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ABUSE OF RIGHTS

Julio Cueto-Rua*

I. INTRODUCTION

On the second day of May, 1855, the Court of Colmar (France) rendered judgment in the affair Doerr, a suit brought by the owner of a lot of land on which a house had been built, against his neighbor who, without any serious and licit interest, had built a high faked chimney atop his house, shading and damaging plaintiff's home. Said the court: "... it is a principle of the law that the right of ownership is, in a fashion, an absolute right, entitling the owner to abuse of his thing; however, the exercise of this right, as the exercise of any other right, ought to be limited by the satisfaction of a serious and licit interest. . . . Principles of morals and equity prevent the court from protecting an action motivated by ill will, performed under the sway of a wicked passion, which while not providing any personal benefit to the performer, causes serious damages to another."1 The court ordered defendant to proceed to eliminate the false chimney he had built on his property.

Almost at the same time the famous case of the mineral waters of Saint Galmier was being decided by the Court of Lyon. In this case the owner of a lot of land, who had drilled a well, installed a powerful pump and had it continuously working. Most of the mineral water so pumped ran along the terrain into a nearby creek, providing no benefit whatsoever to the owner of the well. However, his neighbor was seriously hurt by the operation of the pump. The output of his own well had been reduced by two-thirds. It was shown that the unrestricted pumping of the adjoining well seriously diminished the volume of underground mineral water. The plaintiff requested that the defendant be ordered to reduce the operation of his pump. Defendant argued that article 544 of the French Civil Code recognized absolute rights to the

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1. Colmar, May 2, 1855, D.P. 1856.2.9.
owner of the land, including the right to drill a well and to operate a pump. He added that whoever exercised his rights could not be held accountable for the damages caused thereby: nemo injuria facit qui jure suo utitur.

The Court of Lyon did not share the opinion of defendant; it said that the rights of an owner were limited by his obligation to let his neighbors enjoy their respective properties. Therefore, added the court, the power to abuse one's right cannot justify an act exclusively inspired by the intent to harm which interfered with the rights of a neighboring owner to use his own property. The court recalled the traditional Roman principle, malitia non est indulgendum, and applied Civil Code article 1382 which is the normative foundation for the whole system of extra-contractual liability in France. This prescribes that whoever damages another by his fault or negligence is bound to redress the injured party.

The Court of Lyon confirmed the judgment of the lower court which had awarded damages to the plaintiff, but reversed its order, by which defendant had been required to introduce changes in his pumping operations, and to build certain facilities in order to prevent further losses. The Court of Lyon reserved its jurisdiction, though, to award further damages were the abusive acts to continue.

2. FRENCH CIV. CODE art. 544: "La propriété est le droit de jouir et de disposer des choses de la manière la plus absolue, pourvu qu'on ne fasse pas un usage prohibé par les lois ou par les règlements" (Free English translation: Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the statutes or the regulations).

3. FRENCH CIV. CODE art. 1382: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le repayer" (Free English translation: Every act of man whatsoever which causes damage to another, binds him through whose fault it happened, to redress thereof). It may be appropriate to point out, at this time, that the main body of French case-law on abuse of rights is based on article 1382 of the Code Civil. An article very similar to the French one in its wording may be found in the Louisiana Civil Code. The first paragraph of its article 2315 reads: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." This paragraph was taken by the Louisiana redactors from article 1382 of the French Civil Code. The first paragraph of article 2294 of the 1825 Louisiana Civil Code, the direct source of the first paragraph of article 2315 reads: "Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le repayer." The Louisiana courts have not found in the first paragraph of article 2315, the rich content which French courts have found in French Civil Code article 1382, with reference to abuse of rights.

4. Lyon, April 18, 1856, D.P. 1856.2.199.
Thus, one hundred and twenty years ago started in France a jurisprudential and doctrinal movement in the field of Property Law which was to expand into other fields of the law and, then, into most of the civil law jurisdictions, to the point of becoming a widely accepted principle of the Civil Law.

II. ABUSE OF RIGHTS IN COMMON LAW JURISDICTIONS

Common law jurisdictions have, in general, been very reluctant to follow the path opened by the French courts and by the great civilian jurists of the continent and the western hemisphere. In England and in the United States, a different attitude has prevailed. What may be called rather a strict interpretation of ownership and contractual rights has led the courts to accept, and to provide judicial protection to, actions taken by owners and creditors within the objective boundaries fixed by law, whatever their motives, even if they were prompted to act by greed or malice or cruelty. 5

A striking instance of this judicial reluctance to introduce limitations in the exercise of rights of ownership is to be found in the leading English case of Mayor, Aldermen and Burgesses of the Borough of Bradford v. Edward Pickles, 6 decided by the House of Lords in 1895. The City of Bradford owned waterworks and pipes for the distribution of water to the inhabitants of Bradford. Its main source of water came from certain springs and streams which arose in, or flowed through, land owned by the city. Pickles was the owner of a neighboring tract of land of such structural features that it was possible for him to reduce or to diminish the flow of water into the city property by sinking a shaft or driving a level through the land. In 1892 Pickles began to do this. The City then sued Pickles seeking an injunction to restrain him from continuing to sink the shaft or drive the level and from doing anything whereby the waters of the springs and streams might be drawn off or diminished in quantity, or polluted, or injuriously affected.

Pickles alleged that he was doing these works to take advantage of some minerals although there was evidence

5. Said Justice Wills in Allen v. Flood, [1898] A.C.1: “Any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right. It is hardly too much to say that some of the most cruel things that come under the notice of a judge are mere exercises of a right given by contract.”

that his true intent was to put pressure on the City, and then obtain an attractive price for the sale of his tract of land to it.

The House of Lords, invoking *Chasemore v. Richards*, held that no use of property which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious. Therefore, it said, the owner of land containing underground water which percolates by undefined channels and flows to the land of a neighbor, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbor of it. And his right is the same, whatever his motives might be, whether *bona fide* to improve his own land, or maliciously to injure his neighbor, or to induce his neighbor to buy him out.

One may venture to say that no French Court would have allowed Mr. Pickles to have it his way. The same may be said of almost every civil law jurisdiction. Most likely, Mr. Pickles would have been enjoined from any attempt to divert the percolating water by sinking a shaft in his own land. A good example has been seen in the case of the springs of Saint Galmier.

*Mayor of Bradford v. Pickles* is hard law. Gutteridge had some sharp comments to make about the scope and extent of the rights recognized by the House of Lords to a “churlish, selfish, and grasping owner” (in the words of Lord Macnaghten). Gutteridge said that English law “has not hesitated to place the seal of its approval upon a theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism. This is a conclusion which cannot be regarded with indifference by any good citizen, and it is somewhat strange that English text-book writers should apparently accept it with equanimity.”

Several reasons may explain the lack of interest shown by the common law jurisdictions for the doctrine of abuse of rights. First of all, it should be said that the doctrine is not well known by common law lawyers. Research undertaken by John H. Crabb in 1964 showed a surprisingly limited number of articles, essays and comments dedicated to abuse of rights. Crabb mentioned only four law review articles written in

7. 7 H.C.L. 349.
English and only one in a Canadian law review, but written in French. The subject did not fare better in law treatises. Crabb mentioned only three where incidental and occasional reference is made of abuse of rights.

In the second place, the doctrine of abuse of rights appears to shock the common law lawyer, because of the uncertainties which it seems to introduce in the application of pre-existing rules to cases submitted to the courts for their decision. It may be said that the doctrine opens the door to dangerous policies whereby property and contractual rights may be subject to limitations and restrictions ex post facto, disregarding the known rules of the game. There appears to be a strong feeling against a judicial and doctrinal innovation which runs directly opposite to the theory which sees in precedents and stare decisis the most efficacious guarantee which a state may provide to its citizens against the whims, the prejudices and the subjective preferences of judges and jurors.

In the third place, the method of reasoning which leads to the application of article 1382 of the French Civil Code, the main normative foundation for the doctrine of abuse of rights, is rather strange to the common law lawyer. He is usually amazed when he is told that only five articles of the French Civil Code (1382 to 1386) were more than sufficient for the development of the whole field of law concerning damages caused by negligence, by fault, or by dangerous things. This area of French law covers grounds which are roughly similar to those covered by the common law of Torts. The pragmatic, gradual and specific technique of the common law lawyer handling legal problems bears little resemblance to the logi-

10. Amos, Abusive Exercise of Rights According to French Law, 2 J. COMP. LEG. (N.S.) 453 (1900); Catala and Weir, Delict and Torts: A Study in Parallel (Part II), 38 TUL. L. REV. 221 (1964); Gutteridge at 22, Scholtens, Abuse of Rights, 75 SO. AFR. L. J. 39 (1958) [hereinafter cited as Scholtens]. Crabb also recalls Ames, Law and Morals, 22 HARV. L. REV. 97 (1908); and Surveyer, A Comparison of Delictual Responsibility in Law in the Countries Covered by a Code, 8 TUL. L. REV. 53 (1933), where some incidental treatment is devoted to the subject. See also Angus, Abuse of Rights in Contractual Matters in the Province of Quebec, 8 MCGILL L. J. 150 (1962); Mayrand, Abuse of Rights in France and Quebec, 34 LA. L. REV. 993 (1974); Leske, Abuse of Rights in Louisiana, 7 TUL. L. REV. 428 (1933).


13. Gutteridge at 44.
cal and abstract approach of the civilian. This starts with a very general proposition and then proceeds to specify it, taking advantage of the teaching of the jurists. The civilian may say that while applying statutes or codes to the case, he is deducing consequences from general legal propositions. Instead, the common law lawyer will be inclined to say that by following precedents he is inferring solutions for the pending case on the basis of past and accepted experience in similar cases. It is difficult for a common law lawyer to understand that, in order to properly construe article 1382 of the French Civil Code and decide whether abusive acts should fall under its ruling and be enjoined or cause an award of damages, a civilian could quote Marcellus, Paulus, Ulpian, the teachings of Domat and Pothier, and then those of the great commentators of the Code Napoleon like Toullier, Laurent, Duranton, or Larombière, and on the basis of these teachings restrain an owner or a creditor in the exercise of his rights.

In the fourth place, the common law lawyer is not accustomed to the building of a general theory like the one on "abus de droit" starting from isolated articles in the Civil Code, in the Code of Procedure or in administrative regulations. The civilian is accustomed to think of those articles as specific expressions of an overriding, all-pervasive, implicit principle which runs through the various fields of the law. Thus, every particular article will be placed in its systematic place, and will be considered, evaluated and interpreted in the light of the meaning of the system as a coherent whole. The civilian mind is a systematic mind, while the common law lawyer's mind is mainly analytical.

Finally, reference should be made to the fact that many of the social and economic problems, which led the French jurists and courts to elaborate the doctrine of abuse of rights in order to render justice to the parties involved in the dispute, were not so pressing in the common law area, either because some remedies had already been provided or because the same subject matter was dealt with under different legal categories. Gutteridge mentioned in this context that the theory of abuse of rights cuts across the line of many fundamental principles of the English law of torts such as the rules relating to nuisance, to malicious prosecution and to the rights of fair comment.14

14. Id.
However, the fact that several reasons can be invoked to explain why the common law jurisdictions were not very familiar with the doctrine of the abuse of rights and, therefore, unwilling or unable to consider its application, does not provide sufficient justification for their general lack of interest in its study.

Abuse of rights, as a modern legal institution of the civil law, cannot and should not be ignored. It colors the provisions of the civilian codes and statutes; it has been formally incorporated into modern Civil Codes (i.e., Germany, Switzerland, U.S.S.R., Turkey, Brazil, Peru, Venezuela, Mexico, Argentina); and in those countries where it has not been formally acknowledged, jurists and judges have construed traditional rules concerning extra-contractual responsibility, limitations of ownership rights, and good faith in the performance of contractual obligations, in such a manner that the doctrine of abuse of rights is said to be one of the underlying principles of the national law.

