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ESCROWS — THEIR USE AND VALUE

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ESCROWS—THEIR USE AND VALUE

*BY JOHN MANN**

FOR AT LEAST FIVE CENTURIES, the escrow has served as a convenient mechanism for closing real estate transactions.[1] The use of this familiar device involves the deposit of a deed or other document [2] with a third party to be held by the latter pending performance of certain conditions. When those conditions have been performed, the third party is authorized to deliver the deed or other document to the person then entitled thereto.[3]

Perhaps the simplest illustration of such an escrow transaction is the deposit by the vendor of his deed with a third party to be delivered over to the purchaser upon payment of the purchase price. Thus a nonresident vendor of an Illinois farm may forward his deed to an Illinois bank or trust company in the city where the purchaser resides with instructions to deliver the deed to the purchaser if and when the purchase money has been duly deposited for the vendor's account. In this way the vendor can guard against delivery of the deed without concurrent receipt of the purchase price. Or a vendee who has entered into a contract for the purchase of a home where the purchase price is to be paid in monthly installments over a period of years may insist that the vendor deposit his deed with a bank or trust company to be delivered if and when the purchase price has eventually been paid in full. The deed will thus be available for delivery when the last installment is paid some years later, even though the vendor may have died in the interim.[4]

Generally this basic type of escrow transaction between vendor and purchaser, sometimes referred to as a "Deed and Money Escrow," involves conditions relating to title. Thus it may be provided that the third party

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[1] The practice of depositing deeds as escrows was recognized by the English common law courts at least as early as the first half of the fifteenth century. 4 TIFFANY, THE LAW OF REAL PROPERTY § 1052 (3rd ed. 1939). The general subject of escrows is dealt with by early law commentators. COKE, COMMENTARY UPON LITTLETON 36a (1628); SHEPPARD'S TOUCHSTONE *58-59 (7th ed. by Hilliard 1820). The Illinois legislature has never considered it necessary to make any substantial modifications in the common law rules relating to escrows. Consequently, in the recent decision of Clodfelter v. Van Fossan, 394 Ill. 29, 37-38, 67 N. E. 2d 182, 186 (1946), involving an escrow, we find the Illinois Supreme Court citing Coke and Sheppard as pertinent authorities.

[2] As to the deposit of money, see note 8 *infra*.

[3] For a more complete definition of "escrow," see the following subdivision: "Terminology," p. 401.

[4] See note 51 *infra*.

is to deliver the deed to the purchaser and turn over the purchase money to the vendor only if and when the abstract of title has been examined and approved by the purchaser's attorney. In Cook County, where the great volume of instruments continuously passing through the recorder's office makes it impossible to check the status of a title as of any current date, the third party is frequently authorized to record the vendor's deed as soon as the purchase money has been deposited by the purchaser and before any investigation has been made with respect to title. In addition to the purchase money, the purchaser also deposits with the third party a quitclaim deed back to the vendor. After the vendor's deed has been recorded, a title examination is made up to and including the recording of that deed, and if the title is ready to be guaranteed in the purchaser or is otherwise approved, the third party disburses the purchase money to the vendor and returns the quitclaim deed to the purchaser. If the title cannot be guaranteed or is not found good in the purchaser, the third party records the latter's quitclaim deed in order to put the vendor back in status quo and returns the purchase money to the purchaser.

There may, of course, be many variations in the form of a "Deed and Money Escrow," depending upon the facts of the particular case. For example, the third party is frequently authorized to use a part of the purchase money in discharging liens and encumbrances on the property so that the purchaser will receive an unencumbered title, as agreed.

Another common type of escrow transaction is that known as a "Money Lender's Escrow." In general this involves deposit of the proceeds of a mortgage loan with a third party to be disbursed as directed when satisfactory evidence has been furnished showing the mortgage to be a valid first lien. This type of escrow transaction not only provides the mortgagee with a convenient method of protecting its interests, but it may also be used to advantage by an owner who has made a mortgage loan for the purpose of refunding an existing mortgage or of paying accumulated taxes and special assessments, judgments, mechanic's liens, or other encumbrances on the property.

A further type of escrow transaction frequently used is that known as a "Deed and Money, Proceeds-of-Loan Escrow." This is really a combination of the "Deed and Money Escrow" and "Money Lender's Escrow" referred to above. The actual working of such an escrow transaction can be illustrated by a hypothetical case involving a sale of improved Chicago real estate. The property is subject to a mortgage held by *A*, and the parties desire to have that mortgage paid and released with the proceeds of a new mortgage to *B*.

The vendor deposits with a bank or trust company selected to act as escrowee:

a. The vendor's executed deed to the purchaser.
b. Assigned leases.

c. Survey, assigned insurance policies, and other instruments which are ultimately to pass to the purchaser.

The purchaser deposits:

a. His notes, duly executed, to evidence the new mortgage loan from *B*, and his mortgage, also duly executed, securing the same.
b. Balance of the purchase money required over and above the proceeds of the new mortgage to *B*.
c. Quitclaim deed back to the vendor, duly executed.

The existing mortgagee, A, deposits:

a. Release of existing mortgage.
b. Notes secured by existing mortgage for cancellation when paid.

The new mortgagee, *B*, deposits:

a. The proceeds of the new mortgage loan.
b. An agreement that he will provide a release of the new mortgage as a condition to a refund of his deposit in event title should not be approved and the transaction should fail.

The bank or trust company records the deed to the purchaser and the new mortgage to *B*.[5] When the new mortgage is ready to be guaranteed as a first lien and title is ready to be guaranteed in the purchaser (subject to the lien of the mortgage to *B*), the bank or trust company then:

a. Pays the mortgage indebtedness due *A* and cancels the notes which evidenced such indebtedness.
b. Records the release of *A's* mortgage.
c. Delivers the new notes and mortgage to *B*.
d. Disburses the balance of the purchase price to the vendor.
e. Delivers the assigned leases, insurance policies, title papers, and other documents to the purchaser and also returns the latter's unrecorded quitclaim deed.

The foregoing illustrate only a few of the varied forms which escrow transactions may assume.[6] In essence, however, they involve as their basic

[5] The escrow agreement may provide for the recording of the new mortgage to *B* before the deed to the purchaser is filed for record. A preliminary check of the title is then made to determine whether the new mortgage to *B* will constitute a valid lien if and when the deed to the purchaser is recorded. If this preliminary check indicates that the new mortgage will constitute such a valid lien, the escrowee proceeds to record the deed to the purchaser.

[6] A very common type of transaction used in Cook County in closing sales of real estate is that known as the "Joint Order Escrow." Here the contract for the sale of real estate and the earnest money are deposited with a bank or trust company, subject to the joint direction of the parties in interest. The vendor is thus assured that in event the transaction fails, the contract will not be recorded, clouding his title, and the purchaser is assured that in event the deal fails, the earnest money will be available for repayment to him.

framework the deposit of deeds and other documents with a third party to be delivered upon the performance of specified conditions.

It is well settled, of course, that the use of escrows is not restricted to real estate transactions.[7] Instruments other than deeds for the conveyance of real estate may legally be deposited as escrows.[8] Indeed, the Illinois Supreme Court has said that "the term 'escrow,' though usually applied to deeds, is equally applicable to all written instruments." [9] This article, however, is limited to a discussion of "escrows" in relation to real estate transactions. It deals entirely with the escrow as a device for the closing of sales of real estate and the transfer of title between vendors and purchasers, with the exception that the concluding subdivision has been devoted to the somewhat special situation which arises where a grantor delivers a deed to a third person with directions to transmit it to the grantee upon the grantor's death.

TERMINOLOGY

An "escrow" has been defined by the Illinois Supreme Court to be "any written instrument which by its terms imposes a legal obligation, and which is deposited by the grantor, promisor or obligor, or his agent, with a stranger or third party, to be kept by the depositary until the performance of a condition or the happening of a certain event and then to be delivered over to the grantee, promisee or obligee." [10] It thus appears that the term "escrow" in its strict technical sense characterizes the instrument while it is being held by the third party awaiting performance of the condition upon which it is to be delivered. An instrument for the conveyance of real estate while so held on deposit is not accurately speaking a deed because it has not been completely delivered. It is, on the contrary, an "escrow." Thus it has been said that an escrow differs from a deed only in respect to its delivery.[11]

[7] *See*, for example, Northern Trust Co. v. McDowall, 307 Ill. App. 29, 29 N. E.2d 865 (1st Dist. 1940).

[8] Land Co. v. Peck, 112 Ill. 408 (1885) (release of mortgage trust deed and mortgage bonds); Foy v. Blackstone, 31 Ill. 538 (1863) (note); *In re* Estate of Mancini, 245 Ill. App. 547 (1st Dist. 1927) (note); Jacobitz v. Thomsen, 238 Ill. App. 36 (1st Dist. 1925) (note). The term has been applied, although technically somewhat inaptly, it is said, to money deposited to be held until the performance of a condition. Nash v. Normandy State Bank, 201 S. W.2d 299 (Mo. Sup. Ct. 1947). *Compare* American Service Co. v. Henderson, 120 F.2d 525 (C. C. A. 4th 1941).

