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When Are Deeds Testamentary

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WHEN ARE DEEDS TESTAMENTARY?[1]

IT is no objection to a deed that it is used as a substitute for a will, to avoid the expense and delay of probate proceedings.[2] The frequent litigation arising over such deeds, however, shows that this expedient is a dangerous one unless the grantor uses great care to avoid certain snares and pitfalls which the law in its wisdom provides for the unwary. The grantor may attempt to accomplish his purpose either by express provisions embodied in the deed itself, or by external, collateral conditions, preserved by the delivery of the deed to a depository. This paper will consider how far the transfer of the title may be suspended by (1) internal, and (2) by external conditions precedent; and particularly how far extrinsic evidence of conditional delivery will be allowed to determine the estates which the instrument shall create and the contingencies upon which it shall become fully operative.

There is a sharp conflict of authority between different states as to the effect of provisions in a deed that *"no title or interest shall pass to the grantee until the grantor's death."* Such provisions by which no estate is created at the time of delivery would apparently make the instrument testamentary, "because a deed not to take effect until after the death of the grantor amounts to a testamentary disposition of the property without complying with the Statute of Wills."[3] In some states such language is given literal effect and the deed is held void as an attempted will.[4] If the instrument is to have no legal operation as a completed legal act until the death of the maker, then it is everywhere a will.[5] But in a majority of states the language that the deed is *"to be in force or take effect from and after the decease of the grantor,"* is interpreted very liberally. Such language may be regarded as representing a confusion of two intents: (1) an intent to give an estate to commence *in futuro,* but to reserve the possession, use and enjoyment of the property during the grantor's life; and (2) an intent not to make a

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[2] *Young* v. *Payne,* 283 Ill. 649, 119 N. E. 612.

[3] *Wilson* v. *Wilson,* 158 Ill. 567; *Nofftz* v. *Nofftz,* 290 Ill. 36, 43; *Johnson* v. *Fulk,* 282 Ill. 328; *Babb* v. *Harrison,* (S. C.) 9 Rich. Eq. 111; 70 Am. Dec. 204; *Cole* v. *Nickel,* (Nev., 1919) 177 Pac. 409; *Ferris* v. *Neville,* 127 Mich. 444, 89 A. S. R. 495.

[4] *Turner* v. *Scott,* 51 Pa. St. 126; *Boon* v. *Castle,* 115 N. Y. Supp. 583; *Ransom* v. *Pottawattamie Co.,* 168 Ia. 570, 150 N. W. 657; *Moody* v. *Macomber,* (1910) 159 Mich. 657, 124 N. W. 549; *Goodale* v. *Evans* (1914) 263 Mo. 219; 8 R. C. L., Sec. 11, p. 933, n. 20.

[5] *Cline* v. *Jones,* 111 Ill. 563; *Pemberton* v. *Kraper,* 289 Ill. 295. See note on "Deeds to Take Effect upon Death of Grantor," 17 MICH. L. REV. p. 413; 3 CAL. L. REV. p. 256; *Niccolls* v. *Niccolls* (1914) 168 Cal. 444, 143 Pac. 712; *Meeker* v. *Spencer* (Cal. App.) 182 Pac. 782.

present dispositive instrument, but to keep the deed ambulatory like a will during the grantor's lifetime. The probable intention is effectuated by holding the instrument operative *in praesenti* as a grant of future estate.[6] Thus in *Shackelton* v. *Sebree*[7] a provision "this deed not to take effect until after my decease, not to be recorded until after my decease," was sustained as a present grant of a future estate. Similar holdings have been made in many other cases.[8] In view of the act of delivery to the grantee in the lifetime of the grantor, and the intention to be gathered from the whole transaction, the provision that "title shall not pass until death," does not mean that the grantee shall acquire no right or interest under the deed until the grantor's death. The deed conveys a vested interest to commence *in futuro,* and necessarily cuts down the estate remaining in the grantor.[9]

A grantor may thus make a present conveyance in fee, expressly reserving to himself, or to himself and his wife, a life estate. If a conveyance is conditioned not to take effect until the grantor's death, is the grantor left with a fee subject to a springing fee in the grantee, or is his fee impliedly cut down at once to a life estate, with a remainder in fee in the grantee? Upon the answer to this question may depend the liability of the grantor for waste, and the right of his widow to dower if he made such a deed before his marriage.[9a] Mr. Kales contends that "it would seem best to sustain gifts after the grantor's death, when no life estate is expressly reserved as a springing interest cutting short a resulting estate in fee in the grantor."[10]

A conveyance by A to B from Christmas next, or to B on the death of A is an attempt to create an estate of freehold to commence

[6] *Blanchard* v. *Morey,* (1883) 56 Vt. 170; *Shaull* v. *Shaull* (Iowa) 160 N. W. 36; 166 N. W. 301; *Nolan* v. *Otney,* 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N.S.) 317; 8 R. C. L., Sec. 11, n. 21.

