

# Don't Fence Me In: Louisiana's Fourth Circuit Expands "Voluntariness" Under Louisiana Civil Code Article 693

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# Don't Fence Me In:<sup>1</sup> Louisiana's Fourth Circuit Expands "Voluntariness" Under Louisiana Civil Code Article 693

## I. INTRODUCTION

In *Petrovich v. Trabeau*,<sup>2</sup> the fourth circuit court of appeal held that a landowner whose estate became enclosed due to a sheriff's seizure and sale was not entitled to a legal servitude of passage because the enclosure was caused by the landowner's voluntary act or omission under Louisiana Civil Code article 693.<sup>3</sup> This holding expands upon a consistent line of Louisiana jurisprudence that limited article 693 "voluntariness" to instances in which an owner caused his dilemma by selling his own property and becoming landlocked without reserving passage.<sup>4</sup> Essentially, article 693's application was limited to enclosures resulting from juridical acts. If *Petrovich* is followed, article 693 may apply to situations in which the landowner's enclosure results from juridical facts, i.e., debts arising from the fault of the landowner, which are ultimately remedied with the sheriff's sale. Thus, *Petrovich v. Trabeau* has changed the way that future courts will interpret Louisiana Civil Code article 693.

The facts of *Petrovich* are presented in Part II, Section A. Part II, Section B analyzes the past influences of article 693 and interpretations that Louisiana courts previously gave this article. Part II, Section C presents the court's analysis in *Petrovich*, and demonstrates that it is a derogation from previous interpretations of article 693. Finally, Part III examines the potential results and flaws of *Petrovich v. Trabeau* and concludes that an ambiguity has been created on how to interpret Louisiana Civil Code article 693.

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1. The title is adopted from the song "Don't Fence Me In," written by Cole Porter, that was a hit for Bing Crosby and the Andrews Sisters during World War II. For the lyrics and a history of this song, see <http://www.kcmetro.cc.mo.us/pennvalley/biology/lewis/crosby/DontFence.html> (last accessed Feb. 3, 2003).

2. 780 So. 2d 1258 (La. App. 4th Cir.), writ denied, 793 So. 2d 1251 (2001).

3. *Id.* at 1260.

4. Leblanc v. Thibodeaux, 615 So. 2d 295, 299 (La. 1993). See also *infra* §§ II(B)(3) and II(B)(4).

## II. PETROVICH V. TRABEAU

A. *Factual and Procedural Background*<sup>5</sup>

In *Petrovich v. Trabeau*,<sup>6</sup> Luke Petrovich sought a right of passage over Karen Trabeau's property.<sup>7</sup> In 1965, Petrovich bought a large tract of land that included a thirty-foot right of passage over an adjacent tract of land giving him access to a parish highway from his mother.<sup>8</sup> In 1993, Petrovich and Trabeau acquired the remaining interest in the property surrounding these tracts resulting in Petrovich now having access to a state highway. After this transaction, Petrovich and Trabeau executed a partition giving Petrovich ownership of the land fronting the state highway and Trabeau ownership of the land fronting the parish highway. In this agreement, Petrovich specifically abandoned the right of passage that originally encumbered Trabeau's property because he now had access to the state highway.<sup>9</sup>

In 1997, Petrovich lost ownership of part of his land to a creditor in a sheriff's sale.<sup>10</sup> Consequently, Petrovich was left only with a landlocked parcel of land abutting the Trabeau property.<sup>11</sup> Petrovich filed a petition requesting passage over Trabeau's property.<sup>12</sup> The trial court determined that Petrovich was not entitled to a right of passage because he had become landlocked by his own "voluntary act or omission."<sup>13</sup> Petrovich appealed, and the fourth circuit upheld the trial court's finding.<sup>14</sup> The Louisiana Supreme Court subsequently denied writs.<sup>15</sup>

5. A copy of the plat of land that was the subject of this litigation is attached as Appendix "A" to this note.

6. *Petrovich v. Trabeau*, 780 So. 2d 1258, 1261 (La. App. 4th Cir.), writ denied, 793 So. 2d 1251 (2001).

7. *Id.*

8. *Id.* at 1259.

9. *Id.*

10. The court does not indicate the act or omission that led to the sheriff's sale. See *infra* § III.

11. *Petrovich*, 780 So. 2d at 1259.

12. In the opinion, the court stated that Petrovich requested a right of passage over the tract of land he lost in the sheriff's sale. *Id.* Additionally, the case pleadings indicate that Petrovich sought passage over Trabeau's property. See Plaintiff's Petition for Injunction and Damages, Twenty-Fifth Judicial District Court, State of Louisiana (1997) (No. 42-462). However, the court's reasoning focused on why Petrovich was not entitled to passage over Trabeau's property.

13. Reasons for Judgment at page 5, *Petrovich v. Trabeau*, Twenty-Fifth Judicial District Court, State of Louisiana (1998) (No. 42-462).

