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INTRODUCTION*

Mature legal systems are property conscious. The bulk of their laws deal directly with the protection of property and with transactions involving property. Ownership, manifesting itself in powers of alienation, rights of possession, and rights of use and enjoyment, is scrupulously guarded. This article deals with the protection of a person's rights in the use and enjoyment of land against interferences emanating from the land of another. Such interferences multiply and become more acute as the local population density increases and as more varied land uses, especially industrial and commercial uses, are introduced.

Collisions between interests can be averted or minimized by planning and by advance related administrative measures, or they can be dealt with after the harm has been felt. But administrative controls never supply the complete answer and thus, in either case, the aggrieved parties have to seek the assistance of judicial process under the general principles of statutory interpretation and private law.

An initial difficulty becomes immediately apparent in any conflict that comes before a tribunal. The elimination of an interference with the use and enjoyment of land for the benefit of complainant *A* inevitably entails imposition of restrictions upon the use and enjoyment of land by respondent *B*. Yet *B*'s right to use his property to his own advantage and conduct his affairs in his own way is no less important than the right of *A* to use and enjoy his premises. If the judicial decision-maker invariably approached this dilemma with a compromise solution, litigation might be encouraged and courts flooded with ludicrous claims. It is perhaps for this reason that in many, if not all, legal systems only a limited category of claims is remediable.

In common law countries, the problem is characterized as private nuisance—a segment of the law of tort. Private nuisance is spoken of, though not universally, as such use of land as causes a substantial interference with the use and enjoyment of land by another, if the interference is intentional, negligent, or arises out of ultrahazardous activity.[1] Since all three types of conduct are coupled with a requirement of "unreasonableness under the circumstances," much of the case law has developed

† See Contributors' Section, Masthead, p. 347, for biographical data.

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1 Prosser, Torts §§ 70 and 72 (1955); 4 Restatement, Torts § 822 (1939). Newark, The Boundaries of Nuisance, 65 L.Q. Rev. 480 (1949).

around this term. The unreasonableness of a course of conduct is ascertained ideally through an elaborate process of weighing the utility of the conduct against the harm or risk which results.[2] The tradition of nominate torts, however, leads many a court to neglect such analysis and, instead, requires it to struggle with dubitable distinctions between trespass to land and nuisance, negligence and nuisance, and the notion of a single tort and a field of tort liability.[3]

Justinian's Digest states, as a general principle, *"in suo enim alii hactenus facere licet, quatenus nihil in alienum immitat"*[4]—every person may act as he pleases on his own property, so long as he immits nothing on the property of another. Actionable immissions in Roman law ranged from those of undoubtedly physical matter, like rocks and water, to the less corporeal smoke and odors. The prohibition perhaps could have been extended by analogy to include offensive vibrations or light beams but, subject to certain exceptions, nothing confined within the bounds of one's property could serve as a basis for a lawsuit. Furthermore, many immissions were not actionable because they were so minute and common that everyone was expected to suffer them.[5] Finally, since liability without fault was not known to the Romans, the origin of each *damnum* was examined in order to determine whether it had sprung from *iniuria*. *Iniuria* existed where it was found that the *damnum* was due to the actor's *culpa* (*i.e.*, if it could be attributed to his volition, either because he had intended the damaging effect or had not been careful enough in avoiding it).[6]

German law has preserved the concept of *immissiones* and refuses to entertain actions based on purely intangible interferences, such as unpleasant sights. Unsubstantial interferences do not give rise to an action, nor do substantial ones if they are ordinary under the local usage (*Ortsüblichkeit*) and do not endanger the very basis of the complainant's existence. Changes in technology and in community structure are accommodated by stretching the "ordinary." Certain other interferences

[2] Prosser, op. cit. supra note 1, § 72; 4 Restatement, Torts §§ 826-831 (1939); Beuscher and Morrison, "Judicial Zoning through Recent Nuisance Cases," 1955 Wis. L. Rev. 440 (1955).

[3] Van der Merwe v. Carnarvon Municipality (1948), 3 So. Afr. L.R. 613; Southport Corp. v. Esso Petroleum Co., Ltd. (1953), 3 Weekly L.R. 773, rev'd (1954) 2 Q.B. 182, rev'd in part sub nom. Esso Petroleum Co., Ltd. v. Southport Corp. (1955), 3 All E. R. 864 (H.L.); noted in (1954) Camb. L.J. 172; Bell v. Gray-Robinson Constr. Co., 265 Wis. 652, 62 N.W.2d 390 (1954). See also Wiggins v. Moskins Credit Clothing Store, 137 F. Supp. 764 (E.D.S.C. 1956).

[4] Dig. 8.5.8, § 5.

[5] See generally De Villiers, "Nuisances in Roman Law," 13 L.Q. Rev. 387 (1897). For shorter references consult: Radin, Roman Law 142 (1927); Buckland and McNair, Roman Law and Common Law 308-11 (1936), and Burdick, Principles of Roman Law and Their Relation to Modern Law 363-70 (1938).

[6] Grueber, Lex Aguila 12 (1886); Harris, "Liability Without Fault," 6 Tul. L. Rev. 337, 365 (1932); Comment, 6 Tul. L. Rev. 315, 316 (1932).

are not actionable because they are in the exercise of a servitude, a sovereign right, or an activity authorized by statute. When monetary compensation is claimed, the plaintiff must show that the interference has been intentional or due to negligent conduct (analysis based on delictual liability). This requirement is dispensed with if merely an order of forbearance is sought (analysis in terms of the proprietary limits of land).[7]

In France, because of relatively recent planning history,[8] the resolution of disputes over conflicting uses of land has in large measure devolved upon the courts. This article surveys one and one-half centuries of French judicial effort to create a body of *jurisprudence* cognizant of the complex realities of modern living and consonant with the language of the *Code Civil.*

Droits de Voisinage—Neighbors' Rights

Property rights in France are among the essential guarantees of individual liberty.[9] Article 544 of the civil code provides:

> Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in any way prohibited by statutes or regulations.[10]

In the early years of the nineteenth century, the emphasis was on the word "absolute" and all limitations were strictly construed. This was perhaps due to the distorted image of the character of ownership in the

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[7] German B.G.B. §§ 226, 823, 826, 862, 903, 906, 907 and 1004; Wolff and Raiser, Sachenrecht § 53 (1957); I Great Britain Foreign Office, Manual of German Law 138-140 (1950); Goldschmidt, English Law from the Foreign Standpoint 124 (1937).

[8] Salaün, "Urban Land Policies: France," U.N. Housing and Town and Country Planning Bulletin No. 7 71 (1953). The principal planning acts are: La loi du 15 juin 1943, relative à l'urbanisme, D.A. 1943. L. 94, and Le décret no. 56-620 du 23 juin 1956, portant révision du code de l'urbanisme et de l'habitation, D. S. 1956. L. 217. The foregoing abbreviations refer to Dalloz, Jurisprudence Générale, the primary source of original materials used in this study. The various collections of Dalloz will be cited as follows:

Rép. — Répertoire Méthodique et Alphabétique (1845-1870);
Supp. — Supplément au Répertoire (1887-1897);
D. — Recueil Dalloz;
D. A. — Recueil Dalloz Analitique;
D. C. — Recueil Dalloz Critique;
D. H. — Recueil Dalloz Hebdomadaire;
D. P. — Recueil Dalloz Périodique et Critique;
D. S. — Recueils Dalloz et Sirey.

Citations contain the following abbreviations: Chr.—Chroniques; J.—Jurisprudence; L.—Legislation; Somm.—Sommaires.

[9] Déclaration des Droits de l'Homme et du Citoyen iv, v and xvii (1789).

[10] All translations from French, unless otherwise indicated, are by the author. In describing persons who advance conflicting claims with respect to the use and enjoyment of land, the term "owner" also denotes holders of property rights less complete than full ownership, e.g., tenants, usufructuaries, occupants. Such persons may both claim judicial protection and be sued on the same grounds as owners. See Savatier, Traité de la Responsabilité Civile 90 (1951). See also Cagé v. Girard et Voyet, note 132 infra (owner of mere hunting rights sued).

Roman law.[11] Later, the attention of legislators, judges and legal writers shifted to the proviso. Today, limitations upon owners' rights to enjoy and dispose of their land may be said to fall into two classes: (i) restrictions imposed by uncodified statutory law and implementing administrative regulations,[12] and (ii) restrictions found in other civil code provisions, in particular, in articles dealing with servitudes arising from location, and with general delictual, or prima facie tort, liability. Sometimes a third class, the doctrine of the abuse of rights, is mentioned, but there is at least some disagreement concerning its nature and attendant doubt as to whether interferences with the use and enjoyment of land ought to be analyzed in its terms at all.[13]

Although our common law nuisance is etymologically French, describing in both languages a harmful or offensive thing, there is no such single term, identical or equivalent, in the French legal vocabulary. The problem of interferences with a person's use and enjoyment of land is analyzed in terms of rights existing between neighbors—*droits de voisinage.*

The mutual limitations upon the use and enjoyment of land found in the code, and the actions to vindicate them, have aspects of both the law of property and the law of obligations. Thus, the law imposes upon neighboring landowners various reciprocal obligations, and certain servitudes are established by law or may result from the natural location of the premises.[14] One is allowed to keep trees, shrubs, or bushes near the boundary of an adjoining estate only at a distance authorized by special regulations or by uniform and acknowledged custom.[15] Plants violating the legal distance or, in any case, their intruding branches and roots are subject to removal.[16] Minimum distances, corresponding to side- and rear-yard restrictions found in our zoning ordinances and in restrictive covenants, must be observed by users of land who are building struc-

[11] Lévy, "The Code and Property," Code Napoléon and The Common-Law World 162, 167 (Schwartz's ed. 1956). On the character of ownership in Roman law, see Schultz, Roman Law 151-153 (1936).

[12] It is difficult to speak of private, as opposed to statutory public land use controls in a civil law country, as the civil code itself is statutory. It is better to think of code provisions regulating the reciprocal rights and obligations of private individuals on the one hand, and police measures outside the civil code on the other. An example of the latter kind is La loi du 20 avril 1932 tendant à la suppression des fumées industrielles, D. P. [1932]. 4. 180. For early regulatory measures, see Supp., Propriété no. 65.

[13] 1 Arminjon, Nolde and Wolff, Traité de Droit Comparé § 247 (1950). But see "Acts Intended to Harm Another and the Doctrine of l'Abus de Droit" infra.

[14] Art. 1370, 651, 637 and 639. (All articles cited are from the Code Civil, unless otherwise indicated.) Most of the droits de voisinage impose upon a landowner a passive attitude. Only a few require affirmative conduct. These are, however, limited to situations involving adjoining pieces of land, e.g., the obligations to mark boundaries (bornage) and to enclose lands (clôture). See Art. 646 and 647, and 1 Planiol, Traité Élémentaire de Droit Civil 740 (1911).

[15] Art. 671.