[7] 86 Ill. 616.

[8] *Latimer* v. *Latimer,* 174 Ill., 418, 51 N. E. 548, "To be in force from and after my decease and not before." *White* v. *Willard,* 232 Ill. 464, "Title shall become absolute only on death of grantors." *Bowler* v. *Bowler,* 176 Ill. 541, "Not to be of any force and effect until after the death of the grantor." See also: *O'Brien* v. *O'Brien,* 285 Ill. 570, 575; *Craig* v. *Rupcke,* 274 Ill. 626; *Hudson* v. *Hudson,* 287 Ill. 286, 296; *Bradley* v. *Bradley,* (Iowa) 171 N. W. 729; *Shaull* v. *Shaull,* (Iowa) 166 N. W. 301, 30 HARV. L. REV. 508.

[9] *Wilson* v. *Carrico,* 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213; *Nowakowski* v. *Sobeziak,* 270 Ill. 622, 624; *Linn* v. *Campbell,* 289 Ill. 347, 352; *Bowler* v. *Bowler,* 176 Ill. 541.

[9a] *Bullard* v. *Suedmeier,* 291 Ill. 400, "Estate impliedly reserved for his own life and that of his wife, not an estate of inheritance, although wife survives, and so wife had no dower therein." *Stewart* v. *Wood,* 48 Ill. App. 378.

[10] KALES, FUTURE INTERESTS, Sec. 158b., Sec. 159; *Vinson* v. *Vinson,* (1870) 4 Ill. App. 138, 142; *Abbott* v. *Holway,* 72 Me. 298; HUDSON, EXECUTORY LIMITATIONS, Mo. BULL. 11 Law Series, p. 3, 26; FEARNE, CONT. REM., p. 1, *Butler's* note.

in futuro, and would at common law be absolutely null. It is now well established, however, that an executory interest does not need any freehold to support it. If the future use is contingent and is to commence upon an uncertain event such as the marriage of B, then the disposition might well be regarded as leaving the fee in the grantor, rather than a life estate followed by a destructible contingent remainder. The use cannot arise until the future event, and in the meantime the grantor necessarily retains his original estate subject to an executory interest or springing use.[11] When on the other hand the limitations are to take effect upon a certain event, then the law may mould the estate remaining in the grantor into an estate for life or for years, as the case may be. Thus where a deed provided that after the expiration of fifteen years the title to a certain court yard should vest in the party of the second part and his heirs without any further conveyance, it was held operative as a present conveyance of the fee subject to an estate for years, and not as an estate to commence *in futuro.*[12] So deeds limited to take effect at death have the practical effect of creating a life estate in the grantor and a vested remainder in the grantee.

It was held by Hale, C. J., and two judges in the case of *Pybus* v. *Mitford,*[13] where the grantor, A covenanted to stand seized to the use of the heirs male of his body by a second marriage, that although the use did not arise until his death his land was bound by it immediately. It was a future springing use, without any particular estate expressly limited to support it. The estate undisposed of during his life continued in the grantor during the meantime as an estate for life by implication or subtraction.

If a man covenants to stand seized to the use of his sons from and after his marriage, this is purely a contingent use, because the possible marriage may never take place and nothing is "fetched" out of the covenantor. So much of the use as the covenantor does not dispose of otherwise remains in him. But if A covenants to stand seized to the use of J. S. after 40 years, it may be considered either as a fee simple conditional in the covenantor or as reduced to an estate for years, a new estate created by implication of law. Where the limitations are to take effect at the death of the grantor or covenantor, there the law may well mould the estate remaining in the covenantor into an estate for life.

This is not a case of resulting use by operation of law, as Mr. Kales seems to suppose, but of moulding the estate by the necessary

[11]LEAKE, LAND LAW [2nd ed] p. 88, 107, 253, 254, 350.
[12]*Eckhart* v. *Irons,* 128 Ill. 568, 580.
[13](K. B. 1668), 2 Lev. 75, 1 Vent. 372, 83 Engl. Reprint 456.

cutting down of his interest by subtraction. By the delivery of his deed to B, A intends to make a present disposition and vest in B a right which will spring up at his death. By the provision that the deed is to take effect at death, he intends to keep the full use of the land during his life, with all the rights of ownership except the power of disposition. His fee then becomes subject to a vested conditional limitation, which is substantially a remainder after a life estate. This life estate might well be held to be impliedly reserved *without impeachment of waste* since it is moulded by the law. The grantor evidently intends to retain all the dominion and ownership over the land during his life (such as mining rights), consistent with an unconditional grant in fee to commence in possession and enjoyment at his death.[14]

In many cases the grantor makes an implied or express reservation of a life estate by a clause in the deed itself and such a deed may be delivered direct to the grantee.[15] The same result substantially may be accomplished by a deed drawn in the absolute form and delivered to a third person, to be handed to the grantee after the death of the grantor. It may be asked, How can a life estate in the grantor be created by a juggling of delivery?[16] It has been said that 'the function of delivery is to determine whether the instrument shall be operative, not the estate or estates which the instrument shall create when it does become operative."[17] "A deed of conveyance in present terms is inconsistent with the retention of a life estate."[18] Nevertheless, by the unconditional delivery of an absolute deed to a third person to be handed to the grantee on the grantor's death the grantor may impliedly reserve a life estate just as he does by an express provision in the deed suspending its operation until his death. The deed will in many states operate as a present conveyance of the fee and title passes immediately, subject to a life estate which is by implication left in the grantor.[19]

[14] *Jones* v. *Caird*, 153 Wis. 384.