Continuous expansion of international travel and trade, growing interdependence of nations, and better understanding of national and foreign legal institutions, makes it very convenient and timely for the common law lawyer to study the doctrine of abuse of rights.

III. PRESENT STATUS OF THE DOCTRINE

A brief and sufficiently clear exposition of the doctrine of abuse of rights is very difficult to make. The doctrine is rather recent, at least in its modern meaning, and there are broad divergences among civilians and civil law courts concerning its proper scope and limits. There is still a great deal of discussion as to what are really the grounds covered by the doctrine. At its present stage of development, it is difficult to state neat, clear and precise concepts embodying the doctrine.\(^\text{15}\)

\(^{15}\) Said Demogue at 4 TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 363 (1924): "There is uncertainty as to the autonomous concept of abuse of rights. Is it a case of illicit act or is it a special case of use of right, some kind of a special area of the Law?" In a similar vein, Capitant: "Doctrime has tried without success, so far, to elaborate a theory on abuse of rights. The attempt is premature; it is not possible, yet, to systematize the precedents established by the Courts on this matter, nor to build on some of the pillars sunk by the Courts into this new ground. Up to the present time, those judgments do not provide a comprehensive view of the whole. Courts have applied the notion of
When the cases are studied in France, Germany, Switzerland and Argentina—to cite just a few countries where the doctrine has been accepted and developed—it becomes obvious that judges approach the handling of claims with caution as if they were aware of the risks involved in the application of the doctrine. How far the courts will go remains to be seen. To wait and see, seems to be good advice in this matter, at least for the time being.

Accordingly, any attempt now to enunciate precise definitions and elaborated theories, is bound to fail. Certainly, this is not a happy state of affairs, particularly for the civilians. They are very much concerned with the logical coherence of the system as a whole. Each legal institution is supposed to have its proper place within well-defined boundaries. The doctrine of abuse of rights, though, has disrupted traditional classifications of legal materials, has created semantic problems and has introduced elements which were alien to the prevailing positivistic approach—that the law is given by the legislators to the judges for its application as enacted.

It is true that important legal thinkers have welcomed the doctrine as an indispensable tool that is necessary in order to do justice in particular cases and to avoid the inequities caused by the abstract nature of the propositions of statutes; but it is equally true that certain limits, however broad they may be, are needed in order to make possible an orderly development of the doctrine of abuse of rights.

The task has been undertaken. Some of the best legal minds in Europe and in Latin America have been working on this subject. A brief list of some of the first-class jurists who have written extensively on the subject should be sufficient to indicate the importance of the doctrinal effort to better define and specify the doctrine: In France—Capitant, Josabuse of rights only with reference to certain specified rights, and the conditions which they require for its application, varies with the classes of rights involved” (note published at D.P. 1926.3.10). Subsequently, see Gutteridge at 42: “It is beyond doubt that the theory of abuse has obtained a footing, in one form or another, in most of the continental systems of law. It is also clear that the continental judges can employ it for the purpose of defeating any attempt to utilize a rule of law for a dishonest purpose. But in no case... do we find any real attempt to define the content of the theory, and it must still be considered uncertain both as regards its basis and the degree to which it is applicable to the exercise of legal rights.” This judgment of Gutteridge is still valid, forty years later, as will be seen below.

16. ARISTOTLE, 9 ETHICA NICHOMACHEA bk. 5, 1137a, 1137b, 1138a.
17. H. CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS (1924).

18. L. JOSERAND, DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ: THÉORIE DITE DE L'ABUS DES DROITS (2d ed. 1939) [hereinafter cited as JOSERAND].

19. L. LAROMBIÈRE, THÉORIE ET PRATIQUE DES OBLIGATIONS (1885).

20. RIPERT, LE RÉGIME DÉMOCRATIQUE ET LE DROIT CIVIL MODERNE (1936); Ripert, Abus ou Relativité des Droits, 49 REV. CRIT. DE LÉG. ET JUR. 33 (1929); Ripert, L'exercice des Droits et la Responsabilité Civile, 35 REV. CRIT. DE LÉG. ET JUR. 352 (1906).


27. Charmont, L'Abus de Droit, 1 REV. TRIM. DROIT CIV. 113 (1902).


29. FLUMENÉ, L'USO ILLECITO DEL DIRITTO, STUDI IN ONORE DE F. ASCOLI (1936).


31. A. VON TUHR, TRATADO DE LAS OBLIGACIONES (1934).

32. F. FUNK, COMMENTAIRE DU CODE FÉDÉRAL DES OBLIGATIONS (1930).

33. A. SCHNEIDER AND H. FICK, COMMENTAIRE DU CODE FÉDÉRAL DES OBLIGATIONS DU 30 MARS (1911).

34. E. MARTINEZ-USEROS, LA DOCTRINA DEL ABUSO DEL DERECHO Y EL ORDEN JURÍDICO ADMINISTRATIVO (1947).

35. CALVO-SOTELO, LA DOCTRINA DEL ABUSO DEL DERECHO COMO LIMITACIÓN DEL DERECHO SUBJETIVO (1917).


40. F. LAURENT, PRINCIPES DE DROIT CIVIL (3d ed. 1878).

41. A. FLEITAS, EL ABUSO DEL DERECHO EN LA REFORMA DEL CÓDIGO CIVIL ARGENTINO (1944).
It seems convenient, under these circumstances, to make a brief inventory of the doctrine, its achievements, its limitations, its growth, looking at the countries where its reception or its development has been significant.

IV. THE SEMANTIC QUESTION

The terms “abuse of rights” or “abusive use of rights” are, to say the least, baffling expressions. They appear to be contradictory, lacking any clear, definable meaning. Planiol thought that they did not convey any rational meaning at all; he has been very critical of their use by jurists and judges:

This new doctrine is based entirely on language insufficiently studied; its formula “abusive use of rights” is
a logomachy, for if I use my right, my act is licit; and
when it is illicit it is because I exceed my right and act
without right, injuria, as is said in the Aquilian law. To
deny the abusive use of rights is not to permit a great
variety of acts which the jurisprudence has prohibited. It
is merely to make the observation that every abusive act,
by the fact alone that it is illicit, is not the exercise of a
right, and the abuse does not constitute a distinct juridi-
cal category of illicit acts. One must not be misled by the
use of words: the right ceases where the abuse com-
ences, and there cannot be an "abusive use" of a right
of whatever sort, because of the irrefutable reason that
one and the same act cannot at the same time be in
conformity to law and contrary to law.\hfill 58

However, Planiol hastens to make known that he is not
arguing for the acknowledgment of absolute rights. He thinks
that words should be used properly and that there is not such
a propriety in the new formula. As to the substance of the
problem he says: "Basically, everybody is in agreement, the
difference is that where some say that there is 'abusive use of
a right' the others say that 'An act has taken place without
right.' They defend a just idea with a false formula."\hfill 59 And
then he adds: "The only truth somewhat new (and is it really
that?) which comes out of these discussions is that there are
considerable and continual variations in the ideas formulated
regarding the extent of human rights. The right which was
formerly considered absolute has ceased to be that, others
subject to few restrictions have been subjected to many
others."\hfill 60

There may be some grounds for the statement that the
doctrine has been poorly named. It may not be so grounded to
say that it is "based entirely on language insufficiently
studied." It is arguable to say, at least at the present stage of
development of the doctrine, that an "abusive act" is an "il-
licit act" if we take this expression in its traditional meaning
(malicious, negligent or tortious acts in violation of the law,
whereby damages are caused to third parties).

It seems that Planiol raises some questions which go
beyond the level of semantics. These will be considered later,

\footnotesize{58. 2 PLANIOL, CIVIL LAW TREATISE, no. 871 (La. St. L. Inst. transl. 1959).
59. Id. at 477-78.
60. Id. at 478.}
after the present discussion concerning the adequacy of the words commonly used to name the doctrine.

One of the functions of words is to make reference, to name, and to allude to specific objects. They may perform this task with a satisfactory degree of clarity and precision, or they may be too vague or too ambiguous.

Lawyers and judges needed an expression to refer to the situation which arose by the middle of the XIX century when the Courts of Colmar and Lyon decided that landowners were not allowed to exercise their property rights if doing so was purposely to injure a neighbor. Perhaps they could have used some traditional Roman expression such as “malitiis non indulgendum” (malice is not to be excused) or “si modo non hoc animo fecit, ut tibi noceat, sed ne sibi noceat” (if this was not done with the intent of hurting the other, but to avoid being hurt himself), but Latin expressions are not as popular as they used to be, even among lawyers. Furthermore, they invite retaliation by the simple method of using phrases of opposite meaning (“qui jure suo utitur neminnen laedit”—he who exercises his rights cannot harm another; “non videtur vim facere qui sue jure utitur et ordinaria actione experitur”—he who exercises his right and ordinary action, cannot do violence).

“Abuse of rights” or “abusive use of rights” may look like self-contradictory expressions, if we consider them from a purely logical standpoint. But, on the other hand, they have performed well their referential function. Every time the reader sees them, he knows to what kind of modern legal phenomenon they refer, to wit, acts which objectively appear as exercise of individual rights (an owner building on or drilling in his own land), but which were not protected by the courts because they had been motivated by the desire to harm a neighbor, or because they were contrary to good faith, or were performed without any legitimate interest whatsoever and so forth.

Perhaps better words could be found. Other expressions have been suggested such as “abuse of statutes” and “conflicts of rights,” but these have not made any headway with the specialized public of the law: judges, lawyers and jurists. The traditional expressions, “abuse of rights” and “abusive use of rights” have circulated, have gained wide recognition and acceptance. The name is no longer ambiguous or vague. Ambiguity and vagueness, if any, should lay to rest
where they belong: in the legal phenomenon itself. In other words, the question to be faced is not merely a terminological one. The important thing now is to define the subject matter or the object to which the expressions “abuse of rights” or “abusive use of rights” refer.

Planiol's criticism and the need to clarify the subject matter of our concern makes it convenient to discuss here the differences, if any, between “illicit” acts, “excessive” acts, and “abusive” acts. These three expressions appear to refer to three different classes of legal situations.

(a) Illicit Acts

In the civil law it is generally understood that an act is illicit when it is an act which violates a rule of law, usually performed by a person with the intent to harm, or aware of the harm his act could bring about, or without due care. In the situations where a person fires a gun and kills another, or when he hits a minor because of careless driving, or because he manufactures or markets goods or merchandise negligently made and capable of injuring another, lawyers are not accustomed to speak of abusive acts, or of abuse of rights, or of an abusive use of rights. In civil law jurisdictions it is customary in these cases to speak of illicit acts.

(b) Excessive Acts

The use and enjoyment of land, goods or other legally protected interests by their owners or holders may be affected by the use other persons make of similar goods. Thus, if a person sets up a factory in an area reserved for industrial buildings, holding the appropriate permit or authorization issued by the competent administrative authorities, and operates this factory in such a manner that unavoidable bad odors, thermal pollution or earth vibrations, affect the enjoyment of nearby properties and diminish their value, then those owners or holders may be obliged to redress the injured parties. The building and the operation of the factory were carried out in accordance with standing administrative regulations for a valuable social objective (manufacturing of goods for human use or consumption) but the use of the land was not “normal” or “regular” but “excessive.” It was used to support machinery and equipment which caused acute discomfort to neighbors by their emissions, odors, heat waves
and vibrations. The law usually will not forbid the operation of plants which by inherent and unavoidable technical reasons can cause losses to third parties, but will impose on the operators of the plants, or owners of the land, the duty to indemnify the injured neighbors.

