

# Louisiana Law Review

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Volume 11 | Number 2

*The Work of the Louisiana Supreme Court for the  
1949-1950 Term*

January 1951

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## Private Law: Persons

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### Repository Citation

Robert A. Pascal, *Private Law: Persons*, 11 La. L. Rev. (1951)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol11/iss2/9>

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*State Rice Milling Company, Incorporated.*<sup>10</sup> Contracts for the sale of rice for delivery to the buyer in this country were involved. When the buyer's license was revoked and its establishment sequestered by the government as the property of an enemy alien at the outbreak of the war with Japan, the Louisiana seller immediately notified the buyer that the contracts were cancelled. This was sustained by the court under the common law doctrine of frustration on the ground that the action would have been taken by a prudent business man in view of all of the information the seller had before it at the time indicating that the business efficacy or value of the contract had been materially impaired. The evidence showed that about twenty-four days later the plaintiff was given a limited license. The seller's action appears to have been somewhat hasty, but perhaps the court was correct in not requiring too nice a degree of deliberation in view of the situation existing on and after December 7, 1941.

## PERSONS

*Robert A. Pascal\**

*Parish jurisdiction for divorce or separation.* Section 301 of Title 9 of the Louisiana Revised Statutes, providing for divorce after a two year separation in fact, states that the plaintiff "may sue, in the courts of his or her residence within this state." In *Wreyford v. Wreyford*<sup>1</sup> the plaintiff wife, described as a "resident of Caddo Parish," filed suit in Red River Parish, in which she and her husband had been domiciled while living together and in which the husband was still domiciled at the time of the suit. In the words of the court, quoted because of their extreme importance:

"The sole question before us is whether a plaintiff, whose cause of action is predicated on the ground established by the aforesaid act of the Legislature, *must* initiate his (her) suit in the court of his (her) residence; or, whether that plaintiff has a *choice* of instituting suit in the court of his (her) residence, with the *alternative choice* of initiating suit in the court of the *defendant's domicile* (which would be the proper forum for a personal action) or in the court of the matrimonial domicile (which would have jurisdiction of the *res*)."

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10. 215 La. 1086, 42 So. 2d 855 (1949).

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1. 216 La. 784, 44 So. 2d 867 (1950).

The majority opinion, written by Justice Moise, concludes as follows:

"We hold that, where the domicile of the defendant, as well as the last matrimonial domicile, is in the State of Louisiana, then the plaintiff has the choice of instituting her action for divorce at either place, where that action is grounded on Act No. 430 of 1938, or in accordance with the fiat of the Legislature, at the forum of her own residence."

Justices Hawthorne and McCaleb dissented on the theory that the legislation makes it mandatory for the plaintiff to file suit at his or her "residence."

Three assumptions are found in the majority and the dissenting opinions. The first is that the wife may acquire an *intra-state* or *interparish* domicile separate from her husband's. The second is that there is such a thing in intrastate or internal Louisiana law (that is, excluding conflicts law) as "matrimonial domicile." The third is that the marriage status is a "*res*" which can be located at the last intrastate "matrimonial domicile" and therefore gives that parish a claim to adjudicate in a separation and divorce suit concerning that marriage.<sup>2</sup>

Beginning the discussion with an examination of the second and third points, it may be observed that the concepts "matrimonial domicile" and "marriage *res*" were never warranted or useful in intrastate matters and, while once useful in *interstate* matters, are now obsolete there. During the life of *Atherton v. Atherton* as construed by *Haddock v. Haddock*,<sup>3</sup> "matrimonial domicile" and "marriage *res*" were important because they permitted a state in which the defendant was neither domiciled nor personally served to take cognizance of a divorce or separation suit filed against him with certainty that the judgment rendered would be entitled to full faith and credit. By treating the marriage as a "*res*" and locating "it" in the state in which the spouses last lived together the old "quasi in rem" jurisdictional doctrine of *Pennoyer v. Neff*<sup>4</sup> could be applied, thus obviating the necessity of jurisdiction over the person of the defendant.<sup>5</sup>

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2. These three points were considered in Note, 9 LOUISIANA LAW REVIEW 550 (1949) and by the writer in last year's symposium, 10 LOUISIANA LAW REVIEW 120, 162-164 (1950). The writer believes their importance to be such as to warrant another discussion in this symposium.

