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Some Problems Involved in Conditional Deliveries of Deeds

The Legal Significance of Delivery

At old common law some form of manual transfer constituted the effectual act in transferring title to land. Primitive law dealt primarily with externals and did not distinguish between legal right and physical object. The conception of "a transfer of title required a physical transfer of the physical object of the legal right."¹ The manual transfer served to express the finality of the legal act involved and signified the intention of the grantor that the transfer have a legal operation.² Long before written documents were used in conveyancing, the livery of seisin, while regarded as in effect a symbolical transfer of the land itself, was primarily that mark of finality.³ When the English courts recognized the effectiveness of a transfer of land by means of a manual transfer of a writing, they continued the conception of a physical

1. 5 Wigmore, Evidence (2d ed. 1923) § 2405; 2 Pollock and Maitland, History of English Law (2d ed. 1909) 82ff; Rundell, Delivery and Acceptance of Deeds in Wisconsin (1921) 1 Wis. L. Rev. 65.

2. A legal act must be complete before it can produce a given legal consequence. Professor Wigmore says: "The act must be final in its utterance. It does not come into existence as an act until the whole has been uttered. As almost all important transactions are preceded by tentative and preparatory negotiations and drafts, the problem is to ascertain whether and when the utterance was final; because until there has been some finality of utterance, there is no act." 5 Wigmore, op. cit. supra note 1, at § 2404.

A legal act must also be examined from the point of view of volition. But the absence of writing among the primitive people accounts for the formalism in determining the final utterance of a legal act and the volition of the parties. Professor Andreas Heusler explains that "without such formalism the primitive people could not perceive their law; it would be to them but a buried treasure; and thus to them form is itself law." He mentions besides livery of seisin other symbols, i.e., the act of placing the clasped hands of the ward and the vassal in the opened hands of the lord as symbolizing the submission to the wardship or the suzerainty; the grasping of altar-cloth or bell-rope, the taking possession of church and chapel; the widow's act of laying the house-key or the cloak on the bier or the tomb of the deceased husband, her surrender of the entire marriage-estate to her husband's creditors; the handing over of a lock of hair from head and beard, the transfer into household service. "Writing is the sworn enemy of all symbolic representation. A people who do not write feel the need of making the law visible by external and perceivable symbols, and thereby of providing expression for acts and volitions as legal acts and legal volitions. But as soon as acts come to be put into writing, this formalism becomes first a luxury, then a burden, and finally is repudiated entirely." Heusler, Institutions of Germanic Private Law (1885) 70, 74, cited in 5 Wigmore, loc. cit. supra.

Whether there must be a separate act of acceptance by the grantee before the instrument operates as a deed is not discussed in this paper.

3. Pollock and Maitland, loc. cit. supra note 1. Bracton distinguishes the donatio from the tradito, the feoffment from the livery, the declaration of the donor's will from the induction of the donee into seizin. Bracton, f. 40, 44. The donation by itself would not entitle the donee to take possession. Until there has been livery of seisin, the feoffee has not even ius ad rem. See 5 Wigmore, op. cit. supra note 1, at §§ 2404ff., for the historical development of the principle of delivery. See also Hudson, Land Tenure and Conveyances in Missouri (1915) 8 U. of Mo. Bull. Law Ser. 3, 11.
change of possession of the instrument as a prerequisite to its legal operation. This accounts for the expression “delivery” as used in this connection.

While early law drew the line of finality of the legal act for deeds at the stage known technically as “delivery”, modern jurisprudence has progressed from such strict formalism to a “liberal and flexible practicality” in which internal standards compete with the external, and the subjective with the objective. Whether an instrument has been delivered is in modern law a question of intention. It is generally agreed today that delivery does not necessarily involve a manual transfer of the deed, provided the grantor indicates an intention otherwise that the deed shall take effect, though perhaps the manual act, or the lack of it, is evidence of that intention. The delivery of a conveyance means merely the expression, by word or act, of an intention that the instrument shall be legally operative as a binding instrument.

4. 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1738; 2 POLLOCK AND MAITLAND, op. cit. supra note 1, at 190. It was not until the passing of the Statute of Frauds in 1677 that it was necessary to evidence the feoffment by any writing. HOLDSWORTH, HISTORICAL INTRODUCTION TO THE LAND LAW (1927) 112.

5. 5 WIGMORE, loc. cit. supra note 1.

6. “And for this it must be known, that delivery is either actual, i. e., by doing something and saying nothing, or else verbal, i. e., by saying something and doing nothing, or it may be by both. And either of these may make a good delivery and a perfect deed. But by one or both of these it must be made; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And though the party to whom it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered.” SHEPARD’S TOUCHSTONE (1808) 57; Burke v. Adams 80 Mo. 504 (1883). For a collection of Missouri cases asserting this principle, see 10 Mo. Dig. (1930) 404-405. In Burke v. Adams, supra, the court said: “What constitutes a delivery of a deed is often a mixed question of law and fact. An arbitrary rule cannot be laid down. Each case must stand more or less on its own peculiar facts. The intent to convey is evidenced by the act of making out and duly executing and acknowledging a deed. The delivery may be evidenced by any act of the grantor by which the control, or dominion, or use of the deed is made available to the grantee. It is not necessary that it should be handed over actually to the grantee, or to any other person for him. It may be delivered under certain circumstances, though it remain in the possession of the maker.” Approved in Standiford v. Standiford, 97 Mo. 231; 10 S. W. 836 (1888).

7. In Burke v. Adams, supra note 6, the court said: “Where, however, there is not an actual transfer from the grantor to the grantee, it should affirmatively appear from the circumstances, acts or words of the parties, that the intention to pass title really existed.” See collection of cases in 2 TIFFANY, op. cit. supra note 4, at 1740, n. 43.

8. “These authorities establish that there is no set ritual of delivery; that when a deed is executed, and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered; and that such meeting of minds may be gathered from acts or signs, words or silence, in multitudinous variety of circumstance.” Bogie v. Bogie, 35 Wis. 659, 667 (1874). There is “no invariable mark of finality for a deed—whether it be the act of writing, or of sealing, or of manually delivering, or of publicly recording. Subject to certain usual presumptions of conduct, the circumstances of each case must control.” 5 WIGMORE, op. cit. supra note 1, § 2408.

Professor Ballantine has pointed out the unfortunate uncertainty and confusion resulting from the ambiguous use of the word “operative”. He says that “this term may be used either to refer (1) to the instrument coming into force as a binding document; or (2) to its legal effect to transfer or vest ‘title’.” NATURE OF ESCRROWS AND CONDITIONAL DELIVERY (1920) 3 ILL. L. BULL. 3, 5.
If this intention is not present, even though there is a voluntary transfer of the instrument, and absent any elements of an estoppel, the acquisition of possession by the grantee cannot be regarded as a delivery. On the other hand, if an intention is otherwise indicated, the fact that the grantor retains possession of the instrument is immaterial. Many cases may be cited in which delivery was determined by a consideration of the question as to whether the grantor parted with all control. Control in this sense, however, does not pertain to physical control; it pertains to control in the sense of power over the operation of the deed as a binding instrument.

9. Bunn v. Stewart, 183 Mo. 375, 81 S. W. 1091 (1904); cases cited in 2 Tiffany, op. cit. supra note 4, at 1742. "In other words, if the delivery is not to the grantee qua grantee, it is no accomplished delivery in law; for example, delivery of a deed to the grantee for inspection, or to hold while he had some proposal under advisement, or if the deed while in the hands of the grantee is to be considered in transition to the third person's possession. If the grantee is the grantor's special agent, the agency is paramount." 10 R. C. L. 626.

10. Many statements to this effect may be found in the Missouri cases but in most instances they are mere dicta. See Burke v. Adams; Standiford v. Standiford, both supra note 6; Crowder v. Searcy, 103 Mo. 97, 15 S. W. 346 (1890); Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497 (1891) (not custody but access); Ramsey v. Otis, 133 Mo. 85, 34 S. W. 551 (1895); Shanklin v. McCracken, 151 Mo. 587, 596, 52 S. W. 339 (1899); Schooler v. Schooler, 258 Mo. 83, 167 S. W. 444, (1914); Fenton v. Fenton, 261 Mo. 202, 168 S. W. 1152 (1914). For cases in other jurisdictions see 2 Tiffany, loc. cit. supra note 7.

11. For example see Huey v. Huey, 65 Mo. 689 (1877); Burke v. Adams; Standiford v. Standiford, both supra note 6; Sneathen v. Sneathen, supra note 10; Van Huff v. Wagner, 315 Mo. 917, 922, 287 S. W. 1038 (1926). Many other Missouri cases may be cited in which the control or dominion over the deed itself in the physical sense seems to be emphasized. But a careful reading of these cases reveals that a literal interpretation is not at all intended by the court. The courts have inaptly used, perhaps due to a want of a more accurate expression, the word "control" to refer to the legal power over the operation of the deed.

12. Professor Aigler says: "Difficulty may well arise in this connection by confusing physical power or control with legal right or privilege over the disposition of the instrument, or, in other words, with legal power over the operation thereof. One may very well have the fullest physical power or control over a deed and yet have absolutely no legal right or privilege to deal therewith, except for the benefit of the grantee." Is a Contract Necessary to Create an Effective Escrow (1918) 16 Mich. L. Rev. 569, 582.

In Tyler v. Hall, 106 Mo. 313, 17 S. W. 319 (1891), the following instruction was approved: "The Court instructs the jury that no particular form or ceremony is necessary to constitute a delivery of a deed; it may be by acts or words, or both. Anything which clearly indicates the intention of the grantor and the person to whom it is made that the deed shall then become operative and effectual, that the grantor shall lose all control over it, and that by it the grantee is to become possessed of the estate embraced in such deed is a sufficient delivery. . . ."

Tiffany says that "in spite, however, of these numerous decisions recognizing the minor importance of the matter of actual transfer of the instrument in connection with the question of delivery, the courts not infrequently speak as if such transfer were an essential in delivery. The occasional mention, moreover, of delivery 'to' the grantee, suggests the idea of a physical transfer to him. The delivery of a conveyance or other instrument involves in its essence no delivery 'to' any one, since it means merely the expression, by word or act, of an intention that the instrument shall be legally operative, and the fact that in many
If the operation of the deed is still subject to the directions of the grantor it has not been delivered.

Therefore the fundamental question is: Has the grantor expressed his intent that his instrument become legally operative as a binding document? Where A signs and seals a conveyance in favor of B but retains the instrument in his possession there is a *prima facie* showing that the grantor has intended to retain control over the legal operation thereof. On the other hand, if A hands a completely executed instrument in favor of B to B, who accepts it as A's deed, a presumption is usually cases such intention is indicated by the making of a physical transfer does not show that such transfer is necessary. The partial survival of the primitive formalism which attached some peculiar efficacy to the physical transfer of the instrument as involving a symbolical transfer of the property described therein, is presumably to be attributed to the fact that in other connections the words, 'deliver' and 'delivery', as applied to inanimate things, ordinarily have reference to a physical transfer. Op. cit., supra note 4, at 1742.

