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Editor's Page

THERE is presented this month, an especially fine article. It is upon a subject of peculiar interest to titlemen, and will be eagerly received, not alone because of that, but also because of the scarcity of available material on the subject.

"Trusts and Escrows in Credit Conveyancing" is by George Gleason Bogert, of the University of Chicago Law School. He is one of the best known and authoritative writers on legal subjects. This article is most thorough in its presentations.

It appeared in the March, 1927, issue of the Illinois Law Review and is here reprinted by permission of that publication and the generous consent of the author.

Professor Bogert is well known because of his work, his writings and various activities, one of which is Secretary of the Conference of Commissioners on Uniform Laws.

THE next big event is the Mid-Winter Meetings and Joint Conference of State and National Association Officials. Everyone is invited.

These conferences have been growing in size, in scope and benefit. Each year sees them develop and they have come to play a most important part in state and national association affairs. That means the title business profits as a direct result of these Mid-Winter Meetings.

It is especially desired that the "cut and dried" program will only be a part of the thing this year, and that the general and free-for-all discussion will bring out many things, determine them and the real problems and necessary things thus brought out.

Letters have gone forward to all the state officers from Vice President Wyckoff, and who will preside over the meeting as Chairman of the Executive Committee. He has asked that suggestions and questions for discussion be sent in advance, to the Executive Secretary, so that they can be considered in due time and properly presented at the meeting. State officials are urged to give this consideration.

The Title Hound says:

DON'T WATCH THE OTHER
GUY—KEEP BUZZIN' ON
YOUR OWN BUSINESS



Most abstracters spend most of their worrying time in worrying about the other fellow and how he is conducting his business. They are more concerned with what their competitors are doing than in determining the right way to conduct their own business and then operating that way.

Everyone blames the other guy for messing-up things and causing the deplorable situation in his locality where price cutting, discounts and other unethical practices are the style.

If all the effort, time and energy now expended in watching each other and sinking and staying down in the same low level could be expended in cooperation and elevation to a high plane of ethical and good business practices, the vocation of abstracting would be the berries.

On page two of this issue you will also see a letter from him, asking every member of the association to send in their suggestions. Please let us know what you think needs to be done.

REDUCED rates will be in effect to Chicago during the meeting. These are available because of the National Automobile Show that week.

MUCH work has already been done on the arrangements for the Seattle Convention. The program committee has been busy and a real program is promised. This will be conducted along some different ideas than former ones.

Our local hosts with Charlton Hall as chairman of the convention committee have been hard at work ever since the Detroit meeting and have made great arrangements for our convenience, comfort and entertainment.

Every member of the association is urged to begin planning now to attend the 1928 Convention to be held in Seattle. It will be held during the best time of the summer. It affords a wonderful opportunity to visit the Pacific Northwest—that magic land where every American craves to go. There are the very lowest of all railroad rates in effect at that time, and they provide every imaginable stop-over and diversity of route privilege, as well as being the trip that lets you see more wonderful places and expanse of territory than any other.

Make this a combination vacation and convention trip.

PLEASE, please remit your state association dues promptly when you receive that notice from your secretary within the next few weeks.

Immediate consideration to his request will make life easier, insure your being kept upon the national association mailing list, membership rolls, and included in the Directory number of TITLE NEWS.

YE Editor sincerely wishes everyone a Happy New Year—your best ever—and hopes 1928 will bring great happiness and prosperity.

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December 15
19 27

Dear Fellow Members:

I am arranging the program for the Mid-Winter Conference to be held in Chicago on January 27-28, 1928, and want the help of every member.

A limited number of fixed papers will be presented but it is thought that this meeting affords a wonderful opportunity for open forum discussion. I think that a great deal of benefit would be derived from a real enthusiastic question box. I am therefore asking every one of you to send to Richard B. Hall, Executive Secretary, at his office in Kansas City, any question, a discussion of which will help you in some of the problems of your business and would benefit your state association. These should be in his hands by not later than January 15, so he will have an opportunity to forward them to the various people who can give them consideration and they be properly presented before the conference meeting.

I hope you will be present but remember, whether you attend the conference or not, you can lend valuable assistance to its success by submitting questions which are disturbing you in your business. If you can appear personally, so much the better, but send the questions anyway.

Cordially yours,

Edward W. Campbell
Vice President

Trusts and Escrows in Credit Conveyancing

By George Gleason Bogert, Chicago, Ill.

It would be interesting to compare the relative merits of the contract to convey, "lease-sale," mortgage, trust deed, escrow, bond for title, trust to convey, long term lease, and other methods of transferring title to land and securing protection for the seller in the collection of the price. The kind of land, financial condition of the buyer, use to which the land is to be put, transferability of interests of seller and buyer, refinancing of existing encumbrances, protection against death, mistake, dishonesty, and misfortune, relative expense, and other factors doubtless make one scheme preferable on one occasion and another in another instance. Such an extended inquiry is beyond the scope of this paper. The sole effort which can here be made is to contrast some of the advantages and disadvantages of the escrow and trust methods of collecting the purchase price and securing a deed and title, especially with reference to qualities emphasized in the litigation of the past twenty years. There is excluded from the discussion (1) escrows when the object is other than the collection of the price, as, for example, escrows to allow the seller to bring his evidence of title down to date; (2) all cases where no sale of land is involved, as, for example, where a gift is to be made and the deed is deposited to be handed to the grantee on the death of the grantor; and (3) cases where there is a sale of land contemplated but no contract made, and consequently placing the deed with a third party to deliver, if the grantee does an act, is merely an offer to convey.

A and B have made a bargain for the sale of land by A to B. This contract may or may not be in writing or evidenced by a memorandum. B is unable to pay the full price at once and is to be given credit. A desires to retain such control of the land as to insure the payment of the price in full or the restoration of the land to him. If he takes the escrow method, A will execute a deed of the land to B and place the deed in the hands of X to be delivered to B on the full payment of the price by B to X for A. If B makes timely payment of the price to X, the latter will hand the deed to B and the legal title to the land will vest in B; and X will then pay the money over to A. If B fails to make such payment, X will be under a duty to return the deed to A.

Should A desire to use the trust method in similar circumstances, he will convey the land to a trustee to hold for A and B pending performance of the contract by B. The interests of the two beneficiaries will be roughly measured respectively by the amount due on the contract and the value of the land less such amount due. The trustee will be under a duty to receive, hold and distribute payments made by B, in accordance with the provisions of a trust instrument executed by him

at the time of the conveyance to him, and to convey legal title to B on performance by B.

These methods are similar in that both hold back from the buyer the legal title until full performance, but they differ in the location of the suspended legal title. In the escrow the legal title remains in the grantor, A, while in the trust the legal estate is vested in a trustee and the interests of A and B are both made equities.

The trust method has had a very limited use. It is employed with fair frequency in some cities, as, for example, Chicago and Toledo, with a special reference to subdivisions and valuable business property. There has been practically no litigation to develop its weakness or strength. In discussing its qualities it is necessary to rely on well-known principles in the general law of trusts, on con-

versations with trust officers, on correspondence, and on trust instrument forms.

The escrow, on the other hand, has displayed in litigation many of its more prominent characteristics. An examination of the American Digest system since 1907 shows 253 cases on escrows, of which seventy-seven are concerned with contracts, notes, and other transactions where there was no deed or long lease deposited with a custodian pending the furnishing of consideration by the grantee. This leaves 176 cases where a deed or long lease was escrowed to secure performance of the buyer's contract. The geographical distribution of these 176 cases is shown in Table "A."

The escrow cases from 1907 to 1926, considered from the point of view of the use of the land involved, are distributed as follows: agricultural, 85; town resi-

TABLE "A"

CASES INVOLVING ESCROWS OF DEED OR LEASE 1907-1926

<i>Atlantic Reporter States—</i>			
Pennsylvania.....	4	} 5	2.8%
Vermont.....	1		
Maine, New Hampshire, Rhode Island, Connecticut, New Jersey, Delaware, and Maryland.....	0		
<i>Northeastern Reporter States—</i>			
Illinois.....	6	} 12	6.8%
New York.....	2		
Ohio.....	2		
Indiana.....	2		
Massachusetts.....	0		
<i>Southeastern Reporter States—</i>			
Georgia.....	2	} 7	3.9%
North Carolina.....	2		
South Carolina.....	1		
West Virginia.....	2		
Virginia.....	0		
<i>Southern Reporter States—</i>			
Alabama.....	3	} 8	4.5%
Florida.....	4		
Mississippi.....	1		
Louisiana.....	0		
<i>Northwestern Reporter States—</i>			
Iowa.....	3	} 18	10%
Michigan.....	1		
Minnesota.....	6		
North Dakota.....	3		
South Dakota.....	3		
Nebraska.....	1		
Wisconsin.....	1		
<i>Southwestern Reporter States—</i>			
Arkansas.....	9	} 45	25%
Missouri.....	2		
Tennessee.....	1		
Texas.....	31		
Kentucky.....	2		
<i>Pacific Reporter States—</i>			
California.....	22	} 81	46%
Colorado.....	7		
Idaho.....	3		
Kansas.....	11		
Oregon.....	14		
Utah.....	3		
Washington.....	5		
Oklahoma.....	10		
Arizona.....	1		
Montana.....	2		
New Mexico.....	2		
Wyoming.....	1		
Nevada.....	0		

dence, 26; oil and gas, 23; city, 19; unknown, 10; mining, 3; milling, 3; timber, 3; quarry, 1; hotel, 1; lighting plant, 1; subdivision, 1.

It thus appears that four out of five of the escrow cases in the last twenty years have arisen west of the Mississippi River and that in nearly nine out of ten instances rural or town property has been involved. The typical case in the recent reports is the deposit of a deed to farm or town property with a small city bank.

This distribution of cases may mean merely that the law in the states west of the Mississippi is more unsettled than in the older sections, or that the escrow is less carefully and efficiently used in those parts of the country where business is on the whole conducted somewhat informally. But it is believed that to a certain extent at least the distribution of litigation indicates a wider general use of the escrow in the west and southwest than in the remaining parts of the country.

Correspondence with attorneys and title and trust officers has elicited the opinions given below regarding the current use of conveyancing methods in various parts of the country. These opinions confirm the impressions as to the distribution of escrow use obtained from an examination of the decisions. The long term escrow is little used east of the Mississippi River. See Table "B."

Fact Disputes as to Terms of Escrow.

Where there is an escrow of the kind here discussed there are two agreements—the contract to convey, and the contract that the deed shall be held by a third person and its transmission to the grantee and operative effect postponed. The former agreement is generally required to be evidenced by a writing, but the latter may be wholly oral or partly oral and partly written.¹

Whether this rule can be justified on legal principle under the parol evidence rule or otherwise, is not material here. That the courts allow oral evidence of the escrow agreement is the sole fact of interest at this point.

This possible informality of the escrow contract is a weakness in the device, because it has given rise to frequent dispute and litigation. If the escrow agreement and the consequent instructions to the custodian of the deed are either wholly or partly oral, there is opportunity for mistake or fraud on the part of either grantor, depository or grantee. In an attempt to withdraw from the transaction the grantor may seek to impose conditions not actually agreed upon; the depository may easily misunderstand or forget an ambiguous, incompletely expressed, verbal instruction; and the grantee may endeavor to persuade the holder that the terms were lighter than really fixed.

The dispute concerning the terms of

¹Macy v. Mierenz 199 Pac. (N. M.) 1011; McLain v. Healy 98 Wash. 489; Miller v. Deahl 239 S. W. (Tex) 679. There seems to be conflict whether a written escrow instruction may be supplemented by parol. Gardiner v. Gardiner 214 Pac. (Idaho) 218. In England it seems to be customary to include a phrase in the attestation clause of the deed which shows that the deed is in escrow. 159 L. T. 27.

TABLE "B."