[16] Art. 672 and 673.

tures, *e.g.*, wells, cesspools, chimneys, fire-places, furnaces, stables, or sheds for storage of corrosive substances,[17] which are potentially harmful or obnoxious to their neighbors. The rights to light and air are regulated to some degree.[18] Furthermore, every landowner is obliged to slope his roofs in such a fashion that rainwater is diverted on his own land or on public highways, but not on the adjacent properties.[19] Actions arising out of these relations may be brought to obtain either a mere declaration of the extent of one's proprietary rights[20] or to enforce the corresponding obligations. As a general principle, every obligation to act or not to act resolves itself in damages in case of non-performance on the part of the obligor, but the obligee may also demand either that what has been done in violation of the agreement be destroyed or ask for authorization to carry out obligations not performed by the obligor, at the latter's expense.[21]

But the proprietary limits designated by the code are incomplete. There is no article dealing directly with such common annoyances as gases, vapors, odors, smoke, dust, soot, heat, light, noise, vibration, dangerous structures or unpleasant sights.[22] This gap had to be closed, therefore, with the aid of the articles on delictual liability:

> Article 1382. Any human act whatever that causes damage to another obliges the person by whose fault the damage has occurred to make reparation for it.
>
> Article 1383. Everyone is liable for the damage he has caused not only by his act but also by his negligence or imprudence.
>
> Article 1384. A person is liable not only for the damage he has caused by his own act, but also for that caused by the acts of persons for whom he is responsible or by things under his guard. . . .[23]
>
> Article 1385. The owner of an animal, or the person using it during the period of such use, is liable for the damage the animal has caused, whether it was under his guard or whether it had strayed or escaped.
>
> Article 1386. The owner of a building is liable for the damage caused by its collapse when this has been due to its improper maintenance or defective construction.

These articles, in turn, merely state that damage caused under certain conditions will result in an obligation to repair it. The conditions are being gradually worked out by judicial process. This body of *jurisprudence* is the French law of tort (*responsabilité civile délictuelle*) and,

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17 Art. 674.
18 Art. 675-680.
19 Art. 681.
20 See "Negatory Action (Action Négatoire)" p. 318 infra.
21 Art. 1142-1145.
22 Compare the German B.G.B. §§ 906 and 907.
23 The omitted paragraphs deal with vicarious liability of parents, masters, employers, teachers, and artisans.

therefore, actions arising out of interferences with the use and enjoyment of land, when based on these articles, "sound in tort."

Soon after the *Code Napoléon* had come into effect, French judges working in the shadow of Article 4,[24] were readily according protection against interferences with the use and enjoyment of land. Ownership, the courts declared, was not so absolute after all that one could put his property to a use which, though not contrary to statutes and regulations specifically referring to land use, was, nevertheless, harmful to another.[25] The injured person was enabled either to prevent the continuation of the interference or to exact compensation.[26]

The same rule was applied to expanding industry. No one could successfully defend an action on the ground that he was only using his land, that he was doing it with the consent of public authorities, and that there was no statute specifically prohibiting him from doing it.[27] In reverence to Pothier's writings, the definition of ownership underwent covert transformation. It emerged as "the right to dispose of a thing according to one's pleasure without, however, injuring the rights of another."[28] Apologetic opinion was voiced that even if the code had not reproduced this proposition verbatim, one should not conclude that the modern legislator had intended to exclude the qualification.[29]

During this early period, courts were primarily concerned with the result of an interference and not with its origin. But there was no criterion by which results could be characterized as actionable. Some interferences obviously had to be endured. Thus, in the *Affaire Ducasse*,[30] a smoke nuisance case, the court said that even if the smoke had not been dissipated by wind, as it had been here, the complaint would have been dismissed on the ground that an inconvenience of those dimensions was to be considered a neighborhood encumbrance (*charge du voisinage*). Shortly thereafter, however, a test was born in the great case of *Derosne v. Puzin*.[31]

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24 "A judge who refuses to give a judgment on the pretext that the law is silent, obscure or insufficient, may be prosecuted as being guilty of a denial of justice." See generally Von Mehren, Civil Law System 57-63 (1957).

25 Affaire Lingard, Metz, 10 novembre 1808, and Affaire Mercy, Metz. 16 août 1820, cited in Rép., Propriété no. 166.

26 Affaire Pennetier, Bordeaux, 30 janvier 1839, cited in Rép., Propriété no. 164.

27 Affaire Rigaud-Arbaud, Req., 11 et 12 juillet 1826, and Affaire Ancillon, Nancy, 14 janvier 1830, cited in Rép., Propriété no. 166.

28 Rép., Propriété no. 162. See also Rép., Responsabilité no. 116. But cf. Anglade v. Dumont, Req., 13 mars 1827, cited in Rép., Propriété no. 165.

29 Supp., Propriété no. 66.

30 Bordeaux, 9 mai 1823, cited in Rép., Propriété no. 160.

31 Derosne litigation consists of the following cases: Trib. civ. Seine, 22 août 1840 (Reported in Rép., Industrie et Commerce no. 212); Paris, 16 mars 1841 (ibid.); Civ. 27 novembre 1844 D.P. [1845] 1.13; Amiens, 18 juillet 1845 D.P. [1849] 1.148; Req., 20 février 1849 (ibid.). It is described as the leading case by Capitant, Note, D.P. [1908] 2.49, and as the "germ" of the French jurisprudence on the use and enjoyment of land in Péquart v. Brenière, Civ., 11 novembre 1896, D.P. [1897] 1.10.

DEROSNE v. PUZIN

The case involved a collision of interests between an industrial enterprise, on the one hand, and a private hospital and two homeowners, on the other. The litigation extended over eight years and well-nigh ran the full course of the French review procedure.[32] It deserves a detailed examination as the first case in which the Cour de Cassation was genuinely concerned about the problem of conflicting land uses. The arguments of the counsel and the courts' opinions trace the history of the law of interferences and the consecutive judgments are illustrative of the role of the judiciary in the growth of French law.

The complaint before the Tribunal Civil de la Seine was simple: Derosne's chemical works was giving off odor, smoke, and noise to the plaintiffs' annoyance. The tribunal awarded damages to the plaintiffs and Derosne appealed. The Cour d'Appel de Paris affirmed the decision. Derosne now sought a *pourvoi*[33] for an alleged violation of Article 544 and an incorrect application of 1382.

In the Cour de Cassation, Derosne argued that, apart from the language of Article 544, there was a principle of freedom of industry under equal conditions. Courts, he said, apparently fancying unregulated strife between industry and owners of surrounding properties, felt called upon to intervene to protect the interests of the latter. This thinking, according to the petitioner, was a relic of the days of kings, especially Louis XIV, when everything was given to industry to spur its growth, with the courts left to safeguard the interests of the other property owners. During that era a distinction between public inconveniences (*inconvénients généraux*) and private inconveniences (*inconvénients personnels*) had been developed by the judiciary. As for the former, that is those which affected everybody in his health, comfort and safety, they were admittedly covered by administrative authorization, or by the proper nature of the industry if its exercise was not subject to prior authorization. But where a neighbor had suffered an inconvenience peculiar to him, *e.g.*, one due to the proximity of the source, courts would hear his claim.[34] The distinction, Derosne contended, had been erased by the Revolution of 1789 which abrogated the privileges of industry, as well as by subsequent legislation. Soon thereafter, a group of scientists had been entrusted with working out a system of standards whereby the insalubrious or annoying

[32] For an outline of the judicial hierarchy in France, see David and De Vries, French Legal System 34-35 (1958).

[33] Pourvoi en cassation—a review by the Cour de Cassation for error of law.

[34] On the same distinction, Rép., Industrie et Commerce no. 211. Note the resemblance to the public-private nuisance distinction in the Common Law. See Prosser, op. cit. note 1, supra § 71.

character of industrial establishments was to be determined. The proposed classification had been enacted by *le décret du 15 Octobre 1810*. One consequence of this decree was that the establishments which had been omitted from the listing no longer were left to the mercy of their neighbors. The right of the latter to demand removal or shut-down of manufacturing enterprises had been abolished. *Le décret* had the further effect of taking away from the courts and giving to administrative authorities the competence to decide up to what point and under what conditions business enterprises in the vicinity of residential areas had to be tolerated. Therefore, freedom of industry was the rule and the classification, with its impediments, the exception. The legislation of 1810 was plenary, except that it covered neither physical accidents (*accidents matériels*) arising in the course of actual operations, nor an abuse of the express authorization. It was in these instances, and in these instances only, that the matter returned to the domain in which courts could act as protectors of the rights of the use and enjoyment of land. The challenged judgment, concluded Derosne, therefore had erroneously interpreted and violated the decree of 1810 and was without legal effect.

In contrast to this, Puzin contended that it was an accepted principle that the administrative authorization was solely in the public interest and that it left the rights of third persons intact. Moreover, this principle rested upon uncodified statutes and the code itself. First, *la loi du 24 Août 1790* provided that any damage to property entailed an obligation to compensate its owner. Second, Article 544 forbade utilization of property in a manner contrary to statutes and regulations. Indeed, declared Puzin, this principle had been recoguized by Derosne himself, who had conceded that physical accidents would give rise to claims for compensation. This was a tacit recognition of the principle that administrative regulation rested upon respect for the rights of third persons. Puzin therefore urged that the challenged judgment was correct.

The Cour de Cassation, without any hesitation, rejected the *pourvoi* for that part of the judgment which dealt with the effects of smoke. Apparently it had been feasible, without detracting from the operational efficiency of the plant, to obviate this kind of harm. Derosne was condemned to pay damages for not having taken the necessary precautions. The second part of the opinion dealt with the question of noise in the light of Articles 544 and 1382. The Court posed the fundamental issue very succinctly:

> . . . on the one hand, one cannot disregard the fact that the noise caused by the factory, when it bears down upon the neighboring properties to an intolerable degree, may give rise to a legitimate claim for indemnity

> and . . . , on the other hand, one cannot consider every kind of noise created by industry as constituting indemnifiable harm.[34a]

The Court then proceeded to lay down a test:

> [T]he challenged judgment rests, it is true, upon the intensity of the noise created by the appellant's factory, but . . . in declaring that this noise has been offensive to the neighboring properties, the judgment fails to indicate that the noise has affected them continuously and to a degree exceeding the measure of the ordinary obligations of the neighborhood [*la measure des obligations ordinaires du voisinage*].[34b]

For this reason, and for the reason that the challenged judgment had ordered indemnity for anticipated harm, thus ignoring the possibilities of attenuation or accentuation of the noise and the possible cessation of the operations entirely, that part of the judgment condemning the noise was reversed and sent to a different cour d'appel.[35]

The Cour d'Appel d'Amiens held that:

> The exercise of ownership rights is limited not only by statutes and regulations but also by the requirement to respect the ownership rights of another. When it is found that the harm to the property of another is the result of exaggeration of the rights to use and enjoy one's property, it is a *quasi-délit* which obliges the actor to repair the harm he has caused. The proprietor of an industrial enterprise cannot rely on the administrative classification in his defense. These administrative formalities which must precede the commencement of operations have to be complied with only in the interest of the police and for the sake of public safety. They do not preclude the application of *droit commun* by courts when a neighbor has been affected by *inconvénients particuliers*. The proof shows that the noise produced by Derosne's works has been very intense and has exceeded the measure of the ordinary obligations of the neighborhood.[36]

Now it was for Derosne to bring a *pourvoi* once again. He did so assigning two grounds; first, improper application of Articles 1382 and 1383 and violation of *la loi du Mars 1791*,[37] in that the judgment, without having imputed to him any negligence, imprudence, or violation of specific land use statutes or regulations, had nevertheless adjudged him liable to compensate his neighbors for harm allegedly caused by his business; and second, violation of the classification decree of 1810 and of the statutes ordaining the separation of powers, in that there was no judicial authority competent to award damages for *inconvénients parti-*

[34a] D.P. [1845] 1. 13, 14-15.

