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## Escrow Agreements

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verbal repudiation was sufficient to invoke the doctrine of anticipatory breach,<sup>58</sup> but the rule was extinguished with the birth of the *Slaughter* decision. Since that time, regardless of the renunciation, the same requirements have been specified, although the Court has inferred that the doctrine is recognized in Florida.<sup>60</sup>

#### CONCLUSION

The practical convenience of the doctrine has been the most significant reason for its almost universal acceptance—the ability of the plaintiff to dispose of his action (as long as it is certain he is to have an action) at once. The fact that the doctrine has enlarged the obligation of the law of contracts, however, is also to be considered.<sup>61</sup> The writer would favor the Florida view if the promisee never changed his position between the time of repudiation and the date of performance. This, however, is very seldom the situation, and when the promisor's wrongful action has placed the promisee at a disadvantage, there should be a method of correcting the wrong. Also, as was stated previously, since the breach is determined by facts involved in each particular case, if a contract were not to be performed until a distant date, bringing rules of evidence into play to determine the extent of the renunciation might easily lend itself to great difficulty. To expedite progress, our laws should stay in step with the needs of commerce. The doctrine of anticipatory breach can and does enhance contract law. Even though the doctrine also enlarges contract obligations, the quick settlement of disputes nullifies the deleterious effect of that enlargement.

LAWRENCE J. MEYER

## ESCROW AGREEMENTS

### ELEMENTS OF AN ESCROW

Although escrows play an important part in modern legal affairs, comparatively little litigation has arisen on the point. The attributes of an escrow were established early at English common law, and have been relatively unchanged by the passage of time.

An escrow has been technically defined as an instrument which by its terms, imports a legal obligation, and which is deposited by the grantor with a third party to be kept by the depositary until the performance of a condition, or the happening of a certain event; and then to be delivered to the grantee.<sup>1</sup> While the term escrow originally applied only to real estate

58. *Key v. Alexander*, 91 Fla. 975, 108 So. 883 (1926); *cf. Liberis v. Carmeris*, 107 Fla. 352, 146 So. 220 (1932).

59. *Behrman v. Max*, 102 Fla. 1094, 137 So. 120 (1931).

60. *Gilliland v. Mercantile Investment and Holding Co.*, 147 Fla. 613, 3 So.2d 148 (1941).

61. 5 WILLISTON, CONTRACTS § 1321 (Rev. Ed. 1937).

1. *Love v. Brown Development Co. of Mich.*, 100 Fla. 1373, 131 So. 144 (1930).

matters, it now pertains to written instruments and to the deposit of monies.<sup>2</sup> The term "escrow" need not be used in the agreement as the courts will look to all the facts and circumstances.<sup>3</sup> Needless to say, all the elements must be present. The escrow agreement itself may be oral, written or both.<sup>4</sup> Florida follows this viewpoint and if escrow paper is deposited, additional writing is not necessary.<sup>5</sup>

The major distinguishing element of an escrow is the irrevocable deposit payable on the fulfillment of a certain condition.

#### CONDITION

The basic difference between an escrow and an ordinary completed instrument is the condition.<sup>6</sup> It is usually the sole purpose of the escrow agreement, and requires performance on the part of the grantee which may be by the payment of money, labor or services. Conditions have also been imposed on the grantor, an example of which is providing proof of a marketable title. The condition must be expressed<sup>7</sup> although it need not be in writing.<sup>8</sup>

#### IRREVOCABILITY

Many states, including Florida, hold that in order to create a valid escrow, there must be an absolute and irrevocable delivery to the depository.<sup>9</sup> Delivery by the grantor to the escrow holder may be just as complete as delivery to the grantee.<sup>10</sup> This must place the res beyond the control of the grantor.<sup>11</sup> If the deed is to be kept until the grantor directs its delivery, then it is not a valid escrow because it is subject to the grantor's future orders.<sup>12</sup> This is a logical rule and prevents harm to the grantee who has fulfilled his condition, and then discovers that the grantor has previously revoked. It has been suggested that an escrow may be revoked if not in writing, but this view apparently confuses the escrow agreement with the actual contract for the sale of the land.