14. *Petrovich*, 780 So. 2d at 1261.

15. *Petrovich v. Trabeau*, 793 So. 2d 1251 (La. 2001).

## B. Relevant Law

### 1. Article 693 and Prior Law That Influenced Article 693

Louisiana, like other civil law jurisdictions, grants a legal servitude of passage across neighboring lands to an enclosed estate.<sup>16</sup> There are two types of legal servitudes for a right of passage in Louisiana: the indemnified right of passage and the gratuitous right of passage. Louisiana Civil Code article 689 defines the indemnified right of passage and provides that “[t]he 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.”<sup>17</sup> The enclosed estate must utilize the shortest route to exercise passage, and the estate burdened by the passage must be indemnified.<sup>18</sup>

The gratuitous right of passage is defined in Louisiana Civil Code article 694, which provides that:

When in the case of partition, or a voluntary alienation of an estate or of a part thereof, property alienated or partitioned becomes enclosed, passage shall be furnished gratuitously by the owner of the land on which 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>

Unlike article 689, article 694 does not require that the passage be exercised along the shortest route or that the burdened estate be indemnified. Also, only the vendee in an alienation of property or the recipient of an enclosed estate in a partition may exercise the gratuitous right of passage.<sup>20</sup>

While articles 689 and 694 are mechanisms for granting passage to public roads, article 693 precludes passage. It states that “[i]f an

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16. For general information on the right of passage and how similar civilian jurisdictions treat the right of passage, see 4 A.N. Yiannopoulos, *Predial Servitudes*, in 15 Louisiana Civil Law Treatise (2d ed. 1997); A.N. Yiannopoulos, *The Legal Servitude of Passage*, 71 Tul. L. Rev. 1 (1996); A.N. Yiannopoulos, *Enclosed Estates; Louisiana and Comparative Law*, 23 Loyola L. Rev. 343 (1977); and A.N. Yiannopoulos, *Property*, 35 La. L. Rev. 266 (1975).

17. La. Civ. Code art. 689.

18. *Id.* See also La. Civ. Code art. 692 which states: “The owner of the enclosed estate may not demand the right of passage anywhere he chooses. The passage generally shall be taken along the shortest route from the enclosed estate to the public road at the location least injurious to the intervening lands.”

19. La. Civ. Code art. 694.

20. See *Spotsville v. Hebert & Murrell, Inc.*, 698 So. 2d 31 (La. App. 3d Cir. 1997).

estate becomes enclosed as a result of a voluntary act or omission of its owner, the neighbors are not bound to furnish passage to him or his successors."<sup>21</sup> Article 693 was added during the 1977 revision, and is derived from other jurisdictions' laws as well as existing Louisiana jurisprudence.<sup>22</sup> In discussions prior to enacting article 693, the redactors contemplated that the article and accompanying comment should put a seller on notice that he should retain a right of passage when alienating and encumbering his land.<sup>23</sup> Article 693 is based on Greek Civil Code article 1014, which provides that "[a]n obligation of the neighbours to grant a right of way shall not exist if the communications between the immovable and the public road have ceased by means of a wilful act or omission of the owner of the immovable."<sup>24</sup> Other civil codes provide for such an exception as well. For example, German Civil Code article 918(1) provides that: "[t]he obligation to tolerate the right of way does not arise, if the prior connection of the piece of land with the public road has been eliminated by an arbitrary act of the owner."<sup>25</sup>

Article 693 is also similar to the way that common law jurisdictions interpret their equivalent to the right of passage, a servitude by necessity. A servitude of necessity is implied by law whenever the landowner would be deprived of reasonable use of his property without the servitude.<sup>26</sup> However, the servitude by necessity is often denied when the estate's enclosure was a result of a voluntary alienation of property by the estate's owner<sup>27</sup> or the landowner had notice that voluntary acts on his behalf would create his enclosure.<sup>28</sup>

21. La. Civ. Code art. 693.

22. *Id.*

23. Louisiana State Law Institute, Revision of Code Book II of the Louisiana Civil Code of 1870 at 99 (June 7, 1975).

24. Civ. Code art. 1014 (Constantine Taliadoros, LL.D., trans. 1982) (Greece).

25. § 918 BGB (Ian S. Forrester, Simon L. Goren & Hans-Michael Ilgen, trans. 1975) (F.R.G.).

26. A servitude by necessity is defined as:

A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.

Restatement (Third) of Property, Servitudes § 2.15, 202 (2000).

27. See *Shive v. Schaefer*, 484 N.E.2d 394, 396 (Ill. App. 5th Dist. 1985) ("Plaintiff simply created his own problem by voluntarily conveying away all means of access to his retained property in 1955 and 1957.") and *Gulotta v. Triano*, 608 P.2d 81, 82 (Ariz. App. 1980) ("A landowner may not acquire a way of necessity over another's property after he has voluntarily cut off an alternate means of access to his own property.").

