Some Problems of Constructive Delivery, Agency and Proof in Gift Litigation

Patrick J. Rohan
St. John's University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Litigation Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol38/iss3/7

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Some Problems of Constructive Delivery, Agency and Proof in Gift Litigation

Patrick J. Rohan

In the initial installment of this paper, the writer sought to discern the practical and theoretical bases for the requirement of delivery, and to indicate that recognized social values would be fostered by the adoption of a more realistic and less formal approach to the subject of gifts. The concluding portion of this article is devoted to an analysis of the three subsidiary problems or aspects of gift litigation, specifically, the nature and scope of the "constructive delivery" doctrine, the agency question posed where the donor utilizes a third party to transmit the property, and the standard to be applied in determining whether an alleged donee has carried his burden of proof. The lack of flexibility historically exhibited by the courts in approaching the delivery question has induced claimants to avoid a frontal assault on the issue, and to fall back on the less demanding constructive delivery doctrine, whenever satisfaction of the traditional requirement is in doubt. Under the pressure thus created, the courts have vacillated between the desire to sanction genuine gifts and the attempt to preserve the requirement of transfer of possession, dominion and control. As a consequence, the constructive delivery cases reflect, not a liberalized definition of delivery, but relief granted in isolated and irreconcilable factual patterns. The forays into the field of agency, occasioned by the presence of an intermediary in the picture, also present a fertile field for study. The agency cases in particular demonstrate the needless rejection of an otherwise effectual transaction brought about by an undue stress on abstract theory. Finally, the burden of proof aspect has been selected for treatment because of the unfathomable, and often insurmountable, standard applied in many jurisdictions, namely, the "clear and convincing evidence" test or some variant thereof. In daily operation, this burden supplies the focus for the courts' overriding concern for fraud prevention and exerts a strong influence on the outcome of any given case. In examining these topics an effort will be made to evaluate the extent to which the actual operation of the courts coincides

†John Jay Fellow, Columbia Law School 1962-63; Assistant Professor, St. John's University School of Law.

with, or departs from, the substantive law rules laid down in the opinions. In view of the large number of precedents involved, it has been deemed best to proceed by way of a study of the decisions of a single jurisdiction; New York was selected because of the large number of cases which have arisen in that state, as well as the influence which those decisions have exerted on the development of the law nationally.

THE CONSTRUCTIVE DELIVERY DOCTRINE

The theory that a constructive delivery has taken place is frequently employed to obviate the difficulties occasioned by the failure of the donor to proceed by way of a physical transfer of the object to the donee. Although the doctrine is typically considered by litigants to be a safety valve, or panacea, it remains true that it operates within the narrow confines allotted to it by precedent. From a definitional standpoint, the concept has been refined into two distinct, though frequently overlapping, sub-categories, those of "constructive" and "symbolic" delivery. In the opinions, including those rendered in New York, these labels frequently are used interchangeably. However, when placed in juxtaposition, "constructive" delivery has been applied to situations in which the donor transfers an instrument or object (such as a key), which theoretically enables the donee to exercise dominion and control over the subject matter of the gift; "symbolic" delivery has been utilized to describe the cases in which a donor engages in a ceremonial act (such as the transfer of a token portion of the gift) to represent, or act as a substitute for, a delivery of the gift itself. In view of the uncertain status of the

3. The approach here employed is that advocated in Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431 (1930).

One seeks the real practice on the subject, by study of how the cases do in fact eventuate. One seeks to determine how far the paper rule is real, how far merely paper. One seeks an understanding of actual judicial behavior, in that comparison of rule with practice; one follows also the use made of the paper rule in argument by judges and by counsel, and the apparent influence of its official presence on decisions. One seeks to determine when it is stated, but ignored; when it is stated and followed; when and why it is expressly narrowed or extended or modified, so that a new paper rule is created.

Id, at 450.


5. In spite of the common use of the adjectives symbolical and constructive in the alternative, it should be noticed that there is a significant distinction between them, which the courts will, when the decision of the case requires it, not be loath to make. A delivery is symbolical, when instead of the thing itself, some other object is handed over in its name and stead. A delivery is constructive,
symbolic category, as well as its narrow practical application, the discussion will be focused upon a broad view of the constructive delivery cases.  

Sharp differences of opinion have arisen as to the interpretation to be given constructive delivery. Some have accentuated the "delivery" portion of the term and asserted that it connotes an actual delivery, differing from manual tradition only to the extent that the property has peculiar features which dictate that it may only be transferred in certain limited ways. Others have stressed the "constructive" element and voiced the belief that a change of possession or control has not taken place, nor is it necessary that it take place, if the delivery phase of the gift is described by the adjective "constructive." An analysis of the cases reveals that the latter view is both the modern and more accurate one. The defect in the former view is that in factual patterns in which some peculiar feature of the subject matter limits the mode of transmission; the transfer accepted as "constructive" could well be treated as a traditional delivery in the full sense of the term. The ambiguities inherent in the constructive delivery terminology are reflected in the definitions laid down in the texts and opinions. Early in the last century, Chancellor Kent declared the applicable principle to be that:

Delivery . . . must be according to the nature of the thing. It must be an actual delivery so far as the subject is capable of delivery. It must be secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part, not only with possession, but with the dominion of the property. If the thing given be a chose in action, the law requires an

when in place of actual manual tradition the donor delivers to the donee the means of obtaining possession and control of the subject matter, or in some other manner relinquishes to the object of his benefaction power and dominion over it.  

Brown, Personal Property § 41, at 102 (2d ed. 1955).  
6. The courts have been reluctant to recognize a purely token or ceremonial transfer as sufficient. Thus, for example, in Noble v. Smith, 2 Johns. R. 51 (1806), Chancellor Kent concluded that:

A mere symbolical delivery would not, I apprehend, have been sufficient. The cases in which the delivery of a symbol has been held sufficient to perfect a gift, were those in which it was considered as equivalent to actual delivery, as the delivery of a key to a trunk, of a room or warehouse, which was the true and effectual way of obtaining the use and command of the subject. . . . I do not know that corn, growing, is susceptible of delivery, in any other way than by putting the donee in possession of the soil. . . .  

