

# The Right of Passage for the Benefit of an Enclosed Estate

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## THE RIGHT OF PASSAGE FOR THE BENEFIT OF AN ENCLOSED ESTATE

We cannot be blind to the great change in the nature of land in our country and the needs of the people in regard to land . . . The open country and estates . . . have rapidly disappeared, and the problems of access to estates for full utilization of them have become more complex.

Louisiana Civil Code articles 689-695 contain rules pertaining to the right of passage for the benefit of an enclosed estate. At hand is a discussion of this servitude in light of four recent cases: *Tusson v. Hero Land Co.*,<sup>2</sup> *Stuckey v. Collins*,<sup>3</sup> *Fuller v. Wright*,<sup>4</sup> and *Dallas v. Farlington*.<sup>5</sup>

### *I. Tusson v. Hero Land Co.*

The federal government expropriated a servitude across plaintiff Tusson's land, and dug a drainage canal which isolated a strip of Tusson's estate. Although there had been no judicial decree interpreting the expropriation order to preclude building a bridge across the canal, Tusson alleged that he was denied permission to construct such a passageway. On the basis of this allegation, he brought an action against Hero Land Company, the owner of lands adjacent to the isolated portion, seeking a right of passage. The court held that Tusson had not met the burden of proof required of one seeking rights of passage from an enclosed estate.<sup>6</sup>

Because Tusson filed suit prior to the 1977 revision to the Louisiana Civil Code, the court applied former article 699.<sup>7</sup> According to the

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1. *Rockholt v. Keaty*, 256 La. 629, 638, 237 So. 2d 663, 667 (1970).
2. 446 So. 2d 346 (La. App. 4th Cir.), cert. denied, 449 So. 2d 1359 (La. 1984).
3. 464 So. 2d 346 (La. App. 2d Cir. 1985).
4. 464 So. 2d 350 (La. App. 2d Cir.), cert. denied, 465 So. 2d 737 (La. 1985).
5. 490 So. 2d 265 (La. 1986).
6. *Tusson*, 446 So. 2d at 350.
7. La. Civ. Code art. 699 (1870) provided:

The owner whose estate is enclosed, and who has no way to a public road, railroad, or a tramroad may claim the right of passage on the estate of his neighbor or neighbors to the nearest public road, railroad, or tramroad and

interpretation given that article by the Louisiana Supreme Court in *Rockholt v. Keaty*,<sup>8</sup> to be granted a right of passage a landowner had to prove that his lands were enclosed and that the right of passage he sought was the shortest, most direct, and most feasible route to the nearest public road. In *Rockholt*, the court held that an expropriation of a non-access highway which isolated a portion of a tract of land created an enclosed estate. Nevertheless, the court denied recovery because the landowner failed to prove that the passage sought was the shortest, most direct, and most feasible access to a public road.<sup>9</sup>

In *Tusson*, the plaintiff did not prove either element of the *Rockholt* test. The court defined "enclosed estate," as used in article 699, as one that "is shut off from access to public roads because it is entirely surrounded by other lands."<sup>10</sup> Since *Tusson* owned the land on which the canal was located, the court concluded that the isolated strip was not "surrounded by other lands," and he did not own an enclosed estate.<sup>11</sup> Additionally, since the most direct access to the isolated land was across the canal, until a court held that the expropriation order precluded *Tusson* from constructing a bridge across the canal, a passageway across the servitude, rather than across the defendant's land, was the "shortest most direct access to his enclosed lands."<sup>12</sup>

The *Tusson* court, in dicta, indicated that non-access across an expropriated servitude may satisfy both requirements of *Rockholt*. *Rockholt* itself supports this by recognizing that "non-access" may be a determinative factor in finding that an estate is enclosed. The court in

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shall have the right to construct a road, railroad or tramroad according to circumstances and as the exigencies of the case may require, over the land of his neighbor or neighbors for the purpose of getting the products of his said enclosed land to such public road or railroad, tramroad or for the cultivation of his estate, but he shall be bound to indemnify his neighbor or neighbors in proportion to the damage he may occasion.

8. 256 La. 629, 641, 237 So. 2d 663, 668 (1970).

9. The plaintiff in *Rockholt* sought a right of passage over a neighbor's land back to his own tract. The court found that the shortest, most direct route would be to a public street in a nearby subdivision that was adjacent to the isolated portion. The court concluded this was the shortest, most direct route even though zoning restrictions in the neighborhood allegedly precluded passage.

10. *Tusson*, 446 So. 2d at 350. See *English Realty Co. v. Meyer*, 228 La. 23, 82 So. 2d 698 (1955), and *Finn v. Eoff*, 368 So. 2d 199 (La. App. 1st Cir. 1979). This definition is based on prior La. Civ. Code art. 700 (1870), which read in part, "The owner of the estate, which is surrounded by other lands . . .", and prior La. Civ. Code art. 702 (1870), which began, "A passage must be furnished to the owner of the land surrounded by other land . . ."

11. This distinguished *Tusson* from *Rockholt*, for in the latter case the government had fully expropriated the land severing *Rockholt's* estate, rather than merely expropriating a servitude.