[15] *Harshbarger* v. *Carroll*, 163 Ill. 636; *White* v. *Willard*, 232 Ill. 464.

[16] R. W. AIGLER, "Is a Contract Necessary to an Escrow?" 16 MICH. L. REV. 569, 586—"How a life estate in the grantor can be created by a juggling of delivery is a question never adequately answered."

[17] TIFFANY, "Conditional Delivery of Deeds," 10 COL. L. REV. 404.

[18] *Taft* v. *Taft*, 59 Mich. 185, 26 N. W. 426.

[19] *Arnegaard* v. *Arnegaard*, 7 N. D. 475, 75 N. W. 797; *Hathaway* v. *Cook*, 258 Ill. 2; *Grilley* v. *Atkins*, 78 Conn. 380, 62 Atl. 337, 4 L. R. A. (N.S.) 816 n.; *Bury* v. *Young*, (1893) 98 Cal. 446, 33 Pac. 338; *Wittenbrock* v. *Cass*, (1895) 110 Cal. 1, 42 Pac. 300; *Tennant* v. *John Tennant*, 167 Cal. 570, 140 Pac. 242; *Thatcher* v. *St. Andrews*, 7 Mich. 264; *Meech* v. *Wilder*, 130 Mich. 29. See BIGELOW, "CONDITIONAL DELIVERY," 5 HARV. L. REV. 576, 579; *Fulton* v. *Priddy*, 123 Mich. 298, 82 N. W. 665; *Bishop* v. *Dodge*, 196 Mich. 231, 162 N. W. 1002.

In *Smith* v. *Smith*[20] deeds were deposited with an attorney of the grantor with written directions for the depositary to deliver them "upon my death, so that they may then take effect." It was held that this did not prevent the present passing of title at the time of depositing the deeds, if on all the evidence the directions referred to the time of enjoyment rather than to the passing of title.[21]

In some states, however, the deposit of a deed with a third person, absolute in form, to be delivered at grantor's death, does not operate as a present conveyance to vest at once a future estate in the grantee or reduce the grantor's fee to a life estate, but will be good as an "escrow" to pass the title at the grantor's death. In Illinois perhaps the leading case on the delivery of an absolute deed to a third person, to take effect at the death of the grantor, is *Stone* v. *Duvall*.[22] In that case a deed by Duvall to his daughter was acknowledged before a justice of the peace, who was directed by the grantor to have it recorded and to hold it until the death of the grantor and then deliver it to the grantee. Subsequently the grantee died. Suit was brought for the purpose of having the deed which Duvall had executed to his daughter set aside. The court held that there had been a good delivery as an escrow, and said: "But in such case the delivery only relates back so as to carry out the intention of the grantor and to vest the title. * * * So in this case the deed is an escrow, that will not take effect until Duvall's death, when it may be delivered to the heirs of the grantee, and it will be held to have taken effect so as to have vested such a title in the mother as to pass the fee to them. Until that time Duvall will be entitled to the use of the property as though he had a life estate, and the children of Mrs. Stone the remainder." This language was used with reference to a straight deed of conveyance, without the express reservation of any life estate. The language used by the court is quoted in a number of subsequent cases.[23] The idea seems to be that, though the delivery is not absolute so as to vest an immediate estate in the land, yet it will be good to pass title at the grantor's death to the grantee and his heirs. In effect, then,

[20] *Smith* v. *Smith*, 173 Cal. 725, 161 Pac. 495; *Whitney* v. *Sherman*, (Cal., 1918) 173 Pac. 931.

[21] See also: *Hunt* v. *Wicht*, (Cal.) 162 Pac. 639, L. R. A. 1917-C 961; *West* v. *Wright*, 115 Ga. 277, 41 S. E. 602.

[22] 77 Ill. 475. See 1 DEVLIN DEEDS, Secs. 262, 280.