Id. at 56. See 1 Walsh, Commentaries on the Law of Real Property § 29 (1947).
assignment, or some equivalent instrument and the transfer must be actually executed.\(^7\)

The language Kent employed discloses the antithetical elements in any theory of constructive delivery which limits its application to cases in which the donor has effectively relinquished possession, dominion and control. Under Kent's definition, if the object does not admit of "actual" delivery, there must be some transaction or step taken which is "equivalent" to it. But if there is no de facto relinquishment of possession or dominion, it is difficult to see what acts would be equivalent to it without necessarily having the same practical, as well as legal, effect.

The true nature of the constructive delivery vehicle, as largely an exception to, or substitute for, "actual" delivery, is found in the oft-quoted language from the opinion in \textit{Vincent v. Rix},\(^8\) perhaps the most influential passage in this area:

The delivery necessary to consumate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit; there must be a change of dominion and ownership; intention or mere words cannot supply the place of an actual surrender of control and authority over the thing intended to be given.\(^9\)

Although this definition also equates constructive delivery with a complete transfer, the italicized portion indicates a significant shift in viewpoint. Attention is there focused on factors extrinsic to the donor and the subject matter of the gift, namely, on the "circumstances and surroundings of the parties." This language, when coupled with the notion that the "reasonableness" of what was actually done is to be considered, reflects a transition from a view that would exact unswerving compliance with a pre-existing standard, to an ad hoc approach which would consider the exigencies of the moment as well as the most desirable method of effectuating a donative transfer. This may not have been the court's intention; however, the long range effect of the quoted

\(7\) 2 \textit{Kent, Commentaries} $\S \ 439$, at 355 (Halstead ed. 1827).
\(8\) 248 N.Y. 76, 161 N.E. 425 (1928).
\(9\) \textit{Id.} at 83, 161 N.E. at 427. (Emphasis added.) In \textit{Beaver v. Beaver}, 117 N.Y. 421, 22 N.E. 940 (1889), the court stated:

But delivery by the donor, either actual or constructive, operating to divest the donor of possession of and dominion over the thing, is a constant and essential factor in every transaction which takes effect as a completed gift. Anything short of this strips it of the quality of completeness which distinguishes an intention to give, which alone amounts to nothing, from the consummated act, which changes the title.

\textit{Id.} at 429, 22 N.E. at 941.
language has been the broadening of the delivery concept along the lines suggested.

A review of the constructive delivery cases which have been sustained reveals that two elements have proven of great significance, the presence of extenuating circumstances, which induce the court to accept a less than perfect transfer, and the existence of a writing authored by the donor. Although these features are often found in combination, they will be discussed separately for purposes of clarity. The courts have found a synthetic delivery to be an acceptable substitute for manual tradition in cases wherein the extenuating circumstances ranged from mere inconvenience to a practical impossibility of complying with traditional requirements. Thus, for example, an excusing cause has been found where the object was located in the donor's apartment, which was then in the possession of a sublessee. Such cause also has been found in cases wherein the donor did not have the object with him at the time. However, the typical factual pattern has been one in which the donor, in ill health or nearing death, was unable to manually transfer the subject matter because of sheer lack of physical strength, the location of the object at a distant place, or a combination of these factors. Thus, for example, in Pushecash v. Dry Dock Sav. Institution, a hospitalized patient attempted to retrieve his bank book in order to make a gift of it to a visitor. The doctor informed him that his valuables were in the office of the hospital, which was closed at the time. The patient thereupon instructed the physician that in case he died he wanted his visitor to have the bank book. The donor succumbed the day before the friend returned. The court ruled that:

When decedent, as well as plaintiff, was told by Dr. Sager that the bank book was not in the decedent's clothes, but was in the cashier's office downstairs, and that it could not then be had because the office was closed, but that upon the plaintiff's coming around the next day the doctor would see that the book was delivered to him, there was then delivery to plaintiff in pursuance of the donor's intent. The delivery was as perfect and complete as the circumstances and surroundings of the parties

to the gift reasonably permitted, and this being so, the gift was consummated.\textsuperscript{14}

Incacity stemming from serious illness has invariably proven to be an accepted occasion for relaxation of the delivery requirement.\textsuperscript{15} In other situations, however, the courts have differed in their liberality, with some decisions requiring extreme necessity before constructive delivery may be employed,\textsuperscript{16} and others indicating that mere inconvenience will suffice.\textsuperscript{17}

Confusion and uncertainty have also surrounded the question whether a gift may be effectuated by means of an informal writing or letter of gift transmitted to the donee.\textsuperscript{18} Although the courts have been quite uniform in upholding such transactions, there is no singular theory upon which acceptance is based.\textsuperscript{19} In some instances the rationale employed is that the writing acts \textit{ex proprio vigore},\textsuperscript{20} while in others its effectiveness is attributed to the fact that abolition of the seal elevated unsealed instruments to the status of a deed under seal.\textsuperscript{21} In several decisions the writing has been enforced as an assignment (especially

\begin{enumerate}
  \item Id. at 581, 251 N.Y. Supp. at 186.
  \item The principal limitation in this area has proven to be the case wherein the court concludes that the one charged with caring for the donor in his last illness may have exerted undue influence or obtained the property or documents for purposes wholly unconnected with a donative transaction.
  \item In Speelman v. Pascal, 10 N.Y.2d 313, 178 N.E.2d 723 (1961), the Court of Appeals upheld a delivery consisting of a letter sent to the donee in which the donor assigned a percentage of future royalties to be received if and when a musical version of "Pygmalion" was produced.
  \item The employment of a writing appears to be more satisfactory than the other principal form of constructive delivery, the tradition of a key to a receptacle or safe deposit box. However, the courts have also been disposed to enforce the latter type of transaction, except where undue influence or lack of donative intent appears to have been present, or where extenuating circumstances are entirely lacking.
  \item See cases cited in 1 \textsc{Walsh}, \textsc{Commentaries on the Law of Real Property} § 31, at 236 n.7 (1947).
\end{enumerate}
in cases wherein a chose in action formed the subject matter of the gift). On occasion the courts have relied upon the theory that no delivery is necessary where a writing is placed in the donee's hands, or on the hybrid view that the delivery requirement is "relaxed" in such cases. This last position is sometimes expressed in terms of a change in the burden of proof (from a requirement of clear and convincing evidence to a less demanding standard), or in terms of very little additional evidence being necessary to sustain the alleged gift. It is also held that an informal writing found among the donor's effects merely serves as evidence of a gift, or as an admission against interest on the part of the donor. Also to be considered are the cases which imply that the use of such a document will not be permitted unless accompanied by extenuating circumstances.

