purchase money in full, different results would have followed according as the jurisdiction in which the case arose was English or American. In England, the insurance company could have recovered from Spencer (agreeably with the rule laid down in Castellain *v.* Preston) so much of the purchase money as was equivalent to the policy money. If this were not so, the vendor, instead of being merely indemnified would make a profit. The vendee would not be entitled to the proceeds of the policy, for the insurance was not effected for his benefit, and being a personal contract, does not run with the land. Nor, as has been seen, will the English Courts carry the doctrine of trusteeship far enough to protect him. In the United States, however, (if the doctrine of the principal case is correct), it would seem that the lessor, under such an arrangement as that before the Court, is a trustee for the lessee with the option to purchase, just as in the case of vendor and vendee under articles. It follows, therefore, that even if Spencer had effected the insurance in the principal case in his own name, the vendee would have been entitled to call him to an account in equity for the policy money. Accordingly, it should seem to be clear that the vendee, upon completing the purchase has an even stronger claim to the policy money, where, as here, the insurance was effected "as interest may appear."

GEORGE WHARTON PEPPER.

[NOTE:—In the March number of the American Law Register and Review there will appear a comment upon the case of Castellain *v.* Preston (*supra*), by GEORGE RICHARDS, Esq.]

DEPARTMENT OF PROPERTY.

EDITOR-IN-CHIEF,
HON. CLEMENT PENROSE.
Assisted by
ALFRED ROLAND HAIG. WILLIAM A. DAVIS. JOSEPH T. TAYLOR.

BURY *v.* YOUNG ET AL.[1] SUPREME COURT OF CALIFORNIA.

Deed—Validity—Delivery to third person with instructions not to deliver to grantees till death of grantor.

When the grantor executes a deed of real estate, and delivers it to a third party, with instructions merely to hold it, without recording, until his death, and then to deliver it to the grantees, the grantor cannot recall the deed, nor alter its provisions, and has no interest in the land, except a life estate; the delivery to the depositary makes him a trustee of the deed for the grantees; and his subsequent delivery to them, in pursuance of his instructions, is a valid delivery, though made after the death of the grantor, for the estate vests at the time of the delivery to him.

[1] Reported in 33 Pac. Rep. 338.

STATEMENT OF FACTS.

The plaintiff, in the above case, Mrs. Bury, and the defendant, Mrs. Young, were sisters, daughters of one M. A. Hinkson. Their father, while suffering from a paralytic stroke, called to his bedside one Hazen, an attorney-at-law, for legal advice as to the disposition of his property; and acting upon his advice, signed and acknowledged a grant deed of his real estate, in which his aforesaid daughters were named as grantees. This deed he gave to Hazen with instructions not to record it, but to deliver it to the grantees upon his death. He appears to have recovered from his sickness, and afterwards endeavored to secure possession of the deed from Hazen, but without success. He then subsequently made a will devising all his real estate to Mrs. Young. After his death Hazen delivered the deed in question to Mrs. Bury, who brought this action of partition, and relied on the deed to support her claim. This the Court upheld, on the ground that the title passed with the delivery to Hazen.

VALIDITY OF A DEED NOT TO TAKE EFFECT UNTIL THE DEATH OF THE GRANTOR.

The limitation of the operation of a deed till after the death of the grantor may be effected in two ways: 1st, by clearly expressing that intention in the instrument itself, as by the reservation of a life estate in the grantor, or by other apt forms of expression; and, 2d, by some act dehors the instrument, as by retaining it in the hands of the grantor, or by depositing it in the hands of a third party, with instructions not to deliver it till after the grantor's death.

I. It is scarcely necessary to cite cases to the effect that a deed reserving a life-estate to the grantor is valid, other things being equal; but its validity is not so clear when the intention so to reserve is not expressed in proper technical terms. A deed that, by its own language, is limited to take effect after the death of the grantor, of necessity borders closely on the line of testamentary dispositions; and when once it crosses that line, however good it may be as a will, it can no longer be held valid *as a deed:* Vreeland *v.* Vreeland (N. J.), 21 Atl. Rep. 627. Whether the instrument is one thing or the other is a pure question of construction to be gathered only from its own, terms. The form matters nothing. The true test is whether the estate granted is intended to pass to the grantee upon delivery, or not until after the death of the grantor.