[23] *Baker* v. *Baker*, 159 Ill. 394, 397; *Walter* v. *Way*, 170 Ill. 100; *Shea* v. *Murphy*, 164 Ill. 621; *Kelly* v. *Bapst*, 272 Ill. 242; *Hudson* v. *Hudson*, 287 Ill. 302; see also *Goodpaster* v. *Leathers*, 123 Ind. 121; 23 N. E. 1090; *Stonehill* v. *Hastings*, 202 N. Y. 115, 94 N. E. 1068; *Williams* v. *Latham*, 113 Mo. 165, 20 S. W. 99; *Wheelwright* v. *Wheelwright*, 2 Mass. 447; *Foster* v. *Mansfield*, 3 Metc. 412.

the grantor would have a fee subject to a conditional limitation taking effect at his death. The disposition differs from an escrow only in that the rights conferred are vested instead of contingent. It is intended that the estate shall commence *in futuro,* but since the right is vested, in practical effect the fee of the grantor is at once cut down to a life estate.

It is true that in a genuine escrow the courts say that the deed is not operative to pass the title until the happening of the future event. Thus, in *Grindle* v. *Grindle,*[24] where a conveyance from father to son was placed in an envelope and deposited in a bank, to be delivered on the death of both the grantor and his wife, in connection with a separate contract for support, it was held that the deed was not operative to convey title till the death of the grantor and his wife and the performance of the contract. "Such a deed has no effect as a conveyance and no estate passes until the event happens and the second delivery is made, or at least the grantee becomes absolutely entitled to such delivery." It would then relate back to the time of the deposit.

It would seem, however, that in the common class of cases where the grantor delivers the deed to take effect after the lapse of time, upon the happening of some event sure to come, such delivery is improperly termed an escrow.[25] In *Blaine* v. *Blaine,*[26] the Illinois Appellate Court says with reference to this situation: "We think it clear that it must be held in the case at bar that it was the intention of the grantor to presently convey a title in fee to the respective grantees, the enjoyment of which is to be postponed until his death, or, in other words, that the effect of the deeds was to reserve a life interest in the grantor, with the remainder in fee to the grantees. There can be no question under the facts in this case but that some title or interest was conveyed to the grantees and that some title of interest remained in the grantor. * * * The only estate that the grantor could retain would be that of life tenant. * * * It was held in the case of *Stone* v. *Duvall, supra,* that the grantor 'will be entitled to the use of the property as though he had a life estate.' We can see no distinction between this and a *fee* estate itself."

It would be legally possible to hold both in cases where the

[24] 240 Ill. 143.

[25] *Foster* v. *Mansfield,* 3 Metc. 412 (1841); *Ruggles* v. *Lawson,* (N. Y., 1815) 13 Johns 285, 7 Am. Dec. 375; *Fitzgerald* v. *Allen,* 240 Ill. 80, 94; *Gomel* v. *McDaniels,* 59 Ill. 362.

[26] 202 Ill. App. 453, at p. 462.

deed provides on its face that it shall not be delivered or go into effect until the death of the grantor, and also in cases where an absolute deed is delivered to a third person with similar directions, that such deed should operate as a conveyance of an estate to commence *in futuro,* leaving a fee in the grantor, A, subject to a conditional limitation or springing interest in fee to B, the grantee.[27] According to this theory, while the use does not arise until the grantor's death, his land would be bound with it immediately, without any particular estate precedent to support it. The fee would continue in the grantor during his life. But since the limitations are certain to take effect at the death of the grantor, it would seem preferable to regard the interest remaining in him as reduced to an estate for life without impeachment of waste.

A serious question arises if the grantor delivers a deed to a third party with instructions that it is to become effective only upon the happening of some uncertain future event or condition precedent, as the survivorship of the grantee.[28] In such a case the fee in remainder could not vest on the delivery of the deed, and the fee would have to remain in the grantor, possibly until his death, and title might never pass to the grantee. Where the deed is to be fully operative at the death of the grantor, this is regarded as a certain event and the future estate of the grantee is a vested one. But if an absolute deed is deposited with a third person to be delivered to the grantee upon some contingency or event which is uncertain, as the non-recovery of the grantor from a particular illness or a particular operation, or the survivorship of the grantee, or support of the grantor, it has been held that such a delivery is ineffectual, even though the condition is fulfilled.[29] Is there any reason for not carrying out the intent of the grantor in these cases? Any policy to be safeguarded? Or is the doctrine based on a near-sighted failure to discriminate?

It is established in almost all jurisdictions except Iowa that there is no delivery where the grantor deposits a deed with a third party, but reserves control over the deed, or rather over the opera-

[27] *Abbott* v. *Holway,* 72 Me. 298; *Jones* v. *Caird,* 153 Wis. 384; *Vinson* v. *Vinson,* 4 Ill. App. 138; *Walker* v. *Marcellus,* 226 N. Y. 347, 123 N. E. 736; 30 HARV. L. REV. 508; 17 MICH. L. REV. 413.

[28] *Prutsman* v. *Baker,* 30 Wis. 644.

