion to affirm the relativity of the rights of senders or users of a device, and consequently appeal to the general concept of abuse to maintain the realization of their rights at the social level.

⁹⁸ *Infra/Below* §§ 260 ff; 315 ff.