ATLANTIC REPORTER STATES

City or Town	Contract: No Deed till Full Payment	Escrow of Deed	Conveyancing Trust	Deed and Mortgage or Trust Deed
Providence, R. I.	Used generally only for short period (30 days) till closing	Not used	Not used	In general use
St. Albans, Vt.	.5%	.25%	.25%	99%
Newark, N. J.	Generally only preliminary to closing	Rare (but is being discussed)	Not used	90% plus
New Haven, Conn.	Only temporarily till closing	Rare	Rare	Practically all cases
Baltimore, Md.	Used by developers and real estate dealers	Not used	Not used	In general use (underlying lien created by redeemable ground rent under 99 yr. lease renewable forever)

NORTHEASTERN REPORTER STATES

City or Town	Contract: No Deed till Full Payment	Escrow of Deed	Conveyancing Trust	Deed and Mortgage or Trust Deed
Boston, Mass. (view No. 1)	Perhaps used in rare cases, tracts being developed	Not used (dangerous because power in grantor to convey and his creditors to take)	Not used	Nearly all cases
Boston, Mass. (view No. 2)	Quite common	Very rare	Very rare (but Mass. real property trust used frequently as substitute for real estate corporation)	Very common
Toledo, Ohio. (acreage land, that is, subdivision property only)	10%	5%	60%	25%
Canton, Ohio.	50% Sub-contracts and pyramiding equities cause complications	Rare	Rare	50%
Cincinnati, Ohio.	Not more than 5%	Very seldom used	Very unusual	At least 75%
Cleveland, Ohio. (view No. 1)	Some cases sub-division property	Short term escrow used in 75% of cases	Rare cases of subdivisions	General method
Cleveland, Ohio. (view No. 2) (10% covered by 99 yr. leases use of which is increasing)	25%	20%	None	45%
Indianapolis, Ind.	90% plus (increasing tendency to use contract for tax reasons)	1%	.5% (used with subdivisions in 50% cases)	5%
New York City	Some instances, especially suburban or cheap property	Not used: lack of record; dangerous	Not used: Sometimes suggested by real estate promoters, but trust companies do not like it	In general use
Rochester, N. Y.	10% (mostly vacant building lots)	Scattering cases (is being considered)	Not used	90%
Chicago, Ill. (view No. 1)		Generally used for title examination cases only	Used where buyer to develop alone or in conjunction with seller	
Chicago, Ill. (view No. 2)	Few, except as preliminary to closing day	Number small, but increasing	Used commonly with subdivision property and also in some other cases; use greatly increased in past five years	General (75-90%)

SOUTHEASTERN REPORTER STATES

City or Town	Contract: No Deed till Full Payment	Escrow of Deed	Conveyancing Trust	Deed and Mortgage or Trust Deed
Alexandria, Va.	Preliminary to closing only	Practically not used	Not used	General method (bargain and sale deed with deed of trust back)
Norfolk, Va.	Used till 33-50% price paid in case of land companies and cheap property	Not used	Not used	In 85% cases deed and deed of trust back
Washington, D. C.	Used as preliminary to closing	Very rare	Very rare	General
Atlanta, Ga.	Method practically obsolete	Very rare	Not used	99% (loan deed instead of mortgage)

the escrow has usually taken the form of an action by the grantor against the custodian for damages for wrongfully delivering the deed to the grantee contrary to instructions, that is, prior to the occurrence of the event on which the deed was supposed to be handed to the buyer.²

In many of these cases the bank or other depositary has been held liable in damages to the grantor, the measure being the value of the performance by the buyer of which the seller has been deprived by the premature delivery.³ Such cases show the danger to the depositary arising from informal escrows.⁴ Many large title and trust companies now require complete written instructions and have printed forms raising every conceivable question.

Additional causes of fact dispute are whether the terms of the escrow were complied with by the grantee⁵ (assuming that there is no dispute as to what such terms were), or whether, admitting non-compliance, the grantor has waived strict performance.⁶ These two questions are not, however, peculiar to escrows and hence no stress is laid on them here. Whether the grantee-cestui que trust has performed the terms of a written instrument on which he is to get a deed from the trustee, or whether there has been waiver of such written terms, may also cause litigation.

Contest over the terms of the real property conveyancing trust is not likely to arise. In this respect the trust is markedly superior to the escrow. In all but a few states the full terms of the trust, in order that the trust be enforceable, must be manifested or proved by a written instrument. This requirement of the Statute of Frauds forces parties to reduce the terms of the conveyancing trust to definite form, or run the risk of having the trustee set up the statute and keep the land. Furthermore, professional trustees (the sort usually selected) will for their own protection insist on a complete statement of the trust in writing. The fourth section of the Statute of Frauds will require the conveyance to the trustee from the grantor to be written and this deed may contain the trust terms. At least it will describe the grantee as a trustee.

The several statutory influences insisting upon the reduction of the terms of the real property trust to writing bring to a minimum the chances of litigation over

²Jones v. Title Guar. & Trust Co. 173 Pac. (Calif.) 586; Rowland v. First State Bank 245 Pac. (Kan.) 740; Stone v. Jarbalo State Bank 190 Pac. (Kan.) 1094 (instructions here were by letter); Sunderlin v. Warner 246 Pac. (Idaho) 1; Keith v. First Natl. Bk. 36 N. D. 315; Fanning Corp. v. Bridgeport Bank 202 N. W. (Neb.) 911; Muenz v. Bank of Bowdle 198 N. W. (S. D.) 710; City Natl. Bk. v. Grimm 262 S. W. (Tex.) 197; Gochnaner v. Union Trust Co. 225 Pa. 503. In City Natl. Bank v. Grimm 262 S. W. (Tex.) 197, the depositary was held liable to the grantee for paying money to the grantor in violation of instructions. A written escrow may often be ambiguous and cause litigation. Los Angeles City H. S. Dist. v. Quinn 234 Pac. (Calif.) 313. A writing tends to certainty but does not guarantee it.

³Keith v. First Natl. Bk. 36 N. D. 315.
⁴"My experience has been that the escrow holder runs all the risk and suffers all the losses, both large and small, through misinterpretation of instructions and otherwise." Growth of Escrow Business, E. L. Farmer, of Title Ins. & Trust Co., Los Angeles.

⁵Miller v. Deahl 239 S. W. (Tex.) 679.
⁶Harris v. Geneva Mill Co. 96 So. (Ala.) 622; Sunderlin v. Warner 246 Pac. (Idaho) 1; Oland v. Malson 39 Okla. 456.

SOUTHERN REPORTER STATES

City or Town	Contract: No Deed till Full Payment	Escrow of Deed	Conveyancing Trust	Deed and Mortgage or Trust Deed
Bradenton, Fla.	A few mere option contracts with forfeiture clauses	Few cases where seller non-resident or going away	Negligible	General use
Birmingham, Ala. (view No. 1)	Not used (lease sale with forfeiture of payments as rent in case of sale cheap property)	Rare (used to buy property for new industrial enterprises)	Not used	75%
Birmingham, Ala. (view No. 2)	15-20% (lease sale contracts; payments called rent and deed to be given on full payment rent)	Negligible	Negligible	80%
Jackson, Miss.	Only occasionally	Very rare	Not used	95-99%

NORTHWESTERN REPORTER STATES

City or Town	Contract: No Deed till Full Payment	Escrow of Deed	Conveyancing Trust	Deed and Mortgage or Trust Deed
Detroit, Mich.	90%	Method in its infancy	Not used	5-10%
Minneapolis, Minn.	80%	1%	1%	15%
Des Moines, Iowa	75%	5%	5%	15%
Omaha, Neb. (view No. 1)	79%	1%	Not used	20%
Omaha, Neb. (view No. 2)	50%	10%	Not used	25%
Keokuk, Iowa	7% (adapted to cheap land and irresponsible buyers if forfeiture clause well drawn)	2.5%	.5%	90%
Fargo, N. D.	33.3%	Very few	Negligible	66.6%

SOUTHWESTERN REPORTER STATES

City or Town	Contract: No Deed till Full Payment	Escrow of Deed	Conveyancing Trust	Deed and Mortgage or Trust Deed
Kansas City, Mo.	Rare; cases cheap lots; foreclosure troublesome	Only in case of exchanges where realtor desires to bind parties	Not used	In general use; deed of trust back
St. Louis, Mo.	Used in cheap lot sales till 50% paid	Used only pending perfection of title (disadvantageous to realtor who desires secrecy regarding clientele and possible failure of deal; escrow business does not pay except as feeder)	Not used except pending perfection of title	In general use
Tulsa, Okla. (city property only)	5%	25%	10%	20% (remaining 40% not accounted for unless cash sales)
San Antonio, Texas	10 to 20%	Very seldom used	Very seldom used	80-90% (vendor's lien and deed of trust)
Beaumont, Texas	15%	2%	Rare	75% (vendor's lien and deed of trust)
Little Rock, Ark.	Common in small transactions	Occasional	Rare	Deed of trust used frequently, especially in large transactions
Fort Smith, Ark.	25%	25%	Not used	50%

the exact nature of such terms. The lack of corresponding influences in many escrows makes for loose business deals which stir up quarrels and send the parties to the courts.

Misleading Records in Case of the Escrow.

The short term escrow, in which papers and money are merely held pending the bringing of the seller's evidence of title down to date, often involves an immediate recording of the deed and hence warns third parties of the pending transaction.

If when the title has been searched down to the time of the recording of the deed, there is no flaw, the consideration is delivered to the seller; if the search discloses an incumbrance, the seller must remove it, or if he will not or cannot, the buyer may take back his consideration on executing a quitclaim deed to the seller. Even in short term escrows litigation is not uncommon.⁷

This short term escrow, to bridge the

⁷Lynn v. McCoy 200 S. W. (Tex.) 885; Grimm v. Williams 200 S. W. (Tex.) 1119.

PACIFIC REPORTER STATES

gap in title searching, is so much in the majority that many escrow officers of title companies think of nothing else when they refer to an escrow. See, for example, "Building an Escrow Department," by Mr. K. E. Rice of the Chicago Title and Trust Company.⁸ He reports methods by which a great increase in the use of escrows has been accomplished in Chicago, but apparently his whole discussion is concerned with short term escrows.

In the long term escrow, where the object is the withholding of title until a lump payment or periodic payments are completed, recording of the deed prior to performance by the buyer is not feasible. The record after the escrow, therefore, may continue to show full title in the seller and to give no clue to the existence of the pending escrow. This leaves an opening for fraud by the seller. It is the escrow grantor's duty to refrain from encumbering, contracting to sell, or selling during the escrow period in such a way as to shut off the escrow grantee's rights. But the grantor has the power to convey or mortgage to a bona fide purchaser and the latter will be superior to the grantee in the unrecorded escrow deed.⁹

True, the contract may be recorded in many states,¹⁰ and possession by the grantee will charge the world with notice of his rights in the land. But some states do not allow record of a contract of sale,¹¹ and there is generally strong objection by the seller to the recording of it because of the possibility that in the case of default there will thus be attached an encumbrance which will have to be cleared from the record, possibly by an expensive foreclosure suit. By refusing to acknowledge the contract, the grantor in some states can make it unrecordable. Bills to foreclose land contracts frequently carry the parties to the highest state court.¹² Often it is not contemplated that the grantee occupy the land before complete performance and hence notice from possession cannot protect.