13. Tyler v. Hall, supra note 12; Burke v. Adams, supra note 6. This seems to be but another way of saying that delivery is an affirmative fact which must be proved by the person alleging that there has been a delivery. See collection of cases in the following notes: (1928) 54 A. L. R. 865; (1907) 9 L. R. A. n. s. 224; (1912) 38 L. R. A. n. s. 941; (1912) 44 L. R. A. n. s. 528. The fact that the instrument reserves a life-estate to the grantor is held in Missouri to be evidence that the grantor intended the deeds to take effect at once. Sneathen v. Sneathen, supra note 10; Williams v. Latham, 113 Mo. 165, 20 S. W. 99 (1892). This may be true as to the intention of the grantor, but it is difficult to see what bearing this has on the question of delivery as the final expression of the intent that the instrument shall be legally operative. In some jurisdictions, it has been held that the signing and sealing of the instrument in the presence of the attesting witness is some evidence of a delivery. Howe v. Howe, 99 Mass. 88 (1868). Likewise the attestation clause reciting the delivery has been regarded as creating a presumption of delivery. Hall v. Sears, 210 Mass. 185, 96 N. E. 141 (1911). Contra: Fisher v. Hall, 41 N. Y. 416 (1869). Perhaps the majority of the decisions holds that an acknowledged instrument raises a presumption of delivery. For cases see 2 TIFFANY, op. cit. supra note 4, at 1752. It would seem that these facts should be used only by the jury in determining whether an intention is shown on the part of the grantor that the instrument should be legally operative. Ferguson v. Bond, 39 W. Va. 561, 20 S. E. 591 (1894). Where the grantor has the instrument recorded, or leaves it with the recording officer, it is usually held that such action shows prima facie an intention that the instrument shall be legally operative. Chambers v. Chambers, 227 Mo. 262, 127 S. W. 86 (1909). But cf. Cravens v. Rossiter, 116 Mo. 338, 22 S. W. 736 (1893). In voluntary settlements in favor of infants it seems that a stronger presumption in favor of delivery will be indulged. Crowder v. Searcy; Schooler v. Schooler; Fenton v. Fenton, all supra note 10. It is difficult to see why any less proof of a delivery should be required in voluntary settlements. It would seem that in the case of gifts more proof should be required. Cf. Hooper v. Vanstrum, 92 Minn. 406, 100 N. W. 229 (1904).

Occasionally courts have said that an instrument handed to the agent of the grantor cannot be considered as having been conditionally delivered. No question can be raised as to such statements where the depositary is to be regarded as an agent of the grantor for the custody of the document. Here the grantor retains control and dominion over the instrument and there is no evidence of an intention that the deed be legally operative. But the statement is too broad if it means that the person to whom the instrument is handed, being the agent of the grantor for certain purposes, is also his agent as regards the custody of the document. Compare Day v. Lacasse, 83 Me. 242, 27 Atl. 124 (1892), with Smith v. Smith, 173 Cal. 725, 161 Pac. 495 (1916); Home Ins. Co. v. Wilson, 210 Ky. 237, 275 S. W. 691 (1925), with Kelly v. Chinich, 108 Atl. 372 (N. J. App. 1919). 10 R. C. L. 631.
raised that A intended a transfer of title.\textsuperscript{14} But suppose that A neither retains the instrument within his possession nor hands it to B; instead, A hands a deed in favor of B to C, a third party as custodian or depositary, with directions to hand it to B upon the performance of some act by B or upon the happening of some event which may be certain or uncertain. Here the deed is said to be delivered upon a condition and the transaction is known as a conditional delivery of the deed.

An absolute delivery is a declaration or expression of intent that the instrument shall become binding and shall also go into legal effect presently to produce the change of legal relations in respect to the property according to the terms on the face of the instrument. A conditional delivery is, therefore, like an absolute delivery in that it is a present delivery, a present binding declaration of intention that the instrument shall go into effect as an operative and binding document, only it is not to produce the full change of legal relations in respect to the property, which it purports on its face to do, until some future event has occurred.\textsuperscript{15} A conditional delivery differs from an absolute delivery merely in the fact that a certain operation or full legal effect of the deed is subject to a condition. The rights to be acquired are suspended until something occurs. But as a delivery it is as final and binding as an absolute delivery, for delivery is not so much a matter of transferring legal rights with respect to property as it is of making a deed binding or operative at all. It is a present and not a future act, although the full effect of the legal act may according to its terms be postponed until some future event. The same effect may have been attained by writing the express condition precedent upon the face of the deed and by then delivering the instrument direct to B. In such case "if the condition is sure to happen, the interest of the grantee would be either a vested remainder or a certain executory interest; if uncertain, the interest given would be a contingent executory future interest."\textsuperscript{16}

In cases involving conditional deliveries of deeds, A delivers a deed to C in favor of B to be delivered by C to B upon one of the following conditions: (1) upon the performance of some act by B, such as the payment of the purchase price;\textsuperscript{17} (2) upon

\textsuperscript{14} Scott v. Scott, 95 Mo. 300, 8 S. W. 161 (1888); Green & Yarnall v. Yarnall, 6 Mo. 326 (1839); see Tyler v. Hall, \textit{supra} note 12, at 320. See collection of cases in 2 TIFFANY, \textit{op. cit. supra} note 4, at 1750, n. 67. This presumption is based upon the improbability that the grantor would vest him with the muniment of title unless he intended to pass title.

\textsuperscript{15} Where the third person is the agent of the grantee for certain purposes it has been occasionally said that the instrument has not been conditionally delivered on the grounds that such delivery is in effect to the grantee himself. But the fact of agency for certain purposes does not in itself show that the third person was the agent of the grantee for the purpose of acting as depository of the instrument. Compare Wier v. Batdorf, 24 Neb. 83, 38 N. W. 22 (1888), and Bond v. Wilson, 129 N. C. 325, 40 S. E. 179 (1901), with Price v. Home Ins. Co., 54 Mo. App. 119 (1893), and Dixon v. Bristol Savings Bank, 102 Ga. 461, 31 S. E. 96 (1897).

\textsuperscript{16} Ballantine, \textit{op. cit. supra} note 8, at 5 and 8.

\textsuperscript{17} \textit{Ibid.} at 6. "The practical effects of a conditional delivery or delivery in escrow and of a condition precedent expressed in a deed, where no other estate than the estate on condition precedent is created are almost identical." Rundell, \textit{op. cit. supra} note 1, at 72.

\textsuperscript{17} To this situation the term "escrow" is more commonly applied. "The delivery of a deed as an escrow is said to be when one doth make and seal a deed and deliver it to a stranger, until certain conditions be performed, and then be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such deed is good." SHEPARD'S TOUCHSTONE, \textit{op. cit. supra} note 6, at 58. However, the definition usually given includes not only cases where the condition is some act to be performed by the grantee but
the death of A, an event certain to happen; (3) upon the death of A if B fulfills certain conditions; and (4) upon the happening of some contingency which is neither within the control of B nor is it an event certain to happen.

In the case of a conditional delivery it is not difficult to understand and appreciate the intention and purpose of A concerning the ultimate disposition of the title to his property, nor is the problem so difficult as long as the contention is inter partes. However, there are likely to be many other competing interests crowding in upon the situation, pending the performance of the condition or the occurrence of the event, which make it quite necessary to analyze the legal effect of A's act in order to determine the interests of the various parties at any particular time. It is the purpose of this study to consider the legal effect of conditional deliveries of deeds. In recent years there has been an increasing interest shown by legal scholars in analyzing this subject. A critical examination of the various views held by these writers and by the courts generally, with reference to the various types of situations in which conditional deliveries may be used, may at least show the difficulties of the problems involved.

Situation 1. What is the legal effect of a transaction where A executes a conveyance in favor of B, which is deposited with C to be kept by C until the performance of some act by B, and then to be delivered over to B? What is the legal effect of this type of transaction? When is the deed delivered? When does title pass? What rights, if any, has B? The courts have not agreed as to the underlying theory of the escrow deed. Professor Bogert presents the conflicting views as follows: "On the one side it is claimed that the escrow affects the delivery of the deed, that until performance of the conditions the deed is not delivered and hence of course of no legal or equitable effect." It is as if the parties had said: 'An instrument is to be prepared and placed with X. It is to create no rights, duties or powers until the grantee pays X $10,000. It is not to be considered delivered until that event happens. If and when that event happens, the instrument is to be a deed, is to be considered delivered, to have operative effect to put the legal title in the grantee, and the grantee is to have the right to the possession of the deed as a monument of title'. This is an arrangement for delivery on condition precedent.

also where the condition is the happening of some event. 10 R. C. L. 621; 2 Tiffany, loc. cit. supra note 4, and cases cited. The term escrow, though usually applied to deeds, is equally applicable to all written instruments.

18. Bigelow, Conditional Delivery of Deeds of Land (1913) 26 Harv. L. Rev. 565 (Professor Bigelow was the first to carefully analyze this question); Tiffany, Conditional Delivery of Deeds (1914) 14 Col. L. Rev. 389 (this is substantially incorporated as a part of his treatise on Real Property (2d ed. 1920); Aigler, op. cit. supra note 12; Ballantine, op. cit. supra note 8; Ballantine, Delivery in Escrow and the Patrol Evidence Rule (1920) 29 Yale L. J. 826; Rundell, op. cit. supra note 1; Bogert, Trusts and Escrows in Credit Conveyancing (1927) 21 Ill. L. Rev. 655; Burby, Deeds Delivered on Condition (1927) 1, So. Calif. Rev. 32; White, Escrows and Conditional Delivery of Deeds in Ohio (1928) 2 Cin. L. Rev. 28; Bell, Conditional Delivery of Deeds in Oregon (1930) 9 Ore. L. Rev. 152. For an analysis of the legal theory involved in the concept of conditional delivery, but without a consideration of the cases, see Gavit, The Conditional Delivery of Deeds (1930) 30 Col. L. Rev. 1145.


20. Ashford v. Prewitt, 102 Ala. 264, 14 So. 663 (1894); Fitch v. Bunch, 30 Cal. 208, 212 (1866); Taft v. Taft, 59 Mich. 185, 26 N. W. 426 (1886); Lindley v. Groff, 37 Minn. 338, 34 N. W. 26 (1887).
CONDITIONAL DELIVERIES OF DEEDS

"From the other quarter comes the argument that the escrow condition affects the title to the land, that the escrow deed is delivered when handed to the depositary, and that the condition is as to the time when the deed will have effect in passing title to the grantee. It is as if the parties had said: 'A deed is to be prepared and delivered to X. It will then become a legally operative instrument. The terms of such operations are that an estate in fee simple is to vest in the grantee at a future date, namely, if and when the grantee pays X $10,000. If such a sum is paid X, the estate automatically passes to the grantee, because of the force given the deed by its original delivery to the depositary'. This is a present deed providing for a future estate, to come into being on the happening of a condition precedent."