(*a.*) In the first case, the instrument is a deed, reserving a life estate to the grantor by implication: Carns *v.* Jones, 5 Yerg. (Tenn.) 248; Elmore *v.* Mustin, 28 Ala.

309; Golding *v.* Golding, 24 Ala. 122; Macumber *v.* Bradley, 28 Conn. 445; McGlawn *v.* McGlawn, 17 Ga. 234; Johnson *v.* Hines, 31 Ga. 720; Daniel *v.* Veal, 32 Ga. 589; Clayton *v.* Livermore, 7 Ired. (N. C. L.) 92; Wall *v.* Wall, 30 Miss. 91; Folk *v.* Varny, 9 Rich. Eq. 303; Williams *v.* Sullivan, 10 Rich. Eq. 217. Though made in expectation of death: Brown *v.* Atwater, 25 Minn. 520. When the instrument contained the words, "give, grant and convey," in one clause, followed by "to have and to hold after my death," in the next, it was held a deed, not a will, on the ground that it was a grant of a present estate, the enjoyment of which was not to begin until the event specified should occur: Johnson *v.* Hines, *supra*. And so when the land was conveyed, "after my decease, and not before," these words were held to show merely that the use and enjoyment of the estate granted was postponed until that time: Owen *v.* Williams, 114 Ind. 179; S. C., 15 N. E. Rep. 678.

(*b.*) In the second case, where the estate does not pass *in præsenti*, by the terms of the instrument, but only at the death of the grantor, it can operate only as a will, for a post mortem disposition of property cannot be made by deed; and must, of course, be executed with all the formalities of a will in order to be held valid: Habergham *v.* Vincent, 2 Ves. Jr., on p. 231; Wellborn *v.* Weaver, 17 Ga. 267; Carey *v.* Dennis, 13 Md. 1; Bigley *v.* Souvey, 45 Mich. 370; S. C., 8 N. W. Rep. 98; Sartor *v.* Sartor, 39 Miss. 760; Rose *v.* Quick, 30 Pa. 225; Frederick's App., 52 Pa. 338; Frew *v.* Clarke, 80 Pa. 170; Carlton *v.* Cameron, 54 Tex. 72; Jones *v.* Loveless, 99 Ind. 317. When a grantor reserves to himself the use of all the property granted during his natural life, "then to go to the above named persons, and from thenceforth to be their property absolutely," the instrument is a testamentary paper, not a deed; Symmes *v.* Arnold, 10 Ga. 506; See Cravy *v.* Rawlins, 8 Ga. 450. And the words, "give and devise . . . the property I may die possessed of," make an instrument a will, though in the form of a deed. Brewer *v.* Baxter, 41 Ga. 212.

This distinction is one of great practical importance; for if the instrument is a deed, it is of course irrevocable when once delivered, and rights acquired under it cannot be affected, other things being equal, by subsequent conveyances, wills, or the rights of creditors; while, if it is a will, it is, of course, subject to all these. And it would seem that in some cases this very matter of the intervention of subsequently acquired rights has been an important factor in settling the question of the proper classification of the instrument: See Jones *v.* Loveless, 99 Ind. 317; Owen *v.* Williams, 114 Ind. 179; S. C., 15 N. E. Rep. 678.

