Violations of the Obligations of Vicinage: Remedies Under Articles 667 and 669

A. N. Yiannopoulos
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INTRODUCTION

Articles 667-669 of the Louisiana Civil Code of 1870 are the main source of civil responsibility in the framework of vicinage. These articles impose certain duties on landowners and occupiers of immovable property that are qualified in the Civil Code as "legal servitudes" and as "obligations" imposed by law independent of any agreement. The historical derivation, conceptual structure, and apparent meaning of these articles; the nature, foundation, and extent of the responsibility that they establish; and their applicability to acts, works, and persons, have been dealt with extensively elsewhere. The following study is devoted to an analysis of the remedies that are available to an aggrieved party in case of violation of the obligations of vicinage by a landowner or other occupier of immovable property. An effort is made to determine the circumstances in which one may claim injunctive relief, damages, or both. For the purpose of a better understanding of the pertinent legal problems, and for the evaluation of possible solutions, reference is made to common law and to the legal systems of France, Germany, and Greece.

DISTINCTION BETWEEN ARTICLE 667 AND ARTICLE 669

Articles 666-669 of the Louisiana Civil Code of 1870 form a unit, and, for proper understanding, they must be read together. Article 667 prohibits works that cause damage or deprive neighbors of the enjoyment of their properties; article 668 permits works that merely cause some inconveniences; and article 669 indicates that, in the absence of a conventional servitude, the question whether inconveniences resulting from smoke or odors are to be tolerated depends on police regulations and local customs. Apparently, the redactors of the Civil Code intended to establish the following three principles: no one may use his property so as to cause damage to another or interfere substantially with the enjoyment of another's property (article 667);
landowners may be exposed to some inconveniences arising from the normal exercise of the right of ownership by a neighbor (article 668); and that, in the absence of a conventional servitude, no one is bound to tolerate excessive emissions of smoke, odors, noise, dust, vapor, and the like; the question of responsibility for such emissions is to be determined in the light of local conditions (article 669).

Quite frequently, courts and scholars group articles 667-669 together, but incisive analysis indicates that distinction ought to be made between article 667 and article 669. Such a distinction was proposed for the first time in opinions rendered by Justice Barham. According to Justice Barham, article 667 establishes a veritable predial servitude. Article 669, however, does not establish a predial servitude, because "by providing redress for those in the same house it would require a servitude on an estate in favor of the same estate." Moreover, "by providing redress for those in neighboring houses it appears to give a cause of action for enforcing its provisions to persons other than the proprietors of an estate." Justice Barham concludes thus "[s]uch results are contrary to our theory that predial servitudes run with the land in favor of the proprietor of the estate."

Reasoning and conclusion require comment. Under the Louisiana Civil Code as well as under special legislation, an apartment in a house may be a distinct immovable. Thus, article 669 does not nec-

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8. Id.

9. Id.

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Essarily presuppose a servitude on an estate in favor of another estate, which, of course, is not legally possible. Moreover, one may question the statement that this article does not establish a servitude because this would be contrary to our theory that predial servitudes run with land in favor of the proprietor of an estate. According to contemporary civilian analysis, the so-called legal servitudes must be regarded as limitations on the content of the right of ownership rather than as predial servitudes in the strict sense of the word. Therefore, if article 667 establishes a limitation on ownership it would seem that so does article 669, albeit by virtue of police regulations and local customs rather than by direct legislation.

Nevertheless, a survey of Louisiana jurisprudence tends to confirm the existence and relevance of a distinction between article 667 and article 669 for the resolution of both doctrinal and practical problems. The two provisions have distinct areas of application and the responsibility that they impose has distinct foundation.

Article 666 declares that "the law imposes upon proprietors various obligations towards one another, independent of all agreements; and those are the obligations which are prescribed in the following articles." The following two articles clearly contemplate obligations imposed on proprietors in favor of other proprietors in the neighborhood. Article 669, however, employs much broader language, and argument may be made that it refers to certain obligations that local customs and police regulations impose on any occupier of land in favor of his neighbors, be they landowners or not. Of course, this argument drawn from the language of article 669 alone is considerably weakened if the article is read in combination with article 666. Be this as it may, a functional analysis of Louisiana jurisprudence indicates that articles 667 and 668 apply directly to proprietors and by analogy to other occupiers of land. Article 669, however, which is the source of civil responsibility for insufferable inconveniences, corresponding with the common law of nuisance, applies directly to actions brought by a variety of plaintiffs against a variety of defendants.

14. Id. at 235.
There is agreement between doctrine and jurisprudence that articles 667 and 669 impose responsibility without negligence, but divergent views have been expressed concerning the nature of this responsibility. Perhaps, the preferable view is that the nature of responsibility under article 667 and article 669 is the same. Both articles impose a species of legal responsibility, the incidents and effects of which are determined by analogous application of the rules of delictual obligations. There is, however, a substantial difference in the foundation of the responsibility under article 667 and under article 669. Responsibility under article 667 is founded on the notion of abuse of the right of ownership whereas responsibility under article 669 is founded on the notion of an exceptional use of property that is unreasonable under the circumstances. Responsibility under this article thus goes far beyond the idea of abuse of right.

**ARTICLE 667: ACTIONS FOR DAMAGES AND INJUNCTIONS**

Article 667 of the Louisiana Civil Code of 1870 prescribes duties in the framework of vicinage but it does not expressly determine the consequences of the violation of these duties. The words used in this article, “deprivation of liberty” and “damage,” are joined disjunctively, and this may be taken to indicate the availability of injunctive relief as well as compensation. Perhaps the redactors of the Civil Code, following the civilian tradition, had contemplated that the violation of the duties established by article 667 would give rise to actions for injunctive relief and that damages would be claimed

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18. Id. at 216.

19. See text at note 230 infra.
under the law of delictual obligations.\textsuperscript{20} Be this as it may, there should be no doubt that one may claim under this provision injunctive relief, damages, or both.\textsuperscript{21}

**Damages**

Article 667 imposes civil responsibility for acts, constructions, and activities that may be "the cause of any damage" to neighboring landowners. This, however, does not mean that all damage, however caused, is compensable under this article. No legal system has ever compensated neighbors for all damage suffered as a result of works and activities on neighboring property. If all damage were compensable, the prerogatives of ownership would be drastically curtailed. "[E]vidently an owner cannot be debarred from the legitimate use of his property simply because it may cause real damage to his neighbor. It would be contrary to the fundamental legal principle according to which the exercise of a right cannot constitute fault or wrong . . . ."\textsuperscript{22} As a matter of fact, damage awards under article 667 are always predicated on a finding that duties imposed by this article are violated, on proof of actual damage,\textsuperscript{23} and on proof that the damage

\textsuperscript{20} See Stone, The Loesch Case and Article 667, 17 Tul. L. Rev. 596, 599-600 (1943); cf. LA. Civ. CODE arts. 864-67, 2315. Indicatively, corresponding provisions in the Greek Civil Code provide for injunctive relief only. See GREEK CIV. CODE arts. 1000, 1003-05. Damages may be claimed under the law of delictual obligations. Id. arts. 914, 919; BALIS, CIVIL LAW PROPERTY 96 (3d ed. 1955) (in Greek).

\textsuperscript{21} In Borenstein v. Joseph Fein Caterers, Inc., 255 So. 2d 800 (La. App. 4th Cir. 1971), suit was brought for injunction and damages under article 667. The trial court had maintained defendant's exception of improper cumulation of actions and had required plaintiffs to elect between the abatement suit and the damage suit. Upon plaintiffs' election to proceed in abatement, the trial court dismissed the damage suit without prejudice. On appeal, plaintiffs assigned as error the maintaining of the exception of improper cumulation of actions which resulted in the dismissal of their damage suit. The court of appeal refused to pass on the merits of plaintiffs' argument, because the judgment dismissing the suit for damages was a final judgment that had not been appealed. An appeal from that judgment should have been successful. There is no objection to having two demands on the basis of the same facts. See LA. CODE CIV. P. arts. 461, 462; Blanc v. Murray, 36 La. Ann. 162 (1884). Most cases, however, in which demands were made for damages and injunctive relief in the same action involved responsibility under article 669. See McGee v. Yazoo & M.V.R.R., 206 La. 121, 19 So. 2d 21 (1944); Dodd v. Glen Rose Gas. Co., 194 La. 1, 193 So. 349 (1939); Di Carlo v. Laundry & Dry Clean. Serv., 178 La. 676, 152 So. 327 (1933).


What constitutes a violation of the duties imposed by article 667 is not always easy to determine. Perhaps, the best formula is that there is a violation of the duties imposed by this article when a landowner abuses his right of ownership.25

It would seem that the terms of article 667 are sufficiently broad to support awards for structural damage to immovable property for depreciation of land values, and for all injuries to persons. Most actions brought or decided under article 667, however, involve claims for structural damage caused to immovable property. In conspicuously few cases, when structural damage to property was shown, courts have allowed damages for injury to a person's health or enjoyment of the property.26 The question whether apart from structural damage, diminution of land values is recoverable under article 667 remains largely unresolved in Louisiana jurisprudence.27

Physical damage to immovable property is recoverable in Louisiana by a variety of actions, including those brought under Article 1, Section 2, of the Constitution of 192128 and under articles 2315, 667, and 669 of the Civil Code. These provisions overlap in part but establish distinct grounds of responsibility. It is conceivable that responsibility may rest on one of them exclusively or on several cumulatively for a single recovery. It would be futile to attempt to draw lines of demarcation among articles 667, 669, and 2315 from the viewpoint of recoverable damage. It would seem that all kinds of damage may be recoverable under any of these provisions. The only pertinent differentiation relates to the nature, scope, and foundation of the responsibility that these provisions impose. Article 2315 allows recovery of

27. See text at notes 272-78 infra.
damage to property and persons caused by one's fault, including
abuse of right and ultrahazardous activities; article 667 allows recov-
er of damage to property and persons caused by one's abuse of the
right of ownership; and article 669 allows recovery of damage to
property and persons in circumstances in which the gravity of the
harm suffered by those near-by outweighs the social utility of one's
acts, constructions, and activities on land.29

Until about the middle of this century, it was apparently thought
that physical damage to immovable property was recoverable only
upon a showing of negligence or intentional misconduct. Thus, re-
sponsibility for damage caused by dynamite blasting,30 pile driving,31
by escaping substances such as salt water32 or chemical wastes,33 and
even by the emission of smoke, fumes, dust, and the like,34 was deter-
mined by application of the traditional notion of fault in article 2315.
Today, however, Louisiana jurisprudence is settled that physical
damage to property may also be recovered without regard to defen-
dant's negligence by application of articles 667 and 669.

Article 667 has been consistently applied by Louisiana courts in
recent years to support awards for physical damage to immovable
property caused by dynamite blasting,35 pile driving,36 aerial spraying

29. For detailed discussion, see Yiannopoulos, Civil Responsibility in the Frame-
work of Vicinage: Articles 667-669 and 2315 of the Civil Code, 49 Tul. L. Rev. 195, 220
(1974); see also text at note 243 infra.

Humble Oil & Ref. Co., 196 La. 604, 199 So. 656 (1940); Gerald v. Standard Oil Co.,
204 La. 690, 16 So. 2d 233 (1943); McIlhenny v. Roxana Petro. Corp., 122 So. 165 (La.
App. 1st Cir. 1929).

31. See Egan v. Hotel Grunewald Co., 129 La. 163, 55 So. 750 (1911); Loesch v.
Const. Co., 192 So. 2d 859 (La. App. 4th Cir. 1966). As late as 1960, certain courts
expressed doubts whether a contractor's responsibility for pile driving operations rests
on negligence under article 2315 or on article 667 without regard to negligence. See

32. See Parro v. Fifteenth Oil Co., 25 So. 2d 30 (La. App. 1st Cir. 1946).

33. See Rhodes v. International Paper Co., 174 La. 50, 139 So. 755 (1932); Spyker
Chem. Co., 142 La. 790, 77 So. 632 (1918); Long v. Louisiana Creos. Co., 137 La. 862,
69 So. 281 (1915).