[29] *Stone* v. *Daily,* (Cal., 1919) 185 Pac. 665; *Moore* v. *Trott,* 156 Cal. 354, 104 Pac. 578; *Willams* v. *Daubner,* 103 Wis. 521; *Prutsman* v. *Baker,* 30 Wis. 644; *Hayes* v. *Boylan,* 141 Ill. 400; *Ackman v. Potter,* 239 Ill. 578; *Russell v. Mitchell,* 223 Ill. 438; *O'Brien* v. *O'Brien,* 285 Ill. 570, 575; *Weber* v. *Brak,* 289 Ill. 564, 124 N. E. 654 (1919). See, *Seeley* v. *Curts,* 180 Ala. 445, 61 So. 807, Ann. Cas. 1915 C. 381. MAYFIELD, J., condemns the rule as a snare or pitfall in which to catch honest grantors and grantees.

on of the deed. No strings can be kept on such a deed.[30] A testa-
ientary deed, that is, a deed which is ambulatory, to become an
perative instrument only after the death of the grantor, is invalid
or want of delivery. A would-be grantor cannot make a deed,
etain it among his papers or under his control, and have it deliv-
red as a conveyance after his death. He must put it into effect
uring his life-time, or not at all.[31] So long as the grantor retains
ie right to recall or revoke a deed, though deposited with a third
arty, the grantee can acquire no rights under it, and if the grantor
es without parting with dominion and control over its operation, no
ie can deliver it for him after his decease.[32]

The courts fail to discriminate, however, between the question
hether the grantor gives up the right to recall the deed and whether
ie transfer is to occur only on the happening of some uncertain
vent. The idea that the grantor retains control in case of an un-
ertain event or condition precedent is a purely gratuitous assump-
on.[33] In *Weber* v. *Brak*,[34] an absolute deed from Thomas to
rak, signed, sealed, and acknowledged by Thomas, and filed for
ecord, was found in a private box of the notary sealed in a plain
ivelope, upon which was written the following: "This deed is to
e held and not delivered until after the death of Mrs. Thomas.
i the event Mrs. Brak dies before her mother, then this deed is to
e returned to Mrs. Thomas." It was held that where delivery to
third person is made upon the express direction that it shall not
e delivered to the grantee unless he survives the grantor, the deed
intended to operate as a will and there is no valid delivery. The
eposit of a deed to be delivered upon the grantor's death must be
nconditional and independent of any contingency such as survivor-
ip of the grantee.

Other cases where the courts confuse the question of whether
tle is to pass at a future, uncertain time, with the question whether
ie instrument is to become immediately operative by present deliv-
y, are the following: In *Long* v. *Ryan*[35] an instrument was deliv-

[30] *Mosier* v. *Osborn*, 284 Ill. 141, 146; *Linn* v. *Linn*, 261 Ill. 606; *Stevens* v. *evens*, 256 Ill. 140. Compare, *contra*, *Lippold* v. *Lippold*, 112 Ia. 134, 83 N. W. 809.

[31] *Cline* v. *Jones*, 111 Ill. 563.

[32] *Byars* v. *Spencer*, 101 Ill. 429; *Provart* v. *Harris*, 150 Ill. 40; *Stinson* v. *Ander-n*, 96 Ill. 373; *Noble* v. *Tipton*, 219 Ill. 182; *O'Brien* v. *O'Brien*, 285 Ill. 575; *Johnson Fulk*, 282 Ill. 328; *Wilson* v. *Wilson*, 158 Ill. 567; *Linn* v. *Linn*, 261 Ill. 606; 1 DEVLIN, EEDS [3d ed.] sec. 262.

[33] See *O'Brien* v. *O'Brien*, 285 Ill. 575; *Benner* v. *Bailey*, 234 Ill. 79; *Latshaw* v. *tshaw*, 266 Ill. 44; *Taft* v. *Taft*, 59 Mich. 185, 26 N. W. 426 (1886), 60 Am. Rep. 291; *undling Hospital* v. *Crane* [1911] 2 K. B. 367, 373.

[34] 289 Ill. 564.

[35] 166 Cal. 442, 137 Pac. 29. See also *Stone* v. *Daily*, (Cal., 1919) 185 Pac. 665.

ered to a third person to be handed to the grantee in the event of the grantor's death before July 22, 1910, but to be destroyed in event of grantor's survival. This was held not a valid delivery. In *Kenney* v. *Parks*[36] it was held that a condition that the deed (whether given by a wife to her husband direct or to a third party) was not to be effective unless the husband survived the wife, showed an absence of intent to deliver, as there was no present vesting of title. In *Bloor* v. *Bloor*,[37] a recent Washington case, husband and wife executed simultaneous deeds to each other for their property, and placed them in escrow to be delivered to the survivor; it was held that there was no valid delivery, as each reserved a right to recall his deed in case of surviving the other. The deeds in these cases were to transfer title only on an uncertain event, to-wit survivorship, and not on a certain event like death.[38]