[34b] Id. at 15.

[35] This judgment has been characterized as embodying "une conception un peu trop individualiste du droit de propriété" and therefore quite unsustainable. Ripert, Note D.P. [1907] 1. 385. The criticism apparently is directed against the decision on its merits and not against the test which is sufficiently flexible to permit further judicial experimentation.

[36] D.P. [1849] 1. 148. The court also held that the judgment had properly foreseen possible variations in the intensity of harm.

[37] Art. 7 of this statute proclaimed freedom of work and industry on condition of obtaining a license. See Rép., Industrie et Commerce no. 32.

culiers emanating from an administratively regulated industry. The Chambre des Requêtes rejected the *pourvoi* on the following grounds: (i) The rights established by Article 544 are limited by the natural and legal obligation to cause no harm to another; (ii) The Act of 1791 proceeds on the same principle; (iii) Even when a controversy involves classified establishments, which can and do exist only by administrative sanction, third parties, nonetheless, have a right to claim reparation upon demonstrating that the interference with their land has exceeded the measure of the ordinary obligations of the neighborhood; (iv) The facts show that the noise created by Derosne's factory has exceeded this measure; (v) In disputes between third parties and classified establishments, courts alone are competent to take cognizance of the claims advanced by the former and to award appropriate relief; (vi) There is even less reason to assert that courts act beyond their powers when they entertain claims against nonclassified establishments.

The outstanding result of the *Derosne* litigation was the unequivocal assertion by the judicial branch of its competence to protect private individuals against interferences with their use and enjoyment of land even in administratively regulated sectors. The settlement of the protracted controversy also produced a test to be used in separating actionable from nonactionable interferences—the measure of the ordinary obligations of the neighborhood. Nevertheless, the courts had failed to explain their decisions in a manner satisfactory to legal theoreticians. They had neglected to connect, in an orderly way, the definition of ownership, the principle of general delictual liability found in Article 1382, and the new test of neighborhood obligations.[38]

La Faute—The Connecting Link

General Considerations

By virtue of the proviso in Article 544, legitimate exercise of ownership ceases when the property is used in a manner prohibited by statutes or regulations. That is by no means an astounding proposition. Yet, for some reason, it has been seriously believed that when the thing owned is land, the prohibition ought to be specific. In due time Article 1382 became the source of judicial power to restrict the rights of the use and enjoyment of land.[39] From then on, in so far as the fundamental respect

38 Capitant, Note, D.P. [1908] 2. 49.

39 It is perhaps not quite realistic to suggest that phenomena which are labeled nuisances in our law, belong in the pidgeon-hole of property in the French system. While this might he said about German law, in France the quarrel is not just over the ambit of ownership with claims for reparation of harm being merely incidental. When the limits of ownership are traced almost exclusively by means of principles of delictual liability—responsabilité civile délictuelle, one would rather think of the property aspect as being subsidiary. Cf.

for the equal rights of others was concerned, an owner of a tract of land has been accorded the same treatment as has an owner of a whip.

Article 1382 prohibits a person, under a threat of an obligation to make reparation, from causing damage to another by his fault. Although "fault" is an amorphous term, French courts have given it content. It has been professed that the word "fault," in the context of interferences with the use and enjoyment of land, describes (i) acts intended to harm another, or (ii) acts that are harmful to another and arise out of negligence or imprudence imputable to the actor, or (iii) acts merely harmful to another if the harm is greater than ought to be tolerated (fault by implication).[40]

It should be recognized that this classification is helpful only to a point. It has an aura of artificiality as has any attempt to make order out of concepts that have been created in response to immediate needs but without much regard for logical symmetry. As a matter of fact, it has been a profuse source of disagreement among French jurists. While the first two categories reflect the traditional view of wrongful conduct,[41] the third has been contrived relatively recently to span the gap between the judicial practice and a lagging theory.[42] This fault by implication is determined by a quantitative or objective standard (the ordinary obligations of the neighborhood) as opposed to an, at least, partly subjective standard (the actual or imputed state of mind of the actor).[43] Thus, in solving the same clashes of interests, the French are still using the notion of fault tinged with personal blame side by side with fault derived from social necessities and not necessarily coinciding with human wickedness.

Lawson, Common Lawyer Looks at the Civil Law 142-145 (1955). Louisiana has experienced similar controversies over the classification of nuisance. The choice is influenced, on the one hand, by Art. 2315 (an exact copy of Art. 1382, Code Civil) and, on the other, by Arts. 667-669 (defining proprietary limits) of the La. Civil Code. In an effort to find a solution it has been suggested that the proprietary articles have established a "rule of neighborliness"—a two-headed concept which, in its property aspect, allegedly creates a right in a person not to be harmed in the use and enjoyment of his own land by activities of his neighbor which exceed a certain standard, and, in its tort aspect, defines a duty, the violation of which is fault within the meaning of Article 2315. See Stone, "The Loesch Case and Article 667," 17 Tul. L. Rev. 596, 599-600 (1943). But cf. Devoke v. Yazoo & Mississippi Valley Railroad Company, 211 La. 729, 30 S.2d 816 (1947) in which the court cited indiscriminately the three articles and excerpts from American Jurisprudence and concluded:

> Clearly, therefore, the plaintiff's action is not one in tort, but, rather, one that springs from an obligation imposed upon property owners by the operation of law so that all may enjoy the maximum of liberty in the use and enjoyment of their respective properties. Id. at 743.

[40] Ripert, Note, D.P. [1907] 1. 385.

[41] Rép., Responsabilité no. 170 (the bases of liability: fait positif, négligence, imprudence). Ed. note, D.P. [1857] 1. 293 (rights cannot be exercised for evil ends; precautions must be taken). By "traditional" is meant the view prevalent at the time of the birth of the Code Civil.

[42] Ripert, Note, D.P. [1907] 1. 385.

[43] Josserand, Note, D.P. [1913] 2. 177. For a related analysis, see Rép., Responsabilité no. 116.

The development of fault by implication as a basis of liability is a step toward realizing the suggestion that liability ought to rest simply upon conduct which is socially unreasonable, or, to put it another way, in a society in which the diverse interests of its members must inevitably clash, fault ought to appear as soon as one makes himself "intolerable."[44]

Acts Intended to Harm Another and the Doctrine of l'Abus de Droit

The doctrine of the abuse of rights is found, in some form, in almost all civil law jurisdictions; in France it is invoked very frequently.[45] The doctrine seems to have originated in connection with the exercise of ownership and it has been intimated that this concept most closely resembles the common law nuisance.[46] According to the underlying philosophy of the abuse of rights, a right is granted for a socially useful purpose and cannot lawfully be exercised in a manner inconsistent with that purpose.[47] However, writers disagree about the role of this doctrine in cases concerning interferences with the use and enjoyment of land. Although not so put, the central issue is determining what right has been abused: the right to use and enjoy one's land, or the right reasonably to harm another in the exercise of his equal rights, by such use and enjoyment?

On the one hand, it can be argued that there exists, within the scope of *droits de voisinage,* no right to harm one's neighbors and that we can properly refer only to the right to use and enjoy land. Therefore, in all cases in which the actor is able to prevent harm to another, he is liable if harm ensues. To speak of an abuse of rights in case of his failure to do so, is merely to call an intentionally harmful or negligent act by a different name.[48] It is true that in a broader context the term "abuse of rights" has been equated to the frontier of the law of tort where recurring clashes between conflicting rights are hammering out rules of tort law.[49] But, so conceived, *l'abus de droit* would again be only another name for such mental images as *iniuria* and *faute* in a legal system that recoguizes general delictual liability. In each case it is for the judicial decision-maker, under his "residuary power of judicial legislation," to give content to these otherwise vacuous words as new situations arise.[50]

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44 See Prosser, op. cit. note 1, supra at 6 and 14-16, and Savatier, Note, "la faute apparaît dès qu'on se rend 'insupportable'" D.P. [1928] 1. 73.

45 Surveyer, "A Comparison of Delictual Responsibility in Law in the Countries Governed by a Code," 8 Tul. L. Rev. 53, 80 (1933); Comment, 7 Tul. L. Rev. 426, 432 (1933).

46 Amos and Walton, Introduction to French Law 256-57 (1935); Lévwy, op. cit. note 11, supra at 167; Lawson, op. cit. note 39, supra at 144.

47 Gutteridge, "Abuse of Rights," 5 Camb. L. J. 22, 35 (1933); Walton, "Motive as an Element in Torts in the Common and in the Civil Law," 22 Harv. L. Rev. 501 (1909).

48 Savatier, Note, D.P. [1928] 1. 73.

49 Lauterpacht, Function of Law in the International Community ch. XIV (1933).

50 For an excellent statement of the problem, see Stone, Province and Function of Law 203 (1950).

Other authorities, however, list *droits de voisinage* among *droits permettant de nuire à autrui*.[51] If this is correct, we are speaking of a right that has, by its nature, the quality of being able to harm another without involving any fault. With this approach the question of abuse *can* arise. To this end, we ought to inquire whether, in the presence of the right to harm another, all the damage caused within the framework of such right was necessarily and absolutely exclusive of any responsibility on the part of the actor, or whether it is necessary to find liability because the right in question has been exercised in a morally unjustifiable manner. The recognition of a quantitatively determinable fault seemingly lends support to the argument that the exercise of *droits de voisinage* is capable of harming others without involvement of any fault. There are infinite gradations of harm located between the point of harmless inactivity of a user of land and the point at which the harm is said to exceed the measure of the ordinary obligations of the neighborhood. It is quite clear that while cautious and considerate conduct, though resulting in harm quantitatively within these limits, would be rightful, the same amount of harm could give rise to an obligation if the actor were causing it maliciously. He would have "abused his right." But a moment's reflection reveals a dissimilarity between the right of self-defense, right to prosecute, right to compete, etc., on the one hand, and the right to use and enjoy one's land on the other. In the first instance, the actor, in exercising his rights, directs his acts against his assailant, adversary or competitor with the specific purpose of undermining the position of the latter. If this purpose is not balanced out by the actor's reasonable desire to advance his own interests, we could speak of an abuse of rights. Quite on the contrary, the exercise of the right to use and enjoy one's land or, for that matter, any property, does not call for acts specifically directed at weakening a neighbor. As the owner of a whip is held responsible for scars inflicted through his acts intended to have that result, without any talk of an abuse of rights, so ought the owner of a tract of land be held strictly answerable for his noxious acts.

