YALE LAW JOURNAL

Vol. XXXVI

FEBRUARY, 1927

No. 4

CONDITIONAL DELIVERY OF WRITTEN CONTRACTS

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Two parties are negotiating the terms of a contract, involving perhaps a sale, a promissory note, a lease or other conveyance of an interest in land. They draw up a formal document in writing, full and complete in all of its aspects. They sign and in some cases attach a seal. Then it is delivered by one party to the other, with the clear oral statement that the document is not to be binding on him unless A approves the deal,¹ or that his duty thereunder is to be conditional on B's signing also,² or that the rent provided in the instrument is to be payable only after certain repairs have been made,³ or that the document is to be null and void if C shall disapprove. Or one of the parties to the document delivers it to a third person, with a clear oral direction to such third person to deliver it over to the promisee or grantee only upon his paying a sum of money or upon the happening of some other condition. What are the legal relations of the parties before the happening of the condition? Has a "valid" contract been made? Is the written paper a "contract"? If the obligee sues on the written document is proof of the oral statement as to the condition precedent prevented by the parol evidence rule? If a sealed instrument is delivered to a third person, to be delivered to the grantee or obligee on a parol condition, it is called an escrow. What is an escrow? Is an escrow a deed or a contract or a mere piece of paper? What legal relations does delivery of an escrow create?

It is easy to ask questions; and it is easy to give a stereotyped answer to them—for to some of the above questions there is a

¹ *Pym v. Campbell*, 6 El. & Bl. 370 (Q. B. 1856); *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174 (1888).

² *Beard v. Boylan*, 59 Conn. 181, 22 Atl. 152 (1890); *Alexander v. Wilkes*, 11 Lea, 221 (Tenn. 1883).

³ *Davis v. Jones*, 17 C. B. 625 (1856).

traditional answer. Are the answers wrong? If careful analysis shows them to be so, we need not be surprised; for it is no secret that the law develops by conscious and unconscious fiction and that the meaning of what we lawyers say can be determined only by a close analysis of what we decide and do.

There is a vast mass of material on the subject of this article. An attempt to exhaust it would lead us back to the very beginning of the Year Books and would involve us in the law of conveyance of property, both real and personal, and in the entire field of contracts, both formal and informal. No such exhaustive examination is here attempted. The original purpose of the writer was to determine the legal operation of a sealed promise delivered to a third person as an escrow. The attainment of this purpose, however, has required some investigation into other kinds of escrows and other kinds of delivery.⁴

DELIVERY

Much has been written as to what constitutes a "delivery." Like all other legal terms, this one has a varied usage causing as cases multiply an increasing amount of difficulty for student, lawyer and judge. There has been difference of opinion as to what constitutes a legally operative delivery for specific purposes. Decisions have so shifted the concept behind the term that it is no longer merely the physical tradition from one hand to another as a man of business may suppose. It is believed, however, that all still agree that delivery consists of conduct on the part of the grantor or obligor expressive of an intent on his part. At times it is also held that there must be similar conduct on the part of the grantee, obligee, or other recipient. In any case delivery is purely factual in character; it is a group of operative facts and not a jural relation or group of jural relations.

If delivery is an operative fact, what is its legal operation? What are the jural relations created? This depends upon the *res* delivered and the particular type of delivery used. The factual conduct of the one making delivery may be expressive of one kind of intent or of another entirely different kind. The physical *res* (apparently a *sine qua non*) differs in quality and character, the accompanying words differ, the previous history and relations of the parties differ. As all of these vary, the juristic result of delivery varies. Suppose that A drops a gold piece

⁴ As to conditional delivery of deeds of land, see Bigelow, *Conditional Deliveries of Deeds of Land* (1913) 26 HARV. L. REV. 565; Tiffany, *Conditional Delivery of Deeds* (1914) 14 COL. L. REV. 389; Ballantine, *Delivery in Escrow and the Parol Evidence Rule* (1920) 29 YALE LAW JOURNAL, 826; Rundell, *Delivery and Acceptance of Deeds in Wisconsin* (1921) 1 WIS. L. REV. 65; Aigler, *Is a Contract Necessary to Create an Effective Escrow* (1918) 16 MICH. L. REV. 569.

into B's hand. The legal operation of that act would be affected by any of the following facts: (1) B was pointing a pistol at A's head; (2) B was A's son; (3) B had said "lend me some money"; (4) the gold piece was heated so that it was of a glowing golden red, not observed by B. Thus the legal effect of the delivery might be a gift, a loan, a tort, or a crime.

The same variation in the legal operation of delivery exists where the physical *res* is a paper document containing written words, with the addition that such operation is now affected not only by surrounding facts but also by the written words themselves. Thus, (1) the document may be handed to a person not named in the writing to be held by him solely as the agent or custodian of the party so delivering. Such a delivery does not cause the words of the document itself to have any legal operation whatever, even though those words purport to make a grant or a promise to some person expressly named.⁵ A second delivery by the depositary to the named grantee or obligee would also fail to make the words of the document legally operative, in the absence of an authority or an estoppel. The physical delivery to the custodian is not totally inoperative, since it creates the legal relations involved in bailment; but its operation goes no further.

(2) If the document is delivered to the grantee or obligee named therein, greater difficulty arises in determining its legal operation, especially if there is an attempt to make it dependent upon an extrinsic oral condition.⁶ Written promises so delivered are considered herein.

⁵ Bigelow, *op. cit. supra* note 4, at 567; 1 DEVLIN, DEEDS (1887) §§ 318, 324.

If it is shown that the parties contemplated further negotiation and further voluntary expressions by one or both, it will usually be held that a power of revocation exists and that there is neither a contract nor a delivery as an escrow. In *Miller v. Sears*, 91 Calif. 282, 27 Pac. 589 (1891) deeds were given to the defendant as depositary, the plaintiff saying: "When everything is all right and perfected, you give these papers to me, and these others to him." The parties had not yet passed on titles and had no abstracts. The court held that no contract had been made, that the documents were still subject to the plaintiff's control, and decreed that they should be returned to the plaintiff.

Handing an instrument to the scrivener or attorney without any instructions as to further delivery, no conditions being specified, is not a delivery that in any way affects the legal operation of the instrument, and it is not an escrow. *Carr v. Hoxie*, Fed. Cas. No. 2438 (C. C. R. I. 1828); *Tanner v. Imle*, 253 S. W. 665 (Tex. 1923).

Handing an instrument to the grantee himself for the sole purpose of enabling him to deposit it with a third person as an escrow is not a delivery. *Ford v. Moody*, 169 Ark. 649, 276 S. W. 595 (1925).