[9] Main v. Pratt, 276 Ill. 218, 224, 114 N. E. 576, 578 (1916).

[10] Johnson v. Wallden, 342 Ill. 201, 206, 173 N. E. 790, 792 (1930); Main v. Pratt, 276 Ill. 218, 224, 114 N. E. 576, 578 (1916).

[11] Fitch v. Bunch, 30 Cal. 208, 212 (1866). In his COMMENTARIES, Blackstone said: "A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee; in which last case it is not delivered as a *deed*, but as an *escrow*; that is, as a scroll or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes." 2 BL. COMM. 307 (1765).

Present day usage, however, would seem to justify some enlargement of this technically correct terminology. Both judges and lawyers alike so commonly refer to "deeds" being deposited as escrows that this convenient form of expression would now seem to have the sanction of common usage. Furthermore, the term "escrow" is often used in a broad sense to describe the general arrangement under which an instrument is deposited with a third person to be delivered upon the performance of a condition. Thus instead of speaking of an instrument being deposited "as an escrow," it is often said today that it is deposited "in escrow." [12] It has likewise become common usage to refer to the parties as "creating an escrow" for the purpose of closing a real estate transaction. There would appear to be no reason why this modern and enlarged use of the term "escrow" should lead to any confusion or misunderstanding.

The third-party depositary is sometimes called the "escrow agent" or "escrowee." [13] The directions to the depositary are frequently characterized as the "escrow agreement." [14]

WHY ESCROWS ARE USED

Inasmuch as the escrow has been so long used as a convenient device for closing sales of real estate between vendors and purchasers, it is obvious that it possesses certain practical advantages. Some of these may be enumerated as follows:

1. The use of an escrow renders the transaction less likely to "fall through." The sale in its material aspects is very largely executed by one or both of the parties at the time the contract is signed or shortly afterwards. Only mechanical details are left to be carried out through the instrumentality of the third-party escrowee.

2. Where an escrow is not employed, death of the vendor after the contract of sale has been executed but before the transaction has been finally closed often raises complications with respect to the subsequent

[12] ILL. REV. STAT., c. 30, § 47 (1947).

[13] The term "escrowee" is probably to be preferred over "escrow agent" inasmuch as there seems to be a growing tendency to regard the third-party depositary as being in effect a trustee. Stark v. Chicago Title and Trust Co., 316 Ill. App. 353, 45 N. E.2d 81 (1st Dist. 1942); Dodson v. National Title Ins. Co., 159 Fla. 371, 31 So.2d 402 (1947); Tomasello, Jr., Rec'r, v. Murphy, 100 Fla. 132, 129 So. 328 (1930); Moslander v. Beldon, 88 Ind. App. 411, 164 N. E. 277 (1928); Levin v. Nedelman, 141 N. J. Eq. 23, 55 A.2d 826 (1947); Farago v. Burke, 262 N. Y. 229, 186 N. E. 683 (1933); Nash v. Normandy State Bank, 201 S. W.2d 299 (Mo. Sup. Ct. 1947); 19 AM. JUR., Escrow, § 13 (1939). And *see* Squire v. Branciforti, 131 Ohio St. 344, 2 N. E.2d 878 (1936).

[14] This terminology is used in Clodfelter v. Van Fossan, 394 Ill. 29, 37, 67 N. E.2d 182, 183 (1946). And *see* Home Insurance Co. v. Wilson, 210 Ky. 237, 241, 275 S. W. 691, 692 (1925).

execution of a proper deed. A judicial proceeding may even be necessary in such a case.[15] However, where the vendor has executed a deed and deposited it as an escrow during his lifetime, the escrowee may, notwithstanding the grantor's death, properly deliver the deed upon performance of the conditions, and a deed so delivered will operate as a valid conveyance to the purchaser.[16]

3. If an escrow is used, the concurrent acts involved in a sale of real estate can ordinarily be performed in such a manner as to protect more adequately the interests of both vendor and purchaser. Thus where a sale is closed without an escrow and the vendor delivers a deed to the purchaser and receives the latter's check (frequently large) in return, there is sometimes a lurking fear in the mind of the vendor, which he may hesitate to express, that the check may not clear. It is a simple matter, however, to provide at the outset in an escrow agreement that the purchaser's check be cashed by the escrowee and the deed delivered only when the check has cleared. The utility of the escrow where problems of concurrent performance are involved can also be illustrated by the situation which arises where current property taxes are to be prorated between the parties but the amount of the tax bill has not been ascertained at the time the sale is closed. If a final adjustment is made on the basis of the known taxes for the preceding year, one party will actually lose if the current tax bill when later rendered should differ from that of the preceding year. There generally is a variance, and where a large transaction is involved, the loss could be substantial. The parties may be required, however, under the terms of an escrow agreement to leave a sufficient amount on deposit with the escrowee to cover the current tax bill when it comes out. The bill can then be paid by the escrowee, and the excess remaining in its hands can be so distributed as to adjust the rights of the parties exactly.

4. Particularly is the escrow convenient in closing complex real estate transactions involving the interests of a number of different parties. For example, an escrow may be used by a purchaser as a convenient means of borrowing money on the security of property he is about to acquire and of using the proceeds of the loan as a part of the purchase price.[17] It may, as already indicated, be used to consummate a four-party transaction

[15] ILL. REV. STAT., c. 29, §§ 2-8 (1947).

[16] The conveyance will in such a case be sustained as against a claim that the grantor's death terminated the escrowee's authority to make a valid delivery, on the theory that the deed relates back to and takes effect as of the time of its original deposit with the escrowee. See note 51 *infra*. The deed would also be sustained on like reasoning in event of the grantor's subsequent incompetency. See note 53 *infra*.

[17] In such a situation the seller is willing to convey, provided he receives the purchase money. The mortgage lender, who is supplying a substantial part of the purchase money, is willing to pay out the proceeds of the loan, provided he receives a valid mortgage. The purchaser cannot furnish a valid mortgage, however, until he receives a valid title. Use of the escrow assures each party he will receive that which his particular interest in the transaction requires.

whereby an existing mortgage is replaced by a new mortgage concurrently with the completion of the sale between vendor and purchaser. It may be used to advantage in closing a transaction looking to the consolidation of numerous titles into one ownership. In general the escrow is a particularly convenient closing device in that type of case where a clearing house is needed for involved real estate transactions.[18]

5. The use of the escrow often proves of advantage to the real estate broker by relieving him of mechanical details, which he might otherwise be expected to perform. Since 1947 the Illinois statute has authorized a suspension or revocation of a broker's certificate of registration if he commingles the money or other property of his principal with his own.[19] Where an escrow is used, the earnest money, which would ordinarily be held by the broker, can be deposited with the escrowee; and at the same time, provision can be made in the escrow agreement under which the broker will still be authorized in effect to look to the earnest money for the payment of his commission. The broker is thus relieved of the responsibility and clerical detail of maintaining the earnest money as a separate trust account.

6. In a large county such as Cook, where the volume of daily transactions in the recorder's office is so great that it is physically impossible to ascertain the actual state of a title at any precise current moment, the use of an escrow may be required in order to make certain that the purchaser's interests are protected. In a smaller county it is often possible for the parties to meet at the courthouse, check the records in the recorder's office and in the offices of the clerks of the circuit and county courts from the date of the last abstract continuation down to the current moment so as to make certain that nothing recent has occurred to affect the vendor's title, and thereupon close the transaction forthwith and record the deed to the purchaser. Under such circumstances the purchaser can be reasonably sure, in most instances, that his interests have been protected against any last minute changes in title. In Cook County, however, the volume of daily business at the county courthouse is so great that it is impossible to ascertain from the records the status of a title as of any current point of time. There, as previously indicated, this situation is frequently met by use of the escrow, the escrowee being authorized to record the deed to the purchaser as soon as the purchase money is in its hands but before it is disbursed to the grantor. The title can then be later checked to include the actual recording of the deed, and when title is ready to be guaranteed in the purchaser

[18] In fact it would seem that the lawyer might well give consideration to the use of an escrow when planning the mechanical procedure for closing any complicated transaction, whether one involving real estate or not, particularly where a number of interests are involved. Thus the escrow has often been used to advantage in working out complex compromises of pending litigation where the concurrent adjustment of various adverse interests is required.

[19] ILL. REV. STAT., c. 114½, § 8(3)(i) (1947).

or is otherwise approved, the escrowee is authorized to disburse the purchase money to the vendor. A quitclaim deed from the purchaser back to the vendor is customarily deposited with the escrowee to be recorded in event the title should not be found good in the purchaser. In the absence of such an arrangement, a purchaser who pays the purchase money to the vendor and receives the vendor's deed in concurrent transactions must necessarily be without positive knowledge at the time of such payment as to the condition of the record title during the highly important interval of time immediately preceding the completion of the sale.

SELECTION OF THE DEPOSITARY

One of the first questions presented to a vendor and a purchaser who desire to close the sale by means of an escrow is the selection of an escrowee. In general it would seem clear that the escrowee selected should be a third party who is a stranger to the transaction.