The abuse of rights doctrine could, however, have value in those instances in which a landowner uses his land in a manner that, though not interfering with the corresponding rights of others, is, nonetheless, detri-

[51] Petit Dictionnaire de Droit 1109 (Reau and Rondepierre ed. 1951); 2 Arminjon, Nolde and Wolff, Traité de Droit Comparé § 373 (1950); Les Grands Arrêts de la Jurisprudence Civile 283-84 (de la Morandière ed. 1950). The following are commonly listed as rights permitting harm to another person: right of competition; right of self-defense; right to safeguard professional, economic, social and religious interests; right of literary and artistic critique; right to give unfavorable references; right to prosecute. The latter seems to be the most active area. See Mignon, Les Instances Actives et Passives et la Théorie de l'Abus du Droit, D. 1949. Chr. 183.

mental to society. Such might be the waste of scarce natural resources or the refusal to turn the land over to production in times of dire need. In those cases, indeed, the abuse would be of the right to use and enjoy one's property and not of the right to harm another thereby.[51a]

"Spite structures" provide the classical example of acts intended to harm another. In *Doerr v. Keller*,[52] the defendant had built a dummy chimney for the sole purpose of darkening a skylight in his neighbor's roof. The court ordered the chimney torn down saying that, although, in principle, property rights were in a certain sense absolute entitling the owner to use or abuse his property, their exercise had to have as a limit the satisfaction of an *intérêt légitime*. Precepts of morality and equity were opposed to the law sanctioning acts inspired by malice and performed under the domination of an evil passion not justified by any personal advantage to the person acting, and causing serious damage to another. The case of *Coquerel v. Clément-Bayard*[53] is cited not only for its somewhat amusing facts but also as the favorite illustration of the abuse of rights doctrine applied to interferences with the use and enjoyment of land. Here, the defendant, whose land adjoined the grounds occupied by builders of dirigible balloons, erected on his land huge elevated platforms bristling with sharp iron spikes. In due course the defendant's wish came true as the belly of one of the plaintiffs' airships was slit by the defendant's contraptions. The tribunal awarded money damages to the plaintiffs and ordered Monsieur Coquerel to dismantle the mischievous devices within a fortnight counting from the day of judgment. The Cour de Cassation recognized that the harm to the neighbors had been a means and not an end, the real motive being to compel Clément-Bayard to purchase the defendant's property at an inflated price, but felt that this circumstance should not affect the applicability of the doctrine and affirmed the judgment.

There may be still other forms of abusive conduct. In *Badoit v. André*[54] and *Forissier v. Chaverot*,[55] the defendants had installed pumps in their mineral water springs drawing the precious water away from the nearby springs of their neighbors and allowing it to flow away unused. This conduct was again held to constitute an abuse of their rights of ownership. In *Prince de Wagram v. Marais*,[56] the defendant Prince had

[51a] For an account of experiments in this direction, see Greaves, "The Social-Economic Purpose of Private Rights—Section 1 of the Soviet Civil Code—A Comparative Study of Soviet and Non-Communist Law," 12 N.Y.U.L.Q. Rev. 165, 439 (1934).

[52] Colmar, 2 mai 1855 D.P. [1856] 2. 9.

[53] Req., 3 août 1915, D.P. [1917.] 1. 79.

[54] Lyon, 18 avril 1856, D.P. [1856] 2. 199.

[55] Req., 10 juin 1902, D.P. [1902] 1. 454.

[56] Paris, 2 décembre 1871, D.P. [1873] 2. 185.

posted his servants, equipped with noisy instruments, along the limits of his property in order to create an organized disturbance, frighten the wildlife on his neighbor's land and thus spoil the latter's chase. The court awarded Fr.3,000 to the plaintiff. Years later, a similar instance of Gallic resentment was again resolved in favor of a plaintiff on the ground of the abuse of rights.[57] In *Crédit Lyonnais v. Ardisson,*[58] the defendant, while fully aware of the unstable soil conditions in the City of Cannes, allowed an immense pile of rocks to be accumulated on its land which, by subsiding, aggravated the already defective construction of Ardisson's house. The Cour de Cassation invoked Articles 544 and 1382 and found liability on the ground of the abuse of rights.

All the foregoing examples, except *Crédit Lyonnais,* can be explained as cases of fault through intentionally harmful acts. Had the chimney been genuine, the towering spiked structures socially useful, the mineral water bottled, and the clatter caused by a normal activity, there would not have been any grounds for an action, notwithstanding the fact that the neighbors would have been visited by the identical quantum of harm. The *quality* of the defendants' conduct made all the difference. In *Crédit Lyonnais,* on the other hand, no intention to do harm is shown, but the same result could have been reached on the basis of fault by negligence or imprudence, or on the basis of quantitatively calculated fault.

The burden of proving a defendant's malicious intent is upon the plaintiff. Although the matter to be proved is subjective, courts do allow empirical proof, and assume that an act harmful to another and without benefit to the actor himself, is explainable only by the actor's desire to hurt the former.[59]

Acts Harmful to Another and Arising out of Negligence or Imprudence Imputable to the Actor

The civil code provides that an obligation to redress a harm done can arise not only out of intentional acts but also out of negligent or imprudent conduct.[60] Therefore, when a person has failed to take the reasonable precautions necessary to avoid harmful interferences with the use and enjoyment of land by another, he may be adjudged liable for past harm and/or required to prevent its future recurrence.

In *Barthélemy v. Sénès,*[61] the defendant dug a large hole in his land just one meter off the plaintiff's property line and used the hole to pre-

[57] Bouteville v. Asou, Amiens, 7 février 1912, D.P. [1913] 2. 177.
[58] Req., 23 mars 1927, D.H. [1927] 239, D.P. [1928.] 1. 73. The court's reasoning was strongly criticized in Savatier, Note D.P. [1928] 1. 73.
[59] Josserand, Note, D.P. [1913] 2. 177.
[60] Art. 1383.
[61] Civ., 8 juin 1857, D.P. [1857] 1. 293.

pare fertilizer out of cesspool residue and a solution of lye. In this process he intermittently raked the solids onto the edge of the pit while allowing the liquid to flow through small distributive ditches along the boundary. Sénès brought suit complaining of "fetid and nauseating evaporations." The tribunal saw no basis for the action, but the Cour d'Aix reversed the decision and awarded Fr.300 to the plaintiff. The appeals court also required Barthélemy either to close the pit or to remove it to a spot at least 50 meters from the plaintiff's land. The Cour de Cassation held that Article 1382 had been correctly applied. The fault was established by showing that the defendant had created an offensive installation and had neglected to take the precautions appropriate to insure that no other person would be harmed.[62] Further, the Court said, it was within the province of the judiciary to pass upon the inefficacy or impossibility of the execution of any proposed means aimed at abating the interference, and to determine and prescribe such means as would attain that end.

Fault, in negligence cases, refers to the standard of conduct of the reasonable man. In order to give legal content to this broad standard, customary behavior and the prevailing patterns of conduct are taken into account. The question whether the complained of conduct has met this measure of reasonableness raises an issue of law and is reviewable by the Cour de Cassation.[63] Unfortunately, the application of this standard does not dispose of the underlying problem. It would be easy to suppose that the negligence or imprudence so determined has the same effect as acts intentionally harmful, *i.e.*, that a person bringing harm upon another through his negligence or imprudence is liable to the latter, notwithstanding the fact that the particular harm registers on the scale of interferences below the point of the ordinary obligations of the neighborhood. Perhaps the policy should be to prevent all interferences that are reasonably foreseeable and avoidable.[64] However, court decisions are not so reasoned. Thus, in *Société Minière des Terres Rouges v. Poncier et Grosse*,[65] the Société, an operator of blast furnaces, had installed an unscreened concrete cool-house at the extreme boundaries of its property in such a fashion that it was continuously emitting vapors damaging to

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[62] Accord: Vandangeon v. Favreau, Civ., 7 février 1894, D.P. [1894] 1. 239 (matter from untight manure pits seeping into neighbors' wells).

[63] David et al., op. cit. note 32, supra at 106-107; Nourrigat v. Pech, Civ., 28 février 1910, D.P. [1913] 1. 43. The courts look for an alleged "preexisting duty."

[64] Petit Dictionnaire, op. cit. note 51, supra at 1108. If the exploitation of land has caused an easily preventable harm (albeit non-excessive) there will arise an obligation to repair it, if the actor could have prevented it "without hurting his legitimate rights." Rép., Responsabilité no. 116. Savatier supports the view that a neighbor ought to be responsible for all intentionally inflicted harm. Savatier, op. cit. supra note 10 at 91. But it is most likely that he assumes some requirement of "substantiality."

[65] Colmar, 19 mai 1938, D.H. [1938] 425.

the plaintiffs' properties. Plaintiffs recovered damages in the tribunal and the Société appealed. Having found that the harm could have been prevented by either constructing the cooler at some other place or by properly screening it, the cour d'appel affirmed the decision reached below. The general rule was stated as follows:

> . . . an owner who, by the manner in which he uses and occupies his immovable property, causes to his neighbors harm exceeding the limits of the ordinary obligations of the neighborhood is at fault if he neglects to take precautions which have to be taken in order to prevent these inconveniences.[65a]

The Cour de Cassation has formulated the rule in substantially the same words. Monsieur Joachim, the plaintiff in *Société Maurel et Prom et Maurel Frères v. Joachim,*[66] was a manufacturer of sail-cloth in Bordeaux. He charged that the defendants, his neighbors and operators of oil works, had done harm to his business by firing their boilers with walnut shells—an operation which produced smoke saturated with grease and soot. The tribunal found that the smoke produced by this type of combustion was more troublesome than that created by normal fuel and that the dense fumes had periodically penetrated the plaintiff's shop with hurtful effects. The Cour de Cassation rejected the defendant's *pourvoi,* thus approving the award of damages by the court below. It held that a manufacturing enterprise which, by the use of its land, had exceeded the measure of the ordinary neighborhood inconveniences was at fault if it had neglected to take precautions it should have taken. The high Court has reiterated this principle quite recently in *Cie du Mines de la Grand'-Combe v. Scaramus.*[67]

The rule, as stated, requires the coincidence of two conditions in order to establish fault: interference that exceeds the ordinary obligations of the neighborhood and failure to take reasonable precautions to prevent such interference. Knowing that an interference that exceeds the measure of the ordinary obligations of the neighborhood gives rise to a fault by that very fact,[68] it is difficult to imagine why any plaintiff would present evidence showing a failure to take precautions. One explanation, of course, is that this is merely an instance of logical inconsistency, a phenomenon by no means unusual in the area of nuisance. Another is that "ordinary obligations" in this context simply mean that, in order to give rise to liability, the resultant harm has to have some "substantiality."[68a]

65a Id. at 426.