The second view presented would seem to be more in accord with the nature and purpose of delivery. The condition goes to the transfer of title and not to the instrument becoming a binding instrument. Furthermore, if the delivery of a deed is merely an expression of an intention that the instrument shall have a legal operation as a conveyance, a conditional delivery would seem to be of little importance in so far as the physical act of transfer is concerned. As an expression of intention that the instrument shall go into effect upon performance of the condition, it bears the same significance as in the ordinary case. Those courts holding that an escrow affects the delivery of the deed have reached what is believed to be a very erroneous result on principle in holding that, even upon the performance of the condition by B, no title passes until there has been a "second delivery" or a manual transfer of the instrument by C to B. Tiffany says this is a relic of the primitive formalism, already referred to, which still so frequently emerges, that the operation of a deed is dependent on the physical transfer. On the other hand a so-called "second delivery" will avail B nothing if the condition precedent to the passing of title has not been performed, and this is so even as against a bona fide purchaser for value from the

21. 2 Tiffany, op. cit. supra note 4, at 1763.
22. Ballantine, loc. cit. supra note 16.
23. Supra note 20.
24. Supra note 4, at 1770. No support for this view is found in those cases which permit the grantee, upon satisfaction of the condition, to bring suit to recover the possession of the instrument from the custodian. These cases decide only that the grantee is entitled to his muniment of title and do not decide that this possession is necessary before the instrument is legally operative.
25. Bales v. Roberts, 189 Mo. 49, 87 S. W. 914 (1905); cf Seibel v. Higham, 216 Mo. 121, 115 S. W. 987 (1909). See collection of cases in note (1927) 48 A. L. R. 405; note (1928) 54 A. L. R. 1246. In Bales v. Roberts, supra, the court quoted with approval from 11 Am. & Eng. Ency. of Law (2d ed.) 348: "A deed or other instrument deposited as an escrow is nothing more than a mere scroll until the condition is fully performed or the contingency happens upon the faith of which it was deposited; and, this being so, no title passes prior to that time without the grantor's consent. The grantee or the other party who is to receive the benefit of the instrument cannot acquire the title by gaining possession of it by theft, by fraud, or by the voluntary act of the depositary, but only by the performance of the condition or the happening of the contingency." And where the escrow is tortiously taken from the possession of the depositary, no title or interest passes. Cases collected in note (1927) 48 A. L. R. 430. The grantor may have the deed cancelled. Bales v. Roberts, supra. In Pennsylvania, while the decisions in effect support the general rule, the unauthorized delivery of an escrow by the depositary is said to pass a voidable title to the grantee. See cases cited in note (1927) 48 A. L. R. 409. In Texas it has been held that even though the deed be delivered through the fraud of the grantees exercised upon the depositary, without a compliance with the conditions of the escrow, the deed is not void in the sense that a forged deed
grantee, in the absence of the elements of estoppel.26

But whether the escrow affects the delivery of the deed or affects the title to the land, as between the parties and as regards third parties who succeed to the
is void, so as to prevent the grantees from acquiring title by adverse possession under the short Statute of Limitations. Neal v. Pickett, 280 S. W. 748 (Tex. 1926), rev'g 269 S. W. 160 (Tex. 1925).

The depositary is liable to the grantor for wrongful delivery. See cases collected in note, L. R. A. 1917 E, 907.


The leading case on this subject is Everts v. Agnes, 4 Wis. 356, 65 Am. Dec. 314 (1855), 6 Wis. 453 (1857). Delivery by the depositary without a compliance with the conditions is not a delivery with the assent of the grantors and passes no title and the grantee can pass none. Dixon v. Bristol Sav. Bank, supra note 14; Forcum v. Brown, 251 Ill. 301, 96 N. E. 259 (1911); Tyler v. Cate, 29 Ore. 515, 45 Pac. 800 (1896). However a few courts have followed the language in Schurtz v. Colvin, 55 Ohio St. 278, 45 N. E. 527 (1896) to the effect that the vendor may protect himself by retaining the deed, and therefore when one of two innocent persons must suffer from the wrongful act of another, he must bear the loss who placed it in the power of the person to commit the wrong. Tutt v. Smith, 201 Iowa 107, 204 N. W. 294 (1925); Blight v. Schenck, 10 Pa. St. 285, 51 Am. Dec. 478 (1849). See language of the court in Hubbard v. Greeley, 84 Me. 340, 24 Atl. 799 (1892). The leading case applying principles of estoppel is Schurtz v. Colvin, supra. Here the grantor had not only selected a depositary who wrongfully turned over the deed to the grantee without the performance of the act called for, but the grantor had placed the grantee in possession of the land; see collection of authorities in note (1927) 48 A. L. R. 427, 424. In many cases the grantee had been let into possession, or the grantor had recognized the grantee's possession of the instrument as valid for certain purposes. See Carusi v. Savary, 6 Ct. of App. D. C. 330 (1895) (where the grantor had placed the deed in a safe deposit box accessible to the grantee); Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546 (1872) (dictum to the effect that the grantor may be estopped as against a bona fide purchaser if he puts the deed in a place accessible to the grantee). Estoppel has been held to apply where the grantor, upon learning of the grantee's wrongful acquisition of the deed, failed to assert his rights for an unreasonable length of time and until the innocent purchaser's rights had intervened. Leonard v. Shale, 266 Mo. 125, 181 S. W. 16, (1915); Baillarge v. Clark, 145 Cal. 589, 79 Pac. 268 (1904); Haven v. Kramer, 41 Id. 382 (1875); Connell v. Connell, 32 W. Va. 319, 9 S. E. 252 (1889). Roberts, Wrongful Delivery of Deed in Escrow (1928) 17 Ky. L. Rev. 31. Such cases are quite analogous to that of a vendee of a chattel who leaves the chattel in the possession of the vendor and the latter wrongfully sells it to an innocent purchaser for value. Many courts have held such retention of possession by the vendor to be fraudulent as to bona fide purchasers from the vendor. UNIFORM SALES ACT, §25. Principles of estoppel are also applied in another line of cases where the owner of property clothes another with the indicia of ownership or with ostensible authority to convey the property, and in reliance upon such apparent ownership or authority an innocent purchaser is misled to his detriment. Shirey v. All Night and Day Bank, 166 Cal. 50, 134 Pac. 1001 (1913); Alexander v. Welsker, 141 Cal. 302, 74 Pac. 845 (1903); McNeil v. Tenth National Bank, 46 N. Y. 325 (1871).

For a discussion of the rights of a bona fide purchaser from a grantee who has wrongfully obtained a deed held in escrow see note (1928) 37 Yale L. J. 357; note (1928) 16 Cal. L. Rev. 141. Nor in the absence of estoppel upon the part of the grantor will a deed fraudulently procured from an escrow holder and recorded help an innocent mortgagee of the grantee as against the grantor. Houston v. Forman, 109 So. 297 (Fla. 1926). The court refused to base an estoppel upon a theory that the record gave constructive notice of the filing of the deeds
rights of A or B, the courts agree that title remains in A until the condition precedent is performed, because it is quite obvious that A did not intend title to pass when the deed was handed to C.7

However, when a deed is delivered in escrow, the grantee B acquires certain rights if he subsequently performs the condition. So the operation of the conveyance is not prevented by the fact that the grantor reacquires possession of the instrument.28 Nor will delivery against A's orders to the contrary prevent title by the fraudulent grantee. He may have the record enjoined. Matteson v. Smith, 61 Neb. 761, 86 N. W. 472 (1901). But his failure, for an unreasonable time, to take measures to cancel the instrument after it has passed into the grantee's control may estop him from asserting against an innocent purchaser that the delivery was conditional. Leonard v. Shale, supra; Mays v. Shields, 117 Ga. 814, 45 S. E. 68 (1903); Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722 (1905).

It has been held where the grantor seeks to avoid a deed as against an innocent purchaser from his grantee, on the ground that it was placed in escrow and obtained by fraud, the burden is upon him to show the delivery in escrow and that it was not through the fraud of his own agent that it was delivered and recorded. Tutt v. Smith, supra. But see Kavanaugh v. Kavanaugh, 260 Ill. 179, 103 N. E. 65 (1913).

In the law of negotiable instruments, where a promissory note deposited in escrow is procured by the payee without the consent of the maker and without the performance of the condition gets into the hands of an innocent purchaser for value, the innocent holder is protected. NEGOTIABLE INSTRUMENTS LAW § 52. But the policy of the law in making bills and notes negotiable and to pass from hand to hand like money is not applicable to conveyances.

27. See general principle annotated in (1927) 48 A. L. R. 405; (1928) 54 A. L. R. 1246; and see also supra notes 25 and 26.

28. Fenton v. Fenton, supra note 10; Regan v. Howe, 121 Mass. 424, (1877); Baum's Appeal, 113 Pa. St. 58, 4 Atl. 461 (1886); cf. Seibel v. Higham, supra note 25 ("But the death of the grantor does not annul the depositary's authority to do what he was appointed to do and it does not impair the right of the grantee to perform the condition and take down the deed.")

A very difficult question is involved in establishing the legal position of C. Perhaps the difficulty is due more to a lack of a legal term to describe the position than is found in the concept itself. Is he an agent of both A. and B. jointly, or separately? Is he a trustee, or bailee? Or does he occupy one position with reference to A and a different position with reference to B? See Bogert, supra note 18, at 672; note (1928) 16 Cal. L. Rev. 141; note (1929) 14 Ia. L. Rev. 461, 465; (1905) 5 Col. L. Rev. 163; note, L. R. A. 1917 E, 907. The Missouri cases designate C a trustee. In Seibel v. Higham, supra, the court said: "The depositary of an escrow is sometimes spoken of as the agent of the grantor and sometimes as the agent of both parties, and whilst that may be correct, in a limited sense, yet strictly speaking he is not an agent at all; he is trustee of an express trust, with duties to perform for each which neither can forbid without the consent of the other. If he were the agent of the grantor his agency would cease on the grantor's death and he would have no authority to receive the purchase money from the grantee and deliver the deed. But the death of the grantor does not annul the depositary's authority to do what he was appointed to do and it does not impair the right of the grantee to perform the condition and take down the deed.") See casual statements in Standiford v. Standiford, supra, note 6; Williams v. Latham, supra note 13; Meredith v. Meredith, 287 Mo. 250, 229 S. W. 179 (1921); Mendenhall v. Pearce, 20 S. W. (2d) 670 (1929). If this means that C becomes trustee of the title much difficulty is encountered, for he is not a party to the deed and therefore no title would seem to have been conveyed to him. Furthermore, in the discussion relative to deeds de-
passing. If C should refuse to surrender possession of the instrument, B may recover the deed from C by suit. If C has wrongfully delivered the deed to a third party, B may maintain trover against such third party. Nor will B's interest be affected by the death of A or attempted transfers of title by A. On the other hand, until the condition is satisfied A retains title so that if he buys an interest outstanding at the date of the first delivery, there is no breach of the covenants for title; and if liens attach while the instrument is held in escrow there is a breach of warranty against incumbrances.