12. *Tusson*, 446 So. 2d at 351.

that case stated that, "estates surrounding enclosed lands may by the very nature and method of their development pose problems in affording access to the enclosed lands not foreseen or contemplated by the adopters of the Code article."<sup>13</sup> Because the estate in *Rockholt* fronted a non-access highway and had no other access to a public road, it was enclosed; *Tusson* suggests that non-access across a servitude dividing one's property similarly creates an enclosed estate. Nevertheless, the court in *Tusson* found that, until it was proven that access was absolutely denied, it would have been "inequitable and premature" to order an adjacent landowner, who did not create the complaining landowner's predicament, to provide a right of passage.<sup>14</sup>

Revised Civil Code article 689 defines an enclosed estate as one from which the owner has no access to a public road.<sup>15</sup> This definition reflects the holding of *Rockholt*. As such, meeting the requirements for a right of passage should be easier under article 689 than under prior article 699: a landowner should no longer have to prove that his lands are surrounded by other lands. He merely should have to prove that he has no access to a public road. If the landowner proves anything less than non-access to a public road, he should not be entitled to an article 689 passage. "Non-access" is an appropriate standard, because "the inconvenience of passing over one's property, though extreme, will not be a sufficient reason for forcing a neighbor to yield passage over his."<sup>16</sup> Absolute denial, however, goes beyond extreme inconvenience and justifies granting a passage.

## II. *Stuckey v. Collins*

Stuckey purchased a landlocked estate from Willis. Prior to the purchase, Willis cleared a passageway to enable Stuckey access to a public road. Unknown to Stuckey, the passageway crossed a strip of land immediately adjacent to a public road belonging to Collins. Expecting to exchange this land with Willis, Collins assented to the construction of the roadway. Stuckey used the passageway both before and after the purchase of his lot. To protect himself from a possible threat to ownership, Collins erected a barrier across the front of the roadway, secured by a locked cable. Although Stuckey had a key, he removed the cable because he grew tired of locking and unlocking it. After Collins replaced the cable, Stuckey filed suit for an unrestricted right of passage across Collins's land.

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13. *Rockholt*, 256 La. at 639, 237 So. 2d at 667.

14. *Tusson*, 446 So. 2d at 351.

15. La. Civ. Code art. 689.

16. *Pousson v. Porche*, 6 La. Ann. 118, 119 (1851). See also *Robinson v. Herring*, 20 So. 2d 811 (La. App. 2d Cir. 1944).

Civil Code article 689 provides: "The owner of an estate that has no access to a public road may claim a right of passage over neighboring property to the nearest public road. He is bound to indemnify his neighbor for the damage he may occasion."<sup>17</sup> This article is generally applicable when an estate becomes enclosed as the result of "fortuitous events or irresistible force."<sup>18</sup> On the other hand, if an estate becomes enclosed as a result of a partition or voluntary alienation of a portion of an estate, article 694 applies. Since *Stuckey* acquired his enclosed lot by purchasing a portion of Willis's estate, Collins urged as a defense that Willis, whose remaining property had access to a public road, owed *Stuckey* a gratuitous right of passage in accordance with article 694.

Civil Code article 694 states:

When in the case of partition, or a voluntary alienation of an estate or a part thereof, property alienated or partitioned becomes enclosed, passage shall be furnished gratuitously by the owner of the land on which the passage was previously exercised, even if it is not the shortest route to the public road, and even if the act of alienation or partition does not mention a servitude of passage.<sup>19</sup>

This article permits the owner of an enclosed estate to seek a right of passage in certain instances without requiring him to indemnify the servient estate owner. In *Stuckey*, the second circuit had to decide if article 689 could be applied in a situation where article 694 may also be applicable. The court never concluded that article 694 requirements were met, but held instead that even if article 694 did apply, "where passage across the vendor's land is impossible or highly impractical, an enclosed owner, even though legally entitled to an article 694 servitude across his vendor's property, may seek an article 689 servitude across a neighbor's land."<sup>20</sup> The court employed a "balancing of interests"

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17. La. Civ. Code art. 689.

18. A. Yiannopoulos, *Predial Servitudes* § 99, at 297 in 4 Louisiana Civil Law Treatise (1983). Examples include but are not limited to expropriation, as in *Rockholt*, and natural causes recognized in such cases as *Patin v. Richard*, 291 So. 2d 879 (La. App. 3d Cir. 1974), where a beach road remained underwater most of the year making a would-be passage impassable, and *Morgan v. Culpepper*, 324 So. 2d 598 (La. App. 2d Cir. 1975), cert. denied, 326 So. 2d 377 (La. 1976), where property was deemed enclosed because passage to a public road was "impassable" part of the year due to weather conditions.

19. La. Civ. Code art. 694.

20. *Stuckey*, 464 So. 2d at 348. Since *Stuckey* used the passageway over Collins' land before the voluntary alienation, arguably Collins was the owner of the estate that previously provided access to a public road. Thus, article 694 could have been interpreted to force Collins to provide a servitude of passage gratuitously. However, the court pretermitted any discussion of this issue, probably because such an interpretation of article 694 would be unconstitutional, being an unjust taking without compensation. See La. Const. art. I, § 4.

test which it cautioned should be applied to a "limited extent on a case-by-case basis."<sup>21</sup> The court also held that Collins could not impede this right of passage.

Three aspects of *Stuckey* warrant discussion: the applicability of article 694, the balancing of interests test, and the impediment to passage.

