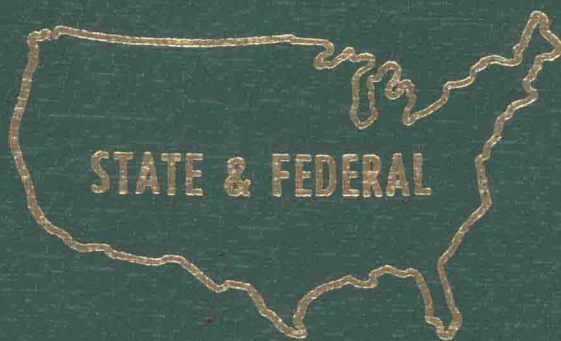


AMERICAN JURISPRUDENCE 2d



ESCROW

ESTOPPEL AND WAIVER

AMERICAN JURISPRUDENCE

SECOND EDITION

A MODERN COMPREHENSIVE TEXT STATEMENT
OF AMERICAN LAW

STATE AND FEDERAL

COMPLETELY REVISED AND REWRITTEN
IN THE LIGHT OF MODERN AUTHORITIES AND DEVELOPMENTS
BY THE EDITORIAL STAFF OF THE PUBLISHERS

VOLUME 28

ESCROW
TO
ESTOPPEL AND WAIVER

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AMERICAN JURISPRUDENCE

SECOND EDITION

Volume 28

ESCROW

Scope of Topic: This article covers the deposit of written instruments or money by one party to a transaction, or his agent, with a depository, to be kept by the latter until the performance of a condition or the happening of a contingency, and then to be delivered to the other party to the transaction. Treated herein are all matters relating to the definition and nature of escrow; the creation, form, and requisites of an escrow; the competency, duties, and liabilities of escrow agents or depositories; the performance of the escrow condition or occurrence of the escrow contingency; the time and manner of operation of the instrument which is the subject of escrow; and procedural questions peculiar to litigation involving escrows.

Treated elsewhere are estates upon condition (see *ESTATES*); the delivery of deeds which constitute the grantor's deed presently (see 23 Am Jur 2d, *DEEDS*); the effect of deeds delivered in escrow as satisfying the statute of frauds (see *STATUTE OF FRAUDS*); and the delivery of negotiable instruments in escrow (see 11 Am Jur 2d, *BILLS AND NOTES* § 280).

Federal Aspects: Property in escrow as assets of a bankrupt is treated in 9 Am Jur 2d, *BANKRUPTCY* § 902.

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I. IN GENERAL

§ 1. Definition and nature.

An escrow fills a definite niche in the body of the law; it has a distinct legal character.¹ The usual definition is that an escrow is a written instrument which by its terms imports a legal obligation and which is deposited by the grantor, promisor, or obligor, or his agent with a stranger or third party, to be kept by the depository until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee, or obligee.²

Delivery as an escrow is defined as a delivery on some collateral condition

1. *Squire v Branciforti*, 131 Ohio St 344, 2 NE2d 878.

2. *Gulf Petroleum, S. A. v Collazo* (CA1 Puerto Rico) 316 F2d 257; *Munger v Perlman Rim Corp.* (CA2 NY) 275 F 21, cert den 257 US 645, 66 L ed 413, 42 S Ct 54; *Ashford v Prewitt*, 102 Ala 264, 14 So 663; *Love v Brown Development Co.* 100 Fla 1373, 131 So 144; *Ullendorff v Graham*, 80 Fla 845, 87 So 50; *Whitney v Dewey*, 10 Idaho 633, 80 P 1117; *Main v Pratt*, 276 Ill 218, 114 NE 576; *Yost v Miller*, 74 Ind App 673, 129 NE 487; *Vaughan v Vaughan*, 161 Ky 401, 170 SW 981; *Wampler v Wampler*, 239 La 315, 118 So 2d 423; *Hubbard v Greeley*, 84 Me 340, 24 A 799; *Van Valkenburg v Allen*, 111 Minn 333, 126 NW 1092; *Killeen v Doran*, 118 Neb 750, 226 NW 435;