2. *State v. Hurley*, 66 Nev. 350, 210 P.2d 922 (1950).

3. *Southern Life Ins. and Trust Co. v. Cole*, 4 Fla. 359 (1852); *Conner v. Helvik*, 105 Mont. 437, 73 P.2d 541 (1937).

4. *Conner v. Helvik*, 105 Mont. 437, 73 P.2d 541 (1937); *Home-State Royalty Corp. v. McClish*, 187 Okla. 352, 103 P.2d 72 (1940).

5. *Ullendorff v. Graham*, 80 Fla. 845, 87 So. 50 (1920).

6. *Conner v. Helvik*, 105 Mont. 437, 73 P.2d 541 (1937).

7. *Angeleyk v. Angeleyk*, 367 Pa. 381, 80 A.2d 753 (1951).

8. See note 6 *supra*.

9. *Lindsey v. Hornady*, 215 Ark. 797, 223 S.W.2d 768 (1949); *Deming v. Smith*, 19 Cal. App. 2d 683, 66 P.2d 454 (1937); *Smith v. MacBeth*, 119 Fla. 796, 161 So. 721 (1935); *Johnson Realty & Investment Co. v. National City Bank of Tampa*, 95 Fla. 282, 116 So. 229 (1928); *Ullendorff v. Graham*, 80 Fla. 845, 87 So. 50 (1920); *Loubat v. Kipp & Young*, 9 Fla. 60 (1860); *Ripley v. Lucas*, 267 Mich. 682, 255 N.W. 356 (1934); *Cooper v. Bergton*, 18 N.J. Super. 272, 87 A.2d 358 (1952); *Creeden v. North*, 160 Okla. 90, 15 P.2d 991 (1932); *Hanson v. Bellman*, 161 Ore. 373, 88 P.2d 295 (1939); *Radiophone Broadcasting Station v. Imboden*, 183 Tenn. 215, 191 S.W.2d 535 (1946); *Bruener v. Hillman*, 186 Wash. 663, 59 P.2d 731 (1936).

10. *Malcolm v. Tate*, 125 Ore. 419, 267 Pac. 527 (1928).

11. *Loubat v. Kipp & Young*, 9 Fla. 60 (1860); *Hanson v. Bellman*, 161 Ore. 373, 88 P.2d 295 (1939).

12. *Loubat v. Kipp & Young*, 9 Fla. 60 (1860).

## ABROGATION OF THE AGREEMENT

The escrow may be revoked only if the conditions of the agreement are breached,<sup>13</sup> or if the sales agreement does not satisfy the Statute of Frauds.<sup>14</sup> If the escrow agreement itself makes specific provisions for abrogation of the contract, then logically these provisions must be followed if the escrow is to be recalled.<sup>15</sup> At least one court has said that attempted revocation, while illegal, does not excuse the grantee from tendering payment.<sup>16</sup> A party will be justified in revoking the escrow if an unreasonable time is taken.<sup>17</sup> If no time is specified for the agreement, it will run for a reasonable length of time,<sup>18</sup> which is to be determined from all the facts and circumstances.<sup>19</sup> Time, actually, is not of the essence unless it is the intention of the parties.<sup>20</sup>

## CIRCUMVENTION OF THE STATUTE OF FRAUDS

An escrow agreement may take an oral contract for the sale of land outside the Statute of Frauds. In *Clay v. Reynolds*,<sup>21</sup> it was held that if pursuant to an oral agreement, a deed containing the terms of the agreement and the consideration is executed and placed in escrow, it will sufficiently comply with the Statute of Frauds. However, in *Johnson v. Wallden*,<sup>22</sup> an undelivered deed was found to be an insufficient memorandum in writing of a parol contract, and the deed could be recalled prior to delivery. In *Campbell v. Thomas*,<sup>23</sup> the grantor was permitted to revoke the escrow for lack of a valid contract for the sale of land.