Seldom, if ever, have the courts fully explored the ramifications of the constructive delivery concept itself. When subjected to close scrutiny,
one wonders whether the doctrine meshes with other forces or principles applicable in the gift area, such as the view that delivery is an operative, rather than evidentiary, fact, and the utilization of the clear and convincing evidence test in cases involving death bed donations.\textsuperscript{29} If the constructive delivery concept is applicable in any case wherein the "circumstances and surroundings of the parties" rule out a full-fledged delivery, it would appear that the goals or functions assigned to delivery may be met by a less demanding standard (in view of the fact that lack of an "actual" delivery does not negate recognition of the factual patterns sheltered under the "constructive" umbrella).\textsuperscript{29} Problems of theory also remain, even if the courts insist that, as in the holdover tenant situation, only medical necessity will authorize the granting of a reprieve. If the jurisdiction tacitly or explicitly adopts the viewpoint that a recognized constructive delivery brings about a transfer of possession or dominion and control, it would appear that the absence of ill health or other difficulty should be immaterial. Conversely, their presence should not enable a court to find the necessary delivery in situations wherein one would not otherwise exist.\textsuperscript{31} However, it may well be that the constructive delivery vehicle represents a shift from traditional thinking on the subject, to an "acceptable substitute under adverse circumstances" approach. If this rationale is accepted, and it seems to have some foundation insofar as it explains the results achieved more plausibly than does any tortured concept of possession or control, there is no logical necessity for limiting the doctrine's application to cases in which the donor is physically incapacitated (especially where the verbalization of the formula takes into account both the "circumstances" and "surroundings" of the parties). It appears anomalous that the courts insist upon physical incapacity, or at least look with great favor upon it as a makeweight, since such an approach limits the availability of constructive delivery to the death bed gift area for all practical purposes. It thus confines its operation to the segment of the gift field most subject to suspicion and criticism, while ruling it out in large measure in the inter vivos gift cases, wherein

\textsuperscript{29} The same medical condition of the donor which favors permitting a constructive delivery also forms the key fact in the death bed gift field and, in some measure, is responsible for the courts' fear of fraud or overreaching. See Matter of Creekmore, 1 N.Y.2d 284, 135 N.E.2d 193 (1956).

\textsuperscript{30} Some commentators have observed that if the formulas stated in the definitions of constructive delivery were literally interpreted, no delivery would be necessary in cases where the circumstances or subject matter of the gift did not admit of a delivery. Such a result is approached in the Pushcash decision, \textit{supra} note 13.

\textsuperscript{31} The appearance of logical consistency is retained by use of the constructive delivery fiction; however, the "constructive" cases could be relegated to the categories of "actual" delivery and no delivery (if viewed from the standpoint of effectuating a transfer of possession or dominion and control).
the alleged donor is available to contest spurious claims.  

It is suggested that the constructive delivery cases as a whole may best be explained by viewing the transaction in each case, not as a make-shift delivery which results in a change of possession or dominion, but as a factual pattern compelling enough to give rise to an exercise of the courts' dispensing power. The impossibility of reconciling many of the "constructive" and "actual" delivery cases, as well as the difficulties encountered in trying to synthesize the various situations within the "constructive" category, suggest that a jurisprudence of factual patterns, rather than of principles, has taken root. The donee then must endeavor to bring his case within one of the molds, or islands of safety, established by prior case law. Nevertheless, the constructive delivery cases may hold the key to a workable concept of delivery, by demonstrating a realistic approach to the question whether a transaction has passed into the realm of an executed gift, as opposed to resting at the stage of mere intention.  

THE AGENCY QUESTION

The agency issue presented by an attempt to effectuate a gift through the offices of a third party, followed by the death of the donor prior to completion of the intermediary's mission, is a recurring one and has been answered in various ways in different jurisdictions. Nationally the solutions have ranged from a presumption that the third party is the agent of the donor, to the contrary presumption that he is the agent of the donee. In several states the third party is characterized as a trustee for the donee, while in others no status is presumed, the question being treated as one of fact. As with many other facets of the gift field, it is probable that the law here operates mechanically, without any positive correlation with the intentions of the donor. It may be that his unexpressed desires can never be ascertained with certainty, since the donor is usually unaware of the agency implications of his actions and has formed no judgment

32. In other jurisdictions, for example, the informal writing is held to be ineffective in gifts causa mortis cases as violative of the statute of wills. See Mechem, The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments, 21 ILL. L. REV. 341, 356 (1926).

33. No sustained attempt has been made to systematize the cases or to overrule earlier inconsistent decisions. Again, the recurrence of familiar factual patterns ordinarily enables the court to place a set of facts within the ambit of a prior, well known decision. Unfortunately, the precedents are so numerous and varied that decisions may be found supporting and defeating all but the clearest case.

34. An interesting approach is found in Matter of Sullivan, 133 Misc. 758, 234 N.Y. Supp. 311 (Surr. Ct. 1929). There the court considered the fact that the donor had done all that he considered to be necessary to consummate the gift.

35. See Mechem, supra note 32; Brown, Personal Property § 40 (2d ed. 1955).
as to whether he is commissioning someone to act for him or as the alter ego of the donee. A presumption in favor of the donee would further the social values set forth in the first portion of this paper. Nevertheless, it would appear that sound conclusions may be arrived at by treating the question as one of fact. Here difficulties are presented by the inaccessibility of the donor's intention and the fact that a court adopting a neutral approach may unconsciously lean toward one conclusion or the other. In recent years some opinions have clouded the issue by all but assuming that the intermediary is the agent of the donor, while professing to represent an ad hoc factual determination. The decisions of the New York courts have evidenced a noticeable drift in this direction. Thus, for example, the earlier opinions frequently contained a statement to the effect that, in order for the gift to be effective, the intermediary must be the agent of the donee, or at least not the agent of the donor. This may have been a tacit recognition of the complexity of reconstructing the donor's hypothetical intention and an abandonment of the agency search whenever the evidence indicated that, in any event, no agency was intended on the donor's behalf. Stated differently, this view might recognize the position that no agency designation need be sought, and that the third party's status could remain without a label, as long as the

36. Difficulties arise where the intent of the donor is not expressed or such expression is ambiguous as to whether the things are delivered to the third person as the donor's agent or as agent or trustee of the donee. Here as in many other situations of doubtful fact turning on intent we can only apply to the facts of each case the test of what the average man would intend under the circumstances, and here as in other cases of disputed intent depending on the facts, the question is generally for the jury. It is quite useless to seek rules of law settling such controversies. The question is one of fact for the jury, subject to the court's usual power to take the case from the jury where the facts are so clear that only one result can fairly be reached.