State Bank v Evans, 15 NJL 155; *Jackson ex dem. Gratz v Catlin* (NY) 2 Johns 248, affd 8 Johns 520; *Squire v Branciforti*, 131 Ohio St 344, 2 NE2d 878; *Home-Stake Royalty Corp. v McClish*, 187 Okla 352, 103 P2d 72; *McPherson v Barbour*, 93 Or 509, 183 P 752; *Foulkes v Sengstacken*, 83 Or 118, 158 P 952, 163 P 311; *Angelcyk v Angelcyk*, 367 Pa 381, 80 A2d 753; *Brockington v Lynch*, 119 SC 273, 112 SE 94; *Day v Townsend* (Tex Civ App) 238 SW 213; *Smith v South Royalton Bank*, 32 Vt 341; *Nash v Fugate*, 73 Va (32 Gratt) 595; *McLain v Healy*, 98 Wash 489, 168 P 1.

The term "escrow" is derived from a French word meaning bond or writing. *Stonewall v McGown* (Tex Civ App) 231 SW 850.

Generally speaking, when a deed is deliv-

which must be consistent with the contract, on the happening of which condition alone the contract is to take effect.³

The instructions by the parties to the depositary concerning the delivery and taking effect of the escrow instrument constitute what the law denominates the "escrow agreement," which is a different thing from the instrument placed in escrow.⁴

The deposit of a deed in escrow to be delivered after payment of the purchase price in instalments is not within the rule against perpetuities, since it does not purport to convey a legal interest presently to take effect at a time offensive to the rule.⁵

§ 2. Subjects of escrow.

While originally the doctrine of escrow applied only to deeds by way of grant,⁶ or as otherwise stated, instruments for the conveyance of land,⁷ under modern theories of law, the term "escrow" is not limited in its application to deeds, but is applied to the deposit of any written instrument with a third person.⁸ Thus, written instruments with reference to a great many types of

ered by the grantor to a stranger, to be delivered to the grantee on the performance of some condition, it is considered an escrow. *Levin v Nedelman*, 141 NJ Eq 23, 55 A2d 826, revd on other grounds 142 NJ Eq 769, 61 A2d 76.

The distinctive feature of an escrow is the delivery of a deed to a third person to await the performance of some condition, whereupon the deed is to be delivered to the grantee and the title is to pass. *Seibel v Higham*, 216 Mo 121, 115 SW 987.

A deed may be delivered to a stranger as an escrow, which means a conditional delivery to a stranger, to be kept by him until certain conditions are performed, and then to be delivered over to the grantee. *Spring Garden Bank v Hulings Lumber Co.* 32 W Va 357, 9 SE 243.

While the term "escrow" was originally applied to instruments for the conveyance of land, an escrow as now interpreted is a writing delivered to a third person to hold until the happening of some event, as until it is signed by another party, the consideration paid, or a suit is dismissed; and until the event happens or the condition is performed, it can have no effect. *Vaughan v Vaughan*, 161 Ky 401, 170 SW 981.

The definition stated in the text deals with a grantor alone, but the law is progressive, and in Ohio the grantee, promisee, or obligee may impose conditions in the escrow instrument or agreement that have the same binding effect upon the escrow agent as those of the grantor, promisor, or obligor. An escrow in Ohio as between grantor and grantee of real estate is witnessed by a written instrument known as an escrow agreement, which is delivered by mutual consent of both parties to a third party denominated the depositary or escrow agent, in which instrument certain conditions are imposed by both

grantor and grantee, which conditions the depositary or escrow agent, by the acceptance and retention of the escrow agreement, agrees to observe and obey. *Squire v Branciforti*, 131 Ohio St 344, 2 NE2d 878.