Handing a box with papers in it to a servant of the grantor who retained control is no delivery. *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299 (1890).

⁶ The conflict as to whether an extrinsic oral condition can affect the operation of a deed of conveyance delivered to the grantee will not be considered herein. See articles by Bigelow, Tiffany and Ballantine, *supra* note 4. See WIGMORE, EVIDENCE (2d ed. 1923) § 2408.

(3) The document may be handed to a third person to hold as the agent or custodian for the grantee or obligee, subject to no condition extrinsically expressed. In this case the document is operative exactly as it would be if delivery had been to the grantee or obligee in person,⁷ except that when the latter first learns of such delivery he has power to nullify it by a disclaimer.

(4) The document may be handed to a third person as the agent or custodian for both the grantor and the grantee, to be delivered over to the grantee at some specified future time. The document is certainly legally operative in this case, there being no extrinsic condition of any sort other than that of the passage of time. If the document is a conveyance, the property interest created will be said to be "vested." If the document is a promise, it will be at once operative in accordance with its expressed words, subject only to the passage of the specified time.

(5) The document may be delivered to a third person as the trustee or custodian for both parties, with expressed oral directions that it is to be delivered over to the grantee or obligee only upon the happening of some future condition, certain or uncertain of occurrence.⁸ This is usually called a "conditional delivery" and the document is said to be delivered as an "escrow." One purpose of the present article is to consider the legal operation of a promissory document so delivered, with respect to the law of

Delivery may be as an escrow to the solicitor of the grantee. *Watkins v. Nash*, L. R. 20 Eq. 262 (1875).

⁷ *Bigelow*, *op. cit. supra* note 4, at 565; *Doe d. Garnons v. Knight*, 5 B. & C. 671 (K. B. 1826); *Blight v. Schenck*, 10 Pa. 285 (1849); *Kidner v. Keith*, 15 C. B. N. S. 35 (1863). It is beyond the scope of this article to discuss cases stating a different rule.

The deed is operative unconditionally if delivery is to one of several grantees without using the word "escrow" and without specifying a condition, even though the grantor may have intended it to be used only as security for money to be obtained. *London Freehold Co. v. Suffield* [1897] 2 Ch. 608.

⁸ A distinction has been drawn between cases where the condition is an event certain to occur and those where it is uncertain; in the former case, the document is not an escrow but a present deed of conveyance. *Wheelwright v. Wheelwright*, 2 Mass. 447 (1807); *Prutsmann v. Baker*, 30 Wis. 644 (1872); *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337 (1905). Differences in degree of certainty are of importance to the grantee; but the difference has no bearing on the questions discussed in this article. Where the grantor delivers a deed to a depositary to be delivered to the grantee only on the grantor's death, the delivery is irrevocable and the grantee will become owner even though the grantor wrongfully takes back the deed and destroys it. *Hudson v. Hudson*, 287 Ill. 286, 122 N. E. 497 (1919); *Emmons v. Harding*, 162 Ind. 154, 70 N. E. 142 (1904); *Grilley v. Atkins*, *supra* (depositary refused to surrender the deed back, but the grantor executed a new deed of conveyance to another person). But the same is true of any delivery as an escrow. As to this distinction, see *Tiffany*, *op. cit. supra* note 4, at 397; *Rundell*, *op. cit. supra* note 4, at 82; *Ballantine*, *op. cit. supra* note 4, at 832, 833.

contract and not the law of property. It may be said in passing, however, with respect to deeds of conveyance so delivered, that such a delivery at once very definitely affects the legal relations of the grantor and the grantee, both with each other and with third persons. It is of no service, indeed it is a positive dis-service, to say that "title" either does or does not pass on the first delivery. The document clearly "takes effect" upon the first delivery; but the question remains as to what is the effect that it "takes," and what is the property interest of each party prior to the happening of the condition.

It is necessary at this point to consider the meaning of the term "condition."

WHAT IS A CONDITION

To determine the meaning of "conditional delivery" it is necessary to answer the question: What is a "condition"? It, too, is a fact and not a jural relation. Thus, if one promises to pay a sum of money if (or on condition that) his ship comes in, the coming in of the ship is the condition. If one creates an estate in land to vest (or to divest) upon the death of A, A's death is the condition—an operative fact. A condition is not a promise; it is not even a group of words, although it may always be described in a group of words.

When we say that a promise is conditional we do not mean that there is no promise. This is true even though the condition is a fact that may possibly never occur at all. The condition may be the death of A, certain to occur but uncertain as to time; it may be the coming in of a ship or the payment of a sum of money by A, an act of a person or other event that may never occur at all.

Furthermore, when we say that a promise is conditional we do not mean that it is not valid or not binding. The formation of what we call a contract occurs upon the expression of assent by the two parties. The terms of the contract assented to may involve promises by one or by both parties, and one or all of these promises may be conditional. No one believes that the present existence of a valid and binding contract for the erection of a building would be prevented by the fact that the owner's promise to pay is conditional upon the architect's approval and that the builder's promise to build is conditional upon the absence of a strike. Conditional promises may be ample consideration for each other, and the conditional contract is valid and binding.

A conditional promise, on the other hand, is not *immediately* enforceable until the condition has occurred, if the condition is a condition *precedent*. Indeed, it may not be immediately enforceable even after a condition has occurred; for the time set for performance may not yet have arrived, and there may be still

other conditions precedent. The life history of a contract is a chronological series of facts, some of them operative and others not operative. There may be inoperative preliminary negotiation. There may be counter-offers, rejections, conditional acceptances; but there must eventually be an operative offer and an unconditional acceptance thereof. At this point we say that there is a valid and binding contract; but we do not mean by this that either party can at once get a judgment or court decree. The series of events must have proceeded further before judicial enforcement is available. There must be a *breach* of the valid and binding contract; and, in the absence of any repudiation, there is no breach as long as some condition precedent has not yet occurred. To make out a *prima facie* affirmative case, therefore, a plaintiff must allege offer and acceptance, the occurrence of all conditions precedent, and breach by the defendant.

It should be apparent from the foregoing that when two parties have agreed upon terms, one of which provides that a certain fact or event shall operate as a condition precedent, it is quite incorrect to say that as long as the condition has not occurred there is as yet no contract, or no valid contract, or no binding contract. Yet it is by making such statements that courts have admitted oral evidence of conditions precedent in the teeth of the parol evidence rule. Indeed, cases of this sort are almost innumerable.

WHAT IS AN ESCROW

What is an escrow and what is its legal operation? Literally the word means merely a writing,⁹ without regard to signing, sealing, or delivery. In Anglo-American law, however, it has been most frequently used in connection with writings under seal.