(c) Abusive Acts

There is a third category of acts which entail liability. Those are acts performed by persons whom the legal order entitles to use land, goods and other physical objects, as they deem fit, or to request performance of duties and obligations which other parties owe them. Such persons may seek the assistance of the state through the judiciary in order to enforce compliance or to appeal, petition or claim before the organs of the state for the protection, recognition or declaration of their rights, their privileges, their powers or their immunities.\(^6^1\)

Rules of law, either statutory or customary, or jurisprudential (case law) as applied to facts or relations, confer upon a person certain rights, powers, privileges or immunities which are legally protected by the organs of the state. Normally a person will exercise broad discretion in the enjoyment of those rights, powers, privileges and immunities without any restrictions or interference whatsoever. The judiciary will be ready to enforce them or to protect them. They are licit acts. However, the holder of rights or powers may be interested in their exercise just for the sheer and exclusive purpose of harming another. Externally, it appears that the holder of rights is doing exactly what he is entitled to do. In fact, he is using his rights for a harmful purpose.

In the Quebec case of *Brodeur v. Choinier*,\(^6^2\) plaintiff owned and occupied a small lot, bounded on one side and in the back by defendant's farm. Defendant's buildings were at a distance of about 180 French feet from the separation line between the two properties; plaintiff's residence was situated at a few feet from the boundary. Defendant kept hens and turkeys in his yard; plaintiff complained about incursions of

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61. These terms are used in the sense given by HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36-64 (1923). In this article the expressions "right" or "rights" will refer to, usually and indistinctly, to powers, privileges, and immunities.

defendant's poultry on his property. Relations between the neighbors became very tense. One day one of defendant's children, together with other youngsters, entered into plaintiff's lot of land. Plaintiff lodged a complaint with the local court and a writ was served upon them ordering their appearance before the judge. During the week preceding their appearance, the defendant, together with his son and most of the accused youngsters, erected alongside plaintiff's house, on or near the separation line, a fence 47 feet long and 18 1/2 feet high, the demolition of which was requested by the plaintiff. The fence was made of rough wood and had a ghastly appearance. It was built with the sole purpose of depriving plaintiff of air, sun and light, and lessening the value of his property. When the work was completed, a flag was hoisted at the top. Defendant argued that the fence had been built in order to keep his hens in his own property and thus avoid causing damage to his neighbor. The court found that this was not the truth. It came to the conclusion that defendant had made these works maliciously without any usefulness for himself, and with the sole purpose to harm the plaintiff and to gratify his aversion to him. The French-Canadian Court said:

The Tribunal cannot encourage or sanction prejudicial acts of this kind. Undoubtedly it is a matter of principle and doctrine that the owner may do with his property whatever he likes, if he is not subject to a servitude in favor of a neighbouring property; he can modify it, degrade it, damage it; his freedom to erect upon it whatever he deems appropriate is absolute; he is limited only by the abuse of his owner's right exercised with the malicious intent of being prejudicial to others without usefulness for himself or without serious motive... considering that the erection of the fence or palisade in question has been made by the defendant without any usefulness for him, maliciously, with the sole purpose of gratifying his hatred and his feelings of revenge against the plaintiff, demolition ordered, damages $30.

A similar case had been decided about half a century before by the Court of Sedan, France. An owner had built a fence 15.80 meters long and 10.15 meters high alongside the

63. Sedan, Dec. 17, 1901.
separation line between his property and that of a neighbor. That very high fence had been painted black. It shaded the neighbor's house and diminished its market value. The Court of Sedan did not admit the justification argued by the builder of the fence that he had merely exercised his rights as an owner, entitled to build on his premises as he wished.

A more striking case was decided by the Court of Dolores, Argentina.⁶⁴ An owner had built a very beautiful chimney on a house located in a resort area, in such shape and manner that it matched the architectural features of the houses of both owners, as well as the main characteristics of the residences of the neighborhood. Unfortunately the architect had committed a slight error: the chimney occupied between 5 and 11 centimeters of the air space above the neighbor's lot. The neighbor then brought suit against the owner of the chimney, requesting its demolition since it had invaded his property. The Court refused to enforce the property rights invoked by the claimant; it said that there was no question that the owner was entitled to enjoy the ownership of his lot of land without excesses or infringements by other persons, but that in the instant case, no interest whatsoever appeared to justify the claim filed by the owner. There was no economic interest, no esthetic interest, and no moral interest involved, and therefore there lay no action for the owner which could be admitted by the court.⁶⁵

⁶⁴. 50 REV. J.A., LA LEY, Sec. Doctrina 1 (1950).
⁶⁵. For a very interesting Dutch case, which offers certain similarities with the Argentine one, see Scholtens at 47. "In the eighteenth century the doctrine of abuse of rights came up for consideration in a case reported by Van Bynkershoek in his OBSERVATIONES TUMULTUARIAE. A local enactment of the City of Amsterdam forbade a co-owner to increase the height of or to build against a common wall between two properties without the consent of his neighbor if the wall was overhanging out of the vertical line. In the present case a co-owner of a common wall had raised the height of this wall and had proceeded to build against it in contravention of the above enactment. The other co-owner applied for an order of court for the demolition of the new structures. . . . It was common cause between the parties that the wall was overhanging at a height of forty-one feet to the extent of one and a half to two inches only. . . . Bynkershoek in his report of the case first pointed out that the enactment indistinctly spoke of overhanging walls and did not contain any provision as to the degree to which a wall should be overhanging. It might perhaps be said that in these circumstances some neighbors did not object to new structures as the witnesses for the defendant had stated, but Van Bynkershoek raised the tentative question: If a person should want to avail himself of his right, why should he not be entitled to do so? Bynkershoek accepted as the undoubted ratio statuti that nothing detrimental
The best-known French case, and the one which gave a great impulse to the doctrine of abuse of rights, was the famous affair Clément-Bayard, decided by the Tribunal of Compiègne, confirmed by the Court of Amiens and finally by the Court of Cassation. A gentleman by the name of Coquerel had bought a lot of land, 170 meters long and 10 to 12 meters wide, just in front of the tract of land where Clément-Bayard had built a hangar for dirigibles. There was a distance of about 90 m. between the lot of Coquerel and the hangar of Clément-Bayard. Coquerel had tried to sell his land at a nice profit to Clément-Bayard, but the latter was unwilling to pay the price requested. Whereupon Coquerel built two wooden fences, 15 meters long, 10 to 11 meters high, and on top of the fences Coquerel installed four steel spikes, 2 to 3 meters high each. These spikes were clearly dangerous to Clément-Bayard's dirigibles, especially when strong winds made difficult the maneuvering of the airships. Actually, one of the dirigibles had been pierced by one of Coquerel's spikes. Clément-Bayard brought suit against Coquerel, asking that defendant be directed to eliminate the spikes and the high fences and to pay damages. Coquerel answered the complaint, alleging that he was seeking an economic advantage to which he as an owner, was entitled (i.e., obtaining as much profit as possible from the sale of his lot of land). In other words, he was not trying to hurt Clément-Bayard just for the sheer sake of hurting him, but with the aim of obtaining a speculative benefit. The three tribunals involved in the case coincided in their judgment: Coquerel's action was abusive. He was ordered to dismantle the spikes and fences, and to pay damages.

The four cases referred to above may help to see the difference between an illicit act (in the traditional sense of should be done to a neighbor. He added that perhaps malicious tricks on the part of the plaintiff need not be sanctioned if it were clearly proven by the defendant that an overhanging of that character could obviously cause no harm to the plaintiff. In the present case the defendant had not only failed to do so but when starting with the work both the defendant and her late husband had intimated to the plaintiff that in view of the condition of the wall it would not be permissible to raise its height without the consent of the plaintiff." The local Court of Amsterdam had decided the case for the defendant. The Hof van Holland reversed and decided for plaintiff. On defendant's appeal, the Hoge Raad, confirmed for plaintiff.

66. Amiens, February 7, 1912, D.P.III.1913.2.177.
the word) and an abusive act, and between an excessive act\textsuperscript{68} and an abusive act.

(d) Comments

Perhaps these distinctions require some additional development in order to avoid logical confusion and fruitless discussions which are often due to lack of understanding as to the meaning of the words employed by the judges, the legislators, and the jurists.

The first comment refers to the class of illicit acts and to Planiol’s criticism. It is perfectly logical to say that all human acts are either licit or illicit; “tertium non datur.”\textsuperscript{69} Therefore the so-called abusive acts are either licit or illicit. Since the doctrine of abuse of rights holds that an abusive act may be the source of an obligation to indemnify the hurt party, or of a duty to eliminate, destroy or modify what was built or done to the detriment of the other party, the logical conclusion is that an abusive act is an illicit act. This was the position taken by Planiol. However, beyond the semantic problem relative to the meaning of the word “illicit,” there is a real and very meaningful difference between the acts of human behavior which we have traditionally called “illicit acts” (malicious, or negligent or tortious, illegal and to the detriment of another) and the “new” illicit acts, the “abusive” acts, the acts whereby rights are used with the intent to harm another, or without any serious and legitimate interest. In the latter case, there is no question that the holder of the

\textsuperscript{68} Article 669 of the Louisiana Civil Code provides a good instance of excessive acts: “If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.”

Another instance may be found at BGB art. 907: “The owner of a piece of land may prevent the construction or erecting, on an adjoining piece of land, of structures from which it can be foreseen with certainty that their condition or use will result in an inadmissible interference with his land. If a structure complies with the provisions of the State law which prescribe a specified distance from the boundary or other protective measures, the removal of the structure can be required only if the inadmissible interference actually takes place.” (Wang transl. 1907).

\textsuperscript{69} This classification is not very useful in law because it is too general. It is utterly insufficient to grasp all of the important nuances, shades, and differences which characterize the juridical meaning of human behavior.
right is enjoying and using a veritable right conferred upon him by the legal order. That right, however, is being used with such purpose or in such circumstances that the law will not protect this exercise.

If, in order to keep logical consistency and coherence of language, the same word "illicit" were to be used for both of the two different types of acts just mentioned, then a distinction should be kept clearly in mind: these two types of illicit acts have a common feature—they entail legal liabilities—but they differ in their legal meaning.

The traditional illicit act, call it for the sake of clarity "illicit alpha," is an act done without right, in violation of the objective law. The "illicit" act known as abuse of rights, call it for the sake of clarity "illicit beta," is an act performed by a person who was empowered by objective law to perform it, but which is not protected or enforced by the law on account of the purpose or circumstances in which it was exercised: with the intent to harm; without any serious and legitimate interest; against good faith, good customs or positive morality; for an aim or end contrary to the aim or end on account of which that right was conferred or vested.

Hereinafter we will call "illicit acts" the ones referred to above as "illicit alpha," and will call "abusive acts," "abuse of rights," or "abusive use of rights," the ones referred above as "illicit beta."

The second comment refers to the distinction between excessive acts and abusive acts. Perhaps the best way to approach the subject is to think of the cases where limitations or charges are imposed by the law on the holders of certain rights who, while exercising them in accordance with their valuable social aims, may at the same time injure or restrict the rights of another person. If a railroad purchases tracts of land in order to lay rails and operate trains thereon, and while doing this—to its own benefit and for the benefit of the social group as a whole—it caused trepidations, noise and emissions which harm the neighbors and diminish the value of their properties, the railroad company may be obliged to indemnify the damaged parties. Usually, we would not call "illicit" the acts performed by the railroad company. It had been legally authorized to operate a railroad by the competent authorities of the state, and the noise, emissions and trepidations were the unavoidable technical consequences of the operation of the equipment and machinery required to
run a railroad. However, since the railroad company was to be benefited by the operation of the trains, it was only just and equitable that it should compensate those neighbors who had been injured thereby. Certain judges and jurists have called these acts, "abusive acts." In effect, an excess, something which is not normal, nor regular, may be called "abusive." But in this case, it will be very convenient to distinguish clearly between both types of "abusive acts." The "abusive acts alpha," where the harm is unavoidably caused by a certain manner of exercise of the right, which is in accordance with its social function (exercise which is often approved or even promoted by organs of the State), and the "abusive acts beta," where the right is exercised with the intent to harm another, or without any serious and legitimate interest.