The Illinois Supreme Court has said that the "rule is established in this State that a deed cannot be delivered to the grantee as an escrow, to take effect upon a condition not appearing upon the face of the deed, but such deed becomes absolute at law unless delivery is made to a stranger." [20] In the early case of *Price v. Pittsburg, Ft. Wayne and Chicago R. R. Co.*,[21] it was contended that deeds to a railroad company had been deposited as escrows with an attorney for the company to be delivered only upon the performance of certain conditions. The Illinois Court held, however, that since the deposit had not been made with a stranger but with the grantee's attorney, the deeds took effect immediately. This holding does not appear to have been overruled or modified by subsequent decisions.[22]

It is true that the modern tendency seems to be to relax in some measure the rigidity of the "third-party stranger" rule,[23] and delivery of a deed as an escrow to the attorney who advised the grantor and drew the

[20] Szymczak v. Szymczak, 306 Ill. 541, 546, 138 N. E. 218, 220 (1923). *See also* Blake v. Ogden, 223 Ill. 204, 79 N. E. 68 (1906); Ryan v. Cooke, 172 Ill. 302, 50 N. E. 213 (1898); Baker v. Baker, 159 Ill. 394, 42 N. E. 867 (1896); Weber v. Christen, 121 Ill. 91, 11 N. E. 893 (1887); Stevenson v. Crapnell, 114 Ill. 19, 28 N. E. 379 (1885); McCann v. Atherton, 106 Ill. 31 (1883). *Compare* Mitchell v. Clem, 295 Ill. 150, 128 N. E. 815 (1920).

[21] 34 Ill. 13 (1864).

[22] *See* Clark v. Harper, 215 Ill. 24, 74 N. E. 61 (1905); Ryan v. Cooke, 172 Ill. 302, 50 N. E. 213 (1898); Connolly v. Bachman, 209 Ill. App. 327 (1st Dist. 1918); Chicago Pressed Steel Co. v. Clark, 87 Ill. App. 658 (1st Dist. 1900). *Compare* Troup v. Hunter, 300 Ill. 110, 133 N. E. 56 (1921).

[23] Gronewold v. Gronewold, 304 Ill. 11, 136 N. E. 489 (1922). And *see* Levin v. Nedelman, 141 N. J. Eq. 23, 55 A.2d 826 (1947); 19 AM. JUR., Escrow, § 15 (1939); Note, 11 A. L. R. 1174 (1921).

deed for him has in some cases been sustained.[24] In order to eliminate any possible question, however, it would appear to be the prudent course for the parties to select a disinterested third party as escrowee who is neither the agent nor attorney for either vendor or purchaser.

REQUIREMENTS AS TO WRITINGS

Another important preliminary problem which may arise where a sale of real estate is to be closed by means of an escrow relates to the nature and extent of the writings or memoranda necessary in order to meet the requirements of the Statute of Frauds.[25]

The Illinois rule is that a binding and irrevocable escrow between a vendor and purchaser must be based on a contract of sale between those parties which is enforceable under the Statute of Frauds. The Illinois Supreme Court has held that in the absence of such a contract, a deposit by the vendor with a third party of a deed in ordinary form for the conveyance of the real estate to be delivered to the purchaser upon payment of the purchase price constitutes a mere revocable transaction only, and the vendor may, under such circumstances, cancel the instructions to the third party and recall the undelivered deed at any time before there has been a performance by the vendee sufficient to take the case out of the Statute.[26] Some commentators have criticized this view on principle,[27] but it, never-

[24] VanEpps v. Arbuckle, 332 Ill. 551, 164 N. E. 1 (1928); Dickerson v. Dickerson, 322 Ill. 492, 153 N. E. 740 (1926); Marshall v. Moon, 311 Ill. 605, 143 N. E. 399 (1924); Fitzgerald v. Allen, 240 Ill. 80, 88 N. E. 240 (1909).

[25] ILL. REV. STAT., c. 59, § 2 (1947), which in general provides that no action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments or any interest in or concerning them for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized in writing, signed by such party.

[26] Johnson v. Wallden, 342 Ill. 201, 173 N. E. 790 (1930); Main v. Pratt, 276 Ill. 218, 114 N. E. 576 (1916); Kopp v. Reiter, 146 Ill. 437, 34 N. E. 942 (1893). *See also* Mode v. Whitely, 30 F. Supp. 129 (D. C. Ill. 1939). It is indicated by the language in *Main v. Pratt, supra,* and *Johnson v. Wallden, supra,* that this principle would not apply to the situation where a deed is delivered to a third person with instructions to deliver it to the grantee therein named upon the happening of an event certain to occur, such as the death of the grantor. In the latter type of case, the decisive issue of whether the grantor did or did not intend to reserve control over the deed at the time it was delivered to the third person may be shown by what the grantor said and did at the time. McReynolds v. Miller, 372 Ill. 151, 22 N. E.2d 951 (1939); Johnson v. Fleming, 301 Ill. 139, 133 N. E. 667 (1922).

[27] Aigler, *Is a Contract Necessary to Create an Effective Escrow?*, 16 MICH. L. REV. 569 (1918); Comment, Aigler, *Necessity of Valid Contract to Support Escrow*, 15 MICH. L. REV. 579 (1917); 4 TIFFANY, *op. cit. supra* note 1, § 1052. Compare, however, Bigelow, *Conditional Deliveries of Deeds of Land*, 26 HARV. L. REV. 565, 567-75, 578 (1913). See, in general, Ballantine, *Nature of Escrows and Conditional Delivery*, 3 ILL. L. BULL. 3, 14-18 (1920); Ballantine, *Delivery in Escrow and the Parol Evidence Rule*, 29 YALE L. J. 826, 830-32 (1920); Note, 17 MINN. L. REV. 817 (1933).

theless, appears to be in accord with the weight of authority from other jurisdictions.[28]

It is also held in Illinois that a deed in ordinary form does not in and of itself supply the necessary written memorandum.[29]

A further question, however, still remains. Is it essential in such a case that the instructions to the third-party escrowee also be reduced to writing and signed by the latter?

While this question does not appear to have been fully discussed in the Illinois decisions, yet in *Osby v. Reynolds* [30] the Illinois Supreme Court pointed out that it was "well settled that the conditions upon which a deed is delivered in escrow may be proved by parol evidence." That statement is not, it would seem, inconsistent with the Illinois holdings previously mentioned [31] to the effect that an enforceable escrow for the closing of a sale of real estate must rest on a contract between the vendor and purchaser enforceable under the Statute of Frauds.[32] The agreement

[28] Ballantine, *Nature of Escrows and Conditional Delivery*, 3 ILL. L. BULL. 3, 14-18 (1920). In this article (pp. 15, 16), Dean Ballantine observed: "Tiffany says that the view that a contract is necessary to a conditional delivery 'has no considerations of policy or convenience in its favor.' No doubt the courts have been influenced in their present tendency to require a contract to uphold escrows by an instinctive hostility to this method of evading the statute of frauds and the parol evidence rule. There is a strong policy against having contracts and conveyances of land rest any more than is necessary in parol, or having title depend upon the performance of unwritten conditions."

[29] Cases cited under note 26 *supra*. The Illinois Supreme Court has pointed out that in order to satisfy the Statute of Frauds, the writings, notes, or memoranda must contain on their face, or by reference to others, the names of the parties, vendor, and vendee and a sufficiently clear and explicit description of the property to render it capable of being identified from other property of like kind, together with the *terms, conditions (if any)* and price to be paid or other consideration; that an undelivered deed in ordinary form, deposited as an escrow, does not meet these requirements inasmuch as such a deed does not sufficiently state the terms of sale. Main v. Pratt, 276 Ill. 218, 114 N. E. 576 (1916); Kopp v. Reiter, 146 Ill. 437, 34 N. E. 942 (1893). It could be urged, of course, that the terms and conditions of sale might be incorporated in such a deed so that the foregoing requirements of the Statute could possibly be satisfied by that instrument alone. There are various reasons, however, why such a course would seem inexpedient. In the first place, there is no Illinois precedent which affirmatively and squarely marks the way. In Johnson v. Wallden, 342 Ill. 201, 207, 173 N. E. 790, 793 (1930), the rule is stated broadly that an "undelivered deed is not, standing alone, a sufficient memorandum in writing of a parol contract for the sale of land to answer the requirements of the Statute of Frauds." Furthermore, the incorporation of such provisions in a deed might, after the transaction was closed and the deed recorded, provoke questions with respect to title. And finally, it would probably be no more difficult, from the viewpoint of draftsmanship, to have the vendor and the purchaser execute a writing which does, apart from the deed itself, satisfy the requirements of the Statute.

[30] 260 Ill. 576, 583, 103 N. E. 556, 559 (1913) citing 1 DEVLIN, THE LAW OF REAL PROPERTY AND DEEDS § 312a (3d ed. 1911).

[31] Note 26 *supra*.