28. See *O'Hara v. Chicago Title and Trust Company*, 450 N.E.2d 1183, 1190

Finally, article 693 draws from prior Louisiana jurisprudence that denied passage to estates that were enclosed because of their owners' acts. For example, in *English Realty Co., Inc. v. Meyer*,<sup>29</sup> the plaintiff sought passage over the defendant's property claiming it was the most convenient route. The plaintiff's passage to the public road was limited because the plaintiff had sold parts of his land to various persons and retained only a distant portion of the tract for himself.<sup>30</sup> Because the plaintiff had caused his own predicament, the court denied the plaintiff passage.<sup>31</sup> The same rationale behind article 693 was reflected when the court stated:

[I]f plaintiff, by reason of the various property sales it has made, now finds itself in the position of holding acreage fronting that part of the overpass approach to which [defendant] might be justified in refusing to grant it access from its property, it is nevertheless not entitled to claim passage over defendants' property as the situation respecting access of which it now complains was wholly created by its own act.<sup>32</sup>

*English Realty* indicates that Louisiana employed a rationale towards the right of passage similar to its civilian and common law sisters before article 693 was enacted.<sup>33</sup>

## 2. Criticism of Article 693

Article 693 is poorly drafted because the "voluntary act or omission" standard it sets is both vague and ambiguous. The article's broad language lacks any reference to specific situations or examples to which its interpreters could apply article 693 to.<sup>34</sup> Articles 689 and

(Ill. App. 1st Dist. 1983) (Where plaintiff renovated his restaurant and had written notice that such renovations would result in enclosure, he was precluded from receiving an easement of necessity).

29. 82 So. 2d 698 (La. 1955).

30. *Id.*

31. The Court also denied the plaintiff passage because they found that he did have actual access to the public road. However, the Court noted that even if the plaintiff was actually landlocked, he still would not be entitled to passage. *Id.* at 701.

32. *Id.*

33. See also *Henry v. Rembert*, 336 So. 2d 323 (La. App. 1st Cir. 1976) and *Brown v. Terry*, 103 So. 2d 541 (La. App. 1st Cir. 1958) (Court overturned a grant of a gratuitous right of passage to a landowner who had enclosed his land during an exchange. The *Brown* court converted the gratuitous right of passage into a passage with indemnity.).

34. The Supreme Court recognized this ambiguity as well in trying to apply article 693:

694 are extremely generous in granting passage to enclosed landowners, even when the enclosure was created by a partition. However, article 693's exception is so broad that it gives any landowner trying to resist an action for passage at least one defense. If the adverse landowner goes far enough down the chain of title, he is probably going to find some action that could be classified as a "voluntary act or omission." The result is that article 693 serves as a "road-block" to all claims made under articles 689 and 694, an effect clearly contrary to the Louisiana Supreme Court's prerogative "of favoring the right of passage." Because of this effect, courts should interpret article 693 narrowly.<sup>35</sup>

### 3. Application of Article 693

Once article 693 was enacted, Louisiana courts had to reconcile it with the existing jurisprudence that favored granting a right of passage to enclosed estates. This policy was first established in the Louisiana Supreme Court decision of *Rockholt v. Keaty*,<sup>36</sup> in which the court explained:

While [the right of passage] has been generally accepted as designed to benefit the landowner so he could produce profit for himself and obtain full utility of his land, it must now be deemed also to offer protection of public interest. 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 the public as well as private benefit.<sup>37</sup>

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Article 693 brings to the statutory scheme a certain tension, if not ambiguity. By virtue of articles 689 and 694 an enclosed landowner is entitled to a right of passage irrespective of how the enclosure came to pass. If the owner of the enclosed estate simply has no access to a public road, he must indemnify his neighbor for the damage he causes. If a partition (or alienation) causes the enclosure, passage is to be gratuitously furnished. Yet, article 693 relieves a neighbor of the obligation to furnish a right of passage if there has been a voluntary act or omission on the part of the landowner who is demanding the right.

Leblanc v. Thibodeaux, 615 So. 2d 295, 298 (La. 1993).

35. This is exactly what the courts have done. See *infra* § II(B)(3). For the author's suggestion on alternative language that could be used in article 693, see *infra* § III.

36. 237 So. 2d 663 (La. 1970).

37. *Id.* at 668.

This language arguably creates a presumption in favor of granting the right of passage to all estates that become enclosed. Furthermore, this jurisprudential policy was endorsed by the redactors when enacting article 693.<sup>38</sup> Thus, article 693 requires a balance between a statutory restriction on granting enclosed estates passage and a policy that discourages enclosing estates.