Cases of loss suffered by the escrow grantee due to a fraudulent second deed or mortgage to a good faith purchaser do not seem to have arisen frequently recently,¹³ but in two instances such an attempt was defeated only by the actual notice which the second grantee had.¹⁴

If the land were conveyed to a trustee to hold pending performance, recordation of the deed to the trustee would be almost inevitable. Thenceforth the book of deeds would show either the complete terms of the trust or put an interested party on notice of them and give him

City or Town	Contract: No Deed till Full Payment	Escrow of Deed	Conveyancing Trust	Deed and Mortgage or Trust Deed
Long Beach, Calif.	Used especially in subdivisions with forfeiture clause and deed on two-thirds payment	Seldom used (bankers do not like necessity for performance of conditions outside their direct knowledge)	Seldom used (if used, is for subdivisions)	Used generally especially for valuable property
Coeur d'Alene, Idaho	40%	40%	Very rare	20%
Portland, Ore.	45% (use increasing)	2.5%	2.5%	50%
Tacoma, Wash.	90 (disadvantageous to buyer under 132 Wash. 649, to effect that contract vendee has no interest)	5% (trend in this direction due to lack of protection of buyer under land contract)	Not used	5%
Spokane, Wash.	Rare and use decreasing (Bar Association working for statute to overcome 132 Wash. 649)	75%	Not used	Used for farm property in some cases.
Denver, Colo.	10%	5%	Rare	85%
Salt Lake City, Utah	50%	25%	10%	15%

opportunity to acquire full knowledge as to the rights of grantor and grantee, by inquiry of the trustee.

It may be said that the only one likely to be injured by this lack of record of the escrow is the grantee, and that he is a party to the escrow agreement and the land contract and can record either or both if they are written. As a fact, however, no record of such contract or contracts is usually made, either because the states does not allow a record, or the seller coerces the buyer into keeping the contract off the record,^{14a} or the buyer does not realize the importance of such record to him. The trust method, where a record almost inevitably follows, is preferable for the buyer.

Not only is there practical lack of opportunity for the honest grantee to protect himself by making a record, but there is frequently a chance for the making of a false record by a dishonest grantee. The latter may get possession of the deed from the depository by fraud, record it, and create the appearance of perfect title in the grantee. The deed is genuine. It contains no condition as to the satisfaction of which a diligent searcher might inquire. Naturally the fraudulent grantee finds no difficulty in getting a bona fide purchaser or mortgagee to take a deed or mortgage. But such bona fide purchaser or mortgagee is not protected by the record. The condition of the escrow not having been performed, no title passed to the grantee, and he can convey none, although he was able to make a record which seemed to show perfect title in him.¹⁵

If the trust had been used, there would have been no such possibility of fraud on third parties. If the trustee in a trust for conveying is fraudulently induced by the intended grantee to convey to him prior to performance of his contract title will pass to the grantee, although it will be a voidable title. A record of this deed then made by the grantee will show the truth, the existence in him of legal title. A later transfer of the land by the fraudulent grantee to a bona fide pur-

chaser will, of course, cut off the equities of the grantor-beneficiary under the conveyancing trust and give the bona fide purchaser what the record leads him to think he is getting.

From the point of view of fairness to the public the trust seems to insure a more honest record of title, the escrow a more misleading situation. The escrow grantor will of course find an advantage in the inability of the grantee to get or pass title, no matter what the state of the record, until performance of the conditions of the escrow.

Conflict as to the Legal Theory and Results of an Escrow.

If two or more devices are available to accomplish the same result, surely that will be preferred which has the more fixed and settled characteristics, is the simplest, and is subject to the least conflict of authority among the courts. The escrow is still an instrument of uncertain theory and result, although it has had centuries of use.

Learned authors have disagreed as to the underlying theory of the escrow deed.¹⁶ On the one side it is claimed that the escrow affects the delivery of the deed, that until the performance of the conditions the deed is not delivered and hence of course of no legal or equitable effect. It is as if the parties had said: "An instrument is to be prepared and placed with X. It is to create no rights, duties or powers until the grantee pays X \$10,000. It is not to be considered delivered until that event happens. If and when that event happens, the instrument is to be a deed, is to be considered delivered, to have operative effect to put legal title in the grantee, and the grantee is to have the right to the possession of the deed as a muniment of title." This is an arrangement for delivery on condition precedent.

From the other quarter comes the argument that the escrow condition

⁸Aigler Mich. L. R. 16: 569, 584; Ballantine Yale L. J. 29: 826, 828; Bigelow Harv. Law Rev. 26: 565; Hohfeld Yale Law Jour. 23: 16, 4849; Tiffany Colum. Law Rev. 14: 389, 400-401. "Where a sealed writing is delivered as an escrow, it cannot take effect as a deed pending the performance of the condition subject to which it was delivered; and if that condition be not performed the writing remains entirely inoperative." 10 Halsbury's Laws of England 387. "There does not appear to be any precise authority as to the position be

⁸17 Lawy. & Bkr. 371.

⁹Wilkins v. Somerville 80 Vt. 48. Dictum, in Waldo v. Frisco L. Co. 176 Pac. (Okla.) 218.

¹⁰Knapp v. Andrus 180 Pac. (Mont.) 908.

¹¹The writer is informed that record is not possible in Ohio. See Ohio Gen. Code sec. 8543. "In some states due to the propensity of operators to attempt to record all documents, even such as letters relating to land, the recording of land contracts has been prohibited or has not been provided for." Bingham and Andrews "Financing Real Estate," 180.

¹²Neher v. Kauffman 242 Pac. (Calif.) 713; McPherson v. Barbour 183 Pac. (Ore.) 752; Anderson v. Morse 222 Pac. (Ore.) 1083.

¹³But see Book v. Book 208 Pac. (Colo.) 474, where an escrow grantee was defeated by a subsequent purchaser with knowledge.

¹⁴Ullendorf v. Graham 87 So. (Fla.) 50; Wilkins v. Somerville 80 Vt. 48.

^{14a}Subdividers' contracts with lot purchasers in Chicago provide that if the buyer records the contract, it shall be null and void.

¹⁵Brigham v. Taylor 12 Fed. 2d 15; Weghorst v. Clark 180 Pac. (Colo.) 742; Houston v. Furman 109 So. (Fla.) 297.

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

Which of these theories is accepted will determine one's attitude toward the propriety of the admission of oral evidence of the escrow, toward the nature of the interest of the escrow grantee pending performance, and toward the necessary qualifications of the escrow depository.

If the escrow affects delivery only, then oral evidence ought unhesitatingly to be received to show the escrow agreement, no matter to whom the instrument has been handed, the grantee or a third party. That a deed was or was not delivered is a question very generally capable of proof by oral evidence. If, on the other hand the escrow is an attempt to read a condition precedent into the deed and thus affect the time of passage of property, there seems to be a violation of the parol evidence rule justified only by the insertion of a disinterested third party into the transaction to hold the deed and provide the escrow condition.

If the escrow affects delivery only, the pre-existing contract to convey the land will remain in effect and its enforceability will decide the nature of the grantee's interest pending the escrow. If that preceding contract is enforceable specifically, the escrow grantee should have an equitable interest in the land, not by virtue of the escrow deed, but because of the land contract. If on the other hand, the escrow is deemed to accomplish a passage of property on condition precedent, then the preceding land contract would seem to be merged in the deed, and the escrow grantee would seem to have no estate or interest pending performance, but merely a power to obtain an estate or interest by performing an act.

The recent cases vary in their treatment of the escrow grantee's interest. Often the deed, prior to performance, is said to be "a mere scroll."¹⁷

Where an insurance policy issued to a landowner provides that the insured cannot collect if there is a change of interest, or the insured becomes other than the full and complete owner of the premises, and later the insured places a deed of the land in escrow, it is generally held that the grantor remains the full and complete owner and that no interest, legal or equitable, has passed out of him to the grantee.¹⁸

Even though the buyer may have obtained from the seller prior to the fire a contract of sale which was specifically enforceable and thus there passed what is generally regarded as an equitable interest, in the case of a contract followed by an escrow of a deed the grantor seems to remain the full and complete owner for insurance purposes.

And yet it has also been held that the escrow grantee in possession has a special interest, even though his payments are held in escrow with a deed, and that he can insure such special interest and recover its full value in case of a loss.¹⁹

If no interest has passed from the grantor, how can any interest have vested in the escrow grantee?

The escrow grantee, in rescinding for fraud prior to performance of the condition, need not tender a deed or anything else to the grantor, since the transaction is entirely executory.²⁰

On the other hand, there is authority that an escrow vendee not in default has an equitable interest in the land proportionate to the value of the land less payments due, and that a creditor of the vendor can take only the interest of the grantor, measured by the amount of the unpaid purchase money.²¹

The escrow grantee, after part payment, has an equitable interest in the land superior to that of a second contract vendee from the same seller who had notice of the first contract.²²

Elsewhere it has been held that part payment gives the escrow vendee an "equitable interest" in the land, although not an "equitable title," and hence that the vendor on default by the buyer should proceed to foreclose the buyer on the theory of a contract and not a mortgage.²³

The escrow grantee has an interest which he can convey so that his transferee steps into his shoes.²⁴

It has been held that the escrow grantee who has paid the price to the depository has an equity superior to a prior secret equity against the grantor, even before the deed has been delivered to the depository.²⁵

The Ultimate Escrow Event.

What is the act or event which causes the escrow deed to be considered delivered under one theory, and causes title to pass under the other hypothesis? Is it the occurrence of the named event (for example, the payment by the vendee), or the handing of the deed by the depository to the vendee, or the happening of the event followed by transmission of the deed to the buyer? If the latter, what is the state of the title after the escrow condition has been performed but prior to

had been placed in escrow by buyer at time of fire and escrow was later performed completely); *Dow v. Ins. Co.* 221 Pac. (Kan.) 1112 (\$200 paid to grantor prior to fire, but buyer later defaulted and all payments were forfeited); *Penn. Fire Ins. Co. v. Stockstill* 197 S. W. (Tex.) 1036 (no payment made prior to fire and escrow failed).

¹⁷*Bright v. Hanover Ins. Co.* 48 Wash. 60. And see *Etheridge v. Ins. Co.* 102 (S. C.) 313.

¹⁸*Harbor Bus. Blocks Co. v. Gregory* 169 Pac. (Kan.) 191.

¹⁹*Knaapp v. Andrus* 180 Pac. (Mont.) 908; *May v. Emerson* 52 Ore. 262.

²⁰*Ullendorf v. Graham* 87 So. (Fla.) 50.

²¹*Wyatt v. Meade Co. Bk.* 166 N. W. (S. D.) 423.

²²*Jarvis v. Chanslor & Lyon Co.* 177 Pac. (Ariz.) 27.

²³*Fuller v. Peabody* 1 Fed (2d) 965; *Harv. L. R.* 38: 689.

the handing of the deed to the buyer? If title passes on the occurrence of the event alone, there is a possible period during which the buyer has title but no chance to protect it by making a record. If there is uncertainty in the cases concerning the identity of the ultimate event which completes the escrow transaction, we have another reason for avoiding its use as a conveyancing tool.

In a number of late decisions there was no performance of the condition, but the deed was handed by the depository to the grantee, because of the grantee's fraud, or the depository's mistake. It has been generally held in these cases that such transmission of the deed does not accomplish a passage of property to the buyer and that no title can be passed by the buyer even to a bona fide purchaser. Transfer of the deed to the buyer, if not preceded by performance of the terms of the escrow, is of no effect on the seller's title.²⁶

In this situation a fortiori the grantor succeeds against a purchaser from the grantee with notice,²⁷ or the grantee himself.²⁸

In *Neal v. Pickett*²⁹ there had been no performance but the depository had delivered the deed on the express acquiescence of the grantor. Held, title passed subject to a right in the grantor to avoid the deed on proof of non-performance, that is, on proof of a mistake of fact.

In *Yantis v. Parker*³⁰ the ultimate escrow event was said to be performance by the buyer followed by delivery to the buyer. Hence performance by a third party and the obtaining of the deed by him for the grantee, did not pass title to such grantee so as to validate a later conveyance from the grantee to such third person. The grantor had a right not merely to the money, but to such money paid by a certain person.

