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# Louisiana's Natural Servitude of Drain

## INTRODUCTION

On March 24, 1699, a group of French explorers guided by native Bayougoula Indians discovered the first over-water route from the Mississippi River to the Gulf of Mexico. The Bayougoula chief led them down a narrow waterway situated between present-day Baton Rouge and New Orleans, now known as Bayou Manchac.<sup>1</sup> As they traveled along the bayou, Pierre Le Moyne, Sieur d'Iberville, who led the expedition, recorded a series of difficulties the party had encountered:

This river or creek is no more than 8 or 10 yards wide, being full of uprooted trees which obstruct it. . . . Within these 2 leagues I have made ten portages, some being 10 yards long, others 300 or 400 yards more or less. . . . Those portages have worn us out today.<sup>2</sup>

Frustratingly impassible, the bayou would never provide a viable route to the Gulf.

D'Iberville's logbook entry suggests that Manchac was unlike anything the French explorers had ever seen. In fact, although the party would not have realized it at the time, the bayou's impassibility resulted from a peculiar feature of Louisiana hydrology.<sup>3</sup> Because of the area's flat topography, the bayou's sources only feed it water during the months of high spring flooding.<sup>4</sup> For the remainder of the year, its low water levels render it nearly impossible to navigate.<sup>5</sup> Moreover, unlike European water bodies that tend to run continuously in a single direction, Manchac can reverse directions over the course of the year, making it even more difficult to traverse.<sup>6</sup> This anecdote of

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1. MARY ANN STERNBERG, *WINDING THROUGH TIME: THE FORGOTTEN HISTORY AND PRESENT-DAY PERIL OF BAYOU MANCHAC* 25 (2007).

2. *Id.* at 26.

3. *Id.* at 29.

4. *Id.* at 30.

5. *Id.*

6. *Id.* Even though the bayou could not serve as a navigable route to the Gulf, early Louisiana settlers recognized the bayou's importance. Over its history, Manchac marked the northern boundary of the Isle of Orleans and served as the dividing line between the French, Spanish, and British North American colonies for more than two decades. *Id.* at 39–40. It was the site of numerous strategic forts and settlements, and because of early hopes that it could provide a viable Gulf outlet, it was even considered as a possible site for the city of New Orleans. *Id.* The history of Bayou Manchac and other Louisiana water bodies illustrates the centrality of water to all aspects of Louisiana's culture, geography, and politics.

d'Iberville's encounter with Bayou Manchac introduces one of this Comment's central themes: the problematic interaction between European expectations and Louisiana hydrology.

In both Louisiana and Europe, water has always been a source of legal controversy.<sup>7</sup> Of the twelve laws set out in the Roman Twelve Tables, the earliest example of written law in western culture, at least one dealt exclusively with water use.<sup>8</sup> By the late 17th century, when d'Iberville and his explorers made their expedition to Bayou Manchac, European jurists had developed a handful of sophisticated rules to govern the water-related controversies they experienced on the continent. Among these rules was the *servitude d'écoulement*, or, in modern Louisiana parlance, the "servitude of drain,"<sup>9</sup> a civilian concept with its origins in Roman law. When French and later Spanish settlers arrived in the new world, they introduced their legal framework and the servitude of drain into Louisiana law.

For the first 300 years of its existence in Louisiana law, the servitude of drain remained a relatively arcane cause of action, invoked mostly by rural landowners in disputes over local flooding.<sup>10</sup> Recently, however, a group of creative legal thinkers invoked the servitude on a massive scale in a controversial lawsuit.<sup>11</sup> The servitude offers many practical advantages to plaintiffs affected by flooding and other water-related injuries. Claimants under the servitude may have the option of suing for

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7. David J. Mitchell, *Lawsuit Filed over Floodgate Pumps*, THE ADVOCATE (Mar. 18, 2014), <http://theadvocate.com/news/8506014-123/lawsuit-filed-over-floodgate-pumps>, archived at <http://perma.cc/LFN6-F48F>.

8. CORPS DE DROIT CIVIL ROMAIN 22 (photo. reprt. 1979) (Henri Hulot et al. trans., Scientia Verlag Aalen 1811). See discussion *infra* Part I.A.

9. For an explanation of the servitude's etymology, see discussion *infra* Part II.B. See also *infra* note 158.

10. An exception to this is the first recorded Louisiana case dealing with the servitude, *Orleans Navigation Co. v. Mayor of New Orleans*, 2 Mart. (o.s.) 214 (Orleans 1812).

11. Bd. of Comm. of the Se. La. Flood Prot. Auth. – E. v. Tenn. Gas Pipeline Co., No. 13-6911, 19 (La. Dist. Ct. 2013). For news stories covering the lawsuit, see Clancey DuBos, *Historic Lawsuit Coming Against Big Oil*, GAMBIT (July 24, 2013, 12:38 AM), <http://www.bestofneworleans.com/blogofneworleans/archives/2013/07/24/historic-lawsuit-coming-against-big-oil>, archived at <http://perma.cc/FH8L-8DX7>. Occasionally, creative legal thinkers will resurrect outmoded legal theories and apply them to solve new legal issues. Public nuisance law, for example, has been invoked to combat global warming, although without success. See, e.g., Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 1 (2011) (discussing the modern application of public nuisance law to global warming issues).

either damages or injunctive relief.<sup>12</sup> Actions for damages are subject to a 10-year prescriptive period, rather than the typical one-year period available for delictual actions under Civil Code articles 3492 and 3493.<sup>13</sup> Moreover, actions for injunctive relief under the servitude are imprescriptible.<sup>14</sup> Thus, when other causes of action under tort or contract law may have prescribed, the cause of action under the servitude will likely remain valid. Additionally, there is no proximity requirement for the two estates, or at least the proximity requirement is loose enough to allow different tracts of land at some distance from each other to fall under the servitude.<sup>15</sup> There is also some precedent for application of the servitude on a large scale—for example, across the entire city of New Orleans.<sup>16</sup> The servitude requires no contractual privity or negligence; it simply imposes on different landowners certain real obligations.<sup>17</sup>

Despite its long tenure in Louisiana law, and although close to 300 Louisiana cases cite the code articles establishing the servitude of drain, only a handful of local doctrinal sources consider it in any detail.<sup>18</sup> This lack of critical attention leaves little guidance for a court faced with an unconventional application of the servitude. Moreover, the fact that the servitude developed on the European continent, where hydrological conditions differ significantly from those in Louisiana, creates some difficulty when applying the old-world rules and foreign doctrine in a new, local setting.

Louisiana Civil Code articles 655 and 656 establish the servitude of drain, setting out its prerequisites and the duties of estate owners subject to it, respectively:

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12. A.N. YIANNPOULOS, PREDIAL SERVITUDES § 21, *in* 4 LOUISIANA CIVIL LAW TREATISE 68 (4th ed. 2014) [hereinafter YIANNPOULOS, PREDIAL SERVITUDES].

13. *Id.*

14. *Id.* An action to enforce a natural servitude is imprescriptible. *Gaharan v. State*, 579 So. 2d 420, 422 (La. 1991); *Moreland v. Acadian Mobile Homes Park*, 313 So. 2d 877 (La. Ct. App. 1975). *But see, e.g., Aubry et Rau*, 3 DROIT CIVIL FRANÇAIS 15 (1938) (stating that a natural servitude may be modified by convention, destination, or 30 years prescription).

15. LA. CIV. CODE art. 648 (2015). *See infra* note 125.

16. *See, e.g., Orleans Navigation Co. v. Mayor of New Orleans*, 2 Mart. (o.s.) 214 (Orleans 1812).

17. YIANNPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 18, at 55.

18. Professor A.N. Yiannopoulos, an eminent authority on Louisiana property law, discusses the servitude in his property law treatise. *See id.* § 21, at 68. Apart from this, however, little Louisiana doctrine considering the servitude exists.

## Art. 655. Natural drainage

An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow.

## Art. 656. Obligations of the owners

The owner of the servient estate may not do anything to prevent the flow of the water. The owner of the dominant estate may not do anything to render the servitude more burdensome.<sup>19</sup>

The servitude exists between two estates, one “situated above” and one “situated below.”<sup>20</sup> It prohibits the estate owners from altering the flow of water between the estates either by increasing the flow (overburdening the servitude) or blocking the flow.<sup>21</sup> Any Louisiana court that must consider the servitude’s application faces a number of conceptual questions. For example, what kinds of water can be subject to the natural servitude? Also, what does the article require in the “estate situated below” and “estate situated above” language? Finally, if a servitude exists, what limitations does it impose on property ownership, and, specifically, what types of actions “render the servitude more burdensome” under article 656?

This Comment attempts to answer these questions through an exegetical analysis of articles 655 and 656 with a comprehensive survey of the available doctrine and jurisprudence to provide a gloss on the rules for each of the servitude’s elements. Part I begins with a history of the drainage servitude and its predecessors, starting in Rome and moving through developments in French and Louisiana law. Part I concludes with an analysis of the servitude’s proper classification and a comparison to developments in other jurisdictions. Next, Part II presents and considers each formal element of the servitude as it currently exists under the Louisiana Civil Code. Part III considers the duties of each estate owner under the servitude and, in particular, what actions qualify as an “overburdening” of the servitude.

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19. LA. CIV. CODE arts. 655–656 (2015).

20. LA. CIV. CODE art. 655 (2015).

21. LA. CIV. CODE art. 656 (2015).

## I. HISTORY AND CLASSIFICATION OF THE SERVITUDE

The servitude of drain ranks among the oldest legal rules in western culture and is best understood through the context of its historical development. This Part traces that development from its origins in Roman law, through French law, and into modern Louisiana law. This Part concludes with a consideration of the servitude's proper classification, comparing Louisiana's servitude to similar legal rules in modern jurisdictions.

*A. Origins as an Affirmative Defense to a Roman Nuisance Action*

Roman law recognized a servitude fundamentally similar to Louisiana's servitude of drain. A careful reading of Roman sources indicates that this servitude developed as an affirmative defense to an older Roman civil cause of action called the *actioe aquae pluviae arcendae*, or action to ward off rainwater—the “*actioe*.” The *actioe* was, in modern terms, a type of tort nuisance action.

Rules governing the flow of water between neighboring properties appeared as early as the fifth-century BCE in the Twelve Tables.<sup>22</sup> This early compilation of Roman customary law provided a civil remedy to landowners whose property suffered damage from rainwater flowing onto it from a neighboring estate.<sup>23</sup> Little evidence remains as to the nature and rules of this early right of action,<sup>24</sup> but later Roman jurists developed it into a sophisticated remedy called the *actioe aquae pluviae arcendae*, or action to ward off rainwater.<sup>25</sup>

The jurists cited in Justinian's *Digest* generally agree on two situations where the *actioe* could apply.<sup>26</sup> First, if the owner of one property constructed some work that increased the flow of water onto a neighboring property, such as digging canals to

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22. ALAN WATSON, *ROME OF THE XII TABLES* 160 (1975) [hereinafter WATSON, XII TABLES].

23. *Id.*

24. *Id.* The only surviving fragment of this provision comes from later Roman sources that discussed the Twelve Tables. *See id.*; CORPS DE DROIT CIVIL ROMAIN, *supra* note 8, at 22. The surviving fragment reads, “*Si aqua pluvia nocet*” (if rainwater harms). Scholars have questioned whether or not actual injury or the mere threat of injury sufficed to seek this remedy. *See* WATSON, XII TABLES, *supra* note 22, at 160.