Louisiana courts reached this balance by favoring a narrow application of article 693. In *Leblanc v. Thibodeaux*,<sup>39</sup> the Louisiana Supreme Court determined that article 693 could not be applied to preclude an indemnified right of passage to an enclosed estate which had become enclosed after a conventional right of passage had prescribed after ten years of nonuse.<sup>40</sup> According to the court, article 693 was an exception to the neighbor's obligation to provide passage and was only "triggered by a voluntary act or omission of an owner."<sup>41</sup> Examining the Louisiana Law Institute's transcripts from the 1977 revision, the court concluded that the drafters intended article 693 to apply only to vendors who sold their property and caused it to become enclosed because they failed to reserve a right of passage and prevent the enclosure.<sup>42</sup> The court also analyzed the *Rockholt* decision and concluded that the comment to article 693 indicated that the legislature intended to maintain the *Rockholt* policy.<sup>43</sup> From these sources, the court determined that article 693 would be applied narrowly, that is "only to instances where the enclosed estate's owner [had] caused his dilemma by selling off his access property, or at least by not applying [it] where the voluntary 'alienation' which causes the enclosure is a partition, which is governed by [Articles 689 and 694]."<sup>44</sup>

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38. "[Article 693 did] not change the law. Cf. *Rockholt v. Keaty*." La. Civ. Code art. 693, cmt. a. (citation omitted).

39. 615 So. 2d 295 (La. 1993).

40. *Id.* at 296.

41. *Id.* at 298.

42. The *Leblanc* court concluded:

The drafters apparently contemplated that article 693's exception would negate the right of passage otherwise afforded by article 689 where the enclosure has been created by the owner's sale of his access property, for the entire focus of their discussion was on how the law would affect vendors. Their statements demonstrate that this article was drafted primarily to address a vendor's voluntary act or omissions, where the vendor fails to reserve a right of passage after his land becomes enclosed as a result of his sale of adjoining property (footnote omitted).

*Id.* at 299 (emphasis in original).

43. *Id.*

44. *Leblanc v. Thibodeaux*, 615 So. 2d 295, 299 (La. 1993).



The narrow standard established in *Leblanc* has been consistently applied to article 693 cases, and most often results in courts refusing to apply the exception.<sup>45</sup> *Spotsville v. Hebert & Murrell, Inc.*<sup>46</sup> is one of the few cases where a court used article 693 to preclude an enclosed estate from receiving passage. In *Spotsville*, the plaintiff sold two acres to the defendant and retained ownership of the remaining 1.86 acres. As a result of the sale, the plaintiff's tract became enclosed without access to a public road.<sup>47</sup> The plaintiff filed suit to obtain a gratuitous right of passage. The third circuit held on appeal that the plaintiff was not entitled to a right of passage because the enclosure was caused by the plaintiff's voluntary act or omission.<sup>48</sup> The court based its decision on *Leblanc* and found that article 693 only applied to vendors who had failed to reserve a right of passage in the actual sale.<sup>49</sup>

*Spotsville* is important because it favors a strict interpretation of article 693. Because it is one of the few cases that actually denies an enclosed estate the right of passage under article 693, it is crucial to note that *Spotsville* is a mere application of the narrow rule enunciated in *Leblanc*. Article 693, according to the interpretation given by the Louisiana Supreme Court, should apply "only to instances where the enclosed estate's owner has caused his dilemma by selling off his access property."<sup>50</sup> Thus, *Leblanc v. Thibodeaux*

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45. Louisiana courts are hesitant to apply article 693 to deny enclosed estate owners a right of passage over neighboring estates. The article is raised often by defendants in an action for right of passage, but has been virtually useless to Louisiana courts. See *Griffith v. Cathey*, 762 So. 2d 29, 36 (La. App. 3d Cir.), writ denied, 771 So. 2d 85 (2000) (court declined to apply article 693 to deny a right of passage to a purchaser who knowingly or voluntarily acquires enclosed property); *Holmes v. Parish of St. Charles*, 653 So. 2d 653 (La. App. 5th Cir. 1988) (without applying article 693, court denied passage to landowner whose estate became enclosed after the landowner donated land to a municipality conditioned on the municipality building a road that would subsequently give the landowner passage, but the municipality did not fulfill the condition within a reasonable time); *Watts v. Baldwin*, 662 So. 2d 519 (La. App. 1st Cir. 1995) (article 693 was not applicable to petitioners who were not "owners who [had] enclosed their estate by selling off access property to the nearest public road under *Leblanc v. Thibodeaux*," but rather had acquired the property); and *Atkins v. Johnson*, 535 So. 2d 1063 (La. App. 2d Cir. 1988) (court granted passage to heirs whose estates had become enclosed after partitioning a large tract of land that had been donated to heirs mortis causa and declined to apply article 693 as the defendants had argued).

46. 698 So. 2d 31 (La. App. 3d Cir. 1997).

47. *Id.* at 32.

48. *Id.* at 34.

49. *Id.* at 33.