35. See Fontenot v. Magnolia Petro. Co., 227 La. 866, 80 So. 2d 845 (1955); Rosh-
ong v. Travelers Ins. Co., 281 So. 2d 785 (La. App. 3d Cir. 1973); Gullat v. Ashland
Oil & Ref. Co., 243 So. 2d 820 (La. App. 2d Cir. 1971); Wright v. Superior Oil Co., 138
So. 2d 688 (La. App. 3d Cir. 1962).

Travelers Ins. Co., 259 La. 1, 249 So. 2d 181 (1971); Craig v. Montelepre Real. Co.,
252 La. 502, 211 So. 2d 627 (1968); Jennfseau v. Sanderson, 239 La. 51, 117 So. 2d 907
of noxious chemicals,\textsuperscript{37} and by escaping dangerous substances such as
dammed water.\textsuperscript{38} Such cases, involving responsibility for ultrahazard-
dous activities, may be best considered as matters of delictual re-
sponsibility within the expanded meaning of fault under article
2315.\textsuperscript{39} Article 667 has also been applied to support awards for physical
damage to property caused by constructions, such as falling walls\textsuperscript{40} or storage tanks.\textsuperscript{41} Finally, in a number of cases, article 667 has
been applied to support awards for physical damage to property
caused by excessive emissions of smoke, fumes, dust, soot, and the
like, whether alone,\textsuperscript{42} or in combination with article 669.\textsuperscript{43}

\textbf{Injunctions}

Article 667 seems to contemplate the availability of injunctive
relief when acts, constructions, or activities on neighboring property
deprive an owner “of the liberty of enjoying his own” property or

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(1960); D’Albora v. Tulane Univ., 274 So. 2d 825 (La. App. 4th Cir. 1973); Legendre
Jackson Apt’s, Inc., 255 So. 2d 249 (La. App. 4th Cir. 1969); Selle v. Klemensakis, 142
So. 2d 50 (La. App. 4th Cir. 1962).

37. See Gotreaux v. Gary, 232 La. 373, 94 So. 2d 293 (1957); Watson v. Mid-
Continent Aerial Sprayers, 170 So. 2d 149 (La. App. 2d Cir. 1964); Trahan v. Bearb,
138 So. 2d 420 (La. App. 3d Cir. 1962); Jones v. Morgan, 96 So. 2d 109 (La. App. 1st
Cir. 1957).

1973); Hamilton v. City of Shreveport, 180 So. 2d 30 (La. App. 2d Cir. 1965).


40. See Tunnage v. Eddy, 42 So. 2d 382 (La. App. Orl. Cir. 1949); Mayer v. Ford,
12 So. 2d 618 (La. App. 1st Cir. 1943); cf. Betz v. Coteau, 261 So. 2d 373 (La. App. 1st
Cir. 1972).

41. See Gretna Mach. & Iron Wks., Inc. v. Southwestern Sugar & Mol. Co., 166
So. 2d 54 (La. App. 4th Cir. 1964).

42. See Daigle v. Continental Oil Co., 277 F. Supp. 875 (W.D. La. 1967) (various
emissions); Burke v. Besthoff Real. Co., 196 So. 2d 293 (La. App. 4th Cir. 1967)
(vibrations); Coddin v. Braswell Supply, Inc., 54 So. 2d 852 (La. App. 2d Cir. 1951)
(dust, acid gas); \textit{cf.} Eastern Air., Inc. v. American Cy. Co., 321 F.2d 683 (5th Cir. 1963);
O’Neal v. Southern Car. Co., 216 La. 96, 43 So. 2d 230 (1949); Union Fed. Sav. &
L. v. 451 Florida Corp., 256 So. 2d 356 (La. App. 1st Cir. 1971). Damage caused by
vibrations resulting from the use of machinery may also be recoverable under Article
669. \textit{See} Di Carlo v. Laundry & Dry Clean. Serv., 178 La. 676, 152 So. 327 (1933);
\textit{cf.} Irby v. Panama Ice Co., Inc., 184 La. 1082, 168 So. 306 (1936); Meyer v. Kemper Ice
Co., Inc., 180 La. 1037, 158 So. 378 (1934).

43. \textit{Cf.} McGee v. Yazoo & M.V.R.R., 206 La. 121, 19 So. 2d 21 (1944); Froelicher
v. Southern Mar. Wks., 118 La. 1077, 43 So. 882 (1907); Froelicher v. Oswald Iron.,
Ltd., 111 La. 705, 35 So. 821 (1903); Kelly v. Ozone Tung Coop, 36 So. 2d 837 (La.
App. 1st Cir. 1948); Galouye v. A.R. Blossman, Inc., 32 So. 2d 90 (La. App. 1st Cir.
1947).
“may be the cause of any damage to him.” For the same reasons, however, that not all damage is compensable, not all acts, constructions, or activities that deprive an owner of the enjoyment of his property or cause damage to him may be enjoined under this article. As a matter of fact, injunctive relief under article 667 is always predicated upon violation of the duties imposed by this article and upon proof of actual or impending deprivation of enjoyment or damage.

A survey of Louisiana jurisprudence discloses a paucity of cases in which injunction was sought or obtained on the basis of article 667 alone. Ordinarily, injunctive relief is predicated on violation of duties imposed by article 669 of the Civil Code, on the provisions of the same code dealing with new works, and on the pertinent provisions of the Louisiana Code of Civil Procedure. At this point, it is appropriate to notice a distinction as to the basis of injunctive relief under article 667 and under article 669. Injunctive relief under article 669 is ordinarily based on a finding that an exceptional use of property that is unreasonable under the circumstances causes damage or excessive inconvenience to persons of normal sensibilities. Injunctive relief under article 667, however, is available even in the absence of a showing of physical discomfort whenever acts, constructions, or activities on neighboring property constitute an abuse of the right of

44. See text at notes 22-24 supra.
45. See Hilliard v. Shuff, 260 La. 384, 256 So. 2d 127 (1972). Of course, an act, construction, or activity may violate the duties imposed by this article as well as duties imposed by other provisions. Id.
47. See Hilliard v. Shuff, 260 La. 384, 256 So. 2d 127 (1972); Morris v. Putsman, 166 La. 14, 116 So. 577 (1928). For example, under certain circumstances, the fear of spreading contagious disease from a near-by hospital might be the basis of an injunction under article 667. Cf. Milne v. Davidson, 5 Mart. (N.S.) 409 (La. 1827).
48. See Borenstein v. Joseph Fein Caterers, Inc., 255 So. 2d 800 (La. App. 4th Cir. 1972); Salter v. B.W.S. Corp., 281 So. 2d 764 (La. App. 3d Cir. 1973). Both damage awards and injunctive relief are predicated on violation of the duties imposed by article 667. Thus, an abusive exercise of the right of ownership ought to be enjoined without balancing equities. Such a process is appropriate in case of violation of duties imposed by article 669. Cf. Busby v. International Paper Co., 95 F. Supp. 596 (W.D. La. 1951); Young v. International Paper Co., 179 La. 803, 155 So. 231 (1934).
49. See text at notes 289, 304 infra.
ownership. Whether acts, constructions, or activities constitute such an abuse of the right of ownership as to justify injunctive relief is not to be decided by the application of any broad or inflexible rule, but by a careful weighing of all the circumstances attending them, by diagnosing them... with the aid and guidance of the two principles, that the owner must not injure seriously any right of his neighbor, and, even in the absence of any right on the part of the neighbor, must not in an unneighborly spirit do that which while of no benefit to himself causes damage to the neighbor.

Thus, depending on the circumstances, the raising of a fence, the dumping of chemical wastes on one's own property, the burning of a brick kiln, the maintenance of a raised planter and vine, and the storage of combustible materials may constitute an abuse of the right of ownership that supports injunctive relief under article 667. But when a landowner does not abuse his right of ownership injunctive relief is not available, even though neighbors are deprived of enjoyment or suffer damage. Thus, when a landowner without abusing his right of ownership locates electric wires or railroad tracks near the boundary line of his property, digs a canal on his property, or drains a common underground water reservoir injunctive relief is...

53. See text at note 25 supra.
63. See Jeannonne v. Cox, 233 La. 251, 96 So. 2d 557, 559 (1957).
64. See Adams v. Grigsby, 152 So. 2d 619, 624 (La. App. 2d Cir. 1963). Of course, a neighbor "might be entitled to relief under certain circumstances; for example, if defendant by his actions caused the pollution of plaintiff's water supply, rendering it unfit for their use, or if he simply opened his own well and allowed it to pour out the water as waste without benefit to himself." Cf. McCoy v. Arkansas Nat. Gas Co., 184 La. 101, 165 So. 632 (1936).
Injunctive relief under article 667 is a matter of right. Cases may be found in which Louisiana courts declared that acts, constructions, and activities may be enjoined only if they cause "material, substantial, and irreparable injury to property owners, for which there is no adequate remedy at law," and that "where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied." These cases, influenced by common law notions that are not applicable in Louisiana, confuse the requirements for injunctive relief under article 3601 of the Code of Civil Procedure, or for that matter under article 669 of the Civil Code, with the requirements for injunctive relief under article 667 of the Civil Code. Under article 3601 of the Code of Civil Procedure, injunctive relief is predicated on a showing of "irreparable injury, loss, or damage," and under article 669 of the Civil Code injunctive relief is predicated on a showing of damage or excessive inconvenience resulting from an exceptional use of property that is unreasonable under the circumstances. Under these provisions, equitable considerations, such as balancing of interests and disproportionate hardship, may be relevant. The duties that article 667 imposes, however, are likened to servitudes, and, as servitudes, are enforceable by injunction upon a showing of actual or impending damage or deprivation of enjoyment, resulting from an abusive exercise of the right of ownership by a neighbor. Recent decisions correctly point out that injunctive relief in this field of property law is available without the historical limitations of equity jurisprudence and that in an action for injunction under article 667 it is not "necessary" to plead and prove irreparable injury. The basis for injunctive relief under article 667

67. La. Code Civ. P. art. 3601; cf. id. art. 3663.
68. See text at notes 230-43 infra.
69. See Poole v. Guste, 261 La. 110, 262 So. 2d 339 (1972).
70. Id.
is thus the same as in actions for damages, and, upon the same proof, the court is bound to grant the relief to which plaintiff is entitled. The court does not enjoy discretion to grant damages in lieu of injunctive relief. There may be instances, however, in which an aggrieved party may be only entitled to damages because his acts, constructions, or activities do not constitute an abuse of the right of ownership but entail responsibility for damages under other provisions of law.

In *Hilliard v. Shuff*, a landowner sued the lessee of adjoining property, owner and operator of a service station, to compel him to remove or place underground certain fuel tanks. The tanks were located above ground within five feet of plaintiff's property; they were designed for the storage of crude oil, but were used by defendant for the storage of much more volatile gasoline and diesel fuels. As a result of such use, fumes that could be ignited by random sparks escaped from the tanks and created a zone of danger extending well into plaintiff's property. Plaintiff contended that the maintenance of the tanks deprived him of the use of 45 feet of his property and posed a threat to his residence in violation of articles 667 and 669.

A majority of the court was of the opinion that:

the storage of basic fuels, a lawful activity, does not, without more, violate these articles . . . . When, however, the storage of fuels creates a substantial hazard to the adjoining property, the court must consider such factors as location, structure of the storage tanks, quantity of fuel stored, operational procedures, as well as surrounding circumstances.

