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Book Review (reviewing Louis Josserand, De l'esprit des droits et de leur relativité, théorie dite de l'abus des droits (1927))

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ternational law and organization. It is still the skeleton in the cupboard of every foreign office. And still the orators of the League of Nations, which has gone far to deprive it of its last vestiges of substance, pay it lip service. The League is not, they say, and never can be, a super-state; it is a free association of sovereign states. There is a terror in the word "super-state" which makes them close their eyes to the obvious fact that exactly in the measure in which they contribute to the success and power of the League they increase its approximation to the "civitas maxima." It is as though they must at all costs keep up the form of struggle against a process of biological evolution.

When nationalism revolts, the lawyer is often scapegoat for the politician. In their devotion to humanity, the representatives of governments would pledge their principals to unreserved co-operation, if the lawyers had not warned them of the limits set by that inalienable sovereignty which constitutes the essential mark of the independent state. Nor can it be denied that they have some justification in sloughing off the responsibility for caution. The profession does not leap at new ideas. It had much to do with the gradual deification of a conception which served its turn in the break-up of the empire and the abandonment of the temporal claims of the papacy, and in the mass it remains ignorant of the desertion of sovereignty by the modern theory of the state. Eventually, however, the discrepancy between the old doctrine and the facts of present international life must impress itself even upon the most conservative and practical. As far as the science of law is concerned, state-sovereignty has been shattered by the unsparing logic of Krabbe, Duguit, Kelsen, and Verdross. The removal of what is still, to put it at the lowest, a common mental inhibition awaits only the realization in practice of a correction in theory.

The Grotius Society has done well in rendering these texts available to a larger public. Compared with the international political thought and practice of today, they furnish, as I have said, a striking demonstration of progress. None of the plans, despite many elements common to them and the covenant, can claim to be the starting point of a direct development culminating in the League of Nations, yet they have all influenced the minds of men in the direction of peace, and it is fitting that those who pointed, rather hopelessly, a way which humanity has since followed, should not be forgotten.

From the practical point of view, much has been added to the usefulness of these small volumes by the introductions. That of Miss Buckland, in particular, which is prefaced to Kant's "Perpetual Peace," is a brilliant synthesis of the political theories of the eighteenth century.

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DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ, THÉORIE DITE DE L'ABUS DES DROITS. Par Louis Josserand, Doyen de la Faculte de Droit de Lyon. Paris: Librairie Dalloz, 1927. Pp. 426.

This book is an interesting and valuable study of the place of the abuse of rights in the legal system. Primarily a study of French "jurisprudence" (the law laid down in judicial decisions), it also covers "doctrine" (legal writings or legal science), and contains sufficient material from foreign codes and statutes to constitute an essay in comparative law. The author traces the vitiating effect of abuse in connection with the exercise of ownership, the enforcement of security rights, the recourse to litigation, the rights within the family, contractual rights, individual and collective liberty, the exercise of public or administrative powers, and in the operation of private and public international law. Under each of these heads judicial decisions or legislative acts are presented tending to show an inclination to condition the recognition of rights upon the legitimacy of the underlying spirit and motive. This material is made to serve as a basis for a comprehensive theory of abuse, the abusive act being illicit as distinguished from the illegality of the tort, and also as distinguished from acts of "excess," of which the most typical illustrations are found in the law of trade nuisances.

It is the apparent belief of the author that it is possible to build on the doctrine of abuse a general theory of a limitation of rights by enforced subservience to their true social function, and that there are only a few specific rights emancipated from this subserviency, which in a sense constitute anomalies in the legal system (see s. 306, 307, pp. 389-91); that while apart from these it is true that the law recognizes self-regarding rights (droits à esprit égoiste), this recognition is in itself (in accordance with Jhering's theory) an instrument of social utility, which is most effectively advanced by the self-interest of individuals.

A detailed comment upon or criticism of the author's elaboration of his views would require an equally elaborate examination of the theory of individual rights; but a few general observations may be offered.