Thus it seems clear that a conditional delivery does produce a change in the legal relation between A and B with reference to the land without requiring a so-called "second delivery", and to some degree at least the escrow deed has an immediate operation as a deed. Writers have described this legal relation in various ways. Professor Hohfeld analyzes the problem of the escrow in terms of powers.

In contemplation of death, infra pp. 21ff., it is seen that any interest passing out of the grantor passes to B immediately. How could the same interest be at once in the grantee and the depositary? But if the court means that the depositary is the trustee of the deed, less difficulty is involved. If the power or interest passes directly to B it is not very material whether C is a trustee of the deed itself or not. B may have more difficulty in proving his title where the deed through which he derives his title is in the possession of another, but this is not impossible. See language of Parsons, C. J. in Wheelwright v. Wheelwright, 2 Mass. 447 (1807); Rundell, supra note 1, at 81. In Smith v. Griffith, 105 Kan. 357, 184 Pac. 725 (1919), the court confronted with this question said: "A depositary is always something more or less than an ordinary agent, and accuracy permits us to say no more than that the depositary is an intermediary between vendor and vendee, having the special powers created by the escrow agreement, and no others."

29. Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301 (1898); Regan v. Howe, supra note 28.

30. See cases cited in 2 TIFFANY, supra note 4, at 1770, n. 39.

31. Hooper v. Ramsbottom, 6 Taunt. 12 (1885).

32. White v. Pollock, 117 Mo. 467, 22 S. W. 1077 (1893); Schooler v. Schooler, supra note 10; Mohr v. Joslin, 162 Iowa 34, 114 Pac. 981 (1911). See cases cited in Bigelow, supra note 18, at 570, n. 12.

In SHEPPARD's TOUCHSTONE supra note 6, at 59, it is said: "Howbeit it seems the delivery is good, for it is said in this case, that if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed, traditio inchoata in the life-time of the parties; and postea consummata existens by the performance of these conditions, it taketh its effect by the first delivery, without any new or second delivery; and the second delivery is but the execution and consummation of the first delivery."


34. Hoyt v. McLagan, 87 Iowa 746, 55 N. W. 18 (1893); Furness v. Williams, 11 Ill. 229 (1849); Wright-Blodgett Co. v. Astoria Co., 45 Ore. 224, 77 Pac. 599 (1904).

35. McMurtrey v. Bridges, 41 Okla. 264, 137 Pac. 721 (1913) (the deed contained a warranty against incumbrances "at the date of delivery" and was held to operate from the time of delivery to the grantee and therefore the state of tax liens at that time determined the grantor's liability on his warranty); and see Wood v. Moreth, 128 Miss. 143, 90 So. 714 (1922). In Cornelius v. Kromminga, 179 Iowa 712, 161 N. W. 625 (1917), a contrary result was reached as to a special assessment in view of the fact that the benefit accrued wholly to the land in the hands of the purchaser. (1918) 1 Minn. L. Rev. 520.

36. Some Fundamental Legal Conceptions as applied in Judicial Reasoning (1913) Yale L. J. 16, 48. He points out that the courts are accustomed to state the question and
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He says: “Fundamentally considered, the typical escrow transaction in which the performance of conditions is within the volitional control of the grantee, is somewhat similar to the conditional sale of personality and, when reduced to its lowest terms, the problem seems easily to be solved in terms of legal powers. Once the escrow is formed, the grantor still has legal title; but the grantee has an irrevocable power to divest that title by performance of certain conditions . . . , and concomitantly to vest title in himself. While such power is outstanding, the grantor is, of course, subject to a correlative liability to have his title divested.” Professor Ballantine expresses the same idea in saying, “where the condition is a future voluntary act of the grantee, the deed creates an irrevocable power in the grantee to draw the title out of the grantor.”

The analogy has been suggested “of an executory limitation contained in a conveyance inter vivos, which does not vest an estate until satisfaction of the condition precedent, but which, when the condition is satisfied, takes effect regardless of events or transactions which may have taken place since the time of the delivery of the conveyance.” Therefore, despite occasional statements emphasizing the importance of a second delivery, it is the first delivery which gives legal significance to the deed, and the result is quite similar to an absolute delivery by A to B of a deed with a condition precedent written on the face of the deed.

The fact that there has been a delivery at one time and that title passed at another affords little difficulty inter partes; but when the rights of third parties are involved the courts have often said that the title of B relates back to the first delivery to accomplish justice or to carry out the intention of the parties. On first impression this seems as vague as the statement of Sheppard’s Touchstone “that to some purpose it hath relation to the time of the first delivery and to some purposes not.” The courts have been inclined to speak of the theory of relation as a fiction. If they mean to imply that it is an artificiality in the law merely to do justice it would seem that they have lost sight of the true nature of a conditional delivery. But if relation is simply a description of the fact that B has acquired some power or contingent property interest dating from the first and only delivery, and that to some degree the escrow has an immediate operation as a deed, although its full effect is suspended, it has some meaning.

Professor Bigelow says: “If the principle that has already been suggested, namely, that the courts in their determination of the rights created under a delivery in escrow have been unconsciously working out in legal form by means of fictions what are essentially equitable rights, is capable of general application it ought not to be difficult to arrive at a perfectly specific answer to the question as to when the legal title derived under the escrow relates to the first delivery.” Since B acquires an irrevocable power or contingent interest, it is a question, where the rights of third persons have intervened, of balancing the relative interests of the parties. Relation back then is simply another means of stating that the interest acquired by to decide it in terms of “delivery”, “relation back”, “performance of conditions”, instead of analyzing the problems of powers.

37.  Supra note 8, at 10.
38.  2 TIFFANY, op. cit. supra note 4, at 1779.
40.  See supra note 16.
41.  See infra notes 46 to 62.
42.  Supra note 32.
43.  See discussion in Ballantine, op. cit. supra note 8.
B is superior to the intervening claim. The law courts have worked out the legal rights of the parties in the same way as equity courts have worked out equitable rights in an action for specific performance. Thus as between B and an heir of A, B will prevail, for, since the grantor had only a defeasible fee, his heir, donee, or devisee should take no greater estate. If the intervening claimant is an intermediate purchaser from A with notice of B's rights, the courts will protect B's interest by holding that B's title relates to the first delivery. Likewise, as against a creditor of the grantor in whose favor a lien has accrued between the first delivery and the satisfaction of the condition, B takes priority, unless such creditor has the position of a bona fide purchaser under the recording acts of the particular jurisdiction. Should A marry, the interest acquired by B takes priority to the dower interest of A's wife. Moreover B has an interest which he can convey and the transferee steps into his shoes. Where B is in possession, it has been held that he has a special interest in the property which is insurable. This is so even though his payments are held in escrow with the deed.

46. Professor Bigelow, supra note 18, has sought to explain the so-called fiction of relation as a working out in legal forms of equitable rights. He says: "If the principle that has already been suggested, namely, that the courts in their determination of the rights created under a delivery in escrow have been unconsciously working out in legal form by means of fictions what are essentially equitable rights, is capable of general application it ought not be difficult to arrive at a perfectly specific answer to the question as to when the legal title derived under the escrow relates to the first delivery." He has accepted the necessity of an enforceable contract in addition to the escrow as is required by the majority of the cases which make the analogy to specific performance complete. See discussion infra pp. 17-21, where the position is taken that the requirement of an enforceable contract to have a valid escrow is to confuse the equitable principle of specific performance with the legal principle of delivery, or as it has been designated "a legal short cut for specific performance."

47. Schooler v. Schooler, supra note 10; Davis v. Clark, 58 Kan. 100, 48 Pac. 563 (1897); Tharaldson v. Evarts, 87 Minn. 168, 91 N. W. 467 (1902); also cases cited supra note 32.

48. McDonald v. Huff, supra note 33; Wright-Blodgett Co. v. Astoria Co., supra note 34; Wilkins v. Somerville, supra note 48; cf. Whitmer v. Schenk, 11 Idaho 702, 83 Pac. 72 (1906). If the intermediate purchaser from A is a bona fide purchaser for value and without notice of B's rights, there will be no relation, for the third person's rights with reference to the land are superior to B's on familiar equitable principles.

49. See collection of cases, 2 TIFFANY, op. cit. supra note 4, at 1780, n. 75.

50. See Knapp v. Andrus, 56 Mont. 37, 180 Pac. 908 (1919); May v. Emerson, 52 Ore. 262, 96 Pac. 454 (1908); Riddle v. Miller, 19 Ore. 468, 23 Pac. 807 (1890). In May v. Emerson, supra, where B had made part payment before a creditor of A had attached, it was held that further payments to C for A, made by B after notice of the attachment were ineffectual as against the attaching creditor on the ground that the creditor by his attachment obtained all the interest in the property which A still had, namely, the bare legal title and an equitable right to hold that title for the unpaid balance of the purchase price.


54. Bright v. Hanover Ins. Co., 48 Wash. 60, 92 Pac. 779 (1907); and see Etheridge v.
to the delivery for the purpose of validating an intermediate quit-claim conveyance by B.65 This would appear questionable since the doctrine of “relating back” is primarily to do justice to B as against intervening claims through A.66

On the other hand, looking at the interest of the grantor during the interval, he has been considered as the owner of the land for the purpose of levying a distress,67 for collecting the rents and profits68 for the purpose of signing a petition for the organization of a drainage district,69 and for imposing upon him a liability for taxes.70 For insurance purposes it is generally held that A remains the full and complete owner and that no interest has passed out of him to B.61 But here again until the condition is performed B suffers no actual loss so as to demand a relation back.62 The dispute is entirely between A and the insurer.

A. The Legal Effect of the Absence of a Contract to Convey.

A very serious hindrance to the use of escrows is found in the rather widespread doctrine that there can be no effective delivery in escrow unless it takes place as the

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55. Beckman v. Frost, 18 Johns (N. Y.) 544, 9 Am. Dec. 246 (1820); Tooley v. Dibble, 2 Hill (N. Y.) 641 (1842). It has been held that a conveyance in escrow to a non-existent corporation is valid if conditioned upon the formation of the corporation and such a corporation is subsequently formed. Spring Garden Bank v. Hulings Lumber Co., 32 W. Va. 357, 9 S. E. 243 (1889); see Santaquin Min. Co. v. High Roller Min. Co., 25 Utah, 282, 71 Pac. 77 (1903).

56. 2 TIFFANY, op. cit. supra note 4, at 1781.