## DELIVERY IN ESCROW TO THE GRANTEE

It is a well established rule that a deed cannot be delivered into escrow to the grantee or his agent to take effect on the performance of a condition not expressed on the face of the deed.<sup>24</sup> A deed delivered on such condition becomes absolute at law unless delivery is made in escrow to a third party.<sup>25</sup> This rule was enunciated in *Whyddon's Case*<sup>26</sup> in 1596, and is the weight of authority today. This restricts the use of parol evidence and protects subsequent purchasers, yet at the same time may defeat the intent of the parties. A Tennessee court in *Tanksley v. Tanksley*,<sup>27</sup> rejected this doctrine

13. *Bingham v. Taylor*, 12 F.2d 15 (5th Cir. 1926); *Johnson Realty & Investment Co. v. National City Bank of Tampa*, 95 Fla. 282, 116 So. 229 (1928).

14. *Johnson v. Wallden*, 342 Ill. 201, 173 N.E. 790 (1931).

15. *Ripley v. Lucas*, 267 Mich. 682, 255 N.W. 356 (1934).

16. *Rothast v. Kind*, 218 Cal. 192, 24 P.2d 771 (1933).

17. *Bingham v. Taylor*, 12 F.2d 15 (5th Cir. 1926).

18. *Ibid.*

19. *Bradshaw v. Superior Oil Co.*, 164 F.2d 165 (10th Cir. 1947).

20. *Southern v. Chase State Bank*, 144 Kan. 472, 61 P.2d 1340 (1936).

21. 169 Okla. 416, 37 P.2d 244 (1934); see *Starkey v. Texas Farm Mortgage Co.*,

45 S.W.2d 999 (Tex. Civ. App. 1932).

22. See note 14 *supra*.

23. 42 Wis. 437, 24 Am. Rep. 427 (1877).

24. *Logue v. Von Almen*, 379 Ill. 208, 40 N.E.2d 73 (1942).

25. *Logue v. Von Almen*, 379 Ill. 208, 40 N.E.2d 73 (1942); *Buchwald v. Buchwald*,

175 Md. 115, 199 Atl. 800 (1938).

26. Cro. Eliz. 520 (1596), 78 Eng. Rep. 769.

27. 145 Tenn. 468, 239 S.W. 766 (1922).

and stated that it is the intention of the grantor which determines whether a delivery of the instrument is absolute or conditional, even though such delivery is made to the grantee. As a further modification of the general rule, one state has held that a grantee can take the deed and impose certain conditions on its acceptance, such as having title vest only if the abstract shows marketable title.<sup>28</sup> The better practice is to insert the written condition in the deed.

#### THE ESCROW HOLDER

The escrow holder has been given many labels, including that of agent,<sup>29</sup> trustee<sup>30</sup> or fiduciary.<sup>31</sup> He may be an agent for the specific duties concerned, but a trustee for the funds placed in his hands.<sup>32</sup>

It is generally held that the escrow holder must be a stranger to the escrow transaction.<sup>33</sup> If he were an agent of one of the parties, no escrow would arise and the deed might take effect without fulfillment of the condition. Today, it is usually held that the grantee's agent may be the holder if he is not antagonistic to the other party.<sup>34</sup> The escrow must be outside his regular agency, however. The older rule would not permit an attorney of one of the parties to act as holder,<sup>35</sup> but the modern view permits the attorney of one party to act as escrow holder so long as he does not promote the interest of one party to the detriment of the other.<sup>36</sup> Actually in such a situation, the escrow holder is the agent of both for purposes of the escrow.<sup>37</sup> As a special agent,<sup>38</sup> his knowledge may be imputed to both parties.<sup>39</sup> However, the escrow holder has the duty to disclose a situation which comes to his attention, and he cannot idly stand by and watch the grantee being defrauded.<sup>40</sup> An early Florida decision held that the directors of a corporation could hold in escrow for the corporation.<sup>41</sup>

28. *Puckett v. Hoover*, 146 Tex. 1, 202 S.W.2d 209 (1947).