A deed, containing a warranty against encumbrances "at the time of delivery," placed in escrow, operates from the time of delivery to the grantee and hence the state of tax liens at that time determines the grantor's liability on his warranty. Delivery means "second delivery," sometimes so called.³¹

Some recent cases have supported the position that a title passes on performance by the buyer, even though delivery of the deed is postponed. Thus, in a recent Indiana case an insurance policy on the grantor's house was held to have been

²⁶*Bingham v. Taylor* 12 Fed. (2nd) 15; *Los Angeles City H. S. Dist. v. Quinn* 234 Pac. (Cal.) 313; *Weghorst v. Clark* 180 Pac. (Colo.) 742; *Houston v. Forman* 109 So. (Fla.) 297; *Evans v. McKinney* 308 Ill. 100; *Houston v. Adams* 95 So. (Fla.) 859; *Bergstrom v. Durham* 181 N. W. (Minn.) 343; *Otero v. Albuquerque* 158 Pac. (N. M.) 798; *Wood v. French* 39 Okla. 685. In *Tyler Bldg. & L. Assn. v. Beard* 106 Tex. 554, the court seems to have held that if the transaction was an escrow, the wrongful delivery of the deed would give the grantee power to transfer title to a bona fide purchaser.

²⁷*Tutt v. Smith* 200 N. W. (Ia.) 187; *Morris v. Blunt* 35 Utah 194.

²⁸*Otero v. Albuquerque* 158 Pac. (N. M.) 798; but see *Rohrbacher v. Wright* 195 Pac. (Ore.) 343, where the fault, if any, was solely that of the depository. The court indicated that in such a situation the innocent grantee should be protected, probably on the ground of estoppel against the grantor who had left a deed with name of grantee blank in the possession of the depository.

²⁹220 S. W. (Tex.) 748.

³⁰237 Pac. (Okla.) 127.

³¹*McMurtrey v. Bridges* 41 Okla. 264; and see *Wood v. Moreth* 90 So. (Miss.) 714.

¹⁷*Stone v. Daniels* 193 Pac. (Okla.) 986.

¹⁸*Ellis v. Home Ins. Co.* 193 Pac. (Kan.) 598 (\$2,500

invalidated under the "change in interest" clause by performance of the escrow condition by the grantee, although the deed had not been handed to the grantee prior to the fire. The court said that the grantee got at least an "equitable interest," if not the legal title.³²

A deed of land to a hotel company, placed in escrow until the completion of the hotel, has been held to create a completed gift to the company as of the date of the construction of the hotel, although the company did not get possession of the instrument until later. The nature of the title in the escrow grantee, as legal or equitable, was not discussed.³³ The gift validated a subscription contract which was subject to a condition precedent that the land be given to the hotel corporation.

In *Neal v. Owings*³⁴ an escrow grantee who had performed was held entitled to proceed in equity to compel the depository to deliver a deed, the court saying that the performance gave him an "equitable title."

There are strong authorities to the effect that performance of the condition passes legal title to the grantee, without a handing of the deed to him.³⁵

It thus appears that in the escrow there is undesirable uncertainty as to the event or events which must occur before legal title passes to the buyer. The best considered view is that the performance of the contract accomplishes passage of legal title to the vendee and that transmission of the deed is a formality necessary merely to give evidence of title. But there are numerous expressions from authoritative sources that until performance and delivery of the deed, to the buyer, the escrow is incomplete, and that mere performance gives the buyer an equitable title only. These statements are based on the primitive idea that delivery means the passing of an instrument from hand to hand. Whether one accepts the concept that an escrow means delayed delivery or delayed passage of property, the occurrence of the escrow event should effect completion, that is, either secure delivery or result in legal property passing.

This uncertainty would not exist in a trust. There unassailable legal title would not pass to the grantee-cestui que trust until performance by him and the execution and delivery of a deed by the trustee to the grantee. The performance of his contract by the grantee would give him a clear-cut, equitable right to proceed in chancery to force the trustee to give a deed; the execution and delivery of a deed by the trustee to the grantee without the performance of the contract would pass legal title, but the grantor-cestui que trust could set aside the conveyance or hold the grantee as a constructive trustee. There would seem to be no opportunity for doubt as to the rights of the grantee or grantor in any given situation.

Legal Relation of the Depository.

What is the relation of the escrow depository to grantor and grantee? Is he an agent for them jointly, an agent of each separately, a trustee, a bailee, in some other position, or in some cases in one relationship and in other cases in another?

A recent California case describes him as "the agent of both parties" prior to performance of the condition and thereafter an agent for the grantor as to the consideration to be paid to him, and an agent of the grantee as to the deed to be delivered to him.³⁶ Therefore, prior to performance, the risk of loss as to a bad check given by the depository to the grantor as a transmittal of funds paid by the grantee to the depository, fell on the grantee. It would seem that if the custodian were at this time the agent of both, any loss caused by his misconduct should rest upon them equally.

Another case arising out of the misdeeds of the same depository is *Hildebrand v. Beck*,³⁷ where the grantee was held not entitled to possession of the land, although he had paid the depository the full balance due on the price and thus done all that he could to perform the condition on which the deed was to be delivered and to take effect. The depository had, prior to the furnishing of a certificate of title by the grantor, embezzled the money paid him by the grantee, and did not give the grantor his (the depository's) own check for the amount due the grantor. The grantor had authorized the custodian to deposit the grantee's checks in the depository's bank account and to pay the grantor by the depository's own check. The court held that this made the depository a trustee of the grantee's check and its proceeds for the grantee until the grantor furnished a certificate of title, and that the embezzlement had occurred prior to the furnishing of such certificate and consequently the loss was a loss of trust funds held for the vendee.

The *Shreeves* case was decided on principles of agency, the *Hildebrand* case on doctrines of trust, although in both the depository had a right to place the grantee's check in the depository's bank account and pay the grantor by the depository's check. There had been no full performance of the escrow conditions at the time the rights were fixed in either case. It would seem that the result should have been worked out on the same theory in both cases, namely, on the theory that the depository was an agent of the grantee with a duty to pay the grantor from the depository's own funds the amount advanced to the depository by the grantee. Instead the court held the custodian an agent for both parties in the first case and a trustee for the grantee only in the second case. Loss due to the default of a joint agent should be distributed. There was no evidence that the depository in either case was to hold separate any property for the purpose of satisfying his duty to pay the grantor, so that it is impossible for the

writer to understand how the depository could be held a trustee.

In *Smith v. Griffith*³⁸ the depository delivered the deed to the grantee on the payment of a sum smaller than the amount due. The grantee claimed that the depository was the grantor's agent to deliver the deed and hence that the principal was bound by the agent's act and that title passed to the grantee. The court said (p. 726):

"A depository is always something more or something less than an ordinary agent, and accuracy permits us to say no more than that the depository is an intermediary between vendor and vendee, having the special powers created by the escrow agreement, and no others."

Hence the unauthorized delivery did not bind the grantor. Does this mean that the depository is a peculiar or special kind of agent or that he is not an agent at all, but rather an "intermediary" sui generis, whose powers are fixed by the facts of each individual case?

In *Parker State Bank v. Pennington*³⁹ an escrow grantee delivered his checks to the depository with permission to cash the checks and mix the proceeds with the depository's general funds. There was no duty to keep the checks or their proceeds separate and turn one or the other over to the grantor. And yet the court held the depository a "trustee of an express trust" for the grantee and so liable for breach of trust when it delivered money to the grantor without performance of his part of the escrow agreement, although the depository could not, the court said, have been held liable on the theory of a conversion of the grantee's property because of the lack of any specific property of the grantee to be converted. If the res was sufficiently specific to allow a trust, it would seem that it was definite enough to permit of a recovery in conversion, if there were found a legal interest. But there does not seem to have been any definite property to act as a trust subject or as the thing converted. The defendant bank was not obliged to and did not set apart any particular part of its assets for the satisfaction of its obligation to the grantee. It merely was under a contractual duty to him, for the breach of which he ought to have been allowed to collect damages from the depository.⁴⁰

Doubtless an escrow depository may be a bailee of deed and money; or a trustee of title and money or either; or a bailee of the deed and the general owner of the money paid by the grantee to him, with merely contractual obligations as to making payments to the grantor. One confusing element in the escrow cases is that there is frequently an assumption that the depository occupies the same relationship in all escrow cases. It is unfortunate that the parties should be uncertain as to which of two or three different relationships the depository will occupy as to deed or money, and that while they may intend to make him an agent, for example, he may at the end of

³²Farmers' Mut. F. I. Co. v. Olson 129 N. E. (Ind.) 234. And see dictum in accord, in *Tanner v. Imle* 253 S. W. (Tex.) 665, 667.

³³Val. Verde Hotel Co. v. Ross 231 Pac. (N. M.) 702.

³⁴194 Pac. (Kan.) 324.

³⁵See *Aigler "Is a Contract Necessary to Create an Effective Escrow?"* Mich. L. R. 16:569, 578.

³⁶*Shreeves v. Pearson* 230 Pac. (Cal.) 448.

³⁷236 Pac. (Cal.) 301.

³⁸184 Pac. (Kan.) 725.

³⁹9 Fed. (2nd) 966.

⁴⁰For another recent affirmation of the doctrine that the escrow depository is a trustee of an express trust, see *Seibel v. Higham* 216 Mo. 121, 132.

expensive litigation turn up in the livery of a trustee.

Contrasting the conveyancing trust with the escrow at this point, we find the advantage all on the side of the trust. The nature of a trust and remedies of the cestui que trust are all well fixed. The duties of the trustee of any particular real property trust will necessarily, if the Statute of Frauds is satisfied, be reduced to written certainty and the terms will define the extent of the interest of grantor and grantee-cestui que trust at all times. The divided ownership will be frankly recognized as to size and equitable nature. Each will have an equitable interest in the land and the grantor in the payments made by the grantee to the trustee.

Disadvantages of the Admitted Results of Escrows.

The inconveniences last considered arise out of the uncertainty as to the exact legal theory and effects of an escrow. There are also qualities of the escrow which the courts agree always follow the deposit of the deed, but which, it seems to the writer, are objectionable or unfair to one party or another.

It is familiar law that parol evidence will not be received to show that delivery of a deed to the grantee was conditional. The escrow depositary must be a person other than grantor or grantee. Numerous examples are to be found in recent years of alleged attempted escrows with the grantee as holder of the deed, where the result has been that the delivery has been held absolute and the title irrevocably vested in the grantee.⁴¹

Doubtless in some of these transactions there was no real condition and the rule prevented a possible invalidating of the deed through perjured testimony. But it seems certain that in other cases there was a real agreement for conditional delivery and the expectation of the grantor was disappointed and his intent frustrated. In *City National Bank v. Anderson*⁴² the deed was put in the grantee's hands on condition that if the grantee did not complete his payments, the deed should be returned. There was a default and the deed was returned. Both parties admitted the condition and sought to enforce it but the law prevented them and held absolute title had vested in the grantee, so that his creditors could take the land.

It may be said that if the grantor desires to suspend the operation of the deed by an escrow he should obey the law and

select a third party depositary. But the point remains that it is a common opinion among laymen that there may be a conditional delivery to a grantee. This technical rule of escrows, founded on legal logic rather than on common sense, deceives many persons who seek to establish an escrow. They ought not to be deceived, but they are deceived. They are presumed to know the law but they do not know it. The question of delivery or no delivery is settled by oral evidence. Why, thinks the layman, may not the question of absolute or conditional delivery be also thus settled? Conditional delivery to a third party may be shown by parol evidence. Why not to the grantee? Instruments other than deeds may be delivered to a party conditionally. Why not a deed? There are technical legal reasons for these differences but they are not readily understood by a layman. That the rule does not accord with modern ideas is shown by the distinctly observable tendency of the courts to abandon the rule in the case of sealed instruments not concerned with land.⁴³ Any conveyancing device which does not have this trap attached to it will, other things being equal, have an advantage over the escrow. Admittedly the trust is free from such a danger. No grantor would be apt to make a grantee a trustee for the purpose of the conveyance, but if he did no difficulty would arise. A grantor may make a grantee trustee for grantor and grantee, for the purpose of holding for both until the grantee performs his contract and then conveying to the grantee. Equity recognizes that the trustee and grantee-cestui que trust are separate legal entities, although they have the same name.