[32] Stanton v. Miller, 58 N. Y. 192 (1874); Akers v. Brooks, 103 Okla. 98, 229 Pac. 544 (1924); McLain v. Healy, 98 Wash. 489, 168 Pac. 1 (1917); Nichols v. Oppermann, 6 Wash. 618, 34 Pac. 162 (1893); Jozefowicz v. Leickem, 174 Wis. 475, 182 N. W. 729 (1921); Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427 (1877).

between the vendor and purchaser which fixes the basic rights of those contracting parties may be distinguished, it seems, from the escrow arrangement which merely provides the mechanics by which those basic rights are to be carried out.

This distinction was long ago pointed out by Mr. Chief Justice Ryan of the Wisconsin Supreme Court in the following apt language:

> "I have no doubt that an *escrow* may be proved by parol. The difficulty here is not in the proof of the alleged *escrow*, but in the proof of the contract of sale and purchase itself. When there is a valid contract under the statute, the papers constituting it, or executed in compliance with it, may be delivered in *escrow*, and the *escrow* may be proved by parol. But the validity of the *escrow* rests on the validity of the contract; and the validity of the contract rests on the statute." [33]

Much the same thought has been very clearly expressed by the Supreme Court of Oregon as follows:

> "The statute of frauds does not contemplate that the delivery of a deed to a depositary with a statement of the condition upon which it is to be delivered to the grantee must be in writing. Merely handing a writing in the form of a deed to a third party with directions to deliver it to the grantee is not a contract to sell on the one hand and to purchase on the other and this is the reason for the rule that both delivery and the conditions of the deposit may be shown by parol. The agreement to sell and to buy is one thing while the delivery of the deed to a third party and the directions to him are another . . . " [34]

It would seem, therefore, that in view of the above-mentioned principle stated with approval by the Illinois Supreme Court in the *Osby* case,[35] a vendor and a purchaser in Illinois should be able to create by parol a valid and binding escrow agreement with a third-party escrowee, under which a deed deposited by the vendor as an escrow is to be delivered to the purchaser upon the performance of certain conditions—provided, of course, that the rights of the vendor and purchaser have been definitely fixed by a written agreement between themselves sufficient to meet the requirements of the Statute of Frauds.

There appear to be strong practical considerations, however, why the directions to the escrowee should be reduced to writing.

In the first place, it is doubtful whether a responsible escrowee would consent to act unless its duties were clearly and specifically defined by written instructions. The sound view undoubtedly is that aside from the

[33] Campbell v. Thomas, *supra* note 32.

[34] Foulkes v. Sengstacken, 83 Ore. 118, 133, 163 Pac. 311, 315 (1917), opinion by Mr. Justice Harris. *See also* Mantel v. Landau, 134 N. J. Eq. 194, 34 A.2d 638 (1943); Macy v. Mielenz, 27 N. M. 261, 199 Pac. 1011 (1921); Anderson v. Morse, 110 Ore. 39, 222 Pac. 1083 (1924); Note, 18 L. R. A. (N. S.) 337 (1909).

[35] See note 30 *supra*.

proposition that an enforceable escrow agreement may rest in parol, nevertheless, where such an agreement has been reduced to writing and is neither ambiguous nor uncertain, parol evidence is inadmissible to modify or vary its terms.[36] Hence where the instructions to the escrowee have been reduced to writing, the latter is in a position to rely on such written instructions as specifically defining and limiting its duties and responsibilities. Without instructions in writing, misunderstanding and uncertainty with respect to the escrowee's duties might well result, and a responsible escrowee would doubtless insist upon obviating such possible difficulties.

In the second place, this effect of written directions to obviate possible misunderstanding and uncertainty with respect to the escrowee's duties likewise operates to the benefit of the vendor and the purchaser. An escrowee, in reasonable doubt as to the proper performance of its duties, is not required to decide close questions at its own risk.[37] It is accordingly to the interests of both vendor and purchaser to have the duties of the escrowee clearly and certainly defined in writing since that will tend to eliminate the possibility of delay and expense which would likely ensue if a controversy over the exact terms of the directions to the escrowee should make it necessary for the latter to resort to a judicial proceeding for a determination of its rights and duties.

Finally, written instructions to the escrowee tend to minimize any risk that the vendor and the purchaser may inadvertently run afoul of the Statute of Frauds. It is easy enough in theory to differentiate between the contract of sale, which must be evidenced by writing to satisfy the Statute, and the incidental instructions to the escrowee, which may rest in parol. In actual practice, however, there is always the lurking danger that the two may through inadvertence not be kept separate and distinct. A note of warning is sounded in *Jozefowicz v. Leickem*,[38] wherein the Supreme Court of Wisconsin says:

> "To constitute a true escrow the contract of sale must be fully executed and nothing left but the transfer of title when the terms of the escrow are complied with. Those terms, however, cannot embody a substantive part of the contract of sale, resting in parol, though the fact of escrow may be shown by parol."

[36] Clodfelter v. Van Fossan, 394 Ill. 29, 67 N. E.2d 182 (1946); Note, 49 A. L. R. 1529 (1927); I DEVLIN, *op. cit. supra* note 30, § 312a. In Colorado Title & Trust Co. v. Roberts, 80 Colo. 258, 259, 250 Pac. 641 (1926), the court said: "Defendant claims that the rule against the variation of written contracts by parol does not apply to escrow instructions. It would seem that in reason the rule ought to be especially beneficial there. How can a bank holding perhaps scores of escrows be expected to remember oral instructions given in connection with written ones? We are not willing to assent to the claim of the defendant in error."

[37] Stark v. Chicago Title and Trust Co., 316 Ill. App. 353, 45 N. E.2d 81 (1st Dist. 1942). And see Note, 60 A. L. R. 638 (1929).

[38] 174 Wis. 475, 478-79, 182 N. W. 729, 730 (1921).

It is entirely possible that in a complicated transaction hurriedly executed, the parties might embody a substantive part of the contract of sale, such as material terms and conditions, in the instructions to the escrowee only and inadvertently omit them from the basic written agreement between the vendor and purchaser. If such instructions were oral, then as the Wisconsin court points out, the entire transaction would be rendered unenforceable by reason of the Statute of Frauds. On the other hand, if the instructions to the escrowee were themselves evidenced by a writing sufficient to satisfy the Statute, those written instructions when taken together with the written contract of sale would be sufficient to supply the requisite memoranda.

It is apparent, therefore, that irrespective of the proposition that the directions to the escrowee may rest in parol, there are, nevertheless, strong and impelling practical considerations why those directions should in every case be reduced to writing.

To sum up, it would seem that a sale of real estate to be closed by means of an enforceable escrow may, from the viewpoint of written documents required, assume one or the other of three basic forms.

1. A written contract may be entered into between the vendor and purchaser containing on its face the ordinary elements required to satisfy the Statute of Frauds in such a case [39] without any reference being made in the contract to an escrow, and the vendor and purchaser may then arrange for the closing of the transaction by depositing with a third-party escrowee a proposed deed, duly executed and acknowledged by the vendor, accompanied by oral instructions to the escrowee with respect to the terms and conditions under which the deed is to be delivered to the purchaser. Notwithstanding the fact that the directions to the escrowee are oral, it would appear that the transaction is not rendered unenforceable by the Statute of Frauds.[40] For reasons outlined above, however, there are strong practical considerations why the instructions to the escrowee should not be permitted to rest in parol.

2. A written contract may be entered into between the vendor and purchaser containing on its face the ordinary elements required to satisfy the Statute of Frauds [41] and, in addition thereto, making express provision for an escrow by naming the escrowee, stipulating that a deed shall be deposited with the escrowee, and setting forth the terms and conditions upon which the deed is to be delivered by the escrowee to the vendee.[42] The

[39] See note 29 *supra*.

[40] Notes 30 and 34 *supra*.

[41] See note 29 *supra*.

[42] The contract which was before the Court in Osby v. Reynolds, 260 Ill. 576, 103 N. E. 556 (1913), is illustrative of this second basic form of transaction.

contract or a duplicate is lodged with the escrowee together with the deed deposited as an escrow. This, it seems, is sufficient to meet the requirements of the Statute of Frauds. There would appear to be no need for the escrowee to sign the agreement since the arrangement with the escrowee could (subject to the practical objections mentioned above) rest entirely in parol.[43]

3. A written contract may be entered into between the vendor and purchaser containing on its face the ordinary elements required to satisfy the Statute of Frauds [44] and making no reference to an escrow. The vendor then executes a deed and deposits it with a third party as an escrow accompanied by a separate document, commonly known as the escrow agreement, executed by himself and the purchaser and setting forth in writing the terms and conditions upon which the deed is to be delivered by the escrowee to the vendee. This is clearly sufficient to meet the requirements of the Statute of Frauds. Since the purpose of the escrow agreement in the case supposed is not to satisfy the requirements of that Statute [45] but rather to remove any possible uncertainty and ground for controversy with respect to the steps to be taken by the escrowee, it would seem that such an escrow agreement need not be signed by the escrowee. And while an escrow agreement duly executed by the vendor and purchaser in form sufficient to meet the requirements of the Statute of Frauds may supply defects and omissions in their basic contract of sale so as to prevent a transaction which otherwise would have been proscribed by the Statute from falling within its terms, yet where the parties are satisfied that their basic contract is in and of itself sufficiently complete, it would seem that the written escrow agreement need not be executed with the same formality necessary in the case of an original contract of sale. In such a case, the escrow agreement may, it seems, be signed by a duly authorized agent of the vendor or purchaser, even though such authority is not itself reduced to writing.