⁹ Various dictionaries explain the word "escrow" as follows: BYRNE'S LAW DICTIONARY (1923): "apparently from Norman French *escrit*, which itself was derived from the Latin *scriptum*, a writing." KELHAM'S NORMAN DICTIONARY (1779): "Escrowes, rolls of parchment, scrolls." TERMES DE LA LEY (Am. ed. 1812): "An escrow is a deed delivered to a third person to be the deed of the party upon a future condition; and is called in Latin *schedula*. Rast. Ent. 181." HOLTHOUSE'S LAW DICTIONARY (Penington's ed. 1847): "from the Fr. *écrou*, a scroll." BURRILL'S LAW DICTIONARY (2d. ed. 1871): "(Lat. *scriptum*, *schedula*)." It is said that in Littleton's time the word was written "escrovet," and that "The radical idea appears to be, a writing the contents of which are temporarily kept out of view, as by being put in a third hand, by rolling up, enclosing in wax, etc." Littleton describes a partition of land, each portion of the land being written alone "in a little scroll (*en un petit escrovet*) and shall be covered all over with wax, in the manner of a little ball (*d'un petit pile*), so that no one can see the scroll," each partitioner then drawing his scroll from a hat.

The OXFORD DICTIONARY (1897) gives also "Escroll" as an obsolete form, and derives the word from "Old French *escroe*, *escroue*—scrap, shred, strip of parchment, scroll."

In the period of the Year Books the question most litigated was put in this form: Is the writing the grantor's "deed" or is it merely an "escrow"? It would appear in the light of this antithesis that an escrow is not a deed at all; and numberless statements to that effect have been handed down to us.¹⁰

When we consider, however, the cases in which the term escrow has been used, and observe the varieties of legal operation that have been given to writings in the various stages of their career, it will be observed that the courts do not make that legal operation depend upon the term of description used. Instead, they determine the legal operation first, and then choose a descriptive term that seems to justify it. The document may be operative in one way and not in another; in holding it to be operative in the one way, a court will call it a deed, and in holding it to be inoperative in the other way will call it an escrow.

It has been supposed that a distinction could be taken between a delivery to a depositary *as the deed* of the grantor to be delivered over on condition, and a delivery *as an escrow* to take effect as a deed on the performance of a condition. It was supposed that the former was a deed and that if the grantee should get possession by any means, he could maintain action thereon and the grantor could not plead *non est factum*; but otherwise in the latter case.¹¹ This was properly disapproved by Kent,¹² and is not a sound distinction. The document is the grantor's deed in either case, its future legal operation being alike dependent on fulfillment of the condition.¹³

An escrow is a written document, delivered to a person other than the grantee or obligee named therein, in its final and completed form, the depositary being instructed to hold it and to deliver it to the grantee or obligee on the fulfillment of some con-

¹⁰ SMITH, CONTRACTS (6th ed. 1878) *8: "If that condition be performed, it becomes an absolute deed; till then it continues an escrow, and, if the condition never be performed, it never becomes a deed at all."

¹¹ See COMYN, DIGEST, tit. Fait, A, 3; SHEPPARD, TOUCHSTONE, *58, *59; Murray v. Earl of Stair, 2 B. & C. 82 (K. B. 1823) where a verdict for the plaintiff was sustained because delivered *as his deed*, and evidence of the depositary that it was delivered to the grantee in breach of a provision that certain notes were to be surrendered before such delivery was treated as immaterial.

¹² 4 KENT, COMMENTARIES (1st ed. 1830) 447. See also Hall v. Harris, 40 N. C. 303 (1848).

¹³ State Bank v. Evans, 15 N. J. L. 154 (1835). Tiffany, *loc. cit. supra* note 4, says: "an instrument in the form of a deed, which is conditionally delivered, is delivered as a deed, an instrument capable of legal operation, and not as a mere piece of paper. Otherwise it could not become legally operative upon the satisfaction of the condition. In the case of a conditional delivery, a delivery in escrow, the maker of the instrument in effect says: 'I now deliver this as my act and deed, provided such a condition is satisfied,' and not 'I now deliver this as a mere piece of paper, provided such a condition is satisfied.'"

dition not specified in the document itself. Such a document is often a deed of conveyance, a contract under seal, a bond, a note, or a release. The character of the instrument as an escrow is fixed by the provision for performance of a condition, and the word "escrow" is not at all necessary.¹⁴

If an escrow is a writing made by the person delivering it, money cannot be an escrow. Much less can a debt (the legal duty to make a payment) be an escrow in the historical use of that word. Nevertheless, money can be deposited with a holder to be paid over to another person on the fulfillment of specified conditions, with legal results strictly analogous to those relating to escrows, and such money is said to be deposited "in escrow."¹⁵ If the money is a segregated physical entity, the grantee gets a conditional property interest in the chattel and the depositary is a bailee; if the money is deposited in a bank, to be mingled with its general funds, the grantee gets a conditional contract right, the depositary being held as a trustee for both parties, but not as a bailee. On fulfillment of the condition the obligee has a legal right to the money against the depositary.¹⁶ On non-fulfillment of the condition the depositor has a legal right against the depositary to a return of the money.¹⁷

YEAR BOOK VIEWS OF ESCROW

The legal operation of a deed delivered as an escrow on certain extrinsic conditions puzzled the lawyers of the Middle Ages as much as it does those of to-day. The substantive law was usually stated in terms of procedure and of formality; in a lesser degree such is still the case. It was much debated whether as against a plaintiff who sued in debt on obligation the defendant could plead the general issue (*nient son fait*) in cases where the document had been delivered as an escrow and the grantee had obtained possession wrongfully without having fulfilled the condition. The general opinion was that such a plea was proper, the theory being that before the second delivery the document was merely an escrow and not a deed.¹⁸ From that day to this, the problem

¹⁴ *White v. Bailey*, 14 Conn. 271 (1841); *Clark v. Gifford*, 10 Wend. 310 (N. Y. 1833); *Nash v. Flynn*, 1 J. & LaT. 162, 175 (Ch. 1844).

¹⁵ See *State Bank v. Schultze*, 199 N. W. 138 (N. D. 1924).

¹⁶ *Harris v. Snyder*, 55 Misc. 306, 105 N. Y. Supp. 502 (1907). As to innocent purchasers the depositary is sometimes held to have the power of a trustee.

¹⁷ *State Bank v. Parker*, 69 Fla. 258, 67 So. 915 (1915); *Parker State Bank v. Pennington*, 9 Fed. (2d) 966 (C. C. A. 8th, 1925).