1 Walsh, Commentaries on the Law of Real Property § 30, at 228-29 (1947).

37. In Vincent v. Rix, 248 N.Y. 76, 83, 161 N.E. 425, 427 (1928), the court wrote:

While delivery may be made to a third party for and in behalf of the donee, yet handing the property to an agent of the donor to be delivered to the donee is not sufficient. The matter was well stated in Bickford v. Mattocks 95 Me. 547, 550, 50 A. 894, 895:

"Not every delivery to a third person is a delivery for the donee, or for the use of the donee, in the sense in which these phrases are used in the cases cited. There may be a delivery to a third person which constitutes him the agent of the donor, and there may be a delivery which constitutes him a trustee for the donee, and the distinction lies in the intention with which the delivery is made. If the donor deliver the property to the third person simply for the purpose of his delivering it to the donee as the agent of the donor, the gift is not complete until the property has actually been delivered to the donee. Such a delivery is not absolute, for the ordinary principle of agency applies, by which the donor can revoke the authority of the agent, and resume possession of the property, at any time before the authority is executed."

proof did not lead to a finding that the donor intended the intermediary to be his agent.

A comparison of the older cases with later ones reveals that factual patterns which might have been upheld at an earlier date would now in all probability fail, although the prior decisions have not been overruled and are constantly cited both locally and nationally. Thus, for example, in the leading case of *Grymes v. Hone,*\(^3^8\) the donor, in ill health, drew up an absolute assignment of twenty shares of stock. He then handed the assignment to his wife, stating: "I intend this for Nelly. If I die, do not give this to the executors; it is not for them but for Nelly; give it to her, yourself." When asked by his wife why he did not give it to the donee immediately, he remarked: "I do not know how much longer I may last, or what may happen, or whether we may not need it." The occasion for the above declaration centered around the act of the husband in handing the assignment to his wife to be placed in a tin box containing his will and other papers. Although the factual pattern is made to order for a finding of an attempted testamentary transaction, the court sidestepped that issue, on the strength of an ingenious gift causa mortis theory, and went on to hold the donor's wife to be the agent of the donee.\(^3^9\) The conversation previously described would appear to indicate that a finding of agency on behalf of the donor would also have been proper, and possibly more proper than the conclusion actually reached (in view of the representative capacity in which the wife was holding the property and the fact that its transmission was not to take place if the donor countermanded his original expression of donative intent).

In sharp contrast are the results reached in several recent cases in

---

38. 49 N.Y. 17, 10 Am. Rep. 313 (1872).
39. The wording of the opinion's key sentence is to the effect that the wife was the agent of the "donor." However, the context, as well as the holdings of the cases cited immediately thereafter, clearly demonstrate that the word "donee" was intended.

While most of the more recent decisions have run counter to the spirit and holding of *Grymes v. Hone,* an occasional case has followed it. However, there is no formula available to enable the attorney to predict which of the two lines of cases will be followed (although, as stated above, it is probable that the decision will run counter to the *Grymes v. Hone* result). Representative cases in which the decision has been followed are: Matter of Mills, 172 App. Div. 530, 158 N.Y. Supp. 1100 (1st Dep't), aff'd mem., 219 N.Y. 642, 114 N.E. 1072 (1916); Matter of Spiegel, 13 Misc. 2d 113, 175 N.Y.S.2d 882 (Surr. Ct. 1958); Matter of Essex, 1 Pow. 28, 20 N.Y. Supp. 62 (Surr. Ct. 1891); Williams v. Guile, 117 N.Y. 343, 22 N.E. 1071 (1889).

which gifts have failed, and even the rationale employed in instances in which donations have been upheld. Although the courts have seldom specifically addressed themselves to the point, it appears that the fact that the intermediary is closer to the donor than to the donee, by way of social or business relation, influences their decision. The fact that it was the donor who requested the intermediary to act also appears to predetermine the issue to some extent. The result is that the Grymes v. Hone case has been abandoned in practice, although technically it has never been overruled.

A few illustrative decisions will serve to demonstrate the interplay of these factors. In Matter of Malloy, the court was presented with a situation where a donor directed a subordinate in the employ of his corporation, one Davis, to prepare certain deeds and a satisfaction of a mortgage. The instruments were subsequently executed in a lawyer's office and then placed in the donor's safe; Davis was instructed to deliver them after the donor's death. In holding the gifts ineffectual, the court stated:

Davis was a bookkeeper of the Malloy Construction Company and did work for Mr. Malloy, its president; he was subject to his orders. So far as the record shows there were no special contract relations between Malloy and Davis or between Davis and the grantees in so far as the deeds were concerned.

Although the result reached is technically correct, the contractual and business associations depicted by the court reflect the influence of these incidental aspects of the typical factual pattern. These distracting factors must be differentiated from a pertinent search for a contract right in the donee to the object of the "gift."

In Matter of Cardwell, the trial court characterized the superintendent of the donor's apartment house as clearly the agent of the donor. When en route to the hospital, the donor left the subject matter of the gift with him, along with instructions to pass it on to the donor's nephew, if the donor failed to return. Although the similarity to the Grymes case is apparent, the appellate courts only reached a satisfactory solution by finding that a conversation between the nephew and the superintendent, which transpired before the donor's death, converted the superintendent into a double agent (that is, an agent of both the

41. 253 App. Div. at 32, 1 N.Y.S.2d at 186-87.
donor to deliver, and the donee to receive, the gift at the one and the same time). A dissenting opinion took the position that the gift should fail and pointed to the inconsistencies involved in the majority's theory:

There is no dispute as to the facts. The deceased gave orders to Rowenhagen that "If anything happens to me or I should not come back, I want Bob (the deceased's nephew) to have this (the envelope containing the bankbook.)" From this instruction it is clear that the deceased wished his agent to give the bankbook to the donee if the deceased did not come back from the hospital alive.