66 Req., 17 novembre 1931, D.H. [1932] 1.

67 Req., 24 janvier 1944, D.A. [1944] J. 45. Accord: Courret v. Lassus, Civ., 28 mai 1952, D. 1953. Somm. 11 (dust of lime and cement).

68 See "Fault by Implication" p. 305 infra.

68a See supra p. 303 and note 64.

There are also confusing references to aggravation of fault. In *Dr. Secret v. Briquet,*[69] the Cour de Cassation rejected a *pourvoi* against the judgment of an appeals court awarding Fr.5,000 to the plaintiff, a radio technician and dealer. The complaint alleged that the plaintiff's neighbor, Dr. Secret, had been using in his office a device for radio-therapy which emitted waves interfering with nearby radio reception. Despite the fact that the defendant had been informed of this, he continued to use the apparatus. As a result, the plaintiff had been unable to conduct satisfactory sales demonstrations and lost clientele. The Court held that the exercise of the rights of ownership created liability when the harm to another exceeded the measure of the ordinary obligations of the neighborhood. It noted that the defendant's fault had been *aggravated* by his negligence to stop completely, or to limit to certain hours, the interferences with his neighbor's business.[70]

Some insight into the reasons for these difficulties is gained by an examination of the contents of the concept of "fault by implication."

Fault by Implication

If relief were given only in cases of intentionally harmful acts and against interferences attributable to negligence or imprudence, many interferences would not be actionable. Among these non-actionable interferences would be those resulting from generally beneficial uses, *e.g.,* smoke from railway locomotives, odor from oil refineries, noise from boiler factories, lights from skating-rinks. However, a long line of decisions has established that, despite the fact that all reasonable precautions, short of cessation of activities, have been taken, mere interferences with the use and enjoyment of land are actionable, if they exceed the measure of the ordinary obligations of the neighborhood.[71] This line of authority certainly refers as far back as *Derosne v. Puzin.*[72] In *Cie du Chemin de Fer d'Orléans v. Desforges et Chalon,*[73] the Cour de Cassation

[69] Civ., 29 mai 1937, D.H. [1937] 393.

[70] This is contrary to the principle that there are no degrees of fault. Amos et al., op. cit. supra note 46, at 250.

[71] Capitant, Note, D.P. [1908] 2. 49.

[72] See note 31, supra. Accord: Tharaud v. De Masjambout, Civ., 14 juillet 1875, D.P. [1876] 1. 447 (oily smoke from a china factory); Cie. Générale d'Imprimerie v. de Rohan-Chabot, Civ., 20 janvier 1891, D.P. [1891] 1. 153 (noise of printing presses); De Chabaud-Latour v. Gaveau, Tr. civ., Seine, 18 juin 1908, D.P. [1908] 5. 63 (noise of a piano store and music rooms); Martin v. Cie. des Vernis Valentine, Tr. civ., Lyon, 17 juin 1950, D. [1951] Somm. 7 (emanations from a varnish plant).

[73] Req., 3 janvier 1887, D.P. [1888] 1. 39. Accord: N. v. Chemin de Fer du Midi, Bordeaux, 21 juin 1859, D.P. [1859] 2. 187 (fire damage from railroad); Mineur v. Bertrand, Metz, 25 août 1863, D.P. [1864] 2. 111 (loading noise and obstruction of sidewalk); Pilté v. Lapha, Orléans, 22 novembre 1889, D.P. [1891] 2. 120 (noise from a bakery); Bottin v. Gemouliat, Req., 7 décembre 1909, D.P. [1910] 1. 95 (fertilizer plant emitting dangerous substances); Roy v. Bonneau, Req., 3 juin 1926, D.P. [1926] 1. 217 (interference with the flow of surface water).

said that the plaintiffs were not required to prove that the railroad company had violated the special regulations governing its operations in order to hold the latter answerable for damages. The plaintiffs had shown that their wax refinery had suffered from the oily smoke rising above the station and then descending upon their establishment. It was then for the trier of fact to declare whether the interference had exceeded the measure of the ordinary rights and obligations of the neighborhood and, if so found, to order the railroad to indemnify the plaintiffs to the extent of the deterioration of their merchandise and the actual depreciation of their plant. The courts have likewise adhered to the principle that the maintenance of a *policed* brothel (*maison de tolérance*) does not change its immoral character nor legitimize its existence, but merely assures its supervision.[74]

The fact that courts have been intervening in activities authorized by administrative bodies in order to protect private rights has provoked discussion concerning the separation of powers.[75] The courts, however, have not retreated from the position taken in *Derosne v. Puzin,* and have reasserted their power to pass upon questions of harm to third persons and their full competence to order that preventive measures be taken providing these measures are not in conflict with those imposed in the public interest by the executive branch.[76] Nonetheless, the courts have felt that their discretion in ordering additional works, though not in conflict with the administrative regulations, must be confined within the following limits: (i) *Regulated establishments*—Additional works may be ordered to a point short of suppression. Complete suppression, or closure, may be required only by the administrative authorities where the establishment has failed to comply with their rules. If the award of damages or the expense of additional works entails cessation of the operations of the defendant enterprise, this fact is considered purely fortuitous and would not be equated to an order of suppression; (ii) *Non-regulated establishments*—Additional works may be required on the pain of closure.[77]

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[74] Supp., Prostitution-Proxénètisme nos. 80-91. Since their abolition, these are no longer a problem. See La loi du 13 avril 1946 tendant à la fermeture des maisons de tolérance, D. 1946. L. 177.

[75] On the question of the separation of powers, see Von Mehren, op. cit. note 24, supra at 138-249 and David et al., op. cit. note 32, supra at 29-36.

[76] Senac v. Société du Gaz de Toulouse, Civ., 26 mars 1873, D.P. [1873] 1. 353 (gas works); Decroix, Viéville et Cie. v. Jet-Brunet et Picot, Req., 11 juin 1877, D.P. [1878] 1. 409 (water pollution); Demouy v. Caïn, Req., 18 novembre 1884, D.P. [1885] 1. 71 (brickmaking yard).

[77] Ripert, Note, D.P. [1907] 1. 385; Supp., Industrie et Commerce no. 105; Prostitution-Proxénétisme nos. 80-91 Supp., Ed. note, D.P. [1873] 1. 353. On occasion, a court may not be overly enthusiastic about its "judicial zoning" chores. Thus, in Gilet v. Laurens, Bordeaux, 5 mars 1903, D.P. [1908] 2. 49, involving the pungent odors of a fishmarket, the

There has been well-founded criticism that the nineteenth century courts allowed the theory to lag behind the judiciary's activities. The courts did not articulate the grounds upon which Article 1382 was invoked in respect to interferences that were neither intentionally harmful nor attributable to the actor's negligence or imprudence. For this reason, the case of *Dupont v. Lacante*[78] has been hailed as another landmark in the French *jurisprudence* of interferences with the use and enjoyment of land. It professedly marks a point of departure from a period of confusion by declaring that an owner who causes to its neighbor harm that exceeds the measure of the ordinary obligations of the neighborhood commits a fault by that very fact.[79]

In fact, an earlier case involving a dispute between honest citizens and the keepers of a bawdy house had handled the same matter with no less directness. In *Nelatou et Pouchouloux v. Ceunot*,[80] the Cour de Cassation set out the law in these terms:

> . . . the exercise of ownership ceases to be legitimate and assumes the character of fault at the very instant it produces a grave and serious harm to a neighbor whose rights are neither less certain nor less respectable; . . . in cases of a conflict between these two sets of rights it is for the courts to regulate and determine the proportion in which the inconveniences of the neighborhood must be borne; . . . the challenged judgment declares in effect that, from the point of view of the respondents, the inconveniences and dangers, represented by the proximity of the appellants' establishment, exceeded the measure of tolerance imposed by the character of the neighborhood; . . . [an examination of the circumstances of this case] inescapably shows fault by implication [*cette appreciation souvrainement faite implique une faute*] and an obligation on the part of those who have committed it to repair the damage caused.[80a]

A great deal of difficulty arises in the attempt to assign the fault by implication to a separate compartment. Its retreat from a predominantly subjective standard, no doubt, gives it distinction. At the same time, however, all the alleged variants of fault are founded upon unreasonableness under the circumstances. The fault by implication is merely deduced by considering additional factors that some time ago might have been regarded as irrelevant. Because of this change, old terms are acquiring new contents. Thus, "precautions" may previously have meant steps taken by a reasonable user of land to protect his neighbor from excesses measured in terms of the particular use. Today, "precautions"

court bluntly stated that it did not intend to act as a comité d'hygiène and ruled for the defendant.

[78] Civ., 18 février 1907, D.P. [1907] 1. 385.

[79] See Ripert, Note, D.P. [1907] 1. 385. A closer reading of the opinion, however, discloses the same two conditions found in the Joachim and Scaramus cases. See supra notes 66-68.

[80] Civ., 3 décembre 1860, D.P. [1861] 1. 331.

[80a] Id. at 334.

may mean protective steps taken to insure non-interference in the context of the whole neighborhood. What was "unavoidable" in the particular "use" was tolerated under the earlier standard. What is "ordinary" for the "neighborhood" is tolerated under the new.

Fault by Implication Rejected

The concept of fault by implication is a handy instrument but it has not been relied on in every instance. Apart from those court opinions which express the same concept in different words,[81] there are several cases rejecting its very essence. The idea that fault should be determined solely by reference to the quality of conduct shows great tenacity and is supported by several decisions. Only five months after *Dupont v. Lacante,*[82] the Chambre des Requêtes, in *Carrière v. Paul Palaysi,*[83] held that since a bad odor was "inherent in the very existence" of Palaysi's slaughterhouse and since the plaintiff had not been able to prove "an abusive act, negligence or fault of any kind" in allowing the odor to escape, the action failed.[84] A similar test was used in *Avoy v. Chenavaz,*[85] where suit was brought by a radio-owning resident against a neighboring merchant. The complaint averred that the merchant's electric bell (installed to signal the arrival of customers) was emitting parasitic waves that interfered with the plaintiff's radio reception. The court denied relief on the ground that it had not been alleged that the use of the doorbell had been abusive or had not conformed to its intended use. *Cie Générale des Omnibus v. Mayer*[86] has also been cited as rejecting the concept of fault by implication.[87] There, a homeowner complained that the defendant's defectively constructed scuttling busses were creating an unbearable noise. The court did *not* apply a test different from the established formula; rather, it seems that the court decided against the plaintiff on the ground that the latter had failed to prove the alleged damage, namely, a decrease in the value or actual physical deterioration of the property that was due to the bus traffic.