But in these cases there was no right reserved in the grantor to alter or change the disposition of the property during his lifetime except in the imagination of the court. In *O'Brien* v. *O'Brien*,[39] it is said: "To constitute delivery it must clearly appear that it was the grantor's intention to pass title at the time and that he should lose control over the same."[40] It is submitted that the *passing of title at the time* of execution of the deed is not an element of delivery. The question is whether the instrument is made operative as a consummated or completed legal act.[41] A deed deposited with a third party need not be upheld on the theory that title passes when such deposit is made. An instrument conditionally delivered may be immediately operative to create rights and liabilities, even though it may be an escrow and confer contingent or executory interests, which will vest only upon conditions precedent. A conditional delivery differs from an absolute delivery merely in the fact that the full operation of the deed is subject to a condition; the delivery is in its nature as final and as irrevocable as absolute delivery. The condition that the deed is not to take effect in the event of the grantee dying before the grantor does not show that the grantor did not part with dominion and control over the deed and also over the title. It is an unfounded assumption to say that the grantor

[36] 125 Cal. 146, 57 Pac. 772. (S. C.) 137 Cal. 527, 70 Pac. 556.

[37] (Wash., 1919) 177 Pac. 722.

[38] See *Russell* v. *Mitchell*, 223 Ill. 438, 79 N. E. 141.

[39] 285 Ill. 575, 121 N. E. 243.

[40] So in *Pemberton v. Kraper*, 289 Ill. 295; *Pollock v. McCarty*, 189 Mich. 66; *Felt* v. *Felt*, 155 Mich. 237, 118 N. W. 953; *Willams* v. *Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916 E, 703. See also *White* v. *Chellew*, (Wash., 1919) 185 Pac. 621.

[41] *Provart* v. *Harris*, 150 Ill. 40; 17 MICH. L. REV. 103, 413; 16 MICH. L. REV. 580, 586. 4 WIGMORE, EVIDENCE, § 2408.

tains control over the instrument or its operation.[42] Why does e not lose his right to recall the deed provided the event happens? Ie has manifested his intention by his acts or words to dispose of s property and to make the deed a valid and effective instrument f conveyance of the estate and interests described therein, subct to a condition precedent that is beyond his control or volition. his constitutes delivery.[43] Delivery is not a question of vesting f title at once, but of making a deed binding or operative at once.

Whether the deed is delivered to take effect upon a certain or pon an uncertain event, it may equally be regarded as beyond the ntrol of the grantor to revoke or defeat its operation. If hower, the *event is sure to happen,* for practical purposes it may be id that the grantee has a *vested estate,* a fixed right of future njoyment, and that by a kind of subtraction the grantor's estate reduced to one for life only. Where the event is uncertain absote title does not pass to the grantee until the event occurs, but evertheless the deed may be put beyond the control of the grantor.[44] he arbitrary and unreasonable doctrine invalidating delivery to a epository upon an uncertain condition constitutes a snare and pitll to honest and innocent grantors and grantees. It has no founation in intelligent considerations of policy or convenience, but is ne of those irrational and technical distinctions that spring up in ne law, when the courts in "discovering" the law lose sight of its ractical ends, and formulate mechanical rules by deduction from nfounded general assumptions. The sole effect of the rule is to efeat the intention of the grantor in seeking to dispose of his propty by deed rather than by will. The fact remains that in most ates deeds may be delivered upon an uncertain condition only by ay of escrow and in general when supported by a collateral conact.[45]

Should it matter whether delivery is dependent not only upon ne certain event of the grantor's death but also upon the performnce of a condition after the grantor's death, such as giving him a espectful and honorable burial? It would seem not. But in *Taft* *Taft,*[46] the Michigan court held that if A executes a deed to B, is son, and gives it to X to deliver to B, if the latter shall after

[42] *Nolan* v. *Otney,* 75 Kans. 311, 89 Pac. 690, 9 L. R. A. (N.S.) 317; *Stanton* v. *iller,* 58 N. Y. 192; *Anderson* v. *Messenger,* 158 Fed. 250; 4 WIGMORE, EVIDENCE, Secs. 05, 2408. See *Hall* v. *Harris,* 40 N. C. (5 Ired. Eq.) 303.

[43] See *Jones* v. *Schmidt,* 290 Ill. 97.

[44] *Nolan* v. *Otney,* 75 Kan. 311, 89 Pac. 690; *Hall* v. *Harris,* 40 N. C. 303.

[45] *Campbell* v. *Thomas,* 42 Wis. 437, 440, 449; *Main* v. *Pratt,* 276 Ill. 218, 114 N. E. 6. "Is a Contract Necessary to an Escrow?" R. W. AIGLER, 16 MICH. L. REV. 569.

[46] 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291.

A's death make provision for C, that the instrument was testamentary and could not take effect as a deed.

The court said: "There is no reason of public policy which would justify the enlargement of the range of cases where a title can rest for any of its essentials upon parol evidence. * * *To allow the performance of unwritten conditions to be purposely postponed until after death would be practically to remove the restraints against parol and nuncupative wills."