II. When a deed, absolute in its terms, and containing no reservation of any estate in the grantor, is signed, sealed and acknowledged, but never delivered, and is retained in the possession of the grantor until his death, subsequent possession of it by the grantee can confer no title upon him, because it is void for want of delivery: Cline *v.* Jones, 111 Ill. 563; Anderson *v.* Anderson (Ind.), 24 N. E. Rep. 1036; Miller *v.* Murfield, (Iowa) 44 N. W. Rep. 540; Martling *v.* Martling (N. J.), 20 Atl. Rep. 41. And the fact of such re-

tention is strong *prima facie* evidence that the instrument was intended to operate as a will, not as a deed: Schuffert *v.* Grote, 88 Mich. 650; Stilwell *v.* Hubbard, 20 Wend. (N. Y.), 44. It would hardly be likely, however, that such a deed would be upheld as a will merely on the strength of this presumption. It is difficult to see what principle could be invoked to support such a ruling. But, though the presumption is that a deed retained by the grantor in his possession has not been delivered, there may be facts connected with and qualifying that retention, which amount to a valid delivery, as when the deed has been recorded: Glaze *v.* Ins. Co., 87 Mich. 349; S. C., 49 N. W. Rep. 595; Colee *v.* Colee, 122 Ind. 109.

III. So far, the question of the validity of the deeds under consideration has been almost purely a question of construction, dependent upon the language of the instrument and its legal effect, the only question of fact being as to the delivery. But in the class of deeds we are now about to discuss the intention of the grantor, in the previous cases to be gathered from the instrument itself, and so a question of law, becomes also a question of fact to be decided from the circumstances attendant upon the execution and delivery of the deed. These deeds are those which, though absolute in form, are delivered to a third person, with the understanding that they are not to be delivered to the grantee until the death of the grantor, thus virtually securing a life estate to the latter.

The first question is, of course, whether such a delivery is sufficient to pass the title to the grantee. It is beyond controversy that delivery need not be made to the grantee in a deed personally; it may be made to another for his use, and it makes no difference when he receives the deed: Sneathen *v.* Sneathen, 104 Mo. 201; or, for that matter, whether he receives it at all. The title passes with the delivery to the depositary, unless the grantor retains some power of control or revocation, in which case there is no delivery: Duer *v.* James, 42 Md. 492; Bovee *v.* Hinde, 135 Ill. 137. The delivery, then, is sufficient, unless the instrument is to be considered as testamentary. But we have already seen that a mere postponement of the enjoyment of an estate granted will not make the instrument conveying it a testamentary paper: See cases cited *ante*, I (*a*). The whole question, then, resolves itself into this: Did the grantor intend to convey a present estate to the grantee, merely postponing his enjoyment of it until his death, or did he intend the estate to vest only upon that event?

There are two classes of deeds, to which these bear a close resemblance:—escrows, and deeds to be delivered on the happening of some future event. But there is a clear distinction between the two. An escrow, the second delivery of which is dependent upon the performance of a condition, of necessity can vest no estate until the performance of that condition; and the title, therefore, passes only upon the second delivery, that from the depositary to the grantee, except in rare cases, where the rights of third parties have intervened, or the grantor has done some act which would defeat the

estate granted, if the strict rule were adhered to; and in which the title is accordingly held to vest by relation to the first delivery: Price *v.* Pitts., Ft. Wayne & Chic. R. R. Co., 34 Ill. 13; Shirley *v.* Ayres, 14 Ohio, 307. But when the final delivery of a deed only awaits the lapse of time, or some contingency, as, for example, when the grantee shall come to town, the title is held to vest in the grantee upon the delivery to the depositary, and the latter is only a trustee of the deed for the benefit of the grantee: 13 Vin. Abr. tit., Faits or Deeds, p. 23, pl. 9; Bryan *v.* Wash, 7 Ill. 557; Cook *v.* Hendricks, 4 T. B. Monroe (Ky.), 500; *contra*, Demesmey *v.* Gravelin, 56 Ill. 93.