25. DIG. 39.3.1 (Ulpian, Ad Edictum 53) (3 THE DIGEST OF JUSTINIAN 395 (Theodore Mommsen and Paul Krueger eds., Alan Watson trans., 1985)). This action seems to have derived from the Twelve Tables provision or from a common source in customary law. *See* WATSON, XII TABLES, *supra* note 22, at 160.

26. DIG. 39.3.1 (Ulpian, Ad Edictum 53).

irrigate a field, the owner of the flooded property could seek removal of the construction to return the flow to its normal pace.<sup>27</sup> Second, if a property owner created some obstacle on his land that blocked the flow of water thereby causing it to back up onto and flood a neighboring estate, the neighbor could seek to have the obstacle removed.<sup>28</sup> The *actio* essentially limited landowners' ability to create works on their lands that caused water damage on neighboring properties, much like nuisance law under Louisiana's vicinage articles.<sup>29</sup>

These remedies did not apply to damage caused by the natural flow of water.<sup>30</sup> The Romans did not require every landowner to prevent the flow established by nature.<sup>31</sup> Instead, the law limited relief to situations in which a neighboring landowner caused water to flow outside its normal and natural course through some artificial work.<sup>32</sup> Jurists writing on the *actio aquae pluviae arcendae* attributed this limitation to a natural servitude of *flumen*—flow of water—that existed *natura loci causa*, or because of the nature of the property.<sup>33</sup> This “natural servitude” burdened a lower estate with the duty to receive water flowing naturally onto it from higher properties, protecting higher landowners from liability under the *actio* for damage resulting from the natural flow of water.<sup>34</sup> In modern terms, the servitude can be thought of as a type

27. *Id.*

28. *Id.* According to Ulpian:

The action is appropriate whenever water is likely to cause damage to a field as a result of man-made construction, that is, whenever someone causes water to flow elsewhere than in its normal and natural course, for example, if by letting it in he makes the flow greater or faster or stronger than usual or if by blocking the flow he causes an overflow. . . . [T]his action is available to the owner of a higher piece of land against the owner of a lower piece to stop the latter carrying out work to prevent naturally flowing water passing down through his own field and to the owner of a lower piece of land against the owner of a higher piece to stop the latter causing the water to flow other than naturally.

*Id.* As the phrase “likely to cause damage” implies, it is clear that by this point the *actio aquae pluviae arcendae* could apply to possible future damage and not just actual damage.

29. See discussion *infra* Part I.D.

30. DIG. 39.3.1 (Ulpian, Ad Edictum 53).

31. See ALAN WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC 162 (1968) [hereinafter WATSON, THE LAW OF PROPERTY].

32. DIG. 39.3.1 (Ulpian, Ad Edictum 53) (“[T]his action is never available when it is the nature of the site that causes the damage, since in that case (to speak accurately) it is not the water, but the nature of the site that causes the damage.”).

33. *Id.*

34. Paulus explains that the natural servitude of flow existed in order to preserve the natural state of the properties. DIG. 39.3.2 (Paulus, Ad Edictum 49).

of affirmative defense to the *actione*. No landowner could be liable for damage caused by nature itself.

Thus, in terms of modern Louisiana classifications, the Roman predecessor to Louisiana's servitude of drain seems to have originated not as a real right under a property law theory but as an affirmative defense to an established civil action under nuisance law.<sup>35</sup> It developed strictly within the context of the *actione* as a means of precluding a landowner's liability for damage caused by the natural drainage of waters between neighboring lands.<sup>36</sup> This

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In reality, the *actione aquae pluviae arcendae* protected the natural state of the land, though indirectly, by discouraging landowners from constructing any works, which diverted the natural flow of water. The servitude itself protected a faultless landowner from the *actione*.

35. In modern legal terminology, such an action would fall under the Louisiana Civil Code's vicinage articles or under a tort law theory of nuisance. In fact, the Roman *actione* would fit perfectly within the paradigm of article 667, which states "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." LA. CIV. CODE art. 667 (2015). For an in depth analysis of the differences between nuisance law and property law under the vicinage articles, see YIANNPOULOS, PREDIAL SERVITUDE, *supra* note 12, § 38, at 105–08.

36. Although some modern scholars consider the servitude of *flumen* to be a "well recognized class" of servitude at Roman law, in reality, little discussion of this servitude appeared outside the context of the *actione aquae pluviae arcendae*. See WATSON, THE LAW OF PROPERTY, *supra* note 31, at 176. The four original servitudes were *iter*, *actus*, *via*, and *aquae ductus*. These appeared as early as the Twelve Tables. The servitudes of *flumen* and *stillicidium*, or eavesdrip, are among the earliest cited servitudes apart from these original four. See *id.* Outside of the *Digest*, the servitude of *flumen* received brief mention in Varro's *De lingua latina*. *Id.* at 176 n.13. Most discussion of the natural servitude of *flumen* was confined to Book 39 of the *Digest*, devoted to the *actione aquae pluviae arcendae*. Remarkably, Book 8 of the *Digest*, devoted to rural predial servitudes, never mentions servitudes *natura loci causa* or a servitude of *flumen*. See generally DIG. 8. The water servitudes discussed in Book 8 are all conventional servitudes, established by agreement of the landowners rather than the *natura loci*, or natural situation of the estates. *Id.* Pomponius mentions in Book 8 that a servitude may cause damage by natural causes and cites as an example a water channel increased by rainfall or a spring. *Id.* In this context, however, he seems to be talking about the conventional servitude of *aquae ductus*. *Id.* The "natural servitude" of *flumen* seems to have developed not as an independent principle of property law under Book 8, like the conventional servitude of *aquae ductus*, for example, but within the narrow context of the *actione* as a reasonable limitation on a higher estate owner's liability under the *actione*. While Roman jurists thought of this limitation as a "servitude," unlike conventional predial servitudes, which created independent rights, the servitude of *flumen* merely affirmed a landowner's natural right to drain water onto a neighboring property through natural watercourses. See WATSON, THE LAW OF PROPERTY, *supra* note 31, at 166. Roman jurists likely



“servitude” existed *natura loci causa*, as a matter of natural law,<sup>37</sup> and required a landowner to receive the water that flowed naturally onto his lands from neighboring property unless his neighbor altered the natural drainage, giving rise to the *actione*.<sup>38</sup>

### B. Formalization of the Servitude in French Law

Pre-revolutionary French *jurisconsultes* followed Roman law in recognizing a servitude of *flumen*, which they called *servitude de cours d'eau* or *servitude d'écoulement*, meaning servitude of “flow” or “runoff” of water.<sup>39</sup>

For practical purposes, the servitude *d'écoulement* conformed to the rules developed around the *actione aquae pluviae arcendae*.<sup>40</sup> If, for example, an owner of a tract of land increased the natural flow

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styled this limitation a “servitude” because of the similarity between the *actione* and a conventional servitude. Like conventional servitudes, the *actione* restricted a property owner’s *usus* for the benefit of a neighboring estate. Also like a conventional servitude, which was a right *in rem*, the *actione* existed not in favor of one person but for whomever owned the estate. *Id.* at 176. In reality, the “servitude” had little effect outside of the *actione aquae pluviae arcendae*.

37. For a helpful introduction to the natural law tradition, see JACQUELINE A. LANG AND RUSSELL WILCOX, *THE NATURAL LAW READER* (2014). “The ancients and the medievals see the natural law as both objective and universal owing to the fact that it partakes in a timeless, eternal law that finds expression in the very structure of the knowable universe.” *Id.* at 1.

38. DIG. 39.3.2 (Paulus, Ad Edictum 49). Although the Louisiana Civil Code groups articles 655 and 656 with the articles on riparian rights in articles 657 and 658, there is no evidence to suggest that the *actione* applied to a neighbor’s decreasing the flow of water. It only applied when the person created a nuisance by flooding another’s estate with unwanted water. *See* LA. CIV. CODE arts. 655–656 (2015).

39. The word “*écoulement*” could imply a runoff or downward flow of water, whereas the word “*cours*” merely implies a flow or course of water.

40. CLAUDE-NICHOLAS M. LALURE, *TRAITE DES SERVITUDES REELLES* 19–20 (Caen, G. Le Roy 1786). Much like the *actione*, the natural servitude of *cours d'eau* existed as a matter of fact due to the natural situation of the estates, despite any lack of agreement between the landowners. Estates situated below were bound to receive the waters that flowed naturally from estates situated above them. The landowner of an estate situated below was thus barred from bringing an action against a higher estate owner for damage caused by the natural flow of water. *Id.* Again following Roman law, the servitude did not shield a landowner from liability for damages due to water that flowed as a result of human labor. Thus, if the higher estate owner rendered the servitude more onerous by human works, the lower estate owner was entitled to bring a cause of action against the higher estate owner. On the other hand, if the owner of the lower estate constructed some work that blocked the natural flow and caused flooding on the higher estate, the higher estate owner was entitled to relief. *Id.*

of water onto his neighbor's property by artificial works, the neighbor was entitled to a cause of action. On the other hand, if the owner of the property that naturally received water from a neighboring property constructed some work that blocked the natural flow and caused flooding on his neighbor's land, the flooded neighbor was entitled to relief.<sup>41</sup> Thus, in terms of the remedies available to these landowners, the French jurists directly emulated the Romans.

Conceptually, however, the French differed significantly from their civilian predecessors. Whereas the Romans discussed the servitude of *flumen* only within the context of the *actioe aquae pluviae arcendae*, the French dedicated entire chapters to the servitude itself.<sup>42</sup> They began to describe the action for damages in servitude terms, rather than vice versa.<sup>43</sup> Man-made alterations of natural drainage patterns were considered an overburdening of the servitude, and the traditional *actioe* applied when the rights of the servient estate owner under the servitude were violated.<sup>44</sup> Whereas at Roman law the servitude had existed within the realm of nuisance, at French law it became a real right based in property.<sup>45</sup>

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41. See 1 OEUUVRES COMPLÈTES DE J. DOMAT 328 (J. Remy ed., 1835); LALURE, *supra* note 40, at 19–20.

42. Vestiges of the servitude's origins in the *actioe aquae pluviae arcendae* are identifiable in Lalure's treatise. When discussing the primary effects of the servitude, he continues to speak in terms of civil remedies. LALURE, *supra* note 40, at 19.