Further intent-defeating refinements are displayed in deciding whether the depositary may have previously or presently the relationship of agent for one of the parties, or must be a person having no relation to the grantor or grantee other than that of depositary. It may be argued that if the depositary is in some other capacity exclusively the agent of the grantor, it is the same as if the grantor had kept the deed in his own hands; and if the depositary is by some contract outside the escrow the exclusive agent of the grantee for some other purpose, it may be urged that there is an attempted conditional delivery to the grantee which results in absolute delivery.

In a recent Minnesota case⁴⁴ the agent of the seller to procure a purchaser was held to be a proper depositary, the court saying "Such is the modern doctrine, on facts like those here presented, though by the earlier cases a different rule prevailed."

Yet we find a Kentucky court recently stating that "an instrument cannot be delivered in escrow to a depositary who is exclusively the agent of either party";⁴⁵

⁴¹Whitaker v. Lane 104 S. E. (Va.) 252; Mich. L. R. 19:343.

⁴²Henry v. Hutchins 178 N. W. (Minn.) 807, 809. But see Van Valkenburg v. Allen 111 Minn. 333, where the grantee's agent was said not to be qualified as a custodian.

⁴³Home Insurance Co. v. Wilson 275 S. W. (Ky.) 691, 693.

while in New Jersey the old rule seems to be abrogated to the extent that an attorney for either party may be a depositary, the court saying that there "was nothing in his (the attorney's) employment by defendants (grantors) which made the escrow by its terms antagonistic to their interests."⁴⁶ This lack of antagonism would seem to make the depositary so much more the alter ego of the grantor and thus disqualified to act as an intermediary.

A not inconsiderable amount of litigation appears to have been necessary to draw the line between an escrow depositary and others somewhat similarly situated. Thus, in *Miller v. Smith*,⁴⁷ a bank was held to be the grantee's exclusive agent and not a depositary, and hence the deed was effective although a condition fixed by the grantor had not been performed. In *Nelson v. Davis*⁴⁸ the deeds were put in the hands of a disinterested third party pending a decision by the parties whether they would exchange. This was held not an escrow. In *Kanner v. Startz*⁴⁹ a third party had possession of exchange deeds but there was no escrow because he was an agent of each to receive immediate delivery and to attach revenue stamps. In *Aggers v. Blackburn*⁵⁰ there was a handing to the grantee to turn the deed over to the depositary and no escrow when the grantee did not carry out the understanding.⁵¹

In *Schmidt v. Baer*⁵² it was necessary to decide whether the handing to the third party was for safekeeping or as an escrow. In *Hargett v. Hargett*⁵³ the escrow failed because of a delivery to the grantor's agent, while in *Harris v. Geneva Mill Company*⁵⁴ and *Roach v. A. D. Malone Company*⁵⁵ the difficulty was whether the third party was not disqualified as an escrow depositary because he was the grantee's agent.

The grantor must part with control of the escrow deed, that is, abandon all right to its return to him, unless the escrow condition is not in due time performed.⁵⁶ This opens a gate for evasion of an escrow by oral proof that, while all other elements of an escrow are present, the grantor orally stipulated for a right to control the deed, and thus vitiated the escrow.⁵⁷

The contract preceding the escrow must be absolute and unconditional. Consequently if both contract and deed are put in escrow, there is not a valid escrow of the deed.⁵⁸

It is evident that such delicate distinctions are a source of fact dispute and misconstruction of the law. Sometimes they prevent fruition of a genuinely intended escrow and give the grantee absolute title. On other occasions they require extended litigation to quiet a con-

⁴⁶Kelly v. Chinich 108 Atl. (N. J.) 372.

⁴⁷205 Pac. (Wash.) 386.

⁴⁸172 Pac. (Wash.) 1178.

⁴⁹203 S. W. (Tex.) 603.

⁵⁰230 S. W. (Tex.) 424.

⁵¹For a similar case see Ford v. McCoy 276 S. W. (Ark.) 595.

⁵²283 S. W. (Tex.) 1115.

⁵³78 So. (Ala.) 865.

⁵⁴95 So. (Ala.) 622.

⁵⁵204 S. W. (Ark.) 971.

⁵⁶Chaffin v. Harpham 266 S. W. (Ark.) 685.

⁵⁷Peters v. Strauss 63 Tex. Civ. App. 118; Seiffer v. Lanz 29 N. D. 139.

⁵⁸Lewis v. Rouse 240 Pac. (Ariz.) 275.

⁴¹Roach v. A. D. Malone M. Co. 204 S. W. (Ark.) 971; Watson v. Chandler, 133 Ky. 757; Kennan v. Trenton 130 Tenn. 71; Springheld Ins. Co. v. Morgan 202 S. W. (Tex.) 784; Manton v. City of Antonio 207 S. W. (Tex.) 951; Parker v. Sorell 230 S. W. (Tex.) 819; Woods v. Rolls 268 S. W. (Tex.) 988; Heck v. Morgan 106 S. E. (W. Va.) 413; Hensley v. Swann 115 S. E. (W. Va.) 864. In *Inman v. Quirley* 194 S. W. (Ark.) 858, the court made a fine distinction in order to escape this intent-frustrating rule, and in *Ball v. Sandlin* 176 Ky. 537, to avoid the rule the grantee was found to have had the deed for safekeeping only. And see *Hotaling v. Hotaling* 224 Pac. (Calif.) 455, where the rule was avoided by holding that although the grantee had possession of the deed, it had not been placed in his hands with the intent requisite to delivery. In *Mitchell v. Clem* 295 Ill. 150 the court escaped in a hard case by finding from oral evidence that there was no delivery at all, although possession of the deed was given to the grantee. See comment in Col. L. R. 21: 381; Mich. L. R. 19: 563. See Ballantine "Delivery in Escrow and the Parol Evidence Rule," Yale L. J. 29:826.

⁴¹89 Ky. 487.

tention that there was an escrow when in reality none was intended. They encourage the breaking of contracts under pretexts. They constitute snares in the way of business men. In the real property conveyancing trust the trustee may be any person,⁵⁹ regardless of his other relationships to the parties. The trust will be unmistakably created by formal papers, delivered and recorded. The opportunity to confuse such a trust relationship with another similar connection is but slight.

Necessity for Formal Contract to Convey.

Another deceptive feature of escrow is the widespread rule that in order to have an enforceable escrow there must be a preceding contract to sell which satisfies the requirements of the fourth section of the Statute of Frauds. Although the parties may well think that the transaction has passed beyond the contract stage when the deed is placed in escrow, and that all formal requirements are met by the deed itself, one or the other is not infrequently enabled to withdraw from the escrow, without any justifiable reason, upon setting up the informal nature of the contract of sale.⁶⁰ For example, in *Main v. Pratt*⁶¹ the grantor's heir admitted the escrow, but was allowed to take back the deed because of the lack of prior formal contract.

It is not intended here to examine the merits of this rule as a legal doctrine. The matter has been well discussed by learned authors.⁶² The point of the writer is that this rule does not harmonize with the practical judgment of business men and that frequent injustice results from its operation. Parties think, and are entitled to think, that the negotiations have resulted in an executed transaction when the deed has been made out and irrevocably deposited to await an event, and that the time for raising objections to the preliminary contract on the ground of its informality has passed.

This difficulty and chance for frustrated intent will surely be avoided by the trust for conveyancing purposes. There the deeding of the property by the grantor to the trustee to hold for the grantor and the grantee (the event cor-

responding to the deposit of the deed in escrow) is obviously an executed transaction which removes from the realm of practical dispute the question whether the contract by the grantor to convey to the trustee was formal or informal.

Admitting that the escrow requires a valid preceding contract, may the deed itself be used as evidence to satisfy the Statute of Frauds as to the formality of the contract to convey? Frequently it is sufficient, but sometimes not.⁶³ Ordinarily deeds and leases do not describe in detail the terms of the contracts which preceded them, and it is not desirable that they should be encumbered with such minutiae.

Withdrawal and Restoration.

What of the relative ease of withdrawal and restoration to statu quo? After the placing of the deed in escrow the buyer may fail to make his payments and the seller may desire to resume possession of the deed, destroy it, and wipe the slate clean. He is entitled to demand back the deed from the depository,⁶⁴ and very little litigation seems to have resulted from inability of the grantor to get his deed back. In the possession of the depository it would not be operative on the title after the time for the buyer's performance had passed, but would give scope for possible fraud on third parties by the depository in wrongfully delivering or recording it. But the existence and especially the recording of the contract of sale may put the seller to considerable expense and delay in foreclosing the equities of the defaulting buyer. Often and perhaps generally retention by the seller of the part payments may be guaranteed by provisions for the forfeiture of part payments, treatment of them as liquidated damages, rent, etc.;⁶⁵ but such forfeiture provisions must be carefully drawn and sometimes are not successful. There may be a record of the contract which does not automatically disappear from the books on the buyer's default. Actions to clear up the title by decree of court are not uncommon.⁶⁶ The courts often give the buyer a redemption period which delays the clearance of title.

If the trust falls through, due to default of the buyer, there is a disinterested third party, the trustee, who can, and is under a duty to, clear up the seller's title by a deed back to the seller. This deed can,

of course, be recorded. The intermediary in the escrow case has no power to execute any instrument which will clear the record and discharge the equity, and the buyer who could execute a release of the recorded contract may not do so. He may deem himself unjustly treated and claim an equity in the land.

In some escrows there is an unfortunate tendency to separate the buyer's performance from the seller's and to require the buyer to make his payments in full before he can have any action against the seller based on breaches of the seller's obligations. Thus, in one case,⁶⁷ the escrowed deed had a covenant against encumbrances. The buyer learned of an encumbrance, paid the depository the amount due, less the amount of the encumbrance, and persuaded the depository to deliver the deed. Held, that the act of the buyer was wrongful and the seller could recover damages for it, since the deed had no effect until the buyer paid the full price and there was thus no cause of action for breach of the covenant against encumbrances at the time the buyer made his deduction. This defeats justice. See also *Craig v. White*,⁶⁸ where the buyer had to make payments to the seller before the title examination was completed and on proof of defect in the title had to sue the seller to get such payments back.

In a trust to accomplish the same result, this difficulty would not arise because the title would have to be cleared of encumbrances at the time of the transfer to the trustee, or if left encumbered the amount to be paid by the grantee to the trustee would be correspondingly reduced. The existence and effect of the encumbrance would be settled prior to the fixing of the terms between buyer and seller. All rights would be thrown into the melting pot of the trust and a general adjustment authorized.

The "Relation Back" Theory.

The artificial "relation back" theory of the escrow is a weakness. The courts have held in substance that the deed ordinarily takes effect from the time of the performance, or performance and second delivery, but that if it is necessary to accomplish justice they will treat the deed as having operated as of the date of the delivery to the depository, on the theory that the title related back from the date of the second delivery to that of the first.⁶⁹ This rule gives rise to another uncertainty. When it is to be considered that justice and equity cannot be accomplished without applying the doctrine of relation? Furthermore, it involves a fiction to accomplish a desired end. It is much better to use methods, if such are available, which reach the same result without strain or invention.⁷⁰

⁵⁹Subject to the restrictions on the powers of artificial legal persons.