¹⁸ Y. B. 8 Hen. VI, f. 26, pl. 15; 10 Hen. VI, f. 25, pl. 85; cf. 9 Hen. VI, f. 37, pl. 12; 14 Hen. VI, f. 1, pl. 4; 19 Hen. VI, f. 58, pl. 22.

In the Year Books the term "escrow" is used to denote "writing obligatory" that has not yet been delivered to the grantee so as to be operative to create a legally enforceable right in him. Sometimes "escript" is used as

has seemed to many minds to turn on whether the document "takes effect" at the first delivery or at the second, without considering an intermediate position that each delivery may be operative to some extent.¹⁹ The litigated issue in these cases was usually whether the defendant owed an enforceable legal duty to the plaintiff before fulfillment of the condition, the courts rightly holding that he did not. Because of the formalism of that day and the crudity of analysis of legal relations, it was thought that the just result could be attained only by holding that the document was not yet the defendant's deed.

Even at that time the escrow was held to be operative if a second delivery by the grantor or obligor became impossible by reason of his death (or in case of a woman, by her marriage) before fulfillment of the condition, in case the condition was properly fulfilled thereafter.²⁰ This holding caused it to be argued that the first delivery must have been fully operative, and that a release delivered as an escrow could be pleaded in bar if the releasee got possession of it without fulfilling the conditions.²¹ The appearance of logic in this position did not cause the court to adopt it.

Delivery of a sealed bond to a third person subject to a parol condition was very common much earlier than this.²² Chattels

practically interchangeable with "escrow," the document being so described before any delivery whatever and also after delivery to a third person on certain extrinsic conditions. Thus in Y. B. 10 Hen. VI, f. 25, pl. 85:

"JOHN T. brings an action of Debt on three obligations against one K.

"NEWTON: We say that the deeds on which the plaintiff has sued were written and sealed by the defendant and delivered by him to H. E. as three 'escrpts'; to-wit: if the plaintiff should execute a defeasance on certain conditions and deliver it to H. E. to be delivered to the defendant . . . then the said H. E. should deliver to the plaintiff the 'escrows' as deeds: and we say that the defeasance . . . was not made or delivered to H. E., but thereafter the plaintiff took the 'escrows' out of H. E.'s possession. Wherefore, they are not the deeds of the defendant. Ready, etc. . . .

"PASTON, J.: The plea is good: for if I am obliged by an 'escrpt,' it is not my deed because it is not delivered to another person. If I seal the said 'escrpt' without delivering it, and the grantee afterwards seizes the 'escrpt,' it is not my deed, because it is nothing but an 'escrow' until delivery has been made to him. And so here, when the condition has not been performed, delivery is lacking. . . .

"If I make a deed for 20£ to James Strange, and I deliver it to a third person as an 'escrow,' then if Strange takes the deed afterwards and brings action against me I can properly plead *not my deed (nient mon fait)*, because there has been no delivery to Strange. So in this case while the condition is not performed, they are not the deeds of the defendant, because the deeds were delivered to H. E. as three 'escrows' until the condition shall be performed. . . ."

¹⁹ As appears hereafter, it has come about that no second delivery is ever necessary.

²⁰ Y. B. 8 Hen. VI, f. 26, pl. 15.

²¹ Y. B. 27 Hen. VI, f. 7, pl. 3. The point was not decided.

²² See Y. B. 3 Edw. III, f. 30, pl. 38; 3 Edw. III, f. 46, pl. 32; 5 Edw. III,

as well as obligations were delivered to a third person to hold subject to stated parol conditions. These are practically all cases where one of the parties brought detinue against the holder of the chattel or the escrow, the latter replying that he did not know whether or not the conditions were fulfilled and asking a writ of "garnishment" against the other party to the agreement to compel him to interplead with the plaintiff on the issue as to the fulfillment of the conditions.²³

AN ESCROW IS OPERATIVE ON THE FIRST DELIVERY

Where a document has been delivered as an escrow the parties almost always contemplate a second delivery in the future, and a second delivery is in fact generally made by the depository. Out of this fact arose the idea that a conditional delivery or a delivery as an escrow could not be made to the grantee himself, because in such case it is evident that no second delivery is contemplated. Hence also arose the notion that the document does not "take effect" until the second delivery, inasmuch as it is expressly made clear that there are certain "effects" that it shall not have at the first delivery. The document is said not to be a contract; or if it be a deed of conveyance it is said that title does not pass. Such loose general statements are due to a failure to analyze such concepts as "title" and "contract" and to observe that legal effects are complex and not simple. The confusion of mind and of statement is no less today than in the time of the Year Books.

The function of an escrow or of a conditional delivery of a document is to give security to both parties. The grantor or promisor wishes to retain a certain property interest or not to assume immediate duties and liabilities, and at the same time to be assured of getting certain values in return. The grantee or promisee wishes ample security that if he gives those return values, he will actually be invested with the property that he covets or with the contract rights for which he bargains. In order that each party shall have this security it is necessary for society to take notice of the escrow transaction and to indicate that societal action will be in large measure determined thereby. This is what is meant by "legal relations," by saying that a document "takes effect" or is legally "operative," and by such terms as "property interest" and "contract rights."

The courts did not hesitate to make the escrow subserve the

f. 17, pl. 15; 7 Edw. III, f. 29, pl. 23; 25 Edw. III, f. 92, pl. 5; 31 Edw. III, f. 1, pl. 2.

²³ See Y. B. 39 Edw. III, f. 22 b; 3 Hen. IV, f. 18, pl. 15; 13 Hen. IV, f. 8, pl. 24; 8 Hen. VI, ff. 36, 37, pl. 5; 9 Hen. VI, ff. 38, 39, pl. 15; 10 Hen. VI, f. 25, pl. 85; 11 Hen. VI, f. 5, pl. 10; 14 Hen. VI, f. 1, pl. 4; 19 Hen. VI, f. 58, pl. 22; 20 Hen. VI, ff. 28, 29, pl. 23; *ROLLE ABR.*, tit. *Entrepleder*.

economic function for which it was designed. They made it take effect upon court action and made it excellent security for both parties.