3. *Atherton v. Atherton*, 181 U.S. 155 (1901), and *Haddock v. Haddock*, 201 U.S. 562 (1906).

4. 95 U.S. 714 (1877).

5. The "quasi in rem" divorce theory and therefore the "matrimonial domicile" and "marriage *res*" concepts are now obsolete in interstate cases.

The "quasi in rem" theory of divorce and separation jurisdiction was never required in *intrastate* or interparish situations for two reasons: First, any of the courts in the state with competence in the *kind* of case may entertain suit against any person served in or domiciled in that parish, though if the person be domiciled in another parish in this state he has the right to demand that he be sued in that parish.<sup>6</sup> Second, in interstate cases the matter is one of *legislative* as well as of judicial competence, but in intrastate or interparish cases the same legislative authority and law prevails, that of the state. In intrastate cases, therefore, there is no reason why a separation or divorce suit cannot be considered a *personal action*.

If *intrastate* separation and divorce suits should be considered personal actions, then certainly suit may be filed in any parish of this state, subject (1) to the right of the defendant to require that he or she be sued at his or her parish of domicile, and subject further (2) to any exceptions established by the legislature authorizing or requiring suit in another parish. The second element, in which is contained the principal question in the case under discussion, is without juridical importance. The legislature may prescribe what it will in this field; and if the legislation is not clear the question is reduced to one of choice between juridically acceptable interpretations. The first element, however, suggests the question whether the wife can ever have a domicile in this state separate from her husband's as long as he is also domiciled in this state.

Article 39 of the Civil Code, which gives the wife the same domicile as her husband, does not indicate exceptions. Article 142 of the Civil Code has been interpreted to mean the wife may have a separate domicile,<sup>7</sup> but whether this interpretation is right or wrong, the case dealt with by the article restricts this interpre-

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Under *Williams v. North Carolina*, 317 U.S. 287 (1942) legislative and judicial competence in separation and divorce cases is established by the fact of domicile of either party in the state. The theory, of course, is that the state in which a person is domiciled has enough interest in his personal status to warrant its legislative and judicial authority, that is, the application of its laws by its courts.

The obsolescence of "matrimonial domicile" and "marriage *res*" make regrettable their use in *Latham v. Latham*, 216 La. 791, 44 So. 2d 870 (1950), a case involving interstate competence. This case is discussed hereafter in this symposium.

6. Arts. 162, 335, La. Code of Prac. of 1870.

7. Such is the effect of *Hyman v. Schlenker*, 44 La. Ann. 108, 10 So. 623 (1892). The case dealt with Article 2437, on the separation of property, but that article and Article 142 were both derived from Act 9 of 1855 and there can be no doubt that the remarks of the court would apply to Article 142 as well as Article 2437.

tation to interstate domicile. Many supreme court decisions affirm the separate domicile idea, but all these, with the possible exception of cases based on Revised Statutes Title 9, Section 301, deal with interstate domicile. If there is any legislative modification of Article 39, then, it is in Section 301 of Title 9. The writer is of the opinion that such an interpretation should not be given this act. The legislation is too narrow to prescribe a general exception to the rules on domicile, and in addition the interpretation seems unnecessary in the light of the purpose of the legislation.<sup>8</sup> Assuming that the term residence refers to intrastate or interparish "residence," the special feature of the clause would seem to be that it permits the plaintiff wife to sue at her "residence" without the defendant husband being able to require that he be sued at his domicile. To interpret the word to mean "domicile" could accomplish no more.

From the above analysis the writer is forced to conclude that (1) the wife may not have an intrastate domicile separate from her husband's, (2) the concepts "matrimonial domicile" and "matrimonial *res*" are without meaning in internal Louisiana law, and, therefore, (3) the parish of last "matrimonial domicile" does not have any special competency in divorce and separation cases.