This contention is not well founded. The deed must be made operative by a valid delivery by the grantor during his life, but the fact that there are conditions precedent to the transfer of title to be fulfilled after the death of the grantor does not negative delivery or render the instrument testamentary.[47]

It may be of interest to compare the situation resulting from delivery of an absolute deed to a third person, to take effect upon an extrinsic uncertain condition precedent, with the effect of an instrument delivered by the grantor to the grantee, which contains an express condition precedent on its face that the deed is to take effect only if the grantee survives the grantor, or upon some other uncertain event. There is very little authority upon the validity of such provisions for springing interests, but there are intimations in a few cases that they might affect the operation of the deed as a conveyance and make it testamentary.[48]

It would seem clear, however, that such a condition precedent as that the grantee should survive the grantor, or that title should pass to A upon his marriage to B, should not affect the validity of the deed as a conveyance. It is simply a question of springing use. It is sufficient that the deed creates an irrevocable possibility or executory interest in the grantee, which renders the title of the grantor subject to be drawn out of him at a future time, and gives the grantee a right which will vest in the event designated according to the terms of the deed.[49] As the court says in *Hudson* v. *Hudson*,[50] "A grantor may convey an estate in his land beginning at a future time, fixed by his death or at any arbitrary date before or

[47] *Nolan* v. *Otney*, 75 Kans. 311, 89 Pac. 690, 9 L. R. A. (N.S.) 317; *Jackson* v. *Jackson*, 67 Or. 44, 135 Pac. 201, Ann. Cas. 1915 C, 373; *Grindle* v. *Grindle*, 240 Ill. 143.

[48] See *Shackelton* v. *Sebree*, 86 Ill. 617, 621; *Bigley* v. *Souvey*, 45 Mich. 370; *Culy* v. *Upham*, 135 Mich. 131, 106 Am. St. Rep. 388, 97 N. W. 405. Cf. *Ekblaw* v. *Nelson*, (Minn.) 144 N. W. 1094. See note *McGarrigle* v. *Roman Catholic Orphan Asylum*, 145 Cal. 694, 79 Pac. 447, 1 L. R. A. (N.S.) 315, note.

[49] *Young* v. *Paine*, 283 Ill. 649; *Abbott* v. *Holway*, 72 Me. 298; *Murray* v. *Kerney*, 115 Md. 514, 38 L. R. A. (N.S.) 937; *Nolan* v. *Otney*, 75 Kans. 311, 89 Pac. 690; *Hunter* v. *Hunter*, 17 Barb. (N.Y.) 25; *Vinson* v. *Vinson*, 4 Ill. App. 138; *Re Diez*, 50 N. Y. 88.

[50] 287 Ill. 286.

after his death, or it may be fixed by any circumstances the grantor may choose." Where the estate is on condition precedent, the grantee has the mere possibility of an estate until the performance of the condition.[51]

The Illinois court no longer holds that a grantor cannot by deed mount a fee upon a fee, or create an estate to vest upon an uncertain event in derogation of a preceding estate. It now holds that there may be shifting interests created by deed by which the grantor conveys the fee, subject to executory and contingent limitations.[52] It should equally recognize the creation of contingent springing limitations.

In *Tennant* v. *Tennant's Memorial Home*,[53] it is held that "the reservation of a power to revoke a deed does not render it testamentary. The instrument is testamentary only when it shows an intent of the maker that it shall not be operative as a disposition until the maker's death. It operates as a present conveyance if it passes a present interest in a future estate, although subject to being defeated on the occurrence or non-occurrence of a future event. There is no difference between the power to revoke contained in a deed of trust and in an ordinary conveyance."

What difference, it may be asked, is there between a deed conditioned to take effect at death in which a power of revocation is expressly reserved, the deed being delivered direct to the grantee, and a deed absolute in form delivered to a depositary or escrow holder to deliver to the grantee on the death of the grantor, provided the grantor does not revoke the instructions and recall the deed before his death? What reason or policy of the law demands that the one deed should be declared operative and the other not? It is commonly said that there is no delivery so long as the grantor reserves control over the deed or its operation.[54] But that is what the grantor may do by express provision. In either case he has manifested his intention that it should be effective as his deed, unless he revokes, and there seems no *conclusive* reason why the law should not aid his intention. The Iowa court is, however, almost the only one that so holds. An analogy might perhaps be found in the tentative savings bank trust cases, revocable at will until the depositor's death. In case the depositor dies without revocation, an absolute trust is created as to the balance on hand.[55]

[51] TIFFANY ON REAL PROPERTY, Sec. 65; 1 JONES REAL PROPERTY, Secs. 619, 621.
[52] *Cutler* v. *Garber*, 289 Ill. 200, 205; 14 ILL. L. REV. 151, 225.
[53] 167 Cal. 570, 140 Pac. 242.
[54] *Stone* v. *Daily*, (Cal., 1919) 185 Pac. 665. Cf. *Lippold* v. *Lippold*, *supra*.
[55] *Re Totten* (1904), 179 N. Y. 112.