⁶⁰*Holland v. McCarthy* 160 Pac. (Calif.) 1069; *Elliott v. Title Ins. & Tr. Co.* 222 Pac. (Calif.) 175; *Main v. Pratt* 276 Ill. 218; *Briggs v. Watson* 139 N. E. (Ind.) 197; *Davis v. Brigham* 56 Ore. 41 (but see *Foulkes v. Sengstacken* 83 Ore. 118; *Jozefowicz v. Leickem* 182 N. W. (Wis.) 729; *Manning v. Foster* 49 Wash. 541, required no formal preceding contract, but in *Nelson v. Davis* 172 Pac. (Wash.) 1178 it was said that the rule was doubtful in Washington, and the court seems to have overruled the *Manning* case in *McLain v. Healy* 98 Wash. 489. See notes on the *McLain* case in *Yale L. J.* 27: 699; *Mich. L. R.* 16: 197. Contra to the weight of authority, see *Schurtz v. Colvin* 55 Oh. St. 274; *Blight v. Schenck* 10 Pa. St. 285.

In some states the escrow deed is held to be sufficient formality and no preceding written contract is required. *Eason v. Walker* 246 Pac. (Okla.) 865; *Ullendorf v. Graham* 87 So. (Fla.) 50. See *Aigler "Is a Contract Necessary to Create an Effective Escrow?" Mich. L. R.* 16: 569. *Kelsey "Deeds in Escrow under the Statute of Frauds" Banking Law Jour.* 29: 976.

⁶¹276 Ill. 218.

⁶²*Aigler "Is a Contract Necessary to Create an Effective Escrow?" Mich. L. R.* 16: 569; *Bigelow Harv. L. R.* 26: 565; *Tiffany "Conditional Delivery of Deeds" Colum. Law Rev.* 14: 389, 398.

⁶³*Supple v. Wheeler* 178 N. W. (Mich.) 96; *semble; Townsend v. Day* 224 S. W. (Tex.) 283; *Pearson v. Fitzgerald* 225 S. W. (Tex.) 407; *Day v. Townsend* 238 S. W. (Tex.) 213; *Simpson v. Conner* 231 S. W. (Tex.) 375. But in *Blue v. Conner* 218 S. W. (Tex.) 533, the lease was held insufficient for lack of terms, and in *McLain v. Healy* 98 Wash. 489, the deed was held to be an insufficient memorandum. That the separate written instructions of buyer and seller to the depository may be read together to make a memorandum of the contract of sale, was held in *Tuso v. Green* 239 Pac. (Calif.) 327, noted in *Cal. L. R.* 13: 361.

⁶⁴*Grimm v. Williams* 200 S. W. (Tex.) 1119.

⁶⁵*Danziger v. Benson* 166 Pac. (Cal.) 313; *Gambrell v. Tatum* 228 S. W. (Tex.) 287; *Quinlan v. St. John* 201 Pac. (Wyo.) 149. "The tendency of the law is to deny to a defaulting vendee reimbursement . . . Statutory provisions are badly needed to give purchasers of land and chattels more effective protection against forfeiture." *Ballantine "Forfeiture for Breach of Contract" Minn. L. R.* 5: 329, 349, 350.

⁶⁶*Neher v. Kauffman* 242 Pac. (Cal.) 713; *McPherson v. Barbour* 183 Pac. (Ore.) 752; *Anderson v. Morse* 222 Pac. (Ore.) 1083.

⁶⁷*Griffin v. Gay* 232 Ill. App. 39.

⁶⁸202 Pac. (Cal.) 648.

⁶⁹*Jackson v. Jackson* 67 Ore. 44.

⁷⁰See, for example, the difficulties which the courts have found with the doctrine of relation back in title by adverse possession and by satisfaction of judgment where benefits have accrued or burdens attached in the intervening period. *Bryan v. Weems* 29 Ala. 157; *White v. Martin* 1 Porter (Ala.) 215; *Bacon v. Kimmel* 14 Mich. 201.

If a deed is put in escrow to await the delivery of a mortgage by grantee to depositor, and the grantor dies before the mortgage is made and delivered, is the grantee entitled to tender a mortgage to the successors of the grantor and demand performance? The general holding is in the affirmative,⁷¹ but sometimes the grantor's death renders performance of the condition impossible and so subsequent tender will be ineffective.⁷²

Shall the second delivery cause relationship back so as to cut off dower in a widow of the grantor who married him during the escrow period? A minor court in Pennsylvania has answered yes,⁷³ and there is a similar decision in Indiana as to the effect of a deed to be delivered on the death of the grantor;⁷⁴ but this latter decision is opposed to the view of a Vermont court.⁷⁵

Shall the relation back cut off the rights of creditors of the grantor who have docketed their judgments during the escrow period? A North Carolina court has said yes,⁷⁶ but an Oregon court considers the title divided between grantor and grantee in accordance with the amount due, and does not shut out the grantor's creditors.⁷⁷

If a trust is used instead of an escrow, there will be divided equitable ownership in the land from the date of the conveyance to the trustee. The grantor's interest will be gauged by what is due him; the grantee's by the value of the realty less what is due the grantor. The qualities of such equitable interests are well known. They may ordinarily be bought and sold, taken for the debts of their owners, and are subject to dower and courtesy. The death of the grantor or the grantee will merely change the ownership of the equitable interests and not disarrange the execution of the trust. By the joinder of the husband or wife of the grantor in the deed to the trustee and by the making of husband or wife of both the grantor and the grantee parties to the trust instrument, it would seem that courtesy and dower in the equitable interests of the cestui que trust could be so controlled as to cause the trustee no undue difficulty of administration. To simplify matters some trust companies insert clauses in the trust instrument to

the effect that the interests of the cestui que trust shall at all times be treated as interests in personality. This clause has recently been sustained by the Illinois Supreme Court,⁷⁸ in a decision where the question was whether a freehold interest in land was involved so as to give the Supreme Court jurisdiction.

Adaptability of Escrows and Trusts.

It is desirable that the interests of seller and buyer in an executory conveying transaction be freely transferable by way of sale or mortgage. Here there is little difference between escrow and trust. The escrow grantor's interest is freely alienable,⁷⁹ and so is that of the escrow grantee.⁸⁰ One court has adopted a rule similar to that of *Dearle v. Hall*,⁸¹ namely, that notice to the depositary is necessary to protect the assignee of the grantee's interest against the effect of action by the depositary taken in ignorance of the assignment.⁸² The same court would probably apply the rule of *Dearle v. Hall* to the assignment of the interest of a cestui que trust.

The rights of grantor-cestuique trust and grantee-cestui que trust under a conveying trust are doubtless freely transferable. It is customary to provide in the trust instrument that the assignment shall not be effective against the trustee until written notice, signed by the assignor, has been deposited with the trustee.

The escrow seems better adapted to property which is to remain static during the escrow period than to land which is to be improved pending the obtaining of deed and title. In the absence of express agreement or special circumstances the defaulting buyer under a mere land contract or land contract plus escrow will lose the value of the improvements he has made.⁸³

The prudent buyer will want title before he builds. Both land contract and the conveying trust can give the defaulting vendee an equity because of improvements made. The advantage of the trust lies in the necessity for some statement on the subject of the trustee's duty in all contingencies. The land contract may more easily exist without any mention of the buyer's equities in case of default.

The trust has been frequently used in Chicago, Toledo and other cities as a means of consummating subdivision transfers involving three sets of parties, the so-called "acre-owner" whose land is to be turned into suburban lots, the "subdivider" or promoter who is to put in improvements, advertise, and negotiate sales of the lots, and the lot buyers. The trust has been very successfully used in securing collection and proper distribution of the lot sale payments, the prompt delivery to lot purchasers of deeds conveying title free of encumbrances at the completion of their payments, and the performance of the subdivider's obligations regarding advertising and improve-

ments. The original acreage is usually subject to a mortgage when the deal is commenced and the mortgagee may exchange his mortgage for an equity under the trust and a right to part of the proceeds of lot sales until he is paid off, with a provision for restoration of his mortgage in case of the subdivider's default. This puts a clear fee in the trustee and gives the lot buyer (often a poor and ignorant individual) much needed protection. A recent Ohio case⁸⁴ gives many details of this trust arrangement. The reason why that trust gave rise to litigation was its lack of provision for certain features of the transaction which gave cause for dispute between the trust company on the one side and the acre-owner and subdivider on the other. In Chicago dozens of these subdivision trusts have been carried through without litigation or serious trouble.

An Oregon case⁸⁵ illustrates an attempt to finance a subdivision near a small city by land contract and escrow methods. A contracted to sell to B a tract of land which was to be subdivided by B. The latter was to find lot purchasers and A was to escrow with a bank deeds to the lots running from A to the several lot buyers, which deeds were to be delivered as the lot buyers made their payments. B defaulted after making some payments to A. A brought suit to foreclose B's contract and have it declared that B's payments were forfeited. The court allowed those who had contracted for lots to proceed, complete their payments, and get their deeds out of escrow; and foreclosed B of his rights if he did not complete his payments within one year. It required a rather liberal administration of equity to accomplish this very fair result. A more technical court might have held that the only equities which ran against the land in A's hands were those of B and that these equities in the entire tract might be foreclosed regardless of what the lot purchasers did as to their several lots. The Oregon court created equities against A's land, arising out of contracts made between B and the lot buyers. Technically such sub-contracts would attach equities to B's interests only.

A subdivision trust would have separated each lot contracted to be sold, created equities in that lot in favor of acre-owner, subdivider and lot purchaser, and made the lot buyer's default the only basis for forfeiture of his equity.

A further advantage of trusts over escrows for subdivision purposes is the freedom of trusts from the bothersome defenses of want of mutuality, lack of consideration, and lack of privity of contract, which at least to a small extent and occasionally lie in wait for parties who seek to get specific performance of land contracts.⁸⁶ In actions for specific performance of contracts where the plaintiff is a lot purchaser who has had no direct relation with the acre-owner or trustee and now claims a deed from the trustee, there is at least a slight danger of a successful defense on the ground that,

⁷¹*Van Tassel v. Burgen* 119 N. Y. App. Div. 509. And see *Foulkes v. Sengstacken* 83 Ore. 118. While the escrow relates back to sustain the deed of the deceased grantor, it does not operate to make the purchase price personal property. The grantor is deemed to have died the owner of the land as far as the distribution of its proceeds is concerned. *Van Tassel v. Burgen* supra.

⁷²*McIntyre v. McIntyre* 147 Mich. 365.

⁷³*Vorheis v. Kitch* 8 Phila. 554.

⁷⁴*Smiley v. Smiley* 114 Ind. 758.

⁷⁵*Ladd v. Ladd* 14 Vt. 185.

⁷⁶*Hall v. Harris* 40 N. C. 303.

⁷⁷*May v. Emerson* 52 Ore. 262.

⁷⁸*Lill v. Duncanson* (Oct. 1926) 322 Ill. 528. The following is a quotation from the certificate issued to the beneficiary under the so-called MacChesney trust plan, prepared by Nathan William MacChesney of Chicago: "And it is expressly agreed that the holder hereof has no claim or interest, legal or equitable, in the lands and other assets and property described and referred to in said trust agreement, but only an interest in the net avails or proceeds thereof as in said instrument provided." And the trust instrument under such plan provides: "Neither of the beneficiaries nor the company has, nor at any time shall have any right, title or interest in or to any portion of the Trust Estate as such, but each, has only an interest in the proceeds aforesaid; it being the intention of this instrument to recognize the vesting of full legal and equitable title to the trust estate in the Trustee." The clauses in the Duncanson trust were very similar.

⁷⁹*Foxley v. Rich* 35 Utah 162. The grantor's creditor can attach his interest. *Knapp v. Andrus* 180 Pac. (Mont.) 908.

⁸⁰*Jarvis v. Chanslor & Lyon Co.* 177 Pac. (Ariz.) 27.

⁸¹3 Russel Ch. Rep. 1.

⁸²*Le Porin v. State Exch. Bk.* 213 Pac. (Kan.) 650.