*State jurisdiction for divorce or separation.* In *Walsh v. Walsh*<sup>9</sup> and *Latham v. Latham*<sup>10</sup> judgments of divorce and separation, respectively, were attacked on the ground that neither spouse was domiciled in Louisiana at the time of suit. The assumption must have been that (1) Louisiana law or (2) the United States Constitution or (3) both require the domicile of one spouse to be in this state, but the conclusion reached by the writer renders it unnecessary to consider any but the first of these possible alternatives.

Louisiana has never enacted any legislation dealing generally and directly with this subject. The domicile of the parties in separation or divorce cases was not mentioned in the Civil Codes of 1808 and 1825. Article 142 of the Civil Code of 1870, however, allows a wife in some instances to institute suit against her hus-

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8. La. R.S. (1950) 9:301 has been interpreted to require the domicile of the plaintiff *in this state*. *Spratt v. Spratt*, 210 La. 370, 27 So. 2d 154 (1946). The writer feels this interpretation was forced simply to insure that no divorce would be allowed under the act which would not be entitled to full faith and credit. Scrutiny of the language of the legislation indicates that the reference therein was to intrastate "residence."

9. 215 La. 1099, 42 So. 2d 860 (1949).

10. 216 La. 791, 44 So. 2d 870 (1950).

band domiciled in another state "in the same manner as if they were domiciliated" in Louisiana. This language assumes that ordinarily both parties must be domiciled in this state at the time of the suit. It is also probable that at the time of enactment of the Civil Code of 1870 the legislature understood and intended that the suit outlined in Article 142 could be brought even though neither party was at the time domiciled in this state, for the possibility of the wife having a separate domicile had not yet been generally recognized. By 1892, however, the doctrine of a wife's separate interstate domicile in cases in which the husband has given her cause for separation had become accepted and the supreme court interpreted Article 142 to require the domicile of the plaintiff wife.<sup>11</sup> The only other legislation possibly dealing with the subject is now contained in Section 301 of Title 9 of the Revised Statutes, originally Act 269 of 1916 as amended by Act 31 of 1932 and Act 430 of 1938, allowing divorces for separation in fact. Here the interpretation has been that domicile of the plaintiff spouse in this state is required.<sup>12</sup> Summarizing, the rule seems to be that before a divorce or separation suit may be brought in this state both parties must be domiciled here unless: (a) the suit is brought under Article 142 of the Civil Code, in which case it suffices if the plaintiff wife is domiciled here; or (b) the suit is brought under Section 301 of Title 9 of the Revised Statutes, in which case the plaintiff spouse must be domiciled here.

If the above analysis is correct, then it may be said that the legislature has never sanctioned the filing of a separation or divorce suit by a non-domiciliary, whether or not his or her spouse is domiciled in this state. In addition, the writer cannot recall any previous decision of the supreme court recognizing such a suit. On the basis of these observations the case of *Walsh v. Walsh* would be correct, for the suit was filed under Section 301 by a Louisiana domiciliary. *Latham v. Latham*, however, would be incorrect, for the suit was one for separation on the ground of abandonment filed by a non-domiciliary husband. Legislative clarification would be desirable.

*Alimony.* According to Article 160 of the Civil Code, after divorce the wife who has not "sufficient means for her maintenance" may in the discretion of the court be allowed alimony

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11. *Hyman v. Schlenker*, 44 La. Ann. 108, 10 So. 623 (1892). See comments on this case, *supra* note 6.

12. *Spratt v. Spratt*, 210 La. 370, 27 So. 2d 154 (1946). See comment on this case, *supra* note 7.

not to exceed one-third of her former husband's income. The meaning of the quoted words was at issue in *Smith v. Smith*.<sup>13</sup> The essence of the opinion, written by Justice LeBlanc, was that "means" implies more than income and includes capital assets. The wife's capital, valued at about \$20,000, consisted of one-half of the community property acquired during marriage and more particularly of one automobile, several United States Savings Bonds, and notes bearing interest at two per cent per annum, all of which yielded her an income of approximately thirty-five dollars per month. The opinion expressly refrains from giving any definite rule as to when the divorced wife must be expected to use her capital assets for her maintenance and leaves this to the discretion of the court, in accordance with the phraseology of Article 160. It may be that the liquid character of the wife's principal assets were an important factor in the actual decision. The main point, nevertheless, is of the utmost importance, for it cannot but result in a tendency to decrease the alimony burden after divorce.