43. *Id.*

44. YIANNPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 21, at 68.

45. If at Roman law the "natural servitude" of flow had developed as a limitation on the *actioe aquae pluviae arcendae*, the inclusion of the servitude *d'écoulement* in the code unequivocally established it as a legitimate servitude, a freestanding right outside the context of any civil action. Some French jurists accepted the classification of the servitude *d'écoulement* as an actual servitude. See, e.g., JEAN-MARIE PARDESSUS, TRAITÉ DES SERVITUDES, OU SERVICES FONCIERS 171 (8th ed., Paris, Garnery 1817). However, others have qualified this classification. See, e.g., 1 C. DEMOLOMBE, TRAITÉ DES SERVITUDES OU SERVICES FONCIERS 25 (1882). The late 19th-century scholar Demolombe, in his treatise on the *Code Napoléon*, considered the true purpose of article 640 and determined that, "the legislature intervened in the private interest of the landowner and in society's general interest not to create a servitude, but to preserve the natural state of place and so that all would be required to conform themselves to it and maintain it." *Id.* "[L]e législateur est intervenu dans l'intérêt privé des propriétaires et dans l'intérêt général de la société, non pas pour créer ici une servitude, mais pour constater la situation naturelle des lieux, et afin que chacun soit tenu de y conformer et de la maintenir . . ." *Id.* Demolombe's uneasiness with the classification of the servitude *d'écoulement* as a proper servitude and his suggestion that its real purpose was to maintain the natural state of the land makes sense considering that in Roman law, the classification of the natural limitation on the *actioe aquae pluviae arcendae*

Moreover, the French refined the Roman idea of a servitude *natura loci causa*, creating a more pronounced classification of “Natural Servitudes,” which included additional servitudes unknown at Roman law.<sup>46</sup> The combined effects of the *actione* and servitude remained the same, but the conceptualization and organization changed. The French began to think of drainage rights between neighboring landowners definitively in terms of a formal predial servitude, a real right under property law.<sup>47</sup>

In 1804, the drafters of the *Code Napoléon* established the servitude *d'écoulement* under article 640 in the section of the code on “servitudes that derive from the situation of places.”<sup>48</sup> The language in this section heading translates the Latin language of servitudes “*natura loci . . . causa*” from Justinian’s *Digest* and

was more of a convenient fiction than a theoretically sound classification. This problem continues to influence how modern scholars conceptualize the servitude *d'écoulement*. See 2 HENRI MAZEAUD, ET AL., LEÇONS DE DROIT CIVIL 375 (François Gianviti ed., 6th ed. 1984). Many modern jurisdictions have refused to classify their version of the servitude as a servitude at all. See discussion *infra* Part I.D; see also 2 AUBRY ET RAU, *supra* note 14, at 280–323.

46. LALURE, *supra* note 40, at 19. These included the servitude of *l'éboulement des terres*, of *la chute des pierres*, and of *la fonte des neiges*. *Id.* Later examples of natural servitudes, servitudes of enclosure and boundary marking, for example, were not considered servitudes at Roman law. See generally DIG. 8. The right to establish a boundary or enclose land was established by an action and a judicial decree. *Id.* These servitudes share the common trait that they exist naturally between a higher and lower estate, and it is conceivable that the latter developed by analogy to the natural servitude of flow. See M. GAVINI DE CAMPILÉ, TRAITÉ DES SERVITUDES 58 (1856). Additionally, Lalure recognized that mountain streams and snow melt, not just rainwater, could be subject to the servitude of *cours d'eau*. LALURE, *supra* note 40, at 19. These departures from the Roman tradition suggest that by the late 18th century, at least, scholars had begun to identify natural servitudes as legal concepts distinct from the *actione*.

47. See YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 3, at 10. Real rights differ from other rights in that they do not require privity of contract; they are enforceable against the world. The rules for prescription also differ between actions in tort and property law, with property based actions having significant advantages. See discussion *supra* INTRODUCTION.

48. CODE CIVIL [C. CIV.] art. 640 (1804) (Fr.). Article 640 of the *Code Napoléon* stated:

Les fonds inférieurs sont assujettis envers ceux qui sont plus élevés, à recevoir les eaux qui en découlent naturellement, sans que la main de l'homme y ait contribué.

Le propriétaire inférieur ne peut point élever de digue qui empêche cet écoulement.

Le propriétaire supérieur ne peut rien faire qui aggrave la servitude naturelle du fonds inférieur.

*Id.*

likely derives from that text or the French jurists who provided a gloss on it.<sup>49</sup> At any rate, it suggests the continuing importance of natural law theory to the French conceptualization of the servitude. The first and second paragraphs of article 640 incorporated the traditional elements of the servitude of *flumen*, closely following the language used by the French *jurisconsultes*.<sup>50</sup> The third paragraph limited a dominant estate owner's right to alter natural drainage and overburden the servitude, a limitation that ultimately derived from the *actioe aquae pluviae arcendae*'s restriction on man-made works that increased the flow beyond its natural pace.<sup>51</sup>

### *C. Introduction into Louisiana and Developments in the Louisiana Civil Code*

Prior to 1808, Louisiana recognized a version of the servitude through the Spanish law of the *Siete Partidas*.<sup>52</sup> In 1808, Moreau Lislet formally introduced the servitude into Louisiana law by reproducing a version of article 640 of the *Code Napoléon* in article 4 of his *Digest of the Civil Laws Now in Force in the Territory of Orleans*, a predecessor to the Louisiana Civil Code of 1825.<sup>53</sup> Lislet's *Digest* was written in both French and English, and the French version of article 4 matched its source article almost word for word.<sup>54</sup>

49. DIG. 39.3.2 (Paulus, Ad Edictum 49).

50. Compare CODE CIVIL [C. CIV.] art. 640 (1804) (Fr.), with LALURE, *supra* note 40, at 19 (“[L]es lieux inférieurs sont assujettis aux lieux supérieurs . . . de supporter le dommage & le préjudice que la situation du terrain supérieur peut leur causer naturellement sans main-d’œuvre . . . de recevoir les eaux, le torrent & la fonte des neiges qui en coulent . . .”).

51. See DIG. 39.3.1 (Ulpian, Ad Edictum 53); see also LALURE, *supra* note 40, at 19–20.

52. MOREAU LISLET, A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS 128 (photo. reprt. Claitor’s 1971) (1808). Lislet’s manuscript indicates that his sources for the article on the servitude of drain included the *Siete Partidas*. *Id.*

53. Despite his references to the French scholar Domat and the *Siete Partidas*, Lislet seems to have derived his article from a source article in the precursor to the *Code Napoléon*, the 1803 *Projet du Gouvernement*, from which he copied that article word for word. *Id.*

54. LISLET, *supra* note 52, at 129. Lislet’s article 4 reads:

Les fonds inférieurs sont assujettis envers ceux qui sont plus élevés, à recevoir les eaux qui en découlent naturellement, sans que la main de l’homme y ait contribué.

Le propriétaire inférieur ne peut point élever de digues ou autres ouvrages qui empêchent cet écoulement.

Le propriétaire supérieur ne peut rien faire qui aggrave la servitude naturelle du fonds inférieur.

The English translation reads:

The article remained relatively unchanged throughout the different iterations of the Civil Code in 1825 and 1870.<sup>55</sup> In 1977, however, code revisionists split Lislet's article into two new articles, articles 655 and 656. The new article 655 contains the substance of paragraph one of the old article, while article 656 incorporates the substance of old paragraphs two and three.<sup>56</sup> In Louisiana jurisprudence, the servitude *d'écoulement* has taken on yet another name, the "servitude of drain,"<sup>57</sup> and legal scholars have adopted this name.<sup>58</sup>

Articles 655 and 656 appear in Book II, on Things and the Different Modes of Ownership, Title IV, on Predial Servitudes, and Chapter 2, on Natural Servitudes, in the Louisiana Civil Code. The servitude currently exists under Louisiana law as a "veritable predial servitude,"<sup>59</sup> just as it does under the French Civil Code. Predial servitudes are real rights that allow the holder to make some use of an immovable owned by another.<sup>60</sup> Correspondingly, they restrict the right of ownership, specifically the right of *usus* of

It is a service 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 service.

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

The proprietor above can do nothing whereby the natural services due by the estate below may be rendered more burthensome.

*Id.* at 128 (citations omitted). The only difference between Lislet's article and article 640 of the French code appears in the second paragraph, where Lislet inserts the phrase "*ou autres ouvrages*," translated "or other works," in order to broaden what had been an overly narrow statement of the doctrinal rule in the French version. In all other respects, Lislet followed his French source without deviation.

55. The Louisiana Civil Codes of 1825 and 1870 adopted the English language version of article 4 from the 1808 Digest, with one alteration. The 1825 redactors replaced the word "service" with the word "servitude."

56. The new articles read:

Art. 655. Natural drainage. An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow.

Art. 656. Obligations of the owners. The owner of the servient estate may not do anything to prevent the flow of the water. The owner of the dominant estate may not do anything to render the servitude more burdensome.

*See* LA. CIV. CODE arts. 655–656 (2015).

57. *See, e.g.,* Orleans Navigation Co. v. Mayor of New Orleans, 2 Mart. (o.s.) 214 (Orleans 1812).

58. *See* YIANNPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 12, at 55.

59. *Id.* § 33.

60. *Id.* § 1:3, at 10–11.

the person who holds title to the burdened estate.<sup>61</sup> For a predial servitude to exist, there must be two estates belonging to different owners.<sup>62</sup> Predial servitudes create real rights; the servitude benefits the land itself, rather than either estate's owner.<sup>63</sup> Moreover, under Louisiana's current classificatory organization, the servitude of drain is a *natural* predial servitude.<sup>64</sup> Unlike other predial servitudes, which may arise from convention, by alienation of title, or by operation of law, a natural servitude arises through the "imposition of nature itself."<sup>65</sup> In other words, for a natural servitude to exist, the estates must naturally possess certain characteristics.<sup>66</sup> Specifically, article 655 requires that there be one estate "situated below" and one estate "situated above."<sup>67</sup> Thus, the servitude cannot exist unless there are two distinct estates—owned by different people—one of which is naturally situated higher than the other.

#### *D. Alternative Classifications in Common Law and Foreign Civilian Jurisdictions*

The foregoing analysis has outlined the servitude's historical development, noting the changes that occurred as it expanded from its origins as a limitation on the Roman *actioe aquae pluviae arcendae*, through French law, and into the formal "veritable predial servitude" under current Louisiana property law.<sup>68</sup> This section now examines some recent developments in foreign

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61. *Id.* § 1:1, at 1.

62. *Id.* § 1:3, at 10.

63. *Id.* § 1:6, at 18.

64. See LA. CIV. CODE art. 655 (2015).

65. Compare LA. CIV. CODE arts. 708, 722 (2015), with LA. CIV. CODE art. 654 (2015), and LALURE, *supra* note 40, at 19. Again, the idea of a natural servitude owes to the natural law tradition and the French jurisconsultes. See *supra* note 45. The 20th-century French scholars Aubry and Rau place the servitude *d'écoulement* within the category of legal servitudes, or *servitudes* arising by operation of law. 3 AUBRY ET RAU, *supra* note 14. The concepts of natural and legal servitudes generally overlap because both technically arise by operation of law, but the traditional distinction between them owes to the natural law tradition. While legal servitudes arise out of society's perceived need to regulate water rights, natural servitudes arise from nature itself, and the law simply respects each landowner's natural rights. See, e.g., 1 OEUUVRES COMPLÈTES DE J. DOMAT, *supra* note 41.

66. LA. CIV. CODE art. 654 (2015).

67. LA. CIV. CODE art. 655 (2015).

68. See YIANNPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 3:9, at 106. See discussion *supra* Part I.B for a description of the gradual formalization of the higher and lower estates language into a definitive requirement, as well as the categorization of hydrological forms that the servitude could apply to.

jurisdictions that push back against the historical trend of formalization. As many recent scholars and foreign codes have recognized, the drainage rights provided under the servitude of drain could be categorized generally as restrictions on the real right of property ownership, rather than as elements of a rigidly formulaic predial servitude.

Many civilian jurisdictions classify drainage rights—or, more specifically, the right to be free from unnatural drainage—as an example of a restriction on property ownership rather than a proper predial servitude.<sup>69</sup> The Quebec, Greek, Dutch, and Swiss codes all place their versions of articles 655 and 656 in code sections entitled “Rights and Obligations of Landowners of Neighboring Properties” or other similar titles.<sup>70</sup> By placing their drainage articles outside the chapters on servitudes, these jurisdictions seem to reject the French view that drainage rights exist under a formal predial servitude. In the 1994 revisions of the Quebec Civil Code, for example, the legislature abandoned the old classificatory scheme, which followed the French Civil Code’s natural-servitude approach. Now, Quebec’s equivalent to Louisiana’s article 655 appears within a chapter on “Special rules on the ownership of immovables.”<sup>71</sup> Even in France, where civil code article 640 remains unchanged, scholars have begun to question the classification of the servitude *d’écoulement* as a real servitude.<sup>72</sup> Of course, servitudes by their nature are restrictions on property ownership, but by taking them out of the realm of predial servitudes, this new trend arguably makes application of the rights more flexible.