In light of these considerations and pertinent evidence, the court concluded that articles 667 and 669 had been violated by defendant's use of crude oil tanks for the storage of gasoline and diesel fuel within a few feet of plaintiff's property. Nevertheless, the majority of the court was not prepared to grant the relief that plaintiff requested, because the violation of the code articles relating to the use of property "requires no automatic injunction to remove the tanks . . . . Injunction is an equitable remedy and should be carefully designed to achieve the essential correction at the least possible cost and inconvenience to the defendant." Since the record failed to reflect whether some correction short of removal or underground placement of the tanks was feasible, the case was remanded for the reception of further evidence relative to the modes of correction.

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72. 260 La. 384, 256 So. 2d 127 (1972).
73. *Id.* at 389, 256 So. 2d at 129.
74. *Id.* See also *Haynes v. Smith*, 85 So. 2d 326 (La. App. 2d Cir. 1956).
In an articulate dissenting opinion, Justice Barham advanced the view that the violation of the duties imposed by article 667 gives rise to an unqualified right for "an immediate and full abatement of the encroachment" in the form of a permanent injunction: "the only requirement is an objective finding of probability that the owner of the dominant estate may at some time be deprived of enjoyment of his property or suffer damage because of the work made on the servient estate." In contrast, the violation of the duties imposed by article 669 affords relief to any person who has been subjectively inconvenienced in the enjoyment of property against any one, but only to the extent that acts, constructions, or activities cause an insufferable inconvenience.

According to this view, which deserves full attention for a possible revision of the Civil Code, there are differences between articles 667 and 669 as to both the basis and scope of injunctive relief. The jurisprudence, however, appears to be settled that there is a difference between the two articles as to the basis of injunctive relief only; there is no difference as to the scope of injunctive relief, which under either article, is available only to the extent that it is required to correct a situation.

The case illustrates the tendency of courts to group together articles 667-669. In reality, as Justice Barham observed, the case was governed by article 667 exclusively. Article 668 had nothing to do with plaintiff's demand because this article relieves an owner from responsibility for inconveniences caused to neighbors when acts, constructions, or activities are a normal exercise of the right of ownership. Article 669 had no application because there was no complaint of physical discomfort. Since the action was governed by article 667 exclusively, the availability of injunctive relief was not subject to limitations of equitable principles. But this does not mean that plain-

76. Id.; Robichaux v. Huppenbauer, 258 La. 139, 245 So. 2d 385, 391 (1971) (concurring opinion). The requirements for injunctive relief under articles 667 and 669 differ because according to Justice Barham, the two provisions contemplate distinguishable situations: article 667 establishes a veritable predial servitude whereas article 669 establishes personal obligations. See notes 7-9 supra.
78. See text at notes 250-55 infra. Plaintiff might also have chosen to claim injunctive relief under the articles of the Civil Code dealing with new works or under articles 3601 and 3663 of the Code of Civil Procedure. For good reasons, these were not the vehicles chosen. An injunction under article 3601 would be limited to the suppression of the cause of danger, that is, the improper use of the tanks. And an injunction under article 3663 is available only in cases of disturbance of possession, in law or in fact. There was no disturbance in law, and it is questionable whether there can be a disturbance in fact without physical invasion of property.
tiff had necessarily the right to an absolute injunction. When correction short of removal of constructions or absolute prohibition of activities is feasible, the court should limit the scope of injunctive relief. If such a correction is not feasible, the court is, of course, bound to issue an injunction ordering the removal of constructions or absolutely prohibiting activities that constitute an abuse of the right of ownership.79

**INTERMEZZO: ARTICLE 669 AND THE COMMON LAW OF NUISANCE**

It has been said that article 669 has been applied by courts "together with the common-law theory of nuisance"78 to grant relief in cases in which use of property causes damage or excessive inconvenience to neighbors. This does not mean, of course, that there has been wholesale adoption of the common law or that the common law controls in this sensitive area of property relations.81 Simply, Louisiana courts have developed, on the basis of article 669, a body of law that corresponds to some extent with the law of nuisance in common law jurisdictions, and, in so doing, they have at times been inspired by solutions reached in sister states.

It was perhaps natural for Louisiana courts to seek in the past guidance in common law precedents. French doctrine and jurisprudence could furnish little guidance in this field, because the French Civil Code does not contain an article corresponding with article 669 of the Louisiana Civil Code of 1870.82 The common law of nuisance,

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79. See Hilliard v. Shuff, 285 So. 2d 266 (La. App. 3d Cir. 1973) (on remand); Salter v. B.W.S. Corp., 281 So. 2d 764 (La. App. 3d Cir. 1973); cf. Keay v. New Orleans Canal & Bank Co., 7 La. Ann. 259 (1852). Under article 669, however, in exceptional circumstances, the court may permit constructions to stand or activities to continue, particularly when inconveniences are unavoidable in spite of employment of contemporary technology. See text at note 311 infra.

80. Robichaux v. Huppenbauer, 258 La. 139, 149, 245 So. 2d 385, 389 (1971). In this case, the writer of the majority opinion felt compelled to refer to the common law of nuisance because he took an unduly restrictive view of the meaning of article 669. See text at notes 150-52 infra.


on the other hand, was supposed to reflect applications of the *sic utere* doctrine, the same doctrine that articles 667-669 embody. In recent years, however, critical analysis has demonstrated that, in spite of similarities of underlying doctrine, the structure and function of the law of nuisance is substantially different from the structure and function of legal servitudes. Indeed, the law of nuisance is a branch of the common law of torts whereas the legal servitudes are institutions of civil law property. Accordingly, the modern trend in Louisiana jurisprudence calls for direct application of the provisions of the Civil Code and for use of common law precedents selectively as illustrations of acceptable practical solutions. The Louisiana supreme court has repeatedly declared that in this field of property law, "while the common-law authorities . . . may be persuasive, they are not decisive of the issue in view of our codal articles and jurisprudence."

Continued reliance on the common law of nuisance in the framework of civil law property institutions is unnecessary and confusing. Louisiana courts are in a position to develop the practical implications of article 669 in the light of contemporary exigencies, relying on civilian methodology and on the accumulated body of Louisiana jurisprudence. For the purpose of a better understanding of this jurisprudence, however, brief reference ought to be made to the fundamentals of common law nuisance.

**Nuisance**

At common law, there is no generally accepted definition of the word "nuisance." In the words of a most influential writer:

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to every-

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85. Frederick v. Brown Fun. Homes Inc., 222 La. 57, 62 So. 2d 100, 111 (1953); Barrow v. Gaillardanne, 122 La. 558, 47 So. 891, 896 (1909); "The common law authorities relied on by the defendants have no application to the present case." See also Milne v. Davidson, 5 Mart. (N.S.) 409 (1827).
thing from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of an exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem. 84

The word "nuisance" is frequently used by common law courts in a factual sense to describe acts, constructions, or activities on land that are harmful or annoying. In this sense, annoying conduct, a pile of garbage, or an industrial plant is a nuisance. The word is also used by common law courts to denote the annoyance or damage caused by acts, constructions, or activities on land. Thus, the harm caused by loud noises, odors, or smoke is a nuisance to persons in the vicinity. The use of the word nuisance in these two senses does not connote responsibility. Thus, courts frequently raise the question whether a particular activity or condition is an "actionable" nuisance. 85 Quite frequently, however, the term nuisance is used to mean both fact situations and the responsibility that arises from them. Thus, judicial decisions declare that a person is maintaining a nuisance, meaning that a person is legally responsible for his acts, constructions, or activities.

Until relatively recent times, writers in common law jurisdictions failed to give full consideration to nuisance. It was only in 1939, on the occasion of the publication of the Restatement of Torts, that a significant attempt was made to determine the limits to types of tort liability associated with the name of nuisance. The pertinent sections of the Restatement of Torts, however, have dealt only with actions at law for the protection of interests in the private use and enjoyment of land, leaving the matter of injunctive relief to equity jurisprudence. 86 Moreover, use of the term nuisance has been carefully avoided because it has been "attended with so much confusion and uncertainty of meaning." 87

Public and Private Nuisance

A nuisance, in the sense of a situation involving responsibility, may be either public or private. A public nuisance is an offense

86. See RESTATEMENT OF TORTS ch. 40, introductory note at 215 (1939).
87. Id.
against the state and may be abated on the motion of the appropriate governmental authorities. Such a nuisance may arise from an interference with the use of public things, such as highways, navigable rivers, and parks. It may also arise from conduct in violation of rules of the common law or statutes expressing a public concern for the health, safety, or property of a considerable number of persons. Thus, a gambling establishment or a house of ill repute may be a public nuisance.

A private nuisance is an offense against a private person, a tort, and is actionable by this person. Quite frequently, conduct that gives rise to a public nuisance may at the same time constitute a private nuisance. The action for private nuisance has historically protected interests in the use and enjoyment of land, including interests in the use and enjoyment of easements and profits. These continue to be the interests protected by the contemporary law of nuisance in common law jurisdictions. According to the Restatement of Torts, "private nuisance is properly an interference with the use and enjoyment of land, and is a wrong only to persons who have property rights or privileges in the land." When plaintiff's protected interests are invaded, there is recovery not only for harm arising from acts which affect the land and its comfortable use but also for harm to members of the family and to chattels.

Liability for private nuisance is opposed to liability for a physical invasion of property, as in trespass. Private nuisance is a field of liability rather than a single type of tortious conduct. The interest protected by law, the free use and enjoyment of land, may be invaded intentionally, unintentionally, or even accidentally. In contemporary common law, there is no liability for accidental invasions in this

90. Id. at 217. Although an individual cannot maintain an action for a public nuisance as such, he may maintain a private action if he has suffered special damage. See W. Prosser, Torts § 88, at 586 (4th ed. 1971).
91. See Restatement of Torts ch. 40, introductory note at 217 (1939); W. Prosser, Torts § 88, at 584 (4th ed. 1971); Burnham v. Hotchkiss, 14 Conn. 311 (1841); Chesbrough v. Commissioners, 37 Ohio St. 508 (1882).
93. This type of nuisance is at times called "mixed." Kelley v. Mayor of New York, 27 N.Y.S. 164, 6 Misc. 516 (1894).
94. For the historical development of the law of nuisance, see W. Prosser, Torts § 86, at 571 (4th ed. 1971).
95. Restatement of Torts ch. 40, introductory note at 219 (1939). See also id. § 823.
field. Negligent, reckless, or ultrahazardous conduct engages responsibility in this field as it does in other fields. Intentional conduct engages responsibility if it is unreasonable and the invasion substantial. Detailed rules in the Restatement of Torts determine processes whereby conduct is characterised as unreasonable and the invasion substantial.

Nuisance in Fact and Nuisance per se

Distinction is made at times between a nuisance in fact (or per accidens) and a nuisance per se. A nuisance in fact is a condition or activity that is unreasonable under the circumstances. A nuisance per se (or absolute) is an activity or condition that gives rise to responsibility without regard to the care with which it is conducted or the circumstances under which it exists. In cases in which a defendant is held responsible for an activity or condition although he has acted reasonably in all respects, courts tend to justify the result by saying that the activity or condition is a nuisance per se. This happens, mainly, in three types of cases: when, within constitutional limits, the legislature has forbidden the maintenance of certain establishments or the carrying on of certain activities; when there is an obviously unreasonable use of property in the light of the surroundings; and when a person conducts abnormal and unduly hazardous activities. Resort to the notion of nuisance per se has been criticized because it confuses issues; it is frequently the statement of a conclusion reached on other grounds.