Sales of real estate closed by means of an escrow differ widely in their terms. As to matters of detail, few are exactly alike. Fundamentally, however, the essential written framework of an enforceable escrow transaction will fall generally into one or the other of the three basic classifications mentioned above. For practical reasons, however, it would seem that the writings should in every case be so fashioned as to fall within either the second or third classification.

[43] Notes 30 and 34 *supra*. However, where a written contract provides generally that an escrow agreement is to be entered into, but material terms of that agreement are not specified in the contract and the parties do not later agree upon such terms, either orally or in writing, specific performance will be denied for want of a completed contract. Battjes v. Michigan Trust Co., 320 Mich. 702, 32 N. W.2d 18 (1948).

[44] See note 29 *supra*.

[45] Notes 30 and 34 *supra*.

SPECIFIC DIRECTIONS TO ESCROWEE

Regardless of whether the directions to the escrowee are made a part of the contract of sale between the vendor and vendee or whether they are set forth in a separate escrow agreement, it is important that the draftsman should see to it that they are complete, detailed, and specific.

The need for particularity is well illustrated by *Ortman v. Kane.*[46] The directions to the escrowee were, in that case, incorporated in the basic contract between the vendor and purchaser. This contract, after setting forth the terms and provisions of sale between the vendor and purchaser, recited that a deed had been executed by the vendor and delivered to the third-party escrowee (naming him) together with a copy of the contract. It was provided that the deed should be held by the escrowee in escrow and delivered to the purchaser upon his full compliance with the provisions of this contract. Except for a stipulation that upon default of the purchaser the escrowee was to surrender all papers, including the deed, to the vendor, nothing further was said with respect to any steps to be taken by the escrowee.

The Court pointed out that under these facts, the escrowee was not authorized "to accept the balance of the purchase money or to do anything else in connection with the transaction except deliver the deed after the contract had been complied with" by the purchaser. "The depositary of an escrow," said the Court, "is a special and not a general agent. His powers are limited to the conditions of the deposit."

Ordinarily an important object of an escrow transaction is to authorize the depositary to receive the balance of the purchase money in order that the vendor may be sure that the purchase money has actually come into its hands for his account before the deed is delivered over to the purchaser. The *Ortman* case makes it clear, however, that in order to effectuate that purpose, express authority must be conferred upon the escrowee to receive such payment. The same principle would apply, it seems, to other steps to be taken by the escrowee, such as proration of taxes and similar items, return of the deed and other papers to the vendor in certain eventualities, and even the affixing of proper revenue stamps to the deed before it is finally delivered to the purchaser. Each step to be taken by the escrowee should be covered with certainty and particularity.[47]

[46] 389 Ill. 613, 621, 60 N. E.2d 93, 97 (1945).

[47] It would appear that the draftsman may rely on the familiar proposition that deeds and other instruments deposited as escrows, and the escrow agreements deposited contemporaneously therewith, will be construed together. Clodfelter v. Van Fossan, 394 Ill. 29, 67 N. E.2d 182 (1946); Grindle v. Grindle, 240 Ill. 143, 88 N. E. 473 (1909). For forms generally, see 6 GRIGSBY, ILLINOIS REAL PROPERTY §§ 3731-3739 (1948).

WHEN DEED TAKES EFFECT

Where a sale of real estate between vendor and purchaser is to be closed by means of an escrow, with final delivery of the deed by the escrowee dependent upon the performance of some uncertain future condition, the general rule is that the escrow will have no effect as a conveyance, and no estate will pass until the event has happened and the second delivery has been made, or at least until the grantee has become absolutely entitled to such a delivery.[48]

This general rule is, however, subject to the important qualification that where the condition has been fully performed, and the deed delivered by the escrowee, it will under certain circumstances be treated as relating back to and taking effect at the time of its original deposit as an escrow.[49] Thus the Illinois Supreme Court has said that "the instrument will be treated as relating back to and taking effect at the time of its original deposit in escrow, where a resort to this fiction is necessary to give the deed effect to prevent injustice, or to effectuate the intention of the parties." [50]

INSTANCES OF "RELATION BACK"

The operation of this doctrine of "relation back" can be best illustrated by reference to certain concrete situations.

Death of grantor. Where the grantor dies before the condition is performed, his death would, if the doctrine of "relation back" were not

[48] Grindle v. Grindle, *supra* note 47; Fitch v. Miller, 200 Ill. 170, 65 N. E. 650 (1902); Skinner v. Baker, 79 Ill. 496 (1875). The sound view appears to be that upon full performance of the condition, title will be regarded as having vested in the grantee notwithstanding a want of formal delivery of the deed by the escrowee. Park Avenue Church v. Park Avenue Colored Church, 244 Ill. App. 148 (1st Dist. 1927); 19 AM. JUR., *Escrow*, § 25 (1939).

[49] In general the doctrine of "relation back" does not come into play unless the condition upon which the instrument was deposited as an escrow has been fully performed. County of Calhoun v. American Emigrant Company, 93 U. S. 124 (1876). Thus where both parties abandon the escrow agreement, a subsequent delivery of the deed will not relate back. Whitney v. Sherman, 178 Cal. 435, 173 Pac. 931 (1918). And where the grantee wrongfully obtains possession of the instrument held as an escrow, the doctrine of "relation back" will not be applied even though the grantor afterward ratifies the delivery. Mosley v. Magnolia Petroleum Co., 45 N. M. 230, 114 P.2d 740 (1941); Carlisle v. National Oil & Development Co., 108 Okla. 18, 234 Pac. 629 (1924). And *see* Illinois Central R. R. Co. v. McCullough, 59 Ill. 166 (1871). However, in Meyers v. Manufacturers & Traders Nat. Bank, 335 Pa. 180, 2 A.2d 768 (1938), where a deed to the purchaser at a tax sale was deposited by county commissioners as an escrow, to be delivered to the purchaser (who had also deposited the purchase money) when title had been adjudged good, it was held the grantee could, in view of the doctrine of "relation back," maintain a suit to confirm title before final delivery of the deed.

[50] Clodfelter v. Van Fossan, 394 Ill. 29, 37, 67 N. E.2d 182, 186 (1946). And *see* Leiter v. Pike, 127 Ill. 287, 326, 20 N. E. 23, 31 (1889); Gudgel v. Kitterman, 108 Ill. 50, 56 (1883).

employed, operate as a revocation of the escrowee's authority to make a valid delivery to the grantee upon subsequent performance. Accordingly in such a case, the rule is universal that the transaction will be effectuated by holding the conveyance operative as of the time when the deed was originally deposited as an escrow, and the grantee's title will for such purpose relate back to that date.[51]

Dower of grantor's widow. Likewise, where the grantor dies before the condition is performed, the doctrine of "relation back" has been applied to protect the grantee against a claim of dower by the grantor's widow where such a claim could not have been properly asserted had the grantor's deed been unconditionally delivered at the time it was deposited as an escrow.[52]

Incompetency of grantor. The doctrine of "relation back" is also applied to effectuate the escrow transaction where the grantor becomes incompetent before the condition has been performed.[53]

Death of grantee. Where the grantee dies after the deed has been deposited as an escrow but before the condition has been performed, the doctrine of "relation back" will be applied to sustain the transaction, and the deed may, after the condition has been performed, be delivered by the escrowee to the grantee's heirs.[54]

Conveyance by grantor to a third party. Where the grantor has deposited his deed as an escrow but thereafter, pending performance of the condition, he conveys to a third-party purchaser with notice, it has been held that the doctrine of "relation back" will be applied to protect the title of the grantee under the deed previously deposited as an escrow.[55] However, it appears that the doctrine will not be so applied where the third

[51] This familiar rule has been frequently recognized in Illinois. Huber v. Williams, 338 Ill. 313, 319, 170 N. E. 195, 197 (1930); Selby v. Smith, 301 Ill. 554, 560, 134 N. E. 109, 112 (1922); Hudson v. Hudson, 287 Ill. 286, 302, 122 N. E. 497, 503 (1919); Stone v. Duvall, 77 Ill. 475, 480 (1875); Price v. Pittsburg, Ft. Wayne and Chicago R. R. Co., 34 Ill. 13 (1864). The authorities generally are collected in a Note, 117 A. L. R. 69, 74-78 (1938). Some later cases are Ryckman v. Cooper, 291 Mich. 556, 289 N. W. 252 (1939); Anselman v. Oklahoma City University, 197 Okla. 529, 172 P.2d 782 (1946); Morris v. Clark, 100 Utah 252, 112 P.2d 153 (1941), *cert. denied*, 314 U. S. 584, 62 Sup. Ct. 357 (1941).

