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Natural Servitude of Drainage - Extent of Burden Upon Owner of Servient Estate - Article 660, Louisiana Civil Code of 1870

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reasoning would lead to the conclusion that Article 2319 applies to curators only and not to anyone having mere custody of an insane person.

Still unsettled in Louisiana, however, is the question of the grounds on which recovery can be had under Article 2319. Does the curator care for the interdict at his peril, or is he liable only when at fault? By express codal provisions the majority of civil law jurisdictions render the curator liable only if he is negligent.¹²

The liability of the parent for torts of the minor is imposed regardless of fault.¹³ The parent escapes this responsibility only when the residence of the minor has been legally changed.¹⁴ Applying the same rule to Article 2319, the curator should be liable regardless of fault where the insane person is residing with him or is under his care. Whenever the court authorizes the interdict to reside elsewhere,¹⁵ the curator should not be liable. However, if the curator, without the protection of a court order, permits the interdict to reside elsewhere he should remain responsible for the acts of the interdict even though he be free of fault.

The court's refusal to apply Article 2319 in the instant case because the defendant was not the curator appears entirely correct. For an action to be successful under Article 2319 the plaintiff should allege that the defendant is the curator and that the insane person¹⁶ is under his care. In such a case there should be recovery without the necessity of showing fault on the part of the curator unless the tort is one that requires malice or intent.

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NATURAL SERVITUDE OF DRAINAGE—EXTENT OF BURDEN UPON OWNER OF SERVIENT ESTATE—ARTICLE 660, LOUISIANA CIVIL CODE OF 1870—Plaintiff and defendant were adjacent landowners. As plain-

12. German Civil Code, Art. 832; Civil Code of Japan, Art. 714; Spanish Civil Code, Art. 1903; Civil Code of the Province of Quebec, Art. 1054.

13. *Mullins v. Blaise*, 37 La. Ann. 94 (1885); *Taylor v. Doskey*, 1 La. App. 399 (1925); *Maloney v. Goelez*, 12 La. App. 33, 124 So. 607 (1929). But see *Miller v. Meche*, 111 La. 143, 147, 35 So. 491, 492 (1903).

14. *Taylor v. Doskey*, 1 La. App. 399 (1925).

15. Art. 417, La. Civil Code of 1870.

16. Another problem raised relative to Article 2319 is why did the redactors use the words "insane person" instead of the word "interdict." An analysis of this problem is beyond the scope of this note, however see Arts. 31, 32, 389, and 422, La. Civil Code of 1870.

tiff's land was of slightly higher elevation than defendant's drainage was through a natural channel across defendant's land. This natural drain became so choked with underbrush and silt that surface water could not drain off plaintiff's land. Suit was brought to compel defendant to remove the obstructions. *Held*, plaintiff's demand was granted even though defendant had committed no positive action affecting drainage of the land. *Brown v. Blankenship*, 28 So. (2d) 496 (La. App. 1946).

The problem of natural servitude of drainage is of practical importance to the landowners of Louisiana. Article 660¹ provides for a servitude "due by the estate situated below to receive the waters which run naturally from the estate situated above." The proprietor below may not obstruct this natural drainage, nor may the proprietor above render the servitude more burdensome. This servitude originates from the natural situation of the places² and exists even though the difference in elevation is only a few inches.³

In the early case of *Darby v. Miller*⁴ the defendants, owners of the servient estate, actively modified plaintiff's drainage by constructing extensive causeways over their low land. However, openings were left for the passage of the water from above and bridges were built over the bayous and natural gullies. Had defendants not built the causeways, water from plaintiff's land would have drained across the entire surface of the defendant's lands. The court held that it was the duty of defendants to keep open sufficient drains to permit the water to flow off plaintiff's land.⁵ The instant case extends this decision by imposing a duty of affirmative action upon the owner of the servient estate to keep drains open, even though he had taken no positive action affecting the drainage of the land.

1. Art. 660, La. Civil Code of 1870:

"It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude.

"The proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of water.

"The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome." (Numerous cases have interpreted and applied various portions of this article and it has been referred to in several periodicals: (1941) 3 LOUISIANA LAW REVIEW 281, (1941) 3 LOUISIANA LAW REVIEW 722, (1942) 5 LOUISIANA LAW REVIEW 144, 7 TULANE L. REV. 267, and 17 TULANE L. REV. 667, but the problem here presented has not been put directly at issue in any prior case).

2. Art. 659, La. Civil Code of 1870.

3. *Broussard v. Cormier*, 154 La. 877, 98 So. 403 (1923).

4. 6 La. Ann. 645 (1851).