In these circumstances there was no delivery to the donee. Even if we were to assume that the bankbook had in fact been accepted by the nephew and then returned to the agent, such purported delivery would not have been valid because contrary to the instructions of the deceased to Rowenhagen. He had told Rowenhagen that the nephew was to have the bankbook only in case "I should not come back." Though there was ample proof of an intention to give, such intention was defeated since there was not, nor could there have been, a delivery during the lifetime of the deceased. (Cf. Beaver v. Beaver, 117 N.Y. 421, 429.)

Other recent cases have found it necessary to make use of the double agency construction in order to work out a completion of the initial agency in the lifetime of the donor.

The fact that the intermediary is often the attorney or employee of the donor, or socially closer to him, appears to be a misleading or unreliable yardstick for several reasons. The existence of a contractual or business relation between the donor and the third party does not carry with it the corollary that such a relation was involved in the transmittal of the gift. The fallacy clearly appears in the case of employees and other business associates who normally have no authority to represent the donor in or out of the commercial field. With respect to the social

43. 268 App. Div. at 515-16, 52 N.Y.S.2d at 70-71.
44. See, e.g., Matter of Wilson, 26 Misc. 2d 839, 206 N.Y.S.2d 323 (Surrogate Ct. 1960). Another illustration of the illogical results to which an undue emphasis on agency can lead is found in Vaccaro v. Prudential Condensed Milk Co., 133 Misc. 556, 232 N.Y. Supp. 299 (City Ct. 1927). There the court concluded that since a housewife purchased groceries as the "agent" of her husband, she herself could not bring a breach of warranty action (the case, of course, is not followed).
45. The commentators appear to have been led astray as well. One text contains the following synopsis of the existing case-law:

Because no transfer of dominion and control takes place thereby, delivery to the donor's agent or attorney, as distinguished from delivery to an agent or attorney of the donee, is not truly a delivery, and is therefore insufficient.
relation, although never expressed, the implication appears to be that the selection of a member of the donee's family, or a friend of the donee, would conversely lead to a finding that an agency had been created on behalf of the donee. Both of these assumptions, however, ignore the fact that the donor quite naturally would be prone to select someone in his own circle, if for no other reason than the fact that such a person would be in the donor's day-to-day company and hence available to act as the intermediary. Moreover, if the donor were to seek out an individual more identified with the donee than with himself, he could just as well go to the donee and forego the convenience an intermediary affords. Again, the need for secrecy and kindred intangible factors might lead to use of a confidant, for reasons wholly unrelated to agency or a desire to retain strings on the property. In a similar vein, the fact that the donor requested the third party to act should never be determinative of the agency issue, since from the very nature of the transaction it will invariably be the

The same rule has been applied in the case of delivery to the attorney for the donor's closely held corporation. 25 N.Y. JUR. Gifts § 23 (1962). A student comment on the Cardwell decision contains the following passage: "[T]he superintendent and the donor occupy the relationship of employer-employee impelling the assumption that the superintendent is agent of the donor." 13 FORDHAM L. REV. 115 (1944).

This development is somewhat inconsistent with the cases in which an individual possessing a power of attorney from the donor (relating to the subject matter of the gift) has been found to be the agent or trustee of the donee. See, e.g., Matter of Mills, 172 App. Div. 530, 158 N.Y. Supp. 1100 (1st Dep't), aff'd mem., 219 N.Y. 642, 114 N.E. 1072 (1916). In Thomas v. Friedman, 194 Misc. 694, 87 N.Y.S.2d 369 (City Ct. 1949), the court denied a motion to dismiss a complaint grounded on the assertion that the intermediary formerly was engaged as attorney for the donor. Additional evidence was held to be necessary to establish the attorney's role in the donative transfer. The courts may be erring due to a belief that an agency designation, once arrived at, exhausts the available theories. Is it possible that the intermediary was acting for the donor in transmitting, and for the donee in receiving, the gift? An illustration of multiple views of a single substantive law designation, depending on the issue raised, is found in Llewellyn, Across Sales On Horseback, 52 HARV. L. REV. 725 (1939).

But if a merchant, as to some wares in transit pursuant to a contract, says "This carload is mine," the fact-side of the statement says only "This is what I shipped," and the ownership-side is not only no proper conclusion from that, but is no proper conclusion for any layman to draw from anything that has occurred; and it also makes a deal of difference what the issue may be. The wares may be "seller's" for proper stoppage in transit, and yet be "his buyer's" for purposes of action for the price, and yet again be "either's," for purposes of recovering damage suffered in transit—and all on the same facts. Now when the location of "the property" in the wares thus gets far enough away from homely fact to need a lawyer to decide about it, but is supposed to be determined by the intentions of parties who are not lawyers, that is not so good. And when the lawyers themselves have difficulty in doing the deciding, that is worse. It bothers predictability, even for lawyers; but it is extremely hard on parties who desire so to "intend" as to get a really intended result on which they want to reckon.

Id. at 733. Thus viewed, it may be argued that the approach of double agency, previously discussed, has some merit, at least as a starting point for construction of a new theory.
donor who decides to make a gift and to make the request.

The courts' inclination to find an agency on behalf of the donor seems peculiarly inappropriate in cases where the third party is requested to transmit an object after the donor's death. To hold that the death terminates the latter's authority to turn over the object to the donee is to conclude that the donor initially created a completely futile arrangement. Although it may be argued that this reasoning is false in that the donor may have unwittingly, rather than intentionally, produced the situation (being unaware of the legal implications of agency), the fact remains that if no such agency is apparent, there is no justification for implying it and thereby frustrating the donor's arrangement. If the agency inquiry were centered on the aspect of retained control, more satisfactory results would be achieved. Here again, however, it is likely that the donor, solely intent on making the gift, did not give a thought to the question whether he reserved the right to retrieve the property pending its ultimate transfer to the donee. He may have regarded the third party as an extension of himself, inasmuch as the intermediary was serving as a means of transmittal "for" the donor in a general sense, or, to put it another way, was doing the donor a "favor" by so acting. Nevertheless, it is probable that, at the same time, the donor had no thought of retaining strings on the property while it was in the hands of the third person and viewed the gift as an accomplished fact as soon as the subject matter was handed to the intermediary. It would appear that these two conflicting inferences, for all practical purposes, cancel one another out. Hence, a realistic approach to the agency question would have its inception in two realizations: one, that the determinative factor is the intention of the donor with respect to the control retained, if any, and the other, that in all probability the donor never gave the matter a thought. If the donor manifested an intention one way or the other, this settles the matter. However, the courts frequently appear to reconstruct the donor's intention on the strength of off-hand language used by him in requesting the third party to act. The language employed is likely to have been a mere chance selection of words to express the general notion of transmittal of the property to the donee and too slim a reed upon which