The comments to the most recent version of Louisiana’s article 654, which describes the different types of predial servitudes,

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69. This seemingly novel classification does not totally contradict the historical conception of the servitude. For example, Lalure qualified the classification of flowing water as a servitude saying: “This damage will be considered less as the effect of a servitude than as a natural inconvenience . . . .” LALURE, *supra* note 40, at 19. The distinction drawn here between a natural servitude and a natural inconvenience suggests that Lalure felt uneasy with the Roman classification as a servitude. As a natural inconvenience, it seems to have been more of a limitation on property ownership than an actual servitude.

70. See Civil Code of Québec, S.Q. 1991, c. 64, art. 979 (Can.); ASTIKOS KODIKAS [A.K.] [CIVIL CODE] 3:1024 (Greece); Burgerlijk Wetboek (BW) [Civil Code] art. 170 (Neth.); SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] Dec. 10, 1907, SR 210, art. 690 (Switz.).

71. Civil Code of Québec, S.Q. 1991, c. 64, art. 301 (Can.).

72. See, e.g., MAZEAUD, *supra* note 45, at 375–76; 2 AUBRY ET RAU, *supra* note 14. As noted above, French scholars have been skeptical of the servitude’s status as a real property right since its incorporation as such into the French civil code. See *supra* note 45.

acknowledge that modern civil codes and theorists have shifted away from the concept of natural servitudes, preferring instead to classify the duties traditionally attributed thereto as limitations on property rights.<sup>73</sup> The drafters of the Louisiana code decided not to follow these jurisdictions and rejected modernization of articles 655 and 656 in favor of “tradition.”<sup>74</sup>

While the code drafters’ respect for civilian tradition is admirable, practically speaking, Louisiana’s relatively flat topography often makes it difficult to apply the formal predial servitude of drain. Specifically, it is often impossible to determine whether one estate is “situated above” another, even at points where drainage positively occurs.<sup>75</sup> If Louisiana were to follow the modern trend and reclassify the rights embodied in the servitude of drain as “limitations on property ownership” or simply relax the rules for creating natural predial servitudes in certain circumstances, the servitude might apply more broadly across the state’s unique topography.<sup>76</sup>

If Louisiana were to adopt a more flexible approach to applying articles 655 and 656, the servitude of drain would effectively

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73. Act No. 514, 1977 La. Acts 1349.

74. LA. CIV. CODE art. 654 cmt. d (2015). Nonetheless, there may still be some authority under Louisiana law for a flexible application of the servitude of drain, specifically by analogy to available doctrine on legal servitudes. Under current Louisiana law, certain restrictions on ownership, including eavesdrip, repair of buildings, and projections over property boundaries, are classified as legal servitudes. This special class of servitudes developed out of the traditional civilian principle that “although one is at liberty to do with his estate whatever he pleases, still one can do nothing which may cause injury to the neighbor.” YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 32, at 95 (quoting POTHIER, DE LA SOCIÉTÉ NO. 235, 4 OEUUVRES DE POTHIER 330 (Bugnet ed., 1861)). *See also* LA. CIV. CODE art. 667 (2015). The Louisiana Civil Code considers legal servitudes true predial servitudes, but the law permits flexibility in their application. As Yiannopoulos has recognized:

Restraints [on ownership] that could not be classified as predial servitudes . . . *because of the absence of a dominant estate* . . . in order to be enforced against a violator ought to be classified as a special kind of personal obligations that are enforceable despite the absence of privity or as real rights.

A.N. YIANNOPOULOS, PROPERTY § 229, at 451, *in* 2 LOUISIANA CIVIL LAW TREATISE 505 (4th ed. 2001) [hereinafter YIANNOPOULOS, PROPERTY] (emphasis added). Even when the estates themselves do not conform to the requirements of a legal servitude, courts have been willing to apply legal servitudes as restrictions on property ownership. “In order to afford protection in appropriate cases, French courts have occasionally strained the notion of personal obligations, whereas Louisiana courts developed a body of law dealing with ‘building restrictions’ as distinct species of real rights.” *Id.*

75. *See* discussion *infra* Part II.B.

76. *See id.*



become a more specific example under nuisance law. From a historical perspective, this change might seem logical since, from its origins in Roman law, the “servitude” and the *actione* dealt with nuisance issues, prohibiting interference with property rights through alterations of drainage.<sup>77</sup> Under the servitude, landowners cannot alter natural drainage in such a way as to cause damage to their neighbor’s property. This fits perfectly under the nuisance article 667, which states, “[a]lthough 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.”<sup>78</sup> Applying the drainage rights established in articles 655 and 656 under a nuisance theory would also bring Louisiana into line with recent trends in American common law jurisdictions. American jurisdictions have traditionally taken two different approaches to the regulation of drainage, some following the civil law and Louisiana’s natural servitude rule, others following an American common law rule called the common-enemy rule.<sup>79</sup> More recently, however, many states have adopted a “reasonable use” rule, which permits a landowner to alter the drainage of his or her property so long as the alteration does not cause “unreasonable” injury to his or her

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77. See *supra* Part I.A.

78. LA. CIV. CODE art. 667 (2015). Articles 667 through 669, the “vicinage articles,” provide a tort action analogous to the rights under the “legal servitudes.” LA. CIV. CODE arts. 667–669 (2015). Most modern scholars understand these articles to represent the Louisiana equivalent of the common law tort of nuisance. See YIANNOPOULOS, *PREDIAL SERVITUDES*, *supra* note 12, § 38, at 105–08.

79. See Joseph W. Dellapenna, *The Legal Regulation of Diffused Surface Water*, 2 VILL. ENVTL. L.J. 285, 292–93 (1991). The common-enemy rule permits a landowner to take any means necessary to divert water, the “common enemy” of all landowners, off of his property. He may do so without regard for injuries that could result to neighboring landowners. *Id.* at 296. See also *Caldwell v. Gore*, 143 So. 387, 388 (La. 1932).

According to the common law rule, no natural easement or servitude exists in favor of the higher estate as to mere surface water, and the proprietor of the lower estate may lawfully obstruct the flow of the water thereon, even to the extent of diverting the water onto and over the higher estate. By the civil law rule, the lower estate owes a natural easement or servitude to the upper estate to receive all the natural drainage thereof, which drainage cannot be interrupted or prevented by the proprietor of the lower estate to the injury of the upper estate.

*Id.* (citations omitted). The common-enemy rule has been criticized for incentivizing landowners to compete with each other in building levees to force water onto each other’s property. Dellapenna, *supra*, at 297–98. See also DEMOLOMBE, *supra* note 45, at 24 (observing that the common-enemy rule would result in a “war without truce and without end” between neighboring landowners).

neighbor.<sup>80</sup> The shift toward a “reasonable use” standard indicates that many states prefer to deal with drainage issues under a nuisance theory rather than through a property law predial servitude.

From conceptual and practical standpoints, the rights embodied under the servitude could be considered a limitation on property ownership, similar to the vicinage articles, and applied under a “reasonable use” standard. Such a reclassification would bring Louisiana into line with its sister jurisdictions, properly reflect the servitude’s Roman origins, and make it easier for Louisiana courts to apply rules developed in the context of the European continent to the local landscape. However, until the legislature is willing to take this reclassificatory step, the formal rules for applying the predial servitude remain in force. Accordingly, this Comment now turns to an analysis of those rules and how they might apply to Louisiana geography.

## II. APPLICATION OF THE SERVITUDE’S FORMAL ELEMENTS

The Louisiana Civil Code states that where surface waters flow naturally from a higher estate onto a lower estate, a natural servitude of drain requires the lower estate to receive those waters.<sup>81</sup> The language of the code article presupposes two necessary elements for the existence of the servitude: (1) naturally flowing surface waters; and (2) two estates: one “situated above,” and the other “situated below.” This analysis considers each of those requirements in turn.

### A. Characteristics of Waters Subject to the Servitude of Drain

The servitude applies to waters that drain naturally across neighboring properties. However, water flowing across land can

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80. Dellapenna, *supra* note 79, at 309–11. *See also Caldwell*, 143 So. at 387–88:

In some jurisdictions a modified common law rule is followed, based on the maxim that one must so use his own as not unnecessarily to injure others. In those jurisdictions, it would seem that, while surface water may be fended off if this is done reasonably, for proper objects, and with due care as regards adjacent property, no right exists to obstruct its natural flow arbitrarily, wantonly, or unreasonably. Arkansas, it appears, maintains a modified doctrine, following neither the strict rule of the common law nor the civil law, but applying the law to the circumstances of each case. Louisiana, of course, is governed by the civil law rule.

*Id.* (citations omitted).

81. LA. CIV. CODE art. 655 (2015) (“An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow.”).

take many hydrological forms. For example, it may sheet flow as diffused surface water originating from rainfall or flow in a well-cut channel as a river or stream. It may flow underground in subterranean rivers, or it may flow in and out across wetlands with the tide. This section considers the limitations, if any, on the hydrological categories to which the servitude of drain might apply.

### 1. Civil Code Article 655

The language of the civil code provides little guidance as to what types of waters fall under the servitude of drain. The terms of article 655 suggest two basic limitations: the waters must be (1) surface waters,<sup>82</sup> which (2) “flow naturally.”<sup>83</sup>

Louisiana courts have long subscribed to the civilian interpretive principle that *ubi lex non distinguit, nec nos distinguere debemus*—“Where the law does not distinguish, nor should we distinguish.”<sup>84</sup> Under this logic, since the code does not distinguish between different types of surface waters, all surface waters that flow naturally could be subject to the servitude. Additionally, article 655 should be read *in pari materia* with the other articles in the chapter.<sup>85</sup> Whereas articles 657 and 658 strictly limit their application to running waters,<sup>86</sup> *a contrario*, articles 655 and 656 make no such distinction.<sup>87</sup> A strict exegetical reading of the code suggests the possibility of a broad interpretation, which would

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82. The Louisiana Legislature adopted this limitation from the Louisiana Second Circuit decision in *Adams v. Grigsby*, 152 So. 2d 619, 621–22 (La. Ct. App. 1963). See LA. CIV. CODE art. 655 cmt. c (2015).

83. Article 655 applies to “waters that flow naturally . . . unless an act of man has created the flow.” LA. CIV. CODE art. 655 (2015). This article mistranslates the 1808 French digest, which stated, “*les eaux qui en découlent naturellement, sans que la main de l’homme y ait contribué.*” The phrase, “unless the act of man has created the flow,” in turn, a modification of the 1870 version “provided the industry of man has not been used to create that servitude,” should have been translated as “unless an act of man has contributed to the flow.” *Id.* cmt. b (emphasis added). While the distinction between creating and contributing to the flow may prove significant when considering the duties of landowners, for the purposes of determining what types of waters give rise to the servitude, the language indicates that waters “flow naturally” as long as man’s intervention has not created or contributed to their movement. See discussion *infra* Part III.

84. See, e.g., *Ventrialla v. Tortorice*, 107 So. 390, 392 (La. 1926); *Greffin’s Ex’r v. Lopez*, 5 Mart. (o.s.) 145, 160 (La. 1817).