Louisiana Jurisprudence

Louisiana courts have frequently employed common law terminology in this field, and have sought to develop an acceptable and working definition of the word “nuisance” in the framework of civilian institutions. Courts have occasionally considered the distinction

97. See Restatement of Torts ch. 40, introductory note at 221 (1939) (liable for accidental interferences with the use and enjoyment of land, but only for such interferences as are intentional and unreasonable, or result from negligent, reckless, or ultrahazardous conduct).
between a public and a private nuisance.\textsuperscript{103} Cases involving acts, constructions, or activities that might be considered as public nuisances in common law jurisdictions are few and deal either with violation of statutes, ordinances, and police regulations\textsuperscript{104} or with encroachments on the public domain.\textsuperscript{105} Most cases deal with private nuisances, and more specifically, with the question whether an alleged nuisance is one per se or in fact. In a leading case, the Louisiana supreme court declared that:

[a] nuisance at law or a nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Nuisances in fact or per accidens are those which become nuisances by reason of circumstances or surroundings. . . . Whether a thing not a nuisance per se is a nuisance per accidens or in fact depends upon its location and surroundings, the manner of its conduct, or other circumstances.\textsuperscript{106} 

In a great number of cases, Louisiana courts have declared that "a lawful business is never a nuisance per se"\textsuperscript{107} and that "no lawful use made by an individual of his own property is a nuisance per se."\textsuperscript{108} The long list of acts, occupations, and structures that have been held not to be nuisances per se includes: manufacturing plants, such as metal works,\textsuperscript{109} paper plants,\textsuperscript{110} oil refineries,\textsuperscript{111} ice factories,\textsuperscript{112} saw

\begin{footnotesize}
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\item[] \textsuperscript{104} See text at note 312 infra.
\item[] \textsuperscript{107} Graver v. Lepine, 161 La. 97, 100, 108 So. 138, 139 (1926). See also Crump v. Carnahan, 155 La. 648, 99 So. 493 (1924); Woods v. Turbeville, 168 So. 2d 915 (La. App. 2d Cir. 1964); Gaouye v. A.R. Blossmann, Inc., 32 So. 2d 90 (La. App. 1st Cir. 1947); Kellogg v. Mertens, 30 So. 2d 777 (La. App. 2d Cir. 1947).
\item[] \textsuperscript{108} City of New Orleans v. Lenfant, 126 La. 455, 462, 52 So. 575, 577 (1910).
\item[] \textsuperscript{109} See Froelicher v. Oswald Iron, Ltd., 111 La. 705, 35 So. 821 (1903); Ragusa v. American Metal Wks., 97 So. 2d 683 (La. App. 1st Cir. 1957); Ellis v. Blanchard, 45 So. 2d 100 (La. App. 2d Cir. 1950).
\item[] \textsuperscript{110} Cf. O’Neal v. Southern Car. Co., 216 La. 96, 43 So. 2d 230 (1949); Young v. International Paper Co., 179 La. 803, 155 So. 231 (1934).
\item[] \textsuperscript{112} See Irby v. Panama Ice Co., 184 La. 1082, 168 So. 306 (1936); Graver v.
\end{itemize}
\end{footnotesize}
mills, cotton gins, rendering plants, cement plants, sugar factories, shipyards, and shellyards; service establishments, such as railroads, freight terminals, restaurants, slaughterhouses, junk yards, garbage disposal plants, blacksmith shops, stables, laundries, filling stations, commercial dog kennels, commercial fishing


123. See Beauvais v. D.C. Hall Trans., 49 So. 2d 44 (La. App. 2d Cir. 1950).
OBLIGATIONS OF VICINA GE camps, and auction shops; funeral homes and cemeteries; entertainment establishments, such as nightclubs, bowling alleys, rodeo shows, and gambling houses. Not only businesses and occupations but also lawful constructions and acts are not nuisances per se in Louisiana. Thus, public works, canals, a combustible wooden structure for the storage of inflammable materials, or the storage of gasoline in above ground fuel tanks are not nuisances per se. And the same is true of the ringing of a church bell, or of the keeping of domestic animals.

In concrete situations, and in the light of all attending circumstances, Louisiana courts have held certain acts, occupations, and constructions to be nuisances in fact. What constitutes a nuisance in fact is not easy to determine. The criterion is to be found in a delicate process of balancing the social utility of a particular act, occupation, or construction against the gravity of the harm suffered by persons in the neighborhood. This forms the topic of the following discussion. For purposes of accurate analysis, and in order to avoid confusion with common law institutions, reference to "nuis-

138. See City of Shreveport v. Leiderkrantz Society, 130 La. 802, 58 So. 578 (1912).
140. See De Blanc v. Mayor, 106 La. 680, 31 So. 311 (1902); Johnson v. Nora, 87 So. 2d 757 (La. App. 2d Cir. 1956).
146. See Woods v. Turbeville, 168 So. 2d 915 (La. App. 2d Cir. 1964); Myer v. Minard, 21 So. 2d 72 (La. App. 2d Cir. 1945).
147. See notes 156-84 infra.
Rondo: Article 669 and the Civilian Tradition

Article 669 of the Louisiana Civil Code of 1870, following the civilian tradition, is designed to afford protection to owners and other occupiers of immovable property against damage or inconveniences caused by the emission of imponderabilia, such as smoke, soot, fumes, odors, noise, vibrations, and the like. The English version of this article refers merely to inconveniences arising from “smoke or nauseous smell,” but this is a mistranslation. The controlling text of the corresponding provision in the 1825 Code declares that neighbors are entitled to relief if they suffer any of the “different inconveniences which one neighbor may cause to another.”

In contrast with article 667 which directly imposes responsibility on landowners for abuse of the right of ownership, article 669 does not itself establish a standard of conduct but relegates the matter to rules of police and local “usages.” Of course, under the Civil Code, responsibility for emissions does not depend exclusively on local regulation. Under article 2315 one is clearly responsible for emissions that

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149. In Roman Law, landowners had at their disposal the actio de effusis et dejectis for damage resulting from excessive or harmful emissions. See D. 3.9. Domat, whose text article 669 reproduces cites in Roman law sources. See Domat, Le Lois Civiles dans leur Ordre Naturel, 1 Oeuvres de Domat 334 (Remy ed. 1828). For bibliographical information on contemporary French doctrine, see 1 Mazeaud et Tunc, Traite de la Responsibilite Civile 685 (6th ed. 1965); for German doctrine, see Meinsner-Stern-Hodes, Nachbarrecht 195-225 (2d ed. 1956); Baur, Sachenrecht 203 (2d ed. 1963); Kleindienst, Der Privatrechtliche Immissionschutz nach § 906 B.G.B., 298/299 Recht unde Staat 1-80 (1964).


153. See notes 25, 29 supra.

154. The words “customs of the place” in the English text of article 669 ought to read “usages.” For the difference between “custom” and “usage,” see Yiannopoulos, Louisiana Civil Law System-Part I §§ 33, 37 (1971). For the proposition that article 669 authorizes municipalities to enact local ordinances, see City of New Orleans v. Lambert, 14 La. Ann. 247 (1859).
cause damage through his fault; and under article 667, a landowner is responsible for emissions that cause damage or deprive a neighbor of the enjoyment of his property, if these result from an abusive exercise of the right of ownership. It is thus only emissions that cause damage or inconvenience not attributed to fault or to an abusive exercise of the right of ownership that the Civil Code relegates to local regulation.

There are relatively few Louisiana decisions in this field dealing with violation of local ordinances; most cases involve the question of civil responsibility on account of emissions in the absence of pertinent legislation. Louisiana courts, under the circumstances, might have embarked on a search for applicable local rules. Instead, they developed an impressive body of jurisprudence anchored on article 669 but expounding general rules of conduct and standards of civil responsibility. These rules of decisional law may be best regarded today as Louisiana customary law. Although this law is founded on article 669, it is not local law but general, prevailing throughout the state. One is thus justified to assert that article 669 of the Civil Code, as interpreted by Louisiana courts, imposes certain obligations on persons occupying immovable property, be they landowners or not, in favor of all persons in the neighborhood. The interest protected by article 669 is the same as in common law jurisdictions and in continental systems: the free use and enjoyment of immovable property.

In Louisiana, courts have imposed responsibility, even in the absence of a controlling local ordinance, on account of the operation of manufacturing plants, such as metal works, a sugar factory, a cement plant, a fertilizer factory, a dehydrating plant, a rendering plant, an oil refinery, and a cotton gin.

156. See Froelicher v. Oswald Ironworks, Ltd., 111 La. 705, 35 So. 821 (1903); Ragusa v. American Metal Wks., 97 So. 2d 683 (La. App. Orl. Cir. 1957); Ellis v. Blanchard, 45 So. 2d 100 (La. App. 2d Cir. 1950).
157. See Barrow v. Gaillardanne, 121 La. 558, 47 So. 891 (1908).
service establishments, such as restaurants, slaughterhouses, commercial dog kennels, stables, railroads, freight terminals, laundries, and a blacksmith shop; and entertainment establishments, such as a concert saloon, a night club, a liquor store, dance hall, and gambling house. Further, courts have also issued injunctions or awarded damages on account of injuries or inconveniences caused by constructions, such as a sign, a fence, a wooden structure for the storage of combustible materials, a brick kiln, a canal, and a vine planter; and on account of activities such as the operation of a tramway on public streets and the keeping of domestic animals without appropriate measures for the comfort of neighbors. On the other hand, in the light of all the attending circumstances, Louisiana courts have refused to award injunctive relief or damages to persons injured or inconvenienced on account of a variety of acts, constructions, or occupations on neighboring property. The list of cases includes manufacturing plants, such as ice

171. See Di Carlo v. Laundry & Dry Clean. Serv., 178 La. 676, 152 So. 327 (1933).
176. See Kellog v. Mertens, 30 So. 2d 777 (La. App. 2d Cir. 1947).
178. See Parker v. Harvey, 164 So. 507 (La. App. 2d Cir. 1935).
plants,\textsuperscript{185} a carbon plant,\textsuperscript{186} a milk pasteurizing plant,\textsuperscript{187} a whiskey distillery,\textsuperscript{188} a saw mill,\textsuperscript{189} and a shellyard;\textsuperscript{190} service establishments, such as a restaurant,\textsuperscript{191} a railroad,\textsuperscript{192} a commercial fishing camp,\textsuperscript{192} and a fish bait business;\textsuperscript{192} constructions, such as an unsightly fence,\textsuperscript{193} and a canal;\textsuperscript{194} and acts, such as ringing of church bells\textsuperscript{195} or the keeping of domestic animals.\textsuperscript{196} Seemingly conflicting judicial determinations may, of course, be fully reconciled in the light of different circumstances and considerations of social or individual utility weighing the scale of justice.\textsuperscript{197}

In France, even in the absence of a provision in the \textit{Code Civil} corresponding with article 669 of the Louisiana Civil Code of 1870, courts have developed a body of law imposing a sort of special responsibility without negligence on landowners for damage or inconveniences suffered by neighboring landowners.\textsuperscript{198} Responsibility has been imposed on owners of large industrial plants as well as on the owners of neighborhood establishments, such as bakeries, coal yards, and hatcheries.\textsuperscript{199} There is clearly responsibility on account of emissions of smoke, heat, noise, light, odors, dust, vapor, vibrations, and the like;\textsuperscript{200} but French courts have also imposed responsibility even in the