The class of deeds under consideration can hardly be properly classed with escrows, though this has sometimes been done; for there is, in these, no condition to be performed by the grantee. And further, if they are so classed, it would be difficult to find any principle upon which they could be held valid; for the title to the estate conveyed by an escrow dates only, as has been said, from the second delivery, except when there are circumstances that would render the strict application of the rule inequitable. Applying this rule, where no rights of third parties had intervened, the title conveyed by deeds of this class would vest only after the death of the grantor, and that would make them operative only as testamentary dispositions. Even when the rights of third parties had intervened, there would be no true equity in following the rule as to escrows, for as these deeds are almost always purely voluntary, the grantee can have no superior equity against intervening rights. But, on the other hand, these deeds present an almost perfect analogy with deeds to be delivered on the happening of some future event, both in their nature and their operation; and should be preferably classed with them.

Accordingly, it is the general doctrine that when a deed, absolute on its face, is delivered to a third party, to be by him delivered to the grantee after the death of the grantor, the delivery is absolute, if the grantor retains no control or dominion over the deed in the hands of the depositary; the effect of the conveyance is to vest the estate in the grantee, subject to a life estate in the grantor; the depositary becomes a trustee of the deed for the grantee; and the delivery of the deed by him, in pursuance of the grantor's instruction, is, to all intents and purposes, as valid as if made by the grantor during his life: Doe *v.* Bennett, 8 C. & P. 124; McCalla *v.* Bane, 45 Fed. Rep. 828; Stewart *v.* Stewart, 5 Conn. 317; Hockett *v.* Jones, 70 Ind. 227; Squires *v.* Summers, 85 Ind. 252; Smiley *v.* Smiley, 114 Ind. 258; Goodpaster *v.* Leathers, 123 Ind. 121; Hinson *v.* Bailey (Iowa), 35 N. W. Rep. 626; Wheelwright *v.* Wheelwright, 2 Mass. 447; Foster *v.* Mansfield, 3 Metc. (Mass.) 412; O'Kelly *v.* O'Kelly, 8 Metc. (Mass.) 436, 439; Hatch *v.* Hatch, 9 Mass. 307, Latham *v.* Udell, 38 Mich. 238; Williams *v.* Latham (Mo.), 20 S. W. Rep., 99; Parker *v.* Dustin, 2 Fost. (N. H.) 424; Hathaway *v.* Payne, 34 N. Y. 92; Diefendorf *v.* Diefendorf, 8 N. Y. Suppl. 617; Crain *v.* Wright, 114 N. Y. 307; Crooks *v.* Crooks, 34 Ohio St. 610; Ball *v.* Foreman,

37 Ohio St. 132; Geisinger's Est., 11 Pa. C. C. R. 168; Stephens *v.* Huss, 54 Pa. 20; Stephens *v.* Rinehart, 72 Pa. 434; Albright *v.* Albright (Wis.), 36 N. W. Rep. 254; Bury *v.* Young (Cal.), the principal case, 33 Pac. Rep. 338. But see Stone *v.* Duvall, 77 Ill. 475. Even if the depositary deliver the deed to the grantee before the death of the grantor, in breach of his trust, the delivery will be good to vest the estate at the death of the grantor: Wallace *v.* Harris, 32 Mich. 380. But he will not be allowed to oust or disturb the latter during his lifetime: Alsop *v.* Eckles, 81 Ill. 424. The rights of third persons, in the absence of fraud, will not be allowed to intervene: Smiley *v.* Smiley, 114 Ind. 258; *contra*, Davis *v.* Cross, 14 Lea (Tenn.), 637. And a conveyance of the estate, made by the grantee, before the death of the grantor, is sufficient to pass his title thereto: Tooley *v.* Dibble, 2 Hill (N. Y.), 641. When part of the land conveyed was taken by a railroad company subsequent to the delivery of the deed to the depositary, the damages therefor were held to go to the grantees of the estate, not to the executor of the grantor: Geisinger's Est., 11 Pa. C. C. R. 168.