3. *Whitlow v Jennings*, 40 Hawaii 523; *State v Perry (Ohio)* Wright 662.

A lucid definition of what an escrow is and how it is to be delivered is given in *Sheppard's Touchstone*, page 58. "The delivery of a deed as an escrow," says the author, "is said to be when one doth make and seal a deed and deliver it unto a stranger, until certain conditions be performed, and then be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such deed is good. But in this case, two conditions must be heeded: first, that the form of the words used in the delivery of a deed in this manner be apt and proper; second, that the deed be delivered to one that is a stranger to it and not to the party himself to whom it is made." *Miller v Fletcher*, 68 Va (27 Gratt) 403; *Ward v Churn*, 59 Va (18 Gratt) 801.

4. *Home Ins. Co. v Wilson*, 210 Ky 237, 275 SW 691.

5. *Anderson v Anderson*, 15 Utah 2d 7, 386 P2d 406, pointing out that the purchaser acquired no legal title under the escrow agreement and that the grantor could convey the fee, subject to knowledge on the part of the grantee.

6. *Jordan v Jordan*, 78 Tenn (10 Lea) 124.

7. *Vaughan v Vaughan*, 161 Ky 401, 170 SW 981; *Moore Mill & Lumber Co. v Curry County Bank*, 200 Or 558, 267 P2d 202.

8. *Gulf Petroleum, S. A. v Collazo* (CA1

agreements, including formal conveyances, sealed contracts, and simple written agreements, for many purposes have been held to be properly the subject of delivery in escrow; and in all such cases, the law of escrow is substantially the same.⁹

Particular instruments which have been held to be the subject of an escrow include bonds¹⁰ or covenants,¹¹ deeds,¹² mortgages,¹³ oil and gas leases,¹⁴ contracts for the sale of land¹⁵ or for the purchase of personal property,¹⁶ corporate stocks¹⁷ and stock subscriptions,¹⁸ promissory notes or other commercial paper,¹⁹ insurance applications²⁰ and policies,¹ contracts for the settlement of

Puerto Rico) 316 F2d 257; Vaughan v Vaughan, 161 Ky 401, 170 SW 981; Ganser v Zimmerman (ND) 80 NW2d 828; Moore Mill & Lumber Co. v Curry County Bank, 200 Or 558, 267 P2d 202; Eaton v New York L. Ins. Co. 315 Pa 68, 172 A 121, 95 ALR 462; Alexander v Wilkes, 79 Tenn (11 Lea) 221.

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10. Pawling v United States (US) 4 Cranch 219, 2 L ed 601; Millett v Parker, 59 Ky (2 Met) 608; Alexander v Wilkes, 79 Tenn (11 Lea) 221; Rhodes v Walton, 163 Va 360, 175 SE 865, 176 SE 472.

11. Jordan v Jordan, 78 Tenn (10 Lea) 124.

12. Ashford v Prewitt, 102 Ala 264, 14 So 663; Conneau v Geis, 73 Cal 176, 14 P 580; Foy v Blackstone, 31 Ill 538; Foley v Cowgill (Ind) 5 Blackf 18; Hubbard v Greeley, 84 Me 340, 24 A 799; Daggett v Simonds, 173 Mass 340, 53 NE 907; Wheelwright v Wheelwright, 2 Mass 447; Taft v Taft, 59 Mich 185, 26 NW 426; Seibel v Higham, 216 Mo 121, 115 SW 987; Gilbert v North American F. Ins. Co. (NY) 23 Wend 43; Jackson ex dem. Gratz v Catlin (NY) 2 Johns 248, affd 8 Johns 520; Jordan v Jordan, 78 Tenn (10 Lea) 124; Wilkins v Somerville, 80 Vt 48, 66 A 893; Nash v Fugate, 73 Va (32 Gratt) 595.

Practice Aids.—Escrow in connection with conveyance of realty. 5 AM JUR LEGAL FORMS 5:801–5:803, 5:805, 5:806.