58. 2 TIFFANY, loc. cit. supra note 56. Where B pays interest on the purchase price, the rents and profits have been given to B in adjusting the equitable rights of the parties. Price v. Pittsburg R. Co., 34 Ill. 13 (1864); Scott v. Stone, 72 Kan. 545, 84 Pac. 117 (1906); cf. Seimers v. Hunt, 28 Tex. Civ. App. 44, 66 S. W. 115 (1920).


62. The determination of the question as to which party shall bear the loss of funds in the hands of the depositary depends upon which party's funds they were at the time of the loss, which, in turn, depends upon the terms of the escrow agreement, and whether they had been complied with at the time of the loss of the funds. Where the depositary was to deliver funds when a deed and title guaranty were deposited with him, the loss of the funds before the performance of the condition fell upon the depositor of the money. Hildebrand v. Beck, 196 Cal. 141, 236 Pac. 301 (1925); note (1925) 39 A. L. R. 1080; Foster v. Elswick, 176 Ark. 974, 4 S. W. (2d) 946 (1928) (money deposited in bank under an escrow agreement by which it is to be turned over to a vendor when title is perfected, belongs to the purchaser, and if the bank fails pending efforts by the vendor to perfect his title without unreasonable delay, the loss falls on the purchaser).
result of an actual contract of sale between the parties to the deed. Furthermore, a number of courts have held that such contract must be enforceable under the requirements of the fourth section of the Statute of Frauds. The first case to hold that there must be a contract of sale as a prerequisite to an escrow was that of Fitch v. Bunch. There A, the plaintiff, wished to exchange real estate for shares of mining stock owned by B, the defendant. The stock and the deed duly made out to the grantee were deposited with a depositary C. The parties had agreed that they would visit the works of the mining company, and if A should then desire to exchange the lands for the stock, she would give B an order on C, and a similar order would be given by B in favor of A. On presentation of the orders C was then to deliver the deed and the stock. These orders were given but in the meantime A had notified C not to deliver the deed and to return it to her. In an action by A to enjoin C from turning over the deed to B, the court held that the deed had not passed out of A's control and she could recall the deed. The court gave the absence of a contract of sale as one of the grounds for its decision. But this was entirely unnecessary to decide the case. As another ground for its holding the court placed special emphasis on the fact that this was not an escrow since C was the agent of A who could revoke his authority or direct him to make such a disposition of the deed as she might desire. This A had done. The instrument could not be delivered by C until additional directions by the grantor. It is quite significant

63. See Aigler, op. cit. supra note 12, where all the cases bearing on this question down to 1918 are analyzed and discussed. Professor Aigler distinguishes two very distinct types of agreements for the sale and conveyance of property, where the consummation of the transaction is postponed until the payment of the purchase price or the performance of some condition. In the one type there is usually a binding, enforceable contract calling for the execution of a proper conveyance. Upon the performance by the vendee and the refusal by the vendor, an action lies for specific performance, in the case of land at least. Here the contract is "vitally important." The other method is to deposit a deed, fully executed by the grantor, with a third party in escrow to be fully operative as a conveyance of title upon the happening of the event specified. Here title passes ipso facto upon the performance by the purchaser, and the handing of the deed over to him is for that purpose unnecessary. Professor Aigler points out that to require an enforceable contract in the latter type of transaction is to confuse the two methods described. And see note (1917) 15 Mich. L. Rev. 579.

64. Fitch v. Bunch, 30 Cal. 208 (1866); Holland v. McCarthy, 173 Cal. 597, 160 Pac. 1069 (1916); Freeland v. Charnley, 80 Ind. 132 (1881); Main v. Pratt, 276 Ill. 218, 114 N. E. 576 (1916); Davis v. Brigham, 56 Ore. 41, 107 Pac. 961 (1910); Foulkes v. Sengstacken, 84 Ore. 118, 163 Pac. 311 (1917); Clark v. Campbell, 23 Utah 569, 65 Pac. 496 (1901); McLain v. Healy, 98 Wash. 489, 168 Pac. 1 (1917); Campbell v. Thomas, 42 Wis. 437 (1877); cf. Seifert v. Lanz, 29 N. D. 139, 150 N. W. 568 (1914). In Foulkes v. Sengstacken, supra, it is said that "a pure escrow presupposes the existence of a valid contract with sufficient parties, a proper subject-matter, and a consideration. There must be an actual contract of sale on the one side and of purchase on the other, and until there is such a contract, the instrument executed by the supposed grantor, though in form a deed, is neither a deed nor an escrow." A binding contract has not been considered absolutely essential by a few courts. Tharaldson v. Evarts, supra note 47; Farley v. Palmer, 20 Ohio St. 223 (1870). The escrow deed has been held to be sufficient formality and no auxiliary written contract is required. Ullendorf v. Graham, 81 Fla. 51, 87 So. 50 (1920); Eason v. Walker, 118 Okla. 37, 246 Pac. 865 (1926); Day v. Townsend, 238 S. W. 213 (Tex. Civ. App. 1920).

65. Supra note 64. Followed by the same court in Miller v. Sears, 91 Cal. 282 (1891), and Holland v. McCarthy, supra note 64.
that this judicial utterance, which seems to form the basis of later decisions, cites no precedent.

Perhaps the leading case on the requirement that there must be a valid and binding contract of sale before there can be a delivery in escrow is that of Campbell v. Thomas, decided by the Wisconsin Supreme Court a few years after Fitch v. Bunch and based entirely upon that case. In Campbell v. Thomas there was a parol contract for the sale of certain lands on which the vendee, B, had paid a small sum to be applied on the purchase price. The vendor, A, had deposited the deed with the depositary with instructions to deliver the same to B upon B's making a deposit of notes and a mortgage, and the payment of a further sum of money. A directed C to refuse to hand over the deed although B had fully performed. The suit was brought by B to compel the delivery of the deed. The court held that, in the absence of an auxiliary contract of sale in connection with the conditional delivery, B could not recover and that A could control the operation of the instrument and revoke delivery.

The soundness of the foregoing decisions would seem to depend upon whether or not a conditional grantee acquires an indestructible power or right to acquire title from the time that the deed is delivered in escrow. If that is the theory of the grantee's right, the same should be perfect and indestructible without being supported by any contract between the parties. On the other hand, if the result of the transaction is merely to vest in the party who holds the deed in escrow an authority to deliver the same to the conditional grantee on behalf of the grantor at a future date, such authority would be revocable upon ordinary principles of agency.

66. Supra note 64.

67. Mr. Justice Lyon said on a rehearing: "Because such deposit did not divest the plaintiff of his title to the land, there is no executed contract of sale; and hence, it seems almost too plain to be questioned or doubted that, before the plaintiff can obtain the delivery of the deed and the title to the land, after the defendant has recalled the deed and repudiated the whole transaction, he must show that the defendant has made a valid and binding agreement to sell and convey the land. And such an agreement can be evidenced only by a written note or memorandum thereof, expressing the consideration and subscribed by the defendant. . . . But we have not discovered a single case in which it has been held that one who has deposited a deed of land with a third person with directions to deliver it to the grantee on the happening of a given event, but who has made no valid executory contract to convey the land, may not revoke the directions to the depositary and recall the deed at any time before the conditions of the deposit have been complied with; provided that those conditions are such that the title does not pass at once to the grantee upon the delivery of the deed to the depositary."

68. Various writers have severely criticized these decisions but upon various grounds. Tiffany says: "The idea at the basis of this asserted requirement of an auxiliary contract in connection with conditional delivery appears to be that, in the absence of such a contract, the grantor can control the operation of the instrument, that, in other words, he may revoke the delivery. Such an idea is, it is conceived, absolutely erroneous, and involves an entire misapprehension of the nature of conditional delivery. After the delivery of the instrument of conveyance, whether absolutely or conditional, the parties stand in the relation, not of vendor and purchaser under a contract but of grantor and grantee under a conveyance, and consequently the question of the existence of a valid contract of sale is immaterial. There is no more reason for regarding the conditional delivery of a conveyance as invalid in the absence of an enforceable contract of sale than for so regarding an absolute delivery." Op. cit. supra note 4, at 1775. The same writer says that there are no considerations of policy
Furthermore, it would seem that if a contract of sale is necessary in order that a conveyance may be delivered in escrow, the courts would make no distinction between deliveries conditioned upon the payment of the purchase price, and conditional deliveries in connection with gifts of property, as will hereinafter be discussed. Yet in the case of a gift the courts uphold the validity of the conditional delivery. Obviously there can be no contract in such cases to support or convenience in its favor. He gives a very potent argument from legal history in pointing out that, while the doctrine of delivery in escrow was recognized in the common law courts at least as early as the fifteenth century, yet there is not the slightest suggestion in the earlier authorities as to the necessity for such an auxiliary contract. He says: “It is, to say the least, somewhat extraordinary that an integral element in a doctrine dating from the commencement of the fifteenth century should have remained to be discovered by a California court in the latter half of the nineteenth century.”

Professor Ballatine sees little difference between a deposit of a deed in escrow to be delivered on payment of the price and a contract to execute a deed on payment of the price under this doctrine. He suggests that the requirement of a contract of sale is simply a legal short-cut to specific performance. Op. cit. supra note 8, at 15.

Professor Bogert observes as a practical matter, that this requirement “does not harmonize with the practical judgment of business men and that frequent injustice results from its operation. Parties think, and are entitled to think, that the negotiations have resulted in an executed transaction when the deed has been made out and irrevocably deposited to await an event, and that the time for raising objections to the preliminary contract on the ground of its informality has passed.” Op. cit. supra note 18, at 679.

The requirement of a contract as an essential to a true escrow is, however, supported by Professor Bigelow. He seems to see in the true escrow case the passing of an equitable interest to B, which, however, is enforced at law, and is in effect what has been called “a legal short-cut to specific performance.” Op. cit. supra note 18, especially at 567-575, 578. But a deposit of a deed in escrow to be delivered on payment of the price is something entirely different from a covenant to execute a deed on payment of the price, both in purpose and legal effect. “For Bigelow's view we must say that it makes the thing definite as to when the grantor still has the power to revoke. No difficulty about ascertaining the intention at the time was handed to the depositary; simply search for an enforceable contract; if there is one, the arrangement is irrevocable. Moreover, this view assimilates the escrow into the general body of law. Instead of having a new doctrine to develop and limit we have, by applying the analogy to equity, well defined rules generally considered correct, to follow. Its simplicity is the greatest argument in its favor.” Bell, op. cit. supra note 18, at 173.

Professor Aigler suggests that the only effect of the absence of a contract in the cases where the grantee has some condition to perform is evidence that A intended the deed as an offer and that C is holding the deed as A's representative. Proof of a contract would of course negative the idea of a mere offer or agency, and he says that “a mutual understanding not amounting to a contract should have the same result.” Op. cit. supra note 12, at 588; note (1917) 15 Mich. L. Rev. 579. He suggests also that if something is to be done by the grantee in the way of providing a consideration for the conveyance and there has been no understanding arrived at, it is quite difficult to avoid treating the deed as a mere offer, and the depositary as holding it as the agent of the grantor. Hoig v. Adrian College, 83 Ill. 267 (1876), supports this suggestion.