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\item \textsuperscript{186} See O'Neal v. Southern Car. Co., 216 La. 96, 43 So. 2d 230 (1949).
\item \textsuperscript{187} See Crump v. Carnahan, 155 La. 648, 99 So. 493 (1924).
\item \textsuperscript{188} See Lewis v. Behan, Thorn & Co., 28 La. Ann. 130 (1876).
\item \textsuperscript{189} See Allen v. Albright, 151 So. 2d 554 (La. App. 2d Cir. 1963).
\item \textsuperscript{190} See Ritchey v. Lake Charles Dredg. & Tow. Co., 230 So. 2d 346 (La. App. 3d Cir. 1970).
\item \textsuperscript{191} See State ex rel. Szodomka v. Gruber, 201 La. 1068, 10 So. 2d 899 (1942); cf. City of Shreveport v. Leiderkrantz Society, 130 La. 802, 58 So. 578 (1912) (bowling alley).
\item \textsuperscript{192} See Werges v. St. Louis, Chicago & N.O.R.R., 35 La. Ann. 641 (1883).
\item \textsuperscript{193} See Haynes v. Smith, 85 So. 2d 326 (La. App. 2d Cir. 1956).
\item \textsuperscript{194} See Hobson v. Walker, 41 So. 2d 789 (La. App. 2d Cir. 1949).
\item \textsuperscript{196} See Jeansonne v. Cox, 233 La. 251, 96 So. 2d 557 (1957).
\item \textsuperscript{197} See Woods v. Turbeville, 168 So. 2d 915 (La. App. 2d Cir. 1964) (horses); Myer v. Minard, 21 So. 2d 72 (La. App. 2d Cir. 1945) (rooster).
\item \textsuperscript{198} See State ex rel. Denis v. King, 105 La. 731, 30 So. 101 (1901).
\item \textsuperscript{199} See text at notes 235-43 infra.
\item \textsuperscript{200} See 3 \textsc{Planhol et Ripert}, \textit{Traite pratique de droit civil francais} 454 (2d ed. Picard 1952); 1 \textsc{Mazaud et Tunc}, \textit{Traite de la responsabilité civile} 686 (6th ed. 1965); 2 \textsc{Carbonnier}, \textit{Droit civil} 153 (5th ed. 1967).
\item \textsuperscript{202} For a comprehensive survey of contemporary French jurisprudence in this
absence of any physical invasion or physical damage to property and persons. Thus, the owner of a theater or of a casino may be responsible not only on account of damage and inconveniences caused by nocturnal noise and the coming and going of customers, but also on account of the increased danger of fire in the neighborhood. The owner of a house of ill repute may be responsible on account of the moral outrage and the resulting diminution of property values in the neighborhood, and the owner of a private clinic that treats patients suffering from contagious diseases may be responsible on account of the fear of spread of the disease. Railroads have been compelled to pay damages resulting from vibrations, smoke, and fires caused by cinders, though not for damages resulting from the construction of the track. Owners of mines, which are distinct immovables in France, have been charged with responsibility for damage resulting from land slides and pollution of waters. And the state and its political subdivisions have been compelled by administrative tribunals to pay damages for harms caused by public works for the construction of aqueducts, railroads, and highways, provided that the damage is directly attributed to these works.

In Germany, Greece, and other civil law jurisdictions, provisions in civil codes declare that an owner, in the absence of contrary provisions of law or rights of others, is entitled to use his property as he sees fit and to exclude any interference by third persons. However, insofar as immovable property is concerned, the scope of the provi-
sions is tempered by the duty of a landowner to tolerate reasonable
emissions of smoke, dust, heat, odors, vibrations, and the like, from
neighboring property. Obviously, a landowner could not possibly
exclude all interferences with the enjoyment of his property because
this would amount to a prohibition against the use of neighboring
property. A landowner may effectively protect his interest in the
comfortable use of his property by injunctions designed to restrain
unreasonable or excessive emissions and by actions designed to repair
the damage that he may have suffered on account of such emis-
sions.

Nature of Responsibility

The nature of civil responsibility under article 669 has not been
discussed extensively in Louisiana decisions and in the legal litera-
ture. Several courts and scholars have regarded this article as a
source of delictual responsibility equivalent to the liability for nuis-
ance under the common law of tort. The Louisiana supreme court,
however, has repeatedly stated that an action under article 669 "is
not one in tort, but, rather, one that springs from an obligation im-
posed 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." It has been pointed out elsewhere that this
is legal responsibility, but its incidents are best determined by analo-
gous application of the rules governing delictual responsibility.

According to well-settled Louisiana jurisprudence, the responsi-
bility under article 669 of the Civil Code does not depend on inten-
tional fault, negligence, or ultrahazardous activities. It is a species
of responsibility without negligence, and, perhaps, without fault,
clearly distinguishable from the responsibility under articles 2315
and 667 of the Civil Code. The view that an occupier of land may be
responsible only on account of intentional misconduct, abuse of right,

210. See B.G.B. § 906; GREEK CIV. CODE art. 1003; cf. SWISS CIV. CODE art. 684;
ITALIAN CIV. CODE art. 844.
211. See B.G.B. § 1004; GREEK CIV. CODE art. 1108. For the protection of owner-
ship in Germany and in Greece by the negatory action, the possessory action, and
actions for damages, see YIANNOPOULOS, CIVIL LAW PROPERTY §§ 150-53 (1966).
212. See The Work of the Louisiana Appellate Courts for the 1965-66 Term-Torts,
213. Fontenot v. Magnolia Petro. Co., 227 La. 866, 879, 80 So. 2d 845, 849 (1955);
214. See Yianoupolous, Civil Responsibility in the Framework of Vicinage: Arti-
215. See Devoke v. Yazoo & M.V.R.R., 211 La. 729, 30 So. 2d 816 (1947); Bankston
negligence, violation of ordinances, and ultrahazardous activities might be acceptable prior to the era of industrial revolution. In the course of the nineteenth century, however, the relations among neighbors were profoundly modified by the transformation of the economy. A rupture of equilibrium has been generally experienced in the use of lands as commercial and industrial establishments proliferated in cities and in the countryside, and inevitable conflicts of interests ensued. Quite frequently, the operations of commercial or industrial establishments produce emissions of smoke, odors, noise, heat, vapor, or vibrations that cause damage or annoy persons in the neighborhood. These emissions may be entirely unavoidable. The landowner or other occupier of land may have used the property diligently, he may have complied with laws and regulations, and he may have taken all the requisite measures to avoid unnecessary emissions. He may not be reproached for any fault or abuse of right. His activities are lawful and socially desirable as they contribute to the development of the economy. Nevertheless, a landowner or other occupier of land may be civilly responsible to persons in the neighborhood under article 669 for the damage and inconveniences that he has caused by his operations.

Foundation of Responsibility

It is the role of doctrine to ascertain the foundation of civil responsibility under article 669, namely, to explain why a landowner or other occupier of land is responsible under this article on account of harms that he has inflicted to persons in the neighborhood. Aware of the solutions reached by courts in a great number of cases, and mindful of the nature of law in a codified system, doctrine must seek formulas that are sufficiently broad to encompass all reported cases, and, at the same time, sufficiently flexible to fit Louisiana’s civilian heritage. It might be easy to state that one is responsible in Louisiana, as in sister states, because he has created a private nuisance. Such a statement, however, would be an analytically useless proposition because “nuisance” has defied attempts at accurate definition. It is advisable, therefore, to seek the foundation of civil responsibility for insufferable inconveniences in fundamental precepts that form the backbone of the civilian tradition.

216. Until the first quarter of this century, however, certain Louisiana decisions expressed the view that damages could be claimed under article 669 only if they were intentionally or negligently inflicted. See Morris v. Putsman, 166 La. 14, 116 So. 577 (1928); Hill v. Chicago, St. L., & N.O.R.R., 38 La. Ann. 599, 601 (1886); Werges v. St. Louis, Chicago, & N.O.R.R., 35 La. Ann. 641 (1883). See also Eclipse Towboat v. Pontchartrain R.R., 24 La. Ann. 1, 12 (1872).
Violation of Obligations of Vicinage

Suggestion may be made that every landowner is bound by certain obligations of vicinage prohibiting him from causing damage or inconvenience to neighbors, and that the breach of these obligations constitutes fault and generates responsibility under article 2315 of the Civil Code.\(^2\) Pothier has postulated the existence of such obligations: “Vicinage obliges every landowner to use his property in such a manner as not to cause damage to his neighbor. The rule must be understood in the sense that although every one has the liberty to do whatever he sees fit on his property, he can do nothing that could cause damage to his neighbor.”\(^2\)

Provisions in the Louisiana Civil Code and in the French Civil Code allude to these obligations.\(^2\)

The notion of the obligations of vicinage has been subjected to criticism in France.\(^2\) Doubts have been voiced whether the Code Civil actually establishes such obligations, and critics have pointed out that the obligations of vicinage, even if they existed, would not furnish an acceptable criterion of responsibility. No one has been able to determine the content and extent of the obligations of vicinage with any degree of precision. These obligations could not be unqualified, because, if this were the case, they would be in effect a prohibition against the use of property. It has been maintained by certain writers that the obligations of vicinage are violated only when a neighbor causes substantial damage to his neighbors. This apparently plausible limitation, however, is inaccurate because, in certain circumstances, a landowner may cause substantial damage to his neighbors without incurring any responsibility; for example, when he obscures the view of his neighbors by raising a building\(^2\) or when he drains by a well on his property a common underground reservoir\(^2\) of water or minerals.\(^2\)

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\(^2\) See 2 Colin, Capitant et Julliot de la Morandière, Traité de droit civil 90 (1959); 3 Planioi et Ripert, Traite pratique de droit civil français 461 (2d ed. Picard 1952).


\(^2\) See McCoy v. Arkansas Nat. Gas Co., 175 La. 487, 143 So. 383 (1932);
Certain French writers have also explained the landowner’s special responsibility in the framework of vicinage on the basis of the notion of risk.\textsuperscript{221} When a use of property involves predictable risks, one who reaps the benefits ought to compensate neighboring landowners for the damage or inconveniences that they have suffered. According to this view, responsibility rests on a broadened conception of fault. Fault is not found in the noxious act, which may well be the exercise of a right, but in the refusal to pay compensation for harms suffered by neighbors. From this point of view, there is a rapprochement with the idea of obligations of neighborhood. If it is true that responsibility based on fault presupposes the violation of an obligation, one may say that the law imposes on a landowner the obligation to use his property upon payment of a compensation to neighbors who suffer damage or are excessively inconvenienced. The use of the property is socially useful and, therefore, permissible; but it entails an obligation to pay compensation because, in effect, it results in partial expropriation of the rights of another owner.\textsuperscript{225}

\textit{Abuse of Right}

It has been suggested in France, and language in several Louisiana decisions may be taken to suggest, that responsibility for insufferable inconveniences or damage in the framework of vicinage rests on the notion of abuse of right.\textsuperscript{226} A landowner or other occupier of land is responsible because he has abused his right, and only to the extent that the damage or inconveniences suffered by neighbors are caused by the abusive exercise of the right. Thus, in a case involving a demand for injunctive relief against inconveniences resulting from the operation of a saw mill in the vicinity, the court dismissed the action seemingly on the ground that defendant did not abuse his right of ownership. In the course of the opinion, the court declared: “A person has the right to use his property in any way he sees fit so long as he does not violate any positive law, but he cannot abuse this privilege by unduly interfering with the rights of his neighbors.”\textsuperscript{227}

\textsuperscript{221} Joosserand, \textit{De l'esprit des droits et de leur relativité - Théorie dite de l'abus des droits} 21 (2d ed. 1939); Note, D. 1923.2.53; cf. Ripert, Note D. 1907.1.385.

\textsuperscript{225} See IV Demogue, \textit{Traite des obligations en général} 421 (1924).