85. See *Malone v. Cannon*, 41 So. 2d 837, 843 (La. 1949); *Succession of Hebert*, 5 La. Ann. 121 (1850).

86. See LA. CIV. CODE arts. 657, 658 (2015).

87. See LA. CIV. CODE arts. 655–656 (2015).

encompass all “surface waters that flow naturally.”<sup>88</sup> Some doctrinal sources support this broad interpretation, suggesting that the servitude could apply to any water that flows naturally on the surface of land.<sup>89</sup>

The history of the code language’s development further supports this broad interpretation. At early Roman law, the *actioe aquae pluviae arcendae* applied only, as its name suggests, to rainwaters, or what modern hydrological scientists would term diffused surface waters, i.e., waters that originated in the sky and run across the surface of the earth in small streams or rivulets or as sheet flow.<sup>90</sup> By the time Justinian compiled his *Digest*, however, scholars had extended the *actioe* to cover damages caused by water from natural springs.<sup>91</sup> In *Ancien Régime* France, scholars further extended the servitude to encompass other naturally running waters, like mountain streams, which differ from diffused surface waters in that they flow along a constant, semi-regular channel.<sup>92</sup>

By the turn of the 19th century and the drafting of the *Code Napoléon*, continental scholarship had settled on three hydrological forms, consistently discussing the servitude in terms of its applicability to rainwaters, spring waters, and running waters.<sup>93</sup> However, when the drafters of the *Code Napoléon* authored article 640, they chose to omit reference to any specific hydrological form. The article describes “waters that flow naturally” without any reference to hydrological forms, not even rainwater.<sup>94</sup> This suggests either that the French redactors wanted to abandon hydrological limitations altogether or that the issue of what kind of waters to which the servitude could apply never came up in France. Since inland continental hydrology is mostly uniform, there would be no reason for French scholars to ever consider the servitude’s application to any other type of waters like tidal or subterranean waters.

Lislet’s *Digest* of 1808 copied the French source article almost word for word, and his English translation broadly describes

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88. LA. CIV. CODE art. 655 (2015).

89. See, e.g., GUY-CLAUDE HENRIOT & PIERRE ROSSILLION, *LES SERVITUDES DE DROIT PRIVÉ ET DE DROIT PUBLIC* 31 (1969); MAURICE BOUSQUET, *DES SERVITUDES DE DROIT CIVIL* 8–9 (Émile Thézard ed., 1913).

90. See discussion *supra* Part I.A; WATSON, *THE LAW OF PROPERTY*, *supra* note 31, at 156; Dellapenna, *supra* note 79, at 292–93.

91. See discussion *supra* Part I.A; DIG. 39.3.3 (Ulpian, Ad Edictum 53).

92. LALURE, *supra* note 40, at 19.

93. See, e.g., *id.*

94. CODE CIVIL [C. CIV.] art. 640 (1804) (Fr.).

“waters which *run* naturally.”<sup>95</sup> In 1977, the redactors of the Louisiana Civil Code altered the English text from the 1808 *Digest* by replacing the word “run” with the word “flow.”<sup>96</sup> Though the comments do not indicate the reason for this change,<sup>97</sup> the substitution could be read as an attempt to broaden the scope of the article beyond waters that “run,” which have a strict definition under Louisiana law,<sup>98</sup> to all waters that “flow” more generally. History has broadened the servitude beyond its original scope, and Louisiana’s current article arguably establishes the servitude in the most general terms to date.

## 2. Doctrine

Despite the broad language of the French code article, scholars have maintained the traditional application of the servitude of drain to three types of waters: rainwaters, running waters, and spring waters.<sup>99</sup> Because scholarship has traditionally focused on these three hydrological forms, this analysis will present a brief explication of each.

### a. Rainwaters and Spring Waters

The application of the servitude of drain to rainwaters dates back to the era and language of the Twelve Tables.<sup>100</sup> Roman jurists defined rainwater as “water which falls from the sky and is increased in quantity by a rainstorm.”<sup>101</sup> Jean-Marie Pardessus, writing on the French article 640 in the decades following the adoption of the *Code Napoléon*, divided all surface waters into two types: water that emerges from the ground and water that falls

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95. LISLET, *supra* note 52, at 128 (emphasis added).

96. See Act No. 514, 1977 La. Acts 1350.

97. *Id.*

98. See, e.g., *Verzwyvelt v. Armstrong-Ratteree, Inc.*, 463 So. 2d 979, 985 (La. Ct. App. 1985) (requiring continuous current for running waters).

99. See YIANNOPOULOS, *PREDIAL SERVITUDES*, *supra* note 12, § 18, at 57; ALPHONSE ROMEU POBLET, *COMMENT S’EXERCENT LES SERVITUDES DE DROIT PRIVÉ* 29 (1990). Initially, the *actioe aquae pluviae arcendae* applied only to rainwaters. See DIG. 39.3.1 (Ulpian, Ad Edictum 53). By late antiquity, however, jurists had expanded the servitude to cover spring water naturally occurring on the higher estate. *Id.* As the servitude developed in modern jurisdictions, scholars began to recognize its application to running waters more generally, applying the doctrine to rivers and streams that flowed across the higher estate and then onto the lower estate. See, e.g., LALURE, *supra* note 40, at 19; M.V.H. SOLON, *TRAITÉ DES SERVITUDES RÉELLES* 55 (1837).

100. WATSON, *XII TABLES*, *supra* note 22. See discussion *supra* Part I.A.

101. DIG. 39.3.1 (Ulpian, Ad Edictum 53).

from the sky.<sup>102</sup> In the former category, he included rivers and streams, and in the latter, he included rainwater and snow melt.<sup>103</sup> Hilbert, writing in the middle of the 20th-century, provided a more scientific analysis of what qualifies as rainwater.<sup>104</sup> Hilbert described the natural process by which water evaporates from the seas and running waters and then falls to the earth as rain or snow and then re-evaporates into the air.<sup>105</sup> What Hilbert considers rainwaters for the purposes of the servitude are waters that have fallen from the sky and glide along the surface, forming rivulets and streams along their path to lower ground.<sup>106</sup>

Additionally, the servitude could apply to overflow from a natural body of water swollen by rain.<sup>107</sup> According to the first-century jurist Ulpian, the servitude applied where a rainstorm increased the volume of an existing body of water, like a marsh, which flooded onto neighboring property.<sup>108</sup> A landowner was prohibited from constructing a dam to block this natural overflow.<sup>109</sup>

102. PARDESSUS, *supra* note 45, at 171.

103. *Id.*

104. A. HILBERT, 4 TRAITÉ GÉNÉRAL DES SERVITUDES FONCIÈRES 19 (1949).

105. *Id.*

106. *Id.* In scientific terms, the flow of rainwater Hilbert describes is called “sheet flow” or “overland flow.” WILFRIED BRUTSAERT, HYDROLOGY: AN INTRODUCTION 161 (2005).

When for some reason, such as rainfall, snowmelt, the overtopping of small depressions, or the emergence of groundwater at a source, surface flow is initiated, it may at first proceed as a thin sheet flow; however, as a result of local irregularities, the flow soon gathers in small gullies and rills, which in turn join to form rivulets in the fashion of a tree-like network. Eventually these merge with others to become larger rivers, which finally end up in some lake or in the ocean. Thus the flow system consists of an intricate combination of many different types of flow regimes, in channels of different geometries and sizes. For purposes of analysis, to describe the basic hydraulic elements of landsurface runoff, it is convenient and useful to distinguish between two major types of free surface flow; these are first, sheet flow or overland flow, which is most likely to occur under conditions of heavy precipitation in source areas where runoff is being generated which feeds into streams; and second, the flow that occurs in larger permanent open channels.

*Id.*

107. *See, e.g.*, BOUSQUET, *supra* note 89; DEMOLOMBE, *supra* note 45, at 33.

108. DIG. 39.3.1 (Ulpian, Ad Edictum 53).

109. *Id.* Ulpian cites a situation in which a marsh overflowed by rainwater could be subject to the *actio*:

Where somebody has made a construction to keep out water which normally flows onto his field from an overflowing marsh, if that marsh is increased in size by rainwater and the said water, held back by the construction in question, damages his neighbor’s field, he will be compelled to remove it by means of an action to ward off rainwater.

*Id.*

Likewise, French scholars have long considered the servitude to be applicable to marsh and pond overflow.<sup>110</sup>

Spring waters, which arise from subterranean sources, typically contribute to streams or flow across the surface in rivulets or sheet flow, either connecting to a larger water body, evaporating, or stagnating.

*b. Running Waters*

Although it may be counterintuitive to describe rivers and streams as “draining” from one property to the next, jurists have recognized the servitude’s applicability to these types of waters since at least the 18th century. The idea that running waters could give rise to the servitude of drain developed in French law and was confirmed in the articles on natural servitudes in the French and Louisiana civil codes.<sup>111</sup> However, neither the code nor the doctrine provides a sound definition of “running waters.”<sup>112</sup> Louisiana jurisprudence, on the other hand, has developed certain guidelines to determine the scope of “running waters” for purposes of classifying public things.<sup>113</sup> The Louisiana Third Circuit Court of Appeal has required running waters to have a continuous current,<sup>114</sup> and a recent First Circuit case states that waters affected by tidal movement but that are otherwise stagnant do not qualify as running waters.<sup>115</sup>

It is unclear whether French scholars ever considered these three categories to be the exclusive forms to which the servitude

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110. See, e.g., BOUSQUET, *supra* note 89, at 8–9. Nineteenth-century French scholarship applied article 640 to marshes overflowed by rainwater. DEMOLOMBE, *supra* note 45, at 33.

111. LA. CIV. CODE arts. 657–658 (2015). Articles 657 and 658 of the Louisiana Civil Code, which appear in the same chapter as the articles on natural servitudes, establish the rights of riparian owners on running waters. A reading of article 655 *in pari materia* with articles 657 and 658 suggests that the servitude established in the former would apply to the types of waters discussed in the latter. The fact that the servitude of drain applies to running waters is conclusively settled in the doctrine. See, e.g., YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 18, at 58 n.22; POBLET, *supra* note 99; HENRIOT & ROSSILLION, *supra* note 89.

112. See LA. CIV. CODE arts. 657–658 (2015).

113. See LA. CIV. CODE art. 450 (2015) (“Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.”).

114. *Verzwyvelt v. Armstrong-Ratteree, Inc.*, 463 So. 2d 979, 985 (La. Ct. App. 1985).

115. *Brown v. Francis*, No. 2011-CA-1509, 2012 WL 1799178, at \*5 (La. Ct. App. May 17, 2012).

could apply. Some sources list these categories as “examples,” suggesting that this list is illustrative rather than exclusive.<sup>116</sup>

### 3. Louisiana Jurisprudence

Even if the French scholars did consider the servitude to be exclusively applicable to limited categories of waters, Louisiana courts have ignored this limitation and applied the servitude to other waters distinctive to Louisiana hydrology. One Louisiana Supreme Court case has held the servitude applicable to tidal waters. In *Poole v. Guste*, the parties owned adjacent tracts of land.<sup>117</sup> The Guste estate historically received surface waters that ran from the Poole property via a natural drain at a point along the boundary.<sup>118</sup> The trial court described the types of waters that ran from the higher estate to the lower estate as “rainwater, other waters draining onto the Poole property from the north, and *tidal overflow water*.”<sup>119</sup> The tidal water came from nearby Lake Pontchartrain, flowing in over the Guste estate and then onto the Poole lands.<sup>120</sup> As the tide receded, the water flowed back down from the Poole estate over the Guste property and eventually back to Lake Pontchartrain.<sup>121</sup> The Court found that the Guste estate owed the Poole estate a servitude of drain for this water that flowed as a result of tidal movement.<sup>122</sup>

In its analysis, the Court never considered the traditional hydrological categories established in doctrinal sources. Of course, this makes sense considering the unique characteristics of

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116. BOUSQUET, *supra* note 89. Bousquet lists several hydrological forms as examples of situations where the servitude could apply. *Id.*

117. *Poole v. Guste*, 262 So. 2d 339, 340 (La. 1972).