Hereinafter we will call "excessive acts" those referred to above as "abusive acts alpha," and "abusive acts" or "abusive use of rights" those acts referred to above as "abusive acts beta."

V. THE CRITERION OF DISTINCTION

It is a well-known fact of social life that the holder of a right may, more often than not, bring about some negative consequences to other persons, by the mere exercise of his rights. One of the most important functions of the law is to provide an orderly procedure for the distribution of benefits and charges, for the settlement of disputes, the award of recompenses, the recognition of privileges, the enforcement of immunities. In this process, some of the parties involved are bound to suffer injuries to their interests by the mere exercise of the rights belonging to one of the other parties. If the seller sues to collect the agreed price and the buyer is convinced now that he agreed to pay too high a price, and so it is, then enforcement of the contract in order to collect the price owed to the seller will harm the buyer. If a corporation undertakes a successful promotional campaign and takes away customers and clients from other competing corporations, these will be damaged thereby.

It is not necessary to discuss this matter further in order to show that the mere exercise of rights may and does cause losses, damages or harm to other parties. However, damages by themselves will not make abusive the use of rights. If it
were otherwise, social and economic traffic could not be carried on.

Therefore, the question arises as to what is the distinctive feature which makes the use of a right an abusive act, an abuse of right. Obviously, this is a crucial matter. Therein lies the all important question of determining the criterion, the identifying concept whereby judges and jurists will be able to determine whether an abuse of right has taken place or not.

If we look at French case law (jurisprudence), where the idea of abuse of rights has been explored with greater imagination and consistency by judges, we will find that a variety of criteria have been selected and applied, sometimes expanding, others restricting, the scope of the theory of abuse of rights.

(a) Exercise of a Right With the Intent to Harm

In the first two French cases which put in motion the modern doctrine of abusive use of rights (the Doerr and Sources de Saint Galmier cases discussed in text at footnotes 1 and 4), the courts refused to enforce the rights of the owners of the lots (where the fence had been built, and where the well had been drilled and the mineral water pumped) because they came to the conclusion that the owners did not have any other intent while exercising their rights than that of harming their neighbors.

The exercise of a right, with the intent of harming another, effectively causing damages thereby, will oblige the holder of the rights so exercised, to redress the injured party. This is an old civil law doctrine known under the name of aemulatio. There has been a great deal of discussion among Romanists as to whether there was a general principle under Roman law, making illicit the act performed “animus aemulandi,” that is to say, the exercise of rights with the intent of harming another. Scialoja was of the opinion that there was not such a general prohibition, although he admitted that the harmful exercise of rights was prohibited in certain specific areas of the law (e.g., use of rain water and underground water). Pacchioni thought otherwise, particularly on the strength of several texts and “constitutiones” of

70. Scialoja, verbo “aemulatio,” 1 ENCICLOPEDIA GIURIDICA ITALIANA pt. 2 § 1 (1912).
late Roman law. In any event, it appears that Roman law would not accept the exercise of certain specific rights if it was motivated by the sole intent of damaging another person.

The opinions of Marcellus and Paulus, critical of the exercise of rights with an intent to harm were received in the Middle Ages. In Spain, the Partidas incorporated the principle stated by Marcellus. In France and Italy, acts *animo...
nocendi (acts executed with the intent to injure another's interests) were illicit. The Roman doctrine on *aemulatio* had been developed by early French74 and Italian75 glossators.

Scholtens recalls in his article an interesting medieval opinion given by Alexander Tartagnus in a dispute between the brothers De Lancis and the brothers De Schinellis. The parties were owners of adjoining properties. The issue was whether the De Lancis were entitled to erect a wall on their property next to the common wall separating the two properties, if the new wall would impede the access of light to the house of the De Schinellis. Tartagnus was of the opinion that the court should appoint experts who should state their opinion as to whether it was necessary or useful for the De Lancis to erect said wall, or whether the building of the wall would merely serve to harm the De Schinellis, and if the experts were to find that the dominant reason for erecting of the building was the intent to injure the De Schinellis, then the court should not permit the erection of the wall.76

Similar principles were accepted in France during the Renaissance; in Northern France, where customary law prevailed, and in Southern France, where Roman law prevailed.77 The same can be said of Germany,78 the Netherlands,79 Switzerland,80 and Italy.81

74. PETRUS DE BELLAPERTICA, COMMENTARIES ON THE INSTITUTES 1.7, said: “Take notice of my saying that everybody can do on his own property what is advantageous to himself, although it might injure another, provided that he does not do it with the intention to injure the other. But if somebody does something on his own property that is of slight advantage to him and which greatly injures another it is presumed to be done ad *aemulationem*” [translation in Scholtens at 41, from text transcribed by 2 E. MEIJERS, VERZAMELDE PRIVAATRECHTLIJKE OPSTALLEN 178, 189 (1954)].

Johannes Faber said that the intention may make unlawful what otherwise, by itself, would be lawful. J. FABER, SUPER CODICE 3.32: *Et enim animus facit illicitum quod alias de se esset licitum*. See Scholtens at 42.

75. Bartolus was of the opinion that lawful acts were not permissible if they were mainly done in order to injure another. Therefore, it was not allowed to build a monastery or church, even within the territory as approved by the Pope, if the main purpose was to harm another monastery or church. BARTOLUS, SUPER AUTHENTICIS, COLLATIO VI, tit. *De operis novi nuntiatone*, and DIGEST 43.12.2 n.2 (see Scholtens at 41).

76. Scholtens at 42.

77. See BENOT, DE LA CONDITION JURIDIQUE DES EAUX DE SOURCES NON MINERALES D'APRES LA LOI DU 8 AVRIL 1898 (1901). Benoit quoted opinions by Henrys, Bretonnier and Bourjon, to the effect that the owner of underground water was entitled to drill and to build on his property as he pleased, provided his works were not motivated by his intent to harm his neighbor. *Id.* at 13-16. Domat, speaking of ownership rights, was of the opin-
We may say, then, that when the Courts of Lyon and Colmar decided the Saint Galmier and Doerr cases—the Code Napoleon already being in force—they had a long tradition to support them, going back to the Justinian Code and even further to some of the great classical Roman jurists. That tradition told that the law should not tolerate acts performed *ad aemulationem alterius*. In other words, the Courts of Colmar and Lyon were not inventing a new doctrine; they were not creating an entirely novel legal institution. They were reviving an old one about limitations which should be imposed on the exercise of rights with the intent to harm other parties.

Actually, the main problem here was one of evidence. If the party seeking redress against an owner or a creditor who abused his rights, had to produce proof of the intent to harm as being the dominant motive for the exercise of the right in question, serious and almost unsurmountable difficulties could appear. The proof of “intent” or “motive” is tricky. It has to be inferred from some external acts, and these may be ambiguous or equivocal in many cases.

In the history of the Roman, medieval and Renaissance antecedents of acts performed *ad aemulationem alterius*, it is common to find a blend of the so-called “subjective” test and “objective” test. An exercise of rights is abusive and should not be protected by the law, if it is executed with the intent to harm (subjective test), but this intent is to be inferred if the one who exercises his right derived no benefit from such exercise while, at the same time, he was injuring another party\(^\text{82}\) (objective test).

The question becomes more complicated when the intent to injure another is mixed with other motives, such as

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79. See Scholtens at 45-48, especially his quotations of Zoesius, Perezius and Christinaeus for southern Netherlands, and Hubert, Voet, Schrassert and Schorer for northern Netherlands.

80. Scialoja, verbo “aemulatio,” 1 ENCICLOPEDIA GIURIDICA ITALIANA pt. 2 § 1 (1912).


82. MENOCHIUS, DE Praesumptionibus, bk. 6, praeas. XXIX; MASCARDUS, DE PROBATIONIBUS, Dec. 621, cited in Scholtens at 43; 3 J. BONNECASE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 377 (1902), and 2 PRÉCIS DE DROIT CIVIL 313 (1934-1935); JOSSEERAND at 366-78.
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speculative profits, or an excessive zeal concerning the exercise of certain powers (e.g., in family law cases).

In the famous affair Clément-Bayard (see text at footnotes 66-67). Monsieur Coquerel wanted to hurt Clément-Bayard. There was no question about that. He added, though, that hurting Clément-Bayard was not an end by itself, but merely a means whereby Clément-Bayard would accept the price asked by Coquerel. In the same manner, Mr. Pickles intended to harm the inhabitants of Bradford, not for the sake of hurting them, but merely as a technique whereby he could force the Mayor and the Aldermen of Bradford to buy him out at a higher price than they were willing to pay.

In a rather similar Court of Cassation case, plaintiff had brought suit against defendant and sought attachment of defendant's ship the day before due date of sailing, with the intent of forcing the debtor to settle in terms which the creditor deemed satisfactory. The court held that there was an abusive exercise of rights and rejected the complaint filed by the creditor.83

A very interesting case of mixed motivation was decided by the Court of Cassation at the beginning of this century. The owner of a tract of land started hydraulic works with the intent of draining his land. These works also drained neighboring sources of water, to the detriment of plaintiff. Defendant alleged that he had a serious and valuable purpose in mind, to wit, the drainage of his land. Expert testimony rendered at the trial disclosed that the hydraulic work started by defendant was useless. Decision was rendered for plaintiff but the award of damages was limited to those damages which were caused by the works after the date on which the testimony of the experts became known to the defendant.84

In a divorce case, the judge imposed upon the husband the duty of supporting a son of the marriage in a certain educational institution until his son would become of age or be married. The husband decided to emancipate his son, who thereby became competent with legal capacity to enter into legal transactions on his own. The Court of Cassation held that the emancipation, although a valid one, was abusive; therefore, it ordered the husband to continue paying the bills of the educational institution until the son became of age or got married.85

84. Req., June 10, 1902, D.P.III.1902.1.454; S.1903.1.11.
In all of the cases just cited, the owner or creditor who exercised his rights to the detriment of his debtor or of a third party, could claim some legitimate motive: to get a better price for his property; to obtain prompt and advantageous payment of a debt; to diminish school expenses. The owner, or the creditor, or the empowered party, was not acting with the exclusive purpose or intent of harming the other party; but he knew that there were going to be losses or harm, and even the harm to be caused became the means to achieve some lawful objective.

In most civil law jurisdictions where the doctrine of abuse of rights has been accepted, the mere fact that there was a mixture of motives or purposes will not be sufficient to justify an act if its dominant feature was the intent to harm, or if the loss was deliberately caused by the exercise of a right, or if the malicious or harmful purpose pervaded the whole exercise or use of the right. The following opinion by Josserand seems to be an accurate statement of the prevailing view among civilians in the question of mixed motivations:

... if we were to admit that a few good grains would purify the weeds, we would be opening the doors to human malice. In the great majority of cases, the holder of the right could invoke an acceptable motive, a legitimate interest—the high wall will provide shade to him, or will protect him from the wind; and by an act of good will, wouldn't he have provided work to some people in a period of unemployment? His imagination will help him save face; and the theory of abuse due to malevolence (malveillance) will become a dead letter. Actually, when many motives have determined an act, it would be rare if all of them were to be placed on the same level; one of them has been predominant, determinant. This is the one to take into account, not the others, and if it is founded on malice, ill will (malveillance), intent to harm, it makes the author liable .... The intent to harm makes an act an abusive act when it has been the principal element, the determinant element, and it will be a matter for the judge to find in the particular case whether the intent to harm has played a central function.87

86. This has occurred in a majority of Western Civil Law jurisdictions at the present time.
87. JOSSERAND at 377. Crabb at 13 presents the same question in this
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Briefly summarized—if a person exercises his rights with a predominant intent to harm, as evidenced by the fact that he obtains little or no benefit from the exercise of his rights while, at the same time, the other party or parties suffer damages thereby, most courts in civil law jurisdictions will find the act abusive, an abuse of rights. They will not enforce it, or will award damages to the injured party, or will order that what was built or done be demolished, modified or, if possible, undone. 88

way: "Intent to harm is specially prominent in abuse of certain classes of rights, of which property rights would furnish the most notable examples. The problem arises of whether abuse exists only when intent to harm is the sole motive, or whether an admixture of legitimate motivation will defeat liability. Probably there is no liability if a perverted satisfaction out of harming another merely adds zest to the enjoyment of an otherwise proper exercise of a right. However, it seems only proper that the legitimate motive must be predominant or at least substantial before its infusion will annul the liability for intent to harm; otherwise, the actor could lend sanctity to his outrageous behavior by setting up some kind of insubstantial but technically correct purpose behind his behavior."