[52] Bucher v. Young, 94 Ind. App. 586, 158 N. E. 581 (1927); First Nat. Bank & Trust Co. v. Scott, 109 N. J. Eq. 244, 156 Atl. 836 (1931); Vorheis v. Kitch, 8 Phila. 554 (Pa. 1871). *Compare* Tyler v. Tyler, 50 Mont. 65, 144 Pac. 1090 (1914), where the escrow agreement was in the form of an option to purchase real estate.

[53] This is recognized in Price v. Pittsburg, Ft. Wayne and Chicago R. R. Co., 34 Ill. 13, 34 (1864). Authorities generally are collected in the Note, 117 A. L. R. 69, 80 (1938).

[54] Van Epps v. Arbuckle, 332 Ill. 551, 164 N. E. 1 (1928); Stone v. Duvall, 77 Ill. 475, 480 (1875). Authorities generally will be found in the Note, 117 A. L. R. 69, 79 (1938). And *see* ILL. REV. STAT., c. 76, § 1a (1947).

[55] Leiter v. Pike, 127 Ill. 287, 20 N. E. 23 (1889); Emmons v. Harding, 162 Ind. 154, 70 N. E. 142 (1904). And see Note, 117 A. L. R. 69, 84 (1938).

party to whom the grantor conveys is a bona fide purchaser for value without notice of the escrow.[56]

Conveyance by grantee prior to performance of condition. If the grantee under an escrow conveys to a third party before the condition has been performed, the doctrine of "relation back" has been applied after performance of the condition to protect the third party's title.[57]

Grantor's title perfected pending performance of condition. Sometimes a grantor after depositing his deed as an escrow will acquire outstanding claims or take other steps to perfect his title. Here in order that the grantee under the escrow may have the benefit of the subsequent steps taken by the grantor to perfect title, the doctrine of "relation back" will not be applied.[58]

Insurance. Where a grantor has premises insured against loss by fire and a loss occurs after he has deposited his deed as an escrow but before performance of the condition, it has been held that the doctrine of "relation back" will not be applied so as to preclude his recovering on the policy.[59] However, where a mortgage and mortgage notes have been deposited as escrows and pending performance of the condition the mortgagee takes out a policy of fire insurance to protect her interests, it has been held that the doctrine of "relation back" will permit her to recover for a fire loss occurring in the interim preceding final delivery by the escrowee.[60]

Tax Liability. The doctrine of "relation back" has been applied in determining the year when profits resulting from the sale of a leasehold, closed by means of an escrow, accrue for federal income tax purposes.[61] As between the parties, however, the doctrine will not be applied to relieve a grantor from liability for real estate taxes which accrue after his warranty deed has been deposited as an escrow but before the condition is performed and the warranty deed actually delivered by the escrowee.[62] The question of liability for current taxes as between the parties is customarily governed by express provisions of the contract of sale.

Rents and profits. The doctrine of "relation back" has been relied on in some cases as a ground for holding that the grantee is entitled to rents and profits accruing during the interim between deposit of a deed as an escrow and its final delivery by the escrowee upon performance of the condition.[63]

[56] Heffron v. Flanigan, 37 Mich. 274 (1877); Waldock v. Frisco Lumber Co., 71 Okla. 200, 176 Pac. 218 (1918).

[57] Note, 117 A. L. R. 69, 83 (1938).

[58] *Id.* at 80. *Compare* Baker v. Snavely, 84 Kan. 179, 114 Pac. 370 (1911).

[59] Vierneisel v. Rhode Island Ins. Co., 77 Cal. App.2d 229, 175 P.2d 63 (1946). And *see* Pomeroy v. Aetna Insurance Co., 86 Kan. 214, 120 Pac. 344 (1912).

[60] St. Paul Fire & Marine Ins. Co. v. Crump, 231 Ala. 127, 163 So. 651 (1935).

[61] Commissioner of Internal Revenue v. Moir, 45 F.2d 356 (C. C. A. 7th 1930). See Comment, 29 MICH. L. REV. 1082 (1931).

[62] McMurtrey v. Bridges, 41 Okla. 264, 137 Pac. 721 (1913). And *see* Mohr v. Joslin, 162 Iowa 34, 142 N. W. 981 (1913).

[63] Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364 (1900); Scott v. Stone, 72 Kan. 545, 84 Pac. 117 (1906); Sibley v. Pickens, 273 S. W. 897 (Tex. Civ. App. 1925).

This is a matter, however, which is usually covered by express agreement of the parties and one which should depend in every case, it would seem, upon the general nature and purpose of the particular transaction involved.[64]

Running of statute of limitations. The doctrine of "relation back" has been applied in favor of a grantee claiming the benefit of the statute of limitations.[65] It does not apply, however, where the statute of limitations is sought to be interposed as a defense to an action for breach of warranty based on covenants of the deed.[66]

Grantor's signature to drainage petition. A grantor who signs a petition for the organization of a drainage district after he has deposited a deed as an escrow but before performance of the condition may properly be counted as an owner in determining the sufficiency of the petition.[67]

Notice to terminate lease. In *Hirschberg v. Russell,*[68] where a grantor gave notice to terminate a lease after she had deposited her deed as an escrow, the doctrine of "relation back" was not applied so as to invalidate such notice.

Grantor's creditors. Whether the doctrine of "relation back" will be applied to protect the grantee against liens of the grantor's creditors attaching after deposit of his deed with the escrowee is a question upon which the authorities are in conflict.[69]

Express agreement between the parties. The parties themselves may expressly agree that the doctrine of "relation back" shall apply, and such an agreement will, it appears, be given effect, at least where rights of others have not intervened so as to be injuriously affected thereby.[70]

"Relation back" for one purpose and not others. The fact that the doctrine of "relation back" is applied for one purpose does not necessarily mean that it must be applied for all other purposes in the same transaction.[71]

The fiction of "relation back" would seem to afford an apt illustration of the flexibility of the common law in adapting itself to practical situations. The escrow has long been a convenient mechanism which serves a useful and practical end.[72] The doctrine of "relation back" is the method by which the common law has exempted that particular transaction from certain general rules governing delivery of instruments so that parties may avail themselves of the escrow as a useful, workable device.

[64] *See* Price v. Pittsburg, Ft. Wayne and Chicago R. R. Co., 34 Ill. 13 (1864), and *compare* Stone v. Duvall, 77 Ill. 475 (1875).

[65] Parker v. Spencer, 61 Tex. 155, 162 (1884).

[66] Lost Creek Coal & Mineral Land Co. v. Hendon, 215 Ala. 212, 110 So. 308 (1926).

[67] Hull v. Sangamon River Drain. Dist., 219 Ill. 454, 76 N. E. 701 (1906).

[68] 317 Ill. App. 329, 45 N. E.2d 886 (1st Dist. 1943).

[69] Note, 117 A. L. R. 69, 85-88 (1938).

[70] Price v. Pittsburg, Ft. Wayne and Chicago R. R. Co., 34 Ill. 13 (1864).

[71] Stone v. Duvall, 77 Ill. 475, 480-81 (1875).

[72] "An escrow fills a definite niche in the body of the law." Squire v. Branciforti, 131 Ohio St. 344, 353, 2 N. E.2d 878, 882 (1936).

UNAUTHORIZED DELIVERY AND BONA FIDE PURCHASERS

Where a deed has been deposited as an escrow, the general rule is that unauthorized delivery by the escrowee before the conditions have been complied with conveys no title.[73]

Suppose, however, that the grantee in such a case records the deed, and thereafter the property passes into the hands of an innocent third party who purchases in good faith and for value in reliance on the public records. Is the latter protected notwithstanding the unauthorized delivery? This question is one upon which there is much conflict of authority.[74]

The Illinois cases do not appear to be in harmony. *Forcum v. Brown* [75] is generally cited as supporting the view that a bona fide purchaser is not entitled to protection, but that case did not involve an ordinary type of escrow, and the deed under which the third-party purchaser claimed was itself probably vulnerable to a charge of forgery.[76] In both *Osby v. Reynolds* [77] and *Stanley v. Valentine*,[78] the Court, while recognizing that it had been held that a bona fide purchaser would not be protected under such circumstances, expressly stated that it was unnecessary to go to such lengths in the particular case because it clearly appeared on the facts that the third party had purchased with notice.[79]

In *Clark v. Harper*,[80] on the other hand, the Illinois Supreme Court, after stating that it was a maxim of the law that where one of two innocent persons must suffer a loss, he who was the cause or occasion of that confidence by which the loss has been caused ought to bear it, announced the rule to be that a "*bona fide* purchaser from one, who wrongfully procures the delivery of a deed placed in escrow, will be protected." The Court cited with approval the Pennsylvania decision of *Blight v. Schenck*,[81] one of the leading American cases supporting the view that a bona fide purchaser under such circumstances will be protected.

It is difficult to say, therefore, what final conclusion may ultimately be reached by the Illinois Supreme Court if and when this question is hereafter squarely presented for decision. There are strong considerations, it

[73] Tucker v. Kanatzar, 373 Ill. 162, 166, 25 N. E.2d 823, 825 (1940).

[74] 4 THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY §§ 3953-3955 (1924).

[75] 251 Ill. 301, 96 N. E. 259 (1911).