5. By virtue of the second paragraph of Art. 660, La. Civil Code. See note 1, *supra*.

On first impression the ruling in the instant case may seem rather severe and not easily reconcilable with certain articles of the Civil Code. Article 655 states that one of the characteristics of a servitude is that it does not oblige the owner of the servient estate to do anything, but only to abstain from doing a particular thing or to permit a certain thing to be done on his estate. Also Article 709 states that no servitude can be established which imposes services upon the person. However, as pointed out in the commentary of Huc,⁶ an important function of these articles is to aid in distinguishing servitudes from such real rights and obligations as are referred to in Articles 2010 et seq. Huc also states:

“As to the owner of the servient estate, he can, on principle, be held to do only that which may be required for the maintenance of the servitude. That is what is meant by saying that the servitude cannot consist in the performance of an act.”⁷

In *Louisiana & Arkansas Railway Company v. Winn Parish Lumber Company*⁸ the court pointed out that certain codal articles provide that the owner of an estate may compel his neighbor to do a positive act, for example, to fix and mark the limits of his estate,⁹ to demolish or prop up his building when it threatens ruin,¹⁰ to contribute to the making and repairing of a fence held in common in cities or towns and their suburbs,¹¹ and to cut off branches of trees which extend over his estate.¹² It is readily seen that compelling the

6. 4 Huc, *Commentaire Theorique et Pratique du Code Civil* (1898) 495-496: “403. A servitude can only be imposed upon an estate and in favor of an estate. Undoubtedly, services can be imposed upon a person, but only under the title of an obligation. Thus, two neighbors can enter into a contract according to the terms of which one will obligate himself to procure for the other a certain quantity of water every day, or even, if he so desire, will bind himself to beat his pond every night (a method of fishing in France). The text does not prohibit agreements of this nature; it does not even prohibit one from obligating himself to accomplish some similar or analogous promises for the profit of those to whom the creditor could sell his estate, because the creditor can cede his credit, even tacitly. But what the Code forbids is the imposition of like services upon a person under the title of a servitude; that is, to combine things in such a manner that whoever becomes the proprietor of the estate will owe, by that fact alone, the services agreed upon, to whoever becomes the proprietor of such other estate. It is necessary that the service imposed under the title of servitude have for its object the maintenance of the servient estate in a certain material condition useful to the exploitation or even to the benefit of the dominant estate. Any service which would not have this character could not then be stipulated as a servitude. Thus one could not stipulate to his neighbor, under this title, that he will not hunt on his land, that he will not shoot firearms . . .”

7. *Id.* at 533, § 482.

8. 131 La. 288, 59 So. 403 (1912).

9. Art. 668, La. Civil Code of 1870.

10. Art. 671, La. Civil Code of 1870.

11. Art. 686, La. Civil Code of 1870.

12. Art. 691, La. Civil Code of 1870.

owner of the lower estate to remove obstructions in the natural drain is not unlike the other duties imposed on estate owners mentioned above.¹³

In *Becknell v. Weindhall*,¹⁴ the Louisiana Supreme Court stated that Article 660 is derived from the Roman law, which is the best source for ascertaining its practical meaning. The ruling in the instant case is in accord with the Roman view. Labeo described a situation where the neighbor below did not remove obstructions from a drainage ditch. This commentator said that suit can be brought against the person owning the land below to compel him to clear the ditch himself, or to permit the owner of the dominant estate to restore it to its former condition.¹⁵

In view of Articles 772¹⁶ and 773¹⁷ it might appear that a more equitable remedy would be to permit the owner of the dominant estate at his own expense to restore the drainage ditch to its former condition. But since these articles have been held to relate exclusively to conventional servitudes,¹⁸ the decision rendered in the instant case is proper.¹⁹

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13. Some light is shed on the problem by looking to the influence in France which led to the establishment of the principle that a servitude cannot obligate the owner of the servient estate to do anything. This rule was intended for the relief of the peasants who, under the feudal regime, were bound during their life to the estate on which they were born. See *Louisiana & A. Ry. v. Winn Parish Lumber Co.*, 181 La. 288, 304, 59 So. 403, 408 (1912).

14. 7 La. Ann. 291 (1852).

15. 9 Scott, *The Civil Law, A Translation* (1932) 6.

16. Art. 772, La. Civil Code of 1870. "He to whom a servitude is due, has a right to make all the works necessary to use and preserve the same."

17. Art. 773, La. Civil Code of 1870. "Such works are at his expense and not at the expense of the owner of the estate which owes the servitude, unless the title by which it is established shows the contrary."

18. *Landry v. McCall*, 8 La. Ann. 184 (1848). This reasoning is also supported by Pardessus, *Traite Des Servitudes* (1817) 96, 147: "66 . . . However, as we have observed, n. 53, this principle (referring to Articles 697 and 698 of the French Code which correspond to Articles 772 and 773 of our code) cannot be applied in its entirety to natural servitudes . . . 92. . . . If the passage of time, or some unforeseen accident has filled up the bed of the waters, the proprietors of the lower estates can be compelled to attend to the cleansing of each one in the extent of his domain. Nothing can be accomplished in refusing to do so, whether by pretending that this bed would have been filled up by a natural event of which he does not wish to change the effects; whether by invoking the general rule, which does not permit that the servitudes consist, on the part of the servient estate, in the exercise of the servitude, when he is not particularly obligated to do so. We have already observed, n. 53 and 66, that the natural servitudes are laws of neighborhood and of necessity, ruled by different principles than conventional servitudes, to which the third chapter of the first part is principally applicable."

19. Also the ruling is in accord with the policy of the court as stated in the case of *Guesnard v. Executors of Bird*, 38 La. Ann. 796 (1881), to the effect that Article 660 is to be liberally construed in favor of the estate to which it is due.