88. A few selected instances chosen from three civil law jurisdictions (two European and one Latin-American) will help to understand the point made in the text.

France: Paris, December 2, 1871, D.P.III.1873.2.185. (making deafening noise by defendant on his land, with the purpose of frightening game and making impossible hunting by neighboring plaintiff, held abusive); Trib. Civ. Draguignan, May 17, 1910, D.P.1911.2.133 (mining of mine by defendant, choosing, among many, the procedure which most damaged neighboring defendant, held abusive); Req., May 5, 1897, S.1901.1.454 (disclosure to third parties by defendant (addressee) of letters of a confidential nature, held abusive); Req., December 26, 1893, D.P.1895.1.529 (multiplication of law suits against relatives of defendant's wife during twelve years with no other purpose than that of hindering and annoying said relatives, held abusive); Paris, February 8, 1912, D.P.1912.2.273 (continuous traveling by father with his child making impossible for his mother to see her child and to stay with him, with purpose of forcing wife to demand divorce, held abusive and custody of child awarded to mother); Req., May 8, 1876, D.P.1876.1.259 (editor of newspaper invited readers to boycott business of a merchant; no slander, or calumny, was printed nor any violation of law nor any misdemeanor was found to have occurred; main reason for the invitation found to be the intent to harm the business of merchant; editor held liable to pay damages); Req., June 29, 1897, D.P.1897.1.537 (employer was struck by union, shortly thereafter third parties (mostly local politicians) intervened in the dispute by organizing a public campaign of support for the union and of attacks against the employer, damaging employer thereby; third parties held liable and obliged to pay damages to employer).

Germany: 57 R.G.E. 239 (willful impairment of economic value of houses by establishment of a brothel in their neighborhood, contrary to good faith, and defendant liable to pay damages); 58 R.G.E. 219 (deliberate performance
(b) **Exercise of a Right Without any Legitimate and Serious Interest**

In many civil law jurisdictions, the courts have gone a step further in the policing of the exercise of rights, particularly when the owner or creditor seeks their assistance for the judicial enforcement of those rights. They have denied such enforcement or have awarded damages to the injured party, although intent to harm was not proved (or even alleged), in cases where it was shown that there was no serious and legitimate interest on the part of the owner, creditor or holder of the right, worthy of judicial protection.

of acts of an economic nature in order to ruin a competitor and to buy his assets cheaply, contrary to good faith, and defendant liable to pay damages); 1916 R.G. Warn #277, 1918 R.G. Warn #218 (banker's inducement of inexpert persons to enter into risky stock exchange transactions, contrary to good faith and entailing liability); 95 R.G.E. 313 (deliberate lengthening of a judicial suit to the detriment of the other party by the introduction of defenses which were known to be groundless, contrary to good faith and entailing liability); 1918 II R.G. Rech. #971 (acceptance of an offer by offeree knowing that offeror had committed an error in calculation at the time of making the offer, contrary to good faith); 53 R.G.E. 171 (filing of a petition for registration of the name of a periodical, without any serious intent of ever publishing it, in order to prevent the use of the same name by another publisher, contrary to good faith and entailing liability); 1912 R.G. Warn #386 (endorsement of a bill of exchange with the exclusive purpose of making unavailable certain defenses of debtor, held contrary to good faith, entailing liability).

**Argentina:** 34 REV. LA LEY 175 (the owners of two rural properties entered into an agreement whereby one of them was to indicate, under certain circumstances, the place through which the adjoining owner could pass with his trucks and cars. Once the condition was fulfilled, the owner of the servient property selected a narrow, winding, perilous strip of land, subject to periodic floods, as the place through which the owner of the adjoining tract of land would be allowed to pass; the agreement clearly empowered the owner of the servient land to select the place through which the adjoining owner could pass. But by selecting an inundable, narrow, perilous strip of land, the owner of the servient land was harming the owner of the dominant land by putting in jeopardy his personal security, by frustrating his efforts to move his production out of his farm and by making impossible enjoyment of said farm by schoolboys during vacation time; held that owner of servient land had abused his rights and was bound to pay damages to owner of dominant land); 37 REV. LA LEY 297 (husband and wife separated shortly after marriage; husband was judicially ordered to pay alimony to wife, which he did during 13 years; then he tried to obtain a judicial release of his duty which was denied on the ground that, first, he had to request the return of his wife in order to live together; seven years after this decision, husband requested judicially that his wife be ordered to return to live together with him or, otherwise, that he be allowed to discontinue payment of alimony; wife refused to return; husband petitioned that obligation to pay alimony be ended; court rejected plaintiff's petition alleging that husband was abusing his rights).
A good instance can be seen in a recent Argentine case. Two adjacent apartments in a condominium building were offered for sale to the same person. The authorized agent told the prospective buyer that he could use some space of the internal corridor which separated one apartment from the other in order to improve communication between those two apartments. The buyer decided to buy the two apartments offered for sale. In accordance to Argentinian law, title does not pass until a formal deed of conveyance is signed by the seller and the buyer before a public notary, and duly recorded, and title passes only in the manner and to the extent stated in the deed. The deed failed to make any reference to the promise made by the seller's agent to the buyer concerning partial use of the internal corridor in order to facilitate communication between the two apartments. Said internal corridor was for use by all the owners of apartments which made up the condominium building. Once the buyer of the two apartments took possession of them, part of the walls along the internal corridor were modified linking the two apartments thereby. The length of the internal corridor was slightly reduced, from 11.63 meters to 10.63 meters. The owners of the other apartments in the building (who had nothing to do with the sale because they had no ownership rights in these apartments) claimed that the internal corridor was part of the common property of all of the condominium owners, that the deed of conveyance did not give the buyer any right or title to occupy part of the internal corridor, and they demanded that the wall be demolished. The court found that the slight change made did not disturb anybody in any manner whatever, while it was highly beneficial to the buyer. It found, too, that another owner in the same condominium and under similar conditions, had built the same type of communication between two adjacent apartments and that the members of the condominium had not brought any suit against this owner to have his work demolished. The court held that the petition by the owners of the condominium was an abuse of right, because there was no serious and legitimate interest to protect in the instant case.89

89. Diario La Ley, Oct. 22, 1974, case #71031. In 40 REV. LA. LEY 728 the following case is reported: a film was made by a movie producer in which one of the characters, a young man of unruly and adventurous life, is given the surname of a well-known person who in his youth had had a rather frivolous existence; the character's first name was not the same, but the initial was and the initial was often used. All of the references in the movie's plot were
There are numerous cases of a similar nature in French jurisprudence. The courts have felt, in those cases, that the
to times and places where the real, well-known person, had been. Defendant
alleged that he had not intended to portray plaintiff nor to despise him, that
there was a mere coincidence as to certain secondary elements, and that
events shown by the movie were events entirely alien to plaintiff's biog-
raphy; the court held that naming the film character living a dissolute exist-
tence, with same surname of living well-known person in such a factual con-
text, was abusive; the defendant was ordered to cease the use of such sur-
name in the film; damages were not ordered because plaintiff failed to pro-
duce evidence of any damages of an economic nature.

90. The following few cases will serve to illustrate the point: Civ., July 18,
1893, D.P.III.1894.1.113; Civ., May 9, 1905, D.P.1909.1.225 (choice of immovable
for foreclosure of mortgage, when other immovables were available which, if
foreclosed, would not have damaged as much the legitimate interests of
mortgagor, held abusive); Req., November 5, 1923, D.P.III.1924.1.11 (retention
of documents of title by architect whose rights to complete work had been
terminated by State regulation, even though owner of immovable offered to
deposit enough money to meet architect's claim, held abusive); S.1926.1.252
(defendant inadvertently cut plaintiff's tree which had been planted at the
end of lot, near its boundary; defendant immediately offered to properly re-
dress plaintiff; plaintiff refused private settlement and brought suit against
defendant; complaint rejected because it was abusive); Civ., June 17, 1911,
D.P.III.1912.1.150 (plaintiff brought action for the determination of bound-
aries (action en bornage) when it was clear that only a revindicatory action
would lie; by bringing action en bornage, plaintiff was forcing defendant to
incur heavy expenses and engage in time-consuming litigation; held that
even if plaintiff was entitled to recover the immovable, he was obliged to redress
defendant for judicial expenses); Req., July 12, 1870, D.P.III.1871.1.218; Req.,
February 12, 1894, D.P.1894.1.218; Aix, March 15, 1929, D.P.1930.2.111; Trib. Civ.
de la Seine, July 28, 1931, D.P.1934.2.57 (father suspended visits and mail
between his children and their grandparents; held that such a prohibition
would only be valid if there were serious reasons or legal motives for it); Colmar,
warning, without any reason, even without keeping elementary rules of
courtesy; plaintiff had a child by defendant; held that notice of break of
betrothal by defendant, in a language contrary to tone of recent letters which
had shown warm feelings, and break of betrothal without any solid reasons
therefor, was abusive, making defendant liable to pay damages to plaintiff);
GAZ. DALLOZ, 10-III-923 (lease contract provided that lessee was to appear
personally or by proxy, at place of lessor, for payment of rent; lessee provided
payment by means of a "carte-mandat"; lessor refused to accept payment on the
ground that the contract required personal appearance either by lessee himself
or by his proxy; claim by lessor rejected); D.P.III.1883.2.71; GAZ. PAL. 8.9-1-922
(contract of lease included clause whereby partial or total assignment of the
lease by lessee required prior approval by lessor; lessor refused consent without
any serious or legal motive; refusal held abusive and invalid); S.1965.67
(plaintiff (lessee) sued lessor alleging that defendant refused, without any
reason, to consent to the replacement of old furnace by a new one, to the
machinery of the state should not be available to those holders of rights who could not show a legitimate and serious interest in the exercise of rights, to the detriment of other persons.

Josserand is of the opinion that this criterion (lack of a serious and legitimate interest) is the one which has received the widest support among judges and jurists in civil law countries, and the one which provides the reasons for most of the cases in which the exercise of a right has been held to be abusive.\(^9\) If one considers that the first criterion (intent to harm) can be included in the second one (i.e., the intent to harm is not a serious and legitimate interest), it is safe to say that this objective criterion seems to be the most widely used in civil law jurisdictions.\(^2\)

Josserand opines that this approach is entirely consistent with the famous definition of rights by Ihering: rights are advantage of both the plaintiff, a baker, and the defendant, owner of the building; the court found that the proposed change was, from a public health standpoint, to improve the manufacture of goods, would enrich lessor and was not against any express prohibition in the contract of lease or in the law; authorization granted by the court because refusal was abusive); Besançon, June 5, 1957, D.1957.J.605 (minority of shareholders prevented approval by general meeting of shareholders, of proposed amendment to the Charter, drafted with the aim of better protecting the rights of the minority shareholders; no reasons were given by minority shareholders for their attitude; held that refusal to approve proposed amendment was abusive and should not stand); J.C.P.1969.II.15078 (changes brought about in the places where the servient and dominant lands were located, made useless the exercise of the servitude rights; intent by owner of the dominant estate to continue exercising servitude rights held to be abusive, and servitude was to be discontinued).