69. See statement in Holland v. McCarthy, supra note 64; Brown v. Allbright, 110 Ark. 394, 161 S. W. 1036 (1913) (where B had partially performed the condition and the grantor had recovered possession of the deed and refused to deliver upon B's tender of performance, the grantor was compelled to deliver the deed). Approved in (1914) 27 Harv. L. Rev. 760. But until there has been at least part performance of the condition by the
the delivery. Where the deed is placed with C to be delivered to the grantee upon the happening of a certain event, as the death of A, the courts are quite agreed that no contract is necessary. But whatever theory is adopted, the rights of the parties as against intervening third parties claiming through or under the grantor are the same. However, the presence of a contract will possibly enable a law court more easily to work out priorities under the legal doctrine of relation by the analogy from equitable principles of specific performance.

Situation 2. What is the legal effect of a transaction where A executes a deed to certain land in favor of B and gives it to C with a request or direction that C is to hand it to B upon A's death, or indicates his intention that it shall become fully operative only upon A's death?

The condition in this type of case is obviously different from that in situation 1 in that the condition is certain to be satisfied. A very important difference is seen in the fact that there is no condition to be fulfilled by B. B is in the position of a donee for he is neither to pay any consideration nor to perform an act. The deed is not put in escrow for subsequent delivery upon the happening of a future event with regard to which the grantee has a causative function to perform, as where the transaction is to consummate a contract of sale, but for the purpose of effectuating a gift. The interest which B has here cannot be called a "power" for he is in no position to effect a transfer of title by the performance of the condition. Furthermore, A has in mind the distribution of his property after his death. But just what is the intention of A? It would seem that there are two possibilities: (1) he may have intended in delivering the deed to C to make the deed effective at once as to B, but to postpone the enjoyment of that interest until after the event; or (2) A may have intended that C act as his agent to deliver the deed to B at A's death.

If A intended the second possibility and intended to retain control over the deed—the right to take it back—then it seems that C is not holding the instrument as a depositary for there has been no delivery. A has intended a testamentary disposition, for it is not his intention that the deed be operative until his death. Therefore it must fail of legal effect since it does not satisfy the requirements of a will. On this the authorities are quite in accord. Many cases reach this result donee in the true escrow cases, the delivery to the escrow is treated as a mere revocable offer. Hoig v. Adrian College, supra note 68. For a discussion of the conditional delivery of deeds as gifts to take effect on the death of the grantor, see infra.

70. Aigler, loc. cit. supra note 68. On the proposition that this may not be considered a conditional delivery at all, see infra p. 23, and notes 75 and 76. In such cases the distinction is well taken if it is held that there is a conveyance in praesentia. See discussion infra.

71. See collection of authorities, 18 C. J. 210, n. 29; note (1928) 52 A. L. R. 1222; 2 TIFFANY, op. cit. supra note 4, at 1786.

72. Courts agree on the general proposition that whether an instrument in form of a deed but to take effect on the death of grantor is to be construed as a deed or a will depends primarily upon whether the grantor intended to pass a present irrevocable interest in the property. It is also a general rule that the intent of the maker is to be ascertained from the instrument taken as a whole in the light of the circumstances surrounding the maker at the time of the execution. The authorities are collected in note (1921) 11 A. L. R. 36. See the Missouri cases in the same note. No general rule of construction may be laid down to determine this intention. The following have been considered as evidence of the intent: Instrument designated on its face as a deed; instrument in the form of a deed; the manner of the execution; acknowledging; attestation. In addition there exists another generally accepted rule to the effect that where such an instrument cannot operate as a will, because
apparently on the theory that since A did not intend to convey an estate in praesenti there is established an effective intention that the instrument shall remain revocable. But these are two entirely different intents and the second does not necessarily follow from the first. It would seem that the true intention, however inaptly expressed, was merely to postpone the vesting of the estate given. The grantor surely wanted to accomplish something, and surely knew that he was not making a will. In a few instances it has been held, although A reserved the right to recall the deed, that there has been sufficient delivery if A dies without having exercised the right. But these cases cannot be supported on principle.

of insufficient execution, and it is sufficiently executed as a deed, the courts will make an effort to construe it so as to prevent it from becoming a mere nullity. A few courts have applied a rule of construction, when the paper is equivocal, that there is a presumption against its being a will. Provisions that the instrument is to "take effect" or "operate" at the maker's death have been interpreted both ways dependent upon the construction to be given to them in connection with the whole deed. Note (1921) 11 A. L. R. 36. See infra note 79. Ballantine, When are Deeds Testamentary (1920) 18 Mich. L. Rev. 470.

73. See note (1917) 30 Harv. L. Rev. 508; infra notes 101 and 102.

74. Davis v. Brown College, 222 N. W. 858 (Iowa 1929) (a deed delivered to a bank together with a written and signed statement stipulating that the bank was to hold it and deliver it to the grantee on the grantor's death and containing the reservation, "said deeds to be returned to me on demand by me"). The reasoning of this court is that, since physical control over a deed by a grantor does not prevent a valid delivery to a grantee, and since in substance there is no difference between a power over the physical deed itself and a power to obtain control over it, the reservation of a power to recall on a delivery to a third person does not invalidate the delivery if extrinsic evidence shows an intention in the grantor that title pass under the deed unless it is recalled. It would seem the answer to that line of reasoning is that a delivery of a deed made with a reservation of power to avoid its legal effect by recalling it, should not consistently or logically be considered as an act having any effect in law at all, for the requirement of delivery is entirely missing. 2 TIFFANY, op. cit. supra note 4, at 1769, 1785. Furthermore the grantor's intention cannot be that the deed become operative immediately to pass a present interest. It does indicate an intention that the instrument is to pass no interest until the grantor's death which would make it appear as a testamentary disposition and valid only if executed as a will. For a case adopting the correct view see Garren v. Shook, 306 Ill. 454, 137 N. E. 489 (1922), commented on in (1923) 36 Harv. L. Rev. 883. See note (1928) 52 A. L. R. 1240. In two early Missouri cases there were dicta that such a delivery might be valid. Huey v. Huey, supra note 11; Standiford v. Standiford, supra note 6. But cf. Ray v. Walker, 293 Mo. 447, 240 S. W. 187 (1922), and Sims v. Brown, 252 Mo. 58, 158 S. W. 624 (1913). Compare with these facts Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304 (1905), where a decedent being in debt to the defendant, entrusted to a third party a deed in defendant's favor, the deed to be returned to the decedent on payment of his indebtedness, unless he should sooner die, when it should be delivered to the defendant. Subsequently, the decedent executed a deed to plaintiff. On decedent's death, the third party delivered to the defendant the escrow deed, which plaintiff now sought to have cancelled. It was held, as the decedent retained control over the deed by the reserved right of payment, its delivery to the third party would not constitute an escrow, and, therefore it should be delivered up and cancelled. See comment on this decision which questions the rule that the condition in escrows can relate to the grantee only. (1906) 6 Col. L. Rev. 202.

Compare the decisions to the effect that there is no valid delivery if it is conditioned on the grantor's death before the death of the grantee. Long v. Ryan, 166 Cal. 442, 137 Pac. 29 (1913); Kenney v. Parks, 125 Cal. 146, 57 Pac. 772 (1899); Dunlap v. Marnell, 95 Neb. 535, 145,
Assuming that A had the intent to make a present delivery and to deny himself any control over the deed, what are the legal effects of such a delivery? Tiffany points out that the courts might have taken the position that a delivery conditioned upon a condition which cannot fail to be satisfied "is not properly subject to any condition at all, and that consequently the instrument operates exactly as if there had been no reference to the grantor's death..." Professor Ballentine criticizes such a suggestion on the ground that the fact of the condition being certain to be satisfied sometime does not prevent its being a condition. He says, "It is indeed as uncertain as anything can be when death will occur, and the mere fact that a condition is certain to be satisfied in no way prevents its being a condition, an operative fact which is necessary to the transfer." The cases have followed four different theories: (1) a few courts have held an instrument of this sort to be an attempted testamentary disposition, and void under the Wills Act because of the lack of attesting witnesses; (2) a few courts have construed such a document as a valid conveyance of an estate in futuro with a resulting fee in A subject to a conditional limitation in fee in favor of B; (3) the great majority of the cases takes an intermediate position and holds that the instrument is a valid deed, which apparently passes title at once to B with the enjoyment of possession thereof postponed until A's death, or with a life-estate reserved in A;

N. W. 1017 (1914). They are based on the erroneous assumption that in such case the grantor retains control of the operation of the instrument, and that there is consequently no valid delivery. 2. Tiffany, op. cit. supra note 4, at 1787. Where the grantor expressly retained the privilege of cancelling the instrument in case the grantee failed to support her for the balance of her life, it was held that there was no such retention of control as to affect the validity of the delivery, but it involved merely the right to terminate the estate created in case the named contingency occurred. Malley v. Quinn, 132 Minn. 254, 156 N. W. 263 (1916); Phifer v. Mullis, 167 N. C. 405, 83 S. E. 582 (1914). See also Young v. Paine, 283 Ill. 649, 119 N. E. 612 (1918), commented on in (1919) 14 Ill. L. Rev. 151.

78. See note (1917) 30 Harv. L. Rev. 508, where it is contended that this position is the more sound and does less violence to the otherwise clearly expressed intention of the grantor, than the first possibility and that followed by the majority of the courts. It is pointed out that the failure of the courts to use this interpretation is possibly due to the effect of the common law rule that a deed purporting to convey an estate in futuro was void. But since the Statute of Uses such a deed may operate as a bargain and sale to convey an estate in futuro. Furthermore under modern statutes permitting the transfer of land by deed there would seem to be an additional reason. Mo. Rev. Stat. (1919) § 2271. Under this statute it was held in O'Day v. Meadows, 194 Mo. 588, 92 S. W. 637 (1905), that a deed creating an estate in futuro, by provision for its commencing upon the death of the grantor, was valid, despite the common law rule. See collection of the authorities in note (1921) 11 A. L. R. 23.
79. See collection of authorities in note (1928) 52 A. L. R. 1222. Williams v. Latham, supra note 13; Cook v. Newby, 213 Mo. 471, 112 S. W. 272 (1908); Crites v. Crites, 225 S. W. 990 (Mo. 1920); Meredith v. Meredith, supra note 28; Tillman v. City of Carthage, 297 Mo. 74, 92, 247 S. W. 992 (1922); Mendenhall v. Pearce, supra note 28. Very little emphasis is placed upon provisions to the effect that the instrument is to "take effect" or "operate" at the maker's death, or that title is to vest or pass upon the maker's death. It is the intention that the court is attempting to find and these words are to be construed in
(4) some courts hold that there has been no delivery, but to do justice, the delivery to B will relate back to the time of the handing of the deed to C by A. 80 

The propriety of the third theory has been questioned, although it is followed by the majority of states in which the question has arisen. If it means that a conveyance so delivered creates two estates, a life estate in A and a future estate in B, in the nature of a remainder or reversion in B, violence is done to its language, for it purports by its terms to convey only an estate in fee simple. 81 Nor is it possible to support a legal life estate in A on any theory of a resulting use, for if the use results it results in fee. But this does not appear very serious if one considers that a court is attempting to give effect to the intention of A who desires a certain result but does not know the technical language of the law.