[76] If there was any showing that the third party, Robinson, paid value for the property, the opinion does not disclose it. The Court did observe, at the conclusion of its opinion: "If Robinson has paid anything on the mortgage against the Illinois land or has paid taxes on the land, he should be protected to that extent."

[77] 260 Ill. 576, 103 N. E. 556 (1913).

[78] 79 Ill. 544 (1875).

[79] Skinner v. Baker, 79 Ill. 496 (1875), involved merely a lessee, with an option to purchase. *See*, however, Land Co. v. Peck, 112 Ill. 408, 443 (1885), which appears to lend support to the view that a bona fide purchaser is not entitled to protection.

[80] 215 Ill. 24, 41-42, 74 N. E. 61, 67-68 (1905).

[81] 10 Pa. 285, 51 Am. Dec. 478 (1849).

would seem, to support the view that the bona fide purchaser should be protected. One well-known commentator, after stating that this is the better view upon principle and the one supported by the weight of authority, advances the following persuasive reasons why the bona fide purchaser should be accorded protection.[82] The first is based on the familiar doctrine that when a loss has occurred which must fall on one of two innocent persons, it should be borne by him who is the occasion of the loss. A deed deposited as an escrow is ordinarily regular on its face and is capable of clothing the grantee with apparent title. Consequently when the maker of such an instrument has voluntarily parted with the possession of it and delivered it into the care and keeping of a person of his own selection, he should be responsible for the use that may in fact be made of it in a controversy subsequently arising between himself and a bona fide purchaser. Secondly, a contrary view would tend to render titles insecure. Many real estate transactions are today closed by means of escrows with nothing of record to indicate that fact. If a purchaser could acquire such a title only at his peril, the merchantability of real estate generally as an article of daily commerce would be impaired. These considerations should, it is believed, carry weight with the Illinois Court.[83]

Aside from the principle just considered, it is to be noted that a grantor may ratify an unauthorized delivery by the escrowee or estop himself by his conduct from questioning such delivery.[84]

DEEDS TO BE DELIVERED BY A THIRD PARTY UPON THE GRANTOR'S DEATH

Many cases are to be found in the Illinois Reports involving delivery of a deed by a grantor to a third person with instructions to deliver it to the grantee named therein upon the grantor's death. It is well settled under the Illinois decisions that if the grantor surrenders complete control over the deed at the time it is delivered to the third person, the transaction will result in a valid conveyance to the grantee.[85] It is not so clear just

[82] 4 THOMPSON, *op. cit. supra* note 74, §§ 3954-55.

[83] *See* Tutt v. Smith, 201 Iowa 107, 204 N. W. 294 (1925); Schurtz v. Colvin, 55 Ohio St. 274, 45 N. E. 527 (1896); Note, 16 CALIF. L. REV. 141-46 (1928).

[84] 4 THOMPSON, *op. cit. supra* note 74, § 3959. And *see* Smith v. Goodrich, 167 Ill. 46, 47 N. E. 316 (1897); Illinois Central R. R. Co. v. McCullough, 59 Ill. 166 (1871); Eichlor v. Holroyd, 15 Ill. App. 657 (2d Dist. 1885); Harris v. Geneva Mill Co., 209 Ala. 538, 96 So. 622 (1923); Home Owners' Loan Corp. v. Ashford, 198 Okla. 481, 179 P.2d 905 (1946); Beck v. Harvey, 196 Okla. 270, 164 P.2d 399 (1944); Hansen v. Bellman, 161 Ore. 373, 88 P.2d 295 (1939); Note, 48 A. L. R. 405, 424 (1927). *Compare* Land Co. v. Peck, 112 Ill. 408, 443-44 (1885).

[85] McClugage v. Taylor, 352 Ill. 550, 186 N. E. 145 (1933); Johnson v. Fleming, 301 Ill. 139, 133 N. E. 667 (1922); Newman v. Workman, 284 Ill. 77, 119 N. E. 967 (1918); Callerand v. Piot, 241 Ill. 120, 89 N. E. 266 (1909); Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775 (1905); Bogan v. Swearingen, 199 Ill. 454, 65 N. E. 426 (1902); Munro v. Bowles, 187 Ill. 346, 58 N. E. 331 (1900). And see Note, 52 A. L. R. 1222 (1928).

when title passes in such a case, although it seems likely that if it were necessary to protect the grantor in the use and possession of the land during his lifetime, the Court would do so—even though the deed does not expressly reserve a life estate—by holding that title did not pass until the grantor's death.[86]

It is obvious that this type of transaction differs in principle from the situation previously discussed where a sale of real estate between vendor and purchaser is closed by means of an escrow. In the latter case, the event upon which the deed is to be finally delivered to the purchaser is ordinarily uncertain, and the initial delivery to the escrowee is conditional only. If the condition is not performed, the grantor will get back his undelivered deed. However, where the grantor places a deed in the hands of a third party to be delivered over to the grantee upon the grantor's death, the event upon which the deed is to be delivered to the grantee is not uncertain but is bound to occur. In that sense of the word, such a delivery to the third party is not conditional at all.[87] If there is no reservation of control over the deed by the grantor, it has been repeatedly held that a final and complete delivery takes place at the time the deed is so handed to the third party.[88]

A decisive issue in a case where the grantor deposits a deed with a third party to be delivered over to the grantee upon the grantor's death is whether the grantor retained control over the deed. If he reserves the right to recall the deed, it will be inoperative for want of a valid delivery,[89] and it has been said that this is true even though the grantor may not have exercised that right before his death.[90] Placing the deed in the hands of a third party with instructions to deliver it to the grantee in event the grantor dies first has been held insufficient.[91] However, where unconditional

[86] McClugage v. Taylor, 352 Ill. 550, 186 N. E. 145 (1933); Selby v. Smith, 301 Ill. 554, 134 N. E. 109 (1922); Kelly v. Bapst, 272 Ill. 237, 111 N. E. 1028 (1916); Baker v. Baker, 159 Ill. 394, 42 N. E. 867 (1896); Stone v. Duvall, 77 Ill. 475 (1875). The doctrine of "relation back" will, it seems, be applied. Stone v. Duvall, *supra*. Where the deed is to be delivered by the third party after the death of both the grantor and his wife, title passes when the grantor and his wife are both dead. Grindle v. Grindle, 240 Ill. 143, 88 N. E. 473 (1909). *Compare* Clodfelter v. Van Fossan, 394 Ill. 29, 67 N. E. 2d 182 (1946).

[87] Note 94 *infra*.

[88] McClugage v. Taylor, 352 Ill. 550, 186 N. E. 145 (1933) ("complete and valid delivery"); Osgood v. McKee, 343 Ill. 470, 175 N. E. 786 (1931) (same); Bullard v. Suedmeier, 291 Ill. 400, 126 N. E. 117 (1920) (same); Thurston v. Tubbs, 257 Ill. 465, 100 N. E. 947 (1913) ("complete and effective delivery"); Kirkwood v. Smith, 212 Ill. 395, 72 N. E. 427 (1904) (delivery "effectual and complete"); Bogan v. Swearingen, 199 Ill. 454, 65 N. E. 426 (1902) (delivery "absolute and unconditional").

[89] Selby v. Smith, 301 Ill. 554, 134 N. E. 109 (1922); Linn v. Linn, 261 Ill. 606, 104 N. E. 229 (1914); Sexton v. Merchants' Loan & Trust Co., 257 Ill. 551, 101 N. E. 56 (1913); Stevens v. Stevens, 256 Ill. 140, 99 N. E. 917 (1912); Lange v. Cullinan, 205 Ill. 365, 68 N. E. 934 (1903).

[90] Johnson v. Fleming, 301 Ill. 139, 133 N. E. 667 (1922).

[91] Stanforth v. Bailey, 344 Ill. 38, 175 N. E. 784 (1931); Weber v. Brak, 289 Ill. 564, 124 N. E. 654 (1919).

instructions are given to deliver the deed to the grantee upon the grantor's death and no control is reserved, delivery becomes irrevocable when the grantor places the deed in the hands of the third party, and no act of the grantor afterwards can revoke it.[92]

In view of the fact that an effective delivery is completed when the grantor places a deed in the hands of a third party with instructions to deliver it to the grantee upon the grantor's death, some authorities suggest that as a matter of strict legal terminology, it may not be entirely accurate to say that such a deed is delivered as an escrow at all.[93] The Illinois Supreme Court has, however, used the term "escrow" in connection with such a transaction,[94] although it has also recognized the distinction which exists between this type of case and the usual transaction between vendor and purchaser where final delivery of the deed by the escrowee depends upon the happening of events which may or may not occur.[95]

From the viewpoint of strict legal analysis, delivery of a deed to a third party with instructions to deliver it to the grantee upon the grantor's death presents some interesting problems.[96] It would seem to be implicit in the very nature of such a transaction that the grantor intends to reserve to himself the use and possession of the land during his lifetime. Can that intention be given effect without doing violence to established legal principles?