There are large sections of the law which operate entirely with rights inherently qualified by purposes which they serve. This is preeminently true of public law and of administrative powers, and under our doctrine of constitutional law the same may even be predicated, to an as yet undefined extent, of legislative powers; it is of course also true of all rights which are in the nature of trusts. The nineteenth century has witnessed the almost complete transformation of family rights in Anglo-American law from self-regarding rights into rights held in trust. The French law remains more archaic in this respect, and the judicial correction of one of its extreme anomalies—the power of the father to demand the imprisonment of his child—furnishes Mr. Josserand with one of his illustrations of the recognition of the doctrine of abuse; on the other hand our law of breach of promise is more archaic than the civil law. In all cases in which legal doctrines recognize specifically the elements of good or bad faith, of malice or of privilege, rights are correspondingly qualified;

many, if not all, specifically equitable doctrines preclude the abusive exercise of rights; probably this is also true of the law of easements; under the German Civil Code all contractual obligations are to be interpreted in accordance with the principle of good faith. This would not prevent many creditor-rights from being absolute, and in principle absolute are also the rights of ownership, and many rights of liberty, particularly the right, in the absence of special obligation, to refuse or to terminate relations with others. The development of the law (e. g., in connection with air navigation) may specifically limit some of these rights, without otherwise impairing their absolute character. Now it is only in connection with these absolute rights that the problem of abuse presents itself as a possible general qualifying principle, and it presents itself in two forms.

In the first form the problem may best be stated by asking the question whether section 226 of the German Civil Code should be recognized as a general principle of law. This section provides that the exercise of a right is not permitted where the only purpose of the exercise can be to injure another. In appearance at least this states a principle more definite than section 826, quoted by Josserand as a companion provision, to the effect that any intentional doing injury to another in a manner *contra bonos mores* creates an obligation to indemnify—a provision which permits the elaboration of guiding principles without stating one. Section 226 clearly identifies abuse with malice and very properly outlaws it. But is not the practical value of such a principle so limited as to be almost negligible? Pure malice does not present a typical situation in the scheme of human relations, and while occasionally the problem may present itself, its solution one way or another is of merely theoretical interest, and would hardly justify the writing of a book.

A worth-while theory of rights will test them by the reaction of the law to typical situations, and a doctrine of abuse is sure to be stretched to cover these. Mr. Josserand does this when he concedes (p. 313) that it would be better to speak of a misdirection (détournement) than an abuse of rights. In administrative law we speak of an abuse of discretion whenever discretion is perverted to other than legal ends. But in practically every case these extra-legal ends are, in the eyes and in the conscience of the administrative agent, justifiable and praiseworthy ends; unfortunately the public policy which he pursues is not that of the statute from which he derives his power, as the statute is interpreted by the court. So the typically important situations in which the so-called abuse of rights comes in question are those in which there is a clash of reciprocally conflicting social, or of conflicting social and individual interests.

In the law of public utilities we have witnessed, in the course of a generation, the transformation of business rights into functions of service, and a few elastic terms give official commissions

the power to prevent what has been turned into an abuse of property, but what without the statute would be legitimate, even if "anti-social." The Federal Trade Commission is given power to forbid unfair methods of competition within the entire scope of interstate and foreign business. But as the law stands, unfairness involves either fraud or a monopolistic tendency. Conceivably the Commission might be given power to deal with unfair practices in general, and this might give a handle to turn all business into public service. An industrial commission might be authorized in similar manner to deal with employment and labor conditions, a zoning or housing commission with neighborhood relations and tenancies, and it would not be difficult to imagine analogous extensions of power into other fields. We have the administrative technique, and the statutory phraseology; what is lacking is the preparedness of public opinion to accept such extension of power and such curtailment of private right. Mr. Josserand quotes the Russian Soviet Code of 1923 as providing that civil rights are protected by the state except in the cases in which they are exercised in a sense contrary to their economic and social purpose. Compare this with s. 226 of the German Code, and you have the wider and the narrower theory of abuse. It is the former for which Mr. Josserand stands, but we must conclude that while it represents an ideal and possibly a tendency of development, it does not express any actual existing theory of private rights in any of the legal systems with which we are familiar.

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ARTICLES IN PERIODICALS

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THE GROUNDS OF PARDON. *James D. Barnett.* 61 Amer. L. Rev. 694.

THE PRACTICAL SIDE OF PERPETUITIES. *McCune Gill.* 61 Amer. L. Rev. 751.

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