Less violence is done to the language of the grantor, where no life estate is expressly reserved, to hold that such a deed should operate as a conveyance of an estate to commence in futuro, leaving a fee in the grantor, subject to a conditional limitation or springing interest in fee in B. 82 Thus an absolute fee simple is created but the condition makes the estate begin at some future time. This has been said in practical effect to leave "a life estate in the grantor by subtraction." 83 This gives full effect to the intention of A, in that he had in mind the creation of a situation whereby he would not be disturbed in his possession during his life. This is the position of the courts which follow the second view, and it is not objectionable as presenting the case of a testamentary disposition, for it would take effect at the time of the delivery of the deed in the sense that B would become entitled to an executory interest which would operate in the future by the springing of the use.

Professor Bigelow suggests that the courts may mean simply that since the connection with all the facts and circumstances of the whole deed. See collection of cases in note (1921) 11 A. L. R. 36. See supra note 72, and infra note 81. Compare Dawson v. Taylor, 214 S. W. 852 (Mo. 1919), Priest v. McFarland, 262 Mo. 229, 171 S. W. 62 (1914), and O'Day v. Meadows, supra note 78, with Goodale v. Evans, 263 Mo. 219, 172 S. W. 370 (1914), Givens v. Ott, 222 Mo. 395, 121 S. W. 23 (1909); Terry v. Glover, supra note 10, Griffin v. Mcintosh, 176 Mo. 392, 75 S. W. 677 (1903), and Griffin v. Miller, 188 Mo. 327, 87 S. W. 455 (1905).

The fact that the third party is left in ignorance as to the contents of the instrument has occasionally been emphasized by the courts to indicate an intention that the deed was to operate only at the death of the grantor and therefore testamentary. Cf. Van Huff v. Wagner, supra note 11, commented on in (1927) 75 U. of Pa. L. Rev. 474.

80. Stone v. Duvall, supra note 52. See cases cited infra note 86. The same courts have in some instances apparently based their decisions at one time on the ground that title passed to the grantee at the moment of delivery by the grantor to the depositary, and at another time on the ground that title passed as of the date of the second delivery but related back. See collection of cases in Bigelow, op. cit. supra note 18, at 579, n. 39. In some cases the courts hold that there was a present transfer but also speak about relation. Meredith v. Meredith, supra note 28; Williams v. Latham, supra note 13.

81. 2 TIFFANY, op. cit. supra note 4, at 1784; supra note 73.

82. KALES, FUTURE INTERESTS (2d ed. 1920) §§ 463-466; HUDSON, EXECUTORY LIMITATIONS OF PROPERTY IN MISSOURI, op. cit. supra note 3; Ballantine, op. cit. supra note 18, at 475; 2 TIFFANY op. cit. supra note 3, at 1784. For a discussion of springing uses in Missouri see Hudson, op. cit. supra.

83. Ballantine, op. cit. supra note 8, at 9. In Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797 (1898), the court said: "The transaction does not vest in the grantee the fee in possession, but only a fee in remainder after the life estate of grantor, which by implication is carved out of the fee, has terminated."
deed is in the possession of C and will not be delivered to B until A's death, there is no one who can disturb A in the possession of the land and consequently A has what is substantially as good as a life-estate. Professor Aigler describes the situation as follows: "In such cases the proper view would seem to be that there has been an inchoate delivery complete so far as the grantor is concerned; in other words a manifestation of intention that as to him the deed shall be taken as a completed act, the full operation of which as a conveyance, however, is to be postponed until the happening of the event, as in cases of true escrows the full operation of a deed completely executed by the grantor is postponed, in order to carry out the intention, until the condition is performed."84

A few courts adopting the fourth view have reached the same result upon a much more doubtful line of reasoning. They have held that no estate vests in B until the death of A, and that the deed becomes operative only on its delivery to B after A's death; but that when necessary for the purposes of justice the title will relate to the time of delivery from A to C.86 It has been pointed out previously that any emphasis upon the second delivery, that from C to B, has no basis in principle. It is merely a reoccurrence of the idea that the operation of a deed depends upon the physical transfer of the deed to the grantee. But this loses sight of the fact that the determining factor was the first and only delivery at which time the grantor indicated his intention that the instrument be presently effective, vesting in the grantee an estate to be enjoyed in possession on the grantor's death.87 Therefore, the transfer or the failure to transfer the instrument by C to B is absolutely immaterial. Moreover, if it is the second delivery which is to make the deed operative, it is clear that no such result could be reached since A is dead and cannot make a delivery.88 Neither can C make the delivery for A since C's authority necessarily comes to an end upon the death of his principal.89

Where the contest is between B and heirs of A it is necessary to find only that B has title. That is the only real question involved. Just how or when he got it is not so important for the determination of the case.90 Where the contest is between B and subsequent donees, grantees, attaching and judgment creditors of A, the cases arrive at the same result in protecting B upon any one of the last three theories discussed.91

86. Supra note 80. In addition see language of the court to this effect in Owen v. Williams, 114 Ind. 179, 15 N. E. 678 (1888); Haeg v. Haeg, 53 Minn. 33, 55 N. W. 1114 (1893); Stonehill v. Hastings, 202 N. Y. 115, 94 N. E. 1068 (1911); Stephens v. Rinehart, 72 Pa. 434 (1872). Williams v. Latham, supra note 13, has been cited as supporting this rule. While the court does use the language of relation yet it is very clear that such was entirely superfluous and does not affect the holding of the court that there was a present transfer of title.
87. These courts have followed the true escrow cases without noticing the difference between the two situations. This will account for the doctrine laid down. For example see Stone v. Duvall, supra note 52.
88. Supra note 72.
89. Givens v. Ott, supra note 79; Seibel v. Higham, supra note 25 (semble); MECEM, Agency (2d ed. 1914) § 652.
90. Bigelow, op. cit. supra note 18, at 579. This writer says that nine-tenths of the cases are of this type.
91. Smiley v. Smiley, supra note 51 (dower claim); Stone v. Duvall, supra note 52 (where B died before A who sought to cancel the deed); Brown v. Austen, 35 Barb. (N. Y.) 341 (1861) (judgment creditors of A); Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300 (1895)
And the authorities uniformly hold, where A has reserved no dominion or control over the operation of the deed, that he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect a delivery thus completed.  

Situation 3. What is the legal effect of a transaction where A hands C a deed with instructions that C is to deliver it to B after A's death if B fulfills certain conditions?  

This set of facts combines those of situations I and II. Before B acquires complete title it is essential that he satisfy the condition as in situation I. There is the additional contingency of the death of A which is found in situation II. There is no intent on A's part that the deed shall become effective at once as to B, with the enjoyment of possession postponed until A's death, which distinguishes the instant case from situation II. Do the differences sufficiently outweigh the comparisons between the various types of situations as to prevent assistance from the decisions in the cases just discussed?  

It would seem that the solution of this type of case lies primarily in whether the courts are inclined to favor conditional deliveries of instruments. A court may very easily say that this is very similar to an escrow, and therefore a legally enforceable contract, by the majority view, is a prerequisite. On the other hand, the analogy to deliveries made in contemplation of death is strong. Inasmuch as by the terms of the instrument it is not to be operative until after the death of the grantor, some courts have held that it is objectionable as being testamentary in character and inoperative.  

A few cases have adopted one or the other of the first two possible positions, apparently without noticing the difference in the facts and without any discussion of the principles involved. In at least two cases the court accepted either position as (purchaser from A with notice). There are other cases which apparently refuse to apply the doctrine. But these cases may well be explained on other grounds. See Rathmel v. Shirey, 60 Ohio St. 187, 53 N. E. 1098 (1899); Ladd v. Ladd, supra note 51. It is quite possible that the recording acts may affect the priorities. See supra notes 47-50. Under the second theory a different result would possibly be reached as to dower rights, waste, and in the application of the Rule in Shelley's Case where A stands seized to the use of his heirs after his death. See Kales, and Hudson, both op. cit. supra note 82.  

92. Authorities collected in note (1928) 52 A. L. R. 1247.  
93. See supra notes 63 and 64.  
94. Taft v. Taft, supra note 20; In re Bybee's Estate, 179 Iowa 1089, 160 N. W. 900 (1917).  
95. Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726 (1886); Stockwell v. Shalit, 204 Mass. 270, 90 N. E. 571 (1910); Plymale v. Keene, 76 Mont. 403, 247 Pac. 554 (1926); Jackson v. Jackson, 67 Ore. 44, 135 Pac. 201 (1913); McCurry v. McCurry, 95 S. W. 35 (Tex. Civ. App. 1906); Gammon v. Bunnell, 22 Utah 421, 64 Pac. 958 (1900); cf. Stewart v. Wills, 137 Iowa 16, 114 N. W. 548 (1908) Detmer v. Behrens, 106 Iowa 585, 76 N. W. 853 (1898), and Trumbauer v. Rust, 36 S. D. 301, 154 N. W. 801 (1915) (where the interest vests but the enjoyment and control is postponed until performance of the condition specified after the death of the grantor). Where the instrument provides for the complete vesting of title on the death of the grantor and on express conditions to be performed during the life of the grantor, i.e., the support of the grantor, it has been viewed by one court as conveying a present interest the enjoyment of which is postponed. Phifer v. Mullis, supra note 74.  
96. Hurtin v. Cramer, 10 Ariz. 110, 85 Pac. 483 (1906); Nolan v. Otney, 75 Kan. 311, 89 Pac. 690 (1907).
applicable, and again with little or no concern as to differences in principle. In Nolan v. Otney, A told C, the day before A died, to deliver the deed to B after A's death, provided B should haul some corn, pay a sum of money, and give a note for a certain sum. These conditions were fully complied with, and, after the death of A, C handed the deed to B. The heirs of A brought suit to have the deed set aside. The courts while noticing that at least one court distinguished between acts to be performed by B which at least were capable of performance while A was still alive, and conditions which were contemplated to be performed after the death of A, held, that on the performance of the conditions by B, the title passed to B and related back to the date of the original delivery. The court deliberately refused to classify these facts as falling under the escrow or the death cases. "The view", said the court, "that no effect can be given a deed placed by the grantor in the hands of a third person to be delivered upon his death, if the performance of some act by the grantee is made a condition of such delivery, is supported only by artificial reasoning. It proceeds upon substantially this argument: A deed intrusted to a stranger for delivery at the grantor's death can be upheld only upon the theory that it is not an escrow, but that the title passes when such deposit is made; and, where the delivery to the grantee is made to depend upon some act of his, the instrument is an escrow, and conveys no title until finally delivered, or at any rate until such act is performed. . . . . . .