\textsuperscript{227} Allen v. Albright, 151 So. 2d 554, 556 (La. App. 2d Cir. 1963).
In France, the doctrine of abuse of right has given rise to an abundant literature but has been sparingly applied by the courts. According to French jurisprudence, there is responsibility for abuse of right merely in cases in which one uses his right with the intention to cause damage to another without benefit to himself or when one uses his right without serious and lawful motive.228 Judicial decisions imposing responsibility for damage or insufferable inconveniences in the framework of vicinage go far beyond these limits. In certain circumstances, the pursuit of a lawful occupation gives rise to claims for damages, if it endangers health or property or if it causes damage or inconvenience to persons in the neighborhood, without any showing of fault or abusive exercise of the right of ownership. An owner who exploits a mine, a factory, a railroad, or a theatre, may be responsible in certain circumstances because he has used his property in an exceptional manner insofar as a particular neighborhood is concerned, but this does not mean that he has done violence to the purposes for which the law recognises the right of ownership in immovable property.229

The foregoing considerations are also pertinent for Louisiana. The notion of abuse of right is fully acceptable as the foundation of responsibility under article 667 of the Civil Code, but is insufficient to explain the jurisprudence imposing responsibility under article 669.

Exceptional Use of Property

A careful study of Louisiana jurisprudence leads to the conclusion that a landowner or other occupier of land is responsible under article 669 because he has used the property in an exceptional manner that is unreasonable under the circumstances.230 The same idea evolves from the study of decisions in continental legal systems and in common law jurisdictions. It is the idea that Jhering expressed last century: "everything appertaining to ordinary life is permitted. . . . One is not allowed, however, to exceed the normal measure of what is tolerable."231 Modern civil codes reflect Jhering’s formulation.

228. See Paris, [1941], Gaz. Pal. 1941.2.490. See also Josserand, De l’esprit des droits et de leur relativité: Théorie-dite de l’abus des droits 24 (2d ed. 1939); Notes, D. 1913.2.177; D. 1923.2.169.


Thus, article 684 of the Swiss Civil Code imposes responsibility on a
landowner who exceeds "the limits of tolerance due by neighbors, in
view of the local usage, and the situation and nature of the immova-
bles."\footnote{232} Simply stated, one who does not use his property in accor-
dance with the prevailing conditions at the time and place is civilly
responsible because, by making an exceptional use, he has destroyed
the equilibrium that existed among the neighboring estates.\footnote{233}

Whether a particular use of property is exceptional or unreasona-
ble under the circumstances is a question of fact.\footnote{231} Determination is
made in the light of all the circumstances, including the character of
a particular neighborhood, the destination of each immovable, prior
use, existing economic conditions, the nature and extent of damage
or inconveniences suffered by neighbors, and the availability or cost
of techniques of correction.

The character of the neighborhood is relevant in a variety of con-
texts. Certain activities which inherently tend to disturb people
cannot be excluded from all areas. These activities may be tolerable
in the open country or in a sparsely populated area though not in a
city.\footnote{235} Moreover, "in a populous part of a city greater precau-
tion must be taken to avoid inflicting annoyances, discomfort, and dis-
tress, than in the open country."\footnote{234} When a commercial or industrial
establishment is located in a city, courts consider the character of the
particular neighborhood because a use of property that may be nor-
mal in one neighborhood may be entirely abnormal in another. As a
matter of fact, a particular neighborhood may be exclusively residen-
tial, partly residential and partly commercial or industrial, or pre-
dominantly commercial or industrial. In an exclusively residential
neighborhood courts are likely to impose responsibility even if plain-
tiff's inconvenience is relatively slight by the standards prevailing in
a partly commercial or industrial neighborhood. In a partly commer-
cial or partly industrial neighborhood, in which there are various
sources of inconvenience, courts are likely to minimize the import-
ance of the particular source of inconvenience of which plaintiff com-

\footnote{232. See also B.G.B. § 906; Greek Civ. Code art. 1003.}
\footnote{233. See 3 Planioi, et ripert, Traite pratique de droit civil francais 464 (2d ed.
Picard 1952); cf. Douai, [1854], D. 1855.2.26; Agen, [1855], D. 1855.2.302; Cass.
Req., [1875], S. 1875.1.352; Cass Req., [1901], D. 1901.1.356.}
\footnote{234. See McGee v. Yazoo & M.V.R.R., 206 La. 121, 19 So. 21 (1944). See also
Robichaux v. Huppenbauer, 258 La. 139, 245 So. 2d 385 (1971); Borgemouth Real.
648, 99 So. 493 (1924); Woods v. Turbeville, 168 So. 2d 915 (La. App. 2d Cir. 1964).
}
\footnote{235. See O'Neal v. Southern Car. Co., 216 La. 96, 43 So. 2d 230 (1949); Robertson
v. Shipp, 50 So. 2d 699 (La. App. 2d Cir. 1951).}
\footnote{236. Tucker v. Vicksburg & P.R.R., 125 La. 689, 698, 51 So. 689, 698 (1910).}
plains, unless his inconvenience is extreme in character. One who resides in a commercial or industrial neighborhood is expected to tolerate certain inconveniences.

The law does not recognise a right in the pre-occupation of immovable property, namely, one may not avoid responsibility because he began using his property in a certain manner at a time in which there were no other residents around. However, when a great number of persons use property in the same way in a given locality, they determine what constitutes normal use; and if this use is commercial or industrial, one who builds his residence in the neighborhood has no ground to complain of certain inconveniences. But if only one or few persons use property in an exceptional manner, this use, however ancient that it may be, remains exceptional and newcomers as well as other owners may have grounds to complain.

\[237. \text{In Graver v. Lepine, 161 La. 97, 108 So. 138 (1926), plaintiff was refused relief when he complained of the erection of an ice plant in an area in which a larger one was already in operation; and in Irby v. Panama Ice Co., 184 La. 1082, 168 So. 306 (1936), plaintiff was refused relief when he complained of the slight noises coming from an industrial plant located in a neighborhood abounding in other noises and disturbances.}

\[238. \text{See Froelicher v. Oswald Iron, Ltd., 111 La. 705, 35 So. 821 (1903). Even if the area is zoned commercial, a person operating a business establishment may have a cause of action on account of insufferable inconveniences resulting from the operation of other establishments. See Jefferson Lbr. & Con. Prod., Inc. v. Jimco, Inc., 217 So. 2d 721 (La. App. 4th Cir. 1969).}

\[239. \text{See Robertson v. Shipp, 50 So. 2d 699, 706 (La. App. 2d Cir. 1951): "[T]he right to conduct a business in such a way or manner as to amount to a nuisance may not be prescribed for"; Ellis v. Blanchard, 45 So. 2d 100 (La. App. 2d Cir. 1950); Tucker v. Vicksburg & P.R.R., 125 La. 689, 51 So. 689 (1910). For corresponding solutions in France, see Civ., [1907] D. 1907.1.385, S. 1908. 2.175; Civ., [1935], Gaz. Pal. 1935.2.950; Solus, Note, 35 Rev. Trim. Dr. Civ. 209 (1936). Plaintiff's prior location, however, is "a factor to be considered." Ritchey v. Lake Charles Dredg. & Tow. Co., 230 So. 2d 346, 350 (La. App. 3d Cir. 1970).}

\[240. \text{See Ritchey v. Lake Charles Dredg. & Tow. Co., 230 So. 2d 346, 351 (La. App. 3d Cir. 1970): "[A]ny one who builds a residence near a navigable river should expect a certain amount of noise from vessels and unloading operations"; Kelly v. Ozone Tung Corp., 36 So. 2d 837, 842 (La. App. 1st Cir. 1948) (damages may not be recovered by plaintiff who moved into the property "well aware of the conditions then existing"); Monlezun v. Jahncke Dry Docks, Inc., 163 La. 400, 111 So. 886 (1927) (locality fit and expected to be used by factories). For corresponding solutions in France, see Algiers, [1898], D. 1899.2.6, S. 1899.2.107; Civ., [1907], D. 1907.1.386; Bordeaux, [1903], D. 1903.2.49, Note, Capitant, S. 1905.2.41, Appert, Note.}

\[241. \text{See Jefferson Lbr. & Con. Prod., Inc. v. Jimco, Inc., 217 So. 2d 721 (La. App. 4th Cir. 1969); Ellis v. Blanchard, 45 So. 2d 100 (La. App. 2d Cir. 1950); cf. Tucker v. Vicksburg & P.R.R., 125 La. 689, 51 So. 689 (1910). The presence of other disturbances is not a valid defense. See Beauvais v. D.C. Hall Transp., 49 So. 2d 44 (La. App. 2d Cir. 1950). Nor does license by the authorities constitute a valid defense. See LeBlanc}
instances, however, newcomers may have a lesser right to compensation than persons who were in the neighborhood prior to the establishment of the noxious operation. Courts thus balance the relative rights of the parties and generally impose responsibility in cases in which the harm suffered by plaintiff outweighs the social utility of defendant's operations. The Restatement of Torts contains detailed rules designed to assist and guide common law courts in their determination whether a particular use of property is reasonable or unreasonable. Louisiana courts, however, may also be guided by their own precedents and by continental doctrine and jurisprudence.

An exceptional use of property, however unreasonable that it may be, does not alone suffice to engage responsibility. A landowner or other occupier of land is responsible in Louisiana only when his exceptional use of the property causes damage or excessive inconvenience to persons of normal sensibilities. The concept of excessive inconvenience, like that of exceptional use, is a relative one. An inconvenience may be excessive in the light of the conditions prevailing in a certain neighborhood though not excessive in the light of the conditions prevailing elsewhere in town. The Louisiana supreme court has declared that noises and vibrations from the operation of machinery cannot involve responsibility "unless they are excessive and unreasonable, depending on the location of the establishment; its relation to other property, and particularly to other sources of noise or vibration." If the inconvenience from smoke, odors, noise, or other emissions is not excessive under the circumstances, there is no


242. See Daigle v. Continental Oil Co., 277 F. Supp. 875, 881 (W.D. La. 1967): "It almost goes without saying that the claimants who owned homes near the plant before operations began are entitled to a higher award for damages than those who bought in the area after the plants were put in production." For corresponding solutions in France, see Lyon, [1887], D. 1888.2.239; Nancy, [1923], Gaz. Pal. May 30, 1923.

243. For excellent analysis, see Blanc v. Murray, 36 La. Ann. 162 (1884); Allen v. Paulk, 188 So. 2d 708 (La. App. 2d Cir. 1966); Myer v. Minard, 21 So.2d 72 (La. App. 2d Cir. 1945); Talbot v. Stiles, 189 So. 469 (La. App. 2d Cir. 1939).