13. Phillips v Sipsey Coal Min. Co. 218 Ala 296, 118 So 513; Davis v Clark, 58 Kan 100, 48 P 563; Ganser v Zimmerman (ND) 80 NW2d 828.

Practice Aids.—Escrow in connection with mortgage. 5 AM JUR LEGAL FORMS 5:804.

14. Chaffin v Harpham, 166 Ark 578, 266 SW 685; Smith v Star Petroleum Co. 103

Cal App 130, 283 P 960; Wampler v Wampler, 239 La 315, 118 So 2d 423; Gypsy Oil Co. v Marsh, 121 Okla 135, 248 P 329, 48 ALR 876.

Practice Aids.—Escrow in connection with gas and oil lease. 5 AM JUR LEGAL FORMS 5:807.

15. Gulf Petroleum, S. A. v Collazo (CA1 Puerto Rico) 316 F2d 257; Scott v Stone, 72 Kan 545, 84 P 117; Naylor v Stene, 96 Minn 57, 104 NW 685; Worrall v Munn, 5 NY 229; Angell v Ingram, 35 Wash 2d 582, 213 P2d 944, 15 ALR2d 865.

Practice Aids.—Escrow in connection with conveyance of realty. 5 AM JUR LEGAL FORMS 5:801–5:803.

16. J. I. Case Threshing Mach. Co. v Barnes, 133 Ky 321, 117 SW 418.

A valid escrow is established where a machine is sold and notes taken for the price are handed to the seller's agent, along with the contract of purchase and a chattel mortgage on the machine, to hold for the seller if the machine stands the test of trial, and if it does not stand such test, to be returned to the purchaser. J. I. Case Threshing Mach. Co. v Barnes, supra.

17. American Service Co. v Henderson (CA4 NC) 120 F2d 525, 135 ALR 1414; Clarke v Eureka County Bank (CC Nev) 123 F 922, affd (CA9) 130 F 325, cert den 195 US 631, 49 L ed 353, 25 S Ct 788; Bailey v Security Trust Co. 179 Cal 540, 177 P 444.

Practice Aids.—Escrow in connection with sale of stock. 5 AM JUR LEGAL FORMS 5:808, 5:809.

18. Wight v Shelby R. Co. 55 Ky (16 B Mon) 4; Beloit & M. R. Co. v Palmer, 19 Wis 574.

19. See 11 Am Jur 2d, BILLS AND NOTES § 280.

20. Price v Home Ins. Co. 54 Mo App 119; Confederation Life Assco. v O'Donnell, 13 Can SC 218.

1. McCabe v Hartford Acci. & Indem. Co. 90 NH 80, 4 A2d 661.

will-contest cases,² indentures of apprenticeship,³ receipts assigning concessions,⁴ and discontinuances and releases of causes of action.⁵ Moreover, it is no longer open to question that money may be delivered in escrow.⁶

II. CREATION, FORM, AND REQUISITES

§ 3. Generally.

No precise form of words is necessary to constitute an escrow.⁷ The term "escrow" need not be used.⁸ Merely labeling a specific delivery of property as an escrow does not make it such,⁹ nor will the misuse of that term in designating an instrument necessarily make it an escrow.¹⁰ However, the use of the term is a circumstance to be considered in arriving at the intent of the parties.¹¹

While a distinction has been recognized by some authorities between the delivery of an instrument, such as a deed, to a third person as a trustee or agent, to be delivered to the grantee upon the happening of some contingency or the performance of a condition, and the delivery of the instrument as an escrow, to take effect as a deed, upon such contingency happening or condition

2. Where a contract for the settlement of a will contest is executed by the defendant on the condition precedent that it shall become legally effective when it is signed by the remaining parties in interest, and it is left in the hands of the draftsman for that purpose, but is never executed by several of the remaining parties, it is a mere escrow and unenforceable. *Vaughan v Vaughan*, 161 Ky 401, 170 SW 981.