118. *Id.*

119. *Id.* at 340–41 (emphasis added).

120. *Id.* “[A]t high tide, after the Canal was built, [the tidal water] flowed onto the Poole land from the south (through the Dendinger Canal) and from the west (from a natural creek.) When the tide ebbed, the waters then drained southeasterly from the Poole land into the Dendinger Canal.” *Id.* at 341.

121. *Poole v. Guste*, 246 So. 2d 353, 358 (La. Ct. App. 1971), *aff’d*, 262 So. 2d 339 (La. 1972).

122. *Poole*, 262 So. 2d at 340–42. While the Court’s treatment of tidal waters suggests an inclination to ignore doctrinal categories, a different Louisiana case indicates judicial hesitance to extend the servitude to new hydrological forms. In *Adams v. Grigsby*, the Louisiana Second Circuit refused to apply the servitude to subterranean waters. *Adams v. Grigsby*, 152 So. 2d 619, 621–22 (La. Ct. App. 1963). This limitation was adopted by the Legislature in the 1977 revision of the Louisiana Civil Code. *See* LA. CIV. CODE art. 655 cmt. c (2015). Arguably, by analogy, courts should be reluctant to extend the servitude beyond its traditional scope as expressed in the doctrinal limitations of rainwater, spring water, and running water.



Louisiana hydrology, which includes features such as massive tidal surges and reversible bayous, like Bayou Manchac. Many of Louisiana's European sister jurisdictions have never dealt with the legal issues arising out of such water bodies. In *Poole*, the Court implicitly recognized that the categories for the servitude's application that developed on the European continent might not harmonize with Louisiana's distinctive hydrology.<sup>123</sup> Its willingness to apply the servitude to tidal waters suggests that Louisiana courts might favor the broad application of article 655 to *any* flowing surface waters, or at least to waters characteristic of Louisiana hydrology but relatively unknown in Europe.

### *B. Characteristics of Estates Subject to the Drainage Servitude*

Unlike conventional servitudes, which two landowners can establish through a juridical act, the servitude of drain exists strictly because of the natural situation of the estates.<sup>124</sup> This implies that the servitude can only exist when the estates themselves conform to certain criteria constitutive of a natural servitude. According to the code language, one estate must be "situated above," and one must be "situated below."<sup>125</sup>

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123. YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 18, at 59.

124. See LA. CIV. CODE art. 654 (2015).

125. LA. CIV. CODE art. 655 (2015) ("An estate *situated below* is bound to receive the surface waters that flow naturally from an estate *situated above* . . . ." (emphasis added)). Arguably, over the course of the servitude's history, two other characteristics have limited the types of estates that could come under a servitude of drain. First, some modern scholars have suggested that at Roman law, a natural servitude only applied between two contiguous estates. See SOLON, *supra* note 99, at 50–51. Modern scholars and codes have expressly abandoned this restriction. Even a public land between the estates does not constitute a barrier to the servitude. Article 648 of the Louisiana Civil Code states that, "Neither contiguity nor proximity of the two estates is necessary for the existence of a predial servitude. It suffices that the two estates be so located as to allow one to derive some benefit from the charge on the other." LA. CIV. CODE art. 648 (2015). Since the Louisiana Legislature still considers the natural servitude of drain a true predial servitude, article 648 should apply. See LA. CIV. CODE art. 654 cmt. d (2015). Thus, non-contiguity does not eliminate the possibility of a natural servitude of drain. Second, the servitude of natural flow originated in an agrarian setting and some Roman jurists strictly limited its application to "fields." DIG. 39.3.1 (Ulpian, Ad Edictum 53). French scholars abandoned this requirement and expanded the servitude to estates that had buildings or cities. See *also* Orleans Navigation Co. v. Mayor of New Orleans, 2 Mart. (o.s.) 214 (Orleans 1812) (applying the servitude between the city of New Orleans, as the dominant estate, and swamp land lying behind it onto which it drained, as the servient estate). However, the Greek Civil Code retained a version of the "field" requirement, specifically requiring application to "agricultural immovables." See

Dating back to the servitude's origins in the Roman *actioe aquae pluviae arcendae*, scholars have used the language of higher and lower estates to distinguish between the dominant and servient estates subject to the servitude.<sup>126</sup> For example, the eminent jurist Ulpian described the *actioe* as:

[A]vailable to both the owner of a higher piece of land against the owner of a lower piece to stop the latter carrying out work to prevent naturally flowing water passing down through his own field and to the owner of a lower piece of land against the owner of a higher piece to stop the latter causing the water to flow other than naturally.<sup>127</sup>

Similarly, Labeo described the servitude itself in these terms:

[When] water flows naturally onto a lower field and causes damage, an action to ward off rainwater cannot be brought since there is always a servitude applying to lower properties by which they must receive any water that flows onto them naturally. . . . [a field's] natural state must be preserved and a lower field must always be under servitude to a higher one, this inconvenience being something that a lower field must suffer vis-à-vis a higher one as a matter of nature . . . .<sup>128</sup>

These jurists established the basic terminology that modern codes, courts, and scholars still use to discuss the servitude.

*Ancien Régime* French commentators, undoubtedly influenced by these examples in the Roman *Digest*, tended to emphasize the higher and lower estate language.<sup>129</sup> The drafters of the *Code Napoléon* included the language of higher and lower estates in article 640, effectively formalizing a higher and lower requirement

ASTIKOS KODIKAS [A.K.] [CIVIL CODE] 3:1024 (Greece); LA. CIV. CODE art. 655 (2015).

126. DIG. 39.3.1 (Ulpian, Ad Edictum 53). Ulpian, Paulus, and Alfenus all describe the *actioe aquae pluviae arcendae* in terms of higher and lower lands. *Id.* See also DIG. 39.3.2 (Paulus, Ad Edictum 49); DIG. 39.3.24 (Alfenus, Digestorum A Paulo Epitomatorum 53). According to Paulus, a lower estate could come under a servitude to a higher one by law, custom, or simply because of the nature of the site. DIG. 39.3.2 (Paulus, Ad Edictum 49).

127. DIG. 39.3.1 (Ulpian, Ad Edictum 53).

128. *Id.* (alteration in original).

129. See, e.g., LALURE, *supra* note 40, at 19. A copy of the Roman text of the *Digest* appears in an appendix to Lalure's treatise along with a French translation.

as a prerequisite for the application of the servitude.<sup>130</sup> In Louisiana, the higher and lower estate language has been a fixture of article 655 since Lisle's *Digest* of 1808,<sup>131</sup> and Louisiana doctrine and jurisprudence have required the party alleging the existence of the servitude to prove a height differential between the estates.<sup>132</sup>

However, some evidence from Roman law calls into question this insistence on higher and lower estates as an absolute prerequisite. One of the early examples cited by Roman jurists, an overflowing marsh, proves the reverse of the normal higher and lower estates rule.<sup>133</sup> When a marsh overflows, water rises above its banks and drains off onto the higher land of neighboring property. The fact that the servitude applied here, where the marsh on the dominant estate was likely situated below the servient estate, raises the possibility that, at Roman law, overall higher and lower estates were not a dispositive requirement of the servitude. It seems likely that the higher and lower estate language was more a convenient description that, in practice, covered many situations in which the servitude could apply.

The Romans, who used the higher and lower estate language so frequently in the *Digest*, might have done so as a generalization of the typical scenario in which the *praetors* had to apply the servitude. In hilly terrain like the European countryside, "most estates are small, the terrain is ordinarily uneven, and the water flows in an easily ascertainable single direction."<sup>134</sup> It seems only

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130. CODE CIVIL [C. CIV.] art. 640 (1804) (Fr.). Perhaps contradictorily, some French doctrine still recognized the servitude's applicability to marsh and pond overflow. See, e.g., BOUSQUET, *supra* note 89, at 8–9. Nineteenth-century French scholarship applied article 640 to marshes overflowed by rainwater. DEMOLOMBE, *supra* note 45, at 33.

131. See discussion *supra* Part I.C.

132. See, e.g., *Poole v. Guste*, 246 So. 2d 353, 357 (La. Ct. App. 1971), *aff'd*, 262 So. 2d 339 (La. 1972). "[T]he burden is on the plaintiffs to prove by a preponderance of the evidence that the elevation of their lands is higher than the defendants' estate so that the waters will flow naturally from plaintiffs' properties onto the lands of the defendants." *Id.* See also YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 18, at 57 ("A person who claims a servitude has the burden of proving by a preponderance of the evidence that his estate is higher than that of his neighbor.").

133. DIG. 39.3.1 (Ulpian, Ad Edictum 53).

134. YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 18, at 57. In its earliest form, the *actio aquae pluviae arcendae* and corresponding servitude of *flumen* applied mostly in agrarian settings. According to Ulpian in the first-century CE, the *actio* could only apply to a "field." DIG. 39.3.1 (Ulpian, Ad Edictum 53). A stream or rain-formed rivulet, for example, would run from a high point on the dominant estate to a lower point on the neighboring field, which then became the servient estate. DIG. 39.3.24 (Alfenus, Digestorum A

natural that continental Roman and French scholars would have discussed the servitude in terms of their surrounding geography, and they may never have even considered its application in flatlands, swamps, or coastal regions. Arguably, the drafters of the *Code Napoléon*, in their zeal to formalize black letter law, mischaracterized the Roman higher and lower estate language, transforming it into a definitive prerequisite for the servitude rather than a descriptive generalization. The requirement, which seems absolute on the face of the current Louisiana and French code articles, may have been the result of mere historical accident.

Although the higher and lower estate requirement may have made sense to Europeans looking at the continental landscape, it may be incongruous to require strict formal adherence in Louisiana where the flat, marshy terrain differs significantly from Europe. Take, for example, Bayou Manchac, discussed above. The bayou developed over 4,500 years ago when floodwaters from the Mississippi river punched a hole in its eastern bank and gradually carved a channel reaching toward the Amite River and eventually to the Gulf of Mexico via Lake Borgne.<sup>135</sup> The bayou's bed sits to the east of the Mississippi but on higher land than the Mississippi river bed.<sup>136</sup> Thus, the larger river can only feed the bayou at times of high flooding when the water level builds enough to overcome this height differential.<sup>137</sup> The bayou also receives water from the Amite River to the east, but again only at times of high flooding when the excess water from the Amite possesses enough force to overcome the land's natural west-to-east slope.<sup>138</sup> During times of normal water levels, the bayou tends to dry up, making it difficult to traverse as the French discovered in 1699. Because of these peculiar geographical features, over the course of a year the bayou might flow from the Mississippi, from west to east, or switch directions and flow from the Amite, east to west. If a court had to apply the servitude of drain along this water body, it would have difficulty determining which estate is dominant and which is servient. Technically, a western property might be elevated slightly higher than its neighbor to the east, but at the same time water could flow from east to west. In such a case, which should be the dominant estate? The higher estate, or the estate from which the

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Paulo Epitomatorum 53). This example provided by Alfenus seems like a typical situation in which the *actione* could apply. *Id.*

135. STERNBERG, *supra* note 1, at 29–30.

136. *Id.* at 30.