⁸³*Quinlan v. St. John* 201 Pac. (Wyo.) 149.

⁸⁴*Lasich v. Ohio Sav. Bk. & Trust Co.* 152 N. E. (Ohio) 394.

⁸⁵*McPherson v. Barbour* 183 Pac. (Ore.) 752.

⁸⁶36 Cyc. 544, 621.

while the defendant was obligated to sell, the plaintiff was not bound to buy, and hence there was no mutuality in the contract sought to be enforced; or that no consideration ran from the plaintiff to the defendant; or that the plaintiff was a third party beneficiary to the contract between the acre-owner and the subdivider. Such defenses were raised in the *Lasich* case⁸⁷ on the theory that that action was one for specific performance and not to enforce a trust. The court was somewhat troubled by these defenses but set them aside, on one ground or another, without definitely holding that the bill was one to enforce a trust, which latter result would have been a short and definitive disposal. The beneficiary of a trust need not be obligated to the trustee at all. Lack of mutuality is unheard of as a defense to a bill to enforce a trust. Neither the cestui que trust, nor anyone else, need furnish to the trustee consideration, in order to make the trust enforceable. And the cestui que trust need not be a party to any trust instrument or any contract to create the trust, in order to enable him to enforce the trust.

Objections to the Use of the Trust.

It will doubtless be said that the trust as a conveyancing device is suited to large and valuable tracts only and is too expensive, complex and cumbersome for other properties.

The expense is probably slightly greater than that of the ordinary escrow. According to the form used in *McNeill v. Pappas*⁸⁸ the escrow grantor bore the cost of the following items: certificate of title, revenue stamps on deed, drawing deed, insurance-transfer fee, and escrow fee. The drafting and recording of one more deed would seem, however, to be the principal extra item. In the carefully conducted escrow the drafting of written escrow instructions will be as burdensome and expensive as the preparation of a trust instrument. The duties of administration will be the same under escrow or trust. It may be, however, that, practically, many escrow depositaries are paid nothing for holding papers and money, receiving and paying out money and delivering the deed.⁸⁹ Country banks and real estate agents doubtless often render this service gratuitously as an incident of their other business. A trustee to do the same work would be entitled to commissions at the statutory rate unless the trust instrument fixed the compensation. An inquiry of the Chicago Title and Trust Company as to the relative expense of the trust and escrow where realty is to be conveyed and payments are to run over a period of one year reveals the following comparative costs:

	Escrow Trust ^t	
\$ 10,000 deal.....	\$ 22	\$ 66
100,000 deal.....	100	250

Another objection to the trust for this purpose is that in towns and small cities

there are no professional trustees, no trust companies, and parties will hesitate to use an individual as trustee. Small state banks probably do not generally have capacity to act as trustee, whereas they have been the common escrow depositaries in the escrow litigation of the past twenty years, but national banks may receive from the federal reserve bank authority to act as trustee.⁹⁰ This is undoubtedly an objection of some slight weight. The professional trustee is much safer than the casual. The difficulty might be relieved to some extent by giving to state banks the power to act as trustee.

A further practical reason why it may be difficult to supplant the long term escrow with the conveyancing trust is that the self-interest of the broker stands in the way. His leading thought is to close the deal and get his commission. He himself may be allowed to act as escrow depositary under an agreement that first payments are to go to him in satisfaction of his commission. He is not apt to desire to be a trustee, or to be desired as such. Trusts to convey generally give the commission priority also, but there is the difference between being one's own paymaster and confiding in another. The realtors may very naturally prefer to lead the parties into an escrow with the broker as depositary and thus to retain the maximum of control.⁹¹ Whether the realtor is strictly speaking disqualified as an escrow custodian by his pre-existing relation as agent for one or the other of the parties, has been discussed previously.⁹² No doubt practically he often is such depositary. The easiest way for the broker to close his deal and get his commission is to use the method most familiar in the locality. An attempt to lead the parties into a new scheme, such as the conveyancing trust, causes hesitation and may give the parties time to change their minds.

In some states the purposes for which real property trusts can be created are limited by statute.⁹³ Are conveyancing trusts within these statutory purposes? They are possibly trusts to "sell" real property, if the grantee from the trustee is to be a third person, not a party to the trust instrument. But this is doubtful. The trustee does not solicit buyers or negotiate sales. If title is to go from the trustee to a party to the trust instrument, the function of the trustee would seem surely to be described by the words "to convey," but the conveyance is not to be "for the benefit of creditors," or "for the benefit of legatees," or "to satisfy any charge thereon." The trust is surely not to accumulate or receive and pay over income. At least in New York,⁹⁴ the statutory restrictions seem to be ill-adapted to the trust for conveyancing purposes.

⁹⁰U. S. Code of Laws (1925) Bks. and Bking. sec. 248 (k).

⁹¹That farsightedly it is to the best interest of realtors to keep free from the entanglements of the escrow depositary, see *Lawy. and Bkr.* 17:371.

⁹²*Supra*, p. 676.

⁹³Bogert on "Trusts" p. 160.

⁹⁴*N. Y. Real Prop. Law* sec. 96; *Stanley v. Payne* 65 Misc. 77; *Bryant v. Shaw* 190 N. Y. App. Div. 578

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⁸⁷*Supra*, note 84.

⁸⁸241 Pac. (Cal.) 897.

⁸⁹The writer is informed that many California title companies on the issuance of title policies render escrow service free. This is doubtless one reason for the common use of the escrow there.

The Annual Mid-winter Business Meeting and Joint Conference

Of State and National Association Officials

Held by

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Headquarters - - Sherman Hotel

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The subject included in the tentative program indicate this will be a very interesting and practical meeting and the results from it will be most beneficial to the business and the service it renders.

Everyone interested in the problems, affairs and welfare of the abstract and title insurance business is asked to attend, and come prepared to take part.

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Suggestions and subjects for matters to be presented and discussed at this meeting will be welcomed. Send them immediately to the Executive Secretary so they may be included in the program.

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Court Decisions by

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Vice-President and Attorney
Title Guaranty Trust Co., St. Louis, Mo.

Does adverse possession run against railroad?

It does (as where house is built on right of way) unless statute forbids. *State v. Day* 138 S. E. 870 (South Carolina).

Does natural boundary rule apply to platted lots?

Yes; thus where deeds referred to plat on which creek was boundary line, the description carried to the creek even though platted distance were wrong. *Hutton v. Yolo*, 258 Pac. 96 (California).

Is Government quarter section stone binding if in wrong place?

It is. *Case v. Ericson*, 258 Pac. 535 (Idaho).

Who gets surplus in block?

It is apportioned equally among all the lots if platted. *Brewster v. Bulow*, 296 S. W. 372 (Missouri).

Does agent get commission if owner himself sells the property?

He does if he has exclusive agency listing contract. *Ciesi v. D'Angelo*, 5 La. App. 452, (Louisiana).

Is a verbal sale of standing timber valid?

No, it cannot be enforced unless it is in writing and complies with Statute of Frauds. *Beckman v. Brickley*, 258 Pac. 488 (Washington).

Does bigamous wife ever inherit?

She or her heirs take half the community property if she did not know the marriage was bigamous. *Ray v. Knox*, 113 So. 814 (Louisiana).

Can corporation of another state get material man's lien?

Not if it or its representative installed the materials, and it was not licensed to do business in the State. *Vander Horst v. Kalamazoo*, 215 N. W. 57 (Michigan).

Does reservation of sand on land conveyed run indefinitely?

No. The sand must be removed within a reasonable time. *Grant v. Haynes*, 138 S. E. 892 (Georgia).

Does residuary clause in will carry reversion after previous conditional devise?

Yes; as where devise is to daughter and her bodily heirs (in a State where those words create remainder) and she dies without issue. *Hyde v. Hopkins*, 296 S. W. 382 (Missouri).

What is effect of deed naming husband alone as grantee in granting clause and husband and wife in habendum?

The husband was held to take the entire title, in Alabama. *Gargis v. Kennemer*, 113 So. 620.

Can execution sale against husband be defeated by showing that land was really the wife's?

Yes, as he is mere trustee for her. *Weitz v. Richardson*, 258 Pac. 262 (Oklahoma).

Is sale to pay debts in Probate Court good if there were no debts?

It will be held good even against minor heirs, if no appeal was taken. *Rizzotts v. Grima*, 113 So. 658 (Louisiana).

Is water heater real or personal property?

It is real property as between vendor and vendee where connected to water pipe; hence passes to vendee even though not specifically described in deed. *Scott v. Brennan*, 109 So. 822 (Louisiana).

Does power to daughter to sell during father's life with his consent, end with his death?

Yes; *New v. Browning*, 133 Atl. 258 (Maryland).

Does construction mortgage, recorded before construction commences, have priority over mechanic's liens?

It does in some States even though there is a statute making certain liens superior. *In re Taylor*, 20 Fed. 2nd, 8, (U. S. Circ. Ct. of App. Ohio).

Do reversionary rights in restrictions go to heir or devisee?

To heir; they cannot be devised. *Trustees v. Putnam*, 221 N. Y. S. 692.

Is acknowledgment before stockholder in lending bank good?

No, it is void, and, if homestead, the mortgage (for any amount) is void in Nebraska. *Anderson v. Cusack*, 214 N. W. 73.

What is effect of omitting separate examination of wife?

It makes the deed, (or power of attorney) void, where statute requires it. *Marshburn v. Stewart*, 259 S. W. 679 (Texas).

Is lease to hospital corporation, owned by Japanese, good?

Yes. *Tashiro v. Jordan*, 256 Pac. 545 (California).

Does "kindred of deceased husband" include kindred of two deceased husbands?

No, only of the last one, as in descent from wife who leaves no relatives of her own. *Abrams v. Rice*, 295 S. W. 83 (Missouri).

INDIANA ASSOCIATION MEETS IN INDIANAPOLIS.

Indiana reports that like all the other state meetings held this year, the 1927 convention was the biggest and best ever in its history of 22 years of existence.

The program was very interesting, judging from the enthusiasm of those when Willis Coval, of the Union Title Co., took the convention to the offices of the company where he delivered his paper on "Building of an Abstract Plant" and had everything at hand to use as examples and for demonstration, after which refreshments were served.

James S. Johns, Chairman of the Abstracters Section of the American Title Association, represented that organization and his appearance on the program of the Indiana Convention was another instance of his creating a furore and being enthusiastically received. As in his other and every appearance before a state meeting, he was kept before the crowd for nearly four hours and given an ovation at the close of his talk.

Others on the program were Oliver Marks, Salem, on "Meander Lines"; Hon. Arthur L. Gilliom, Indianapolis, Present State Attorney General, "Impediments to Real Estate Transactions"; Jack Harding, Secretary and Treasurer, Harmanad, Inc., Indianapolis, "Abstract and Title Insurance Advertising"; William E. Coolman, New Albany, "Some Changes That May be Desired"; J. E. Morrison, Indianapolis, "Growth of Title Insurance in Indiana"; G. W. Seybold, South Bend, "Insolvency Proceedings—Their Effect on Titles."

Officers elected: Earl W. Jackson, Indiana Title and Loan Company, South Bend, President; J. E. Morrison, Union Title Company, Indianapolis, Vice-President; Charles E. Lambert, Lambert Title Company, Rockville, Secretary-Treasurer, re-elected, making his continued service about twenty years.

MISSOURI ASSOCIATION HAS ITS BIGGEST CONVENTION.

The 1928 Convention of the Missouri Title Association, recently held in St. Louis, was a record breaker for that organization. The number in attendance, the number there for their first time at a meeting, and the enthusiasm in the proceedings are indicative of the advancement of the abstract business in the state. It shows, too, that the state association has been energetically conducted for several years and is now recognized as a factor in the business.