A number of Illinois cases may be cited in support of the view that where a deed is delivered to a third person with instructions to deliver it to the grantee named therein upon the happening of an event which is certain to occur, such as death of the grantor, title passes at the time of de-

[92] McReynolds v. Miller, 372 Ill. 151, 22 N. E.2d 951 (1939); Phenneger v. Kendrick, 301 Ill. 163, 133 N. E. 637 (1922); Johnson v. Fleming, 301 Ill. 139, 133 N. E. 667 (1922); Waters v. Lawler, 297 Ill. 63, 130 N. E. 335 (1921); Moore v. Downing, 289 Ill. 612, 124 N. E. 557 (1919); Hudson v. Hudson, 287 Ill. 286, 122 N. E. 497 (1919).

[93] Emmons v. Harding, 162 Ind. 154, 158, 70 N. E. 142, 143 (1904); Foster v. Mansfield, 3 Metc. 412, 37 Am. Dec. 154 (Mass. 1841); Taft v. Taft, 59 Mich. 185, 26 N. W. 426 (1886); Note, 117 A. L. R. 69 (1938).

[94] McClugage v. Taylor, 352 Ill. 550, 186 N. E. 145 (1933); Gronewold v. Gronewold, 304 Ill. 11, 136 N. E. 489 (1922); Kelly v. Bapst, 272 Ill. 237, 111 N. E. 1028 (1916); Stone v. Duvall, 77 Ill. 475 (1875). And notwithstanding the fact that delivery was to be made by the third party upon the grantor's death, an event certain to occur, delivery by the grantor to the third party has been characterized as conditional. Weir v. Hann, 301 Ill. 422, 134 N. E. 52 (1922); Stone v. Duvall, 77 Ill. 475 (1875).

[95] Johnson v. Wallden, 342 Ill. 201, 173 N. E. 790 (1930); Main v. Pratt, 276 Ill. 218, 114 N. E. 576 (1916). These decisions indicate that unlike the case where delivery by the escrowee is to be made upon the happening of an event which may or may not occur, no contract enforceable under the Statute of Frauds is necessary as a basis for an irrevocable delivery of a deed to a third party to be delivered to the grantee upon the grantor's death. See note 26 *supra*.

[96] 4 TIFFANY, *op. cit. supra* note 1, § 1054; Ballantine, *Nature of Escrows and Conditional Delivery*, 3 ILL. L. BULL. 3, 8-10 (1920).

livery of the deed to the third party and not upon the grantor's death.[97] Under this view there would seem to be no difficulty in sustaining the grantor's right to the use and possession of the lands during his lifetime where the deed which he delivers to the third person reserves a life estate by its express terms. Such a deed would operate by its terms as an immediate conveyance to the grantee of a future estate.[98] Suppose, however, that the deed is absolute on its face. If such a deed operates to convey title at the moment it is delivered to the third person, how can the use and possession of the land thereafter remain in the grantor until his death? Does it not become necessary if such a result is attained to read into the completely delivered deed something which admittedly is not there, *viz.*, the reservation of a life estate in the grantor? Indeed it has been said that delivery to the third person "vested the title according to the tenor and effect of the several deeds." [99]

However, the intent of the grantor in such a case to retain the use and possession of the lands during his lifetime seems so clear that it is believed the Court would likely give the transaction that effect even though the deed delivered to the third person may be absolute on its face without any reservation of a life estate in the grantor. Such a result can be accomplished, it seems, under the authority of that other line of Illinois decisions which support the view that title does not pass in such a case until after the death of the grantor.[100] These cases treat the transaction as a condi-

[97] Johnson v. Wallden, 342 Ill. 201, 173 N. E. 790 (1930); Phenneger v. Kendrick, 301 Ill. 163, 133 N. E. 637 (1922); Argile v. Fulton, 295 Ill. 569, 129 N. E. 526 (1921); Dietz v. Dietz, 295 Ill. 552, 129 N. E. 508 (1920); Main v. Pratt, 276 Ill. 218, 114 N. E. 576 (1916); Thurston v. Tubbs, 257 Ill. 465, 100 N. E. 947 (1913); Kirkwood v. Smith, 212 Ill. 395, 72 N. E. 427 (1904).

[98] Ralston v. Graham, 398 Ill. 439, 75 N. E.2d 887 (1947); Weir v. Hann, 301 Ill. 422, 134 N. E. 52 (1922); Hudson v. Hudson, 287 Ill. 286, 122 N. E. 497 (1919); German-American Nat. Bank v. Martin, 277 Ill. 629, 115 N. E. 721 (1917). And if the deed provides on its face that it shall not be in effect until the grantor's death, it seems that the grantors' use and possession during his lifetime could be protected consistently with the language of the instrument. Dry v. Adams, 367 Ill. 400, 11 N. E.2d 607 (1937); Osgood v. McKee, 343 Ill. 470, 175 N. E. 786 (1931); Bullard v. Suedmeier, 291 Ill. 400, 126 N. E. 117 (1920).

[99] Thurston v. Tubbs, 257 Ill. 465, 470, 100 N. E. 947, 949 (1913). The fact that the grantor continues in the use and possession of the property after the deed has been placed in the hands of the third party seems to have been considered, in some cases, as a circumstance inconsistent with a valid delivery. Smith v. Pelz, 384 Ill. 446, 51 N. E.2d 534 (1943); Selby v. Smith, 301 Ill. 554, 134 N. E. 109 (1922); Moore v. Downing, 289 Ill. 612, 124 N. E. 557 (1919). *Compare*, however, Argile v. Fulton, 295 Ill. 569, 129 N. E. 526 (1921); Kirkwood v. Smith, 212 Ill. 395, 72 N. E. 427 (1904); Bogan v. Swearingen, 199 Ill. 454, 65 N. E. 426 (1902).

[100] See note 86 *supra*. In some jurisdictions, where it is held that title passes upon delivery of the deed to the third party, courts have preserved to the grantor the use and possession of the land during his lifetime by reading into the transaction an implied reservation of such a life estate. Foulkes v. Sengstacken, 83 Ore. 118, 130, 163 Pac. 311, 314-15 (1917); Ballantine, *Nature of Escrows and Conditional Delivery*, 3 ILL. L. BULL. 3, 8-9 (1920). No Illinois case, however, appears to have gone this far.

tional delivery of the deed to the third party in escrow, notwithstanding the fact that the event upon which the deed is to be delivered over to the third party is one certain to occur.[101] It is difficult, however, to reconcile these decisions with that other line of Illinois cases, hereinbefore referred to, which treat delivery to the third party as absolute and unconditional [102] and assert that title passes under such a deed at the moment it is delivered to the third party.[103]

The disquieting problems of legal analysis which such a situation provokes would seem to be sufficient to warrant the practitioner in seriously asking: Should the common practice under which a deed is deposited with a third party to be transmitted to the grantee upon the grantor's death be discontinued entirely?

There is much to be said in support of an affirmative answer. Certainly there is no real need to resort to this cumbersome form of transaction in order to carry out the intention of the parties. The only result which a grantor can lawfully attain through deposit of a deed with a third party to be transmitted to the grantee upon the grantor's death will be more easily accomplished, it seems, by the delivery of a deed, reserving a life estate in the grantor, directly to the grantee.[104] This more simple and forthright procedure will not only avoid the troublesome questions of legal analysis mentioned above, but at the same time it may eliminate difficult problems of proof.[105]

[101] See note 94 *supra*.

[102] See note 88 *supra*.

[103] See note 97 *supra*. In Deitz v. Deitz, 295 Ill. 552, 557, 129 N. E. 508, 510 (1920), the Court, in discussing this type of transaction, observes that: "A deed must take effect immediately or it will not take effect at all." And in Argile v. Fulton, 295 Ill. 569, 572, 129 N. E. 526, 527 (1921), a case involving a transaction of the general type here under consideration, the Court observes: "There can be no question that a deed to be valid must take effect upon its execution and delivery or not at all. A deed to land which is not to take effect until the death of the grantor is void, as being an attempt to make a testamentary disposition of the property without complying wih the Statute of Wills." *See also* Smith v. Thayer, 234 Mass. 214, 125 N. E. 171 (1919).

[104] Weir v. Hann, 301 Ill. 422, 134 N. E. 52 (1922).

[105] The fact that a deed was not in the possession of the grantee until after the grantor's death but was in the possession of a third person makes a prima facie case against the delivery of the deed even though the third person afterwards transmits it to the grantee, and in such a case it devolves upon the grantee to overcome such a prima facie case against delivery by showing what the condition was and that it has been complied with. Smith v. Pelz, 384 Ill. 446, 51 N. E.2d 534 (1943); Huber v. Williams, 338 Ill. 313, 170 N. E. 195 (1930); Selby v. Smith, 301 Ill. 554, 134 N. E. 109 (1922). The fact that the third party is dead may make the grantee's problem of proof particularly onerous in such a case. Scott v. Cornell, 295 Ill. 508, 129 N. E. 94 (1920). Furthermore, difficult questions of fact may arise with respect to whether the deed was to be transmitted by the third party to the grantee only upon the grantor's death, McReynolds v. Miller, 372 Ill. 151, 22 N. E.2d 951 (1939), or whether the grantor reserved control over the deed, Jones v. Schmidt, 290 Ill. 97, 124 N. E. 835 (1919).