First, it is undisputed that after delivery as an escrow the grantor or promisor has no power of revocation.²⁴ The grantee or promisee is in a position of legal immunity or safety. This shows that the transaction has no longer the status of an unaccepted offer. The delivery of the document to the grantee will be specifically compelled, even though before fulfillment of the conditions the grantor has instructed the depository not to deliver it;²⁵ and the document is operative, even though the grantor has made a conveyance to a third person,²⁶ or has regained possession of the document and destroyed it.²⁷

Secondly, no new delivery by the depository to the grantee is necessary to invest the latter with all the legal relations intended by the parties as the final consummation of the transaction. Upon fulfillment of conditions the grantee will be regarded as owner as completely as if the document had been delivered formally into his hands.²⁸ If the escrow is a promissory document, action will lie thereon, if all conditions are fulfilled, without any delivery into the hands of the promisee.²⁹ Even though a second delivery by or on behalf of the grantor or obligor has become impossible by reason of death or coverture before the fulfillment of the conditions, upon such fulfillment the document will be made fully operative.³⁰ To effect this result, the doctrine of "relation

²⁴ *Graham v. Graham*, 1 Ves. Jr. 272 (Ex. 1791) ("the authority was not countermandable or determinable"); *Naylor v. Stene*, 96 Minn. 57, 103 N. W. 685 (1905).

²⁵ *Baum's Appeal*, 113 Pa. 58 (1886). If specific enforcement is not possible, damages will be awarded. *Naylor v. Stene*, *supra* note 24.

²⁶ *Beekman v. Frost*, 18 John. 544 (N. Y. 1820); *Cannon v. Handley*, 72 Calif. 133, 13 Pac. 315 (1887). Of course the effect of recording acts would here be involved.

The grantee is preferred over the grantor's heir or devisee. *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958 (1900); *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729 (1890).

The grantor cannot render the transaction inoperative by refusing performance of the condition or by imposing new conditions. *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003 (1906).

²⁷ *Hudson v. Hudson*, *supra* note 8; *Wymark's Case*, 5 Co. 74 (K. B. 1599).

²⁸ *Regan v. Howe*, 121 Mass. 424 (1877); *Gardiner v. Gardiner*, 26 Idaho, 664, 214 Pac. 219 (1923).

²⁹ *Couch v. Meeker*, 2 Conn. 302 (1817).

The surrender of an escrow bond by the depository back into the hands of the obligor was held to be a conversion in *Young v. Clarendon*, 26 Fed. 805 (C. C. Mich. 1886).

³⁰ Y. B. 27 Hen. VI. f. 7, pl. 3; *Perryman's Case*, 5 Co. 84 (C. P. 1599); *Graham v. Graham*, *supra* note 24 (bond delivered by depository after the obligor's death); *Frosett v. Walshe*, J. Bridg. 49 (C. P. 1617) (coverture); 4 KENT, *op. cit. supra* note 12, at 454; SMITH, *op. cit. supra* note 10, at 11; SHEPPARD, TOUCHSTONE, *59; *Wheelwright v. Wheelwright*, *supra* note 8.

back" was appealed to, Chancellor Kent saying that "justice requires a resort to a fiction."³¹ It can and should be described in more realistic fashion, recognizing that the property interest is divided between grantor and grantee, and that contract rights may be future and conditional in this case as in others.

Thirdly, it has been and should be held, in cases where a deed of conveyance is delivered as an escrow, or to the grantee on condition, that the grantee has a property interest before any second delivery, an interest that is subject to execution by his creditors³² and one that includes a power of making conveyances to others.³³ Doubtless these in some measure depend upon the character of the conditions upon which the escrow was delivered. Possession, with its complex jural relations, may be vested in either party as they may agree.³⁴ If possession is still in the grantor, he will usually be the one entitled to rents and profits.³⁵ If the subject matter is land, the grantee has an interest that will descend to his heir.³⁶ It is beyond the scope of this article to consider in detail this division of the property interest or to discuss apparent conflicts in the decisions.

The vitally important and operative fact is not a second delivery of the document, whether a conveyance or a contract; it is the fulfillment of the condition. As stated above, such fulfill-

³¹ 4 KENT, *op. cit. supra* note 12, at 454. As to this Professor Ballantine, *op. cit. supra* note 4, at 830, acutely says: "Relation back is, according to this theory, not a fiction at all. It is simply a description of the fact that the grantee acquires some species of power or contingent property interest *ab initio*, which is not affected by subsequent transactions or events such as death, incapacity, or transfers of title by the grantor." It should be observed, however, that "relation back" is not ordinarily so understood (if it is understood at all). Very likely it is always possible to squeeze the fiction out of ancient language and pump into it a modern and more realistic meaning.

³² *Shirley v. Ayres*, 14 Ohio, 307 (1846). The grantor's interest is also subject to execution and attachment; but the creditor gets only the limited interest of the grantor, the rents and profits as long as the grantor was entitled to them and security for the unpaid price. *May v. Emerson*, 52 Or. 262, 96 Pac. 454, 1065 (1908); *Wittenbrock v. Cass*, 110 Calif. 1, 42 Pac. 300 (1895); *Ranken v. Donovan*, 166 N. Y. 626, 60 N. E. 1119 (1899).

³³ *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243 (1889); *Santaquin Mining Co. v. High Roller Mining Co.*, 25 Utah, 282, 71 Pac. 77 (1903).

³⁴ See *Davis v. Jones*, *supra* note 3, where a lease was delivered on condition that it was not to be operative until certain repairs should be made, but the tenant had "possession."

³⁵ See *Tiffany*, *op. cit. supra* note 4, at 402; *Bigelow*, *op. cit. supra* note 4, at 567. The grantor has been held to be an "owner" within the meaning of a statute requiring the signatures of owners to a petition. *Hull v. Sangamon Dist.*, 219 Ill. 454, 76 N. E. 701 (1906). The grantee might be held to be an owner also, with equal reason, unless the statute is so drawn as to preclude the recognition of divided ownership for the purposes of the statute.

³⁶ *Stone v. Duvall*, 77 Ill. 475 (1875); *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26 (1887).

ment makes the document fully operative without any new delivery; and it is likewise true that a new delivery without fulfillment of the condition is not operative at all except in cases where subsequent reliance by an innocent purchaser may create an estoppel.³⁷

EXTRINSIC CONDITIONS AND THE PAROL EVIDENCE RULE

When a deed or contractual document is delivered as an escrow subject to some extrinsic condition, it is almost universally held that this extrinsic condition can be proved by parol testimony. Why is not such testimony excluded by the parol evidence rule? The answer usually given is that this rule has no application until there is a completed contract or a delivered deed, and that a document delivered as an escrow is not a contract or a deed until final delivery to the grantee, or at least until the happening of the condition.³⁸ That the document is legally operative without any

³⁷ *Smith v. S. Royalton Bank*, 32 Vt. 341 (1859); *Powers v. Rude*, 14 Okla. 381, 79 Pac. 99 (1904); *Clark v. Gifford*, *supra* note 14; *Everts v. Agnes*, 4 Wis. 343 (1856), 6 Wis. 453 (1859); *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. 311 (1897) (grantor can plead *non est factum* even though grantee has possession of the deed); *State Bank v. Evans*, *supra* note 13; *Grindle v. Grindle*, 240 Ill. 143, 88 N. E. 473 (1909); *Crane v. Hutchinson*, 2 Ill. App. 30 (1878) (bill in equity lies to set aside a deed fraudulently obtained and recorded without fulfillment of condition); *Houston v. Adams*, 85 Fla. 291, 95 So. 859 (1923) (grantor wins as against a bona fide purchaser from the grantee); *Ford v. Moody*, 169 Ark. 649, 276 S. W. 595 (1925) (breach of contract by grantor is not equivalent to performance of the condition).