#### A. Applicability of Article 694

Although Willis's tract at the time of the sale was supposed to provide Stuckey access to a public road, in fact no road existed from Stuckey's estate across Willis's to a public thoroughfare. The *Stuckey* court's first concern as to the applicability of article 694 was whether a vendor who otherwise owed a gratuitous passage is relieved from this obligation if no roadway exists across his land connecting his vendee's enclosed estate with a public road. This concern stemmed from the language in article 694 that "passage shall be furnished gratuitously by the owner of the land *on which the passage was previously exercised*."<sup>22</sup> Strict adherence to this language suggests that an *existing* road is a prerequisite to the applicability of article 694. Nevertheless, based on the reasons behind affording an enclosed owner the right to seek a gratuitous passage, this interpretation is strained.

Article 694 is based on convention. It "is founded on the implied intent of the parties to an agreement."<sup>23</sup> Since vendors of land "warrant the enjoyment of the thing sold, . . . the necessary passage should be furnished by them gratuitously on the land that previously provided access to a public road."<sup>24</sup> Therefore, since a seller of a landlocked portion of his estate implicitly obligates himself to provide passage to the purchaser, the absence of an existing roadway previously used over the seller's estate should not relieve the vendor of his obligation. An interpretation of article 694 more in line with this underlying policy would be that the word "passage" merely refers to a link between the original tract and a public road; it need not refer to a particular, previously used form of access. The lands involved in the acts creating the enclosed estate should furnish a gratuitous passage.<sup>25</sup>

The conflict between a strict reading of article 694 and a reading which reflects the underlying policy of that article may perhaps be explained by concern within the legislature over the proper location of the gratuitous servitude, when the original tract is subdivided or par-

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21. *Stuckey*, 464 So. 2d at 348.

22. La. Civ. Code art. 694 (emphasis added).

23. Yiannopoulos, *supra* note 18, at 291.

24. *Id.* at 292.

25. See French Civ. Code art. 684.

tioned into several portions. In *Patin v. Richard*,<sup>26</sup> an owner of an estate, by a common act of sale, sold a portion which was divided into three lots, two of which were enclosed. One enclosed owner sued the other for recognition of a right of passage over an existing driveway, which extended through the third lot and to a public street. In deciding that the defendant owed a gratuitous passage, the court could have chosen to burden any part of the original tract with the servitude. It concluded, however, that the phrase, "upon which the right of passage was before exercised,"<sup>27</sup> found in prior Louisiana Civil Code article 701, meant that "the land which owes the servitude is that upon which it had existed in the past."<sup>28</sup> Therefore, the lots on which the driveway was located owed the right of passage, since the driveway existed at the time of the sale of the enclosed estate. This reasoning applies as well to partitions in kind, which often result in the formation of numerous estates.

If, on the other hand, a roadway does not exist at the time of the sale or partition, the entire original tract should be treated as a single unit, and factors such as cost, convenience, and distance should be used in locating the passageway. Since article 694 is based on convention, after the estate which is to be burdened with the servitude is chosen, Civil Code article 750, which appears in the chapter of the Civil Code governing conventional servitudes, should be used to determine the location of the passageway.<sup>29</sup> In no case should the vendor's obligation to provide passage to a vendee of an enclosed estate be relieved simply because a roadway did not exist over the original tract.<sup>30</sup> Thus, in *Stuckey*, the court's first concern should have been decided in favor of applying article 694.

The court's second concern was whether the obligation to furnish passage gratuitously is transmitted to a vendor's successors, as Willis

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26. 291 So. 2d 879 (La. App. 3d Cir. 1974).

27. La. Civ. Code art. 701 (1870).

28. *Patin*, 291 So. 2d at 883.

29. La. Civ. Code art. 750 states, "the owner of the servient estate shall designate the location" if it is not otherwise provided for by title.

30. The disposition of the *Stuckey* case was based on French Civil Code articles controlling enclosed estates. Under those articles, a landowner enclosed by virtue of a voluntary alienation or partition is entitled to seek a passage for indemnification if a sufficient gratuitous passage cannot be obtained. (see French Civ. Code art. 684). One could argue that under Louisiana's Civil Code sufficient passage is further defined as one existing at the time of the partition or voluntary alienation. This argument would lead to an anomalous interpretation of article 694. Although they are similar in some aspects, it is obvious from the differences between the French and Louisiana provisions that each code does not attempt to reach the same results. Also, since the person creating the enclosed estate should owe the servitude, passage should be found insufficient only in the most extreme circumstances.

had sold all the lots from the original tract. Professor Yiannopoulos has stated that "the right to demand a gratuitous passage under article 694 may be asserted by universal or particular successors of the purchaser against universal or particular successors of the vendor."<sup>31</sup> The most recent decision recognizing this principle is *Patin v. Richard*.<sup>32</sup> The three lots which resulted from the common act of sale were subsequently acquired by successors of the original vendees. The court held that the obligation owed by the vendor was enforceable against the present owners of the lots which had previously provided access to a public road. Thus, the obligation was transmitted to the vendor's successors.

Prior Civil Code article 701 in part provided that "the vendor, coparcener or other owner of the land reserved, and upon which the right of passage was before exercised, is bound to furnish the purchaser or owner of the land inclosed with a passage gratuitously . . . ."<sup>33</sup> In *Patin v. Richard*, Judge Domengeaux dissented because he felt that, based on this clause, a gratuitous servitude was not owed unless the right of passage had been previously exercised over the vendor's reserved portion. This presupposes that the vendor would reserve a portion. The majority in *Patin*, however, concluded that the land on which the passage was previously exercised owed the servitude regardless of whether ownership had changed or whether enclosure had not resulted from the initial sale. The majority's opinion has been codified in article 694 of the Civil Code. The pertinent clause now states: "[P]assage shall be furnished gratuitously by the owner of the land on which the passage was previously exercised."<sup>34</sup> Therefore, it is not only the vendor who reserves a remaining portion who is obligated to afford a gratuitous passage, but his successors are also obligated. Similarly, if the original vendor sells all of the original tract from which the enclosed estate was created, his obligation to afford passage should be transmitted to his successors. Article 694 recognizes this by requiring the gratuitous servitude when an enclosed estate results from the alienation of an estate in whole or in part.