91. **Josserand** at 388.

92. There is a very important procedural advantage in the use of this objective criterion. Whoever seeks recovery of damages caused by abusive use of rights and has to prove the presence of the intent to harm faces the troublesome question of producing clear evidence of a psychological process. This difficulty may defeat the aims which the doctrine of abuse of rights has sought to achieve. So much is this so that article 226 of the German Civil Code which expressly accepts the traditional criterion of abuse of rights, is seldom applied by German courts. It reads: “The exercise of a right which can only have the purpose of causing injury to another is unlawful” (Wang translation). Typical cases of abuse of rights have been decided, instead, by application of article 826 of the same Code, where proof of the intent to harm is not required. Article 826 reads as follows: “A person who willfully causes damage to another in a manner contra bonos mores is bound to compensate the other for the damage” (Wang translation). See 2 **ENNECCERUS, KIPP AND WOLFF, TRATADO DE DERECHO CIVIL: DERECHO DE OBLIGACIONES** pt. 2,665 (1950).
interests judicially protected. Therefore, if there was no interest, there was no right. Adds Josserand:

Rights are bestowed by the State on a human being taking into consideration the satisfaction of his interests, not any interest, but legitimate interests. If these rights are used for the achievement of that end, they will be legally protected, even if his exercise may harm other persons, and it is on this basis that the rule neminen laedit qui suo jure utitur may be invoked; he may triumphantly answer to the victim of his action: feci, sed jure fecit, his acts are licit and they cannot make him liable. It is only when the holder of the right exercises his right without any interest, or for the satisfaction of an illegitimate interest ... that it can be said that he abuses and therefore ceases to have the power to request the protection of the law.93

A group of outstanding civilians in France, such as Sourdat, Saleilles, Charmont, Gény, Bardin and Demogue hold and defend this utilitarian, pragmatic, objective criterion.94

(c) Exercise of a Right Against Bonos Mores (good customs), or Moral Rules, or Good Faith

French, German, Swiss and Argentine courts, among others, have refused protection or enforcement when the exercise of rights runs against some acknowledged general or accepted principles of good faith, or of positive morality, or a widely recognized criterion of elementary fairness. Even where no intention to harm could be proved, if the exercise of the right is contrary to accepted general customs, or offensive to known principles of morality or good faith, then such an exercise of right should not be protected by the courts.

This criterion for the definition of the abuse of rights, based on rules of positive morality, has been expressly received by some civil law codes. The best known instances are provided by the German and the Swiss Civil Codes.

Article 826 of the German Civil Code (BGB) reads: "A person who willfully causes damage to another in a manner contra bonos mores is bound to compensate the other for the damages." (Wang translation)

Article 2 of the Swiss Civil Code reads: "Chacun est tenu d'exercer ses droits et obligations selon les règles de la bonne

93. JOSSE and at 388.
94. Id. at 389.
"Every one is obliged to exercise his rights and perform his obligations in accordance to the principles of good faith. The law does not protect the manifest abuse of a right.")

The same principle is to be found in the Argentine Civil Code. Its Article 1071 reads: "El ejercicio regular de un derecho propio o el cumplimiento de una obligación legal no puede constituir como ilícito ningún acto. La ley no ampara el ejercicio abusivo de los derechos. Se considerará tal al que contrarie los fines que aquélla tuvo en mira al reconocerlos o al que exceda los límites impuestos por la buena fe, la moral y las buenas costumbres." (Free English translation: "The regular exercise of one's right or the performance of a legal obligation cannot make illicit any act. The law does not protect the abusive exercise of rights. Such will be considered the exercise which is contrary to the ends which (the law) took into account when they (the rights) were recognized, or the exercise which exceeds the limits determined by good faith, morals and good customs.")

These provisions are deemed to embody general principles of the law whereby standards of morality, good faith and good customs, as lived, accepted and acknowledged by the people at large, are brought into the picture every time the courts are called to enforce or to protect rights, or to adjudicate a private conflict of interests.
In the well known treatise on German Civil Law by Enneccerus, Kipp and Wolff, the following is stated with reference to Article 826:

(a) The question whether an action is against good customs is not to be decided in accordance with the doctrines of a philosophical system or the opinion of particular classes or parties, but in accordance with general popular conscience.

(b) As a criterion, neither the refined opinion of the illustrious thinker, nor the way of thinking and of action of men of low moral standing even if it were the custom (rather, the bad usage) of certain circles, could be used. In order to satisfy the requisites established by the legal order, only that criterion of moral behavior which, if disobeyed brings about general criticism, can be decisive—particularly that limitation which we establish ourselves in the management of our own interests vis-à-vis the interests of other parties and which cannot be skipped without facing disapproval by those persons who have a sound judgment.

With reference to Swiss law on the same subject, von Tuhr writes along similar lines:

The exercise of rights, as the law indicates, is subject to the postulates of good faith, that is to say, those exigencies should be respected which are proper of the circumstances, and that the holder of the right, correctly behaving, owes to the interests of the other party. Otherwise, he will be responsible for an abuse of right, and will not be protected by the law; the abusive exercise of a right is an illicit act and obliges him to redress the damages caused thereby.

With regard to Article 1071 of the Argentine Civil Code, Borda writes:

... It is considered that there is abuse when the exercise (of the right) runs against the ends taken into account by the law when said right was recognized, or when said

97. A. VON TUHR, TRATADO DE LAS OBLIGACIONES 270 (1934).
exercise is contrary to good faith, morals and good customs.98 . . .

If the theory of abuse of rights has made headway, it is due to moral reasons. All the teachings of prestigious jurists against its admission have become ineffectual against the feeling of justice which each man lodges in his heart and which could not tolerate any attempt to justify under the guise of the law what is arbitrary, immoral, or harmful.99

When one reads the teachings of the most distinguished jurists who have explained the meaning of the doctrine of abuse of rights as enacted by the Codes of countries such as Germany, Switzerland and Argentina, one gets the clear impression that while accepting the doctrine of abuse of rights, they are looking for objective criteria whereby basic stability of legal institutions, of vested rights and of protected interests, can be achieved without creating uncertainties which could jeopardize civil and commercial transactions.

The reference to the principles of good faith, positive morality, and good customs, indicate their concern with the identification of practices, ways of being, and standards so widely accepted and understood, that the discretions of the judges would become circumscribed.

The reading of cases decided by the application of these principles provides further evidence of the care with which the pitfalls of arbitrary or pure discretionary judicial powers have been avoided.100

99. Id. at 45.
100. Citation of a few cases where German Courts applied article 826 of the German Civil Code in order to impose liabilities on holders of rights, will serve to show the way the law has worked: 58 R.G.E. 393 (pactum de non licitando with the purpose of acquiring immovable at a low price, below the standing balance on a mortgage, held to be against good faith); 50 R.G. Gruchot 968 (willful nondisclosure of facts which, if known to the other party would have led to rejection of offer, held to be against good faith); 1906 R.G. Jur 2.1095 (information which was not truthful was given to third party with knowledge that it, eventually, would reach a person liable to act thereon, held against good faith, entailing liability); 115 R.G.E. 415 (transmission of reports which, although truthful, were exaggerated, held to be against good faith, entailing liability).

A few Argentine cases where the principle of good faith was applied may also be useful to illustrate the workings of the concept: Diario La Ley, Oct. 29, 1974, case #71079 (the owner of an apartment in a condominium decided to
(d) Exercise of a Right Contrary to the Aims on Account of Which said Right or Power was Conferred

The famous book by Louis Josserand, *De l'esprit des droits et de leur relativité: Théorie dite de l'abus des droits*, published for the first time in 1927, was a very solid, imaginative and forceful attempt to provide a functional criterion for the identification of exercise of rights which could be considered abusive and therefore apt to entail civil liabilities.

introduce some important changes in it; although he did not request or obtain any formal authorization by the general meeting of owners, as required by the law and the regulations in force for the condominium building, the works began and were for all to be seen and even were the matter of some comments at certain meetings of owners of apartments of the building; once the works were completed and the apartment had been remodeled, the owners of the other apartments brought suit alleging that the works had been done in violation of the law and of the regulations; complaint rejected on the basis that it was contrary to good faith); Diario La Ley, Oct. 10, 1974, case #70989 (buyer offered payment of price after several years delay and asked for the conveyance of title to land; in the meanwhile inflation had seriously affected purchasing power of contract money; claim by buyer held to be abusive as against good faith); Diario La Ley, June 17, 1974, case #70465 (if the mortgagee released, by an act of his own free will, apartments mortgaged to him by mortgagor, diminishing thereby the guarantee provided to him by the mortgage, he abused his rights if he pretended to execute the mortgage only against one of the apartments, which had been bought by a bona fide purchaser, who was in possession of the apartment although the deed of conveyance of title had not been signed yet).

French case-law also provides numerous instances of the good faith criterion: Rouen, December 18, 1919, D.P.1920.2.33 (contract of sale of a car included clause whereby dealer [seller] was not to be held liable to buyer in case of failure to deliver or in case of delay in the delivery; in either case, seller's only duty was to return advance payment made by buyer, and no damages were to be recognized nor paid to the buyer; dealer held liable for damages); Trib. Comm. de la Seine, December 17, 1924, D.H.1925.282 (main condition of merger was maintenance of the voting powers of a group of shareholders; after merger and at a meeting of shareholders, changes were introduced in the management of their merged corporations rendering ineffectual the voting rights of said group of shareholders; decision by the general meeting of shareholders annulled); Chambery, August 19, 1927, S.1928.2.97 (shift of voting powers took place by issuance of a new series of shares; new issuance held invalid); Civ., February 22, 1968, D.1968.J.607 (lessor sued for the full payment of rents due by lessee until the end of the contractual period of lease; lessee had moved to another city due to a transfer ordered by his employer, and asked lessor to consent to termination of lease; permission was not granted by lessor; Courts of Appeal decided for plaintiff; Court of Cassation reversed and remanded, holding that lower court should determine if lessor, in the exercise of his rights, was inspired by legitimate motives or, to the contrary, had intended to damage lessee).
In a nutshell, Josserand’s thesis is this: all rights conferred by the law on human beings, on legal persons, are not absolute; they are relative. They were conferred by the legislator with certain specific aims in mind; those rights, actually, were means to achieve certain social objectives, and were to be recognized and enforced only to the extent to which the exercise of the right was compatible with the social functions it had to perform. If the right was exercised for other objectives or aims or if it was diverted from its legitimate function, then such exercise should not be protected by the courts. Whoever exercised the right against its social function was bound to redress the damages caused thereby, and to demolish, eliminate, or undo (if possible) whatever was done in an abusive manner to the detriment of the other parties.\(^{101}\)

Josserand recalls\(^{102}\) that the principle he propounded had already been accepted by the Soviet Civil Code,\(^{103}\) the 1934 Polish Civil Code,\(^{104}\) the Lebanese Civil Code,\(^{105}\) and he concludes that French law has finally accepted the same criterion.\(^{106}\) If this latter statement was true at the time Josserand

\(^{101}\) Josserand at 394-400.

\(^{102}\) Id. at 395.

\(^{103}\) RUSSIAN CIV. CODE art. 1: “Civil rights are protected by the law, except in those cases in which they are exercised in a sense contrary to their economical and social purpose.”

\(^{104}\) POLISH CIVIL CODE OF OBLIGATIONS art. 135: “Who intentionally or by his negligence has caused damage to another while in the exercise of his rights, is obliged to redress it, if he had exceeded the limits determined by good faith or by the aim on account of which said right was conferred on him.”