Article 232 of the Civil Code authorizes the reduction or increase of alimony when the circumstances of the parties change. The interpretation of this article quite properly has always been that it permits a change for the future and not an increase or decrease of arrearages which have accumulated under a final judgment.<sup>14</sup> Any other interpretation would permit the judgment debtor to question his liability for arrearages every time the creditor attempted to enforce the judgment in this state and, of course, other states could refuse to give the judgment full faith and credit. This interpretation is affirmed in *Gehrkin v. Gehrkin*.<sup>15</sup>

Another aspect of the *Gehrkin* case requires comment. The

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13. 47 So. 2d 32 (La. 1950).

14. The cases which seem to deviate from this rule did not involve final judgments, inasmuch as the original judgments were on appeal. *Scott v. Scott*, 197 La. 726, 2 So. 2d 193 (1941), and *Coney v. Coney*, 215 La. 667, 41 So. 2d 497 (1949). The writer is not in agreement with these decisions for the reasons stated in last year's symposium, 10 LOUISIANA LAW REVIEW 120, 165 (1950).

A third case, *Colby v. Colby*, 200 La. 321, 7 So. 924 (1942), might, from the opinion, lead one to believe that the amount due as arrearages was altered, but the record in the case shows that the second judgment (rendered before judgment on the merits of the separation suit and based on the same evidence on which the first judgment was based) was given prospective operation only. Even this, however, is not understandable. Alimony pendente lite may be an incident to a suit for separation or divorce, but that does not force the conclusion that the court may reconsider, at any time pending judgment on the merits, its previous judgment on the alimony question without a showing that the condition of the parties has changed.

15. 216 La. 950, 45 So. 2d 89 (1950).

defendant father claimed the wife had "waived" the arrearages of alimony due her for support of the child. The court, assuming for the purpose of argument that the law allows "a mother to waive an alimony decree by judgment of court in favor of her child," found that the evidence did not indicate a waiver. This was all that was required for the decision, and the language should not be taken as an indication that the supreme court is of the opinion that such a waiver is possible. It may be pointed out (the practice notwithstanding) that nothing in Louisiana legislation authorizes the payment of alimony for a child to anyone but its legal representative. During marriage and before separation from bed and board the father would be the representative. After the death of a parent, separation, or divorce (as in this case) the tutor would be the representative. Assuming even that the mother had been recognized as tutrix, it should be clear that a tutor cannot waive or compromise his ward's just claims. Such an act would be beyond the scope of administration.

Another case which should be considered in this connection is *Saunier v. Saunier*.<sup>16</sup> After separation from bed and board, the wife had been awarded alimony for herself and for the children in a unit sum without designation of the share of each. On trial of a rule to show cause why he should not be adjudged in contempt of court for failure to pay the alimony, the husband pleaded compensation and proved the wife was indebted to him. The wife, citing Article 2215 of the Civil Code, contended the husband could not claim compensation as some of the alimony was for a third person, the child, who would be prejudiced. The supreme court satisfied itself by saying that the child was not a third person within the meaning of that article. Probably the decision would not have been the same had the mother as *tutrix* been awarded a specific amount of alimony for the child. The informality of the practice followed by the lower courts, as in this case, can lead to the prejudice of children.

In *Felger v. Doty*<sup>17</sup> the supreme court construed Article 160 of the Civil Code so far as it provides that the wife against whom a divorce has been obtained on the ground of separation in fact may be entitled to alimony if she has not been at "fault." According to the court,

"the word 'fault' as so used contemplates conduct or substantial acts of commission or omission on the part of the wife,

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16. 47 So. 2d 19 (La. 1950).

17. 217 La. 365, 46 So. 2d 300 (1950).

violative of her marital duties and responsibilities, which constitute a contributing or a proximate cause of the separation and continuous living apart, the ground for the divorce.”