If, however, the grantor manifest an intention that no present estate shall vest in the grantee, the delivery to the depositary is not a delivery to him, and his title can date only from the second delivery. In such a case, the depositary is the agent of the grantor, not of the grantee, and, his authority being revoked by the death of his principal, his delivery of the deed after the death of the latter, can vest no title in the grantee. Accordingly, any retention of control or dominion over the deed in the hands of the depositary, which is acknowledged on all sides to show an intention that the estate shall not finally pass from the grantor at the time of the delivery to the depositary, will make the instrument a mere testamentary disposition, and therefore invalid as a deed: Wellborn *v.* Weaver, 17 Ga. 267; Stinson *v.* Anderson, 96 Ill. 373; Hale *v.* Joslin, 134 Mass. 310; Weisinger *v.* Cock, 67 Miss. 511; Baker *v.* Haskell, 47 N. H. 479; Prutsman *v.* Baker, 30 Wis. 644. The reservation of a right on the part of the grantor to withdraw the deed at any time before his death: Brown *v.* Brown, 66 Me. 316. The delivery to the depositary with instructions to deliver it to the grantee, "provided it is not previously recalled:" Cook *v.* Brown, 34 N. H. 460. And directions as follows: "Take this deed and keep it. If I get well I will call for it. If I don't, give it to Billy (the grantee):" Williams *v.* Schatz, 42 Ohio St. 47, have been held to show such a retention of control as will render the deed nugatory.

As the grantor, in such a case, has the right to rescind or recall the deed at pleasure, the mere fact that the grantee gets possession of it and records it will not confer any title on him: Pennington *v.* Pennington, 75 Mich. 600.

A few old cases are in opposition to this rule, holding that when the deed is delivered to the depositary, subject to the grantor's control, the delivery by the former to the grantee after the death of the grantor will pass the title, if that right of control is never, in fact, exercised. But these rest upon very insufficient grounds, and can-

not prevail against the weight of authority cited above: See Belden *v.* Carter, 4 Day (Conn.), 66; Shed *v.* Shed, 3 N. H. 432 (expressly overruled in Cook *v.* Brown, 34 N. H. 460); Morse *v.* Slason, 13 Vt. 296.

Though such an instrument is not valid as a deed, it may, nevertheless, if executed with the proper formalities, as we have seen, be good as a will; but in that case will of course be subject to all rights of third persons that have intervened between the date of its delivery to the depositary and the death of the grantor: Jones *v.* Loveless, 99 Ind. 317.

It only remains to consider the manner in which such a deed, when valid, takes effect. A number, perhaps the majority of the cases, hold that it vests the title by relation to the first delivery. But there are a very respectable list of well-considered cases that hold that the title vests in the grantee immediately on the delivery to the depositary. This seems to be in every regard the better view. The cases that hold the title to vest by relation have undoubtedly been misled by the impression that these deeds were similar to an escrow, an impression that we have seen to be without foundation. The doctrine of relation is even in the case of an escrow only permitted to defeat intervening rights; and that would be a poor excuse in the case of a voluntary deed. Further, the first delivery in case of an escrow is conditional, and cannot vest title except by relation; while in the cases under consideration, the first delivery *must* be absolute in order to vest any title, by the second delivery, and if so, what is to prevent its vesting the title of itself, without regard to the second? On every ground, then, the latter doctrine is more consonant with reason, principle and justice.

To sum up the results of the preceding discussion: 1. Any deed, which purports to convey a present estate, even though that estate is not to be enjoyed until the death of the grantor, is valid as a deed, unless never delivered, either to the grantee or some person for him. 2. A deed, delivered to a third person with instructions not to deliver it to the grantee till after the death of the grantor, is valid as a deed, if that delivery be absolute; and vests a present estate in the grantee, the depositary being a trustee of the deed for him; but is of no effect as such, if the delivery is made subject to the subsequent control or dominion of the grantor. 3. Any instrument, evincing an intention to make a post-mortem disposition of property, though nugatory as a deed, will be valid as a testamentary paper, if executed with the requisite formalities of a will. 4. But a deed, purporting to convey a present interest, which is never delivered, but simply retained in the possession of the grantor till his death, whatever may be presumed to have been his intention in so retaining it, will be of no effect, either as a deed or as a will, unless there is some direct proof that it was intended to operate as the latter. *R. D. S.*