46. New York has not taken the position that a gift cannot be delivered to an attorney or other third party, with enjoyment by the donee postponed until after the donor's death. In view of this fact, and the Grymes v. Hone decision, several of the recent cases denying recognition to gifts because they were to be delivered after the donor's death appear to be poorly reasoned. Perhaps the courts are influenced by the analogy of the executor carrying out the desires of the testator with respect to disposition of his assets after death. A return to the focus of whether the gift was intended to take effect immediately upon the transfer to the intermediary would produce more satisfactory results.
to base agency conclusions. What fine distinctions, for example, can be
supported by the use of "to be delivered" to the donee as opposed to
"this is for the donee"? If, as many have pointed out, it is realized that
the quest for the donor's intention often comes down to an inquiry as to
"what the donor would have thought about the matter, had he thought
about it, although he did not think about it,"
4 it would appear that the
courts are forced to conclude that the donor intended that the intermediary
act for the donee, if for no other reason than this would effectuate
his donative intent. Any other imputed intention would not make sense
in view of the donor's expressed desire to make a gift and his tradition
of the property to the third party in aid of that purpose. Again, viewed
from the standpoint of competing desiderata to be achieved by attributing
one intention or the other to the donor where the evidence is silent or
equivocal, the several values fostered by upholding a gift would appear
to favor imputing the intention of making the intermediary the agent
of the donee. The opposite approach would serve no useful purpose, not
even fraud prevention, since there is no intrinsic relationship between
fraud and the agency status of the intermediary.48

47. See Brown, Personal Property § 40 (2d ed. 1955); 1 Walsh, Commentaries on the Law of Real Property § 30, at 228-29 (1947).

48. On occasion the courts have confused the agency issue by referring to it in
cases in which the donor was merely engaged in preliminary preparations to make a
gift. Thus, for example, where a third party is requested to accomplish certain tasks
and to return to the donor with the subject matter of the gift, there is obviously no
intention to make a present gift and the intermediary is in no sense an agent or trustee
for the donee. In the recent case of Matter of Szabo, 10 N.Y.2d 94, 176 N.E.2d 395
(1961), the Court of Appeals was presented with such a situation and rested its decision
on the following rationale:

We would say that, where a transfer of a part interest in stock certificates is
concerned, a symbolical delivery would be sufficient for it is the only kind of
delivery that would be practicable under the circumstances where undoubtedly
the donor would want to retain possession of the certificate. Nevertheless,
even this sort of delivery must proceed to a point of no return, and this point
can only be reached when there is a transfer of record on the stock books of
the company. Obviously the donor does not surrender dominion and control of
a part interest until the transfer of record is made because up until that time he
may change his mind and withdraw his directive to the transfer agent. In the
case at hand the transfer of record was not made in decedent's life time and
hence a valid gift inter vivos was not completed as to any interest in the stock
in question, even as to the certificate for 50 shares which the decedent first
indorsed. This indorsement was evidence of her intent but it was not sufficient
to complete a symbolic delivery. The transfer agent was her agent for the
purpose of delivery and subject to her direction until the transfer was com-
pleted on the books of the company. She had the power to revoke the agency up
until the time the transfer, or symbolical delivery, was actually made (Vincent
v. Rix, supra, 248 N.Y. at page 83, 161 N.E. at page 427). Her death auto-
matically revoked the agency.

ruled the gift to be ineffective, as an examination of the record reveals that no present
gift was intended. The employment of an agency theory, however, has led to un-
necessary uncertainty. Under the applicable provisions of the Uniform Stock Transfer
Another aspect of the agency problem seldom discussed is that in some cases the donor hands the gift to the third party merely because the donee is absent or unavailable at the time. If this fact provides the principal or sole motivation for employment of the intermediary, it would appear that circumstances prevented manual tradition and hence constructive delivery should be authorized. If absence of the res is viewed as sufficient, the courts should regard absence of the donee in at least as favorable a light, since the donor, as owner of the property, could have arranged to have the res available to facilitate delivery, whereas he would not ordinarily be able to control the movements of the donee so as to guarantee his presence. Accordingly, the use of the intermediary under such circumstances is wholly explainable in terms of the absence of the donee, with the third party standing in the donee's place.

THE "CLEAR AND CONVINCING EVIDENCE" TEST

Several states, including New York, have adopted the "clear and convincing evidence" test, or some variant thereof, as the standard of proof to be applied where claims are asserted against an estate. According to Professor Wigmore, the utilization of such a burden is grounded an an attempt to apply the criminal law burden of proof to civil litigation:

Policy suggests that the latter [criminal] test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case. Nevertheless, the effort has been made . . . to introduce it in certain sorts of civil cases where an analogy seems to obtain [including deceased donor

Act, no transfer on the books of the corporation is necessary in order to effectuate a gift of shares of stock. See Uniform Stock Transfer Act §§ 1, 9; N.Y. Pers. Prop. Law §§ 162, 170. If the language of this opinion is taken literally, a change in existing law has been brought about. However, it is probable that no such effect was intended and that transfer on the corporation's books will not be considered essential to an effectual gift. Again, it is unlikely that the law has been changed concerning a delivery by means of a safe deposit box key or bank book, despite the fact that the donor could telephone and direct the depositary to refuse to recognize the donee.

49. The cases in which the donor transmits property to a third party, intending thereby to make a gift to an absent member of the armed forces, demonstrate that the absence of the donee is often the only reason prompting the use of an intermediary. Nevertheless, the agency focus has sometimes prevented recognition of such a gift. See, e.g., Matter of Adams, 58 N.Y.S.2d 899 (Surr. Ct. 1945) (not otherwise reported).

The courts, however, have steadfastly maintained that the "clear and convincing evidence" standard applicable in such situations merely requires the donee to prove his case by a preponderance of the evidence. The following passage from *McKeon v. Van Slyck,* is often quoted in support of that view:

No doubt in determining whether the preponderance exists, the triers of the facts must not forget that death has sealed the lips of the alleged promisor. They may reject evidence in such circumstances which might satisfy them if the promisor were living. They must cast in the balance the evidence offered upon the one side and the opportunities for disproof upon the other. They may, therefore, be properly instructed that to make out a preponderance, the evidence should be clear and convincing. (Roberge v. Bonner, 185 N.Y. 265). But all these instructions in last analysis are merely counsels of caution. The responsibility of determining whether the evidence is clear and convincing must ultimately rest upon the jury, subject, of course, to the power of the court to set aside their verdict.