It is to be hoped that these words will not be taken to mean anything other than they were probably intended to mean, that the wife must have given the husband cause for separation from bed and board as recognized in Article 138 of the Civil Code.

In *Cure v. Tobin*<sup>18</sup> the first section of Act 24 of 1930, now Title 9, Section 4452 of the Revised Statutes, was again interpreted as not excluding the possibility of devolutive appeals on matters contained in the judgment pronouncing on the merits of the separation or divorce proceedings, but not bringing into question the validity of the divorce or separation itself. *Cressione v. Millet*<sup>19</sup> had decided the issue in a case involving an appeal from the custody aspects of the judgment. The instant case involved an appeal on the judgment so far as it related to the disposition of the community property.<sup>20</sup>

#### CUSTODY

Section 1565 of Title 13 gives juvenile courts jurisdiction in cases, among others, “of the State of Louisiana in the interest of children . . . brought before the courts as delinquent or neglected children.” Section 1566 defines “neglected child” to include “any child . . . found destitute, or dependent on the public for support, or without proper guardianship, or whose home, by reason of the neglect, cruelty, depravity or indigence of its parents, guardians, or other persons, is an unfit place for such child. . . .”

In *State v. Traylor*<sup>21</sup> the day after the death of child’s maternal grandmother, said to have been its “legal custodian,” the maternal grandfather filed an affidavit with the juvenile court alleging the child to be “an abandoned and neglected child.” The facts showed that the child’s father had been charged with its non-support on several occasions and did not desire its custody, but that three relatives (the grandfather, a paternal aunt, and a cousin) and another lady whose connection was not reported did desire to have it. The court considered the child a “neglected child” within the meaning of Sections 1565 and 1566

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18. 47 So. 2d 329 (La. 1950).

19. 212 La. 691, 33 So. 2d 198 (1947).

20. *Schneider v. Manion*, 217 La. 118, 46 So. 2d 58 (1950), merely and quite properly applies to appeals in separation and divorce cases the rules presented by the general legislation for the computation of time for filing appeals and posting appeal bonds. It requires no discussion.

21. 216 La. 193, 43 So. 2d 469 (1949).

on the basis that "the legal custodian" of the child had died and that "the child was left without a legal custodian because the father did not have custody of it." The juvenile court was therefore deemed to have jurisdiction to determine in whose custody the child should be placed. The writer feels that the decision is not within the letter or spirit of the above-quoted juvenile court legislation. The whole tenor of that legislation is to authorize state intervention in matters relative to children if and when the child's problem becomes a social one. The proper course of action in this case would have been a suit to appoint a tutor for the child. It does not appear from the opinion that the child was in any danger of neglect or improper influence, except possibly from the father, and he probably would have been excluded from the tutorship under Article 305 of the Civil Code for having failed to support it.

*State ex rel. Martin v. Graza*<sup>22</sup> was a habeas corpus proceeding instituted by a mother to recover custody of her child from strangers. Finding she had entrusted its care to the strangers when and for only so long as she was ill and financially unable to care for it herself, the supreme court affirmed the lower court's award to the mother.<sup>23</sup> The respondents had also challenged the jurisdiction of the district court on the ground that the juvenile court of the parish had already obtained "custody" of the child in adoption proceedings which were pending before the juvenile court at the time the habeas corpus proceedings were instituted. The adoption proceedings, however, had been dismissed before consideration of the writ on its merits, and hence there could be no question of the right of the district court to proceed with the case. The district court has been said not to have jurisdiction in cases in which the juvenile court already has pending before it a matter concerning the custody of the child,<sup>24</sup> but the supreme court has also permitted the district court to retain jurisdiction where the lack of the juvenile court's jurisdiction in the matter pending before it has been demonstrated to the district court.<sup>25</sup>

#### PROOF OF PATERNITY

*Damman v. Viada*<sup>26</sup> is interesting only as an attempt to prove paternity under Article 210 of the Civil Code. That article pro-

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22. 217 La. 532, 46 So. 2d 760 (1950).