It should be noted that the public records doctrine has recently been recognized as a defense to the transmittal of this obligation.<sup>35</sup> Since article 694 is based on agreement, and thus engenders a conventional servitude,<sup>36</sup> the situation of the estates must be publicly recorded, or a third party purchaser is not legally on notice that an enclosed estate exists. Because *Stuckey* does not indicate that the estate was improperly

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31. Yiannopoulos, *supra* note 18, at 294-95.

32. 291 So. 2d 879 (La. App. 3d Cir. 1974).

33. La. Civ. Code art. 701 (1870).

34. La. Civ. Code art. 694.

35. See *Dallas v. Farrington*, 490 So. 2d 265 (La. 1986).

36. *Id.* at 270.

recorded, the subsequent purchasers of Willis's estate should have owed a gratuitous servitude.

Since both concerns of the court as to the applicability of article 694 should have been resolved in favor of the article's application, further analysis is required of the court's holding that in limited instances where an article 694 servitude is due, the owner of the enclosed estate may seek a passage for indemnity pursuant to article 689.

### B. The "Balancing of Interests" Test

Prior jurisprudence has consistently held that if a gratuitous passage is due from one estate to another, the owner of the dominant estate may not seek another passage.<sup>37</sup> Theoretically, this should remain true under present Civil Code article 689, which applies only if the owner of an estate "has no access to a public road,"<sup>38</sup> since when article 694 is applicable the enclosed owner may demand the gratuitous right-of-way. This would give the enclosed estate access to a public road and thereby render article 689 inapplicable. *Marceaux v. Broussard*<sup>39</sup> held that where a gratuitous passage is owed, the enclosed owner "is not entitled to an additional right of passage."<sup>40</sup> It has also been stated that the gratuitous passage "is mandatory, it affords plaintiffs no other alternative passageway—it simply provides that when the owner of a portion of land sells a part thereof, and that part becomes inclosed in consequence of the sale, the vendor must afford a gratuitous passage-way."<sup>41</sup> Moreover, "a landowner should not be allowed to impose by his own volitional acts the burden of a forced passage on neighboring lands."<sup>42</sup> Therefore, a landowner should not be permitted to sell an enclosed portion of his estate and force a neighbor to supply that enclosed portion with a passage to a public road. This would allow a person to force an expropriation of a neighbor's land, when a right of passage existed over other lands. Based on these principles, the court in *Stuckey* could easily have found article 689 inapplicable. The court did, in fact, recognize that "the importance of not imposing a burden of forced passage on neighboring lands will be controlling in the majority of enclosure cases arguably falling under Article 694."<sup>43</sup> Nevertheless,

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37. See *Langevin v. Howard*, 363 So. 2d 1209 (La. App. 2d Cir. 1978), cert. denied, 366 So. 2d 560 (La. 1979); *Marceaux v. Broussard*, 338 So. 2d 308 (La. App. 3d Cir. 1976), cert. denied, 340 So. 2d 992 (La. 1977).

38. La. Civ. Code art. 689.

39. 338 So. 2d 308.

40. *Id.* at 311.

41. *Brown v. Terry*, 103 So. 2d 541, 547 (La. App. 1st Cir. 1958).

42. *Yiannopoulos*, supra note 18, at 291-92.

43. *Stuckey*, 464 So. 2d at 348.

relying on equity, the court utilized a "balancing of interest" test and found that the case before it was exceptional.

The supreme court in *Rockholt*<sup>44</sup> discussed the policy underlying article 689, stating that, "as land becomes less available, more necessary for public habitation, use, and support, it would run contrary to public policy to encourage landlocking of such a valuable asset and forever removing it from commerce and from public as well as private benefit."<sup>45</sup> To achieve the results demanded by this policy, the court in *Stuckey* looked to French law controlling enclosed estates. Under the corresponding French Civil Code article, if a gratuitous passage over the lands composing the original tract cannot be "sufficiently established," the enclosed owner may seek a passage for indemnity.<sup>46</sup> The court found that sufficient passage could not be established because "[c]onstruction of a road across the property formerly owned by plaintiff's vendor would be impossible or highly impractical and economically unfeasible."<sup>47</sup> To reach this conclusion, the court balanced the interest of a neighboring landowner in being free from a burden forced upon him by volitional acts of another, with the interest of the vendor of an enclosed estate in being able to maximize the utility of his estate by selling it and allowing another to fully develop it. The court found that inconvenience to Collins, the neighboring landowner, was minimal because of the road already existing across his land. The road only burdened 1/100 of an acre of his estate and was located in an extreme corner. On the other hand, to construct a passage across Willis's original tract would have "cost a fortune."<sup>48</sup>

When deciding future cases similar to *Stuckey*, one should begin with the proposition that a neighboring estate should not be forced to lend passage to a portion of another estate enclosed by a partition or

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44. 256 La. 629, 237 So. 2d 663 (1970).