29. *Cooper v. Bergton*, 18 N.J. Super. 272, 87 A.2d 358 (1952); *Burford v. Bridwell*, 199 Okla. 245, 185 P.2d 216 (1947); *Kreuer v. Union Nat. Bank*, 276 Pa. 201, 119 Atl. 921 (1923).

30. *Tucker v. Dr. P. Phillips Co.*, 139 F.2d 601 (5th Cir. 1943); *Orloff v. Metropolitan Trust Co.*, 17 Cal.2d 484, 110 P.2d 396 (1941) (holder does not become a trustee until the conditions are fulfilled); *Tomasello v. Murphy*, 100 Fla. 132, 129 So. 328 (1930); *Ullendorff v. Graham*, 80 Fla. 845, 87 So. 50 (1920); *Burford v. Bridwell*, 199 Okla. 245, 185 P.2d 216 (1947); *Kreuer v. Union Nat. Bank*, 276 Pa. 201, 119 Atl. 921 (1923).

31. *Bardach v. Chain Bakers*, 265 App. Div. 24, 37 N.Y.S.2d 584 (1st Dept.), *aff'd*, 290 N.Y. 813, 50 N.E.2d 233 (1942).

32. *Squire v. Branciforti*, 131 Ohio St. 344, 2 N.E.2d 878 (1936).

33. *Suter v. Suter*, 278 Ky. 403, 128 S.W.2d 704 (1939).

34. *McCabe v. Hartford Accident & Indemnity Co.*, 90 N.H. 80, 4 A.2d 661 (1939).

35. *Brown v. Brown*, 192 Ga. 852, 16 S.E.2d 853 (1941); *Morgan v. Wolpert*, 164 Ga. 462, 139 S.E. 15 (1927).

36. *Mantel v. Landau*, 134 N.J. Eq. 194, 34 A.2d 638 (Ch. 1943), *aff'd* 135 N.J. Eq. 456, 39 A.2d 88 (Ct. Err. & App. 1944).

37. *Kelly v. Chimich*, 91 N.J. Eq. 97, 108 Atl. 372 (Ct. Err. & App. 1919).

38. *Kreuer v. Union Nat. Bank*, 276 Pa. 201, 119 Atl. 921 (1923).

39. *Ryder v. Young*, 9 Cal. App.2d 545, 50 P.2d 495 (1935); SEAVEY, *STUDIES IN AGENCY* 167 (1949).

40. See note 31 *supra*.

41. *Southern Life Ins. & Trust Co. v. Cole*, 4 Fla. 359 (1852).

The escrow holder is strictly bound by the terms of the deposit and is charged with the duties assumed by him.<sup>42</sup> As trustee, he will be liable if he parts improperly with the deposit.<sup>43</sup> His death,<sup>44</sup> or that of the grantor does not affect the escrow agreement.<sup>45</sup> He is not a judge of whether the conditions have been fulfilled,<sup>46</sup> but he must be guided by the terms of the contract and he cannot construe the contract where he has a duty to perform.<sup>47</sup>

#### DEFALCATION OF ESCROW HOLDER

The principal is bound by the criminal acts of the escrow holder during the escrow period.<sup>48</sup> As a consequence, the principal will bear the loss in event of the agent's defalcation. If an act of one of the parties is a basic factor in the agent's actions, that party may be forced to suffer the loss.<sup>49</sup> For example, undue delay in clearing a title has shifted the loss.<sup>50</sup> While Florida courts have never directly decided the question, it has been said that there is a constructive delivery when the conditions have been performed.<sup>51</sup> So that if the escrow holder embezzles, the loss falls on the one who owned the embezzled property at the time.<sup>52</sup> If the purchase money is embezzled before the seller is entitled to it, the loss falls on the buyer,<sup>53</sup> but if the seller is entitled to the money at the time, the loss falls on him.<sup>54</sup> However, it would seem that since both parties choose the escrow holder, it might be more equitable to divide the loss.