The titlemen of St. Louis City and County, as hosts, certainly supported President Rohan, one of their own members, and who presided over the sessions. Entertainment was in abundance and to say a good time was had by all would be mild. There was a sight-seeing trip in the afternoon, a par-excellent banquet in the eve-

ning, conducted in the usual Missouri Association manner of all banquet and no oratory, and then close-up seats to a theatre party to see "George White's Scandals." Everyone was inspired to go back to his job and produce better abstracts and service.

The program was very interesting. There were not many topics assigned but those presented invoked so much interest and discussion that it was an effort to find time enough for all.

V. E. Phillips was scheduled for a report of the Legislative Committee, but instead of a report he gave a presentation and discussion of unusual merit and interest.

L. C. Diebel of the Union Title and Guaranty Co., Detroit, presented the subject of "Title Insurance." His talk was very intelligible and thorough, and he was asked many questions afterwards which brought forth a real discussion of things.

Richard B. Hall, Executive Secretary of the American Title Association, presented the subject "The National Association and What the Title Business Needs," and introduced James S. Johns, Chairman of the Abstracters' Section and the representative of the national organization.

Mr. Johns' appearance had been anticipated but he gave them a great deal more than expected. He was kept on the floor for four hours and twenty minutes, bombarded with questions, asked to tell of this, that and the other thing and his part in this program will be the direct cause of some real improvements in the business of the state, and therefore of things that will materially benefit the abstractor. Here, again, his appearance was said to be the outstanding feature of any meeting ever held by this state association.

An unusually interesting question box was handled by Charles R. Hamilton and William H. Barnes.

Every member of the Missouri Association who did not attend this meeting missed more than can be told, and did not avail themselves of an opportunity that would have brought them many returns.

Officers elected were: President, C. S. Hotaling, Linn County Abstract Co., Linneus; Vice President, C. D. Eidson, Height-Eidson Title Co., Harrisonville; Secretary-Treasurer, T. S. Simrall, Cooper County Abstract Co., Boonville.

KANSAS ASSOCIATION HAS EXCEPTIONAL CONVENTION.

The Kansas Title Association met in Parsons for its 1928 convention and this meeting was up to the high standard maintained for years. There is always a large crowd at this organization's get-togethers, good programs and a lot of constructive work done.

Some Regional Meetings have been held in the past few months but more are scheduled and it is the intention to include the entire state in them this year.

The program included a question box, ably handled and conducted in a bit different and more practical way than most question boxes. Only those questions submitted in advance were given consideration. They were printed in the program proper which was mailed several days before the meeting. This gave everyone the opportunity of studying them in advance and brought out much information on each subject.

An abstract contest is one of the annual features and anticipated events and there were many entries. First prize was awarded the firm of W. G. Weaver and Son, Alma; Second, Cragun Abstract Co., Kingman; Third, Columbia Title & Trust Co., Topeka.

Wood Griffin was local host and certainly made it a most pleasant event for everyone in attendance. There was exceptionally good cooperation from the local newspapers and the community at large.

Several of the abstracters and members of the Oklahoma Title Association were in attendance.

James S. Johns, Chairman of the Abstracters Section, represented the national association and his address was the feature of the program. Mr. Johns occupied an entire afternoon's program and although he attempted many times to stop, was enthusiastically urged to keep on amid shots of "more" and "keep on—don't stop." He was bombarded with questions and discussions, and his appearance was conceded to be the most interesting and beneficial event of any Kansas Association program.

The program was exceptionally good and included "Certificates or Statements of Title by Abstracters" by W. G. Fink, Fredonia; "Problems of the Smaller Abstract Office" by Harry G. Armstrong, Liberal; "Maps in Abstracts at a Profit" by H. L. Barbour, Wellington; "The Abstractor from the Viewpoint of a Lawyer" by W. A. Disch, Parsons; "Federal Liens, by C. E. Pile, Parsons; "Lack of Uniformity of Model Abstracts" by C. A. Wilkin, Independence; "The Abstracters Index" by Walter Skinner, Independence; "The Judicial Tax Sale" by Elmer W. Columbia, Oswego; "Title Insurance for Abstracters; by F. R. McEwen, Wichita; "Advertising" by J. I. Miller, Independence; "Uniform Certificates" by E. L. Mason, Wichita; "State Regulation of Abstracters" by Hugh Ricketts, Muskogee, Okla., and read in his absence by J. W. Banker, Secretary of the Oklahoma Association.

Forrest M. Rogers, of the Rogers Abstract and Title Co., Wellington, was elected President, E. L. Mason, of the Guarantee Title & Trust Co., Wichita, Vice President, and Pearl Koontz Jeffrey, Columbus, most capable and efficient Secretary, was re-elected.

The 1928 Convention will be held in Wichita.

The American Title Association

Officers, 1927-1928

General Organization

President
Walter M. Daly, Portland, Ore.,
President, Title and Trust Com-
pany.

Vice President
Edward C. Wyckoff, Newark, N. J.,
Vice President, Fidelity
Union Title and Mtg. Guaranty
Co.

Treasurer
J. M. Whitsitt, Nashville, Tenn.,

President, Guaranty Title Trust
Company.

Executive Secretary
Richard B. Hall, Kansas City, Mo.,
Title and Trust Building.

Executive Committee
(The President, Vice President,
Treasurer, Retiring President, and
Chairmen of the Sections, ex-
officio, and the following elected
members compose the Executive

Committee. The Vice President
of the Association is the Chairman
of the Committee.)

Term Ending 1928.
J. W. Woodford, (the retiring
president) Seattle, Wash., Presi-
dent, Lawyers and Realtors Title
Insurance Co.
Fred P. Condit, New York City,
Vice President, Title Guaranty
and Trust Co.
M. P. Bouslog, Gulfport, Miss.,

President, Mississippi Abstract,
Title and Guaranty Co.
Donzel Stoney, San Francisco, Cal.,
Executive Vice President, Title
Insurance and Guaranty Co.

Term Ending 1929.
Henry B. Baldwin, Corpus Christi,
Tex., President, Guaranty Title
Co.
J. M. Dall, Chicago, Ill., Vice
Pres., Chicago Title and Trust
Co.

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Abstracters Section
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dleton, Ore., President, Hart-
man Abstract Company.
Vice-Chairman, Alvin Moody,
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Abstract Company.
Secretary, W. B. Clarke, Miles
City, Mont., President, Custer
Abstract Company.

Title Insurance Section
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Union Title and Guaranty Co.
Vice-Chairman, Stuart O'Melveny,
Los Angeles, Cal., Executive
Vice President, Title Insurance
and Trust Co.
Secretary, Kenneth E. Rice, Chi-
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cago Title and Trust Co.

Title Examiners Section
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Minn., 814 Guardian Life Build-
ing.
Vice-Chairman, O. D. Roats,
Springfield, Mass., c/o Federal
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Secretary, Guy P. Long, Memphis,
Tenn., Title Officer, Union and
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vention**
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James S. Johns, (Chairman, Ab-
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Ore.
John F. Scott, (Chairman, Title
Examiners Section) St. Paul,
Minn.
Richard B. Hall, (the Executive
Secretary) Kansas City, Mo.

Committee on Membership
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oke, Ark., President, Lonoke
Real Estate and Abstract Co.
(The President and Secretary of
each state association constitute
the other members of this com-
mittee.)

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Odell R. Blair, Buffalo, N. Y.,
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ton Abst. & Title Co.

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solidated Abstract Co.
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Title Guaranty Co.
New Mexico—D. D. Monroe, Clay-
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Utah—Alex E. Carr, Salt Lake
City.

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as, President, Title and Trust
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Arizona—J. J. O'Dowd, Tucson,
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ance Co.
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Montana—R. H. Johnson, Scobey,
Vice President, Montana Ab-
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Idaho—Henry Ashcroft, Payette,
Manager, Payette County Ab-
stract Co.

TITLE NEWS

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Augusta Title Company.
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St. Francis County Abstract Co.
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Lonoke Real Estate & Abstract Company.

California Land Title Association.

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Security Title Ins. & Guarantee Co.
2nd V. Pres., E. L. Dearborn, Fairfield.
Solano County Title Company.
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San Jose Abstract & Title Insurance Co.
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Merchants Natl. Bank Building.

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The Morgan County Abstract & Investment
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Vice President, H. C. Nelson, Cheyenne Wells.
The Cheyenne County Abstract Company.
Secy.-Treas., Edgar Jenkins, Littleton.
The Arapahoe County Abstract & Title Co.

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President, William Beardall, Orlando.
Fidelity Title & Loan Company.
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Nash Title Company.

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(S. E. Division) Teton Abstract Co.
Vice-Pres., M. L. Hart, Boise, (S. W. Divi-
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Vice-Pres., D. G. LaGrange, Storm Lake,
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Linn County Abstract Co.
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Teton County Abstract Co.
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Teton County Abst. Co.
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Abstract Guaranty Co.
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239 Keeline Building.
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Hudson Counties Title & Mortgage Co.
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(Southern Section.) 375 Fulton Street.
Vice-Pres., Clarence B. Kilmer, Saratoga,
Springs, (Central Section.)
Butler, Kilmer, Hoey & Butler.
Vice-Pres., Arthur F. O'Connor, Buffalo.
(Western Section.) Buffalo Abstract & Title
Company.
Treasurer, Fred P. Condit, New York City,
176 Broadway, Title Guar. & Trust Co.
Secretary, S. H. Evans, New York City, 149
Broadway.

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M. B. Cassell & Co.
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Burleigh Co. Abst. Co.

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Real Estate Abst. Co.
Secy.-Treas., Geo. N. Coffey, Wooster.
Wayne Co. Abst. Co.

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Wagoner County Abstract Co.
Vice-Pres., Hugh C. Ricketts, Muskogee.
Guaranty Trust Co.
Vice-Pres., Leo A. Moore, (N. E. Dist.)
Claremore.
Vice-Pres., R. E. Rutherford, (S. E. Dist.)
Tishomingo.
Vice-Pres., Addie Loftin, (S. W. Dist.)
Purcell.
Vice-Pres., Mrs. C. I. Jones, (N. W. Dist.)
Sayre.
Secy.-Treas., J. W. Banker, Tahlequah.
The Cherokee Capital Abstract Co.

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Linn County Abstract Co.
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Abstract & Title Co.
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Pacific Abstract Title Co.

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Con.-Equitable Title & Tr. Co.
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Deleware Co. Tr. Co.

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Bank of Commerce & Trust Company.
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Texas Abstracters Association

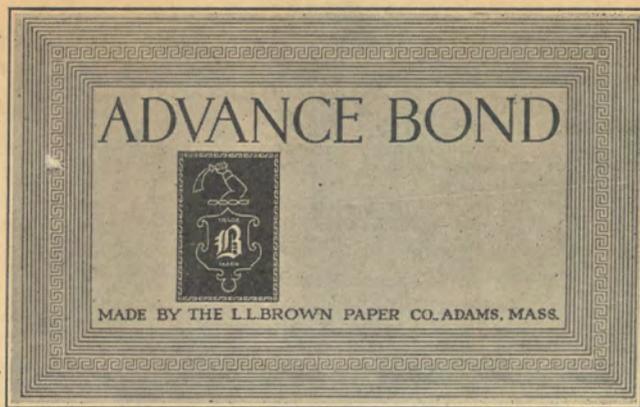
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Guarantee Abstract Company.
Vice-Pres., E. P. Harding, Wichita Falls.
Central Abstract Company
Sec.-Treas., Henry Guenzel, Georgetown.
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Washington Title Insurance Company.
Secretary-Treasurer, Elizabeth Osborne, Ya-
kima.
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Milwaukee Abst. & Title Grty. Co.
1st. V. Pres., H. M. Seaman, Milwaukee.
Security Abst. & Title Co.
2nd. V. Pres., Agnes E. Benoe, Ashland.
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