In *Smith v. S. Royalton Bank*, *supra*, at 347, 348, the court said: "Until the condition is performed the deed is of no more force than it would have been if the grantor, after signing and sealing the instrument, had deposited it in his own desk. . . The deed not having been delivered [the second time] it was a nullity and void, or more properly speaking, *never existed*." As shown above, statements like this go altogether too far.

In *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799 (1892) the court very properly held that the grantor was estopped to prove the extrinsic condition as against an innocent purchaser for value from the grantee, the delivery as an escrow having been to the grantee himself.

³⁸ Thus in *SHEPPARD, TOUCHSTONE*, *59, it is said: "It is of no more force until the conditions be performed, than if I had made it and laid it by me and not delivered it at all." But the author goes on to say that the deed is operative on fulfillment of the condition even though that occurs after the death of the grantor or the grantee "for there was *traditio inchoata* in lifetime of the parties; and *postea consummata existens* by the performance of the conditions, it taketh effect by the first delivery, without any new or second delivery."

In *Hubbard v. Greeley*, *supra* note 37, at 348, 24 Atl. at 801, the court says: "Escrows are deceptive instruments. They are not what they purport to be. They purport to be instruments which have been delivered, when in fact they have not been delivered."

In *Wheelwright v. Wheelwright*, *supra* note 8, at 452, *Parsons, C. J.*, said: "It is not the grantor's deed until the second delivery"; but he *held* that the

second delivery and before fulfillment of the condition has been shown above; it is the contention of this article that there is a deed or contract from the moment of the first delivery, that property or contract rights are created thereby, that such rights are *conditional* in exactly the same way that they would have been had the condition been expressed in the words of the instrument itself, that parol proof of the extrinsic condition clearly varies from the words of the document and vitally alters its effect in the very teeth of the parol evidence rule.³⁹

We need not be in the least disturbed that we find here another breach in the parol evidence rule. That rule already has so many exceptions that only with difficulty can it be correctly stated in the form of a rule. It still serves a useful purpose in helping to prevent the alteration of contracts by mistaken or perjured testimony produced by reason of interests realized only after the contract was made; but the strict application of the rule would do far more harm than good in the case of escrow deliveries. The rule is in the main a guide to the courts in their difficult task of determining what were the actual events of yesterday. We may use it with appreciation even though it is neither a mechanical nor an unfailing guide. What we cannot do without serious damage to ourselves and to our system of justice is to make specious and inaccurate distinctions in the cases where we prefer not to follow it.

*Pym v. Campbell*⁴⁰ is a case that is most often cited in this regard in contract law. A document was drawn up and signed by all parties purporting to be a contract for the sale to the defendant of an interest in an invention. In a suit for the price, the defendant offered evidence to show that it was orally agreed that the document should not be an operative "agreement" unless A, an engineer, should approve of the invention, that it was drawn up and signed in order that the parties should not have to meet again in case A should approve, and that A did not in fact approve. This evidence was held to be admissible in spite of the parol evidence rule. Erle, J., said: "the evidence showed that

deed was operative even though the second delivery was after the grantor's death.

In *Jackson v. Catlin*, 2 Johns. 248, 261 (N. Y. 1807) Kent, Ch. J., said: "No interest whatever in the premises had vested. Jones [the buyer] had nothing, not even a *scintilla juris*, in the land, which he could assign so as to enable the assignee to perform the condition." But this was said in order to prevent the state from forfeiting the buyer's estate by act of attainder, the state attempting to make the payment constituting the condition in order to effectuate the attainder.

See also *Smith v. S. Royalton Bank*, *supra* note 37, and quotations from (1926) AMERICAN LAW INSTITUTE, CONTRACTS RESTATEMENT, *infra* note 51.

³⁹ The writer has stated a similar conclusion in *Conditions in the Law of Contract* (1919) 28 YALE LAW JOURNAL, 739, 764.

⁴⁰ *Supra* note 1.

in fact there was never any agreement at all"; and also, "evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

It is not certain just what was the court's definition of the word "agreement"; but to the writer it seems perfectly clear that factually the parties were in perfect agreement on all terms; that they mutually expressed that agreement in every respect, mainly in writing but partly by parol; that the document was executed for the express reason that the parties wished to avoid the necessity of any further expression of their agreement; and that they merely provided orally that they should not be absolutely bound unless and until A should approve of the invention. Had A expressed approval there can be no doubt that the contract as written would have been enforceable without any further expressions of offer or acceptance and without any further delivery. The evidence was undisputed that both parties had agreed upon this. Had either buyer or seller prevented A from expressing an opinion of the invention or repudiated the contract before A had any opportunity to form an opinion, the other could have maintained a suit for damages. Therefore, the evidence so far from showing that there "was not an agreement at all" showed instead that there was exact agreement and showed fully and completely the terms of that agreement. The legal operation of that agreement was exactly the same as if the condition of A's approval had been written into the document itself thus: The rights and duties of the parties hereto are hereby made conditional upon the approval of the invention by A.

It appears, therefore, that the oral evidence varied the writing and altered its effect. It showed that the writing was not what it purported on its face to be—a complete statement of the terms of agreement. It showed that the contract of purchase and sale was conditional instead of unconditional.