244. See RESTATEMENT OF TORTS §§ 826-31 (1939).

245. See text at note 250 infra; Galouye v. A.R. Blossmann, Inc., 32 So. 2d 90, 92 (La. App. 1st Cir. 1947): "A lawful business cannot be abated . . . unless the business is operated in such a way as to give rise to serious and material discomfort and inconvenience to those living in close proximity thereto." Cf. 1 MAZEAUD ET TUNC, TRAITE DE LA RESPONSABILITE CIVILE 689 (6th ed. 1965).

relief; it is a mere inconvenience within the meaning of article 668 of the Civil Code.\textsuperscript{247} Early Louisiana decisions indicate that when an establishment is located by permit of the public authorities, and is operated in conformity with existing regulations, unavoidable noise, odors, vibrations, and the like must be considered as an inconvenience to which neighbors must submit for the public good.\textsuperscript{248} More recent decisions, however, seem to award damages even if the inconvenience is entirely unavoidable.\textsuperscript{49} Determination whether an inconvenience is excessive is made in accordance with objective standards. The applicable measure is that of discomfort experienced by persons of normal sensibilities.\textsuperscript{250} The Louisiana supreme court has suggested a test on the basis of this question: "is the discomfort one of mere fastidiousness or extreme refinement, as is sometimes seen, or does . . . [it] interrupt the average comfort to which the individual has the right?"\textsuperscript{251}

Louisiana decisions indicate that there is responsibility under article 669 only in situations in which persons in the neighborhood experience "material" or "physical" discomfort.\textsuperscript{252} If the discomfort is not one experienced "through the medium of the senses,"\textsuperscript{253} there may be no recovery. This is, perhaps, a much too narrow interpretation of article 669. In common law jurisdictions, there is responsibility on account of establishments that disturb the peace of mind, such as bawdy houses, funeral homes, and hospitals.\textsuperscript{254} Similar solutions have been reached in France.\textsuperscript{255} In Germany and in Greece, however, a landowner has no standing to complain of merely "ideal" invasions of his property, namely, on account of operations on neighboring

\begin{itemize}
  \item \textsuperscript{249} See Devoke v. Yazoo & M.V.R.R., 211 La. 729, 30 So. 2d 816 (1947); Froelicher v. Southern Mar. Wks., 118 La. 1077, 43 So. 882 (1907); Beauvis v. D.C. Hall Trans., 49 So. 2d 44 (La. App. 2d Cir. 1950).
  \item \textsuperscript{250} See McGee v. Yazoo & M.V.R.R., 206 La. 121, 19 So. 2d 21, 25 (1944); Woods v. Turbeville, 168 So. 915 (La. App. 2d Cir. 1964); Hobson v. Walker, 41 So. 2d 789 (La. App. 2d Cir. 1949). See also Scott v. Lecompte, 260 So. 2d 345 (La. App. 1st Cir. 1972); Kellogg v. Mertens, 30 So. 2d 777 (La. App. 2d Cir. 1947).
  \item \textsuperscript{251} Froelicher v. Oswald Iron., Ltd., 111 La. 705, 35 So. 821, 822 (1903).
  \item \textsuperscript{252} See Moss v. Burke & Trotti, 198 La. 76, 3 So. 2d 281, 285 (1941); Hobson v. Walker, 41 So. 2d 789, 795 (La. App. 2d Cir. 1949); Galouye v. A.R. Blossman, Inc., 32 So. 2d 90 (La. App. 1st Cir. 1947).
  \item \textsuperscript{253} Moss & Trotti, 198 La. 76, 3 So. 2d 281, 283 (1941).
  \item \textsuperscript{254} See \textit{W. PROSSER, TORTS} § 89, at 592 (4th ed. 1971).
  \item \textsuperscript{255} See text at notes 203-04 \textit{supra}.
\end{itemize}
property that depress his feelings or cause fear or shame. There may be responsibility on account of such operations under the rules of delictual obligations or in circumstances in which they cause physical discomfort by excessive emissions. This is also true in Louisiana: there should be no doubt that a landowner, as any other person, may have a cause of action under article 2315 of the Civil Code on account of non-physical invasions of his interests, and that a landowner has a right to complain of non-physical invasions of his property under article 667, if a neighbor abuses his right of ownership.

**Article 669: Actions for Damages and Injunctions**

Article 669 of the Louisiana Civil Code of 1870, as interpreted by Louisiana courts, imposes responsibility on landowners and other occupiers of land who use property in an exceptional manner that is unreasonable under the circumstances. This responsibility is imposed in favor of persons in the neighborhood who suffer damage or excessive inconveniences. According to well-settled Louisiana jurisprudence, the violation of the duties imposed by article 669 gives rise to claims for both injunctive relief and damages. These claims may be cumulated in the same action. Depending on the circumstances, an aggrieved party may be entitled to both damages and injunctive relief, damages only, injunctive relief only.

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257. See text at note 52 supra.


261. See Schneidau v. Louisiana H'way Comm'n., 206 La. 754, 20 So. 2d 14
relief only,262 or to neither injunctive relief nor damages.263

Damages

The violation of the duties imposed by article 669 has given rise to claims for damages for past inconveniences,264 structural damage to property, and depreciation of land values. All reported Louisiana decisions involved awards of damages on account of excessive emissions, such as smoke, soot, odors, noise, vibrations, and the like. No case has been found in which an award was made under article 669 on account of damage or inconveniences resulting from other than physical invasions of property.

In actions governed by article 669, damages are most frequently awarded to compensate persons in the neighborhood for the excessive inconveniences that they have suffered.265 These damages have been


264. Cf. Stone, Tort Doctrine in Louisiana: The Obligations of Neighborhood, 40 Tul. L. Rev. 701, 708 (1966): "Should the neighbor recover all his damages, past, present, and future in one action, or should he be required to bring an action periodically for the damages then occasioned?" In France, courts ordinarily prescribed measures for the avoidance of future damage by means of an astreinte. When damages are continuous, courts may award to an owner a rent rather than a lump sum, payable for as long as the prejudice subsists. See 3 Planiol Et Ripert, Traite Pratique de Droit Civil Francais 467 (2d 3d. Picard 1952). Louisiana courts have awarded a rent in lieu of damages in cases in which a wall or other construction encroaches on neighboring property. See Dupuy Stor. & For. Corp. v. Cowan, 216 So. 2d 610 (La. App. 4th Cir. 1969).

likened to those due on account of mental anguish. Responsibility for payment is attached to the person who is responsible "for the existence of the condition," be he landowner or other occupier of land. Attorney's fees are not recoverable.

Occasionally, damages are also awarded under article 669 for structural damage to property. Diminution of the value of a particular tract of land is clearly recoverable in actions brought under article 2315 of the Civil Code, and ought to be also recoverable in cases in which there is responsibility under article 667 or 669. Such demands have been made accessorily in a number of cases involving physical damage to property or inconveniences caused by emissions, but there is no reported case in which damages were clearly


For actions involving recovery under article 667 or 2315 for damages caused by emissions, see Wichers v. New Orleans Acid & Fert. Co., 128 La. 1011, 55 So. 657 (1911) (damage caused by fumes, gases, and acid through the fault of the defendant); Meyer v. Kemp Ice Co., 180 La. 1037, 158 So. 378 (1934) (damage resulting from vibrations is recoverable even if defendant's operation is not a "nuisance").

270. In such actions, plaintiff must prove that the loss is due to the fault of the defendant. See McCoy v. Arkansas Nat. Gas Corp., 191 La. 332, 185 So. 274 (1938) (claim for damages on account of the depreciation of property due to the depletion of a common underground gas reservoir; no recovery in the absence of proof of fault).


awarded for the diminution of land values. Galouye v. A.R. Blossman, Inc.,\textsuperscript{273} might, perhaps, be cited for the proposition that diminution of the value of the land is a recoverable element of damage. In this case, action was brought for injunction to restrain the storage of liquified petroleum gas near plaintiff's property and for damages for mental anguish and for depreciation of property. The court, exercising its "discretion," awarded $1,000 without specification as to the basis of the award. The opinion as a whole, however, the discretionary nature of the award, and the amount of compensation, support the conclusion that the basis of reparation was plaintiff's inconvenience and mental suffering.

In a number of cases, Louisiana courts refused damages for the diminution of land values on the basis of a finding that acts, constructions, or activities did not violate the obligations imposed by articles 667 and 669, and, therefore, the depreciation of property values was \textit{damnum absque injuria}.\textsuperscript{274} In other cases, the issue whether diminution of land value is a recoverable element of damage was obviated by a finding that plaintiff failed to prove damage of this nature,\textsuperscript{275} that the damage was temporary, and, therefore, not re-

\textsuperscript{273} 32 So. 2d 90 (La. App. 1st Cir. 1947). Exceptionally, however, claims for diminution of the value of lands have been made without allegations concerning physical invasion of property. \textit{See} Jeansonne v. Cox, 233 La. 251, 96 So. 2d 557 (1957); Blanc v. Murray, 36 La. Ann. 162 (1884). In a number of cases, injunctions rather than damages were sought on the ground that non-physical invasions would result in depreciation of land values. In these cases, Louisiana courts declared that such claims may not sustain injunctive relief. \textit{See} Frederick v. Brown Fun. Homes, Inc., 222 La. 57, 62 So. 2d 100 (1952); Moss v. Burke & Trotti, 198 La. 76, 3 So. 2d 281 (1941); Hardin v. Hackabay, 6 La. App. 640 (La. App. 2d Cir. 1927).


\textsuperscript{275} See Borgnemouth Real. Co. v. Gulf Soap Corp., 212 La. 57, 31 So. 2d 488
coverable, or that the claim for damage was lost by prescription. Additionally, in a number of cases courts chose not to discuss at all claims for diminution of land values.

Perhaps, one thing is certain: diminution of land values, though unquestionably caused by acts, constructions, or activities on neighboring property does not support an award of damages under article 669 in the absence of allegations and proof of a physical invasion of property by excessive emissions. In Jeansonne v. Cox, an action was brought by landowners against neighboring landowners who had a street paved and a canal dug on their properties. The demand was for a mandatory injunction to compel the closing of the canal, and, in the alternative, for damages for the depreciation of properties on account of the close proximity of the canal. The court noted that all cases cited by plaintiffs involved “nuisances or physical invasion of property” whereas

In the present case there is no claim of physical damage or physical invasion of the property of the plaintiffs nor is there any allegation that the canal is a nuisance.

There being no physical damage, the only testimony relied upon by plaintiffs is that the presence of the canal greatly depreciated the value of the property. In this respect the evidence is contradictory, some witnesses testifying that, its presence did in fact depreciate the property while other witnesses testified that its presence did not depreciate the value of the property. After considering all the facts in this case, we have come to the conclusion that the plaintiffs have failed to establish that they have suffered any recoverable damage under the laws of this state.

The denial of an award of damages did not merely rest on lack of proof of damages; it rested equally on the ground that this species of damages is not recoverable under article 669 in the absence of a physical invasion of property resulting in structural damage or in


279. 233 La. 251, 96 So. 2d 557 (1957).

280. Id. at 258, 96 So. 2d at 559.
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excessive physical discomfort.

Actions for damages brought under article 669 may be defended on a variety of grounds, including lack of causal connection,281 lack of proof of damage,282 and liberative prescription.283 Ordinarily, the main line of defense is that the obligations imposed by article 669 have not been violated, namely, the use of property is not exceptional or unreasonable under the circumstances,284 and has not caused excessive inconvenience to neighbors.285 License by the authorities is not a valid defense,286 nor the allegation that there are other sources of noxious emissions.287 Likewise, antiquity of the use is not a valid defense, because one cannot acquire by acquisitive prescription the right to use his property in an unreasonable manner and thereby to cause with impunity damage or excessive inconveniences to his neighbors.288

Injunctions

Article 669 clearly authorizes injunctions for the suppression of acts, constructions, and activities on neighboring property that cause damage or excessive inconveniences to neighbors. Question arises,


288. See note 239 supra.
however, whether the same article authorizes injunctions against acts, constructions, and activities that may be expected to cause damage or excessive inconveniences.

Since at least the middle of last century, parties have brought actions in Louisiana for preventive injunctions under article 669. In an early case, the court declared that preventive injunction will not lie against the establishment of a lawful business “except in cases where its establishment will occasion imminent danger or irreparable injury, or at least where there is no question that the erection will be a nuisance violative of legal right.” In case of imminent danger or irreparable injury, injunction will lie today under article 3601 of the Code of Civil Procedure. But the question remains whether injunctive relief is available under article 669 against the establishment of a lawful business that may give rise to excessive inconveniences in the absence of special legislation, local ordinances, servitudes, building restrictions, or contractual agreements. Not a single case has been found in which a lawful act, construction, or activity was prevented by application of article 669. Louisiana courts have refused to issue injunctions under this article forbidding the location in exclusively residential areas of cemeteries, funeral homes, stables, ice plants, a fishing camp, a cistern making business, and a slaughterhouse. Stated in terms of nuisance, Louisiana courts have consis-

289. See Fuselier v. Spalding, 2 La. Ann. 773 (1847). Cf. B.G.B. § 907(1); GREEK CIV. CODE art. 1004: “The owner of immovable property is entitled to forbid the construction or maintenance of establishments on neighboring property, if it is expected with certainty that their existence or use will give rise to an unlawful interference with his right of ownership.” Preventive injunction does not lie under German or Greek law when an establishment is made in accordance with a license by the authorities. Id. B.G.B. 907(2); GREEK CIV. CODE art. 1005.