#### DELIVERY BY ESCROW HOLDER

The escrow holder must make delivery when the conditions are fulfilled.<sup>55</sup> If he fails to do so he is liable and delivery of the escrow relates back to the initial delivery to effectuate the intent of the parties.<sup>56</sup> The remedy is against the holder for his refusal to deliver rather than against the grantor.<sup>57</sup> The grantee can enforce delivery in equity through specific

42. *Tucker v. Dr. P. Phillips Co.*, 139 F.2d 601 (5th Cir. 1943); *Burford v. Bridwell*, 199 Okla. 245, 185 P.2d 216 (1947).

43. *Tucker v. Dr. Phillips Co.*, 139 F.2d 601 (5th Cir. 1943); *Kreuer v. Union Nat. Bank*, 276 Pa. 201, 119 Atl. 921 (1923).

44. *Ryckman v. Cooper*, 291 Mich. 556, 289 N.W. 252 (1946).

45. *Anselman v. Oklahoma City University*, 197 Okla. 529, 172 P.2d 782 (1946); *Morris v. Clark*, 100 Utah 252, 112 P.2d 153 (1940), *cert. denied*, 314 U.S. 584 (1941).

46. *Ortman v. Kane*, 389 Ill. 613, 60 N.E.2d 93 (1945).

47. *Southern v. Chase State Bank*, 144 Kan. 472, 61 P.2d 1340 (1936).

48. *Majors v. Butler*, 99 Cal. App.2d 370, 221 P.2d 994 (1950).

49. *Ibid.*

50. *Ibid.*

51. *Johnson Realty & Investment Co. v. National City Bank of Tampa*, 95 Fla. 282, 116 So. 229 (1928).

52. *Majors v. Butler*, 99 Cal. App.2d 370, 221 P.2d 994 (1950); *Schmidt v. Fitzsimmons*, 190 Ore. 415, 226 P.2d 304 (1951).

53. *Pagan v. Spencer*, 104 Cal. App. 2d 588, 232 P.2d 323 (1951).

54. *Lechner v. Halling*, 35 Wash. 2d 903, 216 P.2d 179 (1950).

55. *Mantel v. Landau*, 134 N.J. Eq. 194, 34 A.2d 638 (Ch. 1943), *aff'd*, 135 N.J. Eq. 456, 39 A.2d 88 (Ct. Err. & App. 1944).

56. *Ibid.*

57. *Angle v. Bass*, 169 Okla. 120, 36 P.2d 483 (1934).

58. *Brown v. Stutson*, 100 Mich. 574, 59 N.W. 238 (1894).

performance.<sup>58</sup> If the depositary delivers improperly, both he and the person improperly receiving may be joined in an action at law for damages.<sup>59</sup>

If the conditions are not performed, title will remain in the grantor, and the grantee will not be entitled to the deed.<sup>60</sup> If the depositary delivers the deed without authority,<sup>61</sup> or if the grantee obtains possession fraudulently,<sup>62</sup> the deed is usually void and conveys no title,<sup>63</sup> either to the grantee,<sup>64</sup> or to a bona fide purchaser.<sup>65</sup> Under certain circumstances, the grantor, by his actions may be estopped from denying the validity of a delivery.<sup>66</sup> By failing to take action at the time of the wrongful delivery, or not making protest and contesting the validity of the act, the grantor may be deemed to have ratified the wrongful act. The grantor may also ratify by accepting the purchase money,<sup>67</sup> or by a suit *ex contractu* for the purchase price.<sup>68</sup> Another view is expressed by an Ohio decision<sup>69</sup> which estopped a grantor when a mortgagee had relied on the grantee's fraudulently delivered deed. It was reasoned that where one of two innocent parties must suffer a loss, it should be the one who chose the escrow holder, to-wit, the grantor in this case.