23. The case may be compared with *State ex rel. Martin v. Talbot*, 161 La. 192, 108 So. 411 (1926) and *State ex rel. Guinn v. Watson*, 210 La. 265, 26 So. 2d 740 (1946).

24. *State ex rel. Terry v. Nugent*, 212 La. 382, 31 So. 2d 834 (1947).

25. *State ex rel. Simpson v. Salter*, 211 La. 918, 31 So. 2d 163 (1947).

26. 216 La. 1087, 45 So. 2d 632 (1950).

vides that the oath of the mother naming the father is sufficient to prove paternal descent unless she is "known as a woman of dissolute manners, or as having had an unlawful connection with one or more men (other than the man whom she declares to be the father of the child)." Although letters from the alleged father contained language "indicating that there might have been an improper relationship" between him and the mother, the court concluded that there was no proof of cohabitation between them. The issue is one of fact only and need not be discussed further. The opinion, however, left the writer with the impression that the lack of probative value assigned the defendant's letter may have been attributable at least in part to reluctance to consider paternity as proved without a clear admission to this effect on the part of the alleged father.

#### INTERDICTION

Article 391 of the Civil Code, as amended by Act 231 of 1948, provides for the appointment of an attorney at law to represent the defendant in proceedings for interdiction if he "though domiciled in this state, shall be confined, because of his disease, in a public or private institution without this state." The *Interdiction of Toca*<sup>27</sup> was just such a case. In 1930 the defendant, while domiciled here, but attending school outside this state, was there judicially determined to be of unsound mind and committed to an institution. He was still there at the time interdiction proceedings were begun in this state. The court, through Justice Ponder, decided that the legislation should be given "practical application" and not interpreted to cover a case in which the defendant had been a charge of another jurisdiction for nineteen years. The legislature, according to the court, could not have intended "that this statute should apply to anyone except those temporarily absent from the state." The decision is obviously contrary to the legislation and unjustifiable.

The idea that the state should not take cognizance of interdiction proceedings if the defendant is not physically present in the state may suggest the confusion of *interdiction* with *confinement*. In the latter case (ignoring the problem of enforcement) it would seem to be the better policy to have the defendant present in court or at least observable within the area in which the court sits. Interdiction, however, does not in any way necessarily involve confinement. The principal effects of interdiction

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27. 217 La. 465, 46 So. 2d 737 (1950).

proper are to deprive an insane or otherwise incapable individual of the care and management of his affairs for his own good and to make possible the appointment of a curator to administer the estate. In the instant case there can be little doubt that the defendant had some interests in this state requiring administration, otherwise the petition for interdiction probably would not have been filed. And there can hardly be better evidence of the inability to care for one's affairs than mental unsoundness justifying actual commitment for over nineteen years.

The writer will go so far as to say that in his opinion neither domicile nor presence is essential to the legislative and judicial competence of this state in interdiction cases if the person has interests in this state which need administration. Even Article 392 of the Civil Code, which states "Every interdiction shall be pronounced by the competent judge of the domicile or residence of the person to be interdicted," would seem to refer to intrastate or interparish domicile or residence, and therefore to *venue* rather than to *jurisdiction*. If the person is not domiciled or residing in the state, there is no question of its application.

## PROPERTY

*Joseph Dainow\**

### SERVITUDES

There have been many instances in which a Louisiana landowner conveys or grants a right-of-way across his property, but the so-called "right-of-way" does not per se identify fully the relationship or the rights of the parties. This uncertainty results from the failure of the parties to realize or to specify whether the transaction is a transfer of ownership or the establishment of a servitude. In the absence of a clearly expressed intent to transfer ownership of the strip of land, the court has treated the right-of-way as a servitude. Accordingly, in *Bonnabel v. Police Jury, Parish of Jefferson*<sup>1</sup> the court held that the right-of-way was a servitude and had been extinguished by the prescription of ten years non-use, even where the deed used the following language: "sell, transfer, convey, assign, set over and deliver . . . a right-of-way . . . which right-of-way is hereby conveyed, transferred, assigned and delivered unto said grantee . . . in perpetuity to have and retain the absolute title to same. . . ."

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1. 216 La. 798, 44 So. 2d 872 (1950).