APPLICATION OF THE "ORDINARY OBLIGATIONS" TEST

The "ordinary obligations of the neighborhood" test is not mechanically applied. Various factors are weighed by the courts in order to

[81] See, for example, Sobraquès v. Clottes, Montpellier, 1 février 1933, D.H. [1933] 212 (the exercise of ownership is limited by the legitimate rights of neighbors).
[82] Note 78, supra.
[83] Req., 24 juillet, D.P. [1908] 1. 62.
[84] For an earlier "inherence" argument, see Albareil v. Vigouroux, Agen, 7 février 1855, D.P. [1855] 2. 302.
[85] Lyon, 13 juillet 1932, D.H. [1933] Somm. 24. Reversed by Civ., 29 mai 1937, D.H. [1937] 394.
[86] Paris, 6 février 1913, D.P. [1913] 2. 393.
[87] Lalou, Note, D.P. [1922] 2. 49.

arrive at what they consider to be a just solution of the facts before them. Some of the factors are relevant in solving all conflicts of land use in a given neighborhood (*e.g.*, the character of the neighborhood); certain others will vary with the particular case (*e.g.*, the nature and extent of the harm). Since the object of the courts in every case is to ascertain whether the defendant's conduct has been reasonable under the circumstances, it would be profitable to have a single test embodying all the relevant considerations,[88] but while fault founded on personal blame is retained side by side with objectively determined social fault, any unitary analysis is likely to break down.

Character of the Neighborhood

The sum of the inconveniences which the inhabitants of a neighborhood have to endure varies with the location of the immovable property. An interference which will appear reasonable in an industrial suburb or on a commercial street may be actionable if the properties involved are situated in a tranquil residential district.[89] Of course, it is quite possible that even a resident of a heavily industrialized area will be able to show that amidst all the activity certain user stands out as particularly offensive. The Chambre des Requêtes held in *Société Commerciale v. Rouboud*[90] that even in an industrial seaport city, the establishment of a coal-yard, from which dust was carried over the surrounding area penetrating and rendering uninhabitable the plaintiff's home and destroying his garden, exceeded the measure of the ordinary obligations of the neighborhood.[91] By contrast, in *Robert v. Schor*,[92] the court held that the defendant had not violated the neighborhood obligations by maintaining a dunghill in front of his house, because such was the common practice among the inhabitants of the village. Furthermore, the court pointed out, the same custom prevailed in almost all rural communities, despite attempts to discourage it by agricultural experts and authorities administering public health.

Priority of Occupation

At one time there was respectable support for the theory of *droit de préoccupation* which did not allow an action by a newcomer to a locality

88 Cf. 4 Restatement, Torts §§ 826-31 (1939). See note 68a, supra and note 102, infra.

89 Compare: Rivoire v. Imbert, 28 février 1848, D.P. [1848] 1. 122 (noisy and malodorous tool plant in an industrial neighborhood) and Nelatou et Pouchouloux v. Ceunot, 3 décembre 1860, D.P. [1861] 1. 331 (bawdy house in a quartier paisible et honnête). See also Capitant, Note, D.P. [1908] 2. 49.

90 Req., 19 avril 1905, D.P. [1905] 1. 256.

91 See also Ville de Paris v. Muzard, Paris, 9 décembre 1904, D.P. [1905] 2. 32: Although the inhabitants of a large city are held to a certain tolerance among themselves as regards discomforts resulting from the density of population, this tolerance does not have to be extended to notable and serious inconveniences.

92 Besançon, 15 novembre 1934, D.H. [1935] 25.

against a person or establishment of previous occupancy.[93] Industrial expansion, however, insured that no such rule became fixed. The opponents to a firm rule of preoccupation argued that a property owner in a modern society must realize that the place he occupied, though isolated at first, could not operate to delay new uses in the neighborhood.[94] Later, the same industrial interests that evidently had helped to defeat the rule of *préoccupation* found themselves looking down the muzzle of their own gun. On many an occasion industrial enterprises were the first to move into an area with residential districts subsequently appearing in the same locality. Their attempts to revive the rule of *préoccupation* and to invoke it in their own behalf have not been successful. Thus, in *Gagey-Seguin et Mathenet v. Jeamel*,[95] Jeamel claimed that the noise escaping from the defendants' coppersmith business forced his tenants to keep their windows closed and did not allow them to carry on normal conversations. The defense of priority of occupation was raised but the court ruled that this factor did not go to the determination of fault but only to the mitigation of damages.

The Cour de Cassation reportedly dealt with this question for the first time in *Dupont v. Lacante*.[96] In affirming the rulings of the lower courts, it held that it mattered very little that the defendant's offensive tile furnace had been in operation, without provoking complaints, prior to the erection of the plaintiff's dwelling.

The doctrine of non-conforming uses, however, appears as an exception to the absence of a rule of priority of occupation. The establishment of a use that is entirely inconsistent with the existing nature of the neighborhood may destroy the actionability of an interference by the prior user.[97] Residential use, however, is not considered such non-conforming use,[98] except in cases of *préoccupation collective*. If an entire district has been turned over to industry, the character of the neighborhood has become fixed and a person who later sets up a residence within that district will not be heard to complain; his will be the non-conforming use.[99]

Type of Harm

The French law protects persons from both physical harm (*préjudice matériel*) and mental harm (*préjudice moral*). The defendant in *Noualhier v. Delage*[100] converted her dwelling into a tuberculosis hospital. As

93 Ripert, Note, D.P. [1907] 1. 385.
94 Rép., Industrie et Commerce no. 211.
95 Dijon, 10 mars 1865, D.P. [1865] 2. 144.
96 Note 78, supra. See Ripert, Note, D.P. [1907] 1. 385.
97 Capitant, Note, D.P. [1908] 2. 49.
98 Ripert, Note, D.P. [1907] 1. 385.
99 Ibid.
100 Limoges, 5 février 1902, D.P. [1902] 2. 95.

a result, rental values of the nearby houses fell and, in many cases, the homes remained vacant. The plaintiff, whose property adjoined the hospital, claimed to have been damaged by the defendant's use of her land. In awarding damages to Delage, the cour d'appel reaffirmed the principle that, in order to be actionable, an interference did not have to leave traces which were physically determinable; it sufficed that the harm manifested itself in a mental hurt or in a property depreciation capable of being evaluated. The opinion in *Quasquara v. Francezon*[101] conveys the same idea in somewhat different words, namely, that a simple discomfort is sufficient if it assumes an abnormal character. Looking at the lower end of the spectrum of mental harm, a contrary interest alone, it has been said, would not effectively thwart the exercise of ownership. Hence, a neighbor cannot, on the pretext of annoyance that would result to him, preclude his neighbor from erecting on the latter's land such structures as may suit him.[102]

An action for the protection of physical and mental security will be entertained if these interests have actually been harmed (*préjudice actuel*) or if the impending harm (*préjudice éventuel*) is serious and imminent. The application of the principle is sometimes a very delicate matter as it is almost impossible to determine by general rules when an eventuality of harm is imminent.[103] It is generally conceded that a neighbor of a building in danger of collapse has an action against its owner to compel repairs.[104] In *Chiron v. Faisandier*,[105] an order was granted to remove a wooden addition to a party wall on the ground that the structure constituted a fire hazard. Although no damage of any kind had yet resulted, it was regarded to be imminent. Also, the Cour de Cassation held, in *Floret v. Zunino*,[106] that where a municipal ordinance had prohibited the use of explosives in quarries within a certain distance from human habitations, a resident of this zone had a cause of action against the defendant blaster who had not observed the distance requirement, even if no actual harm could be proved. From these cases the following generalization can be derived: there is a ground for an action to suppress activities or conditions which, though not causing any present harm, can

101 Rouen, 4 mars 1953, D. [1953] Somm. 72.

102 Rép., Propriété no. 160. This probably refers to building types and does not include "spite structures." Annoyances created by design would most likely be considered "insubstantial," i.e., resulting in no harm, even if the style were chosen with an intent to annoy a neighbor.

103 Ed. note, D.P. [1857] 2. 71; Ed. note D.P. [1902] 2. 95; Supp., Action no. 32; Petit Dictionnaire note 51, supra at 37.

104 Heurtel v. Leguen, Rennes, 23 mars 1843, D.P. [1844] 2. 122. Cf. Électricité de France v. Follot, Civ., 19 mars 1947, D. [1947] J. 313, in which a Fr.10,000 judgment for eventual harm from high tension lines was reversed.

105 Bordeaux, 18 mai 1849, D.P. [1850] 2. 86.

106 Civ., 29 juillet 1886, D.P. [1886] 1. 165.

in the future entail damage the reparation of which would be much more difficult.[107] By comparison, the Cour de Douai, in *Haueisz v. Lespagnol de Grimbry*,[108] reversed a lower court order under which the defendant owner of a small textile mill was to execute certain works to minimize the fire hazard to other properties. The fact that the materials worked and stored in the mill were more combustible than the ordinary contents of buildings did not allow the court to analogize this situation to one in which the building was in a danger of immediate collapse.

While the source of a threatened harm will be suppressed in certain instances, actual harm must be shown in order to entitle the plaintiff to pecuniary compensation.[109] An interesting problem arises when the damage claimed, although measurable in monetary terms, is referrable to a legal cause having the character of a chance event. In *Péquart v. Brenière*,[110] the defendant established a sawmill in an industrial neighborhood. As a result, the rates for fire insurance on the nearby buildings increased. Brenière claimed, among other things, damages equal to his loss on account of the rate differential. The Cour de Cassation did not reach the issue of the contingent harm disposing of the case on the ground of absence of fault. It stressed the precautions taken by the defendant and the industrial character of the neighborhood. An editorial note appended to the report expressed the opinion that, even absent these considerations, no recovery could have been had for the reason that the real causal event (the fire damage) was contingent, uncertain and hypothetical.[111]

Events Beyond Defendant's Control, Complainant's Negligence or Imprudence, and Acquiescence

The case of *Ribouleau v. Nicoleau*[112] arose in the hilly Charente province. A rock-slide originating on the defendant's land had damaged the plaintiff's property. The slide had not been a result of any activity undertaken by the defendant nor did it derive from any failure on his part to take precautionary measures. Rather, it had been due to the nature of the soil and to the atmospheric conditions. In denying recovery, the court noted that those who erect structures at the foot of a mountain ought first to examine the conditions of the terrain.

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107 Note, D.P. [1857] 2. 71.

108 Douai, 16 août 1856, D.P. [1857] 2. 71.

109 But see Cie d'Eclairage et Chauffage v. de Guiringaud, Req., 6 mars 1934, D.P. [1937] 1. 17. The electric company had attached wire-carrying insulators to the walls of the plaintiff's house in violation of administrative regulations. The Court held that even if no physical harm was shown, the plaintiff was entitled to pecuniary damages to compensate her for the mere invasion of her rights. Note the similarity to the common law trespass to land.