If the grantee refuses to accept the deed, then the escrow becomes inoperative and the grantor is entitled to a return of the instrument.<sup>70</sup> When the title is defective, however, one state has held that the grantee may recover the deposit money, plus interest and the expense of examining the abstract.<sup>71</sup> However, this did not include attorney's fees.

#### PARTIAL PERFORMANCE

Generally when the deposit is made into the escrow, the grantee gains an equitable interest in the property,<sup>72</sup> and this interest may be alienated.<sup>73</sup> However, it has been held elsewhere that the grantee has no interest until the conditions are fulfilled.<sup>74</sup> Occupancy of land while awaiting delivery of the instrument in escrow does not give rise to any interest independent of the conditions of the escrow.<sup>75</sup> Although the escrow places the papers

59. *Trask v. Garza*, 51 Cal. App. 739, 197 Pac. 807 (1921).

60. *Home-State Royalty Corp. v. McClish*, 187 Okla. 352, 103 P.2d 72 (1940).

61. *Sherrod v. Hollywood Holding Corp.*, 233 Ala. 557, 173 So. 33 (1937).

62. *Ibid.*

63. *Hart v. Barron*, 122 Mont. 350, 204 P.2d 797 (1949).

64. *Threath v. Threath*, 212 Miss. 555, 54 So.2d 907 (1951).

65. *Bingham v. Taylor*, 12 F.2d 15 (5th Cir. 1926); *Houston v. Adams*, 85 Fla. 291, 95 So. 859 (1923); *Osby v. Reynolds*, 260 Ill. 576, 103 N.E. 556 (1913); *Home-State Royalty Corp. v. McClish*, 187 Okla. 352, 103 P.2d 72 (1940).

66. *Home Owners' Loan Corp. v. Ashford*, 198 Okla. 481, 179 P.2d 905 (1947); *Hanson v. Bellman*, 161 Ore. 373, 88 P.2d 295 (1939).

67. *Home Owners' Loan Corp. v. Ashford*, 198 Okla. 481, 179 P.2d 905 (1947); *State v. Parker*, 59 S.D. 500, 241 N.W. 318 (1932).

68. *Sunderlin v. Warner*, 42 Idaho 479, 246 Pac. 1 (1926).

69. *Schurtz v. Colvin*, 55 Ohio St. 274, 45 N.E. 527 (1896). *Contra*: *Sherrod v. Hollywood Holding Corp.* 233 Ala. 557, 173 So. 33 (1937).

70. *Tucker v. Kanatzar*, 373 Ill. 162, 25 N.E.2d 823 (1940).

71. *Gravino v. Gralia*, 18 N.J. Super. 241, 86 A.2d 827 (1952).

72. *Ullendorff v. Graham*, 80 Fla. 845, 87 So. 50 (1920); *May v. Emerson*, 52 Ore. 262, 96 Pac. 454 (1908).

73. *Jarvis v. Chanslor & Lyon Co.*, 20 Ariz. 134, 177 Pac. 27 (1919).

74. *Hart v. Barron*, 122 Mont. 350, 204 P.2d 797 (1949).

75. *In re Chrisman*, 35 F. Supp. 282 (S.D. Cal. 1940).

beyond the control of the parties, the vendor does not lose all control and dominion over the property, and may use it so long as he does not violate the terms of the escrow.<sup>76</sup>

#### RELATION BACK DOCTRINE

As a general rule, a deed placed in escrow takes effect as a conveyance upon the performance of the prescribed conditions and delivery by the depository.<sup>77</sup> The first delivery is the depositing of the escrow material with the escrow holder. The second delivery is the handing over of the material by the escrow holder to the grantee. It is the second delivery which passes title.<sup>78</sup> This follows the usual intent of the parties who do not intend title to pass until the conditions are performed and until the deed or papers are delivered over. Often, however, some change in circumstance may require the title to pass on the first delivery into escrow in order to prevent an injustice. If necessary for justice, or to effectuate the intent of the parties, the delivery of the deed is considered to operate retroactively, and it relates back in time and effect to the date the escrow was created.<sup>79</sup> This is a fictional device to prevent injury to the grantee.<sup>80</sup>