\(^{105}\) The Civil Code of Obligations for Lebanon followed very closely the teachings of Josserand, who had prepared a draft of it, and the Franco-Italian Draft Code of Obligations. Article 124 of the Lebanese Code was inspired by the well-known formula of the Franco-Italian Draft. Therefore, an exercise of rights became abusive if it exceeded “the limits determined by good faith or the aim on account of which such right was conferred.” It should be added that this “functional criterion” has been accepted by the Venezuelan Civil Code and by the Argentine Civil Code. See note 95, supra.

\(^{106}\) The following cases may serve to illustrate the point: Paris, November 14, 1901, D.P.1902.2.238 (father authorized daughter to engage in business activities, whereupon father entered into a risky business transaction together with her; agreement held to be invalid); Paris, January 5, 1904, D.P.1905.2.249 (wife executed a legal act without the required authorization of her husband; husband remained quiet and silent during several years and then demanded annulment of said legal act alleging his wife’s lack of sufficient authority; after so many years it had become more advantageous for husband to have the act annulled; claim rejected); Civ. Rej. May 7, 1902,
was writing almost fifty years ago, it is very doubtful that it remains truthful today. Pirovano, who has studied the decisions of French courts during recent years, particularly in the fields of property law and business activities and business associations, asked himself whether the concept developed by Josserand had received the type of acceptance which could have led the courts to restrict the exercise of individual rights when they were contrary to the social function they were supposed to perform. His answer is clearly negative. He feels that, finally, French courts have not accepted Josserand's ideas. He thinks that abuse of rights will be identified in accordance to the traditional criterion, to wit, that there is abuse of rights when there is fault in the exercise of a right.\textsuperscript{107} The author does not venture to provide a reasoned explanation for the judicial attitude of the French judges today, but he appears to say that the determination of the social function of individual rights is too complicated a matter to be put squarely on the shoulders of the judges. He feels that this is a political question which the judiciary is not well prepared to tackle and which should be left for discussion and decision to the legislator. With specific reference to the question of property and business associations, to which Pirovano devoted most of his article, he feels that it is not fair to criticize the judges for failure to enforce the social function of rights if, after all, that task was not performed by the state itself. In conclusion, he says:

\textit{\ldots it is up to the community as a whole, the determination \textit{a priori}, and not only up to the judge \textit{a posteriori}, of

the social aims of individual rights, if the idea is accepted—and this may be challenged—that individual rights may satisfy something else than individual interests.\textsuperscript{108}

As Pirovano says, and the cases we have cited appear to indicate that, the theory of abuse of rights in France today seems to follow the tests of “intent to harm” and “lack of serious and legitimate interests.”

The theory so defined keeps broadly in line with the historical antecedents received from Roman and medieval law. On the other hand, the ideas propounded by Josserand and his disciples have led several countries to the acceptance of the criterion which sees an abuse of rights whenever a right is exercised in a manner contrary to its social function (\textit{e.g.}, Argentina, Venezuela). Perhaps it is too early to predict the way in which the legal texts will be handled by the judges. In general, one has the impression, by reading cases and comments, that the “social function” test is not the type of revolutionary instrument it was thought to be. However, in this matter, like in any matter where social behavior occupies the center of the stage, and where competing ideologies and principles are still fighting a battle far from being decided, it seems prudent to pay close attention to legal experience in order to see which principles and criteria will be chosen for further development, if any, of the theory of abuse of rights.\textsuperscript{109}

\textsuperscript{108} Id. at 70.

\textsuperscript{109} In its report for the 1950-1951 period, the Commission for the Reform of the French Civil Code suggested a very broad wording of the abuse of rights principle. Its terms were such that the traditional criterion, as well as the tests based on the “serious and legitimate interest,” “good faith,” “good customs,” and “social function of individual rights” could be considered to be included. It reads: “Art. 31. Tout act ou tout fait qui excède manifestement par l’intention de son auteur, par son objet ou par les circonstances dans lesquelles il est intervenu, l’exercice normal d’un droit, n’est protégé par la loi et engage eventuellement la responsabilité de son auteur. La presente disposition ne s’applique pas aux droits qui, en raison de leur nature ou en vertu de la loi, peuvent être exercés de façon discrétionnaire” (Free English translation: Any act or any fact which manifestly exceeds by the intention of its author, by its object, or by the circumstances in which it took place, the normal exercise of a right, is not protected by the law and eventually involves the responsibility of its author. This rule does not apply to the rights which, on account of their nature or by virtue of the law, can be exercised unconditionally). 6 Travaux de la Commission de Réforme du Code Civil: Année 1950–1951, 26 (Sirey 1952).
VI. ABUSE OF RIGHTS IN LOUISIANA

Higgins Oil & Fuel Co. held an oil lease on a tract of land in the State of Louisiana, adjoining another tract on which Guaranty Oil Co. held a lease of the same kind. Higgins Oil sank a well on its tract, and was drawing oil from it by means of a pump at the rate of some 124 barrels a day, when Guaranty Oil sank a well on its tract approximately 400 feet from Higgins Oil's well. Guaranty's well was a dry one and was abandoned. Through some underground communication it let air into the radius affected by Higgins' pump, thereby reducing the suction power of the pump and, as a consequence, reducing markedly its production. The only thing needed to restore the pumping output at the Higgins' well was a very simple and inexpensive task: just putting back the plug which had been taken out by Guaranty Oil Co. Higgins Oil asked Guaranty Oil to do that. Guaranty Oil refused. Therefore, Higgins Oil brought suit against Guaranty Oil asking that defendant be ordered to close its well and to redress the damages suffered by plaintiff. Higgins Oil indicated very clearly: (a) that there was no reason whatsoever for Guaranty Oil's behavior, since what it was doing was bringing no benefit to it; (b) that in order to close its well, Guaranty Oil did not have to engage in expenses or in any kind of serious effort; (c) that Higgins Oil was being hurt not only because of the reduced output of its oil well, but also because other oil wells in the vicinity were drawing oil from the common oil reservoir to the definitive loss of Higgins Oil.

Defendant introduced an exception of no cause of action and the exception was sustained by the lower court. Plaintiff appealed. The case was heard by the Supreme Court of Louisiana. That happened more than fifty-five years ago.\footnote{\textsuperscript{110}}

It was a typical case of abuse of rights, where the second criterion of abuse listed in section V was applicable: the harmful behavior of Guaranty Oil Co. was not motivated by any serious and legitimate interest.\footnote{\textsuperscript{111}} This was exactly the type of business conduct which had been declared abusive by French courts and apt to engage the liability of its author, in accordance to article 1382 of the French Civil Code.

The case was of particular interest for Louisiana because the first paragraph of article 2315 of the Civil Code was virtually a translation of article 1382 of the French Civil Code.

\begin{itemize}
  \item[\textsuperscript{110}] Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919).
  \item[\textsuperscript{111}] See text section V (b), \textit{supra}.
\end{itemize}
The Supreme Court of Louisiana set aside the appealed judgment and remanded the case for trial at the lower court. Justice Provosty spoke for the majority and he pointed out the difficulties of reconciling articles 491, 668, 505 and 667 of the Civil Code. He said that in order to overcome the problems and to determine the very fine line of distinction between what can be done and what cannot be done by an owner when his action injures his neighbor, it was necessary to resort to the works of Pothier and Toullier whence these articles were derived by the redactors of the Louisiana Civil Code. He proceeded to quote from Pothier and Toullier but found that the latter was not of much help. He decided, then, to see what the commentators had to say and he found that, with the sole exception of Demolombe, they all agreed as to the meaning which should be given to the articles in question. Justice Provosty quoted from Laurent, Baudry-Lacantinerie and Chauveau, Carpentier and Du Saint, and he arrived at the following conclusions:

(a) Cases like the one pending before the court were not to be decided by the application of any broad or inflexible rule, but by a careful weighing of all the circumstances attending them, with the aid and guidance of two principles: (1) that the owner must not injure seriously any right of his neighbor; and (2) even in the absence of any right on the part of the neighbor, the owner must not, in an unneighborly spirit, do things which cause damage to the neighbor while of no benefit to himself.

(b) Were defendant leaving its well open for some purpose of utility other than the supposed utility of preventing the drainage of the oil from under defendant's land, a different case might perhaps be presented; but the allegation, which must be taken as true (for the purpose of deciding the exception of no cause of action) is that leaving the well open is of no benefit to defendant, while at the same time its behavior is injurious to plaintiff by depriving it of its right to pump oil from its underground.

(c) If the defendant's actions were limited to preventing the oil from escaping from his land to plaintiff's land, the plaintiff would have no good ground for complaining; but for all that is known, no oil was being drawn out of defendant's land, while to a certainty the defendant is directly and seriously interfering with plaintiff's right to operate for oil and is
doing so with no benefit to itself. Therefore, there was a cause of action for plaintiff.

Thus, in an undisguised language, half a century ago, the Supreme Court of Louisiana applied the same principles of the doctrine of abuse of rights to a case involving real rights.

Approximately ten years later, the Supreme Court of Louisiana decided the case of *Onorato v. Maestri.*\(^{112}\) Onorato was a licensed real estate agent, and Maestri and others were the owners of certain mercantile property in New Orleans, which they desired to lease. Plaintiff was hired by defendants to secure a lease for said property. Under Onorato’s contract of employment with defendants, he was to collect a percentage commission, payable at the time of the execution of the lease. Onorato secured a lease from a drug company, for a 15 year term, beginning October 1, 1928. For the first period commencing October 1, 1928 and ending September 30, 1930, the lessee was to pay $5,000 per year, at the rate of $416.66 per month. The first six months were paid in advance.

At the time of the execution of the lease, the defendants wrote Onorato acknowledging their duty to pay the agreed commission but, due to the expenses in order to have the property ready for its use by the lessee, they asked that they be allowed to retain the full rent for the first seven months of the lease (from October 1928 through April 1929) and that they pay Onorato the full amount of the rent collected for the subsequent months until the full amount of Onorato’s commission be paid. This proposition was accepted by plaintiff.

On February 27, 1929, at the instance of a creditor, the drug company was put into the hands of a receiver. On March 16, 1929, the receiver was authorized by the court to pay the rent under the lease for six months, beginning April 1, and ending September 30, 1929.

The lease signed by defendants with the drug company included a clause which read:

Should lessee at any time violate any of the conditions of this lease, or fail to comply with any of the lessee’s obligations hereunder, or fail to pay the rent or water bill or other similar charges, punctually at maturity, as stipulated, or upon the filing of a bankruptcy, receivership or respite petition by, or the granting by competent authority of similar petitions against lessee, the rent for the whole unex-

\(^{112}\) 173 La. 375, 137 So. 67 (1931).
ABUSE OF RIGHTS

pired term of this lease shall, without putting in default, at once become due and exigible, and in such event, lessors shall have the option either at once to demand the entire rent for the whole term or immediately cancel this lease without putting lessee in default.\textsuperscript{113}

Taking advantage of this clause, defendants sued the drug company on May 28, 1929, to rescind the lease, and on June 18, 1929, judgment was rendered, rescinding the lease.

As the original lease had been rescinded, the receiver, very shortly thereafter, entered into a lease with defendants expiring September 30, 1929, and, in August 1929, entered into another contract of lease with defendants for the period beginning October 1, 1929, and ending September 30, 1930. The rent was the same in these contracts as it was in the contract rescinded. Defendants collected all the rent due up to April 1, 1930.

On October 30, 1929, Onorato brought suit to recover commissions owed him by defendants corresponding to the period May 1, 1929, up to the date of institution of suit (October 30, 1929). This covered part of the period during which Onorato claimed that he was entitled to the rents in accordance with his amended contract of employment with defendants. Maestri et al. alleged that the provision in the contract of lease giving defendants the option to cancel the contract should a receiver be appointed was a resolutory condition which, under article 2045 of the Civil Code, had the effect (upon the accomplishment of the condition) of revoking the lease. Defendants further alleged that as the receiver was appointed prior to the time that the rentals were earned (which were payable to Onorato under their amended contract) they owed him nothing because Onorato's original contract with Maestri fell upon the appointment of a receiver or the dissolution of the lease. Defendants were saying, in effect, that the rents they collected during the period in which they were payable to Onorato according to the amended contract, were not rents coming from the lease made through the intervention of Onorato, but coming from the lease made directly by defendants with the receiver of the drug company.