It is true that, in the case of an ordinary escrow, it is the expectation of the parties that the matter shall be fully closed up before any of them die, and, where the death of one of them intervenes, it occasions a situation that was never in their contemplation; while here an arrangement was deliberately made that the practical operation of the deed should begin after the death of the grantor, and after the fulfilment of the stated conditions. But we do not perceive in this fact any reason for resorting to a fiction to support one transaction rather than the other. To call the requirement imposed on the grantee a condition precedent to the vesting of title is to beg the question. If the title is regarded as passing with the delivery of the instrument to the custodian, it is a condition subsequent, upon the nonperformance of which the title will revert."

In Hutton v. Cramer on a similar set of facts, the court held that such a delivery could be construed to have been in effect either an escrow or an absolute delivery so as to vest title in the grantee subject to the life estate retained in the grantor.

These two decisions show a desire on the part of the courts to carry out the intention of the grantor but as a matter of sound reasoning certain difficulties follow. How the passage of title on condition subsequent will fit in with the postponement of possession in the death cases, or with the parol evidence rule so as to read into the deed the implied condition subsequent, presents difficult problems. In the Hutton case the court did not limit the passing of title on condition subsequent. But how can A be said to have intended title to pass before the performance of the condition which was entirely within B's power to refuse to perform? Should B refuse to perform what happens to the interest conveyed? A better theory to carry out the intention of the grantor would be to hold that the deed operated to convey an estate to commence in futuro, leaving a fee in the grantor subject to a conditional limitation or springing interest in fee in the grantee. If the facts are held to constitute an escrow, the requirement of an auxiliary contract must also be considered. But usually these cases are gift cases on condition and no contract is to be expected, and no mention of this factor is usually found. 99

97. Ibid. See Bigelow's discussion of this case, op. cit. supra note 18, at 584.
98. Supra note 96.
99. However in many of the cases there were substantial improvements made by
On the other hand, those courts which hold such an instrument to be testamentary have failed to see that the presence of conditions precedent to the transfer of title to be fulfilled after the death of the grantor does not affect the delivery of the instrument.

Situation 4. *What is the legal effect of a transaction where C is to deliver the deed to B upon the happening of some contingency which is neither within the control of B, nor is it an event certain to happen?*

Typical examples of this type of case are found where A delivers a deed to C with instructions that C is to deliver the deed to B if B lives to a specified age, or if B survives A, or upon other uncertain events. These facts differ from any of the escrow cases in that there is no irrevocable power intended to be given B, which B can control at his discretion, such as the payment of money or the performance of some specified act, and thus secure the title. This case differs from those deliveries made in contemplation of death in that the event is uncertain to occur.

A number of courts have held on these or similar facts that there is no valid delivery. These cases are based upon the assumption that the grantor retains control over the operation of the deed. If carried to its logical conclusion this would destroy all escrow deliveries. It does not at all follow because the event is uncertain that the grantor retained control so as to affect the validity of the delivery. If the grantor shows that he intends to retain no power over the subsequent operation of the instrument, there is an operative delivery.

Other courts have reached the same result on the theory that there was no intention to deliver, as there was no present vesting of title. Such a view fails to distinguish between a delivery which makes the instrument operative and binding and the passing of title. It has already been seen that “delivery is not a question of vesting of title at once, but of making a deed binding or operative at all.” The delivery is final but the full operation of the deed is postponed until the happening of the event.

The proper view as to delivery where the condition is some uncertain event would seem to be that laid down in the case of *Hunter v. Hunter*. There A delivered a deed to C to be delivered to B if B reached the age of twenty-five. It was contended that the deed must be inoperative and void, as one of the grantors had died the grantee on the premises in reliance on the gift, or the grantee had taken care of the grantor during the remainder of the grantor's life which perhaps may raise an equity in favor of the grantee entitling him to specific performance. In *De Bow v. Wollenberg*, 52 Ore. 404, 96 Pac. 536, 97 Pac. 717 (1908) the absence of a contract was stressed.

100. *Supra* note 94.


102. Long v. Ryan, and Kenney v. Parks, both *supra* note 74; O'Brien v. O'Brien, 285 Ill. 575, 121 N. E. 243 (1918); Bloor v. Bloor, 105 Wash. 110, 177 Pac. 722 (1919). In Murphy v. Gabbert, 166 Mo. 596, 66 S. W. 536 (1902), the court said: “It is well settled that an instrument in writing to be good as a deed must pass a present interest in the property attempted to be conveyed, and that where it takes effect and becomes operative alone upon the death of the grantor, it is testamentary in character and insufficient as a deed.” It is not at all clear but the court surely does not mean to say that this test may be applied to exclude the creation of a present right to a future interest. See notes 72 and 78 *supra*. But even as a rule of construction as to the intention of the grantor to make a binding delivery the case is objectionable. See discussion of the Missouri cases by Hudson, *op. cit.* *supra* note 3, at 23.

103. 17 Barb. (N. Y.) 25 (1853).
before the time specified for the delivery to the grantee. The court said: "This rule is well settled that when a deed is first delivered to a third person as an escrow, such delivery is good and valid, and vests the title on the performance of the condition, or happening of the specified contingency, and therefore if either of the parties dies before the condition is performed, and the condition is afterwards perfected, the deed avails; for as there was traditio inchoata in the lifetime of the parties, and postea consummatio existens by the performance of the condition, it takes effect by the first delivery. (Shep. Touch, 59). There is primarily a creation of a quasi estate, subject to be defeated by the failure to perform the stipulated condition. If there should be anything in the condition requiring action on the part of the grantor or grantee, which he alone could perform, the death of the required actor without performance, would, of course, put an end to the inchoate estate. But clearly, that was not the case here. The title in this case is yet alive, and may be perfected by the delivery expressly prescribed or impliedly authorized by the written declaration accompanying the deed."

While the court applied the correct doctrine as to the delivery, it is difficult from the language used to determine whether, in the opinion of the court, this is to be treated as analogous to a true escrow, or whether in the "quasi creation of an estate" some present interest passed on condition subsequent, or some future interest was created. If the former, and were the question presented, would the court require an auxiliary contract? If so, what would be the consideration on the part of the grantee? If the latter, the court may imply that B has a vested estate on an implied condition subsequent, or that the deed would operate as an estate to commence in futuro, leaving a fee in A subject to a conditional limitation or springing interest in fee in B. It would seem that the latter would be more consistent with the intent of A. The objections raised to the vested interest are obviously almost insurmountable, and this would not be a fair construction of the grantor's intent.

In the case of Prewitt v. Ashford a deed was delivered to the depositary to be delivered by him to the grantee in the event of the affirmance by the supreme court of a decree which had been rendered in a case involving litigation concerning the lands in controversy. That contingency did happen and the deed was afterwards delivered to the grantee's heirs. The court treated the case as a true escrow without noticing that the grantee had no causative function to perform.

CONCLUSIONS

A fair construction of the grantor's intention in all of these cases shows that he intended in some way by his delivery to the depositary to give the grantee at least a legal interest in the nature of a power where the grantee has some causative function to perform before title passes, and in all other situations a right in the nature of a future interest in the property. The power may be conditioned upon the perform-

104. Supra note 20.
105. Professor Bigelow proposes the following: "It may be, then, that these few cases and the language used by some of the courts in the cases . . . . . indicate a tendency toward a rule that when the deed, perfect on its face and requiring no further act on the part of the grantor, is delivered by him to a depositary with the intent stated above (to give an irre-vocable right to earn the title by doing the required act or to have it come to him if the stipulated contingency happens), this is in itself a sufficient part performance by A of the transfer of the title so that upon these facts alone an indefeasible right is created in B to be allowed to perform within a reasonable time or to await the coming of the specified contingency, with the result that when the performance is made or the event does happen the title vests, and may
ance of some act by the grantee, and the right to the future acquisition of the title may be conditioned upon the occurrence of some certain or uncertain event. Fictions are unwieldy and have no definite rules of application. May not the courts quite properly hold that the grantee acquires an indestructible power or right which should be protected? The decisions which sustain such a result are desirable from a social point of view. The reasoning adopted by the courts in arriving at this result has sometimes been unfortunate. But the very fact of the persistency of the courts in arriving at almost identical results through centuries of litigation regardless of the theories adopted would seem to justify the recognition of such a principle. The theoretical difficulties regarding the location of title prior to the performance of the conditions would disappear. Questions of priorities could be worked out by the application of equitable principles. If the theory suggested is not adopted courts must still persist in confusing conditional deliveries with the transfer of title and will continue to set pitfalls for honest and innocent parties.

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be said to ‘relate’. It is well settled that equity will, under certain circumstances, compel a donor to complete an inchoate gift in cases where at law no rights would arise. It may be that here is another kind of uncompleted transaction where law is going one step beyond equity. It may be that the courts in these cases consider the gift by A, if the act required of B be regarded as the occasion simply of the vesting of the title, or the offer by A, if the act of B be regarded as the consideration for the transfer of the title, as having advanced to such a stage (since no further act need be required of A and the document purporting to convey the title is out of his physical control) as to give B something sufficiently like an equitable interest to put him in at least as good a position as the beneficiary in a voluntary declaration of trust. Of course it is obvious that B is not the beneficiary under a declared trust, nor is he in such a position that for any other reason he could go into equity and compel a transfer of the title. At the same time, there would be nothing inherently unreasonable or unsound if a law court should declare that under facts such as we have been considering B was entitled to be protected. That the step should be declared to be merely a new application of well-recognized principles; or that it should be taken under the kindly cover of a fiction, would surprise no one who is familiar with the way in which law develops.” Op. cit. supra note 18, at 586.

106. Other problems involved in conditional deliveries of deeds not discussed in this paper are the legal relation of the depositary, the parol evidence rule, and the doctrine of acceptance by the grantee. On the relation of the depositary, see references given in note 28, supra. On the doctrine of acceptance by the grantee, see 2 TIFFANY, op. cit. supra note 4, at 1788; Ballantine, op. cit. supra note 18; Rundell, op. cit. supra note 1, at 86. For a discussion of the parol evidence rule, see Ballantine, op. cit. supra. By permitting parol evidence to show a conditional delivery, the grantor is in effect permitted to incorporate provisions in the deed which do vary and contradict the terms of the written instrument. Such evidence is not admissible where the delivery is direct to the grantee by the current of authority in this country. This is to uphold the stability of transactions. The rule is otherwise by the weight of authority as to simple contracts and negotiable instruments. But the fact that the deed is delivered to a third party supplies direct evidence and comes from a supposedly more or less disinterested witness as between the grantor and grantee making such evidence quite trustworthy.