As legal title remains in the vendor until actual delivery, this interest may be available to his creditors.<sup>81</sup> At least one state has said, however, that the vendor parts with title and has only the equity of redemption.<sup>82</sup> In such a situation, the vendee's equity is greater than that of the judgment creditor. The grantee may be justified in making payments to a creditor after the creditor has arrived at the vendor's rights,<sup>83</sup> and in such a case, the creditor's lien would be restricted to the vendor's right and title. The grantee's payments to the grantor would then be made at his peril if he had actual notice of the lien, but until then the grantee is entitled to the benefit of all his payments.<sup>84</sup>

Title will relate back if the escrow holder refuses to deliver,<sup>85</sup> without the necessity of a formal second delivery. However, in that situation, the fulfillment of the condition results in a constructive delivery.<sup>86</sup> It is generally

76. *Bruener v. Hillman*, 186 Wash. 663, 59 P.2d 731 (1936).

77. *Blumenthal v. Liebman*, 109 Cal. App.2d 374, 240 P.2d 699 (1952); *Mississippi State Highway Comm'n v. Anderson*, 183 Miss. 458, 184 So. 450, *overriding suggestion of error*, 183 So. 498 (1938); *Nadeau v. Texas Co.*, 104 Mont. 558, 69 P.2d 586 (1937).

78. *Foy v. Scott*, 197 Ga. 138, 28 S.E.2d 107 (1944). *But cf. Cowden v. Broderick & Calvert*, 131 Tex. 434, 114 S.W.2d 1166 (1938) (title relates back if it was the intent of the parties as evidenced by the date of the instrument).

79. *Hirschberg v. Russell*, 317 Ill. App. 329, 45 N.E.2d 86 (1943); *See Loubat v. Kipp & Young*, 9 Fla. 60 (1860).

80. *Washington Escrow Co. v. McKinnon*, 40 Wash. 2d 432, 243 P.2d 1044 (1952).

81. *May v. Emerson*, 52 Ore. 262, 96 Pac. 454 (1908).

82. *Whitfield v. Harris*, 48 Miss. 710 (1873).

83. *May v. Emerson*, 52 Ore. 262, 96 Pac. 454 (1908).

84. *Ibid.*

85. *See note 55 supra.*

86. *Johnson Realty & Investment Co. v. National City Bank of Tampa*, 95 Fla. 282, 116 So. 229 (1928).



held that title will relate back if the grantor dies.<sup>87</sup> In those instances where relation back is applied, a wife's dower interest in the property may be defeated<sup>88</sup> but the wife may collect the dower from the amount paid by the grantee.<sup>89</sup>

Title will not relate back for the purpose of collection of rents during the period of escrow,<sup>90</sup> but it has been held that if the grantee pays interest for the escrow time, he may be entitled to the property rents.<sup>91</sup> Relation back will not be applied to prevent the passing of rights to a devisee of a will when the grantor dies subsequent to placing the deed in escrow, since the doctrine will not be applied to benefit a third party.<sup>92</sup>

A deed may not relate back against a subsequent purchaser of the same property without notice,<sup>93</sup> but will relate back in time to cut off rights acquired by a third party with notice.<sup>94</sup>

Generally, the grantor can recover insurance for his interest in the property if it is destroyed pending the escrow transaction.<sup>95</sup> The grantee under those circumstances may not be qualified to receive the insurance compensation because of a failure to transfer the policy or notification of the insurance company. In such a situation, there will be no possible recovery unless allowed to the grantor. The grantee can prevent loss by requiring as an escrow condition that the property when delivered to him will be in the same condition as at the time of purchase.