45. *Id.* at 668. See *Stuckey*, 464 So. 2d at 348.

46. The provisions corresponding to La. Civ. Code arts. 689 and 694 are French Civ. Code arts. 682 and 684, respectively. French Civ. Code art. 684 reads:

Si l'enclave resulte de la division d'un fonds par suite d'une vente, d'un echange, d'un partage ou de tout autre contrat, le passage ne peut etre demande que sur les terrains qui ont fail l'objet de ces actes.

Toutefois, dans le cas ou un passage suffisant ne pourrait; afetre aetabli sur les fonds divises, l'article 682 serait applicable.

As translated in Cachard, French Civil Code (rev. ed. 1930), this article reads:

If an estate is surrounded because it has been divided in consequence of sale, exchange, division or any other agreement, the outlet can only be claimed over the lands forming part of these operations.

Nevertheless, when a sufficient outlet cannot be made over lands thus divided, article 682 shall apply.

47. *Stuckey*, 464 So. 2d at 349.

48. *Id.* at 348.

voluntary alienation. In cases where the enclosure is the result of a sale, generally the vendor will be profiting from the transaction, and should, therefore, bear the burden of providing access. In this and other instances of partition or voluntary alienation, the owner of the land from which the enclosed portion is created implicitly agrees to provide its owner with access to a public road. This contractual obligation should not befall another absent extreme circumstances. Even if the vendor does not otherwise use a portion of his estate, and if providing access across his original tract would result in such a high cost that the vendor could not both provide a passage and profit from the sale, keeping the unused portion out of commerce would still not be consistent with public policy. Although arguably "sufficient passage" should be determined only in light of the servient estate's capability to afford passage, if the cost of affording passage would cause the land to remain out of commerce, that cost should be considered. If the cost of affording passage over the vendor's land outweighs private and public benefits, a court may justifiably follow *Stuckey*.

### C. *The Impediment to Passage*

After employing the "balancing of interest" test and concluding that article 689 rather than article 694 applied, the court had to determine whether *Stuckey* was entitled to a passage free of impediments. Collins had erected posts and a cable across the roadway which required a key to effectuate passage. Stopping a vehicle momentarily to gain passage involved the risk of getting stuck in the mud. Visitors had no way of gaining *Stuckey's* attention. Also, utility employees were hindered from reading meters. Collins testified that he erected the posts and cable "simply to assert and delineate his ownership of the property crossed by the road," and he admitted that it served "no useful purpose."<sup>49</sup>

Civil Code article 690 provides that "[t]he right of passage for the benefit of an enclosed estate shall be suitable for the kind of traffic that is reasonably necessary for the use of that estate."<sup>50</sup> In certain instances, an owner of an enclosed estate may lawfully be subjected to some inconvenience in exercising passage. In *Pittman v. Marshall*,<sup>51</sup> both the dominant and servient estates were used for agricultural purposes. Full utilization of the servient estate included enclosing livestock. Since a cattleguard in that particular case would have been ineffective, the court found that the interests of the servient estate in protecting its cattle outweighed the interests of the dominant estate in unimpeded

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49. *Id.* at 349.

50. La. Civ. Code art. 690.

51. 104 So. 2d 230 (La. App. 2d Cir. 1958).

passage. Therefore, the enclosed estate's right of passage was justifiably impeded by a locked gate.

In *Stuckey*, the dominant estate was used as a place of residence. In addition, there was no evidence that the servient estate was used for agricultural purposes. Taking these facts into consideration, the court concluded that passage should not be impeded. Visitors should be able to freely pass to a residence and should not have to risk getting their vehicles stuck in mud while they stop to unlock a cable. Furthermore, persons such as utility employees required to frequent residences should not be impeded. The rule which may be derived from the court's analysis is that, if servient estate interests are insignificant, the dominant estate should be entitled to unimpeded passage which is "reasonably necessary for the use of that estate."<sup>52</sup> Although article 690 appears to focus solely on the dominant estate, in determining what "is reasonably necessary for the use of [the] estate," it is only through this approach of weighing the interests of both the dominant and servient estates that equitable results can be achieved.

### III. *Fuller v. Wright*

Property forming a peninsula between Cypress Creek and the Ouachita River had been traversed by a road since 1924. In 1962, it was partitioned into five parts. Two owners of the inland property fenced off the road, preventing two waterside owners from reaching their property. The waterside owners filed suit for an injunction against the two inland owners. The trial court granted the injunction, and the second circuit affirmed.<sup>53</sup>

The court of appeal stated that "[a] CC Art. 694 servitude of passage must be distinguished from other servitudes of passage."<sup>54</sup> The court went on to indicate that the only requirement of the article 694 right "is that the right of passage must have been previously used or exercised."<sup>55</sup> As pointed out earlier, an existing roadway should not be a pre-requisite to article 694's application. Nevertheless, in *Fuller*, a roadway which had been used for a number of years did in fact exist. By virtue of the partition, the obligation to afford passage was due to the plaintiffs' estates. Since the roadway existed, the court concluded that plaintiffs not only had the right to use it, but also to protect their right by injunctive relief.

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52. La. Civ. Code art. 690.

53. *Fuller v. Wright*, 464 So. 2d 350 (La. App. 2d Cir.), cert. denied, 465 So. 2d 737 (La. 1985).

54. *Id.* at 352.