In the "Merchant of Venice," Shylock is reported to have made a testamentary deed to Lorenzo and Jessica as follows:

"From the rich Jew a special deed of gift,
After his death, of all he dies possessed of."

In a common law jurisdiction Shylock's deed would fail. A deed which attempts to convey all of the property, real and personal, which the grantor shall own and possess at his death, would be held invalid. This is put on the ground that no present estate or interest in property then owned by him could have passed, and therefore the instrument, considered as a conveyance, is simply void, as a deed takes effect upon its delivery, if at all. A will, on the other hand, speaks from the death of the testator and operates on property then on hand.[56]

In *Ricker* v. *Brown*,[57] a deed by a man to his housekeeper of "all the residue of my property, real or personal, not otherwise assigned to her, which may be remaining in my name and ownership at my death," was held good as a covenant to stand seised of real estate belonging to him at the time of execution of the deed, subject to a power to dispose of the property during his life. The deed was not testamentary, as it took effect at the time of its execution.[58] The test to determine whether an instrument is a will or deed is not clear or easy to apply. A will is essentially a tentative nomination of successors, to take effect at death.[59] If the devisee dies before the testator the devise lapses, as he has nothing to transmit. A will is ambulatory up to the testator's death, so that by its execution he has parted with no rights and divested himself of no incident of his estate.[60] A deed, on the other hand, must convey some right, present of future, vested, contingent or executory in some specific property then owned by the grantor to some existing grantee.[61] The grantee even in a deed deposited in escrow has an inheritable right. A deed is essentially a present conveyance of some interest, present or future. It is sometimes said that it must

[56] *Roth* v. *Michalis*, 125 Ill. 325; *Mould* v. *Rohm*, 257 Ill. 436. *Cf. Linn* v. *Campbell*, 289 Ill. 347, 352. See also *Niccolls* v. *Niccolls*, (1914) 168 Cal. 444, 143 Pac. 712; 3 CAL. L. REV. 256; *Walker* v. *Yarbrough*, (Ala.) 76 So. 390; *Martin* v. *Graham*, (Miss., 1917) 75 So. 447; 16 MICH. L. REV. 59.

[57] 183 Mass. 424, 67 N. E. 353.

[58] Cf. *Tuttle* v. *Raish*, 116 Ia. 331, 90 N. W. 66. "In event of my death. I do make and constitute my wife sole owner of all our property."—Held a will.

[59] *Hudspeth* v. *Grumke* (Mo., 1919), 214 S. W. 865, 867; *O'Day* v. *Meadows*, 194 Mo. 618, 92 S. W. 637, 645, 112 Am. St. Rep. 542; *Sharp* v. *Hall*, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 28.

[60] *Nichols* v. *Emery*, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; *Kelly* v. *Parker*, 181 Ill. 49, 54 N. E. 615; *Massey v. Huntington*, 118 Ill. 80, 89, 7 N. E. 269.

[61] *DuBois* v. *Judy*, 291 Ill. 340, 349.

ass a present interest, but one should say rather presently pass an nterest on its execution. The creation of a future or executory nterest is to be contrasted with the future creation of an interest. deed is not rendered testamentary because of reservations re-pecting the use of the property during the grantor's life, or by rovisions that "title" shall pass at the grantor's death, or even y a power of revocation; but it must divest the grantor to some xtent of his title, at least to the extent of creating a liability to ave it drawn out of him without further act on his part. If an nstrument is intended to become binding presently and nothing is eft for the grantor to do to complete the transaction, then it need ot be regarded as of a testamentary character. It is sufficient if appears that the maker intended to convey any estate or interest whatever, though it be future or contingent.[62]

It is a more convenient and economical method to dispose of roperty by deed than by will. It would be the sounder policy for he law, in case of doubt, not to be over-ready to condemn an nstrument as testamentary, but to uphold it as a deed of convey-nce, and thus make it effectual in the simplest manner, especially f it be so executed as not to be good as a will.

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[62] *Ferris* v. *Neville*, 127 Mich. 444, 86 N. W. 960, 89 Am. St. Rep. 480, 495, n. *mes* v. *Potter*, 130 Minn. 320, 153 N. W. 604, 3 Am. Law Rep. 896; *Cole* v. *Nickel*, Nev., 1919) 177 Pac. 409; *Eisenlohr's Estate*, (Pa., 1917) 102 Atl. 117; 16 MICH. L. REV. 9; 14 ILL. L. REV. 151; 1 L. R. A. (N.S.) 315, note; *Wilson* v. *Carrico*, 140 Ind. 533; 9 Am. St. Rep. 219, note; 18 C. J. 149; 40 CYC. 1085.