50. *Leblanc v. Thibodeaux*, 615 So. 2d 295, 299 (La. 1993).

should be construed as the jurisprudential standard for applying the broad language of article 693.<sup>51</sup>

#### 4. *No Application to Forced Transactions*

In addition to the limited *Leblanc* standard, article 693's scope has been narrowed further by the courts' unwillingness to apply the article to forced transactions. For example, courts have not applied Article 693 in the context of an expropriation, in which the government takes land for public use thus causing an enclosure, even where the landowner failed to procure passage during the expropriation process. In *Bouser v. Morgan*,<sup>52</sup> the plaintiffs granted a servitude to the Red River Waterway District that resulted in their property becoming enclosed.<sup>53</sup> Although the plaintiffs granted the servitude, they did so under the "threat of expropriation."<sup>54</sup> They did not request a right of passage during the expropriation process, but instead later sued to obtain passage over the adjacent property. The defendants claimed that the plaintiffs were not entitled to passage because, under article 693, they had voluntarily granted the servitude without procuring passage. The court granted the plaintiffs passage.<sup>55</sup>

The courts did not preclude passage in the context of an expropriation in *Rockholt v. Keaty*<sup>56</sup> either.<sup>57</sup> In *Rockholt*, the plaintiff's property became landlocked because of an expropriation to build an interstate.<sup>58</sup> Reasoning that an expropriation was not voluntary, the court acknowledged that the plaintiffs had a right to passage even though the plaintiffs had not taken measures to reserve passage during the expropriation process.<sup>59</sup>

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51. For an alternative view, see A.N. Yiannopoulos, *The Legal Servitude of Passage*, 71 Tul. L. Rev. 1, 25 (1996) in which Professor Yiannopoulos states that the *Leblanc* standard is mere dictum and is not limited solely to the situations described in the opinion: "[T]he dictum limiting [Article 693] to enclavements resulting from the sale of access property is neither a reasonable interpretation of the provisions of the Louisiana Civil Code governing the legal servitude of passage, nor a solution conforming to legislative intent."

52. 520 So. 2d 937 (La. App. 3d Cir. 1987).

53. *Id.* at 938-39.

54. *Id.* at 939.

55. *Id.*

56. 237 So. 2d 663 (La. 1970).

57. The author acknowledges that *Rockholt* was decided before article 693 was passed; however, Louisiana courts adhered to the principle of article 693 before it was actually enacted. See *supra* § II(B)(3).

58. *Rockholt*, 237 So. 2d at 664-65.

59. *Id.* at 667-68. Although the court reasoned that the plaintiffs were entitled to passage, the *Rockholt* court ultimately denied the plaintiffs passage in this case. The court reasoned that the plaintiffs had not sought passage to a public road as

Courts have also not applied article 693 when enforcing the law would result in an estate becoming enclosed. In *Salvex, Inc. v. Lewis*,<sup>60</sup> the plaintiff purchased a pipeline servitude that was previously exercised by two oil companies. As Louisiana law required, the oil companies had executed releases of the eastern portion of the property because it was not producing any oil or gas.<sup>61</sup> This release caused the remainder of the estate to become enclosed.<sup>62</sup> The plaintiff sued for a right of passage to the nearest public road.<sup>63</sup> The defendants argued that article 693 precluded Salvex from claiming a right of passage because its ancestors in title, the two oil companies, had executed the releases without procuring a right of passage.<sup>64</sup> The court granted the plaintiff passage, finding that the enclosure was not "voluntary" under article 693 because the releases were executed in order to comply with Louisiana oil and gas conservation laws.<sup>65</sup>

This rationale also appears in *Leblanc v. Thibodeaux*.<sup>66</sup> There, the plaintiffs claimed that article 693 did not prevent a legal servitude of passage if a prior conventional right of passage was lost by nonuse.<sup>67</sup> The plaintiffs' estate had become enclosed as a result of the prescription of nonuse, an effect of written law. The court declined to apply article 693 and granted the plaintiffs passage because their estate became enclosed as an effect of written law.<sup>68</sup>

### C. *The Fourth Circuit's Analysis In Petrovich v. Trabeau*

The fourth circuit denied Petrovich a right of passage over Trabeau's property for three main reasons. First, the court reasoned that losing land to pay off creditors in a sheriff's sale was a "voluntary act or omission" under article 693.<sup>69</sup> The court also held

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required by the Code and that plaintiffs could have sought a right of passage over a shorter, more direct, and more feasible route. *Id.* at 668.

60. 546 So. 2d 1309 (La. App. 3d Cir.), *writ denied*, 551 So. 2d 1323 (1989).

61. "Pursuant to Louisiana mineral law, [they] were obligated to release that part of the property which was not producing any oil or gas." *Id.* at 1315 [citing *Noel Estate, Inc. v. Murray*, 65 So. 2d 886 (La. 1953); and *Vance v. Hurley*, 41 So. 2d 724 (La. 1949)].