We must not argue from this that oral evidence is always admissible to show that a writing is not a complete statement of agreement and to add a new term or provision thereto. In nearly all the cases where such evidence has been admitted, it showed not only that the delivered document did not express all the terms of the existing agreement but also that there was an extrinsic condition affecting all promises of the contract alike. If the condition is not fulfilled and one party does not have to perform, the other party does not have to perform either. If the oral evidence varies one of the promises and makes it conditional, it varies the return promise also and makes it conditional on the very same event. Thus the oral evidence does not affect the ratio of value between the promised performances.⁴¹ In a bilateral

⁴¹ So, in *Pym v. Campbell*, *supra* note 1, if A did not approve the invention,

contract one promise is not left absolute and unconditional while the other is being proved by parol to be aleatory and conditional in the teeth of its written words. In such cases as these, oral evidence of the extrinsic condition is admissible even though the writing specifies one or more other conditions in express words.⁴²

Where the contract is unilateral, the admission of oral proof of an extrinsic condition may work injustice. Thus, where a writing contains a promise by B for a specified consideration already fully executed by A, to allow B to give oral proof of an extrinsic condition would affect the parties unequally. The consideration already given by A would not be affected, but the promise of B given in return is turned into an aleatory and conditional one and hence of less value. There is greater danger that the testimony is fraudulent or mistaken. Cases refusing to admit oral proof of an extrinsic condition are sometimes of this sort, although the distinction is seldom put into words. If the contract is merely a unilateral specialty, there having been no executed consideration, proof of an extrinsic condition does not reduce the value of an agreed exchange, for the promisee has given none. Instead, it prevents the promisee from getting something for nothing. If B has delivered his sealed promise to pay A \$1,000, he should be allowed to prove that his promise was conditional on A's making a specified conveyance. Here the condition that he attempts to prove is really the specified equivalent of his money; and unless he can prove it there is failure of consideration and fraud.⁴³

the buyer would not have to pay the price, but neither would the seller have to transfer his interest. In *Whitaker v. Lane*, 128 Va. 317, 104 S. E. 252 (1920) a written bilateral contract for the sale of land was shown to be conditional upon the granting of a corporate charter. The condition not happening, neither had to perform. In *Wallis v. Littell*, 11 C. B. N. S. 369 (1861) a bilateral contract for the sale of land was proved to be conditional in that "the said agreement should be null and void if Lord Sydney should not . . . consent to the transfer." *Ware v. Allen*, *supra* note 1, followed *Pym v. Campbell* and admitted evidence to show that a bilateral contract for the sale of certain notes was to be of no effect if the defendant's lawyer disapproved. The cases admitting parol evidence are almost invariably of this sort. *Blewitt v. Boorum*, 142 N. Y. 357, 37 N. E. 119 (1894); *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860 (1899); *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546 (1898).

⁴² *Expressio unius* is not here *exclusio alterius*. *Golden v. Meier*, 129 Wis. 14, 107 N. W. 27 (1906) (document expressly provided that no signer should be bound until all signed; extrinsic condition that the signers should not be bound until certain written pledges were secured); *Case Threshing Machine Co. v. Barnes*, 133 Ky. 321, 117 S. W. 418 (1909) (document provided that machine was "purchased upon the following conditions and no other"; but parol evidence was admitted to show that the sale was also conditional on a satisfactory test of the machine).

⁴³ In *Colvin v. Goff*, 82 Or. 314, 161 Pac. 568 (1916) oral evidence to show that a promissory note was to be payable only in a certain event was excluded; but the court said at 325, 161 Pac. at 572: "It may be shown as

The fact that there have been many cases misapplying the rule because of faulty analysis must not lead us to doubt the accuracy of the rule itself. If in fact there has been no complete mutual agreement and no operative delivery of a document, the parol evidence rule does not apply. The mere existence of a document does not prove either agreement or delivery. The delivery of a document as an escrow subject to an extrinsic condition and mutual agreements in writing subject to a parol condition must be distinguished from cases where there has been no operative delivery of a document and no mutual agreement at all. A transaction may be in the stage of inoperative preliminary negotiation or in the stage of an unaccepted offer. In these latter cases the reason that there is no contract is that there have been as yet no mutual expressions of agreement and that no legal obligation is intended to exist until one or both of the parties have given a new expression of will. One who has in form promised to perform only in case he subsequently wishes to do so has not promised at all.⁴⁴ The essence of legal duty is that the force of society will be used to induce performance or to punish non-performance. Therefore, whenever it can be shown that no societal force to induce or to punish will be used against a person unless he first expresses his will that it be so used there is no legal duty and he has not made a contract.

Thus a document can be shown to have been a mere preliminary and inoperative draft that was not an expression of assent.⁴⁵ It can be shown to have been signed with the express understanding that it should be inoperative until one of the parties has notified the other that he is willing to be bound by it.⁴⁶ It can be shown that a document has not been delivered as an escrow but merely handed to the promisor's own agent, the first and only operative delivery to be made later.⁴⁷ In these cases, whether

between the maker and the payee that its payment was made conditional, whenever the condition or contingency affects the consideration; that is to say, if the maker of the note stipulates that it shall take effect only upon the happening of an event, and the failure of such contingency affects the consideration to the extent that he does not get the value or the thing that he has bargained for, it is a good defense."

⁴⁴ See discussion of "illusory" promises in Corbin, *Non-binding Promises as Consideration* (1926) 26 COL. L. REV. 550; also, *The Effect of Options on Consideration* (1925) 34 YALE LAW JOURNAL, 471.

⁴⁵ *Wiltse v. Fifield*, 143 Iowa, 332, 121 N. W. 1086 (1909); *Colonial Park Estates v. Massart*, 112 Md. 648, 77 Atl. 275 (1910).

⁴⁶ *Massachusetts Biographical Soc. v. Howard*, 234 Mass. 483, 125 N. E. 605 (1919). Where an agent delivered an insurance policy subject to the approval of the home office, the transaction is still an unaccepted offer, and neither party is bound, even conditionally. *Young v. Newark Ins. Co.*, 59 Conn. 41, 22 Atl. 32 (1890).

⁴⁷ *Pattle v. Hornibrook* [1897] 1 Ch. 25 (lease handed to lessor's own solicitor, not to be delivered to the lessee until later and meantime subject

written or unwritten, sealed or unsealed, there is no contract because there has been no final expression of will by the party to be charged. The transaction is not yet irrevocable and will not become fully operative and enforceable upon the happening of a specified condition. If enforceability still depends upon subsequent voluntary expressions of the parties, or of the party delivering the document, there is truly no escrow and no contract; parol evidence of all the existing facts is certainly admissible.

CONDITIONAL DELIVERY V. CONDITIONAL OBLIGATION

As stated above, oral evidence of an extrinsic condition has generally been admitted on the theory that it shows that there has been no contract made. This erroneous idea has sometimes been expressed in this form: oral evidence is admissible to prove that the delivery was conditional but not to prove that the obligation was conditional. In *Burns v. Doyle*,⁴⁸ action was brought upon the written acceptance of a bill. The defendant tried to show that his acceptance was not to be binding on him except upon a certain extrinsic condition. The court, following *Pym v. Campbell*, said that the defendant's evidence was not admissible to show "a conditional acceptance" but was admissible under proper pleadings to show "a conditional delivery of an acceptance,—a delivery under the terms of which the writing signed by the defendant never became a contract at all."