137. *Id.*

138. *Id.*

water is flowing? Could one property be the dominant estate for part of the year and then switch over to become the servient estate when the water changes directions?

A legal realist might reject the higher and lower estates rule on the basis that it does not accommodate the hydrological conditions found around the state in places like Bayou Manchac. Not surprisingly, Louisiana courts and scholars have found ways to adapt the rule to fit the local landscape.<sup>139</sup> Prominent Louisiana scholar A.N. Yiannopoulos, for example, has recognized the inappropriateness of applying a rule formulated for the rural European landscape to the marshy flatlands of Louisiana.<sup>140</sup> Consequently, he has taken a flexible stance on the higher and lower estate requirement.<sup>141</sup> The natural servitude of drain, he observes, “follows individual patterns along particular points of the boundary, namely, it attaches to points at which one estate is higher than the other.”<sup>142</sup> He notes that the most reliable guide to elevation at these points is the flow of the water itself rather than the overall height differential.<sup>143</sup> The flow of water at individual points, he concludes, should determine the application of the servitude.<sup>144</sup>

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139. See, e.g., *Pickett v. Taylor*, 316 So. 2d 778, 780 (La. Ct. App. 1975); *Broussard v. Cormier*, 98 So. 403, 405 (La. 1923); *La. Irrigation & Mill Co. v. Sixth Ward Drainage Dist.*, 104 So. 623, 624 (La. 1925) (“That the land drains naturally towards the point of which we have spoken is shown conclusively, as we have said. But the slope of the land is very gentle, and therefore the flow of the water is slow and widespread, thus causing no erosion and cutting no defined channel. Hence we are not dealing with a drain at all, whether natural or artificial, but with drainage-natural drainage; and with the right vel non of one possessor of an estate to interfere with the natural drainage of another estate.”). These “adaptations” of the servitude are similar to the *Poole* court’s expansion of the traditional hydrological categories established in European doctrine to accommodate tidal waters. See discussion *supra* Part II.A.3.

140. YIANNOPOULOS, *PREDIAL SERVITUDES*, *supra* note 12, § 18, at 57.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* Yiannopoulos noted:

The provisions of the Civil Code must be applied in accordance with common sense and reason, without involved scientific calculations. Denial of a natural servitude of drain at a particular point for the reason that overall elevation is lacking would upset natural flows and would render cultivation and irrigation uneconomic in many areas. The purpose of the natural servitude of drain is to maintain the *status quo* as it exists in nature, and this is accomplished by the recognition of a natural servitude of drain at particular locations.

*Id.*

Yiannopoulos's reading of the servitude finds support in Louisiana jurisprudence.<sup>145</sup> In *Pickett v. Taylor*, for example, a landowner sued his neighbor for erecting levees along the property boundary that allegedly caused flooding.<sup>146</sup> The plaintiff contended that his property constituted a dominant estate under the servitude of drain and that the defendant's actions in building the levee had blocked the natural flow of water, flooding his property and soy bean crop.<sup>147</sup> The court found that the water in the area generally drained southward, from the defendant's property towards the plaintiff's property, but that a "ditch" near the boundary between the tracts in question allowed water from part of the plaintiff's property to drain in a northeasterly direction onto the defendant's land.<sup>148</sup> Conflicting testimony at trial suggested that the overall elevation drop over the quarter mile from the plaintiff's end of the ditch to the defendant's was either less than a foot or none at all.<sup>149</sup>

The court had to determine whether the plaintiff's was the upper, dominant estate and the defendant's the lower, servient estate.<sup>150</sup> Reasoning that "[t]he test for determining if such a servitude is due, however, is not whether the overall, general area drains in a certain direction or whether an estate is overall higher than another," the court found that a servitude existed despite the negligibility of the difference in elevation.<sup>151</sup> Even though the

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145. See, e.g., *Poole v. Guste*, 262 So. 2d 339, 344 (La. 1972) ("[W]e find no support in the Civil Code, the jurisprudence, or the commentators for the contentions of the defendants Guste . . . [that] the Poole land cannot be the dominant estate and the Guste property the servient estate unless we find that overall (i.e., as between the 5000-acre Guste tract and the 2000-acre Poole property), irrespective of individual patterns along particular points of the boundary, one estate is upper to the other." (alteration in original)); see also *Nicholson v. Holloway Planting Co.*, 229 So. 2d 679, 681–82 (La. 1969) ("[W]hereas the primary slope in subject properties is from east to west, there is also a definite, though slight, overall fall from northeast to southwest. Considerable evidence was adduced by both parties on this crucial issue."); *Broussard v. Cormier*, 98 So. 403, 405 (La. 1923) ("[T]he two estates have practically the same elevation; still there is a slight difference of a few inches, especially when the surrounding estates, south and east, are taken into consideration. There were four engineers and several other witnesses who testified in the case, and while there is a divergence of opinion among them, we think a decided preponderance of the testimony shows that the tendency of the bulk of the water from rainfall, when not impeded or restrained, is to flow north onto the property of defendant with a slight variation to the west."); *Pickett v. Taylor*, 316 So. 2d 778, 780 (La. Ct. App. 1975).

146. *Pickett*, 316 So. 2d at 778, 780.

147. *Id.*

148. *Id.* at 781.

149. *Id.*

150. *Id.* at 780.

151. *Id.*

drainage through this northeasterly ditch was minimal compared to the general drainage pattern in the area, the court recognized that application of the servitude hinged on the actual flow of water at the point in question, not the overall elevation differences between the estates.<sup>152</sup>

The consequence of this holding is clear: the court will apply the servitude of drain whenever the evidence suggests that natural drainage occurs at a specific point. Two estates may be subject to multiple drainage servitudes, and they may even be the dominant estate under one servitude and the servient under another. For example, if a creek on the southeastern portion of estate A runs onto the southwestern portion of estate B, a servitude will exist where A is the dominant estate and B the servient. If, at the same time, rainfall on the northwesterly portion of estate B naturally runs down a slope onto the northeasterly portion of estate A, a servitude will exist where B is the dominant estate and A the servient. This adaptation from the traditional scenario in which one dominant estate was overall higher than one servient estate seems to fit well in Louisiana where “relative overall elevation of two estates is not an easy matter to determine, even by scientific methods . . . and the possibility of reciprocal flows, which depends on slight differences in elevation, make overall height immaterial.”<sup>153</sup>

Courts may be willing to adapt the higher and lower estate rule to fit the Louisiana landscape, but they have not proved willing to abandon it altogether.<sup>154</sup> The code language still clearly requires a higher and lower estate, and even the *Pickett* court’s reading of this requirement depended on slight elevation differences at particular points.<sup>155</sup> Professor Yiannopoulos’s suggestion that application of the servitude at individual points should be determined by the flow of water still implicitly accepts the requirement that the flow result from a height disparity at those points. Of course, this reluctance to abandon the higher and lower estate requirement makes sense considering that the servitude has been associated in Louisiana law

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152. *Id.*

153. YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 18, at 57.

154. *See, e.g.*, *Poole v. Guste*, 246 So. 2d 353, 357 (La. Ct. App. 1971), *aff’d*, 262 So. 2d 339 (La. 1972); *La. Irrigation & Mill Co. v. Sixth Ward Drainage Dist.*, 104 So. 623 (La. 1925); *Broussard v. Cormier*, 98 So. 403, 405 (La. 1923). YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 12, § 18, at 57.

155. *See Pickett*, 316 So. 2d at 778, 781. “Article 660 [now 655] contemplates a natural servitude of drain along particular points of a boundary between lands, *attaching where one estate is upper to the other* and drainage results over the latter.” *Id.* at 780–81 (alteration in original) (emphasis added).

with “drainage.”<sup>156</sup> The extensive development of the Louisiana doctrine and jurisprudence has focused on “natural drainage.”<sup>157</sup> In common parlance, drainage connotes the downward flow of water.<sup>158</sup> The most obvious form of natural drainage results from the effect of gravity on surface waters, i.e., from a height disparity between the point from which the water drains and the point onto which it drains.<sup>159</sup> However, as the example of Bayou Manchac illustrates, in Louisiana water can flow for a number of reasons other than gravity. “Drainage,” or any flow of water, in scientific terms actually results from “head,” a difference in the potential energy between two areas of water.<sup>160</sup> Water flows from areas of high to low energy.<sup>161</sup> For example, water at a higher elevation will have a higher potential energy than water at a lower elevation, so it will flow downward. Alternatively, highly pressurized water will flow to areas of lower pressure, even if that means it must flow uphill, for example from the Amite River into Bayou Manchac. Head can also result when water traveling at a high velocity encounters an obstacle and shoots upwards, for example, as storm surge approaches the seashore. For a complete, scientific understanding of drainage, all of these examples and others should be added to the traditional notion of drainage resulting from gravity’s downward pull. Bearing this in mind, the word “drainage” in and of itself might not prohibit the servitude’s application to non-gravitational flows, like tidal surge or pressurized upward flows caused by river flooding, as in the case of Bayou Manchac.

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156. Compare the English title for the servitude of “drain” with the Roman and French equivalents: the servitude of “*flumen*” or “*cours d’eau*” or “*d’écoulement*.”

157. See LA. CIV. CODE art. 655 (2015).

158. This common connotation may result from speakers’ association of the word drainage with the household drains, that empty a sink or bathtub by drawing water downward into pipes with the aid of gravity. However, the Oxford English Dictionary attributes a broader signification to the verb “drain,” defining it as “[t]o withdraw the water or moisture from (anything) gradually by straining, suction, formation of conduits, etc.; to leave (anything) dry by withdrawal of moisture” among other definitions. *Drain*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com.ezproxy.law.lsu.edu/view/Entry/57460>, archived at <http://perma.cc/SH4G-35KR> (last visited Feb. 26, 2015). According to this and other definitions cited in the Oxford English Dictionary, drainage connotes a withdrawal of liquid by any means, rather than a downward flow of a liquid. *Id.* However, the Romans clearly associated the servitude with a downward flow of water. See DIG. 39.3.1 (Ulpian, Ad Edictum 53). “[I]f water flows down naturally, the action to ward off rainwater is not available.” *Id.*

159. See BRUTSAERT, *supra* note 106, at 161 (describing the overland flow of surface waters resulting from undulations in earth’s surface).

160. ROBERT L. MOTT, APPLIED FLUID MECHANICS 150–69 (5th ed. 2000).

161. *Id.*



## III. DUTIES OF THE ESTATE OWNERS

Provided the requirements of article 655 are met, article 656 sets out the obligations of each estate owner under the servitude of drain.<sup>162</sup> It provides: “The owner of the servient estate may not do anything to prevent the flow of the water. The owner of the dominant estate may not do anything to render the servitude more burdensome.”<sup>163</sup> This analysis now turns to an explication of each estate owner’s obligations.