110 Civ., 11 novembre 1896, D.P. [1897] 1. 10.

111 Ed. note, D.P. [1897] 1. 10.

112 Poitiers, 6 mai 1856, D.P. [1856] 2. 182.

Harm to buildings brought about by unstable soil is a relatively common interference, but whenever the shift has been initiated by human agency the defense of uncontrollable events apparently is not available.[113] In such a case, however, the defendant may escape liability by demonstrating the absence of unreasonable conduct on his part while pointing to his opponent's negligence or imprudence. Thus, in *Drouet v. L'Industrielle Fonciere,*[114] the soil of the district in question had some peculiar, though discoverable, weaknesses. The plaintiff had built his house without taking the special care required by the condition of the soil. When the defendant was later erecting a building on its land, with a proper regard for structural necessities, it was unaware of the fact that the plaintiff's house had been defectively constructed. The latter was damaged by a soil-shift. The tribunal held for the defendant.[115]

When an occurrence beyond human control is combined with the defendant's negligence or imprudence, the human conduct often appears to be more determinative of the defendant's liability than does the act of God.[116] In *Mulard v. Lesourd,*[117] the plaintiff's lands were flooded following an unusually heavy downpour. Although recognizing the uncontrollable character of the event, the Cour de Cassation held the defendant liable for his failure to open his sluice-gates in time to lower the water level.

In every one of the foregoing cases the defense goes to the question of fault. When fault has been established by implication, a fact that would constitute a defense in Anglo-American equity may not necessarily have that effect in French law. In *Nublat v. Gilibert,*[118] the plaintiff had lived next to Gilibert's noisy stables for fifteen years. The Cour de Cassation, in reversing the appeals court, held that once the interference had exceeded the measure of the ordinary obligations of the neighborhood, even this prolonged acquiescence was no defense to the plaintiff's action.

The Role of Articles 1384, 1385 and 1386

Article 1384

Some commentators have suggested that the phrase ". . . but also for that caused by the acts of persons for whom he is responsible or by things under his guard. . . ." in paragraph 1 of Article 1384 was nothing more than a transitional device employed by the legislator to connect those

113 See, for example, Crédit Lyonnais v. Ardisson, note 58, supra.
114 Tr. civ. Seine, D.H. [1933] Somm. 20.
115 Accord: Dumont v. Colnet, Req., 11 mai 1853, D.P. [1853] 1. 163.
116 There is no sharp distinction in French law between force majeure and cas fortuit. Amos et al., op. cit. note 46, supra at 195-196.
117 Civ., 31 juillet 1912, D.P. [1914] 1. 144.
118 Civ., 4 décembre 1935, D.H. [1936] 70.

Articles which treated damage done by responsible human beings (articles 1382 and 1383) with those discussing damage caused by persons under the command of others (the remaining paragraphs of Article 1384), by animate things under the supervision of persons (Article 1385), and by buildings (Article 1386). The court decisions, however, have made full use of this provision and have developed from it a theory of "liability without fault" (*responsabilité sans faute* or *théorie du risque du propriété*).[119] The whole area of industrial and automobile liability for instance, exists by grace of this theory.[120] There were also some equivocal attempts to extend its application to interferences with the use and enjoyment of land but the idea was abandoned after a brief period of experimentation.

In *Dr. Vidal v. Leriche*,[121] it was found that the plaintiff doctor had a fine, properly installed radio set, that Dame Leriche had in her hotel an electric phonograph, the motor of which was emitting parasitic waves that interfered with the plaintiff's radio reception, that these disturbances were caused solely by the defendant's motor, that the only practical remedy was the replacement of the motor, and that a new motor was available on the market and was easy to procure. The defendant was so ordered and, in addition, was required to pay Fr.500 for past damage.

> . . . [B]y operating the motor the defendant has committed a fault and caused harm to the plaintiff; . . . the latter has been deprived, abusively and without right, of the advantages and enjoyment which he was rightfully entitled to derive from listening to his radio.[121a]

The tribunal did not cite any code provision; therefore, it is not clear on what theory its decision rested. However, in affirming the judgment the appeals court referred to Article 1384 as the apparent legal basis for the lower court's decision.[122]

The application of this controversial paragraph conceivably could have been restricted to inanimate movable things, in view of the fact that Article 1385 deals with animals and Article 1386 with immovables. Liability under 1386 is, however, limited to cases where a building has been either improperly maintained or defectively constructed. This approach, therefore, evidently was too restrictive for the courts and they proceeded to broaden the scope of the paragraph to include immovables as well. They imposed liability upon the owner of immovable property for incendiary damage to his neighbors' properties, the fire having orig-

119 Lalou, Note, D.P. [1922] 2. 49.
120 See generally Von Mehren, op. cit. note 24, supra at 367-414.
121 Tr. Civ. Pas-de-Calais, 30 janvier 1930, D.H. [1930] 248.
121a Ibid.
122 Douai, 1 décembre 1930, D.H. [1931] Somm. 44.

inated with the former but without fault on his part, and upon a factory of asphyxiating gases for the harm caused neighboring truck gardens by an explosion. Similarly, an electric company was held responsible for the electrocution of a customer.[123] *Peauger v. Banque de France*[124] belonged to this body of jurisprudence. It, however, went a bit further by extending the applicability of paragraph 1 from man-made to natural immovable objects. The defendant bank owned a large garden of platanus trees planted at the legal distance from the property line. Yet, each autumn the deciduous leaves were driven by the wind over to the plaintiff's property and deposited there to his inconvenience. The court held for the plaintiff on two grounds. It relied first on the theory of Article 1384, saying, in effect, that the leaves were in the custody of the defendant. The defenses of *force majeure* and *cas fortuit* were not available. Similarly, the defendant was not allowed to invoke as a defense the fact that the legal distance had been observed, nor was he allowed to show that the falling of the leaves was natural and could not be halted by man. The court's opinion also rested on the theory of Article 1382 (fault by implication).

This extension of *jurisprudence* fell in disgrace and within a relatively short time was repudiated in contrary decisions. In the case of *Commune de Vic-Fézensac,*[125] *the Conseil d'État* held that the harm (additional maintenance costs and physical deterioration through water seepage caused by clogged gutters and downspouts) caused to a private building by leaves fallen from public trees was one that did not, on the facts, exceed the measure of the ordinary constraints (*sujétions*) of the neighborhood. One writer thinks that the Conseil absolved the municipality from all liability in order to preserve the beautiful vegetation adorning public avenues and squares. The Conseil must have suspected that municipal authorities would rather remove the trees than pay damages out of the public till.[126] Technically, it was not difficult to reach such a decision. Neither the civil code nor the *jurisprudence* of the civil courts, e.g., the extension of Article 1384, have any direct effect upon the system of the administrative courts. Moreover, by adopting the reasoning of civil courts under Article 1382 (fault by implication) the same result could have been reached on the facts before the Conseil. Conversely, this decision did not become part of the *jurisprudence* of the civil

123 Lalou, Note, D.P. [1922] 2. 49.

124 Limoges, 20 juin 1921, D.P. [1922] 2. 49. Accord: Le Mentec v. Collin, Tr. paix Cancale, 3 décembre 1946, D. [1947] J. 107.

125 Conseil d'État, 24 juillet 1931, D.P. [1931] 3. 51.

126 P.-L. J., Note, D.P. [1931] 3. 51.

courts.[127] However, a few decades later, in *Le Molt v. Macheo*,[128] the Cour de Cassation itself discarded the principle announced in the *Peauger* case and held that paragraph 1 of Article 1384 did *not* provide a legal basis for finding that the falling of leaves had given rise to an actionable harm. The practical importance of this decision is great; in so far as non-intentionally and non-negligently created neighborhood inconveniences are concerned, the complainant now must stand on Article 1382 and not 1384.[129]

Article 1385

Interferences by animals are quite common and furnish abundant material for judicial experimentation. In most instances, liability has been predicated on Article 1382 rather than 1385. Apart from a few earlier cases,[130] Article 1385 appears to have been applied only to domestic animals.[131] But even admitting that Article 1382 has become the accepted basis of actions for damage done by wildlife, the problem of fault has by no means been satisfactorily resolved. The concept of fault by implication has not acquired a sure foothold in this area. Likewise, the dimensions of the other bases of fault are not easily ascertainable.

The Cour de Cassation, in *Cagé v. Girard et Voyet*,[132] held that an owner of hunting rights was not liable for damage done by rabbits to the neighbors' crops, unless it could be shown that he had favored their multiplication and had neglected to destroy them. The defendant's failure to keep his wire lattice enclosure tight so as to protect the surrounding fields, was not conduct indicative of his fostering the multiplication of the rodents. Therefore, this fact, standing alone, could not constitute a fault, by negligence or otherwise. About fifty years earlier the Chambre des Requêtes had arrived at an exactly opposite conclusion in *Chaillou v. Rougereau*[133] by holding the owner at fault under Articles 1382 and 1383 for his failure to keep his fences in good repair. The *Gagé* decision perhaps reflects the present state of the law.[134]

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127 On the side-by-side existence of the two court systems, see David et al., op. cit. note 32, supra at 45-46.

128 Civ. 21 juillet 1953, D. [1953] J. 573.

129 Ed. note, D. [1953] J. 573. The Court has reiterated this principle very recently in Knauss v. Pasquet, Civ., 29 février 1956, D.S. [1956] Somm. 22.

130 See: Clary v. Paillet, Req., 7 mars 1849, D.P. [1849] 1. 149; De la Rochefoucault v. Brault, note 137, infra.

131 Harm caused by wildlife entails liability of the landowner by reason of Article 1382 and not 1385: Sellier v. Bazille, Civ., 4 novembre 1941, D.A. [1942] 50; Bal v. de Temmermann, Tr. civ. Provins, 27 juillet 1948, D. [1948] Somm. 40. On harm by domestic animals, see Lafont v. Fite, Nîmes, 8 février 1950, D. [1950] 321.

132 Civ., 6 janvier 1948, D. [1948] J. 126.

133 Req., 1 mai 1899, D.P. [1900] 1. 549.

134 Apparent accord: Association des Chasseurs de Ferricy v. Meng, Civ., 24 mai 1950, D. [1950] Somm. 52; Godin v. Tricoteaux, Civ., 2 mars 1956, D.S. [1956] Somm. 152; Carpentier v. Pinot, Civ., 18 avril 1956, D.S. [1956] Somm. 152.

At about the turn of the century there was a group of cases that held an owner of woods, or of hunting rights in woods, liable for damage done to neighboring fields not only where he had encouraged the multiplication of the animals but also where he had failed to take all the necessary measures to keep their number down. Liability was predicated on fault under Articles 1382 and 1383.[135] This trend induced an eminent commentator to write that a fault, as a legal basis for the condemnation of the owner, was present whenever it was demonstrated that the wild animals had been present "in excessive numbers," notwithstanding the fact that the owner might have had no way of keeping them down.[136] This was really a "fault by implication" creeping into the animal world. It was at this time that *De la Rochefoucault v. Brault,*[137] in referring to both Articles 1383 and 1385, held that the owner of a rabbit warren was liable for the harm caused by the rodents even in the absence of any proven "fault, imprudence or negligence." The decision was immediately labeled as *"un véritable abus de l'idée de responsabilité."*[138] The trend subsequently dissipated, and today Article 1385, along with paragraph 1 of Article 1384, has been ousted from the *droits de voisinage,* excepting interferences by domesticated animals. There is, however, an occasional reference to the contrary. In *Quasquara v. Francezon,*[139] the defendant had set up thirteen bee hives on his suburban property which was located in a neighborhood consisting of residences surrounded by small gardens. The plaintiff's only complaint was that the bees were frightening him to his damage. The cour d'appel held for the plaintiff, saying that any animal, domestic or otherwise, could make its *gardien* liable by virtue of Article 1385 which was applicable irrespective of the nature of the damage.