Onorato answered saying that it was optional with defendants, under the first contract of lease, either to enforce

\textsuperscript{113} 173 La. 375, 377, 137 So. 67, 68 (1931).
payment of the rent or to sue for the rescission of the contract, and as Maestri et al., by their own free act, brought about the dissolution of the lease by electing to sue for its rescission, they were responsible for the non-payment of the rent under the original contract of lease, and that defendants should not be permitted to escape their obligations by taking advantage of an option to rescind the contract of lease and then enter into new leases with the receiver for the same amount of monthly rent.

Thus, Onorato v. Maestri presented a typical abuse of rights issue relative to the exercise of contractual rights. It was also clear, under the facts of the case, that there was an abusive use of rights meeting the requirements of the “good faith” test.\textsuperscript{114}

The defense raised by defendants was, of course, that in rescinding the first contract of lease they were simply exercising their rights under the contract and that article 2040 of the Louisiana Civil Code ("The condition is considered as fulfilled when fulfillment of it has been prevented by the party bound to perform it.") was not applicable when the party exercised a right of his own.

The Supreme Court of Louisiana decided for Onorato. The Court did not expressly resort to the doctrine of abuse of rights, nor did it quote French cases of abuse of contractual rights. It was hard to apply the first paragraph of article 2315 of the Louisiana Civil Code, because it was difficult to see fault in the behavior of defendants. On the other hand, the Supreme Court did not have in the Louisiana Civil Code an article similar to article 826 of the German Civil Code, or article 2 of the Swiss Civil Code, or article 1071 of the Argentine Civil Code. However, the conduct followed by Maestri and the co-defendant \textit{vis-à-vis} Onorato was abusive, contrary to good faith, utterly unfair. It deprived Onorato, without just cause, of what he had earned by his broker’s efforts, and which was legally owed him by defendants.

The Supreme Court felt that the behavior of the defendants should not be condoned and should not have the protection of the judiciary. Therefore, it proceeded to reason by analogy and decided the case by application of articles 1856 and 1857 of the Louisiana Civil Code. Said the Court:

\textsuperscript{114} See text section V (c), \textit{supra}.
Unquestionably, defendants had a legal right to rescind the lease, upon the appointment of a receiver, as provided in that contract. Had they done so, and nothing more, or had they rescinded it and leased the premises to some third person, we should be inclined to hold that plaintiff could not recover, at least, to the extent of rents collected after the rendition of the judgment of rescission, as his contract for payment was dependent on the continuance of the lease until he received payment, through the collection of rents, during a specified period. However, when the defendants virtually, immediately after the rendition of the judgment of rescission, released the property to the receiver, for the same rent, they, to all intents and purposes, reinstated the rescinded lease to the extent of the periods, named in the leases to the receiver, which cover all or most of the time in which plaintiff is interested. To permit defendants by this procedure to be relieved of their obligation to plaintiff would be to sanction the subjection of substantive rights to mere matters of form. This view finds support by analogy, in articles 1856 and 1857 of the Civil Code.115

These articles contain the following provisions:

Art. 1856: If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract.

Art. 1857: But the mere forms of law to cover coercive proceedings for an unjust and illegal cause, if used or threatened in order to procure the assent to a contract, will invalidate it.

The analogy seems far fetched. Onorato v. Maestri was not a case of validity of contract. There was no question that the contracts between Onorato and the defendants, between the defendants and the drug company, and between the defendants and the receiver were valid contracts. No one ever claimed annulment alleging duress, violence or fraud. At no time did any party to any of the contracts act in a coercive manner or suffer violence.

One of the parties, though, the lessors, acted against good faith. They were utterly unfair. Their case was unjust. The

115. 173 La. 375, 381, 137 So. 67, 69 (1931).
cause of their right to evade payment of commission to Onorato was unjust. The contract made by the defendants with the receiver was merely a means to achieve an aim contrary to an elementary sense of good faith.

Though the analogy sought by the Supreme Court of Louisiana in Onorato v. Maestri was a rather distant one, it was nevertheless a just one. French judges would have preferred, under those facts, to render decisions applying the very broad terms of article 1382 (as they have done very often). They could have argued that one who tried to escape the fulfillment of his contractual obligations by an artificial procedure, taking unfair advantage of a contractual clause devised for a different purpose, was at fault within the meaning of article 1382 of the French Civil Code. Anyway, in Onorato v. Maestri, justice was done to the parties by the Louisiana Supreme Court, on the basis of an analogy found by the Court with a situation of coercion or violence.

In fact, the Supreme Court of Louisiana was deciding a clear case of abuse of rights and was denying judicial protection to the holders of a contractual right who were using it to deprive what was owed to the other party, in a manner contrary to good faith.

It could be expected, then, that under the auspices of these two important cases decided by the Supreme Court of Louisiana, the doctrine of abuse of rights would have been welcomed in Louisiana by judges and lawyers interested in the control of inequities bound to occur when very general legal propositions have to be applied to individual cases. The doors, in matters concerning property rights and contractual rights, had been widely opened by the Supreme Court.

They were not used. Insofar as "abuse of rights," or analogies to cases of violence were concerned, Higgins Oil Co. v. Guaranty Oil Co. and Onorato v. Maestri remained isolated instances of a judicial attempt to add new instruments for the judicial control of abusive exercise of individual rights in the State of Louisiana.

Louisiana has followed the patterns which prevail in the United States in matters which in civil law countries would be considered "abuse of rights." In effect, many cases of abuses of property rights are considered as nuisances, some as torts, others as abuses of process. There has been, in the United States, and in Louisiana, a piecemeal step by step partial approach to problems of lack of good faith, lack of
serious and legitimate interests, and malice in the exercise of individual rights. But there is no general recognition of the doctrine. After citing instances of cases and statutes in England which would lead to results in certain areas of the law similar to those achieved in civil law countries under the influences of the doctrine of abuse of rights, Gutteridge had this to say: "But these are isolated instances of the recognition of the proposition that a legal right may be abused." The same may be said about Louisiana. Leake, writing in 1932, said: "No case has been unearthed in this jurisdiction (Louisiana) which definitely recognizes the abuse of right doctrine." Insofar as the author of this article is aware, the situation remains substantially the same in 1975.

It is true that in some cases the Louisiana judges have spoken of "abuse of rights." In the case of Salter v. B.W.S. Corporation, decided by the Supreme Court of Louisiana on February 18, 1974, Justice Barham speaking about article 667 of the Louisiana Civil Code said: "Civil Code Article 667 creates a legal servitude due one estate from a neighboring estate. It gives the proprietor of the servient estate the right to protect and preserve this real right, a servitude. It is an article designed to protect property from the abuse of the right of ownership by the works made on a neighboring estate." Article 667 reads: "Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

The case on which Justice Barham was giving his opinion involved the use of a tract of land for the underground storage of dangerous chemical wastes. Some of the neighbors (who were not owners but lessees) were seeking an injunction to prevent said use. The court allowed the issuance of a qualified injunction as it might be needed to prevent risks and dangers for neighbors caused by the eventual leakage of dangerous chemicals.

116. Leake, Abuse of Rights in Louisiana, 7 Tul. L. Rev. 426 (1933); Gutteridge at 30-31; Parker v. Harvey, 164 So. 507 (1935); Annot., Billboards and Other Outdoor Advertising Signs as Civil Nuisances, 38 A.L.R. 3d 652 (1971); Annot., Spite Fences and Other Spite Structures, 133 A.L.R. 692 (1941).
118. Leake, Abuse of Rights in Louisiana, 7 Tul. L. Rev. 426, 434 (1933).
119. 290 So.2d 821 (La. 1974).
120. Id. at 825.
This was not an "abusive" act, an "abuse of right," in the sense in which the civilian uses this word. The B.W.S. Corporation was not engaged in the performance of acts undertaken with an intent to harm, or without any serious and legitimate interest, or against good faith, good customs or morality, or against the social objectives on account of which individual rights are recognized or conferred. It was doing exactly the opposite. It was performing a valuable act: the storage of chemical wastes which if carelessly handled could endanger the health of many persons. But such storage was dangerous unless very carefully done. It imposed burdens in the neighborhood. It might diminish the value of their properties. Nevertheless, it was not an illegal act; it was not an abusive act in the above specific sense of the word. It was an excessive act.

In Devoke v. Yazoo & Mississippi Valley Railroad Company, a railway company had installed facilities for the firing of its locomotives. Such firing caused soot and heavy smoke to damage walls, tapestry and carpeting of neighboring houses. Firing locomotives was an essential part of the operation of the railway company. It was not an illegal act. It was not an act inspired by the intent to harm neighbors, nor was it done without any serious and legitimate interest, nor was it an act against good faith, good customs or principles of morality, nor was it against the social objectives on account of which rights were recognized by the railway company. for the operation of its equipment, that is to say, it was not an abuse of rights. It was an excessive act.

Article 667 of the Louisiana Civil Code does not make any distinction between what we call here "abusive" acts and "excessive" acts. Article 667 was invoked by the Supreme Court of Louisiana in a typical situation of abuse of rights in Higgins Oil Co. v. Guaranty Oil Co. It was also invoked by the same Court in a typical situation of excessive acts as found in Salter.

The wording of article 667 is very broad. Certainly, as Justice Provosty indicated, it provides sufficient normative ground for a judicial holding to the effect that whenever an owner uses his property with the intent of harming his

121. See text section IV, supra.
122. Id.
123. 211 La. 729, 30 So. 2d 816 (1947).
neighbors, or without benefit for himself, or without any serious and legitimate interest, while, at the same time, damaging his neighbors, such owner may be enjoined and ordered to redress damages. These are cases of abuse of rights which, under Louisiana law, may be restrained by injunction or subject to redress.

Besides, as it was certainly indicated in the majority and minority opinions, in the Salter case, article 667 provides grounds for remedial action in the case of excessive acts.

In summation, Louisiana courts have spoken in certain cases of "abuse of rights" when, actually, they were not handling cases of "abuse of rights," but of "excessive" acts. On the other hand, Louisiana courts have not spoken of "abuse of rights" when they were really dealing with "abuse of rights" cases; the situations were checked by denial of the protection of the law to the owners or holders of credit rights who were exercising them in such an improper manner, as in Higgins Oil v. Guaranty Oil and Onorato v. Maestri.

All of the elements needed for the development of the doctrine of abuse of rights are present in Louisiana. The norms are articles 2315, 667, 1950, 1958, 2040, 1856, 1857 and 2464 of the Civil Code. The precedents are the Higgins Oil, Onorato and Parker cases. As it always happens with the lines of growth of the law, it is up to the judges and lawyers to expand the doctrine or to ignore it. So far, in Louisiana, they have preferred to ignore it. The most pressing needs of fairness and justice have been dealt with, so far, in a partial and limited way by the use of different and unrelated legal remedies (nuisance, abuse of process, torts, public policy restrictions, etc.). Has it been enough?

VII. Conclusion

Now we may go back to our beginning. The doctrine of abuse of rights is in the making, it is "in fieri." It is an important juridical-political element of modern civil law doctrine. Although there are still pending important questions concerning its scope as well as criteria for the definition of abusive use of rights, this we may safely say now: it will be difficult for a holder of an individual right, in most of the civil law jurisdictions today, to exercise such right to the detriment of other parties, just for the sheer sake of exercising it. At least a "serious and legitimate interest" will have to be shown in order to justify the exercise of its right.