62. *Salvex, Inc.*, 546 So. 2d at 1315.

63. *Id.* at 1311. Salvex also requested recognition of a servitude of passage for a pipeline; however, the court declined to extend the legal servitude of a right of passage to pipelines. *Id.* at 1314.

64. *Id.* at 1315.

65. *Id.*

66. 615 So. 2d 295 (La. 1993).

67. *Id.* at 300. *See also supra* § II(B)(3).

68. *Leblanc*, 615 So. 2d at 300.

69. *Petrovich v. Trabeau*, 780 So. 2d 1258, 1259-60 (La. App. 4th Cir.), *writ*

that a gratuitous right of passage was not available to Petrovich because it was only available to landowners who acquired enclosed lands.<sup>70</sup> Finally, the court reasoned that Petrovich had specifically abandoned his prior right of passage over Trabeau's property, indicating a contractual intent to no longer have Trabeau's land burdened with a servitude.<sup>71</sup>

The court first denied Petrovich a right of passage because "[t]he Civil Code clearly states that when a vendor, through his or her voluntary act or omission, loses a right of passage. . . , [he] is not entitled to a right of passage under the law."<sup>72</sup> Because Petrovich had lost the land with access to the highway in a sheriff's sale caused by his failure to pay creditors, the court classified his actions as being voluntary under article 693. The court reasoned that the Civil Code intended to grant a servitude only to persons whose land had become enclosed "through no fault of their own," and to allow a servitude to someone who "[had] voluntarily lost a right of passage" was against the redactor's intent.<sup>73</sup> Thus, the court found that a sheriff's sale was a "voluntary act or omission" under article 693.<sup>74</sup>

The court next resolved the conflict between articles 693 and 694 and found that Petrovich was not entitled to a gratuitous right of passage under article 694. Utilizing dicta from *Spotsville v. Hebert & Murrell, Inc.*,<sup>75</sup> the court reasoned "the right to demand a gratuitous passage is accorded to one who *acquires* an enclosed estate as a result of a voluntary alienation of property."<sup>76</sup> Because Petrovich had not acquired the enclosed land as a result of the sheriff's sale, but instead the land was transformed into an enclosed estate because of the sheriff's sale, the court held he was not entitled to a gratuitous right of passage. Here, the court narrowly read *Spotsville* and focused on the word "acquire" instead of looking at the totality of the circumstances as to how Petrovich's estate had become enclosed.<sup>77</sup>

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*denied*, 793 So. 2d 1251 (2001).

70. *Id.* at 1260.

71. *Id.* at 1261.

72. *Id.* at 1260.

73. *Id.*

74. Though the court is firm throughout the opinion that losing one's property in a sheriff's sale is a voluntary act or omission, the court also stated that "[i]t might have been possible for [Petrovich] to argue that a [s]heriff's sale is a forced transaction, which by its nature is not voluntary." *Petrovich*, 780 So. 2d at 1260-61. Here, the court is forwarding an argument that Petrovich may have been entitled to passage across the land he lost in the sheriff's sale and does not fully explain their retreat from what is otherwise a strong holding. *Id.*

75. 698 So. 2d 31 (La. App. 3d Cir. 1997).

76. *Petrovich*, 780 So. 2d at 1260 (quoting *Spotsville v. Hebert & Murrell, Inc.*, 698 So. 2d 31 (La. App. 3d Cir. 1997) (emphasis theirs)).

77. *Id.*

The court finally denied Petrovich a right of passage because he had abandoned his original right of passage over Trabeau's property in the 1993 partition. Relying heavily on Louisiana authorities on conventional servitudes, the court found the partition to be a specific abandonment of any rights to passage he had over Trabeau's land. Because the partition was intentional, the court held Petrovich was no longer entitled to passage.<sup>78</sup>

### III. CONCLUSIONS

The fourth circuit's analysis in *Petrovich v. Trabeau* is a change in the way that Louisiana courts have traditionally applied article 693. The Louisiana Supreme Court has inferred article 693 "voluntariness" in instances in which the enclosed estate's owner causes his own dilemma by selling his access property without reserving a right of passage.<sup>79</sup> Subsequent courts applied this inference strictly and refused to apply article 693 in cases where a landowner voluntarily executed a servitude agreement under threat of expropriation or enclosure because of a partition.<sup>80</sup> From the analyses in these cases, one could conclude that article 693 would apply in few instances. However, *Petrovich* departs from these cases and broadens the scope of article 693 by classifying a sheriff's sale as a "voluntary act or omission" under Article 693.<sup>81</sup> A sheriff's sale is not a voluntary transaction; rather, it is a forced sale in which the landowner is virtually powerless.<sup>82</sup> In doing this, *Petrovich*, for the first time, defines article 693 "voluntariness" as having the literal meaning of the word "voluntary."<sup>83</sup> Thus, the fourth circuit's classification raises questions about the potential application of article 693 and whether or not it has been expanded.