3. *Millership v Brookes*, 5 Hurlst & N 797, 157 Eng Reprint 1399.

4. *Havana City R. Co. v Caballos* (CA2 NY) 139 F 538.

5. *Tucker v Dudley*, 113 App Div 500, 99 NYS 339.

6. *American Service Co. v Henderson* (CA4 NC) 120 F2d 525, 135 ALR 1414. See *Nash v Normandy State Bank* (Mo) 201 SW2d 299; *Moore Mill & Lumber Co. v Curry County Bank*, 200 Or 558, 267 P2d 202.

Practice Aids.—Escrow of deposit in bank. 5 AM JUR LEGAL FORMS 5:810.

7. *Conner v Helvik*, 105 Mont 437, 73 P2d 541; *Kunick v Trout* (ND) 85 NW2d 438; *McPherson v Barbour*, 93 Or 509, 183 P 752; *Foulkes v Sengstacken*, 83 Or 118, 158 P 952, 163 P 311; *Smith v South Royalton Bank*, 32 Vt 341; *Ward v Churn*, 59 Va (18 Gratt) 801.

8. *State v Thatcher*, 41 NJL 403; *State Bank v Evans*, 15 NJL 155; *Gilbert v North American F. Ins. Co.* (NY) 23 Wend 43; *McPherson v Barbour*, 93 Or 509, 183 P 752;

Lechner v Halling, 35 Wash 2d 903, 216 P2d 179.

Bowker v Burdekin, 11 Mees & W 128, 152 Eng Reprint 744 (per Parke, B.).

9. *American Service Co. v Henderson* (CA4 NC) 120 F2d 525, 135 ALR 1414.

The fact that a bank receiving a sum of money upon stated conditions deposits it in its "escrow account" is not controlling as to the true character of the transaction. *Moore Mill & Lumber Co. v Curry County Bank*, 200 Or 558, 267 P2d 202.

The return by the purchaser's representative of a contract for the sale of land to the vendor's lawyer to hold until the purchaser made up his mind did not constitute an escrow, notwithstanding that it was so-called by the purchaser's representative. *Farago v Burke*, 262 NY 229, 186 NE 683.

10. *McPherson v Barbour*, 93 Or 509, 183 P 752.

In *Stephan v Lagerqvist*, 52 Cal App 519, 199 P 52, it was held that the delivery of savings certificates as security for the payment of a sum of money was a pledge and not a delivery in escrow, notwithstanding that the receipt termed the delivery one in escrow, since the character of a document or transaction cannot be made to depend upon misnomer but must be determined from the facts.

11. *Kunick v Trout* (ND) 85 NW2d 438; *Lechner v Halling*, 35 Wash 2d 903, 216 P2d 179.

When they do employ that term, it indicates more clearly than any other word the actual intent of the parties. *Foulkes v Sengstacken*, 83 Or 118, 158 P 952, 163 P 311.

performed,¹² it is now generally well established that the question whether a deed is to be considered as the deed of the grantor presently or as an escrow is to be determined from the words used and the purposes expressed rather than upon the name which the parties may happen to give to the instrument.¹³ In all cases the question whether an instrument placed with a third person is to be an escrow or a completely executed instrument depends on the intention of the parties,¹⁴ and is generally a question of fact to be determined by the jury.¹⁵ Where the language of an escrow is vague and indefinite, however, it is the duty of the court to inquire into the circumstances and conditions surrounding the execution of a written escrow agreement to ascertain the intention and actual meaning of the parties.¹⁶

An escrow may be terminated by the parties before compliance with its provisions.¹⁷

§ 4. The contract.