291. LA. CODE CIv. P. art. 3601. Comment (a) under this article indicates that “the jurisprudential rules governing the circumstances under which an injunction issues are not changed.” See also art. 3663; LA. CIV. CODE arts. 856-69; Stone, Tort Doctrine in Louisiana: The Obligations of Neighborhood, 40 TUL. L. REV. 701, 706-08 (1966).


tently declared that a lawful use of property is not a nuisance per se, and that the location of a lawful business in a residential area may not be enjoined for fear that it would be a nuisance in fact.

Dicta in a number of cases indicate that a preventive injunction may be granted when there is sufficient proof that a prospective business or construction will be operated in such a manner as to cause excessive physical inconveniences. Thus, in *Moss v. Burke & Trotti*, the Louisiana supreme court indicated that a preventive injunction may be issued upon proof that the operation of a prospective business "by its very nature . . . shall physically annoy the inhabitants." In *Frederick v. Brown Funeral Homes, Inc.*, however, the same court seemed inclined to adopt the rule that unless the establishment and operation of a business "is prohibited by rules of police or customs of the place, it cannot be prohibited prior to its operation."

Most frequently, actions for injunctive relief under article 669 are brought to remove constructions already erected or to restrain the operation of a business after it is established. The basis of the action for injunctive relief is the same as in actions for damages, namely, a complaint that a neighbor is using his property in an exceptional manner that is unreasonable under the circumstances and causes damage or excessive inconvenience to plaintiff. Not only inconveniences arising from the diffusion of "smoke and nauseous" smells but any of the "different inconveniences which one neighbor may cause to another" may support injunctive relief under article 669.

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299. See text at notes 107-46 supra.

300. In *Graver v. Lepine*, 161 La. 97, 108 So. 138 (1926), the court declared that a "lawful business is never a nuisance per se, and no one has the right to prevent the establishment for fear that it might be conducted so as to become a nuisance." See also *Canone v. Pailet*, 160 La. 159, 106 So. 730 (1926). Cf. *Carbajal v. Vivien Ice Co.*, 158 La. 784, 104 So. 715 (1925). There an action for injunction to prevent the establishment of an ice plant was answered with an exception of no cause of action. The exception was overruled on the ground that evidence may show that the prospective business may be a nuisance in fact.


302. 198 La. 76, 3 So. 2d 281 (1941) (funeral home).

303. 222 La. 57, 62 So. 2d 100 (1953) (funeral home).

304. Note 152 supra. Even a thing of beauty may be an actionable inconvenience.
Injunctive relief under article 669, as in the case of article 667, is available without the historical limitations of equity jurisprudence. Thus, it is not “necessary” to plead and prove irreparable injury. Nevertheless, injunctions under article 669, in contrast with injunctions under article 667, are not a matter of right. There may be instances in which an inconvenienced party may be entitled to damages only; for example, when substantial redress may be accomplished by the payment of money and issuance of an injunction would subject defendant to disproportionate hardship, or when defendant has taken all the appropriate measures to prevent harm. When the choice is between suppressing a lawful activity altogether on the ground that it causes unavoidable damage or inconvenience to neighbors, and allowing it to continue upon payment of a compensation to neighbors, courts, balancing the relative rights of the parties, and

Borenstein v. Joseph Fein Caterers, Inc., 255 So. 2d 800 (La. App. 4th Cir. 1972). In Robichaux v. Huppenbauer, 258 La. 139, 245 So. 2d 385 (1971), plaintiffs complained of intolerable stench, noise, and pest-attracting filth resulting from the operation of a stable in a thickly settled neighborhood and prayed for an injunction. The majority opinion was that article 669 was only partially applicable—to nauseous smells only—and, in order to grant relief resorted to common law notions of nuisance. In a convincing and methodically sound concurring opinion, Justice Barham pointed out that the result was fully compatible with article 669, properly interpreted.

305. See text at note 70 supra.


309. The careful and efficient manner in which defendant conducts the disturbing activities may be a decisive factor in his favor. Thus, plaintiff was refused injunctive relief when the noises produced by an ice plant were unavoidable: Irby v. Panama Ice Co., 184 La. 1082, 18 So. 306 (1936); when spark arresters on a tramway were of the most modern type: Morris v. Putsman, 166 La. 14, 116 So. 577 (1928); when a laundry used some of the best equipment available: Olsen v. Tung, 179 La. 760, 155 So. 16 (1934); when a carbon plant was equipped with the most modern machinery available: O'Neal v. Southern Car. Co., 216 La. 96, 43 So. 2d 230 (1949); when a shellyard's equipment was “of the usual type and in satisfactory condition”: Ritchey v. Lake Charles Dred. & Tow. Co., 230 So. 2d 346 (La. App. 3d Cir. 1970); when the underground tanks of a filling station "were installed in the most approved modern manner and method": Beauvais v. D.C. Hall Transp., 49 So. 2d 44 (La. App. 2d Cir. 1950). In Rayborn v. Smiley, 253 So. 2d 664, 665 (La. App. 1st Cir. 1971), an injunction was issued upon proof that equipment existed “which, if installed at defendant's plant, might completely alleviate the conditions complained of.” It is for the defendant rather than the court to ascertain which are the appropriate measures for the avoidance of inconveniences. See McGee v. Yazoo & M.V.R.R., 206 La. 121, 19 So. 2d 21 (1944).

310. Cf. 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS (2d ed. Picard 1952); Paris, [1904], D. 1905.2.32. In France, courts may not absolutely enjoin
taking into account considerations of social or private utility, may reach the conclusion that the activity ought to be allowed to continue.\textsuperscript{311}

Injunctive relief under article 669 is available only to the extent that it is needed to correct a situation. Most cases in which Louisiana courts have ordered the closing down of a business by means of an absolute injunction involve violation of rules of law other than article 669, such as city ordinances,\textsuperscript{312} or violation of real rights, such as building restrictions.\textsuperscript{313} Likewise, most cases in which courts have restrained certain acts absolutely\textsuperscript{314} or ordered the removal of certain constructions\textsuperscript{315} involve infraction of duties other than those imposed on the operation of a business that is subject to administrative control. They may prescribe only reasonable measures, provided that they do not render impossible the operation of the business and that they are not in conflict with the measures prescribed by the administration in the general interest. Cass. Req., [1868] D. 1868.1.486, S. 1869.1.114.

\textsuperscript{311} For cases in which damages were awarded but the court refused to issue an injunction, see Schneidau v. Louisiana Hwy Comm'n, 206 La. 754, 20 So. 2d 14 (1944); Dodd v. Glen Rose Gas. Co., 194 La. 1, 193 So. 349 (1940); Long v. Louisiana Creos. Co., 137 La. 862, 69 So. 281 (1915); Kelly v. Ozone Tung Coop, 36 So. 2d 837 (La. App. 1st Cir. 1948); Galouye v. A.R. Blossman, Inc., 32 So. 2d 90 (La. App. 1st Cir. 1947). See also Gibson v. City of Baton Rouge, 161 La. 637, 109 So. 339 (1926). In this case, the court refused injunctive relief because the city was disposing of garbage by the only available means. But the court indicated that damages could be recovered if proved.


\textsuperscript{313} See, e.g., Roche v. Roumain, 51 So. 2d 666 (La. App. Orl. Cir. 1951)(dog kennels).


\textsuperscript{315} See, e.g., Parker v. Harvey, 164 So. 507 (La. App. 2d Cir. 1935) (fence); Gilly v. Hirsh, 122 La. 966, 48 So. 422 (1909) (sign). Cf. Borenstein v. Joseph Fein Caterers, Inc., 255 So. 2d 800 (La. App. 4th Cir. 1972). In this case, plaintiffs complained that...
by article 669. In contrast with common law jurisdictions, in which a private person cannot sue for abatement of a public nuisance unless he has suffered special damage, in Louisiana any citizen may sue to remove an encroachment from the public domain or to close down a business or other activity that is conducted in violation of a city ordinance.

In extremely few cases, Louisiana courts have issued absolute injunctions prohibiting the operation of a lawful business on account of the insufferable inconveniences inflicted upon neighbors. In the absence of a controlling city ordinance or other provisions of law or contract, courts have ordinarily issued modified injunctions designed to correct the manner in which a business activity was conducted. Such injunctions have been issued to restrain in certain respects the manner of operation of manufacturing establishments, such as metal works, a sugar plant, a cotton gin, a cement factory, a dehydrating plant, and a rendering plant; and of service establishments, such as a restaurant, a night club, a concert saloon, defendant's raised planter caused moisture to accumulate and deteriorate the base of a common wall and that a large vine caused damage to plaintiff's roof and walls. The court issued an injunction enjoining defendant from permitting these conditions to continue.


318. See Kellogg v. Mertens, 30 So. 2d 777 (La. App. 2d Cir. 1947)(rodeo shows); Talbot v. Stiles, 189 So. 469 (La. App. 2d Cir. 1939) (dog kennels).


321. See Barrow v. Gaillardanne, 122 La. 558, 47 So. 891 (1909).


328. See Koehl v. Schoenhousen, 47 La. Ann. 1316, 17 So. 809 (1895); Johnson v.
stables, commercial dog kennels, and railroads. Injunctions have also been issued to restrain the use of certain facilities for the storage of fuels in an objectionable manner, and the keeping of domestic animals without measures assuring neighbors the comfortable enjoyment of their properties.

Actions for injunctive relief under article 669 may be defended on a variety of grounds, the most prominent of which is that the acts, constructions, or activities complained of do not violate the duties imposed by this article. When injunctive relief is demanded by virtue of a local ordinance, the question of the legality or illegality of the ordinance is raised. License by the authorities, excessive fines

Nora, 87 So. 2d 757 (La. App. 2d Cir. 1956)(liquor store, dance hall, and gambling house).

329. See Dubos v. Dreyfous, 52 La. Ann. 1117, 27 So. 663 (1900); State ex rel. Violet v. King, 46 La. Ann. 78, 14 So. 423 (1894). In Robichaux v. Huppenbauer, 258 La. 139, 245 So. 2d 385 (1971), the Louisiana supreme court correctly held that in the absence of violation of a city ordinance the stable operator should be permitted to continue his operations under an injunction requiring him to spray the ground with disinfectants and deodorizers, to cover feed bins, to remove wastes daily, to limit the number of horses to ten, and to keep the premises drained.


335. See note 316 supra.

ancial loss, and prior use of the property are not valid defenses but are matters taken into account by the court in the process of balancing the rights of the parties. Actions for injunctive relief are not barred by liberative prescription, namely, a person does not lose his right to the comfortable enjoyment of immovable property merely because he did not bring action for an injunction within a certain period of time. Courts, however, may assign considerable weight to plaintiff's acquiescence in the erection of constructions or in the establishment of the enterprise creating the disturbance of which he complains.

337. See City of New Orleans v. Degelos Bros. Grain Corp., 175 So. 2d 351 (La. App. 4th Cir. 1965). Courts, however, may take this into account in determining the applicable corrective measures. Cf. Young v. International Paper Co., 179 La. 803, 155 So. 231 (1944), where defendant had invested millions of dollars in his paper mill and was using the only stream available for waste disposal, the court refused injunctive relief.


339. See LeBlanc v. New Orleans Ice Mfg. Co., 121 La. 249, 46 So. 226 (1908); cf. Hilliard v. Shuff, 260 La. 384, 256 So. 2d 127, 129 (1972): "That the plaintiff was aware that the tanks were being erected and made no complaint creates no bar to injunctive relief under the circumstances. The record does not reflect that plaintiff had knowledge that, because of the improper design, they would create a hazard to his property." See also Robertson v. Shipp, 50 So. 2d 699 (La. App. 2d Cir. 1951).