55. *Id.*

Article 694 may be distinguished from article 689 in that the latter requires indemnification. Injunctive relief under article 689 is not proper unless the parties have consented to, or a court has imposed, a fixed passage.<sup>56</sup> The fixing of this servitude is not completed until the owner of the dominant estate compensates the owner of the servient estate.<sup>57</sup> To establish an article 694 servitude, however, the location only needs to be agreed upon for a legally protectable right of passage to exist. Since convention is the basis of the gratuitous servitude, articles 694 and 750 should control its location. If a passageway exists at the time of a partition or voluntary alienation, article 694 suggests this becomes the location of the servitude. If a passageway does not exist at the time of a partition or voluntary alienation, article 750 provides that if the title is silent, "the owner of the servient estate shall designate the location."<sup>58</sup> Once a passageway is constructed, the location is designated and the servitude of passage exists.

The court in *Fuller* held that the roadway in existence at the time of the partition linking the enclosed estate with a public road was a fixed article 694 servitude. Once the article 694 servitude was established, the owner of the dominant estate could seek injunctive relief to prevent interference with the passageway. The court did not, however, answer the question as to what relief an owner of a dominant estate may seek if a passageway does not exist at the time of the partition or alienation.

In *Marceaux v. Reese*,<sup>59</sup> although the court found that an enclosed owner was entitled to a gratuitous passage, it held that the servitude had to be fixed before an injunction would lie prohibiting its interference. Furthermore, the court held that a suit seeking an injunction was not the proper procedure through which to fix a right of passage. In so ruling, the court was in accordance with what Professor Yiannopoulos has written:

[That article] merely confers on the owner of an enclosed estate the right to demand the establishment of a servitude of passage . . . ; it does not by itself give rise to a servitude of passage nor does it confer on the owner of the enclosed estate authority to use a particular part of neighboring lands as a passageway to a public road.<sup>60</sup>

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56. See *Baldwin Lumber Co. v. Todd*, 124 La. 543, 50 So. 526 (1909); *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922); *Martini v. Cowart*, 23 So. 2d 655 (La. App. 2d Cir. 1945); *Ezernack v. Ezernack*, 18 La. App. 56, 137 So. 626 (La. App. 2d Cir. 1944); and *Morgan v. Culpepper*, 324 So. 2d 598 (La. App. 2d Cir. 1975).

57. See *Wemple*, 150 La. 247, 90 So. 637.

58. La. Civ. Code art. 750.

59. 365 So. 2d 504 (La. App. 3d Cir. 1978).

60. Yiannopoulos, *supra* note 18, § 96 at 284-85.

Although the court in *Fuller* did not address the issue, injunctive relief may only be proper against the original parties to the act creating the enclosed estate. As noted above, a recent decision has suggested that since a servitude fixed in accordance with article 694 is conventional, recordation should be required for the servitude to be effective against third persons.<sup>61</sup> In *Fuller*, even though the predecessors in title had been the parties involved in partitioning the land, rather than the parties to the suit, the court did not address this issue. Perhaps this was because the problem was not evident prior to the more recent case. Whatever the reason, future application of *Fuller* may be limited by the recordation requirement. If not properly recorded, the right to a conventional servitude may be lost.

#### IV. *Dallas v. Farrington*

Robert Farrington, Jr., proposed to subdivide and sell lots from his land in 1964, but parish authorities refused his plan. Nevertheless, on October 18, 1965, plaintiffs entered into a purchase agreement to buy adjacent lots numbered 2 and 3, which had no access to a public road. The purchase agreement was conditioned upon a servitude of passage over a proposed street. On December 20, 1965, Farrington sold the lots to plaintiffs. There was no survey describing the subdivision plan attached to the act of sale, nor did the act of sale mention a servitude of passage. Moreover, the act of sale referred to an erroneous plot number. Subsequently, Farrington sold Lot 1 to James Fish. This lot fronted a public road and was adjacent to Lot 2 owned by plaintiffs. The act of sale conveying this lot also failed to make reference to the proposed street.

On January 28, 1971, the Jefferson Parish Council approved a resubdivision plan which differed from Farrington's original proposal. On April 23, 1973, Farrington sold the remainder of his land to his son. The next day Farrington filed an act of correction amending the incorrect plot numbers. His son constructed a fence and blocked the originally proposed street which plaintiffs had been using for ingress and egress. Plaintiffs sued for declaratory and injunctive relief. In the meantime, prior to trial, plaintiffs acquired Lot 1 from James Fish.

Plaintiffs argued that a conventional servitude had been fixed by the purchase agreement. The Louisiana Supreme Court affirmed the appellate court's holding that the plaintiffs and Farrington had not established a conventional predial servitude binding upon Farrington's son.<sup>62</sup> A conventional predial servitude must be in writing, and to affect third parties it must be recorded.<sup>63</sup> Although the purchase agreement

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61. *Dallas*, 490 So. 2d 270.

62. *Dallas*, 490 So. 2d at 269.