Many authorities lay down the rule that in order that an instrument may operate as an escrow when delivered to one not a party to the instrument, to be delivered over in turn to a party to the instrument upon the performance of certain conditions, there must be a valid contract between all the parties as to the subject matter of the instrument and the delivery, and that in the absence of such a contract, the party making the delivery may recall the instrument.¹⁸ Accordingly, not only must there be sufficient parties, a proper

12. *Wheelwright v Wheelwright*, 2 Mass 447; *Martin v Flaharty*, 13 Mont 96, 32 P 287.

See *State Bank v Evans*, 15 NJL 155 (commenting on rule and refusing to follow it).

13. *Foster v Mansfield*, 44 Mass (3 Met) 412; *State Bank v Evans*, 15 NJL 155.

Bowker v Burdekin, 11 Mees & W 128, 152 Eng Reprint 744; *Gudgen v Besset*, 6 El & Bl 986, 119 Eng Reprint 1131.

A memorandum indorsed by the cashier of a bank upon an envelope containing the contract for the sale of land and a vendee's check, stating that these items were to be held "in escrow" until a specified date pending the furnishing of an abstract, is not the complete expression of the agreement of the parties, but must be read in connection with the contract of sale, where such memorandum is unintelligible except by such reference. *Citizens Nat. Bank v Davisson*, 229 US 212, 57 L ed 1153, 33 S Ct 625.

14. *Zweifach v Scranton Lace Co.* (DC Pa) 156 F Supp 384; *Ashford v Prewitt*, 102 Ala 264, 14 So 663; *Price v Pittsburg, Ft. W. & C. R. Co.* 34 Ill 13; *Eddy v Pinder*, 131 Me 139, 159 A 727; *Foulkes v Sengstacken*, 83 Or 118, 158 P 952, 163 P 311.

Whether a grant is in escrow and subject to conditions depends upon the intention of the parties as manifested by their expressed words and purposes. *Kunick v Trout* (ND) 85 NW 2d 438.

15. *Hatch v Hatch*, 9 Mass 307; *Wheel-*

wright v Wheelwright, 2 Mass 447; *Jackson ex dem. Gratz v Catlin* (NY) 2 Johns 248, affd 8 Johns 520; *Northern Trust Co. v Bruegger*, 35 ND 150, 159 NW 859.

16. *Clarke v Eureka County Bank* (CC Nev) 123 F 922, affd (CA9) 130 F 325, cert den 195 US 631, 49 L ed 353, 25 S Ct 788; *Los Angeles City High School Dist. v Quinn*, 195 Cal 377, 234 P 313; *Shire v Farmers State Bank*, 112 Kan 690, 213 P 159.

17. *Orloff v Metropolitan Trust Co.* 17 Cal 2d 484, 110 P2d 396.

18. *Merry v County Board of Education*, 264 Ala 411, 87 So 2d 821; *Miller v Sears*, 91 Cal 282, 27 P 589; *Fulton Land Co. v Armor Insulating Co.* 192 Ga 526, 15 SE2d 848; *Wellborn v Weaver*, 17 Ga 267; *Main v Pratt*, 276 Ill 218, 114 NE 576; *Cloud v Winn* (Okla) 303 P2d 305; *Davis v Brigham*, 56 Or 41, 107 P 961; *Brockington v Lynch*, 119 SC 273, 112 SE 94; *Collins v Kares*, 52 SD 143, 216 NW 880; *Clark v Campbell*, 23 Utah 569, 65 P 496; *Palmer v Stanwood Land Co.* 158 Wash 487, 291 P 342; *McLain v Healy*, 98 Wash 489, 168 P 1; *King v Upper*, 57 Wash 130, 106 P 612, 1135; *Manning v Foster*, 49 Wash 541, 96 P 233; *Campbell v Thomas*, 42 Wis 437.

Until a binding contract exists, a party who has deposited an instrument with a third person with a view to perfecting an arrangement for an escrow and sale is a mere offeror and may withdraw the instrument at any time before acceptance. *Fickas v Bowles* (Tex Civ