The potential expansion of article 693 occurs in the source of the obligation that failure to satisfy leads to article 693 applicability. Doctrinally, obligations are said to arise from two sources—juridical acts and juridical facts.<sup>84</sup> Obligations arising from juridical acts arise

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78. *Id.*

79. *Leblanc v. Thibodeaux*, 615 So. 2d 295, 299 (La. 1993). *See also supra* § II(B)(3).

80. *See supra* §§ II(B)(3) and II(B)(4).

81. *Petrovich*, 780 So. 2d at 1261.

82. "[E]xecution sale. A forced sale of a debtor's property by a government official carrying out a writ of execution. Also termed forced sale; judicial sale; sheriffs sale." Black's Law Dictionary 1338 (7th ed. 1999) (emphasis added).

83. There is nothing "uncivilian" about this. "The words of a law must be given their generally prevailing meaning." La. Civ. Code art. 11.

84. *See* 6 Saul Litvinoff, *Obligations: Book I*, in 15 Louisiana Civil Law Treatise § 63 (1969).

from legal transactions that are a result of the parties' willful determination. However, obligations that arise from juridical facts are a result of obligations imposed by the law. They are a consequence of the social order that the legal order regulates.<sup>85</sup> Past article 693 jurisprudence applied the exception only to juridical acts such as contractual alienations or encumbrances of one's property.<sup>86</sup> However, a sheriff's sale is a procedural remedy that arises solely from the law. It is a unilateral act involving only one will with no meeting of the minds. In essence, *Petrovich* defines article 693 "voluntariness" as now including enclosures resulting from juridical facts.

The problem with the manner in which *Petrovich* defines "voluntariness" is that it is a definition that has never been used in this context before. The legislative intent in enacting article 693 was to address a vendor's voluntary acts or omissions where the vendor fails to reserve a right of passage in the act of sale.<sup>87</sup> Further, Louisiana courts traditionally only applied article 693 to enclosures resulting from juridical acts. *Petrovich* has thus created ambiguity as to whether enclosures resulting from juridical facts should be included in the scope of article 693. This ambiguity is significant as *Petrovich* could be given greater weight than the average circuit court opinion because this is an area in which jurisprudence is scarce. For example, a recent first circuit opinion cites *Petrovich* for the rule that the intention of the civil code was to allow those people whose land is enclosed through no *fault* of their own a right of passage.<sup>88</sup> The word "fault" is synonymous with juridical facts because an obligation derived from one's fault is not the result of two independent wills. This indicates that the jurisprudential expansion of article 693 is now in full progress.

Although *Petrovich* presents a strong argument for expanding article 693 "voluntariness," there are several aspects of the opinion

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85. Litvinoff, *supra* note 84, at 93.

86. See *supra* §§ II(B)(3) and II(B)(4).

87. The drafters apparently contemplated that article 693's exception would negate the right of passage otherwise afforded by article 689 where the enclosure has been created by the owner's sale of his access property, for the entire focus of their discussion was on how the law would affect vendors. Their statements demonstrate that this article was drafted primarily to address a vendor's voluntary act or omissions, where the vendor fails to reserve a right of passage after his land becomes enclosed as a result of his sale of adjoining property (footnote omitted).

Leblanc v. Thibodeaux, 615 So. 2d 295, 299 (La. 1993). See also *supra* note 23.

88. Sceroler v. Rancher, 808 So. 2d 803 (La. App. 1st Cir. 2002) (emphasis added).

that leave open the question of whether this expansion actually occurred. First, the court does not explain the type of debt that led to the sheriff's sale, resulting in ambiguity as to which acts actually would invoke article 693.<sup>89</sup> If Petrovich's debt was for property taxes or to pay off a mortgage, then the court's rationale would be understandable because these debts are associated with maintaining one's property. It would be reasonable to interpret article 693 to bar passage if the landowner did not pay the essential costs required to retain ownership of his land. However, if Petrovich's debt was to satisfy a tort judgment against him, a child support obligation, or a debt for an unrelated purchase, such as a car, then the degree of voluntariness required to invoke article 693 is broadened by *Petrovich* considerably. Since the court does not indicate the type of debt that Petrovich owed in the opinion, it is uncertain which acts are now voluntary under article 693.