Article 1386

Article 1386, with its special requirements of proof, has preempted the field of harm caused by the collapse of buildings. Paragraph 1 of Article 1384, therefore, does not form a legal basis of recovery for such harm.[140]

135 Wallace v. Bonin, Req., 8 juillet 1890, D.P. [1891] 1. 452 (wild boars); Moncuit v. Becquey, Civ., 7 janvier 1891, D.P. [1891] 1. 452 (rabbits); Romand v. Barbier, Req. 24 février 1904, D.P. [1904] 1. 334 (wild boars); Seydoux v. Lepousez, Req., 14 mars 1905, D.P. [1905] 1. 270 (rabbits).

136 Planiol, Note, D.P. [1900] 1. 549.

137 Req., 29 octobre 1899, D.P. [1900] 1. 432.

138 Planiol, Note, D.P. [1900] 1. 549.

139 Note 101, supra.

140 Combes-Gonthies v. Moucheron, Montpellier, 25 octobre 1949, D. [1950] J. 99. But compare the much broader rule in Pallois v. Dalivout, Civ., 26 juin 1924, D.P. [1924] 1. 159.

REMEDIES

The topic of remedies is too broad to be extensively treated here. It should suffice merely to point out some of the kinds of relief available to French plaintiffs in cases of interferences with the use and enjoyment of land. It is generally within the discretion of a judge to decide whether to limit the offensive activity or condition (*réparation en nature*), or to confine the plaintiff to solely a monetary reparation (*réparation en argent*). Elimination of the objectionable activity or condition is probably the prime desire of the courts, but where this would entail a discontinuance adverse to the public interest, monetary compensation is ordinarily given.[141]

Negatory Action (Action Négatoire)

What we at common law accomplish by an action of nuisance, can, to a certain extent, be achieved in the French law by the negatory action, *i.e.*, a declaratory action relating only to the freedom from servitudes. In contrast to the Roman law, but alike to the situation in Germany, it is available regardless of the disturber's claim of servitude—a right to disturb. Since this action cannot compensate the plaintiff for past harm nor prevent future interference, it has but limited utility and is, apparently, used to cut short attempts to acquire rights by prescription.[142]

Damages (Dommages Intérêts)

An action for money damages is the most common remedy. Compensation for past and/or prospective[143] harm may be claimed either separately or in conjunction with other relief, such as the execution of additional works or the imposition of regulations. The expenses of litigation (ordinary court costs and costs of experts) are frequently added to the figure of compensation.[144] In arriving at the figure of damages, courts consider as many relevant factors as possible, yet some factors, they feel must be disregarded because of their intangibility or uncertainty. Thus in *Société des Ciments Portland v. Charpentier*,[145] the plaintiffs were complaining of dust emanating from the cement company's plant. A money judgment was awarded to them based, in the words of the Cour de Cassation, upon the following *éléments actuels et certains*: the difficulties

[141] Savatier, Note, D.P. [1928] 1. 73. For a general discussion of the various types of remedies, see Ripert, Note, D.P. [1907] 1. 385.

[142] Arminjon et al., op. cit. note 13, supra § 778; Goldschmidt, op. cit. note 7, supra at 123-124; Wolff et al., op. cit. note 7, supra at 347. On the various real actions in the French law, see Petit Dictionnaire, note 51, supra at 38 and 1173.

[143] Since the harm must be actual (see "Type of Harm" p. —, supra), prospective damages calculated on the basis of previous experience ought to be subject to subsequent adjustment. Derosne v. Puzin, note 31, supra.

[144] Limouzin v. Arnaudet, Bordeaux, 21 mai 1867, D.P. [1869] 2. 159 (costs and costs of "expertise"); Sobraquès v. Clottes, note 81, supra (costs).

[145] Req., 13 décembre 1932, D.H. [1933] 37.

in the cultivation of their garden, the reduction of the productivity of the garden, the deterioration of the dwelling and its contents, and the grave discomfort, if not injury, to the health of the plaintiffs. In *Société Minière des Terres Rouges v. Poncin et Grosse,*[146] the defendant company contended, among other things, that the deterioration of the plaintiffs' dwellings was not attributable exclusively to the moisture attracted by its cool-house and, moreover, that in computing the amount of compensation to be awarded the Société should be credited with the value of the benefits accruing to the plaintiffs because of the presence of the manufacturing plant. The court held that the depreciation on account of age had been considered but that the presence of the defendant's blast furnaces was an undeterminable, pretended benefit, lacking a juridical basis.

The appeals courts have the power to increase the damages if the awards of the tribunals are inadequate.[147] The Cour de Cassation, however, will not challenge the recoveries since it regards the size of awards as a question of fact.[148]

Additional Works (Travaux et Réparations)

A court may order a defendant to execute certain works or repairs in order to eliminate or minimize interferences with the use and enjoyment of land by others. By such an order it attempts to accomplish what an American court would seek to do by means of a mandatory injunction. Instead of the power to commit for civil contempt,[149] the French courts may rely on *l'astreinte* to induce performance.

L'astreinte is essentially a judgment for additional damages to compel performance and may be considered an integral part of the French jurisprudence. It was developed by the courts following the abolition of imprisonment for default in civil obligations. It is provisional in nature; hence, the swelling sum of money is by no means indicative of the plaintiff's ultimate recovery. Once the defendant's resistance has been broken, the court will compute a sum which is commensurate with the actual harm suffered by the plaintiff. Thus, unless there is some certainty that appreciable harm will actually result in case of non-obedience, *l'astreinte* can be an utterly ineffective means of compulsion.[150] Consequently, when an award of damages for past harm can reasonably be projected into

146 Colmar, 19 mai 1938, D.H. [1938] 425.

147 See Castella v. Ferrie, Montpellier, 24 juillet 1933, D.H. [1933] 566 (from Fr.1,000 to Fr.10,000); Dr. Secret v. Briquet, note 69, supra (from Fr.2,000 to Fr.5,000).

148 David et al., note 32, supra at 107.

149 Execution against the person in civil matters, originally found in Articles 2059-2070, was abolished by La loi du 22 juillet 1867. On the enforcement of judgments for performance, including administrative help, see also Von Mehren, op. cit. note 24, supra at 773-776.

150 Dawson, "Specific Performance in France and Germany," 57 Mich. L. Rev. 495, 510-525 (1959); Brodeur, "The Injunction in French Jurisprudence," 14 Tul. L. Rev. 211 (1940); Fréjaville, "L'Astreinte," D. [1949] Chr. 1.

the future, the defendant may be less obdurate although, of course, his resistance might have weakened simply under the threat of consecutive actions for accrued damages. *Coquerel v. Clément-Bayard*[151] is an excellent illustration of a case involving the typical remedies plus a conditional authorization of self-help. The court gave the plaintiffs monetary compensation for the actual physical harm caused their blimp and also ordered the defendant to remove the spikes within two weeks under the threat of *l'astreinte* of Fr.25 for each subsequent day of non-compliance. Furthermore, if compliance was not forthcoming within a month following the fourteen-day "grace" period, the plaintiffs were authorized to enter the defendant's premises and, by employing "workmen of their choice," to remove the offending irons. In *Gagey-Seguin et Mathenet v. Jeamel*,[152] the court ordered the defendant's noisy coppersmith shop enclosed in stone or brick walls. The deadline for performance was set at five months counting from the day of the judgment under *l'astreinte* of Fr.12 for each day of non-compliance.

Optional Decree (Condemnation Facultative)

The optional decree offers to the defendant a choice between the execution of certain additional works or repairs to reduce the interference and the "purchase," so to speak, from the plaintiff of the privilege of continuing the interference in its previous form. The plaintiff, in *Ville de Paris v. Muzard*,[153] was complaining that the clatter of feet in the stairway of the adjoining public school was disturbing the guests in her hotel. The court found that this was a notable and serious inconvenience and rendered a judgment requiring the city either to pay the plaintiff immediately Fr.20,000 to compensate her for future damage, or to perform certain additional works and repairs within a month under *l'astreinte* of Fr.50 for each day beyond that limit.

Regulation (Réglementation)

In some cases, courts feel that the inconveniences that result from the activities of a defendant might decrease to a nonactionable level if the latter were to alter the manner of his operations. The judges may try to achieve this by prescribing regulations as though they were administrative officers. Thus, in *Castella v. Ferrie*,[154] the complaint was that Ferrie's mechanical sawmill was making an intolerable noise and tremor depriving the plaintiff of any rest, day or night. The cour d'appel affirmed the regulation prescribed by the tribunal, namely, that the mill should be

[151] Note 53, supra.
[152] Note 95, supra.
[153] Note 91, supra.
[154] Note 147, supra.

operated only between the hours of 8-12 a.m. and 2-6 p.m. The regime was backed by a Fr.50 *l'astreinte* for every proved violation. Similarly, in *Gagey-Seguin et Mathenet v. Jeamel*,[155] the defendants were ordered to keep the windows of their copper-smithy closed. The effectiveness of these judicial regulations apparently will vary directly with the probability of the plaintiff's obtaining executable money judgments in the future.

CONCLUSION

Conflicts arising out of the use and enjoyment of land in France are frequently adjusted under the general principles of private law found in the *Code Civil*. However, since only a few of the mutual rights and obligations existing between neighbors have been spelled out in the code, the bulk of these *droits de voisinage* is the product of judicial effort. This body of *jurisprudence* is a part of the French law of tort (*responsibilité civile délictuelle*) that is derived from the five articles[156] dealing with delictual liability. In this area, liability is said to be based on fault, though the fault itself is shedding the connotation of personal blame and is moving toward an objective criterion. But the traditional ideas of fault are by no means dead; hence, this existence of a double standard frequently tends to obscure the reasoning in individual cases. Articles 1384 and 1385 have all but disappeared from the field of neighborhood obligations. It would seem, indeed, that the appearance of the concept of social fault as a competing basis of liability will gradually displace any coexistent theory of liability without fault. It will absorb those elements of the latter which had made such a theory an indispensable legal tool in a period when liability founded on moral fault was inadequate to cope with new conflicts in a more complex society.

On the whole, one is impressed by the fact that French judges, working within their code system and using different techniques of analysis, reach results in controlling land use by judicial action that are substantially parallel to those arrived at by their common law counterparts. In either system the general rules of private law are interpreted and applied so as to cover present day needs. The process by which this is accomplished is largely one of reconciling conflicting interests. It seems, however, that in terms of enforcement the French law is weaker. While one can appreciate the reluctance of civil law systems to enforce civil obligations by measures directed against the obligors' persons,[157] the absence of an effective substitute is deplorable. *L'astreinte* may often be a paper tiger.

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155 Note 95, supra.
156 Articles 1382-86, p. 317 supra. See especially Article 1382.
157 See Pekelis, "Legal Techniques and Political Ideologies," 41 Mich. L. Rev. 665 (1943).