Again, a learned note-writer has said: "The principle that a conditional delivery may be shown is clear. But it is exceedingly difficult to determine from the evidence whether a situation is presented in which the intent of the parties went to the delivery of the instrument, making it conditional, or merely to its obligation."⁴⁹ The reason that it is "difficult" is believed to be that the distinction is purely imaginary. A condition, whether expressed in the writing or extrinsically expressed, is always meant to affect the resulting legal relations, the legal "obligation," the legal "effect" of the transaction. "Delivery" is always factual in character; it always consists of conduct, although definitions vary somewhat in specifying the kind of conduct that will be an operative delivery. Suppose that there has been a physical tradition of a written document accompanied by a statement that it is to bind only if A approves.⁵⁰ The statement also is conduct;

to lessor's orders); *Porter v. Woodhouse*, *supra* note 5 (box of papers handed to grantor's own servant); *Powers v. Rude*, *supra* note 37.

⁴⁸ 71 Conn. 742, 43 Atl. 483 (1897).

⁴⁹ (1922) 20 A. L. R. 421, 428. WIGMORE, *op. cit. supra* note 6, § 2435, attempts a similar distinction; and, like the note-writer, adds: "Here some subtlety of construction may be required."

⁵⁰ As in *Pym v. Campbell*, *supra* note 1.

and we can, if we please, so define delivery as to include both the physical tradition and the statement accompanying it. But in any case, the only purpose and the only effect of the statement is to determine the resulting legal relations and make them conditional—to point out that one more fact must occur before societal remedies are available. Already most of the facts necessary to make those remedies available have happened, and they need not be repeated again. Offer, acceptance, writing, delivery—these have all occurred, and already form the basis for legal prediction. That prediction must be a conditional prediction, just exactly as it would have to be if the condition had been expressed in the writing instead of extrinsically, the prediction (the legal operation) being identical in either case.

It is believed that the legal operation of the following transactions is identical: (1) A delivers to B his sealed promise: "I promise to pay B \$1,000 for Blackacre if X approves title." (2) A delivers to C his sealed promise: "I promise to pay B \$1,000 for Blackacre," at the same time instructing C to hold the document for B and to deliver it to him only after X has approved title. (3) A hands to B his sealed promise: "I promise to pay B \$1,000 for Blackacre," saying to B, "This delivery is conditional on approval of title by X." (4) A hands to B the same document, saying: "My obligation is to be conditional on approval of title by X." With equal propriety, each of these can be called a conditional delivery, a conditional promise, or a conditional obligation. Number (2) is the typical escrow because of the delivery to a third person; but the legal relations between A and B are not different from those in the other three cases. In all alike there is a valid contract under seal, although the obligation in each case is conditional.⁵¹

In further illustration, suppose (a) that an insurance company delivers a policy in which it promises to pay if the house burns (and on other specified conditions). No one doubts that the company is "bound" from the moment of delivery of the sealed policy.

⁵¹ The writer therefore differs with (1926) AMERICAN LAW INSTITUTE, CONTRACTS RESTATEMENT No. 2, § 92, which reads: "The requirements of the law for the formation of a contract under seal are: (a) A sealed written promise and delivery, either unconditionally or in escrow, of the document containing it; and if the delivery is in escrow, the happening of the condition on which delivery is made." If the delivery of an escrow on condition is operative in exactly the same way that it would have been had the condition been expressly stated in the words of the promise, then we have a "contract" without "the happening of the condition on which delivery is made." This contract is a "contract under seal" because of its form, and its operation is determined by the rules applicable to such formal contracts. We must call it a "contract" unless we are prepared to say that no conditional promise is ever a "contract." It is unlikely that any juristic writer has ever said as much.

A like exception is taken to the RESTATEMENT, § 98: "A promise under seal

There is a "contract under seal" from that moment, even though the chance of ever having to pay anything is not one in a hundred. We call it so because of its *irrevocability* and because its enforceability merely awaits the happening of the condition. It makes no difference whether the policy is delivered to the insured or to a third person in escrow for him.

Now suppose (b) that the insurer should deliver his unconditional sealed promise to pay the same sum of money, the delivery being to a third person with an instruction to him to hold for the benefit of the promisee but not to deliver to the promisee until his house burns. Exactly as in (a) we have a promise, to the same person and for the same performance. We have the same irrevocability;⁵² and enforceability merely awaits the happening of the condition. A subsequent delivery to the promisee is not necessary; and the destruction of the document or recovery of its possession by the insurer would not destroy the promisee's right or prevent enforcement by action if the condition is later fulfilled.

In both (a) and (b) there is a "binding" promise and a "contract under seal." In both alike the promisee has a "conditional right" and the promisor is under a "disability" to destroy it. The promisor has the correlative "conditional duty" and will be compelled to increase his reserve fund accordingly. The fact that in (b) the condition was only orally and extrinsically expressed is immaterial so long as the courts permit it to be proved and to give it effect. This they in fact do.

The problem herein discussed turns on the distinction between a "right" and a "conditional right." This has been discussed at length by the present writer in previous numbers of this JOURNAL.⁵³ The relation between two persons described by the terms "right" and "duty" is not a *res* with objective physical existence. Those terms are merely shorthand expressions to state the facts of the past and to predict events of the future. Because of certain facts of the past, such as offer, acceptance, consideration, delivery, etc., courts and other officers will use compulsion against one for the benefit of the other. We express this briefly without enumerating the past facts or specifying the exact form of the future compulsion by saying that the one has a legal duty and the other a legal right. But in the creation of such right

may be delivered by the promisor unconditionally, in which case there is a present contract under seal; or may be delivered in escrow in which case there is no present contract under seal."

⁵² That it is "irrevocable" is expressly stated as the law in the *CONTRACTS RESTATEMENT*, *supra* note 51, § 100; and in *WILLISTON, CONTRACTS* (1920) § 212.

⁵³ *Rights and Duties* (1924) 33 *YALE LAW JOURNAL*, 501, 511; *Conditions in the Law of Contract* (1919) 28 *ibid.* 739.

and duty the operative facts never occur at a single moment of time; they always occur in a chronological series. After all the necessary operative facts have occurred (except the mere procedural process, pleading, and evidence) we say that there is a present, vested, absolute, unconditional right. If most of the operative facts have occurred, but one necessary fact has not occurred, and is uncertain of occurrence, we say that there is a future and conditional right. Conditional contracts (and this includes most contracts) fall within the latter category. It is a mere matter of convenience whether we call them "contracts" at all; but such convenience appears to be fully established and usage is settled.