Although the foregoing rationale has been acted upon by the courts and reiterated, it is doubtful whether it can withstand close scrutiny. Thus, for example, it might seriously be questioned whether an instruction by a trial judge who took the quoted language literally and charged the jury in a negligence or breach of contract action that the plaintiff must prove his case by clear and convincing evidence (rather than by a preponderance of the evidence) would be upheld on appeal. Even if it

---

51. 9 WIGMORE, EVIDENCE § 2498, at 327 (3d ed. 1940).
52. See cases cited supra note 50.
54. Id. at 397-98, 119 N.E. at 853.
55. Query whether such a charge in an inter vivos gift case, where the alleged donor is alive at the time of the trial, would constitute reversible error?

The English courts have experienced difficulty in this area. The following theory was advanced by Denning, L.J., in Bater v. Bater, [1951] P. 35 (C.A.):

[In civil cases, the case may be proved by a preponderance of probability, but there are degrees of probability within that standard. The degree depends upon the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require when asking if negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of criminal nature; but still it does require a degree of probability which is commensurate with the occasion.]

Id. at 37. For related Commonwealth decisions, see Dixon, *The Standard of Proof Required*, 10 AUSTL. CONVEYANCER & SOLICITORS J. 33 (1957).
were possible to equate these two burdens in theory, it is doubtful whether they may be equated in practice. The average juror could reasonably conclude that a "clear" case and a "convincing" case calls for more by way of proof than a slight edge over one's opponent. One might justifiably interpret the judge's directions as calling for a degree of persuasion somewhere between a preponderance and proof beyond all reasonable doubt. A juror confused by such a charge, or one calling for the concur rent application of the preponderance and the clear and convincing formulas, may well resolve the conflict by requiring proof which produces moral certitude.

In cases tried without a jury, the same difficulties arise. An indication that the law-trained individual will also encounter obstacles in attempting to apply the standard may be found in the reformation cases from the same jurisdiction, wherein the test is said to be that:

[Before reformation can be granted the plaintiff "must establish his right to such relief by clear, positive and convincing evidence. Reformation may not be granted upon a probability nor even upon a mere preponderance of evidence but only on a certainty of error." . . .]

The commentators on the law of evidence have also expressed concern over the confusion generated by this elusive standard. Their attempts to give it meaning have invariably centered around the degree of persuasion which must be produced in the trier of the facts, a state of certitude located somewhere between that required by the civil and criminal law norms.

57. See, e.g., McCormick, Evidence § 320 (1954); Morgan, Basic Problems of Evidence 23 (1954); 9 Wigmore, Evidence § 2498 (3d ed. 1940); McBane, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242 (1944).
58. It has been persuasively suggested that [the various forms of stating the clear and convincing evidence burden] . . . could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is "highly probable."

McCormick, Evidence § 320, at 679 (1954). See also Richardson, Evidence § 97 (8th ed. 1955); Fisch, New York Evidence § 1094 (1959). In Morgan, Basic Problems of Evidence (1954), the following synthesis is advanced:

It will be noted that [the clear and convincing evidence] . . . instruction emphasizes the means of persuasion rather than the requisite mental condition of the trier. It is believed, however, that the courts intend to require a greater degree of conviction by the trier, and that the proposition could be better phrased as requiring the trier to find the existence of the fact to be highly probable or much more probable than not.

Id. at 23.
PROBLEMS OF CONSTRUCTIVE DELIVERY

The object of employing the "clear and convincing evidence" formula appears to be fraud prevention, specifically, to compensate for the fact that the alleged donor is not available to testify concerning the transaction. Nevertheless, it would appear that this consideration or caveat could be embodied in the judge's charge, without the addition of the clear and convincing test. The judge sitting with or without a jury may consciously or unconsciously view the requirement of clear and convincing proof as a factor to be considered in addition to the fraud possibility, rather than as another way of stating the latter. Another troublesome feature of the standard is that it may frequently affect the court's thinking on the substantive law and prevent the employment of a broad approach to the technical requirements. Literal compliance with existing substantive law formulas may be exacted in addition to, or in lieu of, clear proof that the transaction actually occurred. The position of the donee-plaintiff whose case will be processed under such a rubric can readily be appreciated. Nor is there a real possibility of achieving a reversal on appeal in a case wherein a preponderance has been established but not a wholly clear case for relief. The appellate courts are quite reluctant to reverse a trial court's finding for the reasons normally applicable to any appeal from a factual determination, in addition to the fraud possibilities and the clear and convincing requirement. In net effect, this burden of proof operates in the same fashion as the substantial evidence rule in appeals from the factual determination of an administrative agency; the case is won or lost in the trial stage.

CONSTRUCTIVE DELIVERY, AGENCY AND PROOF IN RETROSPECT

The outline of the actual operation of the constructive delivery doctrine in a single state points up the fact that neither the delivery nor constructive delivery concept enables one to synthesize the cases or to formulate a completely logical and symmetrical set of principles. The

59. "Because many gifts are sought to be shown by oral evidence after the donor's death, it is necessary for the public good to require clear and satisfactory evidence of the fact to prevent fraud and perjury." Matter of Van Alstyne, 207 N.Y. 298, 308, 100 N.E. 802, 805 (1913). It is suggested that this test, when taken in conjunction with the restrictions imposed on the donee by the "dead man's statute," overly compensate for the fact that the alleged donor is deceased.

60. Thus, for example, the judge must typically formulate, and the jury apply, a charge or instruction which indicates that (1) the clear and convincing evidence test must govern, and (2) that the death of the donor (and hence the possibility of fraud) may be properly considered in coming to a conclusion.