Second, regardless of the range of actions the court intended article 693 to encompass, they expressed doubt as to whether Petrovich's acts were voluntary when they said, "[i]t might have been possible for [Petrovich] to argue that a [s]heriff's sale is a forced transaction, which by its nature is not voluntary."<sup>90</sup> This is a contradiction of the earlier statement in which the court classifies Petrovich's act as being voluntary and raises questions as to whether the court's reasoning is even based on article 693.<sup>91</sup> This doubt may indicate that the opinion is actually based more on the court's conventional servitude analysis. The fourth circuit relied heavily upon the partition between Petrovich and Trabeau, where Petrovich waived his right to passage over Trabeau's property, in denying Petrovich the servitude. Unfortunately, the court did not reconcile the servitude abandonment with article 693, which it purports to be the true basis of their opinion.<sup>92</sup>

The preceding paragraphs represent that *Petrovich v. Trabeau* creates an ambiguity in the way that future courts should interpret article 693. There is a strong argument that *Petrovich* redefines article 693 "voluntariness" to include enclosures that result from juridical facts. This definition makes it easier for article 693 to preclude passage to the owners of enclosed estates. However, there is also a persuasive argument that *Petrovich* does not change article 693 and that the opinion was instead based on conventional abandonment. Currently, these ambiguities must be resolved

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89. *Petrovich v. Trabeau*, 780 So. 2d 1258, 1260-61 (La. App. 4th Cir.), writ denied, 793 So. 2d 1251 (2001).

90. *Id.*

91. *Id.*

92. *Id.* at 1260.

according to the demeanor of the judge, thus making it risky to try a case in which article 693 is an issue. For this reason, the legislature should intervene and clarify its intent in drafting article 693. If the legislature wants to maintain the Louisiana Supreme Court standard and limit article 693's application to enclosures resulting from juridical acts, then it should redraft the law to include the exact language used in *Leblanc v. Thibodeaux*. However, if the legislature wants to expand article 693, as *Petrovich* did, then it should redraft the law to replace the words "voluntary act or omission"<sup>93</sup> with a less ambiguous and more specific phrase that includes words such as "arbitrary,"<sup>94</sup> "negligent," or "fault." If the legislature intended article 693 to encompass acts independent of the actual sale, these words will make its intent clear. Until this needed intervention occurs, Louisiana property lawyers face the prospect of more enclosed estates becoming permanently fenced in.

*Scott D. Huffstetler\**

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93. La. Civ. Code art. 693.

94. Cf. § 918 BGB (Ian S. Forrester, Simon L. Goren & Hans-Michael Ilgen, trans. 1975) (F.R.G.): "The obligation to tolerate the right of way does not arise, if the prior connection of the piece of land with the public land has been eliminated by an arbitrary act of the owner." See also *supra* note 25.

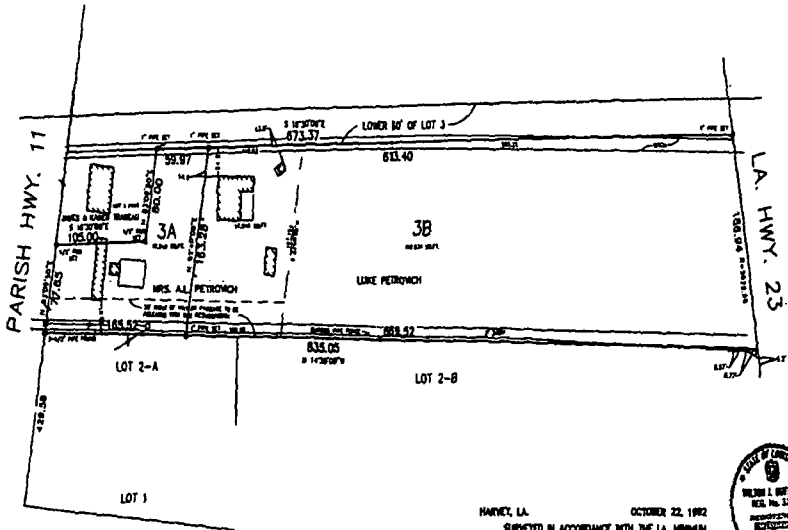
\* This comment is dedicated to the memory of Lee Hargrave, Wex S. Malone Professor Emeritus, Louisiana State University. Professor Hargrave died recently after a short battle with cancer. I am honored that this paper was advised by a true Louisiana legal legend who influenced the development of our civil law system in so many different capacities. His greatest gift to me was his style of writing—clear, short, and concise. It is a style that I will carry with me throughout my legal career.



# Appendix A

PART OF LOT 3  
 TRIUMPH  
 SECTION 23, T20S, R29E  
 PLAQUEMINES PARISH, LA.

APPROVED DATE: \_\_\_\_\_  
 APPROVED BY: \_\_\_\_\_  
 DIRECTOR OF OPERATIONS \_\_\_\_\_  
 FOREST PROSPECT \_\_\_\_\_



ALL DIMENSIONS ARE IN FEET AND DECIMALS THEREOF

HARVEY, LA.                      OCTOBER 22, 1992  
 SURVEYED IN ACCORDANCE WITH THE L.A. HIGHWAY  
 STANDARDS FOR PROPERTY BOUNDARY SURVEYS FOR A  
 CLASS D SURVEY, MADE AT THE REQUEST OF KAREN  
 TRAMBAUD AND PHOENIX, GEORGINA & PHOENIX, ATTYS.