63. La. R.S. 9:2721, 2756 (1965 & Supp. 1986). See La. Civ. Code art. 2440, *McGuffey v. Weil*, 240 La. 758, 125 So. 2d 154 (1960), and *Langevin*, 363 So. 2d 1209.

may have obligated Farrington to grant a servitude, since that agreement was not recorded, the court found that this obligation had no effect on Farrington's son. Whether Farrington's son may have had actual notice of the unrecorded interest was held to be "immaterial."<sup>64</sup>

Plaintiffs alternatively argued that Farrington's original tract from which their estate was formed owed them an article 694 legal servitude of passage. The fifth circuit held that plaintiffs were precluded from demanding a legal servitude of passage from Farrington's son, because at the time he purchased the land from his father, the public records did not indicate the presence of an enclosed estate. Since there was an erroneous plot number on record, "it was impossible to determine from the conveyance records that the conveyances of Lots 2 and 3 created an enclosed estate."<sup>65</sup>

The Louisiana Supreme Court disagreed with the fifth circuit's holding that the public records doctrine applies to "legal" servitudes. Since a legal servitude is "imposed by law,"<sup>66</sup> reasoned the court, the public records do not affect an enclosed owner's right to demand a legal servitude of passage. More critical, though, was that the supreme court found that the lower court mistakenly referred to an article 694 right to passage as a legal servitude. The supreme court held that article 694 confers a right to demand a conventional servitude, and that "plaintiffs were precluded by the public records doctrine from asserting against third persons the right to demand creation of a conventional servitude (just as they would have been precluded from asserting an unrecorded conventional servitude if one had actually been granted by Farrington)."<sup>67</sup>

A legal servitude is a limitation "on ownership established by law for the benefit of the general public or for the benefit of particular persons."<sup>68</sup> Civil Code article 672 classifies "the right of passage for the benefit of enclosed estates"<sup>69</sup> as a legal servitude. Consistent with this classification, the supreme court in *Dallas* characterized Civil Code article 689 as "a limitation imposed by law on the ownership of lands surrounding the enclosed estate."<sup>70</sup> Although article 694 is included in the chapter of the Civil Code pertaining to "Legal Servitudes", it is "juxtaposed with the *legal servitude* of passage under article 689 and . . . ought to be taken to establish a right for the creation of a *con-*

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64. *Dallas*, 490 So. 2d at 269. See *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (La. 1909), and Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 Tul. L. Rev. 491, 496 (1965).

65. *Dallas v. Farrington*, 465 So. 2d 763, 768 (La. App. 5th Cir. 1985).

66. *Dallas*, 490 So. 2d at 270. See La. Civ. Code art. 659.

67. *Dallas*, 490 So. 2d at 271.

68. La. Civ. Code art. 659.

69. La. Civ. Code art. 672.

70. *Dallas*, 490 So. 2d at 270.

ventional servitude of passage.”<sup>71</sup> Since article 694 is based on the implied intent of the parties to an agreement, “the demand of a right of passage under Article 694 is thus the exercise of a contractual right and is to be contrasted with a demand for a forced passage under Article 689, which is based directly on law.”<sup>72</sup> Therefore, the rules peculiar to conventional, rather than legal, servitudes apply to article 694, including the law of registry.<sup>73</sup>

In *Dallas*, since the description of plaintiffs' property was not recorded, Farrington's son was not put on legal notice that plaintiffs were the owners of an enclosed estate.<sup>74</sup> If he had been, based on *Patin v. Richard*,<sup>75</sup> the obligation of his father would have been transmitted to him. In future cases, it is imperative that the purchaser of a portion of an estate which becomes enclosed as a result of the sale records with the act of sale a description which shows the situation of the estates, so as to gain protection to the fullest extent possible.

Recordation of an article 694 servitude may also be useful in another context. If the vendor and vendee of a portion of land which becomes enclosed through the sale create a conventional servitude (independently of that which arises by virtue of article 694), they must record that servitude to affect third persons, as it represents a contractual right which must be written and recorded to affect persons not a party to the agreement.<sup>76</sup> If, however, such a servitude is lost because recordation requirements are not satisfied, the owner may still demand the gratuitous right of passage if the situation of the estates has been appropriately

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71. Yiannopoulos, *supra* note 18.

72. *Id.* at 299.

73. Examples of contrasting an article 689 legal servitude with an article 694 conventional servitude include the following:

[I]f the servitude is legal it is imprescriptible, the right of way must be located in accordance with Article 692, and it may be relocated under the terms of Article 695. If the servitude is conventional it may be lost by nonuse of ten years, the right of way must be located in accordance with Articles 749 and 750, and it may be relocated under Article 748. . . . [I]f the servitude is legal, it is free of requirements of publicity; if it is conventional, it is subject to the requirements of registry in the appropriate public records.

Further, if the servitude is legal, all the owners of lands between the enclosed estate and the public road are indispensable parties in the proceeding. If the servitude is conventional, indispensable parties are only those landowners who contest the right of way.

Yiannopoulos, *supra* note 18, at 298 n.30.

74. The court noted that plaintiffs did not attack the sale for fraud or simulation, even though the timing of the transaction was suspicious. *Dallas*, 490 So. 2d at 269 n.2, 270 n.4.

75. 291 So. 2d 879 (La. App. 3d Cir. 1974).

76. La. R.S. 9:2721, 2756 (1965 and Supp. 1986). See La. Civ. Code art. 2440, *McGuffy*, 240 La. 758, 125 So. 2d 154, and *Langevin*, 363 So. 2d 1209.

recorded. The successor of the original vendor would be on notice that an enclosed estate exists and that he is obligated to afford passage. Therefore, if a fixed conventional servitude is lost, the right to demand passage authorized by article 694 would still be available.