61. The gift cases may represent the reverse of the Workmen's Compensation problem; in the latter area some fear that the principle of liberal interpretation of social legislation may result in an overly-generous view of the facts, whereas in the former, the fear is that a distrust of the facts or evidence will lead to a rigid interpretation of the substantive law requirement.
inconsistencies are attributable to many factors—the large number of cases in which no appeal was taken, an uneven application of the delivery and constructive delivery formulas, and the innumerable situations in which, and methods by which, a donation is attempted, are a few of the obvious causes. A continuing source of difficulty is found in the fact that the gift cases align some of the law's most revered ideals on opposite sides of the litigation. Thus, for example, in the case where an alleged gift was made to a child by an ailing parent, the donee can rely upon enforcement of intention, the naturalness of the gift, the constructive delivery exception and kindred factors. The estate can cite to the possibility of fraud, the confidential relationship existing and the sealing of the donor's lips by death. As a consequence, the solution reached in any given case can be made to appear as the only correct one possible. The existence of myriad, irreconcilable precedents also enables one to find "authority" for almost any viewpoint. Of course, a correct factual determination at the trial level is not vitiated by an illogical opinion. However, such an opinion does serve to confuse the issue in succeeding cases.

The constructive delivery cases typically center around factual patterns in which fraud is not in issue and some act of partial fulfillment has occurred, that is, the donor has moved beyond the stage of mere verbal expression of donative intent. It is submitted that the same motivating force which prompts the courts to utilize the doctrine of part performance to override the statute of frauds—the desire to achieve a just and sensible result—should lead the courts to a similar approach in this area with respect to the delivery requirement. The chose in action cases supply an apt illustration of the satisfactory results which may be accomplished by employment of such a theory. Thus, for example, it has been held that transfer of a bank book, accompanied by the necessary donative intent, will suffice to consumate a gift of the account. In so holding, the courts have dismissed arguments based on by-laws of the bank which stipulate that written notice must be given, or other formal requirements satisfied, before recognition will be accorded a change in ownership. The courts, moreover, have upheld such gifts despite the fact that the bank's requirements were consented to in advance, appear on the bank book itself, and

62. The role played by the desideratum of enforcing a contractual arrangement supported by consideration would be supplanted in the gift cases by the several considerations outlined in the first installment of this paper.

A more novel theory of gifts, based on intention alone, was proposed as early as 1651. See Hobbes, Leviathan 88 (Oakeshott ed. 1946). See also Roberts, The Necessity of Delivery in Making Gifts, 32 W. Va. L. Rev. 313 (1926).

were issued pursuant to statutory authority.\textsuperscript{64} The accepted theory is that the prerequisites are established for the protection of the bank and are not meant to be principles governing creation of rights in and to the account. Issuance of a court order authorizing the donee to receive the funds is viewed as neutralizing these conditions and as affording the depositary all the protection necessary. (Similar rulings have been made in cases where regulations pertaining to endorsement of securities, transfer of stock on the books of a corporation, or access to a safe deposit box, were not complied with.\textsuperscript{65}) Although the concept of "equitable title" in the donee is frequently relied upon to support the decisions reached, the cases under discussion are, of course, sanctioning a delivery which gives the donee neither possession nor control in many instances, and to that extent assume a completed gift before the court renders its assistance to the "equitable" owner.\textsuperscript{66} A technical insistence upon complete transfer of dominion and control would require complete conformity with such by-laws and regulations and might necessitate a finding that the donor could more easily obtain access to the savings account without the bank book than the donee could with it. Again, a more perfect transfer would be possible through withdrawal of the funds, followed by their manual transfer to the donee. The fact that the highest or most perfect form of transfer was not employed, however, should seldom be controlling where a substantial overt act is shown which suggests itself as being a natural method of transfer, while signifying the donor's intention to make an immediate gift.

Perspective will be returned to the agency cases if it is realized that:

Too much nicety may be exercised in determining whom the third man exactly represents. If it is possible to do so, the law ought to be construed not too logically, but to meet the common transactions of our people. . . .\textsuperscript{67}

\textsuperscript{64} E.g., N.Y. Banking Law §§ 238, 317. See note 63 supra.


\textsuperscript{67} Sharpe v. Sharpe, 105 S.C. 459, 466, 90 S.E. 34, 36 (1916). Perhaps the best statement of the need to strike a balance between conceptualism and the practices of the
In addition, a tacit assumption or inference that the intermediary is the agent of the donor should not be indulged in, solely on the strength of a business or social relationship previously established between these parties. Nor should such an assumption be grounded on the fact that the donor requested the intermediary to act. The agency consideration is a deceptive one, akin to the delivery doctrine itself, in that it gives the appearance of a coldly logical rationale and an inescapable conclusion. However, the foregoing discussion demonstrates that a court's decision as to whether to go into the agency issue in ambiguous cases itself represents a value judgment. Perhaps the courts are reluctant to view the third party as the donee's agent in view of the donee's ignorance of the intermediary's existence or mission and the consensual nature of agency. This problem may be avoided, however, by viewing the intermediary as a stakeholder or escrowee, in situations wherein it does not appear that the donor intended to retain control over the property.

The "clear and convincing evidence" standard may be regarded as psychologically unsound and confusing. Nevertheless, it is too well established to be easily or soon dislodged. Some measure of improvement, however, is possible, if the operation of this burden of proof is explained in terms of the degree of conviction to be brought about in the trier of the facts, and not, as in current practice, in terms of the quality of the evidence introduced. In sum, the subject of the law of gifts is a quaint one—full of interesting theoretical problems for lawyers and judges to ponder. Yet the bonds of conceptualism must be broken if a truly satisfactory legal position is to be evolved to cover this simplest of human endeavors.

The real naivete would be to assume that we could do without concepts and therefore write only on practical situations, ignoring the standard concepts. But throughout the law, practical solutions have been impeded by mystical discussions. These mystical discussions again have their place insofar as they keep the law from getting ahead of the common notions of the community. But there is such a thing as getting behind the common notions of the community. Thus the courts of this country have floundered for at least a quarter of a century in an endeavor to discover whether a joint deposit in a bank with an intended right of survivorship, called a poor man's will, is a trust, a contract, a contract creating a joint tenancy, a joint tenancy, a gift, a third party beneficiary contract, an agency, or a testamentary disposition. The problem apparently has not been whether according to our notions it is a good thing to allow a poor man's will in this fashion. It has only been whether the joint deposit will be laid on the altar of one idol or another. And the inability of the courts to realize that the public around them sees a new concept, the concept of joint deposit, which can be molded to do what is thought to be justice is somewhat shocking.

Id. at 609-10. See Gulliver & Tilson, Classification of Gratuitous Transfers, 51 Yale L. J. 1, 39 (1941).
CONTRIBUTORS TO THIS ISSUE


Copyright © 1963 by the Trustees of Indiana University