Relation back may be thus summarized in a few words. In the absence of any special intent, title passes upon the second delivery. Where justice requires, title will be deemed to pass upon the first delivery into escrow. This is a fictional device and the result is obtained by a balancing of the relative equities. Frequently, the problem of relation back is covered in the escrow agreement itself. An actual agreement incorporating anticipated problems such as when title will pass; provisions as to the profits; taxes; and insurance, can prevent expensive and time consuming litigation.

#### CONCLUSION

The escrow transaction today is usually in writing, with the deed taking effect at the date of closing. Rents, insurance and other matters are determined by the instrument of deposit or by the intent of the parties. The chief advantage of the escrow is that it enables a grantee to check the title

87. *Anselman v. Oklahoma City University*, 197 Okla. 529, 172 P.2d 782 (1946); *Morris v. Clark*, 100 Utah 252, 112 P.2d 153 (1940), *cert. denied*, 314 U.S. 584 (1941).

88. *Bucher v. Young*, 94 Ind. App. 586, 158 N.E. 581 (1927); *First Nat. Bank & Trust Co. of Woodbury v. Scott*, 109 N.J. Eq. 244, 156 Atl. 836 (Ch. 1931).

89. *Tyler v. Tyler*, 50 Mont. 65, 144 Pac. 1090 (1914).

90. *Blumenthal v. Liebman*, 109 Cal. App. 374, 240 P.2d 699 (1952).

91. *Scott v. Sloan*, 72 Kan. 545, 84 Pac. 117 (1906) (grantor is not entitled to both interest and rents).

92. See note 80 *supra*.

93. *Waldock v. Frisco Lumber Co.*, 71 Okla. 200, 176 Pac. 218 (1918).

94. See *Whitmer v. Schenk*, 11 Idaho 702, 83 Pac. 775 (1906).

95. *Viermeisel v. Rhode Island Ins. Co.*, 77 Cal. App.2d 229, 175 P.2d 63 (1946).

before he is bound. It also permits the sale of the property to be unaffected by the death of the grantor, and simplifies complicated closings.

When escrow agreements are employed, it guarantees to the grantor performance before the other party receives the fruits of the transaction. The escrow arrangement is a beneficial device since it protects both the grantor and the grantee, and the use of it is unqualifiedly recommended.

WILLIAM A. INGRAHAM, JR.

## VANDALISM UNDER AUTOMOBILE INSURANCE

### INTRODUCTION

Safely, it can be said that the average person knows very little about his automobile insurance policy. When he contracts for a policy he gets in touch with the insurance company or its representative and orders "liability, comprehensive, and collision coverage." He has little actual knowledge of what he is getting. The coverage he asks for often has been suggested, with no further explanation of what it includes, by associates, friends, or insurance agents. He has been told that this coverage, in the proper proportions, protects him adequately. When the policy is received, it is put away immediately for safekeeping, and the insured never bothers to read it, until the day of the accident. Then he finds his insurance is not as complete as he had expected.

When an individual finds his car has been damaged by an unexplainable source he turns to his policy to find a remedy for his loss. Most often he will come upon the "vandalism clause" under "comprehensive coverage." Under this provision, he seeks relief, but frequently the relief eludes him.

### COMPREHENSIVE COVERAGE

Universally, automobile insurance contracts provide coverage for "comprehensive loss." The terms of the insuring agreement usually are set out as follows:

Coverage Y—Comprehensive Loss of or Damage to the Automobile, Except by Collision or Upset. To pay for any direct and *accidental* loss of or damage to the automobile, hereinafter called loss, *except loss caused by collision of the automobile with another object, or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached.* Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, *vandalism*, riot or civil commotion shall not be deemed loss caused by collision or upset. (Italics supplied).

It is obvious from the expressed wording of the policy that damage incurred by collision is not covered by this provision.<sup>1</sup> Recovery for vandalism,

1. Recovery for collision is provided in another portion of the policy where the insurer undertakes to be liable for the loss, but only for the amount of each loss in excess of the deductible amount (usually twenty-five or fifty dollars, depending on the insured's coverage).