In *Dallas*, the supreme court noted that since plaintiffs' right to demand an article 694 passage was lost, "perhaps plaintiffs at that time were entitled to a legal servitude under Article 689."<sup>77</sup> This question had become moot, however, since plaintiffs had acquired Lot 1, which fronted a public road. The law is established that a legal servitude of passage is extinguished by a subsequent acquisition of an alternate passage to a public road.<sup>78</sup> Therefore, acquisition of the lot fronting a public road terminated a legal servitude if one in fact existed.

The implications by the court with respect to this issue constitute the most significant aspect of *Dallas*. Arguably, plaintiffs would not have been able to demand a legal servitude if they had not acquired Lot 1. Civil Code article 693 provides: "If an estate becomes enclosed as a result of a voluntary act or omission of its owner, the neighbors are not bound to furnish a passage to him or his successors."<sup>79</sup> When the purchaser of a portion of an estate enclosed as a result of the sale fails to record the description of the property, then he loses his right to demand a gratuitous passage and thereby arguably encloses himself. Thus, within the terms of article 693, such a purchaser may be denied a legal servitude of passage. The supreme court in *Dallas* recognized this problem in stating that "the neighbor's right to defend against a claim for a legal servitude or obtain indemnity might be affected by the fact that the neighbor's action caused the estate to be enclosed."<sup>80</sup>

Article 693 generally arises in a different context. Usually it applies when the owner of an estate sells or exchanges land and reserves an enclosed portion for himself, either failing to create a servitude in his favor, or creating one and losing it because of prescription of non-use.<sup>81</sup> In such a situation, the owner of the reserved portion cannot obtain passage under article 694, and article 689 is inapplicable because enclosure did not result from "fortuitous events or irresistible force."<sup>82</sup> Even

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77. *Dallas*, 490 So. 2d at 271.

78. See *Pousson v. Porche*, 6 La. Ann. 118 (1851), and *A. Yiannopoulos*, *supra* note 18, § 103 at 305; see also *Perry v. Webb*, 21 La. Ann. 247 (1869), and *Harvey v. McMurray*, 319 So. 2d 876 (La. App. 1st Cir. 1975); cf. *Arcuri v. Cali*, 244 So. 2d 309 (La. App. 4th Cir. 1971).

79. La. Civ. Code art. 693.

80. *Dallas*, 490 So. 2d at 270.

81. See *English Realty Co. v. Meyer*, 228 La. 432, 82 So. 2d 698 (1955), *Henry v. Rembert*, 336 So. 2d 323 (La. App. 1st Cir. 1976), and *Estopinal v. Storck's Estate*, 44 So. 2d 704 (La. App. Orl. 1950).

82. *Yiannopoulos*, *supra* note 18.

though article 693 may have been drafted in contemplation of only this type of situation, by its literal wording, the article may not allow the owner in a situation similar to *Dallas* to demand a legal servitude. The legal servitude established by article 689 is an imposition on neighboring lands, and article 693, if met, precludes the law from enforcing this imposition.

Nevertheless, a defense may exist against this application of article 693. As long as the original vendor owns the reserved portion of land from which the enclave was created, the enclosed owner may demand an article 694 servitude. This is so because the recordation requirement does not affect immediate parties to a transaction. Therefore, the failure to properly record the vendee's estate arguably does not result in an enclosed estate; it is only through a sale by the original vendor to a third person that the vendee loses his right. Thus, article 693 may not be applicable.

Even if it is applicable, a question exists concerning who is affected by article 693: "[I]t is not clear whether the word 'successors' in article 693 applies to universal successors only or to both particular and universal successors."<sup>83</sup> This alone should be enough to encourage taking precautionary measures not to enclose one's estate, for a subsequent alienation possibly does not offer a remedy to gaining passage. The risk that article 693 poses should alert persons purchasing portions of estates which become enclosed as a result of the sale of the dangers of not meeting the appropriate recordation requirements.

#### CONCLUSION

The noted decisions pose more questions than they resolve. Revised Civil Code article 689, in broadening the definition of an enclosed estate to include one with "no access to a public road," indicates a shift in the law recognizing courts' flexibility toward enclosed estates. Although the court in *Tusson* did not find an enclosed estate, it set forth guidelines to apply in expropriation cases. A person may seek a right of passage even though his lands are not "surrounded by other lands," and he may conceivably be granted relief if he establishes non-access to the servitude for passage.

*Stuckey* exemplifies the shift in judicial attitudes toward formulating equitable rules in deciding cases involving enclosed estates. This case recognizes the harshness often accompanied by the effects of the Civil Code, and that in extreme circumstances a court may deviate from the pronounced authority found in the Code to achieve desired results. *Stuckey* sets forth a reasonable "balancing of interests" test for future

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83. Yiannopoulos, *supra* note 18, at 296.

application in cases where valuable land otherwise may be taken out of commerce.

*Fuller* points out the unique features of article 694. The rules centering around this article are the most controversial. The problems are directly attributable to both its wording and its underlying rationale. One major feature of article 694 is found in *Dallas*, where the court concluded that this article provides for a conventional rather than a legal servitude. Several consequences flow from this holding, especially with respect to the effect of recordation. Attorneys employed to advise clients on the purchase of an estate that will become enclosed as a result of the purchase should be aware of the risks of improper recordation.

Over the last several years courts have become more liberal in their application of code articles controlling enclosed estates. The legal system is not blind to the rapid changes in the methods of transferring ownership of land. As persons developing their estates continue to subdivide and sell lots, problems will continually arise, and the issues will become more complex. Nevertheless, the Civil Code and jurisprudence have served well to establish sound principles that may be continually adapted to various situations.

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