*A. Duties of the Servient Estate Owner*

Article 656 sets out the sole duty owed by a servient estate owner under the natural servitude of drain: “The owner of the servient estate may not do anything to prevent the flow of water” onto his estate.<sup>164</sup> Since the code language is clear, little dispute has arisen over its meaning or the duties it imposes on a lower estate owner. Most commonly, courts apply this rule to require the servient estate owner to remove man-made obstacles that block the flow of water onto the servient estate.<sup>165</sup> For example, courts have

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162. LA. CIV. CODE art. 656 (2015). “The owner of the servient estate may not do anything to prevent the flow of the water. The owner of the dominant estate may not do anything to render the servitude more burdensome.” *Id.* Louisiana courts have rejected arguments like the *exceptio non adimpleti contractus*, refusing to hold that these obligations are not co-dependent. If, for example, the dominant estate owner overburdens the servitude, the servient estate owner cannot erect a levee to keep out that water. *See, e.g.,* Ludeling v. Stubbs, 34 La. Ann. 935, 940 (1882) (“But it follows as a corollary, from the proposition established in this opinion, that plaintiff was wrong in erecting the levee or dam which defendant complains of. The error of his opponent could not justify an error on his part, or authorize him to take the law in his own hands.”); *see also* Barrow v. Landry, 15 La. Ann. 681, 683 (1860). *But see* Sowers v. Shiff, 15 La. Ann. 300, 301 (1860). “And the only remaining question is: have the plaintiffs, by their acts, so aggravated this natural servitude as to authorize the erection, by the defendants, of the dam complained of?” *Id.* Thus, the mere fact that the levee board constructed a levee to obstruct the natural flow of water onto its property might not preclude it from bringing a suit based on overburdening.

163. LA. CIV. CODE art. 656 (2015).

164. *Id.*

165. *See, e.g.,* Barrow, 15 La. Ann. at 681, 682; Sowers v. Shiff, 15 La. Ann. 300, 301 (1860). The *Code Napoléon* prohibited the owner of the lower estate from erecting a “digue,” dike or levee, that would prevent the flow of water. *See* CODE CIVIL [C. CIV.] art. 640 (1804) (Fr.). Lislet’s *Digest* made it clear that the example of a levee was illustrative, rather than exclusive when he added the phrase “or any other work.” LISLET, *supra* note 52, at 128. The 1977 revision language makes it even more clear that the restriction does not stop at dikes or levees. This most recent version of the article states that, “[t]he owner of the

consistently held that a landowner may not erect a levee across a natural drainage ditch or other pathway along which drainage naturally occurs.<sup>166</sup> On the contrary, however, the lower estate owner has no obligation to remove barriers that form naturally.<sup>167</sup>

### *B. Duties of the Dominant Estate Owner*

Article 656 establishes a corresponding obligation for the dominant estate owner: “The owner of the dominant estate may not do anything to render the servitude more burdensome.”<sup>168</sup> This obligation not to increase the servitude’s burden on the servient estate follows naturally from the premise established in article 655 that a natural servitude of drain cannot exist when “an act of man has contributed to the flow.”<sup>169</sup> Article 656 prohibits any man-made alteration of the natural situation of the estates that results in “overburdening.”<sup>170</sup> As a general rule, the dominant estate owner cannot dig canals, irrigate his field with furrows, construct aqueducts, or put in place any other conduits that facilitate water’s flow onto the servient estate.<sup>171</sup>

To this general rule, however, the law has historically provided an exception for alterations that promote agricultural development.<sup>172</sup> Recognizing that a strict reading of the “overburdening” language would discourage landowners from clearing, leveling, irrigating, or otherwise cultivating their properties for fear of altering natural drainage patterns, Louisiana jurisprudence has long recognized that a dominant estate owner may “make all drainage works which are

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servient estate may not do anything to prevent the flow of the water.” LA. CIV. CODE art. 656 (2015).

166. See, e.g., *Barrow*, 15 La. Ann. 681 at 682 (requiring landowner to remove a dam erected along a property line that cut off natural drainage between neighboring estates); *Sowers*, 15 La. Ann. 300 at 301 (requiring landowner to remove a dam erected, at the property line, across a natural bayou that drained waters from dominant estate onto lower estate); *Poole v. Guste*, 262 So. 2d 339, 344 (La. 1972).

167. 3 AUBRY ET RAU, *supra* note 14, at 16.

168. LA. CIV. CODE art. 656 (2015).

169. See LA. CIV. CODE art. 655 cmt. b (2015).

170. LA. CIV. CODE art. 656 (2015). See SOLON, *supra* note 99 (“*Celui qui en serait propriétaire [du fond servant] pourrait s’actionner, non en suppression de la servitude telle qu’elle était imposée naturellement, mais il pourrait demander qu’elle fut rétablie dans son état primitif . . .*”). This rule dates back to the origins of the servitude in the *actioe aquae pluviae arcendae*. See discussion *supra* Part I.A.

171. BOUSQUET, *supra* note 89, at 13–14.

172. See DIG. 39.3.24 (Alfenus, Digestorum A Paulo Epitomatorum 53).

necessary to the proper cultivation and to the agricultural development of his estate,” even if such works concentrate waters and accelerate their flow onto the servient estate.<sup>173</sup>

Louisiana courts have refused to extend this exception when the works undertaken to develop the dominant estate increase the *volume* of water flowing onto the servient property.<sup>174</sup> The exception applies only so long as the alterations to the dominant estate do not divert waters onto the servient estate that would not have otherwise flowed there.<sup>175</sup> For example, a dominant estate owner overburdens the servitude when he cuts new drainage ditches that allow formerly stagnant pools to drain onto the servient estate.<sup>176</sup> On the other hand, he does not overburden the servitude when his new ditches merely facilitate the flow of waters that would have “ultimately reach[ed] the same destination” in the slower form of rain rivulets or smaller streams.<sup>177</sup> Additionally,

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173. The Louisiana Supreme Court in *Broussard v. Cormier*, 98 So. 403 (La. 1923), stated:

And the proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome. But with this modification: That the owner of the superior or creditor estate may make all drainage works which are necessary to the proper cultivation and to the agricultural development of his estate. To that end he may cut ditches and canals by which the waters running on his estate may be concentrated and their flow increased beyond the slow process by which they would ultimately reach the same destination. But the upper proprietor cannot improve his lands to the injury of his neighbor by cutting ditches or canals, or do other drainage works by which the waters will be diverted from their natural flow and concentrated so as to flow on the lower lands at a point which would not be their natural destination.

*Id.* at 405. See also *Nicholson v. Holloway Planting Co.*, 229 So. 2d 679, 682–83 (La. 1969); *Chandler v. City of Shreveport*, 124 So. 143, 143 (La. 1929); *Petit Anse Coteau Drainage Dist. v. Iberia & V.R. Co.*, 50 So. 512, 515 (La. 1909); *Ludeling v. Stubbs*, 34 La. Ann. 935, 937–38 (1882); *Sowers v. Shiff*, 15 La. Ann. 300, 301 (1860); *Lattimore v. Davis*, 14 La. 161, 164 (1839); *Martin v. Jett*, 12 La. 501, 504–06 (1838). But see SOLON, *supra* note 99, at 56 (“Le propriétaire du fond supérieur ne peut rien faire qui rende la chute de l’eau plus rapide, ni qui en augmente le volume . . .”).

174. *Martin*, 12 La. at 501, 504–06. “But it is one thing to clear and cultivate arable lands, and another thing to reclaim lands naturally covered with stagnant waters, in such a way as to throw the mass of water, which would naturally remain in pools or ponds, upon the lands of one’s neighbor, situated below.” *Id.* at 505.

175. See, e.g., *Nicholson*, 229 So. 2d at 679, 682.

176. See *Martin*, 12 La. at 501, 504–06; *Stubbs*, 34 La. Ann. at 935, 940.

177. See *Stubbs*, 34 La. Ann. at 937–38 (“The owner of the superior estate may make all drainage works which are necessary to the proper cultivation and to the agricultural development of his estate. To that end, he may cut ditches and canals by which the waters *running* on his estate may be concentrated, and their

courts have refused to extend the exception when drainage between the two estates naturally occurs at a fixed point and the dominant estate owner diverts the flow onto a different point along the boundary line.<sup>178</sup>

Some French scholarship suggests that the natural servitude cannot apply in the case of a *force majeure*.<sup>179</sup> The limited jurisprudence on the subject suggests that in cases of a *force majeure*, such as a major flood, Louisiana law applies a version of the common-enemy rule.<sup>180</sup> In such a case, neither the servient nor the dominant estate owner has any obligation under the servitude, and each may take whatever steps necessary to protect their properties, regardless of any resulting injury to their neighbors.

flow increased beyond the slow process by which they would *ultimately* reach the same destination.”).

178. *See, e.g., id.*

[H]e will not be allowed to cut ditches or canals, or do other drainage works by which the waters running on his lands will be diverted from their natural flow, and concentrated so as to flow on the lower lands of the adjacent estate at a point which would not be their natural destination, thus increasing the volume of water which would by natural flow run over or reach any portion of the lower adjacent estate . . . .

*Id.* at 938. Additionally, the drainage servitude does not apply when the upper estate owner pollutes the water that otherwise naturally flows over the lower estate. *Thigpen v. Moss*, 504 So. 2d 664 (La. Ct. App. 1987); POBLET, *supra* note 99.

179. *See SOLON, supra* note 99, at 59 (“La servitude dont nous nous occupons n’a pas lieu non plus relativement aux eaux produites par un événement de force majeur; chacun a le droit de s’en préserver: telles sont les eaux provenant d’une inondation. Il est clair qu’une crue d’eau n’étant pas dans l’ordre naturel et ordinaire des choses, le propriétaire du fond inférieur peut faire tous les ouvrages nécessaires pour garantir ses propriétés des suites des inondations . . .”).

180. Although the common-enemy rule has been associated with common law American jurisdictions, it seems to have applied in special circumstances at French law. *See infra* Part I.C. In *Mailhot v. Pugh*, 30 La. Ann. 1359 (1878), the Court provided an extensive survey of the French sources considering the application of the servitude in the case of a *force majeure*. The following language from *Mailhot* indicates how a French court abandoned the servitude in favor of a common-enemy-type rule in such a case:

Que chacun peut se préserver dans sa propriété des débordements d’un fleuve lors même que les ouvrages faits pour s’en garantir porteraient préjudice au voisin. . . . qu’en effet il en est du débordement des rivières comme des incursions de l’ennemi, dont chacun peut, par le droit naturel, songer à se garantir, sans s’occuper du sort de son voisin, qui n’aurait pas la même prévoyance. And this was re-affirmed later.

*Id.* at 1359 (citations omitted).

## CONCLUSION

The above analysis attempts to outline the general shifts in conceptualization of the servitude of drain that have occurred over time and to elaborate on the often ambiguous or restrictively formalistic rules suggested by the terms of articles 655 and 656. This Comment concludes that the rights embodied under the servitude—the right to drain through a natural conduit and the corresponding right to be free from unnatural drainage—could exist under a less formally rigid legal framework than Louisiana’s current servitude. The trend in Louisiana jurisprudence of manipulating the servitude’s formal requirements, for example, the application of the servitude to tidal waters ignoring traditional hydrological forms and the adaptation of the higher and lower estates requirement to accommodate Louisiana geography, suggests that courts are moving toward a more flexible standard for the servitude’s application than the language of the articles and traditional foreign doctrine would suggest. Moreover, the scientific notion of drainage, as discussed above, includes a variety of hydrological phenomena. Arguably, in Louisiana, the servitude should apply to water bodies like Bayou Manchac where flows result from forces other than gravity. The Louisiana Legislature may be tempted in the future to follow foreign and American common law jurisdictions in recognizing a reasonable use or quasi- nuisance standard for drainage issues, abandoning the servitude’s formalistic requirements. Until that time, however, Louisiana courts are left with the code language and must work around the formalities to the extent that they can.

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